CLIENT ALERT

New York State Expands Employer Obligations and Liability for Workplace Harassment

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On August 12, 2019, Governor Cuomo signed into law a series of significant amendments to the New York State Human Rights Law ("NYS HRL") and other statutes to provide "increased protections for protected classes and special protections for employees who have been sexually harassed." Most changes are effective October 11, 2019 (sixty (60) days after enactment), for claims filed on or after that date. These amendments will, among other expansions, broaden the prohibition against subjecting individuals to harassment in the workplace, no longer requiring the demonstration that the conduct was "severe or pervasive under precedent applied to harassment claims." This standard now applies to harassment because of an individual's age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, domestic violence victim status or participation in protected activity under the NYS HRL. Employers and other covered entities will be required, in order to avoid liability, to plead and prove the affirmative defense that "the harassing conduct does not rise above the level of what a reasonable victim of discrimination with the same protected characteristic would consider petty slights or trivial inconveniences." The amendments also eviscerate application of the *Faragher-Ellerth* defense to hostile environment claims under the NYS HRL. Specifically, the fact that the individual did not make a complaint about the harassment to an employer or other covered entity "shall not be determinative of whether [it] shall be liable."

This statute also amends the NYS HRL and other statutes in the following ways:

- **Definition of "Employer" Is Expanded.** The statute removes the four (4)–employee threshold for NYS HRL coverage, expanding it to include all employers in New York State. The new definition takes effect February 8, 2020 (180 days from enactment) for claims filed on or after that date.
- **Domestic Workers Are Now Protected.** Domestic workers are covered by these new prohibitions, beginning October 11, 2019 for claims filed on or after that date.
- **Employers May Be Liable to Contractors for Discrimination or Harassment.** The amendments also expand the protections of non-employees in the employer's workplace, including contractors, against harassment and discrimination on the basis of all covered protected categories, beginning October 11, 2019 for claims filed on or after that date.
- **Employers Must Provide Anti-Harassment Policies in Writing.** Employers must now provide employees with notice containing their sexual harassment policy and the information presented at their sexual harassment prevention training programs, in writing, in English and in an employee's primary language, upon hire and at each annual sexual harassment training. This requirement goes into effect immediately.
- **Restrictions on Nondisclosure Agreements Expanded to All Discrimination and Harassment.** Limitations on nondisclosure provisions in agreements are expanded beyond sexual harassment to include the factual foundation for claims of all covered forms of harassment and discrimination unless it is the choice of the claimant and certain specified procedures are followed. This expansion begins October 11, 2019 for claims settled on or after that date. Additional

notice requirements in such agreements regarding the right to speak with law enforcement, the Equal Employment Opportunity Commission, the New York State Division of Human Rights ("State Division"), a local human rights commission or an attorney apply to the non-disclosure provisions in agreements entered into on or after January 1, 2020.

- **Employees No Longer Required to Point to a Similarly Situated Comparator.** The amendments provide that an employee need not "demonstrate the existence of an individual to whom the employee's treatment must be compared."
- **Attorney Fees "Shall" Be Awarded to Prevailing Claimant and Punitive Damages Now Available.** The law requires that reasonable attorney's fees be awarded to a prevailing claimant and allows punitive damages for all discrimination or harassment claims, beginning October 11, 2019 for claims filed on or after that date.
- **Mandatory Arbitration Clauses Prohibited.** The prohibition against the inclusion of sexual harassment in mandatory arbitration clauses is expanded to include all prohibited harassment and discrimination, beginning October 11, 2019.
- **Statute of Limitations Extended to Three Years.** The statute of limitations for reporting sexual harassment claims to the State Division is extended from one (1) year to three (3) years from the date of the alleged unlawful conduct. The new statute of limitations takes effect on August 12, 2020 (one (1) year after enactment) for claims filed on or after that date.
- **The New York State Department of Labor Must Regularly Update Sexual Harassment Policy.** The agency must, in consultation with the State Division, regularly evaluate the impact of its sexual harassment prevention guidance and policy, and update those materials as needed.

Governor Cuomo has promoted his support for the law, stating that "[w]ith the passage of this bill, we will make it easier for claims to be brought forward and send a strong message that when it comes to sexual harassment in the workplace, time is up."

As a result of these amendments, employers with operations in New York State should take a careful look at their employee handbooks, policies, procedures, and training programs to ensure that they address all applicable forms of harassment and discrimination. In light of the statute's expansive non-harassment and non-discrimination mandates beyond sexual harassment, compliance with the new New York State sexual harassment training requirements alone is insufficient to protect against potential liability. The expansion of the limitations of nondisclosure agreements and prohibition on mandatory arbitration clauses will also profoundly impact employers' approaches to addressing and resolving harassment and discrimination claims, and require employers to evaluate and adjust their workplace policies and practices to stay compliant.

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