

### Time's Up: New York Legislature Passes Sweeping Reform to Increase Workplace Protections Against Sexual Harassment and Other Forms of Discrimination

On June 19, 2019, the New York State Assembly passed sweeping legislation designed to increase protections against workplace sexual harassment. The bill builds on prior legislation, discussed [here](#), signed into law last year requiring New York employers to, among other things, maintain an anti-sexual harassment policy, implement a complaint and investigation process, and conduct annual prevention trainings. Governor Cuomo has publicly indicated his support for this newest slate of anti-sexual harassment and anti-discrimination measures, which are likely to be signed into law later this year.

#### Key Reforms

If enacted, the new law would implement a series of reforms that make it easier for victims of workplace sexual harassment and other discrimination to obtain relief. These include:

- **Statute of Limitations.** The bill extends the statute of limitations to file a sexual harassment complaint with the New York State Division of Human Rights (DHR) from one to three years.
- **Legal Standard.** The bill modifies the long-held legal standard requiring harassment to be "severe or pervasive" for employees to obtain legal relief. The new legislation lowers that standard, imposing liability when harassing conduct constitutes more than "petty slights or trivial inconveniences." The law also provides that the Human Rights Law is to be construed liberally for remedial purposes, regardless of how federal civil rights laws have been construed.
- **Affirmative Defenses.** The bill eliminates part of the *Faragher/Elleerth* affirmative defense, which allows employers to avoid liability for harassment because an employee failed to file a formal complaint or follow a particular reporting procedure.
- **Fees & Damages.** The bill permits courts to award attorneys' fees on all claims of employment discrimination, and allows for punitive damages in employment discrimination cases against private employers.
- **Notice Requirement.** The bill requires all employers to provide employees with their sexual harassment prevention policy and "information presented at such employer's sexual harassment training program" at the time of hire and during annual training. Employers must provide this information in English and in each employee's primary language.
- **Prohibition on Mandatory Arbitration.** The law prohibits mandatory arbitration clauses for discrimination claims. This prohibition may ultimately be preempted by the Federal Arbitration Act, but for now, New York employers should assume that these mandatory arbitration provisions are no longer binding.

#### Limitations on Settlements of Discrimination Claims

In addition to the above key reforms, the new law imposes significant limitations on the settlement of discrimination claims. Adopting the same procedures in place for claims whose "factual foundation" involves sexual harassment, the new legislation prohibits non-disclosure agreements in any settlement for a claim of discrimination unless it is the

complainant's preference. Under the law, any non-disclosure term must be provided in writing to all parties, in plain English and in the complainant's primary language.

The new law also imposes onerous timing procedures on employers who wish to include a non-disclosure term in the settlement of any discrimination claim. The employee must be given twenty-one days to consider the non-disclosure term before signing it and seven days to revoke. The non-disclosure does not become enforceable until after the seven day revocation period has elapsed.

The law also voids any term in a non-disclosure agreement that prohibits the complainant from initiating or participating in an agency investigation or disclosing facts necessary to receive public benefits. Finally, the law requires employees to be notified that non-disclosure clauses in employment agreements cannot prevent them from speaking with law enforcement, the Equal Employment Opportunity Commission (EEOC), the DHR or a similar local entity, or a lawyer.

### **Other Important Provisions**

The bill expands New York's Human Rights Law to cover all New York State employers. This is a departure from current law, which excluded employers with fewer than four employees except in cases involving sexual harassment.

In addition, the new law defines harassment as any unlawful discriminatory practice that subjects an individual to inferior terms, conditions or privileges of employment due to 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 status or because an individual filed a complaint. Employers may now be liable for discrimination of any kind against contractors, subcontractors, vendors, consultants and other third parties.

The law also extends the power of the State Attorney General to prosecute certain civil and criminal cases of discrimination against all protected classes.

### **Takeaways for Employers**

- Employers with fewer than four employees should review the Human Rights Law to ensure compliance with all of its requirements;
- Review all employment agreements and separation or settlement agreements to ensure they meet the new requirements under State law;
- Update existing anti-sexual harassment policies to indicate that complaints with DHR may be filed any time within three years of the harassment; and
- Train and inform all human resources personnel on the new requirements and legal standards under State law.

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