



June 24, 2019

New York Lawmakers Pass Legislation Amending Workplace Discrimination Laws

New York lawmakers unanimously passed legislation to amend the New York State Human Rights Law and increase both the protections for protected categories, as well as additional protections for victims of workplace related sexual harassment. The legislation would bring significant changes for employers throughout New York State and make it more difficult for employers to defend against claims of discrimination and harassment.

The bill passed on June 19, 2019 and is currently awaiting signature by Governor Cuomo, who has publicly expressed his support for the legislation and is expected to sign it into law in the coming days.

The legislation provides for significant changes to the Human Rights Law, including:

- Expanding the New York State Human Rights Law to cover all employers. The current law excludes employers with fewer than four employees. This provision of the bill takes effect 180 days after the bill becomes law.
- Extending the statute of limitations for sexual harassment claims being brought before the State Division of Human Rights from 1 year to 3 years. This provision of the bill takes effect 1 year after the bill becomes law.
- Eliminating the “severe or pervasive” standard required to state a claim for harassment. Presently, claims of harassment can be dismissed if the complained of inappropriate conduct is not sufficiently hostile. Under the new legislation, harassment will be considered unlawful when it subjects an individual to inferior terms, conditions, or privileges of employment because of his or her membership in a protected class. The legislation only requires that harassment rise

above the threshold of petty slights or trivial inconveniences in order to be deemed unlawful. An employer may, as an affirmative defense, argue that the harassing conduct does not rise above the level of what a reasonable victim of discrimination with the same protected characteristics would consider to be petty slights or trivial inconveniences. This provision of the bill takes effect 60 days after the bill becomes law.

- Significantly weakening the *Faragher-Ellerth* defense, which allows employers to prevail in sexual harassment cases if the aggrieved employee unreasonably failed to take advantage of the employer's preventive or corrective measures. The legislation protects employees who do not make complaints of harassment out of fear of retaliation. While the bill does not eliminate the *Faragher-Ellerth* defense, it is no longer determinative as to an employer's liability. This provision of the bill takes effect 60 days after the bill becomes law.
- Extending punitive damages in employment discrimination actions brought before the State Division of Human Rights, without limitation on the amount. It also provides for punitive damages and attorney's fees to the prevailing party in all employment discrimination actions. This provision of the bill takes effect 60 days after the bill becomes law.
- Extending protections for non-employees in the workplace and extending liability to employers for all forms of unlawful discriminatory conduct in the workplace. This provision of the bill takes effect 60 days after the bill becomes law.
- Liberal construction of the Human Rights Law, regardless of how federal laws are construed. This provision of the bill takes effect immediately after the bill becomes law.
- Prohibiting mandatory arbitration clauses related to discrimination. This provision of the bill takes effect 60 days after the bill becomes law.
- Prohibiting non-disparagement provisions in employment contracts that prevent employees from disclosing information related to future claims of discrimination with law enforcement, enforcement agencies and private counsel. This provision of the bill takes effect 60 days after the bill becomes law.
- Prohibiting non-disclosure agreements that bar the complainant from initiating, testifying, or otherwise participating in an investigation by a government agency or disclosing facts necessary to receive public benefits that the complainant would be entitled to. This provision of the bill takes effect 60 days after the bill becomes law.
- Requiring that any term or condition in a non-disclosure agreement be provided in writing to all parties in plain English and if applicable, the primary language of the complainant. This provision of the bill takes effect 60 days after the bill becomes law.

- Expanding the prohibition on non-disclosure agreements, unless it is the preference of Plaintiff, to all discrimination cases not just sexual harassment cases. This provision of the bill takes effect 60 days after the bill becomes law.
- Voiding any agreement between an employer and employee or potential employee, entered into after January 1, 2020, that prevents disclosure of facts related to any future claim of discrimination unless the provision notifies the employee or potential employee that he or she is not prohibited from speaking with law enforcement, the Equal Employment Opportunity Commission, the State Division of Human Rights or a similar local entity, or his or her attorney.
- Expanding the State Attorney General's power to prosecute cases of discrimination based on all protected classes. This provision of the bill takes effect 180 days after the bill becomes law.
- Requiring employers to provide a notice containing the employer's sexual harassment policy to all employees at the time of hire and at every annual sexual harassment prevention training. Such notice must be in English and the primary language of the employee. This provision of the bill takes effect immediately after the bill becomes law.
- Requiring the Commissioner of Labor to prepare templates of model sexual harassment prevention policies in languages other than English. This provision of the bill takes effect immediately after the bill becomes law.
- Beginning in 2020, and every four years thereafter, the Department of Labor and the State Division of Human Rights must evaluate the impact of the model sexual harassment prevention policies and update them as necessary.

Takeaway for Employers

When signed into law, this legislation will have a significant impact on New York employers. Not only does it lower the bar for employee's claiming harassment to "petty slights" or "trivial inconveniences", it also increases the employer's liability and essentially eliminates an affirmative defense. The legislation also impacts an employer's ability to resolve claims of harassment by imposing greater restrictions on non-disclosures agreements and banning mandatory arbitration clauses for all discrimination claims. Employers will have to revisit their sexual harassment prevention policies and training materials to ensure compliance with the new legislation in the event it is signed into law by Governor Cuomo as anticipated.

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If you have any questions regarding this legislation, please do not hesitate to contact us.

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