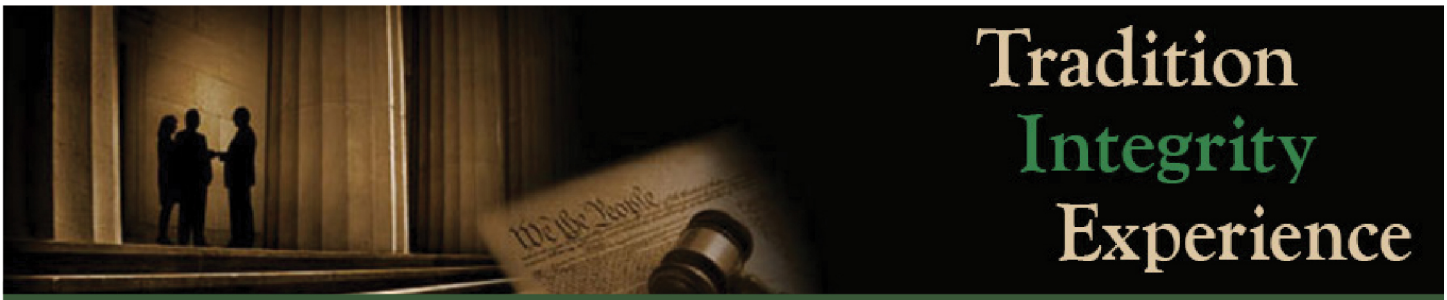
Putney

Putney, Twombly, Hall & Hirson LLP | *Counselors at Law*
521 Fifth Avenue | New York, NY 10175 | (212) 682-0020 | putneylaw.com



AUGUST 19, 2019

New York State Enacts Amendments to Workplace Discrimination Laws

On August 12, 2019, Governor Andrew Cuomo signed legislation increasing protections for victims of discrimination and harassment in the workplace. As we previously reported, the amendments bring significant changes for employers throughout New York State including imposing greater restrictions on non-disclosure agreements, banning mandatory arbitration clauses for all discrimination claims, eliminating the severe and pervasive standard, and weakening the Faragher-Ellerth defense. For further information on the amendments to the law, see our prior alert: https://putneylaw.com/client-news/ny-lawmakers-pass-legislation-amending-workplace-discrimination-laws. The legislation contains various parts that go into effect at difference times.

Effective Immediately:

- The New York State Human Rights Law shall be liberally construed in order to maximize deterrence of discriminatory conduct.

- Employers must 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. The Commissioner of Labor, in conjunction with the New York State Division of Human Rights, will prepare templates in English and in other languages, based on the state population that speaks each language and other factors deemed relevant by the Commissioner of Labor. Where an employee identifies as his or her primary language a language for which a template is not available, an employer may provide an English language notice.

- The State Attorney General's power to prosecute cases of discrimination is expanded to cover all protected classes.

Effective October 11, 2019:

- The "severe and pervasive" standard will be replaced with the "petty slights and trivial inconveniences" standard. The severe and pervasive standard, similar to the standard under federal law, required an employee to show that harassment was sufficiently hostile or created a work environment that a reasonable person would consider intimidating, hostile or abusive. The new standard, which will be similar to the standard under the New York City law, requires only that the harassment rise above the threshold of petty slights or trivial inconveniences. This is a much easier standard for Plaintiffs.

- *The Faragher/Ellerth defense*, which permits an employer to avoid liability if it can be demonstrate that an employee did not utilize the employer's internal complaint procedure or did not complain of harassment, will no longer be determinative as to an employer's liability. Employee's claiming discrimination will also no longer have to show that they were treated less favorably than a comparator.

- Protections for contractors will increase as employers may be held liable to non-employees, such as contractors, subcontractors, vendors, consultants, or other persons providing services in the workplace or employees of contractors, subcontractors, vendors, consultants, or other persons providing services in the workplace, for unlawful discriminatory practices. Protections for domestic workers will also increase as domestic workers will be covered on the same grounds as other types of employees.

- Mandatory arbitration clauses related to claims of discrimination will be prohibited.

- Non-disparagement provisions in employment contracts, which prevent employees from disclosing information related to future claims of discrimination with law enforcement, enforcement agencies and private counsel, will be prohibited.

- 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 will be prohibited, unless the non-disclosure agreement is the preference of the Plaintiff.

- Any term or condition in a non-disclosure agreement must be provided in writing to all parties in plain English and if applicable, the primary language of the complainant.

- Punitive damages will be available in employment discrimination actions.

- Attorney's fees will be awarded to the prevailing party in all employment discrimination actions.

Effective January 1, 2020:

- Non-disclosure agreements will need to notify an 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.

Effective February 8, 2020:

- The New York State Human Rights Law will cover all employers, without regard to the number of employees employed.

Effective August 12, 2020:

- The statute of limitations for sexual harassment claims being brought before the New York State Division of Human Rights will be extended from 1 year to 3 years.

Effective in 2022:

- The New York State Department of Labor and New York State Division of Human Rights must evaluate and update the model sexual harassment prevention policy and guidance document every four years.

Takeaway for Employers

Employers should pay close attention to the effective dates of the various amendments detailed above. Most immediately, employers should take steps to comply with the notice requirement relating to the sexual harassment policy and training.

In light of the lower standard of proof, the weakening of the Faragher/Ellerth defense, the lack of limitation on punitive damages, and the availability of attorney's fees to the prevailing party, employers are likely to see an influx of discrimination and harassment cases. We anticipate more cases will be filed in New York State Court to avoid the limitations under Title VII imposed in federal courts.

* * *

If you have any questions regarding this alert, or any other issue, please do not hesitate to contact us.

PUTNEY, TWOMBLY, HALL & HIRSON LLP