

New York Legislature Passes Sweeping Amendments to its Discrimination and Harassment and Pay Equity Laws

by Laura M. Lestrade

Building in part on amendments passed last year, the New York State Legislature has passed legislation significantly broadening protections for employees. Governor Cuomo is expected to sign the amendments into law shortly. The amendments, when passed, will implement the following changes: (1) the “severe and pervasive” standard for actionable harassment and retaliation claims will no longer apply; (2) the *Farragher-Elzerth* defense, available to employers when an employee fails to take advantage of policies and procedures for complaining of discrimination and harassment, will be eliminated; (3) coverage under the New York State Human Rights Law (“NYSHRL”) will be extended to small employers; (4) all of the protections of the NYSHRL will be extended to non-employees performing services in the workplace, including independent contractors; (5) attorneys’ fees and punitive damages will be recoverable for the first time under the NYSHRL; (6) non-disclosure provisions will be precluded in settlement agreements for any type of discrimination claim; (7) mandatory arbitration of any type of discrimination claim will be precluded; (8) employers will be required to provide new employees with a copy of the employers’ sexual harassment policy as well as the information provided at the employers’ annual sexual harassment training, upon hire; (9) the statute of limitations for filing a discrimination claim with the New York State Division of Human Rights will be extended from one year to three years; (10) New York’s Pay Equity Act will be extended to all protected classes and the requirements for sustaining a claim will be relaxed; (11) employers will no longer be permitted to rely on wage or salary history in decisions concerning hiring, raises or promotions.

Lowering the Standard for Harassment and Retaliation Claims.

A plaintiff alleging harassment based on his or her inclusion in a protected class, or in retaliation for opposing discrimination, is no longer required to establish that the harassment was “severe” or “pervasive” in order to sustain a claim. That standard has been eliminated, and precedent established in cases previously adjudicated under such standard has been declared irrelevant. Under the new law, *any* such “harassment” is unlawful and actionable “regardless of whether such harassment would be considered severe or pervasive under precedent applied to harassment claims, when it subjects an

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individual to inferior terms, conditions or privileges of employment.” Instead of requiring a plaintiff to prove harassment that is severe or pervasive, employers may now raise an *affirmative defense* (on which the employer bears the burden of proof) 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.” It remains to be seen how courts will interpret the new law without the “severe and pervasive” standard, and the vast body of case law interpreting it, as a guide. However, the amendments state specifically that the law should be “construed liberally for the accomplishment of the remedial purposes thereof” and that “[e]xceptions to and exemptions from the provisions . . . shall be construed narrowly in order to maximize deterrence of discriminatory conduct.” This provision will take effect 60 days after the amendments are signed into law and will not apply retroactively to previously filed claims.

No Prior Complaints and No Comparators Necessary.

The amendments also eliminate any defense concerning an employee’s failure to complain of harassment during his or her employment, sometimes called the *Farragher-Elzerth* defense, which remains available in cases brought under federal law. Under the new amendments, “[t]he fact that such individual did not make a complaint about the harassment to such employer . . . shall not be determinative of whether such employer . . . shall be liable.” The bill also eliminates any requirement that a plaintiff identify comparators outside of the protected class who received more favorable treatment. “Nothing in this section shall imply that an employee must demonstrate the existence of an individual to whom the employee’s treatment must be compared.” This provision will take effect 60 days after the amendments are signed into law and will not apply retroactively to previously filed claims.

Extension of NYSHRL Coverage to Small Employers.

Historically, the NYSHRL applied only to employers with four or more employees. Amendments passed last year expanded the protections against sexual harassment to employers of any size. The current amendments expand all of the protections of the NYSHRL, not only the protections against sexual harassment, to all employers, regardless of size. This provision will take effect 180 days after the amendments are signed into law and will apply only to claims filed on or after the effective date.

Extension of all NYSHRL Protections to Non-Employees.

The amendments extend full protection from harassment and discrimination to non-employee contractors “when the employer, its agents or supervisors knew or should have known that such non-employee was subject to an unlawful discriminatory practice in the employer’s workplace and the employer fails to take immediate and appropriate remedial action.” Historically, non-employee contractors were not protected at all under New York’s employment discrimination laws. Last year’s amendments extended coverage to non-employees for sexual harassment only. Under the new amendments, non-employee contractors are now covered under the law for all forms of discrimination and harassment, not just sexual harassment. This provision will take effect 60 days after the amendments are signed into law and will not apply retroactively to previously filed

claims.

Expanded Remedies Available Under NYSHRL.

Attorneys' Fees and Punitive Damages will now be available to employees who sue a private employer for all types of unlawful discrimination. Previously, neither form of damages was available in claims brought under the NYSHRL. This provision will become effective 60 days after the amendments are signed into law.

Non-Disclosure and Mandatory Arbitration Provisions Precluded.

Amendments passed last year precluded non-disclosure provisions in agreements settling claims of sexual harassment "unless the condition of confidentiality is the complainant's preference. The new amendments extend the prohibition against employer-imposed confidentiality agreements to agreements settling all types of unlawful discrimination claims. Where confidentiality is the complainant's preference, the complainant must be given 21 days to consider the non-disclosure provision and 7 days to revoke it after signing. The complainant's preference for non-disclosure must be memorialized in a separate written document. In addition, any agreement entered into after January 1, 2020 that prevents disclosure of future claims, such as agreements entered into at the commencement of employment, will be void unless it "notifies the employee or potential employee that it does not prohibit him or her from speaking with law enforcement, the [EEOC], the state division of human rights, a local commission on human rights, or an attorney retained by the employee or potential employee."

Similarly, last year's amendments prohibited mandatory arbitration of sexual harassment claims. The new amendments will preclude mandatory arbitration provisions relating to any kind of unlawful discrimination. These provisions will take effect 60 days after the amendments are signed into law.

Expanded Training Requirements.

Expanding on the initiation last year of mandatory annual sexual harassment training, employers will now be required to provide new employees, upon hire, with a copy of the employer's sexual harassment policy as well as the information provided at the employer's annual sexual harassment training. This provision will take place as soon as the amendments are signed into law.

3-Year Statute of Limitations for Agency Claims.

The limitations period for filing a complaint of discrimination with the New York State Division of Human Rights will be extended from one year to three years. This provisions will take effect one year after the amendments are signed into law.

Expansion of Pay Equity Act.

Currently, New York's pay equity provisions apply only to pay inequality based on sex. Under the new amendment, the protections of New York's Achieve Pay Equity Act will be expanded to pay inequities based on any of the protected classes under the NYSHRL, including age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, or domestic violence victim status. The amendments also make it

easier for an employee to sustain a claim by showing that he or she is being paid less than someone outside of their protected class for performing “substantially similar work.” Currently, an employee must show that her job is “equal to” the job of a man who is paid more. These provisions will take effect 90 days after the amendments are signed into law.

Salary History Ban.

Employers in New York State will no longer be permitted to inquire about, *or rely on*, the wage or salary history of an applicant in determining whether to hire such applicant and at what compensation level. Nor may salary history be considered in raise or promotion decisions concerning current employees. This provision goes farther than many other salary history ban legislation, including New York City’s salary history ban, which only prohibit inquiring about salary history. Curiously, the amendment specifically states that nothing “shall prevent an applicant or current employee from voluntarily, and without prompting, disclosing or verifying wage or salary history, including but not limited to for the purposes of negotiating wages or salary.” Notwithstanding this seeming inconsistency, the clear intent of the amendment is to prohibit the use of such information in compensation decisions. This provision will take effect 180 days after the amendments are signed into law.

Takeaways:

The new legislation significantly changes the landscape for all employers in New York. Employers should seek guidance concerning how the changes will affect them and should consider putting the following safeguards in place:

- Change on-boarding procedures to include distribution of sexual harassment policy and training materials to new employees upon hire.
- Revise training materials to the extent they discuss the “severe and pervasive” standard for harassment and retaliation claims.
- Provide expanded management training to address pay equity issues and salary history ban.
- Review the use of arbitration provisions, if applicable.
- Review the use of non-disclosure provisions in employment and settlement agreements to make sure the employer is in compliance with the new requirements.
- Consider conducting a comprehensive compensation audit of positions and employees in order to eliminate unlawful pay inequities.