

Client Alert **Employment & Labor**

Dramatic Pro-Employee Changes to New York State's Discrimination Law

Last week, New York State's Legislature passed substantial and far-reaching amendments to the New York State Human Rights Law, the state statute that prohibits discrimination and discriminatory harassment. Governor Andrew Cuomo has announced that he will sign these new pro-employee provisions into law soon. This new legislation amplifies laws that New York State enacted in 2018 to combat sexual harassment.

Here are some important facts about these new amendments.

All Employers Now Covered

The New York State Human Rights Law ("HRL" or the "Law") will now cover all employers in New York State. This amendment will go into effect 180 days after the Governor signs the bill.

Easier To Prove Harassment Claims

It will now be easier for employees to satisfy the burden of proof for allegations, under the HRL, of discrimination, harassment, and retaliation because of the following provisions in the amended HRL.

(a) New York State law had adopted the requirement, under the federal Title VII of the Civil Rights Act of 1964, that an employee needed to demonstrate that alleged harassment was severe or pervasive in order to prevail against an employer. New York City's Human Rights Law (the "City Law"), had abandoned this standard over a decade ago, and requires only that an employee demonstrate that the alleged harassment or retaliation rises above the level of "petty slights and trivial inconveniences." The HRL has now adopted the City Law standard.

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(b) The HRL also required that employees alleging discrimination demonstrate that they were treated less favorably than a fellow worker not in the same protected class. The HRL no longer contains this comparator provision.

(c) The HRL also provided that where an employee had never used the employer's internal complaint process, the employer could use that failure as a defense to a harassment claim. Now, the fact that an employee did not complain about harassment "shall not be determinative" of an employer's liability under the HRL.

These evidentiary revisions will all become effective 60 days after the Governor signs the bill.

Expansion of Attorneys' Fees Awards to Employees

The HRL will now require that a prevailing party "shall" be awarded attorneys' fees, by the NYS Division of Human Rights (the "Division") or a court. However, for a prevailing employer to obtain attorneys' fees, it will need to prove that the plaintiff employee's lawsuit was frivolous. This attorneys' fees provision will go into effect immediately upon the Governor's signing the bill into law.

Punitive Damages Now Available to Employees

The HRL will also now provide for the award of punitive damages, as well as the back pay, front pay, and compensatory damages that are already available under the Law. This provision will become effective 60 days after the Governor signs the bill.

Liberal Construction of HRL Now Mandated

Effective upon the Governor's signature, the HRL will require that courts and the Division construe the HRL liberally and exceptions to the Law narrowly to "maximize deterrence of discriminatory conduct," even when this causes a different result than under Title VII or other comparable federal law.

Coverage of Independent Contractors Expanded

Effective 60 days after enactment, the HRL will now cover independent contractors for all kinds of unlawful discrimination, harassment, and retaliation.

Longer Statute of Limitations for Sexual Harassment

Effective one year after enactment, the HRL will have a three year statute of limitations for filing an administrative claim of sexual harassment with the Division. The statute of limitations for other discrimination claims will remain one year for submissions to the Division. Employers should note that the statute of limitations under the Law for claims initially filed in court is already three years.

Stricter Limits on Non-Disclosure Agreements

In 2018, New York dramatically constrained employers' use of Non-Disclosure Agreements ("NDAs") in sexual harassment cases. The HRL will now, with regard to all forms of discrimination, harassment, and retaliation claims, prevent employers from including NDAs in any agreement to resolve claims, "unless the condition of confidentiality is the complainant's preference." Even where confidentiality is the employee's preference, the Law imposes several requirements that must be met before the NDA may be used. This NDA provision will go into effect 60 days after enactment.

Effective January 1, 2020, NDAs that are part of an employment agreement must contain language that expressly provides that the employee or future employee is not prohibited from "speaking with law enforcement, the Equal Employment Opportunity Commission, the state Division of Human Rights, a local commission on human rights, or an attorney retained by the employee or potential employee."

Mandatory Arbitration Now Barred

In 2018, New York prohibited the mandatory arbitration of sexual harassment claims. Effective 60 days after enactment, the HRL will now expand this provision to prohibit mandatory arbitration of any discrimination, harassment, or retaliation claim. However, the Federal Arbitration Act ("FAA") may limit the effect of this provision outside of the transportation industry, to which the FAA does not apply.

New Notice Requirements

Immediately upon the Governor's signature, the Law will require employers to give employees in New York, when hired and during annual sexual harassment prevention training, a notice that contains the "employer's sexual harassment prevention policy and the information presented at such employer's sexual harassment prevention training program."

Attorneys in our Employment and Labor Law Practice Group can assist employers regarding the issues raised in this alert.

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