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New York Expands Sexual Harassment Law – Yet Again

New York Enacts Law Significantly Expanding Rights Related to Harassment, Discrimination and Retaliation in the Workplace

In the closing days of the legislative session in June 2019, New York State's progressive legislature took yet another step to strengthen worker protections against harassment, discrimination and retaliation.

After some delay, on August 12, 2019, Governor Cuomo signed the law ("Law") strengthening protections concerning sexual harassment, as well as other forms of discrimination and retaliation, in the workplace. The Law applies to all New York employers, including employers of domestic workers.

Employers must adjust to these new requirements while many are still working on addressing the required sexual harassment policy and training requirements from the New York State and City laws passed in 2018.

Employee Burden to Prove Discrimination Decreases

Under the new Law, an employer may be liable for unlawful discrimination if the employer subjects its employee to harassment in the form of inferior terms, conditions or privileges of employment based on the employee's membership in a protected class or participation in protected activity. Claimants will no longer be required to show that they were treated less favorably than other similarly-situated employees who are not members of a protected class or did not participate in protected activity.

New York Abandons the "Severe or Pervasive" Standard

Harassment law has long required a showing that conduct is severe or pervasive. With the stroke of a pen, New York has significantly lessened a claimant's burden of proof for claims of discrimination and harassment as compared to the "severe or pervasive" standard that has long been recognized at the federal and state level. An employer may defend against such claims by demonstrating that the conduct amounted to no more than petty slights or trivial inconveniences. This change comports with the current standard under the New York City Human Rights Law.

Coverage for Domestic Workers and Non-Employees Expanded

The Law now expands coverage provided to domestic workers and non-employees in the workplace from sexual harassment to all of the protected characteristics recognized under New York State law. Employer liability for conduct related to claims by non-employees will examine whether the employer knew or should have known of such conduct and failed to take immediate and appropriate corrective action and the extent of the employer's control and legal responsibility with respect to the individual who engaged in the unlawful conduct.

Employee No Longer Required to Complain Internally

In addition, the Law weakens a commonly used affirmative defense to such claims which has been law since the Farragher/Ellerth Supreme Court decisions in 1998. Under Farragher/Ellerth an employer could defend against claims of discrimination, harassment and retaliation by asserting that a claimant did not utilize the employer's internal complaint procedures to report the alleged unlawful conduct. Under this new Law, whether an employee complains internally will no longer be a determinative factor in employer liability.

These changes that lower a claimant's burden of proof will take effect on October 11, 2019 and will apply to claims filed on or after that date.

Potential Damages for Claimants Expanded

Effective October 11, 2019 for claims filed on or after that date, punitive damages and attorneys' fees may be awarded.

Recovery for Punitive Damages Permitted

The Law permits an employee to recover punitive damages in employment discrimination cases against private employers. This change comports with the New York City Human Rights Law, which also allows an employee to recover punitive damages. Note, however, that in cases brought under both the New York State and New York City laws, double-recovery will not be permissible.

Recovery of Attorneys' Fees

Prior law permitted the award of attorneys' fees by a prevailing party in the court's discretion. The Law amends this provision and now states that the court shall award attorneys' fees

attributable to an employment discrimination claim to the prevailing party. However, the employer's ability to recover such fees is limited to situations where the employer can demonstrate the action was frivolous.

Statute of Limitations is Lengthened

Under the new Law, employees will have 3 years to bring a claim for sexual harassment at New York State Division of Human Rights. The previous applicable statute of limitations was 1 year. This will allow for a longer period of time for claims to be brought against an employer and may allow for a greater scope of damages where the unlawful conduct occurred throughout the 3-year period prior to the filing of the claim.

The new statute of limitations will be applicable to claims filed on or after August 12, 2020.

Further Restrictions on Non-Disclosure Agreements

The Law also expands upon the current prohibition on non-disclosure agreements (NDAs) in settlements of sexual harassment claims that prevent the disclosure of information relating to the underlying facts and circumstances of the claim. The prohibition on NDAs will extend to settlements of all types of discrimination claims unless it is the employee's preference to maintain the settlement as confidential.

Similar to the previously enacted sexual harassment requirements, in order to demonstrate that it is the employee's preference to enter into a confidential settlement, the employee must be provided a non-waivable 21 day period to consider the NDA before executing the agreement, and, after signing, the employee will have a 7-day revocation period, during which the employee may revoke the NDA without consequence.

The Law also provides that an NDA will be void if it does not carveout a claimant's right to make disclosures related to an agency investigation or in order to receive unemployment insurance, Medicaid, or other public benefits. This expanded prohibition will take effect on October 11, 2019.

New Requirements Related to Confidentiality Provisions

Effective January 1, 2020, any confidentiality provision agreed to between an employer and a potential or current employee that prohibits the disclosure of facts related to a future discrimination claim will be void if it does not provide specific carveout language permitting disclosures to law enforcement, an attorney and federal, state and local agencies.

Prohibition of Mandatory Arbitration Clauses Expanded

Under current law, employers were prohibited from requiring mandatory arbitration clauses relating to claims of sexual harassment except where inconsistent with federal law. Effective October 11, 2019, the Law expands the prior prohibition from sexual harassment claims to all claims of discrimination. The Law still contains language that the prohibition stands "except where inconsistent with federal law." While the statutory expansion of this language may appear to limit employers' rights to mandate arbitration, a recent court decision has found that this provision is, in fact, inconsistent with federal law. In the recent decision in Latif v. Morgan Stanley & Co. LLC, et al., No. 1:18-cv-11528 (S.D.N.Y. June 26, 2019), the Southern District of New York held that employers that are covered by the Federal Arbitration Act, which broadly allows for mandatory arbitration clauses, can rely on arbitration to resolve disputes over sexual harassment notwithstanding the New York Law.

Sexual Harassment Prevention Policy and Training Notice Requirements

Effective August 12, 2019, under the Law, at the time of hire and at every annual sexual harassment training, employers will be required to provide employees with notice of the employer's sexual harassment prevention policy and the information presented at the sexual harassment training program. The notice must be provided in English and each employee's primary language, if not English

Practical Tips

New York employers should consider doing the following:

- **Harassment Policy Review:** Review and, if needed, update sexual harassment and discrimination prevention policies to comply with the changes in the Law;

- **Training Materials:** Review and update sexual harassment and discrimination prevention training materials to comply with the changes in the Law;
- **New Hire and Training Notice Requirements**: Distribute updated sexual harassment and discrimination prevention policies and information provided at training upon hiring new employees and at the annual training session;
- **Settlement Agreements**: Review confidentiality provisions of settlement agreements if resolving a claim for harassment, discrimination or retaliation based on any characteristic protected under New York State law. In order to demonstrate that it is the claimant's preference to maintain a settlement as confidential, the settlement agreement must provide the required non-waivable timeframes for review and revocation;
- **Confidentiality Provisions**: Review confidentiality provisions of business protection agreements, employment agreements, employee handbooks, and any other employer-employee agreements that may seek to prevent the disclosure of facts related to any future discrimination claim. In order for such provisions to be enforceable, they must contain requisite carveout language under the Law;
- **Arbitration Agreements**: Review arbitration agreements that cover claims for sexual harassment or other discrimination, harassment or retaliation covered under New York State law and consider whether such agreements require revision to comply with the Law.

Reminder: In 2018, both New York State and New York City adopted laws which require that employers conduct annual sexual harassment training. The New York State law applies to employers with one or more employees. New York State law also requires the adoption of a compliant sexual harassment policy and complaint form. To comply with New York State law, the first round of annual training must be completed by October 9, 2019.

Please contact Meister Seelig's Employment Group if you need assistance in reviewing your compliance with these new requirements. In addition to advice regarding compliance, the firm provides dynamic, interactive and customized training for employees, managers and the C-Suite, conducts train the trainer sessions and can provide other guidance in selecting the right training format for employers of all sizes. *The information contained in this publication should not be construed as legal advice. The invitation to contact is not a solicitation for legal work under the laws of any jurisdiction in which Meister Seelig & Fein LLP are not authorized to practice.*

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