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New York State Legislature Passes Anti-Sexual Harassment and Anti-Discrimination Laws

On June 19, 2019, the New York State Legislature passed a bill amending the laws that govern sexual harassment and discrimination claims in New York State. The act, S6577/A8421 (the “Act”), institutes several statewide reforms. Under the Act, a complainant will no longer need to demonstrate that the alleged harassment is “severe or pervasive”; instead, harassment will be found to be unlawful if it subjects an individual to “inferior terms, conditions or privilege of employment.” Additionally, the Act increases protections for workers who sign nondisclosure agreements by prohibiting nondisclosure provisions in any settlement, agreement or resolution of *any* discrimination claim, unless the complainant prefers a confidentiality provision and other requirements are met. This is a major expansion of the law, which previously restricted the use of such agreements only in connection with sexual harassment claims. The Act also eliminates an affirmative defense that had been available to shield employers from liability, extends the timeframe in which complaints can be filed with the New York State Division of Human Rights (“DHR”) from one year to three years, makes punitive damages and attorney’s fees available in employment discrimination cases, and expands some protections to all anti-discrimination claims. These reforms mark a significant change for New York State, aligning the state much more closely with laws already adopted by New York City.

As of this writing, it is expected that Governor Andrew Cuomo will sign this legislation into law.

Key New Statewide Anti-Sexual Harassment and Anti-Discrimination Measures

- **Replacement of “severe or pervasive” standard with “inferior terms” standard.** The most significant reform contained in the new measures is a revision to the legal standard for bringing a harassment claim in New York State. Courts currently assess harassment claims under the New York State Human Rights Law (“NYSHRL”) by determining whether the defendant’s conduct was “sufficiently severe or pervasive to alter the conditions of the victim’s employment.”¹ The Act amends the NYSHRL to state that complainants need not prove that harassment was either severe or pervasive. Rather, complainants will need to meet a lower standard, demonstrating being subject to “inferior terms, conditions or privileges of employment” as a result of membership in a protected category.²

¹ See, e.g., *Roelcke v. Zip Aviation, LCC*, No. 15 CIV. 6284 (DAB), 2018 WL 1792374, at *6 (S.D.N.Y. Mar. 26, 2018) (“Hostile work environments that are ‘sufficiently severe or pervasive to alter the conditions of the victim’s employment’ are actionable under the NYSHRL”); *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 297, 819 N.E.2d 998 (2004).

² S. Bill 6577, Reg. Sess. (N.Y. 2019), available [here](#).

Those categories include race, sex, sexual orientation, age, national origin, and military status, among others. This provision will take effect sixty days after the Act becomes law.

It remains to be seen whether courts interpret the “inferior terms” standard in the same manner as courts interpret New York City’s standard for a harassment claim. In New York City, the relevant standard under the New York City Human Rights Law (“NYCHRL”) is whether complainants were treated “less well” because of their membership in a protected class.³

- **Nondisclosure Agreements.** The Act also amends New York’s General Obligations Law with respect to nondisclosure agreements. In 2018, New York prohibited employers from including nondisclosure agreements in any settlement, agreement or other resolution of a claim involving sexual harassment, unless the complainant requests confidentiality.⁴ The Act expands that law to include all claims of discrimination. The Act does not define discrimination, other than to say it includes, but is not limited to, the NYSHRL.

Where the complainant does request confidentiality, the Act requires that any nondisclosure term or condition be provided in writing to all parties “in plain English, and, if applicable, the primary language of the complainant.”

The Act also adds language that could void nondisclosure agreements. The Act states that a nondisclosure term or condition shall be void if it:

prohibits or otherwise restricts the complainant from: (i) initiating, testifying, assisting, complying with a subpoena from, or participating in any manner with an investigation conducted by the appropriate local, state, or federal agency; or (ii) filing or disclosing any facts necessary to receive unemployment insurance, Medicaid, or other public benefits to which the complainant is entitled.

Last, the Act renders void and unenforceable any contract or other agreement between an employer (or its agent) and an employee (or potential employee) entered into on or after January 1, 2020, if the agreement “prevents the disclosure of factual information related to any future claim of discrimination,” without notifying the employee or potential employee that the agreement does not prohibit “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.”

These amendments to the General Obligations Law will take effect sixty days after the Act becomes law.

³ *Williams v. New York City Hous. Auth.*, 61 A.D.3d 62, 78 (1st Dep’t 2009).

⁴ N.Y. Gen. Oblig. Law. § 5-336, available [here](#).

- **Mandatory Arbitration.** Prior to the Act, New York law prohibited mandatory arbitration clauses to resolve claims of unlawful discriminatory sexual harassment. The Act broadens this provision to encompass “any allegation or claim of discrimination,” including but not limited to the NYSHRL. This amendment to New York’s Civil Practice Law and Rules (“CPLR”) will take effect sixty days after the Act becomes law.

Note, however, that the CPLR says that the prohibition applies “[e]xcept where inconsistent with federal law.”⁵ The prohibition may be challenged in court, in light of the U.S. Supreme Court’s 2018 holding that the Federal Arbitration Act preempts “any state rule discriminating on its face against arbitration—for example, a law prohibiting outright the arbitration of a particular type of claim . . . [and] any rule that covertly accomplishes the same objective by disfavoring contracts that . . . have the defining features of arbitration agreements.”⁶

- **Elimination of the Affirmative Defense Available to Employers.** Currently, under what is known as the *Faragher-Ellerth* defense,⁷ employers have an affirmative defense under federal law and the NYSHRL against claims of hostile work environment harassment where they can show that either (a) no tangible adverse employment action was taken against the complainant; (b) the employer exercised reasonable care to prevent and correct the harassing behavior; and (c) the complainant unreasonably failed to take advantage of the employer’s policies or procedures that would have avoided, prevented, or corrected the harm. The Act eliminates this affirmative defense for NYSHRL claims: under its provisions, if a claimant does not make a complaint about harassment to the employer, that fact will no longer be determinative of whether the employer is liable. However, the Act codifies into law an affirmative defense, previously stated only in case law, which applies when “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.”⁸ This amendment to the NYSHRL will take effect sixty days after the Act becomes law.

⁵ N.Y. C.P.L.R. 7515, available [here](#).

⁶ *Kindred Nursing Centers Ltd. P’ship v. Clark*, 137 S. Ct. 1421, 1426 (2017) (internal quotation marks, citations, and alterations omitted).

⁷ This defense is named after two United States Supreme Court cases, *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998).

⁸ *Davis-Bell v. Columbia Univ.*, 851 F. Supp. 2d 650, 671 (S.D.N.Y. 2012) (“[T]he NYCHRL, like Title VII and the NYSHRL, is still not a general civility code, and petty slights and trivial inconveniences are not actionable.”) (internal quotation marks omitted).

This reform brings New York State law in line with New York City law. In 2010, the New York Court of Appeals ruled that the *Faragher-Ellerth* affirmative defense does not apply to sexual harassment claims brought under the NYCHRL.⁹

- **Punitive Damages and Attorney’s Fees.** The Act provides for punitive damages in cases of employment discrimination brought against private employers. Previously, punitive damages were available only in housing discrimination cases. In those housing discrimination cases, courts typically uphold DHR’s finding of punitive damages if it is “supported by the evidence,” because the NYSHRL authorizes punitive damages “as a deterrent against housing discrimination.”¹⁰ Courts also avoid reversing the punitive damages determination because “DHR has been vested with broad powers to fulfill ‘[t]he extremely strong statutory policy of eliminating discrimination.’”¹¹ Punitive damages in housing discrimination cases will remain capped at \$10,000, but the Act does not specify any cap for punitive damages in employment discrimination cases.

The NYSHRL does not articulate a standard for assessing a plaintiff’s entitlement to punitive damages. The NYCHRL does not articulate a standard, either, but in 2017 the New York Court of Appeals ruled that a common law standard applies in determining punitive damages under the NYCHRL. That standard states that a plaintiff should receive punitive damages “where the wrongdoer’s actions amount to willful or wanton negligence, or recklessness, or where there is a conscious disregard of the rights of others or conduct so reckless as to amount to such disregard.”¹²

The NYCHRL, unlike the NYSHRL, contains provisions outlining how a defendant can mitigate punitive damages.¹³ To mitigate damages, a defendant must demonstrate that it “[e]stablished and complied with policies, programs and procedures for the prevention and detection of unlawful discriminatory practices by employees [and] agents ... and [has] a record of no, or relatively few, prior incidents of discriminatory conduct by such employee, agent ... or other employees.”¹⁴

The Act also provides for attorney’s fees—previously available only in housing discrimination and sex discrimination cases—may be awarded to the prevailing party in all claims involving employment discrimination. The Act does not change the requirement that a prevailing defendant must file a motion requesting attorney’s fees and demonstrate that the underlying action or proceeding was frivolous. This

⁹ *Zakrzewska v. The New School*, 14 N.Y.3d 469 (2010).

¹⁰ *Woehrling v. New York State Div. of Human Rights*, 56 A.D.3d 1304, 1305 (4th Dep’t 2008).

¹¹ *Van Cleef Realty, Inc. v. New York State Div. of Human Rights*, 216 A.D.2d 306, 307 (2nd Dep’t 1995) (quoting *Batavia Lodge No. 196, Loyal Order of Moose v. New York State Div. of Human Rights*, 35 N.Y.2d 143, 146 (1974)).

¹² *Chauca v. Abraham*, 30 N.Y.3d 325, 334 (2017) (internal quotations omitted).

¹³ N.Y.C. Admin. Code § 8-107(e)-(f).

¹⁴ N.Y.C. Admin. Code § 8-107(d)(1)-(2); *Roberts v. United Parcel Serv., Inc.*, 115 F. Supp. 3d 344, 373 (E.D.N.Y. 2015).

amendment to the NYSHRL will take effect sixty days after the Act becomes law, and punitive damages will be available only for claims accrued on or after that date.

- **Non-employee Discrimination.** The Act also says that employers may be held liable for unlawful discrimination against non-employees—*i.e.*, contractors, subcontractors, vendors, consultants or “other person[s] providing services pursuant to a contract in the workplace,” or who is an employee of the contractor, subcontractor, vendor, consultant or other person providing services pursuant to a contract in the workplace. This expands the current law, which prior to the Act applied only to sexual harassment. This will be effective 60 days after the Act is enacted into law.
- **Extending the Timeframe for Bringing Complaints.** Under the Act, complaints of sexual harassment in employment may be filed with the DHR within three years after the alleged unlawful discriminatory practices. Previously, complaints had to be filed within one year. This brings the NYSHRL in line with the NYCHRL. This amendment to the NYSHRL will take effect one year after the Act becomes law.
- **Requirements for Providing Employees with Policies and Training.** The Act requires every employer to provide its employees, at the time of hiring and at every annual sexual harassment prevention training, a notice containing the employer’s sexual harassment prevention policy and the information presented as the employer’s sexual harassment prevention training program. This information must be provided in writing, both in English and in the language identified by each employee as his or her primary language. The Labor Commissioner will provide employers with a model sexual harassment prevention policy, and if the template is not available in a language that an employee identifies as his or her primary language, the employer will nevertheless be in compliance with the law so long as it provides an English-language notice of the policy. This amendment to the Labor Law will take effect immediately upon the Act becoming law.
- **NYSHRL Applies to All Employers.** Prior to the Act, the NYSHRL applied only to all employers in sexual harassment cases. In all other cases, the NYSHRL did not apply to employers with fewer than four employees. 180 days after the Act becomes law, the NYSHRL will begin to apply to all employers.
- **Continued Evaluation and Updating of State Policies and Guidelines.** The Act also requires the Department of Labor and Division of Human Rights to evaluate and update the state’s model sexual harassment prevention policy and guidelines every four years, beginning in 2022. That department is also required to conduct a study on how to further “combat unlawful harassment and discrimination in the workplace,” culminating in a report and recommendations that must be submitted on or before December 1, 2019.

Key Takeaways for Employers Going Forward

The passage of the Act provides yet another reminder that it is important for employers to stay up to date on developments in the anti-discrimination laws. It is manifest that the new statewide measures will impose greater obligations on employers in New York State. Below are some key takeaways.

- **Conduct a review of employment contracts and agreements.** Employers should consider how the new requirements concerning nondisclosure agreements may render void any future contracts employers enter with employees. Employers may wish to review their contracts for terms that would restrict an employee from initiating, testifying, assisting, complying with a subpoena from, or participating in any manner with an investigation conducted by the appropriate local, state, or federal agency. Additionally, employers may also wish to review contracts for language that would restrict employees from filing or disclosing any facts necessary to receive unemployment insurance, Medicaid or other public benefits to which they are entitled. Employers also should consider whether their contracts do not prevent employees or potential employees from disclosing factual information related to any future claim of discrimination, or, at a minimum, confirm that their contracts notify employees that they are not prohibited from speaking with law enforcement, the Equal Employment Opportunity Commission, DHR, a local commission on human rights, or an attorney retained by the employee or potential employee. Employers may also want to monitor legal developments concerning the prohibition on mandatory arbitration provisions and review their agreements with employees to ensure compliance with the Act.
- **Update manner in which policies are communicated to employees.** The Act obligates employers to provide their employees, at the time of hiring and at every annual sexual harassment prevention training, a notice with the employer's sexual harassment prevention policies and the information presented at the employer's sexual harassment prevention training program. This is effective immediately upon the Act becoming law, and therefore employers should begin to prepare this notice.
- **Consider conducting a review of previous incidents.** Under the Act, employers will be subject to the state's expanded three-year period for filing complaints with the Division of Human Rights. Employers should consider reviewing any complaints previously reported by contractors, subcontractors, vendors or consultants to assess the potential for new litigation risks from these claims.
- **Review insurance coverage.** Employers may wish to determine whether there is any increased risk from: (1) the new standard for defining harassment and discrimination; (2) the elimination of the affirmative defense when an individual has not made a complaint to an employer; (3) the Act's extension of the statute of limitations for sexual harassment claims filed with DHR; or (4) the increased risk that punitive damages and attorney's fees will be owed. Employers should consider whether such determinations warrant adjustments to existing insurance coverage.

Employers that operate in multiple states are encouraged to continue monitoring ongoing developments in those states in order to ensure compliance with new obligations.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

Allan J. Arffa
+1-212-373-3203
aarffa@paulweiss.com

Robert A. Atkins
+1-212-373-3183
ratkins@paulweiss.com

David W. Brown
+1-212-373-3504
dbrown@paulweiss.com

Michele Hirshman
+1-212-373-3747
mhirshman@paulweiss.com

Daniel J. Toal
+1-212-373-3869
dtoal@paulweiss.com

Liza M. Velazquez
+1-212-373-3096
lvelazquez@paulweiss.com

Maria Helen Keane
+1-212-373-3202
mkeane@paulweiss.com

Justin D. Lerer
+1-212-373-3766
jlerer@paulweiss.com

Associate William E. Freeland contributed to this Client Memorandum.