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Alert

New York Strengthens Employee Protections Against Discrimination and Harassment

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On June 19, 2019, the New York State Legislature passed a bill that strengthens employee protections against harassment and other discriminatory practices in the workplace. Changes in the law include:

- Replacing the "severe or pervasive" standard applicable in harassment cases with a lower standard;
- Eliminating the Faragher-Ellerth affirmative defense;
- Extending the limitations on nondisclosure agreements to all claims of discrimination;
- Expanding the prohibition on mandatory arbitration to all claims of discrimination;
- Requiring employers to provide additional information to employees regarding sexual harassment policies; and
- Increasing the statute of limitations for sexual harassment claims to three years.

The new law generally renders the state law to be consistent with New York City's expansive Human Rights Law and extends protections previously enacted with respect to sexual harassment claims to all forms of discrimination in the workplace.

Replacing the "Severe or Pervasive" Standard
Instead of the previously applicable "severe or pervasive" standard for hostile environment claims, harassment constitutes unlawful discrimination if "it subjects an individual to inferior terms, conditions, or privileges of employment" because of an individual's protected characteristics. If, however, a reasonable victim with the same protected characteristics was exposed to the conduct and would consider it to be a "petty slight" or a "trivial inconvenience," then the conduct does not amount to unlawful discrimination.

Eliminating the Faragher-Ellerth Defense
The Faragher-Ellerth affirmative defense allowed employers to avoid liability if the employer had a reporting procedure and the complainant unreasonably failed to comply with it. Under the new law, if an employee does not follow the employer's reporting procedure, that will not be determinative of whether an employer is liable.

Extending the Limitations on Nondisclosure Agreements
Under the new law, employers will be prohibited from using nondisclosure agreements for all claims of discrimination in the workplace unless confidentiality is the complainant's preference. If there is a

nondisclosure agreement, it must be in writing and in plain English language or in the primary language of the complainant.

Furthermore, any term in a nondisclosure agreement that prevents the complainant 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; or filing or disclosing any facts necessary to receive unemployment insurance, Medicaid, or other public benefits to which the complainant is entitled" is void.

Previously, the law granted complainants a mandatory 21-day period to determine their preference in keeping the matter confidential. After the 21 days, the law required the complainant's preference to be recorded in writing, which the complainant could change within seven days.[1]

Expanding the Prohibition on Mandatory Arbitration
The new law will expand the law's prohibition on mandatory arbitration to all discrimination claims in the workplace, to the extent consistent with federal law.

Requiring Employers to Provide Additional Information Regarding Sexual Harassment Policies
Under the new law, upon hire, employers must provide employees with information regarding the employer's sexual harassment prevention policy and training program in the employee's primary language. Information about the employer's sexual harassment prevention policy and training must also be presented to each employee in writing during the yearly mandatory sexual harassment training.

Increasing the Statute of Limitations for Sexual Harassment Cases
Under the new law, the statute of limitations for sexual harassment claims in the workplace will be extended to three years. Filing an administrative complaint with the New York State Division of Human Rights for other types of discrimination claims is still subject to a one-year period.

Other Changes
Previously, employers were liable for the sexual harassment of employees by a contractor, subcontractor, vendor or other person providing services pursuant to a contract in the workplace. The new law expands employer liability to all forms of discrimination against non-employees when the employer knows of the discrimination and fails to take action.

The new law also requires a liberal construction of its provisions regardless of whether comparable federal laws have been construed differently. Exemptions and exceptions must also be narrowly construed.

Additionally, in employment discrimination cases, courts are now required to award reasonable attorneys' fees to the prevailing party. Courts may also award punitive damages for claims of discrimination in the workplace.

Lastly, the new law expands the definition of "employer." The law applies to all employers and individuals, regardless of the number of employees they have. Under the new law, any person who has an employee, including those who employ a single domestic worker, is liable as an employer for any

[1] *See* "New York State and City to Mandate Anti-Sexual Harassment Training for Private Employers," *SRZ Alert*, April 12, 2018, available here.

discrimination that occurs in the workplace. Prior to the amendments, only employees with four or more employees were covered (except with respect to sexual harassment claims).

Once signed into law, most of the changes will go into effect within 60 days, unless stated otherwise.

In response to this change in law, New York employers should review their policies, forms of agreement and training processes to ensure compliance.

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

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