September 11, 2019

2019 Continues to Be a Year of Employee-Friendly Changes in New York

As we previously reported here and here, New York State started off 2019 by enacting a host of progressive, employee-friendly laws. That trend has continued. Here is a look at the latest changes for employers in New York. As always, employers must ensure their policies are updated and that their management personnel are aware of the new laws.

Governor Cuomo Signs Sweeping Package of Anti-Discrimination and Anti-Harassment Legislation

On August 12, Governor Andrew Cuomo signed into law a package of amendments that enhance existing prohibitions against sexual and other unlawful harassment and discrimination. The legislation eradicates many of the defenses on which employers most often rely, enhances the available damages, and further limits employers' ability to mandate arbitration with employees and maintain confidentiality of discrimination, harassment, and retaliation claims.

The package of amendments includes several major changes to the New York State Human Rights Law (NYSHRL).

- Four major changes go into effect on October 11:

  - Employers may now be liable for unlawful harassment even if the alleged conduct does not meet the "severe or pervasive" standard that previously governed harassment claims under the NYSHRL (and is the same standard governing claims under federal law). Instead, employees need only show that they suffered harassment beyond what a reasonable person would consider "petty slights or trivial inconveniences."

  - Under the NYSHRL, employers can no longer avail themselves of what is commonly called the *Faragher/Ellerth* defense, under which an employer has a complete defense to liability for the actions of a supervisor who harasses a subordinate if the employer can demonstrate that: (1) it exercised reasonable care to prevent and correct promptly the harassment; and (2) the employee unreasonably failed to take advantage of the employer's preventive and corrective measures. Although this defense is unavailable in cases where harassment resulted in an adverse employment action (such as a termination of employment), it is an important defense in many cases.

  - Plaintiffs seeking relief under the NYSHRL will no longer need to point to similarly-situated employees outside of their protected class(es) who received better treatment.

  - Plaintiffs in employment discrimination, harassment, and retaliation suits under the NYSHRL will now be able to obtain both punitive damages and attorneys' fees. Previously, these remedies were unavailable.

- Effective February 8, 2020, the NYSHRL (which previously applied to employers with four or more employees) will cover all New York employers, regardless of size.

- On August 12, 2020, the statute of limitations for sexual harassment claims will expand from one to three years (other discrimination claims are still one year).

- Finally, the package contains an express directive to the courts to construe the NYSHRL liberally, in order to "maximize deterrence of discriminatory conduct." This provision goes into effect immediately and is in line with the other dramatic expansions to the law set forth above.

Expanded Restrictions on Arbitration Pacts and Non-Disclosure Agreements

In July 2018, New York amended its General Obligations Law to prohibit the inclusion of terms in any settlement agreement or other resolution of sexual harassment claims that would prevent the disclosure of the underlying facts or circumstances of those claims (unless the complainant requested confidentiality in writing). On October 11, the prohibitions on confidentiality will expand to include any discrimination, retaliation, or harassment claim unless requested by the employee. Where permitted, any confidentiality terms that restrict employees from participating in investigations of discrimination will be void and, beginning January 1, 2020, confidentiality of facts relating to future claims will be void unless the employee is notified in writing that he or she can cooperate with state or federal agencies.

Also in July 2018, New York amended its Civil Practice Law and Rules to ban, except where prohibited by federal law, any contract clause that required the parties to "submit to mandatory arbitration to resolve any allegation or claim of an unlawful discriminatory practice of sexual harassment." Under the package of amendments recently signed by Governor Cuomo, this provision will now expand to all claims of discrimination effective October 11. Notably, however, at least one federal court has called into question the previously enacted provision. In June 2019, the U.S. District Court for the Southern District of New York evaluated whether the Federal Arbitration Act (FAA) preempts this state law. In a case involving the question of whether the plaintiff's harassment claims could be subject to mandatory arbitration, the court held the New York statute inconsistent with the FAA and, therefore, held that the claims must be arbitrated. The plaintiff filed an appeal on July 25, which is currently pending.

New Policy Distribution Requirements

Finally, effective immediately, employers will be required to provide all employees, in writing—at the time of hire and then annually—a notice of the employer's sexual harassment policy and the information presented at the employer's annual sexual harassment training. Prior legislation detailed only the content of such policies and mandatory annual training requirements.

Other Major Developments in New York Law

In addition to the package of amendments Governor Cuomo signed on August 12, several more major changes affecting employers in New York have either recently gone into effect or will soon. We highlight the most prominent of these changes below.

Expansion of "Race" Definition in NYSHRL

Effective July 12, the NYSHRL was expanded to clarify that the term "race" includes traits historically associated with race, including, but not limited to, hair texture and "protective hairstyles," which include, but are not limited to, braids, locks, and twists. Employers should note hairstyle is but one example provided by the amendment, and "traits historically associated

with race" may include other forms of expression or appearance closely associated with race or culture. Employers should be mindful of the bases for personnel decisions in the context of these new amendments and their potentially broader application.

Employment Discrimination Based on Religious Attire Is Also Banned

Effective October 9, employers are barred from discriminating against employees on the basis of their religious attire, clothing, or facial hair. As with the hairstyle amendment noted above, employers should ensure managers and human resources employees are familiar with this new amendment and update their practices accordingly.

Prohibition on Threats to Report Immigration Status

Section 215 of the New York Labor Law (Labor Law) prohibits retaliation against employees for complaining about violations of the Labor Law, providing information to the New York Department of Labor, starting a proceeding under the Labor Law, testifying in connection with a proceeding under the Labor Law, or exercising rights under the Labor Law. Effective October 25, retaliation under the Labor Law now includes contacting, or threatening to contact, United States immigration authorities or otherwise reporting or threatening to report the suspected citizenship or immigration status of an employee or an employee's family or household member.

Expansion of State's Equal Pay Law

Effective October 10, the statute that previously required employers to provide equal pay for equal work based on gender will expand its protections to employees of all "protected classes" (e.g., age, race, religion). There are exceptions (unchanged from the previous version of the law) permitting pay differentials based on seniority, merit, a system that measures quantity and/or quality of work, or a "bona fide" factor other than a protected characteristic, such as "education, training, or experience."

Limitations on Requesting Previous Salary Information

Effective January 8, 2020, employers will be prohibited from (1) relying on salary history in establishing an applicant's wage rate; (2) asking an applicant or employee about his or her wage history as a condition of receiving an interview or continued employment; (3) asking an applicant or current employee's former employer about the individual's wage history; and (4) retaliating against an applicant or current employee based on his or her wage history because the individual did not provide his or her wage history or because the individual filed a complaint pursuant to the statute. Nothing in the statute prohibits an applicant or current employee from *voluntarily and without prompting* disclosing this information. If, after the employer makes an offer to an applicant, the applicant seeks to negotiate compensation by relying on previous salary information, the employer may confirm that information.

New Protections for Victims of Domestic Violence

Effective November 18, the employment protections available for victims of domestic violence under the NYSHRL will expand. In addition to broadening the definition of who may be considered a victim of domestic violence under the NYSHRL, the amendments enumerate specific discriminatory actions that may not be taken against victims of domestic violence, and require employers to permit victims time off from work for specific reasons (such as seeking medical attention and obtaining services from a domestic violence shelter).

Bottom Line

Much like we reported last quarter, New York's employment laws are evolving quickly under Governor Cuomo. Employers must be mindful to keep pace with the rapidly changing laws.

Would you like to receive our *Employment and Labor Quarterly Update?* Sign up here.

Authors



Heather Weine Brochin

Partner

Parsippany, NJ | (973) 966-8199

New York, NY | (212)-297-5800

hbrochin@daypitney.com