

# Employee Relations LAW JOURNAL

## **Expanded Employee Protections for New York Employees**

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*The authors of this article explain recent progressive, employee-friendly legal changes New York employers should be aware of and consider in light of their existing workplace policies.*

New York State and New York City legislatures have continued to enact progressive, employee-friendly changes during 2019. Here is a look at recent legal changes New York employers should be aware of and consider in light of their existing workplace policies. Employers must make sure their management teams understand these changes to the law and update policies to ensure compliance.

### **NEW YORK STATE**

#### ***Expansion of Human Rights Law to Protect Gender Identity/Expression***

Effective February 24, the Gender Expression Non-Discrimination Act (GENDA) amended the New York State Human Rights Law (NYSHRL) to prohibit discrimination based on an employee's gender identity and/or expression. GENDA defines this protected category as an individual's actual or perceived gender-related "identity, appearance, behavior, expression, or other gender-related characteristics regardless of the sex

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assigned to that person at birth, including, but not limited to, the status of being transgender.”<sup>1</sup>

### ***Extension of Paid Voting Leave***

New York State also amended its election law to provide all employees who are registered to vote up to three hours of paid leave, at the beginning or end of their workday, to vote in any election, as long as the request is made at least two days before the election. Previously, New York law required employers to provide only two hours of paid leave to vote under limited circumstances. In addition to providing the leave, at least 10 days before any election and until the polls close, employers must post (in a conspicuous area) a notice that sets forth the provisions of the voting leave law.<sup>2</sup>

### ***Expansion of “Race” Definition in New York State Human Rights Law***

Effective July 12, Governor Cuomo signed into law amendments to the NYSHRL to make clear 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. This change mirrors the guidance issued by the New York City Commission on Human Rights in February (discussed below). 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.<sup>3</sup>

### ***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.”<sup>4</sup>

### ***Prohibition 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 their 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.<sup>5</sup>

### ***Expansion of Protections Against Sexual and Other Unlawful Harassment***

On June 19, the New York State legislature voted to strengthen its prohibitions against sexual and other unlawful harassment. Employers may now be liable for unlawful harassment even if the alleged conduct does not rise to the "severe or pervasive" standard that previously governed harassment claims under state law. In addition, the statute expressly states that the fact an employee did not complain about the alleged harassment is not determinative of whether an employer may be found liable. The statute of limitations for sexual harassment claims will also be lengthened from one to three years (other discrimination claims are still one year).<sup>6</sup>

In July 2018, New York law began prohibiting the inclusion in any settlement agreement or other resolution of claims involving sexual harassment terms that would prevent the disclosure of the underlying facts or circumstances of those claims (unless the complainant requested confidentiality in writing). Under the proposed amendments, the prohibitions on confidentiality will be expanded to include *any* discrimination claim unless requested by the employee. Where permitted, any confidentiality terms that restrict employees from participating in investigations of discrimination by state or federal agencies 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.<sup>7</sup>

Finally, 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 only

detailed the content of such policies and mandatory annual training requirements.

Although Governor Cuomo has not yet signed the bill, he has endorsed it and is expected to sign it.

### ***Prohibition on Arbitrating Sexual Harassment Claims Called into Question***

In July 2018, New York amended its New York 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.” Lawyers and legal scholars alike questioned whether prohibitions on arbitration of harassment claims were preempted by the Federal Arbitration Act (FAA) and the “liberal federal policy favoring arbitration.” In June 2019, the U.S. District Court for the Southern District of New York weighed in as the first court to address whether the FAA preempts a state law of this kind. The court held the New York statute *is inconsistent* with the FAA and, therefore, the plaintiff’s sexual harassment claims were subject to mandatory arbitration. Notably, this decision by a federal court regarding the New York State practice rules may continue to be challenged, and the legal landscape is still unsettled.<sup>8</sup>

## **NEW YORK CITY**

### ***Guidance to Combat Racial Discrimination Based on Hair***

In February, the New York City Commission on Human Rights issued new guidance explaining that policies that ban or restrict hairstyles may constitute race discrimination under the New York City Human Rights Law (NYCHRL). The new guidance focuses on “anti-Black racism” and seeks to allow employees to maintain natural hair or hairstyles that are “closely associated with their racial, ethnic, or cultural identities.” Employers may not prohibit or require a change to certain hairstyles, refuse/limit job opportunities based on hairstyle (i.e., refuse a customer-facing role), force employees to hide hair under a hat/net or establish a “neutral” policy that has a disparate impact on certain races. Employers *are permitted* to enforce appearance policies for legitimate health or safety concerns.<sup>9</sup>

### ***Protections for an Individual’s Reproductive Health Choices***

New York City also amended the NYCHRL to include protections against discrimination and harassment related to “an individual’s reproductive

health choices.” This amendment makes it an “unlawful discriminatory practice” for an employer to take an adverse employment action against an employee based on his/her sexual and reproductive health decisions, which are defined as “any decision by an individual to receive services, which are arranged for or offered or provided to individuals relating to sexual and reproductive health, including the reproductive system and its functions.” This includes, for example, family planning services, STD prevention/testing and abortions.<sup>10</sup>

### ***Lactation Room and Policy Requirements***

New York City employers must provide a designated lactation room and refrigerator suitable for breast milk storage in “reasonable proximity” to the employee’s work area. The law sets forth specific elements for the provision of a lactation room: It must be private and clean – *not a bathroom* – and contain a chair, an electrical outlet, and a flat surface on which to place personal belongings. Although the designated lactation room may be used for other purposes, the employer must give priority use to employees needing to express breast milk. Employers *must also have a written policy* notifying employees of their rights. Specifically, the policy must:

- (1) Include a statement that reasonable break time to express milk is permitted pursuant to Section 206-c of the New York Labor Law;
- (2) Outline the process to request the use of a lactation room;
- (3) Outline the process to address requests by two or more employees for use of a lactation room;
- (4) State that the employer will respond within five business days; and
- (5) State that the employer will engage in “cooperative dialogue” if the employee’s request poses an “undue hardship.”<sup>11</sup>

### ***Ban on Drug Testing Applicants for Marijuana to Begin May 2020***

Effective May 10, 2020, New York City employers will be prohibited from drug testing *prospective employees* for marijuana as a condition of employment. The law includes limited exceptions to the drug testing prohibition, exempting employees in identified safety-sensitive positions and testing required by federal law or a federal government contract. The

law also will not bind employers that are a party to a collective bargaining agreement that “specifically addresses” the drug testing of applicants, but only as to those employees.<sup>12</sup>

### ***Proposed Mandatory Vacation Time Bill***

In May, the New York City Council introduced a bill that seeks to amend the New York City Earned Safe and Sick Time Act to require employers to provide 80 hours of “personal time” (i.e., for any reason) to employees each calendar year. If passed, employers with five or more employees would need to pay employees for this time off, with smaller New York City employers required to provide 80 hours of unpaid personal time. The New York City Council has not voted on this bill, but there are clear signs that the mayor favors this legislation.

## **WESTCHESTER COUNTY**

### ***Sick Leave***

Since July 2014, New York City employers have had to comply with the city’s paid sick leave law. Effective April 10, 2019, Westchester County employers also need to comply with a mandatory sick leave law. Employees who work in Westchester County for more than 80 hours in a calendar year are eligible for up to 40 hours of sick leave under the Earned Sick Leave Law. All employers must provide the required sick leave, but the time is paid by employers with five or more employees. Eligible employees begin to accrue sick leave on July 10 (or their first day of employment, if later). Employers may prohibit use of sick time until the employee has worked for the employer for 90 days. Critically, for all employees working on or before July 10, employers must provide notice of this new law by July 10. Employers must provide new employees (hired after July 10) notice on their first day of employment.<sup>13</sup>

### ***Safe Leave***

Effective November 1, Westchester employers will need to provide annually 40 hours of paid safe leave, *in addition to* the mandatory sick leave noted above, pursuant to the Safe Time Leave for Victims of Domestic Violence and Human Trafficking Law (safe leave). Safe leave is provided so that employees may “attend/testify in criminal and/or civil court proceedings relating to domestic violence or human trafficking and/or to move to a safe location.” Employers may set forth the manner in which employees may request foreseeable use of safe leave and may also require documentation for its use. Employers must also post a notice

(in English and Spanish) about the new law and provide written notice to new hires when they start employment and to current employees within 90 days of the law's effective date.<sup>14</sup>

## CONCLUSION

The evolving New York employment law landscape requires employers to remain vigilant regarding updates. As such, employers should seek legal assistance with policy revision, training, and guidance on these recent changes.

## NOTES

1. N.Y. Exec. Law §§ 291, 292, 295, 296, 296-a, and 296-b; N.Y. Civ. Rights Law § 40-c; N.Y. Educ. Law § 313; N.Y. Penal Law §§ 200.50, 240.00, 240.30, 240.31, 485.00, and 485.05.
2. N.Y. Elec. Law § 3-110.
3. N.Y. Exec. Law § 292; N.Y. Educ. Law § 11.
4. N.Y. Lab. Law § 194.
5. N.Y. Lab. Law § 194-a.
6. N.Y. Exec. Law §§ 292, 296, 296-b, 296-d, 297, and 300.
7. N.Y. Gen. Oblig. Law § 5-336.
8. N.Y. C.P.L.R. § 7515.
9. <https://www1.nyc.gov/assets/cchr/downloads/pdf/Hair-Guidance.pdf>.
10. New York City, N.Y., Code § 8-101, 8-102, 8-107.
11. New York City, N.Y., Code § 8-102 and 8-107.
12. New York City, N.Y., Code § 8-102 and 8-107.
13. [https://librarystage.municode.com/ny/westchester\\_county/codes/code\\_of\\_ordinances?nodeId=PTIVOTLOLAACRE\\_CH585EASILELA](https://librarystage.municode.com/ny/westchester_county/codes/code_of_ordinances?nodeId=PTIVOTLOLAACRE_CH585EASILELA).
14. [https://librarystage.municode.com/ny/westchester\\_county/codes/code\\_of\\_ordinances?nodeId=PTIVOTLOLAACRE\\_CH586SATILEVIDOVIHUTR](https://librarystage.municode.com/ny/westchester_county/codes/code_of_ordinances?nodeId=PTIVOTLOLAACRE_CH586SATILEVIDOVIHUTR).

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