Amendments to State Human Rights Law Will Impact New York Companies

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Key Points

- Amendments to the New York State Human Rights Law (NYSHRL) lower the bar for employees and individual nonemployees pursuing discrimination and harassment claims.
- In several respects, the amendments align the NYSHRL with the New York City Human Rights Law (NYCHRL), extending similar protections to employees across New York State.
- Most of the amendments will go into effect Friday, October 11, 2019, with others taking effect after that date.

Changes to the NYSHRL

On August 12, 2019, Governor Andrew Cuomo signed into law a series of amendments to the NYSHRL that will make it harder for New York employers to defend against claims of discrimination and harassment. The amendments expand upon New York's landmark 2018 anti-sexual harassment legislation, which we discussed here and here.

Among the main changes imposed by the new amendments are the following:

- **All Employers Covered**: Historically, the NYSHRL has covered companies with four or more employees. That changed slightly in 2018, when the law was amended to permit sexual harassment claims against smaller companies as well. The new amendments eliminate the four employee threshold altogether, permitting claims of discrimination, harassment and retaliation under the NYSHRL against all New York employers, regardless of size.
- **"Severe or Pervasive" Standard Eliminated**: Prior to the amendments, a plaintiff pursuing a hostile work environment claim under the NYSHRL had to demonstrate that the harassing conduct was "severe or pervasive." This standard, which mirrors that under Title VII of the federal Civil Rights Act of 1964, poses a high bar for plaintiffs to meet. The new amendments to the NYSHRL, however, eliminate this standard. Instead, an individual will have to show that he or she was subjected to "inferior terms, conditions or privileges of employment because of the individual's

Contact Information

If you have any questions regarding this alert, please contact:

Richard J. Rabin
Partner
rrabin@akingump.com
New York
+1 212.872.1086

Grace Margaret O'Donnell
Associate
godonnell@akingump.com
New York
+1 212.872.1015

membership in one or more . . . protected categories." This new standard more closely mirrors that under the NYCHRL, where a plaintiff must show that he or she was "treated less well" than other employees because of his or her inclusion in a protected category.

As under the NYCHRL, companies will have an affirmative defense to liability if they can show that the alleged 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." This analysis must be undertaken from the perspective of a "reasonable victim . . . with the same protected characteristic" as the plaintiff.

- **Removal of "*Faragher-Ellerth Defense*"**: Under current law, a company can avoid liability for certain hostile work environment claims under the NYSHRL if it can establish the "*Faragher-Ellerth defense*," *i.e*., that the company had a procedure for employees to report alleged harassment and that the alleged victim failed to file an internal complaint under this procedure. Under the new amendments, however, an employee's failure to file an internal complaint "shall not be determinative" of whether his or her employer is liable. This change brings the NYSHRL into closer alignment with the NYCHRL, which has similarly limited application of the *Faragher-Ellerth* defense.
- **Independent Contractors and Other Nonemployees**: Historically, the NYSHRL prohibited discrimination and harassment against only employees. The 2018 amendments to the NYSHRL extended the law's protections against sexual harassment to individual nonemployee service providers (such as consultants) who were subjected to sexual harassment in the employer's workplace. The new amendments extend these protections further, potentially rendering companies liable for any type of unlawful discrimination or harassment against nonemployees in the company's workplace, including but not limited to discrimination or harassment based on an individual's race, religion, age, disability, etc. A company can be liable to such nonemployees if the company or its supervisors "knew or should have known that such nonemployee was subjected to an unlawful discriminatory practice in the employer's workplace, and the employer failed to take immediate and appropriate corrective action."
- **Available Remedies**: The amendments also expand the remedies available to prevailing plaintiffs under the NYSHRL. Currently, the decision of whether to award a prevailing plaintiff his or her attorneys' fees is at the discretion of the court. The amendments change this, however, providing a mandatory fee award to a prevailing plaintiff. (A prevailing defendant can seek its attorneys' fees if it can show that the plaintiff's claims were frivolous in nature). Like the NYCHRL, the new amendments also will allow plaintiffs to seek punitive damage awards in appropriate cases.
- **Confidentiality of Future Claims**: Beginning January 1, 2020, nondisclosure provisions in offer letters, employment agreements, confidentiality agreements or other agreements must include carve-outs permitting employees to share information with law enforcement, the Equal Employment Opportunity Commission, the New York State Division of Human Rights, the relevant local commission on human rights (in New York City, the New York City Commission on Human Rights) and/or an attorney.
- **Settlement Agreement/Nondisclosure Provisions**: The 2018 amendments to the NYSHRL barred New York employers from entering into certain nondisclosure

provisions in settlements of sexual harassment claims unless the provisions were the employee's preference. (*See* here). The new amendments to the NYSHRL expand this proscription to settlement agreements involving any claims of discrimination or harassment. If an agreement contains a mutually-agreed nondisclosure provision preventing "the disclosure of the underlying facts and circumstances to the claim or action," the provision must be written in "plain English" (and in the employee's primary language, if different), and is subject to the same procedural requirements as nondisclosure provisions with respect to sexual harassment claims. These procedural requirements include the execution of a nondisclosure agreement that is separate from the settlement agreement itself, and that employees have 21 days to review and execute and then seven days to revoke. (*See* here). Any nondisclosure provision also must include carve-outs allowing the employee to (i) initiate, testify in, assist with, comply with a subpoena from or participate in an investigation conducted by any local, state or federal agency, and/or (ii) file or disclose any facts necessary to receive unemployment insurance, Medicaid or other public benefits to which the employee is entitled.

- **Mandatory Arbitration Provisions**: Last year, New York State amended the NYSHRL to purportedly prohibit pre-dispute arbitration provisions to the extent that such provisions required the arbitration of sexual harassment claims. The new amendments go even further, purporting to prohibit pre-dispute arbitration provisions to the extent they cover any NYSHRL discrimination or harassment claims, including those based on race, gender, national origin, age, sexual preference, etc.

  As we discussed previously, however, the anti-arbitration provisions of the NYSHRL likely are unenforceable, as they are preempted by the Federal Arbitration Act (FAA). Indeed, a federal court in Manhattan recently found this to be the case. In *Latif v. Morgan Stanley & Co. LLC*, an employee who had signed an arbitration agreement attempted to sue his employer in court over allegations of sexual harassment. Relying heavily on U.S. Supreme Court precedent, the court found that the FAA preempted the NYSHRL provisions purporting to prohibit arbitration, and that these NYSHRL provisions thus are unenforceable. We expect the federal appellate court to affirm this decision, and the law to become settled in this regard in the coming years.

- **Training Materials**: The new amendments also require companies to provide employees with written notice containing (i) the company's sexual harassment policy and (ii) the information presented at the company's sexual harassment training program. (For a detailed explanation of the training required by the NYSHRL and NYCHRL, *see* here and here). Companies will have to supply the foregoing documents at the time of hire and at each annual anti-sexual harassment training, and must provide them both in English and in the employee's primary language (if different).

- **Time to File Harassment Complaint**: Under current law, an individual seeking to file a sexual harassment complaint with the New York State Division of Human Rights must do so within a year of the alleged harassment. The new amendments extend this time frame, permitting such complaints up to three years after the alleged harassment. The limitations period for filing all other types of discrimination and harassment complaints will remain one year. This aspect of the new law will go into effect one year after the amendments are signed into law.

What Now?

With the intensity of the #MeToo movement showing no signs of abating, and the governing standards becoming more and more favorable to employees, companies must be increasingly vigilant in their anti-discrimination/anti-harassment efforts. Among the key considerations for companies are the following:

- **Tone at the Top**: Now more than ever, company leaders should try to set an example of appropriate behavior, demand that their colleagues follow suit and hold violators accountable. Especially for smaller employers, senior executives can have an outsize influence on the conduct of other employees, and can be a key driver of appropriate behavior.
- **Training**: High-quality anti-discrimination/anti-harassment training also now is more important than ever. Ideally, training should be creative, engaging and foster meaningful participation by employees, and not merely be "check-the-box" in nature. Though the NYSHRL and NYCHRL require only anti-sexual harassment training at present, companies should consider covering all types of harassment, discrimination and retaliation during their training sessions. As a reminder, New York-based companies must complete their first annual training cycle under the NYSHRL by October 9, 2019.
- **Employment Agreements**: Companies also should update their form employment agreements, offer letters and confidentiality agreements to ensure compliance with the NYSHRL and NYCHRL, and to protect the company as much as possible.
- **Settlement Negotiations/Agreements**: When negotiating, drafting and executing settlement agreements, companies also should carefully consider the scope of any nondisclosure provisions. Companies seeking broad confidentiality protections with respect to claims of discrimination or harassment must comply with the above-noted procedural requirements. In light of the Tax Cuts and Jobs Act of 2017, companies settling sexual harassment allegations also must remain cognizant of the potential tax implications of a nondisclosure provision governing such allegations (*see* here).

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