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Attention New York Employers: When It Comes to Workplace Harassment, Times Are Changing

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On August 12, 2019, New York Governor Andrew Cuomo signed new legislation amending the New York State Human Rights Law (the "NYSHRL"), changing the State law's previous adherence to certain fundamental principles of federal law concerning employment harassment generally, including the standard for determining employer liability for "hostile work environment" discrimination claims and the availability of punitive damages, among other issues. Whereas New York courts have historically interpreted the NYSHRL based on interpretations of claims filed under Title VII of the federal Civil Rights Act of 1964, the new amendments will alter the applicability of many significant precedents.

The amendment addresses workplace harassment, including but not limited to sexual harassment, against employees in any protected group. Claims of harassment based on age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, domestic violence victim status, or claims based on an employee's opposition to such misconduct, are subject to the new provisions.

To begin with, the revised NYSHRL will now cover employers of all sizes, and even includes new protections for domestic workers, who will now be protected on the same grounds as other types of employees. Some of the law's provisions take effect immediately, others within 60 days or 120 days of the law's passage. Broadly stated, the law purports to provide "***increased*** protections for protected classes and ***special protections*** for employees who have been sexually harassed." Highlights include:

1. ***"Severe or Pervasive" No Longer the Standard.*** Setting aside settled federal precedent, the new state law, like the city law, expands the kinds of behavior within its reach to include harassment ***"regardless of whether" it "would be considered severe or pervasive."*** Such conduct will now constitute an unlawful discriminatory practice if the affected employee experiences "***inferior*** terms, conditions or privileges of employment." Further, the employee need not identify a specific individual who received better treatment to meet this lower standard.

2. ***Only "Petty Slights" or "Trivial Inconveniences" Not Actionable.*** The prior requirement of "severe or pervasive" has been replaced with a new lesser standard for measuring employer misconduct. Behavior that a "reasonable victim of discrimination with the same protected characteristic" (not defined in the statute) would consider more than a "petty slight" or "trivial inconvenience" is now actionable. Moreover, the only affirmative defense available to employers is that the alleged behavior does not rise to that new, lower standard.

3. ***No Requirement That Employee First Complain to Employer***. Departing from U.S. Supreme Court precedent established in the 1998 *Faragher/Ellerth* cases and their progeny, an employee's failure to complain about harassment to his or her employer – in order to give the employer an opportunity to address and correct the misconduct – is no longer a defense to liability. (*Faragher/Ellerth* provides employers in federal cases with an affirmative defense to claims of supervisor harassment which do not result in a tangible employment action, such as termination or failure to promote. However, an employer who can show that it exercised reasonable care to prevent and promptly correct harassment ***and*** that the employee unreasonably failed to lodge a complaint under its policies may avoid all liability.)

4. ***Confidentiality Is Complainant's Exclusive Prerogative.*** Under the New York law, employers seeking to settle unlawful harassment claims may not require confidentiality of the claims' "factual foundation." Complainants may, however, voluntarily agree to such a provision. In that case, complainant has 21 days to consider an employer's proposed non-disclosure term, and then a period of seven days to revoke the decision once the agreement is executed.

5. ***Sexual Harassment Training Notices Must Also Be Provided in Employees' Primary Language.*** Employers in New York must provide employees notice of their sexual harassment training in writing in English and in the employees' primary language.

6. ***Statute of Limitations Extended.*** Employees will have three years, instead of one, to bring an administrative claim of sexual harassment under New York state law, whether filing in an administrative agency or in court.

7. ***Punitive Damages Now Available.*** An award of uncapped punitive damages is permitted; and reasonable attorney's fees are required in cases of employment discrimination by private employers.

8. ***Mandatory Arbitration Clauses Prohibited.*** Last year, New York enacted legislation prohibiting mandatory arbitration of sexual harassment claims. This prohibition has now been extended to all discrimination and retaliation claims, regardless of the alleged basis or theory. But whether federal law preempts this provision will likely be litigated. A federal judge in the Southern District of New York ruled in June that federal law does preempt the earlier legislation that attempted to prohibit mandatory arbitration of sexual harassment claims.

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