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Practice Update

New York State Approves Expanded Protections for Employees and Applicants

July 2, 2019

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New York State is on its way to enacting comprehensive reforms to broaden the scope of its discrimination and harassment laws, including one of the most robust anti-harassment bills in the #MeToo era, amendments to the State's Equal Pay Act to prohibit wage differentials based on protected class, and a ban on salary history inquiries.

Anti-Harassment and Discrimination Amendments to the New York State Human Rights Law

First, lawmakers passed, and Governor Cuomo has promised to sign, a bill which would broadly expand coverage and anti-harassment protections to employees under the State Human Rights Law (NYSHRL). The legislation's expanded protections against harassment in the workplace are not limited to sexual harassment; rather, it broadens protections for harassment based on any protected characteristic under a wide array of categories.

In its key provisions, the legislation would: expand the definition of "employer"; expand the liberal construction of the NYSHRL; lower employees' burden of proof in harassment cases; increase employer obligations for providing notice of sexual harassment prevention and training; prohibit non-disclosure agreements in all discrimination cases

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(with an exception for a plaintiff's preference); prohibit mandatory arbitration; create a right for punitive damages to prevailing plaintiffs; delineate the conditions under which attorneys' fees are available to a prevailing party; and increase the statute of limitations in sexual harassment cases brought under the NYSHRL from one to three years

1. Coverage Expanded To Employers Of All Sizes

The NYSHRL currently applies to employers with four or more employees. 180 days after the new legislation goes into effect, it will apply to all employers, regardless of size.

2. An Expanded Liberal Construction of the NYSHRL

Immediately after the legislation goes into effect, state law will be construed liberally – and exceptions to the law will be construed narrowly – to "maximize deterrence of discriminatory conduct."

3. Employees' Lower Burden Of Proof

Up until now, the NYSHRL resembled federal law by requiring a complainant to meet a "severe or pervasive" standard – the same standard required under Title VII – to prove that his or her harassment was unlawful. The new legislation does away with that higher burden, and brings the NYSHRL in line with New York City law. Employees will now only need to demonstrate that harassment rises above the level of "what a reasonable victim of discrimination with the same protected characteristic would consider petty slights or trivial inconveniences."

Moreover, the new legislation will eliminate employers' ability to utilize the *Faragher/Ellerth* affirmative defense. This defense, named after two 1998 Supreme Court

decisions in a Title VII context, allowed employers to shield themselves from liability in certain circumstances by demonstrating that an employee failed to take advantage of the employer's internal complaint procedures. Now, whether an individual complains about harassment to the employer will no longer be determinative of the employer's liability.

These changes will take place 60 days after the legislation goes into effect.

4. Notice of Sexual Harassment Prevention

Effective immediately upon enactment, all employers will be required to provide notice of their sexual harassment policy and the information presented at their annual sexual harassment training. The notice must be in writing and in employee's primary languages. However, employers need not provide the notice in another language if the state has not published a template for that language. In such a case, defaulting to the English notice is acceptable. The notice must be given to current employees as well as new hires, and annually to all employees as part of annual sexual harassment training.

5. Non-Disclosure Agreements (NDAs)

Last year, New York limited NDAs in sexual harassment cases to situations in which the NDA was the plaintiff's preference. Now, NDAs will be limited for <u>all</u> types of discrimination, rather than just sexual harassment claims. The new legislation retains the exception allowing an NDA where it is the plaintiff's preference. This rule will also apply for judgments, stipulations, decrees, or agreements of discontinuance, and will go into effect after 60 days.

6. Mandatory Arbitration

As with NDAs, last year New York prohibited mandatory arbitration for sexual harassment

claims. Now, 60 days after the legislation takes effect, mandatory arbitration to resolve allegations of discrimination of any kind will be prohibited.

7. Punitive Damages

Sixty (60) days after the legislation goes into effect, punitive damages will become available in all employment discrimination cases against private employers.

8. Attorney's Fees

Effective immediately upon enactment, attorneys' fees must be awarded to prevailing plaintiffs for employment discrimination claims. However, prevailing defendants will only be awarded attorneys' fees if plaintiffs' claims are deemed "frivolous." The legislation defines a "frivolous" action as one that was filed or continued in bad faith, to prolong or delay the litigation, or to harass the defendant, or continued in bad faith "without any reasonable basis and could not be supported by a good faith argument for an extension, modification or reversal of existing law."

9. Extended Statute Of Limitations

One year after the legislation goes into effect, the statute of limitations for sexual harassment in employment complaints to the NYSDHR will be extended from one year to three years.

Prohibition of Wage Differentials Based on Protected Class

New York's Equal Pay Act provides that employees shall not be paid less than employees of the opposite sex in the same establishment for equal work, for a job requiring equal skill, effort and responsibility, and performed under similar working conditions. A new bill passed by the State legislature requires

employers to provide employees with equal pay for substantially similar work across all protected categories under the NYSHRL – not just gender. The bill would broaden protections under the Equal Pay Act by requiring that no employee who falls into any one or more protected classes under the NYSHRL be paid a wage at a rate less than the rate at which an employee outside the same protected class in the same establishment is paid for either: (1) equal work; or (2) "substantially similar work, when viewed as a composite of skill, effort and responsibility, and performed under similar working conditions."

Employers would still be able to justify pay differentials, for example, due to a seniority or merit system, a system which measures earnings by quantity or quality of production, or a bona fide factor such as education, training or experience. However, as is presently the case under the law, employees may still prevail on a claim if they can demonstrate that: (i) the employer's practice causes a disparate impact on the basis of a protected class; (ii) a viable alternative practice exists that would remove the wage differential and serve the same business purpose; and (iii) the employer refused to adopt the alternative practice.

Salary History Inquiry Ban

Finally, New York passed a bill that would prohibit employers from asking job applicants and employees about their wage or salary history. Governor Cuomo is expected to sign the bill, which would become effective after 180 days. Specifically, the legislation would make it unlawful to rely on an applicant's wage or salary history in determining whether to offer employment or in determining the wages or salary offered to the applicant. Additionally, employers may not seek, request, or require wage or salary history from an applicant or current employee as a condition of being interviewed for, considered for, or receiving employment or a promotion. The bill would also make it unlawful to retaliate against an individual by

refusing to hire, promote, or otherwise employ or retaliate against an applicant or employee "based upon prior wage or salary history," or a refusal to provide wage or salary history.

The legislation does allow for exceptions where: (1) an applicant or employee voluntarily, and without prompting, discloses or verifies wage or salary history; (2) an employer can confirm wage or salary history after an offer of employment with compensation has been made, but only if the applicant or employee responds to the offer by providing prior wage or salary information to support a wage or salary higher than offered; and (3) where any federal, state, or local law enacted prior to the effective date of the legislation requires the disclosure or verification of salary history information to determine an individual's compensation.

Notably, the passage of this bill will nullify Westchester County's salary inquiry ban, because that law provides that it will become null after statewide legislation is passed.

Takeaway For Employers

This flurry of legislation will impact virtually all stages of employment, from the hiring process, to employee trainings, settlement negotiations, and in the courtroom. With some of the legislation's provisions taking immediate effect upon enactment, employers are well advised to immediately review their employment practices and policies to ensure compliance. If you have any questions regarding these expected changes, please do not hesitate to contact Akerman's labor and employment attorneys.

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