New York Expands Harassment Laws
By Richard I. Greenberg

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Major changes to New York’s harassment laws were among the flurry of bills advanced and passed by the New York State Legislature in the final hours of its 2019 Legislative Session.

Employers will face greater potential liability under bills passed on June 19 and 20 to lower the standard of review for sexual harassment cases ([S.6577][Biaggi]/[A.8421][Simotas] and a related amendment [S. 6594/A. 8424]). The final, omnibus bill was crafted with the participation of Governor Andrew Cuomo’s office. Governor Cuomo is expected to sign the bill.

Removing the “Severe or Pervasive” Standard
It will be an unlawful discriminatory practice for an employer to subject an employee to harassment based on the individual’s membership in any protected class, or because the individual has opposed any harassment claim or participated in a harassment proceeding, “regardless of whether the harassment would be considered severe or pervasive under precedent applied to harassment claims.” This change will comport New York law with the current standard under the New York City Human Rights Law and will go into effect 60 days after enactment.

Harassment is an unlawful discriminatory practice, and the employer may be liable, when such harassment subjects the individual to inferior terms, conditions, or privilege of employment because of his or her membership in a protected class.

An affirmative defense to liability exists only where the harassing conduct is not worse than what “a reasonable victim of discrimination with the same protected characteristic” would consider petty slights or trivial inconveniences.

Eliminating the Defense that Employee Did Not Follow Internal Procedures
Employers will be liable for harassment even if the employee did not utilize the employer-provided complaint procedure to address such issues. This eliminates what is known as the “Farragher/Ellerth” defense of allowing an employee’s failure to utilize a reporting procedure to avoid employer liability for a supervisor’s actions. Unlike under New York City law, this defense will not mitigate damages under state law.

Expanding Protections for Domestic Workers and Non-Employees
Domestic workers and non-employees will receive the same protections against sexual and other forms of harassment as employees.

Under current state law, protections for domestic workers are limited and do not apply to such situations as the domestic worker observing harassment that is not directed at him or her or is retaliated against for making a complaint about the improper behavior. Under the new law, domestic workers and employees will have the same protections.

Similarly, non-employees will be protected not only from sexual harassment, but all forms of discrimination.

These provisions become effective 60 days after the Governor signs the bill.

Punitive Damages and Attorney’s Fees for Employment Discrimination
The law will allow courts to award punitive damages in all cases of claims of employment discrimination involving private employers. It will require courts to award reasonable attorney’s fees in
all employment discrimination claims to any prevailing party. This provision is effective 60 days after
the bills are signed by the Governor.

Expanding Non-Disclosure Agreement Prohibition
Effective 60 days after enactment, this legislation will expand the 2018 prohibition on non-disclosure
agreements (NDA) in sexual harassment settlements to apply to all discrimination and harassment
claims, unless it is the plaintiff’s preference to enter into an NDA.

Where such NDA is the preference of the plaintiff, the NDA must be written in plain English, or, where
applicable, the plaintiff’s native language. Further, the NDA may not preclude the plaintiff from
assisting in an investigation conducted by local, state, or federal agencies. It also may not prevent
disclosure for use in future claims based on discrimination, unless expressly provided in the
agreement and where the plaintiff may disclose in talks with a government entity.

Expanding Arbitration Clause Prohibition
The legislation will expand the 2018 prohibition against mandatory arbitration clauses in sexual
harassment settlements to apply to all discrimination claims. This becomes effective 60 days after
enactment.

Extending Statute of Limitations to Three Years for Sexual Harassment Claims
The legislation extends the statute of limitations in sexual harassment claims from one year to three
years from the date of alleged discriminatory practice. This mirrors the change made under New York
City law in 2018. This provision becomes effective one year after enactment.

All other actions based on claims of discrimination must be commenced within one year from the last
alleged discriminatory act.

Expanding Sexual Harassment Policy Requirements
Every employer in New York will be required to provide employees with a notice containing the
employer’s sexual harassment prevention policy at the time of hiring and at every annual sexual
harassment training. The notice also must reiterate the information presented at the employer-
provided sexual harassment training program in both English and each employee’s primary language.
This augments the requirements of the mandatory sexual harassment training that was enacted by the
state in 2018.

Further, the New York State Department of Labor (DOL) is required to provide a copy of the model
sexual harassment policy in languages other than English, at the Commissioner of Labor’s discretion,
based on the percentage of New York residents that speaks each language. Where an employee
identifies his or her primary language in which a template is not available from the Commissioner, the
employer must provide a copy of the policy in English. An employer may not be penalized for errors or
omissions in the non-English portion of any notice provided by the Commissioner.

Attorney General Prosecution of Harassment Claims
The statute requires the state Attorney General’s Office to prosecute all discrimination claims where
requested by the DOL Commissioner. The Attorney General’s Office also must prosecute all criminal
claims based on discrimination where, in the Attorney General’s judgment, the local District Attorney
cannot effectively carry out the prosecution or has erroneously failed or refused to prosecute the crime.

Liberal Construction
The legislation provides that the New York Human Rights Law is to be construed liberally, regardless
of the federal civil rights law and regardless of any interpretation of similar language used in the
federal civil rights law. Moreover, any exceptions and exemptions from the provisions of the state
Human Rights Law are “to be construed narrowly in order to maximize deterrence of discriminatory
conduct.”

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Pay the Piper – California Employers Pressed to Pay Arbitration Fees or Risk Harsh Consequences

California employers may face harsh consequences for failing to pay arbitration fees on time under a bill (Senate Bill 707) signed by Governor Gavin Newsom on October 13, 2019. The new law goes into effect on January 1, 2020. Under the new law, if an employer fails to pay fees required for the commencement or continuation of an...

New California Law Attacks Mandatory Arbitration Again ... But Is It More Bark Than Bite?

California has joined a number of states in passing legislation purporting to prohibit mandatory arbitration agreements for sexual harassment and other claims. Such laws have gained popularity in the wake of the #MeToo movement, but are subject to challenge under Federal Arbitration Act (FAA) preemption principles. (See our articles...

Third-Party Harassment and Discrimination: The Customer Isn't Always Right

As fiscal year 2019 ends for the Equal Employment Opportunity Commission (EEOC), it has announced it is pursuing several new discrimination suits, including one alleging a casino failed to protect female staffers from sexual harassment by patrons. Sexual misconduct and harassment have been in the national spotlight more than ever and...