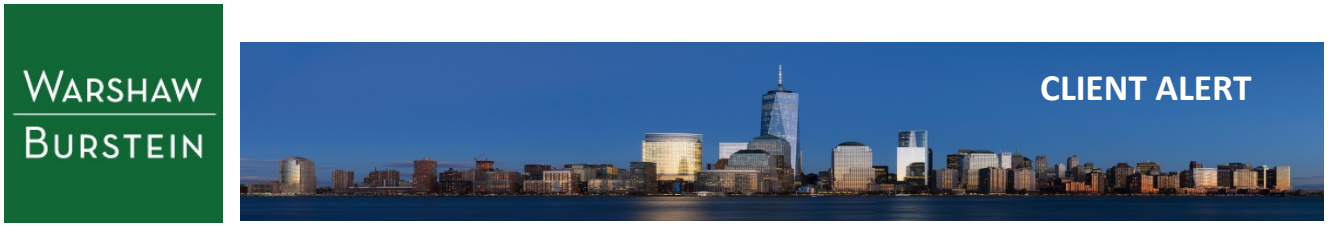


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# NEW YORK STATE LEGISLATURE EXPANDS WORKPLACE PROTECTION FOR EMPLOYEES

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Last year, in response to the nationwide dialogue launched by the #MeToo movement over the continued prevalence of sexual harassment in the workplace, New York State enacted sweeping legislation, taking aggressive steps towards implementing stronger protection against workplace sexual harassment. On June 19, 2019, the New York State Legislature approved a new bill extending workplace protection to all covered categories under the New York State Human Rights Law ("NYSHRL"). *See* NYS Assembly Bill No. A08421 and Senate Bill No. S06571. Governor Cuomo, who has supported this legislation, is expected to sign it into law soon.

**Expanding the Definition of "Employer" and Greater Protection for "Non-Employees"**

The new legislation expands the definition of a covered "employer" under the NYSHRL to include all New York State employers regardless of size. Previously, with the exception of sexual harassment claims, the NYSHRL applied only to those employers with four or more employees. It also provides a definition for "private employer," which includes "any person, company, corporation, labor organization or association," exclusive of any "state or local department, agency, board or commission."

The bill also offers broader protections under the NYSHRL to "non-employees," including contractors, subcontractors, vendors, consultants, or other persons providing services pursuant to a contract. Previously, protection for non-employees under the NYSHRL was limited to sexual harassment.

**Elimination of the "Severe and Pervasive" Standard**

Notably, this bill represents a radical departure from the "severe and pervasive" standard that courts previously applied to harassment claims brought under the NYSHRL. By expressly eliminating this standard, the new legislation lowers the burden on employees seeking to prove workplace harassment under the NYSHRL. Claims of harassment now may be asserted as long as the alleged discriminatory conduct "subjects an individual to inferior terms, conditions or

privileges of employment," because the individual falls within one or more of the protected categories under the NYSHRL. When signed, the law also would eliminate the so-called "*Faragher-Ellerth*" defense, which allowed employers to avoid liability where the employee failed to make a workplace complaint. The law also would eliminate the employee's burden to demonstrate "comparator" evidence - that someone outside of their protected category was treated more favorably - in order to prevail on a harassment claim. However, an affirmative defense is available to employers if they can show that the harassing conduct does not rise above the level of what a reasonable person with the same protected characteristics would consider "petty slights or trivial inconveniences."

**Expanded Damages, Fees and Statute of Limitations**

Claimants who bring an unlawful discrimination claim against a private employer in court also may be entitled to punitive damages, and courts are instructed to award reasonable attorneys' fees to any prevailing party. However, attorneys' fees only will be available to a prevailing respondent or defendant if the claims brought against them were frivolous. The bill also lengthens the statute of limitations period for sexual harassment claims filed with the State Human Rights Division from one to three years from the date of the discriminatory conduct.

**Ban on Mandatory Arbitration and Restrictions on Employer's Use of Non-Disclosure Provisions**

The new law also expands the ban on mandatory arbitration to all claims of unlawful discrimination. Previously, this ban only applied to sexual harassment claims. Similarly, restrictions on the use of confidentiality or non-disclosure provisions in settlement agreements has been expanded to include all claims of unlawful discrimination. Non-disclosure provisions are not permissible unless the complainant chooses to maintain confidentiality. The employer must provide notice of any non-disclosure provision to the complainant in plain English or the complainant's primary language and the complainant is entitled to twenty-one (21) days to consider whether to accept or reject the provision. If the complainant accepts the non-disclosure clause, the complainant will then have seven (7) days to revoke acceptance. The non-disclosure clause will not become effective or enforceable until the revocation period has expired. Any term or condition in a non-disclosure agreement is void if it prohibits the complainant from initiating or participating in an agency investigation or disclosing facts necessary to receive public benefits. Non-disclosure provisions are void if they prohibit future discrimination claims unless the clause notifies the employee that he or she is not prohibited from disclosure to law enforcement, an attorney, the U.S. Equal Employment Opportunity Commission, the New York State Human Rights Division, or any local commission on human rights (*i.e.*, the New York City Human Rights Commission).

**Notice Requirement**

Employers also are required to provide employees with written notice of the employer's sexual harassment policy, both at the time of hiring and at every annual mandatory sexual harassment

prevention training session. Notice of this policy must be provided to each employee in plain English or in the primary language identified by the employee.

**A Proactive Approach for Employers**

The sweeping changes to New York State's anti-discrimination laws place greater emphasis on employers to protect their workers and eliminate unlawful workplace conduct. Employers should be proactive and have their anti-harassment policies and training programs reviewed by a legal professional to ensure compliance with these new legal requirements. Employers should also ensure effective training for managers to identify and address inappropriate workplace conduct that could lead to sexual or other forms of unlawful harassment. Taking affirmative, preventative measures to stop workplace harassment will enable employers to effectively navigate this changing legal landscape.

If you have any questions regarding these important changes to New York State's employment laws or other employment matters, please contact Felicia Ennis, any of the undersigned, or your regular Warshaw Burstein attorney.


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