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What New York State's Recent Employment Law Overhaul Means for Employers

New York lawmakers were busy last month passing legislation that, if enacted, will dramatically impact employers in the state. On June 19, the New York State Legislature passed a bill that would make it easier for employees who complain of workplace sexual harassment and other discrimination to prevail in litigation. The following day, the legislature approved separate bills that would (1) make it illegal for employers to solicit applicants' past salaries to set new pay; and (2) expand a state equal pay law barring sex-based pay differentials to cover workers based on other protected traits, including age, race, and sexual orientation, and to outlaw gaps in pay between workers performing "substantially similar" work. The passage of the sexual harassment/other discrimination and equal pay bills came at the same time the legislature approved other employment-related bills, including a bill giving farm workers organizing and overtime rights and a bill that would prohibit discrimination based on natural hair or hairstyles. New York Governor Andrew Cuomo has indicated that he supports all four bills.

The Workplace Sexual Harassment/Other Discrimination Bill

The workplace sexual harassment/other discrimination bill includes the following significant changes to New York's current harassment and discrimination law for workers of any protected class (unless otherwise specified below):

- **Eliminates the "severe and pervasive" standard for establishing workplace harassment claims.** The new law would outlaw discriminatory or retaliatory harassment, "regardless of whether such harassment would be considered severe or pervasive under precedent applied to harassment claims." The "precedent" referred to in the bill is the federal requirement, pronounced years ago by the U.S. Supreme Court, that in order to be legally actionable, workplace harassment must be so "severe or pervasive" that it alters the terms and conditions of employment and therefore constitutes an "adverse employment action" in violation of federal anti-discrimination law. Under New York's impending law, a plaintiff can establish a claim of discriminatory or retaliatory harassment if he or she is subjected "to inferior terms, conditions or privileges of employment because of the individual's membership" in a protected category. This standard significantly lowers the bar for establishing unlawful harassment. The new law further provides that it is to be construed "liberally" for remedial purposes, regardless of how comparable federal civil rights laws have been construed.

- **Prohibits employers from relying on the *Faragher–Ellerth* defense to avoid liability.** This defense is based on two U.S. Supreme Court decisions in Title VII sexual harassment cases. Under *Faragher–Ellerth*, if the harassment does not result in a "tangible job detriment," the employer can prevail by showing that it had measures in place to prevent and correct harassment and that the plaintiff unreasonably failed to take advantage of those measures. Under the new legislation, the fact that an employee did not make an internal harassment complaint would "not be determinative" of an employer's liability. The new law does provide, however, another affirmative defense to liability: "that the 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."
- **Extends the statute of limitations from one to three years for sexual harassment claims under the law.** The bill provides that claims of sexual harassment under the New York State Human Rights Law must be "filed within three years after the alleged unlawful discriminatory practices."
- **Prohibits mandatory arbitration of all claims of discrimination or harassment.** This would be an expansion from existing legislation, which currently prohibits mandatory arbitration of sexual harassment claims only.
- Prohibits employers from including nondisclosure provisions in settlement agreements for all claims of discrimination or harassment, unless the condition of confidentiality is the plaintiff's preference. This would be an expansion from existing legislation, which prohibits nondisclosure agreements in settlement agreements for sexual harassment claims only.
- Requires employers to provide employees with their sexual harassment prevention policy and training materials at the time of hire and during annual training. Employers must provide this information in English and in the language identified by each employee as his/her primary language.

The majority of these changes would take effect 60 days after the legislation is enacted. The extended statute of limitations, however, would take effect one year after the law is enacted.

The Salary History and Equal Pay Bills

On June 20, the New York State Legislature approved measures making it illegal for employers to solicit applicants' past salaries to set new pay, expanding a state equal pay law barring sex-based pay differentials to cover workers based on other protected traits, and outlawing pay gaps between workers performing "substantially similar" work.

If enacted, the salary history bill will:

- Prevent employers from orally or in writing requesting or relying on the wage or salary history of an applicant to determine whether to offer employment or the salary to be offered.
- Prevent employers from refusing to consider or otherwise retaliating against an applicant who refuses to divulge his/her salary history. The applicant may, however, voluntarily provide this information if he/she is not coerced into doing so.
- Apply to salary history inquiries of both applicants and current employees seeking promotions or transfers.

If enacted, the pay differential bill will:

- Expand the current law that protects against gender-based pay inequity by requiring equal pay for "substantially similar work." The new law will lower the burden of proof for a person claiming wage or salary discrimination based on his/her membership in a protected class by not requiring a showing of "equal" work.

- Prohibit pay differentials based on a person's membership in a protected class, which includes age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, or domestic violence victim status.

- Permit pay differentials when they are based on a seniority system, a methodology measuring earnings by quantity or quality of work, or a bona fide reason other than the individual's membership in a protected class. The pay differential must be job-related and due to business necessity, such as geography, education, or experience.

Best Practices for Employers in the Face of the New Laws

These new laws, which are expected to be signed by Governor Cuomo soon, will have a significant impact on employers in New York. Employers should consider this nonexhaustive list of best practices in anticipation of the laws' enactment:

- Review form arbitration agreements for New York employees. The new sexual harassment/other discrimination law will prohibit mandatory arbitration of all claims of discrimination or harassment. Form arbitration agreements calling for mandatory arbitration of discrimination or harassment claims need to be revised in light of the new law. Although New York's prohibition on arbitration agreements is likely to be preempted by the Federal Arbitration Act, there have been no New York court decisions on the issue to date.

- Review form settlement agreements for New York employees—particularly any nondisclosure provisions. The new sexual harassment/other discrimination law will prohibit nondisclosure provisions for all claims of discrimination or harassment, unless it is the plaintiff/complainant's preference. Form settlement agreements containing a nondisclosure provision covering discrimination or harassment claims need to be revised in light of the new law.

- Rely more on quality and effective anti-harassment training. The new sexual harassment/other discrimination law imposes a lower standard of proof for harassment—namely, whether the employee has been subjected to "to inferior terms, conditions or privileges of employment because of the individual's membership" in a protected category. Employers must train all employees, and especially supervisors, to be on the lookout for *any kind* of disrespectful treatment at work, not just conduct that is egregious or extreme, and to understand the importance of escalating and properly handling concerns about such conduct.

- Rely less on employee handbooks and written policies. Because the new sexual harassment/other discrimination law prohibits employers from relying on the *Faragher–Ellerth* defense to avoid liability, it will not be enough to have a policy informing employees how to complain about alleged harassment/discrimination and explaining what will happen once a complaint is made. Employers should definitely still maintain a written and well-disseminated reporting and complaint procedure, but they will no longer be able to rely on the procedure to defeat harassment claims.

- Revise onboarding and annual harassment training programs to cover not only sexual harassment but also harassment based on any protected characteristic (and be prepared to translate such training into employees' primary languages).

- Don't expect employees to complain of harassment. The new sexual harassment/other discrimination law may incentivize strategic, litigious employees not to complain about perceived harassment and give their employer a chance to correct it since the *Faragher–Ellerth* defense is no longer available. Companies will need to find new ways to detect workplace harassment concerns, regardless of whether they receive actual or formal complaints from employees.

- Remember that the new sexual harassment/other discrimination law applies only to claims brought under state law. Federal law has not changed. Under federal law, the standard for actionable harassment is still "severe or pervasive," and employers may still rely on the Faragher–Ellerth defense to a harassment claim. However, the enactment of the new law may bring with it an increase in plaintiffs who elect not to pursue relief under federal law, and instead choose to rely only on New York law, which may also limit opportunities to remove cases to federal court.
- Don't give great weight to the new affirmative defense under the new sexual harassment/other discrimination law. Recall that the law provides the following affirmative defense to liability: "that the 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." The "petty slights or trivial inconveniences" standard is extremely low, so this defense would only apply in circumstances when the employer could show that the alleged harassment was merely "petty" or "trivial." Most plaintiffs will be able to allege that the harassment was more than that.
- Review job application, transfer, and promotion paperwork and processes. The new salary history bill prevents employers from requesting or relying on the wage or salary history of an applicant to determine whether to offer employment or the amount of salary to be offered. Paperwork with questions about wage/salary history for applicants or employees looking to be transferred or promoted needs to be revised. In addition, interviews or any other related process involving questioning about wage or salary history will need to be updated, too.
- Consider conducting a wage audit to determine whether employees are receiving equal pay for "substantially similar work," or, if not, whether there are bona fide reasons for any pay differentials that exist. Employers should strongly consider contacting outside counsel to assist with this work to keep the results of the audit protected by the attorney-client privilege.
- Consider obtaining employment practices liability insurance to cover the anticipated increased costs of ligation and settlement resulting from these new laws.

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