Employer Update

Weil

July 2019

# New #MeToo and Pay Equity Laws Expand Protections Against Harassment and Discrimination in New York State

*By Ami Zweig*

With the clock about to strike midnight on the 2019 legislative session, New York lawmakers passed a series of bills that will effect sweeping changes to the state's employment discrimination and harassment laws. These bills, two of which Governor Cuomo ceremoniously signed into law at the ticker-tape parade celebrating the U.S. women's soccer team's World Cup championship and the other of which he is expected to sign soon, substantially expand upon existing pay equity and #MeToo legislation in the Empire State, including a variety of sexual harassment measures that were enacted just last year (*See* Weil's July 2018 Employer Update). Employers seeking to reduce their risk of liability in discrimination and harassment claims will be wise to familiarize themselves with the new requirements and standards under these bills, which bring New York to the forefront of state legislative action in response to the #MeToo and equal pay movements.

## Expansion of Protections Against Harassment and Other Forms of Discrimination

Perhaps the most striking change in these bills is the elimination of the "severe or pervasive" standard for hostile work environment claims (the most common type of harassment claim), which moves New York State away from the higher bar under federal law and toward the lower bar under New York City law. Historically, courts adjudicating hostile work environment claims under the New York State Human Rights Law (NYSHRL) have adopted the federal, Title VII standard for such claims, under which the employee must prove that the unwelcome conduct was "severe or pervasive." In contrast, courts adjudicating such claims under the New York City Human Rights Law (NYCHRL) have required employees to show only that they were treated "less well" because of their protected characteristic. *See, e.g., Williams v. N.Y. City Hous. Auth.*, 61 A.D.3d 62, 78 (1st Dep't 2009).

Now, the bill passed by the New York State legislature on June 19, 2019 (S6571/A8421) will amend the NYSHRL to prohibit any harassment that "subjects an individual to inferior terms, conditions or privileges of employment because of the individual's membership" in a protected class, "regardless of whether such harassment would be considered severe or pervasive under precedent applied to harassment claims." This new standard covers not just sexual harassment, but also harassment based on any protected category under the NYSHRL: age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex,

disability, predisposing genetic characteristics, familial status, marital status, and domestic violence victim status. Under the new bill, employers may defend against harassment claims under the "inferior terms" standard by demonstrating that "a reasonable victim of discrimination" in the same protected class would consider the conduct at issue to be no more than "petty slights or trivial inconveniences." While courts will have to determine where to draw the line in assessing what conduct amounts to more than a petty slight or trivial inconvenience, wherever that line is drawn will be a lower threshold than the prior "severe or pervasive" standard.

In another departure from federal law, the New York bill rejects the so-called *Faragher-Ellerth* defense (named for the pair of U.S. Supreme Court decisions that established this defense to Title VII harassment claims) by providing that an individual's failure to complain about the alleged harassment "shall not be determinative" of the employer's liability. Under federal law, employers may defend against certain harassment claims by demonstrating that they took no adverse employment action against the employee, the employer exercised reasonable care to prevent and correct the harassing behavior (such as by maintaining an anti-harassment policy), and the employee failed to take advantage of preventive or corrective opportunities provided by the employer (such as by not taking advantage of reporting procedures set forth in an anti-harassment policy). The elimination of the availability of this affirmative defense to claims where no adverse employment action was taken under the NYSHRL could lead to the filing of more claims by employees who never lodged an internal complaint, and thus, never gave their employer an opportunity to investigate and address the alleged harassment. Also, much like the elimination of the "severe or pervasive" standard, this change brings New York State law closer to New York City law, under which the *Faragher-Ellerth* defense had already been rejected. *See Zakrzewska v. New Sch.*, 14 N.Y.3d 469, 479 (2010).

The new bill also expands aspects of New York's 2018 sexual harassment legislation to cover all claims of discrimination, rather than just sexual harassment. Under the new law, in settling *any* claim of discrimination (rather than just sexual harassment claims), New York employers may not prohibit disclosure of the "underlying facts and circumstances to the claim or action" unless (i) the condition of confidentiality is the employee's preference and (ii) that preference has been memorialized in a written agreement after providing the employee 21 days to consider the agreement (which period cannot be waived) and seven days to revoke the agreement. New York previously issued guidance on these requirements in the context of settling sexual harassment claims, which clarified that the 21-day consideration period cannot be waived, and that the employee's preference to include the non-disclosure language must be memorialized in a separate document from the settlement agreement (which can incorporate the preferred non-disclosure term or condition as part of the overall resolution between the parties). *See* https://www.ny.gov/combating-sexual-harassment-workplace/combating-sexual-harassment-frequently-asked-questions#for-employers. Employers now must take these requirements into account when settling any actual or threatened discrimination claims, or when executing standard separation and release agreements with employees who may have lodged internal complaints of discriminatory or harassing behavior. These requirements apply only to agreements prohibiting disclosure of the "facts and circumstances" underlying a discrimination claim; on its face, the statutory language does not cover prohibitions on disclosing the existence or terms of a settlement agreement (*e.g.*, the dollar amount paid to settle a claim), although restrictions on disclosure of settlement terms related to a sexual harassment claim may implicate federal tax law prohibiting deductions for such payments or related attorney's fees under Section 162(q) of the Internal Revenue Code.

Note also that the new bill prohibits mandatory arbitration of any type of discrimination claim (not just sexual harassment), although this provision is likely preempted by federal law in most cases.

Finally, the new bill expands the ability of employees to recover attorney's fees in connection with

successful claims under the NYSHRL. Under the current law, a court "may in its discretion" award reasonable attorney's fees to the prevailing party in an employment discrimination suit, "where sex is a basis of such discrimination." But under the new bill, this provision of the NYSHRL will be modified to provide that a court "shall" award reasonable attorney's fees to the prevailing party in "all claims of employment discrimination." Moreover, the bill keeps intact the existing provision of the NYSHRL stating that a prevailing employer-defendant can recover fees only by showing that the claim was "frivolous." By expanding employees' ability to recover fees while maintaining the "frivolous" standard for recovery of fees by employers, this change will increase the pressure on employers when faced with claims of discrimination under the NYSHRL.

## Expansion of Pay Equity Protections

Two other bills, passed on June 20, 2019 and signed into law on July 10, 2019, expand employee rights in the area of pay equity. Governor Cuomo signed these bills while attending the parade celebrating the World Cup victory of the U.S. women's soccer team, several members of which are suing the U.S. Soccer Federation for being paid less than members of the men's team.

The first bill (S5248B/A8093A) modifies New York's Equal Pay Law (New York's counterpart to the federal Equal Pay Act) to prohibit pay differentials based on *any* protected class status. The federal Equal Pay Act, like New York's version prior to this change, covers only pay differentials based on sex. While pay discrimination is also prohibited by other anti-discrimination laws (such as Title VII, the NYSHRL, and the NYCHRL), the federal Equal Pay Act and its New York counterpart often serve as alternative causes of action for plaintiffs because, among other reasons, they do not require discriminatory intent, and they provide for liquidated damages under some circumstances. Under the new bill, New York employees will be able to take advantage of this alternative avenue of relief for pay differentials based not only on sex, but on any protected characteristic. This change expands the universe of potential plaintiffs and potential claims under New York's Equal Pay Law.

In addition to expanding coverage to additional protected categories, the bill also lowers the bar for stating a claim under New York's Equal Pay Law. Previously, the New York law, like the federal Equal Pay Act, prohibited pay differentials between employees performing "equal work." Under the new bill, New York law now prohibits pay differentials between employees performing equal work *or* "substantially similar work." While it remains to be seen how significant courts will view the difference to be between "equal" and "substantially similar" work, courts may view this change as expanding the universe of comparators against whom an employee may compare herself or himself in asserting a claim under New York's Equal Pay Law.

The second bill (S6549/A5308B) adds a new section to the New York Labor Law that prohibits employers from relying on or requesting a job applicant's salary history in determining whether to hire or what salary to offer the applicant. The law does not preclude applicants from "voluntarily, without prompting" disclosing their salary history (including for negotiating purposes), and if an applicant does so in response to a job offer with compensation, the employer may confirm such salary history. Employers in New York City and some other parts of the state may already be familiar with these requirements because of local laws banning salary inquiries in the hiring process. Now, the ban applies statewide and brings New York in line with other states and cities across the country that have enacted similar legislation, premised on the idea that reliance on salary history in hiring decisions can perpetuate historical salary inequities.

## Employer Takeaways

The trio of bills passed by the New York legislature will require employers in the Empire State to reevaluate many of their regular employment practices. For example:

- Employers should review their anti-harassment policies to ensure that these policies prohibit not only "severe or pervasive" unwelcome conduct, but also any conduct that would constitute unlawful

harassment under the broader New York State (and New York City) standards.

- Employers should not assume that they are immune from liability if an employee has not lodged an internal complaint of harassment. To the contrary, employers must remain "on guard" for a harassment lawsuit from any employee, at all times.
- In assessing how to respond to actual or threatened claims of harassment under the NYSHRL, employers will have to take into account the modified standard for establishing a hostile work environment, the elimination of the *Faragher-Ellerth* defense, and the increased availability of attorney's fee awards.
- Employers who wish, as part of a settlement agreement, to prohibit disclosure of the facts or circumstances underlying *any* claim of discrimination or harassment must comply with the requirements under New York law to ensure the validity of any non-disclosure provision in the settlement agreement.
- In light of the expansion of New York's Equal Pay Law, employers may wish to conduct regular compensation audits in order to identify potential pay differentials with respect to *any* protected class (not just sex).
- If not already in effect, employers should implement policies prohibiting employees from inquiring about salary history information during the hiring process, and should ensure that any employees who interview or otherwise engage with job applicants are aware of this requirement.

Finally, employers should keep their eyes open for further legislative developments in the #MeToo and pay equity landscape, as the passage of these bills—coming on the heels of other New York laws in this area passed in very recent years—demonstrate that this is an ever-changing area of the law that may continue to evolve in the years to come.

***Employer Update*** is published by the Employment Litigation and the Executive Compensation & Benefits practice groups of Weil, Gotshal & Manges LLP, 767 Fifth Avenue, New York, NY 10153, +1 212 310 8000, www.weil.com.

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