EPSTEIN BECKER GREEN

Employment, Labor & Workforce Management

ACT NOW ADVISORY

New York State Legislature Lowers the Standards for Proving Unlawful Harassment, Passes Other Sweeping Changes to Harassment and Discrimination Laws

June 27, 2019

By Susan Gross Sholinsky, Lauri F. Rasnick, Genevieve M. Murphy-Bradacs, Nancy Gunzenhauser Popper, and Cynthia Joo*

In response to mounting attention to the #MeToo movement, on June 19, 2019, the New York State Legislature passed Assembly Bill A8421 / Senate Bill 6577 ("Bill"), a measure that is even more far-reaching and, thus, potentially more consequential in its impact on New York employers than last year's comprehensive sexual harassment legislation ("2018 legislation"). Most provisions of the Bill, which Governor Andrew Cuomo is expected to sign into law, go into effect immediately or 60 days, or 180 days, after enactment.[1]

In general, the Bill, which amends various New York laws, including the Executive Law, the General Obligations Law, and the Civil Practice Law, will make it easier for many more employees—and some non-employees—to raise and pursue claims of harassment and discrimination by, among other measures:

- lowering the burden of proof in harassment cases by eliminating the "severe or pervasive" standard, and stating that unlawful harassment may occur when an employee is subject to "inferior" conditions of employment;

- limiting the employer's ability to defend against claims based on harassment that was never brought to the employer's attention, and eliminating any requirement in discrimination cases that the complainant identify a comparator;

- increasing an employer's obligations concerning distribution of its anti-harassment policies by expressly requiring that the policies be distributed to new hires, as well as at annual harassment prevention training sessions, along with "information" presented at the employer's training sessions, in English and in the primary language of the employee;

[1] If the Bill becomes law, several of its provisions will be applied prospectively, i.e., only to claims that accrue after the effective date. See S. 6594/A. 8424, which amends several provisions of the Bill. A chart detailing each provision's effective date is included near the conclusion of this Advisory.

- expanding the statute of limitations for bringing sexual harassment claims under the New York Human Rights Law ("HRL"), and allowing an award of punitive damages for any claim arising under the HRL;

- extending coverage of the HRL to all employers, offering greater protections to domestic workers and certain non-employees, and instructing that the HRL is to be liberally construed;

- extending the rules on non-disclosure agreements ("NDAs") applicable to settlements of sexual harassment claims to all settlement agreements involving discrimination, harassment, and/or retaliation claims, as well as mandating additional limitations on NDAs in both settlement agreements and employment contracts; and

- expanding the statutory ban on mandatory pre-dispute arbitration agreements, which currently applies only to sexual harassment claims, to all discrimination, harassment, and retaliation claims.

Employee-Friendly Provisions Relating to Harassment Claims

Provisions lowering the burden of proof in harassment cases

Elimination of the "severe or pervasive" standard

Under the Bill, individuals asserting a hostile work environment claim based on any protected category—not just sex—will no longer be required to demonstrate that the harassment was "severe or pervasive" in order to make a successful claim. Instead, a complainant need only establish that the harassment subjected the individual "to inferior terms, conditions or privileges of employment because of the individual's membership in one or more … protected categories." In doing so, the Bill makes clear that the HRL standard will now be analogous to the uniquely low bar contained in New York City's Human Rights Law, namely, that harassment is unlawful if it rises above the level of "of what a reasonable victim of discrimination with the same protected characteristic or characteristics would consider petty slights or trivial inconveniences."

Weakening of the* Faragher/Ellerth *defense

This defense, named for two 1998 U.S. Supreme Court cases, allows an employer, in certain circumstances, to raise as an affirmative defense that (i) it took reasonable steps to prevent and promptly correct sexual harassment in the workplace (i.e., by implementing anti-harassment policies and offering a complaint procedure whereby employees could report harassers and have their complaints promptly and fairly investigated), and (ii) the aggrieved employee unreasonably failed to take advantage of the employer's preventive or corrective measures. The Bill severely diminishes this defense, as it instructs that an

individual's failure to "make a complaint about the harassment to [the] employer … shall not be determinative of whether such employer ... shall be liable." Thus, while an employer's complaint procedure and policies and the issue of whether an employee took advantage of the employer's procedures may still have some relevance, those factors alone will not be determinative of a plaintiff's claim.

Other provisions concerning harassment

Required distribution of a sexual harassment prevention policy

The Bill will require every New York employer to distribute to its employees, at the time of hire and in connection with each annual sexual harassment prevention training, a written "notice" containing the employer's sexual harassment prevention policy "and the information presented at such employer's sexual harassment prevention training program." (The Bill does not provide an explanation of training "information.") These materials must be in English and in "the language identified by each employee as the employee's primary language." The state will issue a model policy in various languages, and employers need only provide the policy in English and any other applicable language for which the state has published a template.

Extension of the statute of limitations

The Bill extends from one year to three years the statute of limitations for individuals to file a sexual harassment claim under state law with an administrative agency. Employees continue to have three years to file a sexual harassment claim in court. The statute of limitations for filing other state law-based discrimination or retaliation claims with an administrative agency remains one year.

Protections for domestic workers

Under the Bill, domestic workers will be entitled to protection against harassment to the same extent as other employees.

Provisions Affecting *All Claims* Arising Under the Human Rights Law (Not Only Pertaining to Harassment)

*Coverage of **all** New York State employers under the HRL*

Currently, the HRL applies to private employers with four or more employees, except that the law covers all employers with respect to sexual harassment. Under the Bill, the

employment provisions of the HRL will apply to *all* employers concerning *all* types of unlawful discrimination, harassment, and retaliation, based on *any* protected category.[2]

Requirement to broadly interpret the law

The Bill specifically provides that the "Construction" section of the HRL must be liberally construed:

> The provisions of this article shall be construed liberally for the accomplishment of the remedial purposes thereof, regardless of whether federal civil rights laws, including those laws with provisions worded comparably to the provisions of this article, have been so construed. Exceptions to and exemptions from the provisions of this article shall be construed narrowly in order to maximize deterrence of discriminatory conduct.

In other words, the Bill instructs courts and enforcement agencies to interpret the HRL broadly and liberally.

Expansion of the HRL's protections to certain non-employees

The 2018 legislation extended, under certain conditions, an employer's liability for sexual harassment to specific non-employees, e.g., contractors, subcontractors, vendors, consultants, and their employees. Under the Bill, such non-employees will be protected against *any unlawful discriminatory practice*, "when the employer, its agents or supervisors knew or should have known that such non-employee was subjected to an unlawful discriminatory practice in the employer's workplace, and the employer failed to take immediate and appropriate corrective action."

Elimination of the requirement that a complainant demonstrate that another individual, not in the same protected class, was treated more favorably

The Bill states that a complainant may prevail on a claim of discrimination, harassment, or retaliation without identifying an individual outside the complainant's protected class who received more favorable treatment under comparable circumstances (i.e., a "comparator").

Extension of the rules on NDAs to settlements of all discrimination, harassment, and retaliation claims, plus new limitations

Under the 2018 legislation, an employer is prohibited from including a provision in the settlement of a sexual harassment claim that prevents the claimant from disclosing the "factual foundation" of the claim, unless the claimant prefers to include such a confidentiality provision in the settlement agreement. The Bill extends this mandate to

[2] The protected categories under the HRL as of the date of this Advisory are 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.

the settlement of *all discrimination claims*. Further, the Bill requires that the settlement agreement not prohibit or otherwise restrict the complainant from (i) initiating or participating in any manner with an investigation conducted by an appropriate local, state, or federal civil rights enforcement agency, or (ii) filing or disclosing "any facts necessary to obtain unemployment insurance, Medicaid, or other public benefits to which the complainant is entitled." [3]

Required notice of employees' disclosure rights in employment contract NDAs

The Bill mandates that an NDA in an employment contract or agreement that prevents an employee from disclosing "factual information related to any future claim of discrimination" is void and unenforceable, unless the agreement informs the employee or prospective employee "that it does not prohibit him or her from speaking with law enforcement, the [federal] equal employment opportunity commission, the state division of human rights, a local commission on human rights, or an attorney retained by the employee or potential employee."

Extension of the ban on mandatory arbitration agreements

The 2018 legislation banned mandatory arbitration agreements unless they allowed for "independent court review." The Bill retains this language and extends the bar on mandatory final and binding arbitration agreements to *all* discrimination, harassment, and retaliation claims arising under the HRL and other laws that prohibit discrimination.

Employers should note that, based upon the U.S. Supreme Court's interpretation of the Federal Arbitration Act ("FAA"), the prohibitions on mandatory arbitration in this Bill and in the 2018 legislation may be preempted by the FAA.

Availability of punitive damages

The Bill authorizes an award of punitive damages for violations of the HRL by a private employer.

Expansion of the power of the state Attorney General's Office ("AGO")

The Bill broadens the power of the AGO in several ways, including endowing it with the authority, "upon request of the commissioner of labor or the state division of human rights," to bring, prosecute, and defend cases of discrimination based on *any* protected category. Previously, the AGO's authority was limited to cases involving discrimination based on age, race, creed, color, or national origin.

[3] Prior to the inclusion of an NDA in a settlement agreement concerning a discrimination, harassment, or retaliation claim, the complainant must be given 21 days to review the proposed NDA. The Bill mandates that the proposed NDA be in writing, "in plain English, and, if applicable, the primary language of the complainant." If after 21 days the complainant assents to the inclusion of the NDA in the settlement agreement, his or her preference must be memorialized in an agreement signed by all parties. The complainant then has seven days to revoke the agreement, during which time the agreement is not enforceable.

Effective Dates for Various Provisions of the Bill

An "" after the effective date indicates that the Bill provision applies only to claims that* ***accrued*** *on or after that date.*

Bill Provision	Effective Date
Elimination of the "severe or pervasive" standard (for a hostile environment claim based on any protected category), weakening of the *Faragher/Ellerth* defense, and requirement to identify a comparator	60 days after enactment*
Distribution requirements of employer's sexual harassment prevention policy	Immediately
Extension of the statute of limitations	1 year after enactment*
Protections for domestic workers	60 days after enactment*
Expansion of the term "employer" to include *all* employers within the state	180 days after enactment*
Liberal construction of the HRL	Immediately*
Expansion of the HRL's protections for certain non-employees	60 days after enactment*
Extension of the NDA rules to cover settlements of *all* discrimination, harassment, and retaliation claims, plus new limitations	60 days after enactment
Required notice of employees' disclosure rights in employment contract NDAs	January 1, 2020
Extension of the ban on mandatory arbitration agreements	60 days after enactment
Availability of punitive damages	60 days after enactment*
Expansion of the power of the state AGO	60 days after enactment*

What New York Employers Should Do Now

As we discussed, the Bill's reach is wide and deep. Assuming the Bill is enacted, we will continue to assess its immediate and potential effects in future Advisories. At present, New York employers should consider taking the following actions:

- If the Bill is enacted, many smaller New York employers will be exposed to liability under the HRL. Accordingly, all such employers will need to ensure that their policies and practices are compliant with the law's myriad requirements, including notice postings. In short, heretofore exempt employers will need a "crash course" on their obligations under the HRL.

- All New York employers should review their employment contracts, especially mandatory arbitration agreements and NDAs and other confidentiality provisions that implicate any type of discrimination, harassment, or retaliation claim, to determine if they are consistent with the Bill's prohibitions and requirements.

- All New York employers should revise "21/7" NDA letters to confirm that nothing in the Bill's NDA provisions will prohibit or otherwise restrict a complainant from "(i) initiating, testifying, asserting, complying with a subpoena from, or participating in any manner with an investigation conducted by the appropriate local, state, or federal agency[,] or (ii) filing or disclosing any facts necessary to receive unemployment insurance, Medicaid, or other public benefits to which the complainant is entitled."

- As the mandate concerning distribution of the anti-harassment policy and training "information" will become effective immediately upon enactment, all employers should make compliance with this provision of the Bill a priority. As of this writing, it is unclear whether the state will have the necessary templates available for download if and when the Bill is enacted. We will keep you advised of any developments concerning this matter.

****

For more information about this Advisory, please contact:

Susan Gross Sholinsky
New York
212-351-4789
sgross@ebglaw.com

Lauri F. Rasnick
New York
212-351-4854
lrasnick@ebglaw.com

Genevieve M. Murphy-Bradacs
New York
212-351-4948
gmurphybradacs@ebglaw.com

Nancy Gunzenhauser Popper
New York
212-351-3758
npopper@ebglaw.com

***Cynthia Joo,** *a Summer Associate (not admitted to the practice of law) in Epstein Becker Green's New York office, contributed to the preparation of this Advisory.*

About Epstein Becker Green
Epstein Becker & Green, P.C., is a national law firm with a primary focus on health care and life sciences; employment, labor, and workforce management; and litigation and business disputes. Founded in 1973 as an industry-focused firm, Epstein Becker Green has decades of experience serving clients in health care, financial services, retail, hospitality, and technology, among other industries, representing entities from startups to Fortune 100 companies. Operating in locations throughout the United States and

supporting domestic and multinational clients, the firm's attorneys are committed to uncompromising client service and legal excellence. For more information, visit www.ebglaw.com.