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WHAT EMPLOYERS NEED TO KNOW ABOUT NEW YORK STATE'S NEW DISCRIMINATION AND HARASSMENT LAWS: PART 2

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On June 19, 2019, the New York Legislature voted to reform New York discrimination law. Although Governor Andrew Cuomo is expected to sign the bill, as of August 7, 2019, it still has not been delivered to him.

This post will focus on changes regarding mandatory arbitration and non-disclosure clauses, the *Faragher-Ellerth* defense and damages awards. Below is a summary of some of the provisions in the bill including those covered by our prior post on the expansion of the New York State Human Rights Law ("NYSHRL"), and the effective date of each provision.

Requirement	Immediate	60 days	180 days
Extends NYSHRL to all employers regardless of the number of employees			X
Extends protections to domestic workers and contractors who provide services in the employer's workplace		X	
Extends NYSHRL protections to all forms of discriminatory harassment based on all protected categories, and changes hostile work environment standard to be more protective of employees		X	
Model sexual harassment policies and training materials in English and employee's primary language (if available on NYS website)	X		
Prohibits non-disclosure clauses unless it is the employee's preference, and non-disclosure agreements that effect complainant ability to report to law		X	

enforcement, federal, state or local enforcement agencies or private counsel			
Prohibits mandatory arbitration clauses		X	
Eliminates Faragher-Ellerth defense		X	
Authorizes punitive damages and attorney's fees		X	

MANDATORY ARBITRATION AND NON-DISCLOSURE CLAUSES

In 2018, New York banned non-disclosure agreements (unless it was the complainant's preference) and mandatory arbitration clauses for sexual harassment claims (except where inconsistent with federal law). The new bill will extend those prohibitions to all discrimination and harassment claims. Recently, in *Latif v. Morgan Stanley & Co. LLC et al.*, No. 1:18-cv-11528, Doc. No. 52. (S.D.N.Y. June 26, 2019), Judge Denise Cote granted the defendants' motion to compel arbitration of sexual harassment claims. The Court found that the arbitration agreement, signed by plaintiff when he accepted a job with his former employer, was enforceable and the New York law banning the mandatory arbitration of sexual harassment claims was preempted by the Federal Arbitration Act.

Further, non-disclosure/confidentiality agreements must be written in English and the complainant's primary language, and cannot bar the complainant from disclosing those facts necessary to secure unemployment insurance, Medicaid and other public benefits to which the complainant is entitled. Also starting on or after January 1, 2020, any agreement that bars a complainant from disclosing facts and circumstances related to a future claim of discrimination to law enforcement, federal, state or local enforcement agencies such as the Equal Employment Opportunity Commission or private counsel is unenforceable.

Employers should carefully review their sexual harassment policies as well as their employment, termination, separation and settlement agreements based on the new requirements.

FARAGHER-ELLERTH DEFENSE

Established in two 1998 United State Supreme Court decisions, the *Faragher-Ellerth* defense allows an employer to avoid liability for sexual harassment committed by supervisor where there was no adverse employment action (*e.g.*, demotion, termination, etc.), the employer attempted to prevent and promptly remedy the sexual harassment, and the employee 'unreasonably' failed to take preventive or corrective actions. *Faragher v. City of Boca Raton,* 524 US 775 (1998); *Burlington Industries, Inc. v. Ellerth,* 524 US 742 (1998).

The *Faragher-Ellerth* defense has been unavailable to employers sued under the New York City Human Rights Law ("NYCHRL") for discrimination claims since 2010, but was available under the

NYSHRL. Under the new law, the *Faragher-Ellerth* defense is eliminated and an employer defending claims under the NYSHRL will need to prove that "the harassing conduct does not rise above the level of what a reasonable victim of discrimination would consider petty slights or trivial inconveniences." See NYS Assembly Bill No. A8421.

PUNITIVE DAMAGES AND ATTORNEYS' FEES

The new law also provides a plaintiff with a significantly higher recovery upon a successful employment discrimination claim against "private employers" in the form of punitive damages. The Commission or the court, in its discretion, may award reasonable attorneys' fees to the prevailing party. Previously, a successful plaintiff could only recover compensatory damages and attorneys' fees in sexual harassment or discrimination cases (effective January 19, 2016).

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