



New York Changes the Landscape of State Workplace Discrimination and Harassment Litigation

Key Notes

New York's new law:

- Applies to all private employers regardless of size (effective Feb. 8, 2020)
- Removes the requirement that individuals prove that harassment was severe or pervasive (effective Oct. 11, 2019)
- Lowers the standard to complaints that arise as a result of inferior terms, conditions or privileges of employment because employees are members of a protected class
- Opens the door for employers to be held liable in some cases where an individual did not complain of harassment (effective Oct. 11, 2019)
- Extends the time individuals have to file a charge alleging harassment (effective Aug. 12, 2020)
- Restricts the use of arbitration agreements (effective Oct. 11, 2019)
- Prohibits the use of non-disclosure provisions that prevent employees from disclosing factual information concerning discrimination to certain individuals and entities (applies to contracts entered into after Jan. 1, 2020)
- Permits the award of punitive damages in state discrimination and workplace harassment suits, and attorneys' fees "shall" be awarded (effective Oct. 11, 2019)
- Requires employers to provide sexual harassment policy to employees in English and employees' native languages when hired and annually

Yesterday, Aug. 12, 2019, Governor Cuomo signed Senate Bill S6577/Assembly Bill 8421, a law that changes the landscape of workplace discrimination and harassment litigation in New York. The law applies to all New York employers and even addresses discrimination against independent contractors. The significant changes brought about by the new law are summarized below.

Generally, workplace harassment is unwelcome conduct that alters the terms and conditions of an individual's employment because of their membership in a protected class. Under existing law, an employee could prevail only if the conduct suffered was severe or pervasive. Under the new legal framework, individuals no longer have to prove that the conduct they suffered was severe or pervasive. Instead, the law shifts the burden to employers by creating a defense to liability where conduct does not rise above petty slights or trivial inconveniences. However, the standard has also changed: whether an employee was the subject of discrimination is viewed through the eyes of a reasonable victim of discrimination who is a member of the same protected class.

Additionally, under existing law, even if an individual could prove that the conduct was severe or pervasive, the employer often had a defense to liability, known as the *Faragher-Ellerth* defense, if the employee did not complain. Under the new framework, the fact that an employee did not complain is not determinative of liability. The law also permits the award of punitive damages in state workplace discrimination and workplace harassment law suits.

Currently, an employee seeking to bring a workplace harassment law suit under state law must first file a charge of discrimination with the state or federal agency tasked with investigating those complaints within one year of the unwelcome conduct. Under the new law, individuals have three years to file with the state agency.

In the past, it was not uncommon for employers to require their employees to resolve all workplace disputes in confidential binding arbitration, not court. It was also common for workplace discrimination and harassment claims to settle. Such settlements often included non-disclosure provisions prohibiting employees from disclosing the facts leading to settlement. Last year, New York passed laws limiting the use of mandatory arbitration agreements as well as non-disclosure provisions in settlement agreements. However, those restrictions only applied to cases involving sexual harassment. This new law now extends those restrictions to all cases involving workplace discrimination and harassment.

Although the various provisions of the law go into effect over the next year, most provisions will go into effect within 60 days. As summarized above, the statute touches on most aspects of New York workplace discrimination and harassment law. Employers with operations and employees in New York should review the law and consider solutions to quickly bring their workplace policies, training and employment agreements into compliance.

FOR MORE INFORMATION

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