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CLIENT ALERT: New York State Legislature Expands State Human Rights Law – By Gabe Gladstone

On June 19, 2019, the New York State Legislature passed a sweeping expansion of the New York State Human Rights Law (NYSHRL). The bill was supported by Governor Andrew Cuomo, and he is expected to sign the bill into law. The bill includes a host of new protections for New York employees. The changes include amendments to the state's sexual harassment law, limitations on the use of non-disclosure agreements (NDAs), and the elimination of mandatory arbitration of discrimination claims. These changes will apply to all New York employers, including out-of-state employers with remote workers in New York State.

Under the current NYSHRL, it is unlawful for an employer with four or more employees to discriminate against an employee or job seeker because of his or her age, creed, race, color, sex, sexual orientation, gender identity or expression, national origin, marital status, disability, military status, domestic violence victim status, criminal or arrest record, or genetic characteristics. It is also unlawful for an employer to retaliate against any individual because he or she filed a complaint, opposed any unlawful practice, or testified or assisted in an investigation or proceeding.

This recent amendment makes the following key changes:

- Removal of the Employer Size Threshold: Under the current law, the NYSHRL only covers employers with four or more employees. Following this amendment, all employers operating in New York will be subject to the NYSHRL. The statute and amendment applies to employers with remote workers in New York.
- Changes to Discriminatory Harassment: Under the current law, discriminatory harassment is not specifically defined. Following this amendment, unlawful "discriminatory harassment" will be defined as harassment related to any protected class under the NYSHRL. New York courts also require that harassment be "severe or pervasive" to be actionable. Following the amendment, that standard is far lower. An employee must only prove that he or she was subjected to "inferior terms, conditions, or privileges of employment" because of the employee's membership in a protected class. The amendment specifically provides that a plaintiff need not identify a comparable employee to prove that he or she was subjected to inferior terms, conditions, or privileges of employment.
- Elimination of the Faragher-Ellerth Defense: The amendment prohibits employers from asserting the "Faragher-Ellerth" defense for harassment claims, which was developed by federal courts. When using that defense, employers could assert: (1) the employer exercised reasonable care to prevent and correct promptly any harassing behavior; and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer. Following the amendment, that defense will be eliminated. Instead, employers may only be able to avoid liability if they can prove that the harassment alleged does not exceed what a "reasonable victim" would consider "petty slights or trivial inconveniences."

- Sexual Harassment Statute of Limitations: Under the current law, employees must file discrimination complaints within one year after the alleged unlawful practice. Following the amendment, employees will have three years to file complaints asserting sexual harassment.
- Limitations on the Use of Non-Disclosure Agreements in Settlements: The current law restricts employers from using non-disclosure agreements in settlements of sexual harassment claims. The amendment includes a broad expansion of this restriction. Although employers will not be prohibited from including NDAs in settlement agreements, the amendment expands the limitations to any claim of discrimination. The amendment adds several additional steps and specific language that must be used in a NDA. Employers should note that this expansion does not necessarily apply to all separation agreements, particularly where discrimination was not asserted.
- Elimination of Mandatory Arbitration of Discrimination Claims: Under the current law, employers may not require mandatory arbitration of sexual harassment claims. The amendment expands that prohibition to all discrimination claims. This portion of the law could be challenged under the Federal Arbitration Act, particularly in light of the Supreme Court's recent pro-arbitration rulings. We will monitor this portion of the law closely in case it is overturned.
- Distribution of Sexual Harassment Materials: In 2018, New York amended its sexual harassment law to require annual training of New York employees. In April 2019, New York City expanded those requirements for New York City employers. Under the current law, all New York employees must complete their initial sexual harassment training by October 9, 2019. The amendment adds several additional requirements. Both at the time of hire and at the employer's annual training, employers will need to distribute a "notice" containing the employer's sexual harassment policy and "the information presented" at the annual training. The required notice must be provided in English and in the employee's primary language.

Many of these changes will come into effect 60 days after Governor Cuomo signs the bill into law. We will provide an update when this amendment is signed into law. New York employers should also be aware of the upcoming October 9, 2019 deadline for sexual harassment training.

Employers should work with their MBJ attorneys to review their handbooks, sexual harassment trainings and policies, arbitration agreements, and settlement agreements to ensure compliance with the ever-changing NYSHRL.

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