

New York's Harassment and Discrimination Laws Just Changed—Again. Is Your Business Up to Date?

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Less than a year after substantial changes were enacted in 2018, New York State laws concerning harassment and discrimination in the workplace are changed once again.

An omnibus bill amended various provisions of the New York State Human Rights Law (NYSHRL), the General Obligations Law, the Civil Practice Law and Rules, and the New York Labor Law.

Continue reading for an overview of what the new laws entail, along with their effective dates.

Expanded Coverage for Employers and Workers

Small businesses, take note: NYSHRL now applies to all private employers. That means every person or entity, regardless of size, must comply with state-level harassment prevention regulations, including annual harassment prevention training.

The statutes also broadened the scope of worker protections. Domestic workers, such as housekeepers and gardeners, are now covered under laws prohibiting employment discrimination. Non-employees, including independent contractors, subcontractors, vendors, consultants, and other service providers, are similarly protected from any unlawful discriminatory practices—not only sexual harassment.

Effective date: Already in effect as of October 11, 2019

New Sexual Harassment Prevention Policy Document Requirements

Employers must now provide every employee with a written notice containing the employer's sexual harassment prevention policy. This document must be provided at the time of hiring and once per year, during annual anti-harassment training. The policy should be available in English as well as any other language an employee identifies as their primary language.

Employers need not attempt to craft such notices alone, as The New York Department of Labor (DOL) is responsible for preparing model sexual harassment prevention policy and training templates. If an employee requests a template in a certain language that is not available, the employer can provide the employee with the English-language notice. Employers will not be penalized for errors or omissions in any non-English forms created by the DOL.

Effective date: Already in effect as of August 12, 2019

The End of the “Severe or Pervasive” Standard

Previously, allegations of harassment or other forms of workplace discrimination needed to demonstrate “severe and pervasive” misconduct. The new laws remove this standard.

Additionally, alleged harassment no longer needs to be “unwelcome.” The laws do stipulate, however, that “the harassing conduct [must] rise above the level of what a reasonable victim of discrimination with the same protected characteristic would consider petty slights or trivial inconveniences.”

Effective date: Already in effect as of October 11, 2019

Faragher–Ellerth Defenses Thrown Out

In New York and elsewhere, employers have often successfully avoided liability for harassment by using the so-called “Faragher–Ellerth” defense. The defense essentially reasons that employees should first report any incident internally, so that the employer can have the opportunity to resolve or remediate the issue before commencing any legal proceedings.

New York’s new laws eliminate this defense. In other words, an employee no longer needs to file a complaint with their employer before taking the matter to court.

Effective date: October 11, 2019

An Across-the-Board Ban on Mandatory Arbitration in Employment Agreements

The New York laws enacted in 2018 prohibited employers from requiring mandatory arbitration to resolve sexual harassment claims. The amendments widened this to include all kinds of employment discrimination.

Effective date: Already in effect as of October 11, 2019

Current Restrictions on NDAs

Employers can no longer require, as a condition of the settlement of any employment discrimination claim, any terms or conditions which prohibit disclosure of the underlying facts and circumstances of the discrimination claim, unless such is the complainant’s preference. In that case, the complainant will have 21 days to consider that preference, and such confidentiality provisions must be memorialized in a separate writing signed by all parties. Additionally, for a period of seven days, the complainant shall have the right to revoke such confidentiality agreement, and such confidentiality agreement shall not become effective or enforceable until such revocation period has expired.

Effective date: Already in effect as of October 11, 2019

Future Restrictions on NDAs

Any provision in any contract between an employer and any employee or potential employee entered into after January 1, 2020, which prohibits the disclosure of factual information related to a future claim of discrimination is void and unenforceable unless such provision notifies the employee or potential employee that it does not prohibit him or her from speaking with law enforcement, the employee’s attorney, or any federal, state, or local agency that enforces employment discrimination laws.

Effective date: Already in effect as of January 20, 2020

A Longer Statute of Limitations for Sexual Harassment

The statute of limitations for sexual harassment claims has been extended from one year to three years after the date of the

alleged harassment. The statute of limitations for all other forms of employment discrimination remains at one year.

Effective date: Already in effect as of August 12, 2020 (applies to all claims filed after this date).

Punitive Damages and Attorney Fees

Under the amendments, the DOL and the courts can, where appropriate, in their discretion, issue an award of punitive damages in favor of an employee who prevails in an employment discrimination proceeding. Previously, New York Courts and the DOL had the discretion to award attorney fees to a prevailing party in employment discrimination proceedings. That discretion has now been removed as the amendments require the courts and the DOL to award attorney fees to a prevailing party in an employment discrimination proceeding. Note, however, in order for the employer to recover attorneys' fees, the employer must make a separate motion to the court and must establish that the employee's case was "frivolous", meaning that it was commenced or continued in "bad faith" without any reasonable basis.

Effective date: Already in effect as of October 11, 2019

Liberal Construction

NYSHRL is "to 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 and exemptions to the law "shall be construed narrowly in order to maximize deterrence of discriminatory conduct."

This language indicates that courts should interpret state harassment and discrimination laws as broadly as possible. The NYSHRL has an express purpose to protect those who have experienced harassment or other forms of discrimination.

Effective date: Already in effect as of August 12, 2019

Next Steps

Given that 2019 is the second consecutive year in which New York has amended the state's harassment and discrimination laws, employers can reasonably assume that more changes will come along sooner rather than later. Future legislation will likely build on these amendments as well as GENDA; the act passed earlier this year that addresses discrimination related to gender identity and expression.

With that in mind—not to mention the fast-approaching deadlines in 2019—employers should speak with legal counsel and develop proactive strategies as soon as possible.

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