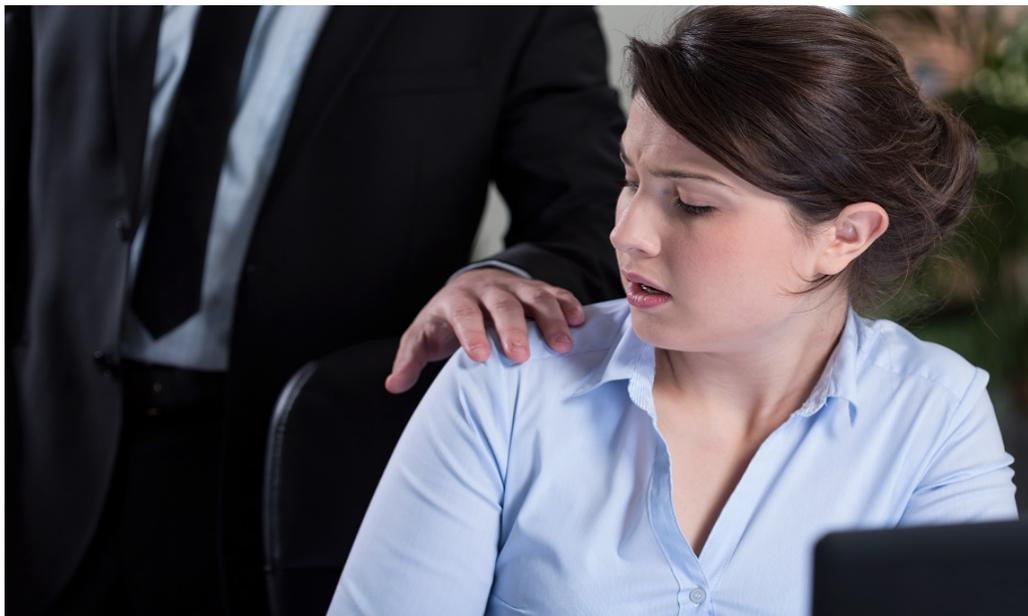


e-Alert: New York State Significantly Expands its Workplace Harassment Laws (Again)



Background

The New York State Legislature substantially revised the state's antidiscrimination and antiharassment laws again. The new legislation builds on the sexual harassment reforms that the state implemented over the course of 2018. New York State continues to take hard-hitting measures to implement stronger protections against workplace sexual harassment, making New York one of the strictest states in the country when it comes to harassment training.

Summary

The actual legislation will affect harassment, discrimination, and retaliation claims of all kinds as well as employer compliance programs across the board. Changes include:

Employers of all Sizes are Covered:

The expanded New York State Human Rights Law will cover employers of all sizes. Previously, except with respect to sexual harassment, only employers with four or more employees were covered. This change goes into effect 180 days after enactment of the amendments for claims filed

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after that date. In addition, the law will now protect domestic workers on the same grounds as other types of employees.

Complainants Will Have a Lower Burden of Proof:

Proponents of the new legislation have focused heavily on lowering the burden of proof for state law discrimination, harassment, and retaliation claims.

Previously, New York State law mirrored federal law, requiring an employee to show that alleged harassment was severe or pervasive in order to state an actionable claim against an employer. New York State law now resembles New York City law, which eliminated the “severe and pervasive” standard in 2005, in requiring only that an employee show that alleged harassment or retaliation rises above the level of “petty slights and trivial inconveniences.”

Employer Responsibility Increases in Being Aware of Harassment:

The new measure also removes a defense commonly used by employers, i.e., that the employee never utilized the employer’s internal complaint procedure. This is known as the Faragher/Ellerth defense, after a pair of Supreme Court decisions that established its availability in federal Title VII cases. Under State law, “[t]he fact that such individual did not make a complaint about the harassment to such employer shall not be determinative of whether such employer shall be liable.” In addition, employees claiming discrimination will no longer be required to show that they were treated less favorably than a comparator (an employee outside the relevant protected category).

Employers May be Held Liable for Discrimination of any Kind Against a Contractor:

Last year, New York State expanded its sexual harassment protections to include contractors. The law is again expanding, this time to protect contractors from other types of workplace discrimination and retaliation: “[a]n employer may be held liable to a non-employee who is a contractor, subcontractor, vendor, consultant or other person providing services pursuant to a contract in the workplace or who is an employee of such contractor, subcontractor, vendor, consultant or other person providing services pursuant to a contract in the workplace.”

The Laws Shall be Construed Liberally to Maximize Deterrence:

Going forward, the state law will be interpreted liberally and any exceptions to the law interpreted carefully in order to maximize the deterrence of discriminatory conduct even where this approach may differ from comparable federal law. This change goes into effect immediately for claims which were filed after the effective date of the law.

Nondisclosure Agreements (NDAs) Restricted for All Discrimination Cases:

Last year, New York sharply limited NDAs in sexual harassment cases by requiring protective measures to ensure that confidentiality was the complainant’s preference. Going forward, the law will apply to all types of discrimination, harassment, or retaliation claims, prohibiting employers from including NDAs in “any settlement, agreement or other resolution of any claim, the factual foundation for which involves discrimination, that would prevent the disclosure of the underlying facts and

circumstances to the claim or action unless the condition of confidentiality is the complainant's preference." If confidentiality is the complainant's preference, then an NDA regarding the facts and circumstances of the claim is permissible, but must be written in "plain English, and, if applicable, the primary language of the complainant." The complainant then must have a full, nonwaivable 21 days to consider the NDA clause before signing the document and a 7-day waiting period during which the employee may revoke agreement to the NDA after signing.

Mandatory Arbitration Clauses Prohibited:

Last year, New York State enacted legislation prohibiting mandatory arbitration of sexual harassment claims. This prohibition has now been expanded to any discrimination or retaliation claim (not just sexual harassment).

Employment Contract NDAs Must Include a Carve-Out:

Beginning on January 1, 2020, NDAs that are part of an employment contract and that limit the employee from disclosing information related to a future claim of discrimination must include an explicit carve-out providing that the employee or future employee is not prohibited from "speaking with law enforcement, the 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."

Mandatory Distribution of a Written Anti-Harassment Policy:

The state will require employers to provide New York-based employees with a notice, both at the time of hire and during annual sexual harassment prevention training, that contains both the "employer's sexual harassment prevention policy and the information presented at such employer's sexual harassment prevention training program." Employers must provide this information both in English and in the employee's primary language. The state will publish a model policy in languages other than English (depending on the prevalence of each language in the state). New York employers are not required to provide their policy in another language if the state has not published a template in that language. This change goes into effect immediately on enactment.

The Statute of Limitations for Sexual Harassment Claim is Now Three Years in All Cases:

Employees will have three years to bring an administrative claim of sexual harassment under state law, whether filing in an administrative agency or in court. Previously, the applicable statute of limitations was one year in administrative agencies; discrimination claims other than sexual harassment are still subject to a one-year statute of limitations when filed in administrative agencies. This change goes into effect one year after enactment for claims filed after that date.

Employer Next Steps

All employers should take steps toward compliance and training as soon as possible. Employers with existing policies and training programs will need to review and update them in accordance with the new



requirements.

- Our training seminar for Harassment Prevention is well-liked by our clients and easy to add to your busy schedule. Our 60-minute (for employees) and 90-minute (for supervisors) presentation is offered with an on-site trainer or as a video. Call us today for more information.
- If you are an HR Knowledge Full-Service or Virtual HR Client, please note that we will be updating our template antiharassment policy with appropriate language to ensure it is compliant with these new rulings and will be happy to provide you with this updated policy. Please [email us](#) if you would like us to assist you in updating your current policy and employee handbook.
- If you are not a current client but are interested in learning more about our services, please [email us](#). **Whether it be face to face, virtual or a learning management system, HR Knowledge can help you and your team keep up with the latest regulations related to harassment prevention and an employer's responsibility.**

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