KASOWITZ
BENSON TORRES

Employers Beware: New York Changes the Game for Employment Discrimination Claims

On August 12, 2019, Governor Andrew Cuomo signed into law Assembly Bill A8421 / Senate Bill 6577 ("Anti-Discrimination Law"). The Anti-Discrimination Law provides for significant and broad amendments to the New York State Human Rights Law ("NYSHRL"), the state law that prohibits discrimination and discriminatory harassment. Under the Anti-Discrimination Law, employees will have a more lenient standard for asserting and proving discrimination and harassment claims, and employers will be subject to stricter requirements relating to discrimination and harassment.

Below is a list of key takeaways from the Anti-Discrimination Law's impact on New York employers and employees.

Expanding the NYSHRL's Application and Coverage

Currently, the NYSHRL applies only to private employers with four or more employees, except that it covers all employers, regardless of size, with respect to sexual harassment. Effective February 8, 2020, the NYSHRL will apply to all employers concerning all types of unlawful discrimination, harassment and retaliation, based on any protected category.

In addition, the Anti-Discrimination Law expands coverage to non-employees. Currently, employers may be liable to certain non-employees (including contractors, subcontractors, vendors, and consultants) with respect to sexual harassment. Effective October 11, 2019, employers may be liable to such non-employees for "any unlawful discriminatory practice."

Lower Standard for Harassment Claims

Currently, a claimant must prove that the harassment experienced was "severe or pervasive," which is the same standard that applies to federal claims brought under Title VII of the Civil Rights Act of 1964. The Anti-Discrimination Law lowers that standard. Effective October 11, 2019, a claimant need only establish that the harassment subjected him or her "to inferior terms, conditions or privileges of employment because of the individual's membership in one or more . . . protected categories." The Anti-Discrimination Law also clarifies that a claimant can prevail "regardless of whether such harassment would be considered severe or pervasive under precedent applied to harassment claims."

Rejecting Longstanding Employer Defenses

Currently, an employer, in certain circumstances, can assert as affirmative defenses to harassment claims that it took reasonable care to prevent and promptly correct harassing behavior and that the employee unreasonably failed to take advantage of the employer's preventing or corrective measures. Effective October 11, 2019, these defenses will no longer be available. The Anti-Discrimination Law clarifies that "[t]he fact that such individual did not make a complaint about the harassment to" his or her employer "shall not be determinative of whether" the employer is liable.

The Anti-Discrimination Law instead provides a limited affirmative defense to employers: "that the harassing conduct does not rise above the level of what a reasonable victim of discrimination with the same protected characteristic would consider petty slights or trivial inconveniences."

Liberal Construction of the NYSHRL

Effective August 12, 2019, the Anti-Discrimination Law amended the NYSHRL to provide for its liberal construction, specifically so as to accomplish the "remedial purposes" of the NYSHRL:

> The provisions of this article shall 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 to and exemptions from the provisions of this article shall be construed narrowly in order to maximize deterrence of discriminatory conduct.

By requiring courts to interpret the NYSHRL broadly, the Anti-Discrimination Law will aid plaintiffs in litigation, including in defeating summary judgment and ultimately succeeding at trial.

Limitations on Non-Disclosure Agreements

As we previously reported, the NYSHRL was recently amended so that, effective July 11, 2018, New York employers were prohibited from requiring nondisclosure provisions in any settlement, agreement or other resolution of a sexual harassment claim "unless the condition of confidentiality is the complainant's preference." Under the Anti-Discrimination Law, effective October 11, 2019, this prohibition will apply to nondisclosure agreements concerning any form of discrimination, not only sexual harassment.

In addition, effective January 1, 2020, any nondisclosure provision will be "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 Equal Employment Opportunity Commission, the New York State Division of Human Rights ("Division"), a local commission on human rights, or an attorney retained by the employee or potential employee.

Ban on Mandatory Arbitration

We also previously reported that, effective July 11, 2018, New York employers were prohibited from requiring employees to sign agreements that contained mandatory arbitration of sexual harassment claims. Effective October 11, 2019, the Anti-Discrimination Law will expand this prohibition to all forms of discrimination, harassment or retaliation.

Availability of Punitive Damages and Attorneys' Fees

Currently, the NYSHRL does not allow for awards of punitive damages for employment discrimination claims. Effective October 11, 2019, the NYSHRL authorizes punitive damages "in case of employment discrimination related to private employers."

In addition, whether a successful plaintiff is awarded attorneys' fees is currently at the court's discretion, and such fees are only available in employment discrimination claims brought on the

basis of sex. Effective October 11, 2019, courts "shall" award attorneys' fees to successful plaintiffs "with respect to all claims of employment discrimination."

Expansion of the Statute of Limitations for Sexual Harassment

Currently, a complainant must file an administrative claim of sexual harassment with the Division within one year of the alleged unlawful harassment. Under the Anti-Discrimination Law, effective August 12, 2019, a complainant may file such claims within three years. Individuals will continue to have three years to file such a claim in court.

Sexual Harassment Training and Notice

Effective August 12, 2019, employers must give employees – at the time of hiring and at every annual sexual harassment prevention training program – a notice containing the employers' "sexual harassment prevention policy and the information presented at such employer's sexual harassment prevention training program."

* * *

Kasowitz Benson Torres' Employment Practices and Litigation Group has been named the 2019 Litigation Department of the Year for Labor and Employment by ***New York Law Journal***. We represent companies in connection with employment policies and practices. Our lawyers are well-versed in drafting and implementing all manner of employment policies, and in defending employers from discrimination and harassment claims. If you would like to discuss these issues, please contact Mark W. Lerner (212-506-1728) or Jessica T. Rosenberg (212-506-1789).