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HR CONNECTION

NYS raises the stakes and lowers the bar on harassment laws…again!

Our family has a running joke about my wife's intuitive powers. For example, when I said I ran into an old friend we hadn't heard from in several months, she said, "Wow, I was just thinking about her yesterday!" Unfortunately, she rarely says anything before I tell her something happened, so there's no proof of her alleged quasi-psychic talents.

Although I would never claim to have such finely tuned foresight, I predicted the demise of the longstanding Faragher-Ellerth affirmative defense in previous articles: "Can Faragher-Ellerth survive the #MeToo movement?" (Daily Record, Dec. 11, 2018), and "Has the Third Circuit redefined 'reasonable?'" (Daily Record, Jan. 8, 2019). What I didn't predict was the plethora of other changes to the New York State Human Rights Law (NYSHRL) that are poised to become effective. (Depending on where you sit on these issues, I suggest buckling your seatbelt because you may experience some turbulence.)

As you may recall, under the *Faragher-Ellerth* affirmative defense an employer may avoid liability if it shows, (a) the employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior, *and* (b) the employee unreasonably failed to take advantage of available preventive or corrective opportunities.

That's all about to change. Gov. Andrew Cuomo is expected to sign legislation that will eliminate the *Faragher-Ellerth* affirmative defense for New York employers. Once enacted, the NYSHRL will be updated to state, "[t]he fact that the individual did not make a complaint about the harassment to the employer shall not be determinative of whether the employer shall be liable."

By FRANK CANIA
Daily Record Columnist

But wait, there's plenty more where that came from.

Lowering the bar for claims of harassment and discrimination

In addition to the *Faragher-Ellerth* affirmative defense, the bill eliminates the "severe or pervasive" standard used to determine whether harassing conduct rose to the level of discrimination. Going forward, harassment on the basis of any protected characteristic will be unlawful "regardless of whether such harassment would be considered severe or pervasive." Harassment will now be an "unlawful discriminatory practice when it subjects an individual to inferior terms, conditions, or privileges of employment because of the individual's membership in one (1) or more of these protected categories." The bill appears to make an effort to temper the potential onslaught of frivolous claims by providing employers with an affirmative defense where "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."

Also, to prevail in harassment cases under the NYSHRL, individuals will no longer be required to show they were treated less favorably than individuals outside their protected class.

Vastly expanded statutory coverage

Going forward, the NYSHRL will apply to all New York employers regardless of the number of employees. (The law currently applies to employers with four or more employees, except for the sex discrimination provisions, which already apply to all employers.) Moreover, domestic workers will be provided the same protections as other types of employees.

In addition to sexual harassment, employers will be liable for all forms of workplace discrimination, harassment and retaliation against "non-employees." These protections will extend to contractors, subcontractors, vendors, consultants and anyone providing services in the workplace "when the employer, its agents, or supervisors knew, or should have known that [a] non-employee was subjected to an unlawful discriminatory practice in the employer's workplace, and the employer failed to take immediate and appropriate corrective action."

Effective with the governor's signature will be a requirement that state courts broadly interpret the NYSHRL in all cases, regardless of how any comparable federal provisions are construed.

Further, employees will have three years to file a claim of sexual harassment under the NYSHRL, regardless of whether it's with an administrative agency or the courts. Until this change, the statute of limitations to file a sexual harassment claim with an administrative agency was one year.

Added sexual harassment policy and training requirements

In addition to the current sexual harassment prevention policy and annual training mandates, employers will be required to provide each employee with a copy of the "employer's sexual harassment prevention policy and the information presented at [the] employer's sexual harassment prevention training program." This information must be provided to new employees at the time they are hired and to all employees during the annual sexual harassment prevention training. Further, the documents must be provided "in English and in the language identified by each employee as [their] primary language."

Available damages and attorneys' fees

Punitive damages will be an available remedy in all "cases of employment discrimination [harassment and retaliation] related to private employers" filed under the NYSHRL.

Additionally, attorneys' fees, which have been discretionary, "shall" be awarded to the prevailing party regardless of whether the claim is adjudicated by a court or the State Division of Human Rights. *However*, if the employer is the prevailing party, it must show the claim was frivolous (pursued in bad faith) before an award will be made.

Nondisclosure and mandatory arbitration agreements

Nondisclosure agreements will not be allowed to prohibit disclosure of underlying facts and circumstances related to any discrimination, harassment, retaliation or failure to accommodate claim or action unless: (a) the complainant prefers confidentiality; (b) the confidentiality provision is written in plain English or their primary language; (c) they are given 21 days to consider the confidentiality provision, and if accepted, it must be memorialized in an agreement signed by all parties; and (d) they are given seven days to revoke the agreement.

While the state already prohibits mandatory arbitration to resolve sexual harassment claims, this legislation extends that prohibition to all harassment, discrimination, and retaliation claims. However, the recent federal court decision in *Latif v. Morgan Stanley & Co.*, found the state's prohibition on mandatory arbitration of sexual harassment claims is preempted by the Federal Arbitration Act (FAA). Based on this decision, it's very likely the state's expanded prohibition on mandatory arbitration for all discrimination claims would also be preempted by the FAA.

What's an employer to do?

As intended, this legislation gives claimants (i.e., your employees and non-employee service providers) significantly more leverage in virtually every discrimination, harassment and retaliation claim going forward. The good news is that employers have even more incentive to ensure no forms of discrimination, harassment, or retaliation are allowed to occur, or go unaddressed, in their workplaces.

Every employer, regardless of how many or few employees, should take this opportunity to:

Ensure equal employment opportunity, and discrimination, harassment and retaliation prevention policies are well-written, effective and consistently enforced without exception.

Confirm their discrimination, harassment and retaliation prevention policies explicitly cover contractors, subcontractors, vendors, consultants and any other person providing services in their workplace.

Evaluate current harassment prevention training and ask: Is it interesting and customized with industry examples? Are employees engaged and participating? Is it educating employees and influencing positive behaviors? After training, are employees having meaningful conversations? Most importantly, is the training effectively preventing harassment in your workplace? If the answer is no to any of these questions, the training may be exacerbating the issue of workplace harassment and should be replaced.

Update the company's sexual harassment prevention training to include preventing workplace harassment based on all protected categories.

Ensure a copy of the company's sexual harassment policy and information from the sexual harassment prevention training is provided to every new employee when hired, and to every employee as part of the annual sexual harassment prevention training.

Although not the only steps employers should take to ensure compliance, these will be a great start.

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