Expansion of New York workplace anti-discrimination protections takes effect

Employment Alert

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By: Brian S. Kaplan | Daniel Turinsky | Edward Rooker

On October 11, 2019, New York State instituted a number of amendments to applicable law aimed at preventing discrimination and harassment in the workplace. As discussed below, the new legislation builds upon the 2018 anti-sexual harassment legislation by amending the New York State Human Rights Law (NYSHRL) to, among other things: (a) expand restrictions on the use of non-disclosure (confidentiality) or "NDA" provisions to apply to agreements settling claims of discrimination based on any protected class; (b) expand the prohibition on the use of mandatory arbitration agreements to apply to all claims of discrimination; (c) lower the burden of proof for complainants to bring workplace harassment claims; and (d) expand the coverage of the statute to apply to non-employees, such as contractors and vendors. These changes underscore the need for employers to continue to prioritize, and otherwise be proactive in, preventing discrimination and harassment in the workplace. Employers should reevaluate their current policies, procedures and standard agreements to address the heightened risk associated with such conduct and new requirements.

- **Expanded restrictions on the use of NDA provisions:** The recent amendments expand the existing prohibition on the use of NDA provisions in agreements settling claims of sexual harassment to apply to claims of discrimination based on any protected class (i.e., age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial

status, marital status, and domestic violence victim status), unless: (a) it is the "complainant's preference" that a NDA provision be included; and (b) the complainant is given 21 days to review the terms of the NDA provision and 7 days to revoke after signing.

- Guidance from New York State specifies that (a) the 21-day review period under the NYSHRL cannot be waived or shortened (i.e., the individual cannot execute the agreement prior to the expiration of the 21-day review period, meaning the 7-day revocation period cannot start prior to such time); and (b) the "complainant's preference" that the Agreement include a NDA provision must be memorialized in writing in a separate agreement signed by all parties after the expiration of the 21-day review period.

In addition, under the recent amendments, NDA provisions in agreements settling claims of discrimination are void to the extent they prohibit or otherwise restrict the complainant from: (i) initiating, testifying, assisting or participating in any manner with an investigation conducted by the appropriate local, state or federal agency, as well complying with a subpoena from such agency; and (ii) filing or disclosing any facts necessary to receive unemployment insurance, Medicaid, or other public benefits to which the complainant is entitled.

The law applies where NDA provisions are included in settlement agreements and releases with individuals who have: (a) made an internal, good-faith complaint of discrimination or harassment; (b) complained or alleged, in good faith, through an attorney that they were subject to discriminatory or harassing conduct (e.g., through a demand letter); and/or (c) filed a good-faith complaint of discrimination or harassment with a court or federal, state or local administrative agency (i.e., the Equal Employment Opportunity Commission, New York State Division of Human Rights, or New York City Commission on Human Rights).

- **Required carve-out in NDA provisions:** Effective January 1, 2020, NDA provisions in agreements settling claims of discrimination must expressly include a statement that the provision does not prohibit the individual "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."
- **Expanded prohibition on mandatory arbitration provisions:** The recent amendments also expand the prohibition on the use of mandatory arbitration agreements (with the exception of arbitration agreements included within collective bargaining agreements) to apply to claims of discrimination based on any protected class (not just claims of sexual harassment). However, the prohibition on mandatory arbitration is likely preempted by federal law favoring the enforcement of arbitration agreements, as at least one federal court in the Southern District of New York recently held.
- **Elimination of the "severe or pervasive" standard:** Previously, workplace misconduct did not rise to the level of a hostile work environment under the NYSHRL unless it was "severe or pervasive" enough to alter employment conditions and create an abusive working environment, which aligns with the current standard under federal anti-discrimination law. The recent amendments to NYSHRL eliminate this "severe or pervasive" standard. Instead, employers will now be liable for any harassing conduct which "subjects an individual to inferior terms, conditions or privileges of employment because of the individual's membership" in a protected class. However, employers may raise as an affirmative defense to liability that the harassing conduct does not rise above the level of what a "reasonable victim of discrimination" in the same protected class would consider "petty slights or trivial inconveniences," which is the same standard that has been adopted with regard to harassment claims asserted under the New York City Human Rights Law (NYCHRL). By eliminating the "severe or pervasive" standard for harassment claims under the NYSHRL, the law lowers the bar for a *prima facie* case of discriminatory harassment and may cause employers to update their discrimination and harassment policies and procedures accordingly.
- **Employee's failure to complain is no longer a defense:** New York State courts previously recognized the *Faragher-Ellerth* defense, which, among other things, allowed employers to avoid liability under the NYSHRL if they are able to show that they exercised reasonable care to prevent and promptly correct any harassing behavior and the plaintiff-employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to otherwise avoid harm. Under the recent New York State amendments, the fact that an individual did not make a harassment complaint to his/her employer will no longer be determinative as to whether an employer is liable for workplace harassment under the NYSHRL. What this means is that human resource professionals and managers will want to be proactive in identifying and correcting possible workplace harassment. This change also places an added emphasis on the need for employers to

review their harassment prevention trainings to ensure that managers and employees are educated on the employer's anti-harassment policies.
- **Expanded protections for non-employees:** The recent amendments expand the NYSHRL's prohibitions against unlawful discriminatory practices to cover non-employees, including contractors, subcontractors, vendors, consultants and other persons providing services pursuant to a contract.

In addition to the amendments to NYSHRL that took effect in October 2019, employers should be aware of the following additional changes that will take effect over the next year:

- **Salary history ban:** Effective January 6, 2020, employers in New York State will be prohibited from inquiring about an applicant's past salary history or using such information in deciding whether to make an offer of employment or in determining a new employee's salary. This law mirrors the salary history ban currently in effect for New York City employers under the NYCHRL.
- **Expanded protections for employees of small employers:** Effective February 8, 2020, NYSHRL's prohibitions against unlawful discriminatory practices will be expanded to cover all employers, regardless of the number of employees in the state (the NYSHRL currently only applies to employers with four or more employees, except for claims of sexual harassment, which already applies to all employers).
- **Expanded statute of limitations period:** Effective August 12, 2020, the statute of limitations period for filing sexual harassment claims under NYSHRL with the New York State Division of Human Rights (NYSDHR) will increase from 1 year to 3 years, which aligns with the statute of limitations for filing a sexual harassment claim in court or with the New York City Commission on Human Rights under the NYCHRL.

Employers are encouraged to examine their policies, practices and standard agreements in light of these new developments. Please contact any of the authors or one of the following attorneys in the DLA Piper Employment Group for assistance or with any questions on these important issues:

Brian S. Kaplan

Joseph A. Piesco, Jr.

Daniel Turinsky

Evan D. Parness

Garrett Kennedy

Joseph D. Guarino

Cherelle I. Glimp

Janeen Hall

Alison Lewandoski

Britt C. Hamilton

Matthew R. Engel

Edward Rooker

AUTHORS

Brian S. Kaplan
Partner
New York | T: +1 212 335 4500
brian.kaplan@dlapiper.com

Daniel Turinsky
Partner
New York | T: +1 212 335 4500
daniel.turinsky@dlapiper.com

Edward Rooker
Associate
New York | T: +1 212 335 4500
edward.rooker@dlapiper.com