10 Important Ways the 2019 Amendments to New York's Human Rights Law Will Protect Employees and Survivors

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On June 19, 2019, the New York State Assembly and State Senate passed S. 6577/A. 8421, which amends the New York State Human Rights Law ("NYSHRL") to strengthen protections for employees who have been harassed or discriminated against at work. Governor Cuomo signed the bill into law on August 12, 2019. Here are the 10 most significant ways the bill increases protections for victims of sexual harassment and discrimination in New York:

1) Eliminates the "Severe and Pervasive" Standard

- Former standard: In order to prevail on a harassment claim, an employee previously had to establish that the harassing behavior was **severe and pervasive** enough to change the conditions of his or her employment and create an abusive working environment.
- What the new law says: Harassment is unlawful when it affects an employee's environment and work such that it leads to "inferior terms, conditions or privileges" of employment.
- What this means for employees: Harassment no longer has to unreasonably interfere with an employee's ability to work in order to be unlawful. As a result of this much lighter standard, plaintiffs likely will have an easier time prevailing on harassment and/or discrimination claims in court under the NYSHRL.

2) Eliminates the Faragher-Ellerth Defense

- *Faragher-Ellerth* Defense: Previously, if an employee failed to utilize the employer's reporting procedure, then the employer could at times use this as a defense to avoid liability. Now, such a defense cannot be used to defend against claims under the NYSHRL.
- What this means for employees: The law now recognizes that just because an employer has a procedure for reporting misconduct, this does not mean that employees are comfortable or able to use it, or that complaints will always be handled sensitively or that unlawful retaliation will not occur. Victims of workplace abuse may now have viable claims of harassment or discrimination even if they did not follow a specific reporting policy or procedure.

3) Eliminates the Comparator Affirmative Defense

- Comparator Defense: Previously, employers could defend against liability by showing that the plaintiff/employee could not demonstrate more favorable treatment of a comparator employee outside the plaintiff/employee's protected class (i.e., an employee with same duties, supervisor and experience level who is of a different race, sex, etc.).

- What this means for employees: Plaintiffs/employees no longer need to identify similarly situated employees outside of their protected class in cases where this may be difficult. The primary affirmative defense an employer can raise to avoid liability under the new NYSHRL is 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." As a result of this change to the available affirmative defenses, plaintiffs/employees have one less obstacle to prevailing on harassment and/or discrimination claims in court under the NYSHRL.

4) Expands Protections to Domestic Workers and Independent Contractors

- The new law expands all protections under the NYSHRL to domestic workers and independent contractors.
- What this means for victims: Previously, the NYSHRL failed to recognize domestic workers (such as house cleaners or babysitters) or independent contractors as employees protected from discrimination or harassment under the law. Under the new law, you are protected against harassment and discrimination if you fall within one of these categories.

5) Awards Punitive Damages and Attorney's Fees

- Allows for awards of punitive damages against employers (uncapped); allows courts to award reasonable attorney's fees to any prevailing party (defendants must show claim was frivolous if they are the prevailing party).
- What this means for victims: Punitive damages are designed to punish a defendant and deter future bad conduct. This means that victims can be awarded substantially more money under the new law, and increases the deterrent effect of the NYSHRL.

6) Expands Prohibition of Non-Disclosure/Confidentiality Agreements

- In 2018, the NYSHRL was amended to include a prohibition on Non-Disclosure Agreements ("NDA") in sexual harassment settlements.
- Now, this prohibition on NDAs applies to all discrimination and harassment claims, unless a plaintiff prefers to enter into NDA.
- This provision will go into effect on January 1, 2020.
- What this means for victims: NDAs in harassment cases are often subject to criticism because they are perceived to allow companies to sweep sexual harassment under the rug by forcing victims into silence, thereby allowing the unlawful conduct to continue unabated. Under the new NYSHRL, if you are an employee entering into a settlement agreement with your employer regarding a discrimination or harassment claim, you must express a preference for confidentiality in any settlement agreement for a confidentiality clause to be enforceable.

7) Expands the Definition of "Employer"

- The new law also expands the definition of "employer" from those with four or more employees to *all* employers within the state, regardless of number of employees.
- What this means for victims: Previously, if your boss harassed you and you were his/her only employee, there was little recourse under New York state law. The new law recognizes that all employees should be protected from harassment and discrimination under the NYSHRL, regardless of the employer's size.

8) Updates Sexual Harassment Training and Policy Requirements

- Sexual harassment training and policies must be provided in the employee's primary language.
- Beginning in 2022, and every four years thereafter, the NY Dept. of Labor and the NYS Division of Human Rights must evaluate and update model sexual harassment prevention guidance documents.
- What this means for victims: A greater number of employees in New York will have a heightened awareness of their rights in the workplace, as the new law mandates that harassment training and policies be given to employees in a language that they can clearly understand.

9) Extends Statute of Limitations from One Year to Three Years for Sexual Harassment Claims Brought to the Attention of the NYS Division of Human Rights

- Employees in New York will now have up to three years to report sexual harassment to the NYS Division of Human Rights after the alleged unlawful incident occurred.
- Goes into effect one year after enactment.
- What this means for victims: Sexual harassment in the workplace can have severe, traumatizing effects on an individual, which can take years to process. The amended NYSHRL recognizes that victims do not always come forward immediately, providing up to three years for the employee to file a claim with the NYS Division of Human Rights from the time the alleged abuse took place.

10) Prohibits Mandatory Arbitration

- In 2018, the NYSHRL was amended to include a prohibition on mandatory arbitration clauses in sexual harassment cases, **except where inconsistent with federal law.**
- The new law prohibits mandatory arbitration clauses in **all discrimination or harassment cases.**
- **However,** on July 8, 2019, in *Latif v. Morgan Stanley & Co., LLC*, the U.S. District Court for the Southern District of New York found that the 2018 prohibition was preempted by the Federal Arbitration Act. As such, it is expected that the 2019 amendments will also be struck down as preempted by a federal court.
- What this means for victims: New York State has sent a strong message that mandatory arbitration is

an unfair process that often denies sexual harassment and discrimination victims access to justice. Unfortunately, right now, if your employment contract with your employer includes an arbitration agreement, it will likely remain enforceable unless and until new federal law is passed by Congress prohibiting forced arbitration of employment discrimination and harassment claims. The Forced Arbitration Injustice Repeal Act (FAIR Act) is one such piece of proposed federal legislation, which would prohibit mandatory arbitration of all employment disputes, among other types of claims.

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