

New York State Legislature Enacts Sweeping Changes to Combat Sexual Harassment

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On June 19th, the New York State [Senate](#) and [Assembly](#) voted to pass omnibus legislation greatly strengthening protections against sexual harassment. While the bill, [SB 6577](#), is still waiting for the Governor's signature, Governor Cuomo supported the legislation and plans to sign the bill when it is sent to his desk. The legislation is the product of two legislative hearings that took place early this year, inspired by a group of former legislative staffers who have said they were victims of harassment while working in Albany, NY. The bill includes several provisions directly affecting private employers. These provisions include:

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1. The New York State Human Rights Law ("NYSHRL") will expand the definition of an "employer" to include all employers in the State, including the State and its political subdivisions, regardless of size. Additionally, the definition of "private employer" will be amended to include any person, company, corporation, or labor organization except the State or any subdivision or agency thereof.
2. Protections for certain groups in the workplace will also be expanded. While non-employees, such as independent contractors, vendors, and consultants, were previously protected from sexual harassment in an employer's workplace, they will now be protected from all forms of unlawful discrimination where the employer knew or should have known the non-employee was subjected to unlawful discrimination in the workplace and failed to take immediate and appropriate corrective action. Similarly, harassment of domestic workers will now be prohibited with respect to all protected classes and will be governed under the harassment standard outlined in (3), below.
3. The burden of proof for harassment claims will be greatly lowered. Any harassment based on a protected class, or for participating in protected activity, will be unlawful "regardless of whether such harassment would be considered severe or pervasive under precedent applied to harassment claims." Unlawful harassment will include any activity that "subjects an individual to inferior terms, conditions or privileges of employment because of the individual's membership in one or more of these protected categories." Also, employees will no longer need to provide comparator evidence to prove a harassment, and, presumably, discrimination claim.
4. The law will also alter the affirmative defenses available to employers accused of harassment. The *Faragher/Ellerth* defense, which allowed employers to avoid liability where the employee did not make a workplace complaint, will no longer be available for harassment claims under NYSHRL. However, an affirmative defense will be available where the harassment complained of "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."
5. The statute of limitations to file a sexual harassment complaint with the New York State Division of Human Rights (the "Division") will be lengthened from one year to three years.
6. The amendments specify that they are to be construed liberally for remedial purposes, regardless of how federal laws have been construed.
7. Courts and the Division will be required to award attorneys' fees to all prevailing claimants or plaintiffs for

employment discrimination claims and may award punitive damages in employment discrimination cases against private employers. Attorneys' fees will only be available to a prevailing respondent or defendant if the claims brought against them were frivolous.

8. Mandatory arbitration clauses will be prohibited for all discrimination claims.
9. The use of non-disclosure agreements will be severely restricted. Non-disclosure agreements will be prohibited in any settlement for a claim of discrimination, unless: (1) it's the complainant's preference; (2) the agreement is provided in plain English and, if applicable, in the complainant's primary language; (3) the complainant is given 21 days to consider the agreement; (4) if after 21 days, the complainant still prefers to enter into the agreement, such preference must be memorialized in an agreement signed by all parties; and (5) the complainant must be given seven days after execution of such agreement to revoke the agreement. The same rules apply to non-disclosure agreements within any judgment, stipulation, decree, or agreement of discontinuance. Any term or condition in a non-disclosure agreement is void if it prohibits the complainant from initiating or participating in an agency investigation or disclosing facts necessary to receive public benefits. Non-disclosure clauses in employment agreements are void as to future discrimination claims unless the clause notifies the employee that they are not prohibited from disclosure to law enforcement, the EEOC, the Division, any local commission on human rights, or their attorney. All terms and conditions in a non-disclosure agreement must be provided in writing to all parties, in plain English and, if applicable, the primary language of the complainant.
10. Employers will be required to provide employees with their sexual harassment policies and sexual harassment training materials, in English and in each employee's primary language, both at the time of hire and during each annual sexual harassment prevention training. Additionally, the Department of Labor and the Division will evaluate the impact of their model sexual harassment prevention policy and training materials every four years starting in 2022 and will update the model materials as needed.

The majority of these changes will take effect 60 days after the legislation is enacted, with the exception of the "employer" definition expansion, which will take effect after 180 days, and the extended statute of limitations, which will take effect after 1 year. In light of these changes, New York employers should alter their practices and policies to conform with these new requirements. We are monitoring this legislation and will provide updates as new information becomes available.

**Myles Moran, a Sumer Associate in the New York office, assisted with the drafting of this blog.*

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