New York State Expanded Protections Against Workplace Harassment [Podcast]

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In this episode of The Proskauer Brief, partner Evandro Gigante and associate Arielle Kobetz discuss the recent developments out of New York State, that will significantly expand workplace anti-discrimination protections. Among other things, recent amendments to New York law will lower the burden on plaintiffs seeking to prove claims of workplace harassment under the Human Rights law. Employers should tune in to see what impact the new law may have on the scope of harassment claims and what changes to policies or practices should be implemented.

Transcript:

Evandro Gigante: Hello, welcome to The Proskauer Brief: Hot Topics on Labor & Employment Law. I’m Evandro Gigante, and I’m here today with Arielle Kobetz. On today’s episode, we’re going to discuss the latest developments out of New York State that will significantly expand workplace anti-discrimination protections. So Arielle, what’s this new law all about?

Arielle Kobetz: Where to begin? Most significantly, the new law lowers the burden on plaintiffs seeking to prove claims of workplace harassment under the State Human Rights Law and also broadens existing limitations on nondisclosure
agreements and mandatory arbitration clauses. In addition to also expanding coverage under the State Human Rights Law, the new law also extends the statute of limitations so that effective August 12, 2020, individuals will have three years to report claims of sexual harassment to the state Division of Human Rights rather than the current one-year limitation on reporting.

Evandro Gigante: Let’s break that down. So currently under the New York State Human Rights Law, which is the same under the federal antidiscrimination law, someone bringing you a claim of harassment has to show that the harassment was “severe and pervasive” in order to succeed on their claim. What’s different now?

Arielle Kobetz: The newly passed bill would eliminate the severe and pervasive standard under the state law. Now, employees can base their claims on an allegation that they were subjected to inferior terms, conditions or privileges of employment because of their membership in one or more of the protected classes under the state law.

Evandro Gigante: So that means in essence an employee can make a claim of harassment based just on the notion that they were treated less well than others because of some protected category.

Arielle Kobetz: That’s exactly right. Also, employees who make such claims don’t have to identify someone outside of their protected category who was treated more favorably than them in order to succeed on their claim.

Evandro Gigante: So you’ve told us about the burdens on an employee to make a claim of harassment. Are there any changes to the burden that an employer would have to make a defense?

Arielle Kobetz: Yes, there are two changes when it comes to employer defenses to be aware of, both of which align the state law to existing standards under the New York City Human Rights Law. So first the law eliminates the so-called to claims under the state’s Human Rights Law. This is a defense that employers were able to raise when an employee unreasonably failed to take advantage of the employer’s internal complaint mechanisms. Now while this defense will still be available to federal discrimination claims, employers will not be able to raise this defense as to the New York State Human Rights Law claims, even if employees asserting these claims failed to follow their employer’s policy for complaining.

As a practical matter, this is really only a game changer though for employers who are in New York State but operate outside of New York City since this has been a standard under the city law for quite some time. Now the other change is that the law entitles employers to raise an affirmative defense to harassment claims where the alleged harassing conduct does not rise above the level of what a reasonable person in the same protected class would consider a petty slight or trivial inconvenience.

Evandro Gigante: So you mention that the law will expand a limitations on nondisclosure provisions. As those of you listening may recall, since July of 2018, employers have been prohibited from including confidentiality clauses pertaining to claims of sexual harassment unless that confidentiality clause was the preference of
the complainant, and there was a process — and there is a process — that employers and employees had to follow in order to basically memorialize that preference which required a 21-day waiting period to consider the confidentiality provision. So Arielle, what’s new with regard to the new statute?

Arielle Kobetz: Effectively all that the amendments do here are to extend the same requirements in place for sexual harassment claims to claims involving any form of discrimination that’s unlawful under the state law.

Evandro Gigante: So, in addition, I’d like to add that any agreement that is entered into after January 1, 2020, that is under the new statute that prevents one party from disclosing the facts underlying some future claim of discrimination would be unenforceable unless that agreement now notifies the employee that he or she is not prohibited from speaking with law enforcement, with an administrative agency enforcing the anti-discrimination laws, or with an attorney that they retain. So in effect this means that any arbitration agreement that covers claims of discrimination and includes a confidentiality clause has to inform employees that notwithstanding that confidentiality clause they can speak with law enforcement, an agency, or an attorney about their claims. Now, you mentioned that the law also expands recently enacted prohibitions on mandatory arbitration of sexual harassment claims. Can you tell us a bit about that?

Arielle Kobetz: Well, many commentators noted after the enactment of the existing restrictions on mandatory arbitration that such limitations would likely be preempted by the Federal Arbitration Act (or the FAA). Essentially, what this means is that these restrictions would actually be unenforceable under the FAA which favors arbitration. In fact, a recent federal court here in New York City held that the prohibition on mandatory arbitration of sexual harassment claims is trumped by the FAA. So it seems likely that this would similarly apply to New York State’s latest attempts to restrict mandatory arbitration of discrimination claims generally.

Evandro Gigante: Now when does all this take effect?

Arielle Kobetz: All of these changes take effect on October 11, 2019, with the exception of the provision you noted about January 1, 2020, in terms of preventing the future disclosure of facts underlying a claim of discrimination.

Evandro Gigante: So, with that in mind, is there anything that employers should be doing now?

Arielle Kobetz: There are a few things. The statute doesn’t expressly require employers to update their policies to reflect these changes, but it would behoove employers to do so such that everyone in the workplace is aware of and understands the individuals and conduct covered by the company’s anti-harassment policy. Importantly, there are some updated notice requirements that are in effect immediately. New York employers will be required to provide employees both at the time of hire and at every annual sexual harassment prevention training, a notice that contains their sexual harassment prevention policy as well as the information presented at the training program. Now best practices would be to include your policy in your employee handbook, which should be distributed to all employees upon hire.
The policy should then be redistributed at every training session as well. As a reminder, New York State’s training deadline is coming up October 9th this year. The second part of their requirement though is a bit more tricky in terms of the information provided at the training program. It’s not really clear what this means. Now, barring future guidance from the state, best practice would be to provide the pdfs of any training slides as this would likely be sufficient. Again, this may not be true in every instance, so it would be best to check with your counsel at that point.

**Evandro Gigante:** And finally, it’s worth noting that effective as of February 2020, the covered employers under the State Human Rights Law will expand. So previously it had been the case that the law only applied to employers with four or more employees, except with regard to claims involving sexual harassment which replied to employers of all sizes. Now the law is changing so that all employers within the state are included regardless of size as to any claim of discrimination whatsoever. So, with that, thank you for joining us on The Proskauer Brief today.

**Podcast:**

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