New Jersey to Consider Mandatory Anti-Harassment Training and Other Significant Expansions of the NJ Law Against Discrimination

Article By
Evandro C Gigante
Laura M. Fant
Proskauer Rose LLP
Law and the Workplace

- Labor & Employment
- New Jersey

Monday, February 24, 2020

New Jersey Governor Phil Murphy has unveiled a sweeping legislative proposal regarding harassment in the workplace, as well as in housing, public accommodations, and business relationships. The proposal would amend the NJ Law Against Discrimination (“NJLAD”) in numerous significant ways.

The proposed legislation to a large extent mirrors that which has been introduced in several other states, including New York, as part of a nationwide push to respond to the increased focus on preventing sexual and other forms of harassment in the workplace. However, the proposed NJ legislation aims to go even further than other current laws in a number of different respects.

Among other things, the proposed NJ legislation would:

- codify a definition of “hostile environment harassment” for purposes of claims brought under the NJLAD, as well as a standard for employer liability for hostile environment harassment engaged in by employees or non-employees;
- require employers to adopt and disseminate a written non-discrimination and anti-harassment policy;
- require employers to conduct biennial non-discrimination and anti-harassment training for all employees;
• create reporting and recordkeeping requirements for certain employers with regard to internal complaints of discrimination and harassment;
• extend the statute of limitations for filing complaints and suits regarding discrimination and harassment under the NJLAD;
• include both paid and unpaid interns within the definition of a covered employee under the NJLAD; and
• expand protections for domestic employees.

Definition of “Hostile Environment Harassment”

The proposed legislation would codify the definition of “hostile environment harassment” for purposes of the NJLAD as requiring a complainant to “show conduct that occurred because of sex or any other characteristic protected under [the NJLAD], which a reasonable person in the complainant’s protected class would find to be sufficiently severe or pervasive so as to alter the conditions of employment and create an intimidating, hostile, or offensive work environment.”

The proposed legislation would further establish standards to be considered in determining whether unlawful hostile environment harassment has occurred, including that:

• the determination of whether harassing conduct was sufficiently severe or pervasive would be based upon the totality of the circumstances considering “the cumulative effect of all incidents of harassing conduct . . . as a whole rather than considering individual incidents in isolation, provided, however, that a single incident of harassing conduct may be sufficiently severe to create a triable issue of fact regarding the existence of an intimidating, hostile, or offensive work environment”;
• such determination also would take into account whether the conduct is sufficiently severe or pervasive from both an objective and a subjective perspective;
• the complainant’s “knowledge of harassment directed to others may be relevant to evaluating whether a hostile work environment exists, whether or not the complainant witnessed the harassing conduct”;
• harassing conduct would not require physical contact to qualify as severe or pervasive; and
• it would not be necessary for a complainant to demonstrate loss of tangible job benefits to establish a violation, nor would it be necessary to prove that the complainant’s “tangible productivity declined as a result of the harassing conduct.”

Employer Standard of Liability

The proposed legislation would codify that an employer would be liable under the NJLAD for unlawful harassment engaged in by either employees or non-employees (including vendors, suppliers, customers, clients, and patrons) if “the entity, or its agents or supervisors, knew or should have known of the harassing conduct and failed to take appropriate preventive or corrective action.” However, for cases involving the acts of non-employees, “consideration shall be given to the extent of the entity’s control and any other responsibility that the entity may have with
Mandatory Non-Discrimination and Anti-Harassment Policy

Within one year of enactment of the proposed legislation, employers would be required to adopt a written policy addressing unlawful discrimination and harassment on the basis of all protected categories under the NJLAD and “applicable to all employees in their interactions with each other and with vendors, suppliers, customers, clients, and patrons.” Such policy would be required to include, at a minimum:

- A statement that unlawful discrimination or harassment in the workplace will not be tolerated and is considered a form of employee misconduct, and that sanctions will be enforced against individuals engaging in such conduct, as well as against supervisory employees who knowingly allow such behavior to continue;
- Definitions of unlawful discrimination and harassment and examples of discriminatory and harassing conduct prohibited by the policy;
- A description of the process for filing internal complaints about such discrimination or harassment and contact information for making such complaints;
- Instructions as to how to contact the Division to file a complaint of, or seek advice regarding, unlawful discrimination or harassment;
- The statute of limitations periods applicable to filing a claim of unlawful discrimination and harassment under the NJLAD;
- A prohibition on retaliation against those who disclose, report, participate in an investigation of, or otherwise challenge such discrimination or harassment and examples of retaliatory conduct prohibited by the policy;
- A description of potential consequences for violating the policy; and
- A statement of the employer’s commitment to conducting prompt, thorough, and impartial investigations of complaints of discrimination or harassment.

Employers would be required to distribute the policy to employees: (1) at the start of employment; (2) at least annually thereafter; (3) when an employee makes an internal complaint about a violation of the policy; (4) when an employee is interviewed in connection with any complaint about a violation of the policy; and/or (5) whenever any updates to the policy are made. Employers also would be required to review the policy at least annually to ensure that it continues to comply with the NJLAD and other applicable laws and regulations.

The NJ Division on Civil Rights (the “Division”) would be tasked with creating a model policy that satisfies the above requirements to be made available to employers in English and other languages. Employers with fewer than 50 employees would be able to satisfy their obligations by adopting the model policy and adding the contact information of the person or persons to whom internal complaints should be made. Such smaller employers could also adopt their own policy, so long as it is otherwise compliant with the subject matter requirements.

Employers with 50 or more employees would not be able to use the model policy as written to satisfy their policy obligations, but rather would be required to
“customize their policy to their specific workplace and industry” by, at a minimum, including: (i) multiple channels through which an employee may report discrimination or harassment; and (ii) a general description of the process by which the employer will conduct prompt, thorough, and impartial investigations and respond to complaints regarding such discrimination or harassment. Such employers also would be required to post a copy of their policy “in a prominent location on the employer’s website” (if they have one). In addition to the distribution requirements noted above, such larger employers would also be required to provide a copy of the policy to employees upon promotion. Such employers also would be required to translate their policy into any language identified by an employee as their primary language, if such employee does not speak English as their primary language and has a limited ability or no ability to read, speak, write, or understand English.

No private right of action would be available based on the failure of an employer to comply with the policy obligations. However, the state attorney general or the Director of the Division on Civil Rights (the “Director”) would have the authority to enforce violations of this section and pursue civil penalties or other remedies available under the NJLAD for same.

**Mandatory Non-Discrimination and Anti-Harassment Training**

Beginning one year from the date of enactment of the proposed legislation, all New Jersey employers would be required to provide interactive training to employees regarding the prevention of unlawful discrimination and harassment in the workplace.

For **non-supervisory employees**, such training would be required within 90 days of initial hire and at least once every two years. The training would be required to address all of the information required to be included in the employer’s written non-discrimination and anti-harassment policy (as discussed above), as well as information concerning bystander intervention.

For **supervisory employees**, training would be required at least once every two years and within 90 days of either initial hire or promotion. In addition to the topics requires to be covered in the non-supervisory employee training, supervisor training would need to address:

- the specific responsibilities of a supervisor regarding the prevention of discrimination and harassment and the prohibitions against retaliation; and
- measures and corrective actions supervisors may take to appropriately address complaints and instances of discrimination, harassment, and retaliation.

All employers would be required to review their trainings at least annually to ensure continued compliance with the law, and would be required to keep and maintain records of employees’ completion of the trainings for at least three years.

The Division would be tasked with issuing model supervisory and non-supervisory training modules. However, only employers with **fewer than 50 employees** could choose to utilize these modules to satisfy their training requirements. Employers with **50 or more employees** would instead be required to provide “live, in-person setting where participants can ask questions.” Such larger employers also would be
required to provide interpretation at the trainings for any employee who does not speak English as their primary language and has a limited ability or no ability to read, speak, write, or understand English.

Similar to the written policy requirement, no private right of action would be available for the failure of an employer to comply with the training obligations. However, the state attorney general or the Director would have the authority to enforce violations.

**Mandatory Reporting of Discrimination, Harassment, and Retaliation Complaints**

Employers with 50 or more employees would be required to collect and annually report to the Division certain data on complaints received regarding unlawful workplace discrimination, harassment and retaliation, including the total number of complaints filed, the number of complaints found to be substantiated and unsubstantiated, and the number of complaints still pending resolution. The data would be required to be broken down by how many such complaints involved allegations of unlawful discrimination, harassment, or retaliation, as well as by the protected class or classes that the complainant alleged. Covered employers also would be required to maintain records of internal complaints for up to three years and make such records available to the Division upon request.

**Expanded Statute of Limitations for Discrimination and Harassment Claims**

The proposed legislation would extend the statute of limitations for individuals to file suit for claims of discrimination and harassment under the NJLAD from the current two years to three years. It would also provide an additional six months for individuals to file a complaint of discrimination or harassment with the Division, extending the current 180 day deadline to 1 year from the date of the alleged misconduct.

**Expanded Protections for Interns and Domestic Employees**

The proposed legislation would expand the definition of a covered employee under the NJLAD to include “all individuals employed by an employer, without regard to whether any such individual, including an intern, performs such services in exchange for a salary or wage.” Thus, both paid and unpaid interns would be afforded the protections of the law, and also would need to be counted as employees for purposes of determining whether an employer crosses the 50 employee threshold for the policy and training requirements discussed above.

The proposed legislation also would expand the definition of a covered employer to include persons who employ domestic workers, as well as “any person . . . who is 18 years of age or older and resides in a private residence in which an individual performs domestic work.” Employers of domestic workers would be subject to the policy and training obligations similar to those of other employers as discussed above. The legislation also would make it a violation for an employer to “allow any
family member or member of their household, regardless of age, to engage in unlawful harassment” or “to keep or request to keep permanent or continuing possession of the employee’s passport or other identifying documents.” The legislation further would expand the existing limitations on non-disclosure agreements relating to claims of discrimination, harassment or retaliation to agreements involving domestic employees.

*          *          *

The proposed legislation is expected to be introduced shortly before the NJ state Senate by Senate Majority Leader Loretta Weinberg. We will, of course, continue to report on further developments regarding this proposed legislation as they arise.

© 2020 Proskauer Rose LLP.

Source URL: https://www.natlawreview.com/article/new-jersey-to-consider-mandatory-anti-harassment-training-and-other-significant