VOLUME 73 ◆ NUMBER 10

Employee Benefit Plan Review

New York State and City Pass Sweeping Changes to Employment Legislation: What Employers Need to Know

Nicolle L. Jacoby, Samantha Rosa, and Christine Isaacs

At the culmination of the 2019-2020 legislative session, the New York State Senate and Assembly passed Senate Bill S6577, also known as New York State Assembly Bill A08421, a comprehensive bill aimed at increasing protections for protected classes and special protections for employees in the face of growing concerns of harassment and discrimination in the #MeToo era. Vital to this bill are the protections against all forms of discriminatory harassment, not just sexual harassment. Additional key aspects of the legislation include, but are not limited to: the elimination of the "severe or pervasive" standard applicable to claims of hostile work environment harassment; the evisceration of the *Faragher/Ellerth* defense to the extent that an employee's failure to avail him or herself of an employer's internal complaint procedures will not enable an employer to avoid liability; the extension of the Human Rights Law to cover all employers of the state; allowance for punitive damages and attorney's fees in employment discrimination cases; and the imposition of severe limitations on the use of non-disclosure agreements designed to prevent an employee's disclosure of the underlying facts and circumstances surrounding their discrimination case to certain parties.

Additionally, New York State has passed sweeping protections including prohibiting discrimination based on natural hair styles and textures; prohibiting discrimination based on religious attire, clothing, or facial hair; enacting the Gender Expression Non-Discrimination Act ("GENDA") which explicitly added "gender identity or expression" as a protected class; prohibiting employers from seeking salary history from applicants; and expanding equal pay protections to all protected classes. The New York City Commission on Human Rights has also adopted new rules under the New York City Human Rights Law ("NYCHRL") which significantly broaden protections against workplace discrimination based on an individual's gender, gender identity, and gender expression, and has issued guidance on discrimination on the basis of immigration status and national origin. Finally, the Stop Hacks and Improve Electronic Data Security Act ("SHIELD Act") imposes additional requirements for all employers and others who collect, manage and store computerized data, including the private information of New York residents.

Developments With Respect to Combating Sexual Harassment and other Workplace Discrimination

As part of the sweeping changes to the employment law landscape through New York State Assembly Bill A08421, the New York State Human Rights Law ("NYSHRL") has drastically expanded employee protections against harassment and discrimination in the workplace. Beginning on February 8, 2020, all protections afforded to employees under the NYSHRL will

be expanded to cover non-employees, including independent contractors, consultants, vendors, and other service providers. The NYSHRL will also soon be applied to all New York employers, no matter the size of the company or the number of employees that the company employs. The new legislation also states that the NYSHRL should be construed liberally, effectively expanding the law even further.

Lower Standard for Proving Harassment

As of October 2019, New York State Assembly Bill A08421 drastically lowered the standard for proving harassment, no longer requiring those alleging harassment to demonstrate that such conduct was "severe or pervasive" as is the case under federal law. That standard recognized that where workplace harassment was so "severe or pervasive" as to "alter the conditions of employment and create an abusive working environment," such conduct violates Title VII. Under this lower standard, harassment is considered to be any activity or conduct that "subjects an individual to inferior terms, conditions or privileges of employment because of the individual's membership" in any protected class, such as race, color, national origin, etc. Now, an employee attempting to prove harassment need only show that the conduct was more than a "petty slight or trivial inconvenience," which generally requires showing that he or she was treated "less well" than other employees based on that employee's membership in a protected class. Thus, an employer can assert an affirmative defense that the harassing conduct does not rise above the level of what a reasonable person would consider petty slights or trivial inconveniences. This change also now aligns the state level burden of proof with that of the NYCHRL.

Faragher-Ellerth Affirmative Defense Eliminated

Also implemented in October 2019 through New York State Assembly Bill A08421 was a change to employment law in New York that has a significant and profound impact on an employer's ability to proffer defenses to allegations of harassment under the state Human Rights Law. Specifically, the new legislation has eliminated the *Faragher-Ellerth* affirmative defense, which allowed employers to avoid liability where a supervisor's sexually harassing conduct did not result in a tangible job detriment when the employer proved both that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior"[1] and that the plaintiff-employee failed to take advantage of the employer's workplace complaint reporting procedures. Now, whether or not the alleged victim used internal complaint mechanisms to raise concerns of harassment is irrelevant for purposes of assessing employer liability under the NYSHRL. This change is designed to address the concern that victims of harassment may not exercise the company's complaint procedure out of fear of potential retaliation. However, it is also important to note that this change has not completely eradicated an employer's right to defend itself from claims of harassment, as other affirmative defenses still remain available under state law.

Statute of Limitations Extended

Under New York State Assembly Bill A08421, the statute of limitations for filing administrative claims of sexual harassment in the New York State Division of Human Rights will be extended to three years, effective in August 2020. This change only impacts the statute of limitations for sexual harassment claims, so other harassment-based claims including race or national origin are unaffected.

Recovery of Punitive Damages and Attorney's Fees

New York State Assembly Bill A08421 has also overhauled the available damages for a prevailing plaintiff, now permitting any plaintiff who succeeds on a harassment or discrimination claim to seek, and be awarded, attorney's fees. If the employer is the prevailing party, he or she is also free to recoup attorney's fees so long as the employer sufficiently establishes that the plaintiff's action was frivolous. Previously, the awarding of attorney's fees was discretionary, so this compulsory attorney's fees mandate is a significant shift.

Further, under the new legislation, plaintiffs are free to seek punitive damages for their claims of discrimination, harassment, or retaliation in violation of the NYSHRL. This is a significant change from the compensatory damages-only approach that was previously available to remedy such violations.

Mandatory Arbitration Prohibited

Effective last year through Senate Bill 7507C, New York State employers were prohibited from requiring employees to sign agreements, such as employment contracts, that require mandatory and binding arbitration of claims related to sexual harassment. This new law is codified in Section 7515 of the Civil Practice Law & Rules of the State of New York. However, as of October 2019, this prohibition of mandatory arbitration provisions has been expanded by New York State Assembly Bill A08421 to cover all claims of discrimination and harassment, not just sexual harassment. Thus, an employer cannot require that an employee arbitrate his claim of race discrimination either. However, this issue remains open and contentious as to whether this law is preempted by the Federal Arbitration Act ("FAA").

Restricted Use of Non-Disclosure Provisions

In Senate Bill 7507C, New York State prohibited employers from including non-disclosure provisions ("NDAs") in their settlement agreements that have the purpose of preventing the employee from disclosing the "underlying facts and circumstances" of his or her sexual harassment claims. This prohibition is codified in CPLR § 5003-b. However, where the employee chooses to voluntarily include a non-disclosure provision in the agreement, then such inclusion is permissible, provided certain stringent procedural safeguards are followed. The Budget Bill sets forth a process akin to that under the federal Age Discrimination in Employment Act for the parties to agree to such a nondisclosure provision. The employee must be given 21 days to consider the provision, after which time the provision is memorialized in an agreement signed by all the parties. The employee then has seven days after execution during which he or she can revoke the agreement. Although not clearly addressed, it does not appear that the 21 day provision is waivable by the employee.

The new wave of legislation, passed in conjunction with the New York State Assembly Bill A08421 on October 11, 2019, has expanded this restriction on employers' rights to maintain confidentiality by extending these non-disclosure restrictions to all discrimination claims, not just sexual harassment claims. Further, effective January 1, 2020, any agreement between an employer and employee that includes a non-disclosure provision at the employee's request must include a qualifier that notifies the employee that the provision does not prohibit him or her from speaking with law enforcement, the Equal Employment Opportunity Commission ("EEOC"), the state Division of Human Rights, a local Commission on Human Rights, or an attorney retained by the employee. Without this qualifier, the agreement is void.

Notice Provisions and Training

Additionally under Section 201-g of the Labor Law, adopted last year in conjunction with Senate Bill 7507C, every employer in New York is now required to provide all employees with sexual harassment prevention training, regardless of whether the employee works part-time or full-time, or whether the employee simply works for the employer for just one day in New York. New York State requires training to be "interactive," meaning that it must include as many of the following elements as possible:

- Be web-based, with questions asked of employees as part of the program;
- Accommodate questions asked by employees;
- Include a live trainer made available during the session to answer questions; and
- Require feedback from employees about the training and the materials presented.

An employer has the option of either adopting the model training developed by the Division of Human Rights, or developing its own program that meets the following minimum standards established by the Division:

- The training must be interactive;
- It must include an explanation of sexual harassment consistent with guidance issued by the Department of Labor in consultation with the Division of Human Rights;
- It must include examples of conduct that would constitute unlawful sexual harassment;
- The training must include information concerning the federal and state statutory provisions concerning sexual harassment and remedies available to victims of sexual harassment;
- It must include information concerning employees' rights of redress and all available fora for adjudicating complaints; and
- It must include information addressing conduct by supervisors and any additional responsibilities for such supervisors.

All employees had to complete the training by October 9, 2019, renewed on an annual basis, while newly hired employees must complete their training as soon as reasonably possible, again renewing on an annual basis.

At the time of hire, employers must also now provide employees with a copy of the sexual harassment policy for the company. Pursuant to Section 201-g of the New York Labor Law, also adopted last year in conjunction with Senate Bill 7507C, every employer in the State of New York is required to adopt a sexual harassment prevention policy. The policy must be provided in writing to each employee and at a minimum must:

- Prohibit sexual harassment consistent with guidance issued by the Department of Labor in consultation with the Division of Human Rights;
- Provide examples of prohibited conduct that would constitute unlawful sexual harassment;
- Include information concerning the federal and state statutory provisions concerning sexual harassment, remedies available to victims of sexual harassment, and a statement that there may be applicable local laws;
- Include a complaint form;
- Include a procedure for the timely and confidential investigation of complaints that ensures due process for all parties;
- Inform employees of their rights of redress and all available fora for adjudicating sexual

harassment complaints administratively and judicially;
- Clearly state that sexual harassment is considered a form of employee misconduct and that sanctions will be enforced against individuals engaging in sexual harassment and against supervisory and managerial personnel who knowingly allow such behavior to continue; and
- Clearly state that retaliation against individuals who complain about sexual harassment or who testify or assist in any investigation or proceeding involving sexual harassment is unlawful.

Other Forms of Workplace Discrimination are Now also Expressly Prohibited

Discrimination Against Natural Hair or Hairstyles Is Now Expressly Prohibited

New York State expressly bans the discrimination against hair styles or textures that are associated with race. On July 12, 2019, Governor Cuomo signed into law S.6209A/A.7797A which amends Section 292 of Human Rights Law and Section 11 of the Dignity for All Students Act making it clear that discrimination based on race includes hairstyles and textures associated with race.

Discrimination Based on Religious Attire, Clothing, or Facial Hair Prohibited

New York State has adopted a new law that prohibits employment discrimination that is based on religious attire, clothing, or facial hair. This legislation, S. 4037/A. 4204, was signed by Governor Cuomo on August 9, 2019, and went into effect on October 8, 2019. As a result, New York State Human Rights Law is amended so that employers cannot refuse to hire, retain, promote, or take any discriminatory action against an individual for wearing attire or facial hair in accordance with their religion. Employers are prohibited from treating both job applicants and employees differently because of that individual's religious beliefs and employers must reasonably accommodate an employee's religious practices.

Additional Protections Against Workplace Discrimination Based on an Individual's Gender, Including Gender Identity or Gender Expression, Have Been Adopted

New York State has enacted the Gender Expression Non-Discrimination Act ("GENDA"), which went into effect on February 25, 2019 which explicitly added "gender identity or expression" as a protected class. GENDA amends Section 296(1) and adds subsection 35 to Section 292 of New York's Executive Law.

The New York City Commission on Human Rights adopted new rules under New York City Human Rights Law, which significantly broadened protections against workplace discrimination based on an individual's gender, gender identity, and gender expression. Specifically, the Commission has adopted new rules that define various terms related to gender identity and expression.

Some examples of prohibited actions include:

- The deliberate refusal to use an individual's self-identified name, pronoun, or title;
- Denying an individual's use of single gender facilities or participation in single-gender programs consistent with their gender identity;
- Imposing different dress or grooming standards based on gender;
- Failing to provide equal employee benefits based on gender; and
- Refusing a request for accommodation based on gender.

New York City Commission on Human Rights Issues Guidance on Discrimination on the Basis of Immigration Status and National Origin

In September 2019, the New York City Commission on Human Rights issued guidance on discrimination on the basis of immigration status and national origin. This guidance applies to employers among others. The guidance states, among other things, that:

- Employers may not ask applicants questions related to work authorization in an inconsistent manner based on actual or perceived immigration status or national origin;
- Discrimination in favor of U.S. citizens over other work-authorized individuals is prohibited outside of the federal law limited exception; an employer must not demand specific documents beyond what is required to establish work authorization under federal law;
- Retaliation is prohibited if an individual opposes discrimination based on his/her national origin or perceived immigration status;
- Undocumented employees are covered by the NYCHRL; and
- Threatening investigations by U.S. Immigration and Customs Enforcement ("ICE") for harassing purposes violates the NYCHRL.

Equal Pay Protections are Expanded to All Protected Classes

Wage Differentials Based on Protected Class Status Are Prohibited

The new law, S. 5248-B/A. 8093, prohibits wage differentials based on protected class status. The new law, which was signed by Governor Cuomo, amends the Labor Law §§194 & 197. It expands existing law that protects

against gender-based pay inequity by requiring equal pay for "substantially similar work when viewed as a composite of skill, effort, and responsibility, and performed under substantially similar working conditions." Additionally, it prohibits pay differentials based on an individual's status within one or more protected class or classes "including age, race, creed, color, national origin, sexual orientation, gender identity and expression, military status, disability, predisposing genetic characteristics, familial status, marital status, domestic violence victim status, and other employees and interns protected under the New York State Human Rights Law." Pay differentials are permitted when they are based on a seniority or a merit system which must be job-related and due to business necessity.

Adoption of State-Wide Salary History Inquiry Ban

New York State law, A. 5308-B/S. 6549 amending Labor Law §194-a, prohibits employers from seeking salary history from applicants. This new law prevents employers from orally or in writing requesting or relying on the wage/salary history of an applicant in determining whether to offer employment or the amount of salary to be offered. An applicant may voluntarily provide this information. However, an employer cannot refuse to consider the applicant or retaliate against an applicant who refuses to divulge his/her salary history.

Provision of Pay Data from Employers to EEOC

In April 2019, the EEOC announced that it would collect employee pay data in the form of reports of the amount of hours worked and pay received by workers of different sexes, races, and ethnicities for the first time. Covered employers were to submit that data later in 2019. However, in September 2019, the Commission reversed course, announcing that it will not be collecting the controversial "EEO-1 Component 2 data" for future EEO-1 filing cycles. The EEOC cited the burden to collect the data being higher than anticipated. On October 30, 2019, a federal judge in Washington, D.C., rejected the EEOC's claim that its collection of pay data broken down by sex and race is complete, and said that the agency must continue its efforts for at least three more months until January 2020.

Other Developments

Another new development under the NYCHRL addresses requests for accommodation. In January 2018, an amendment to the New York City Administrative Code Section 8-102, Local Law No. 59, went into effect requiring employers in New York City to engage in a good faith and cooperative dialogue when evaluating an employee's request for accommodation in the workplace. The employer must also document the results of that conversation in writing. Further, on July 14, 2019, New York City again codified additional protections for those seeking reasonable workplace accommodations in Subdivision 7 of Section 8-107, Local Law 129. Through this amendment, any request for reasonable accommodations will be considered a protected activity for purposes of retaliation under the NYCHRL, effective November 11, 2019.

Additionally, there has been movement toward addressing data security through the Stop Hacks and Improve Electronic Data Security Act ("SHIELD Act"), signed on July 26, 2019, relating to collecting, managing, and storing computerized data, including the private information of New York residents. This Act requires businesses to implement safeguards for the private information of New York residents and broadens the security breach notification requirements as well. Private information under the Act includes social security numbers, driver's license numbers, credit card information, financial account numbers, biometric information, and usernames and passwords that permit access to online accounts.

The SHIELD Act does not mandate specific protocols for businesses to employ, but instead provides that a business will "be deemed to be in compliance with" this standard if it implements a "data security program" that includes all of the elements enumerated in the SHIELD Act, such as:

- Designating an employee or employees to coordinate the data security program;
- Training and managing employees in the security program practices and procedures;
- Assessing internal and external risks and implementing controls to reduce those risks;
- Vetting service providers and binding them contractually to safeguard private information; and
- Securely destroying private information within a reasonable amount of time after it is no longer needed for business purposes. While the Act generally went into effect in October 2019, the data protection program must be implemented no later than March 21, 2020.

Additionally, the SHIELD Act imposes hefty civil penalties for knowingly or recklessly violating its breach notification provisions. A court may award an amount that is the greater of $5,000 or up to $20 per instance of failed notification up to $250,000.

Takeaways For Employers

In light of constantly shifting developments at the city and state level governing employer's responsibilities in the workplace, employers should proactively seek to gain an understanding of the complex requirements and prohibitions they face. Employers should, in conjunction with employment counsel,

carefully review their employee handbooks, policies, and training programs to ensure compliance with updated requirements and best practices. Sexual harassment policies should be a particular focus of attention, and in light of recent severe restrictions on non-disclosure agreements in this area and the media's focus on the use of non-disclosure agreements generally, employers should review any form employment-related agreements and revise as necessary to properly address any provisions governing the compelled confidentiality of sexual harassment claims. Employers should also carefully scrutinize policies and employee contracts regarding arbitration to ensure compliance with evolving legal standards. Finally, employers should know and understand the laws that apply to them with respect to data security and privacy, including the requirements of the SHIELD Act.

Note

1. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *Burlington Indus., Inc. v Ellerth*, 524 U.S. 742, 765 (1998).

Nicolle L. Jacoby is a partner at Dechert LLP and co-head of the firm's Labor and Employment practice, focusing on employment and labor disputes. Samantha Rosa is an associate at the firm focusing her practice on white collar defense, securities litigation, and related commercial litigation. Christine Isaacs is a litigation associate at the firm. The authors may be reached at *nicolle.jacoby@dechert.com*, *samantha.rosa@dechert.com*, and *christine.isaacs@dechert.com*, respectively.