KAUFMAN | DOLOWICH

Mansfield Rule Certified 2022-2023

End of the Summer Recap: Mandatory Sexual Harassment Training, Expansive Changes to the New York State Human Rights Law and New York City Human Rights Law, New Measures to Secure Payment of Earned Wages, and More Changes Facing New York Employers.

By Keith Gutstein, co-managing partner of the Long Island office of Kaufman Dolowich & Voluck, LLP and co-chair of the KD Labor & Employment Law practice group, Monique Robotham, and Jaime Sanchez, all are attorneys with KD in Woodbury, Long Island.

As the summer ends and everyone re-focuses on the numerous employment law changes that face New York employers, Kaufman Dolowich & Voluck ("KD") has prepared an "End of Summer Recap," summarizing some of the most significant recent changes to New York employment law.

Sexual Harassment Training is Mandatory and the Deadline is Around the Corner

The October 9, 2019 deadline for employers to provide the mandatory sexual harassment training is rapidly approaching. Every employer in New York State is required to provide its employees with sexual harassment prevention training by that date, and on an annual basis thereafter. Notably, the training must be interactive and include the following:

(1) an explanation of sexual harassment consistent with guidance issued by the Department of Labor in consultation with the Division of Human Rights;

(2) examples of conduct that would constitute unlawful sexual harassment;

(3) information concerning the federal and state statutory provisions concerning sexual harassment and remedies available to victims of sexual harassment;

(4) information concerning employees' rights of redress and all available forums for adjudicating complaints; and

(5) information addressing conduct by supervisors and any additional responsibilities for such supervisors.

Should you need any assistance with providing compliant training, KD can help.

Sweeping Amendments to the New York State Human Rights Law (NYSHRL)

On August 12, 2019, Governor Cuomo signed into law expansive amendments to the New York State Human Rights Law ("NYSHRL"). The new law not only lessens the standard for proving discrimination and harassment, it also addresses other changes of note:

1. **Lower Standard for Proving Harassment: The amendments to the NYSHRL eliminate the previous "severe or pervasive" standard and broaden the type of conduct that may be found to constitute actionable harassment. Under the new standard, an employee may prove unlawful harassment by showing that he or she was subject to "inferior terms, conditions or privileges of employment" because of his or her membership in a protected class. This change now makes it possible for employees to seek redress for conduct that was previously deemed insufficient to constitute harassment. This change to the law should only further emphasize the importance of effective company training so employers can avoid claims of harassment or discrimination. This provision becomes effective on October 11, 2019, and we expect that the number of harassment claims will increase.**
2. **Employer Coverage: The NYSHRL will now apply to all NYS employers, regardless of their size. The law previously covered only businesses with four or more employees. This change will go into effect on February 8, 2020.**
3. **Expanded Protections to Non-Employees: Non-employees, such as independent contractors, vendors, or consultants, may now recover against employers for all types of discrimination in an employer's workplace where the employer knew or should have known the non-employee was subjected to unlawful discrimination and failed to take corrective action. This change will go into effect on October 11, 2019.**
4. **Extended Statute of Limitations: The statute of limitations to file a sexual harassment complaint with the New York State Division of Human Rights is now three years instead of one year.**
5. **Mandatory Attorneys' Fees Award: Courts and the New York State Division of Human Rights are now required to award attorneys' fees to all prevailing claimants in employment discrimination disputes against employers. Attorneys' fees will only be granted to prevailing employers upon a showing that the action or proceeding brought against them was frivolous. This change will go into effect on October 11, 2019.**
6. **Discrimination on the Basis of Hair is Prohibited: On July 12, 2019, Governor Andrew Cuomo signed a bill amending state law to ban race discrimination on the basis of hair or hairstyle and other traits historically associated with race. The ban is now in effect, therefore company policy addressing employee hairstyles may need to be reviewed and revised.**
7. **Mandatory Arbitration Clauses Prohibited: While the law has previously prohibited mandatory arbitration clauses only for sexual harassment claims, under the new state law, mandatory arbitration clauses are prohibited for all discrimination claims. This means that employees claiming harassment or discrimination cannot be compelled to arbitrate such claims, even if they previously signed an arbitration agreement.**
8. **Limitation on Non-Disclosure/Confidentiality Provisions: Employers may not include broad non-disclosure or confidentiality provisions in Settlement or Separation Agreements resolving** *any discrimination claim unless it is the employee's preference. The law also requires that (1) the agreement be provided to the employee in plain English and in his or her primary language; (2) the employee must be given 21 days to consider the agreement, and if after the 21 days the employee still prefers to settle, such preference must be included in the agreement and signed by all parties; and (3) the employee must be given seven days after execution of such agreement to revoke the agreement. In addition, any term or condition in a non-disclosure or settlement agreement is void if it prohibits the employee from initiating or participating in an agency investigation or disclosing facts necessary to receive public benefits. Non-disclosure or confidentiality provisions are void as to future discrimination claims unless the clause notifies the employee that he or she is not prohibited from disclosure to law enforcement, the EEOC, the Division, any local commission on human rights, or his or her attorney. All terms and conditions in a non-disclosure/confidentiality agreement must be fully compliant. These changes will go into effect on October 11, 2019.*
9. **The Distribution of Sexual Harassment Policies and Training Materials is Required: Employers are now required to provide employees, at the time of hire and during the employer's annual sexual harassment training, its sexual harassment policies and training materials. These materials must be provided to employees in English and in each employee's primary language.**

Substantive Changes to the New York City Human Rights Law (NYCHRL)

1. **Employers Are Now Required to Engage in a "Cooperative Dialogue:" New York City employers are required to engage in a "cooperative dialogue" with any employee who requests an accommodation in the workplace. The NYC law requires employers to make reasonable accommodations to employees who (1) are victims of domestic violence, sex offenses or stalking; (2) have a pregnancy, childbirth or related medical condition; (3) need accommodations based on religious needs; and (4) have disabilities.**

A cooperative dialogue requires the employer to engage in "good faith in a written or oral dialogue concerning the person's accommodation needs; potential accommodations that may address the person's accommodation needs, including alternatives to a requested accommodation; and the difficulties that such potential accommodations may pose for [the employer]." While it was always best practice to document this interactive process, the NYC statute now mandates that the "cooperative dialogue" be properly documented so to provide the individual requesting the accommodation with a final written determination identifying any accommodation granted or denied.

2. Lactation Accommodations: New York City Local Law now requires New York City employers to provide employees with lactation accommodations, including a lactation room where employees can pump/express breast milk, and reasonable time to do so. This law requires the lactation room to be in "close proximity to the work area of the employee(s) using it for the expression of breast milk," that the lactation room contain a chair and a flat surface on which to place a breast pump and other personal items, and that employers provide (a) a refrigerator suitable for breast milk storage in reasonable proximity to the employees' work area; (b) an electrical outlet in the lactation room itself; and (3) nearby access to running water. Employers are required to have a compliant written lactation policy, and to comply with the procedure set forth above.
3. Paid Family Medical Leave (PFL): In 2019, qualified employees may be eligible to take up to 10 weeks of paid leave and can receive up to 55% of their average weekly wage, up to a maximum of 55% of the statewide average weekly wage, $1,357.11. The maximum weekly benefit in 2019 is $746.41. In addition, as of February 3, 2019, employees are permitted to use paid family leave to care for family members who are preparing or recovering from organ or tissue donations. All employers in New York should ensure that their PFL policies are in order.
4. Guidance to Avoid Race Discrimination on the Basis of Hair: Earlier this year, the New York City Commission on Human Rights issued new guidance on race discrimination on the basis of hair. Under the new guidance, the Commission declared that the implementation of policies that subject individuals to disparate treatment based on their hair and/or hairstyles associated with any protected class violates the NYCHRL. To avoid violations of the NYCHRL, New York City employers should not enact policies that (1) consider hairstyles associated with any protected class under the NYCHRL messy or disorderly (2) require the alteration of hair to conform with the employer's expectations, (3) harass and/or impose unfair conditions on employees based on aspects of their appearance associated with their race and/or any other protected class, or (4) ban, limit or restrict natural hair or hairstyles associated with any particular race and/or the communities of any other protected class to promote a certain corporate image. Notably, the implementation of such policies may be used by employees as direct evidence of disparate treatment based on race and/or other relevant protected classes. Thus, employers should review their policies to ensure compliance with the law.

Significant Changes to New York State Wage and Hour Laws

1. Securing Earned Wages Against an Employer's Property: In one of the most significant pieces of legislation affecting employers this year, the New York Assembly and Senate passed the "Securing Wages Earned Against Theft" Bill (also known as the "SWEAT" Bill). The Bill, which awaits Governor Cuomo's signature, seeks to strengthen the enforcement of wage and hour laws by giving employees, the Department of Labor, and the Attorney General new abilities to file liens against an employer's real and personal property before the filing of a lawsuit. The lien amounts would be for the value of an employee's wage claim, including liquidated damages. The proposed law also streamlines the procedures allowing employees to discover the names, addresses, and value of each shareholders' interest in a corporate employer entity for purposes of holding owners personally liable. Given the broad definition of "employer" under New York Law, the SWEAT Bill presents a significant threat to the real and personal property of any individual who acts as an employer or acts, directly or indirectly, in the interest of the employer in relation to any employee.
2. Increased Potential Liability for Frequency of Pay Violations: The New York Labor Law requires all manual workers to be paid on a weekly basis. The New York Department of Labor defines manual workers as "mechanics, workingmen or laborers." This definition has been interpreted by the New York State Department of Labor to include individuals who spend more than twenty five percent of their working time engaged in physical labor. In a recent court decision by a New York Federal District court, the court found that employers may be liable to pay manual workers liquidated damages if the employee was paid bi-weekly rather than weekly. The court left open the door to a finding that an employer may be forced to pay that employee a sum equal to the portion of the employee's wages that was paid untimely as liquidated damages. In sum, though a manual worker was paid all he or she is owed, the employee may be entitled to even more money because payment was one week late. As such, to avoid liability, employers should assess which of their employees are manual workers, and whether they are paying them in

accordance with the New York Labor Law.

For more information about the new legislation, or this alert, please contact Keith Gutstein, Monique Robotham, or Jaime Sanchez, by email at KGutstein@kaufmandolowich.com, MRobotham@kaufmandolowich.com, JSanchez@kaufmandolowich.com or by phone at (516) 681-1100, or any member of Kaufman Dolowich & Voluck's Labor & Employment Law Practice Group.