

New Legislation May Open The Floodgates For More Harassment Claims Under The NYSHRL

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On June 19, 2019, the New York State Senate and Assembly passed a bill that would significantly expand the New York State Human Rights Law (the "NYSHRL"), thereby creating a seismic shift in the current law. The bill is currently awaiting Governor Andrew Cuomo's signature.

Where the NYSHRL was previously interpreted in line with federal anti-discrimination laws, this shift seemingly pushes the NYSHRL to be more in line with the more progressive New York City Human Rights Law ("NYCHRL") by minimizing the standard of proof for plaintiffs to establish harassment claims.

Specifically, the new amendments to the NYSHRL eliminate the previous standard that required an employee to prove that alleged harassment is "severe" or "pervasive." Now, employers defending a harassment claim under the NYSHRL must prove, as an affirmative defense, that the alleged conduct constituted nothing more than "petty slights" or "trivial inconveniences." This is a drastic reduction in a Plaintiff's burden.

This change will now mean more conduct, which would have previously been outside the definition of harassment under the NYSRL, will now be considered unlawful. Previously, the lesser standard was available only under the NYCHRL, which made that statute very appealing to New York City employees and plaintiff's counsel claiming harassment.

The bill also eliminates the Faragher-Ellerth defense under the NYSHRL. This affirmative defense was previously available to employers who, when faced with a harassment complaint, could avoid liability by arguing that the employee failed to follow the internal protocols set up by the employer to address complaints of harassment.

This change is even more significant as New York State only recently mandated that all employers provide sexual harassment training to their employees, and promulgate policies prohibiting sexual harassment. Thus, even though New York State now mandates that all employers have policies prohibiting sexual harassment with procedures for investigating and addressing complaints about same, and even though New York mandates that all employees receive appropriate anti-harassment training, such policies and training will no longer allow employers the ability to avoid liability for harassment when an employee fails to follow an employer's policies and protocols. As such, it is conceivable that employers may now face liability under the NYSHRL for alleged harassment that went entirely unreported by an employee.

This amendment will undoubtedly lead to more claims of workplace harassment under the NYSHRL.

Additionally, the new legislation places new burdens on employers who wish to confidentially settle discrimination claims. In order to now settle any discrimination claim with a confidentiality provision under the new law, the confidentiality provision will not be enforceable unless it also explicitly provides that the employee is not prohibited from speaking with law enforcement, the Equal Employment Opportunity Commission, the New York State Division of Human Rights ("NYSDHR"), local human rights commission, or

an attorney. Employees must also be afforded a period of twenty one days to consider if it is their “preference” to enter into a confidential settlement, and a period of seven days to revoke their acceptance of same. Previously, this particular requirement only applied to the settlement of claims involving allegations of sexual harassment.

Although Governor Cuomo has not signed the legislation yet, it is expected that he will do so promptly. Accordingly, employers should be mindful of these important changes. Employees should not only make sure they are complying with policy and training requirements, but that they are proactively working to prevent any acts of workplace harassment.

If you have questions about these developments, complying with the NYSHRL or are in need assistance in implementing the new policies, please contact one of the experienced employment attorneys at Kaufman Dolowich & Voluck.