Laws Targeting Harassment and Discrimination

Sexual Harassment Prevention

As of April 1, 2019, New York City employers with 15 or more employees were required to conduct interactive anti-sexual harassment trainings annually for all employees, including supervisory and managerial employees. Such training is required after 90 days of an employee's initial hire for employees who work more than 80 hours in a calendar year. Employers must keep a record of all trainings for three years, including a signed employee acknowledgment.

Similarly, New York State now requires that all employers regardless of size ensure that all of their employees complete sexual harassment training that meets the State's minimum standards annually. All new employees are required to complete their sexual harassment prevention training within 30 days of their start date and then once per year thereafter.

Amendments to the New York State Human Rights Law

New York State also passed legislation last year that expands the State's protection of all protected classes from discrimination and harassment. Most of the legislation summarized below mirrors laws that were already in effect in New York City so New York City employers were not impacted as significantly by this legislation as employers outside of the City.

- New York State employers are now required to provide employees at the time of hire and at every annual sexual harassment prevention training with a notice containing the employer's sexual harassment policy and the information presented at the employer's sexual harassment prevention training program.

- The protections provided by the New York State Human Rights Law now apply to domestic workers and non-employees, including contractors, subcontractors, vendors, consultants, and persons who are providing services pursuant to a contract in the workplace (collectively, "Non-Employees"), and individuals who are employed by Non-Employees.

- The burden of proof under the New York State Human Rights Law has been lowered such that employees asserting a claim for harassment thereunder are no longer required to show that the alleged harassment was severe or pervasive, nor do employees have to show that they were treated less favorably than a comparator (*i.e.*, a similarly situated individual outside of the protected category). Mirroring the New York City Human Rights Law, New York State law now requires that employees just show that they were treated less well than other employees because of their protected status and that the alleged harassment rises above the level of petty slights and trivial inconveniences.

- Again mirroring New York City law, New York State law now provides that punitive damages are available as a remedy for employees, and prevents employers from using the fact that an employee did not utilize the employer's internal complaint or reporting

procedure as a defense to the employee's claim of harassment. Notably, even though an employee's failure to take advantage of an employer's reporting procedure is not a defense to a harassment claim, employers can use that failure to mitigate the amount of damages recoverable under New York City law.

- Employees who bring claims against their employers under the New York State Human Rights Law and prevail are now entitled to attorneys' fees, though this was already available under the New York City Human Rights Law. Prevailing employers, on the other hand, are only entitled to attorneys' fees if they show that the action brought by the employee was frivolous.

- Mandatory arbitration of all claims of discrimination based on a protected characteristic (such as sex, race, religion, disability, etc.) is prohibited. However, this prohibition is likely to be challenged as being preempted by federal law. Indeed, a federal judge in New York City has held that an agreement to arbitrate sexual harassment claims is enforceable under the Federal Arbitration Act despite New York law prohibiting mandatory arbitration agreements covering sexual harassment claims.

- Employers are prohibited from including nondisclosure agreements or provisions ("NDAs") in any settlement of a claim involving *any* type of discrimination unless the condition of confidentiality is the employee's preference. If confidentiality is the complainant's preference, then an NDA regarding the claim must be written in plain English and, if applicable, in the primary language of the complainant. The complainant then must have 21 days to consider the NDA before signing the document, and a waiting period of at least seven days during which the employee may revoke their agreement to the NDA after they sign.

- NDAs that are part of an employment contract and that prevent an employee from disclosing information related to any future claim of discrimination must include an explicit carve-out providing that the employee is not prohibited from speaking with law enforcement, the Equal Employment Opportunity Commission, the New York State Division of Human Rights, a local commission on human rights, or an attorney retained by the employee.

- Effective February 8, 2020, the New York State Human Rights Law will cover employers *of all sizes*, not just employers with four or more employees.

Effective August 12, 2020, the statute of limitations for employees to bring a claim of sexual harassment before the New York State Division of Human Rights will be three years.