GIBSON DUNN

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NEW YORK STATE ENACTS IMPORTANT CHANGES TO HARASSMENT AND DISCRIMINATION LAW

To Our Clients and Friends:

On June 19, 2019, the New York State legislature voted to pass bill A08421, a new law which changes the legal landscape governing discrimination and harassment in the workplace. New York State Governor Andrew Cuomo is expected to sign the bill into law. At its core, this bill:

- Provides broader protection to employees of all protected categories who have been the victim of harassment in the workplace;
- Lowers the burden for employees to plead and prove that conduct in the workplace amounts to harassment under New York law;
- Eliminates certain defenses that are available to employers under federal law; and
- Prohibits mandatory arbitration and certain types of non-disparagement clauses for all discrimination and harassment claims.

Summary of Changes

Inspired by the *Me Too* and *Times Up* movements, the New York State legislature explained that its aim with this bill was to translate the work and goals of those movements into policy to enact further protections for all workers—of all protected categories—against all types of harassment (not just sexual harassment). With that goal in mind, the New York legislature explained that "[i]t is time for New York State law to abandon the protection of those who would discriminate and sexually harass in the workplace and recognize and serve victims of discrimination."

This section summarizes the changes to the law, the majority of which will take effect on August 19, 2019.

- The New York State Human Rights Law, N.Y. Exec. Law § 292 *et seq.* ("NYSHRL") now applies to all private employers within New York State.
- The NYSHRL now expressly prohibits harassment based on *any* protected characteristic, not just sexual harassment. Specifically, employers are prohibited from subjecting any individual to harassment "because of an individual's age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics,

familial status, marital status, domestic violence victim status, or because the individual has opposed" forbidden practices.

- The new law alters the standard for sexual harassment, and all other harassment, claims in New York State. Previously, consistent with the well-established standard for harassment under federal law, employees had to plead and prove that the harassment was "severe or pervasive." The new standard in New York defines harassing conduct as any conduct that subjects an employee to "inferior terms, conditions or privileges of employment because of an individual's membership in one or more of the[] protected categories."

- The new bill is intended to eliminate employers' ability to rely on certain defenses previously allowed under the U.S. Supreme Court's decisions in the seminal *Faragher/Ellerth* cases. Employees are not required to report internally before bringing a claim for harassment. And an employee does *not* need to demonstrate the existence of an individual to whom the employee's treatment must be compared.

- Employers are explicitly authorized to defend against harassment claims by demonstrating that the harassing conduct does not rise above the level of what a reasonable victim of discrimination with the same protected characteristic would consider "petty slights or trivial inconveniences."

- In October 2018, the NYSHRL was amended to prohibit mandatory arbitration of sexual harassment claims (except where inconsistent with federal law), and to prohibit employers from requiring non-disclosure agreements when settling sexual harassment claims. Those changes have now been extended to *all* claims of discrimination or harassment based on any protected characteristic.

- The bill *mandates* that reasonable attorneys' fees be awarded to the prevailing party with respect to all claims for employment discrimination. Previously, the award of attorneys' fees was at the discretion of the court.

- The bill also now allows for punitive damages—without limitation—in *all* employment discrimination actions related to private employers, not just those based on sex discrimination.

In addition to the provisions described above, the new bill increases the statute of limitations under which a victim of sexual harassment must file an administrative complaint with the New York State Department of Human Rights from one to three years.

Takeaways for Employers

This new law is a continuation of the changes to the law that took effect in October 2018, and together the changes have resulted in a significant alteration of discrimination and harassment law in New York State.

Previously, the NYSHRL was interpreted consistently with federal law. That will likely no longer be the case going forward. In those cases in which an employee brings claims under federal law, the NYSHRL,

and the New York City Human Rights Law ("NYCHRL"), a court may now have to apply three different legal standards, further complicating the litigation of these types of cases.

In addition, the elimination of the "severe and pervasive" standard will arguably make it easier for employees to plead and prove sexual harassment and other harassment claims, and we expect that the true contours of the new standard will need to be worked out by the courts. We expect that the revised legal standard, coupled with the expansion of actionable harassment claims beyond just sexual harassment, will result in an increase in these types of claims (or, at a minimum, an increase in the number of threatened claims). With the availability of punitive damages and attorneys' fees in all discrimination claims, the potential damages in these actions also will meaningfully increase.

Employers should review their form employment, confidentiality, arbitration, separation, settlement and other agreements in light of these new requirements regarding arbitration and non-disclosure provisions. There remains an open question as to whether the prohibition on mandatory arbitration agreements would survive a legal challenge in light of the Federal Arbitration Act—and the NYSHRL itself states that the arbitration ban does not apply "where inconsistent with federal law"—and employers should consult counsel with respect to their approach to arbitration agreements. Employers should also ensure that their harassment and discrimination prevention training complies with the new requirements and that their procedures for preventing harassment and discrimination are consistent with current best practices.

Gibson Dunn lawyers are available to assist in addressing any questions you may have about this development. Please contact the Gibson Dunn lawyer with whom you usually work in the firm's Labor and Employment practice group, or the following authors in New York:

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