Client Alert

February 2020

New Year's Resolutions for New York Employers: Implementing Lessons Learned from 2019

February is a great time for employers with New York operations to check on their progress regarding New Year's resolutions for revising policies, training supervisors and implementing other changes to ensure compliance with recent developments in the law. The changes in employment laws during 2019 provide strong incentives for employers to update their practices. Following are 13 employment law developments that New York employers should make a part of their 2020 "resolutions" and employment practices.

1. Elimination of Employer Coverage Threshold under the New York State Human Rights Law. As of February 8, 2020, the NYSHRL will apply to *all* New York State employers, regardless of their size. Previously, there was a four-person threshold. All New York employers should inform and train all employees involved with employee relations about requirements under the NYSHRL.

2. Expanded Pay Equity. New York's equal pay law, which previously applied only to sex, now prohibits any pay differentials based on age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, disability, predisposing genetic characteristics, familial status, marital status or domestic violence victim status. The equal pay law also broadens protection from differentials among individuals who perform "equal work" to individuals who perform "substantially similar work." Pay differentials are permitted in certain circumstances (e.g., if the differential is based on a seniority system; a system measuring earnings by quantity or quality; or a bona fide factor that is job related and consistent with business necessity); however, an employee may be able to overcome an employer's stated explanation by demonstrating certain factors. Because the expanded pay equity law effectively lessens an employee's burden in proving a claim for pay discrimination, employers should evaluate their existing pay practices to ensure compliance with the expanded pay equity requirements.

3. Discriminatory Harassment is Now Codified into the NYSHRL. New York explicitly made "harassment" part of the NYSHRL, providing that it is illegal to subject any individual to harassment because of that individual's membership in a protected class recognized under the law (e.g., race, sex, gender, etc.), because that individual has opposed an unlawful practice; or because they have filed a complaint, testified or otherwise assisted in any proceeding under the law. While this development does not require immediate action on the part of employers, it signals that discrimination claims in the workplace now call for a heightened sensitivity.

4. New Lower Standard for Proving Discriminatory Harassment. The new law explicitly sets forth a new lower standard of proof for harassment claims—which will make it easier for employees to prove claims. Previously, courts utilized the federal standard of proof, which required a plaintiff to demonstrate that the harassment was "severe or pervasive" as to alter the conditions of employment. For claims arising after October 11, 2019, however, employees may prevail if they instead demonstrate that the harassment subjected them to "inferior terms, conditions or privileges of employment" because of the plaintiff's membership in a protected class. In addition,

the law notes that a plaintiff need not identify a comparator in proving their harassment claim. Employers should consider training human resources, management and other employees regarding anti-harassment policies.

5. Elimination of Key Employer Affirmative Defense. The New York State Human Rights Law has eliminated the *Faragher-Ellereth* defense, a widely used defense developed by federal courts whereby an employer may avoid liability: (i) where it attempted to prevent and correct the harassing conduct, and (ii) when the employee unreasonably failed to take advantage of preventative and corrective opportunities. Now, employers will only avoid liability if they can prove that "the harassing conduct does not rise above the level of what a reasonable victim of discrimination would consider petty slights or trivial inconveniences." In other words, it is no longer a defense to liability that the employee did not report harassing or discriminatory conduct to the employer. Accordingly, it is more important than ever to train employees regarding appropriate workplace conduct and ensure that employees understand and comply with the company's anti-harassment policies.

6. Non-Employees May Recover Against Companies For Any Type of Discrimination. Under the new law, non-employees (e.g., contractors, subcontractors, vendors, consultants or any other person providing services under a contract in the workplace or who is an employee of the same) may now pursue claims against a company for *any* discriminatory behavior (e.g., discrimination or harassment based on race, religion, sexual orientation, etc.). Employers should ensure that anti-harassment training includes special emphasis that rules regarding workplace conduct must be adhered to during interactions with *any* individual in the workplace, including non-employees.

7. Prevailing Employees May Now Seek to Recover Punitive Damages and Attorneys' Fees Against Private Employers. Employees who file suit against a New York employer now have additional leverage and are eligible to walk away with a significantly higher recovery upon a successful NYSHRL claim. The standard for establishing punitive damages under the NYSHRL has yet to be established. In the meantime, employers may turn to the standard set by the New York Court of Appeals under the New York City Human Rights Law, which states that punitive damages may be awarded upon a finding that an employer has engaged in discrimination with willful or wanton negligence, recklessness, where there is a conscious disregard of the rights of others, or conduct so reckless as to amount to such disregard.

8. Employers May Not Include Broad Non-Disclosure Provisions in Settlement/Separation Agreements Resolving *Any* Discrimination Claim Unless it is Employee's Preference and Must Comply with Certain Requirements. Previously, New York employers were prohibited from including a non-disclosure provision in settlement agreements covering sexual harassment claims unless certain conditions were met. This restriction now applies to *all* claims of discrimination under the NYSHRL. The law now requires a non-disclosure term or condition to be provided in writing to all parties in "plain English," and, if applicable, in the primary language of the individual. The law also requires the inclusion of certain language confirming that the restriction does not limit certain rights. In addition, an employee must be provided a certain number of days to consider and revoke the acceptance of the restriction prior to execution of the agreement. Employers should review all agreements, including, but not limited to, employment, separation and settlement agreements, to ensure any nondisclosure clauses meet the requirements of the new law.

9. Employers May Not Force Employees to Arbitrate Discrimination Claims. New York employers are now prohibited from using mandatory arbitration provisions for any discrimination claims. Employers should review all agreements, including, but not limited to, employment, separation and settlement agreements, to ensure any arbitration provisions meet the requirements of the new law.

10. Expanded Requirements for Distribution of Sexual Harassment Policies and Training Materials. Employers are now required to provide their employees, at the time of hire and at the time they deliver their mandatory annual sexual harassment training, a "notice" that contains a copy of the employer's sexual harassment prevention policy and the information presented at such employer's sexual harassment prevention training program. The notice must be in English and in the employee's primary language. Employers should ensure that all employees have received the required sexual harassment prevention training under New York State and, if applicable, New York City law, including any required notices regarding the employer's policy and the information presented in the training program.

11. Individuals May Now File a Complaint of Sexual Harassment with the State Division Within Three Years Instead of One Year. The new law extends the statute of limitations to file a complaint of sexual harassment with the state human rights law enforcement agency from one to three years. It remains at one year for all other discrimination claims.

12. Prohibition on Salary Inquiries. As of January 6, 2020, all employers in New York are prohibited from requesting that a job applicant or current employee provide them with their salary or wage history as a condition to be interviewed, as a condition of continuing to be considered for an offer of employment, or as a condition of employment or promotion, except under certain circumstances. Employers should evaluate existing pay practices to ensure compliance with the salary inquiry restrictions.

13. Prohibition on Certain Pre-employment Drug Screening. On May 10, 2020, most New York employers will be prohibited from conducting most pre-employment screening for marijuana. Certain exceptions apply. Employers should evaluate drug screening procedures and relevant policies to ensure compliance with Local Law 91.

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