

Bond (Even MORE) Sweeping Changes to the New York Human Rights Law

August 29, 2019

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I thought New York already passed new legislation??!??

- 2018 “Sexual Harassment” Amendments
 - Mandatory Policy & Training
 - Prohibition on Confidentiality Agreements
 - Prohibition on Arbitration Agreements
 - Protection of Non-Employees in the Workplace
 - Other New Requirements

These requirements all focused on sexual harassment!

So there is *more*, new legislation???

- Highlights of 2019 New York Amendments
 - Easier Burden to Claim Unlawful Harassment
 - New Legal Standard
 - Lesser Proof Required
 - Limitations on Employer Defenses
 - Expanded Protection for Non-Employees
 - Broader Penalties & Remedies

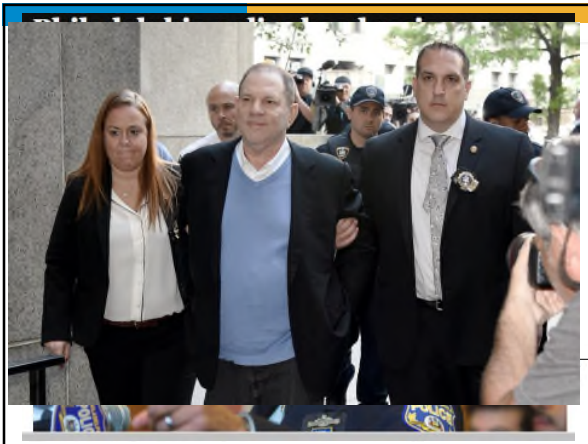
Almost all of the new requirements focus on discrimination and harassment generally, not just sexual harassment!

So there is *more*, new legislation???

- 2019 “Human Rights” Amendment “Highlights” (Cont.)
 - Broadens Prohibition on Confidentiality Agreements
 - Expands Prohibition on Arbitration Agreements
 - New Training and Policy-Related Requirements (Sexual Harassment)

Almost all of the new requirements focus on discrimination and harassment generally, not just sexual harassment!

THE “WEINSTEIN” EFFECT



Easier Burden to Claim Unlawful Harassment Under HRL

- **Old:** Conduct must be “severe or pervasive”
 - Still applicable under federal law, e.g., Title VII
- **New:** Conduct that “subjects an individual to inferior terms, conditions, or privileges of employment”

Easier Burden to Claim Unlawful Harassment Under HRL

- No “comparator” evidence required
- Interpretation under federal law is not controlling
- Exceptions from liability construed *narrowly*
- Remedies for liability to be construed *broadly*

Changes effective October 11, 2019

Limitations on Employer Defenses Under the HRL

- **Old:** Failure to complain = Legal defense
- Third Circuit Court of Appeals
 - *[T]here may be a certain fallacy that underlies the notion that reporting sexual misconduct will end it. Victims do not always view it in this way. Instead, they anticipate negative consequences or fear that the harassers will face no reprimand; thus, more often than not, victims choose not to report the harassment.*
- **New:** No complaint = Claim still viable

Limitations on Employer Defenses Under the HRL

- Remaining *respondeat superior* defense?
 - Employer not liable for an employee's discriminatory act unless it became a party by "encouraging, condoning, or approving it."
- Limited Affirmative Defense
 - "Petty Slights" and "Trivial Inconveniences" Not Actionable
 - May be a small comfort!

Changes effective October 11, 2019

New Standard: "Trivial" or "Petty"

- Where is the new "line" for unlawful harassment under the HRL?
- NYC HRL uses a comparable standard
- Lawful or unlawful?
 - *Crude anecdote about sex life and occasional reference to employee as voluptuous...*
 - *All women are b----es, except my mother...*
 - *Spreading rumor about female employee attending meeting without a bra and supervisor failing to address...*
 - *Commenting that employees' ages made them slow, lazy, and incompetent...*

Expanded Protection for Non-Employees

- New: Covered non-employees in the workplace protected against any and all forms of discrimination and harassment (not just sexual harassment)
- Test: Did employer know – or should it have known – non-employee was subject to discriminatory practice, but failed to take immediate and appropriate corrective action

Changes effective February 8, 2020

Non-Disclosure / Confidentiality of Claims

- **New:** Broadened ban on confidentiality clauses/agreements addressing any and all discrimination claims (**not** just sexual harassment)
 - Can only be used if “complainant’s preference” and following a specific legal process
- **New:** Terms must written in “plain English” and (if applicable) in the “primary language of the complainant”

Non-Disclosure / Confidentiality of Claims

- **New:** Confidentiality provision cannot limit:
 - Subpoena-related activity, e.g., initiating, testifying, or complying with subpoena
 - Cooperating or participating with investigative agency
 - Providing information relating to UI, Medicaid, or other public benefit claims
 - Disclosing factual information relating to future claims, unless also advising that the party can speak with law enforcement, EEOC, SDHR, and other entities (effective 1/1/2020)

Changes effective October 11, 2019

Mandatory Arbitration Clauses

- **New:** Broadened ban on mandatory arbitration clauses/agreements addressing any and all discrimination claims (**not** just sexual harassment)
- But what about *Latif v. Morgan Stanley* (SDNY June 26, 2019)????

Changes effective October 11, 2019

Mandatory Sexual Harassment Training & Policy

- **New:** Policy must be provided “at the time of hiring” and at every annual training program
- **New:** Policy and “information presented” at the sexual harassment training must be provided in English and in other “primary language” of employees (as specified by the state)

Changes effective immediately

Other Significant **New** Changes

- Employers of all sizes are covered under the HRL
- Mandates the award of attorneys fees to a successful party (really, a successful claimant)
 - Unless you are a successful defendant, in which case the underlying claim must be proved “frivolous”
- Claimants will have 3 years to file with SDHR (instead of 1 year)
- Punitive damages cannot be awarded against state or local departments, agencies, or boards of commission (but, do still apply to private employers!)

Various effective dates

Practical Recommendations

- 1) Revise mandatory sexual harassment training program and policy, as needed
- 2) Obtain translations of sexual harassment training and policy materials, as necessary
- 3) Review existing personnel agreements to address confidentiality and arbitration issues, including employment, severance, and non-compete agreements

Practical Recommendations (Cont.)

- 4) Educate leadership about significant changes, especially new lower threshold for harassment claims
- 5) Create or review investigatory procedures and plans
 - Now an even higher premium on promptly addressing complaints!
 - Who will investigate?
 - Who else will be involved?
 - What will be done?
 - How quickly will it be done?

Practical Recommendations (Cont.)

- 6) Use training to raise the "Emotional IQ" and enhance empathy of staff and especially supervisors
- 7) Carefully document all employee complaints – remember the standard is now just something more than "trivial" or "petty"!
- 8) Keep spreading the word: Be respectful 100% of the time!!!

Sexual and Other Workplace Harassment Training

Web-Based Interactive
Training Program
Offered by



Compliant with all New York State and New York City regulations on sexual harassment training.

Questions???

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