

# Client Alert

August 2019

## New York Overhauls Discrimination and Harassment Laws in Second #MeToo Wave

On August 12, 2019, Governor Cuomo signed the last of a series of bills designed to strengthen New York State's workplace discrimination and harassment protections, prohibit wage differentials based on protected class status, and ban employers from seeking applicant and current employee salary history. These bills bring New York State's labor and wage laws more in line with those in the New York City Human Rights Law ("NYCHRL") and add to what were already some of the most employee-friendly laws in the country.

A detailed summary of each bill is as follows:

### **Senate Bill S6577**

The most sweeping legislation appears in Senate Bill S6577, which amends the New York State Human Rights Law (hereafter, "NYSHRL") and other state laws to provide additional protections to victims of harassment, discrimination, and retaliation. The bill contemplates a number of changes that will go into effect at staggered times—immediately upon enactment, 60 days after enactment, 180 days after enactment, and one year after enactment.

The following provisions of S6577 went into effect immediately upon enactment on August 12, 2019:

- **Mandatory Attorney's Fees for Defendants/Respondents Found Liable for An Unlawful Discriminatory Practice.** The bill amends NYSHRL Section 297 to mandate an award of reasonable attorneys' fees to the "prevailing or substantially prevailing party." Fees were previously discretionary. Prevailing employers are only entitled to fees if they prove the action was "frivolous."
- **Courts Must Interpret the NYSHRL Liberally.** The bill amends NYSHRL Section 300 to require that courts liberally interpret the NYSHRL and narrowly interpret exceptions to the law to maximize deterrence of discriminatory conduct. This amendment brings state law in line with the NYCHRL, further departing from comparable federal law.
- **Employers Must Provide Anti-Harassment Policies in Multiple Languages.** The bill amends Labor Law Section 201-g to state that an employer must provide, at the time of hire and every annual mandatory sexual harassment training, the employer's sexual harassment prevention policy and training materials in English and "in the language identified by each employee as the primary language of such employee." However, employers are not required to provide their policy in another language if the state has not published a template in that language. See <https://www.ny.gov/combating-sexual-harassment-workplace/employers>.
- **Broadens Scope of Attorney General's Powers.** The bill amends Executive Law Section 63 and NYSHRL Section 297 to provide the Attorney General's office with greater power to prosecute employers for civil discrimination claims based on all protected classes, not just for claims based on age, race, creed, color and national origin as the law currently states.

The following provisions of S6577 go into effect on October 11, 2019:

- **Elimination of “Severe or Pervasive” Requirement for Proving Workplace Harassment Claims.** The bill amends NYSHRL Section 296 to state that an employer or supervisor may be liable for workplace harassment on the basis of any protected characteristic “regardless of whether it is severe or pervasive,” as long as it rises “above the level of what a reasonable victim of discrimination with the same protected characteristic would consider petty slights or trivial inconveniences.”
- **Elimination of the *Faragher/Ellerth* Defense.** The amendment to NYSHRL Section 296 also effectively removes the ability of employers to assert the affirmative defense first articulated in the companion U.S. Supreme Court cases of *Faragher v. Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). The *Faragher/Ellerth* defense provided employers with a defense to claims of harassment if the employer was able to prove that it had a policy prohibiting harassment, and an employee unreasonably failed to take advantage of preventive or corrective opportunities provided by the employer. Employers can no longer use the fact that a plaintiff/claimant failed to report the harassment as a defense, bringing state law in line with the NYCHRL.
- **Employees Need Not Find “Comparators” to Prove Their Claims.** The amendment to NYSHRL Section 296 states that “nothing in this section shall imply that an employee must demonstrate the existence of an individual to whom the employee's treatment must be compared.” Previously, for some “disparate treatment” discrimination and harassment cases, the plaintiff/claimant was required to demonstrate that he was treated differently than a “comparator” who was “similarly-situated” to the plaintiff/claimant except that the comparator was not in the plaintiff/claimant’s protected class.
- **The NYSHRL Protects Domestic Workers and Contractors.** The bill amends NYSHRL Sections 296-b and -d to specifically cover domestic workers and expand protections for contractors. Under the bill, employers can be found liable for all types of workplace discrimination, harassment and retaliation to domestic workers, and contractors, who were previously only protected from sexual harassment under the NYSHRL.
- **Punitive Damages Available for all NYSHRL Claims.** The bill amends NYSHRL Section 297 to authorize punitive damages as a remedy for all NYSHRL discrimination, harassment, and retaliation claims.
- **Expansion of Ban on Non-Disclosure Agreements/Confidentiality Clauses.** Last year, the state banned non-disclosure/confidentiality agreements for sexual harassment claims. The new law expands this to all discrimination and harassment claim. Such agreements can only be entered into if it is “the complainant’s preference.”
- **Prohibits Mandatory Arbitration Clauses.** Last year, the state banned mandatory arbitration of sexual harassment claims. The new law expands this to all discrimination claims.<sup>1</sup>

The following provisions of S6577 go into effect on February 8, 2020:

- **Expansion of “Employer” Definition to Now Cover All Employers Regardless of Size.** The bill amends the definition of “employer” in NYSHRL Section 292 to cover employers of all sizes. The current definition covers only employers with four or more employees except for sexual harassment claims.

The following provisions of S6577 go into effect on August 12, 2020:

- **Expands the Statute of Limitations for Sexual Harassment Claims to Three Years.** The bill amends NYSHRL Section 297 to enlarge the statute of limitations from one to three years for sexual harassment claims filed before the New York State Division of Human Rights. All other discrimination claims are still subject to the one-year statute of limitations before administrative agencies.
- **Required Statements in Non-Disclosure Agreements/Confidentiality Clauses.** The bill amends General Obligations Law Section 5-336 to require that non-disclosure agreements/confidentiality clauses that are part of employment contracts must include a statement that employee is not prohibited from speaking with law enforcement, the Equal Employment Opportunity Commission, New York State Division of Human Rights, local commission on human rights, or an attorney retained by the employee or potential employee.

## **Senate Bill S5248B**

New York's current pay equity law in New York Labor Law Section 194, which was recently amended by 2016's Achieve Pay Equity Law, provides that "[n]o employee shall be paid a wage at a rate less than the rate at which an employee of the opposite sex in the same establishment is paid for equal work on a job the performance of which requires equal skill, effort and responsibility, and which is performed under similar working conditions, except where payment is made pursuant to a differential based on: a. a seniority system; b. a merit system; c. a system which measures earnings by quantity or quality of production; or d. a bona fide factor other than sex, such as education, training, or experience."

Senate Bill S5248B amends and expands Section 194 to prohibit these wage differentials based on all protected classes including, age, race, creed, color, national origin, sexual orientation, gender identity and expression, military status, disability, predisposing genetic characteristics, familial status, marital status, and domestic violence victim status.

The law also provides that the work performed need not be "equal," but can be "substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions." These revisions will undoubtedly make it easier for employees to prove a pay equity claim.

This law becomes effective on October 8, 2019.

## **Senate Bill S6549**

Senate Bill S6549 amends the New York Labor Law by adding a Section 194-a, which has the stated purpose "to prevent further wage discrimination by prohibiting employers from asking for wage or salary history as a requirement for a job interview, job application, job offer, or promotion."

The law prohibits employers from:

- Relying on an applicant's wage or salary history in determining whether to offer employment or in determining the wages or salary for an applicant;
- Seeking, requesting, or requiring wage or salary history from an applicant or current employee as a condition of being interviewed or continuing to be considered for an offer of employment, or as a condition of employment or promotion;
- Seeking, requesting, or requiring wage or salary history of an applicant or current employee from current or former employers and employees;
- Refusing to interview, hire, promote, otherwise employ, or to retaliate against an applicant or current employee: (1) based upon prior wage or salary history; (2) because the applicant or employee did not provide wage or salary history; or (3) because the applicant or employee filed a complaint alleging violation of Section 194-a.

Applicants and employees may still voluntarily and without prompting, disclose or verify wage or salary history, including for the purposes of negotiating their wages or salary. The law also allows employers to confirm wage or salary history, only after making an offer of employment, if applicants or employees volunteer their previous pay during pay negotiations.

The law authorizes injunctive relief and reasonable attorneys' fees for prevailing plaintiffs.

The law becomes effective on January 6, 2020.

In sum, these new laws drastically change the landscape for employers in New York. Employers should immediately review their employment policies to determine whether this legislation requires them to make any changes.

## Contacts

**Ryan M. Bates**  
rbates@HuntonAK.com

**Jason P. Brown**  
brownj@HuntonAK.com

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<sup>i</sup> However, in June of this year, a New York federal court granted a motion to compel arbitration filed by the defendant in a sexual harassment case, finding that the state's prohibition of sexual harassment arbitration was preempted by the Federal Arbitration Act. See *Latif v. Morgan Stanley & Co. LLC*, No. 18CV11528 (DLC), 2019 WL 261098 (S.D.N.Y. June 26, 2019).