Sweeping Changes Under New York State Anti-Discrimination Law

By Julie Levinson Werner

What You Need To Know:

- **New York has significantly modified the legal standard for individuals to sue their employers for harassment and discrimination.**
- **The new law limits a company's affirmative defenses against such claims.**
- **The new law imposes restrictions on a company's ability to keep discrimination and harassment settlements confidential.**
- **Companies should review and update their employment agreements, separation agreements, and anti-harassment training materials.**

Showing the continued, expansive influence of the #MeToo movement, New York has passed a new law making it easier for employees to successfully sue their employers for unlawful harassment or discrimination in the workplace.

More than 30 years ago, the United States Supreme Court held that, for a plaintiff to prove unlawful harassment, she had to prove that the offending behavior was either so severe or pervasive that a reasonable person would believe that the terms and conditions of employment had been altered. New York and many other states adopted this same standard at the state level.

Now, in a material change to that standard, under New York state law, it is unlawful to subject an individual to harassment based on the individual's membership in any protected class or because the person has opposed any harassment claim or participated in a harassment proceeding, "regardless of whether the harassment would be considered severe or pervasive under precedent applied to harassment claims." New York law now says that harassment is unlawful, and the employer may be liable, when such harassment subjects the individual to inferior terms, conditions, or privileges of employment because of his or her membership in a protected class. For a company to defend against such a claim, the employer must plead and prove that the behavior does not rise above the level of what a reasonable, similarly situated person would consider to be "petty slights or trivial inconveniences." The new law protects employees, contractors, subcontractors, vendors, consultants, and any other person providing services pursuant to a contract in the workplace.

Employers will be liable for discriminatory conduct if the offender was in a management or supervisory role, *or* if the company knew about the behavior and failed to take immediate action to rectify the situation, *or* if the employer should have known of the employee's discriminatory conduct and failed to prevent it.

While, in the past, a company could defend against a claim by proving that the company had procedures in place for an employee to

complain and that the employee failed to do so, New York state will no longer allow employers to rely upon this affirmative defense.

The changes to the state law are important and will have a meaningful impact on the ability of employees to successfully sue their employers. But the standard to prove unlawful harassment or discrimination under New York City law was already diminished about 10 years ago. The city law places a lower bar for potential victims of harassment or discrimination in the workplace than do its state or federal counterparts, requiring only that a potential victim of sexual harassment prove that he or she was treated "less well" than other employees due to his or her protected class. The New York state law follows in the city law's footsteps and expands these policies statewide.

The new law also prohibits employers from imposing mandatory arbitration of discrimination claims. But the viability of this provision is suspect in light of a court case earlier this summer in which a federal district court in New York held that prohibiting the mandatory arbitration of sexual harassment claims is preempted by the Federal Arbitration Act (FAA). The Supreme Court has held routinely that when a state law prohibits arbitration of a particular type of claim, the state statute will be preempted by the FAA. For now, employers should act cautiously before imposing mandatory arbitration upon their employees in employment agreements.

Employers will also need to update their separation and general release agreements to account for common provisions related to confidentiality and nondisclosure.

Last, in 2018, New York state and New York City both passed laws requiring specific information be included in a company's anti-harassment policy and mandating annual harassment training. If you have not yet conducted your workplace anti-harassment training, it is essential that you properly identify the correct legal standard and definitions in your training materials.

With legal changes granting greater protections to employees and imposing heightened standards and obligations upon employers, now, more than ever, New York employers must examine their workplace practices to ensure compliance with these new laws.

We at Lowenstein Sandler routinely represent companies in reviewing their anti-harassment policies and presenting anti-sexual harassment trainings, as well as representing management in the defense of employment litigation, and we would be pleased to assist as needed.

Contact

Please contact the listed attorney for further information on the matters discussed herein.

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