

# Sweeping Anti-harassment Legislation Impacts New York State Employers

A Lexis Practice Advisor® Article by  
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On August 12, 2019, Governor Andrew Cuomo signed into law Senate Bill 506577 / Assembly Bill A8421, significantly expanding protections to individuals working in New York State, thereby increasing an employer's exposure to liability for claims of employment harassment and discrimination. This article discusses key provisions of the law, along with our initial guidance.

Effective August 12, 2019:

- **Construction.** The New York State Human Rights Law (NYSHRL) is to be liberally construed consistent with its "remedial" purposes and independently construed from its federal counterpart. Additionally, the law requires that exceptions to, and exemptions from, NYSHRL's coverage be construed narrowly "in order to maximize deterrence of discriminatory conduct."
- **Training and policy requirements.** At the time of hiring and at every annual sexual harassment prevention training, an employer is required to provide employees, written in

plain English and, if applicable, in the language identified by each employee as his or her primary language, with (1) a notice containing the employer's sexual harassment prevention policy and (2) the information presented at such employer's sexual harassment prevention training program.

Effective October 11, 2019:

- **Expanded definition of employer.** The NYSHRL covers all employers in New York State, regardless of size.
- **Change from "severe and pervasive" standard.** Under the NYSHRL, a complainant shall no longer be required to allege or establish that harassment based on any of the protected categories was "severe or pervasive." Instead, a complainant can build a case by showing that the employer subjected the complainant to "inferior terms, conditions, or privileges of employment because of the individual's membership in a protected category." An affirmative defense will be available to an employer that can show that the alleged 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."
- **Employee's failure to utilize corrective opportunities no bar to suit.** Under the NYSHRL, an employee's failure to take advantage of preventative or corrective opportunities provided by an employer to address the harassment (e.g., failure to follow a complaint procedure pursuant to the company handbook) shall not be determinative of an employer's liability.
- **Comparator requirement removed.** Under the NYSHRL, an employee is no longer required to show a "comparator" (i.e., at least one similarly situated employee outside the complainant's protected class) in order to establish a prima

facie claim of discrimination under the NYSHRL. Generally, to establish a prima facie claim, a plaintiff must show that (1) he or she was within a protected class, (2) he or she was qualified for the position, (3) he or she was subject to an adverse employment action, and (4) the adverse action occurred under circumstances giving rise to an inference of discrimination. Prior to this 2019 amendment to the NYSHRL, courts have expected plaintiffs to allege or establish the existence of a comparator as a way to satisfy the fourth prong of his or her prima facie case.

- **Rights of nonemployees expanded.** Contractors, subcontractors, vendors, consultants and their employees, or other persons providing services pursuant to a contract in the workplace, can bring a claim of discrimination or harassment based on any protected category and retaliation by the employer. These nonemployees merely have to show that (1) the employer, its agents, or supervisors knew or reasonably should have known that the nonemployee was subjected to an unlawful discriminatory practice in the employer's workplace, and (2) the employer failed to take immediate and appropriate corrective action.
- **Domestic employees.** The NYSHRL shall protect a domestic worker, or "a person employed in a home or residence for the purpose of caring for a child, serving as a companion for a sick, convalescing or elderly person, housekeeping, or for any other domestic service purpose" from discrimination based on any protected category.
- **Punitive damages and attorney's fees.** Punitive damages are available, and attorney's fees are recoverable by the prevailing party, for NYSHRL claims filed on or after October 11, 2019.
- **Scope of limitations on non-disclosure agreements expanded.** Any term or condition that would prevent the disclosure of underlying facts and circumstances related to discrimination or harassment is prohibited under the NYSHRL, unless the complainant prefers it. Additionally, any condition of confidentiality must be provided in writing to all parties in plain English and, if applicable, the primary language of the complainant. The complainant must then have a full, non-waivable 21 days to consider the non-disclosure term or condition before signing the agreement containing it, and a seven-day waiting period during which the employee may revoke the agreement after signing. Moreover, any such term or condition of confidentiality that prohibits or otherwise restricts the complainant from initiating or participating in any manner with a government agency's investigation or filing or disclosing any facts necessary to receive unemployment insurance, Medicaid, or other public benefits to which the complainant is entitled, will be void.

- **Arbitration restrictions.** Employers are prohibited from imposing mandatory arbitration of all claims of discrimination, harassment, or retaliation.

Effective January 1, 2020:

- **Additional limitations on non-disclosure agreements.** Any provision in a contract or other agreement between an employer or an agent of an employer and any employee or potential employee of that employer entered into on or after January 1, 2020, that prevents the disclosure of factual information related to any future claim of discrimination is void and unenforceable, unless such provision notifies the employee or potential employee that it does not prohibit him or her from speaking with law enforcement, the Equal Employment Opportunity Commission, the New York State Division of Human Rights, a local commission of Human Rights, or an attorney retained by the employee or potential employee.

Effective August 12, 2020:

- **Enlargement of limitations period for sexual harassment claims filed with the State Division.** The statute of limitations for sexual harassment claims filed with the New York State Division of Human Rights, the agency that enforces NYSHRL, is extended to three years from the alleged sexual harassment. This amendment extends the limitations period for claims filed with the State Division to the same period that already applies to claims filed in court.

Effective 2022:

- **Model policy and guidance.** The New York State Department of Labor and the New York State Division of Human Rights will reevaluate and update the model sexual harassment prevention policy and guidance document every four years beginning in year 2022.

## Initial Guidance

In light of the above, all New York State employers—including those that have only one employee—and out-of-state employers that have at least one employee working in New York State, must consider implementing and enforcing zero tolerance policies for sexual harassment. While many employers' policies undoubtedly already prohibit sexual harassment and other forms of discrimination, the changes to the law discussed above make it even more important for employers to take concrete steps to ensure that their policies are being followed by everyone in the organization, top to bottom, including the C-Suite, management, employees, and contractors. Indeed, rather than needing to show that sexual harassment was "severe or pervasive," effective October 11, 2019, the NYSHRL permits an employee to simply show that she was subjected to "inferior terms, conditions or privileges

of employment because of the individual's membership in a protected category." This lower bar requires employers to be even more vigilant in taking steps to prevent workplace misconduct.

Accordingly, employers should make sure to post (and distribute) the proper notices of employees' rights, provide the mandatory sexual harassment training, make sure employees are encouraged to come forward with their concerns and complaints of harassment, remind their HR professionals and supervisors to take all allegations seriously, document (in writing) the complaints made, investigate and address such complaints, and document all such steps.

Employers must also make sure to protect employees from retaliation for making a complaint or assisting others in connection with the complaint process.

## Related Content

For a comprehensive discussion of New York's various discrimination, harassment, and retaliation laws, organized by topic, see [Discrimination, Harassment, and Retaliation \(NY\)](#).

For a comparative analysis of key provisions in federal discrimination laws and their analogues in New York state law, see [Employment Discrimination Laws Comparison Chart \(NY and Federal\)](#).

For a detailed discussion of the New York State Human Rights Law, which protects employees, applicants, and unpaid interns from discrimination and harassment based on their membership in a protected class, see [New York State Human Rights Law \(NYSHRL\)](#).

For an overview of the remedies available under the major employment-related statutes in the state of New York, see [Remedies under Major Employment Laws Chart \(NY\)](#).

For a checklist outlining the key components of mandatory sexual harassment prevention training in the state of New York, see [Sexual Harassment Prevention Training Checklist \(NY\)](#).

For an anti-harassment policy (with acknowledgment) for use by employers in the state of New York, see [Anti-harassment Policy \(with Acknowledgment\) \(NY\)](#).

For an anti-retaliation policy (with acknowledgment) for use by employers in the state of New York, see [Anti-retaliation Policy \(with Acknowledgment\) \(NY\)](#).

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Jon is an experienced mediator for the United States District Court for the Eastern District of New York. He frequently writes and lectures on employment law topics, and has authored a book chapter, updated annually, entitled "Discrimination", published in the HR Guide to Employment Law: A Practical Compliance Reference (2009). Prior to joining the firm, Mr. Trafimow worked as a Motions Law Clerk for the United States Court of Appeals for the Second Circuit.

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During her tenure at Northeastern University School of Law, Ms. Lopez represented low-income clients in unemployment and food stamp cases as a 3.03 certified student attorney at the Poverty Law and Practice Clinic. She also served as a Research Assistant to the late Professor Hope Lewis on the intersection between American and International discourse on race. Additionally, Ms. Lopez served as a Judicial Intern to the Honorable Bruce M. Seyla, United States Court of Appeals for the First Circuit and interned with the Civil Rights Division at the Massachusetts Attorney General's Office, a management-side labor and employment law firm in Boston, and the Massachusetts Teachers Association. She also served as a volunteer attorney with the Massachusetts Commission Against Discrimination.

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