August 21, 2019

New York State Adopts New Legislation Governing the Workplace

Governor Cuomo Signs Bills That Loosen the Legal Standards Governing Sexual Harassment and Discrimination Claims, Ban Salary History Inquiries in Connection with Hiring, Expand the Scope of the State's Equal Pay Act, and Prohibit Race Discrimination Based on Natural Hair or Hairstyles

SUMMARY

In June 2019, the New York State Legislature passed legislation that expanded the rights of employees and independent contractors in several areas. The legislation changed the legal standards governing sexual harassment and other discrimination claims under State law, bringing those standards more in line with New York City law than federal law, and expanded restrictions that previously applied to mandatory arbitration and non-disclosure agreements in the context of sexual harassment claims, making them now applicable to all claims of workplace discrimination or harassment. The legislation also enacted a state-wide ban on salary history inquiries in connection with employment similar to the ban that applies in New York City and made changes to the State's Equal Pay Act. Finally, the legislation prohibits race discrimination based on natural hair or hairstyles. Governor Cuomo recently signed the bills into law. This memorandum summarizes the significant provisions of the new laws.

BACKGROUND

In April 2018, New York State expanded its laws addressing workplace sexual harassment, as summarized in our memorandum available here. Those changes included, among other things: a ban on mandatory arbitration for sexual harassment claims "except where inconsistent with federal law" (on June 26, 2019, the Southern District of New York held in *Latif* v. *Morgan Stanley & Co. LLC* that this ban is preempted by the Federal Arbitration Act for all arbitration agreements that would fall within that Act[1]); a requirement that any confidentiality provision in a sexual harassment settlement agreement be the "complainant's

preference," that such preference be memorialized in the settlement agreement, and that the complainant be afforded a 21-day consideration period and seven-day revocation period for any such agreement; and, by adding Section 296-d to the New York Executive Law, created employer liability for sexual harassment experienced by independent contractors and other non-employees in an employer's workplace. These new provisions relating to sexual harassment claims set the stage for the new legislation discussed herein.

LOOSENING OF LEGAL STANDARDS GOVERNING SEXUAL HARASSMENT AND DISCRIMINATION CLAIMS

On August 12, 2019, Governor Cuomo signed Senate Bill No. 6577, which enacts various changes to the laws in New York State governing sexual harassment and discrimination law. The principal changes are the following:

- ***Applies the New York State Human Rights Law to all employers***. Effective February 8, 2020, the Human Rights Law will apply to all employers in the State. Prior to this legislation, the Human Rights Law exempted employers with "fewer than four persons" (except with respect to sexual harassment claims).
- ***Eliminates the "severe and pervasive" legal standard for harassment claims***: The bill revises the New York State Human Rights law to provide that it is unlawful for an employer to subject any individual to harassment on the basis of any protected characteristic "regardless of whether such harassment would be considered severe or pervasive under precedent applied to harassment claims." The reference to "precedent" refers to federal decisions, including by the U.S. Supreme Court, holding that, in order to be legally actionable, workplace harassment must be "severe and pervasive" such that it alters the terms and conditions of employment and thus constitutes an adverse employment action. New York State law now provides that "harassment is an unlawful discriminatory practice when it subjects an individual to *inferior terms, conditions or privileges of employment* because of the individual's membership in" a protected category (emphasis added). The legislation does establish a new affirmative defense: "It shall be an affirmative defense to liability under this subdivision that the 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 inconvenience." These provisions become effective on October 11, 2019.
- ***Eliminates the Faragher-Ellerth defense***. Supreme Court precedent had established an affirmative defense for employers in harassment cases that, so long as the alleged harassment did not result in a "tangible job detriment," an employer could defend itself by showing that it had measures in place to prevent and correct harassment (*e.g.*, policies or reporting mechanisms) and that the plaintiff did not take advantage of such measures. The legislation eliminates that defense: "The fact that [the complainant] did not make a complaint about the harassment to [the employer] shall not be determinative of whether [the employer] shall be liable." This provision likewise becomes effective on October 11, 2019.
- ***Extends Employer Liability for Discrimination to Independent Contractors in the Workplace***. The legislation amends the new Section 296-d of the New York Executive Law to provide that "[i]t shall be an unlawful discriminatory practice for an employer to permit *unlawful discrimination* against non-employees in its workplace" (emphasis added) – *i.e.*, not simply sexual harassment. This provision also becomes effective on October 11, 2019.
- ***Extends the statute of limitations for sexual harassment claims to three years***. The legislation amends the statute of limitations clause in the New York State Human Rights Law specifically for "sexual harassment in employment" claims to provide for a three-year limit; all other claims of

unlawful discriminatory practices retain their one-year statute of limitations. This provision becomes effective August 12, 2020.

- ***Prohibits mandatory arbitration of all claims of discrimination or harassment and puts restrictions on confidentiality of settlement agreements of such claims***. The legislation extends New York's ban on enforcement of arbitration agreements in the context of sexual harassment claims to ban mandatory arbitration of all claims of unlawful discrimination and harassment. (There is every reason to believe that, for arbitration agreements that would be subject to the Federal Arbitration Act, a court will find this ban to be preempted by the Federal Arbitration Act in the same way it was held to be preempted with respect to sexual harassment claims, as noted above.) Thus, the legislation prohibits employers from including nondisclosure provisions in settlement agreements for all claims of discrimination or harassment, unless the confidentiality is the complainant's preference and the preference is memorialized in the written agreement (in "plain English" and, "if applicable, the primary language of the complainant"); and mandates that a complainant shall have 21 days to consider the "term or condition" and be given seven days to revoke the entire agreement following execution. These provisions become effective on October 11, 2019.
- ***Places restrictions on the terms of employer-employee agreements, both settlement and pre-dispute, regarding employment discrimination claims***. The legislation establishes very specific restrictions and requirements on permissible language in agreements between employers and employees. First, as to settlement agreements, any confidentiality provision will be void "to the extent that it prohibits or otherwise restricts the complainant from: (i) initiating, testifying, assisting, complying with a subpoena from, or participating in any manner with an investigation conducted by the appropriate local, state, or federal agency; or (ii) filing or disclosing any facts necessary to receive unemployment insurance, Medicaid, or other public benefits to which the complainant is entitled." And, second, as to any employment contract between "an employer or an agent of an employer and any employee or potential employee entered into on or after" January 1, 2020, any provision "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 [EEOC], the state division of human rights, a local commission on human rights, or an attorney."
- ***Requires employers to provide employees with their sexual harassment prevention policy and training materials at the time of hiring and during annual training***. Employers must provide this material in English and in the employee's self-identified primary language.

STATE BAN ON SALARY HISTORY INQUIRIES

On July 10, 2019, Governor Cuomo signed Senate Bill No. 6549, which bans inquiries into salary history in connection with hiring state-wide. The ban becomes effective February 8, 2020. The state's salary history ban is very similar to the one imposed previously in New York City. It prohibits employers from requesting or relying on the wage or salary history of an applicant in determining whether to offer employment or the amount of salary to be offered. It does allow consideration of salary history in situations in which applicants "voluntarily, and without prompting," disclose or verify their salary history, "including but not limited to for the purposes of negotiating wages or salary." Further, as to independent attempts to verify prior salary, "an employer may confirm wage or salary history only if at the time an offer of employment with compensation is made, the applicant . . . responds to the offer by providing prior wage or salary information to support a wage or salary higher than offered by the employer." The law applies both to new applicants and to current employees seeking a new position with the same employer.

EXPANSION OF NEW YORK STATE EQUAL PAY LAW

On July 10, 2019, Governor Cuomo signed Senate Bill No. 5248, which expands New York State's Equal Pay Law (Labor Law Section 194). The law, which previously applied only to discrimination in pay based on sex now prohibits pay differentials on the basis of any "protected class," which the law defines to include "age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, or domestic violence victim status." Further, the amended Equal Pay Law not only forbids a pay differential for employees when "equal work on a job the performance of which requires equal skill, effort and responsibility, and which is performed under similar working conditions," but also now also applies to differences in pay between employees who perform "substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions."

PROHIBITION OF RACE DISCRIMINATION BASED ON NATURAL HAIR OR HAIRSTYLES

On July 12, 2019, Governor Cuomo signed Senate Bill No. 6209A, which amended the term "race" in the New York State Human Rights Law to "include traits historically associated with race, including but not limited to, hair texture and protective hairstyles." "Protective hairstyles" in turn is defined to include, but not be limited to "such hairstyles as braids, locks, and twists." The new law became effective upon the Governor's signature. Previously, in February 2019, the New York City Commission on Human Rights released Legal Enforcement Guidance on Race Discrimination on the Basis of Hair, which took the position that restrictions in the workplace on the basis of hairstyle, including "Natural hair, treated or untreated hairstyles such as loos, cornrows, twists, braids, Bantu knots, fades, Afros," constitutes racial discrimination in violation of New York City law.

IMPLICATIONS

Standards for adjudication of discrimination and harassment claims bring New York State in line with New York City. For employment discrimination and/or harassment claims brought by plaintiffs in New York City, prior to this legislation, there had been a disparity between the legal standards applied under the New York City Human Rights Act, on the one hand, and the New York State Human Rights Law and federal Title VII, on the other hand. New York City law was significantly more liberal and expansive in its protections. With this legislation, New York State aligns its law with that of New York City. In fact, Senate Bill No. 6577 amended the "Construction" section of the New York State Human Rights Law, which originally provided that it "shall be construed liberally for the accomplishment of the purposes thereof," to state that it "shall be construed liberally for the accomplishment of the remedial purposes thereof, regardless of whether federal civil rights law, including those laws with provisions worded comparably to the provisions of this

article, have been so construed. Exceptions to and exemptions from the provisions of this article shall be construed narrowly in order to maximize deterrence of discriminatory conduct."

Provisions dictating contractual agreement terms likely codify what employers have been doing as best practice, at least as to settlement agreements. Effective October 11, 2019, for any discrimination settlement agreement requiring confidentiality, it is now explicitly forbidden under New York law to prohibit the employee from initiating, testifying, assisting, complying with a subpoena from, or participating in any manner with an investigation conducted by an appropriate local, state or federal agency. In addition, effective January 1, 2020, any provision in a contract between an employee or potential employee and an employer—presumably here the legislation is referring to employment agreements—that forbids 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 EEOC, the state division of human rights, a local commission on human rights, or an attorney. Carve-outs in settlement agreements for cooperation with government agencies have long been expected to be included in such agreements by the agencies and, thus, at least the first of these new requirements simply codifies what has been viewed as best practice in many employer agreements.

The expansion of protected persons under the New York Equal Pay Law and the lowering of the burden of proof may be significant. Treble damages are available under New York Labor Law Section 198 for willful violations of the New York State Equal Pay Law. The amendments to the law lower the burden of proof for a person claiming equal pay discrimination from a showing of "equal work [requiring] equal skill, effort and responsibility" to "substantially similar work," and expand the class of potential plaintiffs from women to any member of a protected class as defined in the law. These expansions may encourage plaintiffs to bring claims in what heretofore has been a quiet area of the law.

* * *

ENDNOTES

[1] Our client memorandum dated July 1, 2019 discusses the opinion and its implications and is available here.

ABOUT SULLIVAN & CROMWELL LLP

Sullivan & Cromwell LLP is a global law firm that advises on major domestic and cross-border M&A, finance, corporate and real estate transactions, significant litigation and corporate investigations, and complex restructuring, regulatory, tax and estate planning matters. Founded in 1879, Sullivan & Cromwell LLP has more than 875 lawyers on four continents, with four offices in the United States, including its headquarters in New York, four offices in Europe, two in Australia and three in Asia.

CONTACTING SULLIVAN & CROMWELL LLP

This publication is provided by Sullivan & Cromwell LLP as a service to clients and colleagues. The information contained in this publication should not be construed as legal advice. Questions regarding the matters discussed in this publication may be directed to any of our lawyers listed below, or to any other Sullivan & Cromwell LLP lawyer with whom you have consulted in the past on similar matters. If you have not received this publication directly from us, you may obtain a copy of any past or future publications by sending an e-mail to SCPublications@sullcrom.com.

CONTACTS

New York		
Tracy Richelle High	+1-212-558-4728	hight@sullcrom.com
Ann-Elizabeth Ostrager	+1-212-558-7357	ostragerae@sullcrom.com
Theodore O. Rogers Jr.	+1-212-558-3467	rogersto@sullcrom.com
Washington, D.C.		
Julia M. Jordan	+1-202-956-7535	jordanjm@sullcrom.com