

# New York Expands Harassment Laws

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Major changes to New York's harassment laws were among the flurry of bills advanced and passed by the New York State Legislature in the final hours of its 2019 Legislative Session.

Employers will face greater potential liability under bills passed on June 19 and 20 to lower the standard of review for sexual harassment cases ([S.6577 \[Biaggi\]/A.8421 \[Simotas\]](#) and a related amendment [[S. 6594/A. 8424](#)]). The final, omnibus bill was crafted with the participation of Governor Andrew Cuomo's office. Governor Cuomo is expected to sign the bill.

### Removing the "Severe or Pervasive" Standard

It will be an unlawful discriminatory practice for an employer to subject an employee to harassment based on the individual's membership in any protected class, or because the individual 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." This change will comport New York law with the current standard under the New York City Human Rights Law and will go into effect 60 days after enactment.

Harassment is an unlawful discriminatory practice, and the employer may be liable, when such harassment subjects the individual to inferior terms, conditions, or privilege of employment because of his or her membership in a protected class.

An affirmative defense to liability exists only where the harassing conduct is not worse than what "a reasonable victim of discrimination with the same protected characteristic" would consider petty slights or trivial inconveniences.

### Eliminating the Defense that Employee Did Not Follow Internal Procedures

Employers will be liable for harassment even if the employee did not utilize the employer-provided complaint procedure to address such issues. This eliminates what is known as the "Farragher/Ellerth" defense of allowing an employee's failure to utilize a reporting procedure to avoid employer liability for a supervisor's actions. Unlike under New York City law, this defense will not mitigate damages under state law.

### Expanding Protections for Domestic Workers and Non-Employees

Domestic workers and non-employees will receive the same protections against sexual and other forms of harassment as employees.

Under current state law, protections for domestic workers are limited and do not apply to such situations as the domestic worker observing harassment that is not directed at him or her or is retaliated against for making a complaint about the improper behavior. Under the new law, domestic workers and employees will have the same protections.

Similarly, non-employees will be protected not only from sexual harassment, but all

forms of discrimination.

These provisions become effective 60 days after the Governor signs the bill.

### Punitive Damages and Attorney's Fees for Employment Discrimination

The law will allow courts to award punitive damages in all cases of claims of employment discrimination involving private employers. It will require courts to award reasonable attorney's fees in all employment discrimination claims to any prevailing party. This provision is effective 60 days after the bills are signed by the Governor.

### Expanding Non-Disclosure Agreement Prohibition

Effective 60 days after enactment, this legislation will expand the 2018 prohibition on non-disclosure agreements (NDA) in sexual harassment settlements to apply to all discrimination and harassment claims, unless it is the plaintiff's preference to enter into an NDA.

Where such NDA is the preference of the plaintiff, the NDA must be written in plain English, or, where applicable, the plaintiff's native language. Further, the NDA may not preclude the plaintiff from assisting in an investigation conducted by local, state, or federal agencies. It also may not prevent disclosure for use in future claims based on discrimination, unless expressly provided in the agreement and where the plaintiff may disclose in talks with a government entity.

### Expanding Arbitration Clause Prohibition

The legislation will expand the 2018 prohibition against mandatory arbitration clauses in sexual harassment settlements to apply to all discrimination claims. This becomes effective 60 days after enactment.

### Extending Statute of Limitations to Three Years for Sexual Harassment Claims

The legislation extends the statute of limitations in sexual harassment claims from one year to three years from the date of alleged discriminatory practice. This mirrors the change made under New York City law in 2018. This provision becomes effective one year after enactment.

All other actions based on claims of discrimination must be commenced within one year from the last alleged discriminatory act.

### Expanding Sexual Harassment Policy Requirements

Every employer in New York will be required to provide employees with a notice containing the employer's sexual harassment prevention policy at the time of hiring and at every annual sexual harassment training. The notice also must reiterate the information presented at the employer-provided sexual harassment training program in both English and each employee's primary language. This augments the requirements of the mandatory sexual harassment training that was enacted by the state in 2018.

Further, the New York State Department of Labor (DOL) is required to provide a copy of the model sexual harassment policy in languages other than English, at the Commissioner of Labor's discretion, based on the percentage of New York residents that speaks each language. Where an employee identifies his or her primary language in which a template is not available from the Commissioner, the employer must

provide a copy of the policy in English. An employer may not be penalized for errors or omissions in the non-English portion of any notice provided by the Commissioner.

### Attorney General Prosecution of Harassment Claims

The statute requires the state Attorney General's Office to prosecute all discrimination claims where requested by the DOL Commissioner. The Attorney General's Office also must prosecute all criminal claims based on discrimination where, in the Attorney General's judgment, the local District Attorney cannot effectively carry out the prosecution or has erroneously failed or refused to prosecute the crime.

### Liberal Construction

The legislation provides that the New York Human Rights Law is to be construed liberally, regardless of the federal civil rights law and regardless of any interpretation of similar language used in the federal civil rights law. Moreover, any exceptions and exemptions from the provisions of the state Human Rights Law are "to be construed narrowly in order to maximize deterrence of discriminatory conduct."

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