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What NY's New Sexual Harassment Bill Means For Employers

By **Mark Konkel and Diana Hamar** (June 21, 2019, 8:04 PM EDT)

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Clichés like “seismic shift” and “paradigm change” do not begin to describe just how profoundly the New York Legislature changed the standards for harassment claims in a bill[1] passed June 19, confirmed to be signed by Gov. Andrew Cuomo in the coming days. Human resource professionals and employers beware: The sexual harassment foundation you have known for 30 years — and upon which all your in-house training, HR policies, and legal and HR instincts are built — has just been neatly demolished. Here’s why:

A Critical Bit of History

Boring history lesson now ensues (but will make you sound smart when you tell your HR and management colleagues about it).

Everybody knows that Title VII of the Civil Rights Act of 1964 — the basic federal model for all state employment discrimination statutes — makes it unlawful to discriminate against employees on the basis of a number of protected characteristics, including “sex.” In 1964, and for a couple of decades after that, “discrimination” meant the big employment decisions: You couldn’t refuse to hire, fail to promote or fire somebody because she was, say, a woman, or black or a Baptist. Under the original conception of Title VII, those were the tangible, serious “adverse employment actions” that violated the law — that is, anything that involved getting a job, losing a job, getting promoted or paid on that job, etc. The big stuff only.

In the 1970s and '80s, however, women started aiming Title VII at a real problem that the drafters of the law had not addressed: Terms and conditions of employment — or even just keeping a job — were sometimes appallingly paired with demands for sex by a male supervisor. And sometimes a female employee would be so victimized by a continuous, overwhelming, humiliating barrage of sexual comments and conduct that this “harassment” was as bad as any originally prohibited “adverse employment action.”

In other words, the U.S. Supreme Court ultimately recognized that workplace harassment could be so “severe” and so “pervasive” — so serious — that it was as bad as getting fired, and therefore was exactly the kind of “adverse employment action” that violates Title VII.

Everything you have understood until now about sexual harassment law is built on this legal foundation. And it is precisely that foundation that New York has now treated to 1,000 tons of TNT.

#TimesUp, #MeToo and the Hashtag Wars

The #MeToo movement fundamentally changed the level of tolerance for behaviors that are clearly not the kind of "severe or pervasive" harassment Title VII makes unlawful. The movement asked a basic, important question: Why should any level of unwelcome sex-based conduct or speech be tolerated? Why should a woman at work have to listen to even a single comment about her body, or demeaningly be called "sweetheart" by her boss even once?

Why, indeed. However — and this was a point the Supreme Court repeatedly made — Title VII is not supposed to be a "general civility code."[2] Now, before you jump all over a Scalia-era, conservative Supreme Court as somehow condoning really stupid and awful treatment of women, think about the public policies that have to be balanced: On the one hand, we'd like to bar all demeaning treatment of employees based on protected characteristics. On the other hand, if we gave employees a legal cause of action — that is, a right to sue — every single time they are on the receiving end of something they don't like on the perceived basis of some protected characteristic, you could see a flood of costly lawsuits, often when an employee just doesn't like how she's treated, whether or not the treatment is really on the basis of sex, and whether or not it's "as bad as getting fired."

Even without actual changes to the law, the #MeToo era opened the floodgates to new legal claims resting less on "severe or pervasive" harassment than on this kind of "zero tolerance for anything perceived as demeaning" attitude. But employers could still defend those suits by arguing that the harassment was not "severe or pervasive."

New York has now changed that landscape forever, removing that "as bad as getting fired" standard from harassment suits. New York has also deprived employers who react to harassment complaints by investigating and correcting the harassment from using that investigation/correction as a defense — a defense created by the Supreme Court in two 1998 cases, Burlington Industries Inc. v. Ellerth[3] and Faragher v. City Of Boca Raton.[4]

The New Standards

New York's new legislation makes sweeping changes aimed at strengthening protections for workers of any protected class who face discriminatory harassment in the workplace. The most significant changes include:

- Eliminating the "severe or pervasive" standard from discriminatory and retaliatory harassment cases (takes effect 60 days after enactment for claims filed on or after that date);

- Prohibiting an employer from relying upon the Faragher-Ellerth defense to avoid liability. The fact that an individual did not make a harassment complaint to their employer will *not* be determinative of whether an employer is liable (takes effect 60 days after enactment for claims filed on or after that date);

- Extending the statute of limitations to three years for sexual harassment complaints under the New York State Human Rights Law (takes effect one year after enactment for claims filed after that date);

- Prohibiting mandatory arbitration of all claims of discrimination — an expansion from existing legislation, which prohibited mandatory arbitration of sexual harassment claims only (takes effect 60 days after enactment although this is likely preempted by federal law); and

- Prohibiting employers from including nondisclosure provisions in settlement agreements for all claims of discrimination — not only sexual harassment claims — unless the condition of confidentiality is the plaintiff's preference (takes effect 60 days after enactment for all claims that are resolved on or after that date).

What This Means for Employers

Calling the impact of the new law "significant" is a little like calling a killer asteroid "disruptive." In reality, it could not be more profound. In the most immediate and practical terms, the law means that (1) any unwelcome treatment on the basis of sex, almost regardless of its severity, may give an employee a legal claim against his/her employer; and (2) even if an employee never complains to HR or anyone else, and thus never gives his/her employer a chance to correct the problem, the employer is liable for unlawful harassment.

In other words: If you don't prevent all harassment from occurring in the first place, you're on the hook as an employer.

Perhaps the most significant change in the law is the elimination of the requirement that a plaintiff establish that harassment is "severe or pervasive." Instead, a plaintiff can establish a claim of discriminatory or retaliatory harassment if the plaintiff is subjected "to inferior terms, conditions or privileges of employment because of the individual's membership in a protected categor[y]." This standard significantly lowers the bar to establish discriminatory harassment.

And while the legislation provides an employer an affirmative defense, it doesn't provide much comfort, since the defense is available only if the employer can establish the harassing conduct did not rise above the level of what a "reasonable victim of discrimination" in the same protected class would consider petty slights or trivial inconveniences. Translation: If it's even slightly more than just a little annoying, it's illegal.

Employers must now take a new, very different approach to harassment issues at work:

- It is critical that employers reexamine their anti-harassment training and make it more effective. Inadequate, check-the-box, sleep-through-the-webinar training is more useless than ever, because if your employees don't truly "get it" and avoid all questionable conduct in the first place, you're potentially in big trouble.

- Scrap your harassment policies and rewrite them (maybe). While we advocate for discouraging any kind of disrespectful treatment at work, serious or not (and saying so in your employment policies), many employers' policies are still written around the "severe/pervasive" standard and include harassment reporting procedures written around the Faragher-Ellerth defense. Since those legal standards no longer apply, policies written around them border on worthless.

- Don't count on your employees to complain. Ironically, the new law incentivizes employees who might like to sue you to not complain about perceived harassment and give you a chance to do something about it, since the Faragher-Ellerth defense no longer exists in New York. That means

that your HR professionals need to develop new ways to keep their ears to the ground to detect possible workplace harassment issues, whether or not employees come to you to talk about them.

- "Encouraging a culture of openness" is no longer a cliché — it can save your derriere. We are not suggesting that the new law makes it pointless for an employer to investigate and correct harassment at work — it's just that you can't count on your employees to help you or use the fact that they didn't approach you as a defense. A genuine emphasis on respect at work, and openly communicating about workplace problems — both of which can be tied into and encouraged by better workplace training — has now become not just desirable, but essential.

- Kiss arbitration goodbye. If you have a harassment problem, you're going to court, with all the damaging publicity that public court filings entail. So get your training and your complaint-detection processes right.

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[1] https://www.nysenate.gov/legislation/bills/2019/s6577

[2] https://www.law.cornell.edu/supct/html/96-568.ZO.html

[3] https://caselaw.findlaw.com/us-supreme-court/524/742.html

[4] https://caselaw.findlaw.com/us-supreme-court/524/775.html