

LABOR AND EMPLOYMENT PRACTICE

In the final hours of the 2019 Session, the New York State Legislature passed sweeping amendments to New York's discrimination and harassment laws, and the Governor is expected to sign this new legislation.¹

ALL EMPLOYERS ARE COVERED

The legislation amends the New York Human Rights Law so that all employers are covered. Currently, the Human Rights Law only applies to employers with four (4) or more employees (except for claims of sexual harassment, which currently applies to all employers). This amendment goes into effect 180 days after the bill becomes law.

STANDARD OF PROOF IS SIGNIFICANTLY LOWERED

Currently, State law mirrors federal law with respect to the standard of proof in harassment cases. In order to establish a claim, harassment must be "severe or pervasive." Under the new legislation, the "severe or pervasive" standard is eliminated, meaning that an individual can establish a claim of harassment if he/she is subjected to inferior terms, conditions or privileges of employment because of the individual's membership in a protected category.

The legislation also eliminates the *Farragher-Ellerth* defense. Under this defense, an employer is not liable for harassment (in most harassment cases) if the employee failed to use the employer's internal complaint procedures. The bill expressly provides that an employer can be liable for harassment even if the individual did not make a complaint about the harassment.

Although the *Farragher-Ellerth* defense is eliminated, the legislation provides a narrow affirmative defense to liability where an employer can show that the conduct at issue does not rise above the level of what a reasonable victim of discrimination would consider "petty slights or trivial inconveniences."

These changes all take effect 60 days after the bill becomes law for claims filed on or after that date.

OTHER MAJOR AMENDMENTS

The legislation contains a number of other expansions to New York's discrimination and harassment laws, and include the following:

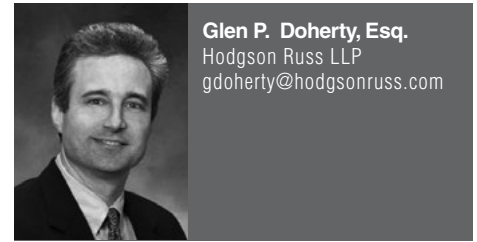
Employers may be liable for harassment of any kind (not just sexual harassment) against contractors, vendors, consultants, or any person providing services in the workplace, so long as the business knew or should have known that the non-employee was subject to harassment, and failed to take corrective action. This amendment goes into effect 60 days after the bill becomes law for claims filed on or after that date.

The statute of limitations for employees to file an administrative claim of sexual harassment with the New York State Division of Human Rights is extended from one (1) to three (3) years. This amendment goes into effect one (1) year after the bill becomes law for claims filed on or after that date.

Courts may award punitive damages in discrimination, harassment and retaliation cases. This amendment goes into effect 60 days after the bill becomes law for claims filed on or after that date.

A prevailing party "shall" be awarded attorneys' fees. An employer can be a prevailing party, but must establish that the lawsuit or proceeding was frivolous. This amendment goes into effect 60 days after the bill becomes law for claims filed on or after that date.

Non-disclosure agreements are prohibited in any settlement, agreement or other resolution of any discrimination or harassment claim, unless confidentiality is complainant's preference. In such a case, complainant must be given 21 days to consider the writing and seven (7) days to revoke it after execution. This amendment goes into effect 60 days af-



ter the bill becomes law for all claims settled on or after that date.

Beginning on January 1, 2020, employment contracts that limit an employee from disclosing information related to a future claim of discrimination or harassment must provide that the employee is not prohibited from speaking with law enforcement, the U.S. Equal Employment Opportunity Commission, the NYS Division of Human Rights, any local human rights commission, or a lawyer hired by the employee.

Mandatory arbitration of any discrimination or harassment claim is prohibited. This amendment goes into effect 60 days after the bill becomes law.

Employers must provide their employees with a notice, both at the time of hire and during the annual sexual harassment prevention training, that contains both the employer's sexual harassment prevention policy and the information presented at such employer's sexual harassment prevention training program. This amendment goes into effect immediately upon the bill being signed into law.

ACTION PLAN

Employers must do everything possible to ensure that they provide a work environment free from discrimination and harassment. This includes a critical review of all anti-harassment policies and anti-harassment training programs. Given the elimination of the *Farragher-Ellerth* defense, policies may need to be significantly revised due to the fact that most policies were drafted around this defense. As to training, serious thought should be given as to whether web-based training is sufficient. Now,

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Attorney General will ensure the beneficiaries receive the appropriate distribution. The Attorney General is not required to be notified, however, when there is a bequest of a specific dollar amount, such as \$1,000 to Albany Law School.

Charitable Trusts

When a trust has a charitable beneficiary, the trustee is required to file a copy of the instrument identifying his or her title, powers and duties within six months after any property held by the trustee is required to be applied to charitable purposes (see EPTL 8-1.4 [d]). The Attorney General has standing to enforce the trust provisions on behalf of the charitable beneficiaries. This policing power is in place to uphold the charitable intent of the grantor and ensure that the trust terms are followed even after a grantor passes away. The Attorney General can compel a trustee to account and examine the acts of the trustee to protect the interest of the charitable beneficiaries.

Cy Pres

The doctrine of cy pres is applicable when there is a charitable disposition

in a will or trust but there exists indefiniteness or uncertainty regarding the beneficiary (see EPTL 8-1.1 [a]). As codified in EPTL 8-1.1, the doctrine of cy pres seeks to prevent the failure of a charitable bequest. For example, if a decedent left \$1,000 to St. Mary's Church of East Greenbush in her will but upon death it is discovered that St. Mary's Church of East Greenbush no longer exists, the doctrine of cy pres could apply to determine what charitable organization should receive the money. In order to apply this doctrine, a court must determine that administration of the charitable bequest pursuant to its terms is impracticable or impossible, and that the testator or grantor had a specific charitable purpose that is no longer capable of being performed (see *Matter of Wilson*, 59 NY2d 461, 472 [1983]). Under cy pres, the terms of the trust or instrument are modified to permit the use of the trust property to pursue other similar charitable purposes, intending to preserve the grantor's wishes. ●

¹ If you have any available family names, they must also be added to the description. name (see generally CPLR 1024).

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more than ever, employees need to be thoroughly trained to avoid inappropriate conduct. This important message might not come through in a training program presented via a computer. Moreover, review of "form" employment documents must be conducted in light of the new requirements concerning non-disclosure and mandatory arbitration. Finally, employers must train their managers (or HR officials) to spot brewing harassment or discrimination issues before they escalate into something concrete. Remember, the new legislation no longer requires employees to complain as a prerequisite to suit. ●

¹ As of the date this article was submitted for publication, the Governor had yet to take action on the bill.

ATTORNEYS IN THE PUBLIC SERVICE COMMITTEE

By Adrienne Kerwin, adrker@yahoo.com

While collecting books during the holiday season, the Attorneys in Public Service Committee (APSC) learned that the book inventory at The RED Bookshelf, a non-profit community literacy program, is typically lowest in June. In an effort to increase this inventory, the APSC held a book drive and donated 560 books to the RED Bookshelf to ensure that Albany County's children could continue to read over the summer. Thank you to all members and non-members who assisted with this important effort.

Over the last year and a half, the APSC has endeavored to coordinate community-based volunteer opportunities for ACBA members, and the Committee has staffed several successful service projects. In a life of deadlines, clients, long hours and constant email, volunteerism is often low on one's list of priorities, yet a great way to re-focus and help those truly in need. Additionally, it can often be a way for families to spend time together.

The APSC is interested in organizing community volunteer events in which members and their families may participate while serving the needs of Albany County. If anyone has any ideas or suggestions of potential family-friendly projects, please email co-chairs Adrienne Kerwin (adrker@yahoo.com) or Patrick Jordan (Pjordan@portofalbany.us). ●