

New York Employment Discrimination Amendments

*More Than a Petty Slight or
Trivial Inconvenience*

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Overview

1 Human Rights Law

2 Arbitration

3 Nondisclosure

4 Policies/Training

5 Pay Equity

New York Human Rights Law

Protected Categories

- Age
- Race
- Creed
- Color
- National Origin
- Sexual Orientation
- Gender Identity or Expression
- Military Status
- Sex
- Disability
- Predisposing Genetic Characteristics
- Familial Status
- Marital Status
- Domestic Violence Victim Status

Race

- “Traits historically associated with race”
- “Including, but not limited to, hair texture and protective hairstyles”
- Amendment effective immediately (July 12, 2019)

Hairstyle Discrimination



“Protective hairstyles”

Include, but are not limited to, such hairstyles as:

- Braids
- Locks
- Twists

Covered Employers

Current

- All employers of any size for sexual harassment only
- 4 or more employees for all other protected categories

Amendment

- All employers of any size for all protected categories
- Effective 180 days after Governor signs bill

Covered Workers

Current

- Sexual harassment protection applies to non-employees in workplace, including contractors, subcontractors, vendors, and consultants
- “Employees” only for all other protected categories

Amendment

- Protections apply to non-employees in workplace for all protected categories
- Slightly higher burden of proof for non-employees
- Effective 60 days after Governor signs bill

Harassment

- Eliminates long-standing “severe or pervasive” standard
- Unlawful = “subjects an individual to inferior terms, conditions or privileges of employment because of the individual’s membership in one or more of these protected categories”
- Failure to make a complaint is not “determinative”
- Employee need not “demonstrate the existence of an individual to whom the employee’s treatment must be compared”
- Affirmative defense = “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**”
- Effective 60 days after Governor signs bill

New Penalties

- Punitive Damages (private employers only) with no statutory cap
- Mandatory Attorneys' Fees to prevailing plaintiff (previously discretionary and only for sexual harassment cases)
- Defendant can only recover attorneys' fees upon showing that the case was "frivolous"
- Effective 60 days after Governor signs bill



Liberal Construction

- Human Rights Law must be construed liberally to accomplish remedial purposes, even if similar federal laws have not been interpreted as broadly.
- “Exceptions to an exemptions from the provisions of this article shall be construed narrowly in order to maximize deterrence of discriminatory conduct.”
- Effective for new cases filed after Governor signs bill

Nondisclosure

Confidentiality Agreements

- Employers cannot include confidentiality provision in an agreement that would prevent person from disclosing facts and circumstances of a discrimination claim
- Exception if “confidentiality is the complainant’s preference”
- Previously only applied for sexual harassment claims
- Now applies for any claim “the factual foundation for which involves discrimination”
- Effective 60 days after Governor signs bill

“Complainant’s Preference”

Provide Terms in Writing



“Plain English” and complainant’s primary language

21-day Waiting Period



Complainant can’t waive

Sign Agreement



Including confidentiality provision

7-day Revocation Period



Before enforceable

Confidentiality Agreement

Must inform complainant of right to disclose facts to:*



- 1 Law enforcement
- 2 EEOC
- 3 New York State Division of Human Rights
- 4 A local commission on human rights
- 5 Attorney retained by the employee

*Beginning 1/1/2020

Arbitration

No Mandatory Arbitration

- Extends restriction from sexual harassment claims to all discrimination claims
- Questionable validity, given federal law encouraging arbitration of disputes
- Federal judge recently struck down existing law preventing mandatory arbitration of New York sexual harassment claim



Sexual Harassment Policies/Training

Written Notice

- Upon hiring and at each annual sexual harassment training, employer must provide written notice containing its sexual harassment prevention policy and the information presented at the training program
- Might have to provide in languages other than English
- Effective immediately upon Governor's signing

Primary Language Requirement

- DOL will prepare model policy and training program in multiple languages
- If DOL templates are available in an employee's primary language, employer must provide sexual harassment policy and training materials in that language (and English)
- Training videos currently available with slides/subtitles in:
Bengali, Chinese, Haitian-Creole, Korean, Italian, Polish, Russian, and Spanish



Review of DOL Templates

- DOL must re-evaluate and update model policies and training programs every 4 years beginning in 2022
- Given these amendments, some portions of DOL templates will be obsolete before 2022
- Employers should re-evaluate their own policies and training before amendments take effect
- Many amendments might apply before first annual training deadline of October 9, 2019

Pay Equity

Equal Pay Law

- Law that historically prohibited pay disparity based on sex will now apply to all protected characteristics under NY HRL
- Extends protections from “equal work” to “substantially similar work”
- Provides additional remedies and longer statute of limitations than HRL alone
- Effective October 8, 2019



Salary History Ban

- Prohibits employers from inquiring about applicants' wage or salary history
- Also prohibits use of such information in hiring and determining wages
- Even applies for current employees (i.e., promotions)
- Exception where employee discloses salary in negotiating higher wage
- Effective January 6, 2020



Thanks for your time!

Questions?

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