

2019 Legal Updates

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Salary History Ban

- Effective January 6, 2020, employers are prohibited from using an employee or applicant's salary history in hiring decisions to determine what compensation to offer
- Prohibits both current or former employers
- An applicant or employee may voluntarily disclose, but employers are prohibited from prompting the employee to disclose
 - Employers may ask what are your salary requirements?

Salary History Ban

- If an applicant or employee volunteers their compensation to negotiate salary, the employer is then permitted to confirm the compensation history
- Exceptions:
 - Employer may rely on its own information about current employees for purposes of compensation changes due to a promotion
 - Law does not supersede any federal, state or local law that requires disclosure or verification of salary history information
- Retaliation against employee/applicant who will not disclose prior salary is prohibited

Legal Update

- Recap of 2018 Changes to NYSHRL
- 2019 Changes to NYSHRL
- 2019 Changes to Equal Pay Law

Sweeping Changes to NYS Human Rights Law

- Recap of 2018 Changes
 - April 2018 Amendment
 - Required Policy Updates by October 9, 2018
 - complaint form; investigation requirement; right to file with external agencies & remedies; applicable laws; definitions with examples
 - Must be provided to all employees (may be electronic) and in language spoken by employees
 - Posted prominently in all work locations and must be provided to employee upon hiring

Sweeping Changes to NYS Human Rights Law: 2018 Recap Con't

- **Coverage Expanded** - Nonemployees/third parties (contractors, subcontractors, vendors, consultants now protected)
- **State Contractors** – applicants for NYS contracts requiring competitive bids must certify *under penalty of perjury* that they have implemented complaint harassment policies and provided annual training
 - Similar amendment to NYC HRL
- **Restrictions on NDAs** involving sexual harassment (unless complainant's preference)
 - If employer initiates the process, agreement must provide a nonwaivable 21 day consideration period; memorialize "complainant's preference" and employee has 7 days to revoke
- **Training Requirement** by October 9, 2019
 - No state record-keeping requirements, but NYC requires we keep records for 3 years

2019 Amendments

- **Gender Expression Non-Discrimination Act (GENDA)**
 - Prohibits employment discrimination based on “gender identity or expression”
 - The term “gender identity or expression” means a person's actual or perceived gender-related identity, appearance, behavior, expression, or other gender-related characteristic regardless of the sex assigned to that person at birth, including, but not limited to, the status of being transgender

- **Expanded Definition of “Race”**
 - Modified to include traits historically associated with race, including but not limited to hair texture and “protective hairstyles” including braids, locks & twists

2019 Amendments

➤ Victims of Domestic Violence

- Expanded protections for “Victim of domestic violence” requiring employers to provide a reasonable accommodation to an employee who is a victim of domestic violence who must be absent from work to:
 - Seek medical attention for injuries caused by DV, including injuries to a child;
 - Obtain services from a DV shelter, program or rape crisis center;
 - Obtain psychological counseling related to DV, including for a child;
 - Participate in safety planning related to DV, including relocation; or
 - Obtain legal services or appear in court for DV-related incidents.

2019 Amendments

- Religious Attire, Clothing and Facial Hair
 - Employers are prohibited from refusing to hire, retain, promote or take other discriminatory action against an individual for wearing attire or facial hair in accordance with the tenants of their religion
 - Cannot treat applicants differently because of religious beliefs

Anti Harassment Law: 2019 Amendments

- Redefines conduct that constitutes unlawful discriminatory harassment
- Eliminates defense based on an employee's failure to use internal mechanisms ("Faragher Ellerth" defense)
- Expands protection to non-employee for all anti-discrimination laws
- Allows for punitive damages and attorney's fees against employer

Anti Harassment Law: 2019 Amendments

- Significantly limits confidentiality of settlements
- Requires distribution (upon hire and annually thereafter) of:
 - anti-harassment policies to employees upon hire and annually; and
 - Information presented at the employer's sexual harassment training
- Expands statute of limitations for DHR complaints from 1 to 3 years (effective August 12, 2020)

New Standard for Discriminatory Harassment

- Hostile Work Environment
 - **Old standard:** conduct must be *severe or pervasive* enough to create a work environment that a reasonable person would consider intimidating, hostile or abusive
 - Not a “general civility code”; petty slights and minor inconveniences/annoyances are not enough

New Standard for Discriminatory Harassment

- **New (lower) Standard:** conduct that subjects an individual to inferior terms, conditions or privileges of employment
 - eliminates the severe or pervasive requirement
 - New affirmative defense: conduct only amounts to “petty slights or trivial inconveniences”
 - Employees are no longer required to show that they were treated less favorably than a “similarly-situated employee”

Faragher-Ellerth Defense Eliminated

- Affirmative defense to harassment claims that:
 - Employer attempted to prevent and correct harassing conduct (e.g., through policies for prohibiting and reporting harassment); and
 - Employee unreasonably failed to take advantage of preventative and corrective opportunities
- This defense is now eliminated, meaning an employer may be held liable even if employee did not report it prior to filing complaint

Expanded Coverage

- Non-employees (e.g., contractors, subcontractors, consultants, or affiliates) may bring claims against the employer
 - Employer liable if the employer “knew or should have known” about discriminatory practice in employer’s workplace and failed to take immediate & appropriate corrective action
- Effective August 12, 2020 - SOL for sexual harassment complaints brought in DHR raised from one to three years

Expanded Coverage

- Legislation directs courts and DHR to interpret the law liberally and to construe exceptions narrowly to maximize effectiveness of legislation in deterring discriminatory conduct
- Attorneys' Fees – prevailing employee in a claim involving a violation of the HRL may be awarded attorneys' fees
 - Employers may also recover attorneys' fees but only if they can prove claim was "frivolous" (high standard)

Nondisclosure Agreements/Confidentiality

- NDAs prohibited in any settlement or resolution of a claim if the basis of the claim involves discrimination of any kind unless it's the complainant's preference
 - Effective October 11, 2019
 - Expanded 2018 amendment prohibiting NDAs for claims involving sexual harassment

Nondisclosure

Agreements/Confidentiality cont'd

- If it is the complainant's preference, must include a non-waivable 21 day consideration period before signing and a 7 day revocation period
- NDAs in employment contracts must include a carve-out that employee is not prohibited from "speaking with law enforcement, the EEOC, the NYS DHR, a local commission on human rights, or any attorney retained by the employee"
 - Effective January 1, 2020

Expansion of Equal Pay Law

- Effective October 8, 2019
- Previously only prohibited unequal pay for equal work based upon sex/gender
- “Equal work” was defined as work on a job the performance of which requires equal skill, effort and responsibility, and which is performed under similar working conditions
- Now expanded to cover:
 - All protected classes under the NYSHRL
 - “Substantially similar work, when viewed as a composite of skill, effort and responsibility, and performed under similar working conditions”

Expansion of Equal Pay Law

- May consider different pay based upon:
 - A seniority system;
 - A merit system;
 - A system that measures earnings by quantity or quality of production; or
 - A bona fide factor other than status within 1 or more protected classes

Questions?

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