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Recent Amendments to New York State Discrimination and Harassment and Pay Equity Laws

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Speakers



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Jillian is a partner in Dorsey's Labor & Employment group, where she focuses her practice on employment litigation and advice, and independent investigations. Jillian assists employers in investigating and responding to internal complaints, agency charges, and lawsuits based on allegations of discrimination, harassment, retaliation, breach of contract, conversion, wage and leave statute violations, and whistleblower claims. In her advice practice, she helps clients avoid litigation and be in the best position possible if an employee does bring a claim. Jillian also helps employers navigate union grievances and unfair labor practice charges. Jillian has conducted a number of complex and sensitive investigations, using her clinical social work background to reach the heart of the matter in a way that leaves interviewees feeling respected during the process.

Before practicing law, Jillian spent six years in human resources management. In these roles, she advised managers on employee relations, recruiting, compensation, benefits, performance appraisals, and organizational development issues.



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Laura began practicing at Dorsey in 1992 and has since counseled and represented employers on complying with the law and minimizing the risk of employment law claims. Laura counsels and represents employers in all aspects of employment law, including employee hiring and terminations, reductions in force, disability and discrimination issues, employee leave laws, wage and hour laws, restrictive covenant agreements, breach of fiduciary duty claims and employee policies and handbooks. She is experienced in all phases of federal and state court litigation and employment proceedings before the EEOC and state administrative agencies.

Laura also represents clients in general commercial litigation matters.



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PROGRAM OVERVIEW

- **Relaxed Standard for Establishing Harassment and Retaliation Claims**
- **Elimination of “Farragher-Ellerth” Defense**
- **Additional Sexual Harassment Training Requirements**
- **Expanded Coverage of New York State Human Rights Law**
 - Small Employers
 - Non-Employees
- **Expanded Remedies Available to Claimants**
 - Attorneys’ Fees
 - Punitive Damages
- **Extended Statute of Limitations for Agency Claims**
- **Expanded Ban on Non-Disclosure Provisions in Settlement Agreements**
- **Expanded Ban on Mandatory Arbitration Provisions**
- **Expanded Coverage for Pay Equity Claims**
- **Expanded Salary History Ban**
- **Race-Based Hairstyle Discrimination Ban**



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Relaxed Standard for Establishing Harassment and Retaliation Claims

Effective Date: September 10, 2019
Not applied retroactively

- Out:** Burden on plaintiff to prove that harassing behavior is severe or pervasive. Plaintiff need only show that the harassment subjected him/her to “inferior terms, conditions or privileges of employment”
- In:** Burden on employer to prove, by way of affirmative defense, that “the 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”

Elimination of “Farragher-Ellerth” Defense

Effective Date: September 10, 2019
Not applied retroactively

No defense against a claim of harassment under the NYSHRL because of an employee’s failure to follow complaint procedures. Under the new amendments, “[t]he fact that such individual did not make a complaint about the harassment to such employer . . . shall not be determinative of whether such employer . . . shall be liable.”

Employees also not required to identify comparators: “nothing in this section shall imply that an employee must demonstrate the existence of an individual to whom the employee’s treatment must be compared.”

Sexual Harassment Training

Review: written sexual harassment policies and annual employee training was mandated in New York State in 2018. The first training sessions must be completed by October 9, 2019.

Requirements:

- A written sexual harassment prevention policy, including a complaint form
- Annual interactive sexual harassment prevention training for all employees
- Sexual harassment prevention poster

Recent amendments: New employees must be provided with a copy of the policy and of the most recent training materials upon commencement of employment

Sexual Harassment Training

Training must be interactive and include:

- An explanation of sexual harassment consistent with DOL guidance
- Examples of prohibited conduct
- An explanation of federal and state law related to sexual harassment and the remedies available under these laws
- Notice of employees' rights of redress and all available administrative and judicial forums for adjudicating sexual harassment claims
- Information addressing conduct by supervisors and any additional supervisor responsibilities

Sexual Harassment Training

The New York State Department of Labor has developed the following materials for use by employers:

- Sexual Harassment Prevention Model Policy
- Sexual Harassment Prevention Poster
- Combat Harassment Complaint Form
- Sexual Harassment Prevention Model Training
- Sexual Harassment Prevention Training Case Studies
- Sexual Harassment Prevention Training Video Part 1
- Sexual Harassment Prevention Training Video Part 2: Case Studies

New York City Employers may use training materials developed by the New York City Commission on Human Rights



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Expanded Coverage of New York State Human Rights Law

Small Employers

Effective Date: January 6, 2020

Not applied retroactively

Review: Historically, the NYSHRL applied only to employers with 4 or more employees. Last year, the protections against sexual harassment under the NYSHRL were extended to employers of all sizes

Recent Amendments: Extend ALL of the protections of the NYSHRL to all employers, regardless of size



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Expanded Coverage of New York State Human Rights Law

Non-Employees

Effective: September 10, 2019

Not applied retroactively

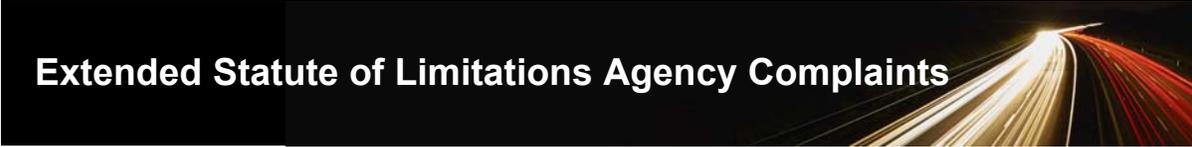
Review: Historically, the NYSHRL applied only to employees. Last year, the protections against sexual harassment under the NYSHRL were extended to non-employees in the workplace, including independent contractors

Recent Amendments: Extend ALL of the protections of the NYSHRL to non-employees in the workplace “when the employer, its agents or supervisors knew or should have known that such non-employee was subject to an unlawful discriminatory practice in the employer’s workplace and the employer fails to take immediate and appropriate remedial action.”

Expanded Remedies under NYSHRL

Effective Date: September 10, 2019

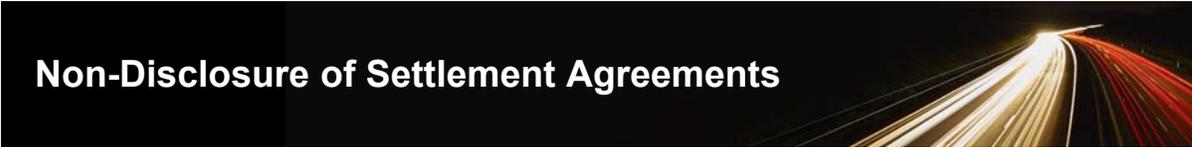
Attorneys’ Fees and Punitive Damages will be available under the NYSHRL



Extended Statute of Limitations Agency Complaints

Effective Date: July 10, 2020

The limitations period for filing a complaint of discrimination with the New York State Division of Human Rights will be extended from 1 year to 3 years



Non-Disclosure of Settlement Agreements

Effective Date: January 1, 2020

Review: Last year, the law was amended to preclude non-disclosure provisions in agreements settling sexual harassment claims “unless the condition of confidentiality is the complainant’s preference”

Recent amendments: Extend the prohibition against employer-imposed confidentiality agreements to agreements settling all types of unlawful discrimination claims.

Non-Disclosure of Settlement Agreements

Effective Date: January 1, 2020

- Where confidentiality is the complainant's preference, he/she must be given 21 days to consider the non-disclosure provision and 7 days to revoke it after signing.
- The complainant's preference for confidentiality must be memorialized in a separate document.
- Non-disclosure provisions may not restrict a complainant from participating in an investigation by a government agency or prohibit the disclosure of facts necessary to receive public benefits.
- Agreements that prevent disclosure of future claims will be void unless the agreement "notifies the employee or potential employee that it does not prohibit him or her from speaking with law enforcement, the [EEOC], the state division of human rights, a local commission on human rights, or an attorney retained by the employee or potential employee."

Mandatory Arbitration Provisions

Effective Date: September 10, 2019 – Maybe

Review: Last year, New York's arbitration law (CPLR 7515) was amended to prohibit mandatory arbitration of sexual harassment claims.

Recent Amendments: Preclude mandatory arbitration of any type of unlawful discrimination claim.

Mandatory Arbitration May Not Be Dead Yet: New York federal court recently held that the 2018 amendment prohibiting mandatory arbitration of sexual harassment claims is pre-empted by the Federal Arbitration Act, which allows mandatory employer-imposed arbitration of employment discrimination claims. *Latif v. Morgan Stanley et al.* (SDNY 2019) (ordering arbitration of sexual harassment claims)



Expanded Coverage for Pay Equity Claims

Effective Date: October 10, 2019

Review: Currently, New York's pay equity provisions apply only to pay inequality based on sex.

Recent Amendments: Extend the protections of New York's Achieve Pay Equity Act to pay inequity based on any of the protected classes under the NYSHRL.

Pay equity now applies to the following protected classes: age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, and domestic violence victim status

Relaxed standard for making claims: employee must show that he/she is paid less than someone outside of the protected class for performing "substantially similar work" (current standard is "equal" work)

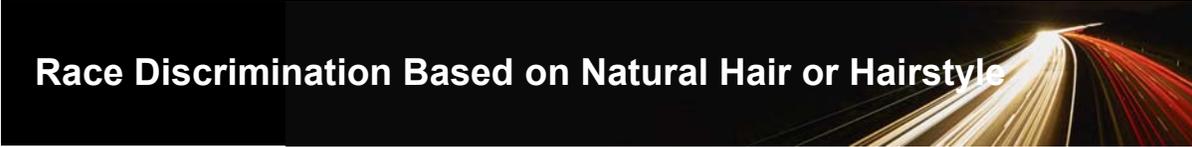


Salary History Ban

Effective Date: January 6, 2020

Employers may not inquire about or rely on wage or salary history in making decisions concerning hiring, promotion or salary increases.

However, "nothing shall prevent an applicant or current employee from voluntarily, and without prompting, disclosing or verifying wage or salary history, including but not limited to for the purposes of negotiating wages or salary."

A black rectangular banner with a background of colorful light trails in white, yellow, and red, suggesting motion and speed.

Race Discrimination Based on Natural Hair or Hairstyle

- The definition of “race” in the NYSHRL has been amended to include “traits historically associated with race, including but not limited to, hair texture and protective hairstyles.”
- “Protective Hairstyles” include hairstyles such as “braids, locks, and twists.”