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The Impact of Intersectional Discrimination on the #MeToo Movement in the Digital Age

Monday, November 18, 2019
6-7:40 p.m.
Fordham Law School
150 West 62nd Street
New York, NY 10023

CLE credit for the program is approved in accordance with the requirements of the New York State CLE Board for a maximum of 2.0 non-transitional Diversity credits.

Panelists

Tamara Bock, Member, Epstein Becker & Green, P.C
Walker Harman '99, Partner, The Harman Firm LLP
Tiffany Ma, Partner, Young & Ma LLP
Edgar M. Rivera '14, Partner, The Harman Firm LLP
Christine Rodriguez '99, Partner, The Noble Law

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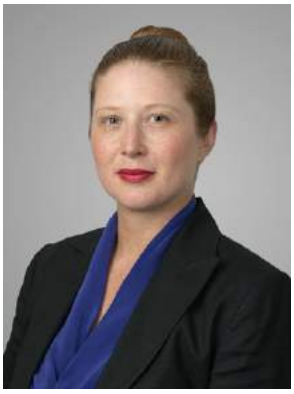

Tamara Bock a Member of the Firm in the Employment, Labor & Workforce Management and Litigation practices, in the New York office of Epstein Becker Green.

Ms. Bock advises national and multinational companies on all facets of employment issues, including compliance with state, federal, and international laws and regulations, assists companies with creation, maintenance, and communication of employment contracts and policies. She conducts workplace training seminars for employees, managers, and human resource personnel. She also conducts internal investigations into complaints of employee misconduct and in response to shareholder demands regarding allegations of, among other things, securities violations.

Ms. Bock represents employers in federal and state trial and appellate courts and in arbitrations and mediations on a broad range of employment law issues, involving, among other things, breach of employment contracts, restrictive covenants, and confidentiality agreements; compensation disputes; misappropriation of confidential information and trade secrets; raiding; partnership disputes; and harassment and discrimination claims. She represents clients in complex commercial litigation matters, including business and banking disputes and real estate, contract, breach of fiduciary duty, limited liability company law, and securities actions Advises prospective hires in the financial services industry on employment issues, including restrictive covenants, employment contracts, and the confidentiality of business information

Before joining Epstein Becker Green, Ms. Bock was an attorney at a litigation boutique in New York City, where she focused on complex commercial litigation, including sophisticated business disputes and employment, real estate, contract, and securities matters. Previously, she was a litigation attorney at an international law firm, where her practice included securities, antitrust, and bankruptcy litigation.

Ms. Bock received her law degree from New York University School of Law, where she was Managing Editor of the *Annual Survey of American Law*. She previously served as manager of the *Post-Soviet Media Law and Policy Newsletter,* and her work has appeared in *The New York Times,* the *New York Real Estate Reporter,* and the *Stanford Law & Policy Review.*

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Walker G. Harman, Jr. ’99, graduated from the Fordham University School of Law with a J.D. in 1999. At Fordham Law School, he was a member of the Moot Court Board and the Criminal Defense Clinic and an editor of the Environmental Law Journal. He also served as President of the Fordham Student Sponsored Fellowship, where he was charged with the distribution of hundreds of thousands of dollars in scholarship funds to students to enable them to work with not-for-profit organizations, and co-chaired the LGBT Students Organization, where he worked directly with Fordham's Dean and other administrators to address diversity and issues of discrimination on campus.

While at Fordham Law School, he spent a summer interning for the Hon. Deborah Batts of the U.S. District Court for the Southern District of New York and a semester interning for the Hon. Denny Chin, now on the Second Circuit Court of Appeals. After law school, Mr. Harman was asked to be the Secretary and then the Co-Chair of the New York City Bar Association's LGBT Committee.

In 2003, after several years as an associate with a large international law firm where he specialized in complex commercial litigation, he formed his own practice, The Harman Firm, LLP. The Harman Firm focuses almost exclusively on employment law, including discrimination, executive compensation, retaliation, sexual harassment, whistleblower, and wage-and-hour litigation on behalf of employees. Since its foundation, The Harman Firm has successfully represented employees in hundreds of employment discrimination cases and complex wage-and-hour disputes, including collective and class actions, and has achieved seven-figure resolutions for high-income individuals, including attorneys, bankers, executives, and other high-level professionals.

Mr. Harman is admitted to practice in the New York State Courts; the United States District Courts for the Southern and Eastern Districts of New York, the Northern District of Texas, and the District of Colorado; and the United States Circuit Court of Appeals for the Second Circuit, where he has argued numerous appeals. He has been an Adjunct Professor of Law at Fordham University School of Law since 2008, teaching lawyering skills as part of Fordham's clinical program.

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Tiffany Ma is a New York employment attorney who practices at her own firm Young & Ma LLP, an employment and litigation law firm focusing primarily on servicing employees in larger companies and small businesses in or working with those in the New York metropolitan area.

From 2016 to the present, Ms. Ma's employment practice has been recognized by Super Lawyers in the New York Metro area. More recently, Ms. Ma is matriculating onto the AAA panel as employment arbitrator, and onto the EDNY and SDNY court panels as employment mediator. Prior to commencing her own law firm, Ms. Ma practiced in the employment, litigation and financial services departments at major national and international law firms such as Morrison & Foerster LLP and Katten Muchin Rosenman LLP.

Ms. Ma regularly appears in her employment cases at venues such as the United States Equal Employment Opportunity Commission; the United States District Court, Southern and Eastern Districts of New York; New York Supreme Court; JAMS; AAA; the Financial Industry Regulatory Authority; New York State Department of Labor, New York State Department of Human Rights; and New York City Commission of Human Rights.

Ms. Ma received her B.A. magna cum laude from Boston University through the University Professors Program and her law degree from Boston University School of Law.

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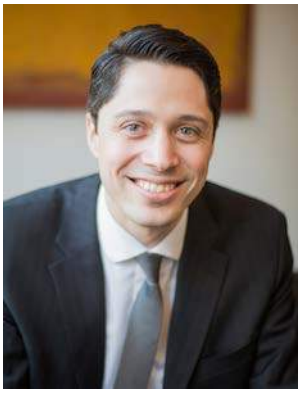

Edgar M. Rivera ’11 is an aggressive and zealous advocate for employees who have been subjected to harassment, discrimination, retaliation, and wage-and-hour violations. Edgar has represented hundreds of employees in individual, multi-plaintiff, collective- and class action litigation before state and federal courts in New York, New Jersey and Florida.

Edgar is a member of the National Employment Lawyer Association ("NELA"), where he participates in NELA's discussion boards and conferences, including the annual Trial Boot Camp in Chicago. He is published in the New York State Bar Association Labor and Employment Law Journal, serves as the editor of the New York Employment Attorney Blog, The Harman Firm, LLP's employment law blog, and frequently speaks on issues in employment law. He has also appeared on a PIX 11 segment “Know Your Rights: Harassment in the Workplace,” where he discussed identifying and reporting sexual harassment in the workplace.

While at Fordham Law School, Edgar interned with Judge Jaime Ríos of the Queens County Supreme Court and with JPMorgan Chase in the Legal and Compliance Department. He also was a member of the Urban Law Journal.

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Christine A. Rodriguez ’99 joined The Noble Law in the summer of 2019 after 20 years as a litigator and representing clients in all aspects of employment law in New York.

Christine started out as a prosecutor with the New York County District Attorney’s Office. When she left public service to join the private sector, Christine joined a mid-size New York City firm where she negotiated, defended, and litigated general commercial liability claims, complex construction cases, premises liability claims and employment claims.

In 2007, she opened up her own litigation practice in New York City, focused primarily on representing employees in all types of employment law matters. As an employment attorney, she has represented clients at the EEOC, the New York State Division of Human Rights, through the EEO process at several Federal agencies, in New York State Courts, the Federal District Courts for the Southern and Eastern Districts of New York, and the Second Circuit Court of Appeals. Christine has been up against many of the larger firms in New York and repeatedly achieved favorable results for her clients.

Christine has family in Charlotte and in 2018 — lured in no small part by the sweet tea, the warmer climate, and the irresistible charms of the Queen City — she decided to expand her practice in North Carolina. Christine is now in The Noble Law’s Charlotte office and will be handling matters in the New York City employment law firm office as well.

In addition to her years of experience handling employment matters in New York City, Christine is a skilled negotiator who has handled all manner of contract negotiations and mediations for both employment and other civil litigation matters and an accomplished trial attorney who has successfully tried many cases in her criminal and civil practice. Christine takes a practical, and when necessary, aggressive approach to litigation to get the results that the clients she represents need to move forward.
She brings to The Noble Law a valuable perspective on the New York market, skills which she now uses in Charlotte to anticipate the tactics and strategies of companies with strong ties to New York.

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(A) Mandatory Arbitration agreements – The Clash between NY Legislature's update to NY CPLR 7515 and FAA Preemption -the Latif decision in Summer 2019 and its implications

- https://www.financialservicesemploymentlaw.com/2019/07/08/arbitration-here-we-come-new-york-state-statute-believed-to-prohibit-mandatory-arbitration-of-sexual-harassment-claims-is-found-by-the-federal-court-to-be-inconsistent-with-federal-law/
  a. Movement to make mandatory arbitration agreements unlawful against sexual harassment victims – NY Legislature and its update of CPLR 7515
  b. Positives and Negatives – Do minorities, women, people with protected characteristics want to speak up publicly? Is publicity an actual benefit?
  c. Are the rules of evidence in federal and state court actually helpful – or the fluid and personal nature of an arbitrator?
  d. How do you introduce digital evidence – texts, social media posts?
  e. How do you get digital evidence from defendants – ESI – is it easier in court or arbitration?
  f. The Latif Decision – FAA preemption of CPLR 7515 – go over facts of the case – how does this impact minorities and people in protected categories?
  g. Appeal of Latif to 2nd Circuit and likely Supreme Court – future Implications

(B) Sexual Harassment and Gender Related laws being "gateway" to other legislative changes for people of all protected characteristics

- https://www.ebglaw.com/content/uploads/2019/07/Act-Now-Advisory_New-York-Lawmakers-Expand-Pay-Equity-Law-and-Ban-Salary-History-Inquiries.pdf
  a. Expansion of CPLR 7515 to all protected characteristics including for discrimination cases – no arbitration for discrimination cases
  b. NYLL 194 – pay equity for men and women, now expanded to all protected characteristics

(C) Continuing Violation Theory – Dealing with the Statute of Limitations Defense

- https://www.ebglaw.com/content/uploads/2019/06/Act-Now-Advisory_NYS-Legislature-Passes-Sweeping-Changes-to-Harassment-and-Discrimination-Laws.pdf
  a. What constitutes continuing violation – continuous sexually hostile environmental
  b. Where can a victim continue to experience cyberbullying and bullying in the digital age even after work hours – but still be in connection to the workplace?
  c. How does this affect minorities in protected characteristics – fear of job loss and fear of loss of reputation to never work again

(D) **Mandatory Sexual Harassment Training**

- https://www.ebglaw.com/content/uploads/2019/08/Act-Now-Advisory_Illinois-Sexual-Harassment-and-Discrimination-Law.pdf

- https://www.ebglaw.com/content/uploads/2018/10/Act-Now-Advisory_New-York-State-Releases-Final-Anti-Sexual-Harassment-Materials-1.pdf
    a. Is video/digital training a positive thing? How do you capture the audience's response? AI?
    b. How does this protect minorities, disabled, protected characteristics? Should their be an interactive requirement?

(E) **Non disclosure clauses – has to be requested by the victim**

- https://www.ebglaw.com/content/uploads/2019/08/Act-Now-Advisory_Governor-Cuomo-Enacts-Expansion-of-New-York-State-Human-Rights-Law-Certain-Changes-Have-Immediate-Effect.pdf
- https://www.ebglaw.com/content/uploads/2018/04/Act-Now-Advisory_NYS-Enacts-Sweeping-Sexual-Harassment-Laws.pdf
    a. In the digital age, does this wait period for request confidentiality cause retaliation to happen and people to change their mind?
    b. Is this additional wait period where people cannot get their payment actually helpful to minorities and victims in other discrimination categories? How plausible is it for a victim to opt out of confidentiality and still get a settlement?

(F) **Pregnancy/Maternity status, Racial Minority, Same Sex, Disability, National Origin Discrimination and Sexual Harassment**

- https://www.ebglaw.com/content/uploads/2019/03/Act-Now-Advisory_New-York-City-Issues-Model-Lactation-Accommodation-Policies.pdf
- https://www.hospitalitylaboremploymentlawblog.com/2019/02/articles/announcements/nyc-commission-on-human-rights-adopts-rules-establishing-broad-interpretation-of-laws-prohibiting-gender-discrimination/
- https://www.ebglaw.com/content/uploads/2018/09/Act-Now-Advisory-New-Disability-Discrimination-Guidance-Sheds-Light.pdf
- https://www.retaillaborandemploymentlaw.com/discrimination/nycchr-issues-guidance-on-discrimination-based-on-immigration-status-and-national-origin/

(G) **Protecting sexuality based activities – reproductive health protections**

- https://www.ebglaw.com/content/uploads/2019/01/Act-Now-Advisory_New-York-City-Law-Protects-Employees-from-Reproductive-Health-Decision-Discrimination.pdf

(H) **Capturing Sexual Harassment Evidence in the Digital Age –** police records, hospital records, posts, text messages, media history, wechats/language translation – all available in evidence years after the harassment –should SOL be expanded?

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ACT NOW ADVISORY

Governor Cuomo Enacts Expansion of New York State Human Rights Law—Certain Changes Have Immediate Effect

August 14, 2019

By Susan Gross Sholinsky, Lauri F. Rasnick, Genevieve M. Murphy-Bradacs, and Nancy Gunzenhauser Popper

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On August 12, 2019, Governor Andrew Cuomo signed Assembly Bill A8421 / Senate Bill 6577 ("Law"), which, as we previously reported, contains sweeping changes to New York State's Human Rights Law ("HRL"). Below is an updated chart of the effective dates for the various provisions of the Law, discussed more fully in our earlier Advisory.

Importantly, several provisions of the Law became effective immediately, including the requirement that every New York employer distribute, at hire and upon each annual training, a notice containing the sexual harassment prevention policy ***and*** "the information presented at such employer's sexual harassment prevention training program." The Law requires that the notice must be provided in English and in the employee's primary language. As we anticipate additional guidance regarding the required contents of this notice, we will continue to monitor New York State's website and advise you of any pertinent developments.

It appears that Governor Cuomo waited to sign this Law until after August 9 so that the effective date for many substantive changes to the HRL will take effect *after* the upcoming October 9, 2019, deadline to complete the first annual anti-sexual harassment training. Thus, training conducted prior to October 9, 2019, does not need to incorporate a reference to the new lowered standard for a hostile work environment claim, the extended statute of limitations, or the availability of punitive damages. That being said, it may be best to begin incorporating these new provisions into any training programs over the next few months in anticipation of these changes.

Effective Dates for Various Provisions of the Law

An "" after the effective date indicates that the provision in the Law applies only to claims that **accrued** on or after that date.*

Provision in the Law	Effective Date
Required distribution of information relating to the employer's sexual harassment prevention policy and training to new hires and harassment prevention training program attendees	August 12, 2019
Liberal construction of the HRL	August 12, 2019*
Elimination of the "severe or pervasive" standard (for a hostile environment claim based on any protected category), weakening of the *Faragher/Ellerth* defense, and elimination of the requirement to identify a comparator	October 11, 2019*
Protections for domestic workers	October 11, 2019*
Expansion of the HRL's protections for certain non-employees	October 11, 2019*
Extension of the prohibition of non-disclosure agreements ("NDAs") in settlement agreements, unless the condition of confidentiality is the preference of the complainant, to apply to settlements of *all* discrimination, harassment, and retaliation claims, plus new limitations	October 11, 2019
Extension of the ban on mandatory arbitration agreements	October 11, 2019
Availability of punitive damages	October 11, 2019*
Expansion of the power of the state Attorney General's Office	October 11, 2019*
Required notice of employees' disclosure rights in employment contract NDAs (including confidentiality agreements issued at the time of hire)	January 1, 2020
Expansion of the term "employer" to include *all* employers within New York State	February 8, 2020*
Extension of the statute of limitations from 1 year to 3 years	August 12, 2020*

What New York Employers Should Do Now

New York employers should immediately begin distributing information relating to their sexual harassment prevention policy and training to new hires and harassment prevention training program attendees.

Moreover, as we previously reported, employers should consider taking the following actions:

- With the lowered threshold for employers covered by the HRL, all New York employers will need to ensure that their policies and practices are compliant with the Law's myriad requirements, including notice postings.

- All New York employers should review their employment contracts and other onboarding materials, especially mandatory arbitration agreements, NDAs, and other confidentiality provisions that implicate any type of discrimination, harassment, or retaliation claim, to determine if they are consistent with the Law's prohibitions and requirements.

    - Any confidentiality provision in an employment agreement or otherwise issued at the time of hire must include language that excludes complaints to law enforcement or fair employment practices agencies.

    - Any arbitration agreements must exclude final, binding arbitration of discrimination, harassment, and retaliation claims based on any protected characteristic under New York law. However, it is advisable to consider recent case law that may implicate the enforceability of this mandatory arbitration ban (see blog posts here and here).

- All New York employers should revise their procedures to determine when "21/7" settlement NDA letters should be used if there are claims of harassment or discrimination on the basis of any protected status (not just sexual harassment) and retaliation. In addition, the letters and NDA language must confirm that nothing in the settlement's NDA provisions will prohibit or otherwise restrict a complainant from "(i) initiating, testifying, asserting, complying with a subpoena from, or participating in any manner with an investigation conducted by the appropriate local, state, or federal agency[,] or (ii) filing or disclosing any facts necessary to receive unemployment insurance, Medicaid, or other public benefits to which the complainant is entitled."

- All New York employers should review the State's Combating Sexual Harassment website frequently for updates, including any new guidance or template documents.

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Epstein Becker & Green, P.C., is a national law firm with a primary focus on health care and life sciences; employment, labor, and workforce management; and litigation and business disputes. Founded in 1973 as an industry-focused firm, Epstein Becker Green has decades of experience serving clients in health care, financial services, retail, hospitality, and technology, among other industries, representing entities from startups to Fortune 100 companies. Operating in locations throughout the United States and supporting domestic and multinational clients, the firm's attorneys are committed to uncompromising client service and legal excellence. For more information, visit www.ebglaw.com.

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ACT NOW ADVISORY

Sweeping New Illinois Law Mandates Sex Harassment Training, Restricts Use of Arbitration and Non-Disclosure Agreements, and Much More

August 16, 2019

By Susan Gross Sholinsky, Michelle G. Marks, and Amardeep K. Bharj

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On August 9, 2019, Illinois Governor J.B. Pritzker signed into law a sweeping piece of legislation, SB 75, enacted as Public Act 101-0221 ("SB 75"). Among other measures, SB 75 (i) imposes a sexual harassment training requirement on *all* employers with employees working in Illinois, (ii) places tight restrictions on the use of mandatory arbitration agreements and non-disclosure clauses in employment contracts and settlement agreements, (iii) significantly expands the rights of certain non-employees under the Illinois Human Rights Act ("IHRA"), (iv) imposes a reporting requirement on employers with respect to certain sexual harassment and discrimination rulings and judgments, and (v) extends job-protected leave to victims of gender violence. These provisions become effective January 1, 2020, except for the reporting requirement, which goes into effect on July 1, 2020.

The Sexual Harassment Training Mandate

Among other provisions (discussed below), SB 75 amends the IHRA to require employers *with any employees working in Illinois* to provide annual interactive sexual harassment prevention training to their employees using either a model program that will be provided by the Illinois Department of Human Rights ("IDHR") or a program of the employers' choosing that meets or exceeds the criteria set forth in the IHRA, as reflected in the IDHR model training.

SB 75 expressly requires that the mandatory training (i) be interactive, (ii) explain and provide examples of sexual harassment, (iii) summarize relevant federal and state law and remedies available to victims of sexual harassment, and (iv) describe the employer's responsibilities under applicable law. SB 75 permits online as well as in-person training but does not mandate a minimum duration for the training. Employers in the restaurant and bar industry must also supplement the mandatory training with a program—either their own or a supplement to be created by the IDHR—addressing harassment issues specific to the industry.[1]

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[1] SB 75 further requires restaurant and bar industry employers to create an anti-harassment policy, in English and Spanish, and provide it to new hires during their first week of work. In addition, SB 75 contains

Restrictions on Mandatory Arbitration Agreements and Non-Disclosure Provisions in Certain Employment Agreements and Settlements

SB 75 incorporates the legislative bill that was originally the stand-alone Workplace Transparency Act ("WTA"). The WTA does not completely bar arbitration and non-disclosure agreements ("NDAs") in the employment context, but it does decree that such agreements may not be unilaterally imposed on a current, former, or prospective employee who has raised a discrimination, harassment, or retaliation claim. Specifically, to be enforceable, an arbitration agreement must (i) be in writing; (ii) demonstrate actual, knowing, and bargained for consideration from *both* parties; and (iii) acknowledge the employee's right to report good-faith allegations to federal, state, or local agencies; participate in agency proceedings; and obtain confidential legal advice.

Further, the WTA still permits employers to use NDAs and confidentiality provisions in settlement and termination agreements pertaining to discrimination, harassment, and retaliation claims, but only if all of the following conditions are met: (i) the NDA or confidentiality clause is the documented preference of the current, former, or prospective employee; (ii) the employer notifies the individual that he or she has the right to have an attorney or representative review the agreement; (iii) the provision is the result of valid, bargained-for consideration; and (iv) the agreement does not waive any claims that accrue after the agreement is executed.

In addition, the individual must be allowed 21 days to review the NDA/confidentiality agreement, and an additional seven days to revoke the agreement after execution. The employer cannot enforce the agreement until the seven-day revocation period has elapsed, unless the individual has voluntarily waived the right to revoke.

If an employer fails to meet all of these requirements, the NDA may be deemed void as against public policy. Notably, however, employers are permitted to require certain individuals to agree to confidentiality—for example, persons with access to confidential personnel information and individuals who are subject to a privilege obligation recognized by law, such as attorneys.

New Rights for Non-Employees and Protections Based on "Perceived" Status

In addition to creating the training requirement discussed earlier, SB 75 significantly broadens the scope of the IHRA in other ways. First, it expands the definition of "unlawful discrimination" to include discrimination and harassment based on an individual's actual *or perceived* sex, race, or other protected status. Permitting individuals to bring discrimination and harassment claims based on *perceived*, as well as actual, status as a member of a protected class is an expansion of the anti-discrimination statute that could significantly increase an employer's exposure to claims under the IHRA.

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the Hotel and Casino Employee Safety Act ("HCESA"), which mandates that employers in those industries also maintain an anti-harassment policy and equip certain employees with a safety/notification device, commonly known as a "panic button." The provisions of the HCESA go into effect on July 1, 2020.

Second, SB 75 creates a private right of action for contract employees—i.e., individuals who are "directly performing services for the employer pursuant to a contract with that employer"—to bring harassment claims. Currently, contract employees, such as consultants, do not have legal recourse against harassment under the IHRA.

Employers should note that the expansion of the IHRA to non-employees and to discrimination based on perceived status relies on the same definition of "employer" as set forth in Section 2-101 of the IHRA—i.e., any person or company employing 15 or more employees within Illinois during 20 or more calendar weeks. However, a bill that would change the IHRA's definition of "employer" to any person employing *one* or more employees during 20 or more calendar weeks is currently awaiting Governor Pritzker's signature. Thus, if that bill is signed into law, SB 75 would allow these expanded private rights of action against virtually all Illinois employers, starting July 1, 2020.

In contrast to this expansion of individuals' rights under the IHRA, SB 75 clarifies that an employer is responsible for harassment by its non-managerial and non-supervisory employees "only if the employer becomes aware of the conduct and fails to take reasonable corrective measures."

Annual Disclosure of Sexual Harassment and Discrimination Claims

Beginning July 1, 2020, employers with one or more employees in Illinois must annually disclose to the IDHR all final and non-appealable adverse judgments and non-appealable administrative rulings involving sexual harassment and other discrimination claims brought by employees and nonemployees (contractors or consultants). The disclosures must specify the total number of adverse judgments or administrative rulings (broken down by protected categories) during the preceding year, and whether any equitable relief was ordered against the employer. Employers do not have to disclose *settlements* entered into during the preceding year that relate to sexual harassment or unlawful discrimination, but the IDHR may request this information when investigating a charge.

Job-Protected Leave for Victims of Domestic, Sexual, or Gender Violence

As of January 1, 2020, SB 75 expands the protections of the Victims Economic Security and Safety Act ("VESSA") granted to victims of sexual and domestic violence to victims of gender violence. "Gender violence" is defined as "one or more acts of violence or aggression," or "a physical intrusion or physical invasion of a sexual nature under coercive conditions," or the threat of either kinds of conduct, which constitutes a criminal offense, regardless of whether the acts resulted in criminal charges, prosecution, or conviction.

Accordingly, employees who have suffered (or have a family member who has suffered) domestic violence, sexual violence, or gender violence may be entitled to take job-protected leave to:

1) seek medical attention to recover from physical or psychological injuries caused by the domestic violence, sexual violence, or gender violence;

2) obtain services from a victim services organization;

3) obtain psychological or other counseling;

4) participate in safety planning, temporarily or permanently relocate, or take other actions to protect their safety; or

5) seek legal assistance or remedies to ensure their own or a family or household member's safety.

What Employers Should Do Now

Employers with employees and/or contractors in Illinois should do the following:

- Given SB 75's aggressive timetable for mandatory training, immediately review your sexual harassment training program to ensure compliance with SB 75's mandates, including the requirements that the training be interactive and that employees be advised of their rights under federal and state law. If you have not previously provided sexual harassment training to your employees, immediately consider developing or purchasing an anti-harassment training program or waiting until the IHRA releases its model program.

- Review and revise, as necessary, employment and settlement agreements to conform to SB 75's substantive restrictions and procedural requirements concerning arbitration and NDA/confidentiality provisions with respect to discrimination, harassment, and retaliation claims.

- Revise VESSA policies to reflect the expansion of the law permitting leave for gender violence.

- Implement a system to track relevant administrative rulings and adverse judgments in preparation for the IHRA's disclosure requirements.

We will continue to provide updates on any significant developments regarding the implementation of SB 75.

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situation under federal law and the applicable state or local laws that may impose additional obligations on you and your company.

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Epstein Becker & Green, P.C., is a national law firm with a primary focus on health care and life sciences; employment, labor, and workforce management; and litigation and business disputes. Founded in 1973 as an industry-focused firm, Epstein Becker Green has decades of experience serving clients in health care, financial services, retail, hospitality, and technology, among other industries, representing entities from startups to Fortune 100 companies. Operating in locations throughout the United States and supporting domestic and multinational clients, the firm's attorneys are committed to uncompromising client service and legal excellence. For more information, visit www.ebglaw.com.

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ACT NOW ADVISORY

New York City Issues Model Lactation Accommodation Policies and Request Form and FAQs

March 22, 2019

By Susan Gross Sholinsky, Nancy Gunzenhauser Popper, Ann Knuckles Mahoney, Amanda M. Gómez, and Corben J. Green*

As we previously reported, effective March 17, 2019, employers with four or more employees in New York City must provide employees with break time and a private space to express milk, unless doing so would cause undue hardship. Employers must also notify employees about these rights in a detailed written policy.[1]

The New York City Commission on Human Rights ("Commission") just released its "Lactation Accommodations" webpage with three sample policies to assist employers in satisfying the policy mandate, along with a Model Lactation Accommodation Request Form and several lactation-related resources, including a detailed set of Frequently Asked Questions ("FAQs").

While the policy requirements of the new lactation accommodation laws are themselves quite extensive, the model policies are extremely long and contain more information than employers are statutorily required to include. Nevertheless, the models may assist employers in developing (or revising) a lactation accommodation policy to ensure that it is both legally compliant and appropriate for their employees' and business needs.

The Model Policies

The Commission offers the following three model policies:

- **A policy for workplaces with dedicated lactation room(s)**
    - This model policy contains helpful descriptions of the various accommodations that employers must provide, such as a private room, types of equipment, break periods, and procedures for use of the room by multiple employees.

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[1] Keep in mind that *New York State's* lactation accommodation law applies to all employers, regardless of size.

- Included in the model policy are items that are not specifically required by law, such as:

  - detailed descriptions of statutes and Commission guidance on such matters as "undue hardship" and "cooperative dialogue";

  - contact information for the Commission;

  - a statement that "[e]ven if the lactation room is available, an employee who wishes to pump at their usual workspace will be permitted to do this so long as it does not create an undue hardship …" (as discussed below, the Commission takes the position that employees may refuse to use a lactation room);

  - a notification requirement that employers resend the policy to an employee before the employee returns from parental leave and "request information from the employee regarding the need for a reasonable accommodation to express breast milk at work" (the statute, in contrast, imposes an obligation on *employees* to request the lactation accommodation; nonetheless, since the Commission may stand by its interpretation of the law, and because it may be useful for planning purposes, employers may wish to send such a notice); and

  - an instruction that the employer will provide a temporary accommodation during the cooperative dialogue process; again, this is not explicitly required by the statute, but it is a procedure that employers may wish to adopt, if feasible. [2]

- Additionally, although employers need not include the model policy's definitions of "undue hardship" and "cooperative dialogue," they should be aware of their obligation at the conclusion of the cooperative dialogue process to provide employees with a final *written determination* as to whether the accommodation is granted as requested, granted as modified, or denied.[3]

- **A policy for workplaces with a multipurpose space, other than a restroom, that may be used as a lactation room**

  - This model policy appears to be consistent with the law's requirements concerning multipurpose lactation rooms, and contains the items noted above in connection with the dedicated lactation room(s).

[2] The law requires an employer to respond to a request for lactation accommodation within five days.
[3] For more information on the cooperative dialogue law, please see our *Act Now* Advisories titled "New Disability Discrimination Guidance Sheds Light on New York City's "Cooperative Dialogue Requirements" and "New York City Employers Will Be Required to Engage in Reasonable Accommodations Dialogue."

- **A policy for workplaces with no available space for a lactation room**

    - This model policy imposes no new requirements on employers, aside from those noted above in connection with the dedicated lactation room(s). The policy does, however, underscore that, even if an employer is unable to provide a dedicated lactation room without incurring undue hardship, the obligation to engage in a cooperative dialogue with the employee to find some means of accommodation remains.

Model Lactation Accommodation Request Form

The Commission has also developed a Model Lactation Accommodation Request Form for employees to use to request an accommodation. Employers are not required to adopt this specific form, but it can be used as a template to design one that better serves the needs of an employer's business and employees.

Lactation Accommodations FAQs

Finally, the Commission introduced a set of FAQs that features some common questions and answers about the new laws. The FAQs address a few concepts not directly touched upon in the policies, such as providing lactation accommodations for non-birthing parents who induce lactation, and lactation accommodations for all gender identities and expressions (i.e., lactation accommodations are not limited to employees who identify as women or mothers).

The FAQs contradict New York State's lactation accommodation laws with respect to delaying or altering pumping schedules. The Commission's FAQs state that an employee dictates the pumping schedule, unless it poses an undue hardship; however, New York State guidelines instruct that an employer may ask an employee to delay a break for up to 30 minutes.

Consistent with the model policies above, the FAQs also state that an employer may not require an employee to use a dedicated lactation room and should advise employees that they have the right to pump at their own workstation.

For employers with a mobile workforce, the FAQs offer some solutions to provide lactation accommodations, including:

- portable lactation spaces;
- using employer vehicles (e.g., the cab of a large agriculture or construction vehicle), along with shades or other privacy measures the employer can offer;
- pop-up tents;
- other mobile enclosed spaces that would allow mobile employees to pump in privacy;

- temporarily assigning changing rooms or manager offices or conference rooms to serve as pumping spaces;
- setting up a stall in an employee locker room;
- for employees with mobile routes, ensuring employees are able to find a space to pump;
- using portable screens to provide privacy in a shared area; and/or
- subsidizing employees to purchase and use hands-free, battery-operated or chargeable breast pumps while in the field.

What New York City Employers Should Do Now

- Whether or not you have developed a lactation accommodation policy, review the applicable law and model policy to ensure compliance with all substantive requirements.
- Assess whether, based on business and employees' needs, any of the additional information contained in the applicable model policy is appropriate for inclusion.
- Consider whether you wish to provide the additional employee notifications suggested in the model policies.
- Confirm that procedures are in place to handle required notifications and requests concerning lactation accommodation.
- Ensure that all relevant personnel are adequately trained on receiving lactation accommodation requests. Such training should include a "refresher course" on "undue hardship" and an employer's obligations under the "cooperative dialogue" law, including documentation requirements.

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ACT NOW ADVISORY

New York City Law Protects Employees from Reproductive Health Decision Discrimination

January 29, 2019

By Susan Gross Sholinsky, Nancy Gunzenhauser Popper, Ann Knuckles Mahoney, and Amanda M. Gómez

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On January 20, 2019, Int. No. 863-A ("Law"), which, among other things, prohibits employment discrimination based on an individual's sexual and reproductive health choices, became law following the New York City Council's approval of the measure last month. Effective May 20, 2019, the Law expands the already significant list of protected categories under the New York City Human Rights Law ("NYCHRL").

Covered Services

Under the Law, sexual and reproductive health decisions encompass "any decision by an individual to receive services, which are arranged for or offered or provided to individuals relating to sexual and reproductive health, including the reproductive system and its functions," such as:

- fertility-related medical procedures;
- sexually transmitted disease prevention, testing, and treatment; and
- family planning services and counseling, such as birth control drugs and supplies, emergency contraception, sterilization procedures, pregnancy testing, and abortion.

The Law, which applies to New York City employers with four or more employees, does not require covered employers to provide specific reproductive health benefits. Rather, it focuses on protecting employees from discrimination based on their sexual and reproductive health choices. New York City law has been at the forefront in establishing anti-discrimination and accommodation requirements related to disability and pregnancy, some of which will overlap with certain aspects of the Law.[1]

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[1] For more information, please see the Epstein Becker Green *Act Now* Advisories titled "New Disability Discrimination Guidance Sheds Light on New York City's 'Cooperative Dialogue' Requirements" and

Enforcement

The Law will be enforced by New York City's Commission on Human Rights ("Commission"). An employee alleging a violation of the Law may either file a complaint with the Commission or proceed directly to court. As with other claims brought under the NYCHRL, actions must be brought to the Commission within one year or filed in court within three years of the alleged violation.

Under the NYCHRL, civil penalties may be imposed for violations, with greater penalties (up to $250,000) available for willful, wanton, or malicious acts. If filed in court, the plaintiff could seek damages, including punitive damages, injunctive relief, attorneys' fees, and costs.

What Employers Should Do Now

- Revise equal employment opportunity statements and policies in handbooks, employment applications, and elsewhere that list the categories protected from discrimination, harassment, and retaliation to include "sexual and other reproductive health decisions."

- Train human resources personnel, as well as supervisors and managers, on any changes made to current policies and practices pursuant to the Law, including topics such as permissible interview questions and what may or may not be included in job postings.

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"New York City Council Enacts Mandatory Lactation Accommodation for Employees, Including a Written Policy."

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ACT NOW ADVISORY

New York Lawmakers Expand Pay Equity Law and Ban Salary History Inquiries

July 8, 2019

By Susan Gross Sholinsky and Carrie Anderer

On the heels of passing sweeping changes to New York's harassment and discrimination laws, the state legislature has approved major changes to New York's pay equity statute. This two-pronged expansion of the equal pay law includes (i) A 8093-A / S 5428-B ("Pay Equity Bill"), which will enable many more employees to more easily prove compensation discrimination, and (ii) A 5308-B / S 6549 ("Salary History Bill"), which provides a ban on salary history inquiries. Governor Andrew Cuomo, who has been a strong advocate of the measures, is expected to sign both bills.

Expansion of Pay Equity Law

Consistent with the federal Equal Pay Act, New York law, with some exceptions, currently requires that men and women receive equal pay for equal work. The Pay Equity Bill dramatically expands the law to protect an employee, job applicant, or intern based on *any protected class* recognized under the New York State Human Rights Law ("HRL"). The more than one dozen categories protected under the HRL currently include 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.[1] Thus, whereas the law previously allowed an equal pay claim based only on sex, the Pay Equity Bill will permit an individual to assert a claim of unequal pay based on, for example, race, sexual orientation, or familial status.

As importantly, the Pay Equity Bill also significantly lowers the burden of proof for establishing an equal pay claim. Currently, state equal pay law requires equal pay for equal work on a job, the performance of which "requires equal skill, effort and responsibility, and which is performed under similar working conditions" in the "same establishment" as the complainant's comparator. Curiously, the Pay Equity Bill does not eliminate the "equal pay" standard; rather, it adds an alternative and less stringent standard, which mandates equal pay for "substantially similar work" when the jobs being

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[1] The New York Legislature just approved an expansion of the prohibition on race discrimination. If signed into law by the governor, A 7797 / S 6209 will add to the definition of "race" "traits historically associated with race, including, but not limited to, hair texture and protective hairstyles," such as "braids, locks and twists."

compared are "viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions." Accordingly, to prevail on an equal pay claim, a member of any protected class will only need to demonstrate that his or her job is substantially similar to the comparator's job, rather than equal to such position.

The Pay Equity Bill does not alter the existing exceptions to the equal pay mandate, other than to prohibit a wage disparity based on any protected status (rather than just on sex). Hence, a pay differential may be lawful if it is (i) job-related and consistent with business necessity, and (ii) based on a nondiscriminatory factor, such as a seniority or merit system or the quantity or quality of work, or another *bona fide* factor other than status within a protected class (such as education, training, or experience). An employee retains the ability to overcome the employer's justification for the wage differential by demonstrating that the employer's policy or practice has a disparate impact on the basis of status within a protected class, and that an alternative, nondiscriminatory practice that would meet the employer's business needs exists, but the employer has refused to adopt it.

The Pay Equity Bill takes effect 90 days after enactment.

Salary History Inquiry Ban

The Salary History Bill prohibits every employer from:

- relying on a job applicant's wage or salary history in determining whether to offer employment to that individual or in deciding the salary to offer;

- requesting or requiring, either orally or in writing, an applicant's or current employee's salary history as a condition to being interviewed or considered for an offer of employment, or as a condition of employment or promotion;

- seeking an applicant's or employee's wage history from a current or former employer, except as discussed below; and

- refusing to interview, hire, or promote, or otherwise retaliating against, an applicant or current employee: (i) based upon his or her salary history, (ii) because the applicant or employee refused to provide his or her salary history, or (iii) because such individual filed a complaint with the Department of Labor alleging a violation of this law.

The Salary History Bill contains an exception for circumstances in which an applicant or current employee voluntarily, and without prompting by the employer, discloses his or her wage history for such purposes as negotiating salary. In addition, an employer is permitted to verify salary history if, following a job offer with compensation, the employee provides his or her salary history to support a higher wage than that being offered. Finally, an employer may inquire into or verify salary history pursuant to any federal or state law that "requires the disclosure or verification of salary history information to determine an employee's compensation." It should be noted, however, that certain exceptions recognized under New York City's salary history inquiry ban,

such as asking about cancelled deferred compensation, are not included in the Salary History Bill.[2]

An applicant or employee aggrieved by a violation of the salary history inquiry ban may bring a lawsuit for damages. A court also may award injunctive relief, as well as reasonable attorneys' fees, to a plaintiff who prevails on his or her claim.

It should be noted that the clause prohibiting an employer from "refus[ing] to interview, hire, promote, otherwise employ, or otherwise retaliat[ing] against an applicant or current employee based upon prior wage or salary history" is unclear and potentially problematic. For example, assuming an applicant voluntarily discloses his or her current salary and it is significantly higher than the amount the employer can pay for that position, would the employer's decision not to hire the applicant because it cannot meet or exceed the applicant's current salary constitute a violation of the provision's ban on "refus[ing] to ... hire … based on prior wage or salary history"? Hopefully, the state will provide guidance as to the intent of this provision.

The Salary History Bill becomes effective 180 days after enactment.

What New York Employers Should Do Now

Assuming, as is likely, that both bills are signed into law, New York employers should consider taking the following measures.

With respect to the Pay Equity Bill, employers should do the following:

- Review pay practices and make any necessary changes to ensure that any wage differentials among substantially similar jobs are based on objective, nondiscriminatory factors, such as those discussed herein.

- Until the courts have had an opportunity to weigh in on the new standard, take a conservative approach to determining those jobs that are "substantially similar."

With regard to the Salary History Bill, employers should do the following:

- Review and, if necessary, revise current hiring and promotion practices and forms to ensure that neither job applications nor interviewers seek salary history information.

- Await any further guidance that may (or may not) be forthcoming from the state.

[2] It is likely that, once effective, the Salary History Bill will supersede Westchester County's salary history inquiry ban, since the county ordinance includes a specific provision to this effect. It is unclear, however, what impact, if any, the Salary History Bill will have on the bans enacted by Albany County, New York City, and Suffolk County, as the applicable laws of those jurisdictions do not address this preemption question. The Salary History Bill, itself, merely states that "[n]othing in this section shall be deemed to diminish the rights, privileges, or remedies of any applicant or current or former employee under any other law or regulation …."

- If the services of an employment agency are engaged, make sure the agency complies with the new prohibition on salary inquiries.

- Train human resources staff and hiring managers on the ban and any new policies implemented to ensure compliance with it.

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ACT NOW ADVISORY

The Wait Is Over: New York State Releases Final Sexual Harassment Guidance and Training Resources

October 3, 2018

By Susan Gross Sholinsky, Jennifer Gefsky, Nancy Gunzenhauser Popper, and Alexandra Bruno Carlo

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On October 1, 2018, New York State released its final sexual harassment guidance and resources, including (i) a model sexual harassment policy, (ii) model training materials, (iii) a model complaint form, and (iv) Frequently Asked Questions ("FAQs") (collectively, "Guidance"). The Guidance, which is now available on the state's "Combating Sexual Harassment in the Workplace" website, contains key differences from the draft guidance issued in August.[1] One of the most significant revisions is the extension of the deadline for training New York-based employees, from January 1, 2019, to October 9, 2019, providing employers an additional nine months to comply. Even though the training deadline has been extended, New York employers should begin to develop a plan to implement a training program as soon as practicable given that employees will be subject to the new harassment policy requirements on October 9, 2018.

As a reminder, the 2018-2019 New York State Budget, signed into law in April 2018, contained several laws pertaining to sexual harassment, including a requirement that New York employers maintain and distribute an anti-sexual harassment policy and provide interactive sexual harassment training on an annual basis to all employees. The budget also included laws prohibiting mandatory final and binding arbitration of sexual harassment claims and barring non-disclosure agreements ("NDAs") pertaining to sexual harassment claims unless such confidentiality is the preference of the complaining party. Details on these items, as clarified in the Guidance, follow.

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[1] For additional information on the draft materials, please see Epstein Becker Green's *Act Now* Advisory entitled "New York State Provides Draft Anti-Sexual Harassment Materials for Employers."

Training

In addition to extending the training deadline from January 1, 2019, to October 9, 2019, the FAQs:

- eliminate the requirement that new hires be trained within 30 days of hire, and instead instruct that they receive training "as soon as possible";

- explain that, while employees must be trained annually, after the first training, the date of subsequent training may be based on the calendar year, the anniversary of each employee's start date, or any other date the employer chooses;

- reiterate that the training must be conducted in the language spoken by the employee; however, employers may conduct the training in English if the State does not have model training in an employee's primary language (although employers are encouraged to provide the training in the employee's primary language, if possible);

- clarify that if an employer has already provided anti-sexual harassment training to employees this year that:

    - met or exceeded the requirements under applicable law, the employer is not required to provide additional training to employees until the next training cycle, or

    - did not meet all the new requirements, the employer need only provide supplemental training addressing the new and previously uncovered topics, instead of providing completely new training;

- expressly state that there is no required minimum number of training hours per year; rather, employees must simply receive training that meets or exceeds the minimum standards;

- eliminate the requirement that employees who work as few as one day during the year in New York be provided anti-sexual harassment training, and instead state that employees who work a "portion of their time" in New York must be trained; and

- clarify that, for purposes of training, the term "employee" includes all workers, regardless of immigration status, as well as exempt or non-exempt employees, part-time workers, seasonal workers, and temporary workers, and that minors must receive training as well (although such training may be modified to be appropriate for individuals of the employee's age).

The FAQs clarify that training may be delivered online, so long as it is interactive. Examples of "interactive" online training include having questions at the end of a section that require the employee to select the right answer, and having an option to submit a

question online and receive an answer immediately or in a timely manner. An example of an interactive in-person or live training is having the presenter ask the employees questions or giving them time throughout the presentation to ask questions. The FAQs make clear that an individual watching a training video or reading a document, with no additional feedback mechanism or interaction, would not be considered interactive.[2]
The FAQs state that employers are encouraged to keep a copy of training records. Finally, the FAQs specify that employees must be paid for time spent training, including any time spent training during the onboarding process before the employee's actual assignments begins.

Sexual Harassment Policy

The revised model sexual harassment policy includes some notable changes from the draft model policy. First, the 30-day period for completion of investigations has been removed. Instead, the model policy now states that investigations must be commenced "immediately" and should be completed "as soon as possible." Second, in accordance with the Equal Employment Opportunity Commission's guidance and recommendation, the reference to "zero tolerance" for sexual harassment has been eliminated. (The agency had found that "zero tolerance" policies lead to individuals being hesitant to complain about harassment, for fear of getting the alleged wrongdoer fired under any circumstance.)

The FAQs explain that a sexual harassment policy can be provided to employees in writing or electronically, and that if the policy is made available on a work computer, employees must be able to print a copy for their own records. Also, the FAQs suggest that the sexual harassment policy should be provided to new hires "prior to commencing work," which means that employers should take care to distribute the policy to new hires during or prior to onboarding. Finally, although not required, the FAQs encourage employers to supply a policy and training to anyone providing services in the workplace, including independent contractors, vendors, or consultants.

Complaint Form

Although a complaint form is not required to be included as part of a policy, all New York State sexual harassment policies must clearly state where an employee may find a complaint form. The most significant change to the model complaint form is the elimination of the questions about whether an employee has filed a claim with a federal, state, or local government agency or instituted a legal suit or court action regarding this complaint.

[2] Employers may choose to use a third-party vendor or organization to provide training so long as the training meets or exceeds the minimum standards required under the law.

Non-Disclosure of Harassment Complaints

As we noted in our prior *Act Now* Advisory, effective July 11, 2018, nondisclosure clauses in settlements, agreements, or other resolutions of sexual harassment claims are prohibited, unless inclusion of the clause is the complainant's preference.

As such, the Guidance confirms that, prior to including an NDA in a settlement agreement, the complainant must be provided with the nondisclosure term or condition provision in writing, and he or she will have 21 days to consider it. Then, the complainant will have seven days to revoke his or her decision. Only then can the agreed-upon provision be included in the larger settlement agreement.
The revised FAQs clarify that this 21-day period cannot be waived, shortened, or calculated to overlap with the seven-day revocation period. The FAQs further specify that unlike the federal provisions for waiving age discrimination claims (which also include a 21-day review period and seven-day revocation period), the NDA provision requires a separate agreement to be executed after the expiration of the 21-day consideration period and the seven-day revocation period before the employer is authorized to include confidentiality language in a proposed resolution.

Mandatory Arbitration

There were no notable changes to the mandatory arbitration FAQs.

What New York Employers Should Do Now

- Review the Guidance, including your model harassment policy and training program.
- Review and revise, as necessary, policies regarding sexual harassment in the workplace to conform to the requirements of the new law pertaining to sexual harassment policies, and include a complaint form.
- Make sure that compliant sexual harassment training of all New York employees and managers is completed no later than October 9, 2019.
- If training has already been provided that does not meet all the minimum requirements, provide supplemental training no later than October 9, 2019.
- Prepare to provide such training on an annual basis.
- Ensure that compliant sexual harassment training of all new employees is completed "as soon as possible."
- Determine the language(s) in which training should be conducted.
- Translate policies, and provide training in an employee's primary language(s).

- Review any arbitration agreements or programs requiring the arbitration of sexual harassment claims to determine if any revisions are required on a going-forward basis.

- Prepare agreements seeking confirmation that the confidentiality of facts and circumstances underlying harassment claims are, indeed, the preference of the complaining person. Such agreements must be reviewed for 21 days, and once the complaining person's preference has been memorialized, the individual will have seven days to revoke his or her preference before such agreements can be included in a broader settlement document.
- Train human resources professionals and internal legal counsel regarding all essential components of the new laws mentioned above.

- Train human resources professionals and managers on the New York State requirements regarding the applicability of the sexual harassment policy and protections to non-employees.

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ACT NOW ADVISORY

New York State Enacts Sweeping Sexual Harassment Laws

April 20, 2018

By Susan Gross Sholinsky, Dean L. Silverberg, Nancy Gunzenhauser Popper, Marc-Joseph Gansah, and Judah L. Rosenblatt

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The 2018-2019 New York State Budget ("Budget"), which was enacted on April 12, 2018, includes several new state laws concerning sexual harassment in the workplace that will affect both public and private employers. (For those in New York City, similar proposed laws[1] await Mayor Bill de Blasio's signature and will likely become effective soon.) The new state laws, which will take effect on various dates throughout 2018 or later, will impact private employers by (i) prohibiting mandatory pre-dispute arbitration clauses relating to sexual harassment complaints, (ii) banning nondisclosure agreements for sexual harassment claims, (iii) requiring employers to enact written sexual harassment policies and conduct annual sexual harassment preventative training for all employees, and (iv) expanding liability for sexual harassment claims to certain non-employees.

A. Prohibition of Mandatory Pre-Dispute Arbitration Clauses

The Budget will add a new section 7515 to the New York Civil Practice Law that states that employers with four or more employees are prohibited from incorporating mandatory pre-dispute arbitration clauses in written employment contracts requiring the resolution of allegations or claims of an unlawful discrimination practice of sexual harassment. This prohibition applies only to contracts entered into *after* the effective date of this law.

If a contract entered into after the effective date of this law contains a prohibited mandatory arbitration clause, the clause will be rendered null and void without affecting the enforceability of any other provision in the contract.

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[1] On April 11, 2018, the New York City Council enacted four bills to significantly expand the obligations of many employers to prevent sexual harassment. The four bills include (1) mandatory sexual harassment training for New York City employers with 15 or more employees, (2) a new sexual harassment poster, (3) more time to file a complaint with the City Commission on Human Rights, and (4) expanded employer coverage under the New York City Human Rights Law ("NYCHRL") for sexual harassment claims.

Employers may continue to use mandatory pre-dispute arbitration clauses for all other claims unrelated to sexual harassment so long as the clauses are agreed to by the parties and are in accordance with federal law.

Additionally, where a conflict exists between a collective bargaining agreement and this law pertaining to mandatory pre-dispute arbitration clauses, the collective bargaining agreement will be controlling.

This provision will take effect 90 days following the Budget's enactment, on July 11, 2018.

B. Ban of Nondisclosure Agreements

The Budget will add two new provisions (New York General Obligations Law § 5-336 and New York Civil Practice Law § 5003-b) that will act to ban nondisclosure clauses in settlements, agreements, or other resolutions of sexual harassment claims, unless the condition of confidentiality is complainant's and/or plaintiff's preference. The term "sexual harassment claim," however, is not defined in either of these two new sections.

Similar to the requirements under the federal Age Discrimination in Employment Act, if the complainant and/or plaintiff prefers to include a confidentiality clause in a settlement or agreement, then the complainant and/or plaintiff will be provided 21 days after receiving such settlement or agreement to consider the clause. Further, the complainant and/or plaintiff will have a seven-day revocation period following the execution of such settlement or agreement, and the confidentiality clause will not become effective or enforceable until the revocation period has expired.

These provisions will take effect 90 days following the Budget's enactment, on July 11, 2018.

C. Mandatory Sexual Harassment Policy and Annual Sexual Harassment Prevention Training

Public and private employers in New York State will be required to maintain a written sexual harassment policy, and to provide annual training to employees, pursuant to a new provision, New York Labor Law § 201-g. To assist employers in creating a policy and training program, the New York State Department of Labor ("NYSDOL"), in consultation with the New York State Division of Human Rights, will (i) create and publish a model sexual harassment prevention guidance document and a sexual harassment prevention policy that employers may use to satisfy their obligations under the law, and (ii) create a model sexual harassment training program addressing appropriate conduct and supervisor responsibilities.

The model sexual harassment prevention policy must:

- state that sexual harassment is prohibited,

- provide examples of prohibited conduct that would constitute unlawful sexual harassment,

- contain information regarding federal and state law concerning sexual harassment and remedies available to victims of sexual harassment,

- include a statement that there may be applicable local laws on sexual harassment,

- contain a complaint form,

- include a procedure for the investigation of complaints,

- state that sexual harassment is considered a form of employee misconduct and that sanctions will be enforced against individuals engaging in sexual harassment and against supervisory and managerial personnel who knowingly allow sexual harassment to continue, and

- state that retaliation against those who complain of sexual harassment or who testify or assist in any proceeding is unlawful.

Employers will be required to either adopt the model sexual harassment prevention policy or establish a policy that equals or exceeds the minimum standards provided by the model policy. The policy must be provided in writing to all employees.

The State's model sexual harassment training program will include:

- an explanation of sexual harassment and examples thereof,

- information regarding the federal and state laws concerning sexual harassment and the remedies available to victims of sexual harassment, and

- information concerning employees' rights of redress and all available forums for adjudicating complaints.

Employers will be required to either use the model sexual harassment prevention training program or establish a training program for employees to prevent sexual harassment that equals or exceeds the minimum standards provided by the model training. In addition, employers will be required to provide the training programs to all their employees and apply the NYSDOL's sexual harassment prevention policy. The law does not specify the length of the training or the format (i.e., in person versus online).

These sexual harassment policy and training provisions will take effect 180 days following the Budget's enactment, on October 9, 2018.

New York City employers may be subject to additional training requirements.[2]

D. Protections for "Non-Employees"

The Budget will create a new provision—New York Labor Law § 296-d—that expands sexual harassment protections to non-employees. Employers may be liable to contractors, subcontractors, vendors, consultants, or other non-employees providing services to the employer with respect to sexual harassment. Such liability will be available when (i) the employer, its agents, or supervisors knew (or should have known) that a non-employee was subjected to sexual harassment in the workplace, and (ii) the employer failed to take immediate and appropriate corrective action. This provision took effect on April 12, 2018.

E. Additional Provisions for Public Employers

Although not applicable to private employers, the Budget enacts two new provisions for public employers and contractors doing business with New York State—one relating to requirements for competitive bid statements and the other concerning reimbursement by public employees:

1. Requirements for Contractor's Competitive Bid Statement

New York Finance Law § 139-L will require a state contractor to certify in its competitive bid statement that it (i) has "implemented a written policy addressing sexual harassment prevention in the workplace," and (ii) "provides annual sexual harassment prevention training to all of its employees." When a competitive bid statement is not required, the department, agency, or official can require a bid statement to include the information noted above. This provision will take effect on January 1, 2019.

2. Reimbursement by Public Employees Found Liable for Intentional Wrongdoing

Under New York Public Officers Law § 17-a, a public employee who has been found personally liable for intentional wrongdoing related to a claim of sexual harassment must reimburse any State agency or entity that makes a payment on his or her behalf

[2] The new state law—and the city law, if enacted—will require employers to provide employees with "interactive" training on sexual harassment. However, in addition to the requirements under the state law, the more expansive city law would require New York City-based employers to provide employees with the following: (i) an explanation of sexual harassment as a form of unlawful discrimination under local law, in addition to state and federal law; (ii) a description of the complaint process available to employees through the New York City Commission on Human Rights, in addition to the New York State Division of Human Rights and the federal Equal Employment Opportunity Commission; (iii) an explanation, with examples, of what constitutes "retaliation" under the NYCHRL; (iv) information concerning bystander intervention; and (v) the responsibilities of supervisory and managerial employees in the prevention of sexual harassment and retaliation. New York City-based employers under the city law would also be required to maintain for three years records of all training, including a signed employee acknowledgement. Notably, the state law applies to all employers in the state while the city law applies only to employers with 15 or more employees who work 80 or more hours in a calendar year in New York City.

within 90 days of the State agency's or entity's payment. This provision took effect on April 12, 2018.

What New York Employers Should Do Now

- Review, when they become available, New York State's model policies and training programs on sexual harassment in the workplace.
- Review and revise, as necessary, policies regarding sexual harassment in the workplace, and consider including references to non-harassment of certain non-employees.
- Prepare to provide sexual harassment training for employees and managers on an annual basis.
- Review any arbitration documents or programs requiring the arbitration of sexual harassment claims to determine if any revisions are required on a going-forward basis.
- Revise separation and settlement agreements, including nondisclosure provisions pertaining to sexual harassment claims, to provide for the applicable review and revocation period.
- Train human resources professionals and internal legal counsel regarding nondisclosure provisions in settlement agreements relating to sexual harassment claims.
- Train human resources professionals and managers on the new New York State requirements regarding non-harassment of non-employees.
- If you are based in New York City and the proposed annual sexual harassment training requirements are signed into law by Mayor de Blasio, then reconcile the differences in the requirements under the state and city laws so that your training program incorporates all of the rules and parameters set forth under both state and city laws.

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ACT NOW ADVISORY

New York State Legislature Lowers the Standards for Proving Unlawful Harassment, Passes Other Sweeping Changes to Harassment and Discrimination Laws

June 27, 2019

By Susan Gross Sholinsky, Lauri F. Rasnick, Genevieve M. Murphy-Bradacs, Nancy Gunzenhauser Popper, and Cynthia Joo*

In response to mounting attention to the #MeToo movement, on June 19, 2019, the New York State Legislature passed Assembly Bill A8421 / Senate Bill 6577 ("Bill"), a measure that is even more far-reaching and, thus, potentially more consequential in its impact on New York employers than last year's comprehensive sexual harassment legislation ("2018 legislation"). Most provisions of the Bill, which Governor Andrew Cuomo is expected to sign into law, go into effect immediately or 60 days, or 180 days, after enactment.[1]

In general, the Bill, which amends various New York laws, including the Executive Law, the General Obligations Law, and the Civil Practice Law, will make it easier for many more employees—and some non-employees—to raise and pursue claims of harassment and discrimination by, among other measures:

- lowering the burden of proof in harassment cases by eliminating the "severe or pervasive" standard, and stating that unlawful harassment may occur when an employee is subject to "inferior" conditions of employment;

- limiting the employer's ability to defend against claims based on harassment that was never brought to the employer's attention, and eliminating any requirement in discrimination cases that the complainant identify a comparator;

- increasing an employer's obligations concerning distribution of its anti-harassment policies by expressly requiring that the policies be distributed to new hires, as well as at annual harassment prevention training sessions, along with "information" presented at the employer's training sessions, in English and in the primary language of the employee;

[1] If the Bill becomes law, several of its provisions will be applied prospectively, i.e., only to claims that accrue after the effective date. See S. 6594/A. 8424, which amends several provisions of the Bill. A chart detailing each provision's effective date is included near the conclusion of this Advisory.

- expanding the statute of limitations for bringing sexual harassment claims under the New York Human Rights Law ("HRL"), and allowing an award of punitive damages for any claim arising under the HRL;

- extending coverage of the HRL to all employers, offering greater protections to domestic workers and certain non-employees, and instructing that the HRL is to be liberally construed;

- extending the rules on non-disclosure agreements ("NDAs") applicable to settlements of sexual harassment claims to all settlement agreements involving discrimination, harassment, and/or retaliation claims, as well as mandating additional limitations on NDAs in both settlement agreements and employment contracts; and

- expanding the statutory ban on mandatory pre-dispute arbitration agreements, which currently applies only to sexual harassment claims, to all discrimination, harassment, and retaliation claims.

Employee-Friendly Provisions Relating to Harassment Claims

Provisions lowering the burden of proof in harassment cases

Elimination of the "severe or pervasive" standard

Under the Bill, individuals asserting a hostile work environment claim based on any protected category—not just sex—will no longer be required to demonstrate that the harassment was "severe or pervasive" in order to make a successful claim. Instead, a complainant need only establish that the harassment subjected the individual "to inferior terms, conditions or privileges of employment because of the individual's membership in one or more … protected categories." In doing so, the Bill makes clear that the HRL standard will now be analogous to the uniquely low bar contained in New York City's Human Rights Law, namely, that harassment is unlawful if it rises above the level of "of what a reasonable victim of discrimination with the same protected characteristic or characteristics would consider petty slights or trivial inconveniences."

Weakening of the* Faragher/Ellerth *defense

This defense, named for two 1998 U.S. Supreme Court cases, allows an employer, in certain circumstances, to raise as an affirmative defense that (i) it took reasonable steps to prevent and promptly correct sexual harassment in the workplace (i.e., by implementing anti-harassment policies and offering a complaint procedure whereby employees could report harassers and have their complaints promptly and fairly investigated), and (ii) the aggrieved employee unreasonably failed to take advantage of the employer's preventive or corrective measures. The Bill severely diminishes this defense, as it instructs that an

individual's failure to "make a complaint about the harassment to [the] employer … shall not be determinative of whether such employer ... shall be liable." Thus, while an employer's complaint procedure and policies and the issue of whether an employee took advantage of the employer's procedures may still have some relevance, those factors alone will not be determinative of a plaintiff's claim.

Other provisions concerning harassment

Required distribution of a sexual harassment prevention policy

The Bill will require every New York employer to distribute to its employees, at the time of hire and in connection with each annual sexual harassment prevention training, a written "notice" containing the employer's sexual harassment prevention policy "and the information presented at such employer's sexual harassment prevention training program." (The Bill does not provide an explanation of training "information.") These materials must be in English and in "the language identified by each employee as the employee's primary language." The state will issue a model policy in various languages, and employers need only provide the policy in English and any other applicable language for which the state has published a template.

Extension of the statute of limitations

The Bill extends from one year to three years the statute of limitations for individuals to file a sexual harassment claim under state law with an administrative agency. Employees continue to have three years to file a sexual harassment claim in court. The statute of limitations for filing other state law-based discrimination or retaliation claims with an administrative agency remains one year.

Protections for domestic workers

Under the Bill, domestic workers will be entitled to protection against harassment to the same extent as other employees.

Provisions Affecting *All Claims* Arising Under the Human Rights Law (Not Only Pertaining to Harassment)

*Coverage of **all** New York State employers under the HRL*

Currently, the HRL applies to private employers with four or more employees, except that the law covers all employers with respect to sexual harassment. Under the Bill, the

employment provisions of the HRL will apply to *all* employers concerning *all* types of unlawful discrimination, harassment, and retaliation, based on *any* protected category.[2]

Requirement to broadly interpret the law

The Bill specifically provides that the "Construction" section of the HRL must be liberally construed:

> The provisions of this article shall be construed liberally for the accomplishment of the remedial purposes thereof, regardless of whether federal civil rights laws, including those laws with provisions worded comparably to the provisions of this article, have been so construed. Exceptions to and exemptions from the provisions of this article shall be construed narrowly in order to maximize deterrence of discriminatory conduct.

In other words, the Bill instructs courts and enforcement agencies to interpret the HRL broadly and liberally.

Expansion of the HRL's protections to certain non-employees

The 2018 legislation extended, under certain conditions, an employer's liability for sexual harassment to specific non-employees, e.g., contractors, subcontractors, vendors, consultants, and their employees. Under the Bill, such non-employees will be protected against *any unlawful discriminatory practice*, "when the employer, its agents or supervisors knew or should have known that such non-employee was subjected to an unlawful discriminatory practice in the employer's workplace, and the employer failed to take immediate and appropriate corrective action."

Elimination of the requirement that a complainant demonstrate that another individual, not in the same protected class, was treated more favorably

The Bill states that a complainant may prevail on a claim of discrimination, harassment, or retaliation without identifying an individual outside the complainant's protected class who received more favorable treatment under comparable circumstances (i.e., a "comparator").

Extension of the rules on NDAs to settlements of all discrimination, harassment, and retaliation claims, plus new limitations

Under the 2018 legislation, an employer is prohibited from including a provision in the settlement of a sexual harassment claim that prevents the claimant from disclosing the "factual foundation" of the claim, unless the claimant prefers to include such a confidentiality provision in the settlement agreement. The Bill extends this mandate to

[2] The protected categories under the HRL as of the date of this Advisory are 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.

the settlement of *all discrimination claims*. Further, the Bill requires that the settlement agreement not prohibit or otherwise restrict the complainant from (i) initiating or participating in any manner with an investigation conducted by an appropriate local, state, or federal civil rights enforcement agency, or (ii) filing or disclosing "any facts necessary to obtain unemployment insurance, Medicaid, or other public benefits to which the complainant is entitled." [3]

Required notice of employees' disclosure rights in employment contract NDAs

The Bill mandates that an NDA in an employment contract or agreement that prevents an employee from disclosing "factual information related to any future claim of discrimination" is void and unenforceable, unless the agreement informs the employee or prospective employee "that it does not prohibit him or her from speaking with law enforcement, the [federal] equal employment opportunity commission, the state division of human rights, a local commission on human rights, or an attorney retained by the employee or potential employee."

Extension of the ban on mandatory arbitration agreements

The 2018 legislation banned mandatory arbitration agreements unless they allowed for "independent court review." The Bill retains this language and extends the bar on mandatory final and binding arbitration agreements to *all* discrimination, harassment, and retaliation claims arising under the HRL and other laws that prohibit discrimination.

Employers should note that, based upon the U.S. Supreme Court's interpretation of the Federal Arbitration Act ("FAA"), the prohibitions on mandatory arbitration in this Bill and in the 2018 legislation may be preempted by the FAA.

Availability of punitive damages

The Bill authorizes an award of punitive damages for violations of the HRL by a private employer.

Expansion of the power of the state Attorney General's Office ("AGO")

The Bill broadens the power of the AGO in several ways, including endowing it with the authority, "upon request of the commissioner of labor or the state division of human rights," to bring, prosecute, and defend cases of discrimination based on *any* protected category. Previously, the AGO's authority was limited to cases involving discrimination based on age, race, creed, color, or national origin.

[3] Prior to the inclusion of an NDA in a settlement agreement concerning a discrimination, harassment, or retaliation claim, the complainant must be given 21 days to review the proposed NDA. The Bill mandates that the proposed NDA be in writing, "in plain English, and, if applicable, the primary language of the complainant." If after 21 days the complainant assents to the inclusion of the NDA in the settlement agreement, his or her preference must be memorialized in an agreement signed by all parties. The complainant then has seven days to revoke the agreement, during which time the agreement is not enforceable.

Effective Dates for Various Provisions of the Bill

An "" after the effective date indicates that the Bill provision applies only to claims that* ***accrued*** *on or after that date.*

Bill Provision	Effective Date
Elimination of the "severe or pervasive" standard (for a hostile environment claim based on any protected category), weakening of the *Faragher/Ellerth* defense, and requirement to identify a comparator	60 days after enactment*
Distribution requirements of employer's sexual harassment prevention policy	Immediately
Extension of the statute of limitations	1 year after enactment*
Protections for domestic workers	60 days after enactment*
Expansion of the term "employer" to include *all* employers within the state	180 days after enactment*
Liberal construction of the HRL	Immediately*
Expansion of the HRL's protections for certain non-employees	60 days after enactment*
Extension of the NDA rules to cover settlements of *all* discrimination, harassment, and retaliation claims, plus new limitations	60 days after enactment
Required notice of employees' disclosure rights in employment contract NDAs	January 1, 2020
Extension of the ban on mandatory arbitration agreements	60 days after enactment
Availability of punitive damages	60 days after enactment*
Expansion of the power of the state AGO	60 days after enactment*

What New York Employers Should Do Now

As we discussed, the Bill's reach is wide and deep. Assuming the Bill is enacted, we will continue to assess its immediate and potential effects in future Advisories. At present, New York employers should consider taking the following actions:

- If the Bill is enacted, many smaller New York employers will be exposed to liability under the HRL. Accordingly, all such employers will need to ensure that their policies and practices are compliant with the law's myriad requirements, including notice postings. In short, heretofore exempt employers will need a "crash course" on their obligations under the HRL.

- All New York employers should review their employment contracts, especially mandatory arbitration agreements and NDAs and other confidentiality provisions that implicate any type of discrimination, harassment, or retaliation claim, to determine if they are consistent with the Bill's prohibitions and requirements.

- All New York employers should revise "21/7" NDA letters to confirm that nothing in the Bill's NDA provisions will prohibit or otherwise restrict a complainant from "(i) initiating, testifying, asserting, complying with a subpoena from, or participating in any manner with an investigation conducted by the appropriate local, state, or federal agency[,] or (ii) filing or disclosing any facts necessary to receive unemployment insurance, Medicaid, or other public benefits to which the complainant is entitled."

- As the mandate concerning distribution of the anti-harassment policy and training "information" will become effective immediately upon enactment, all employers should make compliance with this provision of the Bill a priority. As of this writing, it is unclear whether the state will have the necessary templates available for download if and when the Bill is enacted. We will keep you advised of any developments concerning this matter.

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ACT NOW ADVISORY

New Disability Discrimination Guidance Sheds Light on New York City's "Cooperative Dialogue" Requirements

September 14, 2018

By Susan Gross Sholinsky, Joshua A. Stein, Nancy Gunzenhauser Popper, Amanda M. Gómez, and Alison E. Gabay*

The New York City Commission on Human Rights ("Commission") recently issued a 146-page guide titled "Legal Enforcement Guidance on Discrimination on the Basis of Disability" ("Guidance"), to educate employers on their responsibilities to job applicants and employees with respect to both preventing disability discrimination and accommodating a disability. The Guidance also addresses the new law on "cooperative dialogue" ("Law"), which goes into effect on October 15, 2018.

The Law amends the New York City Human Rights Law ("NYCHRL") to require covered entities—including employers and public accommodations—to engage in a cooperative dialogue with individuals who may be entitled to a reasonable accommodation under the NYCHRL.[1] Under the Law, a person may require an accommodation related to religious needs; a disability; pregnancy, childbirth, or a related medical condition; or the needs of a victim of domestic violence, sex offenses, or stalking.

Under the Law, employers must engage in a cooperative dialogue within "a reasonable time" with a person who has requested an accommodation or "who the [employer] has notice may require such an accommodation." The term "cooperative dialogue" means the process by which a covered entity and an individual who may be entitled to an accommodation exchange information to identify the individual's needs, his or her requested accommodation(s), and potential alternatives to the requested accommodation(s).

What Does a "Cooperative Dialogue" Entail?

The cooperative dialogue may take place in person, in writing, by phone, or through electronic means, and it must be conducted in good faith and in a "transparent and expeditious manner." An employer may request additional information about the

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[1] For more information about the "cooperative dialogue" law, please see the Epstein Becker Green *Act Now* Advisory titled "New York City Employers Will Be Required to Engage in Reasonable Accommodations Dialogue."

employee's specific impairment if the employer does not have sufficient information to understand or evaluate the employee's need for an accommodation. Further, an employer need not agree to the requested accommodation if the employer can propose a reasonable alternative that meets the specific needs of the employee.

A cooperative dialogue is considered ongoing until either (i) a reasonable accommodation is granted or (ii) the employer concludes that:

- there is only one accommodation that is reasonable and will not result in undue hardship for the employer, but the applicant or employee refuses to accept that particular accommodation;

- the employee or applicant has refused the less expensive of two reasonable accommodations;[2] or

- no accommodation exists that will allow the applicant or employee to perform the essential functions of the job or that will not impose undue hardship.[3]

At this point, the employer must notify the employee, in a timely manner and in writing, of its decision, in a final determination identifying any accommodation that is either granted or denied. Importantly, the determination that no reasonable accommodation would enable the person requesting an accommodation to satisfy the essential requisites of a job or enjoy the right or rights in question may only be made after the parties have engaged, or the employer has attempted to engage, in a cooperative dialogue. In other words, *even if there are no reasonable accommodations available, the request cannot be denied until after the cooperative dialogue has taken place.*

Keep in mind that employers must engage in the cooperative dialogue process each time an employee (or applicant) makes a new request for an accommodation.

Importantly, the Guidance advises employers on the criteria that the Commission will consider in evaluating whether an employer has engaged in good faith in a cooperative dialogue with an individual requesting an accommodation. These factors include whether the employer:

- has a policy that informs employees how to request accommodations,

- responded to the request in a timely manner given the urgency and reasonableness of the request, and

[2] The Guidance makes clear the following: "If there are two possible reasonable accommodations and one costs more or is more burdensome than the other, the covered entity may choose the less expensive or burdensome accommodation."

[3] A request for accommodation also may be denied where (i) the individual's request for an accommodation is determined not to be related to a disability or other covered matter, (ii) the individual requesting the accommodation fails to provide adequate documentation of the need for the accommodation (where applicable), or (iii) accommodation would pose a direct threat to the health or safety of the individual or others.

- attempted to obstruct or delay the cooperative dialogue to intimidate or deter the request.

The Guidance strongly encourages employers to include information on its cooperative dialogue and reasonable accommodation policies and processes in an employee handbook.

Model Documents

The Guidance contains an appendix with sample documents on a variety of topics, including:

- **Reasonable Accommodation Request Form** (for use when an applicant or employee requests a reasonable accommodation).

- **Grant or Denial of Reasonable Accommodation Request Form** (for use by the employer to notify an applicant or employee once it has decided whether to grant or deny a request for a reasonable accommodation).

- **Letter to Employee on Leave** (sent towards the end of an employee's leave to determine if the employee (i) is returning to work when the leave expires, (ii) will be requesting additional leave, and/or (iii) will be requesting a different workplace accommodation).

- **Service Animal One-Pager** (provides permissible questions that an employer may ask in response to an accommodation request regarding a service animal).

What Employers Should Do Now

- Review current policies and practices to ensure that they are consistent with the procedural and documentation requirements set forth in both the Law and Guidance.

- Update employee handbooks, as appropriate, to reflect any modifications made to company practices and policies as a result of the obligations imposed by the Law.

- Train human resources staff and supervisors on the requirements of the Law and company procedures, including:

    - the elements of a "cooperative dialogue";

    - the need to engage in this dialogue prior to making a determination about a requested accommodation; and

    - upon making a final determination, the necessity of providing a written response to the employee who requested the accommodation.

- Ensure that human resources and supervisory personnel understand the interplay of the Law with another recently enacted statute—the Temporary Schedule Change for Personal Events Law," which became effective on July 18, 2018.[4] Many requests for workplace accommodations involving shifts in working time and/or locations will implicate both laws.

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[4] For more information about the law, please see the Epstein Becker Green *Act Now* Advisory titled "New York City Gives Employees the Right to Change Work Schedules Temporarily for "Personal Events."

EPSTEIN BECKER GREEN

Financial Services Employment Law

News, Updates, and Insights for Financial Services Employers

Federal Court Declares That a Ban on Mandatory Arbitration of Sexual Harassment Claims Is Inconsistent with Federal Law

By Traycee Ellen Klein, Shira M. Blank & Amanda M. Gómez on July 8, 2019

Launched more than a decade ago, the #MeToo movement made its way into the national (and international) conversation in 2017, and, by 2018, the movement had such momentum that it spurred a cornucopia of new state laws. One of these new laws, which became effective July 11, 2018, is a New York State statute that prohibits employers from requiring employees to submit sexual harassment claims to mandatory arbitration. This new law is codified in Section 7515 of the Civil Practice Law & Rules of the State of New York

("C.P.L.R."), entitled "Mandatory arbitration clauses; prohibited." Section 7515 reflects the New York State Legislature's (which consists of the New York State Assembly and the New York State Senate) determination that employees should be allowed to have their sexual harassment claims adjudicated in a court of law, if that is their preference. The introductory clause of Section 7515 also indicates, however, that legislators understood that an unqualified prohibition of mandatory arbitration might not pass muster under federal law:

> Prohibition. Except where inconsistent with federal law, no written contract, entered into on or after the effective date of this section shall contain a prohibited clause as defined in paragraph two of subdivision (a) of this section. (C.P.L.R. § 7515(b)(i).)

Hence, the statute engendered substantial uncertainty among employers. Now, almost one year after C.P.L.R. § 7515 became law, a U.S. District Court Judge, the Hon. Denise Cote of the Southern District of New York, has addressed this confusion by opining on whether New York State may outlaw privately negotiated agreements to submit *all* disputes, inclusive of claims for sexual harassment, to arbitration. In ***Latif v. Morgan Stanley & Co. LLC, et al.*, No. 1:18-cv-11528 (S.D.N.Y. June 26, 2019),** Judge Cote delivered a clear message about the collision of C.P.L.R. § 7515, which operates to constrain parties' rights to agree to arbitrate claims, and the Federal Arbitration Act (the "FAA"), which, as repeatedly reinforced by the U.S. Supreme Court in recent years, mandates substantial deference to private arbitration agreements. Employers, especially those in the financial services industry, have reason to cheer Judge Cote's opinion in *Latif*, which restores a degree of certainty about whether a mandatory arbitration clause governing an employment relationship may still be enforced—at least in some courts.

The essential facts are as follows: Mahmoud Latif ("Latif") signed an employment agreement (the "Offer Letter") that incorporated by reference Morgan Stanley's mandatory arbitration program. Read together, these documents formed the "Arbitration Agreement" between Latif and Morgan Stanley. The Arbitration Agreement provided that any "covered claim" that arose between Latif and Morgan Stanley would be resolved by final and binding arbitration, and that "covered claims" included, among other causes of action, discrimination and harassment claims. Nevertheless, Latif commenced an action against Morgan Stanley in federal court, asserting, among other charges, claims of sexual harassment under federal, state and municipal law. The Morgan Stanley defendants moved to compel arbitration of the entire case, inclusive of the sexual harassment claims. Latif

opposed that motion on the basis of C.P.L.R. §7515, which, according to Latif, expressed New York State's "general intent to protect victims of sexual harassment," and required the Court to retain jurisdiction over the sexual harassment claims—even though those claims fell clearly within the ambit of the Arbitration Agreement.

In granting Morgan Stanley's motion to compel arbitration, *inclusive of the sexual harassment claims*, Judge Cote held that C.P.L.R. §7515 could not serve as the basis to invalidate the Arbitration Agreement. The Court's rationale is straightforward: C.P.L.R. §7515 purports to nullify agreements to arbitrate sexual harassment claims "except where inconsistent with federal law," and the statute is indeed inconsistent with the FAA's "strong presumption that arbitration agreements are enforceable." Judge Cote therefore stayed Latif's court action pending the outcome of arbitration proceedings.

In light of the foregoing, to maximize the likelihood of full enforcement of an arbitration agreement, inclusive of claims for sexual harassment, employers should promptly consider the prospect of removal of a New York State court action to federal court, if circumstances otherwise permit such removal.

Finally, employers also should note that, on June 19, 2019, the New York State Legislature voted to amend Section 7515 to prohibit not only the mandatory arbitration of sexual harassment claims, but also the mandatory arbitration of *any* allegation or claim of discrimination. While, as of this writing, the amendment has not yet been signed into law by the executive, it appears safe to predict that states will continue, in the near future, to attempt to prohibit or constrain mandatory arbitration of discrimination/harassment claims in a way that generates apparent conflict with federal law. The Supreme Court's adjudication of a constitutional challenge to C.P.L.R. §7515, and/or like statutes, under the Supremacy Clause of the U.S. Constitution seems to be a likely end-game.

NEW YORK EMPLOYMENT ATTORNEYS BLOG
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Following the #MeToo Movement: New York City Mandates Sexual Harassment Training

By The Harman Firm

By Leah Kessler

Last year, New York State and New York City made groundbreaking expansions to the sexual harassment provisions of several state and city statutes and regulations, which we blogged about **here**. In doing so, New York has increased the safety of men and women in the workplace. This is an important task, as there are **approximately 321,500 cases of rape and sexual assault reported annually in the U.S**.—a number far less than the projected actual number, as victims are often too afraid to report their experiences. These laws are an important step forward, effectively holding employers and companies to a higher standard to improve the workplace, especially for the over **74 million** women in the labor force today.

In May 2018, Mayor Bill de Blasio signed the **Stop Sexual Harassment in NYC Act**—comprehensive legislation aimed at addressing and preventing sexual harassment in the workplace. Notably, this act expands the City Human Rights Law in cases of gender-based harassment by increasing the statute of limitations to bring claims to the New York City Commission on Human Rights from one- to three-years, regardless of the size of their employer. In addition, it **requires all employers in the City to display anti-sexual harassment rights and responsibilities in both English and Spanish**. Employers are also required to post a mandatory notice provided by the New York City Commission on Human Rights as well as a mandatory notice to all new hires. (The notices are found **here** and **here**, respectively.) Employers must *already* be in compliance with these posting requirements.

Moreover, beginning April 1, 2019, New York City employers with 15 or more employees will be **required to hold interactive sexual harassment trainings** (which must be completed by October 9, 2019). This new harassment training requirement accompanied a separate mandate under **N.Y. Lab. Law 201-g** that New York employers adopt a sexual harassment policy that *meets or exceeds* the standards of the state's model policy. Requirements under New York State law include, but are

not limited to, an explanation of sexual harassment as a form of unlawful discrimination under local law; a statement that sexual harassment is also a form of unlawful discrimination under state and federal law; and a description of what sexual harassment is, using examples. Employers must also include a specific explanation on the responsibilities of managers and supervisors and their role in reporting sexual harassment, and information regarding bystander intervention during sexual harassment situations. For a full list of requirements, visit this **New York City Human Rights Site**.

These trainings are not solely for full-time employees. Employers must train all independent contractors and part-time and short-term employees who work for the employer more than 90 days and more than 80 hours in a calendar year. These training are annual and must be completed every calendar year, ensuring that all employees are educated and up-to-date on the topic of sexual harassment in the workplace.

The Harman Firm, LLP, is please about these new laws, as it is important for employers and employees alike to be educated on the topic of sexual harassment and gender discrimination. In order to help facilitate and improve compliance with these new laws, The Harman Firm, LLP, is offering sexual harassment trainings.

Posted in: NYCHRL and Sexual Harassment

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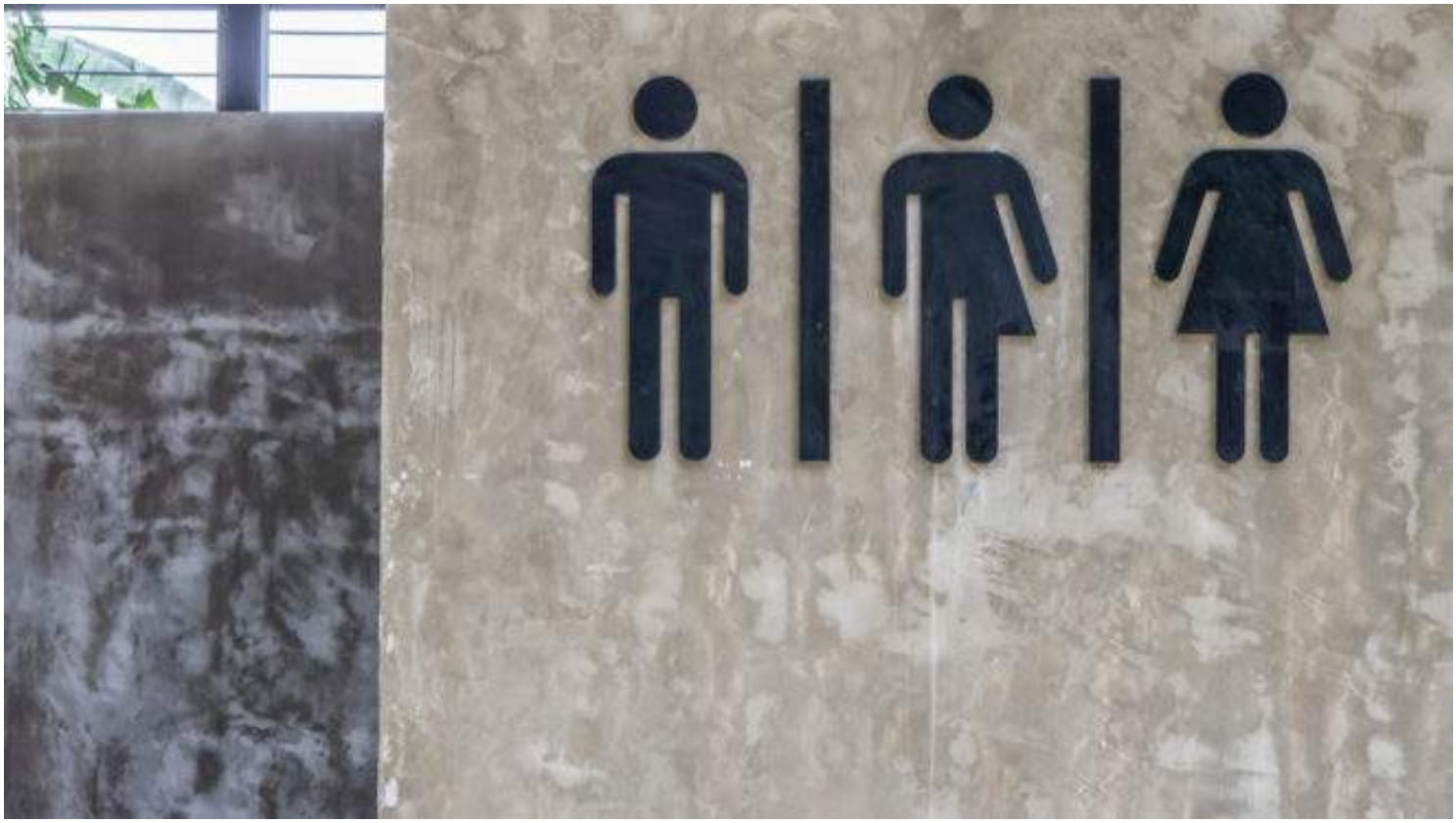
Hospitality Labor and Employment Law

News and Updates on Legal Issues Facing Hospitality Employers

NYC Commission on Human Rights Adopts Rules Establishing Broad Interpretation of Laws Prohibiting Gender Discrimination



By Amanda M. Gómez on February 13, 2019

The New York City Commission on Human Rights (the "Commission") has adopted **new rules** ("Rules") which establish broad protections for transgender, non-binary, and gender non-conforming individuals. The Rules, which define various terms related to gender identity and expression, re-enforce recent statutory changes to the definition of the term

"gender," and clarify the scope of protections afforded gender identity status under the New York City Human Rights Law. New York State also just added gender identity and expression as protected classifications under the state Human Rights Law, following the adoption of the **Gender Expression Non-Discrimination Act**.

The Rules incorporate key pieces of community feedback following a public hearing on the **proposed rules**. Most notably, the Rules have been updated to explicitly include non-binary identities. Under the Rules, "non-binary" is defined as "a term used to describe a person whose gender identity is not exclusively male or female. For example, some people have a gender identity that blends elements of being a man or a woman or a gender identity that is neither male nor female." Furthermore, non-binary individuals are now also included in the Rules' examples section, which illustrates possible violations of the prohibition on discrimination based on gender. For instance, deliberately using the pronoun "he" for a non-binary person who is perceived as male but has indicated that they identify as non-binary and use the pronouns "they," "them," and "theirs" is identified as an example of misusing individual's chosen name, pronoun, or title, along with deliberately calling a transgender woman "Mr." after she has made clear that she uses female titles.

The Commission has also added a list of terms typically associated with gender expression, such as "androgynous," "butch," "feminine," "femme," "gender non-conforming," and "masculine," to the existing definition of gender expression. Terms associated with gender identity, such as "agender," "bigender," "woman," "gender diverse," "gender fluid," "gender queer," "man," "man of trans experience," "pangender," and "woman of trans experience" have similarly been added to the definition of gender identity.

While the Rules have added some important language, the key takeaways remain the same. As the proposed rules initially laid out, deliberate misuse of an individual's chosen name, pronoun, or title, refusing to allow individuals to use single-sex facilities or participate in single-sex programs consistent with their gender identity, imposing different dress or grooming standards based on gender, and refusing a request for accommodation on the basis of gender will all be considered violations under the Rules. Additionally, covered entities must provide equal employee benefits, regardless of gender, such as ensuring that the health plans they offer provide gender-affirming care.

The Rules will go into effect March 9, 2019.

Hospitality Labor and Employment Law

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Retail Labor and Employment Law

News, Updates, and Insights for Retail Employers

NYCCHR Issues Guidance on Discrimination Based on Immigration Status and National Origin

By Susan Gross Sholinsky, Nancy Gunzenhauser Popper & Corben J. Green on October 31, 2019

The New York City Commission on Human Rights ("the Commission") published **a legal enforcement guidance** ("Guidance") clarifying its standards with respect to discrimination based on actual *or perceived* immigration status and national origin. The Guidance applies to employers, housing providers, and providers of public accommodations.

As the Guidance explains, "[d]iscrimination based on immigration status often overlaps with discrimination based on national origin and/or religion." Under the New York City Human Rights Law ("NYCHRL"), employers with four or more employees are prohibited from discriminating on any of these bases against job applicants, employees, interns and **independent contractors**.

Much of the focus of the new Guidance is on discriminatory conduct based on citizenship status and "work authorization" status. In this regard, the Guidance reiterates the following mandates:

- Employers may not discriminate among work-authorized individuals, including citizens, permanent residents, refugees, asylees, and those granted lawful temporary status, unless required or explicitly permitted by law.
- Job application and interview questions related to work authorization must be applied uniformly to all applicants, and not selectively, based on the actual or perceived immigration status or national origin of the applicant.
- If an employer employs workers who are unauthorized to work, those workers may not be treated less favorably on the basis of their immigration status.
- Employers may not engage in "document abuse" by demanding documents from a job applicant or worker beyond those required to establish work authorization under federal law, including green cards and birth certificates. Employers must accept any document from the "List of Acceptable Documents" established by federal law on a Form I-9.
- Except in limited, specified circumstances, employers may not re-verify an employee's work authorization.
- An employer may not take any adverse action against an applicant or worker based on a **No-Match Letter** from the Social Security Administration.
- Employers may refuse Immigration and Customs Enforcement ("ICE") access to non-public facing areas of their workplace if the agents do not produce a warrant signed by a judge.
- An employer may not threaten workers with ICE involvement to harass, intimidate, or retaliate against employees.

- The guidance instructs against the use of such terms as "illegal alien" and "illegals," and reiterates that the NYCHRL prohibits the use of such terms to demean or offend people in the workplace.

The Guidance provides examples of specific kinds of actions that violate the NYCHRL including the following:

- Granting workers different break arrangements based on their immigration or work authorization status.
- Threatening to contact ICE if a worker attends a necessary medical appointment.
- Refusing to accept a Social Security card and demanding a birth certificate from a job applicant because the applicant has an accent.
- Prohibiting hotel housekeepers from speaking Spanish while cleaning because it might make guests uncomfortable.
- Using a No-Match letter as an excuse to terminate an otherwise qualified worker.
- Providing Polish workers (or workers of any specific nationality) first priority in scheduling to the disadvantage of its U.S. citizen workers (or workers of another nationality).

The Guidance further instructs that once an employer hires a worker who is unauthorized to work or undocumented, that worker is covered by the NYCHRL and may file a claim of discrimination with the New York City Commission on Human Rights or a lawsuit.

Finally, employers should be aware that a new **state law**, effective August 15, 2019 and applicable to *all* New York employers as of February 8, 2020, prohibits employers from threatening, penalizing, or otherwise discriminating or retaliating against an immigrant employee, including threatening to report that person or a member of his or her family to U.S. immigration authorities.

The recent focus by both the state and the city on discrimination based on immigration status suggests that employers should anticipate increased scrutiny and enforcement concerning this issue.

Retail Labor and Employment Law

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APRIL 17, 2019

WHEN DOES "ME TOO" GO TOO FAR?

By The Harman Firm

By **Walker G. Harman, Jr.**

Contrary to popular belief, the Me Too movement is not so new. Beginning nearly 15 years ago, it was established to "**help survivors of sexual violence, particularly Black women and girls, and other young women of color from low wealth communities, find pathways to healing**." The original founders had a vision to address both the "dearth in resources" for survivors of sexual violence" (emphasis added) and to "build a community" of advocates, politicians, lawyers, social workers and others to develop a grassroots approach to addressing and redressing sexual violence at its core.

Now, over a decade later, with many celebrities spear-heading the movement, thousands upon thousands of woman (and even some men) have come forward to say Me Too. So, what does Me Too actually mean? It seems via popular sentiment that the utterance of Me Too signifies that the speaker is also a survivor or a victim of sexual violence. However, sexual violence is generally associated with illegal conduct (both civil and criminal), such as rape, molestation, offensive touching, sexual harassment, and other vile and abhorrent conduct. That is, the underlying conduct with a claim of sexual violence is so intrusive and offensive, that it gave rise to criminal and/or civil liability. Keeping with the movement's original intent and to this day, the official organizers of the Me Too movement describe the purpose as "**helping those who need it to find entry points for individual healing and galvanizing a broad base of survivors to disrupt the systems that allow for the global proliferation of sexual violence**."

Over the years since the movement's inception, though, a shift has taken place. And, since 2016, the Me Too association has been used to redress issues other than sexual violence, such as instances where individuals in purported positions of power are alleged to have used that power to gain favors which might be sexual in nature but which do not amount to sexual violence. Examples of this imbalance power dynamic occur amongst teachers, professors, bosses, police officers, politicians, coaches, doctors, directors, casting agents and others in the entertainment industry.

This power imbalance is most evident in the entertainment industry where thousands of women with a platform and audience have come forward to acknowledge that they too were victims of inappropriate conduct. Yet, few recent Me Too accusations, especially those that have proliferated in the media, have been associated with a crime or civil penalties. This fact in no way undermines

the monsters of the entertainment industry who have committed repeated and egregious acts of sexual abuse that should not go unpunished. On the other hand, the assertion of Me Too does not and should not connote or confirm that the speaker is, or believes herself to be, the victim of sexual violence. A limited definition—specifically one that conflates or confuses claims of sexual conduct with sexual assault, or one that is limited to sexual assault only—is not how Me Too is used today. Me Too now is clearly used to refer to a broad range of conduct, both legal and illegal, at present, it has become clear that some have employed the term for means other than its intended use.

For example, while the suggestion might be controversial, it is possible that the assertion of Me Too can be used more as self-promotion and less as a way to call attention to unwanted sexual advances or violence. The dishonest or misguided assertion of Me Too is dangerous, as it could result in ruining the accused's career, relationship and life and, to some extent more importantly, could undermine those who have legitimate claims of unwanted sexual conduct. The moral of the story for the Me Too assertion is to be complete, accurate, and honest.

Few would dispute that the Me Too movement is powerfully important and necessary to move this country forward to protect women and to ameliorate instances of sexual violence. The broad use of Me Too—one that covers behavior that is not illegal—however, creates unique challenges for our culture going forward. When behavior is not patently illegal, the inquiry into the facts of a particular situation becomes even more critical, as the mere assertion of Me Too now cannot automatically amount to a wholesale condemnation of the accused. The moral underpinnings of due process are just as relevant today as ever and, while we champion those who come forward with their stories of sexual violence and unwanted sexual conduct, a thorough factual investigation should be completed before any individual is saddled with the label of sexual predator, a label—whether justified or not—that can destroy a person's career and personal life.

If you feel you have been the victim of unwanted sexual conduct or you believe you have been falsely accused of engaging in unwanted sexual conduct, please conduct The Harman Firm, LLP.

Posted in: #Metoo, Sex Discrimination, Sexual Harassment and Social Media

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EMPLOYMENT LAW UPDATE
February 5, 2019

By Tiffany Ma and Lauren Rosenfeld

On January 19, 2018, the New York City Council amended the New York City Human Rights Law in relation to reasonable accommodations for individuals who are or may be entitled to reasonable accommodations. This amendment, Int 0804-2015, went into effect on October 15, 2018. This requirement applies to employers with four or more employees.

Prior to this amendment, when an employee requested an accommodation, employers were required to engage in an interactive process with the employee. The amendment provides clarity and direction as to what an employer must do to satisfy the requirements of an interactive process. The amendment defines a good faith interactive process as, "a good faith, timely and flexible dialogue to determine what accommodations are feasible in which both the employee and employer may propose alternative arrangements."

The amendment also explains the employer obligation to "reasonably accommodate a person with a known disability [requiring] covered entity to engage in a good faith interactive process to identify potential accommodations and evaluate the reasonableness of any accommodation proposed by such person. At the conclusion of such process, the covered entity shall notify such person, ***in writing***, of the covered entity's decision regarding any accommodation proposed or discussed."

Once an employer is on notice of an employee's accommodation need, there is an obligation of cooperative dialogue. The dialogue can be in person, by phone, or via electronic means. Each time an employee makes an accommodation request, the employer must engage in cooperative dialogue prior to reaching a final determination, no matter how similar the request is to a past accommodation request. If the employee's circumstances change, an employee can make a new request for accommodations that must be fully considered in the same manner as the first accommodation request.

While the amendment does not define timely, the NYC Commission on Human Rights has published guidance where it defines the timely obligation as, "whether the employer responded to the request in a timely manner in light of the urgency of the request." The guidance also explains other factors to be considered when determining if an employer engaged in a cooperative dialogue in good faith. Other factors include, "whether the employer attempted to explore the existence and feasibility of alternative accommodations or alternative positions" and "whether the employer attempted to obstruct or delay the cooperative dialogue or in any way intimidate or deter the employee from requesting the accommodation."

The takeaway for employers is when an employee makes a request for an accommodation, an employer must evaluate the accommodation and have a dialogue with the employee regarding the potential accommodations and consider suggestions from the employee. Once cooperative dialogue has taken place, ***an employer must notify the employee in writing regarding the decision***. With the notification requirements, it is vital to keep sufficient records of the cooperative dialogue and the determination.

The takeaway for employees is to ensure that the employer is engaging in a good faith interactive process when discussing potential accommodations. If they are not, or do not provide in writing the decision, then they are not complying with the requirements. It is important to keep good records of all communications regarding the accommodation.

At Young & Ma LLP, we tailor and create unique business and legal strategies to obtain our clients' objectives and goals. To request a private consultation or to discuss further with the authors, please email tma@youngandma.com or call 212-971-9773.

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EMPLOYMENT LAW UPDATE
March 25, 2019

By Tiffany Ma and Lauren Rosenfeld

As a response to the #MeToo Movement, the New York State and New York City legislatures have recently enacted multiple new laws affecting employment. Some notable changes include:

Mandatory Sexual Harassment Prevention Policy, Complaint Form, and Training

Effective October 9, 2018, all employers in New York State must maintain a sexual harassment prevention policy with a complaint form and complaint procedure. The minimum requirements for the policy, complaint form, and procedure can be found, along with sample policies and complaint forms, on the New York State website:

https://www.ny.gov/programs/combating-sexual-harassment-workplace
https://www.ny.gov/sites/ny.gov/files/atoms/files/SexualHarassmentPreventionModelPolicy.pdf
https://www.ny.gov/sites/ny.gov/files/atoms/files/CombatHarassmentComplaint%20Form.pdf

Additionally, all New York employees must be provided sexual harassment prevention training by October 9, 2019; new employees must be trained as soon as possible. The training must be interactive, which means employee participation is necessary. All employees must be made aware of the mandatory reporter requirement that employees in supervisory roles have.

New York City employers must additionally display a poster to educate employees about their rights and distribute a fact sheet with similar information. Samples can be found here:

https://www1.nyc.gov/assets/cchr/downloads/pdf/materials/SexHarass_Notice-8.5x14.pdf
https://www1.nyc.gov/assets/cchr/downloads/pdf/materials/SexHarass_Factsheet.pdf

Non-Disclosure Clauses are Prohibited for Sexual Harassment Claims

The use of non-disclosure agreements when resolving sexual harassment claims is prohibited unless the employee prefers confidentiality. Employees must be given twenty-one (21) days to consider any settlement agreement containing a confidentiality/non-disclosure clause and then given an additional seven (7) days to revoke the agreement.

Mandatory Arbitration is Prohibited for Sexual Harassment Claims

Effective July 11, 2018, employers in New York with four (4) or more employees cannot require sexual harassment claims to be arbitrated.

Expansion of Workers Protected in Sexual Harassment Laws

The state Human Rights Law protecting employees against sexual harassment has been expanded to include contractors, subcontractors, vendors, consultants, or others providing

services in the workplace. Also, while city laws previously protected only employees of workplaces with four (4) or more employees, the city Human Rights Law has been modified with respect to sexual harassment claims to include all employers, even if the employer only has one (1) employee located in New York City.

Extended Statute of Limitations

Victims of sexual harassment in New York City now have three (3) years to file their complaint of harassment with the New York City Commission of Human Rights, whereas victims only had one (1) year from the last offending harassment in the past.

New Protections for Sexual and Other Reproductive Health/Fertility Decisions

Effective May 20, 2018, the protected classes under the NYC Human Rights law expanded to include sexual and other reproductive health decisions. The new law defines sexual and reproductive health decisions as "any decision by an individual to receive services which are arranged for or offered or provided to individuals relating to the reproductive system and its functions" and includes fertility-related medical procedures, sexually transmitted disease prevention, testing and treatment, and family planning services and counseling, such as birth control drugs and supplies, emergency contraception, sterilization procedures, pregnancy testing, and abortion.

An employee cannot be discriminated against or suffer retaliation for making reproductive health choices during their employment. This law provides protection against employers penalizing employees if they make decisions opposed to the employer's view, or if employees must take time off work to tend to reproductive health matters. For example, an employer cannot terminate or retaliate against an employee upon discovering or disagreeing with the employee's choice to undergo in vitro fertilization (IVF), have an abortion, or seek treatment for sexually transmitted infections. This protection does not require employers to provide reproductive health benefits, but solely requires employers to not take adverse employment actions against an employee participating in the protected activity.

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EMPLOYMENT LAW UPDATE
November 9, 2019

By Tiffany Ma and Maverick James

New York's new pay equity legislation expands New York State's wage parity statute to include employees of all protected categories

Effective October 8, 2019, New York's equal pay law expanded beyond protection for women to encompass all protected classes under the New York State Human Rights Law, including age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, disability, predisposing genetic characteristics, familial status, marital status, or domestic violence victim status.

Prior to this, New York Labor Law § 194 stated that, "no employee shall be paid a wage at a rate less than the rate at which the employee of the opposite sex in the same establishment is paid for **equal work** on a job the performance of which requires equal skill, effort, and responsibility" [emphasis added]. The new standard replaces that with "**substantially similar work**, when viewed as a composite of skill, effort, and responsibility," lowering the employee's burden of establishing pay discrimination and making it easier for employees to assert claims. Instead of finding an "equal" comparator (always highly litigious and contentious), an employee is now able to compare themselves to employees who share "substantially similar work" and job responsibilities. While this change is monumental, it does not affect an employer's affirmative defenses that justify pay differentials through seniority systems, merit systems, a system that measures earnings by quantity or quality of production, education, training, or experience.

As the law expands to protect employees in more classes, traditional issues facing equal pay cases may finally be brought to light, such as access to information. An employee would still have to establish her own comparator, but the information to do so is frequently not readily available. An employee would need that information in order to discover the comparator sharing this substantially similar work. For instance, if a woman sees the salary and benefits information of a man currently in a totally different role than her, she may remember that she came into the job at the same time as the man, was interviewed by the same person, and spent the same two years under the same boss. Then perhaps on the woman's maternity leave, that man was promoted and now has higher pay and can no longer be considered "substantially similar" to her. She may not remember at the time of her lawsuit filing that this man is actually a fair comparator, but a chart including his name, salary and benefits could jog her memory. Young & Ma LLP partner Tiffany Ma discusses this on WNYC on October 7, 2019:

http://www.youngandma.com/equal-pay

Employers can no longer base compensation packages simply on "job titles." They need to look across all their employees and equally compensate those who share substantially similar responsibilities and assignments. It would be prudent for employers to conduct a pay analysis across all employees to make sure they comply with this law, as willful violations of New York's equal pay law under N.Y. Labor Law § 194 can result in liquidated damages of 300% of the pay differential going back six years. Employers should be mindful that N.Y. Labor Law § 194

claims are typically brought with other discrimination claims (e.g., gender) that allow plaintiffs to seek emotional distress damages, which can also be very sizable.

Employees, on the other hand, can feel more empowered to pursue claims that focus on pay discrimination. Although finding a viable comparator may be difficult, it is not impossible, as the discovery process can reveal a comparator of ***substantially similar work and job responsibilities.*** The law now protects a much broader category of employees, and employees are encouraged to assess with counsel whether the state equal pay law is applicable anytime she or he feels significantly underpaid when compared to colleagues doing similar work. As always, it is important that employees maintain good records of their own employment and salary history.

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SEXUAL HARASSMENT FEDERAL LAW

TITLE VII

Did you know...?

- Not all Americans have the same protections from sexual harassment in the workplace
- Title VII protections are the only sexual harassment legal remedies for employees if their state laws do not protect them
- Title VII requires employees to exhaust administrative remedies through a lengthy EEOC process before having access to the judicial system

IT'S OLD!

Drafted and passed in 1964...

5 years before the moon landing

36 years before modern internet

IT'S ARBITRARY!

"Severe or Pervasive"

Federal judges have interpreted sexual harassment very differently by region, state and even within a single courthouse.

The lack of a consistent definition of sexual harassment has created an unlevel playing field for both employees and employers.

WHO DECIDES?

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SEXUAL HARASSMENT LANDSCAPE

KEY STATISTICS

Although an estimated 87 to 94 percent of those who experience sexual harassment never file a formal legal complaint, during fiscal year 2016 alone, nearly 7,000 sexual harassment charges were filed with the EEOC
Source: NWLC

One in three women who filed sexual harassment charges also alleged retaliation, and one in seventeen also alleged racial discrimination
Source: NWLC

Women in food services, retail, and health care filed the most charges between 2012 and 2016
Source: NWLC

Small companies are more likely to lack a human resources director or department, which means that workers in these companies who are being harassed by a supervisor, co-worker, or customer may lack a clear path for seeking assistance or accountability
Source: NWLC

Women employed at small companies with 15-100 employees filed the largest share of sexual harassment charges (43.9 percent)
Source: NWLC

Women employed at companies of less than 15 employees cannot file with the EEOC
Source: EEOC

These key statistics were cited in"Out of the Shadows: An Analysis of Sexual Harassment Charges filed by Working Women" published by THE NATIONAL WOMEN'S LAW CENTER (NWLC) on August 2, 2018. The NWLC is a non-profit legal organization that has been working since 1972 to advance and protect women's legal rights.

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SEXUAL HARASSMENT CLAIMS ARE DIFFICULT TO GET TO TRIAL

Why is disputing a patent easier than getting justice for being sexually harassed in the workplace?

Direct access to judicial system

PATENT DISPUTE → Direct Filing → 

The unnecessarily burdensome employment plaintiff's journey

SEXUALLY HARRASSED AT WORK → **6 MONTH FILING LIMITATION** → **EEOC BURDEN: 6 TO 10 MONTHS WAITING FOR INVESTIGATION** → 

FEDERAL COURT

USA TODAY reports that the average wait time for seeking a remedy for sexual harassment through the EEOC was 295 days in 2017, which is up from 182 days in 2001

Source: USA TODAY

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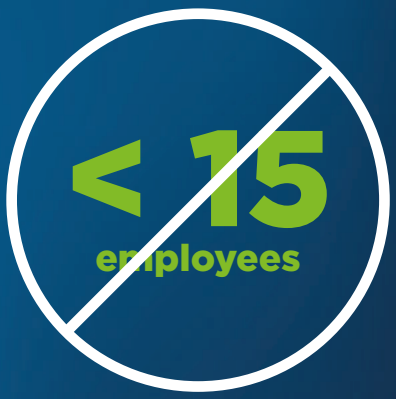
WHO IS NOT PROTECTED?

BY TITLE VII

Independent Contractors?

Not a Paid Employee?



Company has less than 15 Employees?

Over 8 million employees do not have legal protections because their employers are exempt from both federal and state anti-gender discrimination laws because of the size of the company

Source: The Noble Law analysis based on Bureau of Labor Statistics, 2017

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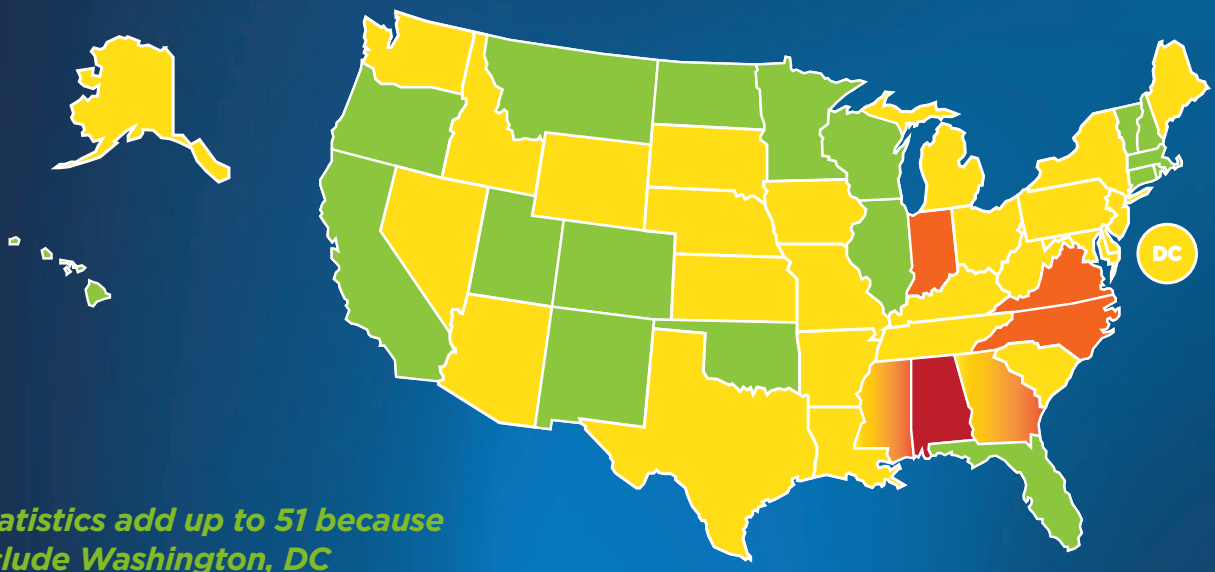
SEXUAL HARASSMENT STATE LAWS

50 STATE OVERVIEW



State statistics add up to 51 because they include Washington, DC

1 state — does not have any type of anti-gender discrimination state law for employees and therefore employees in this state only have access to legal remedies through the federal process using Title VII claims

2 states — have anti-gender discrimination state law, but the law only protects public employees *

3 states — have anti-gender discrimination law, but the state courts have refused to extend "sexual harassment" protections to employees within their states

27 states — have anti-gender discrimination state law that has been interpreted by the state court to include protection for sexual harassment

18 states — have state statutory provisions prohibiting sexual harassment in the workplace

** As of November 2018, this would only cover 13% of the civilian labor force in Georgia and only 19% of the civilian labor force in Mississippi.*

Source: The Noble Law analysis based on Bureau of Labor Statistics, 2018

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STATES TIME TO FILE

BY NUMBER OF DAYS

Filing Limits	# of States
No Statutory Protection	6
180 Days (Federal Standard)	24
181 - 365 Days	9
+ 365 Days	11

20 states have created statutory protection for sexual harassment that exceeds the federal filing limits of Title VII

Source: The Noble Law analysis

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STATES EMPLOYER COVERAGE

State laws set minimum thresholds that exempt employees from state law protections!

Employer Minimums	# of States
All Companies (No minimum)	15
2-4 Employees	8
5 - 14 Employees	10
15+ (Same protetection as federal minimum)	10
No State Protections	8

Should the size of your company determine whether your colleague or boss is allowed to sexually harass you?

More than 37% of employers nationwide are not covered by either state or federal sexual harassment laws!

Source: The Noble Law analysis based on Bureau of Labor Statistics, 2017

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Clarity at Work

MODEL STATE PROTECTIONS

FOR SEXUAL HARASSMENT

CALIFORNIA: Provisions that Explicitly Protect Victims of Sexual Harassment

A single incident of harassing conduct is sufficient to create a triable issue regarding the existence of a hostile work environment. **Sexual Harassment Omnibus Bill SB 1300**

ARIZONA: Provisions that Cover all Employers

The Definition of Employer is separately defined for cases of Sexual Harassment to include "shall include all employers within the state." **AZ ST § 41-1461**

MAINE: Provision that protect all Employees

Any individual employed by an employer as long they whether or not they work directly or indirectly with employers whatever there place of employment. **5 M.R.S. § 4553 3 & 4.**

NEW YORK: Provision that requires Mandatory Training

Employers must adopt a sexual harassment prevention policy and training or use a similar policy and training that meet or exceeds minimum standards. **NY CLS Labor § 201-g**

VERMONT: Provision that Protects Victims Right to Tell their Story

Preserves the right of Employees to to disclose information about their allegations and settlement and voids any provisions restricting that right. **21 V.S.A. § 495h.(h)**

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RECOMMENDATIONS

to improve sexual harassment protections for employees

Title VII:

- Revise Title VII to cover all employees regardless of company size
- Expand protections to include independent contractors and volunteers
- Amend Title VII with a provision instructing courts to construe law liberally
- Amend the "severe or pervasive" standard
- Judges can reject wrongly decided interpretations of "severe or pervasive"

Adopt Model State Laws:

- Revisit state laws to meet or exceed protections offered by Title VII
- Extend time to file complaints to 365 days
- Strengthen EEOC and State Administrative Agencies to help reduce delays
- Address mandatory arbitration agreements and non-disclosure provisions

ABOUT THE NOBLE LAW

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The Noble Law advises and represents employees in workplace disputes and employment legal matters. The Firm's seasoned litigation team provides Clients forward-thinking employment law counsel and assertive representation with value-based fee structures.

Based in North Carolina, the Firm is entering its tenth year as an ethically sustainable employment law firm with a triple-bottom line mission of Client, Financial and Social Impact.

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WHY SYSTEMIC CHANGE IS NEEDED IN NORTH CAROLINA CONCERNING SEXUAL HARASSMENT IN THE WORKPLACE

Part 1 of 4

By: Nick Sanservino, Jr., Partner at The Noble Law Firm

Nick Sanservino, Jr. has almost 20 years' experience practicing employment law. Prior to joining The Noble Law Firm in 2010, worked at two of the nation's largest and most respected management-side law firms representing Fortune 500 companies in nearly all types of employment situations. While at The Noble Law Firm, he has successfully represented several Firm clients at the pre-litigation and litigation phases of employment disputes, as well as representing clients in disputes involving non-compete and similar agreements. Nick is an avid Tar Heel fan, fitness fanatic and a frequent visitor at Disney World.

> Any injustice rankles Americans, systemic injustice rankles them profoundly. Those of us who occupy the constitutional offices of the United States – in whatever branch we serve – must humbly acknowledge that there exists in America today a deep and pervasive sense of injustice . . . When Margo Price sings plaintively 'at the end of the day, it feels like a game . . . one I was born to lose,' she's speaking to the lives of far too many Americans.[1]

I spent the first ten years of my legal career as a management-side employment attorney. During that time, the overwhelming majority of my sexual harassment matters ended in one of three ways: (i) dismissal of the plaintiff's lawsuit before trial; (ii) a pre-trial/pre-litigation settlement that paid the plaintiff monumentally less than the amount originally sought; or (iii) no monetary payment made at all to the plaintiff, who never pursued litigation. Needless to say, corporate clients deemed any of these scenarios to be satisfactory.

While I'd like to think that my impeccable legal acumen helped yield these results, I have reached a far more likely conclusion based upon my last eight years as a plaintiff's employment attorney. It is that the legal battlefield for sexual harassment cases is systemically and unfairly tilted in the employer's favor, particularly in states like North Carolina.

To understand the systemic biases confronting workplace harassment victims, we need to first review how federal employment law is applied in sexual harassment cases

[1] United States v. Aegerion Pharms., 2017 U.S. Dist. LEXIS 191677 (D. Mass. Nov. 20, 2017) (citing #MeToo and #BlackLivesMatter movements & Margo Price, Pay Gap, All American Made (Third Man Records 2017)).

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FEDERAL EMPLOYMENT LAW ON SEXUAL HARASSMENT

Sexual harassment at work is prohibited under federal law by Title VII of the 1964 Civil Rights Act ("Title VII"). While this certainly is good news, there are at least two significant obstacles in pursuing Title VII sexual harassment claims: (i) a mandatory and inefficient administrative process that must be exhausted before filing a lawsuit; and (ii) outdated application of Title VII standards in sexual harassment cases.

1. The EEOC Process: Slow & Frustrating

Under federal law, a plaintiff cannot file a sexual harassment lawsuit until exhausting an administrative process before the Equal Employment Opportunity Commission ("EEOC"). In most cases, a plaintiff must file his/her EEOC charge within 180 days of the alleged unlawful conduct. There are many challenges plaintiffs face during the EEOC process. Consider the following:

- For years, the EEOC has been understaffed. The EEOC's website confirms that the number of full-time EEOC employees ("FTE") is at an all-time low. Simply by way of example, at the end of the 1980 fiscal year, the EEOC had a FTE number of 3,390. At the end of the 2017 fiscal year, that number was 2,082.[2] Consequently, it is not surprising that it often takes months, and in some cases over a year, before the EEOC begins its initial investigation of a sexual harassment charge.

- In addition to being understaffed, the EEOC finds "reasonable cause" supporting a sexual harassment charge in an infinitely small percentage of cases. For example, in fiscal year 2016 (the most recent year referenced on the EEOC's website), the EEOC made a "reasonable cause" finding in only 5.7% of sexual harassment charges filed with the agency.[3]

- The above facts have obvious negative implications for employees. A current employee experiencing sexual harassment often must wait months before the EEOC acts on his/her charge, and cannot file a lawsuit under federal law in the interim. When the EEOC finally investigates the employee's claims, there is little chance of obtaining immediate relief – indeed, even in the small percentage of

[2] See www.eeoc.gov (EEOC Budget & Staffing History 1980 to Present).

[3] See www.eeoc.gov (Charges Alleging Sex-Based Harassment FY2010-FY2016). To be sure, and as the EEOC website indicates, charges can be resolved with some monetary and/or non-monetary resolution before the EEOC completes its investigation. In most cases, however, a meaningful monetary/non-monetary resolution during the EEOC process occurs only in egregious sexual harassment cases.

cases where the EEOC issues a "reasonable cause" finding, it cannot force the employer to settle the matter on any particular monetary or non-monetary terms -- with the most likely scenario being that the EEOC will issue a right to sue letter long after the employee filed his/her charge.

2. The Court System: Antiquated Application Of Title VII Standards Makes It Difficult For Sexual Harassment Claims To Reach A Jury

Title VII prohibits two forms of sexual harassment: *quid pro quo* harassment and hostile working environment. *Quid pro quo* harassment occurs when a supervisor requires a subordinate to tolerate sexual harassment to keep his/her job, get a promotion and the like. These are the most obvious sexual harassment cases and normally the easiest to prove.

More commonly, employees are subjected to hostile working environment sexual harassment. Under federal law, a plaintiff alleging a hostile working environment must show that the alleged harassment was: (i) unwelcome; (ii) based upon sex; (iii) sufficiently severe or pervasive to alter the conditions of his/her employment and create an abusive working environment; and (iv) imputable to the employer.[4]

In many cases, the legal dispute focuses on element (iii) -- whether the alleged harassment was sufficiently "severe or pervasive." A subjective and objective test is used to analyze this element. Specifically, the plaintiff must show that he/she actually perceived the working environment to be sufficiently abusive and that a *reasonable person* would have perceived the working environment as being sufficiently abusive.

The subjective test seems straightforward enough. On the objective test, it can go without saying that societal norms have greatly evolved in various areas over time, including as to workplace harassment. Indeed, it should be apparent to most that what may have been permissible (rightfully or wrongfully) in the workplace during the 1980s certainly is not permissible today. If that wasn't obvious before Harvey Weinstein and the #metoo movement, it certainly is now.

The problem for Title VII plaintiffs is that many courts do not apply the objective test in today's context, opting instead to rely upon outdated legal precedent and outdated stereotypes of what should be permissible in the workplace. This begs the question – if the "reasonable person" analysis is supposed to be objective – shouldn't courts consider how a reasonable person *today* would view workplace misconduct? Unfortunately, this question is too often answered in the negative, as courts have developed an excessively high bar for determining

[4] See High v. R&R Transp., Inc., 242 F. Supp. 3d 433 (M.D.N.C. 2017).

what constitutes sexual harassment. Consequently. many sexual harassment cases under Title VII are dismissed without any trial before a jury.[5] Consider the following:

In a relatively recent North Carolina federal case, the Court dismissed a plaintiff's sexual harassment claims before trial while noting the following:

- Under current law, sexual harassment plaintiffs must clear a "high bar" to avoid dismissal of their case before trial.

- The plaintiff did not clear this "high bar" despite identifying nine different sexual comments made by his immediate supervisor and three different incidents of inappropriate touching by his immediate supervisor, including pinching/grabbing of plaintiff's buttocks while his supervisor made suggestive noises. Other employees corroborated the incidents.

- Plaintiff had complained about the harassment but nothing was done to remedy it. Instead, the employer subsequently placed the plaintiff on a performance improvement plan and terminated him.

- In relying upon legal precedent from more than a decade earlier, the Court stated that although the workplace misconduct was "boorish, juvenile and rude," it was not sufficient to allow a jury to decide whether it amounted to actionable sexual harassment under Title VII. Accordingly, the case was dismissed.[6]

It also is important to consider the case's procedural history because it crystallizes the challenges confronting workplace harassment victims under current law. The plaintiff in the above case was terminated in March 2010. Plaintiff filed his EEOC charge in May 2010. Almost a year later, the EEOC concluded there was no reasonable cause and issued plaintiff a right to sue letter. Plaintiff filed his court complaint in July 2011. The Court dismissed plaintiff's complaint in April 2014. Thus, in this case: (i) the plaintiff had to hire an attorney and incur legal expenses; (ii) it took almost a year for the EEOC to fully investigate plaintiff's charge, with no action taken beyond issuing a right to sue letter; (iii) it took almost 4 total years of litigation for plaintiff to attempt to bring his claims before a jury, only to have the claims dismissed

[5] To that point, one study shows that less than five percent of job discrimination lawsuits that aren't settled or voluntarily dismissed end up providing any kind of relief for employees. See Katie R. Eyer, That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law, 96 Minnesota Law Review 1275 (Mar. 7, 2011).

[6] Castongay v. Long Term Care Mgmt. Servs., LLC, 2014 U.S. Dist. LEXIS 59881 (M.D.N.C. Apr. 30, 2014).

before any trial occurred; and (iv) plaintiff received absolutely no damages or was otherwise made whole during the entire process.[7]

3. Employees Experiencing Unlawful Sexual Harassment Cannot Realistically Leave Their Job And Expect To Be Made Whole

Many times, a current employee reports sexual harassment to Human Resources and/or files an EEOC charge but the harassment continues. This is problematic because individuals can suffer significant emotional and physical distress from workplace harassment. Consequently, having to continue to report to work and experience harassment (and often retaliation for complaining about harassment) takes a substantial toll on the employee's health. Although protected leave may sometimes be an option, such leave is finite and often unpaid. That leaves the employee with the no-win decision of: (i) continuing to report to work so he/she can pay the bills, but at a significant cost to his/her health; or (ii) quitting his/her job, losing income, and facing the uncertainty and anxiety associated finding another job at comparable compensation.

Although federal law ostensibly allows employees to sue for "forced" resignations stemming from sexual harassment (i.e., "constructive discharge"), the manner in which the law is applied can make this a hollow option. To establish a constructive discharge claim under federal law, a plaintiff "must provide sufficient evidence that his employer deliberately made his working conditions intolerable in an effort to induce him to quit. Whether working conditions are intolerable is determined from the objective perspective of a reasonable person. . . To prove deliberateness, the plaintiff must prove that the actions complained of were intended by the employer as an effort to force the employee to quit."[8]

Similar to federal sexual harassment law, the constructive discharge analysis focuses in part upon whether a "reasonable person" would feel forced to resign. Again, most courts apply this analysis in a very stringent manner and dismiss constructive discharge claims before trial.[9]

*¶ * *

In sum, employees suffering workplace harassment possess few palatable options under federal law. They cannot get immediate access to the court system because they must first exhaust the lengthy EEOC process. Moreover, and except in the most egregious cases, they are unlikely to

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[7] Id.

[8] Ward v. AutoZoners, LLC, 2017 U.S. Dist. LEXIS 142652 (E.D.N.C. Sept. 5, 2017).

[9] Id. (dismissing constructive discharge claim before trial even though EEOC concluded there had been a constructive discharge; record showed evidence of significant verbal/physical sexual harassment; plaintiff repeatedly complained to management about harassment with no remedial action taken; and plaintiff suffered anxiety, stress and chest pains requiring ER visit due to ongoing harassment).

prevail in a meaningful way before the EEOC or in a subsequent federal lawsuit. Finally, if they ultimately leave their job due to ongoing harassment, it is unlikely they will be able to recover damages for wrongful termination.

In our next post in this series, we will review how North Carolina employment law is applied in sexual harassment cases.

PART 2: UNDERSTANDING HOW NORTH CAROLINA EMPLOYMENT LAW IS APPLIED IN SEXUAL HARASSMENT CASES

Part 2 of 4 – Why Systematic Change is Needed in North Carolina Concerning Sexual Harassment in the Workplace

By: Nick Sanservino, Jr., Partner at The Noble Law Firm

NORTH CAROLINA EMPLOYMENT LAW ON SEXUAL HARASSMENT

Workplace harassment is prohibited under state law by the North Carolina Equal Employment Practices Act ("NCEEPA"). It is not necessary to exhaust an administrative process to file employment discrimination claims under North Carolina law. Unfortunately, this is a distinction from federal law without any practical benefit to employees because: (i) an individual cannot sue his/her employer for sexual harassment under North Carolina law (unless the individual was discharged for refusing sexual advances at work); and (ii) North Carolina law does not allow claims for constructive discharge.

1. Current Employees Experiencing Sexual Harassment Have No Viable Remedies Available To Them Under North Carolina Law

Some states allow current employees to sue employers under state law for sexual harassment. North Carolina is not one of them. Although the NCEEPA prohibits sexual harassment in the workplace, it does not allow employees to file a lawsuit against their employer under state law. The only time a cause of action is permitted under North Carolina law is when the employer terminates a plaintiff for refusing sexual advances.[1]

In short, North Carolina law is problematic for current employees experiencing workplace harassment. They effectively have no legal remedies under state law and, as explained above, it often takes a long time before legal action can take place under federal law.

2. Current Employees Experiencing Sexual Harassment Have No Remedies Available To Them Under North Carolina Law If Ongoing Sexual Harassment Forces Them To Resign

Unlike federal law, North Carolina law does not allow employees to sue employers for "constructive discharge," even under the most egregious circumstances of sexual harassment.[2] This further undercuts an employee's ability to be made whole for workplace harassment.

3. North Carolina Courts Apply Federal Title VII Standards In Sexual Harassment Cases

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[1] See Saniri v. Christenbury Eye Ctr., P.A., 2017 U.S. Dist. LEXIS 199765 (W.D.N.C. Dec. 5, 2017).
[2] See Clark v. United Emergency Servs., 2008 N.C. App. LEXIS 660 (N.C. Ct. App. Nov. 28, 2007).

In the few sexual harassment-related cases that may be litigated in state courts, plaintiffs run into the same problem they do in federal courts in terms of how sexual harassment law is applied. This is because state courts look to federal Title VII law in deciding sexual harassment-related issues under North Carolina law.[3]

*¶ * *

In sum, employees suffering workplace harassment have almost no practical legal options under North Carolina law unless they are affirmatively terminated for refusing sexual advances. This hardly reflects contemporary views on sexual harassment in the workplace.

Coming up in the next post of this series, we will evaluate other problems that workplace harassment victims face, such as confidentiality and non-disparagement agreements, as well as mandatory arbitration agreements. We'll also look at how employers unfairly benefit from current workplace harassment law.

[3] See Ellerby v. Branch Banking & Trust Co., 2005 U.S. Dist. LEXIS 26729 (W.D.N.C. Nov. 3, 2005).

PART 3: GRASPING ADDITIONAL SETBACKS FACED BY WORKPLACE HARASSMENT VICTIMS AND HOW EMPLOYERS UNFAIRLY BENEFIT

Part 3 of 4 – Why Systematic Change is Needed in North Carolina Concerning Sexual Harassment in the Workplace

By: Nick Sanservino, Jr., Partner at The Noble Law Firm

OTHER PROBLEMS CONFRONTING WORKPLACE HARASSMENT VICTIMS

1. Confidentiality & Non-Disparagement Agreements

Employers certainly want to avoid paying substantial damages for sexual harassment. However, an employer's business can be damaged even more significantly by adverse publicity resulting from workplace harassment. Consequently, when employers settle sexual harassment lawsuits, they invariably insist that the employee agree to broad confidentiality and non-disparagement provisions, which help ensure that the employer's unlawful conduct is not made public. Employers further insist that settlement agreements impose harsh consequences upon employees (such as having to pay back the entire settlement and the employer's attorney's fees) if they violate the confidentiality and/or non-disparagement promises. In addition, a settlement agreement almost always contains the self-serving statement that the employer does not admit to any wrongdoing (even if the employer pays the employee substantial monies under the agreement).

Employers' insistence upon the aforementioned settlement agreement provisions has long been accepted as lawful in most cases. As such, even at the settlement stage of proceedings, employees are often at a disadvantage – given the difficulty of finding a new job or staying in a current job after filing a complaint, an employee often does not have the leverage to walk away from a settlement that is conditioned upon his/her "silence" going forward. As we have seen recently, this helps explain why certain persons and entities could engage in unlawful conduct for years without facing significant repercussions.

2. Mandatory Arbitration Agreements

In theory, all Americans have the right to a trial by jury. In practice, much of corporate America requires employees to sign mandatory arbitration agreements as a condition of employment. Many times, these arbitration agreements (which are not previously in pre-employment interviews) are buried in the piles of paperwork new employees must complete on their first day of work. Arbitration of sexual harassment (and other) claims further stacks the deck against employees because: (i) arbitration can be far more expensive than court; (ii) arbitration limits the amount of evidence employees can obtain from employers to support their claims;

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(iii) arbitration proceedings normally are private and confidential; and (iv) arbitrators often are former management-side attorneys.

Notwithstanding the above, the law favors the enforceability of mandatory arbitration agreements. Moreover, it will be the rare person who has the leverage to refuse to take a job (or continue at a job) because he/she is required to sign a mandatory arbitration agreement.

HOW EMPLOYERS UNFAIRLY BENEFIT FROM CURRENT WORKPLACE HARASSMENT LAW

In the main, under current law, justice for workplace harassment only occurs when the following facts exist: (i) a plaintiff possesses substantial financial and other means to engage in lengthy legal proceedings; and/or (ii) there has been egregious sexual harassment (i.e., sexual assault and the like) with smoking gun-type evidence.

In almost every other scenario, the employer has little incentive to engage in meaningful settlement discussions or otherwise attempt to proactively remedy injuries resulting from workplace harassment. Consider a situation where a current employee lodges a sexual harassment complaint with Human Resources and threatens to file an EEOC charge if the matter is not resolved to his/her satisfaction in a timely manner. Under current law in North Carolina, an employer that is not motivated to act responsibly could engage in the following legal strategy:

- Even if the employee files with the EEOC, nothing will happen on that front for approximately 6-12 months. The employee cannot immediately file a lawsuit under federal law or state law. Accordingly, the employer has little incentive to offer a meaningful resolution at this point.

- While the EEOC charge is pending for the next 6-12 months, the employee may tire of the working environment and quit his/her job.
  - > Even if the employee can show that he/she quit because of ongoing sexual harassment, there will be no wrongful or constructive termination claim under North Carolina law. Likewise, the employee cannot file a constructive discharge claim under federal law until the 6-12 month EEOC process is over. Even then, constructive discharge claims are remarkably difficult to prove under federal law.
  - > If the employee obtains subsequent employment in the near future, any employment attorney will advise that his/her lost wage damages will be offset pursuant to the mitigation of damages legal doctrine (i.e., an individual's lost wages from his/her old job due to an unlawful termination must be offset by the new wages he/she has received since the termination). Thus, even if the employee could win a lawsuit for constructive discharge, there is a real possibility that he/she would recover minimal damages.

> Given the above, and knowing how expense legal fees can be in protracted litigation, an employee may have little appetite to pursue *any* lawsuit because: (i) damages will be limited as a matter of law, even if he/she gets to trial and wins; (ii) application of sexual harassment law at present strongly favors employers; and (iii) employers are aware of these facts and thus are more inclined to take a hard-line stance in litigation.

- In short, and with the exception of egregious sexual harassment cases, a sophisticated employer may not make a good-faith settlement offer unless and until: (i) it sees the employee has the wherewithal to wait out the EEOC process and retain a lawyer to file a lawsuit; and (ii) it confirms that the employee has not obtained subsequent employment, meaning that there would be no damages offset if the employee prevails on any claims in court.
  > If the employee follows through with retaining an attorney and filing a lawsuit, the employer can then decide whether to make a meaningful settlement offer. Of course, only a fraction of employees who experience workplace harassment reach the point of exhausting the EEOC process; retaining an attorney; and filing a lawsuit. Those that don't normally quit (with or without another job lined up) and are never heard from again.

- Even under a worst case scenario where litigation occurs and starts badly for the employer, it can at that time make a meaningful settlement offer; resolve the case before trial; and ensure the employee remains "silent" through confidentiality and non-disparagement provisions.

In sum, current law in North Carolina provides employers with far too much leverage in workplace harassment disputes. It therefore, is not surprising that many workplace harassment victims do not believe they can find justice in the legal system.

Stay tuned for the final post in this series coming soon. We'll wrap-up discussing what can be done to level the playing field for workplace harassment victims.

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PART 4: TAKING ACTION AND MAKING CHANGE

Part 4 of 4 – Why Systematic Change is Needed in North Carolina Concerning Sexual Harassment in the Workplace

By: Nick Sanservino, Jr., Partner at The Noble Law Firm

WHAT CAN BE DONE TO LEVEL THE PLAYING FIELD FOR WORKPLACE HARASSMENT VICTIMS

1. Federal Courts Need To Properly And Consistently Apply Title VII Standards

The United States Congress can amend Title VII to more clearly articulate modern-day standards for workplace harassment. However, this will not be necessary if courts begin to consistently and properly apply Title VII's standards in a manner that reflects the present day, and not the days from a quarter-century ago.[1]

2. The North Carolina Legislature Needs To Significantly Amend State Employment Laws To Reflect Modern Times

Simply put, the North Carolina employment laws should be amended so that: (i) current employees can sue under state law for sexual harassment; and (ii) individuals can sue employers for constructive discharge under state law. Unfortunately, there is almost no chance of this happening. As last year's HB-2 fiasco showed, if the North Carolina legislature has any appetite for altering state employment law, it will only be to do so in a manner that further tilts the legal playing field in employers' favor.[2]

3. The Legislative Branch And/Or The Judicial Branch Need To Otherwise Cure Systemic Deficiencies Concerning The Litigation Of Sexual Harassment Claims

In addition to thoroughly reconsidering the laws that directly prohibit workplace harassment, the legislature and judiciary need to reconsider laws and legal doctrines that are interwoven with workplace harassment claims. This includes the legality of mandatory arbitration agreements and the types of provisions that can be added to settlement agreements for sexual harassment claims.

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[1] Very recently, one North Carolina federal judge applied Title VII in a manner that appeared to more closely mirror present-day society's views on workplace misconduct. See Goad v. N.C. Farm Bureau Mut. Ins. Co., 2017 U.S. Dist. LEXIS 198571 (M.D.N.C. Dec. 4, 2017) (allowing Title VII constructive discharge claim to proceed to trial where record showed that plaintiff quit her job after months of sexual harassment and retaliation and where plaintiff's complaints to management were ignored and downplayed).

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Notably, on December 26, 2017, a bill was introduced in the United States House of Representatives titled, "HR 4734: Ending Forced Arbitration of Sexual Harassment Act of 2017." Although it is unclear whether this bill will ever become law, the bill's introduction is a step in the right direction.

CONCLUSION

This blog series began with a quote about systemic injustice in America today and how many feel they are playing a rigged game they are destined to lose. The quote applies to various groups of people, including employees working in North Carolina. Workplace harassment is not a game and it has no place in our society. Therefore, it is incumbent upon persons occupying constitutional offices to correct the systemic disadvantage placed upon workplace harassment victims in the legal arena.

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We Are Missing the Point: What the Kavanaugh Confirmation Says About Diversity

It was nearly a year ago, last November, that I wrote about diversity and how women and minorities should no longer leave the task of diversifying the legal profession to "Big Law." More recently, in early September, the New York Times published an article about the American Bar Association's study that revealed, wait for it:

"Women and people of color in the legal profession continue to face barriers in hiring, promotions, assignments and compensation, according to a study released Thursday by the American Bar Association." https://www.nytimes.com/2018/09/06/us/lawyers-bias-racial-gender.html

This just is not news anymore. It is only newsworthy that the legal profession appears to be more focused on diversity efforts now than ever before. That focus, however, seems to be lost in the wake of the recent allegations against Supreme Court nominee, Brett Kavanaugh, who was accused of sexual assault by Professor Christine Blasey Ford. Ford alleges, many believe quite credibly, that when she was 15 a 17 year old Kavanaugh pinned her down in a room at an unsupervised party, covered her mouth to prevent her from screaming and tried to pull off her clothing. Professor Blasey alleges that Kavanaugh was very drunk and that he only stopped when his friend, Mark Judge, jumped on them. Judge has since denied any recollection of the incident (not under oath). While this allegation is about an incident that happened 35 years ago, and no other such allegations against Kavanaugh have yet to surface, it is a serious allegation of criminal conduct. More importantly, while we may never know with any degree of certainty what actually happened to Professor Blasey, or if Kavanaugh did actually assault her, Blasey's account is credible. Judge Kavanaugh denies it ever happened.

As of now, the allegations do not seem to have slowed down the push by some politicians to confirm Kavanaugh's appointment to the Supreme Court with lightening speed. Now, I do not expect to make any new friends by stating this all too obvious point, but it must be noted that if Brett Kavanaugh was not affluent, white, male and conservative his nomination would already have been withdrawn or he would have agreed to withdraw himself from consideration. Before you make the obvious comparison and say, "but Clarence Thomas was a black man," let's examine the significant differences between Thomas' confirmation process and what is happening with Kavanaugh right now. Thomas was called back for a hearing and he and Anita Hill gave testimony under oath AFTER an FBI investigation (I won't comment on the adequacy of the investigation here) requested by President George H.W. Bush was leaked in the media. That hearing, which re-opened the confirmation process, took place after the FBI report was used to conclude that Anita Hill's allegations of sexual harassment were unfounded (again will reserve comment on the report and its conclusions) and Thomas was confirmed. The Senate voted to

confirm Thomas despite Hill's allegations. The Senate will also likely confirm Kavanaugh as well, but this time, it will be much easier and faster.

Both the President and the majority Senators on the Judiciary Committee have rejected all requests for an FBI investigation of Professor Blasey's allegations, which would simply be a further background check involving the people and events of the time period when the alleged incident occurred. The Chair of the Committee told Professor Blasey that she must decide whether she will appear for a hearing (either closed or public) by Friday, September 21, 2018. The hearing would take place on the following Monday. She must make this decision without the benefit of any investigation of her allegations, which she herself has expressly requested and welcomed. At the very least Thomas had to endure an FBI investigation and give public testimony, despite how that all turned out. Kavanaugh will simply be allowed to deny the allegations against him and endure nothing more than a conversation with the Committee staff and a few Senators.

Let's be direct about the situation, which would be much different if the nominee were female or not white and from the most elite class of private school educated Yale lawyers (not meant as a dig at Yale). Say, for example, a female nominee had an abortion in college and had not disclosed this fact in her background check, or it was discovered she had an extramarital affair, but had an otherwise impeccable record. Would the leadership of the Senate Judiciary Committee and so many conservative politicians and pundits be so quick to dismiss these facts as mere minor indiscretions that have no impact on her qualifications to be a lifetime appointed Justice of the Supreme Court? Not a chance. Her nomination would have been immediately withdrawn. The appearance of impropriety matters, at least for most nominees. That's why Zoe Baird withdrew from consideration as Bill Clinton's nominee for Attorney General when it was reported that she did not properly withhold and pay taxes on the wages she paid her domestic help.

Yet, now that a white, conservative poster boy of privilege in the legal profession has been accused of attempted rape back in his teens, his equally privileged supporters have been very quick to defend what has been characterized as a youthful mistake. Remember, Kavanaugh simply denies it ever happened, however, whether or not it did does not matter to those who support him. As far as the Senators in charge of his confirmation process are concerned, Kavanagh did all the right things coming up in the legal profession and fits into all the right boxes, so one "mistake" in the distant past, criminal or not, should not disqualify him, nor should he be scrutinized any more closely because of it. Kavanaugh gets a pass because he is the product of our still mostly homogenous legal profession that continues to reward white male privilege and

elitism. If that statement makes you uncomfortable and reluctant to think about this issue, you are part of the problem.

The Kavanaughs of the legal world will continue to get a pass until we truly tackle the diversity problem in the legal profession. Right now, everyone is focused on whether Professor Blasey's allegations are true and if so, if they are serious enough to stop Kavanaugh's nomination. We are missing the point, because the truth does not matter, and we will likely never really know. The real issue is that for anyone who is not like Kavanaugh, this would bring the process to a screeching halt, but for him it will be nothing more than a low speed bump, or a "hiccup" as Senator Dean Heller described it. Until real diversification in the legal profession nullifies white male privilege, people like Kavanaugh will continue to get lifetime appointments despite the unresolved questions of their past alleged improprieties. The rest of us will continue to be held to an impossible standard time and again. Don't miss the point.

MENU

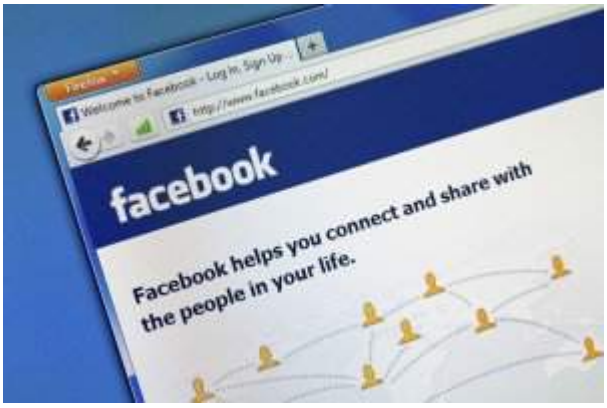
SOCIAL MEDIA, TRIALS

Please Tell Me That You Don't Use Facebook

Anything that goes up on a site that others can view, whether or not that network is private, is vulnerable and subject to discovery.

By CHRISTINE A. RODRIGUEZ

Feb 23, 2018 at 4:58 PM



Whether we like it or not, social media networks are a part of our daily lives. So many people use some form of social media every day. Even grandma has a Facebook account these days. Social media accounts benefit many by giving them the means to stay connected with people on a regular basis with access to instant communication with friends and loved ones, even if they live thousands of miles apart. But every innovation has its negative side effects. Facebook and other social media network users sometimes overshare otherwise private information and post text and photos that they may later regret. We have all heard the stories about the job offer that was rescinded after the prospective employer discovered the forgotten frat house party photos posted years before. In litigation, social media networks

accident showing them doing the very thing they claim they can no longer do.

In New York, at least up until a week ago, civil litigants could often avoid disclosure of the contents of their Facebook accounts as long as there was nothing posted on their public profiles that suggested there was material relevant to their claims on the private portion of their page. The New York State Court of Appeals, the highest appellate court in the state, changed that with its recent decision in Forman v. Henkin, No. 1, 2018 WL 828101 (N.Y. Feb. 13, 2018). The Plaintiff in that case fell from a horse owned by defendants and claimed that due to that fall, she suffered from "spinal and traumatic brain injuries resulting in cognitive deficits, memory loss, difficulties with written and oral communication, and social isolation." During her deposition, the plaintiff testified that she had a Facebook account that she deactivated about 6 months after the accident, and that before the accident, she posted "lots" of photos of her "active" lifestyle. *Id.* She also testified that she could not remember if she posted any post-accident photos on her page. *Id.* Additionally, the plaintiff testified that she could no longer compose emails quickly or without difficulty, and that they contained many grammatical and spelling errors when she did due to her cognitive injuries. *Id.*

Of course, based on plaintiff's claims, the defendant requested an authorization to obtain the contents of her entire Facebook account. When she did not provide one, the defendant filed a motion to compel discovery of the Facebook material. They argued that based on plaintiff's claims and testimony, all of the material and photos on her page were relevant. In particular, the defendant argued that the time stamps for written posts might bear on the plaintiff's credibility concerning her claims of cognitive deficits. The plaintiff opposed that motion, arguing that because the public portion of plaintiff's Facebook profile only contained one photograph that did not contradict her claims, the defendant could not make a showing that the postings on the private portion of the account might contain anything relevant or material to the defense. *Id.* The lower court granted the defendant's motion, but limited the scope of discovery and ordered the plaintiff to produce "all photographs of herself privately posted on Facebook prior to the accident that she intends to introduce at trial, all photographs of herself privately posted on Facebook after the accident that do not depict nudity or romantic encounters, and an authorization for Facebook records showing each time plaintiff posted a private message after the accident and the number of characters or words in the messages." *Id.* Although this was only a partial victory for the defendant, it was

account that she intended to use at trial. *Id.* The defendants decided to appeal that order in the Court of Appeals and won.

The Court of Appeals reversed the Appellate Division order and reinstated the original Supreme Court order that allowed for broader discovery of information from plaintiff's Facebook account. The Court reasoned that New York's discovery statutes allow for broad discovery of information that is material and necessary to prove or defend an action. *Id.* In other words, if information is relevant, or might lead to relevant information which bears on the facts and will assist the parties in sharpening the issues and preparing for trial, it should be disclosed. *Id.* The Court further reasoned that information in a Facebook account, whether posted on a public or private page, should be no exception. Although litigants should be protected from vague and overbroad discovery requests that amount to nothing more than a "fishing expedition" any relevant information is fair game. The Court of Appeals ruled that there should be no heightened standard for Facebook accounts (which some of the lower courts had used) that requires a party seeking discovery to show that there may be relevant material in the private portion of the account based on what can be accessed in the public portion, in particular, because this allows the Facebook user to artificially control access simply by limiting what is on their public profile. *Id.* Rather, the only standard should be whether the request for discovery is "reasonably calculated" to obtain relevant information in the account or information that might lead to the discovery of relevant information. The Court reasoned that, as in this case, when a litigant places something in issue, such as her mental or physical condition, even private information, like material posted on a private Facebook page, is subject to disclosure if it is relevant to those issues. *Id.* This is the standard for all other types of information, including medical records, so the Court ruled that Facebook information should be no exception. *Id.*

Plaintiffs may see this as a loss because it will now be a bit more difficult to avoid disclosure of Facebook information in the future regardless of whether the plaintiff maintains a public or private account. This is, however, less a loss and more a cautionary tale. In reality, before the Forman decision, the lower courts in New York, while applying the heightened standard for discovery of Facebook information, often ordered disclosure of private Facebook information relevant to specific claims in a litigation anyway. Some of these decisions are discussed at length in Forman. Even the Forman court acknowledged that disclosure of a

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relevant to facts she placed at issue by her own testimony. This is the same standard that applies to all discovery in civil litigation.

The good news is that the scope of Facebook discovery can easily be limited. Litigants are still not entitled to unlimited access to Facebook material simply because there might be something relevant in the account. A request for unlimited access to Facebook information can be appropriately rejected with an objection that it is too broad and vague. Litigants are still required to tailor their requests so that they seek only specific information relevant to the claims and facts at issue. In other words, do not ask for the entire Facebook account, but ask for photos depicting particular activities or postings about certain topics within a designated time period that makes sense based on the case. If you must respond to such a request, be specific about why you object, if you do, and about what information you provide in response. More importantly, be glad that you are involved in a civil litigation, and not a criminal matter. In criminal matters, courts often grant search warrants that may require disclosure of everything in a Facebook account. This is common in large scale drug and gang conspiracy cases where what someone else posts about you could be used as evidence to link you to the conspiracy – and then your whole Facebook account and every other social media account is fair game.

The real lesson here is not a new one. Be careful what you post on social media and on other internet platforms. Advise your clients to be careful and discreet with posts. Anything that goes up on a site that others can view, whether or not that network is private, is vulnerable and subject to discovery. I am always thrilled when I ask a client if they use Facebook and the answer is no.

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TOPICS

Balestriere Fariello, Boutique Law Firms, Christine A. Rodriguez, Discovery, Forman v. Henkin, Litigators, Social Media, Trials

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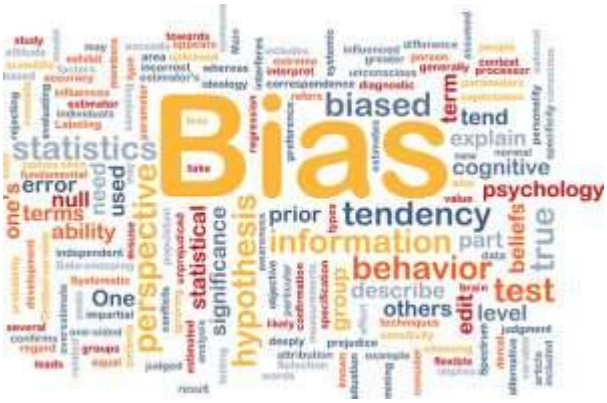
LITIGATORS

Implicit Bias In Legal Arguments — The Optics Always Matter

Litigators: What may not be significant to you and your client may be important and even offensive to someone who is not like you.

By CHRISTINE A. RODRIGUEZ

Mar 16, 2018 at 2:45 PM



A judge in the Southern District of New York recently denied a motion to dismiss in a discrimination case filed by a secretary at Biglaw firm Quinn Emanuel. Marin v. Quinn, Emanuel, Urquhart & Sullivan LLP, SDNY Index No. 17 CV 5488 (VEC). The decision in this case made legal news, but not so much because it is yet another discrimination claim against Biglaw. It was newsworthy because a key argument made by the defendants in support of their motion was that a supervisor's use of the "N-word" was just a bad joke and was not evidence of discriminatory animus. This seems to have annoyed the judge (my

stage are often denied because much less is required to plead a viable claim in a complaint than is ultimately required to survive summary judgment or prevail at trial. Additionally, discrimination cases can be fact intensive and if a claim meets the bare minimum standard, usually discovery and depositions are necessary before there is enough information (or lack thereof) to convince a court to dismiss it.

So then why was this case noteworthy? Perhaps the judge's reaction to the "it was a bad joke, but just a joke" argument is one reason. Another less obvious reason is that the optics always matter. In today's diversity landscape of implicit bias, #metoo, and heightened racial tensions, use of that word just cannot be characterized as a joke — good, bad or otherwise. Let's be clear, use of that word, especially in an employment setting, is never a joking matter. When counsel tries to argue it away as a joke, it just looks bad.

Perhaps the real story here is that implicit bias is an important issue that cannot be ignored in either employment settings or legal arguments. One of the effects of implicit bias is that the person at whom the bias is directed may perceive bias where someone else may just see harmless behavior, a neutral comment, or joke. Some more obvious examples of this are when a non-Latino person immediately assumes that English is not their Latino colleague's primary language or that you must love hip hop but not opera because you are black. Maybe less obvious (but not really) was yet another argument used in the Quinn Emanuel case. Counsel argued that there is nothing wrong with a supervisor asking a black employee if they have ever been arrested because that might just be a sign of "solidarity" in "this time of Black Lives Matter." A little more thought about how that last example looked, or rather, sounded to a person of color might have also made counsel realize that it would not convince the Judge to rule in their favor anymore than their ill-considered "N-word" argument.

Litigators are human, though some loathe to admit that. Sometimes we forget that it is always important to see and appreciate the perspective of your opponent as clearly as your own. In matters where implicit bias is a factor, you must consider carefully that what may not be significant to you and your client may be important and even offensive to someone who is not like you, and you must be cautious about how you deal with those facts. In the end, Quinn Emanuel may prevail in this case, and I do not wish to comment on the merits of the claim. That said, persuasion is key in any litigation. Ignoring the potential impact of

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***Christine A. Rodriguez** is of counsel to the firm **Balestriere Fariello** and successfully represents individuals and small businesses in all manner of employment discrimination, civil rights, criminal defense, civil litigation and commercial litigation matters. She also advises small businesses on all aspects of legal matters from contract to employee issues. You can reach her by email at **christine. a. rodriguez@balestrierefariello. com**.*

TOPICS

Balestriere Fariello, Christine A. Rodriguez, Implicit Bias, Litigators, Quinn Emanuel

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STUPID LAWYER TRICKS

Honesty In The Profession: Lawyer Should Not Be Synonymous With Liar

Just because we know how to use the law does not mean that we get to abuse and break it.

By CHRISTINE A. RODRIGUEZ

May 24, 2019 at 4:43 PM

I am the first lawyer in my immediate family. I am also a litigator: I represent plaintiffs in employment discrimination claims, businesses in legal disputes, and defendants in criminal cases. So, I am used to the "are you a lawyer or a liar" and "how can you defend criminals" comments from some of my family and non-lawyer friends who are less-than familiar with my profession.

Unfortunately, in our current political and economic climate, the perception of lawyers as less than honest and ethical people is sometimes well deserved. Recently, it seems as if the

multiple indictments for fraud, theft, and a variety of other crimes; Mr. Gordon Caplan plead guilty in the college admissions scandal; Mr. Michael Cohen — well, we don't really have to revisit his list of offenses; the lawyer in Florida who pushed a helpless racoon off his boat 20 miles from shore and now has to answer to the Florida State Bar; Mr. Rudy Guiliani and his regular shenanigans speaking on behalf of the White House; the former AUSA convicted of stalking his ex-girlfriend; the string of attorneys and judges accused of sexual misconduct in the last year alone; and the list goes on. Should we wonder why lawyers are still seen as untrustworthy, shady "liars"?

While your personal lifestyle choices do not dictate whether you are a good lawyer, the way you conduct yourself does have a significant impact on the profession. In that respect, honesty and integrity are indispensable and essential. From a practical perspective, what does that mean for any lawyer? It does not mean that you do not have a right to live life as you choose. Marry the person of your choice, irrespective of gender, or don't marry if you so choose and love whomever you want in whatever way suits you and the person(s) you choose. Have children or don't. Be Catholic, or be Muslim, or be Jewish, or don't be religious at all. None of that matters. Don't lie to your clients. Don't steal from your clients. Don't lie for your clients. Don't cheat the system with illegal shortcuts. Don't mistreat, harass, or physically hurt other people. Don't discriminate. Those are the things that matter.

It is important for lawyers to be honest and behave lawfully. We cannot do our jobs effectively if we lie, cheat, and steal while also fighting for clients, whether victims or accused. The people that lawyers represent often entrust us with sensitive information and life-altering circumstances, usually during the worst times of their lives. If we are not honest and lawful in all our dealings, both personal and professional, we betray their trust in us. It makes sense that the character and fitness review that you must go through to get admitted to practice in most states is rigorous and examines every aspect of both your personal and professional life. I recently went through this process to get admitted in North Carolina. When I started that process, I had already been admitted and practicing in New York for **many** years. When I applied to North Carolina, the amount of information I had to supply was voluminous. It included financial history, professional ties and recommendations, business information, family information, criminal background checks (yes, mine is clean),

wanted to be sure that I had the best moral character before they let me do so. They wanted to be sure that I was honest, that I would not break the law, and that I would represent their people honestly and zealously. That's what we sign on for when we take the oath of office as lawyers.

Most of the time, it is not so hard to be honest and abide by the law. Temptation, however, is everywhere. If you run a small shop and finances are tight, a huge amount of client settlement money in the escrow account may be hard to resist for some in desperate times. Of course, you get disbarred for using that money. Perhaps you think it might be ok to look the other way if you know your client is lying. Just spin it a little and you will win your case. I can guarantee that will come back to you in a bad way down the road. Harder still is keeping your practice honest. Are you doing your best to hire the best and most diverse candidates? Would the client who came to you because their employer discriminated against them based on their age, gender, etc. trust you if you did the same in your own office? Sure, your expertise and connections can get you perks that some people might not get, as will your money if you have it. However, if it violates the law, it is not worth the risk. I'll bet Mr. Caplan would agree with that right now. And, don't mistreat animals — almost no one likes an animal abuser.

Just because we know how to use the law does not mean that we get to abuse and break it. It also does not mean that we are above it. If our clients cannot trust us to be honest and do the right thing, they won't trust the work we do. Hopefully, this year will bring fewer stories of lawyers behaving badly and more stories of lawyers championing the rights of others, using the law the right way. Then maybe people will be less inclined to think that lawyer is synonymous with liar.

LITIGATORS

Litigators: Do Not Fear The Narrative – You Can Handle The Truth

Your witnesses must be reassured that you are not afraid of the narrative, no matter how it comes out.

By CHRISTINE A. RODRIGUEZ

Sep 28, 2018 at 11:04 AM

Way back when I transitioned from work as a prosecutor in New York County to private civil litigation practice, one of the more difficult adjustments for me was taking and defending depositions. The difficulty was not the actual process, but the informality of the process compared to the formality of judge-supervised trial testimony. Although some rules apply to depositions in New York and federal practice, for the most part, no subject is off limits and almost anything is fair game.

The purpose of trial testimony is for the litigants to present their narrative to the jury. Witnesses are prepared well in advance of trial for the questions they answer and for the anticipated cross examination. The testimony is limited by the Rules of Evidence and the cross examination is limited to the scope of what is presented by the witness testimony during the direct examination by their counsel. In other words, the witness is cross examined on the narrative they present within the limits of evidentiary rules. This entire process is supervised by a judge who rules on objections by both sides.

A deposition is much less structured. Depositions are part of the discovery process in state and federal litigation and are meant as an information gathering tool. More often, they are used by litigators to highlight inconsistencies and gaps in their adversaries' narrative that may be useful in motion practice to get claims dismissed before trial or to undermine trial testimony later on in the process. Both state and federal rules allow for broad questioning during depositions, and objections, except in very limited circumstances, such as for privileged information, are not allowed. *See*, New York State Uniform Rules of Trial Courts, Part 221 – Uniform Rules For The Conduct Of Depositions; Federal Rules of Civil Procedure 30(c). The biggest difference, however, is that a deposition witness is not first questioned by their own counsel, nor does she get to put forth the narrative in a manner she chooses. Rather, the deposition witness is examined by counsel from the other side whose only objective is to undermine the witness' narrative and credibility.

This is a difficult concept to explain to most witnesses, even the savviest professional ones. It is even more difficult to help witnesses understand that the deposition is not their opportunity to set the record straight, convince the other side of the strength of their narrative, and win the case. This never happens. The way I deal with this is simple. If you have a strong claim, or if you are defending and you know that your adversary is unlikely to succeed on their claim, make sure your client gives up nothing at the deposition and don't worry about what comes out when you depose the other side. Every litigator will tell you that the ideal deposition responses are simple: "Yes," "No," "I do not know," and "I do not recall." I tell my witnesses not to worry if a one-word answer seems misleading or feels like an incomplete answer. It is not their job to follow up. It's the lawyer's job to ask the right questions. If the other side does not follow up, that is their error. More importantly, I am generally not concerned about how the narrative unfolds at a deposition.

nearly impossible for you to control the narrative when you are not asking the questions or, when questioning an adversary, you have not prepared the witness. What does this mean from a practical perspective? Don't worry if the other side doesn't follow up on a yes or no answer that needs further explanation. You can take care of this in an affidavit later during motion practice or on direct testimony at trial, if it gets that far. In some limited circumstances, though not always recommended, you can also question your own witness to clarify a point (the pro and cons of that would take a whole other post to explore). Bottom line, as long as your witness is telling the truth, you can work with whatever comes out. In all likelihood, there will be documents and other testimony to help clarify the point. On the flip side, if the other side is not truthful, there will likely be inconsistencies in their testimony and documents that contradict their narrative. Most importantly, there is the common-sense factor. If the narrative just does not make sense or fit in with the bigger picture, this can work to your advantage. Additionally, although almost any question is permissible at a deposition, not everything that comes out at the deposition will necessarily be admissible. The rules are tighter at trial and you cannot get summary judgment based on inadmissible evidence.

Your witnesses must be reassured that you are not afraid of the narrative, no matter how it comes out. Explain to them that their deposition answers should be truthful and concise, no matter what. You can deal with how the testimony sounds based on their concise answers to the adversary's questions, no matter how good or bad. As a litigator, it is your job to present the facts in the best light possible for your client, regardless of how those facts have been characterized by the other side. There are many tools you can use to do this even after your adversary asks your client every irrelevant question he can think of during a deposition. You CAN handle the truth.

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TOPICS

Advice, Christine A. Rodriguez, Litigators, Trials, Witnesses

TOP ARTICLES 1/6

MENU

POLITICS, WOMEN'S ISSUES

Nevertheless, We Persist

Women lawyers, like women in politics, must keep pushing until we are heard.

By CHRISTINE A. RODRIGUEZ

Jun 16, 2017 at 6:58 PM

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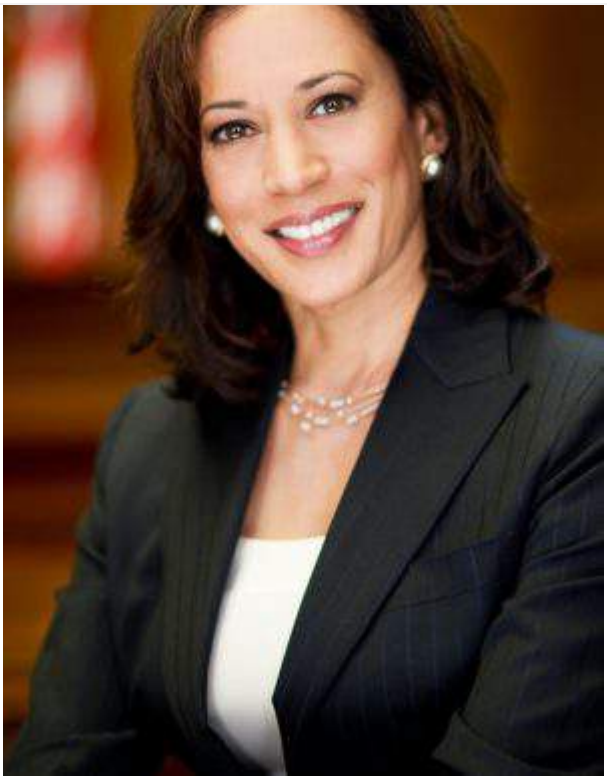

Senator Kamala Harris

Over the last week, while listening to the Senate testimony of Rod Rosenstein and Jeff Sessions, I had to stop myself from yelling at the television multiple times. Most of the time I was yelling, "You didn't scold the male senator who just did that!" or something along those lines. I realized that I was most annoyed every time the committee chair, often at the prompting of another male senator, admonished Senator Kamala Harris for the manner and substance of her questions.

Today the Washington Post, along with several other news outlets, noted the disparate treatment of Harris, as opposed to other male senators who were as aggressive with their questions, yet allowed to proceed without a scolding.

Harris, a career prosecutor before she came to Washington, D.C., is accustomed to conducting tough cross-examination of witnesses. The questions she posed to Rosenstein and Sessions, as well as the way she posed those questions and pursued answers, should be all too familiar to any experienced trial attorney. Yet, as the Washington Post noted, she was criticized by several commentators, one of whom even described her inquiries as 'hysterical." The way Harris was repeatedly slapped down by the committee chair during these hearings

elected to do by her constituents, yet her male peers in the Senate seem to think that she should do that job less aggressively and perhaps a bit more delicately than her male peers.

This seems like a new and awful pattern to the world watching the news these days. It is shocking and outrageous to many political commentators and the general public alike. And, like most hot-button political issues these days, it is viewed in exactly the opposite way by liberals versus conservatives.

This is not, however, new to any professional woman, particularly female attorneys. This is often our reality. While women are slowly increasing their ranks in leadership roles in law firms and leadership positions in the legal profession, the numbers are still much too low. The 2015 Law Firm Diversity Benchmarking Report issued by the New York City Bar Association reported that 1 in 4 law firms had no women on their management committees and 1 in 8 firms had no women as practice group heads, among other deficiencies.

The lack of women in leadership positions, in law firms and in other areas of our profession, is one of the major reasons why women, no matter how experienced, talented, well regarded, and just plain excellent at what they do, are either not taken seriously by their male peers, jurists and other leaders or disregarded altogether, particularly in settings where they are the only woman in the room.

I had this highlighted for me every day during a three-month- long trial two summers ago. I was defending my client with my female associate as my second chair, along with three male attorneys and one other female attorney representing each of the other four co-defendants. Our judge was male and the two prosecutors we were up against were male. The whole trial was contentious and hard-fought, yet the women would get cut off by the judge more often, and I, in particular, would have the toughest time getting the judge to allow me to advocate for my client. Several times, an issue I raised and had disregarded by the judge was then seriously considered when raised by one of my male colleagues. The male attorneys were allowed to ramble on during cross-examination, while the other female attorney and I were often interrupted, cut off, and rushed by the judge.

When I had to advocate for my client on an issue solely pertaining to him, more than once I had other lawyers who had been watching in the audience come up to me after and comment on how hard the judge was on me and how impressed they were that I was able to stay calm and gracious, yet still aggressively advocate for my client despite the judge.

I have lost count of the number of times that I have been the only female attorney in a courtroom, at a hearing, trial, or even a deposition. I have lost count of the number of times that I have been asked "Are you an attorney?" or "Are you the court reporter?" Until they realize that it will not do any good or stop me in my tracks, many of my male adversaries will interrupt me, inappropriately object to my questions, talk over me to a judge, or otherwise just generally try to shush or shoo me away. They do all that until they see that it will not stop me, that I persist and that I often win.

Unfortunately, like Kamala Harris, so many female attorneys have to deal with male peers, superiors, and jurists who shut them down before they get the answer to the perfectly legitimate questions they pose or raise the points they want to address. There is only one way to overcome this. Female attorneys must continue to advocate hard. We cannot wait until we are allowed to have our say. The ethical mandate of zealous advocacy requires us to keep pushing until we are heard. We also have to keep pushing for those seats at the leadership table. They will not be handed to us. We just have to take them. Then we cannot be simply shut down. Simply put, we nevertheless must persist.

***Christine A. Rodriguez** is of counsel to the firm **Balestriere Fariello** and successfully represents individuals and small businesses in all manner of employment discrimination, civil rights, criminal defense, civil litigation and commercial litigation matters. She also advises small businesses on all*