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DATE: August 14, 2019

TO: New York Clients

FROM: Kane Kessler, P.C.

RE: **Employment Law Update – New York State Strengthens Anti-Discrimination, Anti-Harassment and Equal Pay Laws**

On August 12, 2019, Governor Andrew M. Cuomo signed legislation (S.6577/A.8421) changing the legal standard for workplace harassment claims under the New York State Human Rights Law (NYSHRL). This action is the latest in a series of legislative changes aimed at strengthening workplace protections for New York State employees. In mid-July, Governor Cuomo signed into law a ban on employer inquiries into salary history and measures broadening equal pay rights and prohibiting race discrimination based on an employee's hairstyle.

Notably, some of these measures model the existing broad standards already in effect under New York City law. In light of these recent state-wide changes, it is even more imperative for employers to take and maintain preventive measures in the workplace. The following is a synopsis of these important modifications to the NYSHRL:

Effective Immediately:

- It is mandatory that New York employers distribute, both at the time of hire and during annual sexual harassment prevention training, a notice containing the employer's written Anti-Harassment Policy in English *and in the employee's primary language* (required once NYS publishes model policy templates online in the primary languages).

- Such notice must also include the information presented at the employer's sexual harassment prevention training in the employee's primary language.

Effective October 11, 2019:

- Eliminates the requirement that harassment be "severe or pervasive" in order for it to be legally actionable. For claims filed on or after October 11, 2019, a complainant need only show that he or she was subjected "to inferior terms, conditions or privileges of employment because of the individual's membership in one or more protected categories." This is similar to the current standard under New York City law. Employers

do have an affirmative defense to liability if they can show that the harassing conduct does not rise above the level of what a "reasonable victim of discrimination" in the same protected class would consider "petty slights or trivial inconveniences".

- Prohibits discrimination and harassment in the workplace against non-employees on the basis of all protected classifications, not just sex (which is the current New York law). Non-employees include contractors, subcontractors, vendors, consultants and other persons providing services pursuant to a contract in the workplace.

- Prohibits mandatory arbitration of all claims of discrimination. This is an expansion from existing legislation, which prohibited mandatory arbitration of sexual harassment claims only. The status of this law will likely evolve. A New York federal court recently ruled that the Federal Arbitration Act preempts both the City and State law on this issue, thus effectively striking down the law. *See Latif v. Morgan Stanley Co*. (S.D.N.Y. June 26, 2019).

- Prohibits employers from including nondisclosure provisions in settlement agreements for all claims of discrimination unless the condition of confidentiality is the plaintiff's preference. This is an expansion of existing legislation, which prohibited nondisclosure provisions for sexual harassment claims only.

Effective January 1, 2020:

- Agreements entered into after January 1, 2020 that prevent disclosure of information related to any future claim (involving any protected classification) will be unenforceable unless the agreement includes a carve out notifying the employee that it does not prohibit communication with the EEOC, the NYSDHR, a local commission on human rights, law enforcement or an attorney retained by the employee.

Effective February 8, 2020:

- Employers of all sizes will be covered under the NYSHRL. Previously, except with respect to sexual harassment, only employers with four or more employees in New York were covered. The new law also expands the definition of "employer" to include all New York state employers, not just those with four or more employees, including state agencies and political subdivisions.

Effective August 12, 2020:

- Extends the statute of limitations for employment sexual harassment claims filed with the Division of Human Rights from one year to three years (similar to the statute of limitations already in effect under the New York City Human Rights Law, as well as the statutes of limitations to file harassment claims in a court of law).

Ban On Inquiring Into Salary History

Following in the steps of the New York City Commission on Human Rights, as well as many other municipalities across the country, the New York State legislature passed a law prohibiting employers from inquiring into a job candidate's salary history. The effective date of this law is January 6, 2020. Specifically, the law prevents employers from the following:

- Relying on the wage or salary history of an applicant in determining whether to offer employment to such individual;
- Relying on the wage or salary history of an applicant in determining the wages or salary for such individual;
- Seeking, requesting, or requiring the wage or salary history from an applicant or current employee as a condition to be interviewed, or as a condition of continuing to be considered for an offer of employment, or as a condition of employment or promotion;
- Seeking, requesting, or requiring the wage or salary history from the applicant's or employee's former employer, as a condition to be interviewed, or as a condition of continuing to be considered for an offer of employment, or as a condition of employment or promotion;
- Refusing to interview, hire, promote, otherwise employ, or otherwise retaliate against an applicant or current employee based upon prior wage or salary history or because an applicant or employee refuses to provide such history.

Similar to the New York City law, an applicant or employee may voluntarily, and without prompting, disclose his or her wage or salary history, including for the purposes of negotiating compensation. An employer may confirm wage or salary history only if at the time an offer of employment with compensation is made, the applicant or current employee responds to the offer by providing prior wage or salary information to support compensation higher than offered by the employer.

Stronger Equal Pay Laws

The New York legislature expanded the State's equal pay law -- which currently requires equal pay based on sex -- to include all protected classifications. The new law broadens the standard as well -- existing law bars employers from paying workers differently for "equal work"; the new law bars employers from paying workers differently for "substantially similar" work. Currently, employers may justify differing pay based on tenure, a merit system, quantity or quality of work, or a "bona fide" "nonsex" factor. The legislation amends the last exception to include other protected classifications than sex and takes effect on October 8, 2019.

Race Discrimination Expanded to Include Hairstyles

New York State has expanded the definition of race discrimination to include "traits historically associated with race" such as "hair texture and protective hairstyles." "Protective hairstyles" include braids, dreadlocks and twists. The law was effective immediately upon enactment.

Next Steps For Employers

Employers should make it a priority to take the following steps given the passage of these new laws:

- Review discrimination and harassment prevention training materials and methods. The trainings must be interactive for all employees. The new requirements related to providing notice in an employee's primary language must be followed. For management, who now more than ever need to be the eyes and ears of the employer, such training should take place in person so that thoughtful and detailed discussions may be had regarding managers' obligations to prevent harassment and discrimination in the workplace;

- Review training and policy content – any materials and policies that were written around the severe and pervasive standard should be updated;

- Review the company's complaint procedure and ensure that it was not previously written around an employer defense that is now abrogated under the new law, *i.e.*, that the employee must take advantage of corrective measures established by the employer (for example, follow the employer's identified reporting procedure) in order for the employer to be responsible for any harassing behavior;

- Review any company arbitration and separation agreements so that those agreements comply with the new laws surrounding confidentiality provisions and mandatory arbitration clauses;

- Review company grooming or uniform standards and ensure such standards do not violate the City and State laws that prohibit race discrimination on the basis of hairstyles;

- Conduct an audit to ensure equal pay among substantially similar job positions taking into consideration tenure, performance reviews and any other bonda fide factors; and

- If not already done when NYC passed its own ban, remove from any hiring material inquiries into salary history.

If you have any questions or need assistance in complying with the new law, please do not hesitate to contact David R. Rothfeld, Jennifer Schmalz, Lois M. Traub, Alexander Soric, Robert L. Sacks, Jaclyn Ruocco, Joseph Tangredi or Brian Polivy.
