

# STATE OF NEW YORK

3817

2019-2020 Regular Sessions

## IN SENATE

February 15, 2019

Introduced by Sen. BIAGGI -- read twice and ordered printed, and when printed to be committed to the Committee on Investigations and Government Operations

AN ACT to amend the executive law, in relation to increased protections for protected classes and special protections for employees who have been sexually harassed

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Subdivision 5 of section 292 of the executive law, as  
2 amended by chapter 363 of the laws of 2015, is amended and a new subdi-  
3 vision 36 is added to read as follows:

4 5. The term "employer" does not include any employer with fewer than  
5 four [~~persons~~] employees or independent contractors in his or her employ  
6 except as set forth in section two hundred ninety-six-b of this article,  
7 provided, however, that in the case of an action for discrimination  
8 [~~based on sex~~] pursuant to subdivision one of section two hundred nine-  
9 ty-six of this article, with respect to [~~sexual~~] discrimination harass-  
10 ment only, the term "employer" shall include all employers within the  
11 state.

12 36. The terms "because of" and "because" in disparate treatment cases  
13 means the unlawful motive was a motivating factor. Nothing in this defi-  
14 inition is intended to preclude or limit use of the disparate impact  
15 method of proving liability.

16 § 2. Subdivision 1 of section 296 of the executive law is amended by  
17 adding two new paragraphs (h) and (i) to read as follows:

18 (h) For an employer, licensing agency, employment agency, or labor  
19 organization to subject any individual to discriminatory harassment  
20 because of the age, race, creed, color, national origin, sexual orien-  
21 tation, gender identity or expression, military status, sex, disability,  
22 predisposing genetic characteristics, familial status, marital status,  
23 domestic violence victim status of such individual, or because he or she

EXPLANATION--Matter in italics (underscored) is new; matter in brackets  
[-] is old law to be omitted.

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1 has opposed any practices forbidden under this article or because he or  
2 she has filed a complaint, testified or assisted in any proceeding under  
3 this article, regardless of whether such harassment or hostile work  
4 environment is severe or pervasive. Such discriminatory or retaliatory  
5 harassment constitutes an unlawful discriminatory practice under this  
6 subdivision unless the defendant pleads and proves that the harassing  
7 conduct does not rise above the level of petty slights or trivial incon-  
8 veniences.

9 (i) The aggrieved person's failure to complain about, or utilize any  
10 particular complaint procedure to complain about discriminatory harass-  
11 ment or any other unlawful discriminatory practices under this article  
12 is not a defense, or partial defense, to liability under this article.

13 § 3. Section 296 of the executive law is amended by adding five new  
14 subdivisions 1-b, 1-c, 1-d, 1-e and 1-f to read as follows:

15 1-b. An employer, licensing agency, employment agency, or labor organ-  
16 ization shall be liable for an unlawful discriminatory practice based  
17 upon the conduct of an employee or agent which is in violation of subdivi-  
18 vision one of this section only where:

19 (a) The employee or agent exercised managerial or supervisory respon-  
20 sibility;

21 (b) The employer, licensing agency, employment agency or labor organ-  
22 ization knew of the employee's or agent's discriminatory conduct, and  
23 acquiesced in such conduct or failed to take immediate and/or appropri-  
24 ate corrective action; an employer licensing agency, employment agency,  
25 or labor organization shall be deemed to have knowledge of an employee's  
26 or agent's discriminatory conduct where that conduct was known by another  
27 employee or agent who exercised managerial or supervisory responsi-  
28 bility; or

29 (c) The employer, licensing agency, employment agency, or labor organ-  
30 ization should have known of the employee's or agent's discriminatory  
31 conduct and failed to exercise reasonable diligence to prevent such  
32 discriminatory conduct.

33 1-c. An employer, licensing agency, employment agency, or labor organ-  
34 ization shall be liable for an unlawful discriminatory practice commit-  
35 ted by an independent contractor, other than an agent of such employer,  
36 employer or engaged to carry out work in furtherance of the employer,  
37 licensing agency, employment agency, or labor organization's business  
38 enterprise only where such discriminatory conduct was committed in the  
39 course of such employment or engagement and the employer, licensing  
40 agency, employment agency, or labor organization had actual knowledge of  
41 and acquiesced in such conduct.

42 1-d. Where liability of an employer, licensing agency, employment  
43 agency, or labor organization has been established pursuant to subdivi-  
44 sion one-b of this section, and is based solely on the conduct of an  
45 employee, agent or independent contractor, the employer shall be permit-  
46 ted to plead and prove that with respect to the discriminatory conduct  
47 for which it was found liable it had:

48 (a) Established and complied with policies, programs and procedures  
49 for the prevention and detection of unlawful discriminatory practices by  
50 employees, agents and persons employed as independent contractors,  
51 including but not limited to:

52 (i) a meaningful and responsive procedure for investigating complaints  
53 of discriminatory practices by employees, agents and persons employed as  
54 independent contractors and for taking appropriate action against those  
55 persons who are found to have engaged in such practices;

1 (ii) a firm policy against such practices which is effectively commu-  
 2 nicated to employees, agents and persons employed as independent  
 3 contractors;

4 (iii) a program to educate employees and agents about unlawful discrim-  
 5 inatory practices under local, state, and federal law; and

6 (iv) procedures for the supervision of employees and agents and for  
 7 the oversight of persons employed as independent contractors specif-  
 8 ically directed at the prevention and detection of such practices; and

9 (b) A record of no, or relatively few, prior incidents of discrimina-  
 10 tory conduct by such employee, agent or person employed as an independ-  
 11 ent contractor or other employees, agents or persons employed as inde-  
 12 pendent contractors.

13 1-e. The demonstration of any or all of the factors in subdivision  
 14 one-d of this section, in addition to any other relevant factors, shall  
 15 be considered in mitigation of the amount of civil penalties to be  
 16 imposed by the division of human rights pursuant to this chapter or in  
 17 mitigation of civil penalties or punitive damages which may be imposed  
 18 pursuant to this article and shall be among the factors considered in  
 19 determining an employer's liability under paragraph (c) of subdivision  
 20 one-b of this section.

21 1-f. An employee or agent of an employer, licensing agency, employment  
 22 agency, or labor organization is jointly and severally individually  
 23 liable with their employer, licensing agency, employment agency, or  
 24 labor organization for an unlawful discriminatory practice if they exer-  
 25 cised managerial or supervisory responsibility for the employer, licens-  
 26 ing agency, employment agency, or labor organization over employees,  
 27 agents, or independent contractors of the employer, such that they had  
 28 authority to direct the employee, agent, or independent contractor's  
 29 work activities or had the power to do more than carry out personnel  
 30 decisions made by others. Satisfaction of the requirements of this  
 31 subdivision is sufficient but not necessary to satisfy the requirements  
 32 of paragraph (a) of subdivision one-b of this section.

33 § 4. Paragraph (b) of subdivision 2 of section 296-b of the executive  
 34 law, as amended by chapter 8 of the laws of 2019, is amended to read as  
 35 follows:

36 (b) Subject a domestic worker to unwelcome harassment based on  
 37 [~~gender, race, religion, sexual orientation, gender identity or~~  
 38 ~~expression or national origin~~] his or her age, race, creed, color,  
 39 national origin, sexual orientation, gender identity or expression,  
 40 military status, sex, disability, predisposing genetic characteristics,  
 41 familial status, marital status or domestic violence victim status,  
 42 where such harassment has the purpose or effect of unreasonably inter-  
 43 fering with an individual's work performance by creating an intimidat-  
 44 ing, hostile, or offensive working environment.

45 § 5. Section 296-d of the executive law, as added by section 1 of  
 46 subpart F of part KK of chapter 57 of the laws of 2018, is amended to  
 47 read as follows:

48 § 296-d. Sexual harassment relating to non-employees. It shall be an  
 49 unlawful discriminatory practice for an employer to permit [~~sexual~~  
 50 ~~harassment~~] unlawful discrimination of non-employees in its workplace.  
 51 An employer may be held liable to a non-employee who is a contractor,  
 52 subcontractor, vendor, consultant or other person providing services  
 53 pursuant to a contract in the workplace or who is an employee of such  
 54 contractor, subcontractor, vendor, consultant or other person providing  
 55 services pursuant to a contract in the workplace, with respect to [~~sexu-~~  
 56 ~~al harassment~~] an unlawful discriminatory practice, when the employer,

1 its agents or supervisors knew or should have known that such non-em-  
2 ployee was subjected to [~~sexual harassment~~] an unlawful discriminatory  
3 practice in the employer's workplace, and the employer failed to take  
4 immediate and appropriate corrective action. In reviewing such cases  
5 involving non-employees, the extent of the employer's control and any  
6 other legal responsibility which the employer may have with respect to  
7 the conduct of the [~~harasser~~] person shall be considered.

8 § 6. Subdivision 1, paragraph c of subdivision 4 and subdivisions 9  
9 and 10 of section 297 of the executive law, subdivision 1 and paragraph  
10 c of subdivision 4 as amended by chapter 166 of the laws of 2000,  
11 subparagraph (vi) of paragraph c of subdivision 4 as amended by section  
12 1 of part AA of chapter 57 of the laws of 2009, subdivision 9 as amended  
13 by section 16 of part D of chapter 405 of the laws of 1999 and subdivi-  
14 sion 10 as amended by chapter 364 of the laws of 2015, are amended to  
15 read as follows:

16 1. Any person claiming to be aggrieved by an unlawful discriminatory  
17 practice may, by himself or herself or his or her attorney-at-law, make,  
18 sign and file with the division a verified complaint in writing which  
19 shall state the name and address of the person alleged to have committed  
20 the unlawful discriminatory practice complained of and which shall set  
21 forth the particulars thereof and contain such other information as may  
22 be required by the division. The commissioner of labor or the attorney  
23 general, or the chair of the commission on quality of care for the  
24 mentally disabled, or the division on its own motion may, in like  
25 manner, make, sign and file such complaint. In connection with the  
26 filing of such complaint, the attorney general is authorized to take  
27 proof, issue subpoenas and administer oaths in the manner provided in  
28 the civil practice law and rules. Any employer whose employees, or some  
29 of them, refuse or threaten to refuse to cooperate with the provisions  
30 of this article, may file with the division a verified complaint asking  
31 for assistance by conciliation or other remedial action.

32 c. Within one hundred eighty days after the commencement of such hear-  
33 ing, a determination shall be made and an order served as hereinafter  
34 provided. If, upon all the evidence at the hearing, the commissioner  
35 shall find that a respondent has engaged in any unlawful discriminatory  
36 practice as defined in this article, the commissioner shall state find-  
37 ings of fact and shall issue and cause to be served on such respondent  
38 an order, based on such findings and setting them forth, and including  
39 such of the following provisions as in the judgment of the division will  
40 effectuate the purposes of this article: (i) requiring such respondent  
41 to cease and desist from such unlawful discriminatory practice; (ii)  
42 requiring such respondent to take such affirmative action, including  
43 (but not limited to) hiring, reinstatement or upgrading of employees,  
44 with or without back pay, restoration to membership in any respondent  
45 labor organization, admission to or participation in a guidance program,  
46 apprenticeship training program, on-the-job training program or other  
47 occupational training or retraining program, the extension of full,  
48 equal and unsegregated accommodations, advantages, facilities and privi-  
49 leges to all persons, granting the credit which was the subject of any  
50 complaint, evaluating applicants for membership in a place of accommo-  
51 dation without discrimination based on race, creed, color, national  
52 origin, sex, disability or marital status, and without retaliation or  
53 discrimination based on opposition to practices forbidden by this arti-  
54 cle or filing a complaint, testifying or assisting in any proceeding  
55 under this article; (iii) awarding of compensatory damages to the person  
56 aggrieved by such practice; (iv) awarding of punitive damages, in cases

1 of employment discrimination to the person aggrieved by such practice,  
2 and, in cases of housing discrimination [~~only~~], with damages in housing  
3 discrimination cases in an amount not to exceed ten thousand dollars, to  
4 the person aggrieved by such practice; (v) requiring payment to the  
5 state of profits obtained by a respondent through the commission of  
6 unlawful discriminatory acts described in subdivision three-b of section  
7 two hundred ninety-six of this article; and (vi) assessing civil fines  
8 and penalties, in an amount not to exceed fifty thousand dollars, to be  
9 paid to the state by a respondent found to have committed an unlawful  
10 discriminatory act, or not to exceed one hundred thousand dollars to be  
11 paid to the state by a respondent found to have committed an unlawful  
12 discriminatory act which is found to be willful, wanton or malicious;  
13 (vii) requiring a report of the manner of compliance. If, upon all the  
14 evidence, the commissioner shall find that a respondent has not engaged  
15 in any such unlawful discriminatory practice, he or she shall state  
16 findings of fact and shall issue and cause to be served on the complain-  
17 ant an order based on such findings and setting them forth dismissing  
18 the said complaint as to such respondent. A copy of each order issued by  
19 the commissioner shall be delivered in all cases to the attorney gener-  
20 al, the secretary of state, if he or she has issued a license to the  
21 respondent, and such other public officers as the division deems proper,  
22 and if any such order issued by the commissioner concerns a regulated  
23 creditor, the commissioner shall forward a copy of any such order to the  
24 superintendent. A copy of any complaint filed against any respondent who  
25 has previously entered into a conciliation agreement pursuant to para-  
26 graph a of subdivision three of this section or as to whom an order of  
27 the division has previously been entered pursuant to this paragraph  
28 shall be delivered to the attorney general, to the secretary of state if  
29 he or she has issued a license to the respondent and to such other  
30 public officers as the division deems proper, and if any such respondent  
31 is a regulated creditor, the commissioner shall forward a copy of any  
32 such complaint to the superintendent.

33 9. Any person claiming to be aggrieved by an unlawful discriminatory  
34 practice shall have a cause of action in any court of appropriate juris-  
35 diction for damages, including[~~, in cases of housing discrimination~~  
36 ~~only,~~] punitive damages, and such other remedies as may be appropriate,  
37 including any civil fines and penalties provided in subdivision four of  
38 this section, unless such person had filed a complaint hereunder or with  
39 any local commission on human rights, or with the superintendent pursu-  
40 ant to the provisions of section two hundred ninety-six-a of this chap-  
41 ter, provided that, where the division has dismissed such complaint on  
42 the grounds of administrative convenience, on the grounds of untimeli-  
43 ness, or on the grounds that the election of remedies is annulled, such  
44 person shall maintain all rights to bring suit as if no complaint had  
45 been filed with the division. At any time prior to a hearing before a  
46 hearing examiner, a person who has a complaint pending at the division  
47 may request that the division dismiss the complaint and annul his or her  
48 election of remedies so that the human rights law claim may be pursued  
49 in court, and the division may, upon such request, dismiss the complaint  
50 on the grounds that such person's election of an administrative remedy  
51 is annulled. Notwithstanding subdivision (a) of section two hundred four  
52 of the civil practice law and rules, if a complaint is so annulled by  
53 the division, upon the request of the party bringing such complaint  
54 before the division, such party's rights to bring such cause of action  
55 before a court of appropriate jurisdiction shall be limited by the stat-  
56 ute of limitations in effect in such court at the time the complaint was

1 initially filed with the division. Any party to a housing discrimination  
2 complaint shall have the right within twenty days following a determi-  
3 nation of probable cause pursuant to subdivision two of this section to  
4 elect to have an action commenced in a civil court, and an attorney  
5 representing the division of human rights will be appointed to present  
6 the complaint in court, or, with the consent of the division, the case  
7 may be presented by complainant's attorney. A complaint filed by the  
8 equal employment opportunity commission to comply with the requirements  
9 of 42 USC 2000e-5(c) and 42 USC 12117(a) and 29 USC 633(b) shall not  
10 constitute the filing of a complaint within the meaning of this subdivi-  
11 sion. No person who has initiated any action in a court of competent  
12 jurisdiction or who has an action pending before any administrative  
13 agency under any other law of the state based upon an act which would be  
14 an unlawful discriminatory practice under this article, may file a  
15 complaint with respect to the same grievance under this section or under  
16 section two hundred ninety-six-a of this article.

17 10. With respect to all cases of housing discrimination and housing  
18 related credit discrimination in an action or proceeding at law under  
19 this section or section two hundred ninety-eight of this article, the  
20 commissioner or the court may in its discretion award reasonable attor-  
21 ney's fees to any prevailing or substantially prevailing party; and with  
22 respect to a claim of [~~employment or~~] credit discrimination where sex is  
23 a basis of such discrimination, and with respect to a claim in all cases  
24 of employment discrimination in an action or proceeding at law under  
25 this section or section two hundred ninety-eight of this article, the  
26 commissioner or the court [~~may in its discretion~~] shall award reasonable  
27 attorney's fees attributable to such claim to any prevailing party;  
28 provided, however, that a prevailing respondent or defendant in order to  
29 recover such reasonable attorney's fees must make a motion requesting  
30 such fees and show that the action or proceeding brought was frivolous;  
31 and further provided that in a proceeding brought in the division of  
32 human rights, the commissioner may only award attorney's fees as part of  
33 a final order after a public hearing held pursuant to subdivision four  
34 of this section. In no case shall attorney's fees be awarded to the  
35 division, nor shall the division be liable to a prevailing or substan-  
36 tially prevailing party for attorney's fees, except in a case in which  
37 the division is a party to the action or the proceeding in the divi-  
38 sion's capacity as an employer. In cases of employment discrimination, a  
39 respondent shall only be liable for attorney's fees under this subdivi-  
40 sion if the respondent has been found liable for having committed an  
41 unlawful discriminatory practice. In order to find the action or  
42 proceeding to be frivolous, the court or the commissioner must find in  
43 writing one or more of the following:

44 (a) the action or proceeding was commenced, used or continued in bad  
45 faith, solely to delay or prolong the resolution of the litigation or to  
46 harass or maliciously injure another; or

47 (b) the action or proceeding was commenced or continued in bad faith  
48 without any reasonable basis and could not be supported by a good faith  
49 argument for an extension, modification or reversal of existing law. If  
50 the action or proceeding was promptly discontinued when the party or  
51 attorney learned or should have learned that the action or proceeding  
52 lacked such a reasonable basis, the court may find that the party or the  
53 attorney did not act in bad faith.

54 § 7. Section 300 of the executive law, as amended by chapter 166 of  
55 the laws of 2000, is amended to read as follows:

1 § 300. Construction. The provisions of this article shall be construed  
2 liberally for the accomplishment of the purposes thereof, regardless of  
3 whether federal civil and human rights laws, including those laws with  
4 provisions worded comparably to the provisions of this article, have  
5 been so construed. Exceptions to and exemptions from the provisions of  
6 this article shall be construed narrowly in order to maximize deterrence  
7 of discriminatory conduct. Nothing contained in this article shall be  
8 deemed to repeal any of the provisions of the civil rights law or any  
9 other law of this state relating to discrimination [~~because of race,~~  
10 ~~creed, color or national origin~~]; but, as to acts declared unlawful by  
11 section two hundred ninety-six of this article, the procedure herein  
12 provided shall, while pending, be exclusive; and the final determination  
13 therein shall exclude any other action, civil or criminal, based on the  
14 same grievance of the individual concerned. If such individual insti-  
15 tutes any action based on such grievance without resorting to the proce-  
16 dure provided in this article, he or she may not subsequently resort to  
17 the procedure herein.

18 § 8. This act shall take effect on the thirtieth day after it shall  
19 have become a law; provided, however that the amendments made to section  
20 296-b of the executive law made by section four of this act shall take  
21 effect on the same date and in the same manner as chapter 8 of the laws  
22 of 2019 takes effect.