STATE OF NEW YORK

6577

2019-2020 Regular Sessions

IN SENATE

June 16, 2019

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

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; to amend the general obligations law, in relation to nondisclosure agreements; to amend the civil practice law and rules and the executive law, in relation to discrimination; to amend the labor law, in relation to requiring employers to provide employees notice of their sexual harassment prevention training program in writing in English and in employees' primary languages; to amend the executive law, in relation to extending the statute of limitations for claim resulting from unlawful or discriminatory practices constituting sexual harassment to three years; to amend the labor law, in relation to the model sexual harassment prevention guidance document and sexual harassment prevention policy; and directing the commissioner of labor to conduct a study on strengthening sexual harassment prevention laws

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

Section 1. Subdivision 5 of section 292 of the executive law, as amended by chapter 363 of the laws of 2015, is amended to read as follows:

5. The term "employer" [~~does not include any employer with fewer than four persons in his or her employ except as set forth in section two hundred ninety-six-b of this article, provided, however, that in the case of an action for discrimination based on sex pursuant to subdivision one of section two hundred ninety-six of this article, with respect to sexual harassment only, the term "employer"~~] shall include all employers within the state**, including the state and all political subdivisions thereof**.

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

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§ 1-a. Section 292 of the executive law is amended by adding a new subdivision 37 to read as follows:

37. The term "private employer" as used in section two hundred ninety-seven of this article shall include any person, company, corporation, labor organization or association. It shall not include the state or any local subdivision thereof, or any state or local department, agency, board or commission.

§ 2. Subdivision 1 of section 296 of the executive law is amended by adding a new paragraph (h) to read as follows:

(h) For an employer, licensing agency, employment agency or labor organization to subject any individual to harassment because of an individual's age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, domestic violence victim status, or because the individual has opposed any practices forbidden under this article or because the individual has filed a complaint, testified or assisted in any proceeding under this article, regardless of whether such harassment would be considered severe or pervasive under precedent applied to harassment claims. Such harassment is an unlawful discriminatory practice when it subjects an individual to inferior terms, conditions or privileges of employment because of the individual's membership in one or more of these protected categories. The fact that such individual did not make a complaint about the harassment to such employer, licensing agency, employment agency or labor organization shall not be determinative of whether such employer, licensing agency, employment agency or labor organization shall be liable. Nothing in this section shall imply that an employee must demonstrate the existence of an individual to whom the employee's treatment must be compared. It shall be an affirmative defense to liability under this subdivision that the harassing conduct does not rise above the level of what a reasonable victim of discrimination with the same protected characteristic would consider petty slights or trivial inconveniences.

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

(b) Subject a domestic worker to [~~unwelcome~~] harassment [~~based on gender, race, religion, sexual orientation, gender identity or expression or national origin, where such harassment has the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, or offensive working environment~~] **as set out in paragraph (h) of subdivision 1 of section two hundred ninety-six of this article**.

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

§ 296-d. [~~Sexual harassment~~] **Unlawful discriminatory practices** relating to non-employees. It shall be an unlawful discriminatory practice for an employer to permit [~~sexual harassment of~~] **unlawful discrimination against** non-employees in its workplace. An employer may be held liable to a non-employee who is a contractor, subcontractor, vendor, consultant or other person providing services pursuant to a contract in the workplace or who is an employee of such contractor, subcontractor, vendor, consultant or other person providing services pursuant to a contract in the workplace, with respect to [~~sexual harassment~~] **an unlawful discriminatory practice**, when the employer, its agents or supervisors knew or

should have known that such non-employee was subjected to [~~sexual harassment~~] **an unlawful discriminatory practice** in the employer's workplace, and the employer failed to take immediate and appropriate corrective action. In reviewing such cases involving non-employees, the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of the [~~harasser~~] **person who engaged in the unlawful discriminatory practice** shall be considered.

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

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

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

of employment discrimination related to private employers, and, in cases of housing discrimination [~~only~~], with damages in housing discrimination cases in an amount not to exceed ten thousand dollars, to the person aggrieved by such practice; (v) requiring payment to the state of profits obtained by a respondent through the commission of unlawful discriminatory acts described in subdivision three-b of section two hundred ninety-six of this article; and (vi) assessing civil fines and penalties, in an amount not to exceed fifty thousand dollars, to be paid to the state by a respondent found to have committed an unlawful discriminatory act, or not to exceed one hundred thousand dollars to be paid to the state by a respondent found to have committed an unlawful discriminatory act which is found to be willful, wanton or malicious; (vii) requiring a report of the manner of compliance. If, upon all the evidence, the commissioner shall find that a respondent has not engaged in any such unlawful discriminatory practice, he or she shall state findings of fact and shall issue and cause to be served on the complainant an order based on such findings and setting them forth dismissing the said complaint as to such respondent. A copy of each order issued by the commissioner shall be delivered in all cases to the attorney general, the secretary of state, if he or she has issued a license to the respondent, and such other public officers as the division deems proper, and if any such order issued by the commissioner concerns a regulated creditor, the commissioner shall forward a copy of any such order to the superintendent. A copy of any complaint filed against any respondent who has previously entered into a conciliation agreement pursuant to paragraph a of subdivision three of this section or as to whom an order of the division has previously been entered pursuant to this paragraph shall be delivered to the attorney general, to the secretary of state if he or she has issued a license to the respondent and to such other public officers as the division deems proper, and if any such respondent is a regulated creditor, the commissioner shall forward a copy of any such complaint to the superintendent.

9. Any person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of appropriate jurisdiction for damages, including, in cases of employment discrimination related to private employers and housing discrimination only, punitive damages, and such other remedies as may be appropriate, including any civil fines and penalties provided in subdivision four of this section, unless such person had filed a complaint hereunder or with any local commission on human rights, or with the superintendent pursuant to the provisions of section two hundred ninety-six-a of this chapter, provided that, where the division has dismissed such complaint on the grounds of administrative convenience, on the grounds of untimeliness, or on the grounds that the election of remedies is annulled, such person shall maintain all rights to bring suit as if no complaint had been filed with the division. At any time prior to a hearing before a hearing examiner, a person who has a complaint pending at the division may request that the division dismiss the complaint and annul his or her election of remedies so that the human rights law claim may be pursued in court, and the division may, upon such request, dismiss the complaint on the grounds that such person's election of an administrative remedy is annulled. Notwithstanding subdivision (a) of section two hundred four of the civil practice law and rules, if a complaint is so annulled by the division, upon the request of the party bringing such complaint before the division, such party's rights to bring such cause of action before a court of appropriate jurisdiction shall be limited by the statute of

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

10. With respect to all cases of housing discrimination and housing related credit discrimination in an action or proceeding at law under this section or section two hundred ninety-eight of this article, the commissioner or the court may in its discretion award reasonable attorney's fees to any prevailing or substantially prevailing party; and with respect to a claim of [~~**employment or**~~] credit discrimination where sex is a basis of such discrimination, **and with respect to all claims of employment discrimination** in an action or proceeding at law under this section or section two hundred ninety-eight of this article, the commissioner or the court [~~**may in its discretion**~~] **shall** award reasonable attorney's fees attributable to such claim to any prevailing party; provided, however, that a prevailing respondent or defendant in order to recover such reasonable attorney's fees must make a motion requesting such fees and show that the action or proceeding brought was frivolous; and further provided that in a proceeding brought in the division of human rights, the commissioner may only award attorney's fees as part of a final order after a public hearing held pursuant to subdivision four of this section. In no case shall attorney's fees be awarded to the division, nor shall the division be liable to a prevailing or substantially prevailing party for attorney's fees, except in a case in which the division is a party to the action or the proceeding in the division's capacity as an employer. In cases of employment discrimination, a respondent shall only be liable for attorney's fees under this subdivision if the respondent has been found liable for having committed an unlawful discriminatory practice. In order to find the action or proceeding to be frivolous, the court or the commissioner must find in writing one or more of the following:

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

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

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

§ 300. Construction. 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**. Nothing contained in this article shall be deemed to repeal any of the provisions of the civil rights law or any other law of this state relating to discrimination [~~**because of race, creed, color or national origin**~~]; but, as to acts declared unlawful by section two hundred ninety-six of this article, the procedure herein provided shall, while pending, be exclusive; and the final determination therein shall exclude any other **state civil** action[~~**, civil or criminal,**~~] based on the same grievance of the individual concerned. If such individual institutes any action based on such grievance without resorting to the procedure provided in this article, he or she may not subsequently resort to the procedure herein.

§ 7. Section 5-336 of the general obligations law, as added by section 1 of subpart D of part KK of chapter 57 of the laws of 2018, is amended to read as follows:

§ 5-336. Nondisclosure agreements. **1. (a)** Notwithstanding any other law to the contrary, no employer, its officers or employees shall have the authority to include or agree to include in any settlement, agreement or other resolution of any claim, the factual foundation for which involves [~~**sexual harassment**~~] **discrimination, in violation of laws prohibiting discrimination, including but not limited to, article fifteen of the executive law**, any term or condition that would prevent the disclosure of the underlying facts and circumstances to the claim or action unless the condition of confidentiality is the complainant's preference.

(b) Any such term or condition must be provided **in writing** to all parties **in plain English, and, if applicable, the primary language of the complainant**, and the complainant shall have twenty-one days to consider such term or condition. If after twenty-one days such term or condition is the complainant's preference, such preference shall be memorialized in an agreement signed by all parties. For a period of at least seven days following the execution of such agreement, the complainant may revoke the agreement, and the agreement shall not become effective or be enforceable until such revocation period has expired.

(c) Any such term or condition shall be void to the extent that it prohibits or otherwise restricts the complainant from: (i) initiating, testifying, assisting, 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.

2. Notwithstanding any provision of law to the contrary, any provision in a contract or other agreement between an employer or an agent of an employer and any employee or potential employee of that employer entered into on or after January first, two thousand twenty, that prevents the disclosure of factual information related to any future claim of discrimination is void and unenforceable unless such provision notifies the employee or potential employee that it does not prohibit him or her from speaking with law enforcement, the 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.

§ 8. Paragraphs 2 and 3 of subdivision (a) of section 7515 of the civil practice law and rules, as added by section 1 of subpart B of part KK of chapter 57 of the laws of 2018, are amended to read as follows:

2. The term "prohibited clause" shall mean any clause or provision in any contract which requires as a condition of the enforcement of the contract or obtaining remedies under the contract that the parties submit to mandatory arbitration to resolve any allegation or claim of [~~an unlawful discriminatory practice of sexual harassment~~] **discrimination, in violation of laws prohibiting discrimination, including but not limited to, article fifteen of the executive law**.

3. The term "mandatory arbitration clause" shall mean a term or provision contained in a written contract which requires the parties to such contract to submit any matter thereafter arising under such contract to arbitration prior to the commencement of any legal action to enforce the provisions of such contract and which also further provides language to the effect that the facts found or determination made by the arbitrator or panel of arbitrators in its application to a party alleging [~~an unlawful discriminatory practice based on sexual harassment~~] **discrimination, in violation of laws prohibiting discrimination, including but not limited to, article fifteen of the executive law** shall be final and not subject to independent court review.

§ 9. Section 5003-b of the civil practice law and rules, as added by section 2 of subpart D of part KK of chapter 57 of the laws of 2018, is amended to read as follows:

§ 5003-b. Nondisclosure agreements. Notwithstanding any other law to the contrary, for any claim or cause of action, whether arising under common law, equity, or any provision of law, the factual foundation for which involves [~~sexual harassment~~] **discrimination, in violation of laws prohibiting discrimination, including but not limited to, article fifteen of the executive law**, in resolving, by agreed judgment, stipulation, decree, agreement to settle, assurance of discontinuance or otherwise, no employer, its officer or employee shall have the authority to include or agree to include in such resolution any term or condition that would prevent the disclosure of the underlying facts and circumstances to the claim or action unless the condition of confidentiality is the plaintiff's preference. Any such term or condition must be provided to all parties, and the plaintiff shall have twenty-one days to consider such term or condition. If after twenty-one days such term or condition is the plaintiff's preference, such preference shall be memorialized in an agreement signed by all parties. For a period of at least seven days following the execution of such agreement, the plaintiff may revoke the agreement, and the agreement shall not become effective or be enforceable until such revocation period has expired.

§ 10. Subdivisions 9 and 10 of section 63 of the executive law, subdivision 9 as amended by chapter 359 of the laws of 1969, are amended to read as follows:

9. Bring and prosecute or defend upon request of the [~~industrial~~] commissioner **of labor** or the state division of human rights, any civil action or proceeding, the institution or defense of which in his judgment is necessary for effective enforcement of the laws of this state against discrimination by reason of age, race, **sex,** creed, color [~~or~~]**,** national origin, **sexual orientation, gender identity or expression, military status, disability, predisposing genetic characteristics, familial status, marital status, or domestic violence victim status,** or for

enforcement of any order or determination of such commissioner or division made pursuant to such laws.

10. Prosecute every person charged with the commission of a criminal offense in violation of any of the laws of this state against discrimination because of **age,** race, **sex,** creed, color, [~~or~~] national origin, **sexual orientation, gender identity or expression, military status, disability, predisposing genetic characteristics, familial status, marital status, or domestic violence victim status,** in any case where in his judgment, because of the extent of the offense, such prosecution cannot be effectively carried on by the district attorney of the county wherein the offense or a portion thereof is alleged to have been committed, or where in his judgment the district attorney has erroneously failed or refused to prosecute. In all such proceedings, the attorney-general may appear in person or by his deputy or assistant before any court or any grand jury and exercise all the powers and perform all the duties in respect of such actions or proceedings which the district attorney would otherwise be authorized or required to exercise or perform.

§ 11. Paragraph b of subdivision 1 of section 201-g of the labor law, as added by section 1 of subpart E of part KK of chapter 57 of the laws of 2018, is amended and a new subdivision 2-a is added to read as follows:

b. Every employer shall adopt the model sexual harassment prevention policy promulgated pursuant to this subdivision or establish a sexual harassment prevention policy to prevent sexual harassment that equals or exceeds the minimum standards provided by such model sexual harassment prevention policy. Such sexual harassment prevention policy shall be provided to all employees in writing **as required by subdivision two-a of this section**. Such model sexual harassment prevention policy shall be publicly available and posted on the websites of both the department and the division of human rights.

2-a. a. Every employer shall provide his or her employees, in writing in English and in the language identified by each employee as the primary language of such employee, at the time of hiring and at every annual sexual harassment prevention training provided pursuant to subdivision two of this section, a notice containing such employer's sexual harassment prevention policy and the information presented at such employer's sexual harassment prevention training program.

b. The commissioner shall prepare templates of the model sexual harassment prevention policy created and published pursuant to subdivision one of this section and the model sexual harassment prevention training program produced pursuant to subdivision two of this section. The commissioner shall determine, in his or her discretion, which languages to provide in addition to English, based on the size of the New York state population that speaks each language and any other factor that the commissioner shall deem relevant. All such templates shall be made available to employers in such manner as determined by the commissioner.

c. When an employee identifies as his or her primary language a language for which a template is not available from the commissioner, the employer shall comply with this subdivision by providing that employee an English-language notice.

d. An employer shall not be penalized for errors or omissions in the non-English portions of any notice provided by the commissioner.

§ 12. The commissioner of labor in collaboration with the commissioner of human rights shall conduct a study on how to build on the requirements of section two hundred one-g of the labor law, in order to further

combat unlawful harassment and discrimination in the workplace. The study shall include but not be limited to: a review of the section two hundred one-g of the labor law requirements for employers to provide a sexual harassment training and policy to all employees and comparison with similar requirements across other jurisdictions; a review of the full scope of discriminatory practices in the workplace made unlawful by relevant state and federal laws; engagement with relevant stakeholders on the most effective tools to prevent and remediate such discriminatory practices; and the efficacy of requiring such training in the workplace in reducing discrimination. On or before December 1, 2019, the commissioner of labor shall submit his report and recommendations to the governor, the temporary president of the senate and the speaker of the assembly.

§ 13. Subdivision 5 of section 297 of the executive law, as amended by chapter 958 of the laws of 1968, is amended to read as follows:

5. Any complaint filed pursuant to this section must be so filed within one year after the alleged unlawful discriminatory practice. **In cases of sexual harassment in employment, any complaint filed pursuant to this section must be so filed within three years after the alleged unlawful discriminatory practices.**

§ 14. Section 201-g of the labor law is amended by adding a new subdivision 4 to read as follows:

4. Beginning in the year two thousand twenty-two, and every succeeding four years thereafter, the department in consultation with the division of human rights shall evaluate, using the criteria within this section, the impact of the current model sexual harassment prevention guidance document and sexual harassment prevention policy. Upon the completion of each evaluation the department shall update the model sexual harassment prevention guidance document and sexual harassment prevention policy as needed.

§ 15. Severability clause. If any clause, sentence, paragraph, subdivision, section or subpart of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, subdivision, section or subject thereof directly involved in the controversy in which such judgment shall have been rendered. It is hereby declared to be the intent of the legislature that this act would have been enacted even if such invalid provisions had not been included herein.

§ 16. This act shall take effect immediately, provided, however:

(a) Sections one of this act shall take effect on the one hundred eightieth day after it shall have become a law.

(b) Sections one-a, two, three, four, five, seven, eight and nine of this act shall take effect on the sixtieth day after it shall have become a law.

(c) Section thirteen of this act shall take effect one year after it shall have become a law.

(d) Sections one, one-a, two, three, four, five, six and thirteen shall only apply to claims filed under such sections on or after the effective date of such sections.

(e) Effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized and directed to be made and completed on or before such effective date.