



## New York Sexual Harassment and Discrimination Law Update: Another Round of New Laws Makes the State Most Progressive in the Nation

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In recent months, New York has implemented several changes to its discrimination and sexual harassment law, many of which are effective in the coming month.

On July 10, 2019, Governor Cuomo signed into law the Pay Equity Law ([S.5428-B / A.8093-A](#)) which broadens the standard required of an employee, intern, or applicant to establish compensation discrimination under the New York Equal Pay Law. The most notable change to the Equal Pay Law is its inclusion of a lesser, alternative standard that a member of a protective class must show to succeed on an equal pay claim.

Under the new law, a complainant need only demonstrate that his or her job is “substantially similar” to the comparator’s job – rather than the current New York equal pay standard, which requires the complainant to show his or her job is “equal” to the comparator’s job. Thus, employers are advised to perform a review of the various jobs and the skills, efforts, and responsibilities of its employees to ensure that all workers who are “substantially similar” to one another are paid the same – i.e., not just merely due to job title. There are, of course, legitimate reasons set forth in the law that justify compensation differences, including “where payment is made pursuant to a differential based on: (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a bona fide factor other than status within one or more protected class or classes, such as education, training, or experience.” Before the amendment, the Equal Pay Law in New York only protected wage discrimination based on the worker’s gender; it has now been expanded to all protected classification under the Human Rights Law. The Pay Equity Law is effective as of **October 8, 2019**.

Also on July 10, 2019, the Governor signed into law [S.6549 / A.5308-B](#), commonly referred to as the New York Salary History Law, which prohibits inquiries into a job applicant’s or current employee’s salary or wage history. The law is effective as of January 6, 2020.

Two days later, on July 12, 2019, the Governor signed into law amendments to the Human Rights Law and Dignity for All Students Act ([S.6209A / A.7797A](#)) to make clear that discrimination based on race includes hairstyles or traits associated with race. Specifically, the law’s new subsections to the definitions of race now include “traits historically associated with race, including but not limited to hair texture and protective hairstyles.” Outside of California ([SB 188](#)), New York is now the second state to codify such racial discrimination standards, and New Jersey’s legislature is currently considering a similar bill ([NJ A-5564](#)).

Less than a month later, on August 9, 2019, the Governor signed into law further amendments to the Human Rights Law ([S.04037 / A.4204](#)), which prohibit employment discrimination based on religious attire, clothing, or facial hair, and prevent employers from refusing to hire, attain, promote, or take other discriminatory action against an individual for wearing attire or facial hair in accordance with tenets of their religion.



Most recently, on August 12, 2019, the Governor signed into law [S.6577 / A.8421](#), which implements significant new workplace harassment protections into various New York laws, including the Human Rights Law. As detailed below, the law is set to phase in various sections over the course of the next year – but most of the changes take effect as early as **October 11, 2019**. The intent behind the law is clear, as it was enacted to “mak[e] it easier for workplace sexual harassment claims to be brought forward.”

Other principal changes to the Human Rights Law are listed below, along with a brief commentary regarding selected changes. Those changes to the Human Rights Law not effective until after October 11, 2019 are noted below.

- **Eliminates the restriction that harassment be “severe or pervasive” in order to be legally actionable.** Previously, a plaintiff was required to establish that the actionable harassing conduct was “severe or pervasive,” which has been the standard under federal law for decades. The Human Rights Law now eliminates that requirement to allow plaintiffs to bring harassment claims where the actionable conduct exceeds “petty slights or trivial inconveniences.” This is the current standard under the New York City Human Rights Law, which had been widely understood to be the lowest threshold for liability in the country.
- **Requires all employment-related non-disclosure agreements to include language that allows employees to file a complaint of harassment or discrimination.** Now New York law prohibits employers from including in settlement agreements a non-disclosure clause that would prevent employees from filing discrimination and/or harassment claims. Excepted are circumstances where the complainant requests non-disclosure and, in that event, is given 21 days to consider the provision as well as seven days to revoke it. On a related note, the law now also forbids employers from including a clause that prevents the disclosure of alleged harassing or discriminatory conduct to a local, state, or federal agency in connection with an investigation.
- **Prohibits mandatory arbitration to resolve cases of discrimination and harassment in the workplace.** Although the law now prohibits mandatory arbitration of discrimination and harassment claims, courts are likely to find this provision of the statute is pre-empted by the Federal Arbitration Act and therefore unenforceable.
- **Eliminates an affirmative defense previously available to employers where the employee failed to follow internal employer procedures.** The often-used affirmative defense, known as the “Farragher/Ellerth defense,” is no longer available to employers being sued under the Human Rights Law (i.e., by an employee who failed to follow his or her employer’s complaint reporting procedures prior to filing an action). Thus, New York employers now can be held liable despite a complainant’s failure to follow the employer’s complaint procedure.
- **Extends availability of punitive damages to employment discrimination actions against private employers.** The new law allows prevailing plaintiffs in court actions or employment discrimination cases brought before the State Division of Human Rights to recover punitive damages and attorneys’ fees.
- **Clarifies that courts are to interpret the Human Rights Law “liberally” for remedial purposes, “regardless of the federal rollback of rights.”**
- **Extends protections against all forms of discrimination in the workplace to all contractors, subcontractors, vendors, consultants, or others providing services and against all forms of discriminatory harassment to domestic workers.**
- **Requires all employers to provide employees with their sexual harassment prevention policies in the employee’s primary language.**
- **Expands the NYHRL to all employers within the state, regardless of the number of employees in New York.** This change becomes effective on February 8, 2020.



- **Extends the statute of limitations for employment-related sexual harassment claims filed with the New York State Division of Human Rights from one to three years.** This change becomes effective on August 12, 2020.

*By way of a reminder, New York employers are required to conduct sexual harassment training for all employees on or before October 9, 2019 and on an annual basis thereafter.* The training has many required elements, as we detailed in our QuickStudies dated [July 11, 2018](#) and again on [September 6, 2018](#). Locke Lord has prepared training materials that can be tailored to individual clients, and developed a low-cost means for annual compliance.

On [February 12, 2019](#), we reported on ten new employment laws in the 12 months in New York. With the new laws described above, added to those in 2018 and early 2019, New York has now become the most progressive state in the country in terms of anti-sexual harassment and discrimination. The burdens on employers - both large and small - have been significantly increased.

For more information on the matters discussed in this *Locke Lord QuickStudy*, please contact the authors.

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