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CLIENT ALERT

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New York Legislation Eliminates Any Requirement that a Plaintiff Prove that Harassment was "Severe and Pervasive"

To Our Clients and Friends: June 25, 2019

In a major change that will likely result in an increase in workplace discrimination (including sexual harassment) claims, particularly outside of New York City, the New York State Legislature has passed, and Governor Cuomo is expected to sign, a bill that eliminates the requirement that a plaintiff prove that the harassment was "severe and pervasive." Even sporadic or isolated incidents of harassment may now be sufficient to give rise to claims, provided that a reasonable victim of discrimination would not consider them to be petty or trivial.

The new law, which is modeled to a large extent on the New York City anti-discrimination law, also eliminates the employer's ability to establish an affirmative defense to a claim of discrimination simply by showing that a plaintiff failed to follow internal reporting procedures. It also limits the ability of employers to insulate themselves from liability simply by asserting that the harasser violated company policies prohibiting workplace harassment (although companies may still present evidence relating to an employee's failure to follow internal complaint procedures and the employer's good faith implementation and enforcement of anti-harassment policies).

Other significant features of the new state law include:

- the inclusion of vendors, contractors, domestic workers and other workplace participants among the persons protected;
- the addition of attorneys' fees and punitive damages as remedies for unlawful discrimination;
- the elimination of confidentiality provisions in settlement agreements (unless requested by the employee); and
- a ban against "forced arbitration" clauses in employment agreements that would otherwise preclude employees from filing sexual harassment and other discrimination claims in court (although this section of the law will likely be challenged as conflicting with the policies underlying the Federal Arbitration Act).

The bill also expands the authority of the New York Attorney General to investigate and prosecute sexual harassment and other discrimination claims, extends from one year to three years the time a claimant is given to report misconduct to the New York State Division of Human Rights, and requires, among other things, that employers provide sexual

harassment policies and training materials in an employee's primary language.

This bill significantly lowers an employee's burden of proof in discrimination cases and makes clear that employers will face greater challenges in defending against such claims.

Please call your primary contact at Golenbock Eiseman Assor Bell & Peskoe LLP or a member of our Labor & Employment Department with any questions.

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