



NELA/NY Spring 2023 Conference

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SDHR - Practice before the State Agency

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Caroline Downey has been General Counsel at the Division of Human Rights since 2007. She supervises the Division's Legal Bureau, which includes the Legal Advisory Unit, the Legislation Unit, the Legal Opinions Unit and the Litigation/Appeals Unit. She has previously been the Division's Supervising Attorney, the Director of the Legislation and Opinions Unit of the Legal Bureau, and a Senior Attorney in the Litigation and Appeals Unit. Ms. Downey is also the Division's Ethics Officer.

A graduate of Antioch School of Law, Ms. Downey was an associate at the New York City law firm of Hawkins, Delafield & Wood prior to entering public service. She has been a frequent speaker on human rights and equal employment issues for federal, state and local agencies, as well as for various other organizations, including the New York State and City Bar Associations, the New York County Lawyers Association and the National Association of Women Lawyers.

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Mr. Sanders is a member of the New York State Bar Association and its Labor and Employment Law Section and the Erie County Bar Association and its Labor Law Committee as well as NELA/NY, where he serves on its Board. He has also lectured for Western Region ILR Extension Office, SUNY Buffalo Center for Entrepreneurial Leadership, the New York State Bar Association, Erie County Bar Association, and Industrial Relations Research Association for Western New York.

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**Division of
Human Rights**

NYS Human Rights Law - Employment Update

NYC NELA Conference **May 5, 2023**

Caroline J. Downey
General Counsel

NEW YORK STATE HUMAN RIGHTS LAW

- New York was the first state in the United States to have an anti-discrimination law.
- The predecessor statute to the Human Rights Law was passed in 1945.
- The Human Rights Law is codified as Article 15 of the N.Y. Executive Law.
- The Human Rights Law “shall be deemed an exercise of the police power of the state for the protection of the public welfare, health and peace of the people of this state, and in fulfillment of the provisions of the constitution of this state concerning civil rights.”

-- Human Rights Law § 290.2

Bases Under HRL - Employment (with federal parallels)

- **Race, Color**
- **National origin, includes ancestry**
- **Creed**
- **Sex**
- **Age – 18 up (HRL); 40 up (federal)**
- **Disability (more broadly defined in HRL than in federal law)**
- **Predisposing Genetic Characteristics**
- **Sexual orientation**
- **Gender Identity or Expression**
- **Retaliation**

Bases under HRL (no statutory federal parallels)

- **Familial Status**
- **Marital status**
- **Military Status**
- **Domestic Violence Victim Status**
- **Favorably resolved arrest records, youthful offender, sealed records (employment)**
- **Conviction records (see Article 23-A of the N.Y. Correction Law)(employment)**
- **Lawful source of income (housing)**
- **Citizenship and immigration status**

Legislative Changes 2019

The Omnibus Bill – Summary

- All employers covered, removal of 4 or more
- Domestic workers, expanded protection
- Non-employees in workplace, expanded protection
- New § 296.1(h), harassment provisions
- Punitive damages in employment cases
- Attorney's fees in all HRL cases
- Three years to file sexual harassment complaints
- Liberal construction clause enhanced
- Nondisclosure agreements, expanded to all bases

Legislative Change 2019

Enhanced Liberal Construction Clause

- Liberal construction clause in § 300
- To be interpreted liberally **regardless of more narrow federal interpretations of similar federal laws**
 - “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.”

What is “Liberal Construction”?

“A liberal construction ... is one [that] is in the interest of those whose rights are to be protected, and if a case is within the beneficial intention of a remedial act it is deemed within the statute, though actually it is not within the letter of the law”

- Quoted from commentary on New York Statute law
- Quoted in *Dewine v. State of New York Bd. of Examiners of Sex Offenders*, 89 A.D.3d 88 (1st Dept. 2011)
- Cited in *People v. Ivybrooke Equity Enterprises, LLC*, 175 A.D.3d 1000 (4th Dept. 2019)

Legislative Change 2019: **All employers within the State**

- The requirement of “4 or more” is eliminated from the definition of “employer”
- Effective for discrimination occurring on or after **February 8, 2020**
- In 2019 amendment, domestic workers still covered separately, as indicated in the definition of “employee”; no longer were limited to sexual harassment cases, as per the 2015 amendment. But see 2021 amendment, discussed below (domestic workers covered for all purposes, as any other employee)

Legislative Changes 2018 & 2019: New & amended § 296-d

- Employers can be held liable ***for any unlawful discrimination to non-employees*** performing work in the workplace pursuant to a contract
- The 2018 amendment limited protection to sexual harassment only, and was effective April 12, 2018
- The 2019 amendment extended protection to all unlawful discrimination, and was effective October 11, 2019

§ 296-d: Who is covered?

- Who is covered?
 - Independent contractors
 - Contract workers
 - Consultants
 - Service providers
 - Delivery persons
 - Any non-employee who is “working” while on the employer’s premises

§ 296-d: What is covered?

- Protections not limited to those in § 296.1
- Includes all unlawful discriminatory employment practices found in § 296, including
 - Reasonable accommodation of disability
 - Accommodation of religious observance
 - Guide, hearing and service dogs (HRL 296.14)
 - Arrest, sealed conviction, youthful offender
 - Conviction (may be limited by terms of Article 23-A)
 - Harassment

296-d: What is covered?

- **Hiring**, selection or entering into a contract **is not covered** by § 296-d -- covers people providing services in the workplace.
- Once in the workplace, the worker is protected, including from discriminatory termination.
- Harassment was the original focus of the legislation, but all discrimination is covered.

Not changed:

- Joint employer and aid/abet liability, as appropriate
- If the non-employee gets a paycheck from another entity for the work, that entity can be liable under § 296.1
- The employer can be liable for harassment **of** a direct employee **by** a third party (client, vendor, temp worker, etc.)
- If employer is also a public accommodation, could also be liable for harassment of clients, customers, guests, or other non-workers

Legislative Change 2019: **New § 296.1(h) Harassment Standards**

- Explicit statutory protection from harassment in employment – previously it was case law only
- Applies to all employers, licensing agencies, employment agencies and labor organizations
- Sets new legal standards for harassment

New § 296.1 (h)

- The new standards protect
 - **All employees**, including domestics workers
- Applies to ***all*** protected characteristics listed in § 296.1
- Retaliatory harassment also explicitly covered

§ 296.1(h):

New Harassment Standards

- Harassment is unlawful when it subjects “an individual to **inferior terms, conditions or privileges** of employment”
- The harassment **need not be severe or pervasive**
- The employer has an **affirmative defense** “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**”

§ 296.1(h): New Harassment Standards

- The fact that the complainant **did not complain to the employer is not determinative** of whether there is liability.
- The complainant need not identify a comparator who was treated more favorably.

Beyond “Severe or Pervasive”

- The case that changed it all: *Williams v. N. Y. City Housing Authority*, 61 A.D.3d 62 (1st Dept. 2009). Cited by state courts more than 100 times; no negative history.
- Why the standard was changed: Example of case where sex harassment treated differently under State and City Human Rights Laws: *Hernandez v. Kaisman*, 103 A.D.3d 106 (1st Dept 2012)

Legislative Change 2019: Punitive Damages

- Punitive damages may be awarded at hearing against ***private employers***
- Definition of “private employer” § 292.37
- In employment cases no statutory limit on the amount of punitive damages
- Effective for discrimination occurring on or after October 11, 2019

Legislative Change 2019: **Attorney's Fees**

- Attorney's fees may be awarded in any employment case
- No longer limited to sexual harassment
- Private counsel cases only
- Effective for discrimination occurring on or after October 11, 2019

Legislative Change 2019: **3 Years to File Sexual Harassment only**

- Statute of limitations for filing with DHR extended to 3 years for sexual harassment in employment only
- Effective for harassment occurring on or after August 12, 2020

Legislative Changes 2019: **Non-Disclosure Agreements**

- ***Applies to all employment cases***
 - Applied in 2018 only to sexual harassment
- Does not amend HRL but applies to DHR settlements
- Amends the General Obligations Law –
§ 5-336 (and CPLR § 5003-b)
- Effective for all employment cases for settlements entered into on or after October 11, 2019

Non-Disclosure Agreements

- Non-disclosure agreements are not allowed in settlements of employment cases unless desired by the complainant
- This legislation applies *only* to nondisclosure of the “**underlying facts and circumstances**” of the claim

- ... no employer ... shall have the authority to include ... in any [employment discrimination] settlement ... any term or condition that would prevent the disclosure of the underlying facts and circumstances to the claim ... unless ... confidentiality is the **complainant's preference**.
- ... complainant shall have 21 days to consider If after 21 days such term or condition is the complainant's preference [it will be included in written agreement].
- For a period of at least 7 days ... complainant may revoke the agreement, and the agreement shall not become effective or be enforceable until such revocation period has expired.

Non-Disclosure Agreements

- Procedures
 - Separate Nondisclosure Agreement
 - Twenty-one day waiting period – can't be waived
 - Seven day revocation period – can't be waived

Non-Disclosure Agreements

- New in 2019:
 - Nondisclosure agreement must be “in writing to all parties in plain English, and, if applicable, the primary language of the complainant”
 - Complainant cannot be prevented from:
 - Participation in an investigation conducted by the appropriate local, state, or federal agency
 - Disclosing facts necessary to receive unemployment insurance, Medicaid, or other public benefits

Non-Disclosure v. Confidentiality

- Nondisclosure of the underlying facts and circumstances in an employment case requires these procedures
- ***Confidentiality as to the terms*** of the settlement ***does not*** require these procedures
- Division not bound by any nondisclosure or confidentiality agreement

Legislative Change 2019

Gender Identity or Expression

- HRL amended to explicitly make it unlawful to discriminate on the basis of gender identity or expression
- Effective February 24, 2019, though there previously was protection under sex and disability
- All areas of jurisdiction are amended to include gender identity or expression
 - except § 296-c covering interns; they are still covered under sex and disability

Legislative Change 2019

Gender Identity or Expression

- Division regulations at 9 NYCRR § 466.13 have been updated to reflect the amendment
- The Division's Gender Identity brochure has been updated and is included in your materials

Legislative Change 2019: Lactation

- HRL definition of “pregnancy-related condition” amended to explicitly state “including but not limited to lactation”
- Effective September 13, 2019, but it would have been covered anyway
- Medical consequences of pregnancy or childbirth – including lactation, miscarriage or abortion – are all pregnancy-related conditions
 - These were specifically contemplated as being covered by the original pregnancy-related condition amendment to HRL (2015)

Legislative Change 2019: Arbitration

- All discrimination claims are not subject to mandatory arbitration
 - Applied in 2018 only to sexual harassment claims
- See federal law changes regarding sex harassment and mandatory arbitration.
- See also
 - *Charter Commc'ns, Inc. v. Derfert*, No. 1:20-CV-915, 2021 WL 37726 (W.D.N.Y. Jan. 4, 2021), *reconsideration denied*, No. 1:20-CV-915, 2021 WL 949391 (W.D.N.Y. Mar. 12, 2021).
 - *Charter Commc'ns v. Jewett*, 5:21-cv-959 (BKS/ML) (N.D.N.Y. Nov. 16, 2021)

Legislative Change 2021

- HRL 297.1 amended to eliminate the notarization requirement for complaints
- Removes the word “verified” and permits signing “under oath or by declaration”
- Oath = sworn and signed before a notary
- Declaration = signing a declaration that the complaint is true
- All complaint forms have been changed to offer both options
- Laws of 2021, chapter 304, eff. July 16, 2021

Legislative Change 2021

- Domestic workers are considered employees for all purposes under the HRL
- Previously had been limited to harassment
- Only one employee creates an “employer” under the HRL. This had been the case with domestic workers for over a decade, and now is true for all employers.
- Laws of 2021, chapter 830, effective December 31, 2021

Legislative Changes 2022

- Attorney's Fees

- HRL 297.10 amended to provided for the award of attorney's fees and expert witness fees in all HRL cases. Laws of 2022, chapter 154, effective February 1, 2022.

- Retaliation

- The retaliation provisions of the Law, HRL 296.7, amended to provide specifically that it is an unlawful discriminatory act to disclose an employee's personnel files in retaliation for that employee

Legislative Changes 2022

- HRL 295.5 amended to add that the state and its subdivisions will be considered the “employer” of all government officials and staffers:
- “The term "employer" shall include all employers within the state. For the purposes of this article, (a) the state of New York shall be considered an employer of any employee or official, including any elected official, of the New York state executive, legislature, or judiciary, including persons serving in any judicial capacity, and persons serving on the staff of any elected official in New York state, (b) a city, county, town, village or other political subdivision of the state of New York shall be considered an employer of any employee or official, including any elected official, of such locality's executive, legislature or judiciary, including persons serving in any local judicial capacity, and persons serving on the staff of any local elected official.”

Legislative Change 2022

Sex harassment hotline and volunteer attorney referral initiative

- Section 295.18 added to the HRL, to provide a toll-free confidential hotline for individuals with complaints of workplace sexual harassment
- The Division is to operate the hotline during business hours and with the Department of Labor to ensure that information about the hotline is included in all employer's required sex harassment materials.
- The Division is to work with attorney organizations to recruit experienced volunteer attorneys to provide limited pro bono advice to individuals who call the hotline.

Legislative Changes 2022

- Citizenship and immigration status added as a protected basis on all areas of the HRL; verification of citizenship or immigration status, and adverse actions based on such verification, not prohibited where required by law.
- Protections for victims of domestic violence added to housing and other areas of jurisdiction of the HRL (previously only available in employment jurisdiction).

Model Harassment Policy & Training – NEW IN 2023

SEE SEPARATE HANDOUTS/LINKS AS TO NEW DEPARTMENT OF LABOR POLICY and TRAINING REQUIREMENTS

Filing a Complaint

- The Division of Human Rights has regional offices around the state where information may be obtained and a complaint filed.
- Complaint forms are also available on the Division's website, www.dhr.ny.gov. Filing a digital complaint is now available.
- Complaints no longer need to be notarized; may be signed with a declaration.
- A complaint must be filed with the Division within one year of the occurrence of the discrimination (three years for sex harassment).
- Complaints may be filed directly in state court, within three years of the alleged discrimination.
- Complaints may not be filed with the Division following a state court filing. The Division may dismiss a claim to permit a court filing.

Complaint Investigation

- The Human Rights Law requires that the Division investigate complaints promptly, to determine if Complainant was discriminated against because of membership in a protected class.
- The Division regulations provide that the investigation may be made by a field visit, written or oral inquiry, conference or any other method deemed suitable

Investigative Determination

- Based on all the evidence collected by the investigator, the Regional Director will make a determination as to whether there is jurisdiction and if so, whether there is probable cause to believe that discrimination occurred.
- These determinations are generally made within 180 days of the complaint filing.
- If the Regional Director determines that there is no jurisdiction or no probable cause, the Complaint is dismissed and the Complainant may appeal the dismissal to state court.
- If there is a determination of probable cause, the case is forwarded for a public hearing before an Administrative Law Judge.

Private Settlement Agreements at DHR

- DHR will no longer issue Commissioner's Orders of Discontinuance of a Division case following a private settlement agreement.
- This will apply to cases filed after **October 12, 2021**, where a finding of probable cause has been issued following an investigation.
- Cases are always brought in the Division's name, and this will assure that all settlements where the Division has determined that there is probable cause to believe discrimination has occurred comply with Division's standards and do not violate public policy.
- Parties may either settle the case with an Order After Stipulation, stating the terms of the agreement, or may proceed to a public hearing.
- Settlements prior to probable cause are not impacted.

Public Hearing

- At the public hearing before an Administrative Law Judge, material issues of fact and law can be resolved, testimony is taken under oath, witnesses are subject to cross-examination and a full record is made.
- Complainant may be represented by their own attorney, or a Division attorney will be appointed to present the case in support of the Complaint.
- The Administrative Law Judge submits a Recommended Order for the Commissioner's consideration.

Final Orders and Remedies

- The Commissioner reviews all submissions, relevant evidence and the Recommended Order, and issues a Final Order either finding discrimination or dismissing the Complaint.
- Where the Commissioner finds that discrimination has occurred, remedies may include:
 - an order to cease the discriminatory policies;
 - reinstatement to a job, with back pay;
 - provision of housing, public accommodation or education;
 - reasonable accommodation;
 - compensation for monetary losses and mental anguish;
 - a requirement that training be conducted;
 - punitive damages;
 - civil fines and penalties;
 - attorney's fees.

Appeals and Enforcement

- Either side may appeal the Commissioner's Final Order to state court, where the cases are heard in the Appellate Division.
- Complainant may have private counsel, or a Division attorney submits a brief and appears in court to defend the Commissioner's Order where discrimination is found to have occurred.
- The Division will also seek court enforcement of the Commissioner's Order should a respondent fail to comply with the terms of the Order.