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MAY 2010

LABOR & EMPLOYMENT DEPARTMENT

ALERT

New York State Senate Passes Anti-Workplace Abuse Bill

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On May 12, 2010, the New York State Senate passed S1823B, which creates a private cause of action for employees who have been harmed psychologically, physically or economically because of an abusive workplace. The bill now goes to the New York State Assembly and will require the governor's signature before becoming law.

Prohibited Conduct

This bill makes it unlawful to "[s]ubject an employee to an abusive work environment." An employer is "[c]ivilly liable for the existence of an abusive work environment within any workplace under its control." An abusive work environment is defined under the bill as "[a] workplace in which an employee is subjected to abusive conduct that is so severe that it causes physical or psychological harm." The alleged conduct must also be taken "with malice" and be of a nature that "a reasonable person would find to be hostile, offensive and unrelated to the employer's legitimate business interests."

"Abusive conduct" as defined under the bill includes but is not limited to the "[r]epeated infliction of verbal abuse, such as the use of derogatory remarks, insults and epithets; verbal or physical conduct that a reasonable person would find threatening, intimidating or humiliating; or the gratuitous sabotage or undermining of an employee's work performance." While a single act would generally not constitute abusive conduct under this bill, similar to Title VII, a single severe or egregious act could. Though the bill does place an affirmative obligation on the employee to provide the employer with notice of the alleged abuse, the employer is liable, after receiving notice, if it fails to eliminate the alleged abusive conduct. Finally, there is an anti-retaliation provision contained within the bill that prohibits retaliation against employees engaged in the complaint process.

Affirmative Defenses

The bill provides two distinct affirmative defenses that are triggered based on whether an adverse employment action was taken against the employee, i.e., termination, demotion or an unfavorable assignment. First, an employer may be able to avail him/herself of a "reasonable care" defense similar to the Title VII Ellerth v. Faragher defense. In order to use this defense the employer must establish that it: (1) took reasonable steps to "prevent and promptly correct the abusive conduct" at issue; and (2) the employee "unreasonably failed to take advantage of the appropriate preventive or corrective opportunities provided by such employer." However, this defense is not available if the abusive conduct resulted in a negative employment decision with regard to the employee (e.g., termination, demotion, unfavorable reassignment, refusal to promote, constructive discharge, disciplinary action). Second, an employer may avoid liability if it can establish that the adverse action taken against the employee was "[c]onsistent with the employer's legitimate business interests . . . or upon the

investigation of a potentially dangerous, illegal or unethical activity by the employee." For instance, the employer may prevail if it can establish that a termination still would have occurred because of poor job performance.

Statute of Limitations and Damages

A claim under this bill must be commenced within one year of the last abusive conduct. Significantly, remedies under this bill are available in addition to workers' compensation benefits, so long as the employee has not collected such benefits for conditions arising out of that same "abusive work environment." Additionally, the law permits individual liability and provides for various forms of relief including awarding back pay, attorneys' fees, compensatory, punitive and emotional damages — capped in certain circumstances at $25,000 and enjoining the employer from acting, or ordering reinstatement of a discharged employee.

Legislative Landscape

Anti-bullying laws have been proposed in approximately 17 states since 2003, but New York's Senate became only the second legislature to pass such a law after the Illinois State Senate passed a similar bill on March 18, 2010. The Illinois bill is now pending before the Illinois House and if approved and signed by the governor is expected to become law. New Jersey Assemblywoman Linda Greenstein introduced "The Healthy Workplace Act" in 2006, but the bill, numbered A3590, was not heard in committee. Assemblywoman Greenstein reintroduced the bill in the 2008-2009 legislative session numbered A1551 and was assigned to the Assembly Labor Committee. However, a hearing on the bill that was scheduled before the Labor Committee was cancelled. On March 2, 2010, a public hearing was held regarding Connecticut's HB 5285, "An Act Concerning State Employees and Violence and Bullying In The Workplace," but the bill died for the 2010 legislative session.

Implications of the New York Bill

The ramifications of this bill for New York employers are widespread. Workplace behaviors will need to change dramatically in some cases. If the bill is approved by the New York Assembly, employers will need to reevaluate and refine current harassment training programs to include anti-bullying components. Additionally, performance reviews and possible subordinate-to-supervisor reviews may take on new relevance in reducing liability in this area. In anticipation of the passage of the New York bill and those in other states, employers may also want to consider revising employee handbooks to include anti-bullying policies that have both a reporting mechanism and an anti-retaliation provision.

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