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DCR Report and Proposed Legislation Aim to Enhance Harassment Protections

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On Feb. 18, 2020, the New Jersey Division on Civil Rights (DCR), Office of the Attorney General, issued a comprehensive report, entitled “Preventing and Eliminating Sexual Harassment in New Jersey—Findings and Recommendations from Three Public Hearings” (the “DCR Report”), based on information culled from a series of hearings held in September 2019. Available at https://www.nj.gov/oag/dcr/pdfs/DCR-SH-Report_Feb2020.pdf, pp. 2-3. The DCR’s goal was to address the problem of sexual harassment in the workplace and places of public accommodation and housing. The DCR Report contains recommendations for legislative amendments, additional educational outreach by the DCR, and best practices. *Id.* at 23-25. Although the primary focus of the DCR Report was on sexual harassment, the DCR recommendations encompass harassment based upon all of the protected classes under the New Jersey Law Against Discrimination (NJLAD) (race, creed, color, national origin, age, ancestry, nationality, marital or domestic partnership or civil union status, sex, pregnancy, breastfeeding, gender identity or expression, disability, military service, affectional or sexual orientation, atypical or cellular blood trait, genetic information). N.J.S.A. 10:5-1, et seq; N.J.S.A. 10:5-12.

The same day the DCR Report was issued, the Office of Governor Phil Murphy released Proposals to Strengthen New Jersey’s Anti-Harassment Laws (“Proposed Legislation”) that mirror the DCR recommendations. The Proposed Legislation, if enacted, will codify and clarify the existing common law in certain areas, but also significantly expand protections under the NJLAD in other respects. However, as stressed in the DCR Report, many of the recommended legislative amendments contain only minimum requirements, and employers are encouraged to implement greater protections through the recommended best practices. DCR Report, *supra*, at 30-35. As summarized below, both the DCR Report and the Proposed Legislation set forth more enhanced requirements for “larger” employers, which is defined in the Proposed Legislation as those with 50 or more employees. DCR Report, *supra*, at pp. 26-27; Proposed Legislation at §§3, 4 and 5.

Policy Requirements for All Employers / Enhanced Requirements for Large Employers

Both the DCR Report and Proposed Legislation stressed the importance of strong policies and their broad dissemination. Under the Proposed Legislation, all New Jersey employers would be required to implement written harassment and anti-discrimination policies covering interactions with employees, vendors, suppliers, customers, clients, and patrons within one year from the date of enactment. *Id.* at §3b. The policies need to be distributed upon hire and then annually or any time the policy is updated. *Id.* at §§3c(1)-(4). Further, the Proposed Legislation mandates dissemination of the policy to any employee making a complaint and to those participating in an investigation. *Id.* Policies have to identify harassment and discrimination as misconduct, state that such conduct will not be tolerated by the employer, and provide definitions and examples. *Id.* at §§3b(1)-(3). They must provide the internal complaint filing process and directions on how to file with the DCR. *Id.* at §§3b(4)-(5). The policies also need to protect employees against retaliation, include examples of retaliation, and provide the statute of limitations for a claim of harassment or discrimination under the NJLAD. *Id.* at §§3b(6)-(8).

Additional components include potential consequences for violations, and a statement of the employer's commitment to prompt, thorough, and impartial investigations of complaints. *Id.* at §§3b(9)-(10). Policies must also provide that supervisors and management-level employees who allow discrimination and harassment to occur will be subject to discipline. *Id.* at §3b(1).

As indicated below, the Proposed Legislation sets forth requirements for employers with 50 or more employees working both within and outside New Jersey ("Large Employers"), and others for employers with fewer than 50 employees ("Small Employers"). *Id.* at §3j. In addition to the above requirements, Large Employers must provide multiple avenues in the policies for complaining employees to report a violation, describe the investigation process, and translate policies to the primary language of employees. *Id.* at §3h. Small Employers have to offer policies in the primary language of employees only if the DCR has made the model policy available in that language. *Id.* at §3e. Additionally, Large Employers must provide the policies when employees are promoted and must also post the policies on their websites. *Id.* at §§3f and 3h(2).

Interactive Training Requirements for All Employers / Live Training Requirements for Large Employers

The DCR Report emphasized the importance of meaningful training to reinforce prevention policies and recommended "live" training whenever possible. DCR Report, *supra*, at 32. The Proposed Legislation requires "interactive" training that must be participatory. Proposed Legislation, *supra*, at §4k. However, live training, while encouraged, is not required for Small Employers. The Proposed Legislation requires live training only for Large Employers. *Id.* at §§4i-k. The live training requirements for Large Employers require in-person training that allows individuals to ask questions. Large Employers need to have the training interpreted to employees' primary language; whereas, Small Employees only need to offer the trainings in other languages if the DCR has made them available in such languages. *Id.* at §§4i and 4f(2).

While the Proposed Legislation charged the DCR to publish training in one- and two-hour online training modules (one hour for all employees and two hours for supervisors), only Small Employers would be permitted to use these modules to fulfill the requirements. *Id.* at §§4g-h. Large Employers would not be permitted to use the DCR's model training to fulfill the Proposed Legislation's requirements. *Id.* at §4i. Employers would have one year to implement new training programs and would be required to provide the training to new employees within 90 days of hire and every two years thereafter. *Id.* at §4b.

Both the DCR Report and Proposed Legislation identified the need for several components to the training, including supervisor responsibilities and information on bystander intervention. The training shall include, at minimum:

- (1) A statement that unlawful discrimination or harassment in the workplace will not be tolerated and are considered a form of employee misconduct, and that sanctions will be enforced against individuals engaging in discrimination or harassment and against supervisory and managerial personnel who knowingly allow such behavior to continue;
- (2) A definition of unlawful discrimination and unlawful harassment in employment;
- (3) Examples of discriminatory and harassing behaviors prohibited by the nondiscrimination policy adopted by the employer pursuant to [the Proposed Legislation];
- (4) A description of the process for filing internal complaints about such discrimination or harassment;
- (5) Directions as to how to contact the [DCR] if a person believes their rights were violated;
- (6) A description of the prohibition on retaliation against those who disclose, report, participate in an investigation of, or otherwise challenge such discrimination or harassment;
- (7) Examples of retaliatory behaviors prohibited by the nondiscrimination policy adopted by the employer pursuant to [the Proposed Legislation]; and
- (8) Information concerning bystander intervention. *Id.* at §4b.

Under the Proposed Legislation, the supervisor training must cover all topics required by the standard training along with: (1) the specific responsibilities of a supervisor regarding the prevention of discrimination and harassment; (2) the specific responsibilities of a supervisor

regarding the prohibitions against retaliation; and (3) measures and corrective actions supervisors may take to address appropriately complaints and instances of discrimination, harassment, and retaliation. *Id.* at §4c.

Reporting Record Retention

Consistent with the DCR Report, the Proposed Legislation would also require Large Employers to file annual reports with the DCR setting forth all internal complaints of harassment, discrimination and retaliation, and to retain records of those complaints for at least three years. *Id.* at §5b. Employers must also keep records of trainings for three years. *Id.* at §4d.

Severe or Pervasive Totality of Circumstances and Domestic Workers/Interns

The Proposed Legislation encompasses the DCR Report’s recommendation that sexual harassment protections be expanded to include paid and unpaid interns and domestic workers. *Id.* at §§2b3, 6e-f, and 7a.

The Proposed Legislation clarifies what a plaintiff must show in terms of “severe or pervasive” conduct to establish “hostile environment harassment.” Specifically, the totality of the circumstances would be considered:

[T]he cumulative effect of all incidents of harassing conduct shall be considered as a whole rather than considering individual incidents in isolation, provided, however, that a single incident of harassing conduct may be sufficiently severe to create a triable issue of fact. . . .De minimis incidents such as petty slights or trivial inconveniences shall not by themselves be actionable under this act, provided however that a court shall consider all evidence, including de minimis or isolated incidents, when evaluating the totality of the circumstances. *Id.* at §2b(1)(i).

Additionally, although the perspective of a reasonable person in the complainant's protected class would still apply, a complainant's subjective responses to the harassing conduct would also be considered in evaluating the totality of the circumstances. *Id.* at §2b(1)(ii).

Expansion of Statutes of Limitations

As recommended by the DCR Report, the Proposed Legislation includes an expansion of the statutes of limitations to file a complaint of harassment with the DCR from six months to one year, and the period to file a civil complaint from two years to three years after the incident occurred. *Id.* at §11.

Affirmative Defenses

The Proposed Legislation and the DCR Report seek to clarify the *Aguas/Faragher-Ellerth* affirmative defenses available to employers. *Aguas v. State of New Jersey*, 220 N.J. 494, 499 (2015); *Faragher v. City of Boca Raton*, 118 S.Ct. 2275 (1998); *Burlington Industries v. Ellerth* 118 S.Ct. 2257 (1998). DCR Report, *supra*, at p. 26. Under *Aguas*, employers can argue that they exercised reasonable care based on factors involving use of policies, training and arguing that employees unreasonably failed to avail themselves of complaint procedures. *Aguas*, 220 N.J. at 513 (quoting *Gaines v. Bellino*, 173 N.J. 301, 313 (2002)). As highlighted in the DCR Report, if legislative amendments impose mandatory policies and training, every employer will be able to assert the *Aguas* affirmative defense, effectively eliminating liability for workplace sexual harassment. DCR Report, *supra*, at p. 26. The DCR Report suggested that legislative amendments make clear that complying with the recommended requirements will not constitute a defense to liability. *Id.* at pp. 26-27. The Proposed Legislation expressly states that an employer's compliance with the policy and training requirements will not, in and of itself, protect the employer from liability. Proposed Legislation, *supra*, at §§3k and 4m.

Best Practices for Investigations

The DCR Report and Proposed Legislation both specify the need for “prompt, thorough and impartial investigations” into complaints of harassment, discrimination, and retaliation. DCR Report, *supra*, at p. 34; Proposed Legislation, *supra*, at §3b(10). The DCR Report articulated “Best Practices” on conducting investigations.

- First, employers should “allocate sufficient resources and authority to those responsible for investigating complaints,” and “ensure that those conducting investigations are impartial, objective, and well-trained.” DCR Report, *supra*, at p. 34. It was highlighted by the DCR that this may include employers engaging third parties trained in conducting “impartial, independent investigations.” *Id.*
- Second, anti-harassment policies should set forth the stages and procedures for conducting the investigation. *Id.* For example, an employer should have clear protocols for what triggers an investigation; how an investigation will be conducted, including policies on witness interviews; and how an investigation will be concluded, including the issuance of a final report and retention policies on documents, notes and evidence, as well as, protocols for communicating the results to the impacted parties and appropriate post-investigation monitoring mechanisms. *Id.*
- Third, employers should “consistently enforce prohibitions on retaliation throughout the investigations process and maintain the confidentiality of the complainant to the fullest extent possible to prevent retaliation.” *Id.* Employers should ensure that the parties trust the system and are treated with respect and compassion.
- Fourth, employers should empower their investigators to “reach meaningful conclusions” and then follow up those conclusions with corrective action. *Id.* Guidance should be provided to those conducting investigations on how to appropriately assess credibility, weigh evidence, make finding and reach a conclusion. *Id.* at 35. The DCR cited the appropriate investigation burden of proof as “more likely than not” (a preponderance of the evidence). Specifically, if the investigator finds that the conduct is “more likely than not” to have occurred, employers

should “impose appropriate consequences, up to and including termination” of the accused. *Id.* at 35.

Significant and Groundbreaking Impact

While the Proposed Legislation has not yet been approved, it is an aggressive approach against a problem that has long existed in the workplace without sufficient remedy. If these amendments to the NJLAD are approved, it will place New Jersey among the forefront of states that have taken a stand against harassment and discrimination in the workplace. While some states have already passed similar sexual harassment laws, New Jersey’s would be far reaching due to the coverage of virtually every employer/employee, the breadth of the training and policy requirements including all protected types of biased-based harassment, and broad employer reporting requirements on complaints of unlawful workplace discrimination or harassment. These amendments to the NJLAD would position New Jersey on the cutting edge of workplace protections to prevent harassment, discrimination, and retaliation.

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