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SEXUAL HARASSMENT WORKING GROUP

2020 LEGISLATIVE AGENDA

2.27.2020

Repair Nondisclosure Laws to Protect Victims

1. **A849B/S5469-A**: Prohibits sexual harassment or discrimination settlements from including liquidated damages clauses for a complainant's violation of a non-disclosure agreement.[1]

- In 2018, NYS banned NDAs except in cases of a "complainant's preference". This was intended to provide a victim with privacy if they want it, not for employers to continue to punish them if they decide to speak.
- Ordinarily, if someone violates an agreement, the other side would have to prove harm (damages) in order to recover money from the violating party. Liquidated damages are a shortcut, a specific amount agreed to ahead of time -- but they're inappropriate in this context. Legally, liquidated damages are not supposed to be punitive, but in harassment and discrimination NDAs, they function to punish and terrify workers.
- Due to other common provisions in worker settlement agreements, liquidated damages clause is likely to be enforced in mediation, outside the court system and the public eye.

2. **A9993/S7819:** Prohibit employers from using a "do not darken my door" clause in settlement agreements, banning employers from prohibiting employees from re-applying or working in the future.[2]

- No re-hire clauses prevent a worker from staying in the workplace or from re-applying to the job where the harassment occurred -- it's victim-punishing, debilitating their future career.
- A worker should not have to choose between moving on with their life with a settlement and being able to work in a position where they're qualified.
    - In larger companies, these no re-hire clauses can be extremely burdensome where ownership changes hands or where there is conglomerate ownership.

1 **A849B/S5469-A**: *Assembly Sponsor/Co-Sponsors: SIMOTAS, QUART, PAULIN, SEAWRIGHT, M. G. MILLER, LENTOL, GOTTFRIED, CRUZ, THIELE, STIRPE, SIMON, ZEBROWSKI, CYMBROWITZ, STERN, GLICK, FERNANDEZ, MAGNARELLI, MOSLEY, LUPARDO, BLAKE, GALEF, EPSTEIN, MONTESANO, CRESPO, NIOU, NOLAN; Senate Sponsor: BIAGGI, CARLUCCI, HOLYMAN, KRUEGER, LIU, SALAZAR*

2 *Assembly Sponsor/ Co-Sponsors: CRUZ; Senate Sponsor/Co-Sponsors: GOUNARDES, BIAGGI, LIU, RIVERA*

Protections for Employees of Elected and Appointed Officials

3. **A8847/S6828:** Clarifies that employees of elected and appointed officials are employees of the state under NYSHRL.[3]

- Current laws serve as a "license to harass" for elected and appointed officials, where various state entities have argued many times, recently, in court that they are not the employer. This is wrong because to the worker, and any objective observer, it would appear that NYS is the employer.
- That New York State is the employer is in line with what the NYS Assembly has often argued in court. We agree with this argument.[4]
- Federal Title VII contains a carve-out for the "personal staff" of elected officials, and this has been used to deny employees recourse, for example, with victims that NYS Assemblymember Gabryzak sexually harassed.
- State law should provide a safeguard especially as federal worker rights protections continue to deteriorate. Without state-level recourse, workers may be left with no protections at all.

4. **A09904/S7841:** Close a loophole to protect employees of elected officials whistleblowers from retaliation[5]

- Current whistleblower law does not protect these employees - there's no reason to exclude them from protection.
- Without specific whistleblower protections, this means mandatory reporters for harassment and discrimination and witnesses complying with investigations are left unprotected against retaliation.

5. **A7217/S4512:** Prohibits individuals convicted of sex crimes or those with negative determination or findings of harassment or discrimination from lobbying.[6]

3 **A8847/S6828:** *Assembly Sponsor/ Co-Sponsors: NIOU, SIMON, SIMOTAS, ORTIZ, REYES, QUART, CRUZ, JACOBSON, ROSENTHAL L; Senate Sponsor/Co-Sponsors: GOUNDARDES, BIAGGI, KRUEGER, LIU, METZGER, HOYLMAN, MAYER, METZGER, RIVERA*

4 See Appendix A herein for case list and outcomes. The current cases show that there is chaos and confusion as to the definitions of "employee" and "employer" under relevant laws even where New York State pays the worker's salary, therefore improved statutory clarity is urgent if a worker is to have any recourse. At times, some defendants have claimed that only the individual harasser is the "employer" which practically would lead to the bizarre result that *a worker claiming harassment could only report their harassment to the alleged harasser*.

5 *Assembly Sponsor/ Co-Sponsors: SIMOTAS, CRUZ; Senate Sponsor/Co-Sponsors: LIU, BIAGGI*

6 **A7217/S4512:** *Assembly Sponsor/Co-Sponsors: CRUZ, SEAWRIGHT, BLAKE, SIMOTAS, EPSTEIN, SIMON, CROUCH, DINOWITZ, NIOU, DESTEFANO, TAYLOR, GRIFFIN, HEVESI, NIOU, ROSENTHAL L, JACOBSON; Senate Sponsor/Co-Sponsors: KRUEGER, BIAGGI, LIU*

- Legislative staff should be protected from known predators. When these harassers also represent a financial benefit or powerful network, there is an institutional disincentive to avoid confronting the abuse even when it is known.
- This bill closes a loophole that allows for individuals fired or expelled from the legislature to come back into the legislature and potentially continue to harm staff.

6. **A1282/S594A:** Replace JCOPE and the LEC with a new Integrity Commission to investigate and enforce consequences of public corruption, including sexual harassment.[7]

- The structure of JCOPE and LEC build in bias because there is overlap between how people are appointed to the bodies, and the people investigated by those bodies. For example, can you imagine a trial where the only jurors are coworkers of an alleged harasser? There is an extreme disincentive to find fault, and a disincentive for staff to report harassment.

7. Create a joint Assembly and Senate policy to reimburse travel and lodging for a minimum of one employee to travel to Albany or other parts of the state for official legislative functions. Policies should be transparent, and equally applicable minimums to all members. Consideration should be provided for additional allowances for committee chairs, and increased workloads during budget and end of session negotiations.

- Many high profile cases of sexual harassment and sexual assault show that predators pressure their staff into hotel rooms, apartments, cars, etc. and several of us in the SHWG experienced and are still healing from those harms. These legislative predators use "cost" to justify isolating, and infringing on the privacy of their victims -- your staff and coworkers.
- Federal, state, and municipal governments across the country provide either per diems or reimbursement for travel required by staff. The Legislature's failure to provide essential provisions for staff is highly unusual. This is a monumental risk and it is well-known to the legislature, and it is an emergency that must change immediately. One more victim is too many.

Establish Trauma-informed Statutes of Limitation

8. **A304/S6322** : Relates to the statute of limitations for actions based on harassment; six years.[8]

- Extends the substantive statute of limitation for harassment to bring a lawsuit to a time period of six years, from the current time frame of three years.

7 **A1282/S594A:** *Assembly Sponsor/Co-Sponsors: CARROLL, ORTIZ, SCHIMMINGER, D'URSO, STIRPE, BUCHWALD, COOK, DINOWITZ, GOTTFRIED, PAULIN, M.G. MILLER, JAFFEE, THIELE, PHEFFER AMATO, FAHY, ROSENTHAL L, SALKA, MCMAHON, MCDONALD, GALEF, STEC, QUART, MOSLEY, CRUZ, WOERNER, EPSTEIN, SANTABARBARA, MONTESANO, BUTTENSCHON, RAIA, LUPARDO, SEAWRIGHT, FRONTUS, RICHARDSON, TAGUE, LAWRENCE, SIMOTAS; Senate Sponsor/Co-Sponsors: KRUEGER, METZGER, JACKSON, BIAGGI, GAUGHRAN, MAYER, MARTINEZ, RAMOS, LIU, KAMINSKY, SAVINO, KENNEDY, ANTONACCI, MAY, JORDAN, AKSHAR, GOUNARDES, RIVERA, STAVINSKY, SKOUFIS, MYRIE, KAPLAN, BROOKS, HOYLMAN, CARLUCCI, AMEDORE, BOYLE, BAILEY, KAVANAGH, SALAZAR, THOMAS*

8 **A304/S6322** *Assembly Sponsor/Co-Sponsors: ROSENTHAL, CRESPO, NIOU, SEAWRIGHT, LENTOL, GOTTRIED, GALEF, SIMOTAS, CRUZ, JACOBSON; Senate Sponsor/Co-Sponsors: GOUNDARDES, LIU, GAUGHRAN, HOLYMAN*

    - Last year, the statute of limitations for filing sexual harassment with the NYSDHR was increased from one year to three years.
- A three year substantive time frame for a lawsuit isn't trauma-informed as many workers may be traumatized by their harms or experiences and need privacy, are unwilling to pursue on their own until subsequent victims may come forward, or initially just want to "move on" instead of pursuing an action in court because of fear of retaliation or being blacklisted in their field.

Appendix A
Case List Supporting A8847/S6828, which Clarifies that Employees of Elected and Appointed Officials are Employees of the State under NYSHRL

See, e.g., Burhans v. Assembly of the State of New York, 2014 NY Slip Op 30587[U] (Sup. Ct. N.Y. Co. 2014), where Legislative Aides for a New York State Assemblymember sued the Assembly for sexual harassment claims related to harassment by Assemblymember Lopez. In its Motion to Dismiss, the New York State Assembly argued that under NYS Human Rights Law, the Assembly is not the employer, and that Assemblymember Lopez was the employer, "But that **if [Lopez'] conduct is imputable to any entity, its New York State and not the New York State Assembly**[.]" See Defendant's Motion to Dismiss at page 17. While the Court did not directly conclude whether the Assembly was an employer under NYSHRL, it provided a lengthy analysis on the subject, implying that the Assembly was not an employer and dismissing the action on other grounds. The Court referenced the 'economic reality' test laid out in Patrowich v. Chemical Bank, 63 NY2d 541 (1984), which requires a plaintiff show that there is an "ownership interest in the enterprise or the power to do more than just carry out personnel decisions made by others." In its decision, the Court further noted that, "It is uncontested that Assemblymembers do not have any ownership interest in the Assembly itself because they are all public officers…").

After that case was dismissed, the plaintiffs refiled the lawsuit against New York State for sex discrimination and sexual harassment, in Burhans v. the State of New York, (Sup. Ct. N.Y. Co. Index 152906/14 2015). This time, the defendant New York State -- represented by the same Hogan Lovells attorney that represented the Assembly in the prior case -- argued "**The State of New York maintains that Lopez was plaintiffs' employer and that it did not have 'any power to hire or fire them, set their rate of pay, or direct their job duties or functions' " but the Court rejected the state's request to dismiss**, and held that "State of New York **may be** their employer…under NYSHRL." (emphasis added).

Next, in the federal case by the same plaintiffs but against different defendants, in Burhans v. Lopez, 24 F.Supp.3d 375 (2014), former New York State Assembly Speaker Silver had argued he wasn't the employer because under New York State Human Rights Law, to be an employer one must have an "ownership" interest. The Court disagreed because Silver he had "power to do more than carry out personnel decisions" and stated "the Court holds that Silver is an 'employer' under the New York State Human Rights Law and New York City Human Rights Law.")

Soon after, in Kennedy v. New York, 167 F.Supp.3d 451 (2016) the **district office Director of Community Relations** for a New York State Assemblymember sued the Assembly and New York State, among others, for sexual harassment. There, **both the State and the Assembly argued that the staff member fell within "an employment category Title VII expressly exempts from its definition of employee."** The Court agreed "that it does not have subject-matter jurisdiction over Kennedy's Title VII [sexual harassment] claims against Assembly and State because Kennedy is not an 'employee' within the meaning of that statute, therefore all claims against Assembly and State are dismissed without prejudice. Because Kennedy failed to state a claim against Silver, and because he is entitled to qualified immunity under the facts as pled in the Amended Complaint, all claims against him are also dismissed without prejudice. The claims against Gabryzak go forward.")

Most recently, in the unresolved case Marquez v. Hoffman (18-cv-07315, filed S.D.N.Y. 2018), a Court Attorney for a New York State judge sued several defendants for sexual harassment claims, based upon allegations of sexual harassment by Judge Hoffman. **In its Motion to Dismiss, defendant New York State argued that under Title VII, the state is not the employer, noting that the New York State Unified Court System (NYS UCS) or the individual judge is the employer**. See New York State's Motion to Dismiss at page 15. However, in its own Motion to Dismiss, the **NYS UCS denies employership as well, stating that under Title VII, plaintiff is not an "employee" of the NYS UCS but rather is an employee of the individual judge**. See New York State Unified Court System Motion to Dismiss at pages 8-9.

Years ago, in Doe v. New York State Assembly (Sup. Ct., Alb. Co. Index No. 3314/04 2005) an Assembly employee reported that then-Assembly employee Michael Boxley engaged in sexual intercourse with her without her consent, and sued various defendants for sexual discrimination under New York State Human Rights Law. By that time, Boxley had pleaded guilty to "sexual misconduct."

The Doe case was summarized in Santora v. Silver 2008 N.Y. Slip. Op. 28267 [20 Misc 3d 836] (2008) as follows: "The Assembly, the State and Silver appeared ...and moved...to dismiss the complaint as against them for failure to state a cause of action. ... [the Court] **dismissed the Assembly as a defendant, finding that body to be a component of the State only, and finding that the State, not the Assembly, was Jane Doe's employer.**"