

NY Sex Harassment Laws May Get Updated Under New Gov.

By **Vin Gurrieri**

Law360 (August 25, 2021, 10:09 PM EDT) -- Although former New York Gov. Andrew Cuomo was felled by allegations of rampant sexual harassment, some of the nation's strongest legal protections for gender discrimination victims in the country were enacted during his tenure.

Cuomo ceded the governorship to Kathy Hochul in the wee hours Tuesday morning, two weeks after he announced his intent to resign following a **bombshell report** by New York Attorney General Letitia James that found the then-governor sexually harassed and groped women in state government for years. Cuomo denied the allegations despite stepping down.

Just days into the job, Hochul has already **promised to end** the "toxic" work environment of her predecessor and address the problem of workplace harassment in government, tweeting Tuesday that "we can change the culture in Albany."

"This means accountability — and zero tolerance for individuals who cross the line," Hochul said in her tweet. "A new era of transparency will be one of the hallmarks of my Administration. This is our time."

As New York's first female governor, Hochul will also be uniquely positioned to expand on the state's already strong slate of sexual harassment laws, which were greatly expanded during Cuomo's tenure, attorneys say.

Susan Crumiller of Crumiller PC, a feminist litigation firm in New York that helps people fight harassment, discrimination and abuse, said Cuomo's alleged behavior persisted not because of shortcomings in the state's law but rather "because as a society, we still punish and blame victims, and he knew that and took safety in that."

However, there are still areas where improvements can be made, she said.

"New York has some of the best sexual harassment laws in the country regarding the workplace in terms of scope and liability," Crumiller said. "Laws are obviously important, but these big cultural moments make a dispositive difference."

Here, Law360 looks at where the law stands in the Empire State and what changes might be in store as Hochul takes over.

Where Things Stand

The central irony of Cuomo's departure from office amid a sexual harassment scandal is that during his tenure, he signed a **sweeping suite of laws** that are among the nation's best at protecting victims of harassment and expanding their ability to litigate allegations in court, attorneys say.

In 2018 and 2019, soon after the #MeToo movement went viral, New York overhauled its legal

standards in a broad effort to curtail harassment in the workplace and in other contexts.

Among the highlights, the state **barred employers** from insisting that nondisclosure clauses be included in agreements to settle sexual harassment claims. If employees want such a provision, which they can still seek, they have 21 days to consider the terms of the provision and seven days after that to revoke any confidentiality agreement they sign.

Other changes included state lawmakers stretching the time victims have to file workplace sexual harassment claims under the New York State Human Rights Law with the state's Division of Human Rights from one year to three years, and nixing employers' **ability to use** the so-called Faragher-Ellerth defense against claims under the NYSHRL. That defense shields employers that can show they "exercised reasonable care" to prevent and address sexual harassment and that an accuser didn't take advantage of the processes the employer had in place for addressing alleged misconduct.

But the change in New York law that lawyers on both sides of the employment bar say is the most consequential is the **lowering of the legal standard** harassment victims must meet to successfully prove a claim.

Prior to 2019, New York's standard matched the legal benchmark that exists under federal law — alleged harassment had to be shown to be "severe and pervasive" for a claim to succeed. But New York state broadened its test to one in which victims need only show that alleged misbehavior exceeds "petty slights or trivial inconveniences."

Keith Gutstein, co-managing partner of Kaufman Dolowich & Voluck LLP's Long Island office and co-leader of the firm's employment practice, similarly said that the state's lowering of the severe and pervasive bar is a "very significant" development.

"So we have seen claims brought under state law that would not have been sustainable under state law in the past," Gutstein said.

Peter Glennon of The Glennon Law Firm PC, a Rochester, New York-based attorney who represents both plaintiffs and defendants, said the more plaintiff-friendly standard was a key change that has resulted in more people, mostly women but some men, stepping forward to call out inappropriate behavior.

"The whole stated intent for the 2019 changes was deterrence," Glennon said. "The law actually says that the courts should construe the law liberally, and any exception should be construed narrowly and the purpose of that is for deterrence. ... What I've seen is an increase in complaints, and more willingness to resolve it sooner before there's a formal filing with an administrative agency. In going forward with some of these administrative agencies, I've seen them be quicker to find the initial step — the prima facie case — and push it more [toward] an investigation, and possibly find probable cause."

Overhaul of State Worker Training on Hochul's Radar

Besides those changes, another elemental change made by New York lawmakers in 2019 was mandating that employers adopt anti-harassment policies that meet or exceed state-set baselines, and provide workers with interactive **sexual harassment prevention training** every year. Employers can either use model training seminars that the state has made available or create their own that conform to the state's standards.

Out of the batch of laws related to sexual harassment that New York lawmakers passed in 2018 and 2019, Carol Goodman of management-side firm Herrick Feinstein LLP said she believes the requirement that employees be trained as to what the state's laws say and what internal processes exist in an organization are paramount in terms of the impact they've had.

"The reason is because the key to the training is to make it clear that everybody shares responsibility in this," said the New York-based Goodman, who chairs Herrick Feinstein's employment department.

She noted that the state's sexual harassment rules also apply to third parties in the workplace, like contractors, vendors and other nonemployees, which means that training is important because "you're making employees aware that they cannot harass third parties and similarly third parties can't harass them."

"If you don't have a mechanism of letting employees know what the rules are, and also what to do if they're harassed, you can't possibly get rid of workplace harassment," Goodman said.

In Cuomo's case, investigators in a section of the report that led to his resignation concluded that the governor's office had adequate policies and procedures in place for handling sexual harassment allegations, but failed to follow them when responding to the claims levied against Cuomo.

"We find that the problem did not rest with the executive chamber's written policies, which were robust and consistent with the requirements of New York State law, but in the executive chamber's failure to follow them," said one section of the Aug. 3 report.

That section of the report and the conclusion investigators reached highlight the importance of proper training, Goodman said, adding that she believes Hochul "is going to spend a lot of time and focus on making sure that these policies and these laws are understood and followed."

Only a few days into her tenure as governor, Hochul already indicated in a series of televised interviews that beefing up anti-harassment training is high on her to-do list. She said she will mandate in-person sexual harassment trainings for all state employees in an effort to change the work culture that was allegedly present during her predecessor's tenure.

"Everyone's familiar with the dynamic where ... you have training and everyone clicks through on their computer and says they've done it," Hochul told CBS in a televised interview, a transcript of which the governor's office made available. "That's not happening. I want to make sure people have no excuses, that they understand what our policies are."

Next Wave of Laws Blooming

Although state lawmakers have addressed sexual harassment and gender-based assault from numerous angles over the past few years, that doesn't mean there aren't still areas where more changes can be made during Hochul's tenure.

When it comes to civil litigation in sexual harassment and abuse cases, Crumiller said a "big issue" is that it takes survivors time to "recognize and come to terms with what has happened to them" before they feel ready to pursue legal action. Given that reality, broadening the time period survivors have to lodge claims before they become time-barred is a key front in expanding legal protections.

One pending bill that Crumiller pointed to as worth watching is the Adult Survivors Act, which she noted would create a "window period" for adult survivors whose claims are time-barred.

Sponsored by state Sen. Brad Hoylman, the bill would create a one-year so-called lookback window, or grace period, in which victims of alleged sex crimes who were over 18 years old when they occurred can pursue suits that would otherwise wouldn't be viable. The bill passed the New York Senate in June by a 63-0 vote and is currently pending before the state Assembly.

Hoylman introduced the bill in 2019 shortly after shepherding the Child Victims Act into law. That bill allowed people who experienced child sexual abuse in the state to file a civil claim any time

before the age of 55, up from the previous cutoff age of 23. The new law also provided a one-year lookback window **during which people of any age** could file a civil suit.

Aside from the state law system in Albany that Hochul now oversees, the issue of how long survivors of sex-based violence have to file claims is also percolating in New York City, where Crumiller says another piece of notable legislation is percolating.

In late July, City Council Member Carlina Rivera led a group of lawmakers in introducing Int. 2372-2021, a bill aimed at expanding a seven-year statute of limitations for people to bring claims under New York City's Victims of Gender-Motivated Violence Protection Act to nine years. The bill also creates a two-year look-back window under the VGMVPA for survivors to pursue expired claims.

If the Adult Survivors Act or Int. 2372-2021 are enacted, Crumiller said, they "will have an immediate impact on many survivors whose claims are time-barred," and would be the difference in whether many people are ever able to bring a case.

"We've just gotten so many inquiries from women and men whose claims are time-barred, because at the time [sexual harassment] happened and even for many years after it happened, it didn't really occur to them that they might have something they could do about it," Crumiller said. "I think most people when they suffer sexual harassment, especially in the workplace, you're in self-preservation mode and you're not thinking about taking legal action. You're thinking about making sure your own career isn't negatively affected, because that's sort of been the default for quite a long time."

--Additional reporting by Frank G. Runyon and Hailey Konnath. Editing by Abbie Sarfo.