

5 Takeaways As NY Toughens Workplace Sex Harassment Law, *Law360*, ft. Keith Gutstein

Keith Gutstein, Esq., co-managing partner of the Long Island office of Kaufman Dolowich & Voluck, LLP and co-chair of the KD Labor & Employment Law practice group, was quoted in a *Law360* article written by Braden Campbell - June 24, 2019.

New York lawmakers passed anti-sexual harassment legislation last week that would make it easier for workers to win discrimination suits, nixing a requirement that misconduct be "severe or pervasive" to be illegal harassment and eliminating a barrier that blocked employees from winning in court if they hadn't complained internally first. Here, Law360 looks at five takeaways from this landmark legal overhaul.

A Lower Bar for Proving Harassment

New York State Assembly Bill A08421, which New York Gov. Andrew Cuomo championed, takes aim at a portion of state law that advocates for women and workers have named as one of the strongest barriers to justice for harassment victims: the "severe or pervasive" standard.

The standard, which the state imported from a U.S. Supreme Court reading of Title VII of the Civil Rights Act, holds that unwanted advances or other forms of workplace misconduct don't constitute a hostile work environment unless they are severe or pervasive enough "to alter the conditions of [the victim's] employment and create an abusive working environment."

"That is, depending on the judge, depending on the case, a very high standard," said Jeanne Christensen, an attorney at Manhattan employment firm Wigdor LLP who represents plaintiffs in discrimination cases.

The new bill nixes that standard, instead providing employers a defense that lets them off the hook if they show the alleged harassment comprises only "petty slights or trivial inconveniences." Christensen described the provision as a "game changer," and it's inspiring similarly strong language from her opposition.

Keith Gutstein, a Long Island-based attorney who co-heads the employment practice at management-side Kaufman Dolowich Voluck LLP, called the change "huge." Gutstein said he routinely argues that harassment allegations against his clients aren't true, and if they are, that they weren't severe or pervasive. If that standard is a 7 on a scale of 1 to 10 representing its burden on harassment plaintiffs, the new rule is a 3, he said.

"It's a lot less for the employee to have to prove," he said.

'No Complaint' Doesn't Mean 'No Case'

The new bill also neuters the so-called Faragher-Ellerth defense, and while it's not quite the game changer the new standard is, this facet of the plan will be a boon to many sexual harassment plaintiffs.