FALL 2014

TAKEAWAYS

LEGAL EMPLOYMENT INFORMATION YOU CAN APPLY TO YOUR BUSINESS

TAKEAWAYS provides highlights of the most significant New York, New Jersey and Connecticut legal developments from the past quarter, together with action items for your business. These include new state laws in NY, NJ and CT, federal Executive Orders and new EEOC pregnancy guidance, as well as the latest U.S. Supreme Court and state court decisions.

Levy Employment Law, LLC helps businesses and individuals identify and resolve workplace issues* before *they result in litigation.

We leverage HR best practices to mitigate risk for employers by:

- *designing and building Human Resources policies with supporting systems,*
- *training HR staff, line managers and employees,*
- *troubleshooting workplace concerns, and*
- *defending charges filed with the EEOC and state and local administrative agencies.*

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NEW EMPLOYMENT LAWS IMPACT EMPLOYERS THROUGHOUT TRI-STATE

New Jersey Regulates Criminal History Inquiries

New Jersey has adopted a "ban the box" law, which will prohibit employers with 15 or more employees from inquiring about an applicant's criminal record on the employment application or at any time during the initial employment application process. The New Jersey Opportunity to Compete Act, which takes effect March 1, 2015, requires that an employer base its employment decisions on an applicant's qualifications, without regard to criminal history. To achieve this, the law mandates that an employer complete interviews and identify the applicant as its top candidate for the open position before it is permitted to inquire about the applicant's criminal history ….*(see pg. 3)*

New York State Amends Human Rights Law to Protect Unpaid Interns, Medical Users of Marijuana

Tracking the Department of Labor's criteria for defining an unpaid internship, New York has added a new section to its Human Rights law that prohibits employers from discriminating or retaliating against, or harassing, an unpaid intern based on any characteristic protected under New York law. The state law follows a similar amendment to New York City's Human Rights Law, and is intended to assure that individuals providing services in the workplace, regardless of their compensation, are protected against unlawful harassment, discrimination and retaliation.

Separately, the state recently amended the Human Rights Law to provide that patients certified to use medical marijuana should be considered to have a disability, and thereby fall within the law's protections against employment discrimination, harassment and retaliation….*(see pg. 3)*

Connecticut Amends Paid Sick Leave Law

Reaffirming its commitment to paid sick leave, Connecticut recently amended some of the eligibility provisions of the Connecticut Paid Sick Leave law, which take effect January 1, 2015….*(see pg. 3)*

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LIFE'S LESSONS*

Real Issues…Reconstituted Facts

By Tracey I. Levy

With year-end on the horizon, businesses closely assess performance relative to their financial objectives. Workforce restructurings and staff reductions may be a knock-down effect of such assessments, to enable a business to maximize efficiencies and reduce costs. Assume ABC Co. is undergoing just such an assessment.

Bernice, the Head of Sales, plans to consolidate her teams by eliminating all district sales manager roles and designating up to three sales supervisors in each region, who will perform some local management functions in addition to their regular sales duties. Bernice's plan will impact 10 employees, in six different states.

Lucas, the Head of Production, plans to cut 15 junior staff roles by automating and consolidating functions. In selecting among the employees whose functions are not directly impacted by automation, Lucas is considering performance, cross-training, attitude, flexibility in scheduling/overtime, and special skills.

Bernice and Lucas have come to HR with their respective workforce reduction plans, and asked whether they can move forward with the terminations. Before giving them the green light, much needs to be addressed from a Human Resources and employment law perspective.

Analyze the Selections Relative to the Workforce

Consideration must be given to the demographic composition of those selected, relative to the remaining employees. Are employees of a particular sex, race, ethnicity or age group being impacted disproportionately, and is there adequate business justification for each individual selected? This analysis should be conducted both for the employees being terminated and for those being selected for the new sales supervisor roles. For example, by considering flexibility, is Lucas adversely impacting working moms? Have all the production employees had the same opportunity for cross-training, or was it limited, such that a disproportionate number of older employees are being impacted? Are the sales supervisor roles truly distinct from the district sales manager roles? What is the age distribution between those in both roles?

Consider Timing and Communication

Assuming the selections are justified, Lucas and Bernice should consult regarding timing – will the termination dates coincide, or be staggered? How will the decisions be communicated – to those impacted and to the remaining workforce, both locally and throughout the regions? Are in-person communications possible? Will employees be permitted to remain on premises and/or retain access to the company's systems after they have been notified of their termination? Also, verify applicable state law regarding final paychecks, as these too need to be coordinated (i.e., Connecticut requires the next business day, while New York requires the regular payday for the last pay period worked.)

Prepare Documentation

Finally, HR and the management team should compile relevant documents for the impacted employees. These may include severance agreements, disclosures for those age 40 or older to comply with the Older Workers Benefit Protection Act, special state notices (such as the Connecticut unemployment notice), COBRA notices, and perhaps a memo on the transition off company benefits, such as flexible spending accounts, life insurance programs, and outstanding claims for travel and expense reimbursement. In addition, it is helpful to have a script and some guidelines for the managers delivering the message so that they are prepared and consistent in their communications, and a checklist of company property to be collected from the employees. Careful planning can make all the difference in how news of a RIF is received.

** In my years of legal practice, there are certain recurring issues that cross a range of industries and circumstances. This column presents a hypothetical factual situation as a vehicle to substantively review these recurring legal and employee relations issues.*

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REVIEW HIRING PROCESS TO COMPLY WITH NJ BAN THE BOX LAW

New Jersey employers may need to revise their employment applications and job postings, as the new Opportunity to Compete Act prohibits preliminary inquiries about an applicant's criminal record, such as a check box inquiry about criminal history on the employment application. The law makes an exception only for those positions for which federal or state law precludes hiring individuals with criminal records.

Managers and others who interview job applicants must also be trained not to inquire about an applicant's criminal history before the applicant has been identified as the top choice for the position. If, at that juncture, the applicant discloses a criminal record, the employer must consider the nature of the offense, how long ago it occurred, whether there is evidence that the criminal record is inaccurate and evidence of rehabilitation, all relative to the duties and setting of the job at issue. The employer is expected to make a good faith effort to discuss with the applicant any concerns it has about the criminal history and consider information provided by the applicant.

In addition to these general guidelines, the law specifically proscribes employers from considering:

- Arrests that did not result in a conviction, unless the charge is currently pending;
- Expunged or erased records, except where federal or state law expressly requires that they be considered;
- Disorderly person convictions (or their out-of-state penal code equivalent) from more than five years ago, absent a recent criminal conviction; or
- 1st through 4th degree convictions for any crime that occurred more than 10 years ago, absent a recent criminal conviction.

Notwithstanding these broad exclusions, the law permits employers to consider older convictions for certain types of crimes to individuals and property. These include murder, attempted murder, kidnapping, sex offenses, possession of weapons while committing certain crimes, human trafficking, terrorism, aggravated assault, robbery, arson or attempted arson, burglary and theft.

As some reassurance to employers, the act provides that they cannot be held liable for negligent hiring or negligent retention based on an applicant's criminal record unless the employer's action constitutes gross negligence.

Penalties for violating the act start at $1,000, and rise to $10,000 for the third and each subsequent violation.

NY Medical Marijuana Law Balances Employee Protections, Workplace Concerns

While the new Medical Use of Marijuana Law prohibits an employer from taking any disciplinary action against an employee solely based on his/her certified medical use or manufacture of marijuana, that prohibition is qualified in three important respects:

- Employers may continue to maintain and enforce policies prohibiting employees from performing their duties while impaired by a controlled substance;
- Employers need not take any action that would violate federal law or cause them to lose a federal contract or funding (such as by complying with the Drug Free Workplace Act); and
- Employees' possession of medical marijuana is unlawful (and therefore unprotected) if it is smoked, consumed, vaporized or grown in a public place.

Eligibility Thresholds Modified Under CT Paid Sick Leave Law

Employers who were marginally at the 50-employee threshold for the Connecticut Paid Sick Leave law should note the recent amendments, which provide that satisfaction of the 50-employee threshold is to be determined based on the employer's payroll as of October 1 of each year. To preclude gerrymandering, the law prohibits employers from terminating, dismissing or transferring employees solely for purposes of avoiding triggering the 50-employee threshold.

Other amendments to the law grant employers discretion to delineate any 365-day period for purposes of calculating accruals and usage; previously such calculations were based on a calendar year. Finally, the amendments revise the individual eligibility threshold to require that employees cannot use accrued sick leave unless they worked at least ten hours in the most recently completed quarter.

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EEOC GUIDANCE BROADENS OBLIGATION TO ACCOMMODATE PREGNANT EMPLOYEES

The EEOC recently issued its first updated Guidance on Pregnancy Discrimination in more than 30 years. The Guidance details the EEOC's position with regard to employment actions that violate Title VII. Most notably, the EEOC stated that individuals affected by pregnancy, childbirth or related medical conditions must be treated the same for all employment-related purposes as non-pregnant employees who are similarly impacted in their ability or inability to work. This means, the EEOC explained, that pregnant employees should receive the same types of accommodations, for example modified tasks, alternative assignments, or leave, as an employer accords to disabled employees who have requested a reasonable accommodation. Pregnant employees are not automatically entitled to these accommodations, but rather may be required to provide medical certification of the need for accommodation to the same extent as disabled employees, and their requests may be denied if they would pose an undue hardship.

Pregnancy protection is not limited to employees who are currently pregnant or recovering from childbirth. Women who are attempting to become pregnant, those recently recovered from childbirth, and nursing mothers may also be entitled to accommodation, says the EEOC.

For New York City employers, the EEOC's Guidance is consistent with recent amendments to the City Human Rights law. But elsewhere, the Guidance goes well beyond the federal statutory language and any prior judicial interpretation of that law. The U.S. Supreme Court will weigh in this year on whether employers have an obligation to accommodate pregnant employees whose disabling conditions are not so substantial as to qualify them for protection under the Americans with Disabilities Act, as it has accepted for review the case *of Young v. UPS*, in which that question is squarely presented.

EXECUTIVE ORDER EXPANDS DISCRIMINATION PROTECTIONS

Impacts Federal Contractors

Sexual orientation and gender identity were added to the list of characteristics protected from discrimination by government contractors, as a result of an Executive Order issued by President Obama. The Executive Order folds these characteristics into a long-standing order that prohibits federal contractors from discriminating based on race, color, sex, religion or national origin. While the Executive Order had immediate effect as of July 21, 2014, the Department of Labor has been charged with issuing regulations to implement the order by October 19, 2014.

LARGE FEDERAL CONTRACTORS BEWARE OF UNPRECEDENTED LABOR LAW REPORTING REQUIREMENTS

Although not fully effective until 2016, large federal contractors and subcontractors (with contracts exceeding $500,000) should begin preparing to comply with the Fair Pay and Safe Workplaces Executive Order. The Order will require disclosing, during the procurement process and periodically thereafter, any federal and state labor law violations found against bidders during the prior three years, whether derived from an administrative agency, arbitration or civil court determination. Contract awards will take into account serious, repeated, willful or pervasive violations of the applicable labor laws, including wage and hour, safety and health, collective bargaining, family and medical leave, and anti-discrimination laws. The Executive Order has two other prongs:

- Required disclosures each pay period regarding hours worked and deductions; and a
- Ban on mandatory arbitration clauses for Title VII, sexual harassment and assault claims in new employment agreements for employers with federal contracts valued at $1 million or more.

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COURT WATCH

U.S. Supreme Court Recognizes a Corporate Right to Free Exercise of Religion, Derived from Religious Beliefs of Corporate Owners

In *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751, the Supreme Court held that closely-held for-profit corporations could assert free exercise rights to the same extent as natural "persons". The Court therefore recognized a limited religious exemption to the Affordable Care Act for such corporations, holding that they could not be compelled to provide their female employees with no-cost access to contraceptive drugs or devices where doing so would contravene the religious beliefs of the corporate owners. The true import of *Burwell* lies in its recognition of factual circumstances that permitted an employer to assert their personal religious beliefs through a corporate form, and legal commentators are actively debating the long-term implications of such a precedent.

Supreme Court Decision Invalidating NLRB Appointments Leaves Many Recent Precedents in Flux

In *NLRB v. Noel Canning*, 134 S. Ct. 2550, the Supreme Court invalidated President Obama's January 4, 2012 recess appointment of three individuals to the National Labor Relations Board because the appointments were made during a brief three-day period between Senate sessions, not a true "recess", and they were to fill vacancies that had arisen while the Senate was in session. The Court's holding was significant in that it thereby invalidated hundreds of reported and unreported decisions issued by the NLRB between January 4, 2012 and August 4, 2013 because the Board lacked the quorum necessary to issue those decisions.

Among the multitude of decisions impacted by the *Noel Canning* decision are several cases in which the Board extended its reach into the non-unionized workplace with regard to employee handbook provisions and social media activity. It is expected that the Board ultimately will reaffirm its prior decisions in many of these cases, but that process will take time and is not necessarily a certainty.

New Jersey Appellate Court Upholds Contractual Six-Month Limitations Period Applied to State Law Discrimination Claim

A provision in a job application that set a six-month limitation period for any employment claim or suit the applicant had against the employer was upheld by the New Jersey Appellate Division in *Rodriguez v. Raymours Furniture Co., Inc.* (June 19, 2014). The court concluded that the clause shortening the limitation period, which was prominently printed in bold-faced, capital letters, was neither procedurally nor substantively unconscionable. The court declined to adopt a judicial ban on shortening limitation periods for employment law claims. Notably, though, the court's decision solely concerned a state law claim. The court recognized that federal courts have rejected similar attempts to shorten to six months the limitations period for federal employment law claims.

PROMINENT VETOES FROM LAST LEGISLATIVE SESSION

CT: Pocket veto of bill aimed at preventing discrimination of unemployed individuals in employment advertisements.

NJ: Veto of bill that would have prohibited employment discrimination based on applicant's unemployment status.

NY: Pocket veto of bill to repeal annual notice requirements and increase penalties under the Wage Theft Prevention Act.

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