FALL 2015

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 laws, court cases and administrative decisions on wage issues, discrimination protections, limits on criminal history checks and new federal agency pronouncements.

Levy Employment Law, LLC helps businesses 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 EEEOC and state and local administrative agencies.*

Table of Contents

NEW LAWS TARGET PREHIRE PROCESS, ENHANCE WAGE LAW PROTECTIONS

New York City Prohibits Criminal History Inquiries

New York City has now adopted its own version of a ban-the-box law, the Fair Chance Act, which takes effective October 27, 2015. The new law is broader than most in that it will preclude employers from inquiring about criminal history of job applicants at any time prior to extending them a job offer....*(see pg. 3)*

Connecticut Enhances Wage Law Protections

Two new Connecticut laws, one protecting employees' inquiries into and discussions of their colleagues' wages, and the other doubling the damages available for most violations of the state's wage and hour laws, collectively expand employees' rights and protections with regard to wage law violations....*(see pg. 3)*

Jersey City Penalizes Employers for Wage Nonpayment

Effective October 1, 2015, Jersey City employers found guilty, liable or responsible for violating federal, state or local wage laws will face nonissuance or nonrenewal of their license to do business in the city unless they provide proof that they have cured their wage law violation(s) within 90 days of the final judicial or administrative determination. To assure enforcement, the law requires applicants, as part of the licensing process, to certify any wage law violations found against them in the preceding 24 months. The law also creates a process for independent annual review of state records to identify non-compliant employers.

EEOC Recognizes Sexual Orientation as Protected by Title VII

This past July the EEOC held that an employment decision based on sexual orientation is "inherently a sex-based consideration" and thereby falls within the scope of the Title VII prohibition against sex discrimination. While presented matter-of-factly, this is a substantial expansion of Title VII and literally reads a new protected class into the definition of "sex".

LEVY EMPLOYMENT LAW, LLC

Legal and Employee Relations Consulting Services

411 Theodore Fremd Avenue, Suite 206 South, Rye, NY 10580

Tel: 914-338-8023 Fax: 914-637-1909

www.levyemploymentlaw.com; info@levyemploymentlaw.com

LIFE'S LESSONS*

Real Issues…Reconstituted Facts

By Tracey I. Levy

We've covered the challenges of managing Lucy, the top performing quality control specialist who suddenly needed time off for surgery, and how to handle her request for leave and possible need for ongoing treatment as a reasonable accommodation. But often it isn't the top-performing Lucys in the office that present a challenge for employers. Medical issues can be a setback for anyone, and employers are usually understanding about providing necessary time off and workplace flexibility to the super stars who they know will work their hardest, despite their medical limitations.

Accommodation of the Underperforming Employee

The greater challenge under federal, state and local laws prohibiting disability discrimination is whether and how to handle the request for reasonable accommodation made by a substandard performer. Often these accommodation requests seem suspect: the employee has made a major blunder and the company was in the process of writing it up, the employee just received negative performance feedback, or the employee is behind schedule in delivering on an important deadline. Nevertheless, the process followed by the employer must be the same. The employer can, and should, request medical documentation in support of the request (*see* Life's Lessons Summer 2015 for our discussion of what type of information to request). If adequate documentation is provided then the request must be considered.

Let's see how that plays out at ABC Co., where Pam had met with Barry a few months ago to review various performance issues, and placed him on a performance improvement plan. Pam told Barry they would meet regularly to review whether he was meeting certain milestones, and that she expected Barry to resolve his backlog of work by the end of month two. Barry seemed agitated at the meeting, and complained the volume of work was overwhelming. Barry called out sick the next day. He remained absent and was eventually approved for short-term disability.

In Barry's absence, Pam hired a temp who has been successfully handling the regular volume of work, although the temp has not been tasked with addressing the backlogged work that Barry had left behind. After a three-month leave, Barry has submitted medical documentation that he is now ready to return to work. Must she take him back when the temp does the job better?

Returning the Underperformer to Work

Legally, a three-month leave of absence likely would be considered a reasonable accommodation. Particularly as Pam was able to fill Barry's role on a temporary basis, the EEOC and the courts would likely hold that Barry is entitled to be reinstated. Pam may not like that outcome, but it is the legally prudent approach. Thus far, Pam has handled this situation appropriately by documenting Barry's performance issues and holding his position open during his leave. It will be difficult for the company to argue that reinstating Barry would present an "undue hardship" (which is the legal exception to the obligation to grant a reasonable accommodation) because the role is currently being filled by a temp. While the temp may be a better performer, prior to Barry's leave Pam was prepared to work with Barry on improving his performance. It would be advisable for her to stay the course at this juncture – reinstate Barry, hold him accountable to the performance improvement plan, and have the follow-up meetings to review his progress. If Pam does not see notable improvement at the end of that time then she is in a far more defensible position to terminate Barry's employment. The temp may very well have moved on to another job by then, but at that point Pam can freely consider other candidates for the role.

** 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.*

LEVY EMPLOYMENT LAW, LLC
Legal and Employee Relations Consulting Services
411 Theodore Fremd Avenue, Suite 206 South, Rye, NY 10580
Tel: 914-338-8023 Fax: 914-637-1909
www.levyemploymentlaw.com; info@levyemploymentlaw.com

Connecticut Expands Wage Law Protections

Protects Wage Law Discussions

The Connecticut Pay Equity and Fairness Act, which took effect July 1, 2015, protects employees who discuss their wages with other employees, or who ask other employees how much they are being paid. While the law does not require an employer or employee to affirmatively respond to a wage inquiry or discussion, it clearly does foreclose employers from prohibiting such discussions. Connecticut employers should revise any handbook policies, offer letters, or employment agreements that classify wages as confidential and preclude employees from disclosing them to others. Employers who violate the law can be sued for compensatory and punitive damages, attorney's fees and other judicial relief.

Employers cannot get around the Pay Equity and Fairness Act by requiring employees to sign a waiver or other document that denies them the right to engage in these wage discussions. Nor can they in any way penalize an employee for disclosing, discussing or inquiring about wages with other employees where the disclosures were made voluntarily.

CT Doubles Damages for Wage Law Violations

Also, effective October 1, 2015, Connecticut employers can be liable for double damages, plus costs and reasonable attorney's fees (less amounts previously paid) if they fail to pay minimum wage or overtime. The new law thereby reverses state court holdings that had greatly proscribed the circumstances under which double damages can be awarded. The available remedy for a prevailing employee is limited to actual lost wages, costs and attorney's fees (no doubling) if the employer can show it had a "good faith belief" that it had paid its wage obligations in compliance with the law.

NYC Limits Criminal History Checks

Like the City's new prohibitions on credit checks, which took effect September 3 (*see* TAKEWAYS, Summer 2015), the new Fair Chance Act contains several important exclusions. Employers should modify their employment applications to remove questions about criminal history, and should not ask about an applicant's criminal record in the pre-hire process unless the position falls within one of the following exceptions:

- where required by state or federal law,
- for police officers and certain public officials,
- for positions for which bonding is legally required,
- where the employee is required to possess security clearance,
- for non-clerical positions in which the employee will have regular access to trade secrets,
- and for positions in which the employee will have fiduciary responsibility/signatory authority over financial matters valued at $10,000 or more.

Connecticut Protects Unpaid Interns Against Discrimination

Unpaid interns are entitled to the same protections against harassment and discrimination as regular employees under a recent amendment to the Connecticut Fair Employment Practices Act, which takes effect October 1, 2015. This amendment defines an intern as an individual who performs work for the purposes of training where:

- the employer is not committed to hire the individual at the end of the training period;
- the parties agree that the individual is not entitled to wages for the work performed; and
- the work performed supplements academic training to enhance employability, provides experience for the benefit of the individual, does not displace any employee of the employer, is performed under the supervision of the employer or an employee of the employer, and provides no immediate advantage to the employer providing the training and may occasionally impede the operations of the employer.

US DOL Seeks to Limit Classification of Workers as Independent Contractors

In July the U.S. Department of Labor's Wage and Hour Division issued its first Administrator's Interpretation of 2015 (Guidance) to clarify the definition of "employee" under the Fair Labor Standards Act (FLSA), and declared that most workers are employees under the FLSA.

Discussed in detail on our blog, the Guidance reviews in-depth the six factors that comprise the "economic realities test" in classifying workers, and emphasizes economic dependency on the employer as the key factor. As presented by the Guidance, the factors present a collective portrait of an independent contractor as someone who is operating a truly separate business operation, and whose livelihood is not dependent on any one employer either as a source of direct income or referral to work for others.

DOJ Comments on Service Animals

The U.S. Department of Justice recently released supplemental Guidance on the use of service animals under the Americans with Disabilities Act. As relevant to employers, the Guidance addresses the following key points:

- If the need for the service is not obvious, employers may only confirm whether the animal is required because of a disability and the task(s) the animal has been trained to perform. Employees cannot be asked for medical documentation, a special identification card or training documentation for the animal or to demonstrate the animal's ability to perform the work or task specified.
- Allergies and fear of dogs are not valid reasons for denying access or refusing service to people using service animals. Rather, allergies should be accommodated by adjusting work locations when possible.
- A person with a disability cannot be asked to remove his service animal from the premises unless it is out of control or not housebroken.

EEOC Further Updates Pregnancy Discrimination Guidance

Amending its Guidance on Pregnancy Discrimination from last summer in response to the U.S. Supreme Court's recent decision in *Young v. United Parcel Service, Inc.*, the EEOC provided clarification on what evidence it views as sufficient to support a pregnancy discrimination claim. That evidence includes biased policies or statements, close timing between when an employee discloses her pregnancy and experiences an adverse action, or circumstances that undermine the credibility of the employer's business rationale for unfavorably treating a pregnant employee, including where the employer violates or misapplies its own policy. In addition, the Guidance preserves the EEOC's earlier pronouncement that discrimination may be found where employees who are not affected by pregnancy, childbirth, or related medical conditions but are similar in their ability or inability to work are treated more favorably. It also adopts the Supreme Court standard from *Young* that discrimination may be proved by evidence of an employer policy or practice that, although not facially discriminatory, significantly burdens pregnant employees and cannot be supported by a sufficiently strong justification. The bottom line for employers remains the same – tread carefully and when in doubt seek legal counsel on how to respond to a pregnancy-related request for accommodation.

Impending Changes to US DOL White Collar Exemptions

The comment period for the US Department of Labor's proposed amendments to the white collar exemptions closed September 4, 2015. Key elements of the proposed regulations are summarized on our blog. While not yet final, employers should anticipate that the new regulations will substantially increase the annual base salary threshold to qualify for exempt status, so that many more employees will automatically be classified as non-exempt, regardless of their actual duties. Going forward, the salary thresholds also will likely be pegged to a standard benchmark to increase automatically over time.

LEVY EMPLOYMENT LAW, LLC
Legal and Employee Relations Consulting Services
411 Theodore Fremd Avenue, Suite 206 South, Rye, NY 10580
Tel: 914-338-8023 Fax: 914-637-1909
www.levyemploymentlaw.com; info@levyemploymentlaw.com

COURT WATCH

Second Circuit Court of Appeals Modifies Standard for Unpaid Internships

More employers may be able to bring on interns, without pay, as a result of the Second Circuit's recent decision in *Glatt et al. v. Fox Searchlight Pictures, Inc*. The Court adopted a new standard for determining when an intern is an employee covered by the wage laws, which focuses on whether the intern or the employer is the "primary beneficiary of the relationship." Factors to be considered include:

- the extent to which the parties understood there was no expectation of compensation;
- the extent to which the internship provides training similar to clinical, hands-on or other training in an educational environment;
- the tie between the internship and the intern's formal education program, such as through integrated coursework or the receipt of academic credit;
- the internship's alignment with the academic calendar and accommodation of the intern's academic commitments;
- the extent to which the internship is limited to the period in which it provides the intern with beneficial learning;
- the extent to which the intern's work provides significant educational benefits and complements, rather than displaces, the work of paid employees; and
- the extent to which the parties understand that there is no entitlement to a paid job at the conclusion of the internship.

As discussed in more detail on our blog, the focus is on whether there exists a sufficient educational nexus between the internship experience and the intern's academic studies. Mere receipt of academic credit still likely will not satisfy the legal standard unless the internship, on balance, is primarily of benefit to the intern (not free labor for the employer).

NJ Supreme Court Recognizes Watchdogs Can Be Protected as Whistleblowers

The New Jersey Supreme Court recently held in *Lippman v. Ethicon, Inc.* that the state's Conscientious Employee Protection Act (CEPA) protects "watchdog employees" - employees whose job it is to assure the company's compliance with applicable legal requirements. The Court declined to read into the statute a requirement that, to be protected from retaliation, a watchdog employee must be acting outside of his or her usual duties or have pursued and exhausted all internal means of achieving compliance. Rather, the Court held that the same whistleblower analysis applies to such watchdog employees as it does to any other category of employee who reports an employer's misconduct.

NLRB Reverses Long-Standing Precedent, Makes More Contractors Joint-Employers

Expressing concern that its existing standard was inconsistent with current economic circumstances and particularly the dramatic growth in contingent employment relationships, the NLRB in *Browning-Ferris Industries of California, Inc.* reversed more than 30 years of its past precedent and substantially broadened the definition of a "joint-employer" for purposes of union organizing. Under the Board's new standard, a joint-employer relationship may exist not only where a business directly controls the essential terms and conditions of employment of the contractor's staff, but even based solely on reserved authority (that was never exercised), or control exercised only indirectly, through an intermediary.

The Board held that it would look to indicia of control in such matters as wages and hours; dictating the number of workers to be supplied; controlling scheduling, seniority, and overtime; assigning work; and determining the manner and method of work performance. For purposes of collective bargaining as a joint-employer, the Board clarified that, where the contracting employer's control is limited, it will be required to bargain only with respect to such terms and conditions which it possesses the authority to control.

LEVY EMPLOYMENT LAW, LLC
Legal and Employee Relations Consulting Services
411 Theodore Fremd Avenue, Suite 206 South, Rye, NY 10580
Tel: 914-338-8023 Fax: 914-637-1909
www.levyemploymentlaw.com; info@levyemploymentlaw.com