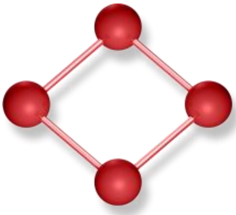
FALL 2016



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. Government agencies did not slow down this summer with a plethora of new federal regulations and guidance, plus new Connecticut and New York laws and notable court decisions.

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 EEOC and state and local administrative agencies.*

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This newsletter is provided for informational purposes only to highlight recent legal developments. It does not comprehensively discuss the subjects referenced, and it is not intended and should not be construed as legal advice or rendering a legal opinion. TAKEAWAYS may be considered attorney advertising in some jurisdictions.

FEDERAL AGENCIES ISSUE ANTICIPATED REGULATIONS/GUIDANCE ENHANCING EMPLOYEE PROTECTIONS

EEOC Updates Anti-Retaliation Guidance

The EEOC ended the summer by issuing updated Enforcement Guidance on Retaliation and Related Issues for the first time in nearly twenty years. As with other recently updated guidance, the EEOC has used the opportunity to push beyond existing caselaw and interprets the anti-retaliation provisions of federal equal employment opportunity laws to enhance employee protections...(*see pg.2)*

US DOL and FAR Implement Fair Pay and Safe Workplaces Order for Government Contractors

The U.S. Department of Labor (DOL) and the Federal Acquisition Regulatory Council (FAR Council) issued new regulations and guidance at the end of August to implement the Fair Pay and Safe Workplaces Executive Order. First announced by the Obama administration in July 2014, and summarized in Takeaways Fall 2014, this Executive Order imposes substantial reporting obligations on large federal contractors and subcontractors with regard to federal and state labor law violations. It also requires certain paycheck disclosures and bans mandatory arbitration clauses for select legal claims.

The new rules begin to take effect October 25, 2016, but initially only require disclosure and assessment of labor law compliance for prime contractors under consideration for contracts with a total value of $50 million or more. Paycheck transparency obligations take effect January 1, 2017 for all federal contractors with contracts valued at $500,000 or more, but this component of the Executive Order will not impact Connecticut and New York employers, as the DOL has determined that both states have wage statement requirements that are "substantially similar" to the Order's wage statement requirement...(*see pg.2)*

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EEOC Anti-Retaliation Guidance *(contd. from p. 1)*

The EEOC's updated guidance raises the stakes for employers, and warrants reconsideration of existing retaliation prevention measures. Retaliation protection arises when an individual either:

- Participates in an investigation, proceeding or hearing under the EEO laws or
- Opposes conduct made unlawful under the EEO laws.

In its Guidance, the EEOC adopts a broad construction of "participation" and extends it to internal complaints. For those claiming protection for having opposed conduct believed to be unlawful, the Guidance requires only that the employee communicate his or her belief that the complained of conduct is or could become harassment or discrimination in a reasonable manner. Opposition may be implicit and the employee need not use words like "harassment" or "discrimination." Further, the EEOC takes the position that protection may extend to those who raise discrimination allegations but are not actually covered by the EEO laws.

In considering the second prong of a retaliation claim, whether the individual has experienced a "materially adverse action", the EEOC provides a host of examples of conduct that might be retaliatory because it "might deter a reasonable person from engaging in protected activity". These include disparagement, false reports to government authorities, filing a civil action, threatening reassignment, closer scrutiny of work performance or attendance, removal of supervisory responsibilities, abusive verbal or physical behavior, threats related to employment authorization, terminating a union grievance process, or threatened action toward a close family member. Harassment may also be a form of retaliation, and the Guidance says this should be assessed under the standard of whether it deters protected activity, even if it is not so severe or pervasive as to amount to a hostile work environment.

Finally, while the Supreme Court recently held that a viable claim requires proof that "but for" the retaliatory motive the challenged conduct would not have occurred, the EEOC qualifies that standard, stating that it does not mean that retaliation has to be the sole cause.

The Guidance concludes with a list of "promising practices" for employers to consider implementing to minimize retaliation violations, including:

- Written policies with user-friendly examples of what to do and not to do,
- Training,
- Advice and individualized support, particularly to handle personal feelings about the allegations,
- Proactive follow-up, and
- Review of employment actions to ensure EEO Compliance.

While many employers already have written policies against retaliation, the EEOC suggests a level of detail and examples be incorporated into such policies that generally exceeds current HR practice. Other "promising practices" are consistent with or an expansion of measures commonly recommended for employers.

DOL/FAR Fair Pay and Safe Workplaces Regulations *(contd. from p. 1)*

The full effect of the new regulations will begin to be felt next spring, as the labor law compliance disclosure and assessment process will expand to prime contractors with a total contract value of $500,000 or more on April 25, 2017. Subcontractors meeting the $500,000 minimum contract value will be included beginning October 25, 2017.

Employers that already contract with the federal government on this large scale or that are considering bidding for such government contracts should consult legal counsel to understand how the new rules regarding disclosure and the federal government's assessment process may impact them.

OSHA INCREASES PENALTIES

OSHA has issued an interim final rule that increases its penalties for citations by 78 percent, effective as of August 1, 2016.

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Connecticut Restricts Physician Non-Competes

Connecticut is cracking down on non-compete agreements applicable to physicians. Under a new law, agreements executed, amended, or renewed in Connecticut subsequent to July 1, 2016 cannot impose non-compete restrictions:

- beyond one year,
- more than fifteen miles from the "primary site" where the physician practices,
- in situations where the employer terminates without cause, or
- where the employment agreement (as distinct from a partnership/ownership agreement) expires or is not renewed, unless a bona fide offer to renew on the same or similar terms was made prior to contract expiration.

To comply with the law, non-compete agreements also must be separately and individually signed by the subject physician. As discussed in our most recent HR Strategy blog posting, the new Connecticut law is consistent with a recent trend among government bodies to place parameters that limit the scope and use of non-compete agreements.

Connecticut Bans the Box with Amended Fair Chance Act

Effective January 1, 2017, all employers in Connecticut are barred from asking employees on an employment application about prior arrests, criminal charges or convictions except when inquiry is required by state or federal law or the position requires posting a bond.

NYS DOL Weighs in on Direct Deposit and Payroll Debit Cards

The New York State Department of Labor adopted final regulations effective March 7, 2017 that permit employers to pay employees by direct deposit or payroll debit card, but only if they provide advance written notice, which can be electronic, that includes:

- a plain language description of all of the employee's options for receiving wages;
- a statement that the employee is not required to accept payment by payroll debit card or direct deposit;
- a statement that no fee may be charged for the alternative payment services; and
- for payroll debit cards, a list of locations where employees can access and withdraw wages at no charge within reasonable proximity of their home or work.

Employers also must secure the employee's consent to be paid by one of these alternative methods, without threats, coercion or any ultimatum. Employers using payroll debit cards must clear an additional set of hurdles regarding the timing of the initial payment, ensuring local access to ATMs, ensuring usage is without fees, and providing advance notice of changes in the terms of usage. Under no circumstances can employees be penalized for not agreeing to accept wages by direct deposit or payroll debit cards.

SEC Fining Employers Heavily for Severance Agreement Clauses

Public companies should review their severance agreements to confirm they comply with Exchange Act Rule 21F-17. In successive weeks in August 2016 the SEC announced settlements of $265,000 and $340,000 with two separate companies for provisions in their severance agreements that:

- waived an employee's right to monetary recovery related to a complaint or charge filed with a government agency, and
- failed to carve out the SEC from a requirement that the company receive notice before con-fidential information is disclosed to a third-party.

The SEC construed these clauses as prohibiting receipt of SEC whistleblower awards and discouraging employees from reporting concerns. In addition to the penalties, each company agreed to reach out to former employees who signed severance agreements dating back to 2011 and offer them the carve-outs that were fatally missing from the original agreements.

COURT WATCH

NJ Supreme Court Broadly Defines Marital Status Protection

The New Jersey Supreme Court adopted a broad construction of "marital status" discrimination *in Smith v. Melville Rescue Squad* (June 21, 2016). The court held that, under the New Jersey Law Against Discrimination, "marital status" JLAD, marital status covers those who have declared they will marry, as well as those who have separated, initiated divorce proceedings or obtained a divorce. The court therefore affirmed the reinstatement of a discrimination claim filed by an employee whose employment was terminated shortly after he disclosed to his manager that he and his wife (who worked for the same employer) were separated, could not reconcile their differences, and were getting a divorce.

Conduct by Non-Supervisory Employee Can Lead to Employer Liability for Retaliation

In *Vasquez v. Empress Ambulance Service, Inc.* (Aug. 29, 2016), the Second Circuit Court of Appeals held that an employer could be liable for the retaliatory motive and manipulative actions of a non-supervisory employee. After Vasquez had complained of sexually offensive comments and photos from a coworker, the accused discerned she was filing a complaint and manipulated his own text messages to make it appear that Vasquez was the one who had engaged in inappropriate conduct. Vasquez was then summarily terminated for sexual harassment, and denied the opportunity to share her own text message records to prove she was being framed. In these circumstances, the Court held that it was appropriate to hold the employer liable for retaliation based on the misconduct of the non-supervisory employee.

Employers cannot contractually shorten the two-year limitations period in which a New Jersey employee can file a state law claim for discrimination, as a result of a recent decision by the New Jersey Supreme Court. In *Rodriguez v. Raymours Furniture Co.* (June 15, 2016), the state's highest court held that a contractual provision that purports to shorten the limitations period contravenes the remedial purposes of the Law Against Discrimination and is therefore unenforceable.

Connecticut Supreme Court Holds Marijuana Use Not Necessarily a Terminable Offense

In *State of Connecticut v. Connecticut Employees Union Independent* (Aug. 30, 2016), the Connecticut Supreme Court concluded that it did not offend public policy for an arbitrator to have ordered disciplinary action short of termination for a 15-year maintenance employee of the University of Connecticut Health Center who was caught smoking marijuana in a secluded parking area of the health center campus while on duty. An arbitrator had ordered that, in lieu of termination, the employee should be suspended without pay for six months, and then be permitted to return to work under a last chance agreement with random drug testing required for a year following his return. While recognizing an explicit, well-defined and dominant public policy against the possession and recreational use of marijuana in the workplace, the Court concluded that this public policy permitted disciplinary action short of termination and therefore ordered enforcement of the arbitrator's award.

New NYC Laws Impact Employers

Gender-Neutral Single Occupant Bathrooms

Effective January 1, 2017, New York City employers must change their signage and ensure that all single-occupant bathroom facilities are available for use by persons of any sex as a result of a new city law.

Union Neutrality of Select Retailers

Under a July 2016 mayoral Executive Order, certain large retail or food service employers operating on the premises of large city development projects in the city are required to enter into a Labor Peace Agreement and adopt a neutral position to union organizing.