SPRING 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. This past quarter, administrative agencies have had the greatest impact, addressing joint employer status, gender classifications, paid sick leave and ban the box rules.

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.*

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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.

NYC PROTECTS CAREGIVER STATUS

Effective May 4, 2016, New York City employees will be protected against harassment or discrimination based on their "caregiver status" as a result of the most recent amendment to the City Human Rights Law. The new city law protection is much broader than New York State law, and may well be the broadest such law in the country, in that it protects individuals who provide care not just for a minor, but spanning three generations of family members (from grandparents to grandchildren), blood relatives, in-laws, and any other person who resides in the caregiver's home.

Unlike the state law, the city law also does not affirmatively relieve employers of an obligation to accommodate an employee's caregiver status. Employees may therefore assert that the law imposes an obligation to provide accommodations such as flexible work arrangements for caregivers if they do not pose an undue hardship.

NEW BRUNSWICK LATEST TO MANDATE PAID SICK LEAVE

Employees in New Brunswick will be entitled to paid sick leave effective May 26, 2016 under the most recent such New Jersey ordinance. The new law resembles that of the other municipalities, except it applies to employers with as few as five full-time employees and the accrual rate is slower, calculated as one hour for every 35 hours worked.

Watch for Upcoming EEOC Regs on Equal Pay Data

The public has until April 1, 2016 to comment on a new EEOC proposal to require employers who file annual EEO-1 reports (those with more than 100 employees and federal contractors) to include aggregate pay data. For each EEO category, the EEOC is proposing that employers would tabulate and report the number of employees whose W-2 earnings for the prior 12 months fell within each of 12 pay bands.

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LIFE'S LESSONS*

Real Issues…Reconstituted Facts

By Tracey I. Levy

I regularly interact with HR professionals, be they clients, attendees at various presentations I have given, or participants in the Cornell University ILR School's Human Capital Development program, with which I have been involved as an adjunct instructor since last year. A consistent theme in our discussions has concerned best HR practice with regard to employment policies and workplace training. My first response is that updating of both is necessary on a frequent basis now that employment laws are so hyper-localized and thereby evolving more rapidly than in the past.

Consider ABC Co., which is based in New York City but has employees in Jersey City, Houston and the suburbs of Los Angeles. ABC Co.'s employee handbook was most recently updated in 2013, and the company has addressed more recent legal changes at the state and local levels by sending out all government-mandated notices and posting them as an addendum to its handbook. ABC Co. also conducted harassment and discrimination prevention training for all its employees in 2014 and is on a three-year cycle to repeat the training in 2017, although supervisors in California receive more frequent training through a local vendor to comply with that state's training requirements.

While better than nothing, ABC Co.'s approach presents significant issues. Most notably, New York City law has changed by adding several new protected characteristics; New York City, Jersey City and the state of California all adopted paid sick leave laws; and both New York City and Jersey City have new restrictions on criminal history checks of job applicants and employees. These legal changes often require updating employee handbook policies. For example, to comply with the New York City paid sick leave law employers must distribute and post a sick leave policy that meets the law's requirements. That policy obligation is in addition to distributing the city's form Notice of Employee Rights.

An additional challenge for ABC Co. is determining how to harmonize its policies across the various geographic locations. Does it want to maintain a uniform paid sick leave policy, applicable to all employees? Or is the New York City/Jersey City accrual formula of one hour for every 30 worked, applicable even to part-time and temporary employees, more than they want to provide in locations like Houston, which has no paid sick leave law? California has laws providing pregnancy disability leave, leave for school activities, and similar employee leave entitlements that have no corollary in Houston or the metro-New York area. Does ABC Co. nevertheless want to extend those benefits across the country?

On the issue of training, retaliation claims have increased considerably in recent years and may warrant renewed emphasis on retaliation prevention training. Recent laws restricting inquiries about criminal and credit history may similarly warrant refresher training. Managers also may benefit from guidance on how to manage leaves of absence and workplace accommodations, especially for pregnancy-related issues where the law has become far more employee-protective over the past two years. Keeping policies current and training managers on how the employment laws apply in actual workplace situations is key to mitigating risk for the company and enhancing morale.

** 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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US DOL Broadly Defines Joint-Employers

The U.S. Department of Labor is closely examining employers' business relationships with the non-employees who provide labor and services for them. Under the most recent Administrator's Interpretation issued by the DOL Wage and Hour Division in late January (the "Guidance"), the DOL will construe these relationships as joint-employment if the "economic realities" of the parties' relationship reflect that the worker ultimately is economically dependent on the business for which he/she is performing services.

Adoption of the economic realities test in this context is an expansion from the applicable regulations, as is the DOL's announcement that it will apply a seven-factor test, borrowed from a law protecting farm workers, to determine joint-employer status under the Fair Labor Standards Act. That test looks at:

- The extent of direction, control or supervision over the work performed;
- Control over employment conditions such as hiring, firing, and compensation;
- The permanency or duration of the relationship;
- Whether the work is repetitive and rote, relatively unskilled, and/or requires little or no training;
- Whether the work is integral to the business;
- If the work is performed on premises; and
- Who handles administrative functions for the employee or provides tools and materials required for the work.

The greater the extent of the contracting business's involvement in these factors, the more likely it is that the DOL will deem the business a joint-employer, fully accountable for any violations of the wage and hour laws.

Although the courts have not yet interpreted joint-employer relationships as broadly as the DOL Guidance, businesses should revisit their contractual relationships through the lens of the DOL's Guidance to assess their potential exposure to joint-employer liability. The existence of such contracts will not, of their own accord, preclude a finding of joint-employer status.

NYC Updates Sick Leave Rules

The NYC Department of Consumer Affairs has issued updated regulations on the Paid Sick Leave Law. Per these regulations, employers should ensure that their sick leave policies:

- define the 12-month period for the "calendar year";
- Set a minimum daily increment of no more than four hours;
- explain all requirements for notice of the need to take leave;
- explain all requirements for written documentation of the need for leave (for absences in excess of three consecutive days);
- Address any discipline for misuse of sick leave; and
- Address whether the time is frontloaded or accrued over the year.

Employers also have two distribution requirements -- first the sick leave policy, which must be posted; and second the city's Notice of Employee Rights, which must be individually provided to all new hires.

New Jersey Interprets Ban the Box Law

Employers can continue to use multi-state employment applications and comply with New Jersey's ban the box law, according to regulations recently issued by the state Department of Labor and Workforce Development, provided they incorporate a disclaimer for applicants who will work in New Jersey that they need not answer any criminal history question contained on the application.

The regulations give employers further flexibility by clarifying that a criminal check can be conducted after any "live, direct contact" with the applicant, including a screening call or video conference. Unlike New York City's new law, a "conditional offer" is not a prerequisite to criminal history inquiries for New Jersey applicants. The scope of the law is broad, however, in that it applies to employers with at least 15 employees, regardless of how many actually work in New Jersey.

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NYC Employers Must Reconsider Dress Codes, Bathroom Usage and Other Gender-Specific Policies

New York City employers must eliminate gender distinctions in their employment policies and business practices to comply with new Legal Enforcement Guidance issued by the NYC Commission on Human Rights. The Guidance explains that employees who are treated "less well than others" on account of the fact that the gender with which they identity or by which they express themselves differs from their anatomical sex at birth may have a viable claim of discrimination under the NYC Human Rights Law.

While any gender-based distinctions are suspect, some of the specific examples of unlawful treatment identified in the Guidance may not be commonly recognized as discriminatory, including:

- Intentional or repeated refusal to use a transgender employee's preferred name, pronoun or title;
- Denying individuals access to the single-sex facility or program that is consistent with their identified or expressed gender where that gender differs from other sex identifiers such as identification, anatomy or appearance;
- Forcing transgender individuals to use a single-occupancy restroom; and
- Enforcing dress codes, uniforms, or grooming or appearance standards that impose different requirements for individuals based on sex or gender.

Employers should create or update their workplace policies to comply with the NYCCHR directive, and also train their employees about the law's requirements. Noncompliance with the NYCHRL can result in hefty (six-figure) penalties, plus the usual host of damages, legal fees and other remedies – further incentivizing organizations to become compliant.

Bathroom Signs Needed
To comply with the NYC Human Rights Law, employers must post a sign in all single-sex facilities that states:
Under New York City Law, all individuals have the right to use the single-sex facility consistent with their gender identity or expression.

COURT WATCH

NLRB Strikes No-Recording Policy

Further broadening its attack on employers' workplace conduct policies in the context of a non-union workplace, the NLRB held in *Whole Foods Market, Inc. and United Food and Commercial Workers* that employee handbook policies precluding surreptitious recording of conversations, phone calls, images or company meetings were unlawful. The company explained the policies were intended to encourage the free exchange of ideas and build trust. The Board, however, held the policies could be read as prohibiting employees from collectively engaging in activity for their mutual aid and protection, which is legally protected.

Second Circuit Holds Employee Misuse of Computer Access Not Unlawful

Employers may wish to enhance access controls for sensitive company data in response to the Second Circuit decision in *United States v. Valle*. One of the issues in that criminal case related to an employee accessing his employer's computer system to obtain information for non-business purposes. The court held that an individual can only be criminally liable under the federal Consumer Fraud and Abuse Act when he/she accesses a computer to obtain information that he/she is not entitled to obtain, and not when information is lawfully accessed but for improper purposes. The court expressed concern that a broader interpretation could criminalize such relatively innocuous behavior as an employee using his/her employer's computer system to check Facebook during the workday.

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