



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 quarter's highlights include paid sick leave, minimum wage increases, and an in-depth focus on legal requirements for background checks.

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.

PAID SICK LEAVE LAWS PROLIFERATE IN NEW JERSEY

Building on a movement that began in Jersey City and Newark, presently eight major cities in New Jersey have adopted paid sick leave laws, including East Orange, Irvington, Montclair, Passaic, Paterson and Trenton. A state-wide paid sick leave bill has been advancing through the legislature.

The six new paid sick leave laws will take effect on varying dates in the first quarter of 2015 (120 days after each city law was passed). Fortunately for employers, as these paid leave laws become more popular they also are becoming more consistent in their mandates.... (see pg. 3)

PREPARE FOR MINIMUM WAGE INCREASES THROUGHOUT TRI-STATE AREA

Minimum wage rates are rising throughout the tri-state area for 2015. New York's minimum wage increases to \$8.75 per hour effective December 31, 2014. As of January 1, 2015, Connecticut's minimum wage will increase to \$9.15 per hour and New Jersey's minimum wage will increase to \$8.38 per hour.

In addition, the widely-publicized increase in the minimum wage rate for federal contractors takes effect for federal contracts awarded on or after January 1, 2015 - rising to \$10.10 per hour.

Not to be Overlooked: NYC Living Wage Amendment

Employers receiving \$1 million or more in financial assistance from New York City, including certain tenants and lessees of subsidized projects, should note the recent increase in the city "living wage" to \$13.13 per hour (for employees who do not receive health benefits) and \$11.50 per hour (for employees with health benefits).

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LIFE'S LESSONS*

Real Issues...Reconstituted Facts

By Tracey I. Levy

Tis the season for holiday parties, and the headaches that result when staff fail to conduct themselves appropriately in a less formal setting. Advance planning can help minimize these situations, including a friendly reminder from senior management about expected behavior, arrangement for car service on standby to transport those who are too drunk to drive, and possibly even designating certain company representatives to be attentive at the party to inappropriate behaviors. But what happens when the official party ends? Is the company then relieved of further responsibility for the actions of its employees? Unfortunately, that is not always the case....

Antics After the ABC Co. Holiday Party

More than 200 people attended ABC Co.'s annual party. Richard, a mid-level manager, and two of his peers were still revved up when the official party ended at 11 pm. They invited some of the junior staff on their teams to meet them at Blizzard, a bar located a few blocks from the company party. The junior staff spread the word to some of their peers, and by midnight, 25 ABC Co. employees had gathered at Blizzard. Richard bought a round of drinks for the ABC Co. employees who were standing around the bar, and then joined a group of the junior staff in the corner of the room.

Shaneequa, a new employee on Richard's team, was dancing with two others. Richard stepped in and joined her, dancing quite closely. They continued in that fashion, sometimes touching, for several songs before another junior staffer, Tom, pulled Shaneequa away. Later that night, Shaneequa approached Richard to say she was leaving. Richard leaned close and kissed her goodbye.

The Complaint to HR

Two days later, Shaneequa complained to HR that Richard had made unwanted sexual advances toward her at Blizzard, including grabbing and kissing her, and that she had felt trapped in his grasp until Tom stepped in to separate them. During the course of HR's investigation, one manager, a close friend of Richard's who had remained seated at the bar that night, said it appeared that Shaneequa was a willing participant in the dancing and other physical interactions with Richard. Tom and several of the other junior staff had a different perspective. They supported Shaneequa's account

and reported that Richard had been quite intoxicated. Tom explained he had stepped in to "rescue" Shaneequa because he knew her to be modest and naive when it came to sexual interactions.

For his part, Richard acknowledged having had four or five drinks but denied he was intoxicated. Richard admitted he had danced closely with Shaneequa, but said she had been a willing participant. Richard noted that it was Shaneequa who had approached him when she was leaving - why would she do so if she found his behavior unwelcome? And why did any of this matter, since they were all out on their own time, not at a company function?

The After-Party Can Be an Extension of the Office

In this factual situation, it is likely that the gathering at Blizzard would be considered an extension of the company function. The staff had gathered there immediately following the company holiday party, at the invitation (direct or indirect) of Richard and two other managers. Richard had also bought the staff a round of drinks, which was another managerial gesture (even if the company was not picking up the tab). Given these ties, as well as the fact of Shaneequa's complaint, the behavior that occurred at Blizzard now is necessarily ABC Co.'s concern.

Perceptions Vary, But Managers Are Accountable

Based on the information HR obtained during its investigation, it is not entirely clear whether Shaneequa led Richard on. That uncertainty is quite common in these types of situations, and HR does not actually need to resolve the issue. Regardless of what Shaneequa may or may not have done, it is reasonably clear that Richard did not conduct himself in a professional manner when he was at Blizzard. As the manager, he should have known better than to have made any advances toward Shaneequa. Further, at this point, it is clear that Shaneequa is uncomfortable with Richard's behavior. ABC Co. has an obligation to address Richard's conduct on two levels: to assure that he does not make further advances toward Shaneequa, and to prevent this type of incident from occurring with another ABC Co. employee in the future. ABC Co. must also take steps to ensure that neither Richard, his fellow managers, or any other ABC Co. employee retaliates against Shaneequa for making a complaint.

** 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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MANY SIMILARITIES IN WAVE OF NEW JERSEY SICK LEAVE LAWS

All of the new New Jersey paid sick leave laws share the following key provisions, as do the Jersey City, Newark, New York City and Connecticut paid sick leave laws:

Five days of leave, carryover for 12 months

The paid sick leave laws in the tri-state area all mandate accrual of 1 hour of sick leave for every 30 hours worked, up to a maximum of five days of sick leave annually. All require that employees be permitted to carry over their unused sick days for a full year, although employers can limit employees to using only 5 days in any given year.

Inclusive of part-time and temporary employees

Even short-term employees are eligible to accrue paid sick leave under these laws – a population that employment policies typically consider ineligible for any paid leave benefits.

Usage extends to family members

Sick days are no longer just for an employee who is sick or hurt. Employees covered by the paid sick leave laws must be permitted to use their days to care for family members with an illness or injury, or to seek preventive medical care, and “family” is broadly defined to include as many as three generations of legally-recognized family relationships.

Notice to employees, workplace postings are required

Employees must receive specific notice with regard to their rights under the city paid sick leave laws. In addition, the laws mandate that employers post notice of the key provisions of the law in their work locations.

FTC Advises Job Applicants on their Legal Rights

The Federal Trade Commission recently issued a new brochure on background checks, [Tips for Job Applicants and Employees](#), which educates applicants and employees of their legal rights with respect to background checks. Employers should similarly review their processes to ensure they are compliant. (See p. 4)

Effective Date of new paid sick leave laws:

East Orange – 1/7/15
Irvington – 1/8/15
Montclair – 2/4/15
Passaic – 12/31/14
Paterson – 1/8/14
Trenton – 2/4/15

NYC DCA Issues New Sick Leave Rules

Under new rules issued by the NYC Department of Consumer Affairs, employers may need to revise their sick leave policies if they have specific expectations concerning any of the following:

- Minimum daily increment for use of sick days;
- Procedure for giving notice if using a sick day;
- Medical documentation requirement, including consequences of noncompliance;
- Procedures for verifying appropriate usage; or
- Payout policy for unused leave.

Employer expectations on these subjects, if relevant, must be expressly addressed in the written sick leave policy.

Connecticut Broadens Financial Institutions' Exemption from Credit Check Prohibition

For employers in the financial services industry, Connecticut slightly loosened the prohibition on performing credit checks on employees, effective October 1, 2014. Connecticut employers are generally prohibited from conducting credit checks on employees except in limited circumstances, such as where credit history is required by law or information in the report is substantially related to the employee's current or potential job.

The Connecticut law also provides a blanket exemption for “financial institutions”. As a result of a recent amendment to the law, the definition of financial institution has been expanded to include mortgage brokers, mortgage correspondent lenders, and mortgage servicing companies.

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IN-DEPTH ANALYSIS: Conducting a Lawful Background Check

Background checks can provide valuable insights for employers, but they also present a liability risk if conducted improperly.

Rule Number 1: Obtain Consent Even When Using On-Line Services

Under the federal Fair Credit Reporting Act (FCRA), employers cannot retain a third-party vendor, including an on-line service that has consolidated public data, to conduct a background check on an applicant or employee without advance consent.

Rule Number 2: Provide the Correct Notice

While background check vendors often offer a standard notice and authorization form for background checks, these forms may not be FCRA-compliant. Unique to the employment context, FCRA requires that the notice consist solely of a clear and conspicuous statement:

- that a consumer report may be obtained for employment purposes,
- if applicable, that an investigative consumer report (a more detailed type of report that includes information on character, reputation, personal characteristics and mode of living) may be obtained, and
- that the applicant has the right to request additional disclosures regarding the nature and scope of the investigation.

The notice may include a signature line at the end, for the applicant to authorize the background check. Additional language, such as a release of liability, requests for information that the vendor may need to verify the applicant's identity, or a certification that the applicant has provided truthful information, must be presented in a document that is separate from the FCRA notice.

Rule Number 3: Only Search for Relevant Information

Many states, including Connecticut, New Jersey and New

York, limit employers' consideration of an applicants' criminal history (for New Jersey's new law, see [Takeaways Fall 2014](#)). New York also affirmatively requires employers to provide each job applicant with a copy of Article 23-A of the Corrections Law, which pertains to the employment rights of individuals with a criminal record.

In addition to criminal history, Connecticut restricts credit checks on job applicants except in certain industries and where the information is substantially related to the job, as reported on page 3 of this issue.

Beyond these specific proscriptions, the EEOC and the Federal Trade Commission have each issued guidance that consideration of applicants' arrest and conviction records can have a disparate impact on certain minority groups and thereby constitute a form of discrimination.

Rule Number 4: Provide Advance Notice Before Acting on Adverse Information

Any employer that reconsiders its hiring decision based on the adverse information discovered in a background check *must* provide the applicant with advance notice of the contemplated adverse action, together with a copy of the report and a Summary of Rights under FCRA. The applicant must be provided a reasonable time (generally at least five days) to respond to the adverse information, although the employer need not alter its decision.

Rule Number 5: Give Detailed Notice of the Action Taken

Once the employer takes adverse action based on a background check, it must provide a second notice to the applicant that includes:

- details on the credit score (if obtained),
- contact information for the third-party vendor,
- a statement that the vendor was not the decision-maker and cannot explain why the adverse action was taken,
- notice of the right to obtain a free copy of the report within the subsequent 60 days, and
- notice of the right to dispute with the vendor the accuracy or completeness of any information in the consumer report that it furnished.

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