WINTER 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 York State enhancing gender protection, the Second Circuit ruling on whistleblower protection and Facebook likes, further limits on pay secrecy and more paid sick leave.

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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NEW YORK STATE EXPANDS GENDER-RELATED EMPLOYEE PROTECTIONS FOR THE NEW YEAR

Announcing an objective of making New York "a model of equality for women," in late October Governor Cuomo signed into law a plethora of bills protecting women, particularly with regard to their rights in the workplace. These include enhanced protections against sexual harassment and sex discrimination, reasonable accommodation of pregnancy-related conditions, recognition of familial status as a protected characteristic, pay equity and pay transparency, and greater monetary remedies for unlawful conduct. The new laws all take effect January 19, 2016....*(see pgs. 3-4)*

OFCCP ISSUES PAY SECRECY RULES FOR GOVERNMENT CONTRACTORS

Federal contractors need to modify their handbooks and obtain new workplace posters to comply with the OFCCP's regulations prohibiting discrimination against employees who ask about, disclose or discuss compensation information. The anti-pay secrecy regulations apply to all federal contractors with contracts entered into or modified on or after January 11, 2016 valued in excess of $10,000. The rules permit discipline of employees who obtain compensation data as an essential function of their job and disclose that information other than in response to a complaint, investigation or legal requirement.

Proposed Changes to FLSA White Collar Exemptions Delayed
Explaining that it received 290,000 comments to its proposal to amend the FLSA exemptions and, among other things, potentially increase to $50,440 the minimum salary threshold for an employee's position to qualify as exempt from the overtime laws, the US DOL has announced that final regulations will not be issued before mid to late 2016. Our blog summarizes the DOL's proposal.

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LIFE'S LESSONS*

Real Issues…Reconstituted Facts

By Tracey I. Levy

Year-end often is when bonuses are collected, new budgets are prepared, and employees seek better opportunities with a new employer. While employers may value the flexibility of employment-at-will, it is a two-sided doctrine – employees are as free to leave (without notice) as employers are free to fire them (without cause). How can you protect your workplace from being a revolving door and what can you do to hold on to strong performers? Those are central concerns for ABC Co. Clara and Barton are top performers, and their manager, Jason, wants to avoid losing them.

Keep Your Team Happy

Employee engagement often is key to employee retention. Jason should be providing his staff with meaningful work, recognizing their accomplishments, and offering timely feedback. Through regular one-to-one meetings, he can maintain contact with his team to know what they are working on, gauge how well they feel it is progressing, and learn where and how they might need his support. Jason should jointly calendar his meetings – for the entire year – and set them for a duration (10-15 minutes, if longer is not truly feasible) and frequency (once per month if his schedule won't support weekly or biweekly) so that they are more likely to occur as planned.

Flexibility Can Offset Compensation

Clara and Barton should be appropriately compensated, but in tight budget cycles, non-monetary benefits such as a flexible work schedule or opportunity to work remotely at times may be of equal or greater value than additional pay. Jason must be careful, though, not to stereotype, for example by awarding a disproportionate amount of a bonus pool to Barton as a primary wage earner and then purporting to offset the differential by approving Clara (as a new mother) to work from home on Fridays. Rather, if they are both top performers, then they should be equitably recognized for that in their bonuses and flexible work arrangements might be additionally offered to both as an additional incentive.

Protect Company Assets

If engagement, compensation and flexibility are the carrots, then restrictive covenants and notice periods are the sticks to discourage employee departures or at least limit the damage such departures can cause. Restrictive covenants may be incorporated in an offer letter or in a stand-alone agreement, and include confidentiality and trade secret protections, as well as restrictions on leaving to work for a competitor, soliciting business from current or prospective clients, or poaching existing employees. Such agreements can be entered into at any time during the employment relationship. However in some states, such as Connecticut, if not included as a term of hire then the restrictive covenants must be supported by a change in employment status such as a promotion, bonus or pay increase. Other states, such as New York, accept the mere fact of continued employment as sufficient consideration for an employee's execution of such an agreement.

ABC Co. would be well-advised to consult with legal counsel regarding the terms, scope and implementation of a restrictive covenant agreement to assure that it appropriately protects the company's interests. Overly broad clauses that preclude a departing employee from pursuing alternative employment within their chosen field may not be enforceable.

Finally, notice periods would enable Jason to buy some time in the event Clara, Barton or another employee was leaving. Where tied to receipt of unused vacation payout or incentive compensation, a notice period assures Jason a window in which to possibly counter-offer and retain a valued employee, or at least better manage the transition of work and capture of institutional knowledge before the employee walks out the door.

** 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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NYS Expands Gender-Related Employee Protections

Broadens Protection Against Sexual Harassment and Sex Discrimination

Every employer in New York State – regardless of the number of employees – will be covered by the New York State Human Rights Law's prohibition of sexual harassment as a result of a recent expansion of the law. Formerly the law only applied to employers with four or more employees, and that minimum continues to apply for other types of harassment and discrimination.

The recent amendments to the Human Rights Law further provide that, in the limited context of claims of sex discrimination, an employee who successfully proves her/his claim in court may recover an award of reasonable attorney's fees. If the court dismisses an employee's sex discrimination claim, the prevailing employer or manager may also seek to collect reasonable attorney's fees, but only if the employer/manager can prove the claim was frivolous.

Requires Accommodation for Pregnancy-Related Conditions

New York employers should give due consideration to all accommodation requests from pregnant employees. Echoing last year's amendment to the New York City Human Rights Law, the New York State law will now require employers to accommodate an employee's temporary, pregnancy-related conditions to the same extent as a disability. This accommodation obligation includes medical conditions related to pregnancy or childbirth that inhibit the exercise of a normal bodily function or are demonstrable by medically accepted clinical or laboratory diagnostic techniques. Employers are, however, permitted to request supporting medical documentation and the law requires the requesting employee to cooperate by providing medical or other information necessary to verify the condition or to consider the accommodation. Employers must keep such medical documentation confidential.

Prohibits Familial Status Discrimination

The scope of the New York State Human Rights Law is being further expanded to preclude discrimination or harassment based on "familial status". This new protection extends to individuals who are pregnant, have a child, or are in the process of securing legal custody of any individual under the age of eighteen. Although individuals have successfully argued sex discrimination claims arising out of family care responsibilities were a form of gender stereotyping, this new amendment to the state law removes the necessity of pigeonholing such claims into the gender stereotyping rubric. Regardless of gender, under the new New York law, employers cannot base employment decisions on an individual's responsibility to care for a child. Notably, however, the scope of the law is limited to discriminatory actions and expressly does not impose an affirmative obligation on employers to provide reasonable accommodation for an employee's family care responsibilities.

Adopts Pay Transparency Requirement

Similar to New Jersey (and the new rules for federal contractors), New York State law will now protect employees who inquire about, discuss or disclose wage information. No employee is required to share wage information with inquiring coworkers, and the New York State law permits employers to issue a written policy that limits the locations, times and manner of such discussions, consistent with federal labor law.

NYS Exponentially Increases Liquidated Damages for Wage Claims

To add teeth to its wage payment and pay equity laws, NYS will increase the amount of liquated damages for a willful violation from 100 percent to 300 percent of wages due.

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NYS Law Seeks Pay Equity

New York State has amended its Equal Pay Act to narrow the defenses available to employers when explaining pay disparities. More specifically, while formerly employers could avoid liability by demonstrating that a pay disparity was based on a seniority system, merit system, system that measures earnings based on quantity or quality of production, or "any factor other than sex," the new law has limited that final exception. Rather than permitting proof of any other, non-gender factor, the law will now require employers to prove a pay disparity is due to "a bona fide factor other than sex, such as education, training, or experience" that:

- is not based on or derived from a sex-based pay differential;
- is job-related relative to the position; and
- is consistent with a business necessity.

Even if the employer makes such a demonstration, its pay practice may still be subject to challenge if the employee shows that the employer could have achieved its pay objectives in an alternative fashion that would not have a disparate impact on employees of a particular gender.

Further, since the law prohibits pay disparities among workers in "the same establishment," that term will now be defined broadly to include employees at any of the employer's workplaces in the same geographic region, no bigger than a county.

Employers may wish to revisit their compensation structure to ensure it can withstand scrutiny under the new pay equity and anti-pay secrecy laws.

Wages Rise for NYS Fast Food Workers

National takeout food chains will be required to pay New York employees a higher minimum wage, beginning December 31, 2015. The minimum wage for these workers is rising to $10.50 in New York City, or $9.75 outside the city. Thereafter, the hourly minimum wage will continue to steadily rise in increments of $1.50 each year for New York City employees and increments of $1.00 each year for employees in the rest of the state, until it reaches $15.00 (in 2018 for New York City employees and in 2021 for others in the state). The wage order applies only to fast food chains with 30 or more locations.

Jersey City Broadens, Elizabeth Adds, Paid Sick Leave

Jersey City employers may need to update their sick leave policies and postings as the city has expanded its paid sick leave law, effective December 29, 2015. Paid sick leave is now required even for small employers with 10 or fewer employees. Child care, home health care and food service workers must receive up to 40 hours of paid sick leave, while other eligible employees of small employers must receive 24 hours of paid and 16 hours of unpaid sick leave. The law also has been expanded to part-time and temporary employees who work in the city at least 80 hours per calendar year. If employees are covered by a collective bargaining agreement, then the law clarifies that the terms of the agreement are controlling with respect to sick leave.

Similarly, employees in Elizabeth are now entitled to up to 40 hours of paid sick leave, but only 24 hours of paid leave for employers with 10 or fewer employees.

CT Bans Ecigarettes in Certain Public Places

Connecticut employers may need to update their signage if covered by a new ban on the use of electronic nicotine delivery systems and vapor products.

CT Employers Can Seek Early Resolution of CHRO Claims

Procedural changes issued by the Connecticut Human Rights and Opportunities Commission now permit employers to request to initiate a conciliation process prior to formally answering a CHRO complaint. If successful, this permits early resolution without the employer formally addressing the complaint. If unsuccessful, the employer has the standard 30 days, post-conciliation, to formally answer the complaint. Employers who participate in conciliation are also exempt from CHRO's mandatory mediation process. For employers who participate in CHRO mediation, the recent changes assure that the same individual will not serve as both mediator and complaint investigator, which reduces concerns that a position taken in mediation will adversely influence the investigator's findings in the event mediation fails.

COURT WATCH

Second Circuit Upholds Protection of Internal Whistleblower Complaints

Whistleblower protection under the Dodd-Frank Act covers internal reports of securities law violations, held the U.S. Second Circuit Court of Appeals recently in *Berman v. Neo@Ogilvy LLC* (Sept. 10, 2015). The Court's decision addressed an open issue of statutory interpretation, caused by a discrepancy between the definition of "whistleblower" in one section of the Dodd-Frank Act and a broader scope of protection against retaliation, which appears in another section of the same law. The Court concluded it should defer to the Securities and Exchange Commission's interpretation, which broadly defines the Dodd-Frank Act to include protection for those who internally report concerns of securities law violations.

CT Supreme Court Recognizes Free Speech Right in Private Sector

In *Trusz v. UBS Realty Investors, LLC* (Oct. 13, 2015), the Connecticut Supreme Court held that employees of a private employer have a protected right to free speech under the state constitution, which they can invoke as a whistleblower. The case involved a managing director at UBS who, as the head of UBS Realty's valuation unit, had internally reported errors in certain property valuations and advocated for their correction and disclosure to investors. UBS had investigated and confirmed valuation errors, but discounted their materiality. Trusz continued to raise concerns. He was subsequently terminated and sued, claiming among other things that he was retaliated against for whistleblowing activity.

The Court held that the state constitution protects employees' speech in the public workplace on the widest possible range of topics as long as the speech is pursuant to an employee's official job duties and does not undermine the employer's legitimate interest in maintaining discipline, harmony and efficiency in the workplace. Extending that concept to the private sector, the Court held that an employee's speech pursuant to his/her official job duties on a matter of public concern that implicates an employer's official dishonesty or other serious wrongdoing, or threats to health and safety, trumps a private employer's right to control its own employees and policies. Trusz could, therefore, proceed with his claim that the valuation concerns he raised were constitutionally-protected and therefore not a permissible reasons for him to be disciplined.

Second Circuit Agrees With NLRB - Facebook "Likes" Can Be Protected Activity

The U.S. Second Circuit Court of Appeals' recent decision in *Three D, LLC v. NLRB* (Oct. 21, 2015), is a reminder for employers to think carefully before disciplining or terminating employees for their Facebook postings. In a summary order, the Court upheld a decision by the National Labor Relations Board that an employer violated federal law by terminating employees for their Facebook activity. Four employees were having an ongoing online debate, interlaced with obscenities, regarding tax withholdings. One posted that maybe someone should buy the business because "They can't even do the tax paperwork correctly!!! Now I OWE money." Another employee "liked" the post and then added to it, including a profane reference to the owner.

The Court upheld the NLRB's finding that the employee postings were a continuation of a workplace discussion about the calculation of employees' tax withholding and were protected activity under federal labor law. The Court further agreed that the employees' comments were not defamatory. Nor did they lose protection based on the obscenities, which had been viewed by some customers, as the Court observed the comments were not directed toward customers and did not reflect the employer's brand. The Court feared a contrary ruling could chill virtually all employee speech online and would be inconsistent with the "reality of modern day social media use."