SPRING 2017

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. Q1 2017 has been unusually quiet, but the repeal of the Obama Administration's Fair Pay and Safe Workplaces Order and new pay transparency rules in New York portend changes to come.

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.*

Table of Contents

New Executive Order Effectively Repeals Obama Administration's Fair Pay and Safe Workplaces Order

All facets of the Fair Pay and Safe Workplaces order issued by the Obama administration have been nullified as of March 27, 2017 as a result of President Trump's signing a Congressional resolution of disapproval pertaining to the regulations and his issuance of a new Executive Order that rescinded President Obama's prior order. As we summarized in Takeaways Fall 2016, the Obama administration order had imposed substantial reporting obligations on large federal contractors and subcontractors with regard to federal and state labor law violations, required certain paycheck disclosures and banned mandatory arbitration clauses for select legal claims.

Governor Cuomo Executive Order Mandates State Contractor Pay and Job Data Reporting

While the federal government is scaling back on government contractor requirements, New York State is increasing state contractor obligations. Governor Cuomo issued an Executive Order in early January that requires New York State contractors and subcontractors, when reporting their equal employment opportunity information, to disclose job title and salary data for each employee performing work on the contract. The new requirement applies to all state contracts executed after June 1, 2017, and mandates quarterly reporting where the prime contract has a value in excess of $25,000. Monthly reporting is required for construction contracts where the prime value exceeds $100,000.

New York Employers – Check Your Compliance with the New Weekly Base Salary Thresholds for Exempt Status

NYC with more than 10 employees	$825
NYC with 10 or less employees	$787.50
Nassau, Suffolk, Westchester	$750
Rest of New York State	$727.50

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NYS DOL Finalizes Regulations Protecting Employee Wage Discussions

Employers that wish to regulate when, where and how employees ask about or discuss their respective wages must clear a series of hurdles under the final regulations recently issued by the New York State Department of Labor. First, any employer restrictions on wage discussions must be stated in a written policy. Second, the restrictions cannot single out wage discussions from other types of employee speech. Third, the restrictions imposed by an employer must be narrowly tailored to serve a significant interest and leave open ample alternative channels for communicating the information. Fourth, the restrictions cannot effectively preclude any disclosure at the worksite and/or during work hours. Notwithstanding all these limitations, the regulations further provide that employers can prohibit employees from inquiring about another employee's wages unless the employee being asked has given written or verbal permission. Employers should therefore carefully frame any policies relating to wage discussions among employees, and would be well-advised to consult with legal counsel before issuing such policies.

In issuing the regulations, the Department of Labor declined to impose a separate notice requirement on employers. It has, however, issued a revised section 195.1 Notice of Rates of Pay that includes a statement referencing employees' rights with regard to wage discussions. Employers that have been using the form notice should download the newest version for future use.

Employers should now be using USCIS's updated I-9 Form, with new prompts and space for additional information.

Privacy Training Required for Federal Contractors

As of January 19, 2017, federal contractors must conduct initial privacy training and annual retraining for employees who handle personally identifiable information, have access to a system of records, or design, develop, maintain or operate a system of records. More than five years in the making, the final regulations specify subjects to be covered in the training, including legal requirements and company procedures related to handling and safeguarding personally identifiable information and what to do in the event of a breach of security procedures. Employees whose access to personally identifiable information falls within the scope of the privacy regulations cannot retain such access unless they complete the requisite training.

CURRENTLY PENDING IN NYC

NYC Council Passes Bar on Salary History Inquiries

While not yet law, Mayor Bill DeBlasio is expected to sign legislation, passed by the New York City Council on April 7, 2017, that will prohibit employers from relying on a prospective employee's salary history in determining what salary to offer for the new hire. Employers would be precluded from asking about a prospective employee's salary history – directly or indirectly, to the employee or anyone else with potentially relevant information – at any point in the employment process. The law will not apply to internal hires or promotions, or where salary history reporting is otherwise required by law. The purpose of the law is to prevent pay inequity in one or more prior jobs from perpetuating a gender wage gap throughout an employee's working life.

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COURT WATCH

CT Supreme Court Clarifies Independent Contractor Test

The Connecticut Supreme Court held that the absence of proof that an individual performed services for third parties does not necessarily preclude a finding that the individual is an independent contractor. In *Southwest Appraisal Group, LLC v. Administrator, Unemployment Compensation* Act (March 21, 2017), the Court considered whether, following an audit, the Employment Security Appeals Division had improperly found Southwest Appraisal Group, which conducts vehicle damage assessments for insurance companies, liable for unemployment compensation taxes for three of the automobile appraisers with which it subcontracted to perform damage appraisals on a flat fee basis.

Connecticut applies the "ABC test" for determining independent contractor status, which requires proof that (a) the individuals were free from the putative employer's direction and control in performing their work; (b) the work is primarily done outside the usual course of the putative employer's business or outside its place of business; and (c) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

In an audit of Southwest Appraisal Group, the Board had concluded that three of six appraisers did not satisfy part "c" of the test because, although they made their services available to other entities, they did not actually perform work for any entity other than Southwest Appraisal Group. The Court held that "context matters" and the test requires considering the totality of the circumstances, not just whether services are actually performed for other entities. The Court listed ten factors to be considered under part "c" of the test:

- the existence of state licensure or specialized skills;
- business cards, printed invoices, advertising and other indicia of an independent business;
- a place of business separate from the putative employer;
- the putative employee's capital investment such as in vehicles and equipment;
- whether the putative employee manages risk by handling his or her own liability insurance;
- whether services are performed in the name of the individual rather than the putative employer;
- whether the putative employee employs or subcontracts others;
- whether the putative employee has a saleable business or going concern with established clientele;
- whether services are performed for more than one entity; and
- whether the performance of services affects the goodwill of the putative employee rather than the putative employer.

The Court's decision broadens the opportunity for employers to structure independent contractor arrangements. Connecticut employers can use the ten factors listed above, combined with parts "a" and "b" of the ABC test, as a checklist in assessing their work relationships.

OSHA Offers Employers Guidance on Establishing Anti-Retaliation Programs

Employers seeking guidance on how to reduce their exposure to retaliation claims under the 22 whistleblower laws enforced by the Occupational Safety and Health Administration (OSHA), or tips that might be applied to retaliation prevention under the equal employment opportunity laws, can refer to OSHA's new, user-friendly Guidance.

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