SUMMER 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. New York employers need to prepare for new leave laws and worker scheduling requirements; recent cases reinforce standards for independent contractors and NLRA-protected activity.

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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PREPARE NOW FOR NEW YORK STATE'S NEW PAID FAMILY LEAVE

New York's new Paid Family Leave law (PFL) represents a significant change, particularly for smaller New York employers. Every private employer in the state (including not-for-profits) with one or more employees who work at least 30 days in a calendar year is covered by the new law. PFL offers eight (increasing to twelve by 2021) weeks of job-protected leave in any 52-week period for employees to care for others – upon the addition of a new child to the family, to care for a close relative who has a serious health condition, or when a close family member is called to active duty military service. It does not apply to an employee's own serious health condition. Even part-time employees become eligible for PFL in as little as 26 weeks from their date of hire.

The payments assured to employees under the law are to be funded entirely through employee payroll deductions and administered through existing state disability benefit insurance policies. Employers have been authorized to collect weekly contributions as of July 1, 2017, but such collections are not required prior to the January 1, 2018 effective date and there is no clear incentive for employers to start early.

The New York State Department of Labor has just released its regulations implementing PFL. They provide much clarification, offer some benefit to employers that currently provide paid leave benefits, and also impose numerous new employer obligations. On the beneficial side, employers that offer paid time off to employees for some or all of the reasons covered by PFL may offset some of that expense by seeking reimbursement from the carrier for any PFL benefits due to the employee. PFL also entitles employers to 30 days' advance notice if the need for leave is foreseeable, and otherwise to notice as soon in advance as possible….(*see* pg. 2)

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NYS Paid Family Leave Regulations Still Pending *(contd. from p. 1)*

As for obligations, to comply with PFL, employers must:

- Collect weekly contributions from employees' pay at a rate of 0.126% of an employee's weekly wage, but capped a $1.65 per week;
- Provide employees with written notice of their rights and obligations under PFL, both through a posting being prepared by the state, and through written policies that must be distributed to all employees;
- Timely respond to employee requests for leave based on any PFL-covered reason;
- Complete and return to the employee the employer portion of a carrier's Request for Paid Leave form within three business days of receiving notice of a request for leave;
- Maintain employees' health insurance coverage at the active employee contribution rates for the duration of their absence on PFL; and
- Reinstate employees upon their return from PFL to the same or a comparable position.

Employers should work with legal counsel in drafting policies and updating procedures to comply with the new law.

NYC Extensively Regulates Scheduling of Retail and Fast Food Workers

Continuing the trend of progressive legislation protecting New York City employees, particularly in the fast food industry, on May 30, 2017 Mayor de Blasio signed a bill package into law that will impose new restrictions on retail and fast food employers with regard to employee scheduling, hiring, and pay practices. The laws take effect on November 26, 2017 and apply to retail businesses with 20 or more employees, individually or within a chain, who are engaged primarily in the sale of consumer goods at one or more stores in the city, as well as to fast food establishments that are part of 30 or more establishments nationally.

The "Fair Workweek" laws:

- Prohibit retail employers from canceling, changing or adding work shifts within 72 hours of the start of the shift, absent certain unexpected emergencies, and require employers to post the work schedule at least 72 hours before the beginning of the scheduled hours of work;
- Prohibit fast food employers from revising an employee's work schedule on less than 14 days' notice, absent certain unexpected emergencies, without paying the employee a schedule change premium (ranging from $10 to $75);
- Require fast food employers to provide each employee with a good faith written estimate of the number of hours the employee can expect to work per week by no later than the first day of work that includes the expected dates, times and locations, as well as a written work schedule containing regular and on-call shifts for a period of at least seven days;
- Allow fast food employees to donate part of their salary to a not-for-profit of their choosing through payroll deductions;
- Ban fast food employers from requiring workers to work back-to-back shifts of the closing shift one day and the opening shift the next day when there are fewer than 11 hours between the two shifts; and
- Require fast food employers to offer available shifts to existing employees before hiring new staff, up to the point at which the employer would be required to pay overtime if further hours were offered to existing employees.

Employers will be required to provide employees with written notice of key legal provisions, and cannot retaliate against employees who seek to enforce their rights. The laws include both public and private enforcement procedures, and the full panoply of remedies, including damages, rescission of discipline, attorneys' fees, fines and penalties.

Connecticut Adopts Enhanced Protections for Pregnant Employees

A new Connecticut law provides employees with enhanced protection against discrimination based on pregnancy, childbirth or related medical conditions, expressly including lactation. The new law, which takes effect October 1, 2017, affirmatively requires employers to provide a reasonable accommodation upon request for an employee's pregnancy-related conditions unless the accommodation would impose an undue hardship. The law precludes employers from forcing employees to accept a reasonable accommodation that has not been requested or to take a leave of absence if a reasonable accommodation can be provided instead. Notice of employees' rights under the law must be provided to all new hires as of October 1 and to existing employees by January 29, 2018. Notice must additionally be provided on an individual basis within 10 days after an employee tells her employer of her pregnancy.

Federal Exec Order Targets Employment Visa Programs

A new "Buy American and Hire American" Presidential Executive Order issued on April 17, 2107 calls for the departments of Homeland Security, Labor, State, and Justice to propose changes to the employment-based visa programs, in particular the H-1B program, to increase wage minimums and identify other ways to promote the hiring of U.S. workers.

NYC Bans Salary History Inquiries

As anticipated in our Spring 2017 issue of TAKEAWAYS, on May 4, 2017 New York City Mayor DeBlasio signed a new law that prohibits employers from asking about or relying on a prospective employee's salary history in determining what compensation to offer for the new hire. Employers may still discuss with applications their expectations with regard to salary, benefits and compensation, but need to be careful not to cross the line into inquiries about salary history with prior employers. The new restrictions take effect October 31, 2017.

Withdrawal of US DOL Guidance Suggests Retrenchment on Joint-Employer Status

Reversing course from the Obama administration, the Wage and Hour Division withdrew two administrative interpretations, covered in TAKEAWAYS Spring 2016 , that had expansively defined joint-employer status. This signals less intensive federal government enforcement and possibly further retrenchment on the issue.

COURT WATCH

2017 U.S. Supreme Court Decisions Impacting Employers

Court Speaks to Judicial Review of EEOC Subpoenas

The United States Supreme Court recently resolved a circuit court split and held that the appellate courts should apply an abuse of discretion standard when reviewing a district court decision whether to enforce a subpoena issued by the Equal Employment Opportunity Commission ("EEOC"). The case at issue, *McLane Co., Inc. v. Equal Employment Opportunity Commission* (April 3, 2017), concerned whether the employer should be compelled to provide "pedigree information" -- the names, Social Security numbers, addresses and telephone numbers of all employees in one of the company's divisions nationwide, who, like the Charging Party, were required to undergo physical capability evaluations.

Court Limits Tribal Sovereign Immunity for Employees

The United States Supreme Court unanimously ruled on April 25 in *Lewis v. Clarke* that tribal sovereign immunity does not apply to employees who are sued in their individual capacities. The Lewises had sued Clarke, an employee of the Mohegan Tribe, for a car accident that occurred off tribal land while he was driving customers to the tribe's casino. The Supreme Court held that tribal sovereign immunity is limited to tribal employees who are not being sued in their official capacity as agents of the tribe.

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Series of Second Circuit Decisions Impact Employers

Employers should take note of several recent decisions by the United States Court of Appeals for the Second Circuit (the "Second Circuit"), which is the appellate court that has jurisdiction over federal court decisions in New York and Connecticut.

Derogatory Facebook Posting Upheld as Protected Employee Activity

A recent decision by the Second Circuit serves as a reminder that employers may violate the National Labor Relations Act ("NLRA") by firing or disciplining employees for critical comments posted on social media if the comments involve "concerted activities for the purpose of collective bargaining or other mutual aid or protection." *National Labor Relations Board v. Pier Sixty, LLC* (April 21, 2017) concerned the termination of an employee who, while on break from work, posted on Facebook derogatory comments about his supervisor, laced with profanity, and concluded by encouraging his co-workers to vote for the union in an upcoming election.

The Court enforced an order of the National Labor Relations Board ("NLRB") concluding that the employee's discharge violated the NLRA because the employee's comments were not so "abusive" or "opprobrious" as to lose the protection of the NLRA. The NLRB had reached its decision by applying a nine-factor "totality of the circumstances" test that it has developed for evaluating employees' use of social media that considers: evidence of antiunion hostility, whether the conduct was provoked, whether the conduct was impulsive or deliberate, the location, the subject matter, the nature of the content, how the employer handled similar conduct, whether a specific rule prohibited the content, and whether the discipline imposed was typical and proportionate.

As an important note for employers faced with similar issues in the future, the Court expressed some question as to whether the totality of the circumstances test developed by the NLRB adequately balances employers' interests. It did not address that question in the *Pier Sixty* case because the company had not challenged use of the test. Rather, the Court analyzed the evidence supporting the Board's decision and found it adequate, particularly because the subject matter of the message included workplace concerns, the company consistently tolerated profanity among its workers, and the comments were posted on Facebook and not in the immediate presence of customers or disruptive of a client event.

Blanket No Recording Workplace Rules Present Legal Concerns

Employers should ensure any policies that restrict employees recording or videotaping in the workplace are narrowly tailored is the lesson to be gleaned from the Second Circuit's decision in *Whole Foods Market Group, Inc. v. National Labor Relations* Board (June 1, 2017). The Court held that a blanket policy prohibiting all recording or videotaping at work absent manager approval violated employees' rights under the National Labor Relations Act as it may prevent employees from, for example, documenting unsafe working conditions, or documenting and publicizing discussions about terms and conditions of employment.

Black-Car Drivers Held to Be Independent Contractors

The Second Circuit held in *Saleem v. Corporate Transportation Group Ltd.* (April 12, 2017) that a group of black-car drivers in the greater New York City area were appropriately classified as independent contractors under federal and state labor laws. Looking at the "economic reality" of the drivers' relationship with the defendant, CTG, the Court observed that the drivers determined the manner and extent of their affiliation with CTG, whether to also work for other companies or develop their own businesses, the degree to which they would invest in their driving businesses, and when and how regularly to provide rides for CTG clients. Considered collectively, the Court held these factors legally evidenced an independent contractor relationship.