SPRING 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. This quarter, they include new US DOL regulations and NLRB action, new NYS and NYC laws, and notable US Supreme Court and NJ high court decisions. Plus Life's Lessons column explains four top HR audit items.

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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US DOL ADOPTS PLACE OF CELEBRATION RULE FOR SPOUSAL FMLA COVERAGE

The United States Department of Labor recently issued long-awaited final regulations that define a "spouse" for purposes of coverage under the Family and Medical Leave Act (FMLA) based on where the marriage was entered into (place of celebration). As a result of this change, a couple legally married in any one of the 50 states, or validly married in a jurisdiction outside the 50 states where that marriage could have been legally entered into in at least one state, will qualify as "spouses" for purposes of the FMLA, regardless of gender or place of residence.

This rule change simplifies administration of the FMLA for employers because it entitles same-sex couples to coverage under the FMLA, regardless of whether their marriage is legally recognized by the state in which they reside.

NEW YORK STATE AMENDS WAGE NOTICE LAW, ADDS NEW CLASS OF UNPAID LEAVE

Annual Wage Notice Discontinued, Penalties Under Other Provisions Increased

New York employers are no longer required to annually distribute a notice of wages to their employees pursuant to Labor Law section 195.1. The requirement to distribute this notice and obtain each employees' acknowledgment of receipt between January and February 1 of each year was repealed as part of a series of amendments to the law that were signed by Governor Cuomo just days before the new year…. *(see pg. 3)*

New Leave for Emergency Workers

Private employers in New York are now required to grant a leave of absence for employees engaged in the actual performance of duties as a volunteer emergency worker during a declared state of emergency, unless the employee's absence would impose an undue hardship on the business…. *(see pg. 3)*

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LIFE'S LESSONS*

Real Issues…Reconstituted Facts

By Tracey I. Levy

We are deviating from the usual hypothetical situation here, in recognition of spring cleaning season, to focus on four of my top HR audit list items, and why I would encourage every employer to make them a priority:

1. Review Your Employee Handbook

Many of the local and state laws creating new leaves of absence and protected classifications also require employers to notify employees of their legally protected rights. Employee handbook policies may satisfy these notice obligations and, even where that is not the case, the policies may need to be updated for consistency with current legal requirements.

A handbook review is an opportunity to look beyond satisfying the legal minimum. In a service economy, often our greatest business asset is our people. The employee handbook can be a platform to set the tone for the organization. To do so, consider:

- Is it written in the first or third person?
- Does it incorporate a sincere welcoming statement from the head of the organization?
- Are the policies presented in a logical order?
- Is the handbook readily accessible?
- Have policies on leaves and benefits been benchmarked against other organizations?
- Are the written policies consistent with actual practice, and do they accurately reflect the culture of the organization?

Think of your employee handbook as an internal marketing piece - a resource for employees and an opportunity to make them feel respected and supported by the organization. For optimal results, customize your policies and give due consideration to the message conveyed by the tone, content and format.

2. Consider Whether Your Staff Are Appropriately Classified

Freelancers reportedly now comprise 30% or more of the U.S. workforce. This trend has not gone unnoticed by the Department of Labor on the federal or state levels, and they have increased their enforcement activities with regard to inappropriate classification of workers as independent contractors. Further, new laws in New York and elsewhere, as well as recent court decisions (*see p. 4*) have increasingly narrowed the definition of independent contractor and established that all workers, at least in certain industries, are presumptively employees. Misclassification can be costly, as it may require refiling quarterly reports and making retroactive payments (with interest and penalties) for unemployment insurance, payroll taxes, Social Security, Medicare and now the Affordable Care Act. Don't wait for a complaint to be filed or a government audit; now is the time for you to conduct an assessment of how you have structured your workforce to determine whether workers are appropriately classified.

3. Update Your Employment Application

If you ask job applicants to complete an employment application, make sure that it complies with current law in all applicable jurisdictions. In particular, note any local ban-the-box laws and understand whether they apply to all or portions of your organization.

4. Be Sure Your Staff Comply with FCRA

If you conduct background checks on job applicants or employees, then you need to be mindful of the federal Fair Credit Reporting Act (FCRA) and any equivalent state laws. FCRA imposes unique disclosure and notice obligations on employers both prior to conducting a background check and prior to acting on adverse information disclosed in the background check process. Note that the model disclosure forms provided by background check vendors are not always compliant with employers' FCRA obligations. While FCRA is not a new law, we are seeing a significant increase in the filing of class action lawsuits for employers' alleged violation of FCRA – all the more reason for you to use this time to ensure your organization is compliant.

** 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 Grants Emergency Worker Leave

The new NYS Emergency Worker Leave law covers employees that are either volunteer firefighters or ambulance service workers when (a) they have provided advance written confirmation of their status from the head of the applicable volunteer service or (b) the employees' services are related to a declared state of emergency.

The leave is unpaid, but employers may permit employees to substitute applicable paid leave under the employer's existing time-off policies. Employers may request that the employee submit a notarized statement from the head of the applicable volunteer service certifying the period of time that the employee was absent due to a covered emergency.

New NLRB Rules Expedite Union Elections

The National Labor Relations Board has published a final rule amending its representation case procedures effective April 14, 2015. The amendments accelerate the time period between when a union calls for an election and the date the election must be held, thereby limiting employers' window to present their perspective to employees in advance of an election. Further narrowing employers' options, the amendments provide that a request for review will no longer stay an election absent issuance of a specific stay order by the NLRB.

The amendments provide for electronic filing of documents and accelerate notice provisions, both for the petitioners and the employer. Employers also must now electronically transmit a list of eligible voters within two business days of the direction of election, and for the first time include employees' personal email addresses and phone numbers.

Other amendments address the timing and scope for various supporting papers to be filed and for raising election-related issues, as well as the authority of the regional director with regard to voter eligibility issues and election details. While the Senate voted March 4 to overturn the amendments, President Obama has announced that he will veto any such bill.

NYS Repeals Annual Wage Notice Requirement, Adds New Penalties

Recent amendments to the wage notice law did not alter the notice requirement for new hires, but they did adopt substantially more punitive consequences for employers who violate the wage laws, including:

- exponentially increased penalties;
- individual liability for the top ten members of a limited liability company;
- successor liability for a prior employer's breach; and
- special reporting obligations in the event of a recurring, willful or egregious breach.

NYC Mandates Employer Participation in Pre-Tax Transit Benefit Program

Effective January, 1 2016, private employers with 20 or more full-time employees working in New York City will be required to offer a pre-tax transit benefit program for their employees. The NYC law mandates participation in a long-standing federal tax benefit program, which currently allows participating employees to use up to $130 a month of pre-tax dollars to purchase transit passes or for commuter highway vehicle costs.

Unionized employers are covered by the law only to the extent they have at least 20 full-time employees who are not under a collective bargaining agreement. Employers can comply with the law by contracting with a third-party provider, or work with their accountants to create a self-administered program. The law will be enforced by the Department of Consumer Affairs, which is authorized to impose civil penalties for non-compliant employers.

US Attorney General Declares Gender Identity, Transgender Status Covered by Title VII

US Attorney General Eric Holder recently announced that the Justice Department will no longer assert that Title VII's prohibition against discrimination based on sex does not encompass gender identity per se (including transgender discrimination).

Special note for NY hospitality industry: the NYS minimum wage for tipped hotel and restaurant workers will increase to $7.50 effective December 31, 2015.

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COURT WATCH

Time Spent Undergoing Security Clearance Is Not Compensable Under the Fair Labor Standards Act

The United States Supreme Court recently held, in *Integrity Staffing Solutions, Inc. v. Busk,* that time spent waiting to undergo security screening before an employee enters or leaves the employers' premises is not compensable under the Fair Labor Standards Act (FLSA).

The Supreme Court assessed whether the security screening was an "integral and indispensable part" of the principal activities for which the employees were hired. The Court concluded this standard was not met, as the case involved two employees who were principally hired to retrieve and package products for shipment at an Amazon.com warehouse. The Court held that the 25 minutes they spent waiting for security screenings were not intrinsic to the performance of their job duties, and the fact that the employer *required* the security screenings was not dispositive.

New Jersey Court Applies Restrictive Test for Independent Contractor Status

New Jersey employers should reassess the employment status of their contingent workforce following the New Jersey Supreme Court's recent decision in *Hargrove v. Sleepy's, LLC*. The high court held that the Unemployment Compensation Act's narrow "ABC" standard for defining independent contractors should similarly apply in resolving claims under the state Wage Payment Law. The "ABC" test presumes that an individual is an employee unless the employer can show that:

a) the individual has been and will continue to be free from the employer's direction and control in performing services, both per the contract and in fact;
b) the service is either outside the usual course of the business for which it is performed, or the service is performed outside of all the places of business of the enterprise for which such service is performed; and
c) the individual is customarily engaged in an independently established trade, occupation, profession or business.

New Jersey Supreme Court Bolsters Employer's Defense to Sexual Harassment Claims Against Supervisors

New Jersey employers may now rely on their anti-harassment policies, training and complaint procedures as an affirmative defense to sexual harassment claims based on a hostile work environment under the New Jersey Law Against Discrimination. In *Ilda Aguas v. State of New Jersey*, the New Jersey Supreme Court adopted the long-recognized *Faragher-Ellerth* federal affirmative defense to hostile work environment sexual harassment cases.

In that same decision, however, the court adopted a broad definition of "supervisor", for purposes of determining vicarious liability for a sexual harassment claim. The court held that a "supervisor" includes employees who have authority either to take tangible employment actions or to control the day-to-day activities of another employee.

NLRB Reverses Course, Protects Use of Employer Email for Union Organizing

Employees who are granted access to an employer's email system time must be permitted to use the email system during non-working hours for union organizing activity under a recent determination of the National Labor Relations Board in *Purple Communications, Inc. and Communications Workers of America, AFL-CIO*. The Board overturned past precedent, and held that employees' use of the email system to communicate about their terms and conditions of employment was presumptively permitted absent a showing of special circumstances justifying specific email restrictions.

The Board cautioned that special circumstances would rarely justify a total ban on non-work use of email. However, more limited restrictions might be permissible where necessary to maintain production or discipline, such as measures to prevent the email system from becoming overloaded.

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