SUMMER 2016

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 past quarter saw much activity at the federal level, and for New York State and City employers, covering pay, leave, discrimination protection and more.

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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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.

EMPLOYERS GAIN AND LOSE WITH NEW FEDERAL LAWS AND REGULATIONS

Trade Secrets Receive Federal Law Protection

Employers may need to modify their agreements protecting confidential information and trade secrets to confirm they comply with the new federal Defend Trade Secrets Act. This new federal law adopts a uniform standard for trade secret protection and provides federal court jurisdiction to adjudicate claims for theft of trade secrets. The new law does not supercede existing state law trade secret protections….(*see pg.2)*

US DOL Issues Final Rules on Classification for Overtime Exemptions

Employees earning less than $47,476 annually must automatically be classified as non-exempt and overtime eligible to comply with the new regulations issued by the U.S. Department of Labor (DOL). The DOL's long-anticipated regulations have not changed its standards for when an employee's duties qualify under the "white collar exemptions" for administrative, executive and professional employees, but those standards are only considered if the employee first meets the new, higher salary threshold. Our recent blog posting, Exempt or Non Exempt? The Rules Have Changed provides a more detailed summary of the new standards.

New OFCCP Rules Dramatically Push Forward Scope of Sex Discrimination Protections

Federal contractors will likely need to modify policies and practices to comply with just-released rules from the Office of Federal Contract and Compliance Programs (OFCCP). The rules interpret Executive Order 11246, which prohibits contractors from discriminating against employees or job applicants on the basis of race, color, religion, sex, national origin, sexual orientation or gender identity….*(see pg. 2)*

LEVY EMPLOYMENT LAW, LLC

Legal and Employee Relations Consulting Services

411 Theodore Fremd Avenue, Suite 206 South, Rye, NY 10580

Tel: 914-338-8023 Fax: 914-637-1909

www.levyemploymentlaw.com; info@levyemploymentlaw.com

Trade Secrets Receive Federal Law Protection *(contd. from p. 1)*

The Defend Trade Secrets Act requires employers to provide employees with notice that they cannot be held criminally or civilly liable for confidentially disclosing a trade secret:

- to a government official or to an attorney solely to report or investigate suspected unlawful conduct; or
- in a court proceeding, if the trade secret information is filed under seal.

The notice requirement can be incorporated in the confidentiality or trade secret agreement itself or by cross-referencing a policy document that states the employer's whistleblower reporting and protection policy.

New OFCCP Rules Dramatically Push Forward Scope of Sex Discrimination Protections *(contd. from p. 1)*

For the first time since 1970 the OFCCP has updated its rules enforcing Executive Order 11246, effective August 15, 2016, to bring the standards for contractors to prevent sex discrimination in the workplace in line with current case law and legal principles. The new rules also go one step beyond and base certain requirements on developing case law and interpretations of existing law by the EEOC, including some that thus far have not been recognized by the courts.

The rules expand the Executive Order's protections against discrimination based on sex, sexual orientation and gender identity to include transgender status, sex stereotypes, and pregnancy, childbirth and related medical conditions. They require that family leave and light duty work accommodations be provided on a gender-neutral basis. They also prohibit adverse treatment of employees based on assumptions that one gender is better suited for family caretaking responsibilities, or less suitable for certain work because of a presumption that employees of that gender will have conflicting family caregiving responsibilities.

Consistent with the Obama Administration's position against "bathroom bills", the rules preclude contractors from denying transgender employees access to the restrooms, changing rooms, showers or similar facilities designated for use by the gender with which they identify. They further state that employees or applicants cannot be treated adversely because they are undergoing or have undergone medical procedures to transition genders.

The rules are also expansive in addressing gender disparities in compensation. While most claims under the Equal Pay Act fail because the roles at issue are not "substantially equal," the new OFCCP rules focus on whether employees are "similarly-situated". That case-specific determination should consider whether some, but not all, of such factors as the tasks performed, skills, effort, levels of responsibility, working conditions, job difficulty, and minimum qualifications are comparable.

Life's Lessons column on hiatus

Over the past three years, through this column I have used hypothetical facts to discuss real, recurring employment law and employee relations issues. These included: a range of performance management issues, from effective reviews to graceful exits; intern hiring; thorny situations that can give rise to harassment claims and how to handle internal complaints; best practices for employment policies and procedures; reasonable accommodation considerations; and workforce restructuring and employee retention issues. This past year it has become challenging to ensure that the issues I discuss are relevant but do not resemble those on which I have recently been advising any of my clients. At the same time, the plethora of legal changes employers are facing has required more column space in which to cover them and pushed prior issues of this newsletter to five pages. It therefore seems an appropriate time to put this column on hiatus. Past columns are available on my HR Strategy blog. Thank you for reading.

Tracey I. Levy

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NYS Announces Paid Family Leave

New York employees will be eligible for paid leave to care for family members under the new Paid Family Leave Law, effective January 1, 2018. Phased in over a four-year period with eight weeks of leave in 2018, ten in 2019, and ultimately twelve in 2021, the paid leave benefits will be funded through employee and employer contributions to the state disability insurance programs.

The New York law resembles a paid version of the federal FMLA, but it does not cover leave for an employee's own disabling condition (which is covered by the existing Disability Benefits Law) and it is broader in:

- Covering family members (who include domestic partners, grandparents, grandchildren);
- Defining a qualifying serious health condition (an illness, injury, impairment or physical or mental condition that involves inpatient care, continuing treatment or continuing supervision by a health care provider);
- Eligibility (beginning after 26 weeks of continuous employment); and
- Coverage (extending to all New York employers).

In its first year, employees will be paid the lesser of 50 percent of their average weekly wage or 50 percent of the statewide average weekly wage. The rates then increase by five percent intervals each year thereafter until they top out at 67 percent of average weekly wages in 2021. The Superintendent of Financial Services is empowered to delay the increases in wage subsidies for any given year based on the economic impact.

Paid Family Leave is presumed to run concurrently with FMLA unless an employer's policy states otherwise. Notably, paid leave benefits are not available if the employee is collecting sick pay or paid time off from the employer. This seems to preclude employers from offsetting part of the cost of paid time off by using the state paid leave benefit, and thereby differs from the law on short-term disability payments. Employers should watch if future regulations modify this restriction.

NYC Expands Human Rights Law, Again

A series of recent amendments to the New York City Human Rights Law further expand the protections and remedies the law provides to employees. One amendment codifies several recent court decisions that recognized the broad scope and liberal interpretation of the law, and reinforces that the city law is more protective of employee rights than similarly-worded state and federal laws. Another amendment includes expert fees in attorney's fee awards and grants the Human Rights Commission in its adjudication the authority to award attorney's fees and costs. A third amendment removes anachronistic qualifying language that was relevant at the time the city added discrimination protection based on sexual orientation.

NYS Raises Minimum Wage, Staggered by Geography

New York City employers with 11 or more employees face $2 per year increases in the minimum wage until it reaches $15 by the end of 2018; smaller New York City employers face $1.50 per year increases through 2019.

Nassau, Suffolk and Westchester County employers of any size will see the minimum wage rise by $1 per year through 2021. For the rest of the state, increases will be $.70 per year through the end of 2020, and will then rise to $15 on an indexed schedule.

OSHA Requires Electronic Submission of Workplace Incidents for Online Posting

Employers' illness and injury data will become more publicly available under new regulations from the Occupational Safety and Health Administration (OSHA) that take effect January 1, 2017. These require employers with 250 employees, and those in high risk industries with 20 to 249 employees, to electronically submit their workplace injury and illness records, which will then be publicly posted on OSHA's website.

Covered employers also have until August 10, 2016 to ensure their policies do not deter employees from reporting work-related injuries and illnesses and inform employees of their right to report free from retaliation.

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COURT WATCH

HR Director Can Be Personally Liable Under FMLA, Second Circuit Holds

Human Resources professionals who handle requests for leave under the Family Medical Leave Act ("FMLA") should note the U.S. Second Circuit Court of Appeals' recent decision in Graziadio v. Culinary Institute of America (March 17, 2016) which held that a Human Resources Director could be personally liable for violating the FMLA where she was central to the assessment of the employee's FMLA claim and the ultimate decision to terminate her employment. The Court cited evidence that the Human Resources Director:

- reviewed the employee's FMLA paperwork and determined its adequacy;
- controlled the employee's ability to return to work and under what conditions;
- was virtually the sole contact and communicator with regard to the employee's leave and employment; and
- exercised substantial authority over the decision to terminate the employee's employment, even though final authority resided with the employee's direct manager.

The factual circumstances as recounted by the Court in Graziadio reflect a significant communication failure on the part of Human Resources particularly with regard to the medical documentation desired to support the employee's leave request. But the precedent created by the court's decision is further reason for Human Resources professionals to carefully handle requests for FMLA leave and seek legal guidance when uncertain of an employee's rights or their obligations.

U.S. Supreme Court Sets Time Clock for Constructive Discharge Claims

The Supreme Court held in *Green v. Brennan* (May 23, 2016) that the statute of limitations period begins to run with respect to a constructive discharge claim as of the date of the employee's resignation, and not as of the date of the employer's last allegedly discriminatory act. The Court reasoned that a constructive discharge claim is inherently predicated on two elements – discriminatory conduct of such a nature that a reasonable person would feel compelled to resign, and actual resignation. Thus, as a legal and practical matter, the clock for filing such a claim should not begin until after the time of the employee's actual resignation.

FEDERAL AGENCIES ISSUE NEW GUIDANCE

ADA Guidance Stresses Reasonable Accommodations May Exceed Leave Policies

Responding to repeated charges filed by employees regarding employer leave policies and their rights under the Americans with Disabilities Act (ADA), the EEOC issued new guidance in May to clarify that employers may need to go beyond their existing leave policies to comply with their ADA obligation. Unpaid leave may need to be provided as a reasonable accommodation for an employee's disability even If the employee is not otherwise eligible for or has exhausted all leave provided by the employer, unless granting the request would present an undue hardship.

Helpful tool:

The U.S. DOL has issued a new, user-friendly Employer's Guide that walks employers through the process of complying with the Family and Medical Leave Act.

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