



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. Pay issues have predominated this past quarter, including the white collar exemptions, pay for freelancers, rising minimum wages, and new reporting of aggregate pay data on EEO-1 forms.

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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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.

LEGAL CHANGES FOCUS ON WORKER PAY REQUIREMENTS

Halt on Federal White Collar Exemption Thresholds Small Comfort for NYS Employers

As has been widely reported, the U.S. Department of Labor regulations increasing the base salary threshold for employees to be classified as exempt from overtime eligibility was placed on hold as a result of a federal district court order issued just before Thanksgiving. New York State employers may, however, still need to reclassify certain of their employees as non-exempt, overtime eligible under proposed regulations issued by the State Department of Labor that could take effect as early as December 31, 2016.

New York State's new regulations will increase the base salary thresholds for exemption as an executive or administrative employee from their current level of \$675 weekly, but in varying amounts, based on the geographic work location of the employees and the size of the employer. New York City employers with eleven or more employees will see the greatest increase, to \$825 weekly (or \$42,900 annually). For smaller employers in New York City, the weekly base salary threshold will increase to \$787.50. In Nassau, Suffolk and Westchester Counties the new threshold will be \$750 weekly, while for the rest of the state it will be \$727.50.

Minimum Wages Are Rising Again

Throughout the tri-state area, the minimum wage is again increasing with the new year. In Connecticut, the minimum wage increases to \$10.10 per hour effective January 1, 2017. In New Jersey, the minimum wage will modestly increase to \$8.44 per hour. In New York, December 31, 2016 marks the initiation of the state's new, geographically-staggered minimum wage law.... (see pg.2)

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EEOC Finalizes Regulations Requiring Reporting of Aggregate Employee Pay Data

Beginning with the 2017 calendar year, private employers with 100 or more employees will be required to report summary pay data and aggregate hours worked, in addition to the standard workforce demographic data, on their annual EEO-1 filings.

New, final regulations issued by the Equal Employment Opportunity Commission (EEOC) require that, for each EEO-1 job category, covered employers must report:

- the number of full and part-time employees, and
- the aggregate hours collectively worked by those employees,

broken down into each of twelve separate pay bands.

The EEOC also changed the reporting period, so that calculation of the applicable pay band is to be based on the annual, year-end W-2 reported income for each employee. Because of the change in the reporting period, the filing deadline has been pushed back to March 31, 2018 and each March 31 thereafter.

Federal Contractor Paid Sick Leave Rules Take Effect

The U.S. Department of Labor has finalized its regulations requiring federal government contractors to provide employees with up to 56 hours of paid sick leave annually. The new rules apply to employees working on virtually all federal government contracts.

While the 56-hour threshold exceeds the state and local paid sick leave laws applicable to employers in

the tri-state area, many other provisions of the federal contractor rules are similar to those already applicable in this region. These include:

- reasons for leave - for an employee's own or close family member's illness, injury or preventive medical care;
- accruals – at the rate of one hour for every 30 worked on or in connection with a covered contract, unless the full 56 hours is provided in a lump sum at the beginning of the year;
- usage in partial-day increments – measuring as small as one hour;
- carry-over of unused, accrued leave – capped at 56 hours;
- recoupment of accrued, unused time - if an employee is rehired within twelve months of job separation;
- requiring advance notice – of seven calendar days where the need for leave is foreseeable; and
- requiring certification – but only for absences of three or more consecutive full days, and only with advance notice to the employee.

Minimum Wages are Rising *(contd. from p. 1)*

Going forward, New York State employers must be mindful of the county in which their employees work. The minimum wage rates are increasing as follows:

- New York City large employers (11 or more employees) \$11
- New York City small employers (10 or less employees) \$10.50
- Nassau, Suffolk, Westchester County employees \$10
- All other New York counties \$9.70.

Finally, the minimum wage for federal government contractors is increasing to \$10.20 per hour effective January 1.

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New York City First in Nation to Require Written Contracts, Prompt Pay for Contractors

New York City businesses that augment their workforce with freelance workers should note the new Freelance Work Isn't Free Act, which takes effect May 15, 2017. This law, the first of its kind in the United States, requires any business or individual who retains the services of an individual for work valued at \$800 or more to specify certain terms of the financial arrangement in a written contract, and to pay the worker on a timely basis.

Some key points to note:

- Freelancers are covered even if they perform services through a corporate or trade name, but sales representatives, doctors and lawyers are not covered;
- Private-sector businesses of all sizes (including not-for-profits) are subject to the new law's requirements;
- The \$800 contract threshold is measured by considering all contracts for services between the same parties during the preceding 120 days (so businesses cannot avoid the law by subdividing a contract into smaller agreements);
- The contract must specify the names and mailing addresses of both parties and itemize the services to be provided, their value, the rate and method of compensation, and the date payment is due or the mechanism by which such date will be determined;
- If the contract does not specify a date due then payment is required within 30 days after completion of services; and
- Once services have begun, the hiring party cannot negotiate a discount with the freelance worker in exchange for timely payment.

The new law broadly prohibits all retaliatory action against a worker who seeks to enforce his or her rights under the law. It defines retaliation to include any action that is "reasonably likely to deter" a worker from attempting to exercise any right under the law or from obtaining a future work opportunity.

Finally, the law has teeth. Aggrieved individuals can file a complaint with the Office of Labor Standards, or a civil action in court. A prevailing party will be awarded attorney's fees. Just failing to comply with the written contract requirement, by itself, will result in an award of \$250 statutory damages. Violation of the no-retaliation rule will subject a hiring party to a damage award equal to the value of the contract, and failure to pay a freelancer on time may result in an award of double the value of the underlying contract.

Employers can expect to see the law publicized in the coming months, as the law requires outreach and education to the public. A new "navigation program" will be established to advise workers of their rights, provide them with general court information, inform them about classifying workers as employee or independent contractors, and put them in touch with organizations that will help them find an attorney.

SEC Issues Risk Alert on Employer Manuals and Agreements

Following several recent enforcement actions, the Securities and Exchange Commission (SEC) has issued a Risk Alert for covered companies to revise all language in their compliance manuals, codes of ethics, employment and severance agreements, and other documents that might control disclosure of confidential information concerning possible securities law violations. The SEC takes a dim view of such restrictive language.

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COURT WATCH

Sexual Orientation Discrimination is Protected by Title VII, Holds District Court Judge in Connecticut

In *Boutillier v. Hartford Public Schools*, the U.S. District Court for the District of Connecticut broke new ground by denying an employer's motion for summary judgment and holding that an employee could assert a claim for sexual orientation discrimination under Title VII.

The court recognized that legislative proposals to amend Title VII and expressly include sexual orientation as a separate protected characteristic had not been successful. It held, however, that Congress's failed efforts did not preclude a conclusion that sexual orientation is included within the existing prohibition on sex based discrimination.

The court also acknowledged that past federal cases in the Second Circuit (and nationally) have not construed Title VII to prohibit discrimination based on sexual orientation. The court concluded, however, that the absence of past precedent should not foreclose the plaintiff's current claim that she was discriminated against for being married to someone of the same gender. The court reasoned that straightforward statutory interpretation and logic dictate that the term "sex" necessarily includes sexual orientation. The court also looked to more recent caselaw interpreting Title VII's prohibition against race discrimination, which has been recognized to prohibit discrimination based on interracial association, and held that a more expansive view

of sexual orientation discrimination claims is similarly warranted.

Further, the court took note of the changing legal climate. The EEOC's current position is that sexual orientation discrimination is protected by Title VII. Further a recent decision in the Seventh Circuit has been scheduled for full rehearing on the same issue presented in the *Boutillier* case. Also, a federal court decision out of the Southern District of New York, which held that sexual orientation was not protected by Title VII based on what that court viewed as binding precedent, is pending review on appeal to the Second Circuit. In an unusual move, the court chose to allow the employee's discrimination claim to proceed, notwithstanding its recognition that the appellate cases have not yet adopted the same analysis of Title VII's broader protection.

Transition to New I-9 Form for 2017

Beginning January 22, 2017 all employers must use a new version of the [I-9 form](#) for each new employment hire. The United States Citizen Immigration Service (USCIS) describes the new version as more user-friendly.

EEOC Issues New Enforcement Guidance on National Origin Discrimination

Continuing the recent trend of updating long-standing guidance, last month the EEOC issued updated enforcement guidance on national origin discrimination, together with a question and answer publication and small business fact sheet. As was the case with its recently updated Guidance on Retaliation, the EEOC included a list of "promising practices" that employers may adopt to promote compliance with the anti-discrimination laws.

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