FALL 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. The major legal developments have been in court cases this time, but note our update on hiring practices for NYC employers and the federal pivot to more conservative positions.

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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NYC RULES DESIGNATE 6 AUTOMATIC VIOLATIONS OF THE FAIR CHANCE ACT

Nearly two years into the New York City Fair Chance Act, which regulates employer inquiries into job applicants' criminal history, the City Commission on Human Rights has issued new rules enforcing the law. Among the key changes is the establishment of six "per se" violations, for which employers can be held liable without any evidence of an adverse employment action or proof of actual injury.... (*cont'd pg. 2)*

NYS Releases Model Forms to Comply with New Paid Family Leave Law

Now is the time for all New York State employers to update handbooks to include a Paid Family Leave policy. In addition, the state department of labor has now released forms, which can be accessed on their website, for employees to use both when requesting paid family leave and when eligible to opt out of the paid family leave benefit program.

Federal Government Pivoting on Key Labor and Employment Laws

As anticipated, the effects of the new presidential administration are becoming evident in the federal government's interpretation and administration of the laws pertaining to discrimination and employment compensation. Employers should note:

DOJ Backtracking on Sexual Orientation/Gender Identity Discrimination

On October 4, 2017 the Department of Justice rescinded a 2014 DOJ memorandum that the prohibition against sex discrimination protected gender identity and transgender individuals. This followed the DOJ's filing of an amicus brief in late July in which it argued that federal law does not prohibit discrimination based on sexual orientation. Currently the DOJ's position stands in direct contradiction of the position being maintained by the Equal Employment Opportunity Commission.... (*cont'd pg. 2)*

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SPOTLIGHT ON PRACTICES FOR HIRING IN NYC – EMPLOYERS BEWARE

6 Automatic Violations of NYC's Fair Chance Act

The following are *automatic* violations of the NYC Fair Chance Act:

(1) Advertising positions with reference to a limitation regarding criminal history, including phrases such as: "no felonies," "background check required," and "must have clean record;"
(2) Using employment applications that include a background check authorization or criminal history inquiry prior to a conditional offer;
(3) Using multi-jurisdiction employment forms that instruct New York City applicants not to answer specific questions on criminal history;
(4) Saying anything about an applicant's pending arrest or criminal history before a conditional offer;
(5) Noncompliance with the "Fair Chance Process" before taking action based on adverse criminal history, particularly the obligation to (a) provide the applicant with a written copy of all information relied on to determine if the applicant has a criminal history, (b) share with the applicant a written copy of the analysis of the relevance of the criminal history to the position at issue and the conclusion that it either bears a "direct relationship" to the job or presents an "unreasonable risk to property or to the safety or welfare of specific individuals or the general public"; and (c) hold the position open for at least three business days after providing both a and b to the applicant; or
(6) Requiring disclosure of an arrest that, at the time disclosed, resulted in a non-conviction.

Review Application Forms

Disclaimers to applicants will not cure multi-jurisdiction employment applications that ask impermissible questions about criminal or salary history. Criminal history questions automatically violate the NYC law and can result in fines and penalties; the NYC guidance also declares salary history questions to be impermissible.

New FAQs Proscribe Limits of Salary History Inquiry for NYC Employers

The clear message from new guidance issued by the NYC Commission on Human Rights is that neither direct nor indirect inquiries about a candidate's salary history are permissible. In particular, employers cannot ask about salary history on an employment application or during the pre-hire process. Such inquiries also may not be made to former employers or others, nor can public records be searched for information on a specific applicant's salary history, and background checks or feedback from headhunters cannot include salary history. The only time an employer can verify salary information is when it is disclosed voluntarily by an applicant, but employers need to ensure such disclosures are *truly* voluntary. Further, the proscription on salary history inquiries extends through the hire date; employment offers cannot be conditioned on such disclosures.

Federal Government Pivoting

New EEO-1 Forms on Hold, US DOL Again Revisiting FLSA Exemptions

The Office of Management and Budget has stayed the implementation of the new EEO-1 Form, which added compensation and hours worked components to the annual EEO-1 submission. Employers have until March 31, 2018 to submit their data for 2017, using the prior version of the EEO-1 Form.

The U.S. Department of Labor has gone back to the drawing board and is again considering revisions to the minimum wage and overtime requirements for executive, administrative, professional, outside sales and computer employees.

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NJ and NYC Enhance Discrimination Protections for Uniformed Service

As of August 7, 2017, New Jersey amended its Law Against Discrimination to prohibit all forms of discrimination against members of the Armed Forces and veterans. Similarly, current or prior uniformed service becomes a protected class under the New York City Human Rights Law effective November 19, 2017. The NYC protection is broader than New Jersey law and extends to actual or perceived service in the U.S. armed forces, the Commissioned Corps of NOAA or the U.S. Public Health Services, the National Guard, the organized militia of any state, territory, or possession of the United States, the Reserves, or comparable status for any other state, territory or possession of the United States. Notably, the New York City Human Rights Law also will affirmatively permit employers to offer a preference or privilege in hiring or employment decisions based on uniformed service.

COURT WATCH

Second Circuit Lowers Bar for Causation in FMLA Retaliation Claims

The Second Circuit Court of Appeals has lessened the evidentiary hurdle required for employees to prevail on a retaliation claim for interference with their taking leave under the Family and Medical Leave Act ("FMLA"). In *Wood v. START Treatments & Recovery Centers, Inc.* (July 19, 2017), the Court held that an employee with a documented record of poor performance who alleged she was terminated in retaliation for taking leave under the FMLA needs to prove that her protected leave was "a motivating factor" in her termination. The Court therefore vacated a jury verdict in favor of the employer and remanded the case for further proceedings based on what it deemed an erroneous and prejudicial jury instruction that the plaintiff was required to prove that "but for" her FMLA leave requests she would not have been terminated.

Second Circuit Serves Reminder to Non-Union Employers Against Overly Broad Confidentiality Clauses

In *National Labor Relations Board v. Long Island Ass'n for AIDS Care, Inc.* (Aug. 31, 2017), the Second Circuit Court of Appeals held that an employee acting individually could still assert a claim for an unfair labor practice where he was terminated for refusing to sign a confidentiality agreement that included clauses prohibiting employees from disclosing "non-public information intended for internal purposes" and barring employees from speaking with any "media source" without the employer's permission.

There are two notable aspects to the *LIAAC* decision. First, the Court reinforced the NLRB's position that, even in a non-union environment, employer agreements that can be construed to prohibit employees from discussing their compensation or other terms and conditions of employment are unlawful. Second, the Court refused to dismiss the claim even though the employee was acting on his own behalf in objecting to the confidentiality agreement. The Court stated that, when presented with unlawful restrictions on employee activity, an individual's objection is sufficient to make a legal claim and the employee need not have organized others to join in protest of the unlawful restriction.

CT Supreme Court Rules on Overtime Calculation for Retail Employees

In *Williams v. General Nutrition Centers, Inc*. (Aug. 17, 2017), the Connecticut Supreme Court held that, in accordance with a state Department of Labor regulation, employers must calculate overtime for non-exempt employees who work in retail based on the hours the employee usually works each week. Use of the fluctuating workweek method, under which employees receive a fixed weekly salary and overtime is calculated based on the hours actually worked in any given week, is not permissible for Connecticut employees in the mercantile trade, which includes retail sales employees.

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COURT WATCH

CT Federal Court Preserves Wrongful Termination Claim for Medical Marijuana Use

In *Noffsinger v. SSC Niantic Operating Company LLC* (Aug. 8, 2017), the U.S. District Court of Connecticut held that an authorized medical marijuana user who was offered a position as director of recreational therapy at a nursing home, conditioned on a pre-employment drug test, could proceed with her discrimination and common law legal claims after the nursing home rescinded its offer when she tested positive for cannabis in her system. The nursing home had sought to dismiss the plaintiff's claims, arguing the state law was preempted by three federal laws. The Court held that neither the Controlled Substances Act nor the Food, Drug and Cosmetic Act, cited by the employer, apply to employment practices. The Court further held that the Americans with Disabilities Act authorizes states to provide greater protection of individuals with disabilities and its provisions pertaining to drug testing of employees and addressing employees' use of illegal substances did not preempt the Connecticut law authorizing the accommodation of an employee's off-premises use of marijuana for medicinal purposes.

NY Appellate Court Holds Class Action Waiver in Arbitration Clause Violates NLRA

In *Gold v. New York Life Ins. Co.* (July 18, 2017), the New York State Supreme Court, Appellate Division held that a provision in New York Life's arbitration agreement with its insurance agents that prohibited class, collective or representative claims was unlawful. The Court reasoned that the class action waiver clause violated the National Labor Relations Act ("NLRA") because the NLRA has long been held to protect employees' right to collectively seek judicial remedies to achieve more favorable terms and conditions of employment. The Court therefore concluded that the entire arbitration agreement was unenforceable and that the plaintiff, a former insurance agent who had sought to file a class action against New York Life for violation of the wage and hour laws could proceed with her lawsuit and could not be compelled to arbitrate her claims.

NJ Supreme Court Provides Guidance on Roll-Out of Arbitration Policy to Existing Employees

In *Dungan v. Best Buy* (Aug. 11, 2017), the New Jersey Supreme Court held that a former manager suing for age discrimination was not bound by an arbitration clause rolled out three weeks prior to his termination where he had mouse-clicked a box at the end of the e-learning module introducing the policy that acknowledged he had read and understood the new policy. The Court held that the "I acknowledge" check box was fatally flawed in that it did not further state "and agree to the terms of the policy."

The arbitration policy rolled out by Best Buy had further provided that by remaining employed after the effective date, employees would be presumed to have consented to the policy. The Court acknowledged that, in some situations, continued employment may be sufficient to evidence acceptance of the new policy. However, because the plaintiff was fired just three weeks after the policy took effect, his continued employment was too brief to meet the requisite standard of explicit, unmistakable acceptance of the policy.

Dungan presents some clear guidance to employers introducing new arbitration policies in New Jersey. Ideally, obtain employees' handwritten signatures acknowledging agreement to the policy. If an employer instead relies on electronic signatures or acknowledgment boxes, be sure they state the employee "acknowledges reading and understanding the policy *and agrees to its terms*." Finally, continued employment after rolling out such a policy needs to be of meaningful duration to suffice as implicit consent to the arbitration policy.