WINTER 2017/18

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 reversals of NLRB decisions, new state wage rates, expanded paid sick leave, and cases clarifying standards on punitive damages and employee status.

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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TAX CREDIT FOR PAID FAMILY LEAVE BAKED INTO NEW TAX LAW

In a modest step toward national paid family and medical leave, the new federal tax law introduced a general business credit for 2018 that may benefit employers covered by the Family and Medical Leave Act (FMLA) who offer fully or partially-paid FMLA leave. Eligible employers who provide salary continuation at 50 percent or more of an employee's regular earnings for at least two weeks of the FMLA leave period can claim a tax credit equal to between 12.5 percent and 25 percent of the wages paid.

The new tax credit is not universally beneficial, and includes a number of important caveats. Most notably:

- The credit cannot be claimed if the employee is being paid by means of using accrued paid time off, including vacation, sick days or personal days;
- The credit only applies to paid leave for employees who are paid no more than 60 percent of the tax code's threshold for "highly compensated employees" (currently that would limit the credit to employees whose annual compensation does not exceed $72,000);
- To claim the tax credit, both full-time and part-time employees must be eligible for paid leave; and
- The credit does not apply to leave paid for by a state or local government (such as leave paid under New York State's new Paid Family Leave law).

Employers should consult with their tax advisors regarding their eligibility for the business credit. For some employers it may provide an opportunity to offer or enhance existing paid family and medical leave benefits by making such benefits more financially viable.

Responding to #MeToo

The #MeToo movement provides much for consideration, but most critically, employers are advised to revisit their harassment prevention policies and workplace training, incorporating lessons from the issues currently being raised.

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NLRB Rapidly Reverses Course On Host Of Issues

In a series of decisions issued last month, the National Labor Relations Board repeatedly demonstrated more deference to business interests, overturning or substantially modifying recent decisions.

NLRB Holds Business Rationale Relevant in Reviewing Handbook Policies

Employers may be given a reprieve in drafting employment policies meant to protect business interests and/or ensure civility and courtesy in the workplace. In its recent *Boeing Company* (Dec. 14, 2017) decision, the Board upheld a Boeing policy that prohibited use of camera-enabled devices, such as cell phones, on its property. Recognizing "fundamental problems" with the standard established for evaluating workplace policies that was set in the Board's 2004 *Lutheran Heritage* decision, under which policies were held unlawful if an employee could reasonably construe the rule as prohibiting activity protected under the labor relations law, the Board adopted a new test for evaluating such policies. The Board explained that, when evaluating facially neutral workplace policies that, when reasonably interpreted, would potentially interfere with the exercise of rights protected under the labor relations law, it would evaluate the nature and extent of that potential impact and consider the employer's legitimate justifications for its policy. The objective will be to strike a "proper balance" between the employer's business justifications and the protection of employee rights.

Applying such a standard to Boeing, the Board recognized a host of business concerns related to national security, protection of proprietary information, protection of employees' personally identifiable information and limiting the risk of terrorist attack. The Board concluded that any adverse impact of the no-camera rule on employees' exercise of their rights under the labor relations law is comparatively slight and outweighed by the company's "substantial and important justifications" for its policy.

Former Joint Employer Test Reinstated

In *Hy-Brand Industrial Contractors* (Dec. 14, 2017), the NLRB reinstated what had, until 2015, been a long-standing standard for defining a joint employer for purposes of union organizing. A majority of the Board emphatically reversed the test established in *Browning-Ferris Industries of California* (Aug. 27, 2015) (*see* Takeaways Fall 2015 p. 5). The Board declared the *Browning-Ferris* standard to be a "distortion of common law," "ill-advised as a matter of policy," and an impediment to the Board's discharge of its responsibility to foster stability in labor-management relations. Accordingly, the Board held that an entity should be held to be a "joint-employer" only if there is proof that it actually exercised joint control that was direct and immediate over essential employment terms. The Board said that control that is limited and routine would not suffice.

Other Union-Related Decisions

In *PCC Structurals, Inc.* (Dec. 15, 2017), the Board overruled its decision in *Specialty Healthcare and Rehabilitation Center of Mobile* (2011) and held that consideration of the appropriateness of the bargaining unit a union seeks to represent should focus on the "community of interests" impacted by that petition. This test requires evaluating the interests of the employees in the petitioned-for unit and those outside the unit. The *Specialty Healthcare* standard had more narrowly declared that only those groups that shared an "overwhelming" community of interests should be considered, thereby resulting in workplaces subdivided into much smaller bargaining units.

In *Raytheon Network Centric Systems* (Dec. 15, 2017), the Board reversed *E.I. du Pont de Nemours* (2016) and held that, in a union environment, an employer can take action unilaterally that is consistent with its past practice, regardless of the circumstances under which the past practice developed, and without triggering an obligation to bargain with the union.

Federal Tax Law Responds to #MeToo

Employers should seek legal advice before inserting nondisclosure clauses into settlement agreements related to sexual harassment claims. Among the less-publicized provisions included in the new tax law is a new section 162(q) of the Internal Revenue Code that, effective December 22, 2017, *denies* a tax deduction:

- for any settlement or payment related to sexual harassment or sexual abuse, or
- attorneys' fees related to the settlement or payment

if the settlement is subject to a nondisclosure agreement. While regulatory guidance is needed to clarify what is meant by settlements "related to" sexual harassment or sexual abuse, employers should be mindful of this new tax law when negotiating settlements of employment law claims.

NYC Expands Paid Sick Leave Uses

New York City is expanding its paid sick leave law in two significant respects, effective May 5, 2018. First, employees will be able to use paid sick leave to obtain needed medical, legal or social services if they or a family member are a victim of domestic violence, sexual assault, trafficking or stalking. Second, the broad definition of "family member" under the law will become even broader, expanding to include any blood relative or someone whose association is as close as that of a family member.

Salary Basis Threshold for Exempt Employees in New York State Rises with the New Year

New York employers may need to increase salaries or reclassify workers to adjust to the most recent increases in the salary basis thresholds for exempt status under the state's overtime laws. Separate from the federal Fair Labor Standards Act, New York State law requires that employees who are classified as exempt from overtime because of their executive or administrative responsibilities meet certain minimum weekly salary thresholds in order to be eligible for that exempt status. As of December 31, 2017, those thresholds increased throughout the state, but to varying amounts based on the work location of the employee within the state.

Within New York City, the thresholds are:

$975 per week for employers with more than 10 employees; and

$900 per week for employers with 10 or fewer employees.

In the surrounding suburbs of Westchester, Nassau and Suffolk counties, the new threshold is $825 per week. In the rest of the state it is $780 per week. Employers that raise employees' salaries in response to the new thresholds (or for any other reason) also should remember they are obligated to issue the impacted employees a new Form 195.1 Wage Notice.

Minimum Wage Rates Increase for New Jersey and New York

While Connecticut's minimum wage rate remains consistent for 2018 at $10.10 per hour, the minimum wage in New Jersey increased as of January 1, 2018 to $8.60 per hour. For New York State, the hourly minimum wage rate increased as of December 31, 2017, but to different rates depending on the work location of the employee:

NYC more than 10 employees	$13
NYC 10 or fewer employees	$12
Westchester, Nassau, Suffolk	$11
Rest of New York State	$10.40

Minimum wage rates in New York State for fast food restaurant employees are different ($13.50 for those in New York City with more than 10 employees, and $11.75 for all other fast food restaurant employers in the state). For employees who are partially compensated by tips, the tip credit thresholds also have modestly increased with the new year.

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New NYS Paid Family Leave Forms

The New York Workers' Compensation Board has made forms necessary for the implementation of the Paid Family Leave Law available on its website. The available forms include PFL-1, a general request for leave, and separate certifications for bonding leave, leave for a family member's serious health condition, and leave for a qualifying exigency.

New Jersey Expands Ban the Box Law

Effective December 20, 2017, New Jersey employers are prohibited from inquiring into an applicant's expunged criminal history. The state's existing ban on criminal history inquiries was also expanded to expressly prohibit online inquiries.

Albany Bans Salary History Inquiries

Effective December 17, 2017, employers with four or more employees in Albany County are prohibited from requiring job applicants to provide prior or current salary information before offering them employment.

Attention NYC Retailers

The NYC Department of Consumer Affairs has issued a form notice on scheduling practices that must be posted by all retail businesses that primarily sell consumer goods and have 20 or more employees in New York City.

COURT WATCH

NYS Court of Appeals Declares Distinct Standard for Punitive Damages Under NYC Human Rights Law

In *Chauca v. Abraham* (Nov. 20, 2017), the New York State Court of Appeals held that the state's common law standard for punitive damages should apply to claims under the New York City Human Rights Law. Under that standard, an employee is entitled to punitive damages "where the wrongdoer's actions amount to willful or wanton negligence, or recklessness, or where there is 'a conscious disregard of the rights of others or conduct so reckless as to amount to such disregard.'" In contrast, under federal law, employees cannot seek punitive damages without showing the employer intentionally discriminated with malice or reckless indifference to protected rights.

The distinction in language is not merely semantic. It means that the threshold a plaintiff needs to meet under the New York City law is arguably lower than that required by federal law in that punitive damages may be awarded even if the employee has not proven intentional discrimination. The Court explained that its holding is consistent with the broad remedial purpose stated in the New York City law.

NYS Court of Appeals Holds Perceived Alcoholism Not Protected Under NYCHRL

The New York Court of Appeals held that the New York City Human Rights Law (NYCHRL) does not permit a claim of disability discrimination based solely on a *perception* of untreated alcoholism. The Court accordingly held in *Makinen v. City of New York* (Oct. 17, 2017) that two New York City police officers who said they were not alcoholics could not assert a claim of disability discrimination under the NYCHRL for actions they said were taken against them based on the police department's presumption that they were alcohol dependent. Rather, the Court held that only those who are recovering or recovered from alcoholism and not currently abusing alcohol can assert such a discrimination claim under the New York City law.