SPRING 2018

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. #MeToo means major legal changes for NYS employers. NYC has added mandates for accommodating employees, and NJ and NYC have expanded discrimination law

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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NYS ADOPTS SWEEPING EMPLOYER MANDATES TO PREVENT SEXUAL HARASSMENT

New York employers' obligations to prevent sexual harassment in the workplace have increased exponentially as a result of a series of legal changes – including new policy language, annual training, new liability, and limits on contractual clauses – incorporated in the state's recently-passed budget bill. Effective immediately is an expansive new protection for non-employees, who include contractors, subcontractors, vendors, consultants and others providing services in the workplace pursuant to a contract or who are employed by such a contracting entity.

New York employers can now be held liable for sexual harassment of non-employees in their workplace if they knew or should have known of the conduct and failed to take immediate and appropriate corrective action to address the harassing behavior.

As of July 11, 2018, it will no longer be permissible to enter into any written contract in New York State providing for mandatory arbitration of sexual harassment claims, and any such clause will be deemed null and void. In addition, employers will not be permitted to include a confidentiality clause in the settlement or resolution of any claim for which the underlying factual basis involves sexual harassment unless the condition of confidentiality is the complainant's/plaintiff's preference. To prove that the complainant/plaintiff preferred to keep confidential the underlying facts and circumstances, the parties will be required to enter into a separate agreement memorializing this preference. The complainant will have 21 days to consider the confidentiality agreement before signing, and seven days to revoke that signature, before the confidentiality clause can become legally effective….(*see* pg. 3)

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NYC Employers Face Additional Procedural Obligations in Managing Employees

Two recent changes to New York City law grant employees new workplace entitlements and mandate new procedural requirements for employers with regard to temporary schedule changes and accommodation of certain conditions. The first law, which takes effect July 18, 2018, imposes three types of obligations on employers.

First, it grants employees essentially a guaranteed right to adjust their work schedule on up to two occasions per year, each time for no longer than one business day, due to a "personal event." The employer can require the employee to take the time off without pay in lieu of a schedule change, but except in very limited circumstances it cannot otherwise deny the request of an eligible employee. Employees are eligible for the benefits of the temporary schedule change law if they have been employed for at least 120 days and work at least 80 hours in the city in a calendar year. The "personal events" covered under the law relate to care of a minor child or an individual with a disability, attending legal proceedings for subsistence benefits, and for any reason covered under the city's paid sick leave law.

Second, the new law requires adherence to a documented consideration process. The employee must submit the schedule change request in writing as soon as practicable, but no later than the second business day after returning to work following the date of the schedule change. The employer then has a maximum of 14 calendar days to provide a written response that explains the reason for any denial and memorializes the number of requests and business days available for the employee to make future requests in that calendar year. The employer cannot deny the request if the employee fails to submit it in writing, but the absence of a written request will relieve the employer of the obligation to provide a written response.

Third, the law grants employees the right to request other temporary schedule changes (beyond the two legally-entitled requests). While the employer need not grant those additional requests, the parties are required to follow the same written documentation process with respect to all such requests, and the law prohibits retaliation against employees who make such a schedule change request.

In addition, a second New York City law, which takes effect October 15, 2018, requires employers presented with an employee's request for accommodation based on religious needs, disability, pregnancy, childbirth or related medical conditions, or as a victim of domestic violence, sex offenses or stalking, to engage in a "cooperative dialogue" with the requesting employee. This dialogue may be oral or written, and must discuss the need being addressed, potential accommodations including alternatives to those requested, and the difficulties potential accommodations may pose for the employer. Following this dialogue, the employer must provide the employee with a written final determination of whether and what accommodation has been granted. A reasonable accommodation request cannot be denied without an employer first having engaged in the cooperative dialogue.

NYC Updates "Sexual Orientation" And "Gender" Definitions Under Human Rights Law

Effective May 10, 2018, the New York City Human Rights Law definitions of "sexual orientation" and "gender" are being updated to more expansively protect against harassment and discrimination. The new law defines "sexual orientation" as "an individual's actual or perceived romantic, physical or sexual attraction to other persons, or lack thereof, on the basis of gender." The law defines "gender" as "actual or perceived sex, gender identity, and gender expression including a person's actual or perceived gender-related self-image, appearance, behavior, expression, or other gender-related characteristic, regardless of the sex assigned to that person at birth."

NYS Mandates Sweeping Sexual Harassment Prevention (*cont'd from p.1*)

Another key provision of the new state law gives New York employers the next six months to revisit their sexual harassment prevention policies. The NYS Department of Labor and the NYS Division of Human Rights are developing a model policy, and the law requires that every New York employer adopt that model or one that minimally includes the following provisions:

- Prohibition of sexual harassment, including examples of conduct that would be considered unlawful sexual harassment;
- Information concerning the federal and state laws on sexual harassment, remedies available to victims, and reference to possible local laws that also apply;
- A standard complaint form;
- A procedure for timely and confidential investigation of complaints that ensures due process for all parties;
- Information about employees' rights of redress and available forums to pursue legal remedies administratively and judicially;
- A clear statement that sexual harassment is a form of employee misconduct, individuals who engage in such misconduct will face sanctions, and supervisors and managers who knowingly allow the behavior to continue will also face sanctions; and
- A clear statement that retaliation against those who complain or those who testify or assist in any proceeding is unlawful.

All New York State employers will also be required to conduct annual sexual harassment prevention training. While the state is developing a model program, the minimum provided by the law is that the training be interactive and include:

- an explanation of sexual harassment consistent with the model policy;
- examples of unlawful harassing conduct;
- information on the federal and state statutory provisions and remedies available;
- information on the employees' rights of redress and all available forums for adjudicating complaints; and
- conduct by supervisors and their additional responsibilities.

Effective since April 12, 2018, state and local government employees adjudicated to be personally liable for sexual harassment will have to reimburse the government for their proportionate share of any jury award. Finally, as of January 1, 2019, all bidders for state government contracts will be required to certify in their bid that they have a written policy addressing sexual harassment prevention in the workplace and conduct annual sexual harassment prevention training for all their employees that minimally meets the requirements of New York law.

Note for NYC employers: currently pending for the mayor's signature is legislation that would require annual harassment prevention training for employers with 15 or more employees. The requirements are similar, but not entirely the same, as the NYS law.

NJ Expands Protections Against Discrimination

As of January 8, 2018, New Jersey's Law Against Discrimination has been expanded to protect employees who are breastfeeding. The amended law further requires employers to accommodate breastfeeding employees and provide "reasonable break time" and a "suitable room or other location with privacy" to express breastmilk. The law specifies that the room or location must be in close proximity to the employee's work area and may not be a toilet stall.

Effective July 1, 2018, New Jersey's Law Against Discrimination will be further expanded to assure employees equal pay not only without regard to gender, but without regard to any characteristic protected by the state's anti-discrimination law.

NJ Protects Employee Inventions

New Jersey employers who require their employees to sign agreements assigning the employees' rights to inventions and developments should note a recent legal change that preserves employees' right to their personal work product. As of April 1, 2018, any new agreement that requires the assignment of inventions will be unenforceable to the extent that it includes inventions the employee develops entirely on personal time, without using the employer's resources, if they do not relate to the employers' business and were not developed as a result of work performed for the employer.

COURT WATCH

Supreme Court Limits Dodd-Frank Whistleblower Protection to SEC Reports

In *Digital Realty Trust, Inc. v. Somers* (Feb. 21, 2018), the United States Supreme Court adopted a narrow construction of the Dodd-Frank Act and held that an employee cannot sue for whistleblower protection based solely on an internal report of conduct believed to be in violation of the securities laws. Rather, the Supreme Court held that the employee must have reported the concern externally to the Securities and Exchange Commission in order to claim protection under the law.

Second Circuit Recognizes Sexual Orientation Protection Under Title VII

Furthering a split among the federal courts, the Second Circuit Court of Appeals overturned 20 years of legal precedent to hold that a skydiving instructor could assert a viable claim of sex discrimination in violation of Title VII based on his assertion that he was fired for disclosing to a client that he was gay. The Court held in *Zarda v. Altitude Express, Inc.* (Feb. 26, 2018), that the Title VII prohibition against discrimination based on "sex" should be construed to prohibit discrimination based on sexual orientation.

Supreme Court Reinstates Expired State Law Claims

In *Artis v. District of Columbia* (Jan. 22, 2018), the United States Supreme Court addressed a question that arises when an employee files a lawsuit in federal court, asserting claims both under federal law and under state law, and the federal law claims are then dismissed. In *Artis*, the employee refiled the state lawsuit 59 days after the dismissal of the federal lawsuit, but the court dismissed the claims as time-barred. The Supreme Court reversed, holding that the filing of the federal lawsuit effectively suspended the statute of limitations on the state law claims during the pendency of that litigation.

Second Circuit Precludes Doubling Liquidated Damages

In *Rana v. Monirul Islam* (Apr. 6, 2018), the Second Circuit Court of Appeals held that an employee who receives a liquidated damages award for violations of the Fair Labor Standards Act may not additionally be awarded liquidated damages under the New York Labor Law when both claims are based on the same course of conduct.

US DOL Recognizes Court Test for Intern Classification

In January 2018, the U.S. Department of Labor released new guidance that adopts the "primary beneficiary test" to determine if interns are more appropriately classified as employees under the Fair Labor Standards Act. The Second Circuit Court of Appeals has been applying that same test since its 2015 decision in *Glatt et al. v. Fox Searchlight Pictures, Inc.*, as discussed in our Fall 2015 issue of Takeaways.

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