SUMMER 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. This issue covers #MeToo-related mandates from NYC, NJ Sick and Safe Leave, Connecticut and Westchester barring salary history inquiries, the NLRB easing up on handbook policies, and new U.S. Supreme Court decisions.

Levy Employment Law, LLC helps businesses identify and resolve workplace issues* before *they result in litigation 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 RESPONDS TO #METOO

NEW EMPLOYER TRAINING MANDATES, EXPANDED EMPLOYEE LEGAL PROTECTIONS

New York City has passed its own Stop Sexual Harassment in NYC Act that includes the following key provisions impacting employers:

- Mandatory interactive sexual harassment prevention training for all individuals who work at least 80 hours per year in New York City, which must be conducted on an annual basis, beginning within the first 90 days of an employee's hire;
- Mandatory posting of a new notice on rights and responsibilities to prevent sexual harassment;
- Distribution of a sexual harassment information sheet to all current employees, and to all new employees upon hire;
- Expansion of the scope of the New York City Human Rights Law with regard to sexual and gender-based harassment to apply to employers of any size (not just those with four or more employees);
- Expansion of the limitations period for gender-based harassment claims to three years (from one year currently); and
- A requirement that city contractors include in their employment reports disclosure of their policies, practices, and procedures relating to preventing and addressing sexual harassment.

The New York City law takes effect April 1, 2019, so employers have some time to plan for the new training requirement. The New York City training requirements are similar to those under the New York State law, except that the city law also requires discussion of options for bystander intervention.

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NLRB General Counsel Issues Welcome Respite on Employee Handbooks

New "Guidance on Handbook Rules Post-*Boeing,*" issued by the NLRB General Counsel on June 6, 2018, offers relief to employers by authorizing many handbook clauses that had been targeted as suspect or struck down by the Board in recent years. The General Counsel pronounced in this new memorandum that "ambiguities in rules are no longer interpreted against the drafter, and generalized provisions should not be interpreted as banning all activity that could conceivably be included."

The following types of handbook policies are to be recognized as "always lawful":

- Civility rules, such as those prohibiting rude or discourteous behavior or disparaging or offensive language;
- No-photography and no-recording rules;
- Rules against insubordination, non-cooperation or on-the-job conduct that adversely affects operations;
- Disruptive behavior rules, such as against disorderly conduct or creating a disturbance on work premises or during work hours;
- Rules protecting confidential, proprietary and customer information or documents (other than wage information);
- Rules against defamation or misrepresentation;
- Rules against using employer logos or intellectual property;
- Rules requiring authorization to speak as a representative of the company; and
- Rules banning disloyalty, nepotism or self-enrichment.

More broadly phrased policies on these same subjects will be subject to a balancing test. For example, confidentiality protection that extends beyond confidential and proprietary information to "employee information" generally, or prohibiting use of an employer's name, as distinct from its logo or trademark, will be reviewed based on:

- how employees will likely interpret the rule,
- the kinds of examples provided,
- the type and character of the workplace,
- whether the rule actually caused employees to refrain from engaging in protected activity, and
- the ease with which an employer could tailor the rule to accommodate its business interests and the employees' protected rights.

The General Counsel explained that rules that specifically ban protected concerted activity, or that are promulgated directly in response to organizing or other protected concerted activity, remain unlawful.

New Jersey Adopts State-Wide Sick and Safe Leave

Ending the piecemeal approach that has proliferated in many cities and other localities over the past several years, New Jersey has finally adopted a state-wide paid sick and safe leave law, which takes effect October 29, 2018. The new law will apply to all private employers in the state of New Jersey, and grant employees up to 40 hours (5 days) of paid sick and safe leave, accrued at a rate of one hour for every 30 hours worked.

Under the New Jersey law, leave can be used for any of the following:

- Diagnosis, care, treatment, or recovery for the employee's own mental or physical condition (inclusive of preventive care);
- Diagnosis, care, treatment, or recovery for a family member's mental or physical condition (including preventive care);
- Time needed as a result of an employee's or family member's status as a victim of domestic or sexual violence (including counseling, legal services, or participation in any civil or criminal proceedings related to same);
- Time when the workplace, school, or childcare is closed by order of a public official due to a public health concern; and
- Time to attend a school-related conference or meeting. (*Cont'd on p. 3)*

NJ Sick and Safe Leave *(cont'd from p. 2)*

This last reason distinguishes the New Jersey law from its counterparts in New York and Connecticut. The definition of "family member" under the law is quite extensive and includes any individual "whose close association with the employee is the equivalent of a family relationship."

Employees are permitted to carry over accrued, unused sick and safe leave time, but the employer need not provide more than 40 hours of leave in a single benefit year. Employees need not be paid out for unused sick and safe time when they separate from employment.

The New Jersey Department of Labor and Workforce Development is preparing a notice of rights under the Sick and Safe Leave Act, and employers will have 30 days from its issuance to post a notification of the law's provisions in the workplace and provide each employee with an individual notice. Going forward, employers will need to provide notice of employees' rights to sick and safe leave at the time of hire.

Connecticut and Westchester County Ban Salary History Inquiries

Continuing a recent legislative trend, Connecticut is prohibiting employers from asking candidates about their salary history during the job interview process. This new prohibition takes effect January 1, 2019. The law recognizes an exception if the job applicant voluntary discloses salary history information. Further, the law states that employers can inquire about other elements of an employee's compensation structure, provided it does not inquire about the value of any of those elements.

Effective July 9, 2018, employers in Westchester County, New York who have four or more employees will be prohibited from inquiring about prior or current salary information during the hiring process.

COURT WATCH

Supreme Court Upholds Class Action Waivers in Arbitration Clauses

The Supreme Court provided employers with greater scope in drafting arbitration agreements, holding in *Epic Systems Corp. v. Lewis* (May 21, 2018), that a class action waiver clause in an arbitration agreement did not violate the National Labor Relations Act. The decision consolidated three cases, in each of which an employee sought to litigate wage and hour claims under the Fair Labor Standards Act as a class or collective action, despite being party to an arbitration agreement that precluded such lawsuits. The Supreme Court held that the Federal Arbitration Act requires federal courts to enforce arbitration agreements according to their terms, including terms providing exclusively for individualized proceedings. The Court further held that the NLRA and the FAA enjoy "separate spheres of influence" and nothing in the NLRA grants employees an absolute right to proceed with class actions.

Supreme Court FLSA Decision Provides Window for Broader Interpretation of FLSA Exemptions

In *Encino Motorcars, LLC v. Navarro* (Apr. 2, 2018), the Supreme Court addressed a relatively narrow statutory exception to federal overtime eligibility requirements, but part of the Court's reasoning is likely to have a much broader impact. On the narrow issue before it, the Court held that service advisors at an automobile dealership are exempt from the overtime requirements of the Fair Labor Standards Act (FLSA) under an exemption for salesmen "primarily engaged in selling or servicing automobiles." In so holding, the Court departed from more than 50 years of precedent and rejected the principle that exceptions to the FLSA should be construed narrowly. The Court stated that, instead, such exemptions should be given a "fair reading." The Court's holding on this latter point may have implications with respect to the interpretation of other, more common, exemptions to the FLSA.

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