WINTER 2018/19

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 includes an in-depth analysis of paid sick leave requirements in the tri-state area, and also covers further NYC protections for employees, changes in NYS and CT law, the Supreme Court's recent decision on the ADEA, and NJ court decisions on medical marijuana and arbitration agreements.

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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PAID SICK LEAVE LAWS EXPAND ACROSS TRI-STATE AREA; REQUIRE REVISITING POLICIES AND PRACTICES

Westchester County recently enacted its own paid sick leave law, which will apply to private employers effective April 10, 2019. The county law builds on a wave of paid sick leave laws spreading throughout the tri-state area, with a new state-wide law that took effect in New Jersey this past October (superceding the piecemeal approach that had spread to more than a dozen municipalities within the state), and recent (more expansive) regulations under New York City's Earned Safe and Sick Time Act. The collective impact for employers in multiple locations can be quite significant because, while similar in key respects, the paid sick laws in these locations and Connecticut vary with regard to eligibility, accrual, usage, notice and anti-retaliation provisions. Businesses may elect to incorporate the most employee-friendly provisions from each of the four jurisdictions to avoid a piecemeal approach and achieve uniformity and consistency across all locations. (*see Analysis p.4)*

NYS WAGE DEDUCTION LAW REINSTATED

New York State has extended until November 6, 2020 its wage deduction law, which had expired this past November. The law permits employers to make only very limited deductions from employees' wages, and also mandates prior authorization and certain established procedural measures to assure employees will not be subject to unfair deductions.

80/20 FEDERAL TIP CREDIT RULE REVOKED

The United States Department of Labor recently reversed previous guidance setting an "80/20" rule for use of the tip credit under the Fair Labor Standards Act, which had barred employers from paying a lower cash wage to tipped employees who spent more than 20% of their time performing non-tip generating duties.

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NYC Employers Need to Identify Private Spaces for Nursing Mothers; Issue Policy

Effective March 18, 2019, New York City employers with four or more employees must review their work locations to identify an appropriate private space that can be used by nursing mothers to express breast milk. The designated space must be shielded from view and free from intrusion, and it needs to minimally include an electrical outlet, a chair, a surface on which to place a breast pump and six other personal items, and nearby access to running water and a refrigerator. A bathroom is not considered a suitable location under the law. Employers must also adopt a written policy regarding the provision of a lactation room, notifying employees of their right of access and right to reasonable break time to use the room, and including detailed provisions on the process to obtain access.

NYC Brings List of Protected Characteristics to 20 Under NYCHRL

Employers are now expressly prohibited from basing employment decisions on an individual's "sexual and reproductive health decisions" as a result of the most recent amendment to that portion of the New York City Human Rights Law. This change is intended to assure employees that they may not be discriminated against based on their decision to receive such services as fertility-related medical procedures, sexually transmitted disease prevention, testing, and treatment, and family planning services and counseling, such as birth control drugs and supplies, emergency contraception, sterilization procedures, pregnancy testing, and abortion. The city now prohibits employment discrimination based on 20 protected characteristics, including:

- Age
- Alienage or Citizenship Status
- Arrest or Conviction Record
- Caregiver Status
- Color
- Credit History
- Disability
- Gender
- Gender Identity or Expression
- Marital or Partnership Status
- National Origin
- Pregnancy
- Race
- Religion/Creed
- Salary History
- Sexual Orientation
- Status as Victim of Domestic Violence, Sexual Violence, or Stalking
- Unemployment Status
- Status as a Veteran or Active Military Service Member
- Sexual and Reproductive Health Decisions.

More NY Localities Prohibit Asking a Job Applicant About Salary History

Suffolk County is joining Westchester and Albany counties and New York City in prohibiting employers from inquiring about a job applicant's wage history. The new Restricting Information on Salaries and Earnings ("RISE") Act takes effect June 30, 2019 and prohibits any inquiry or search of public records to ascertain an applicant's past compensation or benefits. While the other jurisdictions in New York with such a law permit some limited consideration of salary history later in the process if raised by the applicant, the Suffolk County law has an outright prohibition on salary history being considered, with no exceptions.

NYS Paid Family Leave Coverage Expanded

Effective February 3, 2019, the NYS Paid Family Leave benefit expressly applies to the time an employee spends preparing for and recovering from organ or tissue donation. Employers should also be mindful that employees' PFL entitlement has increased to 10 weeks as of January 1, 2019. Paid benefit amounts increased to 55 percent of the employee's average weekly wage, but are capped at the statewide average of $746.41 (55% of the AWW of $1357.11).

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CT Requires Retirement Plans for Employees in the Private Sector

Moving forward with legislation enacted in 2016 that established the Connecticut Retirement Security Authority (CRSA) to oversee a state-run IRA program for private-sector employees, the Chairman of the CRSA recently announced that beginning in January 2019 it will begin to phase-in a requirement that private employers without their own workplace-based retirement plans enroll employees in IRAs sponsored by the state. The program applies to employers with five or more employees in the state that do not provide pensions or have 401(k) plans for their employees, and requires that covered employees be automatically enrolled in the CRSA program.

COURT WATCH

USSC Holds ADEA Applies to All Municipalities

In *Mount Lemmon Fire District v. Guido* (Nov. 6, 2018), the U.S. Supreme Court unanimously held as a matter of statutory interpretation that the federal Age Discrimination in Employment Act of 1967 (ADEA) applies to all state and local government employers, regardless of the size of the workforce. In so holding, the Court rejected arguments that the 20-employee threshold for application of the ADEA to private employers was equally applicable to state and local governments, or that there was any incongruity in its holding when the anti-discrimination protections under Title VII of the Civil Rights Act of 1964 had been construed as limited to government employers that met Title VII's 15-employee jurisdictional threshold.

NJ District Court Denies Medical Marijuana Exception to Employer Drug Test

In the still-novel area of medical marijuana usage as applied to employer drug testing policies, a federal district court in New Jersey recently held, in *Cotto v. Ardagh Glass Packing, Inc.* (D.N.J. Aug. 10, 2018), that neither New Jersey's Law Against Discrimination (NJLAD) nor its Compassionate Use Medical Marijuana Act (CUMMA) require an employer to waive a drug test as a condition of employment for employees who use prescribed medical marijuana. Cotto, a forklift truck operator, had sought an exception from the company's requirement that he pass a breathalyzer and urine test in order to return to work following a medical leave because he had been prescribed marijuana, in accordance with the CUMMA, for pain management from a past neck and back injury. The court held that passing a drug test was an essential function of Cotto's job, and that the employer neither discriminated against Cotto nor failed to accommodate him by refusing to "waive a drug test for federally-prohibited narcotics." The *Cotto* decision, based on New Jersey law, reached the opposite conclusion of the previously-reported decision of the federal district court in Connecticut in *Noffsinger v. SSC Niantic Operating Co., LLC, d/b/a Bride Brook Nursing & Rehab. Ctr.*, (Sept. 5, 2018), which was construing Connecticut's Palliative Use of Marijuana Act (*see* Takeaways Fall 2018).

NJ Court Holds Failure to Specify Arbitration Panel Invalidates Arbitration Agreement

The New Jersey Appellate Division's decision in *Flanzman v. Jenny Craig. Inc.* (Oct. 17, 2018), reminds employers not to overlook the details when drafting contractual agreements. The employee had signed an agreement providing that she was waiving her right to a jury trial and instead agreeing to arbitration of any and all claims arising out of her employment. While the agreement specified the allocation of costs for the arbitration, it never specified the arbitration forum or any process for conducting the arbitration. The appellate court held this was a fatal flaw, and it therefore held that the employer's request to compel arbitration of Flanzman's age discrimination and harassment claims should have been denied.

IN-DEPTH ANALYSIS:

Structuring a Multi-Locality Sick Leave Policy

Consensus at the Macro Level:

Connecticut, New Jersey, New York City, and Westchester County all permit eligible employees of covered employers to accrue up to 40 hours of sick leave per calendar year. This leave can, at a minimum, be used for the employee's own illness, injury, or preventive medical care or treatment, and the medical care and treatment, including preventive medical care, of certain family members. Employees are minimally required to provide notice as soon as practicable prior to taking a sick day. Employers may request documentation to substantiate an absence of more than three consecutive days, but are required to keep confidential the information they receive. Further, all employees must receive written notice upon hire regarding their rights under the law, and retaliation is prohibited against employees who exercise their sick leave rights.

Divergence in the Details:

Connecticut's sick leave law is limited to non-exempt service workers (as defined by the US Bureau of Labor Statistics), excluding manufacturing and not-for-profits. The New Jersey, New York City, and Westchester County laws apply to all private employers, although in New York City and Westchester, the leave need only be paid if the employer has five or more employees. And then there are the following key jurisdictional differences:

Key Differences In Sick Leave Mandates Across Jurisdictions

Connecticut	New York City	New Jersey	Westchester County
Eligible if worked an average of 10 hours/week in prior quarter	Eligible if worked at least 80 hours in the locality	No minimum hours worked required	Same as NYC
Accrue 1 hour/40 worked; can begin to use after *working* 680 hours	Accrue 1 hour/30 worked; can begin to use 120 days after begin employment	Same as NYC	Accrue 1 hour/30 worked; can begin to use 90 days after begin employment
Uses include if employee is a victim of family violence/sexual assault	Uses same as CT *plus* if public health emergency closes office or child care center	Uses same as NYC *plus* to attend school-related conference, meeting or event, or meeting related to care provided to a child for a disability or health condition	Same as NYC except *not* for victims of family violence or sexual assault
Family members include child (broadly defined) and spouse	Same as CT *plus* domestic/civil union partner, parent (broadly defined), sibling, grandparent or grandchild, or child or parent of spouse/domestic partner, and any blood relative or individual who is equivalent to a family member	Same as NYC *plus* the sibling of a spouse/ domestic/civil union partner	Same as NYC *plus* the child or parent of a household member; *except* does *not* apply to any blood relative or individual who is equivalent to a family member
Rehired employee credited for past hours worked, not prior accrued days	Reinstate accrued, unused time if employee returns within 6 months of break-in-service	Same as NYC	Reinstate accrued, unused time if employee returns within 9 months of break-in-service
Can **eliminate carryover** by mutual agreement if pay out accrued, unused days	Need not permit carryover if employer frontloads the full sick/safe time annual entitlement	Year-end payout opportunity mandatory under an accrual policy, optional under a front-loaded policy; anything not paid out must be carried over	Same as NYC
7 days' employee notice may be required if usage is foreseeable	Same as CT; confidentiality required	Same as NYC	Notice may be required if reasonable and in a written policy
Notice of rights under the law must be provided to employees upon hire or through a posting	**Distribution** of notice *and the policy* is required upon hire; for the policy, redistribute within 14 days of any policy changes, and upon employee request	Same as NYC regarding notice, with distribution upon hire or employee request; no requirement regarding policy distribution	Same as NJ
Retaliation prohibition	Same as CT	*Rebuttable presumption of retaliation* for any adverse action 90 days post exercising rights under the law	Same as NJ