



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 a plethora of employee-friendly changes to NJ law (including leaves, legal remedies and minimum wage), guidance for NYC employers on discrimination and training, new Westchester County laws, and court decisions on wage payments, disability-based harassment, and employee privacy.

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 EEOC and state and local administrative agencies.*

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This newsletter is provided for informational purposes only to highlight recent legal developments. It does not comprehensively discuss the subjects referenced, and it is not intended and should not be construed as legal advice or rendering a legal opinion. TAKEAWAYS may be considered attorney advertising in some jurisdictions.

NEW JERSEY RAPIDLY ADOPTS NEW EMPLOYEE-PROTECTIVE LAWS

New Jersey is becoming increasingly progressive with a series of recent laws that expand employee leave protections, restrict non-disclosure provisions in settlements and pre-dispute arbitration agreements, and raise the minimum wage.

Substantial Expansion of Family Leave Act

New Jersey amended its Family Leave Act (NJFLA), effective June 30, 2019, to apply to employers with 30 or more employees (which is a significant expansion from the prior 50-employee threshold). The law also made the following significant changes, that became effective immediately upon the law’s passage on February 19, 2019:

- Broadening the definition of “family member” beyond child, parent, spouse, or civil union partner to also include parent-in-law, sibling, grandparent, grandchild, domestic partner, or any other blood relative, and “any other individual that the employee shows to have a close association with the employee which is the equivalent of a family relationship;”
- Expanding the period for intermittent leave from 24 weeks to 12 consecutive months, and requiring employers to grant leave on an intermittent basis for the birth, adoption, or foster care placement of a child; and
- Revising the definitions to provide for leave for the birth of a child via a surrogate or gestational carrier.

Broadened Coverage Under the Security and Financial Empowerment Act

The New Jersey SAFE Act provides eligible employees with up to 20 days of unpaid leave to address circumstances resulting from domestic violence or a sexually violent offense. Recent amendments expand the scope of covered family members to mirror the broadened scope under the NJFLA; preclude employers from mandating that employees use accrued paid time off for SAFE Act leave; and permit employees to use statutory short-term disability benefits during their leave. (see *NJ Employee-Protective Laws p.3*)

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NYC Employers Note Guidance on Harassment Prevention Training, Gender and Race Discrimination

New Sexual Harassment Prevention FAQs and Video

New guidance issued by the New York City Commission on Human Rights ("NYCCHR") makes clear that small employers or those based outside New York City should not assume that they are exempt from the particulars of the New York City sexual harassment prevention training requirement. While training is only required for employers with 15 or more employees, independent contractors *are counted* toward that minimum threshold, and the training obligation is triggered if the employer has 15 or more employees *at any point* in the calendar year. Also, employees who work outside New York City but who have *any connection* to the City are required to be trained, even if they never set foot in the City.

Employers can satisfy their training obligations under both the City and State law by having their employees complete a free 45-minute online [video](#). The video can be completed by multiple staff together on a single device, but it must be completed in a single sitting because progress cannot be saved and employees cannot skip ahead. For each completed session, the training will generate a single certificate of completion, and the Commission states that it is not retaining any records of who completes the training. While legally compliant, the video focuses almost exclusively on prevention of *sexual* harassment and retaliation. Employers that wish to go beyond the legal minimum and address the full range of protected classes and

inappropriate behaviors should consider alternative training options.

Rules on Gender Non-Conforming Employees

The New York City Commission on Human Rights has adopted new rules that establish broad protections for transgender, non-binary, and gender non-conforming individuals. In addition to providing definitions of terms, the Rules make clear that the following actions are considered unlawful discrimination:

- Deliberate misuse of an individual's chosen name, pronoun or title because of the individual's gender;
- Barring individuals from single-sex facilities or single-sex programs consistent with their gender identity;
- Imposing different dress or grooming standards based on gender;
- Gender-based differences in employee benefits; or
- Refusing a request for accommodation based on gender.

Restrictions on Natural Hair and Hairstyles as Racial Bias

The Commission also released enforcement guidance in February 2019 that classifies bans or restrictions on natural hair or hairstyles associated with black people as a form of race discrimination. According to the Guidance, employer policies may not prohibit "twists, locs, braids, cornrows, Afros, Bantu knots, or fades which are commonly associated with Black people... or any grooming or appearance policies that generally target communities of color, religious minorities, or other" legally-protected groups.

NY Adds Gender Identity Protection to State Human Rights Law

New York State has expanded the list of protected characteristics under the Human Rights Law to now preclude employers from discriminating against individuals based on their gender identity or expression. The amendments to the law took effect February 24, 2019.

NYCCHR Issues FAQs and Model Policies on Lactation Accommodation

The NYC Commission on Human Rights has issued model policies and [Frequently Asked Questions](#) related to lactation accommodation. As reported in the Winter 2018-19 issue of [Takeaways](#), employers were required to have dedicated space and policies in place by March 18, 2019.

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New Jersey Employee-Protective Laws

Expanded Family Leave Insurance Rights and Benefits

New Jersey has greatly expanded its Family Leave Insurance to:

- Increase the monetary benefits available;
- Double from six to 12 the number of weeks for which benefits are available (effective July 1, 2020);
- Increase from 42 to 56 the number of days of benefits available for intermittent leave;
- Limit employers' ability to offset Family Leave Insurance benefits against employer-provided paid leave time;
- Expand definitions to mirror the covered individuals under the NJFLA;
- Add an expansive anti-retaliation provision;
- Impose additional notice requirements for employers with private plans; and
- Impose new penalties and extend others for employers who do not comply with legal requirements.

Preclusion of Arbitration Agreements and Nondisclosure Clauses for Discrimination, Harassment and Retaliation Claims

New Jersey has uniquely amended its Law Against Discrimination ("LAD"), effective March 18, 2019, to render unenforceable against the employee any agreement that:

- in any way limits the employee's rights related to a claim of discrimination, harassment or retaliation (including arbitration agreements, class action waivers and jury trial waivers);
- prospectively waives a right or remedy under the LAD or any other statute or case law; or
- limits disclosure of "the details" of a claim of discrimination, harassment or retaliation.

Employers are further required to provide a "bold, prominently placed notice" to employees that the employee will not be able to enforce a confidentiality clause in a settlement agreement against the employer

if the employee publicly reveals sufficient details of the claim so that the employer is readily identifiable.

The new law has some limits. It does not apply to agreements that predate the effective date, unless they are subsequently renewed, modified or amended. It also does not apply to non-compete agreements, or to confidentiality agreements that limit disclosure of trade secrets, business plans and customer information.

Minimum Wage Increases Begin July 1

New Jersey is raising its minimum wage by increments to reach \$15 per hour by 2024. The first increase, to \$10 per hour, takes effect July 1, 2019. A more graduated schedule applies to employers with five or fewer employees and to seasonal employees, for whom the first increase to the minimum wage will be to \$10.30 per hour effective January 1, 2020, and incrementally thereafter to reach \$15 by 2026.

Westchester County, NY Laws Impact Private Employers

New Ban-the-Box Law

Westchester County law now prohibits employers from discouraging applicants with an arrest or criminal record from applying for jobs, and from asking about arrest or criminal history on the initial employment application. The Westchester law recognizes only two exceptions:

- Where the criminal background check is otherwise required by law for employment; or
- For positions in law enforcement agencies, such as peace or police officers.

Employers are not, however, prohibited from inquiring about criminal history at the interview stage or thereafter.

Paid Sick Leave Notices

To enforce the new Earned Sick Leave Law (as reported in the Winter 2018-19 issue of [Takeaways](#)), Westchester County recently released a model [written notice](#), which employers are required to provide employees, along with a [copy of the law](#), by July 10, 2019 and, thereafter, upon hire.

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COURT WATCH

NYS Court of Appeals Rules on Pay for 24-Hour Home Health Aides

Providing immediate relief to the home health care industry, the New York Court of Appeals, in *Andryeyeva v. New York Health Care, Inc.*, and *Moreno et al. v. Future Care Health Services, Inc.* (Mar. 26, 2019), upheld as rational and reasonable the Department of Labor's interpretation of a wage order with regard to home health aides. That order required payment for at least 13 hours in a 24-hour shift if the aide is allowed a sleep break of at least 8 hours, and actually receives five hours of uninterrupted sleep and three hours of meal break time. The court thereby reversed decisions of the Appellate Division, Second Department, which had required payment of at least minimum wage for every hour of a 24-hour shift because the aide was required to be available during that time.

Second Circuit Recognizes Disability-Based Harassment Claim

In *Fox v. Costco Wholesale Corp.* (Mar. 6, 2019), the Second Circuit Court of Appeals affirmatively held that an individual may assert a hostile work environment claim under the Americans with Disabilities Act. The Court reinstated the claim of a long-time Costco employee who has Tourette's Syndrome and Obsessive-Compulsive Disorder, where he asserted that his coworkers mocked him for his disabilities, within hearing of supervisors, and the supervisors failed to intervene. The plaintiff asserted that, for months and months, employees mimicked his verbal and physical tics, and the comments persisted for "months and months" whenever he experienced tics. Noting similarities in the language and purpose of Title VII of the Civil Rights Act of 1964 and the ADA, the Court held that the discrimination prohibition under the ADA should be construed similarly to that under Title VII and thereby extend to claims of a disability-based hostile work environment.

Third Circuit Upholds Injunction in Favor of Former Employer, Despite Employer's Having Spied on Former Employees' Social Media Activity

In *Scherer Design Group, LLC v. Ahead Engineering LLC*, (Feb. 25, 2019), the Third Circuit held that a New Jersey engineering firm that surreptitiously spied on the social media activity of its former employees who had left as a group to start a competing firm was not barred from obtaining an injunction to stop the group from taking Scherer's clients. The departed employees had argued that their former employer had unclean hands because it had accessed the personal social media accounts of several of its former employees via passwords saved on their office computers and installed software allowing them to monitor that social media activity without detection. The Third Circuit held that it was not unreasonable for the District Court to have declined to apply the "unclean hands" doctrine because the conduct was not related to the equitable relief sought.

Court Lifting of OMB Stay Reinstates EEO-1 Pay Data Reporting Requirements

Employers with EEO-1 reporting requirements (those with at least 100 employees, and federal contractors with 50 or more employees and at least \$50,000 in contracts) must begin filing revised forms that include aggregate pay data beginning September 30, 2019. More information on the particulars of what needs to be reported are summarized in the Winter 2016 issue of [Takeaways](#). While initial reporting of the new pay data was to have been completed by March 31, 2018, for the 2017 reporting cycle, in late August 2017 the Office of Management and Budget (OMB) had ordered the EEOC to issue a stay of the new form, pending further OMB review. Two non-profit advocacy organizations sued to challenge the stay, and in *National Women's Law Center v. Office of Management and Budget* (Mar. 4, 2019), the U.S. District Court in Washington, D.C. granted their motion, vacated the stay, and ordered that the revised form be put in effect. The EEOC has since announced that employers need to collect retroactively the additional pay data for 2018 and submit the relevant data to the EEOC by September 30, 2019.

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