SUMMER 2019

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 bursts with CT harassment prevention, FMLA and minimum wage changes; NYS salary history, discrimination and equal pay protections, new voting leave; NJ medical marijuana and salary history protections; noteworthy U.S.S.C. and state appellate court decisions and more at the local level.

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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CONNECTICUT TAKES ITS TURN

Recent changes to Connecticut law follow New York and New Jersey's lead of expanding employee workplace benefits and protections. A new Time's Up Act enhances protections against sexual harassment and mandates new notice and training requirements. The state's Family and Medical Leave Act is expanding to cover every private employee in the state and add a paid leave benefit. Finally, the minimum wage is being increased at an accelerated rate to reach the $15 per hour threshold. (*see CT Employee-Protective Laws p.2)*

NYS PROHIBITS EMPLOYERS FROM ASKING APPLICANTS HOW MUCH THEY EARN; NJ LIKELY FOLLOWING SUIT

New York State and New Jersey both recently passed laws prohibiting employers from requesting, requiring or seeking a job applicant's salary or wage history. The New York bill was signed by Governor Cuomo on July 10, 2019 and takes effect January 7, 2020. The New Jersey version is sitting on Governor Murphy's desk and will become law on August 5, 2019 or sooner, with immediate effect, unless vetoed by the governor.

New York State's law builds on existing laws in New York City and Albany, Suffolk and Westchester Counties, and is more stringent than any of them. The New York State law protects current employees as well as job applicants and prohibits any inquiry (to anyone) about an individual's salary or wage history in interviewing, hiring, promoting, or otherwise continuing employment. Applicants for employment may voluntarily disclose their salary or wage history, but New York State *prohibits* employers from relying on that information in determining whether to offer employment or in determining what wages or salary to offer an applicant. Employers also may not retaliate against any applicant or employee who refuses to provide salary or wage history or files a complaint with the Department of Labor based on a violation of the wage history ban. *(see NY/NJ Salary History Bans p.3)*

LEVY EMPLOYMENT LAW, LLC
Legal and Employee Relations Consulting Services
411 Theodore Fremd Avenue, Suite 206 South, Rye, NY 10580
Tel: 914-338-8023 Fax: 914-637-1909
www.levyemploymentlaw.com; info@levyemploymentlaw.com

Connecticut Employee-Protective Laws

All-Inclusive Harassment Prevention Training, Notice and Protections

Beginning October 1, 2019, employers must provide each employee, within three months of their start date, with information about the illegality of sexual harassment and remedies available to victims of sexual harassment. This notice must be provided by email if the employer provides employees with a business email address, and otherwise the employer must post this information on the employer's internet website, if the employer has one.

Harassment prevention training requirements that formerly were limited only to supervisors at larger employers will now expansively apply to every employee at employers with three or more employees and all supervisors, regardless of the size of the employer. Employers have 12 months (or until October 1, 2020) to complete the training for existing employees, but there is only a six-month window to train anyone hired or assuming a supervisory role on or after October 1, 2019. Once the initial training is completed, employers have 10 years to conduct a refresher training session.

The Connecticut Commission on Human Rights and Opportunities ("CHRO") can now assign a representative to inspect an employer's place of business where a complaint has been filed or if the Executive Director "reasonably believes" that the employer is in violation of the new posting and training requirements.

Further, employees who believe they have been subjected to any discriminatory practice in violation of Connecticut law will now have 300 days from the adverse action to file a complaint with the CHRO. In responding to an employee's complaint of sexual harassment, an employer can no longer relocate the complainant, change his/her schedule or make any other modification to the terms and conditions of the employee's employment absent the employee's written consent.

Expanded Family Medical Leave Benefits

Connecticut has substantially overhauled its Family Medical and Leave Act ("CT FMLA"), extending the law to every employer in the state, escalating the employee eligibility threshold, broadening the range of covered activities and introducing a new paid family leave component. In particular, the new law:

- covers every employer (at least 1 employee);
- recognizes eligibility for benefits if an employee has worked at least three months, earning at least $2,325 in a "base period;"
- extends current family care coverage to include siblings, grandparents, grandchildren and "anyone else related by blood or affinity whose close association the employee shows to be the equivalent of those family relationships;"
- changes the leave benefit to a maximum of 12 weeks in a 12-month period, with an additional two weeks of leave available for pregnancy-related disability; and
- introduces a paid family leave benefit, which will be funded through an employee payroll tax and provide wage replacement up to a cap, tied to the state's minimum wage (initially $780).

None of the provisions of the new CT FMLA will take effect before January 1, 2021, and the paid leave component and broadened coverage will not take effect until January 1, 2022.

Minimum Wage Increases Begin October 1

Connecticut is increasing its minimum wage to $15 per hour, with the first increase to $11 this October 1, and annual $1 increases at 11-month intervals thereafter, until reaching the $15 threshold effective October 15, 2023. The state has also adopted annual minimum wage adjustments for each succeeding calendar year that are tied to the percentage change in the U.S. Department of Labor's annual Employment Cost Index for civilian workers' salaries and wages. The new law includes a process to suspend minimum wage increases in the event of significant financial impact, measured by negative growth in the state's gross domestic product.

NY/NJ Salary History Bans (*cont'd from p. 1)*

Westchester County's salary history law, by its terms, is expressly preempted by the new state law. There is no comparable express preemption clause in the Suffolk or Albany County laws, but those laws appear to be less protective of employees than the new state version. The New York City law prohibiting salary history inquiries is more protective than the state version in that it prevents employers from searching public records to learn an applicant's salary history. In this regard the law will continue to impact New York City employers, but in all other respects it appears that the state version is either the same or more protective.

If it becomes law, the New Jersey version is limited to job applicants and, unlike in New York, permits an employer to consider salary history when voluntarily provided by the applicant. New Jersey also will permit an employer to seek permission to verify an employee's salary history after making an offer that is inclusive of the compensation package, but an employer will be prohibited from basing any employment decision on an applicant's refusal to authorize the salary verification.

NYS Expands Equal Pay to All Protected Classes

Effective October 8, 2019, the New York State Labor Law will prohibit pay differentials based on any protected characteristic under the state Human Rights Law. Similar to a change adopted last year by New Jersey, the amended New York law requires equal pay for substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under substantially similar working conditions. The New York law also follows New Jersey's lead in permitting pay differentials that are based on bona fide factors such as merit or seniority-based systems; differences in training, experience or education; and differences in the quality or quantity of production. However, the bona fide factors are not a defense if they have a disparate impact on individuals with a particular protected characteristic or if an alternative compensation practice would serve the same business purpose without the pay differential and the employer refused to adopt the alternative practice.

One of the key differences between the New York and New Jersey versions of the equal pay law is that New York law looks for equal pay among employees performing substantially similar work in the "same establishment," while New Jersey law looks more broadly at pay rates among "all of an employer's operations and facilities."

Retaliation Prohibited for Accommodation Requests

New York City has amended its Human Rights Law, effective November 11, 2019, to expressly prohibit retaliation against individuals who make a request for a reasonable accommodation under the law.

NYS Law Now Prohibits Race-Based Hairstyle Discrimination

Earlier this month, Governor Cuomo signed into law amendments to the NYS Human Rights Law and the Dignity for All Students Act to expand the definitions of race, effective immediately, to include "traits historically associated with race, including but not limited to hair texture and protective hairstyles." The term "protective hairstyles" includes "braids, locks, and twists." New York State thereby joins California, and has gone beyond the guidance issued by New York City (as previously reported in the Spring 2019 issue of Takeaways), to codify hair style discrimination based on race.

NYS Extends Paid Time Off to Vote

Regardless of whether employees have time to vote outside work hours, New York State now requires employers to grant up to three hours off, without loss of pay, for employees to vote in any election. Employers can require two working days' notice and that the time be taken at the beginning or end of the employee's work day.

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New York City Will Ban Pre-Employment Marijuana Testing in 2020

Effective May 10, 2020, most employers in New York City will be prohibited from including marijuana in their pre-employment drug screening. Pre-employment testing for marijuana will only be permissible where required by federal or state law (such as by the Department of Transportation) or a collective bargaining agreement, or for positions:

- as police or peace officers, or in a position with a law enforcement or investigative function with the department of investigation;
- requiring compliance with the NYC building code for a public work site or any position that requires compliance with Section 3321 of the NYC Building Code;
- requiring a commercial driver's license;
- requiring the supervision or care of children, medical patients, or "vulnerable persons" as defined by the state Social Services Law; or
- other positions identified by the city as significantly impacting the health or safety of employees or members of the public.

NJ Takes Different Approach to Protect Employee Use of Medical Marijuana

New Jersey employers are now expressly prohibited from taking any adverse employment action based solely on an employee's status as a registered medical cannabis patient. In addition, the law requires employers who have drug testing policies to offer any employee or job applicant who tests positive for cannabis the opportunity to present a legitimate medical explanation for the positive test result.

To implement these protections, the law requires employers to give the employee or job applicant written notice of their right to explain, and grants the employee or job applicant three business days to submit responsive information or request a confirmatory retest of the original sample. The employer is not obligated to pay for the retest. The employee can also present an authorization for medical cannabis issued by a health care practitioner, proof of registration with the Cannabis Regulatory Commission, or both, as an explanation for their positive test results.

Notably, nothing in the amendment restricts an employer's right to prohibit or take adverse employment action against an employee for the possession or use of intoxicating substances during work hours or on workplace premises outside of work hours. The law also still recognizes and authorizes employers to take different actions where required by federal law or to prevent loss of a federal contract or funding.

EEO-1 Retro Data Reporting Expanded to Include 2017

Employers who are required to file annual EEO-1 reports must submit historic "Component 2" wage and hour data for 2017 and 2018 by September 30, 2019. More information on the pay data filing requirement can be found on page 4 of the Spring 2019 issue of Takeaways. The EEOC and its contractor, NORC at the University of Chicago, also issued resource documents on how to submit the required data, including both Additional Information and Frequently Asked Questions.

CT Pregnancy Guidance Goes Broad

A CHRO *Best Practices Bluepaper* limits employers from requiring medical certification in support of a request for a pregnancy or childbirth-related accommodation, requires advance notice of both accommodation and post-leave fitness-for-duty certification requirements, and restricts the scope of the certification to confirming it is pregnancy/childbirth-related and stating the nature of the employee's limitations necessitating an accommodation. These and other elements of the bluepaper go beyond what Connecticut law requires.

Financial Incentives/Obligations for Employers

New York Offers Tax Credit to Employers Who Hire Recovering Substance Abusers
A new program, reportedly first in the country, will permit certified employers to receive a tax credit beginning in 2020 of up to $2,000 for each recovering substance abuser that they hire who works a minimum of 500 hours.

New Jersey Requires Pre-Tax Transportation Benefit
New Jersey employers with 20 or more employees are required to offer a pre-tax transportation fringe benefit to all employees who are not subject to a collective bargaining agreement. The law is inoperative until the earlier of March 1, 2020 or the date that implementing rules are issued by the Labor Commissioner.

Connecticut Offers Tax Credit for Student Loan Payments by Employers
Connecticut employers can claim an annual tax credit of up to $2,625 per employee for making eligible student loan payments on a qualified employee's behalf.

Federal Agency Opinions Find Gig Workers to be Contractors

The U.S. Department of Labor issued a new opinion letter on April 29, 2019 in which it held that workers who provide services to consumers through a company's virtual platform are independent contractors, working with a referral service, and not employees. The DOL applied a six-factor test: employer control; permanency of relationship; investment in facilities, equipment or helpers; skill, initiative, judgment and foresight required; opportunity for profit and loss; and extent of integration with employer's business, and concluded the workers were engaged in business for themselves and not economically dependent on the referral service.

A few weeks later, on May 14, 2019, the Office of the National Labor Relations Board's General Counsel issued an opinion letter that Uber drivers are not legal "employees" for the purposes of federal labor laws. The opinion noted the "virtually unfettered freedom" that drivers had to set their own work schedules and work location, as well as their driving for competitors, as inconsistent with the common law agency test for employee status.

Westchester Adds Stand-Alone Safe Time

Beginning October 30, 2019, employers in Westchester County must provide employees with up to 40 hours of paid "safe time" for victims of domestic violence, family offense matters, and human trafficking. Employees are eligible for safe time if they work in the county for more than 90 days in a calendar year, and this leave entitlement is in addition to the 40 hours of paid sick leave that took effect on April 10, 2019.

Mimicking the county's paid sick leave requirements, employers are obligated to post a copy of the safe time law in English, Spanish and any other language deemed appropriate by the County, in a conspicuous location at work; and provide employees with a copy of the law and written notice of how it applies with 90 days of the effective date and, thereafter, upon hire.

New Jersey to Require Hotel Employers to Provide "Panic Devices" to Employees

Hotels in New Jersey with 100 or more guest rooms are required to provide "panic devices" to housekeeping and room service attendants when they are assigned to work in a guest room without another employee present, and employers cannot take adverse action against employees for leaving the immediate area after engaging such a device. This new law, which takes effect January 1, 2020, further requires employers to respond promptly in the event a panic device is triggered, keep record of the accusation, and investigate when reasonable. The law restricts who can be assigned to an offending guest's room and sets a minimum three-year ban on an offending guest's return. Employers also have an affirmative obligation to report any incidents alleging criminal or inappropriate conduct to the authorities, and must educate both employees and guests on the panic device policy.

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COURT WATCH

United States Supreme Court

Holds EEOC Charge-Filing Requirement Is Not Jurisdictional

The U.S. Supreme Court made clear in *Fort Bend County, TX v. Davis* (June 3, 2019), that employers must raise an employee's failure to exhaust administrative remedies before the EEOC at the outset of the litigation, or they waive the right to assert the objection. The Court held that Title VII's charge-filing requirement is not "jurisdictional," and "must be timely raised to come into play." The Court therefore held that the employer was precluded from seeking dismissal of one basis of the plaintiff's discrimination claim, which it asserted she had not formally presented to the EEOC, because it was not until "years into the litigation" that the employer moved to dismiss.

Declares Ambiguity Precludes Class Arbitration

Employers need to be clear in drafting contracts if they wish to compel class arbitration. That was the central holding of the United States Supreme Court in *Lamps Plus Inc. et al. v. Varela* (Apr. 24, 2019), in which the Court held that ambiguity in the contract language precludes a court from compelling class arbitration.

State Courts

NJ Appellate Courts Hold Adverse Employment Action Not a Necessary Element of a Disability Claim; Obesity by Itself Is Not a Disability

Two recent decisions from the Superior Court of New Jersey, Appellate Division, are setting parameters with regard to disability discrimination claims under the state Law Against Discrimination ("LAD"). In *Richter v. Oakland Bd. of Educ.* (June 11, 2019), the Court clarified that an employee need not prove that he/she suffered an "adverse employment action" to establish a prima facie case of failure to accommodate a disability claim under state law. The plaintiff, a middle school teacher who suffers from diabetes, alleged that, because she was assigned lunch duty that precluded her from eating until later in the day, her blood sugar levels fell so low that she fainted while teaching and suffered significant and permanent injuries. The Court recognized this to be the rare case, which prior New Jersey Supreme Court decisions referenced was theoretically possible, in which an individual could have a viable claim notwithstanding the absence of an adverse employment action.

In *Dickson v. Community Bus Lines, Inc.* (Apr. 4, 2019) , the Court held that obesity, on its own, is not a disability protected under the New Jersey LAD. Therefore, the Court held that an employee could not assert a disability claim where he presented no proof that his obesity was caused by bodily injury, birth defect, or illness, or that the defendant ever found him "disabled."

Connecticut Appellate Court Permits Discipline for Absenteeism Related to a Disability

In *Barbabosa v. Board of Educ. of the Town of Manchester* (Apr. 23, 2019), the Connecticut Appellate Court held that an employer was not liable under the Connecticut Fair Employment Practices Act for disciplining an employee for excessive absenteeism, even if the absences were related to a disability, because attendance was an essential function of the plaintiff's job. The plaintiff in the case was a paraprofessional with the Board of Education, who performed her job well when she was present but whose excessive absences and frequent tardiness (which she said were attributable to her disability) caused documented disruption to the educational environment, for which she was disciplined. The employee had twice requested extended intermittent leave as an accommodation. In addition to upholding the discipline, the Court held that the request for intermittent leave was not a reasonable accommodation, as a matter of law, "because that proposal would eliminate the very essential job function it purports to address."