FALL 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. Discrimination law protections keep expanding across the tri-state - to more employers, and to appearance standards, immigrants, victims of domestic violence and civil air patrol members. New Jersey wage laws are tougher, while New York employers face claims for not paying on the right schedule.

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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US DOL Finally Increases Exempt Status Thresholds

Effective January 1, 2020, the minimum salary requirements for employees under the executive, administrative, and professional exemptions to the federal overtime laws will increase to $35,658 or $684 per week, which represents a 50 percent increase from the current level of $23,660 or $455 per week. The annual minimum compensation to qualify as a "highly compensated employee" (and thereby meet a simpler duties test for exempt status) will modestly increase to $107,432. Employers will be permitted to use nondiscretionary compensation, including commissions, that is payable at least annually to satisfy up to 10 percent of the new standard salary level, and can issue a year-end catch-up payment to employees who would not otherwise have earned the full 10 percent through nondiscretionary pay. These changes will directly impact employers in New Jersey and Connecticut, where the salary requirements for exempt status have equaled or only modestly exceeded the prior federal standard, but it will have no impact in New York where the state law salary thresholds are much higher.

NYS Amends HRL Well Beyond Sexual Harassment Protections

As summarized in our recent blog posting, New York State substantially expanded its Human Rights Law: to include for the first time a statutory definition of sexual harassment ("subjecting an individual to inferior terms, conditions or privileges of employment" because of a protected characteristic) that is notably broader than the federal law; require distribution of the employer's sexual harassment prevention policy and training materials at hire and at every harassment prevention training; extend the Human Rights Law to employers of any size, for all protected characteristics, and even to some degree for contractors, consultants and vendors; increase the limitations period and remedies available in litigation; and extend the limitations on confidentiality and mandatory arbitration clauses for sexual harassment claims to apply to any claim of harassment or discrimination under the Human Rights Law.

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NY Focus on Protecting Immigrants Requires Delicate Balance for Employers

State-Level Protection Under the Wage Laws

A recent amendment to the New York State Labor Law grants immigrant employees enhanced legal protection for reporting wage law violations. Effective October 25, 2019, the New York Labor Law defines retaliation under the wage law to include contacting or threatening to contact or report a whistleblower's suspected citizenship or immigration status to immigration authorities.

NYC Guidance on Intersection with National Origin Discrimination

Recently issued guidance from the New York City Commission on Human Rights raises the stakes for employers seeking to comply with federal law and only employ individuals who are legally authorized to work in the United States while meeting their obligation under the City Human Rights Law not to discriminate based on national origin or immigration status. The guidance emphasizes that, where individuals have demonstrated work authorization, employers can grant a hiring preference for U.S. citizens over non-citizens who are equally qualified, but they cannot: discriminate among work-authorized individuals; repeatedly ask for verification or reverification of work papers; threaten investigations by Immigration and Customs Enforcement as harassment; or implement any adverse action based solely on a "no match" letter from the Social Security Administration.

NYS Adds Protections for Domestic Violence Victims

Effective November 18, 2019, the New York State Human Rights Law will explicitly include "victims of domestic violence" as a protected class and require that, unless it poses an undue hardship, employers must provide reasonable accommodations of time off for employees who are themselves victims of domestic violence or whose child is a victim in order to:

- seek medical attention for resulting injuries;
- obtain services from a domestic violence shelter, program, or rape crisis center;
- obtain related psychological counseling;
- participate in related safety planning, including actions to prevent future incidents or temporary or permanent relocation; and
- obtain or participate in related legal services or processes.

Similar to other types of accommodation obligations, whether the absence will cause an undue hardship requires an evaluation of such factors as the overall size and structure of the employer's business, budget and workforce. In considering requests, employers may require reasonable advance notice and certification of the need for accommodation. The time off need not be paid, and employers may require employees to use any available paid time off during any leave provided as an accommodation.

NJ Cracks Down on Wage Law Compliance

Effective as of its signing on August 6, 2019, New Jersey has adopted a new anti-wage theft law that imposes significant penalties on employers who fail timely to pay wages owed to their employees. The new law includes:

- A penalty of 200 percent of the unpaid wages as liquidated damages, plus reasonable costs and attorney's fees to the employee, with a limited good faith defense for a first-time violation;
- A new six-year (formerly two-year) statute of limitations for filing a wage claim;
- Successor entity liability for wage violations;
- Joint and several liability for labor contractors and their clients for any violations of the wage and hour laws; and
- Criminal liability for failing to timely pay wages (this last provision takes effect November 1, 2019).

NYS/NJ Further Regulate Employer Appearance Standards as Discrimination

New York Protects Religious Attire and Appearance
New York State amended its Human Rights Law, effective October 8, 2019, to explicitly prohibit employment discrimination based on attire, clothing, or facial hair worn to comply with an employee's or prospective employee's religion. Employers must accommodate, and cannot discriminate, based on religious appearance unless, after engaging in a bona fide effort, the employer demonstrates that accommodating an individual's sincerely held religious practice would impose an undue hardship on the employer.

New Jersey Addresses Appearance Standards Impacting Race
The New Jersey Division on Civil Rights issued new enforcement guidance to clarify that discrimination based on hairstyles that are inextricably intertwined with or closely associated with race violates the state Law Against Discrimination (LAD). The guidance clarifies that the LAD extends to grooming or appearance policies that ban, limit, or restrict hairstyles closely associated with Black people, including twists, braids, cornrows, Afros, locs, Bantu knots, and fades. The guidance clarifies that the analysis of such restrictions is the same as that which applies to hairstyles that are inextricably intertwined with or closely associated with other protected characteristics, such as those associated with a particular religion. The New Jersey guidance also makes clear that facially neutral hair-related policies – such as requirements to maintain a "professional" or "tidy" appearance – will likely violate the LAD if they are discriminatorily applied or selectively enforced against Black people.

CT Adds Leave for Civil Air Patrol

Connecticut law now protects employees from discrimination based on membership in the civil air patrol or absence from work, as a member, to respond to an emergency or participate in emergency training. Employees may be required to provide advance notice and a written statement verifying the need for time off, and they need not be paid for the leave time.

Contractors Now Count as Employees Under NYCHRL

Effective January 11, 2020, New York City will extend the harassment and discrimination protections of its Human Rights Law to freelancers and independent contractors. The scope of the law will also be expanded to count independent contractors and immediate family working for a business within the definition of "employees" for purposes of determining if an employer meets the four-employee threshold to be covered by the law.

Updates from Summer 2019 Takeaways

CT Releases Guidance on Time's Up

The Connecticut Commission on Human Rights and Opportunities (CHRO) has now posted information concerning sexual harassment and remedies on their website, including an online training video, FAQ's and other sexual harassment prevention resource materials. The CHRO training video includes tests to satisfy the interactive training requirement and is available to all employers at no cost. The new guidance also makes clear that the scope of the Act is intended to reach all employers who employ individuals in Connecticut; employers with only one employee in Connecticut still must comply with the Act's posting and training requirements if they have at least two employees in other states.

NJ Prohibits Salary History Inquiries

As anticipated in the Summer 2019 issue of Takeaways, effective January 1, 2020 New Jersey law will prohibit employers from screening applicants based on their salary history, including prior wages, salary or benefits. Multi-state employers must ensure that their employment applications instruct New Jersey employees not to answer any question pertaining to salary history.

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COURT WATCH

NY Appellate Court Rejects Notion of Strict Liability for CEO Under NYCHRL

In *Margaret Doe v. Bloomberg, L.P., et al.* (Sept. 24, 2019), the Appellate Division, First Department held that the New York City Human Rights Law is not so broad as to hold an individual owner or officer of a corporate employer strictly liable under the law, but rather the plaintiff employee must show that the owner or officer encouraged, condoned or approved the specific discriminatory conduct giving rise to the claim. The plaintiff had named both her direct supervisor (the accused harasser) and the CEO as additional defendants, asserting the CEO has been the subject of a separate class action discrimination suit, has displayed discriminatory conduct toward other women, and created a culture of discrimination and sexual harassment at the company. The Court dismissed the claim against the CEO, holding that, even if taken as true, the allegations failed to connect the CEO in any way to the specific discriminatory conduct allegedly committed by the plaintiff's direct supervisor and the plaintiff had not alleged any facts supporting an inference that the CEO knew of or was involved in the direct supervisor's conduct toward the plaintiff.

Biweekly Pay Structure Violates NYS Pay Requirements for Manual Workers; Employer Liable for Statutory Remedies

A recent decision of the New York State Appellate Division, First Department provides a stark reminder to employers of manual workers that failure to pay wages on a weekly basis is a violation of Labor Law §191(1)(a), for which an employer can be liable for liquidated damages, interest and attorney's fees, even if the employees ultimately received all the wages to which they were entitled. In *Vega v. CM & Associates Construction Management, LLC* (Sept. 10, 2019), the court held that, simply by paying the employee biweekly instead of every week, the employee was "underpaid" within the meaning of the wage law and entitled to those statutory remedies.

NLRB Reverses Precedent on Solicitation, Worker Misclassification

In *Kroger Limited Partnership I Mid-Atlantic* (Sept. 6, 2019), the National Labor Relations Board (NLRB) overturned past precedent to hold that a supermarket that allowed community and charitable groups (such as the Girl Scouts and the Salvation Army) to solicit donations and sell items on supermarket property did not impermissibly discriminate against nonemployee union representatives by ejecting them from the supermarket's parking lot after the representatives solicited participation in a boycott of the supermarket. The NLRB found that the union solicitation was not of the same nature as the solicitations by the community and charitable groups, and therefore the supermarket could treat them differently.

In *Velox Express Inc.* (Aug. 29, 2019), the NLRB held that an employer who violated the NLRA by discharging a driver who complained she and her coworkers were improperly classified as independent contractors did not additionally violate federal law through its erroneous misclassification of the workers at issue.

Recent Federal Regulatory Developments

EEO-1 Data Reporting

Recognizing the binary structure of current EEO-1 gender reporting requirements, the Equal Employment Opportunity Commission issued recent guidance instructing employers to report Component-2 data for non-binary gendered employees in the comment box on the Certification Page of the form. The EEOC also announced that it will not be collecting Component 2 data in future years. Data for 2017 and 2018 was due to be submitted by September 30, 2019.

Minimum Wage Increasing for Federal Contractors

Workers performing work on or in connection with covered federal contracts must be paid at least $10.80 per hour beginning January 1, 2020.