WINTER 2020

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 past quarter, the legal requirements multiplied – both in terms of anti-discrimination and wage law protections, including new policy mandates for employers in New York and New Jersey, massive new enforcement mechanisms in New Jersey, and new requirements for government contractors.

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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NYS REQUIRES NEW EMPLOYEE HANDBOOK UPDATES

New York State amended its Labor Law to prohibit discrimination and retaliation based on an employee's or the employee's dependent's reproductive health decision making, and to require employers to obtain an employee's informed, affirmative written consent before accessing personal information regarding an employee's or an employee's dependent's reproductive health decision making. The new law further prohibits employers from requiring employees to sign a waiver or any other document that could deny their right to make reproductive health decisions, and it protects employees from retaliation for asserting their rights under the law. Significantly, in addition to imposing new legal protections, the law specifically mandates detailed new policy language to be included in every New York employer's employee handbooks. Employers were required to update their handbook policies by January 7, 2020 to comply with the law's requirements.

US DOL ADOPTS NEW TEST FOR JOINT-EMPLOYER STATUS

As state and local law mandates progressively erode the practical distinctions between employees and contractors, a new final rule issued by the U.S. Department of Labor's (DOL's) Wage and Hour Division, effective March 16, 2020, offers some clarity as to the factors relevant to defining "joint employer" status under the Fair Labor Standards Act (FLSA). Under the final rule, the DOL will balance whether the individual or entity actually exercises one or more of the following four control factors: (1) hires or fires the employee; (2) supervises and controls the employee's work schedule or conditions of employment to a substantial degree; (3) determines the employee's rate and method of payment; and (4) maintains the employee's employment records. (*cont'd on pg. 5)*

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NYS Clarifies and Builds on Recent Wage Inquiry and Payment Law Changes

NYS Issues Guidance on Salary History Law

Recently issued Guidance from the NYS Department of Labor clarifies the state's expectations with regard to the state's salary history ban law, which became effective January 6, 2020. As previously reported in the Summer 2019 issue of Takeaways, the law prohibits an employer from asking about an applicant's salary history, by any means, and prohibits employers from relying on an applicant's salary history information as a factor in decisions related to the hiring process and job offers.

The new Guidance clarifies that:

- an employer may ask an applicant for their salary *expectations* for a position;
- the prohibition on asking about salary history includes benefits as well as compensation;
- "applicant" includes part-time, seasonal, and temporary workers;
- for current employees applying for new positions, the employer may consider information regarding their compensation history with that employer, but cannot ask about pay from other employers;
- an employer may consider voluntarily disclosed salary information, if it is disclosed without prompting, but not to justify paying an applicant less than employees in other protected classes who are performing substantially similar work under the Equal Pay Act;
- it is impermissible to include any salary history questions on a job application, even if they are marked "optional"; and
- employers are encouraged to proactively state in their job postings that they do not seek salary history information from job applicants.

NYS Eliminates Tip Credit for Miscellaneous Industries

By the end of 2020, employers covered by the Minimum Wage Order for Miscellaneous Industries and Occupations will no longer be permitted to claim any tip credit for positions covered by the wage order, including car wash attendants, nail salon workers, tow truck drivers, wedding planners, dog groomers, valet parking attendants, hairdressers, aestheticians, golf and tennis instructors, and door-persons. Rather, Governor Cuomo announced that the State DOL is issuing an order to eliminate the tip credit for these industries, and as an interim measure the tip credit will be cut to half its current level as of June 30, 2020. The hospitality industry is covered by a separate wage order, which is not subject to this change.

NYS Adds Liability to Members of Out-of-State LLCs

Beginning February 11, 2020, the top ten members of out-of-state limited liability companies will face the same personal financial liability for unsatisfied judgments related to wages, salaries, and other debts for work performed in New York State as do corporations and in-state limited liability companies. Liability under the new law is joint and several, such that members may seek contributions from each other, and there are notice requirements both for employees seeking to collect unsatisfied judgments and for members seeking contributions.

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New Year Brings Explosion of New Employment Law Protections in New Jersey

NJ Mandates Severance Pay for Large Employers

New Jersey has become the first state in the country to mandate severance pay for terminated employees in the context of large-scale reductions-in-force (RIFs). Under the new law, which takes effect July 9, 2020, employers with 100 or more employees (including part-time employees) will be required to provide severance pay equal to one week of pay for each full year of employment if a RIF impacts 50 or more employees reporting to an establishment during any 30-day period. The new law further requires that employees receive the longer of 90 days' notice, or whatever period of time is required under the federal Worker Adjustment and Retraining Notification Act (WARN), to employees being impacted by a RIF or mass layoff, or four additional weeks of pay in lieu of the full notice. Anticipating bankruptcy claims, the law characterizes the severance as compensation due to an employee for back pay and earned in full upon the termination of the employment relationship.

DOL Issues New Rules on Sick Leave

The NJ Department of Labor released Final Rules and guidance on January 6, 2020, interpreting the state's Earned Sick Leave Law (ESLL). Of particular note, the Final Rules:

- Require employers who frontload paid sick leave on the first day of the benefit year to either pay out unused time at year-end or allow the time to be carried over to the next year, although employers can cap both carryover and usage at 40 hours per year;
- Permit employers to use an employee's anniversary date or a similar measure that varies by employee, rather than a uniform start date, for purposes of measuring the 12-month benefit year;
- Define permissible uses to include attending a child's sporting event, play, or similar activity, if the employee's attendance is requested or required by the appropriate school personnel;
- Prohibit employers from *requiring* employees to use their sick leave, even if they are absent for a qualifying reason;
- Require employers to give reasonable advance notice of black-out dates for sick days that may be requested for foreseeable occasions; and
- Require employers who use existing paid time off (PTO) policies to satisfy their paid sick leave obligations to adhere to all the requirements of the ESLL with regard to all the employer's PTO time, even for hours that exceed the 40 mandated by ESLL.

NJ Further Prohibits Hairstyle Discrimination

Codifying and expanding guidance issued by the New Jersey Division of Civil Rights, on December 19, 2019, Governor Murphy signed the CROWN Act, which amends the definition of racial characteristics protected under the Law Against Discrimination to include "traits historically associated with race, including, but not limited to, hair texture, hair type, and protective hairstyles… such as braids, locks, and twists." The law is effective immediately.

Onslaught of New NJ Laws Tackle Worker Misclassification

Employers that are found, following a preliminary audit or investigation, to have violated any state wage, benefit or tax law could face a stop-work order and temporary shutdown of their operations from the Department of Labor and Workforce Development (DoLWD) under one of a series of new laws signed by Governor Murphy on January 20, 2020. Also effective with the laws' signing, the DoLWD can impose penalties on employers who misclassify workers that equal five percent of each misclassified worker's annual gross earnings and a fine of $250 to $1,000 per worker.

Employers and contractors now face joint liability under the wage, benefit, and employer tax laws for misclassifying workers as independent contractors. The new laws further provide for information sharing with the Department of Treasury for the purpose of enforcing wage and worker classification laws.

Finally, effective April 1, 2020, employers will be required to post notices that define the standard for worker classification, specify the legal protections and remedies available with regard to worker classification and wage, tax and benefit laws, and advise employees how to file a complaint for misclassification. The DoLWD will be developing a website that provides the public with this information, and employers face liability for retaliating against employees who raise any inquiry or concern regarding worker classification.

NJ Enhances Organ Donor Protection

Employees in New Jersey who experience a period of temporary disability due to organ or bone marrow donation will be assured job security under a recent amendment to the state's Temporary Disability Benefits Law (TDBL). Under the new law, which takes effect on May 20, 2020, employees will be entitled to be restored to their position of employment, or to an equivalent position of like seniority, status, employment benefits, pay, and other terms and conditions of employment, at the end of the period of disability. The law also eliminates the one week waiting period for the payment of TDB benefits for disability due to organ or bone marrow donation.

NJ Employers Must Provide More Wage Information

By May 20, 2020 employers with 10 or more employees must update their payroll statements to ensure that they each specify: the employee's gross and net wages; the employee's rate of pay; and, for hourly employees, the number of hours worked during the pay period.

NYS Tracking Numbers of Women on Corporate Boards
New York State is gathering new data on women's participation on corporate boards. Effective June 27, 2020, corporations must specify in their filing statement the number of directors constituting the board and how many of such are women. The state will then analyze and report on that data by February 1, 2022 and every four years thereafter.

Connecticut Adopts 80/20 Tip Credit

Connecticut has adopted under its state wage law the "20 percent tip credit" rule for tipped restaurant service employees, and thereby repealed the prior regulations that required employers to closely track and segregate service and non-service duties. Following the April 1, 2020 deadline for adopting new regulations, employers will be able to apply a tip credit toward satisfying their minimum wage requirements for restaurant employees who customarily spend at least 80 percent of their time performing service duties.

US DOL Adopts New Test *(cont'd from p. 1)*

Each factor under the new joint-employer test is to be determined on a case-by-case basis, and no single factor is determinative. Further, while a reserved right to take one or more of the four types of actions may be considered, it will not prove joint employer status without some actual exercise of control. The DOL guidance further states that an employee's economic dependence is not a relevant factor in determining joint employer status. When there is the potential for multiple employers, if the DOL finds that they are sufficiently associated then the hours worked for each employer will need to be aggregated for purposes of complying with the FLSA.

Federal Government Adopts Paid Parental Leave

Federal government employees will be eligible to receive up to 12 weeks of paid parental leave in connection with the birth, adoption, or foster care placement of a child, as part of this year's National Defense Authorization Act. Paid parental leave will be available only to employees covered by the Federal Medical Leave Act, and only for leave taken in connection with a birth or placement occurring on or after October 1, 2020.

Federal Executive Orders Bring Relief and New Obligations for Federal Contractors

Effective October 31, 2019, the President has revoked Executive Order 13495, which required qualified workers on a covered contract be given the right of first refusal for employment with successor contracts for the performance of the same or similar services at the same location. This revocation also relieves federal contractors of the posting and notice requirements related to the right of first refusal.

Effective December 20, 2021, the federal Fair Chance Act will prohibit federal government contractors from inquiring about a job applicant's criminal background during the initial stages of the application process. The Act will prohibit federal contractors from asking applicants who apply to job openings "related to work under" a federal contract about their criminal history until after the contractor extends a conditional offer of employment and it will prohibit contractors from seeking that information from other sources.

US DOL Updates FLSA Regulations

Updating its rule on how to calculate the "regular rate of pay" for purposes of determining the overtime rate under the FLSA for the first time in 50 years, the U.S. DOL has now clarified which perks and benefits provided by an employer fall outside that calculation. As outlined in the DOL's Fact Sheet, employers may generally exclude from the regular rate such benefits as parking; wellness and discount programs; reimbursed expenses; certain sign-on, longevity and discretionary bonuses; and office snacks. The DOL's final rule also permits exclusion of "call-back" and similar pay, provided it is not so frequent as to effectively amount to additional regular compensation, and updates the calculation of the "basic rate," which is an alternative to the regular rate of pay system.

EEOC Rescinds Anti-Arbitration Policy

The Equal Employment Opportunity Commission has overturned a 1997 Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment, finding it does not reflect current law and should not be relied upon by EEOC staff in investigations or litigation.

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COURT WATCH

Second Circuit Recognizes Rule 68 as Vehicle for Non-Judicial Settlement of FLSA Claims

The Second Circuit held in *Mei Xing Yu v. Hasaki Rest., Inc.*, (Dec. 6, 2019), that offers of judgment pursuant to Federal Rule of Civil Procedure 68 to settle Fair Labor Standards Act claims for unpaid wages do not require court approval before the judgment is entered by the clerk. In so holding, the Court provided employers with an avenue through which they can resolve FLSA claims without the necessity of a judicial fairness hearing. The Court distinguished its prior decision in *Cheeks v. Freeport Pancake House, Inc*., in which it held that court or U.S. DOL approval was required for FLSA settlements, as limited solely to stipulations dismissing FLSA claims with prejudice.

NLRB Reverses Recent Precedents, Restores Employer Rights to Control Use of Email System, Require Confidentiality in Workplace Investigations

In *Caesars Entertainment Corp.* (Dec. 17, 2019), the National Labor Relations Board reversed its 2014 ruling in *Purple Communications* and restored its prior standard, holding that employees have no statutory right to use employer equipment, including company computer and email systems, to engage in concerted activities for mutual aid or protection, as protected under Section 7 of the National Labor Relations Act. The Board recognized only a limited exception, for rare cases in which an employer's email system is the only reasonable means for employees to communicate with one another.

In *Apogee Retail LLC d/b/a Unique Thrift Store* (Dec. 16, 2019), the Board overturned *Banner Estrella Medical Center* and held that work rules requiring confidentiality during workplace investigations are presumptively lawful. The Board held that *Banner Estrella* had improperly placed the burden on the employer to determine whether its interests in preserving the integrity of an investigation outweighed employee Section 7 rights, and instead concluded that investigative confidentiality rules are generally lawful if they are limited to the duration of the investigation.

LEGAL COMPLIANCE: Updates from Fall 2019 Takeaways

NYS Releases Sample Notice and Guidance to Comply with Anti-Discrimination Law

The New York State Division of Human Rights has released a Sexual Harassment Prevention Notice that must be delivered to employees, upon hire and at every annual sexual harassment prevention training session. The notice may be distributed in print or digitally, in English and in the language identified by an employee as their primary language, along with links to, or physical copies of, the employer's anti-harassment policy and training materials. The Division defines the training materials to include "any printed materials, scripts, Q+As, outlines, handouts, PowerPoint slides, etc."

Westchester Releases Guidance, Notice and Poster for Safe Leave Law Compliance

The Westchester County Human Rights Commission has posted the Notice of Employee Rights that employers are expected to have provided to each of their eligible employees, along with a copy of the County's Safe Time Leave Law, by January 28, 2020. These same documents must also be provided to all new hires as of their first day of employment. The Commission additionally posted the Safe Time poster that employers are required to post (in both English and Spanish) in a conspicuous location to further inform employees of their rights under the law. The Commission recently released guidance for covered employers about their obligations and rights with regard to providing Safe Time for their eligible employees.