SPRING 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 brought new legal developments, particularly paid leave laws in New York, and expanded employee protections in New Jersey, plus numerous court decisions, all of which were overshadowed by the massive legislative and executive response to COVID-19.

***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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NY ADDS STATE-WIDE PAID SICK LEAVE MANDATE

Effective September 30, 2020, all employers in New York State will be required to provide sick leave for their employees, and most employers will be required to pay employees for that time off. The terms of providing sick leave depend on the size and net income of the employer:

- Employers with *1 to 4 employees* are required to provide 5 days (40 hours) of *unpaid* sick leave per calendar year, but if the employer had a net income of *greater than $1 million* in the previous tax year then the sick leave must be *paid*;
- Employers with *5 to 99 employees* must provide 5 days (or 40 hours) of *paid* sick leave per calendar year.
- Employers with *100 or more employees* must provide a total of 7 days (56 hours) of *paid* sick leave per calendar year…. (*cont'd on p. 2)*

NY REVERSES VOTING LEAVE LAW

In an unusual reversal, New York State has retracted a 2019 law that granted all employees in the state up to three hours off, without loss of pay, to vote in any election, regardless whether they had time to do so outside of work hours. As part of the 2020 annual budget, the state again amended the Election Law, but this time to revert to providing only two hours of paid time off to vote and only if an employee does not have sufficient time to vote outside of scheduled working hours. Employers are still required to conspicuously post notice of the voting leave law beginning no less than 10 working days before the election. Employers that had amended their employee handbooks to reflect the 2019 voting leave entitlement may want to update their policies to revert to the prior version.

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NYS Adds State-Wide Paid Sick Leave Mandate *(cont'd from p. 1)*

Employees begin accruing paid sick leave under New York State law as of September 30, 2020 and can begin using it as of January 1, 2021. Employees will be able to carry over unused sick days into the next year, but they cannot use more than the annual accrual amount in any given year. Employers have discretion whether to front-load the sick leave at the beginning of the year, but it is not currently clear whether front-loading will excuse the carry-over requirement.

The state law permits sick leave to be used:

- for a mental or physical illness, injury, or health condition of an employee or an employee's family member, regardless of whether such illness, injury, or health condition has been diagnosed or requires medical care at the time that the employee requests leave;
- for the diagnosis, care, or treatment of a mental or physical illness, injury or health condition of, or need for medical diagnosis of, or preventive care for, an employee or an employee's family member; or
- to obtain legal or social support services, participate in safety planning, relocate, file or pursue a criminal complaint, enroll children in a new school or take any other action necessary to ensure the health or safety of the employee or family member who has been the victim of domestic violence, a family offense, sexual offense, stalking, or human trafficking.

Employers must track usage and retain those records for six years. The state law does not expressly supersede local paid sick leave laws, and it therefore should be read in tandem with existing sick and safe leave obligations in New York City and Westchester County.

NYS Accelerates Unemployment Benefit Eligibility for Striking Workers

Effective February 6, 2020, New York amended the Labor Law to permit striking workers to obtain unemployment insurance benefits beginning two weeks into the strike. Formerly, workers had to wait until the expiration of a 49-day suspension period. Employees who are subject to a lockout or who are permanently replaced are not subject to any suspension period, but rather can immediately apply for unemployment benefits. The law provides that a replacement worker will be assumed to be permanent unless an employer certifies in writing that the employee will be able to return to their position upon conclusion of the strike.

NLRB Adopts New Test for Joint-Employer Status

Following on the heels of the U.S. Department of Labor's narrower definition of "joint employer" status under the Fair Labor Standards Act, the National Labor Relations Board (NLRB) has reinstated the test for joint employer status that had applied for several decades prior to the Board's 2015 *Browning-Ferris* decision. The NLRB's final rule, which became effective April 27, 2020, declares that an entity is a joint employer *only if* the two employers share or codetermine the employees' "essential" terms and conditions of employment, which include wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction. The test requires that an organization have "substantial, direct and immediate control" over essential terms or conditions of employment to be deemed a joint employer. The Board rejected any classification of joint employment based on indirect, limited, or contractually reserved rights that the organization never exercised, and similarly deemed sporadic, isolated or a de minimis exercise of control as insufficient.

CT Employers Can Get Extension on Completing Training

The Connecticut Commission on Human Rights and Opportunities (CHRO) has announced that employers who are unable to complete the state's new harassment prevention training requirements due to COVID-19 can email the CHRO to request a 90-day extension.

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NJ Enhances Enforcement of LAD

New Jersey recently enhanced the enforcement powers under the state's Law Against Discrimination by clarifying which government entities can sue to enforce the law, and entitling prevailing plaintiffs in a state court action to the same injunctive relief that may be awarded in an administrative proceeding. The amendments also make the award of attorney's fees, litigation costs, and investigation costs mandatory in any action in which the Attorney General or Director of the Division on Civil Rights is a prevailing party.

NJ Issues Equal Pay Act Guidance

In March 2020, the New Jersey Division on Civil Rights issued enforcement guidance on the state's amended Equal Pay Act. In addition to delineating the distinctions between the New Jersey Act and prior state and federal law, the guidance clarifies the law's broad prohibition of retaliation against any employee who requests, discusses or discloses to any current or former employee, lawyer, or government agency, information relating to job title, compensation, or certain protected characteristics.

The guidance also contains frequently asked questions that clarify, among other things, that:

- the law covers all employers in New Jersey, regardless of the number of employees, and all employees who have a primary place of work in the state other than domestic service workers;
- the law requires equal pay for substantially similar work, which is defined as a combination of the skill, effort, and responsibility required to perform an employee's job duties;
- variations in pay between individuals who are and are not in a protected class can be justified only if based on a seniority or merit system, or by meeting a five-part test for pay differentials based on any other bona fide factor;
- each paycheck represents a separate violation of the law; and
- employer-initiated self-evaluations of pay practices and resulting adjustments are encouraged and will not be treated as an admission of liability.

NJ Prohibits Discrimination for Infectious Diseases

Employees in New Jersey are expressly protected against discrimination, as of March 20, 2020, for requesting or taking time off from work because they have, or are likely to have, an infectious disease that may infect others in the workplace. Employees are required to provide certain documentation to support their medical status. Employers must reinstate the employee to the same position, including pay and other benefits, upon their return to work.

Insights From 2019 EEOC Charge Statistics

Statistics on charges filed with the EEOC in 2019 reflect a modest decline in sexual harassment charges from their peak in the wake of the #MeToo movement, and a modest increase in retaliation claims, which were included in nearly 54 percent of all the charges filed for the year.

NJ Appellate Division Finds Light Duty Policy Discriminatory on its Face

New Jersey's Appellate Division held in *Delanoy v. Township of Ocean* (Jan. 3, 2020) that an employer's maternity policy discriminated against pregnant employees, on its face, in violation of the state's Pregnancy Workers Fairness Act, by requiring them to exhaust accrued paid leave time as a precondition to transferring to a light duty assignment while pregnant. The policy at issue permitted employees seeking to transfer to light duty for reasons other than pregnancy to be excused from the exhaustion of paid leave requirement, but it did not similarly authorize waiver in the context of pregnant employees. The Court held that the employer's policy violated the law's equal treatment mandate.

COURT WATCH

USSC Holds "But-For" Causation Required Under Section 1981

The U.S. Supreme Court held in *Comcast Corp. v. National Association of African American Owned Media* (Mar. 23, 2020), that a plaintiff who sues for racial discrimination under Section 1981 bears the burden of showing, both on a motion to dismiss and at trial, that the challenged action would not have occurred "but-for" the plaintiff's race. The Court declined to apply a lesser standard of causation from the Title VII context.

The plaintiff, an African-American owned television network (Network), alleged that when it sought to have defendant Comcast carry its channels, Comcast refused because of a preference for white television programs. Comcast argued that its decision was based on legitimate business reasons, specifically lack of demand for the Network's programming, bandwidth constraints, and a preference for news and sports programming that the Network did not offer. The District Court had dismissed the complaint for failing plausibly to show that, but for racial animus, Comcast would have contracted with the Network, while the Ninth Circuit reversed, applying a lesser causation standard. The Supreme Court reversed the Ninth Circuit and reinstated the dismissal of the complaint.

NYS Court of Appeals Holds App-Based Couriers Are Employees, Not Contractors

In *Matter of the Claim of Luis A. Vega v. Postmates Inc.* (Mar. 26, 2020), the New York Court of Appeals held that couriers for a smartphone application-based delivery business should have been classified as employees, and not independent contractors, for purposes of the unemployment insurance law. The Court found that the company could not operate without the couriers who accessed its app, and that while the couriers could decide whether to accept any particular job, the company determined which couriers had access to possible delivery jobs, informed couriers of the delivery destination only after the courier accepted the assignment, found replacements if a courier became unavailable, did not permit customers to request a particular courier, paid the couriers a fixed rate that they could not negotiate, and granted the couriers limited discretion over how to perform what was a low-paid, unskilled job. The Court reasoned that the company thereby had complete control over the means by which the couriers obtained and connected to customers, as well as whether and how the couriers were compensated, and should be deemed employees.

Second Circuit Affirms ADA Does Not Cover Stress Caused by Particular Supervisors

The Second Circuit held in *Woolf v. Strada* (Feb. 6, 2020) that an employee who attributed performance issues at work to severe migraines brought on by work-related stress did not have an ADA-qualifying disability because he claimed that only his direct supervisors caused the stress, and he believed he could perform the same job if he were transferred to a different location or new supervisor. The Court held that because the employee did not attempt to show that his work-induced impairment extended beyond his performance of a particular job, he had not met the standard of being substantially limited in the major life activity of working.

Accommodation May be Required for Off-Work Use of Medical Marijuana

In *Wild v. Carriage Funeral Holdings, Inc.* (Mar. 27, 2020), the Supreme Court of New Jersey affirmed the reinstatement of a state law claim of disability discrimination based on an employer's refusal to accommodate off-duty use of prescribed cannabis. The plaintiff, a cancer patient who was a medical cannabis cardholder, sued after his employer fired him for testing positive for cannabis following a work-related car accident, even though the emergency room doctor had concluded he was not impaired. The Court held that while accommodation is not required for use of medical cannabis in the workplace, employers may be required to accommodate off-site usage during non-work hours.

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TAKEAWAYS … *Supplemented*
COVID-19 COMPENDIUM FOR EMPLOYERS

Employers striving to meet their legal obligations or seeking government support in response to the COVID-19 pandemic should be aware of the following legal changes and governmental guidance:

Coronavirus Aid, Relief, and Economic Security ("CARES") Act – offers business loans and expanded unemployment insurance benefits.

- Pandemic Unemployment Assistance ("PUA") – enhances and extends existing state benefits and broadens eligibility to new classes of impacted individuals, including independent contractors. The U.S. DOL has issued various guidance documents and FAQs on PUA.
  - New York State guidance on the intersection of PUA and state benefits can be found from this fact sheet and FAQs and there is a guide for self-employed individuals on how to apply for unemployment insurance benefits.
  - Connecticut employees can refer to a centralized Connecticut COVID-19 resources link for Q&As on unemployment insurance benefits, paid sick leave, and wage and hour questions.
  - New Jersey employees can refer to the state's COVID Information Hub on unemployment benefits for information on eligibility and how to apply for benefits.
- Paycheck Protection Program ("PPP") – provides forgivable loans to businesses with 500 or fewer employees who have been substantially, adversely impacted by COVID-19, for payroll and related business expenses. The Small Business Administration has created a central PPP webpage with information and links to additional resources, including the Interim Final Rule related to PPP eligibility and calculations for individuals with self-employment income.
- Employee Retention Credit – is a fully refundable payroll tax credit for employers that suspend operations or experience substantial declines in gross receipts due to COVID-19. The IRS has issued FAQs on the tax credit.

Families First Coronavirus Response Act ("FFCRA") – provides a two-pronged approach to paid time off and job guarantees for employees who are unable to work due to health, child care, or public safety reasons stemming from COVID-19.

- For more information on the interrelation between federal and New York State emergency paid leave laws, see our recent HR Strategy Blog post.
- The U.S. Department of Labor issued a mandatory poster to be posted or distributed to employees as of April 1.
- The U.S. DOL issued guidance on the FFCRA, and our HR Strategy Blog post summarizes the key points.

New York State Emergency Paid Sick Leave – New York State has also taken a two-pronged approach to paid time off for employees who are unable to work due to health or child care reasons stemming from COVID-19, which is comprised of emergency paid sick leave benefits and enhancements to the existing NYS Short-Term Disability and Paid Family Leave benefits.

- The NYS DOL has issued FAQs on COVID-19-Related Paid Leave that address the benefits available, eligibility, and how employees can obtain an order of quarantine to qualify for the leave.

New Jersey Emergency Paid Sick Leave - New Jersey expanded the existing bases for employees' use of NJ paid sick leave, NJ Family Leave, and Temporary Disability Insurance ("TDI") benefits to include COVID-19 related reasons, and eliminated the 7-day waiting period for TDI benefits. New Jersey has compiled links to information on all these benefits and more on its COVID Information Hub.

Connecticut Paid Sick Leave – Connecticut has not passed anything equivalent to the New York and New Jersey emergency paid sick leave laws. Only employers with 50 or more employees have any obligation to provide paid sick leave, and that is per a long-standing law that is not pandemic-specific.

WARN Act Notice – This applies to employers with 100 or more employees and may require 60 days' advance notice for large-scale layoffs that extend beyond six months unless they fall within a recognized exception. Recognized exceptions include natural disasters and unforeseeable business circumstances.

- **New Jersey** delayed the effective date of recent amendments to its WARN Act until 90 days following the termination of the current state of emergency. Retroactive to March 9, COVID-19-related mass layoffs are exempted from the NJ WARN Act.
- The **New York State** DOL website directs businesses unexpectedly forced to close due to COVID-19 to notify the DOL, which will determine whether the situation falls within an existing WARN Act exception.

Guidance on Preventing Discrimination Related to COVID-19 - The EEOC has been issuing guidance on medical questioning and examinations, disclosure of an employee's exposure to the virus, discrimination considerations during the pandemic, and reasonable accommodations and the interactive process in the context of COVID-19. These can be accessed on a centralized EEOC coronavirus resource website.

- The EEOC also temporarily suspended the issuance of right to sue notices, unless requested by a charging party.
- **New Jersey** now expressly prohibits employment discrimination based on taking leave for an infectious disease (*see p. 3, above)*.
- The **New York City Commission on Human Rights** has issued an online resource page outlining New Yorkers' rights and protections from COVID-19 related discrimination in housing, employment, and public accommodations.

CDC Guidance – The CDC has issued extensive Interim Guidance for Businesses and Employers on how employers can plan, prepare and respond to COVID-19 in the workplace. Additional CDC guidance dedicated to Critical Infrastructure Workers Exposed to COVID-19 is also available.

OSHA Guidance – OSHA has issued guidance on Preparing Workplaces for COVID-19. Additional OSHA guidance, including for specific industries, can be accessed on a dedicated OSHA COVID-19 Response page, as well as Enforcement Guidance for Respiratory Protection and the N95 Shortage.

- OSHA also recently issued Interim Enforcement guidance that, outside the healthcare and emergency response industries and correctional institutions, employers need to determine whether an employee's contracting of COVID-19 is work-related and therefore an OSHA-reportable incident only where there is reasonably available objective evidence of a work connection, such as where a number of employees who work closely together all contract the virus.

State Business Closures

- New York State's closure of non-essential businesses has been extended currently through May 15, and the state has issued guidance on essential businesses.
- Connecticut has extended its closure of non-essential businesses currently through May 20, and has provided the following guidance identifying essential businesses, as well as Safe Workplace Rules for Essential Employers.
- New Jersey's Stay-at-Home program remains in effect until revoked by the governor, and New Jersey has provided guidance on what is considered essential.
- For employees working at businesses deemed "essential", under directives issued by the governors in all three states, employers are required to provide protective face masks and gloves for employees at the employers' expense.