SUMMER 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. Pandemic response in compliance with legal mandates is still central to employment decisions. This past quarter also included notable Supreme Court decisions, ongoing regulatory changes at the federal, state and local levels, and a new local county ban on criminal history checks.

***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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U.S. SUPREME COURT SIGNIFICANTLY EXPANDS PROTECTION AGAINST SEX DISCRIMINATION

In a trio of cases, the Supreme Court for the first time held that the prohibition against "sex" discrimination in Title VII of the Civil Rights Act of 1964 includes a prohibition against discrimination based on sexual orientation, gender identity, and transgender status. Each of the cases under review, *Altitude Express Inc. v. Zarda*, *R.G. & G.R. Harris Funeral Homes Inc. v. EEOC*, and *Bostock v. Clayton County, Georgia* (June 2020), challenged the termination of a long-time employee allegedly based on the employee's sexual orientation or transgender status.

In *Bostock*, the plaintiff claimed that Clayton County had won many national awards for his leadership as a child welfare advocate for more than a decade, but that he was fired for conduct "unbecoming" of a county employee soon after he began participating in a gay recreational softball league and was subjected to disparaging comments from members of the community about his sexual orientation. In *Altitude Express*, the plaintiff had worked for several seasons as a skydiving instructor and was fired days after he mentioned that he was gay. In *R.G. & G.R. Harris Funeral Homes*, the plaintiff presented as a man when hired for the job, and was then fired in the plaintiff's sixth year with the funeral home, after writing to the employer that the plaintiff planned to "live and work full-time as a woman" after returning from an upcoming vacation. The funeral home responded to the plaintiff's letter, "this is not going to work out."

In a 6-3 decision, the Supreme Court resolved a split among the federal circuit courts to hold that Title VII prohibits employers from taking certain actions "because of sex," and an adverse employment decision based on an individual being homosexual or transgender necessarily is predicated on the individual's sex. As such, the Court held that those employment decisions violate Title VII.

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PROTECTING EMPLOYEES IN A PANDEMIC WORKPLACE

While the pace of legislative initiatives in response to COVID-19 that impact the workplace has slowed from that experienced in March and April, the administrative agencies charged with enforcing those laws have been issuing a continuous and ever-changing array of responsive regulations, frequently asked questions ("FAQs") and other guidance documents. Many reinforce existing employment and labor law principles, while some recognize exceptions to existing law based on the unique circumstances of the pandemic. Employers can refer to our COVID-19 Compendium in the Spring 2020 issue of Takeaways for information on unemployment insurance benefits, the Paycheck Protection Program, federal and state emergency paid sick leave mandates, WARN Act notices, and guidance on preventing discrimination. In addition to these resources, the following are notable developments on the federal level that pertain to employer obligations to employees.

The U.S. Department of Labor ("DOL") has issued new guidelines on COVID-19 and the Fair Labor Standards Act ("FLSA") that address, among other issues, compensating employees who are teleworking due to the pandemic, temporarily assigning certain nonexempt duties to a salaried employee without thereby making them overtime-eligible, and lawfully reducing the salary of an exempt employee during an economic slowdown. The DOL also has substantially expanded its roster of FAQs related to the Families First Coronavirus Response Act.

The Occupational Safety and Health Administration ("OSHA") reversed course since the spring and issued new enforcement guidance that, in most situations, employers will be expected to conduct a reasonable investigation to determine whether an employee who reports testing positive for COVID-19 was infected with the virus at work. OSHA also recently published new Guidance on Returning to Work, which includes OSHA requirements for PPE, respiratory protection, and sanitation and suggests employers address nine guiding principles:

- Conducting a hazard assessment;
- Implementing hygiene practices;
- Maximizing social distancing practices;
- Identifying and isolating sick employees;
- Following return to work guidance issued by the CDC after illness or exposure;
- Selecting and implementing control measures for social distancing;
- Being flexible with workplace policies and accommodations;
- Training workers on the signs, symptoms, and risk factors associated with COVID-19; and
- Ensuring anti-retaliation practices are in place and notifying employees of their rights.

OSHA also has its own web page of OSHA FAQs with regard to cleaning and disinfection, protective equipment, testing, training, enforcement and related matters, and its general COVID-19 Response page includes specific control and prevention standards for a wide range of industries.

The Centers for Disease Control and Prevention ("CDC") updated its Interim Guidance for Businesses and Employers with strategies and recommendations for resuming operations and a table outlining the various controls employers may use to help prevent the spread of COVID-19 in the workplace. The CDC has also posted its own CDC FAQs that include what to do if an employee in the workplace is suspected or confirmed to have COVID-19 as well as measures to maintain healthy workplaces and reduce the spread of COVID-19. The CDC's Businesses and Workplaces page provides links to these resources as well as industry-specific guidelines, information for small businesses, and considerations for COVID-19 testing for workplaces outside of healthcare.

The Equal Employment Opportunity Commission ("EEOC") has updated its FAQs on medical accommodations and COVID-19. Among the key points

Pandemic Protections *(cont'd from p. 2)*

covered in the most recent guidelines are directions that:

- employers should not use antibody test results as a basis for employment decisions;
- employees are not entitled to a reasonable accommodation solely because their age places them in a high risk category or in order to avoid exposing a high risk family member to COVID-19; and
- employers can offer accommodations but cannot exclude from the workplace employees who are known to fall into a high risk category absent an individualized, "direct threat assessment."

NY Guidance Simplifies Obtaining Quarantine Orders

Recent orders and guidance have been issued by New York State and New York City to address the threshold eligibility requirement under the New York State Emergency Paid Sick Leave Law that an employee be subject to a mandatory or precautionary order of quarantine or isolation issued by any duly authorized government entity due to COVID-19. New York City issued an order with appendices that allows individuals to self-certify for the state's Emergency Paid Sick Leave if they have tested positive for COVID-19, are experiencing COVID-19 symptoms and were in contact with a known COVID-19 case, or otherwise meet the qualifications for mandatory isolation in accordance with New York State agency or CDC guidance. The state Department of Health ("DOH") and Department of Labor ("DOL") issued joint guidance that deems individuals employed by a health care provider who test positive or are exhibiting symptoms of COVID-19, or who have been directed by their employer not to work because the employer suspects or has confirmed that the employee was exposed, exhibits symptoms or has been diagnosed with COVID-19, to thereby be subject to an order of quarantine and entitled to emergency paid sick leave. The joint guidance additionally recognizes an exception for asymptomatic individuals to be required to work, subject to certain other criteria, in the event of a "staffing shortage". Employees who do not fall within these exceptions can follow a process jointly defined by the DOH and DOL to request an order of quarantine from their local health department.

New Posting Requirement for NJ Employers

New Jersey employers have one additional posting requirement as of April 1, 2020, which results from a string of bills passed earlier this year, targeted at enforcing penalties for misclassification of employees. The New Jersey Department of Labor and Workforce Development has published the required posting in two different sizes here and here.

COURT WATCH

USSC Holds Catholic School Teachers Outside the Protection of Federal Anti-Discrimination Laws

The U.S. Supreme Court held, in *Our Lady of Guadalupe School v. Morrissey-Berru* (July 2020), that the claims of age and disability discrimination separately asserted by two Catholic school elementary grade teachers were appropriately dismissed under the "ministerial exception" to the First Amendment. That exception bars courts from applying the laws against employment discrimination to the relationship between a religious institution and certain key employees. The Court held that such key employees were not limited to those with a minister title, formal religious training, and a designated ministerial role (which were the missing factors that had led the appellate court to conclude the exception was not applicable). Rather, the Supreme Court focused on the teachers' contractual obligation to develop and promote a Catholic School faith community. It concluded that they performed vital religious duties because each taught religion in the classroom, worshipped with her students, prayed with her students, and had her performance measured on religious bases.

NYC Amends Guidelines on Screening for Marijuana Use

Effective July 24, 2020, the New York City Commission on Human Rights adopted amendments to clarify when an employer can conduct pre-employment screening for marijuana under the exception for positions that significantly impact the health or safety of employees or members of the public. The new rule identifies positions that require an employee *regularly* to work: on an active construction site; operating heavy machinery; on or near power or gas utility lines; operating a motor vehicle on most shifts; or fueling, maintaining or operating an aircraft or aircraft support equipment as all falling within the exception. The rule further extends the exception to positions in which impairment would pose an immediate risk of death or serious physical harm to the employee or other people. We previously reported on the prohibition against pre-employment marijuana testing in our Spring 2019 issue of Takeaways.

Suffolk County Bans the Box

Effective August 25, 2020, employers in Suffolk County with 15 or more employees are prohibited from asking job applicants about criminal conviction history during the employment application process or prior to the first interview. Subsequent to the application and initial interview process, the law permits employers to consider an applicant's criminal conviction history consistent with the factors delineated in Article 23-A of the NYS Correction Law. The new Suffolk County law recognizes only limited exceptions: where prior inquiry is specifically authorized by law; for law enforcement and safety departments; for positions providing services at a school or involving the care or supervision of children, young adults, senior citizens or the disabled; or for licensed positions where criminal history inquiries are posed by the trade or professional licensing body, in accordance with state law.

DOL Has New FMLA Forms
Employers may wish to begin using new model FMLA forms, which seem to have more check boxes to address the permutations of the FMLA.

US DOL Loosens Rules on Flexible Workweek Method

The U.S. Department of Labor recently issued a final rule to clarify that employers can use the fluctuating workweek method of compensating their non-exempt employees even if they provide those employees with additional payments, such as bonuses, premium payments, commissions, or hazard pay. The fluctuating workweek method permits compensating non-exempt employees at one-half their regular rate for hours worked over 40 in a workweek provided the employees are paid a fixed weekly base salary for all hours worked. While use of this compensation method is predicated on the employees' work hours varying from week to week, the final rule further clarifies that the fluctuation in hours worked need not fall both above and below 40 hours; it can be applied even if the only variation is in the number of overtime hours worked each week.

Law Changes Impact Employer Data Collection

***EEO-1 data*:** In response to the pandemic, the EEOC announced it will delay until March 2021 collection of EEO-1 Component 1 data, but covered employers should still begin preparing the data, as the reporting snapshot period will remain the same.

***OFCCP Self-Identification of Disability*:** The OFCCP introduced a new form to collect self-identification data on disabilities, which federal contractors and subcontractors must begin to implement by August 4, 2020.

NYS Paid Sick Leave Usage: Beginning September 30, 2020, employers are required to maintain records for no less than six years reflecting the amount of sick leave provided to each employee under the state's new paid sick leave law.

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