FALL 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-related requirements continue to be at the forefront of legal changes. There also are new paid sick leave laws, federal guidance on accommodations and mandates for federal contractors. The courts struck down recent DOL regulations and addressed NJ arbitration agreements.

***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 PAID SICK LEAVE NOW IN EFFECT; NYC ADDS NEW REQUIREMENTS

Just two days before the September 30 effective date for New York State's new paid sick leave law, New York City expanded its own Earned Safe and Sick Time Act ("ESSTA") by:

- matching the state's sick leave accrual formula;
- eliminating waiting periods for newly hired employees to utilize safe/sick time; and
- eliminating minimum annual hours to be eligible for leave.

Recent guidance from the NYS Department of Labor suggests, that the state may permit the City's approach with regard to excusing carryover of unused sick days if the employer front-loads the employee's annual paid leave entitlement each year, but the guidance is not definitive.

The revised ESSTA then goes further than the state law. It provides that if an employer requests documentation to support that an absence for more than three consecutive work days was used for an authorized purpose, the employer must reimburse the employee for all reasonable costs or expenses incurred for the purpose of obtaining that documentation. Additionally, employers must provide written notice of employees' rights under the law upon hire and must conspicuously post that notice in the employer's place of business. Updated guidance from the City advises that the notice must also be provided to current employees of organizations with 100 or more employees by January 1, 2021. For each pay period, NYC employers must provide the amount of ESSTA time accrued and used during that pay period and an employee's total balance of accrued ESSTA leave on their pay stub or other form of pay period documentation. Employers also are now required to retain records of complying with these requirements for at least three years.

FEDERAL CONTRACTORS RESTRICTED IN CONDUCTING DIVERSITY TRAINING

Organizations are speaking out against a new Executive Order that restricts how federal contractors conduct diversity training. (*See p.4)*

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EMPLOYER OBLIGATIONS IN A PANDEMIC WORKPLACE

Federal, state and local executives and government agencies have been continuing to add responsive guidance to address an array of pandemic-specific issues impacting workplaces, from childcare leave to accommodating remote workers.

Determining "Close Contacts" for Tracing Possible COVID-19 Exposure

The Centers for Disease Control ("CDC") revised its definition of "close contact" for purposes of determining which individuals should be notified that they are at risk from exposure to someone who has tested positive for COVID-19. The rule had been that notice was to be given to anyone who was within 6 feet of an infected person for 15 minutes or more. That guidance has now been revised to clarify that the 15 minutes is a *cumulative* measure over a 24-hour period, starting from 2 days before illness onset until the time the patient is isolated. Multiple exposures throughout the day, each in increments of as little as a few minutes, can meet the new CDC standard, and the CDC advised that the determination of close contact should be made irrespective of whether the parties were wearing face coverings.

Determining FFCRA Eligibility for Hybrid Schooling

The Department of Labor ("DOL") issued new FAQs to address return-to-school leave issues concerning the Families First Coronavirus Response Act ("FFCRA"), which make clear that when an employee's child's school is operating on a hybrid-attendance basis, in which students are expected to work remotely and not permitted to attend school on certain days, the employee is eligible to take paid leave under the FFCRA on the remote learning days if the time is needed for the employee to care for the child and no other suitable person is available to do so. However, when a school gives the employee a choice between in-person or remote learning and the employee chooses to keep the child home, the employee would not be eligible to take FFCRA paid leave.

Accurately Paying Remote Workers

In response to the new telework arrangements promoted by COVID-19, but extending to all remote work arrangements, the DOL's Wage and Hour Division issued a field assistance bulletin on employers' obligation to exercise reasonable diligence in tracking teleworking employees' hours of work. An employer must pay for all hours that it knows or has reason to believe work was performed, and must establish a reasonable process for employees to report uncompensated work time. Compensation must be paid even if the employer did not ask for the work to be done, or did not want the work done, and even if there was a rule against doing the work, regardless of where the work is performed.

Screening Employees

Some key points addressed in the Equal Employment Opportunity Commission's ("EEOC's") latest guidance:

- Authorizes screening and testing employees for COVID-19 before permitting them to enter the workplace and/or to determine if an employee's presence in the workplace is a direct threat to others, provided the tests are accurate, reliable, and are administered consistent with current CDC guidance and ADA standards;
- Precludes employers from asking employees entering the workplace if their family members have COVID-19 or related symptoms;
- Requires confidentiality of screening data and states employers should not share any information about employees experiencing COVID-19 symptoms who are teleworking or on leave at the time of diagnosis.

Accommodating COVID-19 Risk for Older Workers

The EEOC's updated guidance reiterates the Commission's position that, while there is no duty to provide an accommodation to employees 65 or older who, based solely on their age, are at higher risk of

EMPLOYER OBLIGATIONS IN A PANDEMIC WORKPLACE *(cont'd)*

severe illness if they contract COVID-19, covered employers are allowed to grant greater flexibility to such individuals and cannot treat older workers less favorably. New York City employers need to be mindful that the NYC Commission on Human Rights has taken a different position, however, and issued Enforcement Guidance and a COVID-19 Supplement that *prohibit* employers from granting preferential treatment to older workers, such as permitting older employees to work remotely while prohibiting younger employees from doing so.

Determining Worker's Compensation Eligibility

New Jersey recently passed a new law, retroactive to March 9, 2020, that creates a rebuttable presumption of workers' compensation coverage for COVID-19 infections contracted by health care workers, public safety workers, or other essential employees during a public health emergency declared by executive order of the governor, if an individual contracts COVID-19 during a time period in which the individual is working in a place of employment other than the individual's own home. The presumption can be rebutted if an employer can show by a preponderance of evidence that the worker was not exposed to the disease while working in the place of employment. Any claim of workers' compensation paid as a result of the rebuttable presumption will not be considered in calculating an employer's workers' compensation premium.

Connecticut also enacted a rebuttable presumption of worker's compensation coverage for any employee diagnosed with COVID-19 or COVID-19 symptoms, but only for those who may have contracted COVID-19 in the early days of the virus. The presumption only applies to benefit claims where the employee missed one or more days of work between March 10 and May 20, 2020. Further, any wage replacement benefits paid must be reduced by the amount of FFCRA or other paid sick leave available specifically in response to COVID-19.

Medical Support for Exempting Face Masks

Effective on August 14, 2020, Connecticut updated its rules with regard to requiring any individual who declines to wear a face mask or face covering because of a medical condition, to require that such individuals provide written documentation in support of an exemption from a licensed medical provider, the Department of Developmental Services or another state agency that provides or supports services for people with emotional, intellectual or physical disabilities. The medical documentation does not need to name or describe the condition that qualifies the individual for exemption.

Tightening Workplace Protections

New Jersey has issued a new Executive Order, effective November 5, 2020, that establishes COVID-19 health and safety protocols for all employers in the state that have resumed partial or total operations. These protocols include social distancing, masking requirements, providing sanitization materials, routine cleaning and disinfection of all high-touch areas, daily health checks of employees and responsive measures for those who appear to have symptoms, and promptly notifying employees of potential exposure and disinfecting the worksite in such circumstances.

CT Pushes Out Harassment Prevention Training Deadline; No Similar Action in NY

In recognition of the challenges of the pandemic, the Connecticut Commission on Human Rights has extended the deadline for employers to conduct required sexual harassment prevention training to January 1, 2021. New York State and New York City have not modified their annual harassment prevention training requirements.

EEOC Provides Clarity on Reasonable Accommodations for Legal Opioid Users

On August 5, 2020, the EEOC issued guidance for employees and health care providers on when the legal use of opioids may entitle an employee to reasonable accommodations and other protections under the Americans with Disabilities Act ("ADA"). The guidance affirms an employer cannot automatically disqualify an employee for a job based on lawful current use of opioids or past usage, but rather must consider if the employee is able to do the job safely and effectively. Except as otherwise provided by law (for example, for safety-sensitive positions), the employer may not remove an employee from a position on mere suspicion that the employee's opioid use could interfere with safe job performance. Instead, the employer needs objective evidence that the person cannot do the job or poses a significant safety risk, even with a reasonable accommodation.

OFCCP Avoids Gender Identity Issues

Rather than adopting new categories for gender identity, the Office of Federal Contract Compliance Programs ("OFCCP") recently issued guidance that federal government contractors must include on their affirmative action program submissions data from individuals who self-identify as non-binary or a gender other than male or female. Employers may exclude that data in its gender-based workplace analyses.

Federal Contractors Restricted *(cont'd from p. 1)*

A new Executive Order on Combating Race and Sex Stereotyping, issued on September 22, 2020, goes beyond past government mandates as to the subject matter to be incorporated in workplace training, and expressly limits the manner and phrasing by which information is communicated to employees. The Executive Order applies to executive departments and agencies, federal contractors and subcontractors, and federal grant recipients, and prohibits such employers from conducting workplace training that includes "divisive concepts," including, among other provisions, that:

- An individual, by virtue of race or sex, is inherently racist/sexist/oppressive, consciously or unconsciously;
- The United States is fundamentally racist or sexist;
- An individual, by virtue of race or sex, bears responsibility for actions committed in the past by other members of the same race or sex;
- An individual should feel discomfort, guilt, anguish or other psychological distress because of race or sex; or
- Meritocracy or traits such as a hard work ethic are racist or sexist or were created to oppress a particular race.

The order applies to new federal contracts executed after November 21, 2020. Contractors that fail to comply risk cancellation of their contracts. In addition, vendors retained to conduct diversity and inclusion training for federal government agencies must submit their materials in advance for review and may be debarred for failure to comply with the Executive Order.

The order also required the OFCCP to establish a compliance hotline, which is already receiving complaints, that a federal contractor has violated the new Executive Order or existing Executive Order 11246 (which prohibits employment discrimination). In addition, as per the Executive Order, the OFCCP is now seeking information from federal contractors, subcontractors and their employees regarding the training, workshops or similar programming provided to employees having to do with diversity and inclusion, including information about the duration, frequency and expense of such activities.

Finally, private employers may also be impacted because the Executive Order directs the Attorney General to assess the extent to which workplace training that private employers conduct teaches any of the "divisive concepts" and thereby creates a hostile work environment in violation of Title VII.

COURT WATCH

Federal District Court Invalidates FFCRA Regulations; DOL Responds with Revised Rules

The U.S. District Court for the Southern District of New York in *New York v. U.S. Dep't of Labor* (Aug. 3, 2020) struck down several portions of the DOL's temporary rule implementing provisions of the FFCRA. Specifically, the District Court ruled four parts of the DOL's rule invalid: (1) the requirement that paid sick leave and expanded family and medical leave are available only if an employee has work available from which to take leave; (2) the requirement that an employee may take FFCRA leave intermittently only with employer approval; (3) the expanded definition of "health care provider" and whom an employer may exclude from being eligible for FFCRA leave; and (4) that employees who take FFCRA leave must provide their employers with certain documentation before taking leave.

In response to this decision, the DOL published revised regulations effective as of September 16, 2020, to revise and reaffirm with explanation its rules and address the issues raised by the District Court. For more information on the DOL's revised regulations, which essentially clarify and reinstate the prior DOL rules, see our previous blog post.

Federal District Court Strikes Much of DOL's Final Rule on Joint-Employer Status

In *New York v. Scalia* (Sept. 8, 2020), the U.S. District Court for the Southern District of New York invalidated significant portions of the DOL's Final Rule on joint employment under the Fair Labor Standards Act ("FLSA"). Promulgated in March 2020, and discussed in the Winter 2020 issue of Takeaways, the DOL had adopted a four-factor test that looked to balance whether the individual or entity actually exercised control over the individual. The District Court held that the DOL's rule was inconsistent with the broad definitions in the statute itself and it contradicted the FLSA by distinguishing the test for employer status from that for determining joint employer status.

NJ Supreme Court Upholds Electronic Arbitration Agreement; Reverses Decision on Failure to Specify Arbitral Forum

The New Jersey Supreme Court held in *Amy Skuse v. Pfizer, Inc.* (Aug. 18, 2020) that an electronic arbitration agreement and class waiver agreement were validly communicated and enforceable against an employee because the communications clearly and unmistakably explained that if the employee remained employed with the company for more than sixty days from her receipt of the agreements, she was deemed to assent to them. Notably, the Court held that email transmittal (rather than physical delivery) of the notice was acceptable and did not invalidate the agreement.

In *Flanzman v. Jenny Craig, Inc.* (Sept. 11, 2020), the Court reversed an Appellate Division decision (discussed in the Winter 2018/19 issue of Takeaways) and held that the failure to designate a forum for arbitration was not a fatal flaw because the state Arbitration Act provides for a default arbitration procedure.

NLRB Takes Stand Against Abusive Employee Conduct

In *General Motors LLC and Charles Robinson* (July 21, 2020), the National Labor Relations Board reversed decades of precedent and adopted a uniform standard (the "Wright Line test") to determine whether an employee's abusive conduct should be permissible if it is in furtherance of collective actions with regard to terms and conditions of employment (Section 7 rights). The Board held that, if an employee demonstrates the employer had animus against Section 7 activity in which the employee engaged, the employer then has the opportunity to show that it would have taken the same action against the complaining employee even in the absence of the Section 7 activity. The new test enables employers to address harassing or excessively profane speech that violate their policies, even if cloaked in expressions of opposition to workplace decisions.