WINTER 2020/21

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. NYC has taken some decisive employee-protective actions. The landscape keeps changing with new pandemic-related requirements. Change is afoot at the federal level, and there are recent notable court decisions on worker classification and overtime liability.

***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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NYC FURTHER RESTRICTS CONSIDERATION OF CRIMINAL RECORD FOR APPLICANTS, EMPLOYEES

Recent amendments to New York City's ban the box law place substantial additional limitations on employers' consideration of an applicant's or employee's criminal record. Absent a federal or state law disqualifying employment based on particular criminal history, a demonstrably direct relationship between the conduct giving rise to the criminal record and the job, or a determination that, based on the underlying conduct, employing the individual would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public, New York City employers generally will not be permitted to revoke an offer or terminate an existing employee based on the individual's criminal record or pending charges. (*cont'd p. 2)*

NYC MANDATES JUST CAUSE FOR PRIVATE EMPLOYER ACTIONS; LIMITED INITIAL SCOPE, REVOLUTIONARY PRECEDENT

New York City is breaking new ground in its regulation of private employer actions through its continued focus on the fast food industry. The city has passed two new laws that collectively expand on prior restrictions requiring "predictive scheduling" for fast food workers to now provide that, after completing a 30-day probationary period, such employees cannot be terminated, suspended indefinitely, laid off, or subjected to more than a 15% reduction in their scheduled work hours absent "just cause" or a "bona fide economic reason." The new laws, which take effect July 5, 2021, define "just cause" as an employee's "failure to satisfactorily perform job duties or misconduct that is demonstrably and materially harmful to the fast food employer's legitimate business interests." (*cont'd p. 3)*

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NYC Restrictions on Criminal Record Review (*cont'd from p. 1)*

The revisions to the New York City law, which take effect July 29, 2021:

- close a loophole in the existing state and city laws, which did not previously regulate employment decisions where an individual had pending criminal charges (but the matter had not been adjudicated), so as to now require employers to evaluate the relevance of the underlying conduct in that context under similar standards as are required for those convicted of a crime;
- effectively modify the "at will" nature of most employment relationships by precluding an employer from revoking a conditional offer of employment except in three circumstances:
    - Based on appropriate analysis of the relevance of an applicant's criminal history;
    - Based on a legally-compliant medical exam; or
    - Based on other information the employer could not have reasonably known before making the conditional offer, but only if the employer can show that such new information prompted it to revoke the offer regardless of the results of the criminal background check;
- require employers to adhere to the city's "fair chance" process for evaluating pending criminal charges or a criminal conviction involving a *current* employee;
- permit employers to make employment decisions based on an applicant's or employee's intentional misrepresentations regarding the individual's arrest or conviction history, provided that the information requested was lawful and the employer first provides documentary support for its finding of intentional misrepresentation and allows the individual a reasonable time to respond;
- declare it a discriminatory practice for an employer even to *inquire* about (as well as to consider) criminal charges or history for a "violation"-level offense or conduct that is defined as a non-criminal offense under the law of another state; and
- mandate that employers specifically request from applicants and employees information relating to the relevant fair chance factors as part of the employer's deliberative process.

Employers may want to review their job applications to confirm they comply with the revised law, update their processes, and educate managers and supervisors to ensure compliance.

NYS PFL Phase-In Achieved as of January 1

New York State's Paid Family Leave benefit has been phasing in over the past several years. As of January 1, 2021, the benefit increased to the maximum level of 12 weeks of leave, with wage replacement benefits equaling 67 percent of the employee's average weekly wage, up to a maximum of $971.61 per week.

EEOC Clarifies Procedures, Expands Public Access to Data

The EEOC has issued a final rule clarifying that when it indicates "no-cause" on its Dismissal and Notice of Rights form, that simply means that the EEOC has decided not to further pursue its investigation, and not that the claim is without merit. The final rule further delegates to investigators the authority to issue dismissal notices and explicitly authorizes digital transmission of charge-related documents.

The EEOC also has introduced EEOC Explore, initially on a pilot basis with data from 2017 and 2018, which is designed to make aggregate EEO-1 data available through an interactive system so that it can be explored across categories that include location, protected characteristic and industry sector.

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NYC Just Cause Mandate (*cont'd from p. 1)*

The new New York City laws adopt strict procedural requirements and evidentiary hurdles for employers who are invoking the just cause standard. The laws require that employers:

- have a written progressive discipline policy;
- provide the policy to their employees;
- adhere to the policy except in the event of "egregious" performance failings or misconduct;
- consider only disciplinary actions taken within the preceding year; and
- provide a written explanation, within five days, of the precise reason for the action.

Any reason not included in the written explanation may not be considered as proof that the just cause standard was met.

To assert that termination was due to a "bona fide economic reason," the employer must show through its business records that, in response to reduced production volume, sales or profit, it needs to fully or partially close its operations or make technological or organizational changes. When invoking this standard, employees must be discharged in reverse order of seniority, so that the longest tenured employees are the last to go and the first to be rehired. For a twelve month period following such a discharge, the employer has to make "reasonable efforts" to reinstate former employees before it can offer shifts to other employees or hire anyone new.

The laws offer covered employees the option of arbitration (beginning January 1, 2022) or judicial relief, and a prevailing employee is entitled to reinstatement, reasonable attorneys' fees, back pay and similar relief. In an arbitration, the losing employer must additionally reimburse the city for the cost of the arbitration. In a court action, the court may additionally award punitive damages, and the employer will be liable for schedule change premiums, as provided under the existing predictive scheduling law, for each shift the employee loses as a result of having been discharged without just cause.

Covered employers will need the coming months to develop and train their managers on progressive discipline policies and compliant procedures.

NYS Requires Gender-Neutral Single Occupancy Bathrooms

Effective March 23, 2021, all single-occupancy bathrooms located in public spaces in New York State, including but not limited to those located in restaurants, bars, mercantile establishments, or factories, must be designated as gender-neutral with a clear posting on or near the bathroom entrance. Single-occupancy gender neutral bathrooms will be for use of no more than one occupant at a time or for a family or assisted use.

Tri-State Minimum Wage Rates for 2021

Location	Minimum Wage w/o Tip Credit	Minimum Annual Salary for Exempt Employees
New York City	$15.00	$58,500
Westchester, Nassau, Suffolk	$14.00	$54,600
Remainder of New York State	$12.50	$48,750
New Jersey 6+ employees	$12.00	$35,568*
New Jersey < 6 or seasonal employees	$11.10	$35,568*
Connecticut	$12.00	$20,800

*follows federal law

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EMPLOYER OBLIGATIONS IN A PANDEMIC WORKPLACE

The most recent government guidance for employers related to the pandemic includes the following.

Proceed Cautiously Before Mandating Vaccination
The Equal Employment Opportunity Commission (EEOC) published additional information in Section K of its guidance on COVID-19 and the Americans with Disabilities Act (ADA) that permits employers to require employees to get vaccinated as a condition of employment, subject to several parameters and exceptions. Among the key points from the guidance are:

- proof of vaccination may be required, provided employees are not asked questions related to a disability or family medical history, which would potentially violate the ADA or the Genetic Information Nondiscrimination Act (GINA);
- employers must consider requests for a reasonable accommodation, which may include teleworking or additional PPE and social-distancing measures, for employees who cannot receive the vaccine due to a disability or a sincerely held religious belief, and cannot ban such employees from the workplace without conducting an individualized assessment that determines the unvaccinated employee poses a direct threat at the worksite that cannot be remediated through a reasonable accommodation; and
- employers or their contracted third-party providers may inoculate employees against COVID-19, but should review any pre-screening questions that might pertain to medical history of an employee or an employee's family member.

Employers should be additionally mindful that, because of the expedited, "emergency use" process that the Food and Drug Administration (FDA) followed to approve COVID-19 vaccines, FDA rules require recipients be informed that they have the option to refuse the vaccine. The FDA, EEOC and Center for Disease Control and Prevention (CDC) have not clarified whether this FDA rule thereby precludes an employer from mandating vaccination.

Obtain Informed Consent Before Testing Employees
The CDC issued guidance that work-based testing for COVID-19 should not be conducted without the employee's "informed consent," which requires disclosure of information to the employee, in a manner that the employee can understand, and allows the employee free choice to act independently according to the employee's values, goals, and preferences. To ensure informed consent, employers should:

- disclose whether a positive test result or declination to participate in testing may mean exclusion from work;
- use non-technical terms to explain the testing program itself (what type of test will be administered and how), in the employee's preferred language (employers can use this tool from the CDC to create clear messages); and
- explain any other parts of the testing program that an employee would consider especially important in deciding whether to participate, such as where the test(s) will be conducted, by who, who will have access to the results, who bears the cost, how frequently tests will be conducted, and where to go with additional questions.

Employees should be able to have their questions answered during the process and should not be pressured by supervisors or co-workers to participate. Also, employers need to ensure safeguards are in place to protect employees' privacy and confidentiality, and provide each employee with an emergency use authorization patient fact sheet during the consent process.

Employer Obligations *cont'd*

Heed OSHA Guidance on Masks and Social Distancing
Following a directive issued by President Biden the Occupational Safety and Health Administration (OSHA) issued new advisory guidance that identifies a COVID-19 prevention program as the most effective way to mitigate the spread of COVID-19 in the workplace. Notably, the Guidance recommends employers provide information and training on the benefits and safety of the vaccine to employees, and ensure all employees continue to follow protective measures, such as wearing face masks and social distancing.

NYS Employees May Be Entitled to Multiple Periods of COVID-19 Protected Leave
As discussed in more detail on our Levy Employment Law blog, the New York State Department of Labor (NYSDOL) has taken the position that employers must provide up to three periods of COVID-19 leave for eligible employees. The first covered period offers up to two-weeks of leave (with salary continuation obligations dependent on the size of the employer) under any circumstance that subjects an employee to a COVID-19-related order of quarantine or isolation. The second and third covered periods, each also up to two weeks in duration, apply if the employee personally tests positive for COVID-19, either as a new instance or as an extension of a prior COVID-19 leave. If the employee has not yet been quarantined but an employer mandates an employee remain out of work due to an actual or potential exposure to COVID-19 (from any source), the employer must continue paying the employee's regular salary until the employee is permitted back to work or becomes subject to an order of quarantine or isolation.

FFCRA Credit Extended, Without Mandate – for Now
While the paid leave requirements of the Families First Coronavirus Response Act (FFCRA) expired December 31, 2020, as we previously discussed in our recent blog posts, employers may voluntarily continue to provide paid leave under the FFCRA and take credits connected with this leave through March 31, 2021. Further extensions of the FFCRA credit, as well as the former mandate of paid leave, are currently under discussion as part of the Biden administration's COVID relief package.

Electronic Workplace Postings for Remote Workforces
Responding to the continuing prevalence of remote work arrangements, the U.S. Department of Labor (DOL) published guidance to clarify that employment law posting requirements that fall under the Wage and Hour Division (including notices under the Fair Labor Standards Act, Family and Medical Leave Act, and the Employee Polygraph Protection Act) can be satisfied by an electronic posting only if all employees (1) exclusively work remotely, (2) customarily receive information from the employer via electronic means, and (3) have readily available access to the electronic posting at all times. Where an employer has employees on-site and other employees teleworking full-time, the employer may supplement a hard-copy posting requirement with electronic posting, but the electronic notice must be as effective as the hard-copy posting in the sense that it needs to be in a conspicuous location to which employees regularly have access, and the Department encourages both methods of posting. Where notices are to be provided to employees individually, electronic distribution is generally permissible for employees who customarily receive information from the employer electronically.

NYS Expands WARN Act Notice Recipients
Effective November 11, 2020, New York amended its Worker Adjustment and Retraining Notification (WARN) Act by expanding the list of required recipients that must receive advance notice when an employer orders a mass layoff, relocation, or employment loss. In addition to providing 90 days' advance notice of such WARN-triggering events to affected employees, the DOL, and workforce investment boards for the localities in the which the event will occur, employers must now additionally provide notice to: the chief elected officials of the unit(s) of local government and school district(s) in which the event will occur; and each locality that provides police, firefighting, emergency medical, ambulance or other emergency services to the site of employment subject to the triggering event.

Biden Executive Orders Strengthen Workplace Employment Protections

In addition to actions responsive to the COVID-19 pandemic, several of President Biden's initial Executive Orders are of potential relevance to private employers. They include an order implementing the Supreme Court's 2020 decision in *Bostock* v. *Clayton County*, by ensuring that all federal anti-discrimination statutes are administered in a manner that protects individuals based on sexual orientation and gender identity; an order revoking the prior administration's restrictions on the content of diversity and inclusion training for federal government agencies, contractors and grant recipients; and an order advancing "equity" for all by charging federal government agencies to assess whether, and to what extent, their programs and policies perpetuate systemic barriers to opportunities and benefits for those who fall under federally protected classes, as well as people who have been disadvantaged socio-economically, such as those affected by persistent poverty, and taking concrete measures to address identified inequities.

COURT WATCH

NYS Appellate Court Holds Uber Drivers are Employees

In *Matter of Lowry* (3d Dep't, Dec. 17, 2020), the New York State Appellate Division held that Uber drivers are employees – not independent contractors – and are entitled to unemployment insurance benefits. The Court affirmed the determination of the Unemployment Insurance Board that Uber exercised sufficient control over the drivers to establish an employment relationship. The Court cited as factors that Uber controls the drivers' access to their customers, calculates and collects the fares, sets the drivers' rate of compensation, authorizes the vehicle used, precludes certain driver behavior and uses its rating system to encourage and promote drivers to conduct themselves in a way that maintains a positive and fun atmosphere in the car. While drivers may choose which route to take when transporting a customer, the Court observed that Uber provides a navigation system that tracks the drivers' location on their digital platform application and Uber reserves the right to adjust the fare if the driver takes an inefficient route.

NJ Supreme Court Clarifies Availability of Good Faith Defense for Overtime Wage Violations

The New Jersey Supreme Court held that employers can only assert a good-faith defense for failing to pay overtime compensation when the employer is relying on a determination issued directly by the Commissioner of the Department of Labor and Industry or the Director of the Wage and Hour Bureau, or when relying on a Department of Labor and Industry (DOLI) practice or policy. In *Branch v. Cream-O-Land Dairy* (NJ S Ct. Jan. 13, 2021), the employer argued it had relied in good faith on three matters in which the DOLI, specifically a senior investigator and the Section Chief of the Division of Wage and Hour Compliance, had investigated its operations and concluded it was a "trucking industry employer." As such, the employer had paid its employees one and a half times the minimum wage for each hour of overtime in accordance with a wage payment exemption applicable to trucking industry employers. The Court held that none of the decisions in the three prior investigative matters satisfied the requirements of the good-faith defense because the determinations on which the employer relied were issued by subordinate employees and not directly by the Commissioner or Director. The Court suggested the DOLI may wish to institute a procedure for employers to obtain an opinion letter or other ruling clarifying their obligations under the overtime provisions, but it declined to deviate from the plain language of the statute.