SUMMER 2021

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. Connecticut is aligning with its neighbors in adding new employer obligations; New York is mandating employer preparedness for the next pandemic; and New Jersey is further cracking down on wage law violations. Federal requirements are now controlling on COVID compliance, and there is more.

***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 HERO ACT CLOCK IS TICKING FOR SAFETY PREVENTION PLANS

New York employers must have airborne infectious disease prevention plans written by August 6, 2021, and distributed to their employees (including within any existing employee handbook), before Labor Day 2021. As reported in our recent HERO Act and prevention plan blog articles, the New York State Department of Labor (NYSDOL) in consultation with the Department of Health (DOH) issued safety standards for all employers to implement, as well as a range of industry-specific standards, and a model prevention plan that set the minimum requirements for employers to meet. These requirements apply to every employer in New York State....*cont'd p. 2*

CONNECTICUT JOINS LEGALIZATION OF RECREATIONAL MARIJUANA USE

Effective July 1, 2022, Connecticut employers must adhere to new employment law protections for users of cannabis products in certain circumstances. In particular, as discussed in our recent blog article on the Connecticut law, employers will need to provide written notice to applicants and employees before conducting drug testing, and employment decisions may only be based on a positive finding for cannabis if: (1) not taking adverse action against the individual would cause the employer to lose a federal contract; (2) the employer reasonably believes the employee is engaged in cannabis usage while performing work duties; or (3) the employee manifests specific "articulable symptoms" of drug impairment while working that decrease or lesson the employee's performance. As in New York and New Jersey, the Connecticut law permits employers to maintain drug free workplace policies and workplace safety by precluding possession or use of cannabis in the workplace or work while an employee's ability has been impaired by cannabis.

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NY HERO Act Clock (*cont'd from p. 1)*

The prevention plan under the HERO Act must be provided to all current employees upon first entering the workplace and upon request, and to new hires going forward, in English and any other primary language, as well as be posted in a visible location. Under amendments to the original version of the HERO Act, employees are required to provide 30 days' advance notice of a perceived violation of the HERO Act to the employer, and can then commence an action if the employer "demonstrates an unwillingness to cure a violation in bad faith." A prevailing employee is entitled to recover reasonable attorneys' fees and costs, and the same may be awarded by a court to a prevailing employer in the event of a claimed violation of the Act.

The HERO Act further requires that, effective November 1, 2021, New York State employers with 10 or more employees must permit employees to establish and administer a joint labor-management workplace safety committee. The committee, which must be predominantly comprised on non-supervisory employees, is authorized to adopt certain workplace safety standards, report concerns, review policies, and meet regularly during work hours. Employers are prohibited from retaliating or discriminating against employees for exercising their rights and will be subject to fines for non-compliance as well as civil remedies.

CT Sets Parameters of Lactation Rooms

Effective October 1, 2021, Connecticut employers must ensure that, absent undue hardship, they provide a room for the purpose of expressing breast milk in the workplace, that:

- is free from intrusion and shielded from the public while the employee uses the room;
- is situated next to or near a refrigerator or other employee-provided portable cold storage unit for the employee to store the milk; and
- includes access to an electric outlet.

CT Requires Pay Equity, Transparency

Effective October 1, 2021, Connecticut employers will need to meet a pay equity standard based on whether pay differences between the sexes for "comparable" work can be justified based on bona fide factors other than sex, such as education, training, credentials, skill, geographic location, or experience. Employers will also be required to provide job applicants and employees with a "wage range" for the position to which they are applying or which they currently occupy.

CT Grants Employees Voting Time

Effective immediately, Connecticut employers are required to provide employees with two hours of unpaid time off to vote, if requested at least two days in advance. The law expires June 30, 2024.

Juneteenth Is Newest Federal Holiday

President Biden has signed a bill recognizing Juneteenth, which commemorates the reading of federal orders in Galveston, Texas on June 19, 1865 that announced the end of slavery in the United States, as a national holiday.

EEOC Resources Educate on Broadened Scope of Title VII "Sex" Discrimination

New resource materials published by the Equal Employment Opportunity Commission (EEOC), including a new landing page and a technical assistance document, are designed to educate employees, applicants, and employers about the rights of all employees to be free from sexual orientation and gender identity discrimination in employment. The guidance was issued on the one-year anniversary of the Supreme Court's ruling in *Bostock v. Clayton County* (as discussed in Takeaways, Summer 2020) that held that the definition of "sex" discrimination includes discrimination against an individual on the basis of sexual orientation or transgender status.

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EMPLOYER OBLIGATIONS IN A PANDEMIC WORKPLACE
TRI-STATE RESTRICTIONS LARGELY LIFTED, BUT FEDERAL PROTOCOLS MUST BE CONSIDERED

Connecticut, New York and New Jersey (in that order) have lifted virtually all workplace restrictions related to COVID-19 protections. However, all three states continue to expect mask usage will be enforced for those who are unvaccinated. New York State requires that unvaccinated individuals wear masks and that employers have masks available for those individuals. New Jersey expects businesses to "strongly encourage" unvaccinated individuals to wear masks and socially distance, and Connecticut requires unvaccinated individuals to wear masks in the workplace.

At the federal level, the Occupational Safety and Health Administration (OSHA), the Equal Employment Opportunity Commission (EEOC), the U.S. Department of Labor (DOL) and the Centers for Disease Control and Prevention (CDC) have continued to update their guidance for employers, including the following.

EEOC Updates Guidance on Vaccination Programs
The EEOC continues to update its EEO guidance on COVID-19 responsive action by employers. A series of updates posted on May 28, 2021, which were further refined on June 28, 2021, address employer vaccination mandates and initiatives to encourage employees to get vaccinated. The guidance states that federal EEO laws permit employers to mandate vaccinations, and to require employees who are not vaccinated to work remotely, provided that accommodations are considered on an individualized basis for individuals who are not vaccinated due to a disability, religion or pregnancy. Employers can also educate employees about COVID-19 vaccines and offer incentives for employees to confirm their vaccination status. Further, employers can offer incentives for employees to be vaccinated, provided the incentives are not so large as to be coercive. Employers must preserve the confidentiality of information gathered from employees with regard to vaccination status and similarly maintain confidentiality of any pre-screening responses if employers are administering a vaccination program.

DOL Updates Guidance on Telework
The DOL guidance on wage and hour issues related to the pandemic was updated as of April 26, 2021 to address issues related to teleworking, including implications for calculating compensation for hourly and salaried employees, and clarifying that OSHA regulations do not apply to home offices with the exception of reporting work-related injuries or illnesses.

OSHA Return to Work Guidance
OSHA updated its return to work guidance on June 10, 2021 to focus protections on unvaccinated and otherwise at-risk workers, encourage COVID-19 vaccinations and update its links to relevant information. As discussed in our blog article on OSHA restrictions, the lifting of state restrictions does not alleviate employers' general duty, under OSHA, to provide a safe workplace for their employees. OSHA recommends a multi-layered preventive approach for employers to protect unvaccinated individuals in the workplace, as delineated in its return to work guidance.

New CDC Guidance for Fully Vaccinated
The CDC posted new guidance for the vaccinated on June 17, 2021 that authorizes those who are fully vaccinated to resume activities consistent with life before the pandemic – free of masks or physical distancing except where required by other laws or workplace guidance. No testing or self-quarantining is required as a result of travel within the United States, but testing is still required before and after international travel, and other countries may impose additional requirements.

US DOL Reinstates Former Independent Contractor Status Test

Effective May 6, 2021, the Department of Labor (DOL) withdrew its final rule on Independent Contractor Status under the Fair Labor Standards Act (FLSA). As previously discussed in the Winter 2020 issue of Takeaways, the new rule applied an "economic dependence" test that emphasized two core factors in determining whether a worker is an employee or an independent contractor. The DOL withdrew the rule as inconsistent with the FLSA's text and purpose and a departure from longstanding judicial precedent, which had applied a totality of the circumstances test in determining independent contractor status.

EEOC Conciliation Reforms Withdrawn

President Biden on June 30, 2021 signed a Congressional resolution withdrawing changes to the EEOC's conciliation process that had been adopted earlier this year under the prior administration. The revised process had required the EEOC to provide employers with a written summary of the facts and information relied on, and the legal basis to support its probable cause finding, as part of the conciliation process that precedes the EEOC's commencement of legal action against a private employer. The EEOC announced the withdrawal of this requirement gives it greater flexibility to tailor the conciliation process to each case.

EEOC extends EEO-1 filing deadline again: Now August 23, 2021

NJ Adds More Teeth to Wage/Benefit Law Enforcement

A package of four bills signed into law on July 8, 2021 further enhance New Jersey's enforcement powers with regard to violations of state wage, benefit and tax laws. These new laws first grant the Commissioner of Labor and Workforce Development the authority, in response to an employer's violation of any state wage, benefit or tax law to:

- bring an enforcement action against the employer and collect all the remedies available by law to named or unnamed victims as if they had personally sued the employer, plus fines, penalties, reasonable attorneys' fees and costs;
- seek injunctive relief for actual or anticipated violations;
- have a noncompliant party held in contempt for not complying with an information subpoena; and
- require the employer to pay wages for employees for the first 10 days of work lost due to a stop-work order issued by the Commissioner and impose a civil penalty of $5,000 per day for each day the employer continues to operate in violation of the stop-work order.

The new laws also declare the misclassification of employees for the purpose of evading payment of unemployment insurance premiums as a violation of the New Jersey Insurance Fraud Prevention Act, for which an employer may be subject to additional penalties.

To track employers' compliance, the laws create and fund a new Office of Strategic Enforcement and Compliance within the Department of Labor and Workforce Development to oversee and coordinate across the divisions of the department and other state agencies as necessary the strategic enforcement of wage, benefit and tax laws. This office will need to sign-off that a business is in substantial good standing from a wage, benefits and tax compliance perspective before an employer can receive any direct business assistance from the department. The laws also require that the payroll information that contractors and subcontractors provide when engaging in public works projects be provided to the Commissioner of Labor and Workforce Development, stripped of personal identifying information, and then published in a publicly-accessible statewide database to be created by the Commissioner.

COURT WATCH

NY Arbitrator's Penalty Vacated in Sexual Harassment Case

In *Matter of New York Office for People with Dev.al Disabilities* (3d Dep't, Apr. 29, 2021) the NYS Appellate Division made clear that there are limits to an arbitrator's authority with regard to resolving a workplace sexual harassment complaint. Presented with findings that a 20-year employee with no prior disciplinary record had physically assaulted a female coworker on multiple occasions over a 10-month period, culminating in him straddling the coworker at her desk under circumstances that led to him pleading guilty to criminal harassment in the second degree, the court vacated an arbitrator's determination that the offending employee should be returned to work as soon as practicable after a period of suspension without pay. The court held that the penalty imposed offended public policy, and that it failed to account for the rights of other employees to a non-hostile work environment and conflicted with the employer's obligation to eliminate sexual harassment in the workplace.

NY Appellate Court Applies Punitive Damages Standard for NYCHRL Sexual Harassment Claim

In *Tirschwell v. TCW Group Inc.* (N.Y. A.D. 1st Dep't, May 27, 2021), the court held, among other things, that a demand for punitive damages in a sexual harassment case under the New York City Human Rights Law was improperly dismissed. Applying the standard articulated by the Court of Appeals in *Chauca v. Abraham* (N.Y. 2017), the *Tirschwell* court held that, if proven, the supervisor's conduct in conditioning his support for the plaintiff's work on her compliance with his demands for sex could demonstrate the requisite level of "willful or wanton negligence, or recklessness, or a conscious disregard of the rights of others or conduct so reckless as to amount to such disregard," as to support an award of punitive damages. The Court further held that the defendant employer could also be liable for punitive damages if it was found vicariously liable for the supervisor's conduct.

NJ Supreme Court Confirms Standard for Discrimination Claims

The New Jersey Supreme Court confirmed the determination of the Appellate Division in *Richter v. Oakland Bd. of Educ.* (June 8, 2021), which, as discussed in the Summer 2019 issue of Takeaways, held that an individual could have a viable claim under the New Jersey Law Against Discrimination, notwithstanding the absence of an adverse employment action.

We Are Writing More…

We invite you to regularly check our Levy Employment Law Blog, where we are posting on employment law developments. We strive to maintain a cross-jurisdictional lens in many of our postings, as we recognize the challenges for employers in reconciling overlapping and sometimes competing obligations and opportunities under federal, state and local laws.

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