FALL 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. Pressing concerns remain in complying with COVID-19 obligations, while state legislatures and government agencies are tweaking the equal employment opportunity and wage and hour laws, and the Biden administration is rolling back employment laws to maximize employee protections.

***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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NJ, CT Amend Age Discrimination Protections

New Jersey has removed an age exception from its Law Against Discrimination (LAD), effective October 5, 2021, so that it is no longer permissible for employers to refuse to hire or promote individuals over age 70. The state also removed language in the LAD that limited the remedies available to employees claiming they were forced to retire because of age, so that older employees now have the full panoply of remedies available under the law. Previously, individuals who were claiming forced retirement were limited to filing a complaint with the Attorney General, seeking reinstatement and back pay.

In Connecticut, effective October 1, 2021, employers are generally precluded from asking applicants to identify on an initial employment application their age, date of birth, and dates of attendance at, or date of graduation from, an educational institution. The law recognizes exceptions where such inquires are legally required or the employer can demonstrate a legitimate need for the information.

Vaccine Mandates Proliferate at the Federal, State and Local Levels

In a substantial shift from this past spring, a growing chorus of government bodies, starting with the Biden administration but also within New York, New Jersey and Connecticut, have all begun to impose vaccine mandates for select categories of employers and industries. We have summarized them in a chart as part of our COVID-19 update. *See pg. 3.*

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NYC Fair Chance Act Upends Employers' Background Check Process

Recent amendments to the New York City Fair Chance Act that took effect July 29, 2021, together with Legal Enforcement Guidance issued by the New York City Commission on Human Rights, collectively necessitate that employers in New York City who conduct criminal background checks revisit their processes. Unless an employer falls within one of the Fair Chance Act exemptions (which we listed in the Fall 2015 issue of Takeaways when the law first took effect), the amendments to the Fair Chance Act require employers to bifurcate their background check process and delay conducting or even referring to a criminal history check until after issuing a conditional offer of employment. Our recent blog article provides further details on the bifurcated process and the latest requirements for New York City employers conducting background checks.

US DOL Officially Withdraws Joint Employer Rule

Effective September 28, 2021, the U.S. Department of Labor has rescinded the narrowed definition of joint employer for purposes of the Fair Labor Standards Act (FLSA) that was adopted under the prior administration. The standard for determining who is a "joint employer" under the FLSA has had something of a tortured history in the past five years.

In 2016, the DOL issued an Administrator's Interpretation, as we reported in some detail in the Spring 2016 issue of Takeaways, that focused on the "economic realities" of the relationship between the parties to determine whether workers are ultimately economically dependent on the business for which they are performing services, such that the service-recipient business should be deemed a "joint employer." The DOL further identified seven factors (delineated in our Spring 2016 article) to be considered in evaluating the "economic realities" of the relationship.

As we subsequently reported in the Winter 2019/20 issue of Takeaways, that broadened "economic realities" test was then superseded by a final rule on "Joint Employer Status Under the Fair Labor Standards Act," which became effective on March 16, 2020. The rule shifted the focus away from economic dependence to consider four factors evidencing control. Key provisions of the 2020 DOL rule were then invalidated by a U.S. district court in September 2020, as discussed in the Fall 2020 issue of Takeaways. This latest rescission of the 2020 DOL rule therefore means that the DOL will once again analyze joint employer status based on the "economic realities" of the relationship between the parties. Employers should revisit the 2016 Administrator's Interpretation and prior DOL guidance, and presume that shared services arrangements are now more likely to be considered joint employment for purposes of the federal wage and hour laws.

NY Amends Wage Payment Law

To the extent any employer questioned whether it could withhold *all* of an employee's wages, benefits or wage supplements, a recent amendment to the New York Labor Law entitled the "No Wage Theft Loophole Act" makes clear that such action is unlawful. The amendment, which took effect August 20, 2021, addresses a "judicial loophole" resulting from some recent court decisions to clarify that the limitations on deductions from wages in section 193 of the New York Labor Law apply regardless of whether the employer's deduction subsumes only a portion or the entirety of the employee's wages, benefits or wage supplements.

EMPLOYER OBLIGATIONS IN A PANDEMIC WORKPLACE
CURRENT VACCINE, MASKING REQUIREMENTS

As discussed in more detail in our recent Levy Employment Law blog article, updated Safe Work Guidance issued by the Occupational Safety and Health Administration (OSHA) on August 13, 2021 recommends new workplace protocols for face coverings, COVID-19 testing and quarantine requirements, which differ based on vaccination status.

The Department of Justice (DOJ) in a July 6, 2021 Memorandum Opinion clarified that employers may lawfully mandate vaccinations for their employees, even with COVID-19 vaccines only that are approved for emergency use authorization. The Safe Work Guidance builds on that to strongly encourage employers to impose vaccination mandates. Further, to incentivize vaccinations, FAQs jointly issued on October 4, 2021 by the Departments of Labor, Health and Human Services, and Treasury provide that employer health plans can offer a premium discount for employees who obtain a COVID-19 vaccine, provided the discount complies with general wellness program regulations.

Simultaneously, government-imposed vaccination requirements are proliferating at the federal, state and local levels. The following table captures the current status of vaccination mandates impacting employers in the New York tri-state area. Still pending are details from OSHA on a vaccination requirement for all employers with 100 or more employees.

Jurisdiction	Mandated Vaccination	Deadline	Exceptions
Federal	All employees of federal contractors and subcontractors	Fully vaccinated by 12/8/21	Medical or religious accommodation – testing option
New York State	Employees and contractors at hospitals, long-term care facilities and home care programs and agencies	1st shot by 9/27/21 (hospitals/nursing homes) or 10/7/21 (other covered workers)	Medical Accommodation*
Connecticut	Long-term care facilities, childcare facilities, preK-12 schools	Fully vaccinated by 9/27/21	Medical or religious accommodation – testing option
New Jersey	Healthcare and licensed community care workers; preK-12 schools, childcare facilities	Fully vaccinated by 9/7/21 (healthcare/ community care) 10/18/21 (schools); 11/1/21 (childcare)	Testing option 1-2x weekly for anyone not vaccinated
New York City	All staff of indoor dining, indoor fitness and indoor entertainment and certain meeting spaces	1st shot by 8/17/21	Medical, religious, pregnancy accommodation

* Per a district court decision issued October 12, 2021, employers must additionally consider requests for religious exemption from the vaccination requirement.

EEO-1 Filings at Play

The Equal Employment Opportunity Commission (EEOC) has once again extended the deadline for filing 2020 EEO-1 reports to October 25, 2021, and it has announced no further extensions will be made.

The Office of Federal Contract Compliance Programs (OFCCP) has announced it is reversing course and it will use EEO-1 Component 2 pay data from 2018-19 when enforcing and investigating affirmative action and non-discrimination compliance of federal contractors. While prior policy had declared that pay data, comprised of hours worked and pay data from employees' W-2 income information, broken down by gender, race and ethnicity, and job category, was of limited utility, the OFCCP now asserts that policy determination was premature as it was made before OFCCP had enough information on the utility of the data collected.

NYSDHR Requires Public Disclosure of Settlements

The New York State Division of Human Rights has announced that, for complaints filed on or after October 12, 2021, the Division will no longer automatically discontinue complaints that are resolved through private settlements. Rather, expressing a public interest in increased transparency and good governance, the Division announced that, after a probable cause determination, a complainant's attorney will be required to state in writing why they are seeking a discontinuance. If the request for discontinuance is due to private settlement, parties will be encouraged either to settle the matter through an order after stipulation that indicates the terms of the settlement, or proceed through the agency's public hearing process. The Division's announcement appears only to cover settlements reached after a finding of probable cause, and does not address those reached at an earlier stage of the agency's process.

NJ Requires Worker's Comp Hiring Preference

Effective September 24, 2021, New Jersey employers with 50 or more employees are subject to a new requirement under the state Worker's Compensation Act to give a hiring preference for employees returning from work-related injuries. Employees who have reached maximum medical improvement and are no longer completely unable to work, but are not able to perform the essential job functions required for their previous position, must be given a preference over other job applicants for other positions that they are qualified for and can perform.

COURT WATCH

NJ Holds Twice Stated Racial Slur is Actionable Harassment under the LAD

Reversing a decision of the Appellate Division, the New Jersey Supreme Court held in *Rios v. Meda Pharmaceutical, Inc.*, (June 2021), that a supervisor's use of a racial slur on two occasions could be sufficiently severe to create a hostile work environment under state law. The plaintiff, who is Hispanic, alleged that his supervisor once used the racial slur "Sp**" directly toward him, and once used the same slur in conversation with the plaintiff about another person, not affiliated with the company.