



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. The landscape continues to shift with regard to COVID-19 compliance. Also, NYS has a series of new requirements, providing greater employee rights, benefits and protections. There are wage law changes in CT, NYC and nationally, and New York City is now regulating AI in hiring.

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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This newsletter is provided for informational purposes only to highlight recent legal developments. It does not comprehensively discuss the subjects referenced, and it is not intended and should not be construed as legal advice or rendering a legal opinion. TAKEAWAYS may be considered attorney advertising in some jurisdictions.

New York Governor Hochul Signs a Flurry of New Employee Protections

Employers in New York are facing a wave of new obligations and employee protections since Governor Hochul took office in late August. Those include:

- Dramatic expansion of the state's whistleblower law;
- Notice requirements before monitoring employees' electronic communications;
- Expanded scope to the state's paid family leave program;
- New construction contractor liability for subcontractors' wage payments;
- Empowering employees to petition for a shared work program in lieu of layoffs; and
- Presumed employee opt-in and auto-contributions to IRA programs.

Significant Expansion of NYS Whistleblower Law

In a major change from New York's long-standing whistleblower law, effective January 26, 2022 all current and former employees, and independent contract workers, are protected against retaliation for reporting violation of any law, regulation, rule or order. The new whistleblower law will:

- Expand the scope of protected activities to include employee disclosures related to any activity of an employer that the employee reasonably believes is in violation of federal, state, or local law, even if the matter is outside the scope of the employee's job duties;
- Expand the definition of retaliatory action to include any actions that would adversely impact a former employee's current or future employment;
- Require employers to post a notice of employee rights; and
- Lengthen the statute of limitations for bringing a cause of action against the employer from one to two years.

Details on this new law, and action items for employers, are covered in our recent blog post on [mitigating risk](#). Coverage of New York's other new laws continues on page 2.

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Governor Signs Flurry of New Employee Protections in New York State *(cont'd)*

NYS Employers Need to Provide Notice of Monitoring Electronic Communications

Effective May 7, 2022, New York employers will be required to give notice to employees before monitoring their phone, email, and internet usage. The law requires written notice be given individually to all employees and posted in the workplace. Employees must receive notice:

- upon hiring and once annually, and acknowledge receipt in writing; and
- through physical posting of notice in the workplace.

The only time electronic monitoring will not trigger the notice requirement is where it is:

- designed to manage the nature or volume of email, voicemail, or internet usage;
- not targeted to monitor or intercept the activities of any individual employee; and
- performed for the purpose of computer system maintenance or protection.

NYS Expands Paid Family Leave to Siblings

With a very delayed effective date of January 1, 2023, New York State has expanded its paid family leave program to include coverage when caring for siblings, whether biological, adopted, or related by marriage.

NYS Holds Construction Contractors Liable for Subs' Wage Violations

Effective January 4, 2022, New York State businesses with construction contracts will be liable for non-payment of wages, benefits or wage supplements by any of their subcontractors on those construction contracts, no matter how many levels removed from the prime contractor. The law prohibits employees and subcontractors from waiving the prime contractor's liability for these wage payments.

Prime contractors are authorized, under the law, to require subcontractors to disclose payroll records, and they can withhold payment of invoices from subcontractors that fail to provide requested records in a timely fashion.

The law authorizes private civil actions and enforcement by the attorney general, with a three-year limitations period.

NYS Empowers Employees to Request Shared Work in Lieu of Layoff

New York State employees who are being impacted by layoffs are now empowered to petition to participate in a shared work program. Under this new law, which took effect October 23, 2021, employees can file such a petition with their employer prior to or within 10 days following a lay-off, and employers must then respond in writing within seven days and explain the basis for their decision. The state's shared work program allows employers to reduce employees' hours, and pay, while keeping them all employed, and in exchange the state provides unemployment insurance benefits to help offset those lost wages.

NYS Mandates IRA Plans for All Employees

Private employers in New York State that do not have their own retirement plan for their employees must auto-enroll their employees in the New York State Secure Choice Savings Program. This new IRA program, which is similar to programs previously adopted by Connecticut, New Jersey, and most recently New York City, applies to employers with at least ten employees in the state that have been in business for at least two years. Under the new law, employers must make automatic payroll deductions at a default contribution rate of three percent into the IRA accounts (up to the deductible annual amount for contributions under the Internal Revenue Code) and retain records of compliance. Employees can opt out of the program or adjust their contribution rate at any time.

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EMPLOYER OBLIGATIONS IN A PANDEMIC WORKPLACE

VACCINE, MASKING, QUARANTINE REQUIREMENTS

Government mandates and guidance pertaining to COVID-19 vaccination, masking and quarantines continue to evolve in all jurisdictions. Employers need to be mindful of the following:

Check the most current CDC and state guidance

The CDC issued [updated guidance](#) as of December 27, 2021 that shortens to five days the quarantine/isolation period for most asymptomatic people who have tested positive for or been exposed to COVID, provided those individuals then follow a five-day regimen of wearing a well-fitted mask at all times. Keep checking [here](#) for new updates on quarantine and isolation. New York State similarly updated its guidance on isolation for many industries, *below p.5*.

If you have 100 or more employees

Watch for a decision by the U.S. Supreme Court, which is scheduled to hear arguments on January 7, 2022 with regard to the enforceability of OSHA's Emergency Testing Standard mandating that workplaces with at least 100 employees implement vaccination or weekly testing requirements and memorialize those requirements in detailed written policies (which we discussed in this [blog article](#)). OSHA's website currently notes that it will not begin enforcing the mandate until January 10, 2022, but if it is upheld by the Supreme Court then employers will likely have a very short window to achieve compliance.

If you are an employer of any size in NYS

Keep your HERO Act Plan (discussed in this [blog article](#)) activated for COVID-19. Currently the plans have been extended to January 15, 2022 but further extension seems likely.

If you are a federal government contractor

Employers have until January 18, 2022 to comply with mandates for vaccination of all employees working for a covered contractor, with exceptions only for medical

or religious accommodations. All employees must additionally adhere to masking and social distancing requirements. Details regarding compliance are available in the [FAQs for federal contractors](#) and the Safer Workforce guidance linked to the FAQs.

If an employee requests a vaccine exemption as a reasonable accommodation

Employers must consider all such requests, consistent with guidance from the Equal Employment Opportunity Commission and applicable state/local guidance, such as the guidelines issued by the New York City Commission on Human Rights (*see this [blog article](#)*).

If you are a NJ state government contractor or sub

Governor Murphy signed an executive order that all employees of new and potential state contractors and subcontractors who provide services in any state agency location must either be fully vaccinated or provide weekly negative test results.

If you are a healthcare employer in NYS

The Second Circuit Court of Appeals recently upheld vaccination mandates for healthcare workers in New York (*see [this blog](#) on the mandate*), notwithstanding the absence of a religious exemption to the vaccine requirement. The Court observed that employers can and should consider alternative accommodations for religious objectors, such as telehealth or remote work, if they would not impose an undue hardship.

If you are an employer in NYC

Permit employees to take paid time off, in addition to any paid Sick and Safe Leave time available to them, for their children to be vaccinated. Employees can use up to four hours of additional paid sick time, per child, per injection, for the vaccination itself and for care due to temporary side effects.

Be mindful of new EEOC guidelines against [retaliation](#) and recognizing "long-COVID" as a [disability](#)

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CT Clarifies Wage Range Disclosure Requirement

The Connecticut Labor Department recently issued guidance that interprets the state's new wage range disclosure requirement, which became effective as of October 1, 2021 and requires employers to disclose the "wage range" for any position to which an individual is applying. Under the guidance, this requirement extends to anyone who applies for a job with a Connecticut employer, even if they are being hired to work remotely from outside the state. The guidance clarifies that, when determining the wage range to be disclosed, employers should include salary, commissions, and bonuses, but need not include discretionary pay. The act requires that the wage range be disclosed upon the earlier of the applicant's request, or by the time an offer of compensation is made. The guidance makes clear that the employer's disclosure obligation is limited to the wage range for the position to which the individual applied; employers are not required to disclose the wage range of other positions, and employers need not disclose the amount of wages paid to any other employee.

New Minimum Wage Rates for 2022

NYS: \$15 NYC, Long Island and Westchester; \$13.20 everywhere else, effective 12/31/21

NJ: \$13 effective 1/1/22

CT: \$13 effective 8/1/21, increasing to \$14 effective 7/1/22

Federal contractors: \$15 effective 1/30/22

US DOL Reinstates 80/20 Tip Credit Rule

Effective December 28, 2021, the Department of Labor issued a new rule that reinstates and expands on an 80/20 formula for a tip credit, under which employers cannot claim a tip credit for non-tip generating work that consumes more than 20 percent of an employee's

time. The rule divides tipped employees' work duties into three categories:

- tip-producing work (covered by the tip credit);
- directly supporting work (covered by the tip credit only if it meets the 80/20 rule and does not exceed 30 consecutive minutes); and
- work that is not part of a tipped occupation (which must be paid at full minimum wage).

New York employers should note that the state's version of the 80/20 rule imposes additional restrictions on compensating employees who perform non-tip-generating work.

NYC Mandates Severance for Hotel Worker Layoffs

Non-supervisory employees who were working at a hotel used primarily for transient occupancy in New York City as of March 1, 2020, had been working at the hotel for at least a year, and are subsequently laid off are entitled to up to 30 weeks of severance payments if the layoff impacted at least 75 percent of the employees at the hotel due to a closure or mass layoff. This mandate, which shifts the economic equation for hotels that temporarily shuttered due to the pandemic, is the result of a New York City law that took effect upon its enactment on October 5, 2021.

Severance is due to covered employees on a weekly basis commencing October 11, 2021 if the hotel did not recall at least 25 percent of its covered employees by that date and did not reopen to the public by November 1, 2021. Severance payment obligations cease for any former employee who is subsequently recalled during the severance period or, in the case of the closed hotel, if it recalls at least 25 percent of its former employees when reopened to the public.

Hotels that have closed permanently or converted to alternative use have a different severance obligation. They are required to pay covered service employees severance that equates to at least 20 days of pay per year of service.

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NYS DOL Clarifies Paid Sick Leave Regulations

The New York State Department of Labor (NYS DOL) has adopted as final the regulations it published in December 2020, interpreting the state's paid sick leave law. In doing so, the NYS DOL clarified several points that were not clearly addressed in the regulations. NYS DOL expressly declined to suggest any limit on the number of hours of accrued, unused sick leave that employees can carry over to the following year, even when employers front load the leave time, because it said that no limitation is contemplated by the state law. Employers' options are to permit full carryover of unused time, or they can choose to permit employees to voluntarily elect to be paid out for unused sick leave on an annual basis.

NYS DOL further clarified that the size of the employer on a national level is determinative as to the amount of paid sick leave required, but the paid sick leave mandate itself only applies to employees in New York State. Further, the state expressed that the remedy for an employer who questions an employee's basis for leave is disciplinary action upon finding the request to be false or fraudulent. Employers may not require documentation or attestations for absences of less than three days and may not deny a leave request while attempting to confirm the basis for the leave.

NYC Requires Bias Audit for AI Hiring

Beginning January 1, 2023, New York City will regulate employers' use of automated employment decision tools. Employers who use tools that rely on artificial intelligence to screen job applicants will be required to have a bias audit conducted to ensure fair evaluation of applicants and to minimize the disparate impact such tool may have. Bias audits must be conducted no more than one year prior to the use of the tool, and a summary of the results of the bias audit needs to be made publicly available on the employer's website.

The new law additionally requires employers to notify job applicants at least ten business days in advance that an automated decision tool is being used to evaluate them. The notice must specify the job qualifications the tool is using for its assessments and allow the candidate to request an alternative selection process. Each day that an employer uses an automated assessment tool that does not comply with the law is considered a separate violation, as is each time an employer fails to provide the proper notice, with a penalty that ranges from \$500 to \$1,500 per violation.

New York City employers that already use or are considering incorporating automated screening tools as part of their hiring processes should plan and budget for annual, independent bias audits, beginning later this year, to comply with the new law.

NYS Reduces Isolation Period for Healthcare and Essential Workers

Citing updated guidance from the CDC on the isolation of healthcare workers, and recognizing the high COVID-19 case counts in New York relative to the number of fully vaccinated people with mild or no symptoms, New York State declared effective December 24, 2021 that all fully-vaccinated healthcare workers and workers providing a broad range of "essential" services can return to work after a five-day isolation period if they have no more than mild symptoms that do not include fever, runny nose or significant cough and wear a well-fitted face covering at all times.

"Essential" services include infrastructure, manufacturing (food, defense and transportation), food-related retail, services (municipal, childcare and burial), and residence maintenance (security, safety, cleaning, movers and auto repair); as well as providers of services for the economically disadvantaged, defense operations, school personnel, and vendors for logistics, technology, childcare programs, government buildings or services, and personnel for remote learning.

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