SPRING 2022

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. Employers again need to assess their COVID-19 compliance. Legislatures are again targeting sexual harassment with new laws, New Jersey is increasing employee protections, and federal agencies are enhancing enforcement of 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*

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Sexual Harassment Prevention Again Prompts New Federal and NYS Laws

Approaching five years since the #MeToo movement, government bodies are still seeking legislative solutions to prevent workplace sexual harassment.

Federal Law Targets Arbitration Clauses

The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, which took effect March 3, 2022, invalidates any pre-dispute agreement to arbitrate claims of sexual harassment or sexual assault. The law also invalidates pre-dispute agreements that waive the ability to assert claims of sexual harassment or sexual assault on a class-wide basis. At the time of asserting a claim, an individual may elect to proceed through arbitration, but can no longer be required to do so.

The new federal law is intended to address one factor that has been cited as enabling the continued employment of individuals who repeat harassing behaviors, as discussed in our recent blog article.

Cuomo Investigation Prompts New NY Laws on Sexual Harassment

The escalating volume of sexual harassment complaints raised last year against Governor Cuomo has brought a new wave of employment protections signed into law March 16. One closes a legal loophole by extending discrimination protections to the public sector. The other two impact private employers, with a law declaring release of a personnel file to be retaliation, and a new state hotline for reporting sexual harassment complaints.

The sexual harassment complaint hotline is to be available by July 14, 2022 and the New York State Division of Human Rights (NYSDHR) is to recruit experienced lawyers to provide callers with pro bono counsel and assistance regarding complaints of workplace sexual harassment. Employers will be required to post information about the hotline in their workplaces, but NYSDHR has not yet issued guidance with regard to that requirement.

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NJ Law Requires Notice to Track Employees in Vehicles

Beginning April 18, 2022, private employers in New Jersey must provide employees with written notice of the use of tracking devices on vehicles operated by employees, including on employer-provided vehicles. The written notice requirement applies only to devices that are being used for the sole purpose of tracking employees or vehicles, and not to devices that are intended to be used for documenting employee expense reimbursement.

NJ Hotel Employee Protections Erode Employment at Will

A new New Jersey law applicable to hotel employees is the latest example of a whittling away of the principle of employment at-will. Under the new law, which took effect January 18, 2022, unless a collective bargaining agreement addressing terms for discharge or layoff of employees is in effect, hotel employers are required to provide notice and job protections to employees if there is a "change in control, controlling interest or identity of a hotel."

In the event of a change in control, the new employer must offer all eligible employees continued employment at their existing wages and benefits for a minimum of 90 days. Employees have 10 business days to accept the offer. If accepted, the employee cannot be terminated during the 90-day period without cause, except in the event of a reduction in force. Any reduction in force during the 90-day period must be administered based on employees' seniority and experience in their job classification, and the employer must offer to rehire the laid-off employees if their positions are subsequently restored. For those employees who remain employed through the end of the 90-day retention period, the employer is required to conduct a written performance evaluation of each employee and can only terminate employment at that time if performance is less than satisfactory.

Department of Labor Issues Guidance on Retaliation Protections

New guidance issued by the U.S. Department of Labor's Wage and Hour Division (WHD) serves as a ready reminder of the many ways in which employees are protected against retaliation with regard to their compensation, leave benefits and immigration status, and is intended to put employers on notice that the WHD intends to enforce those protections. The guidance explains that retaliation protections apply: when an employee makes a complaint to a manager, employer, or WHD; cooperates with a WHD investigation; requests payment of wages or refuses to return back wages to the employer; complains on behalf of another employee; consults with WHD staff; exercises or attempts to exercise rights, such as requesting certain types of leave; or testifies at trial. The guidance explains with examples the types of behaviors that it considers to be prohibited retaliation in the context of:

- minimum wage, overtime pay, recordkeeping, and child labor standards;
- job protected leave for specific family and medical reasons;
- employment standards for migrant and seasonal agricultural workers;
- compliance with worker visa programs;
- paid sick leave and minimum wage protections for government contractors;
- wage garnishment; and
- subjecting employees to lie detector tests.

NYC Issues Guidance on Pay Transparency

As discussed on our blog, New York City has issued guidance for employers with regard to including a wage range in job postings.

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EMPLOYER OBLIGATIONS IN A PANDEMIC WORKPLACE

VACCINE, TESTING, QUARANTINE REQUIREMENTS

Employers need to be mindful of the following to comply with government mandates and guidance pertaining to COVID-19:

Check the most current CDC and state guidance
The CDC has a new county-specific map to guide individuals on appropriate COVID exposure precautions. Particularly as state and locality-specific mandates are lessening, employers should refer to the CDC's most current guidance when setting workplace policies particularly with regard to quarantine, isolation, and testing.

Review the EEOC's compliance guidelines
The Equal Employment Opportunity Commission (EEOC) continues to add new sections and update its responses in a comprehensive guide on EEO obligations in the context of COVID-19. Most recently, in March 2022 the EEOC updated its guidance on religious objections to vaccination. The guidance reviews the EEOC's broad definition of religion and the limited inquiry that employers may pose into the religious nature or the sincerity of an employee's religious beliefs or practices.

The EEOC also issued new guidance on caregiver discrimination in the context of COVID-19. While recognizing that federal EEO laws do not prohibit employment discrimination based solely on caregiver status, the guidelines highlight the various ways in which stereotypes pertaining to protected characteristics may be attached to caregiving responsibilities and thereby present legal issues.

Broad federal testing mandates for the private sector are gone, for now
The U. S. Supreme Court invalidated, and OSHA has since withdrawn, its Emergency Testing Standard mandating that workplaces with at least 100 employees implement vaccination or weekly testing requirements. OSHA has announced that it still plans to develop similar requirements through the standard regulatory process.

Federal government contractors need to be on alert
Watch for a decision in *Georgia v. Biden*, which was argued on April 8 before the 11th Circuit Court of Appeals and reviews a district court's nationwide injunction against enforcement of a vaccine mandate for all employees working for a covered contractor.

NYS HERO Act Plans are deactivated, for now
Employers in NYS can shelve their airborne infectious disease prevention plans temporarily, as the government order placing them in active status with respect to COVID-19 was permitted to lapse after March 17, 2022.

NYS employees can self-certify for quarantine
The NYS Department of Health recently made available self-attesting quarantine and isolation forms that employees may use in order to qualify for the state's Covid-19 quarantine leave.

Healthcare employers in NJ have vaccine mandates
New Executive Orders signed by Governor Murphy on January 19 and updated on March 2 require healthcare workers and those working in other high-risk congregate settings (such as correctional and secure care facilities and various licensed community residences and certain group homes) to be fully vaccinated against COVID-19, including a booster dose. A list of the covered healthcare and high-risk congregate settings can be found on the NJ Department of Health website. The state has removed the weekly testing option for those who are not fully vaccinated, with the exception of individuals who are approved for an exemption from vaccination as a reasonable accommodation. Covered workers were required to provide proof of the booster by April 11, 2022, or (if later) within three weeks of becoming eligible.

US DOL Modernizes Employer Portals to Certify AAP/EEO Compliance

Federal contractors and subcontractors that are required to maintain Affirmative Action Programs (AAP) will also be required to certify their compliance for such programs through the newly developed Affirmative Action Program Verification Interface, also known as the Contractor Portal. This portal was developed by and will be monitored by the Office of Federal Contract Compliance Programs (OFCCP). OFCCP will use the portal to monitor whether covered contractors are meeting their obligation to develop and maintain AAPs.

Registration for the Contractor Portal opened on February 1, 2022. Beginning March 31, contractors can start certifying that they have developed and maintained an AAP before the June 30 deadline. In addition to this certification, federal contractors will still be subject to audits and compliance evaluations, but OFCCP expects to use the portal as a secure means of conducting these compliance evaluations.

The EEOC has similarly updated its EEO-1 Component 1 procedure for reporting demographic workforce data into an online portal, which was tentatively scheduled to open on April 12, 2022 (but was not open as of that morning). The EEO-1 reporting requirement applies to all private sector employers with 100 or more employees, as well as federal contractors with 50 or more employees. The tentative deadline for employers to file the EEO-1 reports via the portal is May 17, 2022.

Federal Contractors Should Anticipate Heightened Review for Pay Equity

On March 15, the OFCCP issued its first directive of the year, which addresses the agency's analysis of federal contractors' pay equity audits. Federal government contractors are required as part of their AAP to assess their compensation systems for disparities based on gender, race or ethnicity and address the factors contributing to those disparities.

The new directive outlines the circumstances under which OFCCP may request additional information from employers with regard to those analyses. In it, OFCCP expresses scant regard for employer assertions that their internal analyses, prepared under the guidance of legal counsel, are protected by attorney-client privilege.

On the same day as the OFCCP directive, President Biden issued a new executive order for consideration of rules enhancing pay equity and transparency for federal contractors. The executive order specifically directs consideration of limitations on contractors' ability to obtain salary history information with regard to job applicants and employees. Federal contractors and subcontractors should look for additional federal rules with regard to pay equity coming from the current administration.

NJ Exec Order Further Delays WARN Act Changes

As a result of executive orders issued by New Jersey Governor Murphy on January 11 and then on March 4, 2022, a declared State of Emergency continues in New Jersey due to the COVID-19 pandemic. As a result, the effective date of WARN Act Amendments that were scheduled to go into effect on July 19, 2020 (which we reported on in the Winter 2020 issue of Takeaways) is postponed indefinitely. Those amendments will take effect 90 days subsequent to the termination of the governor's Executive Order No. 103 (2020).

Federal Court Invalidates NYS Handbook Policy Requirement

In *CompassCare et al. v. Cuomo* (Mar. 2022), a federal district court permanently enjoined New York State from enforcing a legal requirement pertaining to notice of reproductive health decisions. As we discussed in a recent blog article, the law required that employers include in their employee handbooks a rather prescriptive notice with regard to employees' rights and remedies pertaining to reproductive health decisions.