SUMMER 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. Pay transparency predominates in New York, and employer speech is being regulated in Connecticut. New Jersey court decisions address employee speech, while the Supreme Court has ruled on waiver of arbitration and federal contractors' damages liability under anti-discrimination laws.

Levy Employment Law, LLC helps businesses identify and resolve workplace issues. We provide "AIDD" to organizations of all sizes in four key focus areas:

- ***A****dvising on sensitive employment issues;*
- ***I****nvestigating workplace concerns as independent, outside fact-finders;*
- ***D****eveloping policies and agreements; and*
- ***D****efending administrative charges at the agency level.*

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Pay Transparency Laws Proliferate Throughout the Tri-State Area

Legislation that would obligate private employers throughout New York State to specify a specific salary or salary range for all job postings has passed both houses of the legislature and is currently pending submission to the governor for signature. In the interim, localities throughout New York and in neighboring Jersey City are adopting similar pay transparency requirements.

NYC Modestly Delays Its Pay Transparency Law

Following intense lobbying by the business community, New York City employers were granted a brief compliance reprieve, as the City Council amended its recently adopted wage transparency law to postpone the effective date to November 1, 2022. Most of the significant changes limiting the scope of the law that had been proposed by the business community were not included in the final amendments. Rather, the amendments adopted the interpretation previously announced in Guidance issued by the New York City Commission on Human Rights (NYCCHR) that pay disclosures are not required in job postings for "positions that cannot or will not be performed, at least in part, in the city of New York."

The amendments also minimized the available enforcement provisions and remedies. As a result, the only individuals who can sue for violations of the law are employees bringing an action against their current employer. Employers also will now have one free pass at compliance with a $0 civil penalty for a first violation, provided the employer cures its violation within 30 days of receiving notice of such from NYCCHR.

Spreading to Other New York and New Jersey Localities

Employers in Jersey City, New Jersey are currently subject to a local pay transparency law, which took effect April 13, 2022, and similar laws have been adopted by Ithaca (effective September 1, 2022) and Westchester County, New York (effective November 6, 2022) in a trend that seems to be sweeping across local legislative bodies.

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Pay Transparency Laws Proliferate *(cont'd from p. 1)*

There are commonalities between the local ordinances in Westchester, Ithaca and Jersey City:

- they apply to employers with four or more employees;
- they require posting the minimum and maximum salary range; and
- they provide that the salary range should be based on the employer's good faith belief at the time of the posting.

Where they differ is in the scope of covered job postings. Jersey City's ordinance only applies to employers with their principal place of business within the city of Jersey City, and only to the extent the employer posts available positions through print or digital media that circulates within the city.

Westchester County's ordinance covers employers based in Westchester and any posted position that is required to be performed, in whole or in part, in the county, whether from an office, in the field, or remotely. Ithaca's ordinance is silent on coverage.

Significantly, the Westchester County ordinance further provides that it becomes null and void on the day that Statewide legislation goes into effect that includes the same or substantially similar provisions. If signed by the governor, the New York State version of pay transparency will be substantially the same as the Westchester law, but the state's version takes effect 270 days after it is adopted, and thus there will be an interim period when the Westchester law will be controlling for covered employers.

EEOC Enhances Its Own Inclusivity

Amending its own intake processes for discrimination charges, the EEOC has announced that it will enable individuals the option of selecting a nonbinary gender marker in response to self-identification questions on the form.

EEOC Focuses New Guidance, Initiatives on Inclusive Hiring Practices

While it continues to use its litigation powers as a strong enforcement tool, the EEOC also has been issuing a wealth of guidance and new initiatives that employers can leverage to understand potential legal minefields and build more comfortable, inclusive workplaces. Hiring processes and practices have been a recent focus of these initiatives.

Recent Guidance issued by the EEOC considers the myriad ways in which automated processes and artificial intelligence, deployed to screen job applicants, can reject individuals with disabilities who would be qualified to do the job if provided a reasonable accommodation. The EEOC recommends that employers account for this in various ways, including:

- providing clear notice and instructions for applicants to request a reasonable accommodation in the context of the application process;
- assessing algorithmic decision-making tools to confirm they measure only necessary skills and do not screen out individuals with certain disabilities; and
- disclosing in advance information about which traits are being measured by an algorithmic tool, how they are being measured, and which disabilities might potentially score less favorably.

The purpose is to equip individuals with disabilities so they know when they may need a reasonable accommodation to succeed in an application process.

The EEOC's new HIRE program (Hiring Initiative to Reexamine Equity) focuses on strategies in hiring that remove unnecessary barriers, boost diversity, equity, inclusion, and accessibility, and help provide workers with access to good jobs. Intended as a multi-year joint-initiative with the Office of Federal Contract Compliance programs, HIRE seeks to collect and share best practices and recommendations. Its most recent focus is on practices like degree requirements or formal

qualifications that may unduly screen out qualified applicants from underrepresented communities.

CT Employers Must Provide Family Medical Leave Notice

As of July 1, 2022, Connecticut employers sorting through the complexities of the amended Connecticut Family and Medical Leave Act (CTFMLA) and Connecticut Paid Leave Act (CTPL) need to ensure they are providing all new hires with the requisite notice, which explains CTFMLA entitlements, employee obligations, the prohibitions against retaliation, and the procedures to file complaints with the Labor Department for alleged violations. The notice must further be provided to all employees annually going forward. In FAQs, the Department of Labor advises employers to include this information in any employee handbook or other written guidance the employer issues. Final regulations on the CTFMLA, which are still pending approval, indicate that inclusion of the notice in the employee handbook will meet the ongoing notice requirements.

CTFMLA and CTPL collectively provide eligible employees with job-protected leave and income replacement while the employee:

- recovers from or cares for a family member with a serious health condition;
- bonds with a child newly added to the family;
- serves as an organ or bone marrow donor;
- addresses qualifying exigencies related to a close family member's military service; or
- cares for a close family member who is seriously ill or injured while on active duty in the armed forces.

CTPL is additionally available for employees who have been impacted by family violence and are entitled to leave under the Connecticut Family Violence Leave Act.

The laws are newly in effect as of January 1, 2022. They alter and expand employers' prior CTFMLA obligations, and add a new layer of paid leave. Details on employers' obligations and employees' rights are available through a portal developed by the Connecticut Department of Labor.

CT Protects Employees' Right to Avoid Political/Religious Discourse By Employers

Connecticut has added broad restrictions on employer speech that specifically pertain to union organizing efforts but embody a much broader swath of employer communications. These restrictions, which take effect July 1, 2022, come in the form of granting Connecticut employees a protected right to refuse to attend any employer-sponsored meeting, or otherwise listen to or view communications, that are primarily intended to communicate the employer's opinion on religious or political matters. "Political matters" are defined to include elections, political parties, proposed legislation or regulations, and "the decision to join or support any political party or political, civic, community, fraternal or labor organization." Employers who discipline or threaten to discipline an employee for engaging in this protected conduct are liable to the employee for gross loss of wages, costs and reasonable attorney's fees.

Given the potential chilling effect of this new legislation in parsing what comprises political or religious speech, the law expressly excludes communications that are:

- legally required;
- necessary for the employee's job;
- part of coursework, symposia or an academic program involving an institution of higher education;
- casual, non-mandatory conversations between employees or with an agent or representative of the employer; or
- requirements limited to the employer's managerial and supervisory employees.

Religious organizations also are generally exempt from the act with regard to speech to employees on religious matters.

COURT WATCH

Supreme Court Holds FAA Does Not Warrant Special Protection Against Waiver of Arbitration

The Supreme Court held in *Morgan v. Sundance, Inc.* (May 23, 2022) that claims that a party waived its right to compel arbitration need to be considered under the same standards of waiver as apply to any other type of contract. The case involved a class-wide overtime claim that the employer initially defended in federal court, and then moved to send to arbitration eight months after the litigation had been filed. Citing the Federal Arbitration Act's policy favoring arbitration, the appellate court had held that the belated motion to arbitrate could be granted unless the employer's delay and interim actions had prejudiced the other party. The Supreme Court rejected that notion and held that the federal policy favoring arbitration does not justify imposing additional hurdles to show that a party waived its contractual right to compel arbitration.

Supreme Court Rejects Emotional Distress Damages Under Federal Contractor Anti-Discrimination Statutes

The Supreme Court held in *Cummings v. Premier Rehab Keller* (Apr. 28, 2022) that individuals cannot recover emotional distress damages in a private action to enforce the Rehabilitation Act of 1973 or the Affordable Care Act. The Court reasoned that these statutes, as well as Title VI and Title IX, which prohibit recipients of federal financial assistance from discriminating based on certain protected characteristics, create contractual relationships between the funding recipients and the federal government. The Court held that while individuals can sue for injunctive relief under those laws, their monetary remedies are limited to compensatory damages. The *Cummings* case involved an individual seeking services from a federal contractor, not an employee, but the Supreme Court's opinion did not turn on that relationship and it therefore has potentially significant implications to limit the monetary liability for employers facing discrimination claims under any of the four referenced statutes.

NJ Court Holds Non-Disparagement Clauses Are Enforceable

A New Jersey appellate court recently upheld a determination that New Jersey's 2019 amendments to the Law Against Discrimination, which prohibit non-disclosure clauses in employment and settlement agreements, did not additionally preclude nondisparagement clauses. In *Savage v. Township of Newton* (May 31, 2022), the New Jersey Appellate Division considered a claim for breach of a nondisparagement clause in an agreement settling a prior claim of sex discrimination. In a media interview given days after receiving her settlement payment, the plaintiff employee stated that the employer did not "want women there," had "not changed" and reflected a "good ol' boy system." While the court concluded the nondisparagement clause was enforceable, it determined that the employee had not breached the agreement because the nondisparagement clause only prohibited statements regarding the "past behavior of the parties" and the quoted statements pertained to present or future behavior.

NJ Court Holds Free Speech Does Not Preclude Termination of Employee for Social Media Post

In *McVey v. Atlanticare Medical System* (May 20, 2022), the New Jersey Appellate Division held that an employer had not wrongfully terminated a corporate director in violation of public policy after she posted on her personal Facebook account racially insensitive comments about the Black Lives Matter movement that violated the employer's social media policy. The Court held that neither the First Amendment nor the New Jersey Constitution reflect a clear mandate of public policy that prohibit the employee's termination. The Court observed that these constitutional protections apply to state action, and not actions taken by a private employer toward an at-will employee.