FALL 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. These include shifting federal discrimination protections and expanded protections in Connecticut, new employer obligations in New Jersey and updated federal workplace posters, the unwinding of COVID mandates and a survey of what remains in effect, and a series of recent court decisions.

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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Texas District Court Decision Has National Implications for Gender Identity/Gender Expression Protections

The scope of federal law protections for individuals based on their sexual orientation, gender identity, gender expression or transgender status is now uncertain as a result of a recent decision by a federal district court in Texas. The court set aside guidance issued by the EEOC, following the Supreme Court's 2020 decision in *Bostock v. Clayton County, GA.* The EEOC guidance had stated, among other things, that transgender individuals were legally entitled to use the sex-segregated bathroom that aligned with their gender identity and it characterized the intentional use of pronouns or names that are inconsistent with an individual's gender identity as a potential form of sexual harassment.

In *State of Texas v. EEOC* (N.D. Tex., Oct. 1, 2022), the court reasoned that the Supreme Court's holding in *Bostock*, that terminating employees on the basis of their sexual orientation or transgender status was a form of unlawful sex discrimination, was limited to one's gender "status" and did not extend to protect "conduct" related to an individual's gender identity. In granting declaratory judgment for the state of Texas, the court ultimately based its decision striking the EEOC's guidance on the narrower procedural ground that the EEOC had effectively adopted new substantive regulations (not mere "guidance") without following the procedural requirements of federal law.

Connecticut Adds New Protections for Victims of Domestic Violence

Effective October 1, 2022, victims of domestic violence are now included as a protected class under the state's Fair Employment Practices Act. The law additionally makes it a discriminatory practice for an employer to deny an employee a reasonable leave of absence in order to seek medical, legal, counseling or social services related to incidents of domestic violence. In addition, employers with three or more employees are required to post information concerning the resources available to victims of domestic violence in Connecticut.

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Employers Must Comply with New Federal, NJ Workplace Poster Requirements

Employers with 15 or more employees must ensure they have posted the latest 'Know Your Rights' poster issued by the Equal Employment Opportunity Commission (EEOC). The new poster includes updated language and formatting that is intended to be more user-friendly, calls out some recent legal clarifications including that the prohibition against "sex" discrimination extends to pregnancy and related conditions, sexual orientation and gender identity, and adds a QR code for individuals to link directly to instructions on how to file a charge of discrimination with the EEOC.

Covered employers need to place the new poster in a conspicuous location in the workplace, where other such notices are typically posted, and are encouraged to additionally post a notice digitally on their websites. The EEOC has stated that online posting is not a substitute for meeting the physical posting requirement except in limited situations, such as when the employer has no physical location or for employees who work remotely most or all the time.

New Jersey employers additionally need to ensure they are complying with updated regulations issued by the New Jersey Division on Civil Rights (NJDCR) by posting the most current versions of official NJDCR posters in an easily accessible place. Employers that do not have a physical workplace can meet the posting requirement by displaying the posters on a website that is readily accessible to all employees, and where other notices are customarily displayed. Employers are additionally required to provide employees with a written copy of the official NJDCR poster on an annual basis and upon the employee's request, and this too can be done electronically, either by email or by providing employees with notice of where they can find the poster on the employer's website. Links to PDFs of the posters in both English and Spanish, as well as further information about the posters can be found here.

NYS Sexual Harassment Complaint Hotline Is Now LIVE

New York State employers need to update their harassment prevention policies and training materials to reference the state's new sexual harassment complaint hotline: 1-800-HARASS-3.

Contracting Entities Jointly Responsible for Safety of Temporary Workers

The National Institute for Occupational Safety and Health (NIOSH) recently released a guide on Protecting Temporary Workers that holds both the staffing agencies supplying workers, be it on a temporary or regular basis, and the organizations hosting those workers accountable for workplace safety and OSHA compliance. The guide describes the staffing and host organizations as "joint employers" with shared responsibility for providing and maintaining a safe work environment for workers.

NIOSH recommends that the staffing agency and the host organization clearly define in writing their respective responsibilities for compliance with OSHA standards. It expresses an expectation that temporary workers, like regular employees, receive appropriate safety and health training and clear instruction as to their duties. The guide requires the staffing and host organization to consider the respective hazards that they each are in a position to prevent and correct, and where they are in a position to comply with OSHA standards.

The guide places two burdens on staffing agencies. First, to inquire into the conditions of their workers' assigned workplaces, any known hazards and how to protect their workers. Second, to verify that the host organization has fulfilled its responsibilities for a safe workplace. The guide requires host organizations to treat temporary workers like all other workers in terms of training and safety and health protections, as well as injury and illness prevention program assessment.

NJ Offers Interim Measure While Developing Standards to Certify Cannabis Impairment Experts

Employers may recall that New Jersey's version of legalizing the use of cannabis for recreational purposes includes a requirement that any assessment of an employee's impairment be certified by a "Workplace Impairment Recognition Expert" (WIRE). On September 9, 2022, the New Jersey Cannabis Regulatory Commission issued interim guidance for employers to follow while the state develops the standards for WIRE certification. For now, employers can rely on assessments conduct by an individual "sufficiently trained to determine impairment and qualified to complete a Reasonable Suspicion Observation Report," which documents the behavior, physical signs, and evidence that support the employer's determination of impairment. Employers also can use a cognitive impairment test if it is a scientifically valid, objective, consistently repeatable, standardized automated test, and/or an ocular scan as physical signs or evidence to establish reasonable suspicion of cannabis use or impairment at work.

NJ Healthcare Facilities Limited in Staffing Changes Upon Sale of Business

Effective November 16, 2022, health care entities in New Jersey, including licensed facilities, staffing registries and home care services agencies, will be significantly constricted in their ability to implement immediate changes to employee staffing, wages and benefits following a change in ownership. The new law requires the successor health care entity to offer continued employment during a transitional period of at least four months, with no reduction of wages, paid time off or in the total value of benefits. Employees have 10 business days to accept the offer.

While the successor employer is permitted under the law to reduce its total staffing during the transition period, layoffs must be determined based on seniority and experience and those laid off must be given the first opportunity for recall if their position is subsequently restored during the transition period. The law prohibits the termination of retained employees other than for just cause during the transition period, requires written performance evaluations to be conducted for all remaining employees at the end of that period, and requires that those rated as satisfactory or better be offered continued employment.

The law requires that all employees impacted by a change in control receive at least 30 days' advance notice of the change and their rights under state law, and employers are additionally required to post a notice of these rights in a conspicuous location in the workplace.

OFCCP Revises Directive on Pay Equity Analyses and Privileged Communications

We had reported in the Spring 2022 issue of Takeaways on a new directive from the Office of Federal Contract Compliance Programs (OFCCP), addressing the agency's analysis of federal contractors' pay equity audits, and a concern that OFCCP expressed scant regard for employer assertions that internal pay equity analyses were protected by attorney-client privilege. On August 17, 2022 OFCCP revised its directive to permit federal contractors to comply with OFCCP reporting requirements by submitting:

- a redacted version of their compensation analysis, provided that it includes the requisite factual information;
- a separate analysis that does not implicate privilege concerns; or
- a detailed affidavit setting forth the required factual information but excluding privileged material.

NLRB Holds Uniform Policy Must Make Exception for Union Insignia

Considering a uniform policy at Tesla, Inc., the National Labor Relations Board recently reversed a 2019 decision involving Wal-Mart Stores and held that employers can only apply workplace rules that restrict the display of union insignia if they establish "special circumstances." (*cont'd p. 4)*

NLRB Uniform Policy (*cont'd from p. 3)*

The Board concluded that Tesla failed to meet that standard when it enforced its team-wear policy, which required employees to wear shirts imprinted with the Tesla logo or all-black clothing, and did not make an exception for shirts that some employees wore during a union organizing campaign at the company's Georgia facility that had a small logo with the union's campaign slogan on the front and a larger logo with the slogan and "UAW" on the back. The Board held that the facial neutrality of the uniform rule was irrelevant and noted long-standing precedent protecting employees' right to display union insignia at work (be they buttons or logo'd garments) as a "critical form of protected communication."

NYC/Westchester County Pay Transparency Laws Now in Effect

Employers are reminded that, as discussed in our blog, employers hiring for positions to be performed at least partially in New York City or Westchester County (including those performed remotely from an employee's home) must ensure that their job postings specify the salary range for the position. Connecticut employers are subject to a less public requirement, which took effect last year, that, when asked or by the time an offer is made, the job applicant or employee needs to be told the salary range for the position.

Managing in a Pandemic Workplace

Governments Scale Back COVID-19 Precautions

Updated isolation guidance from the Centers for Disease Control and Prevention (CDC) makes two significant changes from its prior approach:

- it removes the distinction in protocols based on vaccination status; and
- it removes the quarantine recommendation for those who have been exposed to COVID-19 but are not exhibiting symptoms.

Rather, individuals who have been exposed to COVID-19 are advised to wear a high-quality mask for 10 days and get tested on the fifth day after exposure. Isolation is recommended only for those who test positive or have symptoms. For those who are without symptoms, isolation may be for as little as five days, depending on the individual's risk category, but face masks should be worn for a full 10-day period. Those exhibiting symptoms of moderate or severe COVID-19 illness are encouraged to isolate for 10 days or longer based on advice from their healthcare providers. The CDC recommends that the isolation period be restarted if symptoms reappear or worsen.

In New York City, the private sector vaccine mandate became optional as of November 1, 2022. Employers are instead encouraged to maintain their own vaccination policies, and New York City is actively promoting the newest COVID-19 bivalent booster shot.

NYS Extends Vaccine Leave, Awards Bonuses to Healthcare Workers

Legislation granting employees in New York State up to four hours of paid time off to get a COVID vaccine has been extended. The employer-provided leave is now scheduled to sunset on December 31, 2023.

In addition, New York State has established a pool of money to fund special semi-annual bonuses for healthcare and mental hygiene workers who have provided services throughout the course of the pandemic. The bonuses range from $500 to $1,500 each, depending on the number of hours worked, up to a maximum of $3,000 in total. Qualifying employers need to apply for the bonuses on their employees' behalf, supported by appropriate documentation. Information on which employers qualify for the program, employee eligibility, and the process for requesting and receiving the bonuses is available on the new Health Care and Mental Hygiene Worker Bonus (HWB) Program website.

COURT WATCH

Second Circuit Holds SOX Requires Proof of Retaliatory Intent

A former strategist in UBS's commercial mortgage-backed securities business had sued UBS under the Sarbanes-Oxley Act (SOX), asserting his employment was terminated in retaliation for whistleblowing. On appeal from a jury trial finding in favor of the employee, the Second Circuit Court of Appeals held in *Murray v. UBS* (Aug. 5, 2022), that the trial court erred by instructing the jury that the whistleblower-employee had to prove that the whistleblower activity was a "contributing factor" that "tended to affect" UBS's decision to terminate the strategist's employment. Rather, the Court held, the jury should have been instructed that the strategist was required to prove "retaliatory intent," meaning an intent to discriminate against an employee because of lawful whistleblowing activity. The Court therefore vacated the jury verdict and remanded the case for a new trial.

NJ Supreme Court Holds Employer Failed to Present Sufficient Evidence of Independent Contractor Status

A recent decision by the New Jersey Supreme Court in *East Bay Drywall, LLC v. Dep't of Labor and Workforce Dev.* (Aug. 2, 2022) serves as a reminder and illustration of the difficulties of establishing independent contractor status under the "ABC" test – a three-part analysis that New Jersey, Connecticut and other states apply to determine whether a worker's employment status has been appropriately classified.

An audit by the Department of Labor and Workforce Development determined that 16 workers should have been classified as employees. That finding was reversed at hearing as to 13 of the workers, but then the commissioner reversed again and found all 16 failed the ABC test. On appeal, the Appellate Division held that 11 of the workers were appropriately classified as independent contractors and five were not. On further appeal, the Supreme Court reversed in part and held the commissioner's determination that all 16 workers should have been classified as employees was reasonably supported. The Court cited an absence of record evidence presented by East Bay to substantiate that the workers were truly independent, as required by part "C" of the test.

Court Entertains Question Whether Electronic Signature on Arbitration Agreement Was Legit

Employers should consider carefully whether to rely on electronic signatures for employment agreements, and how to collect those signatures, given a recent decision by the Second Circuit Court of Appeals in *Barrows v. Brinker Restaurant Corp.* (May 31, 2022). The employer had sought to compel arbitration of the plaintiff's employment law claims, based on an arbitration agreement electronically signed by the plaintiff. The plaintiff countered that the electronic signature was not hers and that her manager had sufficient system access to have falsely signed in her name. The Court held that the plaintiff's assertions presented an issue of fact, and that the district court improperly granted a motion to dismiss, thereby necessitating further judicial proceedings.

Appellate Court Limits Injunction Against Federal Contractor Vaccine Mandate

The Eleventh Circuit Court of Appeals has upheld the issuance of a preliminary injunction in *Georgia v. President of the United States* (Aug. 26, 2022), that precluded enforcement of an Executive Order mandating that all federal contractors ensure their employees were vaccinated against COVID-19. However, the Court limited the scope of the injunction only to federal contracts with those who had sued (the states of Georgia, Alabama, Idaho, Kansas, South Carolina, Utah, West Virginia and the trade organization Associated Builders and Contractors), instead of nationwide application. The Court also held that, if any of those plaintiffs are among the pool of bidders for a federal government contract, the federal government cannot consider as a factor in awarding that contract whether a bidder was subject to the vaccine mandate.