SPRING 2023

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 new protections of select non-exempt workers in New York and New Jersey, continued regulation of AI in hiring NYC employees, updates to New York's model harassment prevention materials, new FMLA decisions from the US DOL, and court decisions on harassment, overtime liability, and military leave.

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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NYS Amends Its New Employment Laws

The New York legislature has reconsidered, and promptly amended, several key employment laws that Governor Hochul signed into law in the final weeks of 2022…(*cont'd p.2)*

NYS Issues New Model Sexual Harassment Prevention Policy and Training Materials

New York employers need to ensure their harassment prevention policies and training materials are updated, consistent with the revised model policy and materials issued by New York State. As discussed in our recent blog posting, the new model policy includes updates to comply with previously-reported changes to New York law, a new section on bystander intervention, and a range of new, clarifying provisions.

NYC Finalizes Rules for AI Hiring Tools

New York City employers have been granted a final reprieve until July 5, 2023 to achieve compliance with the city's new rules for the use of automated hiring tools. Called "automated employment decision tools" (AEDTs), employers who use any form of AEDT and rely on scoring, classification or ranking generated by the tool either without considering other factors in their hiring, by giving the tool's output greater weight than other criteria, or to overrule conclusions derived from other factors, must ensure the AEDT has undergone a bias audit conducted by an independent third-party.

Surviving as a holdover from an earlier draft of the City's regulations is a requirement that the bias audit consider both the "selection rate" and "impact ratio" by gender and racial or ethnic category. We discussed what those terms mean and how they are calculated in this blog article. Expanding from an earlier proposal, the final regulations require that the bias audit analysis additionally be conducted based on the intersectionality of gender, race and ethnicity. …(*cont'd p.2)*

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New York Amends New Pay Transparency, Warehouse Worker Protection Laws (*cont'd from p.1)*

Months prior to the September 17, 2023 effective date, New York State amended its pay transparency law in two key respects. First, it expanded the scope of the law to include positions outside the state if:

- the person hired will report to a supervisor, office or work site in New York State, or
- the work otherwise will be physically performed, at least in part, in New York.

Second, it reduced employers' burden by eliminating the requirement that employers keep records of compensation history and all job descriptions. The law therefore now centers around a single requirement that employers include compensation information and a job description for all jobs, promotions or transfer opportunities in the state if they post to potential applicants, either internally or publicly, a written description of the employment opportunity.

New York State's new Warehouse Workers Protection Act now has a delayed effective date of June 19, 2023 and reflects both a narrower scope and enhanced protections. Recent amendments clarify that the law only protects non-exempt employees working at warehouses with 100 or more employees at a single site or 1000 employees at distribution centers throughout the state, and neither drivers nor farm product warehouses are included.

Focused on employers' imposition of quotas on warehouse workers, the amendments:

- expand the definition of "quota" to include a work standard for which an employee may suffer an adverse action for nonperformance;
- require that covered notices be provided in English and the employee's primary language;
- remove specific recordkeeping requirements with regard to worker productivity and instead adopt a general requirement that records be retained for three years to ensure compliance with requests for data from employees or the commissioner; and
- modify the circumstances where an employee can request their own work speed data and the aggregate data for comparable employees and give employers more time to provide that data.

The law now creates a "rebuttable presumption" of retaliation with respect to any adverse action that an employee experiences in the first 90 days after the employee asks about a quota or for work speed data, or files a complaint under the law.

NYS Requires New Workplace Posting

Employers with more than 50 full time employees must display in the workplace and post electronically a new poster about benefits available to military veterans, consistent with an amendment to the New York Labor Law that took effect on January 1, 2023.

NYC Finalizes Rules for AI Hiring Tools

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The final regulations also clarify that the data considered for the bias audit should generally be the employer's historical data, either in isolation or in conjunction with the historical data of other employers using the AEDT. If, however, an employer lacks sufficient historical data (for example if it is newly implementing an AEDT), then test data may be used until such time as the employer has enough historical data for a meaningful statistical analysis.

The regulations include extensive notice and posting requirements, including publishing results on the employer's website, notice to job applicants about their right to request an alternative selection process or reasonable accommodation, and notice of the employer's data retention policy.

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NJ Adds New Temporary Worker Protections

Temporary workers in New Jersey will soon have significant employment law protections under a new Temporary Workers' Bill of Rights. Applicable to individuals who are employed and placed by temporary help service firms with third-party clients, the law has six key components – notice of the terms of the engagement, record keeping for each assignment, guidelines to ensure safe and either free or non-obligatory transportation to the worksite, a right to be offered regular employment by the third-party client, pay standards and disclosures, and a prohibition against retaliation for exercising rights protected by the law.

For each placement, the law requires the temporary help service firm to provide the temporary employee in English and the employee's primary language, details of the engagement, including:

- contact information for the temporary health service firm, its workers' compensation carrier, the client, and the Department of Labor and Workforce Development;
- details as to what work is to be done, where, for how long and on what schedule;
- the amount paid and how paid sick leave will be calculated;
- terms of transportation that may be provided;
- descriptions of special clothing, protective equipment and training that will be required, and what will be provided by who; and
- whether meals are provided, by who and at what cost.

For multi-day assignments, the law additionally requires providing 48-hours' notice to workers whenever possible before changing the schedule or location. Temporary workers must also be told in advance if they are being sent to the site of a strike, lockout or other labor dispute and notified of their right to refuse the assignment.

The law additionally prohibits the third-party client from paying a temporary laborer at a rate less than the average rate of pay and benefits for a regular employee of the client who is performing the same or substantially similar work with equal skill, effort, and responsibility, under similar working conditions.

The anti-retaliation provision and the notice provisions related to the terms of the engagement take effect on May 7, 2023. The remaining provisions of the law take effect on August 5, 2023.

US DOL Addresses FMLA Eligibility for Remote Workers

New guidance issued by the US Department of Labor (DOL) suggests that a remote worker's affiliation to an office location should be considered for purposes of determining the employee's eligibility for leave under the federal Family Medical Leave Act (FMLA). The new DOL guidance directs that whether an employee working remotely can meet the threshold eligibility requirement of 50 employees working within a 75-mile radius of that employee's worksite is not necessarily determined by the employee's remote work location. Rather, the DOL said the determination should be on a case-by-case basis, considering factors such as where the employee reports to work or the location where the employee's assignments are made.

US DOL Clarifies Employees Entitled to Better of FMLA/ADA Protections

A recent DOL opinion letter concluded that, provided an employee's medical condition qualified as a serious health condition under the FMLA, the employee could use FMLA leave to work a reduced schedule until such time as the employee exhausted the employee's annual FMLA entitlement. The DOL added that the employee might additionally be able to request a reduced schedule as a reasonable accommodation under the ADA, particularly after having exhausted available FMLA leave, but they were not mutually exclusive, nor could the employer choose to consider an employee's request under the ADA and not consider whether the request was FMLA-qualifying as well. We discussed the ramifications of this opinion letter for employers in more detail in a recent blog post.

NLRB Holds Right to Record Conversations Preempts State Criminal Laws

A recent decision by the National Labor Relations Board (NLRB) in *Starbucks Coffee Company*, 372 NLRB No. 50 (Feb. 13, 2023), held that, even if unlawful under state law, employees' surreptitious audio or video recordings of managers and others in the workplace are permissible if they are made in connection with employees' protected concerted activity.

The recordings at issue were made in the context of a union organizing drive. When the employees then presented them as evidence in an unfair labor practice proceeding, Starbucks had objected that the recordings were made in Pennsylvania, a two-party consent state, in which recording conversations without the consent of the other employee is a felony. The Board held that, because of the over-arching federal law protection of employees' union organizing rights, the recordings were appropriately considered as evidence in the proceeding.

EEO-1 Window to Open Mid-July

The 2022 EEO-1 Component 1 data collection window has been postponed and is tentatively scheduled to open mid-July 2023.

COURT WATCH

USSC Reminds Employers That High Pay Does Not Preclude Overtime Pay Obligation

Paying people a lot of money does not immunize an employer from its overtime pay obligations under the Fair Labor Standards Act (FLSA). That was the crux of the Supreme Court's recent holding in *Helix Energy Solutions Group v. Hewitt* (Feb. 22, 2023), which involved an overtime claim by a manager on an offshore oil rig, who was paid about $200,000 annually. The Court held that, although the manager's duties and salary level met two elements of the FLSA test for exemption from overtime, because he was paid a daily rate, and not based on an annual salary, he ultimately was not appropriately classified as exempt. The manager, who typically worked 84-hour weeks, was therefore entitled to overtime pay for all the hours he had worked over 40 per week.

9th Circuit Decision Suggests Broadening Preferential Treatment for Military Leaves

A decision by the Ninth Circuit Court of Appeals in *Clarkson v. Alaska Airlines, Inc.* (Feb. 1, 2023), puts employers on notice that, if they provide paid leave for various purposes, including jury duty, bereavement and sick leave, they may also be required to provide pay continuation during short-term military leaves. The Court based its holding on a provision in the Uniformed Services Employment and Reemployment Rights Act (USERRA) that requires employers to provide employees who take military leave with the same benefits as employees who take comparable non-military leave. While the district court had held that military leave could not possibly be compared to the forms of short-term leave offered by the employer, Alaska Airlines, the circuit court held that the analysis should instead have considered only the similarities between those other leaves and the short-term form of military leave that the plaintiff, a commercial airline pilot, had taken for military reservist training.

Court Recognizes New Theory to Hold Corporate Officers Accountable for Harassment

Corporate officers of organizations incorporated in Delaware may be held accountable to shareholders for not effectively addressing issues of workplace harassment that are brought to their attention. In *In re McDonald's Corporation Stockholder Derivative Litigation* (Mar. 1, 2023), the Delaware Chancery court held that corporate officers owe a duty of oversight that extends to complaints of workplace harassment. The court therefore allowed a claim against the Executive Vice President and Global Chief People Officer of McDonald's to proceed where shareholders alleged that he "consciously ignoring red flags" of sexual harassment that occurred nationwide at the company over a four-year period.