SUMMER 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. This past quarter, they have included significant Supreme Court decisions on discrimination, new protected classes under NYC law, requirements for expressing breast milk at work, rising NYS minimum wage, Connecticut paid sick leave expansion, new EEOC guidance, NLRB decision reversals, Connecticut court decisions limiting employer liability.

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.*

Table of Contents

U.S. Supreme Court Strengthens Employees' Right to Religious Accommodation

The Supreme Court modified long-standing guidance from the Equal Employment Opportunity Commission (EEOC) and the interpretations of numerous courts to expand employees' right to religious accommodation. In *Groff v. DeJoy* (June 29, 2023) the Court held that that an employer denying an employee's request for a religious accommodation must demonstrate that the requested accommodation would impose a "substantial burden" in the overall context of the employer's business. Nearly 50 years of prior decisions had imposed a lesser accommodation standard, stating that anything more than a "de minimis" burden presented an undue hardship. Going forward, employers must consider accommodation requests under the same standards in the context of religion as with respect to disabled individuals.

Supreme Court Prioritizes Protection of Speech Excluding Gay Marriage Over State Law Prohibiting Discrimination

On the day after the Supreme Court strengthened employees' religious accommodation protections, it held in *303 Creative LLC et al. v. Elenis et al* (June 30, 2023) that a graphic designer who was looking to get into the wedding website design business only for marriages between a man and a woman could not be required to design websites for other types of marriages. The graphic designer had sought to prevent the State of Colorado from applying its Anti-Discrimination Act in such a way as to require her to provide services for a wedding that she believes "contradicts biblical truth." Colorado's law was designed to ensure equal access to businesses serving the public for individuals and prohibits discrimination based on protected characteristics, including sexual orientation....(*cont'd p.4)*

Virtual I-9 Process Reverts to Physical Inspection July 31

All employers that conducted the inspection virtually during COVID will need to conduct a physical inspection of the prior virtual I-9 documents, with a grace period until August 30, 2023.

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NYC Prohibits Height and Weight Discrimination

Effective November 22, 2023, employees in New York City will be protected against discrimination based on height or weight under the city's Human Rights Law. The law makes an exception to clarify that employers can still offer incentives to support weight management as part of a voluntary wellness program.

The city law does not apply where it conflicts with other federal, state or local laws. The law further authorizes the Commission on Human Rights to issue regulations that identify particular jobs or categories of jobs in which a person's height or weight may be considered if:

- height or weight could prevent performing the essential requirements of the job and no reasonable alternative would enable individuals who do not meet certain height or weight criteria to perform those essential job requirements; or
- consideration of height or weight is reasonably necessary for the employer to execute its normal operations.

In the absence of a regulatory exception, employers can raise those considerations as an affirmative defense to a claim of height or weight discrimination.

US DOL Issues Guidance on PUMP Act

Guidance issued by the U.S. Department of Labor clarifies some key points with respect to implementation of the federal "PUMP" Act, which requires employers to provide reasonable break time and a private place other than a bathroom in which a nursing employee can express breast milk. The guidance does not place any limit on the number of breaks an employee may take, provided each is for purposes of expressing breast milk, and any schedule for pumping set by an employer in consultation with an employee must be flexible enough to accommodate the employee's varying pumping needs over time. Breaks must similarly be provided to remote workers for expressing breast milk. The breaks generally need not be compensated unless the employee is not completely relieved of duty, the breaks are for less than 20 minutes, or the employer otherwise provides paid break time.

While the PUMP Act itself requires only privacy and a space outside a bathroom, the guidance states that the space additionally needs to include a seat for the employee and a flat surface other than the floor where the pump can be placed, and ideally should have access to electricity, with water nearby. The space need not be reserved solely for use by nursing employees, and partitions may be used to create privacy. Employees also need on-site access to a space to safely store the breast milk.

NYS Issues Model Lactation Policy

Employers in New York State face some additional obligations beyond the provisions of the federal PUMP Act, as a result of a state law on expressing breast milk in the workplace that took effect June 7, 2023. Most significantly, New York employers must distribute in writing a policy on employee rights under the law to all employees when they are hired and annually thereafter, as well as when an employee returns to work following the birth of a child. The state's model policy (which is three pages in length) is the minimum required accommodation, and employers can take additional measures to support employees in this context.

New York State's requirements differ from federal law and previously existing requirements under New York City's law in various respects. Those distinctions are covered in our recent blog posting. Significantly, New York City employers should not assume that their current policy and practices are compliant with the state law. Most city employers will need to review their current practices and amend their policy or additionally issue the state's model policy.

NYS Further Increasing Minimum Wage

New York State's minimum wage will increase January 1, 2024 and then annually through January 1, 2026 to reach $17 per hour in New York City and the surrounding suburbs of Long Island and Westchester, while the rest of the state will be one dollar less. Thereafter, the minimum wage will be indexed to the non-seasonally adjusted Consumer Price Index and increase annually relative to inflation.

NYC Issues FAQs to Round Out Its Requirements on Use of AI Hiring Tools

New York City has issued FAQs that clarify its regulations implementing the new law on bias audits for artificial intelligence tools used in hiring processes, which took effect July 5, 2023. The FAQs clarify several key points, including when a particular position is considered to be "in the city" and thereby covered by the law, which employment decisions are covered, what happens if an audit finds the hiring tool has a disparate impact on one or more protected groups, the parameters for conducting an audit based on historical data, who can qualify as an independent auditor, and how soon an automated hiring tool can be put into use after providing notice of its planned use.

EEOC Weighs in On AI Hiring Tools and Preventing Bias

The Equal Employment Opportunity Commission (EEOC) has issued its own guidance on assessing adverse impact when using artificial intelligence in hiring processes. The guidance explains that such tools are subject to the same standards used for screening tests and other hiring processes, to ensure the tools do not have an adverse impact on protected groups. The guidance holds employers, and not the vendors developing the AI tools, responsible for ensuring they do not have an adverse impact.

CT Expands Paid Sick Leave Uses

Connecticut has amended its paid sick and safe leave law effective October 1, 2023 to permit eligible employees to use their accrued, paid sick time for two additional purposes:

- a "mental health wellness day;" and
- if the employee's child is a victim of family violence or sexual assault by someone other than the employee.

A mental health wellness day is defined as a day when the employee attends to the employee's emotional and psychological well-being instead of working.

OFCCP Updates Disability Reporting Form

Beginning July 25, 2023, federal government contractors need to use a newly updated Voluntary Self-Identification of Disability Form (CC-305) issued by the Office of Federal Contract Compliance Programs when collecting voluntary applicant data on disabilities. The new form updates the preferred language for disabilities and includes new examples of disabilities.

EEOC Offers Tips to Prevent Harassment

The EEOC released what it describes as "promising practices" to address workplace harassment. While drafted for the federal government, the EEOC stated that many of the practices may be helpful to employers in the private sector.

EEOC Updates FAQs for COVID Post Public Health Emergency

The EEOC has updated the technical assistance guidance it provided in the form of frequently asked questions to reflect the end of the declaration of the COVID-19 public health emergency. Recent changes clarify that accommodations provided due to pandemic-related circumstances cannot automatically be terminated because they may still be required as a disability accommodation. Updates also include more robust guidance and examples of reasonable accommodations for employees with Long COVID. Employers are still advised to follow the most current CDC guidance when establishing COVID-19 screening and response practices.

EEO-1 Window Postponed Again

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

NLRB GC Declares Noncompetes Generally Unlawful

The General Counsel to the National Labor Relations Board (NLRB) recently issued a memorandum outlining her position that noncompete agreements are generally unlawful to the extent they interfere with employees' exercise of legally protected rights to confer with other employees, organize, and bargain collectively with regard to terms, conditions and privileges of employment. The General Counsel asserted that noncompetes could be lawful if the restrictions are limited to precluding employees' managerial or ownership interests in a competing business, but they are otherwise suspect.

NLRB Reverts to Stricter Test for Worker Classification

The NLRB has changed course for the second time in less than a decade and reinstated a 2014 test that relies on 10 common law factors to determine if workers should be classified as employees or independent contractors. Those factors include considering the nature of the work, the parties' relationship and communications, the duration, the method of payment, and the supplier of tools and materials, with no one factor being determinative. In *The Atlantic Opera, Inc.* (June 13, 2023), the Board applied those factors to conclude that makeup artists, wig artists and hairstylists who work for the opera were employees, not independent contractors.

NLRB Reverses Course in Assessing Abusive Employee Conduct

Just three years after the Board reversed decades of precedent in *General Motors LLC and Charles Robinson* (July 21, 2020) and adopted a uniform standard for considering abusive employee conduct, it reversed course again, overruled the *General Motors* decision, and reinstated its prior approach of setting-specific standards for determining whether an employee's abusive conduct should be permissible when it is in furtherance of collective actions with regard to terms and conditions of employment (Section 7 rights).

Federal Agencies Issue New Workplace Posters

Employers should update to the following new workplace posters to comply with federal law:

Employee FMLA Rights

FLSA Minimum Wage

EEOC Rights Against Discrimination

COURT WATCH

Supreme Court Prioritizes Free Speech (*from p.1)*

The Supreme Court recognized Colorado's interest in protecting gay people and other classes of individuals to ensure they have access to products and services on the same terms and conditions as other members of the public. However, the Court held that the right of equal access has to be consistent with the Constitution, and specifically the First Amendment protections against compelled speech.

The Court held that the story-telling and pictures that comprise website designs is a form of speech protected by the First Amendment. The graphic designer had stipulated that she would create custom graphics and websites for LGBTQ+ clients and organizations, provided they do not violate her moral and religious beliefs, and she applies that same condition to all customers. The Court therefore reasoned that the graphic designer was not refusing to serve customers based on their protected characteristics, but rather based on expressive speech. The Court further stated, and repeated throughout its opinion, that First Amendment protections extend to speakers whose motives may be misinformed or offensive to others, and to messages that others may find "deeply 'misguided'" and likely to cause "'anguish' or 'incalculable grief.'"

Supreme Court Allows Employer to Be Sued in State Where Registered, Even if Matter Occurred Elsewhere

In *Mallory v. Norfolk Southern Railway Co.* (June 27, 2023), the U.S. Supreme Court held that an employer could be sued by an employee in a state in which the employer was registered to do business, even though the employee no longer lived in that state and the issues about which he complained did not occur in that state. The Supreme Court held that the determinative factors for where an employer can be sued are (1) whether it was registered to do business in the state and (2) whether the state had a law that made locally registered corporations liable to lawsuits in the state's courts.

Supreme Court Strikes Affirmative Action at Universities with Implications for Employers

The Supreme Court struck down race-based decision making in university admissions in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* (June 29, 2023). While based on the Equal Protection clause, as discussed in our recent blog posting, the decision will likely implicate some of employers' diversity, equity and inclusion initiatives as well. Many of the supporting rationales cited by the university in support of their race-conscious decisions, which were rejected by the Supreme Court, resemble the rationales cited by employers in support of some of their own DEI programs.

Supreme Court Holds Workers Have Responsibilities to Employers' Property Even When Going on Strike

Employees who time a strike so as to maximize harm to the employer's property may face liability for the damage caused by their actions was the effective holding of the Supreme Court's recent decision in *Glacier Northwest, Inc. v. Int'l Brotherhood of Teamsters* (June 1, 2023). Workers at a ready-mix concrete company had waited for the trucks to be fully loaded with concrete for delivery and then walked off the job, leaving the concrete to harden in the trucks. Although the company was able to save the trucks by offloading the concrete, it incurred significant damages from the loss of all the concrete and sued the union for damages.

The union argued that the company's state law claims had to be dismissed because they were preempted by the National Labor Relations Act (NLRA). The Supreme Court rejected this assertion, holding that because the union failed to take reasonable precautions to protect the employer's property from foreseeable, aggravated and imminent danger before commencing its strike, its conduct was not protected under the NLRA.

Connecticut Appellate Court Limits Employer Liability for Keeping Poor Records of Wages

An employer's poor record keeping is not sufficient, by itself, for an individual employee to successfully sue under Connecticut's wage laws, according to a recent decision by the Connecticut Court of Appeals in *Nettleton v. C&L Diners, LLC* (June 6, 2023). The Court held that a restaurant worker could not sue her employer for damages based on the employer's failure to keep proper records and appropriately segregate between service work, which is subject to a tip credit, and nonservice work where the restaurant worker never claimed to have received less than the applicable minimum wage.

Connecticut Appellate Court Declines to Broaden Employer Liability for Supervisory Employees

An employer is not strictly liable for harassing conduct by an individual exercising day-to-day oversight over the work of the targeted employee if the harasser is not empowered to take tangible employment actions (such as hiring, demotion, or termination) with respect to the targeted employee. That was the central holding of the Connecticut Court of Appeals in *O'Reggio v. Comm'n on Human Rights & Opportunities* (Apr. 25, 2023). The Court adopted the federal Title VII standard for imputing supervisory liability and declined to adopt a broader interpretation under the state Fair Employment Practices Act.