Levy Employment Law, LLC

TAKEAWAYS

FALL 2023

LEGAL EMPLOYMENT INFORMATION YOU CAN APPLY TO YOUR BUSINESS

NYC Issues New Paid Sick and Safe Time Regulations

Only employees who physically work in New York City are covered by the city's paid sick leave law, under amended regulations that took effect October 15, 2023. Other provisions in the regulations add new obligations for the unwary employer including:

- broadly counting employees nationwide to calculate employer size (which drives the amount of paid sick leave accrued);
- requiring employers to specify any employee notice requirements in their written policy;
- protocols to provide notice of sick leave usage and available balances for employers that issue electronic pay statements; and
- deadlines for employers to reimburse employees for the cost of providing documentation to support their time off under the law.

The regulations further create a presumption that employers that fail to distribute a written sick and safe time policy, maintain records of usage and available balances, or place other impermissible restrictions on usage have thereby refused to allow employees to take the time to which they are legally entitled, in violation of the law.

NYS Restricts Access to Employees' Personal Social Media Accounts

Effective March 12, 2024, New York State law will prohibit every employer in the private and public sectors from asking employees or job applicants to disclose their username or password or otherwise provide access to their social media accounts. The law makes exceptions that relate to access as required by law or court order. Exceptions may also be made to access accounts being used for business purposes, but generally only if the employer provided advance notice and the employee explicitly consented to the access. The law does not restrict accessing information that is publicly available or voluntarily shared by an employee, client or third party, including if an employee or applicant voluntarily adds an employer or employee to the approved contacts associated with a personal social media account.

Legal Changes Effective Q4 2023

Oct. 1 CT - amendments to paid sick leave law

Oct. 15 NYC -amendments to paid sick leave law

Oct. 31 US – EEO-1 data collection window opens

Nov. 13 NYS - expanded notice of unemployment insurance eligibility

Nov. 20 NYS – Hospitality industry complete training to prevent human trafficking

Nov. 22 NYC - height and weight protections

Celebrating 10 Years with a New Look, the Same Commitment to Quality Reporting

Helping Workplaces Thrive

Levy Employment Law, LLC leverages more than 25 years of experience to support employers with: employment law advice, workplace investigations, employment policies and agreements, and administrative agency charges.

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NYS Protects Employees' Right to Avoid Political/Religious Discourse by Employers

Following Connecticut's lead, New York has now adopted its own version of a "captive audience" law, which prohibits employers from taking adverse job action based on an employee's refusal to attend an 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.

Intended to limit employer speech in the context of union organizing campaigns, the law is written much broader. It defines "political matters" 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." The law took effect September 6, 2023, and includes a workplace notice requirement, advising employees of their rights. The state Department of Labor has not yet issued a model notice.

NYS Adds More Teeth to "Wage Theft" Prevention

New York State has now made it a crime (a form of larceny) for an employer with one or more employees to fail to pay wages owed to an individual.

Employers Should Be Using New I-9 Form

Employers have until the end of October to retire their use of the old I-9 Form for verifying an individual's authorization to work in the United States. As we discussed in a recent blog post, guidance issued by the Department of Homeland Security has authorized employers to continue remote inspections of documentation, provided the employer uses the E-Verify system and conducts a video meeting to review the documentation presented.

New NYS WARN Act Regulations Include Substantial Changes for Employers

New York employers that are considering workforce reductions or layoffs need to be mindful of updated regulations issued by the state Department of Labor that took effect June 21, 2023. One notable change, which we discussed in detail in a recent blog post, is that in determining whether an employer is large enough to be covered by the law, and then whether enough employees have been impacted at a single site of employment to trigger the law's protections, the headcount needs to include individuals who work remotely but are based at that employment site. Other changes under the new regulations include:

- broader notice, to be provided electronically, to an expanded group of recipients including the chief local elected official, school district and fire and safety services;
- expanded content to the notice, including contact information for each impacted person, pay status, date of separation, and totals of employees at each impacted site;
- delineation between temporary layoff (return anticipated within 6 months) and permanent layoff; and
- a new process to seek exception from the 90-day notice requirement.

Finally in the context of the sale of a business, if the purchasing employer was supposed to take on the employees and does not do so, WARN notice obligations shift to the purchaser.

NYS Increasing Workers Comp Payments

The minimum benefit amount for disabled individuals under the New York State Workers' Compensation law will increase beginning January 1, 2025 to $275 per week, and then increase to $325 per week after January 1, 2026, and will be indexed to increase with the state's average weekly wage thereafter.

NYS and NJ Each Require More Notice for Unemployment Insurance Eligibility

New Jersey and New York State each have recently amended their unemployment insurance laws to require employers to provide additional notices.

Amendments to the New Jersey law are fundamentally tied to a shift from postal to electronic communications between employers and the Department of Labor (DOL). They require employers to provide immediate and simultaneous notice to impacted individuals and the state DOL related to events triggering unemployment eligibility, with significant penalties for noncompliance. Although the changes took effect July 31, 2023, the state has been delayed in transitioning employers to an electronic communications platform and in specifying what information employers need to provide. Recently posted FAQs acknowledge the delay and give employers forbearance with regard to compliance until specific directions have been issued.

In New York, the changes to the unemployment insurance law expand the situations in which employers must provide notice of unemployment benefit eligibility. While formerly limited to terminations, the new law, which takes effect November 13, 2013, requires notice also for reduction in hours, temporary separation and other "partial unemployment."

NJ Issues Guidance on New Temporary Worker Protections

Guidance issued by the New Jersey Department of Labor and Workforce Development (NJDOL) to implement the state's new Temporary Workers' Bill of Rights expansively applies the law to temporary workers assigned to work in New Jersey and to New Jersey residents who work *outside* the state.

One of the most revolutionary aspects of this new law is that it requires that temporary workers retained through a third party be paid the same as the contracting entity's regular employees who are performing substantially similar work. The guidance centers analysis of whether work is "substantially similar" on the actual job duties performed and years of experience required, dismissing small differences and variations in what the jobs are called. The guidance provides that neither the employer's use of a merit system to compensate its regular employees, nor variations in pay based on the shift worked, are relevant to determine if work is substantially similar.

Once the employees performing substantially similar work are identified, the guidance requires the temporary placement firm to average the hourly cost of pay and benefits for that group of employees and pay the temporary worker at that hourly rate. The guidance further provides a formula for temporary placement firms to calculate their maximum placement fee and recognizes the formula may zero-out the temp firm's entitlement to any placement fee for a particular worker. A federal district court recently denied a motion for a temporary injunction sought by the placement firm industry, on the grounds that the law would likely be upheld under federal law.

NJ Guidance Stresses Commitment to LGBTQ+ Discrimination Protections

Reacting to the U.S. Supreme Court's decision in *303 Creative* (which we discussed in the summer 2023 issue of Takeaways and this blog article) with regard to business's First Amendment free speech protections, the New Jersey Attorney General and Division on Civil Rights issued guidance on the state's Law Against Discrimination (LAD) to emphasize the state law's protections particularly based on sexual orientation, gender, gender identity and gender expression. The guidance construes the Supreme Court's decision very narrowly, and explains that an exemption from the LAD extends only:

- to providing creative services that are "original" and "customized and tailored" for each customer,
- where that which is created is "expressive" of the creator's own First Amendment-protected speech; and
- if the refusal to provide creative services is based on the message it would convey and "not the customer's identity or protected characteristic standing alone."

NLRB Repeatedly Rejects Checklist Guidance in Favor of Case-by-Case Assessments of Protected Activity

Overruling recent precedent that delineated for employers which categories of handbook policies regulating employee conduct were permissible, which were suspect, and which were generally impermissible, in *Stericycle and Teamsters Local 628* (Aug. 2, 2023), the National Labor Relations Board (NLRB) instead reinstated a prior test that assesses such policies on a case-by-case basis. Although the NLRB stated that the initial burden of demonstrating a workplace rule is "presumptively unlawful" falls on the employee, it emphasized the lesser power of an "economically dependent" employee and the necessity of considering the rule from a non-lawyer's perspective. The NLRB thereby tilted against the enforceability of workplace rules that *could* possibly be construed as restricting employees' protected concerted activity, irrespective of the employer's intent or how the rule has actually been applied. Employers seeking to rebut the presumption that a rule is unlawful must prove it advances "legitimate and substantial business interests that cannot be achieved by a more narrowly tailored rule."

Similarly, in *Miller v. Plastic Products, Inc.* (Aug. 31, 2023), the NLRB said that the determination of whether an individual employee has engaged in protected activity under the National Labor Relations Act needs to be based on the specific facts presented and whether they reflect "concerted activity," meaning that the employee is acting on behalf of others and not solely as an individual. The NLRB overturned a prior decision that had established a checklist of specific factors to review in making that determination.

NLRB Holds Employee Actions in Support of Non-Employees May Be Protected

In *American Federation for Children, Inc.* (Aug. 26, 2023), the NLRB held that an employee engaged in protected activity when she advocated for the rehire of a non-employee, a former colleague. The NLRB overruled a prior decision that had held that advocating on behalf of non-employees was not protected and could be grounds for discipline.

EEOC Guidance Addresses ADA Protections for Visual Disabilities

The Equal Employment Opportunity Commission issued updated guidance on individuals with visual disabilities in the workplace and compliance with the Americans with Disabilities Act (ADA). Stressing that an employer can ask how an individual with a disability would perform job functions, with or without a reasonable accommodation, but not ask about the cause or treatment of the individual's impairment, the guidance suggests questions like whether an applicant can:

- "read labels on packages that need stocking;"
- "work the night shift;"
- "inspect small electronic components to determine if they have been damaged."

For job applicants, such inquiries are permissible where the impairment is obvious, where it has been raised by the individual with a disability, or where the inquiry is being posed to all job applicants. For employees, an employer can initiate inquiries into an employee's vision when the employer reasonably believes, based on objective evidence, that vision may be impaired to a degree that impacts the employee's performance of essential job functions, such as misreading data, not noticing certain objects, squinting at screens or more frequently rubbing the eyes.

The guidance additionally provides examples of possible accommodations that may be appropriate for employees with vision issues. It further repeats the EEOC's warning related to the use of artificial intelligence in employment decisions, this time in terms of the possible negative impact on those with visual disabilities.

OFCCP Providing Employers with Less Notice

Federal contractors should be mindful of new rules issued by the Office of Federal Contract Compliance Programs (OFCCP) that took effect September 5, 2023. The new rules largely shorten and streamline the agency's pre-enforcement processes, which will mean less detailed advance notice and shorter response times for employers that OFCCP believes are not compliant.