Levy Employment Law, LLC

TAKEAWAYS

SO YOU KNOW WHAT TO ASK TO AVOID EMPLOYER PITFALLS

New York Adopts Statewide Protections for Freelancers

Following New York City's lead, New York State has now passed its own version of the "Freelance Isn't Free Act." Applicable to individuals retained as contractors for $800 or more of work, the law requires that the freelancer receive a written contract for services that includes:

- The parties' contact information;
- Itemized list of the services to be provided, and their value, rate and method of compensation; and
- The invoicing deadline and expected date of payment.

The law excludes sales representatives (who are already subject to written contract requirements under the New York Labor Law), as well as lawyers, licensed medical professionals and construction contractors. Individuals operating under an LLC may still be covered.

Freelancers can file a complaint with the state Department of Labor or sue in court for violations of the law. Organizations are prohibited from retaliating against a freelancer for asserting rights under the law, and are expected to retain their contracts with freelancers for a minimum of six years.

NYS Adopts Clean Slate Act to Seal Certain Criminal Convictions

Employers will be unable to access certain types of criminal conviction history once the state's new Clean Slate Act takes effect November 16, 2024. Under the law, misdemeanor records will be sealed effective three years after the individual was released from incarceration or sentenced if no incarceration. Felony records will be sealed eight years after release from incarceration provided the individual does not then have a criminal charge pending and is not under probation or parole.

Certain convictions, including Class A felonies for which a maximum sentence of life imprisonment could be imposed, and convictions requiring sex offender registration, are not eligible to be sealed.

Legal Changes Effective Q1 2024

Jan. 1
- NJ – minimum wage increase to $15.13/hour
- NYC, Nassau, Suffolk, Westchester counties – minimum wage increase to $16/hour
- Rest of NYS – minimum wage increase to $15/hour

Feb. 26 US – New NLRB joint employer test

Mar. 11 US – New DOL test for worker classification

Mar. 12 NYS – restrictions on accessing employees' personal social media accounts take effect

Mar. 20 NYC – new enforcement options under sick leave law take effect

Celebrating 10 Years with a New Look, the Same Commitment to Quality Reporting of Legal Developments in NY, CT and NJ

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.

LEVY EMPLOYMENT LAW, LLC

411 Theodore Fremd Avenue, Suite 206 South, Rye, NY 10580

Tel: 914-834-2837 Fax: 914-637-1909

www.levyemploymentlaw.com info@levyemploymentlaw.com

NYS Carves Out IP Protections for Employees

Employers in New York State should confirm any agreements they have with employees to protect the organizations' intellectual property comply with recent amendments to New York law. Those agreements must exclude inventions that employees have "developed entirely" on their own time without the use of the employer's "equipment, supplies, facilities, or trade secret information" unless:

- the invention relates to the employer's business, or the employer's anticipated research and development; or
- the invention results from work performed by the employee for the employer.

Agreements that do not preserve employees' right to their own developments are now deemed void as against New York public policy. As a result, inclusion of the impermissible provisions can jeopardize employers' ability to protect their intellectual property.

NYS Amendments Require Employers to Revise Settlement Agreement Templates for Harassment and Discrimination Claims

Effective November 17, 2023, New York State has invalidated any clause in an agreement settling claims of sexual harassment or other unlawful discrimination that requires the complainant to pay the employer liquidated damages for violating a non-disclosure provision. The state has also given parties some more flexibility by eliminating the strict 21-day period for a complainant to consider whether to agree to a confidentiality clause in such a settlement agreement. Going forward, complainants must be given up to 21 days to consider the confidentiality clause, but can reach agreement sooner and waive the duration of the 21-day period.

NYS Minimum Pay for Exempt Employees Increased for 2024

As a counterpart to the latest increases in the state minimum wage, employers must confirm they are paying employees who are classified as exempt at least $1,200 per week ($62,400 per year) if they are working in New York City or Nassau, Suffolk or Westchester counties, and at least $1,124.20 per week ($58,458.40 per year) if they are working anywhere else in the state.

NYC Enables Employees to Sue for Sick Pay

Effective March 20, 2024, New York City has amended its Earned Safe and Sick Time Act to enable individual employees to directly sue their employer in court for failing to comply with the law and recover compensatory damages, injunctive relief, and attorney's fees if they are successful in their claims. Previously the only remedy for violations was to file a complaint with the city's Department of Consumer and Worker Protection (DCWP), which could investigate and attempt to work with the employer to achieve compliance, or sue the employer to enforce the law. Under the amended law, employees will still have the option of complaining to the DCWP, as an alternative to a lawsuit.

EEOC Adds E-Filing System

Organizations that have faced the challenges of communicating with the EEOC by fax and mail may be relieved that the agency has officially launched what they call E-File for Attorneys. This system enables attorneys to access charges electronically through a portal and file responses through that same channel.

NLRB Broadens Joint Employer Liability

The National Labor Relations Board (NLRB) has issued a new final rule that once again broadens the standard for when an organization will be considered a "joint employer" for purposes of being subject to the requirements of the National Labor Relations Act (NLRA). Under the new rule, which takes effect February 26, 2024, an organization will be considered a joint employer if it has the right to exercise control over one or more of these seven conditions of employment:

- wages, benefits and other compensation;
- hours of work and scheduling;
- assignment of duties to be performed;
- supervision of the performance of duties;
- work rules and directions governing the manner, means and methods of the performance of duties and the grounds for discipline;
- the tenure of employment, including hiring and discharge; or
- working conditions related to the safety and health of the employees.

The rule provides that an organization merely needs to possess the authority to control one or more of these terms, even if the control is exercised "indirectly," and regardless of whether the control is actually exercised. The previous 2020 rule had a much higher threshold, where the employer needed to have "substantial direct and immediate control" over employment terms.

Updated US DOL Worker Classification Test Finally Takes Effect

After several years in play since the end of the last presidential administration, the U.S Department of Labor (DOL) recently modified its standard for determining whether an individual is appropriately classified as an employee (and therefore entitled to a range of workplace protections) or an independent contractor. DOL has adopted a six-factor test that ultimately focuses on the economic realities of the arrangement between the organization and the worker.

The six factors to be considered, in the context of the "totality of the circumstances," are:

- opportunity for profit or loss depending on managerial skill;
- investments by the worker and the potential employer;
- degree of permanence of the work relationship;
- nature and degree of control;
- extent to which the work performed is an integral part of the potential employer's business; and
- skill and initiative.

The DOL noted that "additional factors" also may be relevant in this analysis, "if the factors in some way indicate whether the worker is in business for themselves, as opposed to being economically dependent on the potential employer for work."

U.S. Executive Order Focuses on Implications of AI

A new federal Executive Order on the use of artificial intelligence (AI) directs federal government agencies to assess the implications of AI. In the employment sector, this includes recommending best practices and taking other appropriate actions to mitigate the potential harms of AI to employees' well-being and maximize its potential benefits. Employers should anticipate future guidance or more formal regulatory actions in areas that AI may touch, including use of AI for monitoring employees and their work, implications for job displacement, labor standards and job quality, and addressing unlawful discrimination.

COURT WATCH

U.S. Supreme Court Rules on Legal Standard for SOX Retaliation Claim

A whistleblower who claims to have been retaliated against under the Sarbanes-Oxley Act (SOX) must show that the individual's protected activity was a "contributing factor" to the employer's adverse employment action. This was the central holding in the U.S. Supreme Court's recent decision in *Murray v. UBS* (Feb. 8, 2024), which reversed a decision of the Second Circuit Court of Appeals (discussed in the Fall 2022 issue of Takeaways), which held that the whistleblower was required to prove "retaliatory intent," meaning an intent to discriminate against an employee because of lawful whistleblowing activity. The Supreme Court clarified that, when a whistleblower is treated less favorably "because of" that protected activity, it is unlawful retaliation and the employer's "lack of 'animosity' is 'irrelevant.'"

Court Rejects OFCCP Attempt to Block Release of EEO-1 Reports

A decision by a federal district court in California has national implications for employers that are required to file EEO-1 reports. The Center for Investigative Reporting (CIR), a nonprofit investigative news organization, has been seeking access to all Type 2 consolidated EEO-1 reports for the period of 2016 through 2020. Those reports are required to be filed annually by larger multi-establishment companies, including federal contractors with 50 or more employees, and they provide data on company employees categorized by race/ethnicity, sex and job category.

CIR filed a request for access to the reports with the Office of Federal Contract Compliance Programs (OFCCP) under the Freedom of Information Act (FOIA). OFCCP provided employers with a window to submit objections to releasing the reports they had filed. Many employers did in fact object. The OFCCP released the rest of the reports to the CIR. The CIR in turn sued the OFCCP to compel the release of the withheld reports.

In response to CIR's lawsuit, the OFCCP argued the withheld reports should be exempt from disclosure because they are "commercial and confidential" and/or are protected by the federal Trade Secrets Act. Considering the implications of the disclosure for a representative sampling of companies, the district court in *Center for Investigative Reporting v. U.S. Dep't of Labor* (Dec. 22, 2023), rejected the OFCCP's argument that the information was "commercial," holding that:

- the EEO-1 data alone did not reveal the staffing strategies of representative companies;
- the representative companies failed to demonstrate that the diversity data in the reports is "inherently commercial" in nature; and
- the composite release of five years' worth of data from these companies does not have a commercial impact, particularly because the data will likely be stale by the time it is disclosed.

Having failed to establish commerciality, the court concluded it need not additionally determine whether the information was "confidential." The court also rejected as "superficial" the argument that the information was "confidential statistical data" protected by the Trade Secrets Act, or that such designation in itself would be grounds to exempt the data from disclosure under FOIA. Finally, the court referenced 2016 amendments to FOIA that added a "foreseeable harm" standard and held that even if the requested data fell within a FOIA exemption, its release could only be withheld if disclosure would "reasonably harm" that exemption-protected interest. The court found that no such risk of harm had been established.