SPRING 2021

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. COVID developments abound, but also note the legalizing of recreational marijuana, raising the minimum wage for federal contractors, protection for employee hairstyles, and a spate of court decisions on pregnancy accommodation, medical marijuana, executive liability and arbitration.

***Levy Employment Law, LLC helps businesses identify and resolve workplace issues* before they result in litigation by:**

- *designing and building Human Resources policies with supporting systems,*
- *training HR staff, line managers and employees,*
- *troubleshooting workplace concerns, and*
- *defending charges filed with the EEOC and state and local administrative agencies.*

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NEW YORK AND NEW JERSEY LEGALIZE RECREATIONAL MARIJUANA USE

On February 22, 2021, New Jersey became the 15th state to fully legalize cannabis for recreational and medical use. New York State followed suit just over a month later, on March 31, 2021, and fully legalized cannabis for adult users. As discussed in our recent blog articles on the New Jersey law and a comparison with the New York law, both states included new employment law protections for users of cannabis products in certain circumstances. The New York law clarifies and establishes workplace standards related to cannabis including the rights and protections of both employers and employees. The New Jersey law places significant constraints on drug testing of applicants and employees. The employment-related provisions of the New Jersey law are not operative just yet, as they are pending adoption of the Cannabis Regulatory Commission's initial rules and regulations, but the workplace protections in the New York law took effect immediately.

FEDERAL CONTRACTOR MINIMUM WAGE RISING TO $15

Beginning in early 2022, federal government contractors will need to pay a $15 per hour minimum wage for new contracts and for the extension of existing federal contracts under President Biden's new Executive Order. The minimum wage for federal contractors was last increased in 2014 under the Obama administration to $10.10, indexed to an inflation measure, and currently stands at $10.95. By 2024, the Executive Order will phaseout entirely the minimum wage for tipped employees of federal contractors (currently $7.65). These represent substantial wage increases over a very abbreviated time period. As under the prior Obama order, the new minimum wage will be indexed to adjust with inflation.

2019/2020 EEO-1 Data Deadline Approaching

The EEOC is currently accepting, through July 19, 2021, submission of EEO-1 Component 1 data for 2019 and 2020.

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CT Adopts, NYC Broadens Protections for Employees Based on Hairstyles

On March 1, 2021, Connecticut passed the Create a Respectful and Open Workplace for Natural Hair Act ("CROWN Act"), which adds to the definition of "race" protected under the Connecticut Fair Employment Practices Act "ethnic traits historically associated with race, including, but not limited to, hair texture and protective hairstyles," including wigs, headwraps and hairstyles such as individual braids, cornrows, locs, twists, Bantu knots, afros and afro puffs. The law became effective immediately.

New York City adopted a broader version of the CROWN Act, effective January 30, 2021, which protects hair textures, hairstyles, hair lengths, and the use of headcoverings as associated with race, creed, or religion under the New York City Human Rights Law. The law makes clear discrimination based on hair can function as a proxy for discrimination based on race or religion and constitutes a form of unlawful stereotyping.

The New York City law mainly codifies guidance published in February 2019 by the New York City Commission on Human Rights, and prohibits disparate treatment including:

- restricting hairstyles associated with a racial or ethnic group or religious practice or belief;
- harassment on the basis of an individual's hairstyles associated with their religion or race;
- restrictions on hairstyles based on customer preference; or
- restrictions based on a perception that a person's hairstyle is "unprofessional," a "distraction," or inconsistent with a covered entity's image,

unless the restriction or prohibition addresses a legitimate (not speculative) health or safety concern. Before imposing a restriction for health or safety reasons, employers must consider alternatives such as hair ties, hair nets, other headcoverings, and alternative safety equipment, and engage in the City's "cooperative dialogue" process if considering requests for reasonable religious accommodations related to hairstyle.

NYC Contractors Required to Submit Sexual Harassment Data

Under an executive order issued by the mayor of New York City on March 3, 2021, all organizations that contract with the city for the provision of human services will be required to provide:

- a copy of the contractor's sexual harassment policies, including complaint procedures;
- a copy of any complaint or allegation of sexual harassment or retaliation based on a sexual harassment complaint brought against the Chief Executive Officer or equivalent principal of the organization;
- a copy of the final determination or judgment with regard to any such complaint against the CEO; and
- any additional information requested to investigate the submissions.

Further, the Board of Directors of the contracted provider must annually certify in writing that they have made all the reports required.

NLRB Rescinds 10 Advice Memoranda As "Inconsistent" or "Unnecessary"

On February 1, 2021, the National Labor Relations Board withdrew 10 guidance memos issued by the former administration that it described as either inconsistent with the practice and procedures of the Board and/or Board law, or no longer necessary as they have been subsequently interpreted by Board case law. The rescinded memos included guidance on employer handbook rules that tracked a standing Board decision, as well as guidance on chargeability and case handling procedures, changes to investigative practices, guidance on employer assistance in union organizing, notice obligations to employees, and other procedural standards.

EMPLOYER OBLIGATIONS IN A PANDEMIC WORKPLACE

The most recent government guidance for employers related to the pandemic includes the following.

FFCRA Payroll Tax Credits Extended to Cover Absences for COVID-19 Vaccination and Recovery
As detailed in our recent ARPA blog posting, employers that choose to voluntarily comply with the Families First Coronavirus Response Act (FFCRA) may claim a federal payroll tax credit for up to 10 days of COVID-related paid sick leave. The list of qualifying reasons for taking this FFCRA paid sick leave was recently expanded, under the American Rescue Plan Act (ARPA), to include taking time off to get a vaccine, and an employee's recovery from illness or injury related to the vaccine.

NYS Mandates Paid Vaccination Leave
Effective March 12, 2021, New York State requires employers to grant employees up to four hours of paid time off to receive the COVID-19 vaccine. This leave must be provided for each shot, and it is in addition to all other paid leaves provided by the employer.

CDC, OSHA Provide Guidance on Vaccination Programs
Employers that are contemplating an on-site or coordinating an off-site vaccination program can refer to new guidance from the Center for Disease Control and Prevention (CDC). The CDC guidance serves as a helpful checklist of considerations. It notes, among other things, that vaccinations should be prioritized by worker risk exposure, without regard to employment classification (i.e., employee or independent contractor), and that exemptions should be implemented based on individuals' medical conditions or religious beliefs in accordance with Section K of the Equal Employment Opportunity Commission's (EEOC's) guidance on COVID-19. The CDC guidance further cautions that, even post-vaccination, employers should continue to follow the CDC's Guidance for Businesses, including continued mask-wearing and/or social distancing of employees.

The Occupational Safety and Health Administration (OSHA) has issued new FAQs on vaccines, which designate an employee's adverse reaction to a vaccine as a potentially reportable event. If the employer has *mandated* the vaccine, then it must be reported if it meets one or more of the general OSHA recording criteria.

No Change in NY/NJ/CT Workplace Rules for the Fully Vaccinated, But CT Lifting Restrictions Generally
Individual states have their own guidelines for COVID-19 protocols, which may impose obligations beyond those established by the CDC. Connecticut began reducing workplace restrictions in March. By May 19, 2021 the state will have removed most COVID-19 business requirements. New York State has similarly announced a May 19, 2021 date for removing many business restrictions. However, even after May 19, the current guidance for New York, Connecticut and New Jersey continues to require employers to adhere to social distancing and mask-wearing in indoor spaces; none lessen the standards for workplaces in which all employees are fully vaccinated.

New Jersey Issues Guidance on Mandatory Vaccination
New Jersey has updated its FAQs for employers to require employers who mandate vaccination to make exceptions for employees based on medical or religious reasons (similar to the EEOC guidance), or if an employee's doctor advises against getting the vaccine while pregnant or breastfeeding. If an employee falls within one of the exemptions, the employer must provide a reasonable accommodation from the mandatory vaccination policy unless doing so would impose an "undue burden" on the employer's business operations. The state's guidance recognizes safety of employees, clients and customers as relevant in determining if there is an undue burden, provided decisions are based on objective, scientific evidence.

CDC Details Effective Mask-Wearing
The CDC has posted an illustrated guide on effective mask-wearing, which includes recommendations for types of masks and how to most effectively affix them.

COURT WATCH

After a very quiet year with few court decisions, largely due to pandemic-related court closures, the spring has brought an unusually wide array of notable employment law decisions.

New Jersey Supreme Court Adopts Broad Construct of State Pregnancy Law Protections

Considering on appeal for the first time a pregnancy discrimination claim under the New Jersey Pregnant Workers Fairness Act (PWFA), the New Jersey Supreme Court in *Delanoy v. Township of Ocean* (Mar. 9, 2021), recognized for pregnant and breastfeeding employees three distinct causes of action: 1) "unequal" or "unfavorable" treatment; 2) failure to provide a reasonable accommodation; and 3) illegal penalization of a pregnant or breastfeeding employee for requesting an accommodation. The case involved a claim by a police officer alleging her employer's maternity policy discriminated against pregnant employees, on its face, by requiring them to exhaust accrued paid leave time as a precondition to transferring to a light duty assignment while pregnant when it did not similarly require exhaustion of paid leave for employees seeking to transfer to light duty for reasons other than pregnancy. The appellate court held, and the Supreme Court affirmed, that the employer's policy violated the law's equal treatment mandate.

The Supreme Court further agreed that the plaintiff advanced a viable reasonable accommodation claim. In so holding, the Court explained that the standard for evaluating such claims in the context of pregnancy is different from other disability accommodation claims in that the PWFA may require an employer to temporarily permit a pregnant employee to transfer to work that omits an essential function of her job as a reasonable accommodation, unless the employer can prove that such a temporary waiver of an essential job function would present an undue hardship.

New Jersey Supreme Court Holds Workers' Compensation Insurer Can Be Required to Pay Cost of Employee's Medical Marijuana

In *Hager v. M&K Construction* (N.J. Apr. 2021), the Supreme Court of New Jersey was asked to consider an employer's multiple challenges to a worker's compensation court decision ordering reimbursement of the costs of an injured employee's medical marijuana prescription. The Court held that language in New Jersey's Compassionate Use Act that states it should not be construed to require a government medical assistance program or private health insurer to reimburse a person for costs associated with the medical use of cannabis is limited in scope, and does not similarly exempt workers' compensation insurers from reimbursing for such expenses.

The court further held that medical marijuana may, with proper medical testimony, be found to be "reasonable and necessary" care within the scope of the state's workers compensation scheme. Finally, the Court held that the state's Compassionate Use Act is not in actual conflict with the federal Controlled Substances Act (CSA).

The Court recognized that marijuana remains classified at the strictest category of a level 1 drug under the CSA, despite repeated petitions to have its classification reduced. However, it also noted that the federal government has issued statements deprioritizing federal prosecution of marijuana where it is being used in a permissible manner under state law, and that, since 2015, Congress has included a rider in its annual federal Appropriations Act to prohibit the Department of Justice from using allocated funds to prevent states from implementing their medical marijuana laws. The Court therefore concluded that the CSA was "effectively suspended" by the most recent appropriations rider, such that compliance with the Compassionate Use Act does not present a "positive conflict" and an employer

can be ordered to compensate qualified patients for their use of medical marijuana.

Connecticut Federal District Court Holds No ADA Protection for Medical Marijuana

In a decision focused solely on the legal protections provided to medical marijuana users under federal law, the United States District Court for the District of Connecticut held that the Americans with Disabilities Act (ADA) does not require an exception from meeting drug testing requirements. Rather, in *Eccleston v. City of Waterbury* (Mar. 22, 2021), the Court held that the ADA explicitly provides that an employer may drug test employees and terminate employment based on a failed drug test even where the employee tested positive based on prescribed use of marijuana. The Court reasoned that because federal law explicitly prohibits the use, possession and distribution of marijuana even for medical purposes, there is no basis under the ADA for an exception for medical marijuana that is being used to treat an underlying disability.

New Jersey Federal District Court Invalidates Limits on Arbitration of Harassment/ Discrimination Claims

A New Jersey federal district court in *New Jersey Civil Justice Institute v. Grewal* (D. N.J. Mar. 25, 2021), struck down section 12.7 of New Jersey's Law Against Discrimination as preempted by the Federal Arbitration Act. New Jersey was the most recent of several states (notably New York and California) in which the legislative response to the #MeToo movement had included a declaration that agreements requiring employees to arbitrate claims of harassment, discrimination or retaliation were unenforceable as a violation of public policy. The New Jersey district court's decision and analysis in striking down that section of the law was consistent with federal court decisions in New York and California, which have similarly invalidated challenged state laws.

New York Court of Appeals Holds Company President Not Individually Liable as "Employer"

The New York Court of Appeals held in *Doe v. Bloomberg* (Feb. 11, 2021) that where a plaintiff's employer is a business entity, the shareholders, agents, limited partners, and employees of that entity are not themselves "employers" within the meaning of the New York City Human Rights Law. Rather, those individuals may incur liability only for their own discriminatory conduct, for aiding and abetting such conduct by others, or for retaliation against protected conduct. The Court therefore upheld the dismissal of an employee's claims of sexual harassment against Michael Bloomberg, as the co-founder, chief executive officer, and president of the company because he was not alleged to have had any personal participation in the specific offending conduct. The Court held that allegations that Mr. Bloomberg had fostered a culture of discrimination and sexual harassment at the company were based primarily on news articles and reports from an unrelated case, and therefore were an insufficient predicate for imposing personal liability.

We Are Writing More…

We invite you to regularly check our Levy Employment Law Blog, where we are posting on employment law developments. We strive to maintain a cross-jurisdictional lens in many of our postings, as we recognize the challenges for employers in reconciling overlapping and sometimes competing obligations and opportunities under federal, state and local laws.

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