Levy Employment Law, LLC

TAKEAWAYS

SO YOU KNOW WHAT TO ASK TO AVOID EMPLOYER PITFALLS

New York State Mandates Paid Prenatal Leave and Paid Lactation Breaks

New York has become the first state in the country to mandate paid leave for pregnant employees to go to doctors' appointments or for other prenatal care. As part of the 2025 budget bill, the state amended its paid sick leave law, effective January 1, 2025, to require that, in addition to the existing paid sick leave accruals, employers create a new and separate bank of up to 20 hours of prenatal leave that can be used by pregnant employees in hourly increments over a 52-week period.

In addition, the state amended the Nursing Mothers in the Workplace Act to provide that, effective June 19, 2024, employers provide up to 30 minutes per day of paid break time for employees to express breastmilk. This break time is separate from any other paid breaks to which an employee may be entitled, as the law also requires that employees who need additional time for this purpose be permitted to use existing paid break time or meal time, and any time in excess of that for the day may be unpaid. The law assures employees protection for lactation breaks for up to three years following the birth of a child.

EEOC Finalizes Rules Under the Pregnant Workers Fairness Act

Regulations issued by the Equal Employment Opportunity Commission (EEOC) to implement the Pregnant Workers Fairness Act go beyond the anticipated scope of reasonable accommodation obligations for employees or applicants impacted by pregnancy, childbirth, or related medical conditions. The regulations provide that accommodations should be provided for a broad spectrum of pregnancy-related conditions, including fertility and infertility treatments, a range of physical and mental medical conditions related to pregnancy and lactation, pregnancy termination (whether voluntary or involuntary), menstruation, and changes in hormone levels.

In evaluating the reasonableness of a requested accommodation, the EEOC identified four accommodations that almost always should be deemed reasonable and therefore permitted: for an employee to keep water nearby; additional restroom breaks; being able to sit or stand when the work typically requires the opposite; and additional snack breaks.

The EEOC also indicated that in some circumstances, an employer may be expected to "temporarily" suspend one or more of the essential functions of an employee's position, provided that doing so does not impose an undue hardship. Such a "temporary" suspension may need to extend for up to the entire 40 week term of a pregnancy, under the EEOC's guidance.

The regulations are scheduled to take effect June 18, 2024. However, attorneys general from 17 states have sued to block the new regulations because of their inclusion of accommodations for employees seeking an abortion.

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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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FTC Banning Non-Competes; Court Action Pending

Most non-compete agreements issued by organizations throughout the United States will become impermissible as of September 4, 2024, unless stopped by a pending court challenge. New rules issued by the Federal Trade Commission (FTC):

- invalidate current non-compete agreements, except for select senior executives;
- ban all new non-compete agreements, for all employees and executives; and
- require employers to notify workers with existing non-competes that they are no longer enforceable.

As discussed in more detail in our recent blog post, employers need to review existing non-compete and non-solicitation restrictions in their agreements with all workers (not just employees) to assess whether they are impermissible under the FTC's broad definition of non-competes. Several pending lawsuits have challenged the validity of the FTC's regulations and seek a preliminary injunction to prevent them from taking effect. A decision on that application is expected to be released by July 3, 2024.

CT Significantly Expands Paid Sick Leave

Connecticut, as one of the earliest adopters of a paid sick leave law, is now expanding that law, phased in over the next three years, to cover all employers in the state and all categories of employees, with very limited exceptions. Employees will accrue sick leave at a more accelerated rate of one hour for every 30 worked, and will be able to use that leave for a range of reasons including their own or a family member's illness, injury or preventive medical care, mental health wellness days, the closure of the workplace or a family member's school or place of care due to a public health emergency, assessments related to exposure to communicable diseases, and care and support if the employee or a family member is a victim of family violence or sexual assault.

US DOL Has New Hub to Support Employment of Individuals with Disabilities

A new Hub developed by the U.S. Department of Labor centrally gathers resources for employers and individuals, including practical guidance, policy information and best practices considerations related to hiring and accommodating individuals with disabilities.

COVID Restrictions Are Winding Down

New guidance issued by the Centers for Disease Control has eliminated any minimum quarantine duration for COVID. Rather, individuals experiencing COVID symptoms are advised they can resume normal activities when they have been fever-free (without taking medication) and their symptoms have been improving overall for at least 25 hours. They are advised to take precautions like wearing a mask, distancing, and careful hygiene, for the following five days.

For New York employers, this means that the burden of providing COVID quarantine leave (whether paid or unpaid depends on the size of the employer) has been lessened. New York State's COVID leave law was unique in that it did not include any sunset provision. The latest state budget amends that and provides that employers' COVID quarantine leave obligation will expire on July 31, 2025.

Federal Government Redefines Standards for Classifying Race and Ethnicity

For the first time in nearly three decades, the federal Office of Management and Budget (OMB) has updated

the federal standard for maintaining, collecting, and presenting information pertaining to race and ethnicity. OMB will combine race and ethnicity as a single identifying characteristic, add "Middle East or North African" (MENA) to the list of reporting categories, and add some new subcategories, so that individuals of Asian descent will be able to specify their country of origin. Federal agencies have 18 months to submit an action plan to apply these changes, and five years to fully incorporate them.

New York City employers have a July 1, 2024 deadline to post this Notice of Worker Rights and distribute it to all employees. The notice covers paid safe and sick leave, temporary schedule changes, commuter benefits, and special rights for discrete groups of workers.

NJ Adds Employment Protections for Domestic Workers

Effective July 1, 2024, individuals who work in a residence providing childcare, support for adults in need of care, housekeeping, cooking, butler services, laundry, gardening, personal organizing, car parking or similar domestic services will become entitled to the protections of the New Jersey Law Against Discrimination and the state's Wage and Hour Law. Employers will be required to notify these workers of their legal rights, which will include a 30-minute meal break, 10-minute rest breaks after every four consecutive hours worked, and a seventh day off for live-in workers who work six consecutive days. In addition, employers will be required to provide at least two weeks' notice before terminating a domestic worker, and four weeks' notice for live-in domestic workers.

OSHA Allows Third Parties on Inspections

The Occupational Safety and Health Administration (OSHA) has amended its rules, effective May 31, 2024, to provide that in certain circumstances, a third-party representative may be authorized by employees to join an OSHA inspector's "walkaround" the work location. The employees must show why the third-party's presence is reasonably necessary to conduct an effective and thorough inspection.

NLRB Holds Apolitical Dress Code Did Not Preclude Employee Wearing BLM Insignia

In *Home Depot USA, Inc. and Antonio Morales* (Feb. 21, 2024), the National Labor Relations held that an employee's refusal to remove a Black Lives Matter marking from the employee's work apron was protected concerted activity. Home Depot's general dress code policy prohibited the display of causes or political messages unrelated to workplace matters. Notwithstanding the policy, the Board concluded that the BLM insignia the employee and other coworkers had worn on their work aprons was a "logical outgrowth" of the employees' ongoing concerted activity to address perceived racism at the facility, which included reports of another employee's mistreatment of employees and customers of color and the repeated vandalizing of a Black History Month display.

COURT WATCH

NYS High Court Adopts Broad Federal Test for Retaliation Claims

When considering claims of retaliation under the New York State Human Rights Law, the New York State Court of Appeals has adopted the U.S. Supreme Court's standard and held that a viable claim can be based on any conduct that "well might have dissuaded a reasonable worker" from raising the underlying complaint of discrimination. In *Matter of Clifton Park Apts., LLC v. NYS Div. of Human Rights* (Feb. 15, 2024), the Court therefore allowed a retaliation claim to

proceed where, after the New York State Division of Human Rights investigated and dismissed a discrimination complaint, legal counsel for the respondent organization sent a letter to the original complainant, stating the allegations that had been raised were "false, fraudulent, and libelous" and that they were "looking to" hold the complainant personally responsible for the damages purportedly sustained as a result of the complaint. The Court reasoned that the threatening letter could be found to dissuade people from raising complaints of discrimination, and this should be considered on a fact-specific basis.

Second Circuit Allows Nonresidents to Sue Under NYS/NYC Discrimination Laws

Demonstrating the liberal construction accorded to the New York State and New York City human rights laws, the Second Circuit Court of Appeals recently held in *Syeed v. Bloomberg* (Mar. 14, 2024), that the state and city laws both protect nonresidents who proactively seek a job opportunity in New York. The court therefore allowed claims to proceed by an individual who worked in Bloomberg's Washington D.C. bureau and asserted she was not selected for various positions in the company's New York bureau because of her sex and race, as well as a class action claim by a California resident who alleged the company, which is headquartered in New York City, had denied her promotions because of her sex and race.

Supreme Court Holds Job Transfer Can Be an Actionable Basis for a Title VII Claim

The Supreme Court held in *Muldrow v. City of St. Louis* (Apr. 17, 2024), that an employee can assert a claim for discrimination under Title VII based on having been transferred to a less favorable position. The Court held that the plaintiff need not prove that the harm experienced as a result of the transfer was "significant," serious, or substantial, but simply that it meant the employee was being treated worse. The Court therefore allowed a plainclothes officer with the St. Louis Police Department to proceed with a discrimination claim based on her reassignment from the specialized Intelligence Division to a regular neighborhood patrol officer position. The plaintiff asserted that she was replaced with a male police officer because he was deemed to better fit the "very dangerous work" of the role in the Intelligence Division.

Federal Court in Texas Strikes NLRB's New Joint Employer Test

A federal district court in Texas has invalidated the National Labor Relations Board's (NLRB's) new joint-employer standard, which we summarized in the Winter 2024 issue of Takeaways. In *Chamber of Commerce v. Nat'l Labor Relations Bd.* (Mar. 8, 2024), the court held that the new test was too broad because it deemed organizations to be joint employers just by having the right to exercise control over one essential term and condition of employment, even if the control was not actually exercised. The court's ruling applies nationwide and restores the prior NLRB test, pending review by an appellate court.

Termination of Employee Impaired by Marijuana Upheld by CT Appellate Court

A Connecticut appellate court recently upheld a determination in *Bartolotta v. Human Res. Agency of New Britain, Inc.* (Mar. 19, 2024), that a preschool teaching assistant who used valium and marijuana to mitigate the symptoms of epilepsy was not denied accommodations or discriminated against when she was terminated for reporting to work in an admittedly impaired state. The employee had not informed the employer of her marijuana prescription until after an incident at work, and the court held that under Connecticut's palliative care law, the employer was not required to allow her to use marijuana during the workday or appear at work in an impaired state.

Court Declines to Equate Monitoring a Work Vehicle Camera with Stifling Union Activity

A pro-union employee drove a work vehicle with an inward facing camera, that company policy required "remain on at all times." Shortly after covering his camera one day, the employee received a text from his supervisor directing him to uncover the camera. The employee asserted, and the National Labor Relations Board agreed, that this created an "impression that the company was conducting surveillance of him in his pro-union activities."

In a win for employers, the U.S. Court of Appeals for the District of Columbia in *Stern Produce Co. v. NLRB* (Mar. 26, 2024), held that it did not. The court reasoned that the employer's policy was not ambiguous and did not allow for any exceptions when the camera could be turned off. Further, the court said that, given the presence of the camera and the scope of the employer's policy, the employee should have assumed he was being watched while on the job. The court found no reason to assume that in this instance the supervisor's monitoring of the camera was an attempt to suppress union activities.

Legitimate Reason May Not Be Enough to Avoid Trial Where Employee Also Proves Discriminatory Behavior

In a Title VII discrimination claim where an employer has proven a legitimate business reason for having terminated an individual's employment, the Second Circuit recently held that the employee can still proceed with her claim by presenting evidence that the employer additionally had a discriminatory reason for making that business decision. In *Bart v. Golub Corp.* (Mar. 26, 2024), the plaintiff employee admitted to having falsified health and safety records, which the employer asserted was the basis for her termination, but she further cited numerous remarks made by her direct supervisor (who was involved in the termination decision) regarding his belief that women were unsuited to be managers. The court held that these remarks were sufficient to create a triable issue of fact as to the *real reason* for the employment decision.

Supreme Court Broadly Construes Transportation Exception to FAA

The U.S. Supreme Court held in *Bissonnette v. LePage Bakeries Park St.* (Apr. 12, 2024), that the exemption in the Federal Arbitration Act applicable to the "transportation industry" is not limited to those whose sole job is to transport goods across borders. Rather, the Court held that the exemption extended to those who are "actively engaged" and "play a direct and 'necessary role'" in the transportation of goods across borders. As a result, franchisees who worked for a packaged bakery goods company could proceed with their claim that they were not required to arbitrate a dispute with the bakery goods company for unlawful wage deductions and failure to pay overtime.

Recent Articles on the LEL Blog:

- FTC Invalidating Non-Competes: Wait and See or Act Now?
- Pay Protections for NYS Freelance Workers Take Effect May 20
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- DEI or IED? Will Renaming Save Diversity Initiatives?