Levy Employment Law, LLC

TAKEAWAYS

KNOW WHAT TO ASK TO AVOID EMPLOYER PITFALLS

Status of Noncompete Agreements Remains In Flux with Federal Court Order Striking FTC's Non-Compete Ban

A federal district court in the Northern District of Texas issued a nationwide injunction on August 20, 2024, setting aside the Federal Trade Commission's (FTC's) new regulatory ban on non-compete agreements and declaring them unenforceable, just two weeks before the regulations were scheduled to take effect. Noting that, "[t]he role of an administrative agency is to do as told by Congress, not to do what the agency thinks it should do," in *Ryan, LLC v. FTC*, the district court held that the FTC lacked the authority to issue substantive rules about unfair competition. The court further held that even if the FTC had authority to issue substantive rules, its ban on non-competes was arbitrary and capricious in that the evidence considered by the FTC did not demonstrate why a sweeping prohibition on virtually all non-competes was necessary instead of a more specifically targeted approach.

The FTC has not yet announced whether it will appeal the decision, but state legislatures (including in New York) are increasingly considering their own limitations on noncompete clauses. In addition, the National Labor Relations Board has taken an aggressive position against noncompete agreements, most recently reflected in an administrative law judge's decision (*J.O. Mory, Inc., June 13, 2024*) and Memorandum GC 25-01 from the Office of the General Counsel, both theorizing that an employee subject to a noncompete will be more fearful of being fired and less willing to "rock the boat" by raising labor law violations out of concern that the employee cannot readily find equivalent alternative employment.

NYS DOL Mandates First of Its Kind Paid Leave for Expressing Breastmilk

Adopting a very broad construction of New York's recent amendments to the state Labor Law, the state Department of Labor (DOL) has issued guidance that employees are entitled to a 30-minute paid break *each time* they need to express breastmilk in the workplace. As discussed in a recent blog post, this interpretation appears to exceed the plain language of the statute, but employers are on notice that it reflects how the DOL is interpreting the state law.

Employers are additionally required to ensure that employees are aware of their paid break time entitlement by repeatedly providing them with a state-issued notice of rights: (i) when an employee is hired; (ii) once a year after hiring; and (iii) whenever an employee returns to work following the birth of a child.

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.

This newsletter is provided for informational purposes only to highlight recent legal developments. It does not comprehensively discuss the subjects referenced, and it is not intended and should not be construed as legal advice or rendering a legal opinion. TAKEAWAYS may be considered attorney advertising in some jurisdictions.

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

SUMMER/FALL 2024

Legal Changes Effective Q2-Q4 2024

May 20 NYS – new pay protections for freelance workers

June 19 NYS – paid break time for nursing employees

July 1 US – increased minimum salary for exempt employees

July 1 NYC – provide employees with a Know Your Rights At Work notice

Oct. 1 CT – Paid Family Leave for sexual assault victims

Nov. 16 NYS – Clean Slate Act sealing certain criminal records

NYS Retailers Must Adopt Workplace Violence Prevention Measures

Effective March 4, 2025, employers in New York with at least 10 retail employees will be required to have in place a Workplace Violence Protection Plan and conduct regular Workplace Violence Prevention Training. Covered employers will need to ensure that their plans:

- list factors that could increase the risk of violence for retail employees (like working late at night or handling cash transactions with the public);
- describe employer strategies to prevent workplace violence;
- inform employees of legal protections and remedies for victims of domestic violence; and
- reassure employees of the protection against retaliation for reporting risks or participating in related proceedings.

Employees must receive a copy of the plan, along with a site-specific list of emergency exits and meeting places, and a copy of the information presented at the workplace violence prevention program, upon hire and annually thereafter.

Minimum Salary Increased Nationwide for Classifying Employees as Exempt

All U.S. employers who classify their employees as exempt must ensure that the employees are being paid an annual salary of at least $43,888. This threshold will increase again to $58,656 annually as of January 1, 2025. New York State has a higher salary threshold of $62,400 for employees in New York City and the surrounding suburbs or $58,458.40 in the rest of the state, and those thresholds are scheduled to increase as of January 1 and again in 2026. Our recent blog post explains how the minimum salary threshold relates to overtime eligibility, and the rationale behind these increases.

NJ Employment Protections Extend Beyond Borders of State

The New Jersey Office of the Attorney General and the New Jersey Division of Civil Rights released new guidance that the state's Law Against Discrimination (LAD) extends to employees who are working remotely or on a hybrid schedule from locations outside of New Jersey. This interpretation impacts both employee rights during the term of the employment relationship, and the terms of separation agreements.

CT Expands Paid Family Leave Uses

Connecticut employees may now seek benefits under the state's Paid Family Leave program if they are a victim of sexual assault, as a result of a change in the program that took effect October 1, 2024. Victims can additionally receive benefits through the victim compensation program administered by the Office of Victim Services within the Judicial Department, provided that the total amount received cannot exceed the employee's regular rate of compensation.

U.S. DOL Considers Impact of AI

Recent Guidance from the DOL urges employers to carefully oversee the use of AI while tracking hours and processing leave requests to confirm they are not under-cutting employees' hours. The DOL has also launched a new website for guidance on AI in hiring.

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COURT WATCH

U.S. Supreme Court Holds NLRB to Higher Standard for Injunctive Relief

In *Starbucks Corp. v. McKinney* (June 13, 2024), the U.S. Supreme Court held that the National Labor Relations Board (NLRB) should be subject to the courts' standard four-part test for a preliminary injunction when the NLRB is seeking temporary relief pending adjudication of an unfair labor practice charge. The Court therefore reversed a district court decision, upheld by the Sixth Circuit, that had applied a simpler two-part test that considered whether there was reasonable cause to believe an unfair labor practice occurred, and whether it would be "just and proper" to issue a preliminary injunction, and held that the standard four-part test should apply in this context.

U.S. Supreme Court Widens Door to Challenge Federal Agency Determinations

The U.S. Supreme Court recently overturned a long-standing decision that required courts to defer to federal government agencies in their rulemaking. The Court held in *Loper Bright Enterprises v. Raimondo* (June 28, 2024), that the courts should exercise their own independent judgment in determining if an agency acted within its statutory authority, particularly if Congress did not specifically direct the agency to make an administrative determination or for matters that do not involve a technical statutory question.

The Court separately held in *Corner Post, Inc. v. Board of Governors* (July 1, 2024), that the limitations period to file a lawsuit challenging a federal agency determination begins not from the date the agency makes its determination, but from whenever the plaintiff is injured by final agency action. The implications of both decisions are discussed in a recent blog post.

Connecticut Supreme/Appellate Courts Define Elements of State Law Discrimination Claims

Standard for Vicarious Liability

The Connecticut Supreme Court has adopted the federal standard for holding an employer vicariously liable for harassing behavior by a "supervisor" under the state's human rights law. In *O'Reggio v. Commission on Human Rights and Opportunities* (Aug. 1, 2024), the Court determined that a coordinator who could assign work, set schedules, provide training and conduct performance reviews was not a supervisor because the coordinator did not have the authority to take tangible employment action against the plaintiff employee, such as hiring, firing, or disciplinary action. The employer therefore was not liable for the coordinator's racially discriminatory comments because it was found to have taken prompt remedial action by placing the coordinator on leave pending an internal investigation and then disciplining the coordinator and requiring the coordinator to attend diversity training.

Discrimination Based on Association

In *Demarco v. Charter Oak Temple Restoration Ass'n* (June 18, 2024), an employee who claimed he was fired after he took a leave of absence to be with his physically disabled newborn son had sued for discrimination based on his association with a disabled individual under the state Fair Employment Practices Act. The Connecticut Appellate Court upheld the dismissal of the claim, holding that the state law only protects disabled employees who are themselves the target of discrimination, and not to discrimination by association with others.

NJ Supreme Court Invalidates Non-Disparagement Clauses

Broadly construing a 2019 amendment to New Jersey's Law Against Discrimination, which invalidates non-disclosure clauses in employment or settlement

agreements, the New Jersey Supreme Court recently held that the law additionally invalidates non-disparagement clauses if the clause would conceal details relating to a claim of discrimination, harassment, or retaliation.

In *Savage v. Township of Neptune* (May 7th, 2024), a sergeant with the township police department had twice sued, and settled, claims of sexual harassment, discrimination, and retaliation against the department. A few weeks after the second case was settled, the sergeant appeared on NBC 4 New York, and claimed the police department had "abused her for 8 years," and the "harassment and retaliation had been intensified with bogus disciplinary charges." The township sought to enforce a non-disparagement clause in the settlement agreement, which prohibited the parties from making any comments that would disparage or impugn the reputation of any party. The state Supreme Court held that the non-disparagement clause was against public policy and could not be enforced.

NJ Supreme Court Limits Wage Theft Penalties

The New Jersey Supreme Court recently held in *Maia v. IEW Constr. Grp.* (May 14, 2024), that 2019 amendments to the state's wage payment laws do not apply retroactively. Those amendments, which we discussed in the Fall 2019 issue of Takeaways, had imposed a penalty of up to 200 percent of unpaid wages as liquidated damages, plus reasonable costs and attorney's fees to the employee.

Courts Reject Repeated Challenges to NJ Temporary Workers' Bill of Rights

The Third Circuit Court of Appeals declined to block the New Jersey Temporary Workers' Bill of Rights by upholding a federal district court decision that denied a preliminary injunction against the new law. As discussed in the Spring 2023 and Fall 2023 issues of Takeaways, the New Jersey law, which took effect August 5, 2023, requires that individuals who are employed and placed by temporary help service firms with third-party clients receive:

- notice of the terms of the engagement,
- safe and free or non-obligatory transportation to the worksite,
- a right to be offered regular employment by the third-party client,
- standardized pay and disclosures, and
- protection against retaliation for exercising rights protected by the law.

The employing organizations must additionally comply with certain record keeping requirements.

A coalition of staffing agency industry groups had sought to block the law on the grounds that it creates undue burdens on interstate commerce by setting wage standards that unfairly impact in-state staffing firms compared to out-of-state firms, and its terms are unduly vague. In *New Jersey Staffing Alliance v. Fais* (July 24, 2024), the Third Circuit rejected those arguments, holding that the law is meant to ensure consistency between full-time and temporary workers.

While their appeal was pending before the Third Circuit, the same coalition of staffing agency industry groups amended their original complaint to assert that the Workers' Bill of Rights was preempted by the federal Employee Retirement Income Security Act (ERISA) and again sought a preliminary injunction to block the law. In a decision issued on August 30, 2024, the federal district court denied that request for an injunction on the ground that the industry groups failed to show they were likely to succeed on the merits, or that the law was causing them irreparable harm that outweighed the harm that would result from granting the request for emergency injunctive relief. The court cited the over one-year delay in the plaintiffs asserting the ERISA claim, which it said undermined a claim of irreparable harm. The court prioritized avoiding disruption to the temporary workers who it said may have made life decisions in reliance on the law over the financial concerns of the industry groups.