Levy Employment Law, LLC

TAKEAWAYS

SO YOU KNOW WHAT TO ASK TO AVOID EMPLOYER PITFALLS

Trump Administration Upends Private Sector Employee Protections

Day 1 of the new presidential administration initiated a wave of attacks on two areas of employment law that had received focused employer attention since the summer of 2020 – diversity, equity and inclusion (DEI) initiatives, and recognition of the rights of transgender individuals. New executive orders have terminated all DEI-related mandates, policies, and programs across the federal government except with respect to veterans and individuals with disabilities, struck down past executive orders related to DEI and affirmative action, and will now require federal contractors and grant recipients to certify that they do not operate any programs promoting DEI that violate applicable federal anti-discrimination laws. The Office of Federal Contract Compliance Programs (OFCCP), is currently determining what remains of its work under the executive orders. Links beyond the cover page to the OFCCP website are currently unavailable, including all information on EEO-1 reporting.

Another new executive order declares a United States policy to recognize only two sexes, male and female, denies that the term "sex" includes gender identity, and forbids the use of federal grant funds to "promote gender ideology." The chair and another commissioner of the Equal Employment Opportunity Commission (EEOC) were terminated from their positions by the president, an unprecedented action that is now under court review. The immediate effect is that the EEOC lacks a quorum to effectuate some of the policy changes directed by the executive orders, particularly with regard to gender diversity.

Acting EEOC Commissioner Andrea Lucas has outlined actions she intends to take to implement the executive orders. Resources supporting transgender individuals have been removed from the government's website. A quick perusal of the EEOC's What You Should Know page reflects that most links listed no longer connect to actual information, including guidance on artificial intelligence, wearable technologies, background checks, and EEOC activities. Our DEI in Crisis series of nine blog articles analyzes in detail the executive orders, initial measures taken to implement them, and their ramifications.

The new Acting General Counsel of the National Labor Relations Board on February 14, 2025, revoked 18 memoranda issued by his predecessor. Revoked memoranda included challenges to employer non-compete agreements and electronic monitoring and algorithmic management of employees, which applied even to non-union employers. A new directive against "stay or pay" agreements requiring employees to repay tuition or similar benefits upon termination, also has now been revoked.

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NYS Constitution Expanded to Include Gender-Related and Other Protections

Effective as of January 1, 2025, voters in New York approved an amendment to the state constitution, which expands the state's protection against discrimination. Previously limited to race, color, creed, and religion, the new equal rights act also protects individuals based on ethnicity, national origin, age, disability, or sex. Sex expressly includes sexual orientation, gender identity, gender expression, pregnancy, pregnancy outcomes, and reproductive healthcare and autonomy.

The amendment also added two provisions. First is a statement that permits laws designed to prevent discrimination. Second is a provision that denies any hierarchy among protected characteristics. The Constitution provides that the protection of one characteristic may not be interpreted to interfere with or limit the civil rights of any individual based upon a different protected characteristic, thereby resolving any potential conflict between gender identity and religious beliefs.

NJ Adopts Pay Transparency Law

Effective June 1, 2025, New Jersey will require employers with 10 or more employees to include in their job postings both the salary and a list of benefits and other compensation being offered. This requirement applies whether the organization employs people in New Jersey or takes applications for employment within the state. It covers both external and internal postings, whether for new jobs, promotions, or transfer opportunities.

NYC Amends Lactation Law

New York City employers need to make changes both to the language and the distribution of their existing lactation accommodation policies. Effective May 11, 2025, employers must reference in their policies, consistent with New York State law, that employees are entitled to be paid for the first 30 minutes of break time, and can use existing paid break or meal time if they need time in excess of 30 minutes to express breast milk. Employers are further required to post their lactation accommodation policy (in its entirety) in a conspicuous location in the workplace and electronically on the employer's intranet, if one exists.

NY/NJ/CT Laws All Entitle Employees to Higher Wages for 2025

Minimum wage rates increased for the new year throughout the tri-state area of New York, New Jersey, and Connecticut. In New York, there remains a geographic differential in the wage rate, which increased to $16.50 per hour in New York City, Nassau, Suffolk, and Westchester counties, and increased to $15.50 per hour for the rest of the state. Connecticut's minimum wage increased to $16.35 per hour and New Jersey trails slightly behind with a new minimum wage of $15.49 per hour.

For New York employers, as a counterpart to the increases in the state minimum wage, employers must confirm they are paying employees who are classified as exempt at the state's minimum salary level. That rate increased to $1,237.50 per week ($64,350 per year) for employees who are working in New York City or Nassau, Suffolk, or Westchester counties, and at least $1,161.65 per week ($60,405.80 per year) for employees working anywhere else in the state. Except with respect to employees whose duties fall within the professional exemption (which does not have a minimum salary requirement), employers must either increase salaries for their New York employees to meet the new salary thresholds or reclassify their employees as non-exempt.

CFPB Warns on AI and FCRA Compliance

Employers that collect and analyze data on employees or job applicants may be inadvertently triggering Fair Credit Reporting Act (FCRA) requirements, according to the Consumer Financial Protection Board (CFPB). The FCRA requires employers to obtain advance notice and employee consent if they will be using data reported by a third party for purposes of assessing employees. Employers must additionally provide notice and a copy of the data report before taking adverse action against an employee based on such a report.

Guidance issued by the CFPB in the waning months of the Biden administration (but as yet untouched by the new administration), takes the FCRA's reach far beyond the typical pre-hire background check report. The guidance warns that employers are required to comply with FCRA if they obtain reports from third parties that analyze or score data on workers' driving activity, sales interactions, task completion times, web browsing, keystroke frequency, communications, and similar work-related activities.

Comply With NYS Fair Chance Act

NY employers are reminded that under the new Fair Chance Act, if a background check produces criminal history information on an individual, the employer must provide the individual with:

- a copy of the criminal history information;
- a copy of Article 23-A of the state Correction law; and
- notice that the individual can seek to have any incorrect criminal information corrected.

Waning Days of Biden Administration Brought Final Wave of NLRB Decisions

Two decisions issued within days of each other outline new parameters as to what employers can say and how they can meet with employees to comment on unionization efforts. In *Siren Retail Corp. d/b/a Starbucks* (Nov. 2024), the Board prospectively overruled a 40-year old precedent, holding it was poorly reasoned. The Board held that when an employer makes statements to employees about the impact of unionization, it must be careful in its phrasing and base predictions on objective facts. The Board said broad statements that unionization would foreclose employees' ability to interact individually with the employer will be deemed an impermissible threat.

The NLRB then determined in *Amazon.com Services LLC* (Nov. 2024) that employers cannot require employees to attend meetings where the employer expresses its views on unionization. Such "captive audience" meetings had been permissible under a precedent going back more than 75 years, provided that employees were on work time and were not threatened, interrogated, punished or promised benefits. Central to the Board's reasoning was the mandatory nature of the meeting, which it reasoned "reasonably tends to inhibit [employees] from acting freely." The Board held that such meetings can be permissible if employees are told the purpose in advance, attendance is voluntary, and the employer does not keep a record of who attends.

DOL Rules on PTO to Augment FMLA/PFL

A January 14, 2025, opinion letter issued by the U.S. Department of Labor clarified that employees who simultaneously take leave under the Family Medical Leave Act and receive paid leave benefits under a state paid family leave program can elect, but cannot be required, to use their available paid time off to receive full salary while on leave.

COURT WATCH

NY Employers Must Provide Notice of Reproductive Rights in Handbooks

New York employers must once again include in their employee handbooks a notice regarding state law protections against discrimination based on reproductive health decisions. While a federal district court had issued a permanent injunction in 2022 that blocked the state from enforcing the notice requirement on the ground that it violated the First Amendment, a panel of the Second Circuit Court of Appeals has now reversed that decision.

In *CompassCare v. Hochul* (Jan. 2025), the Court held that the right to expressive association only applies if a particular employment decision threatens the very mission of the organization or impedes the organization's ability to disseminate its preferred views. The Court reasoned that the state's notice requirement did neither of these. The Court explained that the information the state required in the notice was purely factual and uncontroversial, pertaining to the terms of employment under New York law, and therefore was like many other state law notice requirements. Further, the Court reasoned the notice does not interfere with the organizations' mission because they still can share their moral, political and religious views, including their disagreement with the state law.

Appellate Court Denies Basis for Individual to Sue Under NJ Marijuana Rights Law

Job applicants denied employment based on a positive cannabis drug test result have no ability to sue under New Jersey's Cannabis regulatory law. Although that law prohibits employers from discriminating against individuals based on cannabis use, the Third Circuit Court of Appeals held in *Zanetich v. WalMart Stores East Inc.* (Dec. 2024), that the law does not include any mechanism for an individual to sue to enforce the law's prohibition. The Court further held that a second provision in the law, which prohibits adverse employment actions based solely on a positive cannabis drug test applies only to employees, not job applicants.

CT Follows Federal Test for Supervisor Liability for Harassment

Following the approach of federal law, the Connecticut Supreme Court held in *O'Reggio v. Commission on Human Rights & Opportunities* (Aug. 2024) that Connecticut courts should apply the U.S. Supreme Court's standard for determining when an employer will be held vicariously liable under the state's anti-discrimination law for the actions of an employee. The court held that only an individual who has the ability to make tangible employment decisions should be considered a "supervisor" for purposes of holding the employer vicariously liable for creating a hostile work environment. The Court observed that it has generally construed the state anti-discrimination laws to align with federal law, absent clear evidence of a contrary legislative intent.

Supreme Court Confirms Review Standard for FLSA Exemption

In *E.M.D. Sales, Inc. v. Carrera* (Jan. 2025), the U.S. Supreme Court held that courts should apply a preponderance of the evidence standard when determining whether an employer met its burden of proving that it appropriately classified workers as exempt from overtime under the Fair Labor Standards Act (FLSA). The Court thereby overturned an appellate court determination that had required a food distributor to prove by clear and convincing evidence that its sales representatives met the exemption as outside salesmen.