The New Year Brings New Rules to New York

Barbara E. Hoey, Mark A. Konkel

January 22, 2018

As January draws to a close, New York employers are confronting the reality of many new laws and regulations that govern the employment relationship – from the new Paid Family Leave law, to the new federal tax law. We are also tracking several newly-signed and proposed pieces of legislation, which could further complicate the employment relationship in New York.

Here is what there is so far:

New York Paid Family Leave

As we previously reported, effective January 1, most employers in New York State will be covered by the new Paid Family Leave law ("PFL"). Under the PFL, employers will need to provide eligible employees with 8 weeks of family leave with salary reimbursement capped at 50% of the state's average weekly wage. This will increase on an annual sliding schedule until 2021 when employees will be entitled to 12 weeks of family leave with salary reimbursement capped at 67% of the state's average weekly wage.

Eligible employees will be permitted to take leave to care for a qualified family member's serious medical condition, to care for the birth or placement of a child, or for a qualified military exigency. Leave under the PFL will overlap with an employee's leave under the Family and Medical Leave Act under certain circumstances.

For a more extensive analysis of the PFL, its requirements (including employer notice requirements), and suggested steps for compliance, we encourage you to read our previous blog post on this law: "A New Headache – New York's Paid Family Leave"

New York City and Albany County Ban Salary History Inquiries

On October 31, 2017, a new law went into effect banning New York City employers from asking about, relying on, or verifying a job applicant's salary history during the hiring process. As discussed in our prior post, the new law amends the New York City Human Rights Law and makes any violation of the law "an unlawful discriminatory practice." In effect, applicants will now be able to assert claims against prospective employers with either the New York City Commission on Human Rights or directly in court. The new law specifically prohibits employers from:

- "Inquiring about" an applicant's salary history throughout the entire employment process; and/or
- Relying on the salary history of a job applicant when determining an applicant's salary amount at any stage in the employment process, including when negotiating a contract.

Although this new law is broad in scope, the new law does enable employers to discuss the proposed or anticipated salary for the position as well as an applicant's salary expectations. In addition, an employer can consider an employee's salary history if the applicant's disclosure is made voluntarily and without prompting.

Along with New York City, the Albany County Legislature enacted a salary history ban law which went into effect on December 17, 2017. Albany's salary history ban law amends the Albany County Human Rights Law, and prohibits employers from:

- Screening job applicants based on their current or past wages, benefits or other forms of compensation;
- Requiring that an applicant's past wages meet a minimum or maximum set of criteria;
- Requesting or requiring applicants to disclose salary history as a condition of being interviewed or considered for an offer of employment; or
- Seeking an applicant's salary history from his or her current or former employers.

Unlike New York City, the Albany County law allows a prospective employer to confirm an applicant's prior wages, benefits, or other compensation history ***after*** an employer has extended an offer to the employee with compensation details if the applicant provides the employer with written authorization.

Employers should also be aware of a bill (A2040C) passed in the New York State Assembly which seeks to amend the New York State Human Rights Law to prohibit inquiries regarding salary history. Unlike the New York City and Albany County laws, the proposed New York State legislation does not provide any exceptions for voluntary or authorized disclosure. This bill has not been signed by the Governor and we will continue to follow this closely.

New York City Freelance Isn't Free Act

Effective May 15, 2017, this New York City law places new requirements on businesses that use freelance workers.

The law requires that a business and a freelancer enter into a written contract when the value of the work to be provided is $800 or more (either by itself, or in the aggregate for services in the preceding 120 days). This contract must include:

- The name and mailing address of both parties;
- An itemization of services to be provided by the freelancer, the value of these services, and the rate and method of compensation; and
- The date when the hiring business must pay the freelancer, or the mechanism by which such date will be determined.

The hiring business must pay the freelancer on or before the date compensation comes due under the contract. If the contract doesn't specify when payment is due or the mechanism by which such date will be determined, then the hiring business must pay the freelancer within 30 days of completion of the freelancer's work under the contract.

Once the freelancer begins work under the contract, the hiring business cannot require the

freelancer to accept less than the contracted amount of compensation as a contingency for timely payment.

Businesses cannot threaten, intimidate, harass, discriminate against, or deny opportunity to any freelancer from exercising their rights under this law.

Businesses that violate this law could face statutory damages and attorney's fees. Businesses that engage in a pattern or practice of violation may be fined up to $25,000.

New York City Scheduling Restrictions for Retail Workers

On November 26, 2017, the employee-friendly Fair Work Week Law went into effect in New York City. The Fair Work Week Law is a legislative package of five bills that regulates shift scheduling and pay practices in the fast food and retail industries. The law also imposes significant record-keeping requirements for employers and provides employees with a private right of action against their employer for violations of the law. The following provides a brief summary of the retail law provisions. Stay tuned as a detailed explanation will be the subject of a forthcoming blog post.

The law covers employers with at least 20 employees primarily engaged in the sale of consumer goods at a store in New York City. Under the new law, employers must provide employees with written work schedules at least 72 hours in advance. The effect of the new law is to ban on-call scheduling, which is a standard industry practice where employees are either required to contact their employer or wait to be contacted by their employer to determine whether they will work that day. Employers may still approve workers' requests to switch shifts or take time off.

Upon an employee's request, employers are obligated to provide a written copy of an employee's work schedule for any week worked during the past three years and provide the most current version of the work schedule for all retail employees at the specific work location.

New Safe Time Leave under the New York City Earned Sick Time Act

On November 6, 2017, Mayor de Blasio signed an amendment to the Earned Sick Time Act allowing employees to use paid sick leave to cover "safe time." Effective May 5, 2018, employees can use statutory paid sick leave when the employee or an employee's family member "has been the victim of a family offense matter, sexual offense, stalking, or human trafficking." Specifically, the employee can use safe time leave in the following situations:

- To obtain services from a domestic violence shelter, rape crisis center, or other shelter or services program for relief from a family offense matter, sexual offense, stalking, or human traffic king;
- To participate in safety planning, temporarily or permanently relocate, or take other actions to increase the safety of the employee or employee's family members from future family offense matters, sexual offenses, stalking, or human trafficking;
- To meet with a civil attorney or other social service provider to obtain information and advice on, and prepare for or participate in any criminal or civil proceeding.
- To file a complaint or domestic incident report with law enforcement;
- To meet with a district attorney's office;
- To enroll children in a new school; or

- To take other actions necessary to maintain, improve, or restore the physical, psychological, or economic health or safety of the employee or the employee's family member or to protect those who associate or work with the employee.

If an employee is absent three consecutive work days for reasons under these new safe time amendments, employers may require "reasonable documentation" to verify the leave. However, employers cannot require that the documentation specify the details of the incident for which safe time leave is being taken.

Any notices the employer provides to its employees regarding the Earned Sick Time Act will now have to include information regarding the new safe time leave. Also, on or before June 4, 2018, employers must provide notice to their New York City employees regarding the safe time law, if not already done so.

New Considerations for Sexual Harassment Claims and Settlements

In a topic that will be the focus of a forthcoming blog post, as part of the new tax bill, Congress included a provision titled "Denial of Deduction for Settlements Subject to Nondisclosure Agreements Paid in Connection with Sexual Harassment or Sexual Abuse." This provision amends the Internal Revenue Code Section 162(q) to disallow deductions for payments pursuant to settlement agreements, along with attorneys' fees, for sexual harassment or abuse claims when the settlement agreement contains a confidentiality or non-disclosure provision. This new provision will put businesses in the position to choose between confidentiality or tax deductions when deciding to settle any sexual harassment claims. As our future blog post will discuss in greater detail, there are several unanswered questions surrounding this provision.

Additionally, this year lawmakers in New York will consider new legislation that will prohibit employers from requiring employees to arbitrate sexual harassment claims, and from requiring that sexual harassment settlements be subject to a confidentiality provision. This is in line with a consistent trend of state legislatures introducing various laws regarding sexual harassment claims and settlements, including California, New Jersey, Pennsylvania, South Carolina, and Washington.

New Reasonable Accommodation Regulations in New York City

New York City employers should be on the look-out for new standards relating to reasonable accommodations under the New York City Human Rights Law. The New York City Council recently passed new regulations that will now go to Mayor de Blasio for review. This law will apply to employees seeking reasonable accommodations for disability, religious needs, pregnancy-related conditions, and for victims of domestic violence.

If enacted, these new regulations will require employers to engage in a "cooperative dialogue" with employees seeking reasonable accommodations. This "cooperative dialogue" appears to increase an employer's responsibility during the interactive process. The regulations require that a covered employer engage in a discussion with the employee to identify any potential accommodations, and also to evaluate the reasonableness of these accommodations. At the conclusion of the process, the employer must notify the employee in writing of its decision in either granting or denying the proposed accommodation.

Minimum Wage Increase

On December 31, 2017, the minimum wage increased again as part of the state law to ultimately increase the state-wide minimum wage to $15.00 per hour. The new minimum wage standards are:

- $13.00/hr. – NYC employers with 11 or more employees
- $12.00/hr. – NYC employers with 10 or fewer employees
- $11.00/hr. – Nassau, Suffolk, and Westchester counties
- $10.40/hr. – Remainder of New York State

Note that these rates are different than those for fast food workers, who will receive minimum wage pay increases on a separate schedule.

Increase in Salary Threshold for Overtime Exemptions

The New Year will also mark an increase in the state salary threshold for those employees who are considered exempt from overtime under the administrative and executive exemptions:

- $975/week ($50,700 annually) – NYC employers with 11 or more employees
- $900/week ($46,800 annually) – NYC employers with 10 or fewer employees
- $825/week ($42,900 annually) – Nassau, Suffolk, and Westchester counties
- $780/week ($40,560 annually) – Remainder of New York State

It’s important to note that these thresholds are higher than those provided by the Fair Labor Standards Act, so employers cannot rely on the federal standards for these exemptions. Exempt employees will still have to meet all other criteria other than the salary level to be considered exempt.