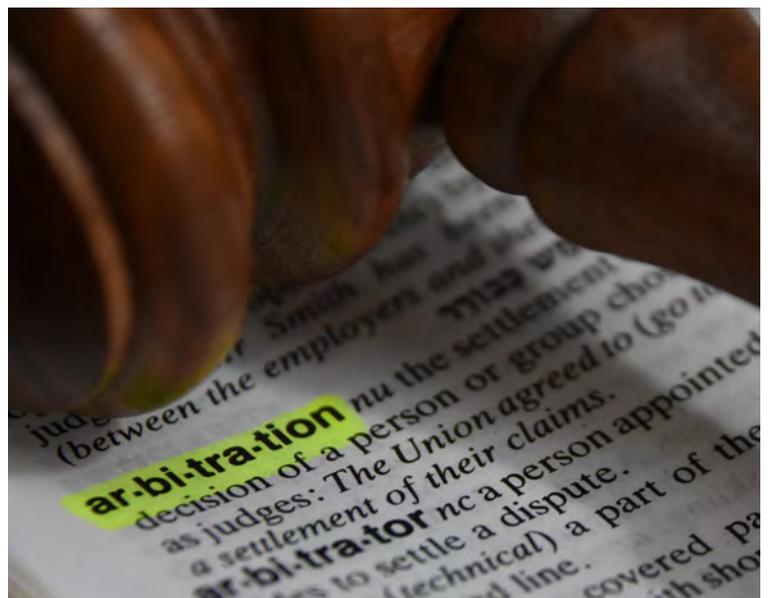


The BakerHostetler Quarterly New York Employment Law Newsletter



Trends

#MeToo

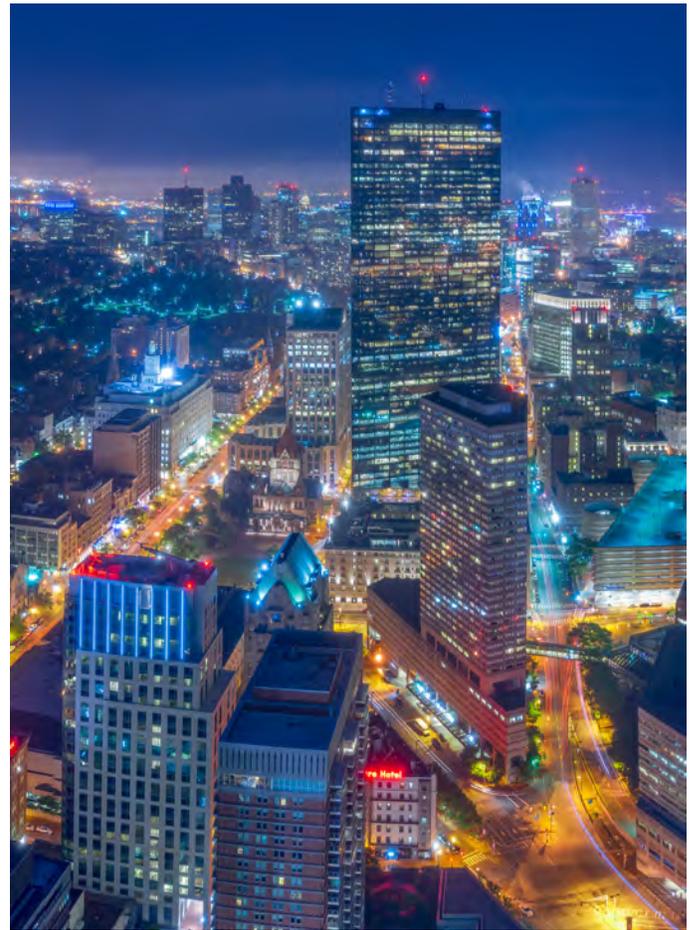
#MeToo continues to impact employers. More states have limited nondisclosure agreements, and, as discussed in the “On the Horizon” section below, there is now a push to limit nondisparagement clauses. Related to #MeToo, the Equal Opportunity Employment Commission (EEOC) recently released its data for fiscal year 2018, which revealed a 13.6% increase in sexual harassment charges from the previous year.

Paid Family Leave

Paid family leave laws are trending. While this will be a hot-button issue in the upcoming federal elections, and the federal government has several bills pending addressing paid leave, many states, such as Connecticut and Maine, have decided to beat the federal government to the finish line and are considering and/or have already passed paid family leave laws of their own. Meanwhile, Maine’s and Nevada’s new laws, which were passed in late May and early June, respectively, will go into effect in 2020 and will permit leave for any reason. Connecticut’s bill is awaiting the signature of the governor, who is expected to sign, and will provide employees paid leave to care for themselves or their family members.

Minimum Wage

Another hot-button issue we have seen is state legislatures passing increases in the minimum wage – which, in many states, including New Jersey and Connecticut, will increase to \$15 per hour. Additionally, there is a bill pending at the federal level to increase the minimum wage to \$15 per hour. Even some corporate officers, including Walmart’s chief executive officer, support a raise in the federal minimum wage. The federal government’s last increase in wages was in 2009, when the federal minimum wage rose from \$6.55 per hour to \$7.25 per hour. While Walmart has raised its minimum wage to \$11 per hour, Amazon and Target have agreed to raise their minimum wages to \$15 per hour. It is likely that this issue will also play a role in the upcoming federal elections, and we are likely to continue hearing about raising the minimum wage.



Massachusetts Paid Family and Medical Leave: Where Do We Stand With the Upcoming Deadlines?

As previously reported in our Employment Law Spotlight blog last summer, Massachusetts Gov. Charlie Baker signed a comprehensive bill requiring employers in the state to provide workers with paid family and medical leave (PFML). As Massachusetts employers should know by now, the new law will provide workers with up to 12 weeks of job-protected paid leave to care for a seriously ill or injured family member, to care for a new child, or to meet family needs arising from a family member’s active-duty military service. It also authorizes up to 20 weeks of job-protected paid leave to recover from a worker’s own serious illness or injury or to care for a seriously ill or injured service member. Many of the benefits provided for in the law, including parental leave, will become available to workers beginning in 2021.

Although employees will not be entitled to take leave under the new law until Jan. 1, 2021, employers face upcoming deadlines starting as early as June 30, 2019. Notably, PFML will be regulated by the Department of Family and Medical Leave (DFML) and covers all Massachusetts employers, regardless of size. Several of the deadlines that were initially set by the DFML have been recently delayed. Below is a brief summary of the upcoming deadlines as they currently exist.

As of now, in order to comply with the PFML benefit, all Massachusetts employers must do the following by **June 30, 2019**:

- Post the PFML poster (provided by the DFML). The poster must be available in English and each language that is the primary language of five or more individuals in their workforce, if these translations are available from the DFML.
- Provide personal written notice of PFML benefits, contribution rates and other provisions as outlined in the law, in paper or electronic form, to current employees and covered 1099 independent contractors. The DFML has made template notices available, including some translated versions, since the notice must be written in the employee's/contractor's primary language. Employers must issue a PFML notice in the employee's/contractor's primary language within 30 days of their first day of employment/service. The notice must include the opportunity for workers to acknowledge receipt or decline to acknowledge receipt of the information. Failure to provide written notice may result in fines of \$50 per worker for the first violation and \$300 per worker for each subsequent violation. According to the DFML, however, in the event that an employee or independent contractor fails to acknowledge receipt, the DFML will consider the employer to have fulfilled its notice obligation as long as it can establish that the notice and opportunity to decline or acknowledge receipt was provided to the entire workforce.



And by September 20, 2019, employers who already provide paid family leave benefits may apply for an exemption from collecting, remitting and paying PFML contributions. However, the July 1 withholding deadline still applies, and this application deadline impacts the contribution requirements only if the application is approved.

Shortly thereafter, by **October 31, 2019**, employers must also:

- Make payroll withholdings based on contribution rates to fund the program.
- Complete quarterly filings and submit contributions for the previous calendar quarter (July-September) through MassTaxConnect.

If you have any questions regarding any of these upcoming deadlines, we are here to help.



DOL Proposes New Definition of Joint Employer

As we previously reported in our Employment Law Spotlight Blog, on April 1, the Wage and Hour Division of the U.S. Department of Labor (DOL) proposed a new, four-part test for determining “joint employment” under the Fair Labor Standards Act (FLSA). According to the DOL, the proposed four-part balancing test is slated to eliminate any circuit splits over the issue and is supposed to make joint employer analysis “simple, clear-cut, and easy to apply.” The test considers whether the potential joint employer actually exercises the power to:

1. Hire or fire the employee.
2. Supervise and control the employee's work schedules or conditions of employment.
3. Determine the employee's rate and method of payment.
4. Maintain the employee's employment records.

The reserved right to do these things would not be relevant to a company's status as a joint employer. To be a joint employer, it must actually do them.

The DOL would permit other factors to be considered in the joint employment analysis, but only if they tend to show whether the potential joint employer is exercising significant control over the terms and conditions of the employee's work, or otherwise acting directly or indirectly in the interest of the employer in relation to the employee.

The new rule would clarify that certain business practices are also not suggestive of joint employment. For example, none of these activities would make a finding of joint employment more likely:

- Providing a sample employee handbook to a franchisee.
- Participating in or sponsoring an association health or retirement plan.
- Allowing an employer to operate a facility on one's premises.
- Jointly participating with an employer in an apprenticeship program.



The new rule would provide that certain types of business agreements are not indicative of joint employment. For example, requiring an employer to institute workplace safety measures, wage floors, sexual harassment policies, morality clauses, or requirements to comply with the law or promote other desired business practices would not be evidence in favor of joint employment.

On May 13, the DOL announced that the comment period originally set to end on June 10 has been extended until June 25. Based on the comments, the DOL could decide to modify the proposed rule, rewrite it or scrap it entirely. We will keep our eyes and ears open to see what happens!

Bank Settles \$5 Million Parental Leave Discrimination Lawsuit

Following up on our previous report regarding a \$1.1 million class settlement of the EEOC's first parental leave lawsuit against a large cosmetics company, a large bank recently agreed to pay \$5 million to settle a class action parental leave lawsuit brought by the American Civil Liberties Union and a plaintiffs' firm on behalf of an employee. The lawsuit alleges that the bank discriminated against fathers based on gender stereotypes by giving mothers more parental leave. The settlement, once approved by the court, will be payable to a class of hundreds, if not thousands, of male employees who can demonstrate that between 2011 and 2017 they would have taken the full 16 weeks of primary caregiver leave had they not been deterred from doing so.

The plaintiff in the lawsuit, a male employee, requested 16 weeks of parental leave based on the bank's parental leave policy, which provides 16 weeks of leave to "primary caregivers" and two weeks of leave to "non-primary caregivers." He alleged that the bank informed him that "per our policy, birth mothers are what we consider as the primary caregivers" and that he could take primary caregiver leave only if he could prove that his spouse or partner was back at work or "medically incapable" of caring for the child. The employee understood the policy to mean that if he were a birth mother, he would presumptively be eligible to receive 16 weeks of paid parental leave as a primary caregiver, regardless of whether his spouse had returned to work or was medically capable of providing care for their child. Because his wife, a teacher, was off for the summer and not medically incapable of caring for their child, his request was denied, and he was eligible to take only two weeks of non-primary caregiver leave.

The lawsuit challenged the bank's alleged unequal application of its policy. The employee alleged that in denying his request for primary caregiver leave, the bank improperly presumed, based on gender stereotypes, that men cannot be primary caregivers. The bank maintains that its policy was always gender neutral.

Under Title VII of the Civil Rights Act of 1964, it is illegal to treat men and women differently based on gender stereotypes. The EEOC has issued guidance regarding parental leave policies, stating that while employers can treat men and women differently due to physical limitations on women imposed by pregnancy or childbirth with respect to parental leave, they cannot treat men and women differently with respect to child-bonding leave.



Although the bank continues to maintain a bifurcated parental leave policy, it has revised the policy to make clear that both mothers and fathers can be eligible for primary caregiver leave. The bank has also agreed to train its human resources representatives regarding applying the policy fairly to both men and women.

The effect of this settlement is wide-ranging. In order to promote gender neutrality, many employers use the terms “primary” and “secondary,” or “non-primary,” to describe caregivers in their parental leave policies. However, there are risks to using these terms in a parental leave policy if they are not properly defined, are not properly understood, or are applied differently to male and female employees with respect to child-bonding leave. Further, employers should not presume that male employees cannot be primary caregivers. Employers that offer different levels of parental leave for different groups of employees should carefully draft their policies based on applicable legal guidance and train their human resources professionals appropriately.

If you would like assistance with reviewing your company’s parental leave policy, our New York Labor & Employment Group is available to help.

Amendment to New York State Election Law for Time Off to Vote

In April, the New York State Election Law was amended to provide that New York state employees who are registered voters may, without loss of pay for up to three hours, take off so much working time as will enable them to vote in any election. Previously, the Election Law provided that an employee was entitled to time off to vote only if he or she did not have four consecutive hours in which to vote between the opening of the polls and the start of the employee’s work shift, or the end of the employee’s shift and the closing of the polls. Furthermore, an employers’ pay obligation was limited to only two hours. This is no longer the case.

Employers may not require employees to use paid time off (PTO) for this leave. Employees seeking time off to vote must notify their employers at least two working days before the election. Employers may designate that any requested time be taken at the beginning or end of an employee’s shift.

In addition, employers are required to post a notice in the workplace, not less than 10 working days before every election, setting forth the provisions of this new law, and the notice must remain posted until the close of the polls on an election day.

DOL Adopts Narrowed Take on Who Is an Employee

In late April, the DOL issued an opinion letter on the employee versus independent contractor classification, stating that workers for an unidentified gig economy platform connecting service providers with customers are contractors – not company employees who are covered by the FLSA’s minimum wage and overtime protections – because they are economically independent from the company. The DOL described the business as a “virtual marketplace company that operates in the so-called ‘on-demand’ or ‘sharing’ economy.”

In reaching this conclusion, the DOL Wage and Hour Division analyzed the company’s business model using a six-factor test aimed at discerning the “economic realities” of whether workers are employees. These factors include the company’s “control” over the workers; the “permanency” of the relationship; the workers’ “investment in facilities, equipment or helpers”; the “skill, initiative, judgment or foresight” their work requires; their “opportunities for profit or loss”; and the extent of their services’ integration into the business.



The opinion letter is much more business-friendly than were previous letters issued under the prior administration, and it provides a checklist of factors for employers to consider in structuring contractor arrangements. It also provides peace of mind to employers in the gig economy platform space and offers them protections under the Portal-to-Portal Act, which protects from liability businesses that rely in good faith on the DOL's interpretations.

In a similar vein, the National Labor Relations Board's General Counsel's Office recently concluded in an advisory memo that Uber drivers are not legal employees for the purposes of federal labor laws, meaning they cannot form or join a union. The office concluded that Uber's business model avoids the control of drivers traditionally associated with such systems and affords drivers significant entrepreneurial opportunity. In issuing the memo, the office relied on a recent decision in the *SuperShuttle DFW* case, which established a new test based on "entrepreneurial opportunity" and consideration of at least 10 factors relevant to an employment relationship.

Notwithstanding recent pro-business federal guidance on the issue, several states maintain their own tests for the employee versus contractor classification, which often differ from federal standards, only adding to the uncertainty in this area of the law.

NYC to Ban Preemployment Marijuana Testing

Last month, New York City Mayor Bill de Blasio signed into law a bill prohibiting preemployment drug testing for the presence of marijuana or tetrahydrocannabinol. The law will take effect on May 10, 2020 – one year after it was signed into law. Although many employers are opting to forgo marijuana testing due to the expanding legalization of medical and recreational marijuana, this law goes further by prohibiting preemployment marijuana testing, making it the first of its kind.

Notably, the law contains several exceptions. First, it does not apply to any individuals applying for work (a) in law enforcement positions, such as police officers, peace officers or investigators with the department of investigation; (b) as laborers, mechanics, workers, contractors or other persons working on a public work site; (c) in any position that requires compliance with Section 3321 of the NYC Building Code; (d) in any position requiring a commercial driver's license; (e) in any position requiring the supervision or care of children, medical patients or vulnerable persons as defined by the New York Social Services Law; or (f) in any position that could "significantly impact the health

or safety of employees or members of the public," as determined by the Department of Citywide Administrative Services or identified in regulations issued by the NYC Commission on Human Rights.

Second, the law includes an exception for drug testing applicants when required by rules and regulations (a) issued by the U.S. Department of Transportation, the New York State Department of Transportation or the New York City Department of Transportation; (b) any contracts or grants from the federal government to an employer; or (c) federal or state statutes. Third, the law exempts preemployment drug testing when required pursuant to the terms of a collective bargaining agreement. This new law comes amid rapid changes to marijuana laws at both the federal and state levels. Following their recent failure to approve a measure that would legalize the recreational use of marijuana, New York state lawmakers recently approved a measure to decriminalize marijuana. As a result, the possession of less than an ounce of marijuana will be a violation subject to a \$50 fine, with larger fines for possession of up to 2 ounces. The possession of than 2 ounces of marijuana will remain a crime, and smoking marijuana in public remains a finable violation. In the meantime, although New York City employers have one year to comply with this new law, they should begin to update their drug testing policies and procedures to ensure timely compliance with this new law.





NYC Finally Issues Model Sexual Harassment Training

As discussed in our previous *New York Quarterly Newsletters*, employers in New York City who have 15 or more employees (inclusive of independent contractors) are required to provide anti-sexual harassment training on or before Dec. 31 to all employees who work in New York City (including employees who work only part time in New York City or who only interact with employees working in New York City).

Until April, employers were left guessing what a model training module from the city would look like, but the city has now posted its model training module – a 45-minute video (a different format than the state’s PowerPoint model presentation) that can be found on New York City’s website and will satisfy the mandatory training requirement for both New York state and New York City. The city’s video appears to differ most from the state model training in the emphasis it places on explaining gender identity and gender stereotypes. Employers are not required to use the city’s model video and instead may use their own training methods, provided such methods meet the city’s minimum requirements.

The Supreme Court Limits Employers’ Defenses in Discrimination Cases

On June 3, the United States Supreme Court ruled that the requirement for complainants to file Title VII claims with the EEOC or the state equivalent prior to filing suit was not jurisdictional, and thus, a complainant’s failure to do so does not necessarily bar a suit from proceeding. The Court explained that “jurisdictional” relates either to subject matter (the kinds of cases a court may hear) or personal (the persons over whom a court may rule). The Court explained that the requirement to file with the EEOC was a “claim-processing rule,” rather than a matter of jurisdiction. The Court held that meant the requirement could be waived if a defense regarding a plaintiff’s failure to meet the requirement is not timely asserted.

In the case before the Court, the plaintiff had filed a charge of discrimination with the state agency asserting sex discrimination and retaliation, but not specifically alleging religious discrimination (although the word “religion” appeared in the margin of a supplemental document submitted to the state agency). When the plaintiff filed her suit in federal court, she claimed she was discriminated against on the basis of religion, sex and retaliation. The defendant did not raise the failure to exhaust administrative remedies defense until years into the litigation. The Court’s finding that the requirement was not jurisdictional, and that the defendant did not timely assert the defense, held that the religious claim could proceed. This case acts as a reminder for all employers to timely assert a defense related to a plaintiff’s failure to exhaust their administrative remedies.

Keep a Lookout:

Connecticut to Raise Minimum Wage to \$15 per Hour and to Offer Generous PFML

The Connecticut Legislature has been busy! On May 28, Connecticut Gov. Ned Lamont signed a minimum wage measure that would raise the Connecticut minimum wage to \$15 per hour in 2023, which is more than double the current federal minimum wage of \$7.25 per hour.

Under the new law, the current Connecticut minimum wage of \$10.10 per hour will increase to \$11 per hour on Oct. 1, 2019, to \$12 per hour on Sept. 1, 2020, to \$13 per hour on Aug. 1, 2021, to \$14 per hour on July 1, 2022, and then to \$15 per hour on June 1, 2023. In doing so, Connecticut has joined six other states – California, Illinois, Maryland, Massachusetts, New Jersey and New York – in raising its minimum wage to \$15 per hour.



Despite the minimum wage increase, Connecticut's minimum tipped wage for hotel and restaurant employees remains \$6.38 per hour, and \$8.23 per hour for bartenders. Connecticut employers are required to pay to employees the difference between the tipped wage and the state minimum wage if the employees do not receive the difference in wages with tips. The new law requires the Connecticut Labor Commissioner to conduct a study on workers who receive gratuities and submit a report to the Legislature by January, which could result in raising the minimum tipped wage.

Additionally, the Connecticut Legislature recently passed a generous PFML bill, which Gov. Lamont is expected to sign into law, which would make Connecticut the seventh state (in addition to California, Massachusetts, New Jersey, New York, Rhode Island and Washington, as well as the District of Columbia) to offer paid family leave.

Assuming the bill is signed into law, Connecticut employees will be eligible for 12 weeks of paid time off over a 12-month period for reasons allowed under Connecticut's Family and Medical Leave Act (FMLA). An additional two weeks of leave will be available for serious health conditions resulting in incapacitation during pregnancy.

The benefit, which will be available to employees beginning on Jan. 1, 2022, will be funded by a 0.5% employee payroll tax (similar to the tax in New York and New Jersey) beginning on Jan. 1, 2021. The benefit will provide a wage replacement capped at up to 60 times the state's minimum wage. As of Jan. 1, 2022, when the state's minimum wage will be \$13 per hour, the maximum benefit will be \$780 per week.

The law will also expand Connecticut's existing FMLA coverage. For example, by Jan. 1, 2022, it will extend the current FMLA coverage from caring for a spouse, children or parents to include caring for siblings, grandparents, grandchildren and "anyone else related by blood or affinity whose close association the employee shows to be the equivalent of those family relationships." The Connecticut Department of Labor is expected to provide guidelines regarding this standard on or before Jan. 1, 2022. The bill also expands FMLA coverage to include private-sector employers with at least one employee (as compared with 75 employees) and lowers the eligibility requirements to only three months of employment and earning at least \$2,325 in a "base period" (as compared with 12 months of employment and 1,000 hours worked). The bill also changes the amount of total leave available from 16 weeks in a 24-month period to 12 weeks in a 12-month period.



If you need assistance or have questions about these new laws, our team would be happy to help.

Increase to Federal Minimum Salary Threshold for Overtime Exemptions

As previously reported in our Employment Law Spotlight blog, after the March 7 unveiling by the DOL of its long-awaited proposed rule – which would make more employees eligible for statutory overtime pay – on March 22, the DOL announced the official publication of its Notice of Proposed Rulemaking in the Federal Register and the commencement of the 60-day period for public comments.

Most notably, the DOL's new rule will increase the minimum salary required for an employee to qualify as exempt from the FLSA's overtime requirements from \$455 to \$679 per week (\$35,308 annually, up from \$23,660). In addition, the new rule:

- Boosts the total annual compensation requirement for employees to qualify for the “highly compensated employee” exemption from \$100,000 to \$147,414 per year.
- Permits employers to use nondiscretionary bonuses and incentive payments, including commissions and other payments tied to productivity and profitability, paid on at least an annual basis, to satisfy 10% of the minimum salary threshold.
- Commits the DOL to conducting periodic reviews of the minimum salary threshold in order to update the amount, keeping it in line with future wage rates and inflation, although any future increases would not be automatically implemented but would instead be subject to the notice-and-comment rule-making requirements.

Importantly, the DOL's proposed new rule does not make any revisions to the duties requirements of the overtime exemption rule.

The proposed new rule also does not change the regulations governing overtime for police officers, firefighters, paramedics, nurses, and laborers such as nonmanagement production line employees and nonmanagement employees in maintenance, construction and similar occupations.

On March 29, the DOL published its newly proposed rule, triggering a 60-day public comment period that expired May 28. Presumably, the DOL will be reviewing the comments it receives and publishing its final rule, though the final rule's promulgation date is uncertain. Given the anticipated political and judicial battles over what the new threshold should be, it is not clear what overtime salary exemption threshold ultimately will emerge. While an increase in the threshold is likely, the amount and effective date of the increase remain uncertain.



While we anxiously await what new threshold (if any) will emerge, employers should – as will we – closely monitor administrative, judicial and legislative developments relating to the proposed increase in the salary exemption overtime threshold. Employers should also begin preparing now to ensure that their payroll procedures comply with the new rule by first reviewing payroll and salary records to determine which employees would no longer be exempt under the higher salary requirements. For those employees, companies will need to decide whether or not to keep the compensation rates the same but begin paying these employees overtime for all hours worked over 40 in any given workweek or increase their annual salary to meet the new \$35,308 salary threshold. Employers are not limited solely to increasing annual salaries, however. The new rule does give employers the option of using annual bonuses and incentive payments to satisfy up to 10% of the salary threshold, including a yearly catch-up payment at the end of the year. Employers may not, however, use bonuses and incentive payments to meet the new minimum salary threshold for the highly compensated employee exemption. Further, employers must remember to check state and local minimum salary thresholds, which must also be adhered to.



House Passes Broad LGBTQ Rights Legislation Ahead of Supreme Court LGBTQ Decision

As we have previously discussed, there is a circuit split as to whether Title VII's prohibition on sex discrimination protects against discrimination based on sexual orientation. The Second Circuit recently held that it did (based partly on Seventh Circuit precedent), and other circuits, such as the Eleventh and Third, have held that it does not protect against sexual orientation discrimination under its prohibition of sex discrimination. Based on the circuit split, in April, the Supreme Court finally made a decision to grant certiorari to three cases addressing whether Title VII protects against sexual orientation and gender identity discrimination – one of which was the employer's appeal of the Second Circuit case that held Title VII's prohibition of sex discrimination included discrimination based on sexual orientation. A decision on the Supreme Court case is not expected until early 2020.

Perhaps in an effort to moot the need for such a decision, the United States House of Representatives passed a bill on May 17 that would amend several civil rights laws to affirmatively provide protection against discrimination on the basis of sexual orientation and gender identity (lesbian, gay, bisexual, trans and queer) as well as pregnancy and childbirth (the Bill). The Bill passed easily in the Democrat-controlled House but is expected to have more difficulty in the Republican-controlled Senate. However, the Bill has the support of many large businesses (Apple, Amazon and more than 200 others) and the U.S. Chamber of Commerce, which may convince Republicans to sign on.

Although many states, including New York, have their own prohibitions against sexual orientation and gender identity discrimination – so the Bill and the Supreme Court's upcoming decision may not drastically change the legal landscape there – several states do not have such protections against these forms of discrimination, and the Bill and potential decision will have the effect of creating new protected classes that employers will be required to educate their supervisors, human resources staff and employees on. Additionally, the outcome of the Bill and the Court's decision will have an effect on the forum and remedies that may be available to individuals, even in states that recognize sexual orientation and gender identity as protected classes.

Update on EEO-1 Reporting

With continued confusion around the EEO-1 reporting requirements and deadlines, the EEOC has finally provided some additional details regarding the anticipated opening of the EEO-1 pay data reporting helpdesk and portal.

The EEOC has stated that a helpdesk will be operational starting approximately June 17. The contact information for the helpdesk will be EEOCcompdata@norc.org and 877.324.6214.

The EEOC has also recently reported that it expects a web-based portal for the collection of 2017 and 2018 Component 2 data to be active by mid-July 2019, which should be available at <https://eeocomp2.norc.org>. Although this URL is not yet active, the EEOC did state that it will notify filers prior to the launch of the portal, and that it will provide FAQs and other materials to help filers better understand the Component 2 data submission requirements and process.

Nondisparagement Clauses Post-#MeToo

As a result of the #MeToo movement, several states moved to quash the use of nondisclosure agreements in cases where sexual harassment was alleged. Many employers voluntarily agreed to stop using such clauses where sexual harassment was alleged, even when state law did not prevent them from doing so. Now, nondisparagement clauses are under attack. Many employers utilize nondisparagement clauses to prevent employees who have received a settlement or severance payment from speaking poorly of the company. At least seven states (including Connecticut), however, are attempting to limit the use of these clauses. In many ways, if a state prohibits nondisclosure agreements already, a nondisparagement clause, at least as it relates to the underlying harassment, would be unenforceable anyway, so in many ways this is a restatement of the nondisclosure limitations. In order to determine whether a nondisparagement clause is right for your business, please reach out to a member of our team.

New York State Expected to Vastly Overhaul Harassment/Discrimination Laws Again

Late on June 19, New York lawmakers passed a bill that makes wide-sweeping changes to New York state discrimination and harassment law. Gov. Andrew Cuomo has indicated that he will sign the bill, but he has not done so at this point. The bill implements changes related to the construction, definitions, proofs, affirmative defenses, policies and remedies related to discrimination and harassment.

Construction, Definitions and Proofs

First, the bill amends the definition of “employer” in the New York State Human Rights Law (NYSHRL) to include *all* employers within the state, including state and political subdivisions.

Second, it extends the filing deadline for Division of Human Rights sexual harassment complaints from one year to three years.





Third, the bill makes clear that the NYSHRL should be interpreted on its own and construed “in order to maximize deterrence of discriminatory conduct,” regardless of how comparable federal law is construed. This amendment likely means that courts will interpret the NYSHRL more akin to the far more employee-friendly New York City Human Rights Law, rather than federal law as they currently do.

Perhaps the biggest impact employers will feel with this new law is that it removes the requirement that a plaintiff show that he or she suffered “severe or pervasive” treatment in order to prove a hostile work environment claim. Instead, the bill provides that harassment is unlawful when an individual is subjected to inferior terms, conditions or privileges of employment because of the individual’s membership in a protected class *regardless of whether the alleged conduct was severe or pervasive*. The bill does, however, provide an affirmative defense that no liability should attach if the employer can show that the harassing conduct did not rise above what a reasonable member of the same protected class who was a victim of discrimination would consider petty slights or trivial inconveniences. It is unclear how employers will measure or prove what a reasonable member of the same protected class would consider petty slights or trivial inconveniences.

And in a huge loss for employers, the bill takes a stab at *Faragher-Ellerth* by stating that the fact that an individual did not make a complaint about harassment to an employer is not determinative of whether an employer shall be liable. Presumably this means that employers are still free to make the *Faragher-Ellerth* argument (i.e., that they had policies for preventing and reporting harassment, and the employee failed to take advantage of such resources) in a lawsuit, but that the court may or may not consider it. In short, employers have now lost a key affirmative defense in sexual harassment cases.

Expansion of Post-#MeToo Laws

The bill also expands protections that were recently enacted post-#MeToo by expanding the restrictions on nondisclosure and arbitration agreements to *all* forms of discrimination, not just sexual harassment, and expanding protections for non-employees. The bill imposes liability on employers for *any* unlawful discrimination practices it permits against non-employees in the workplace. Previously, non-employees were protected only from sexual harassment.

Additionally, employers will be forced to once again provide new anti-harassment policies embodying this new definition of harassment. The policies must be provided in English and the primary language identified by each employee. The policy must be provided upon

hire, and at each yearly anti-harassment training. The state will be releasing a new model policy and revising it on an as-needed basis.

NYSHRL Violations Now Bring Attorneys' Fees

With this bill also comes attorneys' fees for all NYSHRL claims against employers with regard to any unlawful discrimination practices. The bill also revokes a court's discretion and instead dictates that such attorneys' fees *shall* be awarded to any prevailing party. The requirement for employers to obtain attorneys' fees upon prevailing in the case, however, remains that they must prove that the claim asserted was frivolous.

This is a vast departure from federal law and a huge blow to employers. Employers should be even more vigilant in training employees on what inappropriate behavior is, take complaints of any inappropriate behavior seriously and immediately nip any bad behavior in the bud. Supervisors should take care to ensure there is not even an appearance of harassment.

Additional Employee Protections Approved by New York Legislature

The New York Legislature is not finished with employers just yet – on June 20, lawmakers passed another bill strengthening protections for employees. This was a double hitter focused on equal pay. The first bill prohibits employers from asking about or relying upon salary history for determining salary amounts for a new applicant or promoted employee, unless the employee voluntarily discloses his/her previous pay. The bill also prohibits employers from retaliating against an applicant or employee on the basis of his/her disclosed salary and his/her refusal to disclose salary history. If signed into law, employees will have a private right of action if they believe their employers violated the law. Some New York employers are already familiar with the requirements of the salary history ban as New York City and some other localities have already implemented their own bans. But if this new bill is signed into law, all employers across the state will have to comply. Employers will need to train all interviewing staff to refrain from asking about previous salaries and remove all inquiries from any application documents.

The second piece of legislation expands the equal pay law from requiring equal pay only between sexes to requiring equal pay for all protected classes under New York law (i.e., age, creed, race, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, or domestic violence victim status). This bill also lowers the bar to prove a violation of equal pay by decreasing the standard from being paid less for equal work to being

paid less for “substantially similar work.” The bill permits pay differentials when “based on a seniority or merit system, a system measuring earnings by quantity and quality, or bona fide factor other than status within one or more protected class or classes which is job-related and consistent with business necessity.” If signed by the governor, the law will take effect within 90 days of such signature, giving employers a short window to ensure compliance. In the meantime, New York employers should be sure to audit their pay to ensure there are not employees who are outliers related to pay, and ensure that all pay decisions and predetermined pay scales are based on job-related skills and benchmarks that are applied equally across all employees. Employers should also ensure that any job-related skills and benchmarks do not disparately impact employees of a certain protected class as that is also prohibited by the bill.



Connecticut Expands Employers' Obligations and Employees' Protections in Fight Against Sexual Harassment

On June 18, Connecticut Governor Ned Lamont signed into law [Connecticut Public Act No. 19-16](#) (the Law), publicly known as the "Time's Up" bill. The Law expands the training and posting requirements for employers in Connecticut and will become effective on October 1, 2019.

Training Requirements

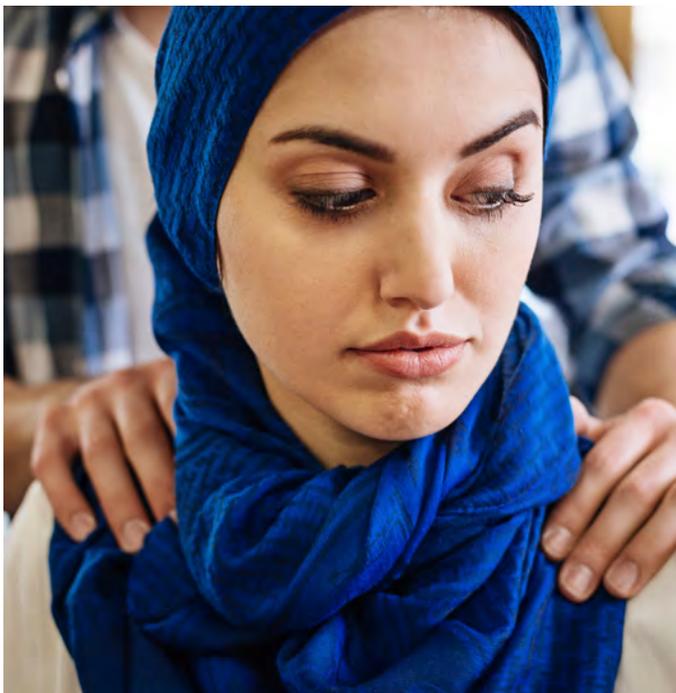
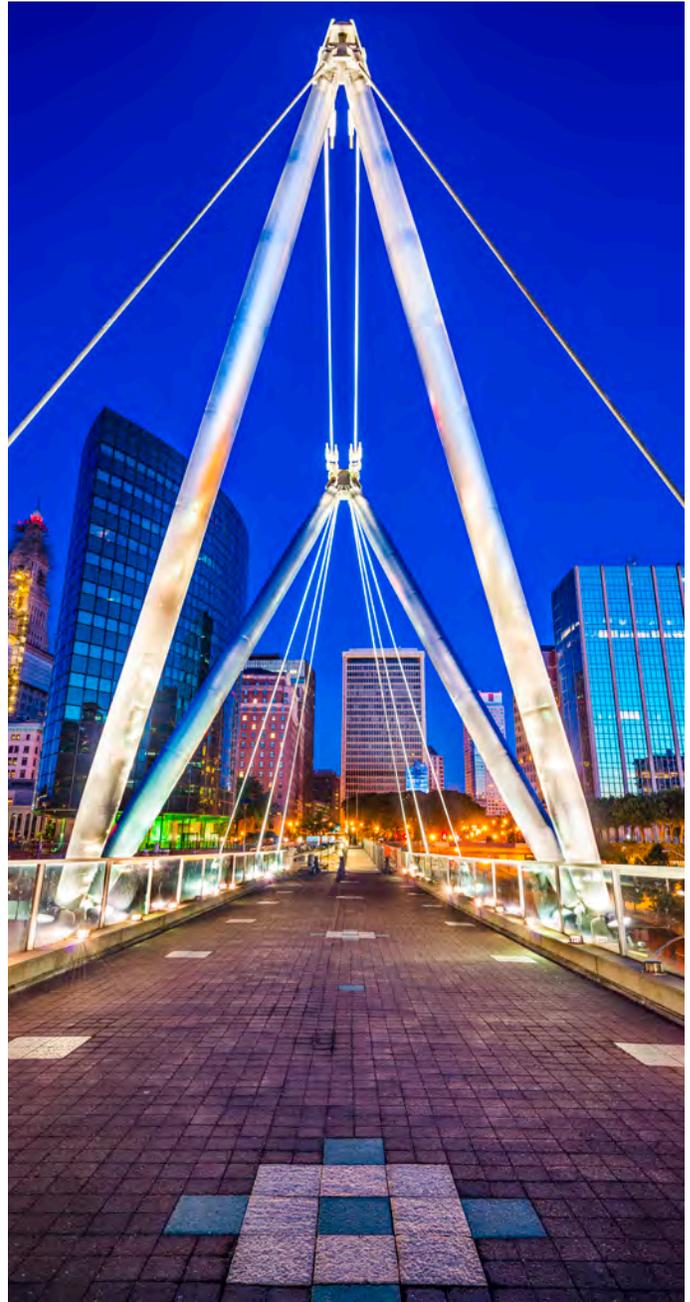
Connecticut employers will have new mandatory training requirements depending on their size.

Under the Law, employers **with three or more employees** must provide two hours of sexual harassment training to **all** employees by October 1, 2020 (or within six months of hire, after that time). Employers who had already provided such training to their employees after October 1, 2018, do not need to provide it a second time.

Additionally, all Connecticut employers **with fewer than three employees** are now required to provide sexual harassment training to their **supervisory** employees. The previous law imposed supervisory training only on employers with more than 50 employees. This training must also be provided by October 1, 2020, or within six months of an employee assuming a supervisory role.

Employers must provide supplemental training to supervisors and employees at least every 10 years.

The Connecticut Commission on Human Rights and Opportunities (CHRO) will create and provide training materials to employers at no cost.



Posting Requirements

The Law also expands posting requirements for employers. The previous law required employers with at least three employees to post, in a prominent location, information on the illegality of sexual harassment and remedies available to victims of harassment. The Law now requires that employers with three or more employees provide the information to their employees not later than three months after an employee's start date.

Employers may send the information to each employee by email with a subject line that includes the words "Sexual Harassment Policy" or similar words if the employer knows the employee's email address.

Alternatively, the employer can post this information on its website or provide an employee with a link to the CHRO’s website concerning the illegality of sexual harassment and the remedies available to victims of sexual harassment.

Protections for Employees

Effective October 1, 2019, an employer will have to obtain employees’ consent in writing before relocating them, changing their schedule, or making any other modifications to the terms and conditions of their employment, after receiving a complaint of sexual harassment from them.

The Law also extends the statute of limitations for filing a discriminatory practice claim with the CHRO from 180 days to 300 days.

The CHRO will be able to award reasonable attorneys’ fees to a prevailing complainant. Under the Law, courts will be able to award punitive damages to successful plaintiffs.

Penalties

If an employer fails to provide the mandatory training, it will be subject to fines of up to \$750. The CHRO can also recover a civil penalty from the employer, not to exceed \$10,000, if a discriminatory practice has been established by “clear and convincing evidence.” The amount will be used by the agency to advance the public interest in eliminating discrimination.

Bottom Line

Employers will need to carefully review, with counsel, the guidance released by Connecticut to determine how to comply with the new requirements for conducting sexual harassment prevention training and implementing a sexual harassment prevention policy. While the model training guide has not yet been issued by the CHRO, employers should use this opportunity to review their current policies and assess the best way to announce these changes to their employees.



Key Contacts

Amy Traub – Editor

T +1.212.589.4248
atraub@bakerlaw.com

Tracy Cole

T +1.212.589.4228
tcole@bakerlaw.com

Fanny A. Ferdman

T +1.212.589.4283
fferdman@bakerlaw.com

Marc-Joseph Gansah

T +1.212.589.4611
mgansah@bakerlaw.com

Amanda Van Hoose Garofalo

T +1.212.589.4610
agarofalo@bakerlaw.com

Paul Rosenberg

T +1.212.589.4299
prosenberg@bakerlaw.com

Saima Z. Sheikh

T +1.212.589.4243
ssheikh@bakerlaw.com

bakerlaw.com

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