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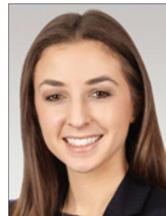
Outside Counsel

Five Key Employment Law Issues Facing NY Employers in 2020

December is an opportune time for employers to take stock of their policies and prepare for any compliance issues that might arise in the New Year. Accordingly, the following provides a summary of five key employment law issues facing New York employers in 2020.



By **Jason B. Klimpl**
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Continued Compliance With #MeToo Movement Legislation

There have been significant legislative changes in New York aimed at combating sexual harassment in the workplace since the #MeToo movement first gained traction in late 2017. On April 12, 2018, New York Governor Andrew Cuomo signed an omnibus anti-sexual harassment legislative package. Similarly, on May 8, 2018, New York City Mayor Bill de Blasio signed the Stop Sexual Harassment in NYC Act, which imposed new requirements on employers relating to sexual harassment prevention. Most recently, on Aug. 12, 2019, Governor Cuomo signed legislation expanding workplace protections against sexual harassment. See Outside Counsel, Stacey Usiak and Andrew Yacyshyn, *5 Best Practices for NY Employers To Remain Complaint With Harassment Laws*, NYLJ, Sept. 17, 2019, discussing the first wave of legislation, such as the employee training requirements. And in October 2019, New York State released updated FAQs to provide additional guidance on the new legislative requirements.

Establishing Unlawful Harassment. As of Oct. 11, 2019, harassment claims under the New York State Human Rights Law (NYSHRL) are subject to a lower evidentiary standard, making it easier to establish unlawful harassment. Namely, an individual complaining of harassment need not prove the challenged conduct was "severe or pervasive," but merely that it "subjects an individual to inferior terms … of employment" because of protected class membership, unless the conduct at issue amounted to nothing more than "petty slights or trivial inconveniences," effectively mirroring the liberal standards under the New York City Human Rights Law (NYCHRL).

> 2020 may witness a legislative focus on "gig" workers in New York state, as lawmakers continue to push for new protections for workers in an increasingly app-based economy.

Sexual Harassment Prevention Notice. Also as of Oct. 11, 2019, employers must provide employees, both at the time of hiring and at every annual sexual harassment prevention training, with a notice containing the employer's anti-sexual harassment policy and the information presented at the training, in writing in English

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and in the employee's primary language, so long as New York State has published a model in that language. The FAQs clarify that the policy and training materials, which include "any printed materials, scripts, Q&As, outlines, handouts, PowerPoint slides, etc.," may be delivered in print or electronically.

Non-Disclosure Agreements. Additionally, as of Oct. 11, 2019, employers are prohibited from including a confidentiality provision in any agreement that resolves a discrimination claim unless a certain three-part process is followed—namely, the complainant is given 21 days to consider whether to agree to confidentiality; expresses a preference for confidentiality in an agreement; and is given seven days to revoke the agreement. The FAQs clarify that the same limitations, which previously applied only to sexual harassment claims, apply to all discrimination claims.

Protections for Non-Employees Under the NYSHRL. Further, as of Oct. 11, 2019, "non-employees" are able to bring claims of discrimination under the NYSHRL. The FAQ clarify that protected non-employees include, among others, independent contractors, "gig" workers, and temporary employees.

State Hostility To Arbitration Agreements

Recent legislative changes in New York State reflect a hostility towards arbitration agreements in the employment discrimination context. In 2018, New York State passed a statute, codified at §7515 of the CPLR, which generally rendered "null and void" any provision in a contract that required an employee to submit to arbitration to resolve a sexual harassment claim. On Oct. 11, 2019, §7517 was amended to expand this prohibition to *all* discrimination claims.

Unsurprisingly, however, federal courts have repeatedly found that state laws prohibiting the use of arbitration to resolve particular types of disputes are preempted by the Federal Arbitration Act (FAA). Recently, in *Latif v. Morgan Stanley & Co.*, No. 18cv11528, 2019 WL 2610985 (SDNY June 26, 2019), the district court granted an employer's motion to compel arbitration where the employee's offer letter incorporated the employer's arbitration agreement. The court rejected the employee's argument that he was not required to submit to arbitration to resolve his sexual harassment claims on the basis of the new legislation, reasoning that applying §7515 to the parties' agreement would be inconsistent with and preempted by the FAA.

Given the recent amendment to §7517, as well as other possible forthcoming attempts by the New York legislature to avoid FAA preemption, it is likely that litigation concerning the arbitrability of discrimination claims will continue. However, in light of *Latif* and other federal precedent strongly favoring arbitration provisions (including the U.S. Supreme Court's decision in *Epic Sys. v. Lewis*, 138 S. Ct. 1612 (2018)), employers must consider the likelihood that their arbitration agreement will survive, notwithstanding the new state laws.

Increased Protections For 'Gig' Workers

2020 may witness a legislative focus on "gig" workers in New York State, as lawmakers continue to push for new protections for workers in an increasingly app-based economy.

The Dependent Worker Act. Although the 2019 legislative session ended without the passage of the Dependent Worker Act—a bill proposing to classify gig workers as "dependent workers" and extend to them certain rights traditionally reserved for employees—the bill is expected to be debated next legislative session. Namely, the bill seeks to amend the New York Labor Law (NYLL), among other ways, by making a "dependent worker" subject to §191's frequency of pay requirements, §192's direct deposit protections, §195's wage theft notice and record-keeping requirements, and §196-d's gratuity appropriation protections, and the regulations promulgated thereunder.

Amendments to the NYCHRL. Moreover, as of Jan. 11, 2020, gig workers in New York City will statutorily secure new express protections against unlawful discrimination with amendments to the NYCHRL.

New Compensation Practices Requirements and Scrutiny

With upcoming legislative changes and a new decision by the New York Appellate Division, 2020 is also likely

to see an uptick in wage and hour litigation and disputes concerning compensation practices.

Minimum Wage and Salary Threshold Increases. In 2020, the minimum wage for all New York City employers (including now small New York City employers) will be $15.00 per hour. In addition, the minimum wage for employers in Long Island and Westchester will increase from $12.00 per hour to $13.00 per hour, and the minimum wage for employers in the remainder of New York State will increase from $11.10 per hour to $11.80 per hour. The New York State salary level thresholds for exempt administrative and executive employees will also proportionately increase.

Incidentally, pursuant to a final rule issued by the U.S. Department of Labor on Sept. 24, 2019, effective Jan. 1, 2020, the "standard salary level" for "white collar" exemptions will increase from $455 per week to $684 per week.

Compensation History Ban. As of Jan. 6, 2020, New York employers will be banned from inquiring about or relying on compensation history when making employment decisions. Notably, there are salary history bans already in effect in New York City, Westchester, Albany, and Suffolk County, but with some differences (for example, the New York City ban applies only to job applicants and not current employees).

The New York State ban will prohibit employers from: (1) relying on compensation history in determining whether to offer employment to, or the compensation of, a job applicant; (2) seeking, requesting, or requiring compensation history (a) as a condition of being interviewed, considered for employment, or employment or promotion, or (b) from an applicant's employer, employee, or agent or a current employee's employer; or (3) refusing to interview, hire, promote, otherwise employ, or otherwise retaliate against an applicant or a current employee (a) based on their compensatory history, (b) because they did not provide their compensatory history, or (c) because they filed an administrative complaint alleging a violation of the law, subject to limited exceptions, such as when compensation history is disclosed both "voluntarily" and "without prompting."

With the ever-evolving legal landscape in state, it is important that New York employers stay on top of these important legal issues.

Frequency of Pay Requirements. Finally, employers are reminded to carefully comply with NYLL §191's frequency of pay requirements. The Appellate Division recently affirmed in *Vega v. CM & Assocs. Constr. Mgmt.*, 175 A.D.3d 1144 (1st Dept. 2019), that an employee who is paid wages in full but late can maintain a private right of action against their employer. The plaintiff in *Vega* was a "manual worker" who was paid bi-weekly as opposed to weekly, as required by §191. The decision is significant for New York employers as it recognizes the availability of liquidated damages equal to the full amount of any untimely payment of wages. Thus, any repeated failure to timely pay wages could result in substantial liability.

Paid Voting Leave

With the primaries for the U.S. presidential election commencing in February 2020 and the general election scheduled for Nov. 3, 2020, New York employers should be mindful of a recent revision to New York State's election law, which now entitles New York employees who are registered voters up to three hours of paid time off as needed to vote in any election. Employees requiring time off to vote must be afforded such time at either the beginning or end of a workday, at the employer's election, and must notify their employer of their need not less than two working days before the election.

Conclusion

With the ever-evolving legal landscape in state, it is important that New York employers stay on top of these important legal issues.

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