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Expanded Employee Protections for New York Employees in 2019

New York State and New York City legislatures have continued to enact progressive, employee-friendly changes during the first few months of 2019. We previously highlighted New York employment law updates from the end of 2018. Here is a look at recent legal changes New York employers should be aware of and consider in light of their existing workplace policies. Employers must ensure their management teams understand these changes to the law and update policies to ensure compliance.

New York State

Expansion of Human Rights Law to Protect Gender Identity/Expression: Effective February 24, 2019, the Gender Expression Non-Discrimination Act (GENDA) amended the New York State Human Rights Law (NYSHRL) to prohibit discrimination based on an employee's gender identity and/or expression. GENDA defines this protected category as an individual's actual or perceived gender-related "identity, appearance, behavior, expression, or other gender-related characteristics regardless of the sex assigned to that person at birth, including, but not limited to, the status of being transgender."

Extension of Paid Voting Leave: New York State also amended its election law to provide all employees who are registered to vote up to three hours of paid leave, at the beginning or end of their workday, to vote in any election, as long as the request is made at least two days before the election. Previously, New York law only required employers to provide two hours of paid leave to vote under limited circumstances. In addition to providing the leave, at least 10 days before any election and until the polls close, employers must post (in a conspicuous area) a notice that sets forth the provisions of the voting leave law.

New York City

Guidance to Combat Racial Discrimination Based on Hair: In February, we reported that the NYC Commission on Human Rights issued new guidance explaining that policies that ban or restrict hairstyles may constitute race discrimination under the NYC Human Rights Law (NYCHRL). The new guidance focuses on "anti-Black racism" and seeks to allow employees to maintain natural hair or hairstyles that are "closely associated with their racial, ethnic, or cultural identities." Employers may not prohibit or require a change to certain hairstyles, refuse/limit job opportunities based on hairstyle (i.e., refuse a customer-facing role), force employees to hide hair under a hat/net or establish a "neutral" policy that has a disparate impact on certain races. Employers **are permitted** to enforce appearance policies for legitimate health or safety concerns.

Protections for an Individual's Reproductive Health Choices: NYC also amended the NYCHRL to include protections against discrimination and harassment related to "an individual's reproductive health choices." This amendment makes it an "unlawful discriminatory practice" for an employer to take an adverse employment action against an employee based on his/her sexual and reproductive health decisions, which are defined as "any decision by an individual to receive services, which are arranged for or offered or provided to individuals relating to sexual and reproductive health, including the reproductive system and its functions." This includes, for example, family planning services, STD prevention/testing and abortions.

Lactation Room and Policy Requirements: NYC employers must provide a designated lactation room and refrigerator suitable for breast milk storage in "reasonable proximity" to the employee's work area. The law sets forth specific elements for the provision of a lactation room: It must be private and clean —**not a bathroom**— and contain a chair, an electrical outlet and a flat surface on which to place personal belongings. Although the designated lactation room may be used for other purposes, the employer must give priority use to employees needing to express breast milk. Employers **must also have a written policy** notifying employees of their rights. Specifically, the policy must (1) include a statement that reasonable break time to express milk is permitted pursuant to Section 206-c of the New York Labor Law; (2) outline the process to request the use of a lactation room; (3) outline a process to address requests by two or more employees for use of a lactation room; (4) state the employer will respond within five business days; and (5) state that the employer will engage in "cooperative dialogue" if the request poses an "undue hardship."

Ban on Drug Testing Applicants for Marijuana to Begin May 2020: Effective May 10, 2020, NYC employers will be prohibited from drug testing **prospective employees** for marijuana as a condition of employment. The law includes limited exceptions to the drug testing prohibition, exempting employees in identified safety-sensitive positions and testing required by federal law or a federal government contract. The law also will not bind employers who are a party to a collective bargaining agreement that "specifically addresses" the drug testing of applicants, but only as to those employees.

Proposed Mandatory Vacation Time Bill: In May 2019, the NYC Council introduced a bill that seeks to amend the NYC Earned Safe and Sick Time Act to require employers to provide 80 hours of "personal time" (i.e., for any reason) to employees each calendar year. If passed, employers with five or more employees would need to pay employees for this time off, with smaller New York City employers required to provide 80 hours of unpaid personal time. The NYC Council has not voted on this bill, but there are clear signs that the Mayor favors this legislation.

Westchester County

Sick Leave: Since July 2014, NYC employers have had to comply with the city's paid sick leave law. Effective April 10, 2019, Westchester County employers also need to comply with a mandatory sick leave law. Employees who work in Westchester County for more than 80 hours in a calendar year are eligible for up to 40 hours of sick leave under the Earned Sick Leave Law. All employers must provide the required sick leave, but the time is paid by employers with five or more employees. Eligible employees begin to accrue sick leave on July 10, 2019 (or their first day of employment, if later). Employers may prohibit use of sick time until the employee has worked for the employer for 90 days. Critically, for all employees working on or before July 10, 2019, employers must provide notice of this new law by July 10. Employers must provide new employees (hired after July 10, 2019) notice on their first day of employment.

Safe Leave: Effective November 2019, Westchester employers will need to provide annually 40 hours of paid safe leave, **in addition to** the mandatory sick leave noted above, pursuant to the Safe Time Leave for Victims of Domestic Violence and Human Trafficking Law (safe leave). Safe leave is provided so that employees may "attend/testify in criminal and/or civil court proceedings relating to domestic violence or human trafficking and/or to move to a safe location." Employers may set forth the manner in which employees may request foreseeable use of safe leave and may also require documentation for its use. Employers must also post a notice (in English and Spanish) about the new law and provide written notice to new hires when they start employment and to current employees within 90 days of the law's effective date.

The evolving New York employment law landscape requires employers to remain vigilant regarding updates. As such, employers should seek legal assistance with policy revision, training and guidance on these recent changes.

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