April 14, 2022

UPDATED: 2022 Brings More Employment Law Updates for New York Employers

UPDATE (07/20/2022): The hotline providing counsel and assistance to individuals with complaints of workplace sexual harassment is now available. The telephone number for the hotline is 1-800-HARASS-3 (1-800-427-2773). Employers should include information about the hotline in the materials that they provide to employees regarding sexual harassment.

UPDATE (05/02/2022): See Day Pitney alert, "New York City Council Votes to Amend Pay Transparency Law and Extend Effective Date to November 1, 2022."

UPDATE (04/28/2022): The New York City Council voted to amend the New York City Pay Transparency Law implementing certain changes and extending the effective date to November 1, 2022. The New York City Council issued a press release, which can be found here. More detailed alert to follow.

Just as New York employers have begun to adjust to some of the changes that we reported in January, the state and city have rolled out further updates, keeping employers on their toes. Here's an overview of the highlights from the first quarter of 2022 and some pending legislation that we are tracking.

New York State Updates

New York Hero Act Amendment

Per the NY HERO Act's website, "[o]n March 17, 2022, the designation of COVID-19 as an airborne infectious disease that presents a serious risk of harm to the public health under the HERO Act ended. Private sector employers are no longer required to implement their workforce safety plans." Employers, however, are still required to have a HERO Act safety plan, provide a copy of the plan to employees, post the plan in each worksite, and include a copy within their employee handbooks. Separately, in New York City, employers are still subject to the workplace COVID-19 vaccine mandate, notwithstanding the fact that the "Key to NYC" requirements for entertainment establishments are no longer in effect.

New York State Human Rights Laws Amendments

On March 16, New York Governor Hochul signed into law several amendments to the New York State Human Rights Law (NYSHRL) that became effective on that date. The first amendment aims to prohibit retaliation through the publication of an employee's personnel records. The amendment modifies the definition of "unlawful retaliation" to include "disclosing an employee's personnel files because he or she has opposed any practices forbidden under [the NYSHRL] or because he or she has filed a complaint, testified, or assisted in any proceeding." The amendment still allows employers to disclose personnel information "where such release is necessary to respond to a complaint, civil or criminal action, or judicial or administrative proceeding." Additional information regarding this amendment can be found here.

The second amendment to the NYSHRL requires the New York State Division of Human Rights to establish a confidential hotline that will "provide individuals with complaints of workplace sexual harassment counsel and assistance." The hotline will be staffed by pro bono attorneys who will be available during regular business hours from 9:00 am to 5:00 pm. Once the hotline is established, employers will be required to provide information about the hotline in employee rights notices and postings relating to sexual harassment. More information about this amendment can be found here.

New York State Department of Labor Whistleblower Notice

As we previously reported here, there were several amendments to New York's Whistleblower law that went into effect on January 26, 2022. The amendments provide greater protection for private-sector employees who report actions of their employer that they reasonably believe to be illegal or a danger to public health or safety. The New York State Department of Labor has released a model Notice of Employee Rights, Protections, and Obligations Under Labor Law Section 740. The notice includes the revised language from New York Labor Law § 740. Employers must post the notice in a conspicuous, easily accessible, and well-lighted place customarily frequented by employees and applicants for employment. It is advisable that this notice also be accessible electronically to employees who are working remotely.

Reproductive Health Rights Notice—N.Y. Labor Law § 203-e(6)

The United States District Court for the Northern District of New York has permanently enjoined the requirement that employers provide notice in an employee handbook of employee rights and remedies under N.Y. Labor Law § 203-e, which provides that workplaces shall be free from discrimination based upon reproductive health decisions. This decision does not change the prohibition on such discrimination.

In *CompassCare et al. v. Cuomo*, several faith-based employers sued the state of New York, arguing that the reproductive health law undermines their anti-abortion beliefs and therefore, the notice requirement infringes upon their First Amendment protections. The court found that the notice requirement compelled plaintiffs to deliver a message contrary to their beliefs. In applying the strict scrutiny standard, the court held that the state failed to prove that requiring the written notice in employee handbooks is the least restrictive means to achieve the state's interest in ensuring workers have notice of their rights under the law. The court concluded that plaintiffs would suffer irreparable harm and that they lack an adequate remedy at law, and therefore, the notice requirement must be permanently enjoined.

Importantly, although the court permanently enjoined the notice requirement, employers *may* still include this language in their employee handbooks to advise employees of these rights under the law. The decision (which is subject to appeal) only limits the mandate to include the language.

IRA Mandate for Private Sector Employers

On October 21, 2021, New York Governor Hochul signed into law legislation requiring employers to automatically enroll employees into the New York State Secure Choice Savings Program (the Program) and deposit after-tax employee contributions into a Roth individual retirement account (IRA). The Program applies to any New York State employer that (i) had at least 10 employees in the state at all times during the prior calendar year; (ii) has been operating for at least two years; and (iii) has not offered a qualified retirement plan to its employees in the prior two years. A participating employer is not considered a fiduciary with respect to the Program, has no responsibility for the Program's administration and has no liability with respect to its employees' decisions regarding participation in the Program and investment of IRA assets.

Employees who have attained age 18 and earned New York source wages are eligible to participate in the Program. Any employee who fails to affirmatively elect a contribution level will be automatically enrolled in the Program at a three percent savings rate. Employees may choose to opt out of the Program at any time, and employees who opt out must be given the opportunity to enroll in the Program at least once each year.

The Program must be opened by the New York State Secure Choice Savings Program Board (the Board) before employers can begin enrolling employees. The Board has not yet indicated when the Program will open, but it is expected to occur no later than December 31, 2022. Once opened, employers will have nine months to comply with the Program's requirements.

New York City Updates

Salary Ranges in Job Advertisements

As of May 15, 2022, New York City employers must list salary ranges, determined in good faith at the time of the posting, for all advertised job, promotion, and transfer opportunities. The salary range cannot be open-ended. This law applies to any employer (including employment agencies) with more than four employees in New York City. Independent contractors are

included in the four-employee threshold. The New York City Commission on Human Rights recently published a fact sheet with additional information.

On March 24, several New York City councilmembers introduced a bill that would amend the law. If enacted, the bill would exclude employers with fewer than fifteen employees. It would also clarify that the law equally applies to hourly and salaried employees but exclude positions that are not required to be performed in New York City (including those done remotely). The proposed changes also seek to limit application of the salary disclosure requirement if an employer merely posts that it is hiring without identifying the specific position.

Automated Employment Decisions Tool Law

New York City has enacted the Automated Employment Decisions Tool law, which sets standards for employers using artificial intelligence tools in making employment decisions. Effective January 1, 2023, New York City employers and employment agencies will be prohibited from using "automated decision tools to screen candidates or employees unless a bias audit has been conducted no more than one year prior to using the tool and shows an absence of bias against a protected classification of employees." The law defines an automated employment decision tool as "any computational process, derived from machine learning, statistical modeling, data analytics, or artificial intelligence, that issues simplified output, including a score, classification, or recommendation, that is used to substantially assist or replace discretionary decision making for making employment decisions that impact natural persons." A summary of the results of the most recent bias audit must be made publicly available on the website of the employer or employment agency prior to the use of the tool. The law also requires that job applicants or employees that reside in New York City be notified about the use of such automated tools in the assessment or evaluation for hire or promotion.

Pending Legislation

No-Rehire Clauses in Settlement Contracts

On March 1, the New York State Senate passed a bill that would make the release of any claim by an employee against an employer unenforceable if the employee is prohibited from applying for, accepting, or engaging in future employment with such employer, or any entity related to such employer. This bill would also cover independent contractors. The bill has been referred to the Assembly. If passed by the Assembly and signed by the governor, the legislation would go into effect 60 days from the date of the governor's signature.

Statute of Limitations for Employment Discrimination Actions

On March 1, the New York State Senate passed a bill that would extend the statute of limitations for actions based on unlawful discriminatory practices in the workplace. The statute of limitations for such claims would be extended from three years to six years. The bill has been delivered to the Assembly. If passed by the Assembly and signed by the governor, the legislation would go into effect 60 days from the date of the governor's signature.

Let Survivors Speak Act

On March 1, the New York State Senate passed the Let Survivors Speak Act. The Act prohibits settlements or any other resolutions of claims involving sexual harassment or any other form of unlawful discrimination from including any term or condition that requires the complainant to pay the defendant liquidated damages in the event that the complainant violates a non-disclosure agreement (NDA). The Act would also prohibit the complainant from being required to forfeit all or part of the consideration for violating the NDA. Additionally, the Act would prohibit the inclusion of any affirmative statement or disclaimer by the complainant that the complainant was not subject to unlawful discrimination, harassment, or retaliation. If passed by the Assembly and signed by the governor, the Act would go into effect immediately and will apply to agreements entered into on or after that day.

The Bottom Line

Employers are encouraged to review their workplace policies and handbooks to make sure they are complying with the most recent laws and should contact counsel for guidance and assistance with these new laws.

Authors



Daniel L. Schwartz
Partner

Stamford, CT | (203) 977-7536

New York, NY | (212) 297-5800

dlschwartz@daypitney.com



Francine Esposito
Partner

Parsippany, NJ | (973) 966-8275

fesposito@daypitney.com



Glenn W. Dowd
Partner

Hartford, CT | (860) 275-0570

gwdowd@daypitney.com



Heather Weine Brochin
Partner

Parsippany, NJ | (973) 966-8199

New York, NY | (212)-297-5800

hbrochin@daypitney.com



Rachel A. Gonzalez
Partner

Parsippany, NJ | (973) 966-8201

New York, NY | (212) 297-5800

rgonzalez@daypitney.com



Theresa A. Kelly
Partner

Parsippany, NJ | (973) 966-8168

tkelly@daypitney.com



Thomas F. J. O'Mullane
Partner

Parsippany, NJ | (973) 966-8413

tomullane@daypitney.com