December 31, 2018

The Year Past and Future: A Myriad of New York Employment Law Updates

New York State and City have some of the most employee-friendly employment laws in the country, and in 2018, legislatures passed numerous new laws and amendments to existing employment laws. Below is a sampling of some of the more noteworthy developments. Employers must ensure compliance lest they risk lawsuits and penalties.

New York City and New York State Mandated Sexual Harassment Policies and Training – As we hope employers know by now, New York State and New York City imposed new requirements on employers to combat sexual harassment, requiring mandatory policies and training. Our previous updates on what employers must do to comply with these laws can be found here and here.

New York State Updated Sexual Harassment Resources to Include Additional Languages – On October 17, the New York Department of Labor (NYSDOL) posted policy and training documents in Chinese, Haitian Creole, Korean, Italian, Polish, Russian and Spanish. The documents include the harassment complaint form; the minimum standards for sexual harassment prevention training; the sexual harassment FAQs; the sexual harassment prevention model policy; the sexual harassment prevention model training; the sexual harassment prevention poster; the toolkit for employees; the toolkit for employers; and training case studies. If an employee's primary language does not have a template on the NYSDOL website, then the employer must only provide the training in English. Regardless of whether the NYSDOL requires the training in a certain language, the employer may be liable for that employee's conduct anyway, so employers must ensure their employees understand all that is contained in their policies and training.

New York City Issued Additional Sexual Harassment Guidance – In November, the New York City Commission on Human Rights updated its Frequently Asked Questions (FAQs) to further clarify the notice and training requirements related to the sexual harassment amendments to the New York City Human Rights Law (NYCHRL). Noteworthy provisions include the following:

- Training requirements apply to employers with 15 or more employees in the previous calendar year.
- Employers must train employees who worked more than 80 hours and for at least 90 days in a calendar year. Employers must also train independent contractors who have performed work for the employer for more than 90 days and more than 80 hours in a calendar year, but are not required to train independent contractors who received the annual training elsewhere. Independent contractors count toward the 15-employee requirement for training purposes.
- The Commission is developing an online training tool that will satisfy the requirements of the law and will be free and available to the public. The online training should be available on or before April 1, 2019—the effective date of the amendments.
- Employers are free to craft their own training that complies with the law, and the FAQs provide the minimum requirements that must be covered in the training. Those minimum requirements include an explanation of sexual harassment as a form of unlawful discrimination under local law; a statement that sexual harassment is also a form of unlawful discrimination under state and federal law; a description of what sexual harassment is, using examples; any internal complaint process available to employees through their employer to address sexual harassment claims; the complaint process available through the NYC Commission on Human Rights, the New York State Division of Human Rights and the United States Equal Employment Opportunity Commission, including contact information; the prohibition

of retaliation, pursuant to Subdivision 7 of Section 8-107, and examples thereof; information concerning bystander intervention, including but not limited to any resources that explain how to engage in bystander intervention; and the specific responsibilities of supervisory and managerial employees in the prevention of sexual harassment and retaliation, and measures that such employees may take to appropriately address sexual harassment complaints.

- The required notice must be posted in "conspicuous locations accessible to all employees, such as breakrooms and other common areas." If a physical location is not convenient or if electronic posting is the best method of reaching all employees, notices may be posted on "electronic bulletin board[s]." If an employer has multiple sites, the notice must be affixed in each location. If employers have remote employees, they may provide the notice via e-mail. The notice must be in English and Spanish and can be posted in black and white.
- New employees must receive the fact sheet at the time of hire. "Time of hire" means by the end of the employee's first workweek, but best practices are to provide the notice when the employee receives all other paperwork. The fact sheet may be contained in an employee handbook or onboarding materials, and it should be distributed in the manner the employer ordinarily communicates with employees.
- The legal standard for gender-based harassment under the NYCHRL remains unchanged. The standard prohibits discrimination based on gender (including sexual harassment in the workplace), in housing and in public accommodations (i.e., stores and restaurants), and prohibits retaliation for opposing or reporting harassment.

New York City Expanded Workplace Accommodation Requirements – Effective October 15, 2018, the NYCHRL was expanded to require employers with four or more employees to engage in and document in writing a "cooperative dialogue" with employees seeking workplace accommodations. We detailed the "interactive process" that employers must engage in under both federal and state workplace accommodation laws when we first posted about this amendment here. The expansion under the New York City law requires employers to engage in this cooperative dialogue for employees requesting accommodations for religious needs, disability, pregnancy, childbirth, or a related medical condition, and to accommodate the needs of a victim of domestic violence, sexual offenses or stalking. Notably, once the employer engages in this process, the employer must provide the employee a written final determination identifying any accommodation that was granted or denied. Employers should ensure that their human resources and management personnel are aware of these changes and continue to seek legal advice when an accommodation issue arises.

New York City Amended and Updated Sick Leave Law – On May 5, an amendment to the NYC Earned Sick Time Act became effective, amending the law's title to the NYC Earned Sick Time and Safe Time Act (ESSTA). The law was amended to expand the ability to take paid time off ("safe time") to victims (and their families) of "family offense matters," which includes victims of sexual offenses, stalking and human trafficking. The definition of "family member" was also expanded. Initially, family member included the employee's "child, spouse, domestic partner, parent, sibling, grandchild, or grandparent, or the child or parent of an employee's spouse or domestic partner." The definition now includes "any other individual related by blood to the employee; and any other individual whose close association with the employee is the equivalent of a family relationship." The New York City Department of Consumer Affairs (DCA), the agency charged with enforcing the ESSTA, recently issued amended rules and updated its FAQs to provide additional guidance on this amendment. The amended rules now require that all employers maintain a written ESSTA policy that meets certain minimum requirements, including the employer's policies regarding the use of sick/safe time and any limitations or conditions placed on such use; the employer's method of calculating sick/safe time and policy with respect to carryover of sick/safe time at the end of the year; and if the employer uses any term other than "safe and sick time" or "safe/sick time" to describe sick/safe time, the policy must state that the time may be used for any purpose set forth in the ESSTA. Employers must maintain the policy in a "single writing" and distribute the policy at the time of hire, within 14 days of the date any changes to the policy are made or when an employee requests a copy. There is no further guidance, however, on what single writing means, but employers would be wise to ensure that the ESSTA policy is contained wherever the rest of their policies are kept (handbook, etc.).

Our previous paid sick leave article can be found here.

Westchester County Passed Earned Sick Leave Law – Following New York City's lead, on October 12, Westchester County enacted its own sick leave law. For employers with five or more employees, the earned sick time must be paid at the employee's regular hourly rate; for employers with fewer than five employees, the sick time may be unpaid. Westchester's law contains some of the same provisions as its New York City law counterpart. Employees accrue one hour of sick time for

every 30 hours worked. Employees may use earned sick time for reasons similar to those under the New York City law, including to care for their own mental or physical illness, injury or health condition; to care for a family member's mental or physical illness, injury or health condition; to attend school meetings or meetings necessitated by the child's health condition or disability, or related to the child's or family member's needs as a victim of a family offense matter, sexual offense or stalking; for the closure of the employee's place of business due to a public health emergency or to care for a child whose school or place of care has been closed due to a public health emergency; or for an absence necessary because of an employee's or employee's family member's status as a victim of a family offense matter, sexual offense or stalking in order to attend to medical attention, counseling services, relocation issues or legal issues resulting from the family offense matter, sexual offense or stalking. As with the New York City law, employers may satisfy the law by providing at least 40 hours of combined sick and personal time; however, under the Westchester law, the employer must allow the employee to take the time when needed without advanced notification. The law also will not apply to employees who are covered by a collective bargaining agreement (CBA) if the law's provisions have been expressly waived and the CBA provides comparable benefits. Unlike the New York City law, the Westchester law provides a private cause of action to employees to enforce their rights. Employees may recover the greater of $250 or three times the wages that should have been paid for each instance when employees were undercompensated for sick time. In addition, employees may recover $500 for each instance their employer wrongfully denies a request for sick time. Employees who are discharged for seeking to use sick time may be entitled to reinstatement and back pay. For any of these violations, employees may be able to recover reasonable attorneys' fees and costs.

Westchester County Banned Salary History Inquiries – Again following New York City's lead, effective July 9, 2018, Westchester employers are prohibited from asking job applicants about their salary history or relying on salary history in making a prospective employee an offer, unless the employee provides the information voluntarily. As such, Westchester employers must take steps to remove all salary history questions from employment applications and educate those in the hiring process about the new law in order to avoid liability.

Impending Minimum Wage Increases – Effective December 31, 2018, the minimum wage in New York State will increase for all employers, although the increases may depend on the employer's size, location (i.e., New York City, Nassau/Suffolk/Westchester and the remainder of the State) and whether the employees are service employees, food service employees or non-service employees. With these increases come mandatory notice requirements that employers must follow prior to December 31. Employers that fail to provide the proper notice within 10 days of the changes can be subject to a statutory penalty of up to $5,000 per employee. Employers, depending on industry, are permitted to claim certain allowances toward the minimum wage, including tip credit, meal credit, lodging and uniform maintenance allowances. These allowances will also all change effective December 31, 2018, and the changes will be based on the specific employer's size, location, industry and workforce. The changes can be found in these two Wage Orders, here and here. Pursuant to the New York Wage Theft Prevention Act, employers must provide a notice within 10 days to new hires that includes their rate(s) of pay, designated pay day, the employer's intent to claim allowances (tip credit, meal credit) and on what basis the employee is paid (hourly, shift, day, etc.). Only employers in the hospitality industry must provide a new notice upon an increase in the hourly wage. Non-hospitality employers do not need to provide an updated notice at this time as long as the new rate is shown on the employee's next pay stub, and should update their notices to new hires only to reflect the changes in the minimum wage and other allowances if applicable.

New York City About to Implement New Lactation Room Requirement – On October 17, the New York City Council approved and sent to the Mayor for signature two new amendments to the New York City Administrative Code. The first bill, Int. No. 879-A, requires employers with 15 or more employees to provide a "lactation room" and a refrigerator "suitable for breast milk storage" in "reasonable proximity" to the employee's work station. The amendment requires a lactation room to include specific features—it must be sanitary and cannot be a bathroom; it must be out of view and "free from intrusion" so that employees can express breast milk; and it must include, at a minimum, an electrical outlet and a surface to place a breast pump and other personal items; and there must be "nearby access" to running water. The room designated as a lactation room may also be used for other purposes; however, when an employee needs it to express breast milk, that must be its "sole function" and the employer must provide notice to all employees that an employee needing it for lactation purposes has first priority. The second bill, Int. No, 905-A, requires all employers to develop and maintain a written policy about the lactation room, and this policy must be distributed to all new hires. The policy must inform employees about their

right to request a lactation room and set forth a process for employees to request a lactation room. The amendment provides further detail about what the process must entail, including specifying the means by which an employee can make the request; requiring employers to respond within five business days; providing a procedure when two or more employees need to use the lactation room simultaneously; expressly stating that the employee is entitled to reasonable break time to express milk, in accordance with the New York State Labor Law; and informing employees that if the request for a lactation room imposes an "undue hardship" on the employer, the employer must then engage in a "cooperative dialogue" with the employee. These provisions will become effective 120 days after the Mayor signs them, which he is expected to do in the near future. Accordingly, employers must review and update their policies as necessary to comply.

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