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Advisory | Labor & Employment

September 2018

Recapping the Many Legislative Developments Affecting Private Employers in New York and New Jersey, So Far, in 2018

There have been many significant legislative developments over the past year which have and will affect private employers in New York and New Jersey. Federal, state, and local legislatures have been busy in the employment arena, promulgating rules and regulations affecting a broad range of well-entrenched employment practices. For instance, in New Jersey, pending legislation affecting the resolution of discrimination cases could upturn the status quo on matters as fundamental as requiring claimants to hold terms of a settlement agreement in confidence and agree to waive claims. If you overlooked any of these developments, or need a quick and easy reference of all that has occurred or is on the horizon, we hope this topline recap will be helpful.

FEDERAL

Sexual Harassment Settlements with NDAs Not Tax-Deductible (effective Dec. 22, 2017)

An easily missed provision in the Tax Cuts and Jobs Tax Act, signed into law by President Trump Dec. 22, 2017, has implications for employers who wish to settle sexual harassment claims. In short, the provision disallows a business deduction for amounts paid to settle claims of "sexual harassment or sexual abuse," which the law does not define. To further complicate matters, nor does the provision define the "employers" or "payers" subject to it. For more on this highly significant tax development, ***see our December 2017 Alert*.**

The "Tip-Pooling Provision" (effective March 23, 2018)

On March 23, 2018, President Trump signed an appropriations bill that, in addition to funding government for the remaining fiscal year, also included provisions prohibiting restaurant owners from sharing server tips with managerial staff. In a change from prior law, tips may, in certain circumstances, be shared with non-wait staff such as dishwashers and cooks. For more information on this development, ***see our March 2018 Alert.***

NYC "FAIR CHANCE"/ NEW JERSEY "BAN THE BOX" DEVELOPMENTS

Final Regulations to NYC's Fair Chance Act (effective Aug. 5, 2017)

New York's Fair Chance Act (FCA), which went into effect back in October 2015, made it an unlawful discriminatory practice for covered employers to ask about a job applicant's criminal history until after extending a conditional employment offer. Pursuant to the law, an employer thereafter seeking to withdraw the conditional offer must provide the employee with a copy of its analysis into the applicant's criminal history and provide the applicant three days to respond.

Most recently, effective Aug. 5, 2017, Final Rules and Regulations went into effect which, among other things, identify ways an employer may commit a "*per se*" violation in the absence of actual adverse action against an applicant. These violations include such actions as circulating a job advertisement that references interest in criminal history, using job applications that require job applicants to consent to running background checks before receiving a conditional offer, or using publicly available records or the internet to search an applicant's criminal history.

Amendment to NJ's "Ban the Box" Law – (effective Dec. 20, 2017)

On Dec. 20, 2017, then-Governor Christie signed into law amendments to "The Opportunity to Compete Act," which has been the law in New Jersey since March 2015. Since its passage, covered employers have been prohibited from asking job applicants about their criminal record during the application process. Recent amendments extend this rule to online job applications, and clarified that the restrictions also apply to expunged records. ***GT's Alert on the 2015 legislation is available here***.

NEW JERSEY

Equal Pay Act – (effective July 1, 2018)

On April 24, Governor Murphy signed into law amendments to New Jersey's Law Against Discrimination (LAD) designed to target allegedly discriminatory pay practices. While equal pay act legislation typically addresses gender-based inequities, this law extends the principle across all protected classes. Bottom line: if an employee in a protected class is paid less than someone outside the class for "substantially similar work, when viewed as a composite of skill, effort and responsibility," the employer could be liable for compensatory damages, punitive damages, and attorneys' fees and costs. Even more, liability may reach as far as six years. It has already been described as "one of the most expansive equal pay laws in the country." For information on this watershed development, ***see our April 2018 Alert.***

NJ Paid Sick Leave Law – (effective Oct. 29, 2018)

Starting next month, New Jersey employers must provide up to 40 hours of paid sick leave – one hour of leave accrued for every 30 hours worked – to their full- and part-time employees. Leave is available not only for illness (the employee's or a family member's) or tending to preventive care, but also for needs related to domestic or sexual violence, including an employee's need to attend court or obtain counseling. The law also protects an employee's need to attend a parent-teacher conference. For more information, ***see our May 2018 Alert***.

COMING SOON?

NJ Bill to Prohibit NDAs Relating to Discrimination and Ban Waivers of LAD Claims

While the precise scope remains unclear, a bill that could dramatically affect the ubiquitous confidentiality provisions contained in settlement agreements arising from all types of discrimination claims passed the Senate 34-1 June 7, and is headed to the State Assembly. The proposed bill states that a provision "in any employment contract or agreement which has the purpose or effect of concealing the details relating to a claim of discrimination, retaliation, or harassment shall be deemed against public policy and unenforceable." Standard claim waivers may also be affected, as the bill also contains language prohibiting employers from including "in any employment contract" (emphasis added) a provision waiving "any substantive or procedural right or remedy relating to a claim of discrimination, retaliation, or harassment." While impossible to predict the precise impact of such legislation on litigation and settlement strategy, if passed, NJ employers may face a new set of challenges when forced to defend against workplace discrimination claims.

NJ to Study Classification of Employees as Independent Contractors

On May 3, Governor Murphy signed an executive order directing a 12-person task force to examine misclassification enforcement by executive agencies, develop best practices and recommendations to foster compliance, and conduct a review of existing law and applicable procedures related to misclassification. While the state's study is in its nascent stage, legislation affecting the treatment of employees vs. independent contractors could be on the horizon.

NEW YORK

NY Paid Family Leave Law – (effective Jan. 1, 2018)

Starting this year, eligible employees must receive up to eight weeks, to increase over time to 12 weeks, of job-protected leave (1) for the birth, adoption, or foster placement of a child; (2) to care for a defined close relative or domestic partner with a serious health condition; and (3) when a spouse, child, domestic partner, or parent is on or called to active military duty. For more information, ***see GT's Labor & Employment Law Update 2017***.

New Sexual Harassment Laws – (effective Oct. 9, 2018)

Governor Cuomo signed legislation in April to confront sexual harassment in the workplace. The new legislation (1) expands who has standing to sue for sexual harassment, providing a new cause of action for interns, contractors, vendors, and consultants; (2) prohibits contract clauses that require sexual harassment claims or allegations to be submitted to mandatory arbitration; (3) prohibits employers from including non-disclosure as a condition of settlement; and (4) requires employers to adopt sexual harassment policies and conduct mandatory training annually. ***See GT's Alert on this topic here.***

NEW YORK CITY

Salary History Law – (effective Oct. 31, 2017)

While this law went into effect late last year, we thought it warranted inclusion here. Effective Oct. 31, 2017, it became illegal for public and private employers of any size in New York City to ask a job applicant about their salary history during the hiring process. Such inquiries, according to the NYC Commission on Human Rights, "often create[.] a cycle of inequity and discrimination in the workplace, which perpetuates lower salaries specifically for women and people of color." ***See GT's prior Alert on this topic here***.

Amendment to New York City Human Rights Law to Amend Definitions of "Sexual Orientation and Gender" (effective May 10, 2018)

This amendment from January expands the definitions of sexual orientation and gender under the New York Human Rights Law. "Sexual orientation," which used to be defined briefly as "heterosexuality, homosexuality [or] bisexuality," is now defined more broadly as "an individual's actual or perceived romantic, physical or sexual attraction to other persons, or lack thereof, on the basis of gender. A continuum of sexual orientation exists and includes, but is not limited to, heterosexuality, homosexuality, [or] bisexuality, asexuality, and pansexuality." The definition of "gender" has likewise been expanded to include "gender identity, and gender expression including a person's actual or perceived gender-related self-image, appearance, behavior, expression, or other gender-related characteristic, regardless of the sex assigned to that person at birth."

Earned Safe and Sick Time Act – (effective May 5, 2018)

Expanding upon New York City's Paid Sick Leave Law that went into effect in April 2014 – which broadly required employers to give covered employees up to 40 hours of sick leave each year – the New York City Department of Consumer Affairs issued a revision allowing covered employees to use earned leave to address safety issues and access critical services if they or a "family member" are a victim of domestic violence, unwanted sexual contact, stalking, or human trafficking. According to its official website, New York City is the "first in nation to extend safe leave to survivors of human trafficking." The revision also expands the definition of "family member" to include anyone whose close relationship with the employee is akin to a family relationship. For more information, ***see our May 2018 Alert***.

Amendment to City's Fair Workweek Law – Schedule Changes for Personal Reasons – (effective July 18, 2018)

By way of background, the Fair Workweek Law, which went into effect in November 2017, was intended to protect employees in the fast food and retail industries specifically by giving them the right to predictable work schedules.

Under a recent amendment, however, employers in all industries must allow covered employees (those who work more than 80 hours per calendar year and have been employed for at least 120 days) two temporary schedule changes – including, but not limited to, paid time off, the ability to work remotely, or to swap shifts – per calendar year, for "a caregiving emergency, a legal proceeding or hearing for subsistence benefits, or any circumstance that would constitute a basis for permissible use of safe time or sick time [. . .]." Employers must conspicuously post the notice entitled "*You Have a Right to Temporary Changes to Your Work Schedule*" in English, and any other language that is primary for at least 5 percent of the workforce if the translation is available on the Department of Consumer Affairs website. The law also protects employees from retaliation for making a schedule change request.

Stop Sexual Harassment in NYC Act – (key provisions effective Sept. 6, 2018, and April 1, 2019)

Effective May 9, the day Mayor Bill de Blasio signed this act into law, claims of gender-based harassment could be filed by employees working for employers of any size (not just employers with four or more employees). The law also extends the statute of limitations for filing such claims. Employees now have three years to file a charge with the NYC Commission on Human Rights, instead of one.

Effective July 8, city contractors are required to include information about their procedures for "preventing and addressing sexual harassment" when submitting required reports to obtain certain contracts under the City Charter.

Starting Sept. 6, and using content from the New York City Commission on Human Rights, employers must conspicuously display an anti-sexual harassment and responsibilities poster, and distribute an information sheet with similar content to new employees upon hire.

Starting April 1, 2019, employers with 15 or more employees must conduct "interactive" annual anti-sexual harassment training for all employees, including managers and supervisors, and must address specific topics. The law requires the City Commission to develop training content, which employers may utilize provided they also supplement the standard material with their own internal complaint procedures.

Amendment to New York City Human Rights Law to Require "Cooperative Dialogue" When Addressing Accommodation Requests (effective Oct. 16, 2018)

This highly significant amendment from January 2018 requires covered employers to engage in a "cooperative dialogue" with employees requesting reasonable accommodation for (1) their disability; (2) religious needs; (3) pregnancy, childbirth, or a related medical condition; or (4) the person's "needs as a victim of domestic violence, sex offenses or stalking." The law further requires that the results of this dialogue be provided to the employee in a "written final determination." Failure to engage in such dialogue "within a reasonable time" will be considered an unlawful discriminatory practice.

WESTCHESTER COUNTY

Wage History Anti-Discrimination Law – (effective July 9, 2018)

To "prevent the perpetuation of the gender wage gap" and help older workers, local law was amended to make it "an unlawful discriminatory practice to rely upon, request or seek the wage history of a prospective employee."

TAKEAWAYS

Legislators and agencies at all levels of government – federal, state, and municipal – have been steadily expanding the myriad rules and requirements employers face. While the current focus on sexual harassment claims tends to grab headlines, make no mistake: the rules governing equal pay, employee leave, and workforce scheduling are changing as well. Employers are encouraged to keep abreast of these changes and proactively adapt to the ever-evolving legal landscape to reduce their exposure to enforcement actions and lawsuits.

Authors

This GT Advisory was prepared by **Robert Bernstein, Michael Slocum,** and **Noel Lesica**. Questions about this information can be directed to:

- Robert H. Bernstein | +1 973.360.7946 | bernsteinrob@gtlaw.com
- Michael J. Slocum | +1 973.360.7900 | slocumm@gtlaw.com
- Noel A. Lesica | +1 973.443.3248 | lesican@gtlaw.com
- Jerrold F. Goldberg | +1 212.801.9209 | goldbergj@gtlaw.com
- Any member of Greenberg Traurig's Labor & Employment Practice
- Or your Greenberg Traurig attorney