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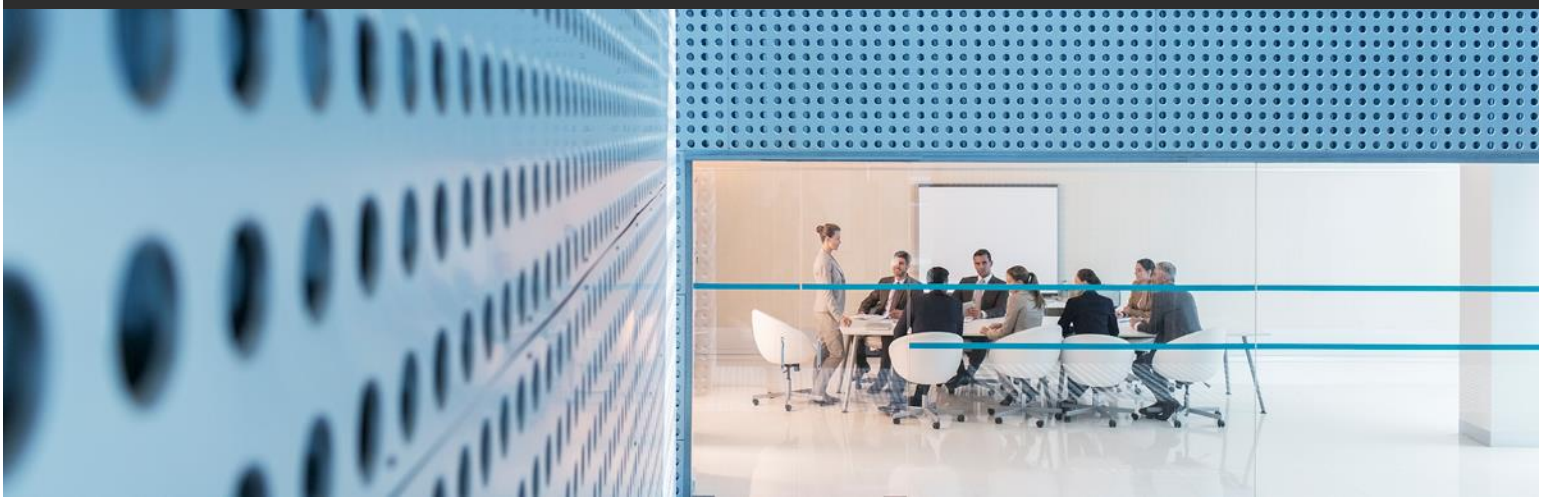
Alert | Labor & Employment



June 2019

Recapping the Many Legal Developments Affecting Private Employers in New York and New Jersey, So Far, in 2019

There have been many significant developments in the first half of 2019 impacting private employers in New York and New Jersey. Federal, state, and local legislatures and agencies have been particularly busy in the employment arena, promulgating sweeping laws and regulations affecting a broad range of well-entrenched employment practices. For instance, New Jersey adopted prohibitions against non-disclosure provisions in settlement agreements resolving discrimination and harassment claims (with, as discussed in this GT Alert, New York expected to follow shortly), and New York enacted its Gender Expression Non-Discrimination Act.

So too have our courts been active, rendering decisions fleshing out some of these recent laws, as well as revisiting other, more familiar questions under longstanding principles. If you overlooked any of these developments, or need a quick and easy reference of what has occurred and what is on the horizon, we hope this topline recap helps.

FEDERAL

U.S. Supreme Court

FAA Bars Orders Requiring Class Arbitration When Agreement Is "Ambiguous," and Even Independent Contractor Agreements Are "Contracts of Employment" under the FAA

In two significant employment cases this term involving the Federal Arbitration Act (FAA), the Supreme Court addressed whether federal courts may compel class arbitration absent the parties' unambiguous agreement, and whether independent contractor agreements are "contracts of employment" for purposes of § 1's limited exception to the courts' authority to compel arbitration.

In *Lamps Plus, Inc. v. Varela*, plaintiff-employee instituted a class action in federal court against his employer after a hacker impersonating a company official obtained his (and roughly 1,300 other employees') personal information and filed a fraudulent tax return under his name. The employer moved to compel individual arbitration under its mandatory arbitration program, but the District Court instead ordered arbitration on a class basis. The Supreme Court reversed. Stressing "the 'fundamental' difference between class arbitration and the individualized form of arbitration envisioned by the FAA," the Supreme Court held that "an ambiguous agreement" cannot "provide the necessary 'contractual basis' for compelling class arbitration."

In *New Prime Inc. v. Oliveira*, plaintiff worked as a truck driver for New Prime under an independent contractor agreement, which contained an arbitration clause. Plaintiff filed a federal class action, alleging that he was in reality an employee and that he had not received a statutory minimum wage. When the employer moved to compel arbitration, plaintiff argued that FAA § 1 bars federal courts from compelling arbitration under "contracts of employment of . . . workers engaged in foreign or interstate commerce." Turning to historical sources, the majority concluded that "as dominantly understood in 1925" when Congress enacted the FAA, "the term 'contracts of employment' referred to agreements to perform work" – regardless whether the worker is technically engaged as an employee or as an independent contractor. The Court therefore held that § 1's exception applied and New Prime could not compel arbitration.

Administrative Exhaustion under Title VII Is Not "Jurisdictional" and Can Be Waived If Not Timely Raised

In *Fort Bend County, Texas v. Davis*, plaintiff-employee filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) asserting claims against her employer for sexual harassment and retaliation under Title VII. When her employer subsequently fired her, plaintiff "handwrote" religion on her EEOC intake questionnaire, but "made no change . . . in the formal charge document." After receiving her Notice of Right to Sue from the EEOC, plaintiff pursued her claims in federal court. "Years into the litigation," the employer sought to dismiss her religious discrimination claims because plaintiff had not exhausted them before the EEOC. Resolving a circuit split on the issue, the Supreme Court held that Title VII's administrative exhaustion requirement is not "jurisdictional," and "must be timely raised to come into play." Because the employer in *Fort Bend County* had "wait[ed] too long to raise the point," the Supreme Court held it had forfeited its right to assert the defense. *Fort Bend* is a stark reminder to employers that they should promptly assert whatever administrative exhaustion defenses they potentially possess to avoid forfeiting them.

Second and Third Circuits

Second Circuit Clarifies Causation Standard under ADA/Rehabilitation Act

On April 18, 2019, in *Natofsky v. City of New York*, 921 F.3d 337 (2d Cir. 2019), the Second Circuit Court of Appeals held that the causation standard for claims under both the Rehabilitation Act and the Americans with Disabilities Act (ADA) should be the same, and the applicable standard is a "but for" standard. In short, plaintiffs alleging discrimination claims under either law must now prove that discrimination was the "but for cause" of any employment action. The Court of Appeals concluded that the Rehabilitation Act (which generally applies only to programs conducted by federal agencies, programs receiving federal assistance, federal employers, and federal contractors) incorporates the ADA's causation standard, and therefore, the "solely because of" standard used by the District Court was improper. The Court further concluded that the "mixed motive" test that the Second Circuit historically used for ADA claims was improper, and joined the Fourth, Sixth, and Seventh Circuits in adopting the "but for" causation standard for ADA and Rehabilitation Act claims. The Second Circuit's adoption of the heightened "but-for" standard should improve employers' defense of ADA suits, as plaintiffs now must show not simply that their disability was a motivating factor for the adverse employment action, but that the employment decision would not have occurred "but for" the employee's claimed disability.

Third Circuit Affirms Summary Judgment for Employer in FMLA, NJLAD and CEPA Case, Highlighting Importance of Well-Documented Progressive Discipline Process

In *Simons v. Bos. Sci.,* 765 F. App'x 773 (3d Cir. 2019), an employer issued two detailed written warnings to plaintiff for impaired job performance due to alcohol consumption and being intoxicated at work events. After receiving the warnings, plaintiff emailed his supervisor, complaining of the supervisor's alleged inappropriate behavior. Plaintiff then requested and was granted a 30-day leave to "address his alcoholism." After his return to work, the employer discovered plaintiff was arrested (during work hours) for a DUI which he did not disclose. The employer thereafter terminated plaintiff's performance for his repeated misconduct and violations of Company policy.

Plaintiff filed a lawsuit asserting claims of disability discrimination under the New Jersey Law Against Discrimination (LAD), retaliation for whistleblowing activities under the New Jersey Conscientious Employee Protection Act (CEPA), and retaliation for asserting his rights under the Family and Medical Leave Act (FMLA). The trial court granted summary judgment in favor of the employer on all claims, and the Third Circuit affirmed. When analyzing whether plaintiff met his burden of establishing that the employer's reasons for terminating his employment were pretext for discrimination or retaliation, the Third Circuit repeatedly cited to the employer's well-documented progressive disciplinary procedures that discredited plaintiff's self-serving allegations. Specifically, the court held "no reasonable factfinder could conclude in the face of the events leading up to the request for leave—namely, two prior written corrective actions, an undisclosed DUI arrest, and an investigation which concluded that [plaintiff] was intoxicated during a conference call—that there is a causal relationship between [plaintiff's] request for leave and the decision to terminate him."

NLRB

NLRB Proposes New Rule Narrowly Defining "Joint Employment" Following Debate Over Browning-Ferris and Hy-Brand Decisions

The National Labor Relations Board (NLRB) has been making headlines of late with a high-profile internal debate over the scope of the joint employment doctrine. The doctrine itself carries broad

implications for franchisors and corporate "families" of affiliated companies, as well as any employer that relies on "temp agency" workers or subcontractors to supplement its own workforce. For more background on this debate in the wake of the NLRB's 2015 *Browning-Ferris Industries* decision, see our April 2018 GT Article published in the *New Jersey Law Journal*.

On September 14, 2018, the NLRB issued a Notice of Proposed Rulemaking that would narrow the definition of a "joint employer." Under the proposed rule, "a putative joint employer must possess and actually exercise substantial direct and immediate control over the employees' essential terms and conditions of employment in a manner that is not limited and routine." The NLRB extended the public comment period several times, finally closing it February 11, 2019 – by which time the Board had received almost 30,000 comments. The NLRB is expected to issue further notice on this proposed Rule later this year.

NLRB Embraces New Definitions of "Concerted Activity" and of "Employee"

In January 2019, the Board reaffirmed in *Alstate Maintenance, LLC*, the longstanding principle that "individual griping" does not become "concerted activity" under the National Labor Relations Act simply because it occurs in the presence of other employees, or because the griping employee uses the plural "we." The Board expressly overruled its 2011 decision that expanded the definition, finding concerted activity when a salesman asked a vice president about a dress code change in front of other employees. The Board in *Alstate* concluded that its 2011 decision misstated the established standard that to be "concerted activity" the complaining employee must act with the *authority* of other employees to raise concerns on their behalf.

Also in January 2019, the Board reaffirmed in *SuperShuttle DFW, Inc. and Amalgamated Transit Union Local 1338*, the 10-factor common law test for determining independent contractor vs. employee classification first articulated by the Supreme Court in *NLRB v. United Insurance Co. of America* (1968). Applying that test, the Board determined that franchisees who operate shared-ride vans for SuperShuttle Dallas-Fort Worth were independent contractors under the NLRA. The Board in *SuperShuttle* ruled that its 2014 *FedEx Home Delivery* decision improperly conflated the 10-factor test to a single question – whether the evidence tends to show that the putative contractor is, in fact, rendering services as part of an independent business – and that no bright line rule is applicable.

Coming Soon

Supreme Court to Decide Whether Title VII Prohibits Sexual Orientation Discrimination

On April 22, 2019, the U.S. Supreme Court agreed to hear cases involving sexual orientation discrimination claims in *Altitude Express v. Zarda* and *Bostock v. Clayton County, Georgia*, and gender identity discrimination claims in *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission et al.* The Court's decisions in these cases, scheduled for argument next term, are expected to resolve a circuit split over whether Title VII's prohibition against discrimination on the basis of sex includes discrimination based on sexual orientation or gender identity and expression. While the cases bear watching, they should not materially impact most New Jersey and New York employers' operations as the anti-discrimination laws in both states already extend such protections.

NEW JERSEY

New Jersey Bans Confidentiality Provisions in LAD Settlement Agreements, and May Have Banned Arbitration Agreements as Well

On March 18, 2019, New Jersey passed legislation prohibiting inclusion of confidentiality provisions in settlement agreements for LAD claims. Specifically, New Jersey now prohibits any provision that "has the purpose or effect of concealing the details relating to a claim of discrimination, retaliation or harassment." The legislation additionally prohibits employers from including provisions in "**any** employment contract" that waive substantive or procedural rights or remedies relating to a claim of discrimination, retaliation, or harassment under the LAD – and notably, under "any other statute or case law." Only collective bargaining agreements are explicitly excluded from the legislation's "any employment contract" language, and thus it remains to be seen how the new law will impact, for example, jury-waiver provisions in employment applications and agreements to arbitrate LAD claims. It also remains to be seen whether this new law survives a preemption challenge under the Federal Arbitration Act.

For additional information, please read GT's Alert: New Jersey Passes Law Eroding Bedrock of Settlement – Confidentiality Provisions Relating to Discrimination, Retaliation, and Harassment Claims No Longer Enforceable.

New Jersey Adopts Statewide Mandatory Paid Sick Leave

New Jersey Governor Phil Murphy signed a much-anticipated statewide paid sick leave law. The law, which went into effect October 29, 2018, requires all New Jersey employers – regardless of size – to provide paid sick leave to their employees, whether full- or part-time. The law primarily covers absences due to (i) an employee's own physical or mental illness, (ii) the physical or mental illness of a family member, or (iii) tending to preventive care. Notably, while dubbed the "paid sick leave bill," the law also requires employers to pay "sick" leave to employees absent from work for reasons unrelated to illness, including, for example, absences due to parent-teacher conferences or domestic or sexual violence.

Employees accrue one hour of earned sick leave for every 30 hours worked, up to a required minimum of 40 hours. (Employers may of course choose to exceed this amount.) Employers are not required to allow employees to accrue more than 40 hours of leave per year, or carry unused leave that exceeds 40 hours forward to the next year.

For additional information regarding the law's coverage and requirements, please read our complete GT Alert: New Jersey Adopts State-Wide Mandatory Paid Sick Leave

New Jersey Adopts Unequal Pay Law Expanding Upon the Federal Equal Pay Act, but Notably Federal Court Declares It Does Not Apply Retroactively

On April 24, 2018, New Jersey enacted the Diane B. Allen Equal Pay Act (NJEPA), which became effective July 1, 2018. Similar to, but much broader than, the Equal Pay Act (EPA), New Jersey's law declares it unlawful for employers to pay employees within a protected class less than those outside that class for "substantially similar work, when viewed as a composite of skill, effort and responsibility." Employers may escape liability if they demonstrate "that the [pay] differential is made pursuant to a seniority system [or] a merit system," or if they satisfy a list of requirements demonstrating that the pay differential is based on a "bona fide factor[] other than the characteristics of members of the protected class, such as training, education or experience, or the quantity of production . . . ."

Where New Jersey's law differs from its federal counterpart is in the scope of its application and its damages provisions, making it one of the nation's most expansive laws of its kind. While the EPA only applies to sex-based discrimination, New Jersey's law applies to all protected classes under LAD (for example, gender, race, national origin, age, etc.). The bill additionally carries harsher penalties than the EPA, including, for instance, an extended six-year limitations period and trebling of "monetary damages."

On January 15, 2019, U.S. District Judge William J. Martini ruled in *Perrotto v. Morgan Advanced Materials, PLC,* that the NJEPA "is not retroactively applicable to conduct occurring prior to its effective date."

For additional information, please read our complete GT's Alerts: New Jersey Legislation Raises the Stakes in Unequal Pay Claims and New Jersey Federal Court Declares State's New Equal Pay Act Does Not Apply Retroactively – Will State Courts Agree?

New Jersey Expands Family Leave Act

On February 19, 2019, Governor Murphy signed into law expansions to New Jersey's Family Leave Act (NJFLA). The NJFLA enables employees to take leave to care for family members, and the recent amendment expands the definition of "family member" to include "parent-in-law," "sibling," and a catch-all provision including "any other individual related by blood to the employee, and any other individual that the employee shows to have a close association with the employee which is the equivalent of a family relationship."

The NJFLA also now permits employees to take leave when (1) the employee or a family member is a victim of domestic or sexual violence, (2) an employee becomes a foster-care parent, or (3) an employee introduces a new child into the family through a gestational carrier agreement. Finally, beginning June 30, 2019, the NJFLA applies to employers with 30 or more employees (reduced from 50 or more employees).

New Jersey Joins Trend Raising Minimum Wage

In February 2019, Governor Murphy signed legislation that incrementally raises New Jersey's minimum wage. New Jersey's current minimum wage is $8.85 per hour. Under the new law, the minimum wage for New Jersey workers will increase to $10 per hour on July 1, 2019, and will then increase by $1 per hour every January 1st until it reaches $15 per hour on January 1, 2024.

Appellate Division Raises the Bar for CEPA Claims Arising Out of Alleged Public Policy Violations, Enhancing Potential Success for Early Dispositive Motions

In *Chiofalo v. State, Div. of State Police*, 2018 WL 3059451 (App. Div. 2018), which is now pending before the New Jersey Supreme Court, plaintiff, a New Jersey State Trooper, received a letter from a civilian thanking the State Police for an escort of civilian cars. Prior to receiving the letter, numerous troopers had been terminated for escorting civilian vehicles without proper authorization. As such, plaintiff reported the civilian letter to his supervisor who instructed him to destroy it. Plaintiff alleged his employer thereafter retaliated against him by terminating his employment when he refused to do so. Plaintiff filed a complaint alleging violations of CEPA. The trial court initially heard the case before a jury that returned a verdict in favor of plaintiff.

Defendants appealed, and the Appellate Division vacated the judgment and entered summary judgment in favor of defendants. The Appellate Division concluded that plaintiff failed to establish a prima facie

claim under CEPA because he did not establish what "law, rule, or regulation promulgated pursuant to law, or a clear mandate of public policy" he reasonably believed his employer's conduct was violating. In so holding, the Appellate Division rejected plaintiff's argument that it was "self-evident" that his supervisor's request for him to destroy a public police record was against some amorphous "public policy."

In short, the Appellate Division's opinion raises the bar for plaintiffs asserting CEPA claims arising from alleged violations of "public policy," as plaintiffs are – at least for now – required "to identify a source of law or other authority, constituting an expression of public policy, that sets a governing standard for the defendant employer's conduct." Accordingly, employers should study CEPA complaints closely to determine whether an application to dismiss is warranted.

Appellate Division Opens the Door for Medical Marijuana LAD Claims

On March 27, 2019, the Appellate Division in *Wild v. Carriage Funeral Holdings*, 458 N.J. Super. 416 (App. Div. 2019), held that, despite an apparent conflict between the New Jersey Compassionate Use Medical Marijuana Act (CUMMA) and LAD, employees may advance LAD claims against employers for failing to accommodate their off-duty use of medical marijuana. Plaintiff-employee, who legally treated a disability with marijuana under CUMMA, alleged his employer terminated him for his off-duty medical marijuana use, in violation of CUMMA and LAD. The trial court dismissed the case, finding that CUMMA "does not contain employment-related protections for licensed users of medical marijuana." The Appellate Division disagreed, finding that while CUMMA states that it does not "require . . . an employer to accommodate the medical use of marijuana in any workplace" this restriction is limited to use in any workplace. The court observed that just because CUMMA does not obligate employers to accommodate medical marijuana use "does not mean that the LAD may not impose such an obligation." Accordingly, the Appellate Division reversed the trial court's dismissal, allowing plaintiff to advance her LAD claim.

In sum, New Jersey is now one of the several states in which courts have concluded that employers may have a legal obligation to accommodate an employee's off-duty medical marijuana use. Employers should thus consider reviewing their drug-screening policies and protocols to allow for exceptions for off-duty medical marijuana use that does not cause undue hardship or on-duty impairment.

Appellate Division Holds Adverse Employment Action Is Not Required to Advance a LAD Failure to Accommodate Claim Where Employer Forces Employee to "Soldier On"

In *Richter v. Oakland Board of Education*, 2019 WL 245807 (App. Div. 2019), plaintiff-employee, a Type I diabetic, fainted at work due to low blood sugar levels, sustaining injuries due to her fall. Plaintiff alleged that her blood sugar levels were low because her employer refused to provide her the reasonable accommodation of eating lunch at an earlier class period in violation of LAD. The trial court dismissed the claim, holding that, as a matter of law, plaintiff "failed to prove a prima facie case of failure to accommodate her disability because she did not establish an adverse employment action." The Appellate Division, however, based on its interpretation of Supreme Court precedent, reversed: "We conclude that [plaintiff] need not demonstrate an adverse employment action to establish a prima facie case of a failure to accommodate claim under the LAD." The Appellate Division reasoned that plaintiff's claim "fell within the unusual situation . . . where the employee could demonstrate that the failure to accommodate forced the employee to soldier on without a reasonable accommodation and there need not be proof of adverse employment action because the circumstances 'cry out for a remedy.'"

Coming Soon

On June 20, 2019, the New Jersey Senate passed Bill A-1094, which would prohibit employers from "screen[ing] a job applicant based on the applicant's salary history, including, but not limited to, the applicant's prior wages, salaries or benefits." It would also make it unlawful for an employer to require an applicant's salary history to satisfy any minimum or maximum criteria. There are certain instances, however, where employers may consider such information. If an applicant voluntarily provides the employer with his or her salary history, an employer may consider the applicant's salary history in determining salary, benefits, and other compensation and may verify the history provided by the applicant. Further, once an employer makes an offer of employment to the applicant "that includes an explanation of the overall compensation package," it may request that the applicant provide it with a written authorization to confirm his or her salary history. An employee's refusal to volunteer compensation information may not be considered in any employment decisions. Employers who violate the law would be subject to a $1,000 civil penalty for the first violation; $5,000 civil penalty for the second violation; and $10,000 civil penalty for each subsequent violation. The bill will now go before Governor Phil Murphy for final approval.

NEW YORK

New York State

New York Paid Family Leave Increases

The New York Paid Family Leave Benefits Law came into effect in 2018. As of January 1, 2019, employees are now eligible to take up to 10 weeks of leave annually and can receive 55% of their average weekly wage, up to a maximum of 55% of the statewide average weekly wage ($1,357.11). The maximum weekly benefit in 2019 is therefore $746.41. Additionally, beginning February 3, 2019, employees can also use paid family leave to care for family members who are preparing for or recovering from organ or tissue donations.

New York Passes Gender Expression Non-Discrimination Act

In January 2019, Governor Cuomo signed the Gender Expression Non-Discrimination Act (GENDA), which took effect on February 24, 2019. The law amends the New York State Human Rights Law to expressly prohibit discrimination based on gender identity or expression and adds transgender individuals to those protected by the New York State Hate Crimes Law.

New York State/New York City Sexual Harassment Laws Require Additional Training

Per new sexual harassment legislation passed last year, New York employers have until October 9, 2019, to begin annually training each of their employees on sexual harassment prevention. A similar training requirement went into effect for New York City employers as of April 1, 2019, with new hires to be trained within 90 days of hire. In late 2018, the New York City Commission on Human Rights clarified that the training requirements under the City law are the same as those under the State law, so two separate trainings are not required for NYC employees. For more information, see our October 2018 Alert.

Coming Soon

New York Bill Would Lower the Bar for Harassment Claims, Bars Confidentiality and Arbitration Provisions

On June 20, 2019, the New York State Assembly and Senate passed a bill removing the requirement that sexual and other forms of workplace harassment be "severe or pervasive" to be actionable under the State Human Rights Act. The bill also eliminates the familiar *Faragher-Ellerth* defense, which provides a defense for employers in harassment lawsuits where employees failed to utilize the employer's internal harassment reporting process prior to bringing the lawsuit. The bill has not yet been signed by Governor Cuomo, but he is expected to sign it into law. The lower proof burden and erasure of the *Faragher-Ellerth* defense means that New York employers will almost certainly face an increase in sex and other harassment claims, and that a greater proportion of those claims will survive summary judgment.

The bill also precludes employers (or its officers or employees) from including in any settlement agreement resolving any discrimination claim "any term or condition that would prevent the disclosure of the underlying facts and circumstances to the claim or action unless the confidentiality is the complainant's preference." Additionally, the bill prohibits mandatory arbitration clauses covering "any allegation or claim or discrimination, in violation of laws prohibiting discrimination."

New York City

NYCCHR Issues Guidance Prohibiting Race Discrimination on the Basis of Hair

In February 2019, the New York City Commission on Human Rights issued new guidance explaining the City Human Rights Law's prohibition against race discrimination on the basis of hair. The Law allows New York City employees to wear (and prohibits discrimination based on) "natural hair or hairstyles that are closely associated with their racial, ethnic, or cultural identities." "Natural hair" is defined to include natural texture and/or length and includes hair styled into twists, braids, cornrows, Afros, Bantu knots, fades, and/or locks. The guidance extends to grooming or appearance policies prohibiting employees from wearing untrimmed beards, regardless of health and safety concerns or customer preference. If an employer has a legitimate health concern, it must consider alternative ways to meet that concern prior to imposing a restriction or ban. For more information, see our February 2019 Alert.

New York City Adds a Lactation Room Requirement

As of March 18, 2019, pursuant to New York City Local Laws 185 and 186, employers in New York City must provide a lactation room upon request and must distribute a written lactation room policy to their employees.

New York City Prohibits Pre-Employment Marijuana/THC Testing

In May 2019, New York City passed a law prohibiting employers, labor organizations, and employment agencies from requiring job applicants to submit to pre-employment drug testing for the presence of marijuana or tetrahydrocannabinols (THC) as a condition of employment. Notably, the bill only restricts the testing of prospective employees, so it will have no effect on employer drug-testing programs for current employees. The law does contain an exception for certain healthcare workers whose position requires the supervision or care of children, medical patients, or vulnerable persons (as defined by Section 488(15) of the NY Social Services Law), as well as positions that "significantly impact the health or safety of employees or members of the public." The law will take effect in May 2020.

New York City Prohibits Discrimination Based on Sexual/Reproductive Health Decisions

On May 20, 2019, an amendment to the New York City Human Rights Law took effect which prohibits discrimination in employment and discriminatory harassment or violence based on an individual's sexual and reproductive health decisions. Sexual and reproductive health decisions include any decision to receive services relating to sexual and reproductive health, including the reproductive system and its functions.

Westchester County

Westchester County "Bans the Box"

In March 2019, Westchester County's "Ban the Box" law came into effect. The law, like other similar legislation, prohibits employers in Westchester County from asking questions about criminal records on an initial job application or prior to extension of a conditional offer of employment.

Westchester County Adopts Paid Sick Leave

On April 10, 2019, the Westchester County Sick Leave law came into effect. The law requires private employers with five or more employees to provide paid sick leave to all employees who work more than 80 hours per calendar year in Westchester County. Employees may take sick leave for five reasons: (1) their or their family member's mental or physical illness, injury, or health condition; (2) their or their family member's medical diagnosis, care, or treatment of such condition; (3) their or their family member's preventative medical care; (4) their place of business or their child's day care, elementary, or secondary school is closed due a public health emergency; or (5) a public health authority determines the presence of an employee or family member in the community may jeopardize others' health because of the individual's exposure to a communicable disease, whether or not the individual has actually contracted the communicable disease. The law provides a minimum of 40 hours of paid sick leave per year, with employees accruing one hour of paid leave per every 30 hours worked. Accrual begins upon hire or 90 days after the new law takes effect, whichever is later. Employers may impose a 90-day waiting period before a new hire can use sick leave. Unused leave may be carried over to the following year, but employers may cap the amount of paid sick leave that can be taken per year at 40 hours.

Westchester County Passes "Safe Time" Leave Law

On May 3, 2019, Westchester County Executive George Latimer signed the Safe Time Leave for Victims of Domestic Violence and Human Trafficking Law, which provides eligible employees who are victims of domestic violence or human trafficking with up to 40 hours of paid leave in a calendar year to attend criminal and civil court proceedings and/or relocate to a safe house. The law will go into effect on October 30, 2019. Any employee who works more than 90 days in Westchester County in a calendar year is eligible for "safe time" under the law. At the beginning of each year (calendar or anniversary as elected by the employer), employers must provide 40 hours of "safe time" in a bank; there is no accrual option. The time can only be used in full day increments. The law is separate from, and therefore provides additional leave to, the Westchester Earned Sick Leave Law.

Takeaways

Legislatures, agencies and courts at all levels of government – federal, state and municipal – have been steadily reshaping and often expanding the myriad rules and requirements employers face. 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.

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