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Labor Relations

Expert Analysis

State and City Legislation Set Up New Workplace Requirements

In 2015, New York state and city legislators enacted a number of new and amended laws having a significant impact on employers. This month's column reviews these important statutory developments.

Wage Payment

On Feb. 27, 2015, several amendments to the New York Wage Theft Prevention Act (WTPA) became effective pursuant to a bill (S5885-B/A8106-C) signed by Governor Andrew Cuomo. By way of background, the WTPA aims to prevent employers from failing to pay wages by requiring written notices to employees setting forth their pay rates and pay dates and providing a civil cause of action against employers for improperly disclosing or paying wages.

As a positive for employers, the amendments eliminated New York Labor Law (NYLL) Section 195's onerous requirement that employers provide a wage notice to employees each January. However, employers must continue to provide this wage notice within 10 business days of each new hire's first day of employment and obtain a signed acknowledgement of receipt.

Other provisions of the amended WTPA are not so employer-friendly. First, the amendments substantially increase penalties under Section 198 of the NYLL for violations of wage payment and wage notice requirements. An employee now may recover $50 per work day (increased from $50 per work week) that the employee does not receive the new hire wage notice, with the maximum recoverable increasing from $2,500 to $5,000. Likewise, the amendments increase penalties for failing to provide a pay stub that complies with the WTPA from $100 per work week to $250 per work day, with the maximum recoverable increasing to $5,000. Employers with repeated violations in a six-year period also may be required to pay a civil penalty ranging from $1,000 to $20,000 at the Commissioner of Labor's discretion.

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The amendments prevent em-ployers from avoiding wage payment liabilities by forming alter ego companies. A successor employer that is similar in operation and ownership to a prior employer, whose employees engage in substantially similar work or who has substantially the same products and customers, may remain liable for its predecessor's wage payment violations.

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Furthermore, the same bill amended the New York Limited Liability Company Law to make the 10 members with the largest percentage ownership interest in a limited liability company (LLC) jointly and severally personally liable for all wages due to the LLC's employees. In addition, the bill amended the New York Construction Industry Fair Play Act to require construction industry contractors and subcontractors found liable for wage violations to notify all of their employees of the nature of the violations.

Wage Deductions

On Oct. 26, 2015, Governor Cuomo signed State Assembly Bill A07594 which renewed the 2012 amendments to NYLL Section 193 regarding wage deductions. The 2012 amendments permit New York employers to make certain deductions from an employee's wages, such as deductions to recover wage overpayments, repayment of employer loans, and payments for gym memberships, parking or mass transit passes and child care.

The New York Department of Labor has issued interpreting regulations which, among other things, provide specific rules on how employers should document permissible deduction arrangements with employees. The amendments, which were set to expire on Nov. 6, 2015, will now remain in effect until Nov. 6, 2018.

Women's Equality

On Oct. 21, 2015, Governor Cuomo signed into law eight pieces of legislation known collectively as the Women's Equality Act which will take effect on Jan. 19, 2016. Five of the eight laws provide greater protection for women in the workplace.

The Achieve Pay Equity bill (S1/A6075) amends NYLL Section 194 to strengthen prohibitions on differential pay based on sex. Section 194 currently provides an exception to the rule that men and women receive equal pay for equal work if the employer can demonstrate the differential payment is based on "any factor other than sex." Under the amended law, an employer now must show the difference is based on "a bona fide factor other than sex, such as education, training, or experience," which must be job-related and consistent with business necessity. Moreover, an employer cannot use this exception if an employee demonstrates the employer's practice causes a disparate impact on the basis of sex, an alternative employment practice exists that would serve the same business purpose and not produce a pay differential, and the employer has refused to adopt the alternative practice.

The bill further amends Section 194 to provide that employers may not prohibit employees from sharing wage information with other employees. Importantly, the bill also amends NYLL Section 198 to provide that employers who willfully violate Section 194 may be liable for liquidated damages equal to 300 percent of the wages found to be due.

The Protect Victims of Sexual Harassment bill (S2/A05360) amends Section 192 of the New York State Human Rights Law (NYSHRL) to allow

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employees who work for an employer of any size to file sexual harassment claims. Prior to this amendment, employees have been permitted to pursue these claims only against employers with four or more employees.

The End Family Status Discrimination bill (S4/A07317) amends NYSHRL Section 196 to make it unlawful for an employer to discriminate against any individual because of familial status. Familial status includes any person who is pregnant or has a child or is in the process of securing legal custody of any individual under age 18.

The Remove Barriers to Remedying Discrimination bill (S3/A07189) amends NYSHRL Section 297, which previously has not provided for an award of attorney fees with respect to employment discrimination claims, to provide that a court may award reasonable attorney fees to a prevailing party in a claim for employment discrimination based on sex.

The Protect Women from Pregnancy Discrimination bill (S8/A04272) amends NYSHRL Section 296 to explicitly require that employers provide reasonable accommodations for pregnancy-related conditions unless the accommodation would impose an undue hardship. A pregnancy-related condition is defined as a medical condition related to pregnancy or childbirth that inhibits normal bodily function but does not prevent an individual from performing her job activities in a reasonable manner.

Fair Chance

The New York City Fair Chance Act (FCA), effective Oct. 27, 2015, amends the New York City Human Rights Law (NYCHRL) by making it an unlawful discriminatory practice for New York City employers to inquire about or consider the criminal history of job applicants until after extending conditional offers of employment. On Nov. 5, 2015, the New York City Commission on Human Rights (NYC Commission) issued its Enforcement Guidance governing the act.

The act makes it unlawful for employers to circulate any solicitation or advertisement for employment that states any limitation or specification regarding criminal history. As stated in the Enforcement Guidance, employment advertisements may not contain phrases such as "no felonies" or "background check required." Employment applications likewise cannot ask an applicant to authorize a background check or disclose whether the applicant has a criminal history or pending criminal case. An employer also may not inquire about, search for or consider a job applicant's criminal history before extending a conditional offer of employment. Under the Enforcement Guidance, such inquiries constitute a per se violation of the FCA, even if no adverse action occurs as a result of the inquiry.

After an employer extends a conditional offer of employment, an employer may ask whether an applicant has a criminal conviction history or pending criminal case, run a background check and ask an applicant about any convictions. However, an employer may never inquire about, or take any action based on, a non-conviction. A non-conviction is any non-pending criminal action that concluded in one of four ways: termination of the action in favor of the individual, adjudication as a youthful offender, a sealed non-criminal conviction, or a sealed conviction. Further, an employer may not withdraw its conditional offer of employment after learning about an applicant's conviction history unless the employer performs the evaluation process mandated by New York Correction Law Article 23-A. Under Article 23-A, an employer cannot deny employment unless it draws a direct relationship between the applicant's criminal record and the prospective job, or shows that employing the applicant "would involve an unreasonable risk to the property or to the safety or welfare of specific individuals or the general public."

The FCA's Enforcement Guidance states that an employer cannot show a direct relationship exists merely because the applicant has a conviction record. Rather, an employer must evaluate whether the concerns have been mitigated by the Article 23-A factors which include, among other factors, the responsibilities of the prospective job, the time elapsed since the crime and the age of the applicant when the crime occurred.

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After conducting the Article 23-A evaluation, if an employer still wishes to retract a conditional offer of employment, it must follow the "Fair Chance Process." The process requires employers to disclose to the applicant a written copy of any inquiry it conducted into the applicant's criminal history; share with the applicant a written copy of its Article 23-A analysis; and allow the applicant at least three business days, from receipt of the inquiry and analysis, to respond to the employer's concerns. Failure to comply with the Fair Chance Process constitutes a per se violation of the FCA.

The amount of civil penalty imposed for an FCA violation will depend on the severity of the particular violation, the existence of previous or contemporaneous violations and the employer's size. The FCA does not apply to employers hiring for positions where federal, state or local law requires criminal background checks.

Credit Discrimination

New York City's Stop Credit Discrimination in Employment Act (SCDEA) took effect on Sept. 3, 2015, and the NYC Commission released Enforcement Guidance on this law on Sept. 2, 2015. The SCDEA amends the NYCHRL to make it unlawful for an employer to consider an applicant or employee's consumer credit history in making any employment decision. Under the law, an employer may not request consumer credit history from a job applicant, current employee or consumer reporting agency. Consumer credit history is defined as an applicant's creditworthiness, as indicated by a credit report, credit score or information provided by the applicant such as credit accounts, bankruptcies, judgments or liens. Requesting such information constitutes a violation of the SCDEA, even if the request does not result in an adverse employment action.

The SCDEA includes exemptions for certain positions, including positions with control of funds or assets worth $10,000 or more, positions with control over digital security systems, non-clerical positions with regular access to trade secrets, and positions for which credit checks are required by law or a self-regulatory organization (SRO). The Enforcement Guidance provides insight as to how the NYC Commission will interpret these exemptions, which it cautions "are to be construed narrowly."

For example, it states the exemption for positions involving responsibility for funds or assets worth $10,000 or more applies only to executive-level positions with financial control over a company, such as chief financial officers and chief operations officers (as opposed to all staff in a finance department). Similarly, positions with control over digital security systems include executive-level positions, such as chief technology officers or senior information technology executives (but not all staff in an information technology department). It is not clear whether professionals below the executive level who are responsible for cybersecurity fall under this exemption.

The Enforcement Guidance also narrowly interprets "trade secrets," stating they do not include recipes, formulas, customer lists, processes, and other information regularly collected in the course of business or regularly used by entry-level and non-salaried employees and supervisors or managers of such employees. With regard to the SRO exemption, the Enforcement Guidance states FINRA members are exempt from the SCDEA only when making decisions about certain individuals required to register with FINRA. And it makes no mention of other SROs, such as the National Futures Association. Further guidance from the NYC Commission is needed in this area. It is anticipated the Enforcement Guidance will be further clarified through FAQs and formal rules.

Violations of the SCDEA are punishable by civil penalties ranging up to $125,000, and up to $250,000 for violations resulting from willful, wanton or malicious conduct.

Conclusion

Employers are advised to consult with legal counsel regarding compliance with each of these new workplace requirements.