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Expert Analysis

Recent Changes And Updates to New York Laws

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While many employers remain focused on COVID-19 and return to office issues, New York employers should also be aware of several significant updates to New York law. Specifically, in the past few months, New York has seen laws and guidance concerning (1) wage deduction claims, (2) the impact of cannabis legalization in the workplace, (3) expanded protection for whistleblowers and (4) new notice requirements for monitoring employees' emails, phones and Internet usage. This column addresses each of these updates and relevant considerations for employers.

Wage Deduction Claims

On Aug. 19, 2021, the No Wage Theft Loophole Act became effective. The Act amended §§193 and 198 of the New York Labor Law. It clarifies that employees may assert statutory claims against employers for any unpaid wages.

Section 193 only allowed for certain types of "deductions" from "wages." Section 198 provides a private right of action for any unlawful deductions. Historically, many New York courts interpreted "deduction" to include only the partial withholding of wages and not the failure to pay wages in full.

The No Wage Theft Loophole Act amended §§193 and 198 to provide that "[t]here is no exception to liability … for the unauthorized failure to pay wages, benefits or wage supplements." As reflected in the Assembly's memo, the amendment was intended to "clarify that employees must be paid what they are owed, no matter what." Accordingly, under the No Wage Theft Loophole Act, an employer's withholding of pay in its entirety constitutes a "deduction" within the meaning of §193 of the New York Labor Law.

As a result, employees may now be entitled to receive liquidated damages and attorney fees if they prevail on a claim for unpaid wages. To avoid disputes, New York employers should ensure that all compensation agreements, including commission agreements, bonus agreements or discretionary compensation arrangements, are clearly documented and that changes are only made in writing signed by the employee and employer. They should also ensure that wages are paid when due.

Cannabis Legalization

On Oct. 8, 2021, the New York Department of Labor (NYDOL) issued Frequently Asked Questions (FAQs) addressing common workplace issues related to employees' use of cannabis under the Marijuana Regulation and Taxation Act (MRTA). The MRTA legalized the recreational use of cannabis for adults over the age of 21 in New York. With certain

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exceptions, it became effective immediately on March 31, 2021. The MRTA also amended §201-D of the New York Labor Law to prohibit discrimination against employees for use of cannabis outside of work.

Specifically, under §201-D, as amended, an employer may not discriminate against an employee or applicant for the use of cannabis outside of work hours, off the employer's premises and without the use of the employer's equipment or other property. However, an employer may take action against an employee if the employee is "impaired by the use of cannabis" while working, which means that the employee "manifests specific articulable symptoms" that "decrease or lessen the employee's performance of the duties or tasks of the employee's job position," or "interfere with an employer's obligation to provide a safe and healthy work place, free from recognized hazards, as required by state and federal occupational safety and health law."

The FAQs state that articulable symptoms of impairment are objectively observable indications that the employee's job performance is decreased or lessened. The FAQs reiterate that an employer may take employment action if an employee is impaired by cannabis while working, even if the employer does not have an explicit policy prohibiting its use. Notably, the FAQs caution employers that such articulable symptoms could also be an indication that an individual has a disability protected by federal or state law.

The FAQs indicate that observable signs of marijuana use do not indicate impairment on their own—only those that objectively indicate that an employee's performance of essential duties or tasks is decreased or lessened. Similarly, the smell of cannabis or a positive test for cannabis, each on their own, are not evidence of articulable symptoms of impairment. Employers may, however, prohibit an employee's use or possession of cannabis during work hours and while on company property.

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Employers should review their substance abuse policies, including any policies related to drug testing, to ensure compliance with §201-D. They should also consider whether objective measures for determining impairment can be established. In addition, employers should take care to avoid unlawful bias on the basis of other characteristics, including race, when implementing adverse job actions based on cannabis use.

Whistleblower Protection

On Oct. 28, 2021, Governor Kathy Hochul signed legislation substantially expanding whistleblower protections under §740 of the New York Labor Law. The amended law becomes effective Jan. 26, 2022. It broadens the definitions of "employee" and protected activity, expands the scope of what is considered retaliatory conduct and provides additional remedies to whistleblowers, among other things.

First, the new law expands the definition of "employee" to include current and former employees and independent contractors rather than just current employees. Second, the new law significantly expands the scope of protected activity. Prior to the new law, protected activity included only reports of violations of law which created or presented a danger to public health and safety. The new law, by contrast, protects employees from retaliation for reporting any type of violation of law, regardless of subject matter.

Third, the new law eliminates the requirement that employees first notify their employers of the violative activity, policy or practice and provide their employer with a reasonable opportunity to cure the problem before disclosing any potential violation of law to a public body. Employees now need only make a "good faith effort" to notify their employers for a report to a government agency to be protected activity.

Additionally, the law provides certain circumstances under which an employee need not notify an employer, including where the employee reasonably believes that his or her supervisor is already aware of the

issue and will not take corrective action. Employees also need not provide prior notice and an opportunity to cure where there is an imminent and serious danger to public health and safety, there is a risk of destruction of evidence or the activity could reasonably be expected to lead to the endangerment of a minor.

Fourth, the new law expands the type of employment actions that are considered retaliatory to include any action that would discriminate against any current or former employee exercising his or her rights under the whistleblower law, including any action that would adversely impact a former employee's current or future employment.

Fifth, the new law lengthens the statute of limitations for a retaliation claim from one year to two years, provides for additional remedies such as front pay and punitive damages and provides the parties with the right to a jury trial. Under the new law, employers must post notice of the employee's rights and other obligations in the workplace prior to the law taking effect.

Employers should anticipate that this law will result in an uptick in internal and external reporting going forward. Accordingly, employers should revisit their policies and procedures for general compliance with law. They should revisit whistleblowing policies and procedures and post them as well as training with the expanded scope of whistleblower protections in mind.

Phone, Email and Internet Monitoring

On Nov. 8, 2021, Governor Hochul signed legislation requiring all private employers to notify employees in writing if the employer intends to monitor the employee's company phones, email or Internet usage. The law becomes effective May 7, 2022.

Under the new law, written notice must be provided to employees upon hiring in hard copy or electronic format. Each new hire must acknowledge receipt of the notice. The new law does not include a similar requirement for current employees.

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Employers must, however, post notice of their phone, email and Internet monitoring practices in a "conspicuous place which is readily available for viewing by its employees." The law provides that the notice must inform employees that "any and all telephone conversations or transmissions, electronic mail or transmissions, or Internet access or usage by an employee by any electronic device or system, including but not limited to the use of a computer, telephone, wire, radio or electromagnetic, photoelectronic or photo-optical systems may be subject to monitoring at any and all times and by any lawful means."

The law includes certain exceptions. Specifically, notice is not required with respect to processes that are (1) designed to manage the type of volume of incoming or outgoing electronic mail, telephone voice mail or Internet usage; (2) are not targeted to monitor or intercept such activities of a particular individual; and (3) are performed solely for the purpose of computer system maintenance and/or protection.

The state Attorney General, rather than the New York Department of Labor, will enforce the law. Employers may be subject to a civil penalty of up to $500 for a first offense, $1,000 for a second offense and $3,000 for each subsequent offense. The law does not provide for a private right of action.

Prior to the law's effective date, employers should review their policies and procedures related to employee monitoring and post them. Further, employers should draft the required notices and develop a procedure for administering notices to new hires and collecting and maintaining employee acknowledgement forms.