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Recent Changes and Updates to New York Laws

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Heading into the new year, employers should be mindful of recent updates to New York state and city law. In the past few months, New York has enacted new laws, amended current laws and updated rules concerning (1) social media, (2) settlement agreements, (3) captive audience meetings, (4) wage payment, (5) size bias and (6) safe and sick time. Additionally, New York Governor Kathy Hochul recently vetoed a bill that, if enacted, would have banned non-competition agreements. This column addresses each of these updates and the relevant considerations for employers.

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Social Media

On Sept. 14, 2023, New York Governor Kathy Hochul signed legislation that further protects the personal social media accounts of employees. Effective March 12, 2024, the amended law prohibits employers from requesting, requiring or coercing an employee or applicant for employment to (1) disclose the username, login information and password of a personal account,(2) access their personal account in the presence of the employer or (3) reproduce photographs, video or other information from a personal account. Specifically, an employer cannot require disclosure of such information as a condition of hiring, condition of employment or for use in a disciplinary action.

The law includes several exceptions. Specifically, an employer may (1) request or require an employee to disclose access information to business accounts if the employee was provided prior notice of the employer's right to access such information, (2) request or require an employee to disclose access information for an account known by the employer to be used for business purposes and (3) access a device paid for in whole or in part by the employer where payment was conditioned on the right of employer access and the employee was provided prior notice and agreed to such condition.

Settlement Agreements

On Nov. 17, 2023, Governor Hochul signed legislation further limiting the use of non-disclosure provisions in settlement agreements. The amendments became effective immediately. The former iteration of the law prohibited non-disclosure provisions in agreements regarding discrimination claims, unless three criteria were met: (1) the employee requested the implementation of a confidentiality provision, (2) the employee had 21 days to consider the agreement and (3) the employee had seven days to revoke the agreement.

The amended law expands and alters the use of non-disclosure provisions in settlement agreements in four critical ways.

First, the law now applies to non-disclosure and non-disparagement clauses in agreements involving "discriminatory harassment or retaliation." Second, the prohibition now includes claims made by independent contractors. Third, employees may now sign during the 21-day consideration period if they choose. Notably, Section 5003-B of the New York Civil Practice Law and Rules, which applies to settlement agreements resolving claims for which the factual foundation involves discrimination, still requires employees to wait the full 21 days to consider a provision prohibiting disclosure of the underlying facts and circumstances of any such claim. Fourth, the agreement may not (1) impose liquidated damages for breaches of a non-disclosure or non-disparagement provision, (2) require forfeiture of all or part of the consideration for the agreement for a violation of the provision or (3) require the complainant to represent they were not subject to unlawful discrimination, harassment or retaliation. Employers must also notify complainants that complainants are not prohibited from speaking with the New York Attorney General.

Captive Audience Meetings

Effective Sept. 6, 2023, employers are prohibited from requiring employee attendance at employer-sponsored meetings with the primary purpose of conveying the employer's opinion on religious or political matters, including relating to labor union membership. The law defines "religious matters" as matters relating to "religious affiliation and practice and the decision to join or support any religious organization or association." "Political matters" are defined as matters relating to "elections for political office, political parties, legislation, regulation and the decision to join or support any political party or political, civic, community, fraternal or labor organization." The law also requires employers to post a notice of such rights in the workplace.

The law does not prohibit (1) employer communications required by law, but only to the extent of such legal requirement, (2) employer communications that are necessary for the performance of employee job duties, (3) an institution of higher education from holding meetings with or participating in communications with employees "that are part of coursework, any symposia or an academic program at such institution," (4) casual conversations between employees or the employees and employer on such subjects, as long as attendance is voluntary and (5) communications on such subjects with managerial or supervisory employees. In addition, the law does not apply to a "religious corporation, entity, association, educational institution or society that is exempt from" Title VII of the Civil Rights Act of 1964 "with respect to speech on religious matters to employees who perform work connected with the activities undertaken by such religious corporation, entity, association, educational institution or society."

Wage Payment

On Sept. 6, 2023, Governor Hochul signed legislation amending the New York Penal Law to include wage theft as a form of criminal larceny. The legislation, effective upon signing, defines "compensation for labor or services" as "property" and defines wage theft as the hiring of a person to perform services and, subsequently, not paying for the work performed. Under the law, prosecutors may aggregate non-payments or underpayments of wages, even if they occurred in multiple counties.

Size Bias

On May 26, 2023, New York City Mayor Eric Adams signed legislation that classifies height and weight as protected classes under the New York City Human Rights Law. Effective Nov. 26, 2023, the law prohibits unlawful discrimination on the basis of height or weight in employment, housing and public accommodations. There are limited exceptions for when height and weight may be taken into account in employment and public accommodation circumstances, including when a person's height or weight will prevent them from performing essential requisites of the job.

New York City's Earned Safe and Sick Time Act

On Sept. 15, 2023, the New York City Department of Consumer and Worker Protection (DCWP) adopted

new amended rules governing New York City's Earned Safe and Sick Time Act (ESSTA). Effective Oct. 15, 2023, these amended rules clarify aspects of the ESSTA such as determining employer size, employee eligibility, documentation and notice requirements, reporting standards and penalties.

The amended rules instruct that an employer's size for purposes of the ESSTA is determined by total employees nationwide, including employees that are part-time, jointly employed and on paid or unpaid leave. As for employee eligibility, only employees working in New York City, regardless of employer location, will be covered by the ESSTA. This standard includes employees who primarily work outside of New York City, but regularly perform work or are expected to regularly perform work in New York City. However, only hours worked in New York City will count toward accrual of safe and sick leave. Remote employees physically located outside of New York City are not eligible.

The amended rules also provide that an employer may require reasonable written documentation when the employee is absent for more than three consecutive workdays, if such requirement is detailed in a written policy. Acceptable sources of documentation include licensed health care providers, licensed mental health counselors and licensed clinical social workers.

Similar to documentation, employers may also require employees to provide notice of their foreseeable and unforeseeable need to use safe and sick time, provided such requirements are included in a written policy. A need is foreseeable when the employee is aware of their need to use safe and sick time seven days or more in advance; if unforeseeable, employees may be required to give notice as soon as practicable.

Additionally, employers must report safe and sick time accruals and balances to employees every pay period via pay stubs or on other written documentation. Employers must compensate employees for safe and sick time at the employees' regular rate of pay. As for penalties, the amended rules provide that failure to maintain a safe and sick time policy or adequate records of employee safe and sick time balances will result in a reasonable inference that the employer violated the ESSTA.

Non-Competition Agreements

In June 2023, the New York State Assembly and the New York State Senate passed a bill that would have banned non-competition agreements if signed into law by Governor Hochul. On Nov. 30, 2023, Governor Hochul expressed her desire for the legislation to protect low- to middle-income workers while also allowing high-income workers to make their own decisions regarding competition.

Specifically, Governor Hochul suggested that the legislation should be modified to incorporate income thresholds, such as only banning non-competition agreements between employers and workers making less than $250,000 per year. In this case, the legislation would allow high-income workers, who Governor Hochul believes are better equipped to advocate for themselves, the ability to be subject to non-compete agreements.

Senator Sean Ryan, the sponsor of the bill, disagreed with Governor Hochul's proposal that an income threshold be added to the statute, arguing that a blanket salary range is not an effective threshold for exemption.

The bill was not amended. On Dec. 22, 2023, Governor Hochul vetoed it. In doing so, she released a statement explaining that she supports non-compete legislation protecting "middle-class and low-wage workers," but does not agree with a "one-size-fits-all approach."

Employers should review and update their policies and practices to ensure compliance with the newly enacted and amended laws and updated rules. Employers should also monitor legislation governing non-competes for new developments.

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