HRtelligence

WEBINAR OVERVIEW

2023 Year End Review and Supreme Court Update

December 13, 2023

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- Why Legal Guidance Is Necessary

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- New York City Enacts Legislation Prohibiting Discrimination on the Basis of Height and Weight

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- 2023 Recap – Key Decisions that Employers Should be Aware of

WEBINAR OUTLINE

Intro/Setting the Stage

Adaptability Is Key for Employer Compliance

- Every business must stay compliant with laws, appropriately communicate with employees, and manage risks
- Ever evolving changes in employment law
- Employers must be agile in their practices to be able to adapt as the laws change
- Process for developing and updating policies cannot be set in stone

Why Legal Guidance Is Necessary

- Laws change frequently at the state and federal level, making it difficult to maintain legal compliance.
- Understanding and complying with the applicable laws and regulations can help protect your employees' rights, promote a positive workplace culture, and prevent legal disputes.
- It's important to seek legal counsel and educate yourself about employment laws and regulations that apply to your business.

Federal Law Updates

NLRB Determines that Overbroad Confidentiality and Non-Disparagement Provisions in Severance Agreements Are Unlawful

- In *McLaren Macomb,* the NLRB held that an employer violates Section 8(a)(1) of the National Labor Relations Act ("NLRA") when it offers a severance agreement containing provisions that would restrict employees' exercise of their rights under Section 7 of the Act.
- A current or former employee does not have to sign an unlawful agreement, but merely be offered one to bring an unfair labor practice complaint against an employer.

The Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act) – Effective April 28, 2023

- The PUMP Act expands existing protections under the Fair Labor Standards Act so that all employees who are nursing a child are entitled to reasonable time and

a private location (other than a restroom) to express breast milk for up to one year after the child's birth.
- Employers with less than 50 employees have a possible undue hardship exemption.
- A nursing break under the act is unpaid unless the employee is not completely relieved of their duties during the break.
- Teleworking employees also must be free from any camera observation during a covered break.
- Employees are protected from retaliation for exercising their rights under the act and may enforce a violation of the act through a private cause of action.

The Pregnant Workers Fairness Act (PWFA) – Effective June 27, 2023

- The PWFA codifies protections for employees already in effect under the Americans with Disabilities Act.
- Under the PWFA, employers with 15 or more employees are required to provide reasonable accommodations for an employee's known limitations arising from pregnancy, childbirth, or related medical conditions unless it would be an undue hardship to do so.
- Employers are prohibited from forcing employees to take paid or unpaid leave in lieu of a reasonable accommodation. Employees are protected from discrimination or retaliation for requesting an accommodation.

NLRB New Joint Employer Rule

- On October 26, 2023, the National Labor Relations Board issued a final rule addressing the standard for determining joint-employer status under the National Labor Relations Act. The new rule is effective February 26, 2024.
- Pursuant to the new rule, two or more employers of the same employees are considered joint employers of those employees if the employers share or codetermine those matters governing employees' essential terms and conditions of employment.
- To share or codetermine those matters governing employees' essential terms and conditions of employment means the employer must possess the authority to control (whether directly, indirectly, or both) or exercise the power to control (whether directly, indirectly, or both) one or more of the employees' essential terms and conditions of employment.

Notes: The new rule defines the "essential terms and conditions of employment" as: (1) wages, benefits, and other compensation; (2) work hours and scheduling; (3) assignment of work duties; (4) supervision of performance of work duties; (5) work rules and directions on the manner, means, and methods of the performing work duties, and the grounds for discipline; (6) hiring and firing decisions; and (7) "working conditions related to the safety and health of employees."

The new rule makes it easier for workers to be considered employees of more than one entity for labor relations purposes – a move that will result in more opportunities for unions to organize not only the workforce but also those workers formerly understood to be independent contractors.

NLRB Establishes New Standard for Evaluating Workplace Policies

- In August 2023, the National Labor Relations Board ("NLRB") released the decision in *Stericycle Inc.* which revises the test for determining whether an employer's workplace policies comply with the National Labor Relations Act.
- The decision reverses the Board's former decision in *Boeing Co.* and adopts a new test: could a worker reasonably read, or interpret, a workplace policy as restricting their NLRA rights?
- Any policy that has a "reasonable tendency to chill employees from exercising their [collective bargaining] rights" may constitute an unfair labor practice and a violation of the NLRA—even if the rule could also be interpreted as not restricting workers' rights.

Notes: In Stericycle, the Board has shifted the burden to the employer to demonstrate the legitimate business need for a particular workplace policy. Now, when the Board reviews a policy, the burden to prove the policy's lawfulness immediately shifts to the employer if an employee could reasonably interpret a policy as having coercive meaning.

New York State Updates to the Law

New York Enacts Law Regarding Captive Audience Meetings – Effective Immediately Upon Signing

- On September 6, 2023, New York Governor Kathy Hochul signed the captive audience bill into law which prohibits employers from coercing employees into attending or participating in meetings sponsored by the employer concerning the employer's views on political or religious matters.
- The legislation also requires employers to post a sign in every workplace informing employees of their rights under the new law.

Notes: The new law makes it unlawful for New York employers to discipline employees who refuse to attend an employer-sponsored meeting or listen to speech or view communications, the primary purpose of which is to communicate the employer's opinion concerning religious or political matters.

The law defines "political matters" as "matters relating to elections for political office, political parties, legislation, regulation and the decision to support any political party or political, civic, community, fraternal[,] or labor organization."

"Religious matters" are defined as those "relating to religious affiliation and practice and the decision to join or support any religious organization."

Notably, the new legislation does NOT prohibit the following:

- *"casual conversations" between an employer or its agent or representative and employees "provided participation in such conversations is not required";*
- *communicating to employees about "any information that the employer is required by law to communicate" to the extent that such legal requirement or information is necessary for employees to perform their job duties;*
- *"a requirement limited to the employer's managerial and supervisory employees"; or*
- *communication by institutions of higher education to employees that are part of coursework, symposia, or academic programs at the institution.*

Notice of Eligibility for Unemployment – Effective November 13, 2023

- New York employers are now required to provide written notice of unemployment eligibility to New York employees upon permanent or indefinite separation of employment, reduction in hours, temporary separation, and any other interruption in continued employment that results in total or partial unemployment.
- This law expands the scope of an employer's obligation to provide individuals with notice of eligibility for unemployment insurance by requiring notice upon a "reduction in hours" or "any other interruption in continued employment that results in total or partial unemployment."

New York Enacts Law Prohibiting Employment Agreement Provisions that Assign Employee Inventions – Effective Immediately Upon Signing

- New York recently enacted legislation that amends the New York Labor Law by adding a new section 203-f which specifies that an invention developed entirely on an employee's own time, without using an employer's property or trade secrets, belongs to the employee.
- Section 203-f of the Labor Law bans the enforcement of invention assignment agreements that entitle employers to intellectual property developed by employees entirely on their own time without using their employer's equipment, supplies, facilities, or trade secret information, unless the invention relates at the time of conception or reduction to practice of the invention to the employer's business, or actual or demonstrably anticipated research or development of the employer, or if the invention results from any work performed by the employee for the employer.
- Section 203-f further provides that a requirement in an employment agreement that an employee assign, or offer to assign, any of his or her rights in an invention developed on his or her own time to an employer is against New York State public policy and will be deemed unenforceable.

New York Prohibits Employers from Accessing Employees' Personal Social Media Accounts – Effective March 12, 2024

- On September 14, 2023, New York Governor Kathy Hochul signed legislation to restrict employers from requesting access to an employee's or job applicant's private social media account.
- The law states that an employer cannot request, require or coerce any employee or applicant for employment to:
    - (i) disclose any username and password, password, or other authentication information for accessing a personal account through an electronic communications device;
    - (ii) access the employee's or applicant's personal account in the presence of the employer; or
    - (iii) reproduce in any manner photographs, video, or other information contained within a personal account obtained by the means outlined in the law.

Notes: There are several exceptions to the law in which employers may lawfully access an employee's or applicant's private social media account, including:

- *An employer may require an employee to disclose any user name, password or other means for accessing nonpersonal accounts that provide access to the employer's internal computer or information systems.*
- *The law does not prohibit an employer from requesting or requiring an employee to disclose access information to an account provided by the employer where such account is used for business purposes and the employee was provided prior notice of the employer's right to request or require such access information.*
- *An employer may request or require an employee to disclose access information to an account known to an employer to be used for business purposes.*

The law also does not prohibit an employer from accessing an electronic communications device paid for in whole or in part by the employer where the provision of or payment for the electronic communications device was conditioned on the employer's right to access such device and the employee was provided prior notice of an explicitly agreed to such conditions. However, this does not permit an employer to access any personal accounts on the device.

New York Governor Hochul Passes Bill that Modifies the Definition of Clerical and Other Workers – Effective March 13, 2024

- On September 15, 2023, New York Governor Kathy Hochul signed bill S5572/A6796 that amends the New York Labor Law's definition of "clerical and other worker."
- The legislation increases the minimum weekly earnings that a bona fide executive, administrative, or professional employee must receive to be excluded from the category of "clerical and other worker," from $900 to $1,300 per week.
- The legislation is significant for New York employers, as it effects wage protections that are only available to "clerical and other workers," such as being subject to mandatory direct deposit.

- In addition, employers who fail to pay wages within 30 days for "clerical and other worker[s]" can be found guilty of a misdemeanor.

New York State Enacts New Legislation Strengthening Penalties Against Employers for Wage Theft – Effective Immediately

- New York State Governor Hochul recently signed legislation (S2832-A/A154-A) to make wage theft a form of larceny and allow prosecutors to seek stronger criminal penalties against employers who are found guilty of wage theft.
- Under the new law, employers can be charged with larceny if they do not pay wages at the minimum wage rate and overtime rate, or the promised wage rate (if greater), to an employee for work performed.
- The law allows aggregation of all nonpayments or underpayments to one person from one person into one larceny count. The law also allows aggregation of all nonpayments or underpayments from a workforce (defined as a group of one or more persons who work in exchange for wages) into one larceny count.

Gender Identity or Expression – Effective Immediately Upon Signing

- Governor Hochul signed a bill adding "gender identity or expression" as a protected class for purposes of the New York State Human Rights Law's prohibitions on discrimination against interns.
- The enactment is consistent with other provisions of the New York Human Rights Law that extend these protections to employees.

Minimum Wage Increasing – January 1, 2024

In May, Governor Hochul signed budget legislation to increase the minimum wage for workers beginning January 1, 2024, and continuing through 2026. Further, as part of the legislation, increases to the minimum wage will be indexed based on inflation by the U.S. Department of Labor's consumer price index beginning in 2027 and each year thereafter.

Minimum Wage Increases

For New York City, Westchester and Long Island:

- 2024 - $16.00/hour
- 2025 - $16.50/hour
- 2026 - $17.00/hour

For the rest of New York:

- 2024 - $15.00/hour
- 2025 - $15.50/hour
- 2026 - $16.00/hour

For 2027 and beyond, the New York Department of Labor (NYSDOL) will publish the minimum wage on October 1 each year for the rate to take effect on January 1. Increases will not occur for a given year if the inflation index is negative; New York State's unemployment rate increases by half a percentage point from its low during the preceding year; or total non-farm state employees decrease over the previous six (6) months.

New York State Pay Transparency Law- Effective September 17, 2023

- Pursuant to the New York State Pay Transparency law, employers who advertise a job, promotion, or transfer opportunity must include:
  (1) the compensation or a range of compensation for such job, promotion, or transfer opportunity; and
  (2) the job description for such job, promotion, or transfer opportunity, if such description exists. In addition to the disclosure requirements, the law contains an explicit non-retaliation provision.

- Covered employers must include in any advertisement for a job, promotion, or transfer opportunity the minimum and maximum annual salary or hourly range of compensation that the employer in good faith believes to be accurate at the time of the posting.
- The law requires employers to also disclose the applicable job description (if one exists).

Notes: The law expands upon the meaning of the term "advertise" by defining it as "to make available to a pool of potential applicants for internal or public viewing, including electronically, a written description of an employment opportunity."

The law defines "range of compensation" as the "minimum and maximum annual salary or hourly range of compensation for a job, promotion, or transfer opportunity that the employer in good faith believes to be accurate at the time of the posting of an advertisement for such opportunity."

Notably, the law applies to remote positions physically performed outside of New York that report to a New York supervisor, office, or work site. The standard is no longer whether work "can or will be performed" in New York State. Instead, the law will now apply to advertisements for "a job, promotion, or transfer opportunity that will physically be performed, at least in part, in the state of New York, including a job, promotion, or transfer opportunity that will physically be performed outside of New York but reports to a supervisor, office, or other work site in New York."

New York State Updates Its Model Sexual Harassment Policy and Training Materials

- On April 11, 2023, New York State updated its sexual harassment prevention model policy and training requirements which employers will need to incorporate into their handbooks and communication with employees.

The new guidance:

- Notes that harassment does not need to be "severe or pervasive" to be illegal in New York.
- Adds more examples of sexual harassment, discrimination and retaliation, including circumstances in which sexual harassment can occur while working remotely.
- Adds a section on bystander intervention and provides tools and methods that can be used when an employee witnesses discrimination or harassment.
- Adds language regarding gender diversity and gender-based harassment and discrimination, which can include gender stereotyping and treating employees differently because they identify as cisgender, transgender or nonbinary.
- Provides emphasis and guidance on supervisors' and managers' responsibility to report harassment and discrimination.
- Explains that harmless intent is not a defense for harassment and discrimination, and that the impact of the behavior on a person is what counts.
- Adds information regarding the New York State Division of Human Rights' sexual harassment hotline.

New York Employers Must Provide Workplace Postings Electronically- Effective Immediately

On December 16, 2022, Governor Kathy Hochul signed into law an amendment to Section 201 of the New York Labor Law that requires New York employers must now furnish all employees with digital copies of all required posters via email or by posting them on the employer's website.

Specifically, the new law provides that employers must:

1. Furnish digital versions of all copies and abstracts required under New York law or the NYDOL's regulations to all employees through either the employer's website or by email;
2. Furnish digital versions of all other documents required to be physically posted in the workplace pursuant to any state or federal law or regulation to all employees through either the employer's website or by email; and
3. Provide notice to employees that all physically posted notices are available electronically.

New York State Provides New Protections Against Discrimination Based on Citizenship and Immigration Status

On December 23, 2022, Governor Hochul signed into law a bill amending the New York State Human Rights Law ("NYSHRL") to add citizenship and immigration status to the list of protected classes covered.

New York City Update to the Law

New York City Enacts Legislation Prohibiting Discrimination on the Basis of Height and Weight – Effective November 22, 2023

- New York City amended the New York City Human Rights Law to include height and weight as protected categories and New York City employers will be prohibited from discriminating against applicants and employees on the basis of their actual or perceived height or weight in all employment decisions.

Notes: The legislation provides the following exceptions:

- *Where preferential treatment on the basis of height or weight is required by federal, state, or local law or regulation;*
- *Where an individual's height or weight could prevent them from performing the essential functions of the job with or without an accommodation; or*
- *Where a certain height or weight is reasonably necessary for the normal operation of the business.*

Supreme Court Review

2023 Recap

- Supreme Court Redefines Standard for Religious Accommodation Requests

Notes: In Groff v. DeJoy, *the Court held that an employer must allow a religious accommodation for employees unless the employer can show the burden of doing so "is substantial in the overall context of an employer's business," moving away from the long-standing "*de minimis *cost" standard.*

Under Title VII, employers are required to accommodate an employee's religious beliefs as long as it does not impose an "undue hardship" on the business. Prior to the new holding, "undue hardship" has been held to mean anything that has more than a de minimus, or trivial, burden on the employer.

In Groff, the Supreme Court unanimously held that an employer must make such an accommodation unless it would result in substantial increased costs in relation to the conduct of its business. The Supreme Court has now rejected the de minimus standard, thus requiring employers to demonstrate a greater level of burden before denying a religious accommodation

request. Under this more vigorous standard, it is likely that employers could see an increase in religious accommodation requests and have greater difficulty in declining accommodations.

- Supreme Court Ruling Protects Top 3 Benefits of Arbitration

Notes: In *Coinbase, Inc. v. Bielski (June 23, 2023), the Supreme Court held that if a trial court denies a party's request to compel arbitration, the court must pause pre-trial and trial proceedings while the decision is appealed. According to SCOTUS, many of the benefits of arbitration — such as efficiency and lower cost — could be lost if trial court proceedings continue, even if an appeals court ultimately finds that the case belongs in arbitration. Moreover, despite having an arbitration agreement in place, the employer could face significant pressure to settle claims to avoid such proceedings during the appeal. Thus, SCOTUS found that trial court proceedings are automatically paused during the appeal.*

- Supreme Court Ruling Makes It Easier for Employers to Recover Damages Caused by Union Strike Misconduct

Notes: In Glacier Northwest v. International Brotherhood of Teamsters (June 1, 2023), the Supreme Court ruled that federal labor law does not prevent employers seeking to sue and recover economic damages from labor unions from filing state law claims for intentional damage when workers fail to take reasonable precautions and destroy company property during a strike. Although the National Labor Relations Act (NLRA) generally blocks state law claims when the two "arguably conflict," SCOTUS noted in an 8-1 decision that federal law does not shield strikers in every situation.

- Highly Paid Employee Entitled to Overtime Pay

Notes: In Helix Energy Solutions Group, Inc. v. Hewitt (February 22, 2023), the Court held that high-earning workers making more than $200,000 a year might be eligible for overtime pay. To be exempt from overtime pay under the Fair Labor Standards Act's "white-collar" exemptions, employees must earn at least $684 a week on a salary basis, among other requirements. In this case, an oil rig worker was paid a guaranteed daily rate of at least $963, which is significantly higher than the weekly salary threshold. In a 6-3 ruling, however, the Supreme Court said the worker was eligible for overtime pay because he was not paid on a salary basis.

The laws enacted in 2023 continue the trend of expanding employee protections in New York State. Employers should take the following steps to meet their current obligations and prepare for the laws:

- Review and update template nondisclosure clauses and preference agreements.
- Review exempt employees' salaries in light of the announced increases to the minimum wage/overtime exemptions as well as pay frequency exemptions.
- Create and post communications informing employees of their right to not participate in employer meetings on political and religious matters.
- Review social media policies to ensure they do not require employees to provide access to personal accounts in violation of the law.
- Review employee handbook provisions concerning employee intellectual property and inventions.
- Employers should verify that they are keeping accurate pay records and statements, including ensuring employees are paid for all time worked, in light of the new criminal penalties for wage theft.
- Ensure your sexual harassment prevention materials have been updated to reflect the new requirements.

Every business leader knows that "the only constant is change." In today's constantly evolving legal landscape, it's a business's ability to adapt quickly and efficiently that ensures its longevity and success. Between emerging trends and ever-changing laws/regulations, it's essential for an employer to be flexible and adaptable in order to navigate unexpected challenges. Developing the proper HR policies and strategies for implementing the updates and changes is key for legal compliance.