Webinar 1 – January 16, 2024

Preparing for 2024 – What Employers Need to Know

WEBINAR OUTLINE

Key New York State Employment Law Updates for 2024

- Governor Hochul Vetoes Non-compete Bill
- Benefit and Contribution Updates to New York's Paid Family Leave Law
- New York Minimum Wage and Salary Exemption Levels Increase
- New York COVID-19 Paid Vaccination Leave
- New York COVID-19 Paid Sick Leave
- Extended Statute of Limitations Under the New York State Human Rights Law
- New York Increases Salary Threshold for Labor Law Exemptions
- New York Prohibits Employers from Accessing Employees' Personal Social Media Accounts
- New York Enacts Freelance Isn't Free Act
- New York Clean Slate Act

Federal Law Updates

- NLRB Determines that Overbroad Confidentiality and Non-Disparagement Provisions in Severance Agreements are Unlawful
- The Pregnant Workers Fairness Act – EEOC Regulations
- NLRB New Joint Employer Rule
- NLRB Establishes New Standard for Evaluating Workplace Policies
- Accommodations in the Workplace

Top Trends Employers Should Be Aware of for 2024

- Workplace Culture
- Discrimination and DEI
- Artificial Intelligence
- Rise in Accommodation Requests
- Interplay of Leave Laws

WEBINAR CONTENT

Key New York State Employment Law Updates for 2024

Governor Hochul Vetoes Non-compete Bill

On December 22, 2023, Governor Hochul vetoed S3100A/A1278, a law passed by the New York State legislature in June 2023. The bill would have created a section in the New York Labor Law, and defined "non-compete agreement" and "covered employees," prohibited the imposition of a non-compete on a covered employee, voided any non-compete entered into after the effective date of the bill, and provided a mechanism for aggrieved employees to enforce the bill.

Notes:
Notes: On June 7, 2023, the New York State Senate passed Bill No. S03100 (the "Bill"), which would amend the New York Labor Law to ban the use of non-compete agreements between employers and employees. Governor Hochul felt as though changes would have to be made to the bill before she would sign it. She told reporters, "What I'm looking at right now is striking the right balance between protecting low and middle-income workers, giving them flexibility to have mobility to go from job to job as they continue up the ladder of success … But those who are successful have a lot more negotiation power, and they're at the industries that are an important part of our economy here in New York."

In order to achieve this balance, Governor Hochul would like any amendment to the bill to include a sale-of-business exception and potentially a $250,000 salary threshold for when employees could be subject to non-competes.

In light of her comments to the press, it is likely that there will be amended versions of the bill resubmitted.

Benefit and Contribution Updates to New York's Paid Family Leave Law

Effective January 1, 2024, the maximum weekly benefit for employees taking Paid Family Leave will be $1,151.16. Employees taking Paid Family Leave receive 67% of their average weekly wage, up to a cap of 67% of the current New York State Average Weekly Wage (NYSAWW). For 2024, the NYSAWW is $1,718.15, which means the maximum weekly benefit is $1,151.16. This is $20.08 more than the maximum weekly benefit for 2023.

New York Minimum Wage Increase

Effective January 1, 2024, the minimum wage will increase incrementally over the next few years based on the region where employees work as follows:

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

Notes: Beginning on January 1, 2027, increases to the minimum wage rates will be based on inflation using a three-year average of the Consumer Price Index for Urban Wage Earners and Clerical Workers ("CPI-W"). The State labor commissioner is directed to publish the adjusted minimum wage rate no later than October 1st each year, with the new rates taking effect the following January 1st.

New York COVID-19 Paid Vaccination Leave No Longer in Effect

As of January 1, 2024, New York employers are no longer required to provide up to four hours of paid leave for employees to receive a COVID-19 vaccine. This requirement had been extended to remain in effect only through December 31, 2023.

New York COVID-19 Paid Sick Leave Remains in Effect

Employers are still required to provide employees with COVID-19 paid sick leave. The amount to be provided depends on the size of the employer. There has been no expiration date announced for this law. Therefore, COVID-19 paid sick leave must continue to be provided to eligible employees in addition to their NYS paid sick leave.

Extended Statute of Limitations Under the New York State Human Rights Law

Effective February 15, 2024, the New York State Human Rights Law will extend the statute of limitations for filing claims of unlawful discrimination under state law to three years, which runs from the date of the alleged unlawful discriminatory practice.
The previous deadline for initiating discrimination claims under state law was one year, except for claims of sexual harassment, which could be filed within a three-year statute of limitations period. The new law expands the three-year limitations period to all New York State Human Rights Law discrimination claims.

Increase in Salary Threshold for Exempt Executive and Administrative Employees

Effective January 1, 2024, the New York State salary threshold for exempt executive and administrative employees is as follows:

- New York City, Westchester, Nassau and Suffolk Counties - $1,200.00/week ($62,400.00/year)

- The Rest of New York State - $1,124.20/week ($58,458.40/year)

Notes: professional employees are not subject to the New York State salary threshold requirements, but these employees remain subject to the federal exempt salary threshold (currently $684.00/week ($35,568.00/year)).

Misclassification of employees could lead to financial penalties. Each exempt position should be reviewed to ensure that the position is meeting both the new salary threshold and the "job duties" test.

New York Increases Salary Threshold for Certain Labor Law Exceptions

Governor Hochul signed S5572/A6796, which increases the threshold for applicability of wage-payment protections under Article 6 of the New York Labor law for certain persons employed in a bona fide executive, administrative, or professional capacity, from $900 to $1,300 per week. The law becomes effective on March 13, 2024.

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:

- disclose any username and password, password, or other authentication information for accessing a personal account through an electronic communications device;
- access the employee's or applicant's personal account in the presence of the employer; or
- reproduce in any manner photographs, video, or other information contained within a personal account obtained by the means prohibited in this paragraph.

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 Enacts Freelance Isn't Free Act

On November 22, 2023, New York Governor Kathy Hochul signed into law the "Freelance Isn't Free Act," which addresses payment of wages for freelance workers. Specifically, the Act amends the New York Labor Law to establish protections for covered freelance workers, including the right to receive a written contract, the right to be paid timely and in full, and the right to be free from retaliation. The new law takes effect May 20, 2024 and applies only to contracts entered into on or after that date.

New York Clean Slate Act

The Clean Slate was recently enacted which amends the criminal procedure law, the executive law, the correction law, the judiciary law and the civil-rights law to automatically seal certain convictions after a certain passage of time from the imposition of sentence, release from parole or probation, and if the defendant does not have a current charge pending. The law goes into effect on November 16, 2024.

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.

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.

The Pregnant Workers Fairness Act (PWFA) – EEOC Regulations

- 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.
- On August 11, 2023, the EEOC published its proposed regulations for the PWFA in the Federal Register. Public comment was open through October 11, 2023, and final regulations are due to be published by December 29, 2023.

Accommodations in the Workplace

- **Defining "Reasonable" Accommodations Under the PWFA**

The EEOC's proposed regulations provide a range of examples which would meet the standard of "reasonable accommodation" under the PWFA such as more frequent breaks, sitting/standing, schedule changes, part-time work, working from home, job restructuring, and temporarily suspending job functions. The EEOC asked for public comment as to whether more examples would be helpful.

- **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.

Top Trends Employers Should Be Aware of for 2024

Workplace Culture

One of the best ways for employers to hire and retain quality talent is to foster a healthy workplace culture which will help attract candidates and reduce turnover.

Discrimination and DEI

A positive workplace culture based on strong company values can reduce the risk of discrimination and harassment claims by ensuring that all employees are treated with respect and dignity.

Artificial Intelligence

Employers should prepare for an increased use and presence of AI in hiring, employment decision-making, as well as employee engagement with their employers.

Multiple states proposed legislation in 2023 addressing the use of AI in the employment context.

The EEOC has issued new technical guidance on how to measure adverse impact when employment selection tools use artificial intelligence (AI), titled "Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964."

Rise in Accommodation Requests

In light of the Supreme Court's recent ruling on religious accommodation requests, as well as the Pregnant Workers Fairness Act, employees may be making an increased amount of requests for accommodations. Having a system in place to document and address these requests are crucial. Additionally, job descriptions for each position are a must so that there is clarification regarding the "essential duties" of each job.

Interplay of Leave Laws

New York employees are still entitled to COVID-19 paid sick leave, in addition to their paid sick time under the NYS Paid Sick Leave law. Employers should have a system in place to track leave taken under each law in order to avoid employee claims that they are not receiving the sick time which they are entitled to.

Employers should take the following steps to meet their current obligations and prepare for the laws:

- Update all job postings for New York positions (or positions that will report to New York) to include compensation.
- Review templates of separation and release agreements to confirm compliance with laws governing nondisclosure of discrimination claims.
- Review arrangements with independent contractors to ensure compliance with the "Freelance Isn't Free Act.
- 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
- Review social media policies to ensure they do not require employees to provide access to personal accounts in violation of the law
- Ensure that job descriptions are in place for all positions
- Ensure that a system is put in place to manage accommodation request
- Institute a leave tracking system to ensure that employee's time away from work is designated correctly

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.