Attention New York Employers: New State and City Employee Rights Laws

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Recently, both New York State and New York City have promulgated new laws that expand the rights of employees. Below are a few key takeaways regarding each of these new laws.

Key Takeaways

- New York State employers should update their sexual harassment policies and training materials to reflect changes to New York State's model sexual harassment policy.
- New York City employers, if utilizing Automated Employment Decision Tools ("AEDT"), should ensure that the AEDT is audited for bias annually; that they publish a public summary of the audit; and that they provide certain notices to applicants and employees who are subject to screening by the AEDT.
- New York State employers should ensure all physical postings are also available electronically for their employees.
- The New York State Human Rights Law has been expanded to protect covered employees from being discriminated against on the basis of their citizenship and immigration status.
- New York State, like New York City, has adopted a Pay Transparency Law. The State's Pay Transparency Law requires employers to not only disclose a range of compensation, but also a job description if one exists, in advertisements for jobs, promotions, or other transfer opportunities.
- New York State employers should ensure that their written policies concerning the rights of nursing employees is updated.
- The list of family members for whom eligible employees can take New York State Paid Family Leave to care for has been expanded.
- The National Labor Relations Board has issued a decision that severely limits the inclusion of overly broad confidentiality and non-disparagement provisions in severance agreements.

Updates to New York State's Model Sexual Harassment Policy

New York State previously implemented a law requiring that every employer in the State adopt a sexual harassment prevention policy and provide employees with sexual harassment prevention training. The State also published a model sexual harassment prevention policy that New York State employers could use, which was recently updated.

The model policy now includes:

- Provisions clarifying that harassing behavior can take place in a remote workplace.
- An updated list of examples of sexual harassment and retaliation including, with limitation, "creating different expectations for individuals based on their perceived identities" and an "intentional misuse of an individual's preferred pronouns."
- Language providing that supervisors and managers should be cognizant of the impact that investigations of sexual harassment has on victims. The updated model policy states that an employer must "accommodate the needs of individuals who have experienced harassment to ensure the workplace is safe, supportive and free from retaliation for them during and after any investigation."
- Guidance on bystander intervention, including how it can be implemented when an employee witnesses harassment or discrimination.
- Language providing that impact, not intent, is what matters when evaluating whether the law has been violated.

Employers must update their written sexual harassment prevention policies so that they either mirror or exceed the updated model policy. The updated model policy can be found here.

New York State also updated its model sexual harassment prevention training materials. Updates to these training materials mirror the changes to the model policy and include:

- The following content warning, which should be shown to those attending the training:
    - "This subject matter can be sensitive or difficult for some employees, including those that might have experienced harassment, discrimination or violence in the past. If the training is being facilitated in a group (whether in person or virtually), trainers should make clear to those attending that anyone needing to step out briefly on behalf of their mental health may do so. All employees do need to complete the training. The employee is allowed to complete the training at a later time if need be.";
- A new slide explaining what gender identity is; and
- Updated case scenarios with examples that cover remote work and harassment based on gender identify.

The Use of Automated Employment Decision Tools by Employers in New York City

The New York City Department of Consumer and Worker Protection issued Final Rules on the AEDT law on April 6, 2023. This new law becomes effective on July 5, 2023, and prohibits employers and employment agencies from using an automated employment decision tool (as defined below) to make an "employment decision" unless the tool is audited for bias annually; the employer publishes a public summary of the audit; and the employer provides certain notices to applicants and employees who are subject to screening by the tool. Notably, an "employment decision" under this law is limited to decisions concerning hiring and promotions.

An "automated employment decision tool" is defined as "any computational process, derived from machine learning, statistical modeling, data analytics, or artificial intelligence, that issues simplified output, including a score, classification, or recommendation, that is used to substantially assist or replace discretionary decision making for making employment decisions that impact natural persons."

To be clear, an artificial intelligence ("AI") tool is only covered by this law if it is used "to substantially assist or replace discretionary decision making," which occurs when the decision maker (i) solely relies on the output of the tool, or (ii) considers the output of the tool more than any other criteria, or (iii) uses the output of the tool to overrule or modify conclusions derived from other factors considered. Therefore, an AI tool is only considered an AEDT if it is the only or the most significant element used by an employer in making an employment decision.

Under this new law, when an employer uses an AEDT, the AEDT must be independently audited annually for potential bias. After this audit is completed, employers and employment agencies must post the date of their audit alongside a summary of the results.

In addition, candidates for employment or promotion must be provided with notice 10 business days before use of the tool. The notice must include: (1) that an AEDT is being used in assessing and evaluating the candidate; (2) the job qualifications and characteristics the AEDT will use in its analysis; (3) if not disclosed elsewhere on its website, the AEDT's data source, type, and the employer's data retention policy; and (4) that a candidate may request an alternative selection process or accommodation. This notice may be satisfied by a single clear and conspicuous notice on the employer's website, in a job posting, or by way of U.S. mail or email to the candidate.

Additional Requirements Concerning Workplace Postings in New York State

Documents that must be physically posted at a worksite pursuant to state law or federal law or regulation now must also be made available through the employer's website or by email. In addition, employers must post in the physical location where these documents are posted that they are also available electronically.

Added Employee Protections Under the New York State Human Rights Law

The New York State Human Rights Law ("NYSHRL") has been amended to mirror the New York City Human Rights Law and prohibit employment discrimination based on citizenship or immigration status. "[C]itizenship or immigration status" is defined as "citizenship of any person or the immigration status of any person who is not a citizen of the United States." The NYSHRL now prohibits employers from discriminating, harassing, or retaliating against any individual because of their immigration or citizenship status. However, this law does not ban employers from checking the immigration status of current and prospective employees for legitimate purposes such as to confirm an employee can lawfully work in the United States.

New York State's Pay Transparency Law

New York State's Pay Transparency Law, which takes effect on September 17, 2023, requires employers to disclose the compensation or range of compensation for a role in advertisements for jobs, promotions, or other transfer opportunities. In addition to disclosing compensation, employers must also disclose the job description for the position, if one exists. For purposes of this new Pay Transparency Law, "to advertise" means "to make available to a pool of potential applicants for internal or public viewing, including electronically, a written description of an employment opportunity."

The disclosure requirements apply to positions that will be performed in the State of New York. Moreover, if the position will be fully performed outside of New York State, even in a non-remote location, but will *report* to an office or manager in New York, the job posting also needs to satisfy the disclosure requirements.

The Expansion of Workplace Protections for Nursing Employees in New York State

The New York State Labor Law has been amended to provide additional requirements regarding written nursing policies and lactation rooms. These new requirements, detailed below, will take effect on June 7, 2023. The State's amendments largely mirror New York City's lactation accommodation requirements, so little should change for New York City employers.

Pursuant to these amendments, employers are required to maintain a written policy regarding the rights of nursing employees. This includes identifying the means by which a request can be submitted by an employee for a lactation room and setting a reasonable time for the employer to respond to such a request.

Employers are also required to designate a lactation room or other location to be used by nursing mothers. The room must be in close proximity to the employee's work area; well lit; shielded from view; and free from intrusion from other persons in the workplace or the public. This room must have a chair, working surface, access to clean running water, and if applicable, an electrical outlet. In addition, if the workplace has a refrigerator, the employee must be provided access to store their milk. Once a room or location has been designated, the employer must provide notice to all employees. If the room is also used for other purposes, then it must be made available to nursing employees when needed. If designating such a room would impose an undue hardship on an employer "by causing significant difficulty or expense when considered in relation to the size, financial resources, nature or structure of the employer's business," then it is not required.

Changes to New York State's Paid Family Leave Law

New York State's Paid Family Leave—which currently provides covered employees with up to 12 weeks of paid time off (i) to care for a new child following birth, adoption, or placement in the home; (ii) to care for a "family member" with a serious health condition; or (iii) for qualifying exigencies related to military duty—was recently amended. The definition of "family member" was expanded to include siblings, such that employees may now use Paid Family Leave to care for a biological, adopted, step, or half sibling with a serious health condition.

The National Labor Relations Board Restricts Confidentiality and Non-Disparagement Obligations in Severance Agreements

The National Labor Relations Board (the "NLRB" or "Board") issued a decision in *McLaren Macomb*, 372 NLRB No. 58 (2023) which holds that a severance agreement that includes overly broad confidentiality and non-disparagement provisions is a violation of employees' rights under Section 7 of the National Labor Relations Act (the "NLRA"). In addition, the Board held that merely offering an agreement with unlawful terms is enough to result in a violation because the "[m]ere proffer" of a severance agreement that conditions receipt of benefits on the "forfeiture of statutory rights" violates the NLRA.

After the *McLaren* decision was issued, the General Counsel of the NLRB issued Memorandum GC 23-05, which provides guidance on the practical implication of this decision on employers. This memorandum includes that:

- Lawful severance agreements are permitted if they do not include "overly broad provisions that affect the rights of employees to engage with one another to improve their lot as employees."
- Lawful confidentiality clauses are permitted if they are narrowly tailored to "restrict the dissemination of proprietary or trade secret information for a period of time based on legitimate business justifications[.]" Any clauses that prohibit an employee from communicating with the NLRB, a union, a legal forum, the media, or other third parties are impermissible.
- The *McLaren* decision applies retroactively.
- Agreements that contain an unlawful provision should not be completely voided, but rather only the unlawful section should be voided.
- An unlawful provision is still unlawful even when an employee requests that the agreement contain such provision.

While to date *McLaren* has not been appealed, there may be further direction from the courts on this ruling as well as its interpretation.