

## 3 Employee-Friendly Updates In NY's 2021 Budget Proposal

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In what has become a trend over the last few years, New York Gov. Andrew Cuomo included multiple labor and employment law proposals in the 2021 budget, which, if approved, would create significant new responsibilities for New York employers, including paid sick leave requirements and contractor disclosure requirements, in addition to the creation of a gig economy task force.

Cuomo unveiled his proposed 2021 New York state budget on Jan. 21. As we have noted in the past, Cuomo's 2020 budget proposal[1] included a state salary history ban,[2] expanded equal pay protections[3] and antidiscrimination law reforms,[4] each of which was passed into law by the New York Legislature.

Two years ago, Cuomo included initial versions of the since-passed broad sexual harassment protection policy and training laws. This year, there are three key provisions of interest to employers: (1) a statewide mandatory paid sick leave requirement; (2) increased disclosure requirements for state contractors regarding sexual harassment complaints; and (3) the creation of a task force to propose legislation addressing the gig economy and an alternate grant of regulatory authority to the New York State Department of Labor.

### 1. Statewide Sick Leave Requirement

If approved by the New York Legislature, the budget would mandate that employers provide employees with paid sick leave as follows:

- For employers with four or fewer employees in any calendar year: five days of unpaid sick leave per calendar year;
- For employers with between five and 99 employees in any calendar year: five days of paid sick leave per calendar year; and
- For employers with 100 or more employees in any calendar year: seven days of paid sick leave per calendar year.

Similar to the New York City Earned Safe and Sick Time Act, the proposed state requirement would also create an accrual rate of one hour of sick time earned for every 30 hours worked. However, if enacted,



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the state law would require employers with 100 or more employees to provide at least seven days (56 hours) of paid sick time per year whereas the New York City law only requires covered employers to provide at least five days (40 hours) of paid sick time.

The proposed law does not contain any other details regarding sick leave, including permitted uses for leave, definitions of covered family members, notice or record-keeping requirements, payment requirements, employee eligibility, or any carryover or payout requirements, all of which are commonly included in paid sick leave laws. Instead, the budget delegates authority to the commissioner of the New York State Department of Labor to adopt regulations and issue guidance to establish standards for implementation.

If passed in its current form, the proposed law would take effect one year after enactment.

### ***Key Takeaways***

This proposal is particularly significant as while 10 other states have enacted mandatory paid sick leave, no state law has required that covered employers provide seven days of paid sick leave yet. However, certain local jurisdictions have implemented sick leave requirements of up to nine days. Thus, if the law is passed, New York employers with policies designed to comply with all current state laws will need to review and revise their policies to ensure they are also in compliance with the forthcoming New York state law.

Further, given just how few details the proposal includes regarding coverage and implementation, employers should monitor any proposed regulations or administrative guidance to be issued by the NYDOL closely. Under the broad delegation of authority it received, the NYDOL could continue to add requirements that are broader than those found in any other state sick leave law.

## **2. Increased Disclosure Requirements for State Contractors**

The budget includes a proposal that would dramatically increase sexual harassment disclosure requirements for organizations that contract with New York state. Two years ago, New York state instituted a requirement that all organizations contracting with the state must, in submitting competitive bids, affirm that they meet the state's sexual harassment policy and training requirements.

If the proposed legislation is enacted however, the budget would also require that beginning on July 1, 2020, all organizations bidding for a state contract include a report disclosing the following:

- The name of the bidder and total number of employees in the organization;
- The total number of adverse judgments or administrative rulings arising from allegations of sexual harassment during the preceding year;
- Whether any equitable relief was ordered against the bidder in any adverse judgment or administrative ruling;
- The total number of settlements entered into during the preceding year in which the bidder directly or indirectly provided an individual compensation or other consideration due to an allegation that the individual had been a victim of sexual harassment or that relate to any alleged act of sexual harassment that occurred in the workplace of the bidder; and

- The total number of settlements entered into during the previous year that relate to any alleged act of sexual harassment committed by a corporate executive without regard to whether that behavior occurred in the workplace of the bidder.

The budget defines "settlements" for purposes of this provision as any written commitment or written agreement, including any agreed judgment, stipulation, decree, agreement to settle, assurance of discontinuance, or other form of agreement between an employee and a bidder.

Notably, the budget also proposes a requirement that the information shared in these bidder reports would also be shared with the New York State Division of Human Rights and the Office of the New York State Comptroller. The comptroller's office then shall be required to prepare an annual report summarizing this data.

This annual report would be submitted to multiple senior New York officials, including the governor; temporary president of the Senate; speaker of the Assembly and the chairpersons of the Senate Finance and the Assembly Ways and Means Committees; the attorney general; the commissioner of the Department of Labor; and the commissioner of the Division of Human Rights.

If passed, the law would specifically require this report to include the name of the bidder, number of adverse judgments or administrative rulings during the preceding year, number of employees, whether any equitable relief has been ordered against the bidder in any adverse judgment or administrative ruling, and the total number of settlements related to sexual harassment.

### ***Key Takeaways***

This expansive proposal is worth monitoring closely to see if any reporting requirements or definitions are modified in the final law. Although bidders for state contracts previously had to confirm that they complied with the state's sexual harassment training and policy laws, requiring bidders to affirmatively state the number of adverse rulings and the number of settlements related to sexual harassment that relate to workplace or nonworkplace conduct is a seismic shift in these reporting requirements.

This new law also impacts potential dispute resolution and litigation strategy as companies that are or seek to be state contractors may be dissuaded from settling claims and instead might consider litigating claims further to avoid an adverse finding or settlement that would need to be reported. Further, although the law lists numerous officials to whom information on sexual harassment settlements must be provided, it does not in any way limit the use of this information by these agencies.

Thus, under the language of the new proposal, there is no prohibition on an agency using the information reported to deny a contract to a bidding company, or even from using information reported to the agency through a contracting bid in an investigation of potential wrongdoing. As the potential impacts of this budget proposal are far-reaching, employers that are or may consider becoming bidders for state contractor work should follow the development of this legislation closely.

### **3. Gig Economy Task Force or Regulation**

Finally, the budget would create a digital marketplace worker classification task force. If the budget proposal is approved, the task force would "provide the governor and the legislature with a legislative recommendation addressing the conditions of employment and classification of workers in the modern

economy of on-demand workers connected to customers via the internet."

The task force would be directed to submit its report, which would include a recommended standard for classification, on or before May 1.

The legislation would also authorize the NYDOL to promulgate regulations after May 1 (if the task force cannot come to an agreement) to determine the appropriate classification of individuals providing services for a digital marketplace company, defined as follows:

[A]n organization ... that operates a website or smartphone application, or both, that customers use to purchase, schedule and/or otherwise arrange services including, but not limited to repair, maintenance, construction, painting, assembly, cleaning, laundry, housekeeping, delivery, transportation, cooking, tutoring, massage, acupuncture, babysitting, home care, healthcare, first aid, companionship, or instruction, and where such company utilizes one or more individuals to provide such services.

Such organization: (i) establishes the gross amounts earned by the individual providing such services; (ii) establishes the amounts charged to the consumer; (iii) collects payment from the consumer; (iv) pays the individual; or any combination of the foregoing actions; and the individual may provide such services in the name of the individual, or in the name of a business, or as a separate business entity, and without regard the consumer of such personal services may be an individual, business, other entity, or any combination thereof.

The legislation would further direct the NYDOL to consider whether the so-called ABC test should be the appropriate standard for whether such workers should be classified as employees or independent contractors. Finally, the legislation would allow the NYDOL to "exempt any company from application" of the regulations.

### ***Key Takeaways***

Notably, when discussing the gig economy during his 2020 State of the State address,<sup>[5]</sup> Cuomo stated that "too many corporations are increasing their profits at the expense of the employee and the taxpayer and that must end." He then explained that simply because a driver used their own car or a domestic worker used their own broom and mop to provide services, he believed this did not warrant their classification as an independent contractor.

He further expressed his belief that these classifications are exploitive, abusive and comprised of fraud that "must stop now." Accordingly, employers that rely on independent contractors who engage with customers through a website or smartphone application should be aware that creating new laws and regulations governing these relationships appears to be one of the top priorities of the New York government for 2020.

### **Outlook**

The New York state budget is subject to legislative approval before it is finalized and its provisions are enacted into law.

Notably, however, the governor has successfully used the budget as a vehicle to enact significant employment legislation over the last two years, including drastically increasing training requirements

regarding sexual harassment prevention; creating an extensive process that applies to all settlements for claims of any type of discrimination; significantly expanding the state's equal pay law to now cover all protected categories; lowering the legal threshold applicable to an employee's claim of discrimination; and removing common defenses employers used when responding to these claims.

Unlike previous years' budget proposals however, which largely were limited to changes to discrimination protections, this year's proposal seeks to provide significant leave and classification changes, reflecting an expanded and aggressive effort to pass new employee-friendly laws. Indeed, during the State of the State address, Cuomo expressed a desire for New York to be the "progressive capital of the nation" and specifically said that "progressive government does not make promises it cannot fulfill," signaling that he feels strongly these new budget proposals will indeed become law.

If the budget is enacted, employers may need to revise their handbooks/leave policies to ensure that they are compliant with the expanded state law and generate significant new reporting data. Further, employers that are, or hope to become, state contractors should be aware of the new reporting requirements, which may affect business decisions regarding how to respond to potential allegations of sexual harassment in the workplace.

Finally, employers that operate in the digital marketplace should be aware that there are significant efforts underway to regulate these industries and potentially impose new burdens on classification of workers as independent contractors.

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[1] <https://www.morganlewis.com/pubs/ny-governor-proposes-budget-addressing-labor-and-employment-issues>.

[2] <https://www.morganlewis.com/pubs/new-york-state-legislature-passes-salary-history-ban-broadens-equal-pay-law>.

[3] <https://www.morganlewis.com/pubs/new-york-state-legislature-passes-salary-history-ban-broadens-equal-pay-law>.

[4] <https://www.morganlewis.com/pubs/new-york-legislature-passes-significant-harassment-and-discrimination-law>.

[5] <https://www.governor.ny.gov/programs/2020-state-state-address>.