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INSIGHT: New York Labor Law Changes in 2020—Time to Evaluate Policies

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Morgan, Lewis & Bockius attorneys examine new and upcoming changes to New York state and city labor laws, including the longer statute of limitations for sexual harassment claims, restrictions on arbitration agreements, and the expansion of protected categories and lower thresholds of proof in discrimination cases. They say employers need to evaluate their policies and procedures because enforcement actions will increase in 2020.

As an employee in New York, everything from the way you wear your hair to how you get paid has some level of protection. As an employer in New York, you need to know what recent and upcoming changes to New York state and city law could affect how you do business.

#MeToo and Challenges for Employers

Recent amendments to the New York law will continue to raise new challenges for employers with respect to discrimination and harassment claims. For instance, on Aug. 12, 2020, the statute of limitations for sexual harassment claims will extend from one year to three years, likely increasing the number of claims.

Employers will also continue to face challenges to arbitration agreements covering sexual harassment claims. Though CPLR 7515, which prohibits such provisions, was recently found to be preempted by the Federal Arbitration Act, there could be additional efforts to restrict arbitration of these claims.

Indeed, recent amendments to the State Human Rights Law now prohibit agreements barring the disclosure of facts and circumstances of any discrimination claim unless confidentiality is the employee's preference. Beginning on Jan. 1, 2020, such agreements must include that employees are not prohibited from "speaking with law enforcement, the Equal Employment Opportunity Commission, the state Division of Human Rights, a local commission on human rights, or an attorney retained by the employee or potential employee."

In 2020, employers can expect to see challenges to those agreements and possible challenges to maintaining confidentiality in settlement agreements with these new amendments to the law.

Expansion of Protected Categories

New York state and city are also expanding protected categories and lowering the thresholds of proof in discrimination cases. For instance, in 2019, New York City amended its law to protect natural hair or hairstyles, while the state law was also amended to cover hairstyles, including "braids, locks, and twists."

New York City also passed a provision that prevents discrimination or retaliation based on "any decision by an individual to receive services ... relating to sexual and reproductive health, including the reproductive system and its functions."

Similarly, the New York labor law's equal pay provision was expanded in October to include members of all protected classes receiving less pay than colleagues who are not in the same protected class for the same or substantially similar work. New York state also lowered the threshold for discrimination claims, removing the "severe and pervasive" standard for harassment claims and the requirement to allege comparators in a complaint. The law also provides for punitive damages and eliminates the need for an employee to have made a complaint about the alleged harassment to the employer.

Employers should be aware of new expansions in both the city and state amendments in creating workplace policies as well as processing complaints of discrimination, particularly as the lower standards and expanded protections could lead to an increase in litigation.

Increase in Department of Consumer Affairs Enforcement

The New York City Department of Consumer Affairs (DCA) is responsible for enforcing several laws, including the Fair Workweek Law and the Paid Safe and Sick Leave Act. Since those laws went into effect, the DCA has processed more than "290 complaints about Fair Workweek, closed more than 120 investigations, and obtained resolutions requiring … fines and restitution for more than 2,900 workers," and "received more than 2040 complaints about Paid Safe and Sick Leave, closed more than 1780 investigations, and obtained resolutions requiring … fines and restitution for more than 35,300 workers," according to the Office of the Mayor.

We expect the level of enforcement actions to increase in 2020.

For instance, the Fair Workweek Law regulates scheduling for fast food and retail workers, and requires that employers provide such employees with two week's notice of their schedule and pay premiums and/or fines to the DCA when changes are made to their schedules. Recently, the DCA filed its first lawsuit against a corporately-owned fast food chain when it asserted claims seeking at least $1 million in restitution and noted that approximately another dozen locations were under similar investigation.

One potential issue for employers is the Fair Workweek Law's definition of a retail employer: A "store that primary sells consumer goods and employs 20 or more workers in NYC." As this definition may encompass employers who do not consider themselves to be retail establishments, employers should evaluate whether they and their employees would be covered.

Employers should also evaluate their current paid time off policies and procedures to ensure full compliance with the Paid Safe and Sick Leave Law.

Changes to Independent Contractor Legislation

Across the country, independent contractor classification is on the forefront of legislative agendas. In New York, legislators introduced a bill (A.08343/S.06538) that would give "dependent workers" labor and employment protections, such as the right to collectively bargain and bring certain wage claims.

There have also been recent efforts to change the test New York utilizes for employee/independent contractor classifications from the current direction-and-control test to the "ABC test" other states employ, or a new "dependent worker" test.

Under the current test, a worker qualifies as an employee if, on balance, consideration of multiple factors suggests that the employer exercises significant control over either the worker's results or the means used to achieve the results.

The "ABC test" presumes a worker is an employee unless the worker:

1. is free from the company's control and direction in performing the service, both under a contract and in fact;
2. provides services outside of the alleged employer's premises or usual course of business; and
3. is customarily engaged in an independent trade, occupation, profession, or business of the same type.

New York could see legislative activity in an effort to change classification of independent contractors. Additionally, employers should examine their employee classifications to ensure compliance with the existing standards.

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