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NEW YORK EMPLOYMENT LAW YEAR IN REVIEW

Leni D. Battaglia, Ashley J. Hale, Gina McGuire, and Daniel Kadish
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Presenters



Leni D. Battaglia



Ashley J. Hale



Gina F. McGuire



Daniel Kadish

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Topics to Discuss

Salary
Transparency

Electronic
Postings and
Monitoring

Adult Survivors
Act

Harassment
Hotline

Lactation
Accommodations

Paid Family Leave

NY COVID-19
Updates

AI Tool Bias
Audits

Lawful Absence
Retaliation

Pending &
Potential
Legislation

Salary Transparency (NYC and NYS)

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New York City Job-Posting Salary Disclosures

- Employers must include minimum and maximum potential salaries in all job advertisements and postings, effective 11/1/2022.
- Employer must make a “good faith” determination at the time of the job posting of the lowest and highest salary it would pay for that position.
- Possible civil penalties of up to \$250,000 per violation.
 - Employers will not be penalized for their first violation, provided that they fix the violation within 30 days of receiving notice of the violation.
- Current employees can bring a private cause of action seeking damages and attorney fees.
 - Prospective candidates have no private cause of action.

New York City Job-Posting Salary Disclosures(*cont.*)

- Employers are not required to post nonbase wage forms of compensation.
 - Bonuses, commissions, incentive compensation plans, benefits, etc.
- New York City Commission on Human Rights (NYCCHR) Guidance:
 - “An ‘advertisement’ is a written description of an available job, promotion, or transfer opportunity that is publicized to a pool of potential applicants.”
 - “Covered employers should follow the new law when advertising for positions that can or will be performed, in whole or in part, in New York City, whether from an office, in the field, or remotely from the employee’s home.”

New York State Job-Posting Salary Disclosures

- Gov. Kathy Hochul signed a statewide salary disclosure bill into law on 12/21/2022.
- Similar salary disclosure requirements to the New York City law.
- No private right of action, but individuals can file complaints with the New York State Department of Labor (DOL). Penalties range from \$1,000 for a first violation, to \$2,000 for a second violation, to \$3,000 for a third or subsequent violation.

New York State Job Posting Salary Disclosures (*cont.*)

- Requires employers to include a job description (if one exists) on advertisements for job, promotion, or transfer opportunities in New York State (NYS).
- Requires employers to maintain records demonstrating the history of compensation range for each job, promotion, or transfer opportunity in NYS and the job description(s) for each position.
- Effective September 17, 2023.

Regional Local Salary Transparency Laws

- Westchester, New York:
 - Effective November 6, 2022, the law requires employers to include a minimum or maximum salary for a specific job, promotion, or transfer in a job posting or advertisement.
 - The law applies to positions “that are required to be performed, in whole or in part, in Westchester County, whether from an office, in the field, or remotely.”
- Ithaca, New York:
 - Effective September 1, 2022, employers must include a minimum or maximum salary in an advertisement for a job, promotion, or transfer.
 - The law only applies to employers with four or more employees whose standard work locations are within the City of Ithaca.

Regional Local Salary Transparency Laws (*cont.*)

- Jersey City, New Jersey:
 - Effective June 15, 2022, employers within the City of Jersey City that employ at least five employees must include a minimum and maximum annual salary and/or hourly wage in any job posting or advertisement.

Electronic Workplace Postings

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Electronic Workplace Postings

- Effective December 16, 2022, employers must make available electronically any documents that are required to be posted in the workplace.
- Effectively, employers must create and make available electronic versions of all workplace postings currently required under state or federal law.
- NYS postings include a Section 740 whistleblower retaliation notice, an Article 23-A criminal conviction notice, and a minimum-wage notice.

Electronic Workplace Postings (*cont.*)

- The digital copies can be made available through an employer's website or disseminated to employees via email. Employers must also notify employees that documents required to be posted physically are available electronically.
- This law took effect immediately upon signing.

Electronic Monitoring in the Workplace

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New York State Law

- Effective May 7, 2022, employers must provide employees with written notice that all telephone conversations, emails, other electronic transmissions, and internet access or usage on any electronic device or system may be subject to monitoring at any and all times and by any lawful means.
 - The law excludes processes designed to manage incoming or outgoing email, telephone, voice mail, or internet usage, or performed solely for system maintenance or protection.
- Employees must sign acknowledgment of receipt and companies must also post notice conspicuously (physical location or company intranet).

New York State Law (*cont.*)

- Acknowledgment can be included on an employee handbook signature page.
- Employers who violate the law will receive a civil penalty of \$500 for their first violation, \$1,000 for a second violation, and \$3,000 for a third and any subsequent violation(s).

Statute of Limitations for Sexual Offenses

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New York Adult Survivors Act

- NYS enacted a law that permits any individual who was the victim of a sexual offense that occurred when he or she was age 18 or older—but which is currently time-barred—to file a timely claim between November 24, 2022 and November 24, 2023.
- The one-year window only applies to otherwise time-barred claims based on a sexual offense as defined in the New York penal law.
 - Sexual offenses include, but are not limited to, sexual misconduct, rape, criminal sexual acts, forcible touching, sexual abuse, and sexual assault.
- The law does not specifically mention employment-related claims, as it is not limited to claims solely against a party that perpetrated some form of sexual offense.

NYSDHR Harassment Hotline

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Potential Revised Harassment Materials

- In March 2022, Gov. Kathy Hochul signed legislation directing the New York State Division of Human Rights (NYSDHR) to implement a toll-free confidential hotline to provide counsel and assistance to individuals experiencing workplace sexual harassment.
- The new law also directs the DOL to revise required employer postings and notices to incorporate the new hotline.
 - To date, the DOL has not revised any required materials accordingly, but updated guidance is expected.
- Companies may consider adding the hotline, 1-800-HARASS-3 (1-800-427-2773), to their sexual harassment trainings, but it is not required under the law.

Lactation Accommodations

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Expanded Accommodations for Nursing Employees

- Effective June 7, 2023, NYS law requires employers to provide reasonable accommodations for nursing employees.
- The law largely mirrors the NYC lactation accommodations law.
 - Upon request, the employer must designate a room or area that is (i) in close proximity to the work area, (ii) well lit, (iii) shielded from view, and (iv) free from intrusion.
 - Designated space shall include a chair, a working surface, nearby access to clean running water, and an electrical outlet.
 - Designated space cannot be a restroom.
 - If the workplace has access to refrigeration, employees must be able to use such refrigeration for storing breast milk.

Expanded Accommodations for Nursing Employees (*cont.*)

- Unlike the NYC law, the NYS law requires additional notice requirements. Employers must provide written policy developed by the DOL to employees:
 - (i) Upon hire;
 - (ii) Annually; and
 - (iii) Upon returning to work following the birth of a child.
- DOL policy shall inform employees of their rights and how to request a lactation space, and require the employer to respond to lactation accommodation requests within five business days.

Expanded Accommodations for Nursing Employees (*cont.*)

- These requirements are in addition to current NYS law requiring employers to provide reasonable unpaid break time to employees to express breast milk.
- US Congress just passed somewhat similar protections for employees, including pregnancy accommodation protection:
 - [Congress Enacts New Employment Protections for Pregnant Employees and Nursing Mothers – Publications | Morgan Lewis.](#)

New York Whistleblower Statute

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Recent Amendment to Retaliation Provision

- Effective February 20, 2023
- New York Labor Law Section 526 was amended to clarify that it is actionable retaliation for an employer to discipline workers by assessing points or deductions from a time bank because an employee has used any legally protected absence. Specifically:
 - Any “legally protected absence pursuant to federal, local or state law” is now expressly a protected activity under the whistleblower law.
 - The assessment of “any demerit, occurrence, any other point, or deductions from an allotted bank of time, which subjects or could subject an employee to disciplinary action, which may include but not be limited to failure to receive a promotion or loss of pay” is now expressly considered retaliation under the whistleblower law.

New York Paid Family Leave

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New York Paid Family Leave

- NYS Paid Family Leave (NYSPFL) went into effect in 2018. Under the NYSPFL Program, employee-paid insurance provides workers with job-protected paid time off to:
 - **Bond** with a newly born, adopted, or fostered child;
 - **Care** for a family member with a serious health condition; or
 - **Assist** loved ones when a spouse, domestic partner, child, or parent is deployed abroad on active military service
- Leave may also be available in situations when an employee or their minor, dependent child is under an order of quarantine or isolation due to COVID-19.
- Eligible workers can take up to 12 weeks off at 67% of their pay. The 12 weeks can be taken all at once, or in increments of full days.

New York Paid Family Leave Eligibility

- NYPFL previously covered leave to an employee caring for spouses, domestic partners, children, step-children, parents, parent-in-laws, grandparents, and grandchildren.
- Effective Jan. 1, 2023, NYS expanded NYPFL to allow caring for **siblings** (biological, adopted, step, and half). NYPFL also confirmed that family members do not need to be located in NYS.
- NYS created new notice form to provide incoming employees: [NYS Paid Family Leave: Employee Notice of PFL Sibling Care for 2023](#).
- Consider revising handbooks/PFL policies and replacing onboarding form.

NY COVID-19 Updates

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New York City Vaccine Mandate

- No longer in effect.
- As of November 1, 2022, most private employers have discretion in NYC on whether to implement a vaccine mandate for workers.
- Companies permitted to require vaccination, masking, screening, etc., but not required to do so.

New York HERO Act

- NYS companies are still required to maintain a NY HERO Act airborne infectious disease safety plan:
 - The plan must
 - Comply with the standards set by the New York DOL and the Commissioner of Health;
 - Be posted at all NYS locations;
 - Be attached to an employer’s handbook if an employer has one; and
 - Be distributed to new hires (including verbal review).
- The plan does not need to be activated until the NYS Commissioner of Health designates an airborne illness as a highly communicable disease that poses a serious risk of harm.

Artificial Intelligence (AI)

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New York City Law

- Department of Consumer and Worker Protection (DCWP) issued new proposed rules in December. Holding a second public hearing on January 23, 2023.
- Announced that enforcement is scheduled to begin on April 15, 2023.
- It is unlawful for an employer to use an automated employment decision tool (AEDT) to screen candidates for employment or promotion in NYC unless:
 - the tool has undergone a bias audit no more than one year prior to its use;
 - a summary of the most recent bias audit is made publicly available on the employer's or employment agency's website; and
 - the candidate or employee is notified at least 10 business days in advance of the interview that AI will be used and the job qualifications and characteristics that the tool will assess.

New York City Law (*cont.*)

- “Employment decision” means “to screen candidates for employment or employees for promotion within the city”
- The candidate or employee must have an opportunity to request an alternative selection process
- May result in civil penalties for each day the AI tool is used

New York City Law (*cont.*)

- Revised proposed rules make four significant changes to the initial September 2022 proposed rules.
- Narrowed the definition of an AEDT
 - AEDT must create an output that (i) is the sole factor used in an employment decision, (ii) is a factor weighed more heavily than other factors, or (iii) overrules conclusions derived from other factors.
- Confirmed that multiple employers using the same AEDT can rely on the same bias audit if the employer provides historical data to the auditor or can explain why such data is not available.

New York City Law (*cont.*)

- Clarified definition of “independent auditor” to mean an individual or organization (i) not involved in the development of the AEDT, (ii) not employed by the organization that uses or develops the AEDT, and (iii) who does not have a financial interest in the employer or vendor that uses or develops the AEDT.
- Explained that the law does not create an independent alternative selection process or reasonable accommodation obligation. Candidates can request an alternative process if available.

Upcoming Public Hearing (11 a.m., January 23, 2023)

- Prior to the hearing, any individual or group may submit comments on the proposed rules.
- Written comments can be submitted in advance online at <https://rules.cityofnewyork.us/rule/automated-employment-decision-tools-updated/>, which also includes a link to join the public hearing by video conference or phone, or by email to Rulecomments@dcwp.nyc.gov.
- Comments can also be raised at the public hearing. You must sign up in advance by calling (212) 436-0396.
 - Individuals will be allotted three minutes to speak.

Upcoming Public Hearing (11 a.m., January 23, 2023) (*cont.*)

- The Equal Employment Opportunity Commission (EEOC) remains focused on this issue too. It is holding a videoconference on navigating employment discrimination in AI at 10 a.m. on January 31, 2023:
 - [Next Commission Meeting | U.S. Equal Employment Opportunity Commission \(eoc.gov\)](#)

Lawful Absence Retaliation

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Lawful Absence Retaliation

- On November 21, Gov. Kathy Hochul signed legislation making it unlawful retaliation for an employer to discipline workers who use statutorily protected leave.
- Retaliation includes assessing demerits, deductions from allotted bank of time, loss of pay, failure to promote, or any other adverse employment action.
- Private cause of action available and the DOL can assess penalties of up to \$10,000 for a first offense or \$20,000 for a subsequent offense, plus loss of pay and other damages that the DOL deems appropriate.

Lawful Absence Retaliation (*cont.*)

- Applicable federal, state, and city statutes providing for protected absences as a leave or accommodation already prohibit retaliation.
 - Effectively creates additional damages for retaliating against workers who take time off.
- The law takes effect on February 20, 2023.

Pending Legislation

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Pending Bills: Statute of Limitations

- **Statute of Limitations Expansions**

- **New York Senate Bill S556A:** If enacted into law, it will extend the statute of limitations for claims of unlawful discrimination from one to three years. If enacted, this three-year statute of limitations would apply to all discrimination claims, whereas previously this was only allowed for sexual harassment cases in employment.
- **New York Senate Bill S849A:** If enacted into law, it will extend the statute of limitations for NYS Human Rights Law claims from three to six years.

Pending Bills: Restrictive Covenants in Budget

- **Restrictive Covenants in Budget Bill**

- **New York Senate Bill S8006A:** If the prior version of this bill would have been enacted into law, it would have eliminated noncompete agreements for employees who make below the median wage in NYS and would have imposed several factors for noncompete agreements to be enforceable on employees who make above the median wage.
- Final version of the bill was amended to remove this language before Gov. Kathy Hochul signed it.

Pending Bills: Release Clauses in Settlement Agreements

- **Release Clauses in Settlement Agreements**

- **New York Senate Bill S738:** If enacted, it would amend the law on nondisclosures in settlement agreements. The amendment would render unenforceable a “release of any claim, the factual foundation for which involves unlawful discrimination” if the agreement containing the release also includes any of the following:
 - A liquidated damages provision for breach of nondisclosure or nondisparagement clauses
 - A forfeiture provision for breach of nondisclosure or nondisparagement clauses
 - “Any affirmative statement, assertion, or disclaimer by the complainant that the complainant was not in fact subject to unlawful discrimination, including discriminatory harassment, or retaliation.”
 - It would also expand the law to cover independent contractors. Currently, the law only covers employees or potential employees.

Pending Bills: Release Agreements and No-Rehire Clauses

- **Release Agreements and No-Rehire Clauses**

- **New York Senate Bill S766:** If enacted, a release agreement between employers and employees or independent contractors would be rendered unenforceable if the release includes a no-rehire clause. A “no-rehire clause” includes any form of prohibition from applying, accepting, or engaging in future employment with the employer, or entities that are related to the employer.
- If a release agreement is rendered unenforceable, the employer would still be required to perform all other obligations under the agreement including paying the employee or independent contractor the full settlement amount.

Potential Legislative Priorities

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NYC Just Cause/At-Will Employment Bill

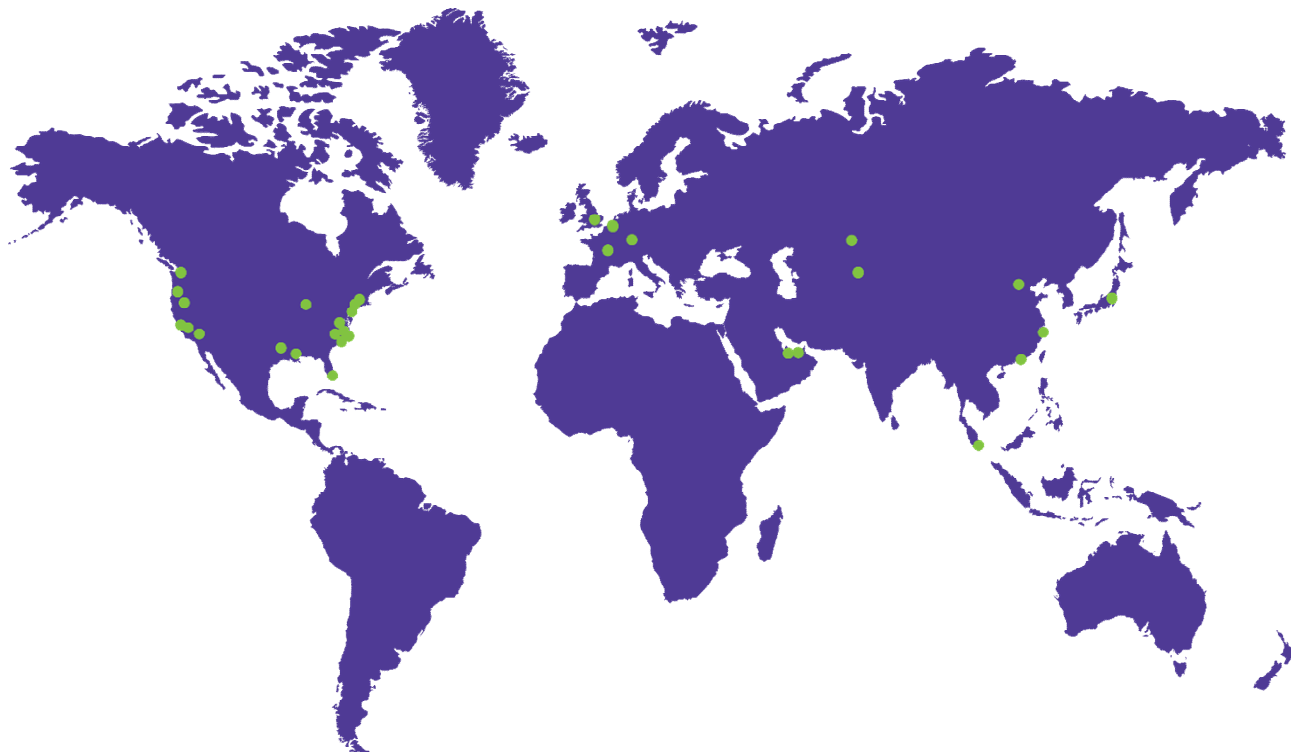
- In December 2022 an NYC council member introduced Bill No. 837-2022. If enacted, the bill would prohibit NYC employers from terminating employees without “just cause” or a bona fide economic reason.
 - The proposed bill imposes several factors that determine whether an employer had just cause to terminate an employee. Some of these factors include whether the employee knew or should have known of the policy/rule that was the basis of his or her discharge, whether the employer provided adequate training to the employee, and whether the employer’s policy/rule was reasonable and consistently applied.
 - If the termination is for a bona fide economic reason, the law would require employers to provide business records as proof of economic hardship.
 - There are also very few exceptions for when an employer will be able to terminate without showing just cause or a bona fide economic reason.

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