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# Locke Lord QuickStudy: Are You Finding It Hard to Keep up ?With All the New Employment Laws in New York??

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Over the past year there has been a surge of new employment laws and amendments to existing employment statutes in New York State and New York City. They place additional obligations on New York employers and expand certain protections for employees and independent contractors. In addition to various COVID-19 related laws and minimum wage increases, New York employers have seen significant expansions to the protections for employees. Four of the most significant legislative developments involve enhanced notice requirements when employers electronically monitor their employees, salary range posting obligations, retaliatory actions for whistleblowing, and requirements and limitations relating to an employer's use of artificial intelligence in the hiring process. These new laws impose burdens on New York employers and require prompt action, as two become effective in the next two months.?

It is a daunting task to keep up with these various new laws and their effective dates, but we summarize them below and provide our insights about these new developments.

***New Requirements for New York Employers Who Conduct Electronic Monitoring of Employees***

Effective ***May 7, 2022***, New York employers who monitor employee telephone conversations, emails, and internet usage are required to provide notice of such monitoring to new employees and post a notice to all employees for viewing. As we noted in a prior publication just after the new law was signed by the Governor, the amendment to New York State's Civil Rights Law (S2628) contains language that can be used as a notice: "*Any and all telephone conversations or transmissions, electronic mail or transmissions, or internet access or usage by an employee by any electronic device or system, including but not limited to the use of a computer, telephone, wire, radio or electromagnetic, photoelectronic or photo-optical systems may be subject to monitoring at any and all times and by any lawful means*."

Although the language required in the notice is straightforward, employers are likely to have questions as they make preparations to comply with the new law.

The law only requires employers to post the notice "in a conspicuous place" available to employees, but because some employees may work remotely on a full-time basis, it is recommended that all employees be provided with an electronic notification on or before May 7, 2022, informing them that they are subject to monitoring. It is also prudent for employers to include the above notice information in their employee handbooks.

The new law requires employers to obtain acknowledgement of the notice from new hires. Many employers may choose to obtain employee acknowledgments from existing employees as well.

***New York City Salary Wage Range Posting Requirements (Updated)***

Effective ***November 1, 2022***, employers in New York City will be required to include salary ranges in job postings. The law was originally set to go into effect on May 15, 2022 but was subsequently amended to provide employers additional time and clarify certain requirements. The new law (No. 1208-B), seeks to promote transparency and equal pay, making it an "unlawful discriminatory practice" under the New York City Human Rights Law for an employer to advertise a job, promotion, or transfer opportunity without stating the position's minimum and maximum salary in the advertisement. The law applies to employers with four or more employees (including independent contractors), but does not apply to temporary positions or staffing firms. The salary range must include a minimum and maximum amount the employer believes in "good faith" it would pay for the job, promotion, or transfer at the time of the posting. Failure to comply with the new requirements can result in significant fines of up to $125,000 and/or other civil penalties.

The law's recent amendments provide clarity to several previously unanswered questions. Specifically, the amendments clarify that: (i) the law applies only to "[p]ositions that cannot or will not be performed, at least in part, in the city of New York;" (ii) the posting requirements apply to both annual salary and hourly wages, whichever is applicable; and (iii) the law's private right of action only applies to existing employees (and not job applicants). The amendments also provide that civil penalties will be $0 for a *first* violation if the employer proves that the violation has been cured within 30 days. Notably, the submission of proof of a cure will be "deemed an admission of liability for all purposes." The City Commission issued a fact sheet that provides some additional information relating to the new law and the amendments. If the City Commission adds to and/or amends the fact sheet ahead of the November 1 effective date, we will provide a link to the same.

In preparing to comply with these new requirements, employers may wish to audit the current salary and hourly wage ranges for certain or all job positions. This will provide employers with greater confidence that they are satisfying the law's "good faith" requirement and are better equipped to field questions from current employees relating to existing salaries or hourly wages. At a bare minimum, it would be wise to make sure the minimum is no lower than the current salary or hourly wage level of all employees in such positions. Employers should anticipate that once salary and hourly wage ranges are made public, current employees with the same or similar job description will scrutinize new postings and compare the salary or hourly wage ranges to their own. This will likely prompt questions by some workers as to why their salary or hourly wage is in the lower part of the range.

It is also anticipated that some employees will compare their own salary or hourly wage to the range for a particular position at a competitor. Some employers may feel compelled to give raises to particularly valuable employees whom they cannot afford to lose to a competitor.

Although this is a New York City law, employers throughout the state should keep their eyes open for passage of a similar state-wide law, as both legislators and the Governor have hinted support for this type of legislation on a state-wide basis.

***Significant Expansions to the New York Labor Law to Protect Employees and Independent Contractors***

***Who "Blow the Whistle"***

Effective ***January 26, 2022***, Sections 740 and 741 of the New York Labor Law (S.4394A) were significantly expanded to extend whistleblowing protections to employees and independent contractors from retaliatory actions taken by New York employers. The amended law, as we described in a blog post:

- Expands protected conduct to include whistleblowing about actions that the worker reasonably believes violates a law or presents a substantial danger to the public health or safety or constitutes health care fraud
- Enlarges the statute of limitations to two years
- Removes the need to afford the employer an opportunity to remedy the allegedly illegal or harmful conduct if one of five circumstances are present, including where the employee reasonably believes that the supervisor is already aware of the activity, policy, or practice and will not take corrective action
- Expands the definition of "retaliatory action" to cover threatened reprisals including threats to contact immigration authorities
- Requires posting of a notice about the new whistleblower law
- Extends protections to former employees and independent contractors.

These amendments bring New York's "whistleblower" protections in line with other states such as New Jersey. That state's Conscientious Employee Protection Act (CEPA) is commonly regarded as one of the most expansive whistleblower statutes in the country. It is reasonable to assume that this new amendment to the New York Labor Law, which has previously been narrowly construed, will bring the same wave of retaliation lawsuits that New Jersey employers have faced (and continue to face) under the broad protections of CEPA. This is especially true now that New York has gone even further than CEPA to expand protections to independent contractors and former employees. When evaluating a potential claim under the new whistleblower amendment, it may be prudent to see how New Jersey courts have addressed similar claims under CEPA to guide pre- and post-litigation strategy.

Employers would be well advised to modify their employee handbooks to address this new amendment, directing employees to bring concerns about any activities that they believe may violate a law to the attention of a set of designated individuals at the company. Management training is also advised, as there are a number of useful strategies that can be used to avoid unwitting violations of this new law.

***New York City to Place Restrictions on the Use of Artificial Intelligence to Screen Candidates for Employment or Promotions***

Employers and employment agencies in New York City that currently use or anticipate using automated tools to assist in the hiring and promotion process will soon face added restrictions relating to the types of artificial intelligence that they may use, as well as disclosure requirements. Effective ***January 1, 2023***, employers and employment agencies in New York City are prohibited from using "automated employment decision tools" to screen candidates or employees unless a bias audit (i.e., an impartial evaluation by an independent auditor) has been conducted no more than one year prior to using the tool and shows an absence of bias against a protected classification of employees.

The law (No. 1894-A) defines "automated employment decision tool" broadly as "any computational process,

derived from machine learning, statistical modeling, data analytics, or artificial intelligence (AI), 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 [i.e., hiring or promotion] that impact natural persons." Prior to using an automated employment decision tool, employers and employment agencies must also post on their websites a "summary of the results of the most recent bias audit of such tool as well as the distribution date of the tool to which such audit applies." In addition, no less than ten business days before using the tool, those employers and employment agencies are required to provide notice to employees or candidates residing in NYC that the tool will be used to assess and/or evaluate their candidacy for either employment or promotion. Candidates have the option of requesting an alternative selection process or accommodation.

Failure to comply may result in penalties ranging from a fine of $500 for a first violation to fines of up to $1,500 for any additional violations. The law provides that each day on which an automated employment decision tool is used in violation of the law's disclosure requirement is a separate violation. Failure to provide notice to a candidate or employee in violation of the law is a separate violation.

Employers and employment agencies who currently use (or plan to use) these automated tools in NYC should confirm that those tools have been or will soon be subject to a bias audit. This will inform those employers and agencies whether there has been any disparate impact by the automated employment tools identified as to individuals because of their race, ethnicity, or sex, and any changes that have been implemented to eliminate bias. Employers also should review their current notice and recruiting processes to confirm that the above timelines are feasible, such as providing notice to a candidate that the technology will be used in connection with hiring decisions at least 10 business days before even utilizing the tool. In addition, should the candidate opt-out of the selection process, employers should be prepared to use an alternative section process or accommodation. The City will likely provide additional guidance ahead of the January 1, 2023 effective day, and we will provide an update of this publication.

In sum, while employers can easily comply with some of these new laws, others will require a great deal of work, especially the salary range law applicable in New York City. The one law that will plague New York employers for years to come, though, is the state's expansion of its whistleblower law.

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