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Locke Lord QuickStudy: Who Can Possibly Keep up ?With All the ?New Employment ?Laws in New York? ?

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Back in May 2022, we wrote about a surge of new employment laws and amendments to existing employment statutes in New York State and New York City. Since then, New York State and New York City have continued to enact a wave of significant additional employment laws and amendments and issue new regulations about existing laws. Some of these new obligations on employers go into effect in the New Year. It remains a daunting task to keep up with these various new laws, amendments, regulations, and their effective dates, but we summarize below and provide our quick insights about the following ten (10) legislative and regulatory developments:

- Use of artificial intelligence technology in pre-employment screening and promotions;
- Pay protections for independent contractors operating as freelancers;
- Limits on employer rights to employee inventions;
- Updates to the New York City Earned Safe and Sick Time Act ("ESSTA") regulations;
- New salary transparency posting requirements;
- Notice required for terminated employees regarding eligibility for unemployment benefits;
- Disclosure requirements by employers seeking to access employee social media accounts;
- Notice requirements for employees required to participate in political and religious matters in the workplace;
- Limits on nondisclosure agreements involving claims of sexual harassment and discrimination; and
- Modifications to the definition of "clerical worker," providing greater rights for many New York employees.

1. Clarifications Regarding the Use of Artificial Intelligence Technology Used in Pre-Employment Screening and Promotions

We previously wrote about New York City Local Law 144, which prohibits employers and employment agencies from using an automated employment decision tool (AEDT) unless they ensure the tool is subject to an annual bias audit, the audit summary is published, and required notices have been sent to employees and applicants who are subject to the AEDT. After several rounds of public comment and revisions, the New York City agency that enforces the law adopted final regulations regarding the use of AEDTs. Enforcement of the law began on **July 5, 2023**, so those employers who use or plan to use AI technology for hiring, screening, and/or promotion purposes should review the newly adopted regulations to ensure that their existing hiring and promotion procedures are compliant.

The regulations contain various clarifications regarding the requirements for a bias audit, the information required to be included in the publication of the audit's results, and notice requirements, among other things. For example,

although it was previously unclear, the new regulations clarify that for an AI tool to be covered by the law, its output (i.e., a rating, score, classification, or recommendation) must be used in one of the following ways: (1) as the sole criterion in making the hiring / promotion decision, without any other factors considered; or (2) as one of a set of criteria used in making the hiring / promotion decision, but where its output is weighted more than the other criterion in the set; or (3) as a simplified output used to overrule conclusions derived from human decision making and other factors. **Bottom line**: if you are an employer who is using any form of AI technology in the hiring, screening, or promotion process, you should confirm whether the technology is covered by the new law and, if so, that proper notice has been provided to your employees and applications who are subject to the technology.

2. Governor Signs the "Freelance Isn't Free" Act to Provide Pay Protections for Freelance Workers

Despite vetoing the exact same bill passed by the Legislature in 2022, Governor Hochul late last month signed a bill that provides pay protections for independent contractors operating as one-person businesses. As we commented in a comprehensive blog post on the day of its enactment, the Freelance Isn't Free Act "is plagued with ambiguities and other critical defects." We noted that one of the most glaring flaws is an unreasonable double damages provision for late payment or nonpayment by a company even if it had a good faith belief the freelancer's work was unsatisfactory or did not meet contract specifications.

The law, which is codified as new Section 191-d of the New York Labor Law, was modeled after the 2017 New York City law of the same name, and did not cure many of the defects in the City law. It only covers individuals in business for themselves, even if operating as LLCs, corporations, or under trade names, but does not require the freelancer to disclose if it is actually a one-person shop. Hence, many companies engaging independent contractors may have no idea if the small business is covered by the law. That is critical to know, because a company engaging freelancers must provide the contractor a contract with terms that are not typically included in many independent contractor agreements. Failure to provide a compliant contract is a violation of the law, as is failure to pay the full amount of a freelancer's fees in a timely manner, which is 30 days after the services have been completed unless the agreement provides for a longer or different period.

The new law imposes double damages on companies that do not pay in full on a timely basis, even if they genuinely believe the work failed to satisfy industry standards or the statement of work or if they are simply late in paying by a short period of time. And if the company engaging the freelancer had also failed to provide a compliant contract to the contractor, the damage provisions of the new law can be crushing, providing that the freelancer shall be paid statutory damages equal to the "value of the underlying contract" as well as double damages.

There are ways for companies to avoid getting snagged by this new law, as we note in our prior publication on this matter. The new law is effective **May 20, 2024**, so companies have time to prepare. However, New York State is not the only jurisdiction that has enacted a freelance protection pay law. Illinois passed one earlier this year, and several cities, including Los Angeles, Minneapolis, and Seattle, have also passed such laws.

3. New Limits Regarding Employers' Rights to Employees' Inventions

As of **September 15, 2023**, New York employers may no longer require their employees to assign to the employer the rights to an invention that the employee develops on their own time. Pursuant to Senate Bill 5640, which added section 203-f to the New York Labor Law, if an employee develops an invention "on his or her own time

without using the employer's equipment, supplies, facilities, or trade secret information," his or her employment agreement may not require that employee to assign the invention rights to the employer. The law, however, does provide two exemptions: (1) if, at the time of conception or reduction to practice, the invention relates to the employer's business, actual research or development, or anticipated research or development; or (2) if the invention results from work that the employee performs for the employer. The law does not provide a private right of action, nor does it expressly reference any remedies other than rendering unenforceable any contract language that is impermissible under the new law.

New York employers should review their employment agreements ensure that any invention assignment provisions are compliant with the new law.

4. Updates to the New York City Earned Safe and Sick Time Act ("ESSTA") Regulations

On **September 15, 2023**, the New York City Department of Consumer and Worker Protection adopted new amended rules, which as of **October 15, 2023**, codify NYC's previous amendments to ESSTA and bring them in line with the New York State Paid Sick Leave Law. The amendments also provide additional clarification for employers about their compliance obligations. For ease of reference, listed below are some of the more pertinent updates:

- **Calculation of Employer Size** – The amended rules clarify that when calculating the size of the employer for purposes of determining how many hours of paid safe and sick leave employees receive, the employer must include the "total number of employees *nationwide*" during a calendar year. If, at any point throughout the calendar year, the nationwide employee count surpasses a certain threshold (such as from 99 to 100+ employees), the employer must provide employees with the corresponding number of sick and safe leave hours. By way of example, if during the calendar year the employer's nationwide employee count goes from under 100 (where the employer must only provide 40 hours of paid safe and sick leave) to 100 or more employees, the employer is required to provide 56 hours of paid safe and sick leave "prospective from the date of the increase." To the extent there is a reduction in workforce (such as 100 to 99 or less), the employer may not reduce leave entitlements until the following calendar year.

- **Remote Employees** – The amendments clarify that only hours worked within NYC count toward the accrual of paid safe and sick time. Therefore, an employee who lives and primarily works remotely in New Jersey or Connecticut for a New York employer, but who is expected to regularly work in NYC, will accrue safe and sick leave *for those hours worked in NYC*. But an employee who lives in New Jersey or Connecticut and is only expected to travel to NYC a few times a year for meetings will not accrue safe and sick leave during their time in NYC. Such employees may, however, be governed by the earned sick and safe leave requirements in those other states, which currently provide for up to 40 hours of such leave per year.

- **Prior Notice Requirements** – Employers may require employees to provide reasonable, advance notice of the employee's foreseeable need to use safe and sick time. However, such requirement must be in the employer's handbook or other policies.

- **Written Documentation Requirements** – When an employee uses safe or sick time for more than three consecutive workdays, employers may require written documentation from a licensed healthcare professional that states the use of safe or sick time was for a purpose authorized under ESSTA. However, in most circumstances the employer cannot require the employee disclose the underlying details relating to the reason for use of safe or sick time.

5. New York Salary Transparency Posting Requirements

As we previously reported, effective November 1, 2022, New York City implemented a salary transparency law, which requires employers with four or more employees to reference the minimum and maximum salary ranges in job postings, including transfers and promotions. New York State also passed a similar law, which took effect on **September 17, 2023**. Similar to the New York City law, the New York State law requires employers with four or more employees to disclose the minimum and maximum annual salary or hourly wage in their job postings. This includes salary and compensation ranges for all internal promotions and transfer opportunities. To the extent the employer maintains a job description, the postings must also include a written description of it.

Before the law became effective, it was amended to clarify that the law applies to positions that will physically be performed in New York State *or by workers outside the state who report to an office or supervisor in New York*. Although the New York Department of Labor has proposed regulations to provide additional guidance, they have not yet been adopted. After they do so, we will provide an update. In the meantime, the New York State Department of Labor has published Frequently Asked Questions and Answers (Q&As) and other materials about the law.

6. New Notice Required Regarding Eligibility for Unemployment

Effective **November 13, 2023**, Senate Bill S4878A requires employers to provide separated employees with written notice of eligibility for unemployment benefits, including their right to file an application for unemployment. Specifically, the law requires that the information "shall be given at the time of each permanent or indefinite separation from employment, reduction in hours, temporary separation, and any other interruption of continued employment."

The notice must be in writing and on a form furnished or approved by the Department of Labor, which can be found here. The notice must also include (1) the employer's name and registration number; (2) the address of the employer to which a request for remuneration and employment information with respect to such employee must be directed; and (3) such other information as is required by the commissioner. The notice must be provided no more than five working days after the termination date or reduction of their working hours. Separate from this new law, employers have been required for years to "notify any employee terminated from employment, in writing, of the exact date of such termination, as well as the exact date of cancellation of employee benefits connected with such termination."

7. Disclosure Requirements Regarding Access to Employee Social Media Accounts

Governor Hochul recently signed Senate Bill S2518A amending the New York Labor Law to prohibit employers from requesting, requiring, or coercing an applicant or employee to disclose personal username, login information, passwords, or social media accounts as a condition of hiring, a condition of employment, or for use in a disciplinary action. The law takes effect on **March 12, 2024**. As of that date, employers will be also prohibited from retaliating against an applicant or employee who refused to disclose their social media information. There are, however, several exceptions to the law, including: (1) when the employer must comply with federal, state, or local law or a court order; and (2) to access an employee's electronic communications device that is paid for in whole or in part by the employer *if* the employee received advance notice of the employer's right to request or require such information. Employers with social media and related onboarding policies should determine whether they need to amend their policies or practices to comply with this law.

8. New Employer Notice Requirements for Employees Who Refuse to Participate In Political And Religious Matters in the Workplace

New York recently joined several other states, such as New Jersey and Connecticut, in enacting a "captive audience" law, which prohibits employers from discriminating against employees for refusing to attend employer-sponsored meetings, listen to speeches, or view communications that are intended to convey the employer's opinion concerning political or religious matters. The law, signed by the Governor and effective on **September 6, 2023**, defines the terms "political matters" and "religious matters" broadly, which will likely cause a variety of interpretations as to what matters fall within or without the law's protections.

Specifically, the term "political matters" is defined as "matters relating to elections for political office, political parties, legislation, regulation and the decision to join or support any political party or political, civic, community, fraternal or labor organization." The term "religious matters" is defined as "matters relating to religious affiliation and practice and the decision to join or support any religious organization or association." Employers must now post a sign informing employees of their rights under the amendment.

The law makes clear, however, that it does not prohibit: (i) an employer from communicating to its employees, any information that the employer is required by law to communicate, but only to the extent of such legal requirement; (ii) an employer from communicating to its employees any information that is necessary for such employees to perform their job duties; (iii) an institution of higher education from meeting with or participating in any communications with its employees that are part of coursework, any symposia, or an academic program at such institution; (iv) casual conversations between employees or between an employee and an agent, representative, or designee of an employer, provided participation in such conversations is not required; or (v) a requirement limited to the employer's managerial and supervisory employees.

9. Limitations on Damages Regarding Nondisclosure Agreements

On **November 17, 2023**, Governor Hochul signed Senate Bill S4516 into law, which amends the law that prohibited non-disclosure agreements regarding any claim that involved unlawful discrimination, harassment or retaliation by placing additional restrictions on employers who include damages provisions in such nondisclosure agreements. The law's requirements and prohibits take effect immediately. Specifically, employers can no longer include a release of any such claim, if as part of the agreement and release:

(a) the complainant must pay liquidated damages for disclosing the underlying facts of the claim;

(b) the complainant must forfeit all or part of the consideration for the agreement for disclosing the underlying facts of the claim; or

(c) it contains or requires 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).

The above-referenced "complainant" can be either an employee or independent contractor. Employers that tend to use and re-use the same or similar release language in their settlement and employment separation agreements should review them to confirm that they do not contain language or requirements that violate the new

law.

10. Amendment to the New York Labor Law That Modifies the Definition of "Clerical Worker"

On September 15, 2023, Governor Hochul signed a bill that, effective as of **March 13, 2024** will amend New York Labor Law's definition of "clerical and other worker." Specifically, the amendment modifies the minimum weekly earnings that a bona fide executive, administrative, or professional employee must receive to be excluded from the category of "clerical and other worker" (i.e., increased from $900 to $1,300 per week). This amendment is significant in several respects, including that only those meeting the increased exclusion threshold will be exempt from the Labor Law's right to seek recovery of "benefits or wage supplements" (which include reimbursement of expenses, vacation, separation, and holiday pay), and the Labor Law's requirement that such workers be paid no less frequently than semi-monthly.

One Bill That the Governor Did Not Sign: New York's Law That Would Have Outlawed Non-Competes

We would be remiss if we did not mention a key bill passed by the New York legislature that was not signed by the Governor. We previously wrote about Assembly Bill 1278, which sought to outlaw virtually all non-compete agreements and restrictive covenants in New York. In our QuickStudy on the matter, we noted nearly a dozen uncertainties in the manner in which the bill was drafted that could lead to years of litigation, and suggested that New York follow the lead of other states that have limited the scope of their non-compete restrictions and provided a carveout for the sale of a business. The Governor concurred. On November 30, 2023, Governor Hochul announced that she would not sign the bill in its current form. Instead, she reportedly stated that she is looking to strike the right balance between protecting low and middle-income workers, giving such workers the flexibility to go from job to job as they continue their careers. She also reportedly stated that she may approve a new bill that includes a sale-of-business exception and a $250,000 salary threshold. It remains unclear whether the New York legislature will amend the bill before year-end or pass a new bill in 2024 that is responsive to the governor's concerns or propose an alternative.

Conclusion

This may well be the busiest 18-month period ever in the New York labor and employment law arena. Hopefully, the 2024 legislative and regulatory developments covering this area of the law in New York will be far less challenging for businesses to keep up with.

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