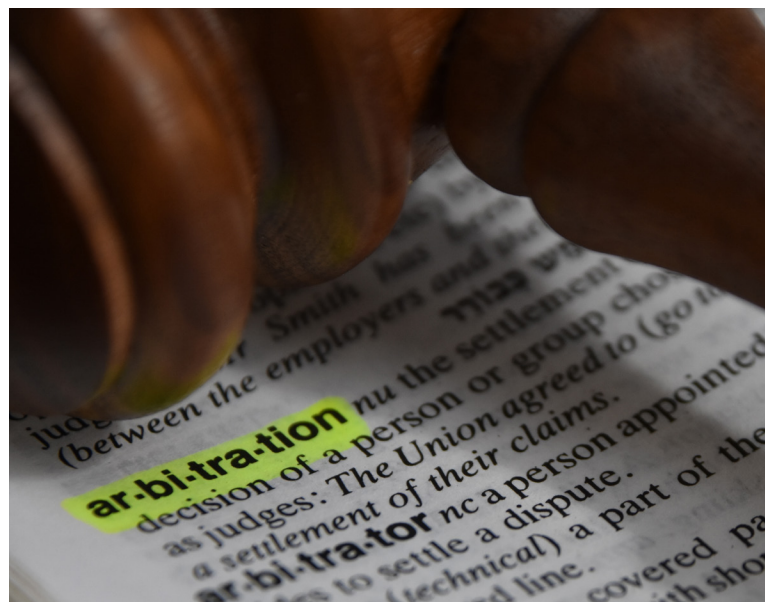


# The BakerHostetler Quarterly New York Employment Law Newsletter



# Trends

## #MeToo

- The Equal Opportunity Employment Commission (EEOC) has announced that sexual harassment filings have increased with the federal agency.
- With increased charges, we have also seen increased litigation. By way of example, female employees at Nike have brought a class action lawsuit alleging sex harassment, sex discrimination, and unequal pay. Many other large employers (e.g., ESPN) have seen similar lawsuits. It is likely we will continue to see lawsuits like these, especially as states continue to pass pay equity laws of their own.
- More states have passed legislation addressing sexual harassment.
  - » For example, on May 30, Vermont passed “An Act Relating to the Prevention of Sexual Harassment,” which provides expansive protections for employees, prospective employees, independent contractors, and unpaid interns regarding sexual harassment in the workplace.
  - › Effective July 1, the law sets out new restrictions and regulations governing sexual harassment, including:
    - A prohibition against requiring employees to arbitrate sexual harassment claims;
    - A prohibition against including a provision in any sexual harassment settlement agreement preventing the claimant-party from working for the employer in the future; and
    - Broad powers for the Vermont attorney general to conduct an inspection of an employer’s records and work site in connection with an investigation into sexual harassment claims.

## Misclassification of Employees

On the heels of New Jersey’s governor announcing a crackdown on the misclassification of workers, in August, the New Jersey Department of Labor and the United States Department of Labor signed a letter pledging cooperation in rooting out worker misclassification. The letter of cooperation means that the federal and state agencies will coordinate investigations and share resources. The state agency said that the agreement “sends a strong message” to businesses that misclassification laws “are being strictly enforced.” The state agency hinted that it will be focused on construction, transportation, and information technology employers and workers who participate in the gig economy.

## Protection for Sexual Orientation

We continue to see a shift toward sexual orientation being recognized as a protected class at the state level. For example, Pennsylvania has created a Commission on LGBTQ Affairs, which will advise the governor’s office on “outreach and important issues in the LGBTQ community.” These efforts will include lobbying for legislation to support the LGBTQ community, including nondiscrimination protections.

## Removal of “No Poach” Clauses

- Earlier this year, the Department of Justice (DOJ) announced that it would be pursuing criminal charges against companies that enter into “no poach” agreements with other companies.
- In response, an increasing number of companies have proactively announced the removal of no-poach clauses from their business contracts in response to the DOJ’s increased scrutiny:
  - » On July 13, seven fast food chains (Auntie Annie’s, Arby’s, Buffalo Wild Wings, Carl’s Jr., Cinnabon, Jimmy John’s, and McDonald’s) announced the removal of “no-poach” clauses from their contracts with franchisees.
  - » On Aug. 7, eight more fast food chains (Applebee’s, Church’s Chicken, Five Guys, IHOP, Jamba Juice, Little Caesar’s, Panera, and SONIC Drive-In) agreed to the removal of their no-poach clauses.
  - » The no-poach provisions these chains had in place prohibited workers at, for example, one Carl’s Jr. franchise from going to another Carl’s Jr.
  - » The announcements were both made as part of a deal these companies made with the attorney general of Washington, who was conducting an investigation into no-poach clauses used by these companies.

## Rise of ADA Website Accessibility Class Actions Lawsuits

- During the past year, there has been a spike in lawsuits filed against company websites, alleging violations of Title III of the Americans with Disabilities Act (ADA). These cases have targeted employers in a wide variety of industries nationwide. Plaintiffs in these cases have generally alleged that the targeted websites are discriminatory because they are not accessible to people with vision, hearing, or other disabilities. The majority of these lawsuits have been filed in federal court (primarily in New York, Florida, and California), with many being filed as class actions.

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## Reminders

### **New York State Anti-Harassment Provisions Effective Oct. 9, 2018**

Although New York employers are required by Oct. 9 to enact a policy compliant with the new anti-harassment measures passed in the 2019 Budget Bill, employers received good news on Oct. 1 when the state issued final guidance extending the deadline for all employees to receive anti-harassment training until **Oct. 9, 2019**. The final guidance made a number of changes to the initial guidance drafts published in July, and should be carefully reviewed to ensure that you are in compliance with the most up-to-date requirements. For more information on the changes, please visit our blog post: <https://www.employmentlawspotlight.com/2018/10/new-york-state-sexual-harassment-guidance-finalized/>.

### **NYC Commission on Human Rights Issued Guidance on Stop Harassment Law, and the Poster and Statement of Facts Should Now Be Posted and Distributed to Employees**

As a reminder, the New York City Stop Harassment Law became effective as of Sept. 6. In early August, the NYC Commission on Human Rights (NYCCHR) issued the poster and statement of facts required to be provided under the Stop Harassment Law. The law required employers to display the poster in the workplace and provide the statement of facts to all employees by Sept. 6. Employers may either hand out the stand-alone fact document provided by the NYCCHR, or they may add those facts to their employee handbooks. All employees hired after Sept. 6 must be provided the statement of facts at the time of hire.

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## In-Depth Analysis of Recent Developments

### **#MeToo – [Nearly] a Year in Review**

It has been nearly a year since the allegations against Harvey Weinstein broke in The New York Times, which unleashed one of the largest social media-driven movements seen to date – #MeToo. #MeToo did not confine itself to social media; instead, the individuals driving this movement screamed from their social media platforms until real change occurred – not just small changes made to appease some current fad, but truly dramatic changes that have shifted the way employers and the law handle sexual harassment claims.



- The relief sought is primarily injunctive, prohibiting any additional alleged discriminatory activity, and requiring website remediation to allow people with various disabilities to access the content therein, in addition to awards of attorneys' fees and costs.
- In New York, these lawsuits have also included state and local statutory claims asserted under the New York State Human Rights Law (NYSHRL) and New York City Human Rights Law (NYCHRL).
- Earlier this month, two New York City hotel operators got slapped with proposed class actions in federal court accusing them of violating the ADA, the NYSHRL, and the NYCHRL because they failed to ensure that their websites' online reservation systems offer full accessibility to the disabled. The complaint also alleges that both operators run hotels with online reservation systems that fail to describe ADA-accessible features in detail and do not permit disabled individuals to independently assess whether the hotels and their available guest rooms meet their individual accessibility needs.

### **Rise in Litigation Under the Defense of Trade Secrets Act**

- Two years after the enactment of the Defense of Trade Secrets Act (DTSA) on May 11, 2016, a review of the federal docket reveals that trade secret litigation under the DTSA has risen nearly 30 percent.
- The top three jurisdictions with the most filings under the DTSA are the Central District of California, the Northern District of Illinois and the Southern District of New York.

## **Trial in the court of public opinion**

This has been one of the most dramatic changes – at the inception of the movement, people were no longer content sitting by and listening to allegations about some individual in power wielding that power over an often younger, subordinate individual to either force that individual into intimate interactions or expose that individual to lewd and constant comments on the basis of sex. Rather, they boycotted companies that were accused of harboring such individuals and demanded that they be fired. Individuals who seemed to be at the height of their careers – such as Mario Batali, Ken Friedman and Matt Lauer – came toppling down. These were not low-level rank-and-file employees; these were faces of brands. The message was clear – no one is safe, and this behavior will not be tolerated anymore.



Once an individual was the subject of allegations, the issue could no longer be swept under the rug, and instead the public demanded transparency of how the investigation was handled, how long the harassment had gone on and the punishment doled out to the bad actor.

Some of this has changed now that a year has gone by since the movement began. It is now clear that there is a spectrum on which harassment sits. There are the allegations that rise to the level of immediate termination, and there are those that do not. Although a behavior may not be appropriate, it appears the public agrees that it is also not appropriate to obliterate someone's entire career over one errant comment. In fact, to do so may lead to claims by the accused (e.g., defamation, tortious interference, age discrimination, sex discrimination, etc.). Employers are now put in the difficult position of investigating employees' complaints and determining not just whether the alleged conduct occurred but also weighing how "bad" the conduct was under a microscope that did not previously exist.

## **Actions taken by employees**

As the movement continued, employees saw that this was their opportunity and seized it. There have been several class actions filed since the movement started, alleging sexual harassment and oftentimes unequal pay as well. Frequently, these two issues go hand in hand. From an optics

perspective, it is easier for a jury to believe that, if there was harassment, there was a culture that did not value the time of women the same as men's, for example. This makes it even more important for employers to properly document their policies against sexual harassment, their complaint structure, and their investigations of and responses to all complaints of sexual harassment.

In addition to filing lawsuits, members of different employee groups have been emboldened to stand up and ask for changes they find important to their industry or specific job title. For instance, hospitality employees in Rancho Palos, California collected signatures for a referendum to require hotels to provide housekeepers with panic buttons to guard against assault. Organizations like Time's Up also speak out on behalf of employees who may be disenfranchised or feel disenfranchised to request changes or make complaints related to sexual harassment.

## **Actions taken by federal and state governments**

Both the federal and state governments have taken action in response to #MeToo. The federal government has legislation pending that would prohibit requiring arbitration for sexual harassment claims and would overhaul a 21-year-old law related to sexual harassment that occurs in Congress. The recent federal tax reform also commented on sexual harassment – businesses are no longer permitted to deduct amounts paid in settlement of claims related to sexual harassment or abuse if the settlement is subject to a nondisclosure agreement. Additionally, many states (as reported in our last newsletter), including New York, have passed their own legislation related to sexual harassment – banning nondisclosure agreements, banning mandatory arbitration, requiring training and policies, and requiring equal pay. In fact, more than 100 bills and resolutions related to sexual harassment were introduced in 2018, according to the National Conference of State Legislatures. It is unclear how some of these state laws will cohabitate with federal laws and regulations like the Federal Arbitration Act, the EEOC's guidance and the National Labor Relations Board's (NLRB's) guidance. Since many of the laws have been enacted only recently or have not yet been enacted, it will likely take several months before we are able to see any of them tested in the courts.

## **Actions taken by the EEOC**

Since the inception of the movement, the EEOC has made it all the more clear that eliminating harassment in the workplace is one of its top priorities, and the commission recently confirmed, even in advance of the its reporting year-end, that there has been an increase in the number of sexual harassment charges filed with the federal agency. In addition to this increase in filed charges, the EEOC kicked its enforcement action filings into high gear, filing a burst of such actions in August. While the filings did include various protected classes, several were sexual harassment claims.



The new actions seem to center on cases where the employer ignored complaints from employees, failed to have a proper complaint structure in place, or failed to take appropriate action in response to substantiated complaints.

The EEOC has also been in the process of revising its harassment guidance, but that has reportedly been stalled due to the White House's review of the guidance. Another thing that may be holding up the process is the disagreement between the EEOC and the NLRB regarding whether sexual harassment investigations should be kept confidential. The EEOC demands it, whereas the NLRB finds that an investigation related to sexual harassment may be considered a discussion of job-related complaints or conditions, which is protected concerted activity under the National Labor Relations Act. There have been reports that the two agencies are attempting to harmonize their positions in light of the increased focus on sexual harassment in the wake of #MeToo.

### **Actions taken by employers**

Employers, with the increased scrutiny from outside eyes, wisely do not want to appear to be lax on hot-button issues like sexual harassment. In order to avoid any appearance of impropriety and to reinforce that their culture is not one where sexual harassment would flourish, many employers are taking steps in addition to those required by law. Some are adopting policies that carve out the applicability of their arbitration provisions to sexual harassment claims, overhauling their sexual harassment policies and training programs, retraining their highest-level staff, and setting up new ways to report harassment complaints. Some universities have even added clauses into their contracts requiring coaches to report sexual misconduct or risk forfeiting their pay.

In order for employers to take these steps, they have correctly focused less on independent harassment incidents and instead have looked at the overall culture to determine where improvements can be made. The goal of these

improvements has been to enable employees to make complaints without fear of reprisal or to feel comfortable enough in their environment to not immediately assume that a comment or behavior was sexual harassment in the first place. This includes having managers lead by example and changing policies to encourage behavior that is not just legal but also cordial and collegial, and prohibiting behavior that is not. This goal has been made easier since the NLRB has reversed its prohibition on policies that mandate respectful workplaces (as reported in our last newsletter).

It is clear that the #MeToo movement has spurred many actions from all sides, but we likely will not know its full impact for years to come. To hear more about what we have seen after #MeToo in the past year, mark your calendars to join us for a presentation at our New York office on Oct. 10.

## **Temporary Schedule Change Law Now That We Have the Frequently Asked Questions**

Since we last reported on the new Temporary Schedule Change Law that now requires NYC employers to accommodate "personal events," the Department of Consumer Affairs (DCA) has published an overview for employers and employees, as well as the notice that employers are required to post, and a Frequently Asked questions (FAQs) document that helps clarify certain points that left many employers confused.

Among those points of clarification are the following highlights, which clear up various points of confusion for several of our own clients:

- An employer must respond immediately to an employee's request for a temporary change to their work schedule due to a personal event. And when an employee submits a written request following a temporary schedule change, the employer must provide a written response – which must include some very specific content under the law – within 14 days.
- An employer cannot deny a request because an employee fails to submit supporting documentation for the need for the temporary change.
- The only two lawful reasons for denying a request are if the employee exceeded the number of allowable requests under the law or the employee did not have a qualifying reason for the request. An employer may, however, discipline employees under its standard disciplinary policy if it learns that employees did not have a personal event but represented that they did.
- The employer may offer the employee the option to use accrued leave time (i.e., vacation, paid time off, or other types of leave), but may not require employees to use paid leave or any type of safe and sick leave for a temporary schedule change or to use paid safe and sick leave prior to requesting a temporary schedule change.

- The employer may, however, require the employee to take unpaid leave instead of granting the type of temporary change the employee proposes in the temporary change request.
- The law does not allow employers to prohibit employees from using a temporary change on specific days.
- Employees also have a right to be free from retaliation for additional schedule change requests. Employees can request additional changes to the times, days, and locations they are expected to work, regardless of whether their employer is required to grant those additional changes. Employers cannot retaliate against employees for making additional schedule change requests.
- Covered employers must post the required notice where employees can easily see it at each NYC workplace. Notices should be printed on and scaled to fill an 11" x 17" piece of paper. Employers must post the notice in English and in any language that is the primary language of at least 5% of the workers at a workplace if the translation is available on the DCA website.
- Covered employers must retain electronic records documenting their compliance with the requirements of the law. Examples of the types of records employers would maintain include documents recording temporary change requests and responses. Covered employers must retain records for a period of three years.

Despite the FAQs pertaining to this new law, it continues to create confusion among employers and employees alike. This is exactly why several of our clients see the value in having a written policy and/or guidelines for managers that lay out exactly what their managers and employees should and should not do. If you would like our assistance in preparing a written policy and/or guidelines for your managers, our New York Employment Team is here to help.

### **Lessons Learned With the DCA on NYC's Earned Safe and Sick Time Act**

As we reported on the recent amendments to NYC's paid sick leave law, which is now called the Earned Safe and Sick Time Act (ESTA), NYC has a strict paid sick leave law that recently got even stricter. The law contains many requirements for employers, including having legally compliant notices, policies, accrual and carryover systems; anti-retaliation provisions; appropriate recordkeeping; and so much more. Many of our clients and other employers around the city have unfortunately been learning their lessons the hard way – particularly through investigations being led by the DCA, the agency that enforces the law and has been on a mission to assess hefty relief, penalties, and fines for violations of the law.

Some of the lessons recently learned include the following:

- Make sure to properly accrue ESTA at the minimum required rate of 1 hour for every 30 hours worked rather than in full-hour increments only (i.e., 1 hour, 2 hours, 3 hours, etc.) and/or rather than after working a full 30, 60, 90, etc. hours. In other words, do not wait until the employee has worked 60 hours to give an employee 2 hours of ESTA time.
- Make sure to distribute the Notice of Employee Rights and to maintain some sort of proof of doing so (e.g., email blast, employee signature or acknowledgement of receipt, etc.). Remember that simply posting the notice is not sufficient.
- Include all covered employees in your applicable policies. Do not, for example, include only nonexempt or full-time employees.
- Ensure that your attendance/call-out policies do not require advance notice of an employee's unforeseeable need to use sick time.
- Ensure that your other policies do not contain requirements to disclose an employee's medical condition (unless required by other laws).
- Be careful of terminating an employee for taking a sick day or even for failing to call out of work properly on a sick day. Even though the law contains some caveats, it is a slippery slope and one that we have seen employers get in trouble for.



### **Weed in the Workplace: The Impact on Employers Due to the Legalization of Marijuana**

The subject of legalizing medical and recreational marijuana is a hot topic with serious implications for employers across the country. Although marijuana remains illegal under the federal Controlled Substances Act (CSA), approximately 30 states have legalized medical marijuana, and 9 states have legalized recreational marijuana.

New York legalized marijuana in 2014, when Gov. Andrew Cuomo signed the Compassionate Care Act (CCA), by which “Certified Patients” can use medical marijuana to treat certain severe, debilitating, and life-threatening medical covered conditions including: cancer, positive status for HIV or AIDS, Lou Gehrig’s disease, Parkinson’s disease, multiple sclerosis, damage to the nervous tissue of the spinal cord with objective neurological indication of intractable spasticity, epilepsy, inflammatory bowel disease, ulcerative colitis, Crohn’s disease, chronic inflammatory demyelinating polyneuropathy, neuropathies, Huntington’s disease, chronic pain, and post-traumatic stress disorder. Certified patients must be under the care of Certified Physicians and must purchase medical marijuana from only Registered Organizations. Approved forms of medical marijuana include liquids and oil for vaporization, administration via inhalers, and capsules to take orally, but smoking is not permitted. As of Aug. 28, New York State has approximately 1,857 Certified Physicians and 69,466 Certified Patients.

Notably, the CCA created anti-discrimination protections for medical marijuana users. The CCA provides that Certified Patients are automatically deemed disabled under the NYSHRL. This means that New York employers with four or more employees are prohibited from terminating or refusing to employ an individual on the basis of his or her status as a Certified Patient, and that terminating or disciplining an employee who tests positive for marijuana is no longer a risk-free decision. In addition, employers must provide reasonable accommodations to Certified Patients as a result of their disability. Employers may be subject to a discrimination claim if they fire or discipline employees for lawfully consuming marijuana under the CCA. Like with other disabled employees, employers must engage in an interactive process to determine whether a reasonable accommodation can be made for Certified Patients. On the other hand, marijuana remains illegal under federal law, and the federal Americans with Disabilities Act (ADA), which requires accommodations for employees with disabilities, provides that a person’s current use of illegal drugs is not considered a disability.

The CCA does contain some protections for employers. First, it does not prevent employers from prohibiting employees from performing employment duties while impaired by marijuana. Second, the CCA does not require any person or entity to engage in any activity that would put the person or entity in violation of federal law or cause it to lose a federal contract or funding.

In light of conflicting federal and state laws, the case law on this subject is developing and murky. However, certain guidance has emerged for employers who are dealing with issues of medical marijuana in the workplace. In 2015, the Colorado Supreme Court held that employers may

terminate employees who test positive for marijuana (even if they use marijuana outside the workplace), despite that medical marijuana use outside the workplace is specifically authorized by Colorado law. The court accepted the employer’s federal preemption defense, holding that because marijuana use is unlawful under federal law, medical marijuana use cannot be deemed “lawful” under the state’s law.

Since then, there have been several court decisions finding in favor of medical marijuana users. For example, a Connecticut federal court has held that an employer’s refusal to hire an individual who tested positive for marijuana in a pre-employment drug test violated Connecticut’s Palliative Use of Marijuana Act. Interestingly, the court found that the federal CSA was not in direct conflict with Connecticut law because the CSA does not regulate employment practices in any manner. The Massachusetts Supreme Judicial Court has also held that a patient who qualified for the medical use of marijuana but was terminated from her employment based on a positive marijuana drug test could seek a civil remedy against her employer through claims of handicap discrimination in violation of Massachusetts’ laws. A state court in Rhode Island recently held that Rhode Island’s Hawkins-Slater Medical Marijuana Act prohibits an employer from refusing to hire a job candidate because she would have failed a pre-employment drug test due to her use of medical marijuana. Just like the Connecticut court, the Rhode Island court agreed that Rhode Island’s Medical Marijuana Act was not preempted by federal law, which does not address issues of discrimination and employment.

Although New York courts have yet to consider these issues, there is at least one relevant New York administrative decision on point. Last year, the New York City Taxi & Limousine Commission (TLC) sought the revocation of a taxi driver’s license because the driver tested positive for marijuana. The New York City Office of Administrative Trials & Hearings (OATH) disagreed and recommended that the petition be dismissed, finding that revocation solely because of the driver’s status as a certified medical marijuana patient would violate New York City and State laws. The TLC adopted the OATH decision, suggesting that medical marijuana users have some employment protections that may require employers to provide reasonable accommodations.

Recently, Cuomo created a new state panel to propose legislation to legalize marijuana in New York for recreational purposes, signaling that New York employers will continue to deal with issues concerning marijuana in the workplace. In light of these changes, New York City employers should be mindful of the following best practices and guidelines with respect to accommodating medical marijuana users in the workplace. First, because

Certified Patients are deemed disabled under the NYSHRL, employers should engage in the interactive process with employees who are Certified Patients. As with any accommodation, whether an accommodation is necessary will depend on the particular circumstances, including the type of business, the employee's position, the employee's need for medical marijuana, and the burden imposed on the employer, if any. Second, employers are not required to allow a Certified Patient to use marijuana in the workplace. In particular, the act does not require an employer to take any action that would cause it to lose a federal contract or funding. Third, employers may maintain zero-tolerance drug policies but should have experienced employment counsel review their drug testing, disability accommodation, and drug and alcohol policies to ensure compliance with applicable laws. Multistate employers in particular should understand their obligations in all states in which they have employees. Finally, employers should provide training to human resources and management-level employees so that they understand how to comply with applicable laws.

## **Companies in the Gig Economy and Employers Battling Misclassification Claims Handed a Big Win**

Earlier this summer, employers, or perhaps better stated, platforms, were handed a big win from the Appellate Division that oversees all New York unemployment appeals when it held that a Postmates courier was an independent contractor, not an employee, and thus not entitled to unemployment. While this decision does not mean that as a matter of law for all purposes these kinds of couriers are not employees under New York law, it is a ray of hope for employers, specifically web-based platforms that are increasingly popping up in various sectors (e.g., Uber, Lyft, Caviar, Handy). Hopefully, courts will look to this case to set a precedent for how these kinds of workers will be viewed not just in an unemployment context but also as it relates to their entitlement under other laws applicable to employees (e.g., New York Labor Law, Title VII, etc.).

Postmates is a web-based platform that operates almost as one's personal errand runner. Individuals can order various items from local stores or restaurants on Postmates' website or phone app and Postmates' couriers deliver those items to the individuals in short order. In coming to its decision that Postmates couriers are not entitled to unemployment, the court reiterated that the question of whether a worker is an employee is a "question of fact" that turns largely on whether the "alleged employer exercises control over the results produced . . . or the means used to achieve the results." The court also made clear that incidental control over the ultimate product or service (the "results produced") without further evidence of control over the means used to produce the results will not necessitate

finding an employer-employee relationship exists. Some of the facts that supported the court's finding that Postmates couriers were not employees were that the couriers did not have to go through an application or interview process, they do not report to any supervisor, they have discretion as to whether or not to log onto the platform and deliver on a particular day, there is no minimum time or delivery commitment, there is no restriction on working for other companies (including Postmates' competitors), they are not required to wear uniforms, they have discretion in the route and transportation they take to make deliveries, and they are paid only for the deliveries they make and not reimbursed for any other expenses. The court did not find the incidental control Postmates maintained over the ultimate service, such as determining the delivery fee to be charged, tracking deliveries, or handling customer complaints persuasive enough to evidence an employer-employee relationship.

This case is helpful not just to companies that operate platforms like Postmates but also to other companies to rely upon when combating claims of misclassification from either workers or the Department of Labor when the allegations relate to incidental control the company maintains. Despite several years of case law finding that when the negotiation of prices and direct payments to a worker are handled by an alleged employer, that is strong evidence of an employer relationship, this case gives an alleged employer at least an argument that depending upon the facts, control may only be incidental.

## **Southern District of New York Denies Conditional Certification of Café Managers for Second Time**

On June 25, U.S. Magistrate Judge Katharine H. Parker denied certification of a putative class of 1,100 café managers who claimed that Barnes & Noble misclassified them as exempt from overtime under the Fair Labor Standards Act (FLSA). Judge Parker's ruling in the case, *Brown v. Barnes & Noble Inc.*, Case No. 1:16-cv-07333 (RA)(KHP), was the second time the plaintiffs had moved for conditional certification.

Prior to the June 25 decision from Judge Parker, the plaintiffs first moved for conditional certification shortly after filing their complaint in September 2016. Named plaintiff Kelly Brown sought to classify two Illinois-wide classes consisting of café managers and managers in training and two similar nationwide classes who did not receive overtime compensation for their work.

The plaintiffs' early-stage motion for conditional certification was denied without prejudice, in part because of the submission of "cookie-cutter declarations," which the court explained "fall short of the modest standard" needed for conditional certification. Following a period of discovery, the



plaintiffs once again moved for conditional certification on Nov. 17, 2017. Again, the court denied certification and found that the café managers were not similarly situated.

Judge Parker refused to grant the café managers' Nov. 17 renewed motion for conditional certification of their FLSA claims as a collective action, saying that despite named plaintiff Brown's extensive evidence that managers performed primarily nonexempt duties, she favored Barnes & Noble's argument that the plaintiffs' main duties were managerial and that each manager's tasks were the result of their individual circumstances.

More specifically, the court found that café managers had different experiences with respect to the amount of non-exempt work they performed, their input on hiring and firing, the number of nonexempt workers at a café at various times and whether and when the managers simultaneously performed exempt and nonexempt tasks. Based on these differences, the court found that the managers were not similarly situated and no FLSA collective class could be certified.



Judge Parker's opinion was largely based on the April 2018 Supreme Court ruling in *Encino Motorcars LLC v. Navarro et al.*, which rejected the notion that FLSA exemptions should be construed narrowly. Instead, the Supreme Court advised that FLSA exemptions should be given a "fair" reading. Judge Parker's opinion explains that this "fair" reading would affect the analysis of the plaintiffs' claims:

"Although the court does not determine whether any of the plaintiffs are exempt or non-exempt on a motion for conditional certification, it nevertheless is cognizant of the Supreme Court's recent pronouncement about FLSA exemptions when evaluating whether plaintiffs have met their burden of demonstrating the existence of common nationwide policies suggesting that other café managers across the nation may be similarly situated with respect to being misclassified as exempt, notwithstanding their job title and duties contained in their common job description."

Judge Parker concluded her opinion by noting that the court will later decide whether the plaintiffs and current opt-in plaintiffs are in fact similarly situated and whether a merits determination can be made on a consolidated basis.

## Massachusetts Enacts Comprehensive Noncompete Reform

At long last, Massachusetts has passed comprehensive legislation limiting the use and enforcement of noncompetition agreements. On Aug. 10, Gov. Charlie Baker officially signed An Act Relative to the Enforcement of Noncompetition Agreements (the Noncompetition Act) into law.

The Noncompetition Act, which goes into effect on Oct. 1, applies to both employees and independent contractors and will undoubtedly have a major impact on the use of noncompete agreements in Massachusetts. The Noncompetition Act applies only to noncompete agreements formed after Oct. 1 and does not impact any current litigation involving noncompete agreements.

Below is an analysis of the most significant provisions of the Noncompetition Act, how those provisions apply to the law in New York and key strategies employers can use to prepare for these upcoming changes.

### Prohibition of noncompetes for specific categories of employees

The Noncompetition Act specifically prohibits the enforcement of noncompete agreements against four categories of employees:

1. Employees who are nonexempt under the Fair Labor Standards Act (FLSA).
2. Undergraduate or graduate students in a short-term employment relationship.
3. Employees laid off or terminated without cause as the term "cause" is defined in their employment agreement.
4. Employees under the age of 18.

Although New York does not specifically outlaw noncompete agreements for specific categories of employees, New York courts tend to look skeptically at attempts to enforce noncompete restrictions against low-level employees. This provision of the Noncompetition Act essentially puts the current norms surrounding noncompete agreements into writing.

### Garden leave requirement

The most publicized provision of the Noncompetition Act is the requirement that employers must now provide payment of "garden leave" or some "other mutually agreed-upon consideration" during the restricted period. Garden leave provisions require an employer to pay the former employee a portion of his or her salary during the restricted period of the noncompete agreement.

The Noncompetition Act sets the minimum amount of garden leave as “at least 50% of the employee’s highest annualized base salary within the two years preceding the employee’s termination” on a pro rata basis.

However, because the Noncompetition Act alternatively allows for the payment of some other “mutually agreed-upon consideration,” which is not defined by the Noncompetition Act, employers will be able to contractually agree to pay an employee less than 50 percent of their highest base salary. Critics of the Noncompetition Act have identified this language as a potential loophole, which will allow employers to pay employees a nominal lump-sum payment to abide by a noncompete restriction.

Given that employees in Massachusetts have not previously negotiated compensation for abiding by a noncompete restriction, it remains to be seen how close to the garden leave threshold employees will be able to secure.

New York, along with every other state, does not have any kind of garden leave requirement, and employers are not required to provide any consideration to enforce a noncompete restriction.

### **Consideration for noncompete agreements**

Consistent with the current law in Massachusetts, the Noncompetition Act states that new employment is sufficient consideration for having an employee sign a noncompete agreement at the start of his or her job.

The Noncompetition Act does, however, change the current law, which permits continued employment as sufficient consideration for a noncompete agreement signed after the start of employment. Instead, the Noncompetition Act now requires that a noncompete agreement signed after the commencement of employment be “supported by fair and reasonable consideration independent from the continuation of employment.” In other words, continued employment is no longer sufficient consideration for having a current employee sign a new or revised noncompete agreement.

Although this represents a clear shift from the current law, the Noncompetition Act does not define what constitutes fair and reasonable consideration, so it is unclear whether this requirement will have a material financial impact on employers.

In New York, both new employment and continued employment are sufficient consideration for having an employee sign a noncompete agreement. In other words, New York does not require employers to provide any additional consideration when either a new or current employee is asked to sign a noncompete agreement.

### **Requirements regarding scope of a noncompete Restriction**

The Noncompetition Act provides guidance on what constitutes a “reasonable” noncompete restriction.

Specifically, the Noncompetition Act mandates that noncompete restrictions cannot exceed one year in duration. However, if an employee is shown to have breached a fiduciary duty to the employer or to have unlawfully taken the employer’s property, the restricted period can be tolled for up to two years.

The Noncompetition Act defines a reasonable geographic scope as the areas in which the employee “during any time within the last 2 years of employment, provided services or had a material presence or influence.” The Noncompetition Act doesn’t define material presence or influence, so this will likely be a source of future litigation.

While New York does not specifically identify a specific duration or geographic scope that is considered “reasonable,” noncompete restrictions are expected to be reasonably tailored to protect a legitimate business interest. Generally, New York courts have upheld restrictions of up to six months to one year as reasonable as long as such a duration is necessary to protect the employer’s interest and the restriction is reasonably tailored in geographic scope.

In summary, Massachusetts employers will need to carefully review and revise their existing noncompetition agreements to ensure compliance with the new requirements of the Noncompetition Act. Employers should also use this as an opportunity to assess their use of noncompete agreements to evaluate whether they are using these restrictions effectively.



## **Massachusetts Passes Comprehensive Paid Family and Medical Leave and Raises Minimum to \$15 by 2023**

On June 28, Massachusetts Governor Charlie Baker signed An Act Relative to Minimum Wage, Paid Family Medical Leave and the Sales Tax Holiday (the Act), which makes sweeping changes to benefits provided to workers in the Bay State. As part of the “Grand Bargain,” the Act will incrementally raise the minimum wage from \$11 to \$15 an hour by 2023 and will phase out time-and-a-half pay for

retail workers on Sundays and holidays. The Act also creates one of the most generous paid family and medical leave programs in the country. Massachusetts now joins California, New York and Washington, D.C., as the only states to have both a \$15 minimum wage and mandatory paid family and medical leave.

The new paid family and medical leave benefits require all Massachusetts employers, regardless of size, to provide workers in the state with the ability to take up to 12 weeks of paid family leave per year and up to 20 weeks of paid medical leave per year for the employee's own serious health condition. At a maximum, employees are entitled to use 26 weeks of paid leave per year.

Under the Act, a "covered individual" is defined as a current employee of a Massachusetts employer; a self-employed individual who has elected coverage under the Act and reported self-employment earnings; and a former employee, assuming that the employee has not been separated from employment for more than 26 weeks at the start of the former employee's family and medical leave.

As provided in the Act, a covered individual may take paid family leave for any of the following reasons:

- To care for a family member with a serious health condition:
  - » "Family member" includes an employee's domestic partner, grandchildren, grandparents, and siblings, as well as the parents of a spouse or domestic partner.
  - » "Serious health condition" is defined as an illness, injury, impairment, or physical or mental condition that involves (i) inpatient care in a hospital, hospice, or residential medical facility; or (ii) continuing treatment by a health care provider.
- To bond with the employee's child during the first 12 months after birth or the first 12 months after the placement of the child for adoption or foster care.
- Because of any qualifying exigency arising out of the fact that a family member is on active duty or has been notified of an impending call or order to active duty in the Armed Forces; or
- In order to care for a family member who is a covered service member with a serious injury or illness incurred or aggravated in the line of duty. An employee taking paid family leave for this reason is entitled to take up to 26 weeks per year.

If paid leave taken under the Act also qualifies as protected leave under the federal Family and Medical Leave Act or the Massachusetts Parental Leave Act, the paid leave taken under the Act will run concurrently with, and not in addition to, such protected leave. Employers must restore employees who return from leave to their previous or an equivalent position with the same status, pay, benefits and seniority, barring intervening layoffs or changed operating conditions. Employers are also required to maintain an

employee's existing health insurance benefits for the employee's family leave as if they had not taken such leave.

The benefits under the Act will not affect any collective bargaining agreement or employer policy so long as the employee receives the greater of the various benefits available for the covered reason. Thus, employers will have the option of providing equivalent benefits to their employees through an approved private plan or self-insurance.

The Act, which will take effect on July 1, 2019, also establishes the Department of Family and Medical Leave within Massachusetts Executive Office of Labor and Workforce Development, which will be responsible for administering the paid leave program.

The department is required to establish reasonable procedures and forms for filing claims under the Act and to specify what supporting documentation is necessary to support a claim of benefits, including requiring proof of a serious health condition and the length of leave expected. Benefits will not be paid to any employee who willfully makes false representations to the department. The department will notify applicants of their eligibility for benefits within 14 days of receiving a claim and must pay the benefits not less than 14 days after the eligibility determination has been made. The department will further notify the employer within five business days of a claim being filed. The Act also calls for the department to establish an administrative appeals process that will adjudicate claims within 30 days of the notice of decision.

To fund these new benefits and the department, the Act establishes the Family and Medical Leave Trust Fund, which will be used to fund the program and compensate workers when they use paid leave. After a seven-day waiting period, employees on paid leave will earn 80 percent of their wages up to 50 percent of the state average weekly wage, and then 50 percent of their wages above that amount, up to a maximum of \$850 per week. To fund the Family and Medical Leave Trust Fund, Massachusetts will institute a new 0.63 percent payroll tax, with the cost split 50-50 between employers and employees.

In addition to mandating paid family and medical leave, the bill will also raise Massachusetts basic minimum wage from the current \$11 per hour to \$15 per hour by Jan. 1, 2023. Beginning Jan. 1, 2019, the minimum wage will increase to \$12 per hour. The minimum wage will then increase by 75 cents on Jan. 1 of every subsequent year until it reaches \$15 per hour on Jan. 1, 2023. Similarly, tipped workers in Massachusetts will also see an increase in their minimum wage from the current \$3.75 per hour to \$6.75 by 2023. On Jan. 1, 2019, the tipped minimum wage will increase to \$4.35 per hour. Thereafter, the tipped minimum wage will increase by 60 cents on Jan. 1 of every subsequent year until it reaches \$6.75 per hour on Jan. 1, 2023.

Simultaneous with these increases, Massachusetts will phase out the requirement that workers receive time-and-a-half pay on Sundays and holidays over the next five years. Massachusetts law currently requires most nonexempt employees who work in retail establishments to receive time-and-a-half for work performed on Sundays and certain holidays. The new law gradually eliminates this requirement. Retailers will see this premium rate decrease from 1.5 times the regular rate to 1.4 times the regular rate on Jan. 1, 2019, to 1.3 times the regular rate on Jan. 1, 2020, and so on, until Jan. 1, 2023, when the mandatory premium pay requirement is eliminated altogether.

## **Two Cases Petition the High Court to be Heard on Sexual Orientation Rights Under Title VII – Could Lead to the EEOC and Department of Justice Being on Opposing Sides of the Ring**

You may recall reading about the high profile cases that found their way to our nation's circuit courts this year related to whether or not sexual orientation is protected under Title VII. As a recap, the Second and Seventh Circuits said it was, and the Eleventh Circuit said it was not. Both the Second Circuit case and the Eleventh Circuit case are now headed to the U.S. Supreme Court, where the defendant and plaintiff, respectively, are petitioning for a decision to settle the circuit split.

In the Eleventh Circuit case, an employee who accused Clayton County, Georgia, of firing him because of his sexual orientation is appealing the Circuit's decision that Title VII does not protect employees from discrimination on the basis of sexual orientation. The county argues that the circuit split is still not ripe enough for the Supreme Court to hear the issue, and instead it should let the issue remain with the circuit courts to be fully developed. Altitude Express, the skydiving company alleged to have terminated its employee for being gay, is appealing the Second Circuit case. Altitude Express acknowledges that the Second Circuit was "laudable" in its attempt to protect workers against discrimination based on sexual orientation, but that it could not "circumvent the immutable legislative process by which we remain bound to govern."

Both of these appeals come less than a year after the Supreme Court denied certiorari to an employee seeking to review a previous Eleventh Circuit ruling that dismissed her claim that she was terminated because she is a lesbian. At the time the U.S. Supreme Court denied certiorari in that case, there were only two circuits that had delivered competing opinions on the issue. Now that the Second Circuit has ruled on the issue as well, that divide has deepened. Aside from the two pending writs

for certiorari to the U.S. Supreme Court, there is another circuit that may soon be weighing in on this issue. Lambda Legal filed an appeal in the Eighth Circuit on behalf of a plaintiff who claims his job offer was revoked after the company found out he was gay. If the Eighth Circuit rules on that case, in either direction, it could add fuel to the fire for a U.S. Supreme Court review.

Another divide that many are closely watching is that between the EEOC and the DOJ. In the Second Circuit case, these two federal agencies found themselves on opposing sides, submitting competing amicus briefs. To date, neither the EEOC nor the DOJ has filed a brief in either the Second or Eleventh Circuit appeal to the U.S. Supreme Court. However, the EEOC has not retracted its view that LGBTQ individuals are protected by Title VII and the DOJ has not reversed its view that they are not, so it seems likely the two agencies could face off again if the Court does grant certiorari. Some argue that this divide within the government charged with enforcing the law is another reason why the U.S. Supreme Court should grant certiorari in these cases.

Regardless of whether the Supreme Court decides to take on either pending petition, a decision would not be rendered at least until the 2018-2019 term, since the 2018 term has already completed. While employers continue to await a definitive ruling, for those who are not already covered by state and local laws that require protection for sexual orientation, best practice is to treat all employees with respect and dignity and to ensure the workforce understands that such discrimination will not be tolerated.

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## Case Updates

### **First Class Action Under New York City's Pregnant Workers Fairness Act**

New York City's Pregnant Workers Fairness Act (PWFA) requires New York City employers with four or more employees to provide reasonable accommodations to employees with pregnancy- or childbirth-related conditions. In July, the first class action alleging violations of this act was filed in New York State court against a large retail company. In the lawsuit, two former hourly employees allege that their former employer's policy of punishing workers for unscheduled absences discriminates against pregnant women. The plaintiffs describe that their former employer issued disciplinary points to employees who missed scheduled shifts, arrived late for shifts, or left early from shifts without advance approval, and that employees could be terminated if their disciplinary points reached a certain threshold. The plaintiffs allege that they unfairly

accumulated disciplinary points due to their taking time off for their pregnancy-related conditions, which leave is protected under state law. The plaintiffs also allege that the former employer systematically failed to accommodate pregnant workers. The proposed class would include hundreds of current and former pregnant hourly employees from 2015 to the present who incurred disciplinary points for absences due to pregnancy- and childbirth-related conditions. Employers should understand the requirements of the PWFA as well as ramifications of noncompliance with the PWFA, and also ensure training for management and human resources employees regarding the same.

### **Reminder for Hospitality Employers: Noncompliance With Tipping Rules Can Be Costly**

As many restaurant employers operating in New York City are aware, New York City's Hospitality Wage Order imposes strict requirements on hospitality employers with respect to the payment of wages and tips to hourly employees. A recent settlement involving a large restaurant chain with locations in both Illinois and New York serves as a reminder to hospitality employers of just how costly noncompliance with wage and hour laws can be. The lawsuit, which was filed in Illinois federal court in 2016, alleged violations of the FLSA as well as New York and Illinois labor laws. In particular, the employees alleged that the restaurant failed to properly notify tipped employees they were receiving tip-credit rates of pay below the minimum wage, required tipped employees to perform non-tip-related tasks such as cleaning and refilling condiments and encouraged tipped employees to work off the clock and share their tips with non-tipped employees. Although the restaurant denied the claims, the court recently preliminarily approved a \$2.65 million settlement for a class of over 400 members.

Among other things, the New York Labor Law and Hospitality Wage Order require employers to provide written notice to employees regarding their rate of pay at their time of hire and upon changes in their rate of pay, prohibit tipped employees from working off the clock and engaging in certain amounts of non-tipped functions, and impose strict requirements with respect to the sharing of tips with other employees. New York City hospitality employers should consult with experienced employment counsel to understand these requirements and implement them in the workplace in order to avoid lawsuits of this type with serious financial ramifications.

### **EEOC Brings First Parental Leave Lawsuit**

Recently, the U.S. EEOC and a leading cosmetics company settled the EEOC's first lawsuit targeting a

parental leave policy that purportedly gave greater benefits to new mothers than to new fathers. The settlement included a \$1.1 million payment to a class of over 200 male employees of the company.

In the lawsuit, which was brought in August 2017 in the U.S. District Court for the Eastern District of Pennsylvania, the EEOC alleged that the company's parental leave policies provided fewer parental leave benefits to male employees as compared to female employees, in violation of Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963. The company offered only two weeks of child-bonding leave to a new father, a stock worker, after rejecting his request for the six weeks of child-bonding leave it offered to new mothers. The EEOC claimed that the company provided eligible "primary caregivers" with six weeks of paid parental leave for child-bonding (in addition to leave for recovery from childbirth) and flexible return-to-work benefits, but "secondary caregivers" on the other hand, were eligible for only two weeks of paid leave for child-bonding. The EEOC argued that male employees were discriminated against because they were eligible to receive only "secondary caregiver" leave benefits.

Although employers can treat men and women differently for purposes of parental leave for recovery from childbirth on the rationale that women who give birth need time to recover physically, they cannot treat them differently with respect to child-bonding leave. There are serious risks to using the terms "primary" and "secondary" caregivers in a parental leave policy when these terms are not properly defined or when they result in differential treatment of male and female employees with respect to child-bonding leave. For guidance, employers should consult employment counsel and the EEOC's Enforcement Guidance for Pregnancy Discrimination and Related Issues.

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## Keep a Lookout – Legislation or Regulations on the Horizon

### **New York City Imposes New "Cooperative Dialogue" Requirements on Employers**

As many employers know, the NYCHRL, like federal and state law, requires employers to engage in an interactive process with employees to determine a reasonable accommodation for an employee's disability and other protected characteristics that may require an accommodation. Effective Oct. 15, New York City employers will be subject to heightened administrative requirements relating to this process, referred to as the "cooperative dialogue" process, to address employee

needs for accommodations due to religion, disability, pregnancy, domestic violence, and any other covered reasons. The upcoming amendments to the NYCHRL provide employers with specific guidance as to how to participate in a “cooperative dialogue,” and also impose significant consequences on employers that do not comply with this guidance.

Among other requirements, employers will be required to engage in the cooperative dialogue with employees within a “reasonable time” after the employer is on notice about the need for an accommodation. The cooperative dialogue should be an oral or written dialogue between the employer and employee concerning the employee’s accommodation needs, potential accommodations that address those needs (as well as alternatives), and any difficulties the potential accommodations (and alternatives) may pose for the employer. Depending on the circumstances, the employer may be required to initiate the dialogue. Employers will be precluded from denying an accommodation request on the basis that one is not available until after they have engaged in the cooperative dialogue process. Further, employers will be required to provide any employee who participated in a cooperative dialogue with a final written determination identifying the accommodation that was granted or denied. Finally, employees will have a private right of action against employers that do not participate in this cooperative dialogue in court or in a proceeding before the New York City Commission on Human Rights. Failing to engage in the cooperative dialogue requirements will be considered an unlawful discriminatory practice under the NYCHRL, which could subject an employer to liability for compensatory and punitive damages as well as attorneys’ fees and costs. Employers should update their accommodation policies based on this amendment and train management and human resources employees regarding when and how to engage in the cooperative dialogue process.

## **NLRB’s Potential Re-visitation of the Purple Communications Case**

On Aug. 1, the NLRB invited public feedback on whether it should “adhere to, modify, or overrule” its 2014 decision in *Purple Communications, Inc.* In that case, the Board overturned decades of its own precedent and held that employers could not prohibit employees from using work email accounts and systems for union purposes during nonwork time, absent “special circumstances.” On Aug. 31, the Board extended the deadline for public feedback until Oct. 5. Most recently, on Sept. 17, the board’s general counsel, Peter Robb, announced that his office had filed a brief asking the Board to overturn its decision in *Purple Communications*.

When issued, the decision in *Purple Communications* was a significant departure from prior Board law, which had regularly enforced an employer’s right to control its property, limiting it only where it was exercised in a way that discriminated against protected activity. Most recently, in its 2007 *Register Guard* decision, the Board upheld an employer’s property right to let employees use company email addresses and servers for limited personal purposes, including lunch invitations and other casual communications, while prohibiting them from using them for the purpose of soliciting support for or participation in an outside cause or organization. The Board called these “neutral restrictions,” which applied to all outside solicitation, not just those involving a union. For example, such restrictions could prevent employees from using company email addresses and servers to solicit their co-workers for a union as well as for the purpose of selling Girl Scout cookies. As long as those policies did not differentiate between union and nonunion-related activity, they were lawful.

The decision to revisit the Board’s decision in *Purple Communications* could have significant implications for employers’ property rights. Employers have a number of reasons for restricting use of their email and communications systems, including server bandwidth, data privacy, and information security. Employers can breathe a sigh of relief at the NLRB’s invitation for briefs because it signals that, at the very least, the Board is not considering further restricting employers’ property rights in this regard. Following the holding in *Purple Communications*, employers expected that the Board would extend its rationale to other employer property, and in fact, the NLRB’s general counsel under President Barack Obama identified such an extension as one of his policy goals for the agency.

After considering briefs submitted by the public and its own general counsel and the merits of the underlying case, the Board’s most likely course of action will be to return to the *Register Guard* standard because it reasonably balances employers’ property rights with employees’ rights to not be discriminated against for engaging in protected activity. Even if the Board chooses not return to the *Register Guard* standard and instead fashions a different standard, with the current composition of the Board, it is extremely unlikely that *Purple Communications* will remain good law in its entirety, which is good news for employers.

Any modification to or overruling of the Board’s decision in *Purple Communications* will likely draw a dissent from Board Member Mark Pearce, whom President Trump recently re-nominated to the NLRB for another five-year term (though he has not yet been confirmed). Member Pearce authored the majority opinion in *Purple Communications* and he dissented from the Board’s August 1 invitation for employers to file briefs.

The case in which the Board is reconsidering its *Purple Communications* decision is *Caesars Entertainment Corp. v. International Union of Painters and Allied Trades, District Council 15, Local 159, AFL-CIO*.

## **Pennsylvania Proposes Higher Minimum Salary Threshold for Exempt Employee Status**

Pennsylvania is among one of the recent states that has proposed raising the salary threshold for an employee to be classified as exempt from overtime. The proposal would increase the salary threshold by more than double – from \$23,660 to \$47,892 by Jan. 1, 2022 – and would make nearly half a million employees eligible for overtime! Pennsylvania’s proposed changes are but the latest example of states and localities seeking to adopt more protective wage and hour legislation and regulations.

## **Proposals for Federal Family Leave, Sick Leave, and Flexible Schedule Laws**

We have been seeing family leave, sick leave, and flexible schedule laws pop up around the country on a state and/or local level, but these laws are now being proposed on a federal level. Although it is currently unclear what (if anything) will happen with these proposals, below is a quick recap of what is currently on the table for consideration.

Republicans have proposed:

- The Economic Security for New Parents Act, which would give workers at least two months off at about two-thirds of their salary to care for newborn or newly adopted children and would be funded by employees’ Social Security, letting workers get a portion of their benefits now while pushing back their retirement pay eligibility.
- The Workflex in the 21st Century Act, which would give workers 12-20 days of paid sick time, depending on the size of the business and the employee’s tenure, and would also provide for different flexible scheduling options, including letting employees work remotely or allowing for variable allocations of 80 hours across two workweeks.

Democrats, on the other hand, have proposed:

- The FAMILY Act, which would give workers up to 12 weeks of family leave at up to two-thirds of their salary but also allows employees to take time off to care for their own or loved ones’ serious health conditions; also, rather than being funded by Social Security, these benefits would be funded by nominal payroll taxes paid by businesses and their workers.
- The Healthy Families Act, which would give workers up to seven days of paid time off per year to treat their own illnesses, care for a sick family member or take care of other personal business related to a child’s health.

- The Schedules That Work Act, which would allow employees to request changes to certain terms of their employment, such as when, where and how long they work; how far in advance they get their schedules; and how much their hours can fluctuate.

Although it is clear that Republicans and Democrats are currently proposing different laws on these subjects, the fact that they are proposing them at all shows that the federal government is thinking about giving businesses some relief from the varying local and state laws on these issues.



## **Proposed Changes to the NY Paid Family Leave Law and On-Call Rule**

Although the NY Paid Family Leave (PFL) law just went into effect on Jan. 1, apparently a change to the law has already been proposed. Namely, an amendment to the State’s PFL law, which is proposed to go into effect on Jan. 1, 2020, could give workers paid job-protected leave to use for the death of a family member. As the new law gets phased in during the next few years, some worry that this could mean that employees would essentially get 12 weeks of bereavement leave.

In addition, the New York Department of Labor (NY DOL) has proposed changes to the state’s “call in” requirements, which would require employers to include two extra hours of pay for certain employees at minimum wage if they are called in with less than two weeks’ notice. The new law would apply to all industries and occupations that are not exempt from the minimum wage law and are not covered by separate minimum wage orders for hospitality, building service and agriculture.

The PFL amendment still awaits the approval of Cuomo (who has until Dec. 31 to sign the legislation), and the scheduling rule still awaits approval by the NY DOL Commissioner. It is unclear whether either law will be approved, but it is worth looking out for both, as both could be quite costly for New York employers.

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