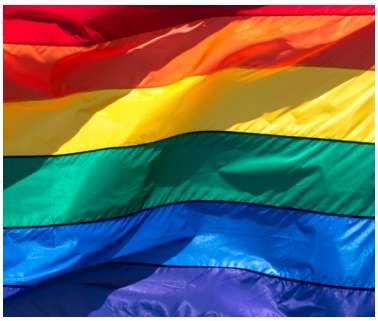
BakerHostetler

Brief

SUMMER 2018

The BakerHostetler Quarterly New York Employment Law Newsletter



Trends

#MeToo

- Heightened attention on workplace cultures.
- Heightened attention on equality in the workplace – related to both pay and responsibilities.
- Focus on retraining on sexual harassment – specifically individualized training, with a focus on retraining top executives.
- Reconsideration of hiring outside counsel to conduct internal investigations.
- Legislation regarding confidentiality of sexual harassment settlements and overturning mandatory arbitration and enforcing stronger protections against sexual harassment, like mandatory anti-harassment policies and trainings.
- Federal tax bill no longer permits businesses to deduct attorneys' fees and settlement payments related to sexual harassment if that settlement contains a nondisclosure agreement.
- Passed and proposed ban-the-box legislation for salary history.
- State equal pay laws.

Sexual Orientation

- In recent years:
  - » Published EEOC guidance provides that sexual orientation is a protected category under Title VII.
  - » Many states have rules protecting against harassment on the basis of sexual orientation, but the trend seems to suggest that soon federal law will as well.
- Late last year the Seventh Circuit ruled sexual orientation is protected, and just this year the Second Circuit joined the Seventh Circuit in finding that sexual orientation is a protected class.
- In May, Michigan's Civil Rights Commission interpreted the state anti-discrimination law's prohibition on sex discrimination to include discrimination on the basis of sexual orientation and gender identity.

More Employer-Friendly Policies at the Federal Level

- The National Labor Relations Board (NLRB) reverses the joint employer test to pre-*Browning Ferris* in *Hy-Brand*. (Although this decision was reversed again due to a conflict of interest of one of the board members, the board has announced that it will now address the proper joint employer test through rule making. It is expected that any rule would match the standard that was articulated in the *Hy-Brand* case.)
- Amendments to the minimum salary thresholds for exempt employees are rumored to be forthcoming, but at minimum salaries far less than the Obama administration's proposed rule.
- NLRB rules that civility codes in employment handbooks are now permitted again.
- The Department of Labor brings its opinion letters back.
- BUT NOTE, the counterbalance to a very employer-friendly federal administration is a flurry of state legislation – many states have proposed and/or passed laws related to – paid leave, ban the box for salary, protections for protected classes, state laws related to sexual harassment, minimum wage increases, scheduling certainty and more. Additionally, several states have stated that enforcing the misclassification of employees as exempt will become a priority.

Digging In – A More In-Depth Analysis of Recent Developments

Predictable Schedules a Right, Not a Privilege, in NYC Fast-Food and Retail Industries

Toward the end of 2017, New York City implemented the Fair Workweek Law, which aspires to ensure more predictable schedules and paychecks for fast-food and retail workers by setting restrictions on how and when their employers can schedule them for work.

The idea was to assist workers who are, as Mayor Bill de Blasio stated, "forced to deal with an arbitrary schedule at a job where they still don't always make ends meet." The result, however, has required covered employers to make some serious changes.

Among those changes for covered retail employers are:

- Requiring retail employers to give employees advance notice of their schedules. Specifically, employers must:
  - » Give employees at least 72 hours' notice before scheduling or canceling a shift.
  - » Provide employees with a written work schedule and post, in a location accessible and visible to all employees, the work schedule for all employees at that location at least 72 hours before the start of the first shift on the schedule.

- » Transmit the schedule electronically if it regularly uses electronic means to communicate scheduling information.
- » Directly notify employees of any schedule changes.
- » Retain copies of work schedules for the previous three years, which the employer must provide to employees upon their request.

- Prohibiting the practice of "on-call" scheduling, meaning that retail employees can no longer be required to call their workplace or wait to be contacted by the employer less than 72 hours before a shift to find out whether they will need to come in to work for that shift.

Among those changes for covered fast-food employers are:

- Providing new hires with a "good faith" written estimate of the employee's weekly hours for the duration of his/her employment and the expected dates, times and locations of those hours, and providing updated good faith estimates as soon as possible after long-term or indefinite changes occur.
- Providing employees with at least seven-day work schedules (including anticipated regular shifts and on-call shifts) at least 14 days in advance. If the employer changes a work schedule, it must update the schedule within 24 hours and provide the revised written schedule to the employee – although an employee may refuse to work additional hours that were not included in the original schedule. Also, schedule changes with less than 14 days' notice must be compensated and entitle the affected employee to a "schedule change premium" of $10 to $75, in addition to their regular wages, as compensation for schedule changes such as canceling, shortening, rescheduling or adding shifts.
- Prohibiting a fast-food employer from requiring an employee to work two shifts that span two days but are less than 11 hours apart without compensating the employee $100 in addition to their regular earned wages, unless the employee either requests or consents to these work hours in writing.
- Requiring that when a fast-food employer needs shift coverage, the employer offer available shifts to current employees before hiring new workers. The law also requires an employer to notify its employees of the available shifts, and it provides what this type of notice must contain. Only after the employer satisfies the posting requirements specified in the law, if existing employees (first at that location and then at other locations) decline the additional shifts or if the employer would be required to pay the existing employees overtime for the additional work, may the employer then hire additional employees.

Other provisions of the Fair Workweek law include allowing fast-food employees to make voluntary contributions to a nonprofit organization through payroll deductions, prohibiting employers from retaliating against employees for exercising their rights under the Fair Workweek law, and establishing notice and record-keeping requirements for covered employers.

The Second Circuit Finds Title VII Protects Against Sexual Orientation Discrimination

On May 22, 2017, in *Melissa Zarda et al. v. Altitude Express d/b/a Skydive Long Island et al.*, the Second Circuit agreed to hold an en banc hearing to determine whether an estate for a gay man, who alleged he was terminated as a result of a customer complaint related to his sexual orientation, may revive its previously dismissed case against the deceased's former employer. By granting the en banc hearing, the Second Circuit agreed to reconsider its current precedent that Title VII does not protect against discrimination based on sexual orientation.

On June 1, 2017, the Second Circuit invited the Equal Employment Opportunity Commission (EEOC) to participate as *amicus curiae* and write a brief answering the question "Does Title VII of the Civil Rights Act of 1964 prohibit discrimination on the basis of sexual orientation through its prohibition of discrimination 'because of sex'?" The EEOC had previously filed an *amicus* brief in the *Christiansen* case arguing that Title VII protects against sexual orientation discrimination based on the well-settled precedent that it is sex discrimination under Title VII to discriminate against someone who fails to conform to gender norms (*e.g.*, being attracted to the same sex is nonconformance to gender norms). The EEOC took a similar position in this case.

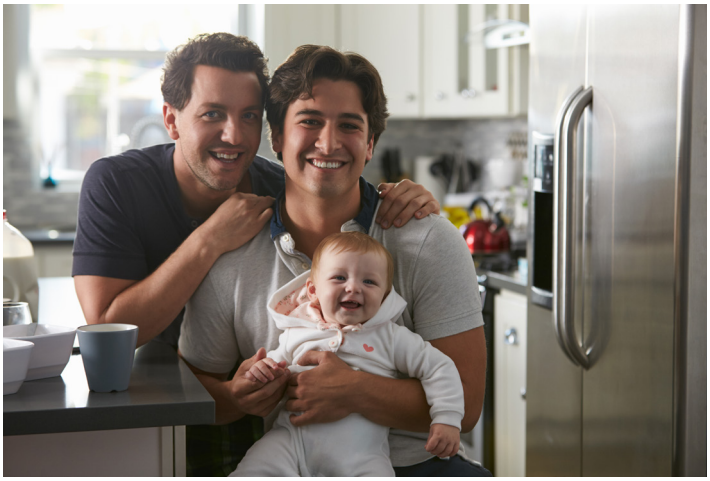
On Feb. 26, 2018, the Second Circuit decided that the estate may revive its suit against the deceased's employer. In so doing, the Second Circuit held that "sexual orientation discrimination is motivated, at least in part, by sex, and is thus a subset of sex discrimination," which makes it sex discrimination under Title VII. This decision overturns the Second Circuit's prior precedent that held otherwise. The court based its decision on the text of the

statute, the Supreme Court's test for determining whether an employment practice constitutes discrimination, and the fact that Title VII should be broadly interpreted and that the "legal landscape" has changed since the Second Circuit last considered the issue in 2000 in the *Simonton* case. Specifically, the court cited the EEOC's position that sexual orientation is protected under Title VII as well as the Seventh Circuit's decision in *Hively* (which recently held that sexual orientation was a protected class under Title VII). This is a significant ruling for the Second Circuit, and further solidifies the circuit split on this matter.

Although most employers in the Second Circuit have already been treating sexual orientation as a protected class due to state statutes, now would be a good time to review your policies and procedures to ensure not only that sexual orientation is listed as a protected class, but also that managers and human resources professionals are trained in how to enforce these policies. Likewise, employers should ensure that employees are properly trained on proper workplace behavior, including what constitutes harassment.

New York Institutes Paid Family Leave

As of Jan. 1 of this year, New York joined several other states that offer paid family leave benefits for employees. Currently, the New York Paid Family Leave Law (PFLL) provides eligible employees with eight full weeks of job-protected paid family leave to bond with a newly born, adopted or fostered child; care for a family member with a serious health condition; or assist loved ones when a family member is called to active military service abroad. The benefit amount and length of the leave will increase gradually through 2021.



Employees with a regular work schedule of 20 or more hours per week are eligible after 26 consecutive weeks of employment. Those with a regular work schedule of less than 20 hours per week are eligible after 175 days worked. Employees who will not meet the time-worked requirement for eligibility (e.g., certain temporary employees) may waive coverage via opt-out waiver forms.

The benefits are funded through employee payroll deductions, and the 2018 payroll contribution is 0.126 percent of an employee's weekly wage and is capped at an annual maximum of $85.56. If an employee earns less than the New York State Average Weekly Wage ($1,305.92 per week), they will have an annual contribution amount less than the cap of $85.56, consistent with their actual weekly wages. The New York State (NYS) Department of Financial Services will reset the employee contribution rate annually. However, an employer may choose to pay for the PFL benefit on behalf of its employees.

Employers with existing family leave policies should coordinate the PFLL with existing paid leave policies, if any. If an employee has an event that qualifies for leave under both the PFLL and the Family and Medical Leave Act (FMLA), and the employer is covered under both laws, the leave may be taken concurrently, so long as the employer notifies the employee that the leave qualifies for both FMLA and PFLL and that it will be designated as such. One important distinction between the FMLA and the PFLL is that an employee may not use leave under the PFLL for an employee's own serious health condition. For the same reason, employees cannot take short-term disability and PFL at the same time. However, if the employee qualifies for short-term disability (for example, after giving birth), they may take short-term disability and then PFL. But employees cannot take more than 26 weeks of combined short-term disability and PFL in a 52-week period. Likewise, if an employee is collecting workers' compensation for a total disability, they cannot take PFL. If they are on a reduced earnings schedule, they may still be eligible for PFL.

The law further provides that employees may choose to supplement PFLL benefits, up to their full salary or wages, by using any form of accrued or allotted paid time off, consistent with their employer's policies, while on leave under the PFLL. If an employee chooses to take advantage of an employer's paid-time-off policy at 100 percent of his or her salary instead of receiving the benefit available under the PFLL, the employer may request reimbursement from its carrier of any benefits due to the employee. Employers may not, however, require employees to exhaust all available paid time off under other policies prior to using paid leave under the PFLL.

If they haven't done so yet, employers should take the following steps to prepare to comply with the PFLL:

- Ensure your company has PFL coverage. If you have not yet done so, contact your broker or insurer for information about available policies and about paying your premium. If you are self-insured for disability, you should purchase a separate PFL policy or apply to the NYS Workers' Compensation Board to self-insure.

- Unless you are paying for these benefits on behalf of your employees, make appropriate deductions from employee paychecks to pay for this insurance, and notify your employees in writing before withholding any such contributions.
- Inform ineligible employees about waivers.
- Post a Notice of Compliance for employees, which should be provided to you by your carrier.
- Update existing handbooks and policies concerning the PFLL, or create written guidance for employees regarding the PFLL.

Become familiar with the law. Visit New York's website dedicated to the PFLL, which provides answers to frequently asked questions.

Supreme Court Upholds Class Action Waivers in Arbitration Agreements as Valid and Enforceable

In a landmark opinion, the Supreme Court issued its long-awaited decision in *Epic Systems Corp. v. Lewis*, upholding the validity of class action waivers in employment arbitration agreements. In a 5-4 majority opinion authored by Justice Gorsuch, the Court delivered its conclusion that class action waivers do not violate employees' rights to engage in "protected concerted activity" under Section 7 of the National Labor Relations Act (NLRA) and "must be enforced as written" as mandated by the Federal Arbitration Act (FAA).

The controversy surrounding the validity of class action waivers in employment arbitration agreements has been hotly contested over the past eight years. Since 2012, the National Labor Relations Board (NLRB) has taken the position that arbitration agreements with class or collective action waivers deprive employees of their rights to proceed collectively under Section 7 of the NLRA. The NLRB's stance eventually led to a federal circuit split, with the Seventh and Ninth Circuits adopting the position of the NLRB and the Second, Fifth, Eighth and Eleventh Circuits taking the view that the FAA's policy of favoring arbitration overrides any concerted activity rights provided to the employees by the NLRA.

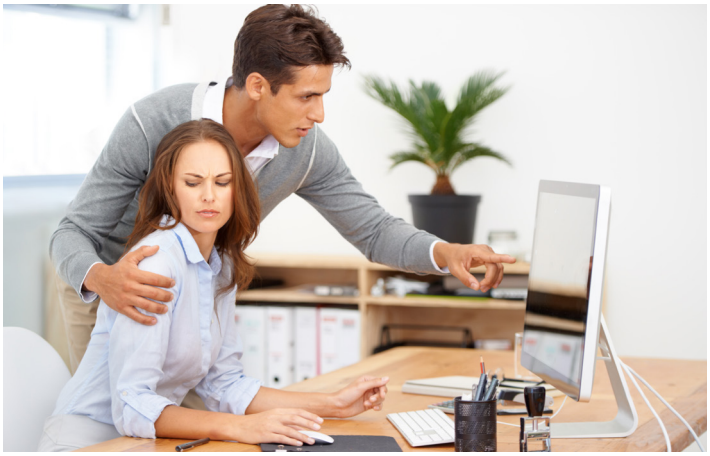
On Jan. 13, 2017, the Supreme Court granted certiorari, consolidating three separate cases involving collective actions for unpaid wages under the Fair Labor Standards Act. In each case, the defendant employer argued that the class action waiver in each employee's arbitration agreement prevented the initiation of a collective action lawsuit. After hearing oral arguments on Oct. 2, 2017, the Supreme Court issued its decision on May 21, 2018, under the *Epic Systems Corp.* case number.

Delivering the opinion of the Court, Justice Gorsuch emphasized that Section 7 of the NLRA does not contain a right to pursue a class action and does not trump the FAA's command to honor arbitration agreements:

> *The NLRA secures to employees rights to organize unions and bargain collectively, but it says nothing about how judges and arbitrators must try legal disputes that leave the workplace and enter the courtroom or arbitral forum. This Court has never read a right to class actions into the NLRA – and for three-quarters of a century neither did the National Labor Relations Board. Far from conflicting, the Arbitration Act and the NLRA have long enjoyed separate spheres of influence and neither permits this Court to declare the parties' agreements unlawful. (Slip op. at 2.)*

In reaching its conclusion, the Court rejected the primary arguments presented by the employees and reaffirmed the importance of the FAA.

Justice Gorsuch rejected the employees' argument that the specific language of the FAA's "savings clause," which states that arbitration agreements are enforceable except "upon grounds as exist at law or in equity for the revocation of any contract," allows the Court to strike down an arbitration agreement that violates another federal law (i.e., the NLRA). The employees argued that because a class action waiver in an arbitration agreement violates the NLRA, the savings clause permits the Court to find such an arbitration agreement invalid. Justice Gorsuch emphatically rejected this argument noting that "the savings clause recognizes only defenses that apply to 'any' contract," which means that "the savings clause does not save defenses that target arbitration either by name or by more subtle methods, such as by 'interfer[ing] with the fundamental attributes of arbitration.'" (Slip op. at 7.)



Additionally, Justice Gorsuch rejected the employees' argument that the right to engage in "protected, concerted activity" under Section 7 of the NLRA also encompasses the right to bring a class action lawsuit. Rather, the majority clarified that Section 7 "focuses on the right to organize unions and bargain collectively. It does not mention class or collective action procedures or even hint at a clear and manifest wish to displace the Arbitration Action." (Slip op. at 2.)

The key takeaway from the *Epic Systems* decision is that employers may continue to rely on – or resume relying on – the enforceability of class and collective action waivers within employment arbitration agreements. The decision clarifies that NLRA Section 7 rights are not superior to the FAA mandate to enforce such agreements as written. The decision further confirms the Supreme Court's long-standing history of favoring the FAA's arbitration mandate over other federal laws.

In New York, Employers Are Now Responsible for Harassment of Nonemployees

As part of the 2019 New York Budget Bill, there were several pieces of legislation intended to combat sexual harassment. The rest of the bill is discussed in more detail in the section "Keep a Lookout," but one piece of the law, which is effective immediately, makes employers responsible for permitting sexual harassment in the workplace of contractors, subcontractors, vendors and others providing services pursuant to contracts. Employers are liable if they knew or should have known that the sexual harassment was occurring and failed to take appropriate corrective action. This means that if a contractor or vendor of an employer is being sexually harassed by any employee of the employer, the employer may be held liable for its employees' harassing conduct if it knew or should have known about that activity. This is a significant departure from the current law, which holds employers liable only to its own employees. This change may necessitate that employers distribute their anti-harassment policies and complaint procedures to all contractors in addition to their employees, in order to reduce risk of liability and preserve any defenses.

New York City Expands Paid Sick Leave Law With Creation of 'Safe Time'

On May 5, 2018, NYC's amended sick leave law went into effect. Previously, it was known as the Earned Sick Time Act, and is now amended as the Earned Safe and Sick Time Act (ESTA) and increases the reasons for which an employee is entitled to use paid time off.

The amended ESTA implements two major changes. First, it expands the types of circumstances for which employers must allow employees to use paid time off. Specifically, an employee may now use paid time off for a wide range of circumstances related to any situation where the employee or "family member" of the employee becomes a victim of a family offense, sexual offense, stalking or human trafficking. The law defines sexual offenses, stalking, human trafficking and family offense matters by reference to the New York Penal Law. An employee's use of paid time off for any of these circumstances is referred to as "safe time."

If an employee or family member has been the victim of a family offense matter, sexual offense, stalking or human trafficking, the employee can use safe time to do any of the following:

- Obtain services from a domestic violence shelter, rape crisis center, or other shelter or services program.
- Participate in safety planning, temporarily or permanently relocate, or take other actions to increase the safety of the employee or employee's family members from future family offense matters, sexual offenses, stalking or human trafficking.
- Meet with a civil attorney or other social service provider to obtain information and advice on, and prepare for or participate in, any criminal or civil proceeding, including but not limited to matters related to a family offense matter, sexual offense, stalking, human trafficking, custody, visitation, matrimonial issues, orders of protection, immigration, housing, or discrimination in employment, housing or consumer credit.
- File a complaint or domestic incident report with law enforcement.
- Meet with a district attorney's office.
- Enroll children in a new school.
- Take other actions necessary to maintain, improve or restore the physical, psychological, or economic health or safety of the employee or the employee's family member or to protect those who associate or work with the employee.

Although the creation of safe time allows employees to use paid time off for a wider variety of reasons, employers are not required to increase the total number of hours for paid time off available to their employees.

Second, the law broadens the definition of "family member" for both sick and safe time to also include "any other individual related by blood to the employee; and any other individual whose close association with the employee is the equivalent of a family relationship." This amendment provides employees with significant flexibility in determining who qualifies as a family member for whom they may use sick time or safe time.

Consistent with the previous version of ESTA, employers may require employees to provide up to seven days' advance notice of a foreseeable need to use safe time and notice as soon as practicable for unforeseeable absences.

The amended ESTA also requires employers to have updated their written policies and have provided an updated written notice to existing employees of their right to accrue and use safe time by June 4, 2018 (within 30 days of the effective date of the amended law). Employees starting after June 4, 2018, must be informed at the commencement of employment of their right to use safe time.

Employers should also be aware that the New York City Council is considering another proposed amendment to the ESTA (introduced in July 2017) that would provide employees with a private right of action in court for violations of ESTA. Currently, employees who claim they are aggrieved under ESTA must file a complaint with the New York City Department of Consumer Affairs, the agency tasked with administering this law.

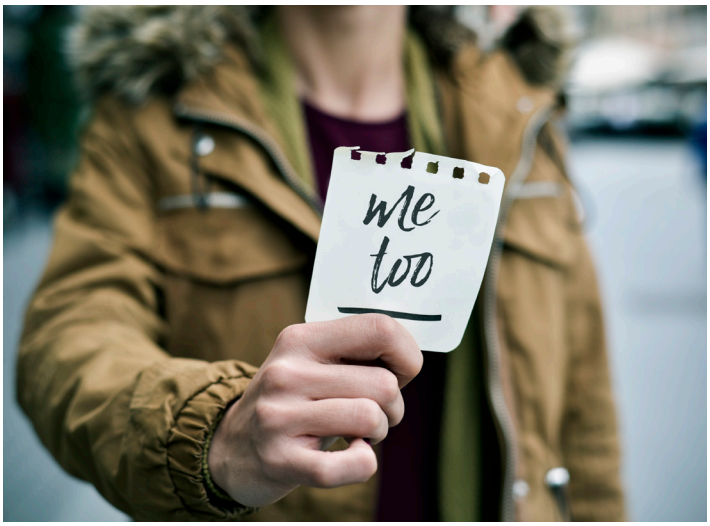
The bottom line: Employers should review their existing paid leave policies to ensure compliance with the expanded coverage provided by ESTA. Specifically, employers will want to ensure their paid-time-off policy clearly identifies the reasons an employee may use sick time and safe time as enumerated in ESTA. Additionally, any written policy should include an explanation of the newly expanded definition of "family member."

As Of July 1, 2018, New Jersey Has One of the Most Employee-Friendly Equal Pay Laws in the Country

On April 24, 2018, the New Jersey governor signed the Equal Pay Act into law. This Act, which took effect on July 1, 2018, amended the New Jersey Law Against Discrimination (NJLAD) to add an equal pay section. This Act, unlike the federal Equal Pay Act, and many other state equal pay acts, ensures equal pay and benefits not just for women but for all protected classes listed in the NJLAD. The Act demands equal pay for "substantially similar work when viewed as a composite of skill, effort and responsibility." This standard is more lenient than the standard set forth in the federal equal pay provisions, which requires equal pay for "equal skill, effort, and responsibility," and it is unclear how broadly the courts will interpret this standard.

In order to pay a member of a protected class less than a nonmember for substantially similar work, an employer must prove that the differential is based upon seniority, merit, or one or more bona fide factors (not based on an employee's membership in a protected class). These one or more bona fide factors must not perpetuate any differential in compensation based on membership in a protected class, and must be applied reasonably, account for the entire wage differential, be related to the position in question, and be based upon business necessity. The requirement that a bona fide factor may not perpetuate any wage differential based on a protected class is a significant one. This essentially imposes a disparate impact claim for equal pay. It is also notable that a bona fide factor based upon business necessity will not be sufficient if it can be demonstrated that alternative business practices would serve the same purpose without resulting in a wage differential.

Perhaps the most surprising provision in the Act is its prohibition against employers reducing the pay of any employee in order to comply with the Act. This means that employers may not reduce the pay of higher-paid employees in an effort to even out salaries, but instead must raise any salaries for members of protected classes who are being paid less for substantially similar work, which could have an enormous financial impact upon employers. Another potentially huge financial impact is the Act's requirement that the comparison of wages be based upon wage rates in all of an employer's facilities.



The Act makes each occasion that an individual is affected by a discriminatory compensation decision an unlawful employment practice, and specifically states that this includes each payment of wages. This means every time an employee of a protected class is paid at a rate less than that of his or her counterpart who is not a member of a protected class, without a bona fide reason, an unlawful employment practice has occurred. This is important because it means the statute of limitations would start anew on each new discriminatory employment practice.

The Act prohibits employers from asking their employees to sign any waiver shortening the statute of limitations for any claim pursuant to the NJLAD, or retaliating against employees for, or requiring any agreement to waive, requests for information related to an employee's or other employees' compensation and benefits and their membership in a protected class.

The Act, which permits a private right of action, allows plaintiffs to recover lost wages for up to six years, which is triple the federal act's recovery time. The Act also imposes triple the damages in liquidated damages for any violation of this equal pay section of the NJLAD.

If they have not already, employers should immediately begin conducting privileged audits of salaries and related job duties to ensure that all employees who conduct substantially similar work are paid equal amounts.

Keep a Lookout – Legislation or Regulations on the Horizon

New York State Anti-Harassment Measures Passed in the 2019 Budget Bill Begin to Take Effect

The #MeToo movement is not finished making waves just yet. Gov. Cuomo signed a 2019 Budget Bill on April 12, 2018, but the bill did not limit itself to budgetary issues. Instead, it included sweeping revisions to several statutes, resulting in several new requirements for employers doing business in New York State.

Anti-Sexual Harassment Policies and Training

Effective Oct. 9, 2018, all New York employers must enact an anti-sexual harassment policy that meets or exceeds the standards set by a model policy, which will be drafted by the New York State Department of Labor (DOL) and New York State Division of Human Rights (DHR). The model policy, although not yet drafted, will reportedly include (1) a prohibition against sexual harassment, with examples of what sexual harassment is; (2) information regarding employees' rights and potential redress to adjudicate sexual harassment, including administratively and judicially, and the remedies available to victims of sexual harassment, including references to the federal and state provisions and a statement that there may be applicable local law; (3) a complaint form; (4) a confidential investigation procedure and a commitment to due process for all parties involved; (5) a clear statement that sexual harassment is misconduct and that any employee engaging in such misconduct, and any supervisory or managerial personnel knowingly allowing such misconduct, will be sanctioned; and (6) a clear prohibition against retaliation for those who complain or who assist in any sexual harassment proceeding. Employers should note that the requirement to promise a confidential investigation may conflict with requirements from the Equal Employment Opportunity Commission to conduct a thorough investigation, and directives from the National Labor Relations Board that employers cannot institute a blanket confidentiality provision on workplace investigations. It is unclear how or whether the DOL and DHR will remedy this contradiction in the model policy.

The law also mandates that effective Oct. 9, 2018, employers provide sexual harassment training, which must be equal to or exceed the standards of a model training program, which will be developed by the DOL and DHR. The model training program, although not yet drafted, will reportedly include (1) an explanation of what sexual harassment is, including examples of some conduct that would constitute unlawful sexual harassment; (2) information regarding employees' rights and potential redress to adjudicate sexual harassment, including administratively and judicially, and the remedies available to victims of sexual harassment, including references to the federal and state provisions; and (3) an explanation of conduct by supervisors and additional responsibilities of supervisors.

The content of both the policy and the training program will be available on the DOL's and DHR's websites at some point before the laws become effective in October.

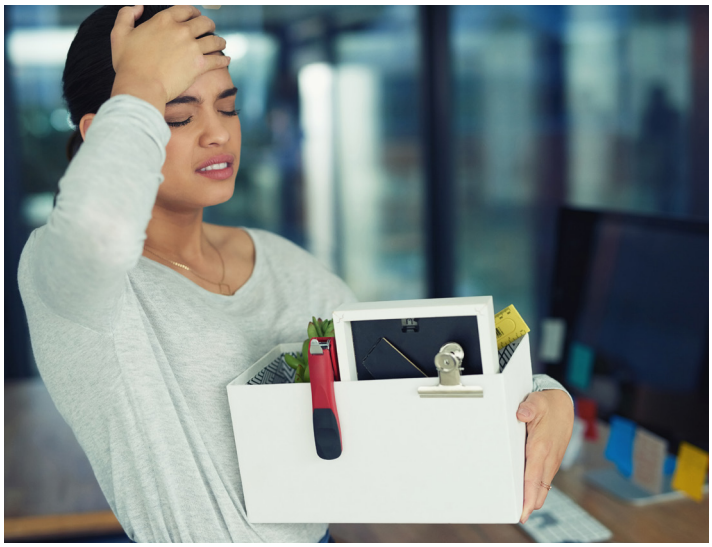
Prohibition on Mandatory Arbitration of Sexual Harassment Claims Begin July 11

Effective July 11, 2018, employers are not permitted to institute mandatory arbitration agreements related to sexual harassment claims. This means that if an employer currently has a mandatory arbitration clause built into its standard employment agreements, separation agreements or settlement agreements, those documents will need to be edited to carve out an exception for any claims related to sexual harassment. It is unclear how or whether the Federal Arbitration Act will pre-empt this prohibition, but it is possible we will see litigation related to pre-emption in the coming months.

Limitations on Nondisclosure Agreements Related to Sexual Harassment Claims Begin on July 11

Effective July 11, 2018, the law will no longer permit nondisclosure provisions in agreements settling or resolving claims involving sexual harassment that would prevent the disclosure of the underlying facts and circumstances, unless the condition of confidentiality is

the complainant's preference. To the extent a confidentiality or nondisclosure provision is used, the provision must be provided to all parties with at least 21 days for them to consider it. If after the 21 days the complainant decides to include such terms, an agreement to that effect should be signed by all parties. The complainant then has seven days to revoke his or her agreement to use the provision, and the agreement shall not become effective until that revocation period has expired. The law does not address whether a complainant may waive any portion of the 21-day review period.



The Bottom Line: This law imposes several new requirements upon New York State employers, and they should review all existing policies and form agreements to ensure that these comport with the new requirements, some of which are effective immediately and others of which will begin to phase in over the coming months. Employers should also conduct training to ensure that all supervisors and employees understand the new provisions and requirements. As with most state law changes, there are nuances to this new law, most of which have not been borne out yet since there have been no regulations or decisions enacted related to these amendments.

New York City to Follow in New York State's Footsteps

New York City has followed the example set by the state. On April 11, 2018, the New York City Council passed several bills, which have collectively been called Stop Sexual Harassment in NYC Act (the "Act") in an effort to curb sexual harassment. On May 9, 2018, the mayor signed that bill into law. Like its counterpart in the state, the Act imposes mandatory anti-harassment trainings at all employers in the city with 15 or more employees. The Act's requirement for annual training is effective April 1, 2019. Importantly, and unlike the state law, the city Act requires the annual harassment training to occur within 90 days of a new employee's hire, and requires employers to keep records of all trainings for three years. Effective Sept. 6, 2018, employers must post the New York City Commission on Human Rights' (NYCCHR) new anti-harassment posters in the workplace, and distribute that information to new employees at the time of hire. The NYCCHR will publish this poster/information in the coming months.

The Act's provisions that take effect immediately include an amendment to the New York City Human Rights Law (NYCHRL) to specifically name sexual harassment as a form of discrimination, and expanding it to protect all employees (regardless of an employer's size) from gender-based discrimination/harassment; and an amendment to the NYCHRL to enlarge the statute of limitations for harassment claims to be filed with the NYCCHR based on gender to three years (currently one year).

Any employer that applies for city contracts, will now be required to submit its employment practices and policies that relate to preventing and addressing sexual harassment in the employment report required of any proposed contractor or subcontractor.

The Act also imposes several new requirements, including reporting and tracking requirements related to sexual harassment statistics on city agencies.

In addition to its substantive requirements, the Act pledges support for a federal bill known as Ending Forced Arbitration of Sexual Harassment Act of 2017, and urges the federal government to pass it and the president to sign it.

New Jersey Adopts a Statewide Paid Sick Leave Act

On May 2, 2018, the governor signed into law the New Jersey Paid Sick Leave Act, which the New Jersey Legislature passed on April 12. The Act will become effective Oct. 29, 2018, and once effective, the Act will pre-empt any sick leave laws passed by cities and towns in New Jersey.

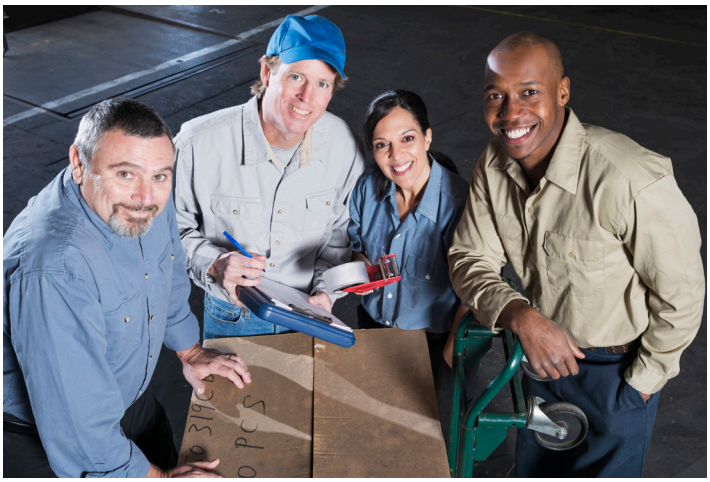
Under the Act, employees will accrue one hour of paid sick leave for every 30 hours worked, up to a maximum of 40 hours of sick leave time during a consecutive 12-month period. The consecutive 12-month benefit period must be established by employers and may not be changed without notifying the commissioner of Labor and Workforce Development. Employers that already provide sick leave are permitted to maintain their own policies, provided their policies provide benefits that are equal to or greater than the Act's benefits. Employees are permitted to carry over accrued sick leave time, but an employer may limit an employee's use of the leave to no more than 40 hours in a single benefit year. The Act does not require that accrued time be paid to employees upon separation of employment, unless an employer's policy so dictates.

The Act applies to all employers, except public employers, that are already subject to other sick leave laws. The Act's eligible employees are all employees EXCEPT per diem healthcare employees, public employees who already benefit from sick leave requirements and union construction workers. Importantly, temporary employment agencies should take note that temporary employees are entitled to sick leave, and their sick leave will accrue based on the time worked with the temporary agency rather than with individual assigned employers. Likewise, the Act explicitly states that per diem healthcare employees shall not include homemaker-home health aides.

In order to comply with the record-keeping requirements of the Act, employers must maintain documents reflecting the number of hours worked and number of sick leave hours accrued by employees. These records must be maintained for five years and made available for inspection upon request of the Department of Labor and Workforce Development. The Act expressly states that any accrued benefits transfer with employees to new positions and remain in place after acquisitions, and that if an employee separates from his or her employment and is then reinstated within six months, that employee's accrued leave time is maintained.

An employee may use his or her leave time for any of the reasons listed in the Act:

1. diagnosis, care, treatment or recovery for an employee's own mental or physical condition, or a family member's mental or physical condition;
2. counseling, legal services, or participation in any civil or criminal proceedings related to an employee's or family member's status as a domestic or sexual violence victim;
3. leave when the employee's workplace or an employee's child's school or child care is closed by order of a public official due to a public health concern; or
4. leave to attend a school-related conference or meeting.



Notably, and unlike in many other statutes, "family member" is defined very loosely as any person "whose close association with the employee is the equivalent of a family relationship." This means that an employee may have an argument for leave related to a good friend, rather than being confined to what is traditionally considered a "family member."

Employers may dictate the increment in which an employee takes leave, provided that the largest increment required may not exceed the number of hours the employee was scheduled to work during the shift from which he or she requested leave. The Act also permits employers to require no more than seven calendar days' advance notice for any foreseeable use of leave. Employers also may utilize blackout dates for use of leave based on foreseeable reasons (i.e., a doctor's appointment), and may require proof that the leave was unforeseeable if leave is later requested on those blackout dates. Likewise, if an employee uses leave for three consecutive days, employers are permitted to request documentation to confirm that the employee's use of leave was consistent with one of the enumerated leave reasons under the Act.

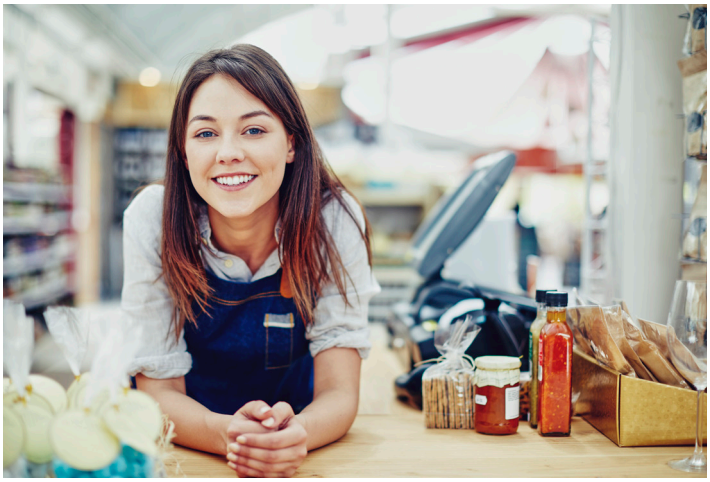
Employees may, upon mutual consent with the employer, voluntarily choose to make up the time missed for any of the enumerated leave reasons under the Act, rather than taking sick time. However, an employer may not require employees to work additional hours, nor may an employer require an employee to find a replacement employee to cover the hours for which leave is taken.

The Act provides employees with a private right of action, which allows the same damages as those permitted in violations of the New Jersey Wage and Hour Law, such as back pay, double the amount of wages lost as liquidated damages and attorneys' fees. The Act also includes a rebuttable presumption of retaliation if any adverse action (i.e., termination, demotion, unfavorable reassignment) is taken by the employer within 90 days of certain protected activity (e.g., filing a complaint regarding retaliation or the refusal of leave, cooperating in an investigation).

Once in effect in October, the Act requires employers to notify employees about the benefits in the Act within 30 days from when the New Jersey Department of Labor (NJDOL) issues the notification. The notice must also be posted in the workplace. After the Act is in effect, and the notification has been issued by the NJDOL, employers are required to provide notice to each employee upon hire.

Employees will begin accruing sick leave as of Oct. 29, 2018, unless an employer's policy already provided for accrual prior to that time. Any employee who was hired prior to the effective date of the Act shall be eligible to use the sick leave on the 120th calendar day after that employee's hire date. This means that if an employee has been employed for 120 calendar days by the time the Act

becomes effective, that employee is eligible to begin taking any accrued leave immediately. Employees hired after the effective date shall accrue time beginning on their hire date, and will be eligible to use the accrued time 120 calendar days after their hire.



Employers should begin planning to provide sick leave and reviewing their policies to ensure they are compliant with the Act's requirements.

More Scheduling Accommodations Required by New NYC Law Taking Effect July 18

Most New York City employers are probably familiar with the Fair Workweek Law that went into effect Jan. 1, 2018, but surely not all New York City employers are. That is likely because until now, that law applied only to fast-food restaurants and retail employers. But all that will change come July 18, 2018, when an amendment to the Fair Workweek Law, which added – with little to no fanfare – a Subchapter 6 to the tail end of the legislation, will come into effect. That subchapter creates obligations under the law for all New York City employers, with few exceptions, but the obligations are limited to accommodations for "personal events."

Specifically, effective July 18, 2018, New York City employers will be required to grant employees two temporary changes to their work schedule when those requests relate to (1) a caregiver's need to provide care to a minor child or a care recipient; (2) an employee's need to attend a legal proceeding or hearing for subsistence benefits to which the employee, a family member or the employee's care recipient is a party; or (3) any reason that is permitted under the New York Earned Sick and Safe Time Act (ESTA). These three reasons are referred to as a "personal event."

Employees may receive the temporary schedule change for up to one business day per request. To be clear, employers are required to accommodate only changes to two business days, so if one request affects two days, an employer is not required to accommodate another request.

An employer may accommodate an employee's request for a schedule change through paid time off, working remotely, swapping or changing work hours, and using unpaid leave.

In order to request such an accommodation, an employee must notify his or her supervisor as soon as he or she becomes aware of the need for the accommodation, and the employee must make the request in writing no later than the second business day the employee returns from the schedule change. Employers are then required to respond immediately and also must respond in writing no later than 14 days after the request.

Employers may deny a request only if (1) the employee has already used his or her two requests/business days, (2) the employee is covered by a collective bargaining agreement that waives the provisions of the law and itself addresses temporary changes to work schedules, (3) the employee has been employed for less than 120 days, or (4) the employee works less than 80 hours per calendar year in New York City.

Employees are not required to use ESTA leave prior to requesting a temporary schedule change, nor does any unpaid leave granted under this law count toward ESTA-mandated leave. These accommodations are in addition to the benefits provided to employees under ESTA.

The statute strictly prohibits retaliation for employees exercising, or attempting to exercise, any right provided by this law.

In advance of this law going into effect, employers should review and amend their applicable policies to ensure this new law is addressed, and should train their managers and supervisors regarding this new law.

New York State Scheduling Regulations

New York State has proposed several regulations that would require employers to pay premiums related to schedule changes that occur without the requisite notice. The proposed regulations relate to employees subject to the miscellaneous wage order (i.e., not hospitality, building service or agriculture). The state regulations impose rules and penalties similar to those in New York City's Fair Workweek Act. The regulations' comment period ended Jan. 22, 2018, so stay tuned for more information regarding these regulations once they have been enacted.

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