

# The BakerHostetler Quarterly New York Employment Law Newsletter



## Trends

- States continue to institute protections for employees on the basis of sexual orientation and transgender status.
  - » Earlier this year, New York passed the Gender Expression Non-Discrimination Act (GENDA), which adds gender identity as a protected class in housing, employment and public accommodations.
- Paid family and medical leave laws are being teed up in numerous states across the U.S., with at least 18 states introducing paid family leave bills in 2019.
  - » The bills generally provide leave benefits for new parents and for workers dealing with their own serious illness or that of a family member. The programs typically grant workers 12 weeks of paid leave at a percentage of annual wages and are funded through a combination of employee and employer payroll deductions.
  - » Advocates for paid leave are keeping an eye on bills in Oregon, Connecticut, New Hampshire, Maine and Virginia, where measures could go far with the new Democratic leaders.
- #MeToo continues to broaden its impact and is an increasingly important consideration in mergers and acquisitions.
  - » There has been increase in the inclusion of “Weinstein clauses” (also referred to as “#MeToo reps”) in connection with M&A transactions. While a #MeToo rep can take various forms, such a clause typically requires the target company and/or its equity owners to represent that within a certain time period, no sexual harassment or assault allegations have been made against the company’s senior employees or officers and the target company has not entered into any settlement agreements with regard to such behavior.
- Pay equity continues to be a hot topic for employers and lawmakers. There has been a general trend at the state and city levels to amend pay equity laws to do the following:
  - » Define bona fide reasons for pay disparities, such as education and tenure.
  - » Provide pay transparency so workers know how their wages compare to the target range for the job.
  - » Ban salary history inquiries in order to stop perpetuating historic pay discrimination.



## Digging In – A More In-Depth Analysis of recent developments:

### Federal Judge Reinstates EEOC Pay Data Collection Requirement for EEO-1 Form

On March 4, 2019, Judge Tanya S. Chutkan of the U.S. District Court for the District of Columbia vacated an Aug. 29, 2017, decision by the Office of Management and Budget (OMB) to stay the Equal Employment Opportunity Commission (EEOC) requirement that employers use a revised EEO-1 form to report pay data information by employee job position, gender, race and ethnicity. The possible inclusion of pay data on the EEO-1 has been a source of uncertainty for employers over the past two years.

The EEO-1 is used by the EEOC to collect information from employers on an annual basis. Specifically, employers with at least 100 employees and federal contractors with at least 50 employees and a contract of \$50,000 or more with the federal government must file the EEO-1, which identifies by job category, race, sex and ethnicity the number of employees who work for the business.

In August 2016, the OMB approved a rule proposed by the EEOC to expand to include pay data the information collected from employers in the EEO-1. In September 2016, the EEOC issued a revised EEO-1 form expanding the data to be reported by employers to include (1) pay data for all full- and part-time employees by race and gender in each EEO-1 job category for each of the employer’s physical locations and (2) the number of hours worked by employees in each pay band. The EEOC’s announcement was controversial and met with immediate pushback from employers objecting to the burden of having to collect and report pay data.

One year later, on Aug. 29, 2017, the OMB announced the immediate stay of the rule. The OMB issued a memorandum explaining that it was authorized under the Paperwork Reduction Act to review the EEOC’s rule because the EEOC inaccurately estimated the burden that the pay data requirements would place on employers.

In response to the stay, the National Women’s Law Center and the Labor Council for Latin American Advancement brought a lawsuit against the EEOC and the OMB, challenging the OMB’s authority to issue the stay.

The case appeared before Chutkan, who found that the OMB’s stay decision was “arbitrary and capricious” and did not comply with the OMB’s own regulations governing an OMB decision to review and/or stay a previously approved collection of information by a federal agency. Moreover, the OMB did not show good cause to support its position that the EEOC has underestimated the burdens on employers to comply with the pay data collection requirements.



Chutkan’s decision reinstates pay data reporting provisions of the EEOC’s EEO-1. The EEO-1 website opened on March 18, 2019, in preparation for the 2018 EEO-1 filings due on or before May 31, 2019. Notably, the portal for submitting the 2018 EEO-1 *does not* include a pay data request. While no official announcement has been made regarding when the EEOC will start collecting pay data, the agency recently released a statement stating that it would provide “further information as soon as possible.”

### Key takeaways

It remains to be seen whether the Justice Department, which defended this case, will appeal or seek clarification of Chutkan’s order and whether the EEOC and/or the OMB will take further action.

In the interim, employers should review their internal reporting systems to ensure they can produce the pay data that they will eventually be required to report. However, employers should wait until additional guidance is released by the EEOC regarding the reporting of such data before undertaking any extensive data collection.

### NJ Acts on #MeToo, but Broadens to All Discrimination and Harassment

In response to #MeToo, New Jersey legislators introduced a bill that would preclude non-disclosure agreements in settlement agreements, but New Jersey took the ban even further than most states and applied the ban to claims of discrimination, harassment or retaliation of any kind. Governor Murphy signed a revised version of this bill on March 18, and it is now law, effective immediately, that non-disclosure agreements that attempt to limit the details related to any claims of discrimination, harassment or retaliation are always unenforceable against the current or former employee, and will become unenforceable against the employer if the current or former employee publicly discloses sufficient details of the claim such that the employer is reasonably identifiable. It is unclear as of yet if “details related to a claim of discrimination, retaliation, or harassment” includes the settlement terms related thereto, or only the underlying details of the actual harassment, discrimination or retaliation, but based on the broad language of the law, it seems likely that it was intended to encompass both the underlying facts and the settlement agreement details. The law also requires settlement agreements regarding discrimination, harassment and retaliation to contain particular language informing the employee about this law. The law also imposes a non-retaliation provision, a private right of action, and an attorneys’ fees award against anyone who attempts to enforce these unenforceable non-disclosure provisions.

Separately, the law prohibits employment agreements from containing any waiver of substantive or procedural rights or remedies relating to any claims of discrimination, retaliation or harassment. Although it is unclear if this prohibition against waiver was intended to include the right to a jury trial for discrimination, harassment and retaliation claims, it is likely that plaintiffs' attorneys will interpret the law in that manner and attempt to use it to avoid arbitration agreements. However, like many state bans on arbitration that we have seen post #MeToo, it is very likely that, if challenged, the FAA would supersede it.

New Jersey employers should review all settlement agreement templates they may be using and be sure to update them.



### New York Paid Family Leave Law 2019 Updates

Since we last reported on the New York Paid Family Leave Act, there have been some updates to the legal requirements by which employers with employees in New York must abide. The state also has since revised its website, with an updated overview for employers and employees as well as an updated statement of rights for 2019 and other model forms and some FAQs that help clarify certain points that left many employers confused by the switch from 2018 to 2019.

Among these updates are:

- The statewide average weekly wage (SAWW) changed from \$1,305.92 in 2018 to \$1,357.11 in 2019.
- The benefit duration changed from eight weeks (or 40 days) in 2018 to 10 weeks (or 50 days) in 2019.
- The benefit percentage changed from 50 percent of an employee's average weekly wage (up to a cap of 50 percent of the SAWW) in 2018 to 55 percent of the employee's average weekly wage (up to a cap of 50 percent of the SAWW) in 2019.

- The maximum weekly benefit amount changed from \$652.96 in 2018 to \$746.41 in 2019.
- The payroll deduction rate changed from 0.126 percent of covered payroll (up to an annual cap of \$85.56) in 2018 to 0.153 percent of covered payroll (up to an annual cap of \$107.97).
- Effective Feb. 3, 2019, the definition of "serious health condition" was expanded to include preparation for and recovery from surgery related to organ or tissue donation, ensuring those who donate can be cared for by their eligible family members on *New York* paid family leave.

Despite the state's updated website, this law continues to create confusion among employers and employees alike – particularly with regard to situations involving a leave of absence that began in 2018 and continues through 2019 as well as those situations involving employees who used all eight weeks in 2018 and experience another qualifying event in 2019.

### New Lactation Room Requirements in NYC in Effect

Recent amendments to the New York City Human Rights Law (NYCHRL) took effect on March 17, 2019. These amendments expand the requirements for employers to provide lactation space for breastfeeding employees and to develop lactation policies and processes for employees to request accommodations for nursing.

New parts of the law require employers to designate as a lactation room a sanitary space other than a restroom where employees can express breast milk while shielded from view and free from intrusion. The room must include a space to place at least a breast pump and other personal items, must be near running water, and must have an electrical outlet and a chair. In addition, both the lactation room and a refrigerator suitable for storing breast milk must be reasonably close to the employees' work area. When not in use for purposes of expressing milk, the room may be used for other purposes, but the employer is required to notify other employees that the room is given preference for use as a lactation room. If, however, providing a lactation room results in an undue hardship for an employer, the employer is required to engage in a cooperative dialogue with the employee(s) to determine what if any other accommodation(s) might be available and to provide a written final determination to the employee(s) identifying any accommodation(s) that were granted or denied – as is necessary when providing accommodations for other protected purposes under NYC law.

The other new part of the law requires employers to distribute to all new hires a written policy about the right to request a lactation room and to identify a process by which an employee may request use of the room. This process must specify the way an employee may submit such a request; require the employer to respond within five business days; provide a procedure to follow when two or more individuals need to use the room at the same time; state that the employer will provide reasonable break time for an employee to express breast milk (per Section 206-c of the New York Labor Law); and state that if the employer cannot provide a lactation space, the employer will engage in a cooperative dialogue with the employee(s) and provide the employee(s) with a written response that identifies the basis upon which the employer has denied the request. Notably, employers are now required to retain records of requests for a lactation space (including the date of the request and a description of how the employer resolved the request) for at least three years.

The New York City Commission on Human Rights (NYCHR) has made available model policies, request forms and FAQs. If they have not yet done so, employers should immediately review their policies and procedures to ensure compliance with these new amendments

### New Westchester County Sick Leave Law to Take Effect April 10, 2019

Effective April 10, Westchester County employers will join NYC employers (as well as those in several other states and cities) in being required to comply with a mandatory sick leave law. Below are some Q&As we've prepared highlighting some of the nuances of this new law:

- **Who's covered?** With some limited exceptions, employees (including full-time, part-time and domestic workers) who work in Westchester County for more than 80 hours per year are covered. Workers covered by a collective bargaining agreement (CBA) are exempt if the benefits of the law are expressly waived and the CBA provides a comparable benefit in the form of paid days off.
- **How much time do employees get, and how does it accrue?** Eligible non-domestic employees are entitled to one hour of leave for every 30 hours worked, up to 40 hours per year (unless the employer sets a higher limit), which must be paid if they work for employers with at least five employees. Leave accrues beginning on the later of 90 days after the effective date of the law or the beginning of employment. Employers can also front-load 40 hours of combined sick and personal time at the beginning of each year to allow employees to use leave for sick time with no advance notice and with no restrictions on use other than as contained in the law.

- **Is carryover required?** Unused sick time can be carried over to the following year, subject to the 40-hour annual usage cap. Carryover is not required if the employer front-loads leave annually, since the carryover of time should not allow the employee to exceed 40 hours of sick time per year.
- **What about employees who are transferred or reinstated?** Employees who are transferred to another unit or division of the same employer in Westchester or employed by a successor employer retain their accrued leave and ability to use it. Employers must reinstate previously accrued unused leave for employees who are rehired within nine months of an employment separation.
- **Are there limitations of leave usage?** Employers can require employees to wait until 90 days after beginning employment to use leave. Also, for partial-day usage, employers may require employees to use leave in a minimum of four-hour increments and the smallest increment used to account for other time if more leave is needed.
- **For what reasons may employees take sick leave?**
  - » The medical diagnosis, care or treatment of a mental or physical illness, injury, or health condition or preventive medical care for an employee or employee's family member, defined as a child (including a biological, adopted or foster child, or a legal ward or child of a worker standing in loco parentis when the child was a minor); a spouse, domestic partner, sibling, parent (same relations as child), grandchild, grandparent, and the parent or child of an employee's spouse, domestic partner or household member (broadly defined to include ex-spouses and partners, co-parents, blood relationships, and intimate relationships regardless of marital status or cohabitation).



» Closure of the employee's business or need to care for a child whose day care or elementary or secondary school has been closed for public health or safety reasons, or to care for the employee or a family member when health authorities determine that the individual's presence will jeopardize others' health.

■ **Is advance notice from the employee required?**

Employers must grant leave on an employee's oral, written or electronic request that, when possible, includes the expected duration of leave. Employees must make a good-faith effort to provide advance notice. Employers can require advance notice where feasible only if they provide a written policy with notice procedures.

■ **Can employers require documentation from employees?**

Employers can request reasonable documentation for absences of more than three consecutive days but cannot require HIPAA information.

■ **Can employers require employees to find a replacement while taking sick time?** No.

■ **Is payout on termination required?** No.

■ **Can employers discipline for use of sick leave?**

Absolutely not. Employers cannot retaliate against any employee for using or requesting earned sick time, for filing a complaint regarding an employer's violation of the law, or for informing another employee of his or her rights under the law. This is based on the premise that employers cannot interfere with, restrain or deny the exercise of the right to use earned sick leave in any way.

■ **Do employers have any notice and/or posting requirements?**

Yes. Employers must provide a copy of the law and a written note of how the law applies to employees upon hire or within 90 days of the effective date of this law (whichever is later). Employers must also post in a conspicuous location accessible to employees a copy of the law and a poster in English, Spanish and any other language designated by Westchester County.

■ **Do employers have any record-keeping requirements?**

Yes. They must retain records documenting hours worked by employees and earned sick time taken by employees for a period of at least three years.

Employers with employees in Westchester County should ensure compliance with this new law. To do so, employers should ensure that they have legally compliant policies and payroll procedures in place, and they should train managers on sick leave use and notice requirements.



### Noncompete Update for 2019

This year, we are monitoring several interesting and novel issues in the restrictive covenant context.

First, we expect to see litigation this year involving Massachusetts's Noncompetition Agreement Act, which went into effect on Oct. 1, 2018. This new law places several limits on the use of noncompetes in Massachusetts. Among other things, it limits noncompetes to a one-year duration, prohibits the use of noncompetes with respect to certain low-wage employees and is the first state law to require the payment of gardening leave compensation during a post-employment restriction period. On the heels of passage of this new law, we anticipate litigation challenging noncompetes entered into after October 2018 that do not comply with the requirements of the new law. We also anticipate litigation challenging noncompetes entered into prior to the effective date of the new law on the basis that noncompetes with terms conflicting with the requirements of the new law violate Massachusetts public policy, which is now codified in its Noncompetition Agreement Act.

Second, out in California, employers had assumed that California law distinguishes employee nonsolicitation agreements from noncompetition agreements and the former were enforceable. That assumption was based largely on a 1985 decision by the California Court of Appeal in *Loral Corp. v. Moyes*, 174 Cal. App. 3d 268, which enforced an agreement prohibiting a former company executive from soliciting the employees of his former employer to join his new venture. However, this

assumption has been upended by recent decisions by the California Court of Appeal in *AMN Healthcare, Inc. v. Aya Healthcare Services, Inc.*, 28 Cal. App. 5th 923 (2018) and the United States District Court for the Northern District of California in *Barker v. Insight Global, LLC*, 2019 WL 176260 (Jan. 11, 2019) invalidating employee nonsolicitation agreements. Unless the California Supreme Court weighs in and rules differently than the courts have held in *AMN Healthcare* and *Barker*, California employers should consider eliminating their use of employee nonsolicitation agreements with their employees, as there is now a reasonable concern that such agreements will be found invalid in California.

Third, we expect to continue to see litigation and investigations involving "no-poach" agreements entered into between businesses, such as two franchisees who agree not to poach each other's employees. Although these cases do not arise in the traditional noncompete context involving an employee and employer, the issue has gained attention at both the federal and state levels. At the federal level, criminal antitrust charges have been brought against some businesses that have struck deals not to hire each other's workers. At the state level, state attorneys general have been investigating the hiring practices of several fast-food chains. Most recently, following an investigation spanning 14 states, Dunkin' Donuts, Arby's, Five Guys Burgers and Fries, and Little Caesars agreed to not enforce and no longer include no-poach provisions in their franchise agreements. Investigations are ongoing at other fast-food establishments. In addition, plaintiffs' lawyers are filing class action lawsuits against employers in the services and fast-food restaurant industries that have agreed not to hire each other's workers, alleging violations of federal antitrust laws.

Finally, at the federal level, we anticipate a continued spike in the number of lawsuits filed involving the Defend Trade Secrets Act, which was passed in May 2016. Additionally, in January of this year, Sen. Marco Rubio (R-Fla.) introduced the Freedom to Compete Act (S124), which would amend the Fair Labor Standards Act to prohibit the use of noncompete agreements against nonexempt employees. The bill was referred to the Committee on Health, Education, Labor and Pensions. This legislation is expected to garner more bipartisan support than the Workforce Mobility Act, which was proposed in April 2018 by Sens. Chris Murphy (D-Conn.) and Elizabeth Warren (D-Mass.) but not enacted. That legislation would have banned all noncompetes for all U.S. employers and employees engaged in commerce and also would have provided for a private right of action as well as civil fines and punitive damages. We will continue to monitor the Freedom to Compete Act.



### New York State (Finally) Passes Gender Expression Non-Discrimination Act

In January, following 16 years of discussion and debate, the New York state legislature finally passed the Gender Expression Non-Discrimination Act (GENDA), amending the state New York Human Rights Law to prohibit discrimination on the basis of gender identity or expression in housing, employment and public accommodations. The act, which became effective in New York on Feb. 24, 2019, defines gender identity or expression as "a person's actual or perceived identity, appearance, behavior, expression, or other gender-related characteristic regardless of the sex assigned to that person at birth, including, but not limited to, the status of being transgender." New York state follows several other states; cities, including New York City; and counties that have passed legislation protecting gender identity and gender expression. The act goes further to amend the state penal law to include certain offenses motivated by gender identity and expression in the hate crime statute.



Although the act has amended the state New York Human Rights Law to specifically include gender identity and gender expression as protected classes, the change may be less significant than one would expect. Notably, in October 2015, New York adopted regulations to prohibit harassment and discrimination on the basis of gender identity, transgender status and gender dysphoria. In addition, the model sexual harassment policy for New York employers issued by New York in October 2018 prior to the passage of the act states that sexual harassment includes harassment on the basis of gender expression, gender identity and the status of being transgender, and that harassment and discrimination on the basis of gender identity are prohibited. Nevertheless, employers should review and update their discrimination policies and consider educating, through training or written guidance, managers and human resources employees regarding the prohibited conduct and best practices.



## **New York City Amends Human Rights Law to Protect Sexual and Reproductive Health Decisions**

New York City employers should be aware of a recent amendment to the NYCHRL that adds sexual and reproductive health decisions as a protected characteristic. This new protected category encompasses “any decision by an individual to receive services, which are arranged for or offered or provided to individuals relating to sexual and reproductive health, including the reproductive system and its functions.” Such services include but are not limited to “fertility-related medical procedures, sexually transmitted disease prevention, testing, and treatment, and family planning services and counseling, such as birth control drugs and supplies, emergency contraception, sterilization procedures, pregnancy testing, and abortion.”

This amendment will go into effect on May 20, 2019 (120 days after it was enacted, on Jan. 20, 2019). The NYC Commission on Human Rights has not yet released the written notice to new and existing employees regarding the new law. In the meantime, employers should update their policies for NYC employees to include this new protected category and advise human resources employees and managers of this new law.

## **NYC Employers Should Care About Hair**

In February 2019, the New York City Commission on Human Rights issued legal enforcement guidance on racial discrimination on the basis of hair under the NYCHRL. The guidance indicates that natural hair or hairstyles are closely associated with racial, ethnic or cultural identities, and it specifically addresses natural hair or hairstyles most commonly associated with black people because “there is a strong, commonly known racial association between Black people and hair styled into twists, braids, cornrows, Afros, Bantu knots, fades, and/or locs.” The phrase “Black people” is defined as those who identify as “African, African American, Afro-Caribbean, Afro-Latin-x/a/o or otherwise having African or Black ancestry.” The guidance indicates that grooming policies may implicate other protected classes and religious groups such as Rastafarians, Native Americans, Sikhs, Muslims and Jews.

The guidance provides that grooming policies that ban, limit or otherwise restrict natural hair or hairstyles associated with black people will violate the anti-discrimination provisions of the NYCHRL and may subject an employer to disparate treatment racial discrimination claims. Grooming policies that appear to be facially neutral but have an adverse impact on certain protected classes may give rise to disparate impact racial discrimination claims.

Notably, employers may still maintain grooming policies that require employees to keep a neat and orderly appearance. Employers with specific grooming requirements that are based on health and safety concerns should consider alternatives – such as the use of hair ties, hairnets, head coverings and alternative safety equipment that can accommodate various hair textures and hairstyles – prior to imposing limitations on employees’ hairstyles. Examples of practices that may violate the NYCHRL include:

- Prohibiting twists, locs, braids, cornrows, Afros, Bantu knots or fades.
- Banning, limiting or otherwise restricting natural hair or hairstyles to promote a certain corporate image because of customer preference or under the guise of speculative health or safety concerns.
- Requiring employees to alter the state of their hair to conform to the company’s appearance standards, including having to straighten or relax hair.
- Banning hair that extends a certain number of inches from the scalp, thereby limiting Afros.
- Forcing black people to obtain supervisory approval prior to changing hairstyles, but not imposing the same requirement on others.

Finally, in addition to employers, the guidance extends to public accommodations because the NYCHRL prohibits discrimination in places of public accommodation, including but not limited to public, private and charter schools. To ensure compliance with this guidance, New York City employers should evaluate their existing grooming and appearance policies to confirm consistency with the guidance, and train management and human resources personnel accordingly.

## **Wage and Hour Division of Department of Labor Issues Internal Guidance Regarding Elimination of “80/20” Rule**

Last November, the Wage and Hour Division (WHD) of the Department of Labor (DOL) reissued Opinion Letter FLSA2009-230, effectively eliminating the DOL’s long-standing “80/20 rule,” which put restrictions on an employer’s ability to take a tip credit for tipped employees who also perform non-tip-generating duties when time spent on such duties exceeds 20 percent of their total daily work time.

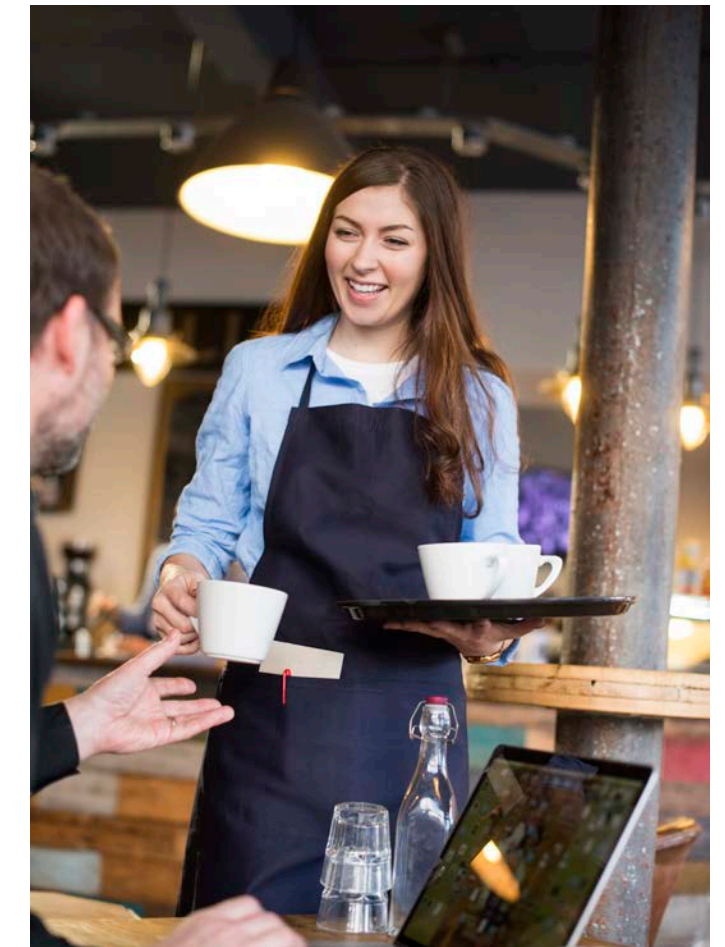
Now the WHD has updated the division’s Field Operations Handbook by issuing Field Assistance Bulletin (FAB) No. 2019-2 (Feb. 15, 2019), which further emphasizes the reduced burden on employers that utilize a tip credit.

The FAB confirms the WHD’s new stance regarding the 80/20 rule, stating in relevant part, “WHD will no longer

prohibit an employer from taking a tip credit based on the amount of time an employee spends performing duties related to a tip-producing occupation that are performed contemporaneously with direct customer-service duties or for a reasonable time immediately before or after performing such direct-service duties.”

The FAB does remind employers, however, that regardless of whether an employer takes a tip credit, it may not keep tips received by its employees.

The FAB adds that WHD staff should apply the new guidance to all investigations on or after Nov. 8, 2018, and the DOL will follow the revised guidance in any open or new investigation concerning work prior to the issuance of the Nov. 8, 2018, opinion letter.



Other takeaways from the FAB include a reinforcement of the following principles the WHD will use when assessing an employer’s use of tip credit. Each of these was discussed in the DOL’s Opinion Letter FLSA2009-230:

- Duties listed as “core” or “supplemental” for the appropriate tip-producing occupation in the Tasks section of the Details report in the Occupational Information Network (O\*NET), will be considered tip-related duties (even though they might not directly generate a tip).

- An employer may take a tip credit for any time spent by the employee on such tip-related duties if they are performed contemporaneously with, or within a reasonable time before or after, direct customer-service duties.
- Employers may **not** take a tip credit only for time spent performing any tasks that are not contained in 29 CFR 531.56(e) or in the O\*NET task list for the employee's tipped occupation.

Despite the above, it's important for hospitality employers in New York to remember that they are still bound by the New York Hospitality Wage Order (NY wage order), which sets a stricter standard than DOL's 80/20 rule. Under the NY wage order, an employer may not take a tip credit for an employee if he or she spends at least two hours or 20 percent of his or her shift (whichever is less) working in a non-tipped occupation.

### U.S. Supreme Court Issues Pair of Decisions Upholding Use of Arbitration by Employers

In January of this year, the Supreme Court issued a pair of decisions addressing additional issues related to the use of arbitration.

#### **Schein v. Archer & White**

On Jan. 8, 2019, the Supreme Court decided in *Henry Schein, Inc., et al. v. Archer & White Sales, Inc.* that the Federal Arbitration Act (FAA) allows parties to agree by contract that an arbitrator rather than a court should decide threshold questions of arbitrability.

In that case, the parties entered into a business contract that included the following dispute resolution clause: "[a]ny dispute arising under or related to this Agreement (except for actions seeking injunctive relief ...) ... shall be resolved by binding arbitration in accordance with the arbitration rules of the [AAA]."

When a dispute arose between the parties, Archer & White sued Henry Schein Inc., seeking monetary damages and injunctive relief. Schein asked the district court to refer the parties to arbitration as required by the dispute resolution provision.

Archer & White opposed, arguing that the parties' contract barred arbitration because the complaint sought, in part, injunctive relief. Archer & White added that Schein's argument for arbitration was "wholly groundless," and thus, the court could decide arbitrability. The district court sided with Archer & White and denied

Schein's motion to compel arbitration on the basis of the wholly groundless exception. The Fifth Circuit affirmed, and the Supreme Court then took up the case.

In a unanimous decision, the Supreme Court rejected the wholly groundless exception and remanded the case. As part of its reasoning, the Court rejected the argument that the wholly groundless exception saves time and money and noted that the FAA contains no such exception.

The Court also upheld its view that arbitration agreements are private contracts that cannot be rewritten, stating in relevant part, "arbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms." The Court noted that where the parties have delegated the issue of arbitrability to an arbitrator, the courts must respect the parties' decision as embodied in the contract.

#### **New Prime v. Oliveira**

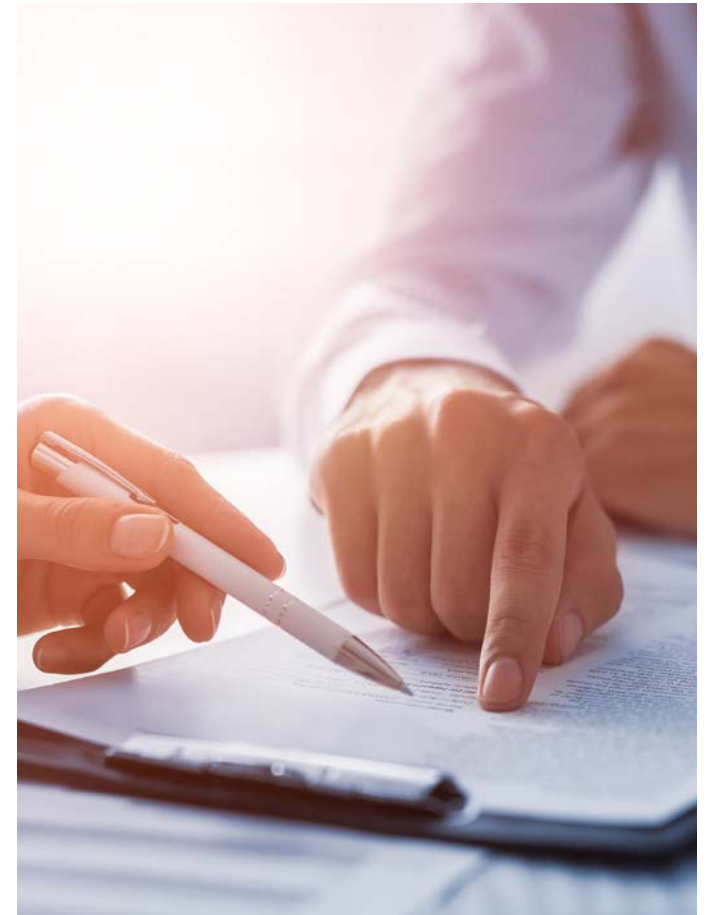
On Jan. 15, 2019, the Supreme Court issued its decision in *New Prime v. Oliveira*, finding that the FAA Section 1 exemption applies to transportation workers regardless of whether they are classified as independent contractors or employees.

The case surrounded an interpretation of Section 1 of the FAA, which states that the FAA does not apply to "contracts of employment of seamen, railroad employees or any other class of workers engaged in foreign or interstate commerce." In a unanimous 8-0 decision (Justice Brett Kavanaugh did not participate), the Court held that the FAA's Section 1 "contracts of employment" exemption covers independent contractors as well as employees.

Dominic Oliveira, a truck driver for New Prime, a trucking company, brought the case. Oliveira was classified as an independent contractor, and his independent contractor agreement with New Prime contained an arbitration provision, which stated that disputes between parties, including disputes about "arbitrability," would be resolved by arbitration.

Oliveira filed a class action suit against New Prime in federal court for alleged violations of the Fair Labor Standards Act (FLSA). Relying on the FAA, New Prime moved to compel arbitration, but the district court denied the motion. On appeal, the U.S. Court of Appeals for the First Circuit held that before a court may compel arbitration pursuant to the FAA, it must determine whether the FAA applies.

The First Circuit then examined the text of the FAA's Section 1 exemption. In doing so, it found that the FAA does not include a definition for contracts of employment and determined that when the FAA was enacted, contracts of employment meant agreements to perform work, which includes agreements with independent contractors.



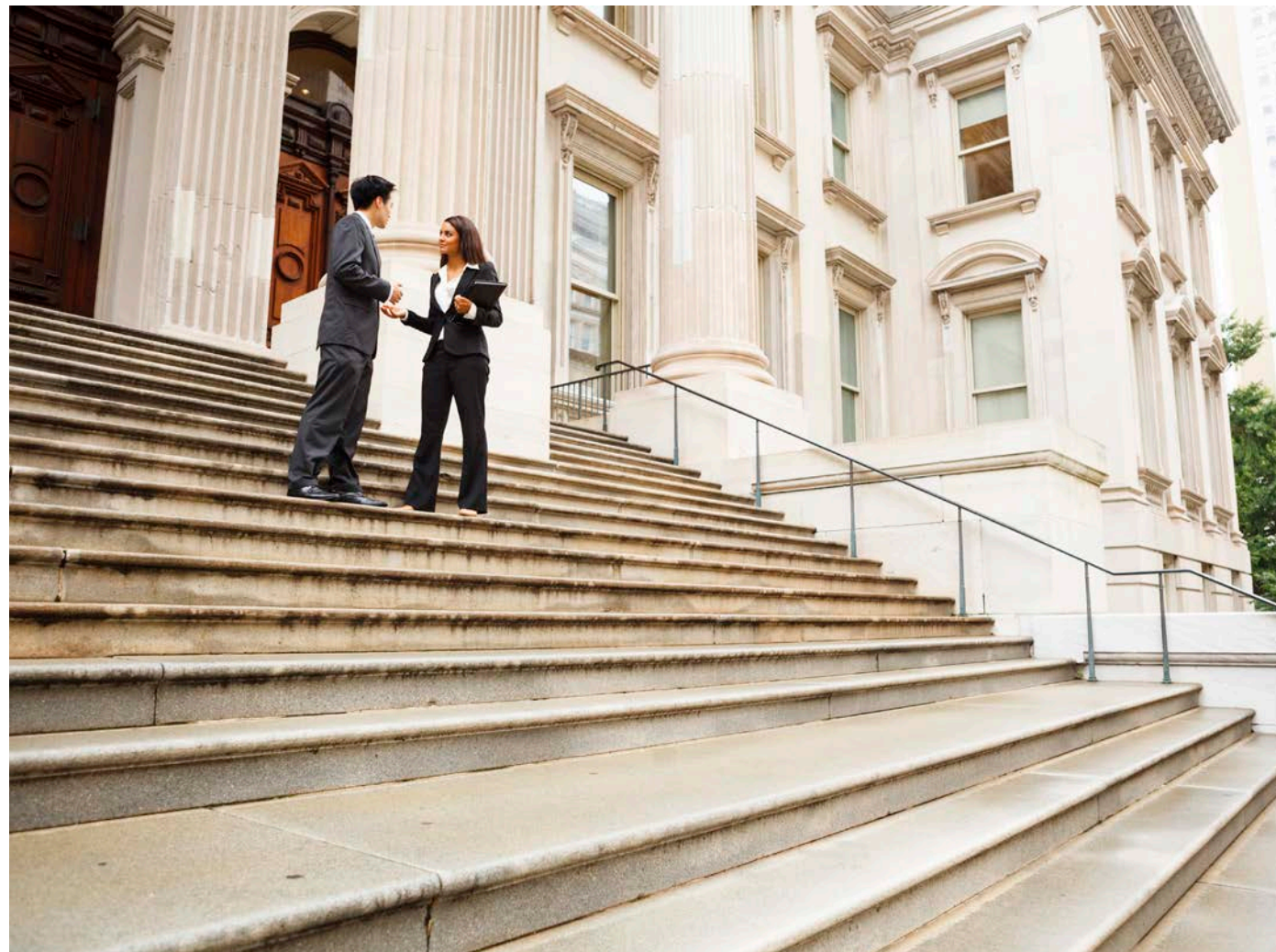
Because Oliveira was a transportation worker, the First Circuit ruled that the agreement is exempt from the FAA and is unenforceable. New Prime appealed.

The Supreme Court affirmed the First Circuit, finding that a court must first determine whether the exemption in Section 1 of the FAA applies *before* it may compel arbitration.

With respect to the coverage of the exemption in Section 1 of the FAA, the Court held that the phrase "contracts of employment of ... workers engaged in ... interstate commerce" covers independent contractors as well as employees. In reaching this conclusion, the Court determined that the plain language of the statute – *i.e.*, the term "workers" – was broader than "employees." The Court further held that the plain language, the ordinary meaning and the intent of the drafters all indicated that the Section 1 exemption applied there and supported the First Circuit's conclusion that courts lacked the authority under the FAA to compel arbitration in the case.

#### **Key takeaways**

The Supreme Court's rulings in *Schein v. Archer White* and *New Prime v. Oliveira* serve as a reminder that even though recent Supreme Court decisions have favored enforcement of arbitration agreements, such agreements must be prepared thoughtfully.





## Keep a Lookout: Legislation/Regulations on the Horizon:

### Proposed Changes to the NY On-Call Rule

In our Fall 2018 Employment Law Newsletter, we reported that the New York Department of Labor (NY DOL) proposed changes to the state’s call-in requirements, which would require employers to include two extra hours of pay for employees at minimum wage if they are called in with less than two weeks’ notice. On March 5, 2019, the NY DOL announced that these proposed changes will expire without going into effect. Finally, a win for New York employers!

### New Jersey Joins New York in Increasing Minimum Wage to \$15 per Hour

Effective Jan. 1, 2019, employers in New Jersey increased their employees’ minimum wage to \$8.85, but employers are now being forced into providing an even bigger raise – up to \$15 per hour. For many employers, \$15 an hour for minimum wage is daunting, but there is some good news – this increase will be gradual, just like New York’s was, and will incrementally increase most employees’ wages to \$15 per hour by 2024.

### Who is excluded?

Employers are permitted to pay employees in training 90 percent of the minimum wage for up to 120 hours of work in an occupation where the employee had no previous experience, provided the employees are enrolled in a “training program.” It is not yet clear what will constitute a training program, but what is clear is that employers will not be permitted to continue to hire employees at the training wage, terminate them and then hire someone else. The law strictly forbids such action.

Small employers (those with five or fewer employees) and seasonal employers (as defined in the act) will have until 2026 to work up to \$15 per hour.

Tipped employees may still be paid less than minimum wage when the tip credit is properly applied; however, the minimum base wage they need to be paid is also increasing, to \$5.13 per hour by 2022.

Agricultural employees’ wages are the only wages that may not see an increase to \$15. Their minimum wage will be raised to \$12.50 an hour by 2024, with an option for the labor and agriculture regulators to determine whether agricultural employees’ wages should be raised to \$15 per hour by 2027, which would be subject to the state legislature’s approval.

Here are tables illustrating what to expect in the coming years.

### Typical Employer

Effective Date	Minimum Wage
July 1, 2019	\$10.00/hour
Jan. 1, 2020	\$11.00/hour
Jan. 1, 2021	\$12.00/hour
Jan. 1, 2022	\$13.00/hour
Jan. 1, 2023	\$14.00/hour
Jan. 1, 2024	\$15.00/hour

### Small Employers and Seasonal Employers Paying Seasonal Employees

Effective Date	Minimum Wage
Jan. 1, 2020	\$10.30/hour
Jan. 1, 2021	\$11.10/hour
Jan. 1, 2022	\$11.90/hour
Jan. 1, 2023	\$12.70/hour
Jan. 1, 2024	\$13.50/hour
Jan. 1, 2025	\$14.30/hour
Jan. 1, 2026	\$15.00/hour

### Agricultural Employees

Effective Date	Minimum Wage
Jan. 1, 2020	\$10.30/hour
Jan. 1, 2022	\$10.90/hour
Jan. 1, 2023	\$11.70/hour
Jan. 1, 2024	\$12.50/hour

### Tipped Employees

Effective Date	Minimum Base Wage	Tip Credit
July 1, 2019	\$2.63	\$7.37
Jan. 1, 2020	\$3.13	\$7.87
Jan. 1, 2021	\$4.13	\$7.87
Jan. 1, 2022	\$5.13	\$7.87
Jan. 1, 2023	\$5.13	\$8.87
Jan. 1, 2024	\$5.13	\$9.87

## New Jersey Now Requires Additional Paid Family Leave

New Jersey’s Family Leave Act (NJFLA), which is similar to the federal Family Medical Leave Act, provides up to 12 weeks of protected, unpaid leave per 24-month period to care for a family member with a serious health condition. For nearly a decade, New Jersey’s Temporary Disabilities Benefits Law (NJTDBL) has permitted a vehicle for payment during a NJFLA leave, among other leaves, but recent amendments vastly expand the provisions of NJFLA, NJTDBL and the New Jersey Security and Financial Empowerment Act (NJSAFE). The amendments expand upon the employees who are eligible for NJFLA leave, the amount of leave an eligible employee can take, the amount of benefits an eligible employee receives while on leave and the definition of family member.

### Coming soon

On June 30, 2019, the amendment expands the definition of who is eligible for NJFLA leave to employees employed by employers who employ 30 or more employees – down from the 50 or more employees currently required.



Currently, the NJTDBL provides employees with up to six weeks of benefits (or 42 days of intermittent leave) while on qualified leave, and the benefits paid are two-thirds of their pay, up to \$600 per week. **Effective July 1, 2020**, the amendment increases the benefit time under NJTDBL to 12 weeks per year (or 56 days of intermittent leave) and increases the payment during leave to 85 percent of their salary, up to \$860 per week. Additionally, as of **July 1, 2019**, employees will no longer be required to wait one week before NJTDBL benefits are available and instead will be eligible to receive NJTDBL benefits immediately upon taking a qualified leave. The increases in benefits will continue to be funded by payroll deductions.



### **Effective immediately**

The amendment also expands the definition of a family member under NJPFLA, NJSAFE and NJTDBL. Domestic partners, foster children, children born via surrogate, siblings, grandparents, grandchildren and parents-in-law all have been added to children, parents, spouses and civil union partners, who previously were covered. Additionally, the amendment adds the increasingly popular catchall for the definition of family member: “any other individual related by blood to the employee, and any other individual that the employee shows to have a close association with the employee which is the equivalent of a family relationship.” This expanded definition permits almost anyone to qualify as a family member for which NJPFLA/NJSAFE can be taken and leave for which NJTDBL benefits can be paid.

The amount of time an employee may take intermittent NJPFLA leave is also increased – eligible employees are now entitled to take intermittent leave for up to 12 consecutive months (rather than the 24 weeks previously permitted). Additionally, employers are now required to grant intermittent leave for the birth or adoption of a child.

Employees using NJSAFE time are now permitted to use NJTDBL. Additionally, employers can no longer require employees to use their accrued paid vacation for absences qualifying under NJTDBL.

### **What action employers should take**

Employers should be sure to update their policies and forms consistent with the amendment, including a new anti-retaliation provision for the NJTDBL, which prohibits employers from retaliating against employees for requesting or receiving NJTDBL benefits, including failing to reinstate an employee following a leave, but the amendment does not go so far as to say that any leave wherein benefits are paid pursuant to NJTDBL is protected (if the leave is not otherwise protected by applicable statute under, for example, the NJFLA). So, the amendment does not impose a requirement that employers reinstate an employee after he or she has been paid NJTDBL, but instead it appears that this amendment will act as a rebuttable presumption that an employer retaliates when failing to reinstate an employee who has received NJTDBL benefits but was not on protected leave.

Employers that choose to use a private plan rather than a state plan to fund temporary disability benefits should also ensure that notice is properly given to employees, as the penalties for failure to notify employees regarding these private plans has increased with the new amendment. The notice, which will be prepared by the state, must be posted and distributed to each employee.



### **New York City Proposes PTO**

New York City offers several paid days off to employees for various reasons, and employers may soon have to comply with a new set of mandated paid days off. Earlier this year, Mayor Bill de Blasio proposed that employers with five or more employees should be required to provide employees with 10 days of paid time off per year. Employees would be able to use this time for any reason at all and could begin using the paid time off after 120 days of employment. The mayor’s proposal includes permitting employers to require at least two weeks’ notice prior to an employee taking paid leave and to impose “reasonable restrictions,” although it is unclear whether those will be defined. This proposal still needs to be approved by the New York City Council, and it will likely face strong opposition from New York City’s business advocates. There is not currently an indication as to when or if the City Council will take up a vote on this matter.

### **Connecticut’s Proposed Generous Paid Family and Medical Leave Program**

The Connecticut General Assembly has proposed legislation that would offer generous paid family and medical leave benefits to employees via a state family and medical leave insurance program. The proposed program, which would be funded by a 0.5 percent payroll tax, would pay 100 percent of an employee’s wages in an amount up to \$1,000 per week for 12 to 14 weeks. The program would be mandatory for all private employers in Connecticut as well as for public employers whose workers are not represented by a union (unless participation in the plan is a term of the relevant collective bargaining agreements). Although the legislation is supported by Gov. Ned Lamont, a Democrat; the Democrat-controlled state Senate; and a Democratic majority in the Statehouse, there is a concern that small businesses will struggle with the costs of implementing the new plan.

If the legislation is passed as proposed, Connecticut would offer greater family and medical leave benefits than its neighboring states do. New York’s paid leave insurance plan currently offers 10 weeks of paid leave at 55 percent of the state’s average weekly wage and, by 2021, will offer 12 weeks of paid leave at 67 percent of the state’s average weekly wage. Rhode Island’s paid leave insurance plan offers 60 percent wage replacement for four weeks of leave, at a maximum of \$795 per week. Massachusetts’ paid family and medical leave plan offers employees up to 20 weeks of paid medical leave per year at a maximum benefit of \$850 per week. Although employees will begin paying a payroll tax July 1 to support the plan, employees will not start receiving benefits until 2021.

The legislation has not yet been scheduled for a vote. We will continue to monitor this legislation.





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