Patterson Belknap Webb & Tyler LLP

Employment Law Alert November 2019

Calling All NYS Employers: Another Employee Handbook Revision Must be Made

Earlier this month, New York State passed a new law prohibiting discrimination against employees based on a new protected class: reproductive health decision making. New York Labor Law § 203-e was signed into law by Governor Cuomo in November 2019, and its provisions go into effect immediately.

Background

Federal, state and local laws have long prohibited employers from discriminating on the basis of various protected classes such as race, religion, national origin and gender (to name a few). In recent years, the list of protected classes has been steadily expanding under various state and local laws. Beginning in May 2019, New York City added protections against discrimination based on sexual and reproductive health decisions. New York State appears to have quickly followed suit this month with the new protected class "reproductive health decision making."

Under the new New York State provision, reproductive health decision making includes, but is not limited to, "the decision to use or access a particular drug, device or medical service." This appears to be very similar to the City's corresponding protected class, but further guidance from the regulatory authorities (or the courts) may be necessary to determine exactly where the City and the State laws overlap and where they do not.

Prohibitions under the New Law

The new law prohibits employers from:

> (1) Accessing information about the reproductive health decisions of their employees and their dependents, unless the employees have provided prior informed affirmative written consent;
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> (2) Discriminating or taking retaliatory personnel actions against employees or their dependents on the basis of their reproductive health decisions. In other words, employers may not make decisions about an employee's compensation, terms, conditions, or privileges of employment because of an employee's reproductive health decision making; and
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> (3) Requiring that employees sign a waiver or any other document that would deny their right to make their own reproductive health decisions.

In addition to the prohibitions mentioned above, employers cannot retaliate against employees for attempting to exercise their rights under Labor Law § 203-e. More specifically, employers cannot discharge, suspend, demote, or otherwise penalize their employees for: (i) making or threatening to make a complaint that their rights have been violated; (ii) starting a proceeding under or related to the new law; or (iii) providing information or testifying before a public body about a potential violation of the new law by an employer.

Remedies for Employees

Employers must provide notice of their remedies under the new law. If an employee believes that an employer has violated Labor Law § 203-e, the employee can bring a civil action against their employer seeking a broad range of remedies including monetary damages, injunctive relief, an order of reinstatement, and, in certain circumstances, an award of liquidated damages which would effectively double the damages.

Next Steps for Employers

The new law takes effect immediately. Employers should ensure compliance by taking the following steps:

- Employers must include a notice of the rights and remedies created by Labor Law § 203-e in personnel handbooks. Employers should promptly update their handbooks to comply with this new requirement;
- Employers should review and confirm that their current practices comply with the new law, paying special attention to the prohibition on accessing, without prior informed affirmative written consent, information relating to the reproductive health decisions of employees. Such information could arise in health insurance utilization summaries (where an employee's identity may be deduced from even anonymized information), unintentional disclosure by a co-worker, social media or other electronic surveillance, and personal admission by an employee; and
- In the case of any cooperative dialogue process under New York City law that potentially implicates a disability or pregnancy or a related condition that might result in the disclosure of information relating to reproductive health decision making, if such information is relevant in order to consider a requested accommodation, employers should ensure that the employees' prior informed written consent is obtained at the commencement of the cooperative dialogue process.

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