

The BakerHostetler Quarterly New York Employment Law Newsletter



Trends

Anti-Harassment Training

The #MeToo movement continues to impact employers as states enact additional anti-harassment training legislation. California recently extended the deadline from Jan. 1, 2020, to Jan. 1, 2021, for most employers to comply with its training requirements. As discussed below, New York state expanded protections to individuals working in New York and employers' liability to claims of employment harassment and discrimination.

Worker Protections

States are enacting more worker protections. New York passed new legislation prohibiting discrimination based on religious facial hair or clothing. The new law is part of a package of legislation that increases worker protections in harassment and discrimination claims and settlements (see below). Similarly, Illinois enacted legislation that limits arbitration agreements and nondisclosure clauses, mandates sexual harassment training, and extends protection to domestic violence victims. Following this trend, Connecticut, Nevada, New Jersey and Oregon have all passed new legislation focused on worker protections.

Gig Economy Regulations

On April 29, the U.S. Department of Labor issued an opinion letter concluding that workers providing services to customers through a virtual marketplace should be classified as independent contractors under the Fair Labor Standards Act.

However, on Sept. 11, California enacted Assembly Bill 5, requiring gig economy workers to be reclassified as employees instead of independent contractors. The bill is now heading to Gov. Gavin Newsom's desk he publicly supports it.

In Depth Analysis and recent developments

New Jersey Enacts Job Protections for Medical Marijuana Users

As we previously reported in our Employment Law Spotlight Blog, on Aug. 20 New Jersey expanded job protections for employees and applicants who use medical marijuana. New Jersey joins a growing list of states (including Massachusetts and New York) offering employment protections for authorized users of medical marijuana.



The law prohibits employers from taking an adverse employment action against an employee or applicant who is a registered qualifying patient based solely on the individual's status as a registrant.

The law also amends how employers should react to a positive test result. Specifically, employers must (i) provide employees and applicants with a written notice of the right to offer an explanation and (ii) give employees and applicants three working days after receiving the notice to submit an explanation or request a second test of the original sample at the employee's or job applicant's own expense. Under the law, employers can prohibit or take adverse employment action for the possession or use of intoxicating substances during work hours or on workplace premises outside of work hours.



New Jersey and Illinois Ban Salary History Requests

Following up on our previous report in our Employment Law Spotlight Blog, on Aug. 15 New Jersey banned salary history requests. The New Jersey law makes it unlawful for an employer to (1) screen a job applicant based on the applicant's salary history, (2) require that the applicant's salary history satisfy any minimum or maximum criteria, or (3) use an applicant's refusal to volunteer compensation information as a factor in any employment decision.

However, employers may consider an applicant's salary history in determining compensation if the applicant voluntarily – “without prompting or coercion” – provides the information. Additionally, after the employer has made an offer of employment, the employer may ask an applicant to provide written authorization to confirm salary history. Employers that do business in multiple states can include a salary history inquiry on their employment application, so long as the application states that applicants who will be working in New Jersey do not have to answer the question. The New Jersey law will take effect on Jan. 1, 2020.

Illinois passed a similar law on July 31, prohibiting employers from (1) screening a job applicant based on the applicant's salary history; (2) requesting or requiring wage or salary history as a condition of being considered for employment, being interviewed or being considered

for an offer of employment; and (3) requesting or requiring that an applicant disclose wage or salary history as a condition of employment. The Illinois law took effect on Sept. 29.

Contrary to the New Jersey law, however, employers may not consider or rely on a voluntary disclosure of salary history as a factor in determining whether to make an offer or determine an applicant's compensation.

New Jersey and Illinois join at least 18 other states and a number of cities that prohibit salary history questions during the application stage of employment.

New York State Human Rights Law Update: New Anti-Harassment Laws

As we reported in our summer newsletter, in late June the New York Legislature passed a bill that vastly changed the discrimination and harassment landscape for employers. On Aug. 14, Gov. Andrew Cuomo signed that bill into law.

As a reminder, this law expands the New York Human Rights Law (NYSHRL) in several ways: it amends the definition of “employer” to include all employers within the state; it extends the filing deadline for complaints of sexual harassment with the Division of Human Rights from one to three years; it dictates that the NYSHRL should be interpreted more broadly (i.e., more like the New York City Human Rights Law) than federal law; it removes the “severe and pervasive” requirement for all

forms of harassment; it removes Faragher-Ellerth as an affirmative defense; it extends the restrictions on nondisclosure and arbitration agreements to all forms of discrimination; it expands the individuals protected by all forms of harassment/discrimination to include non-employees; it provides attorneys' fees for all successful discrimination/harassment claims; and it requires employers to provide anti-sexual harassment policies in English and the primary language identified by each employee, and to provide such policy upon hire and at the mandatory yearly anti-harassment training.



As a result, employers likely now need to change their New York state-required antiharassment policies and training. Specifically, policies and training should be reviewed to ensure that any reference to the severe and pervasive standard be eliminated and a strong emphasis be placed on the employer's receptiveness to any and all complaints and how the employer will react swiftly to such complaints. Additionally, policies and training should be reviewed to ensure that they include the enhanced protections the law provides to other protected classes that previously only applied to sexual harassment.

Under the new law, employers can be held responsible even when an employee has not complained internally, so employers also should start making additional efforts to ensure their employees are happy and harassment is not occurring. It is also imperative for employers to play up their anti-retaliation provisions in this new construct –

if employees are concerned they will be retaliated against, they are sure to not report problems to the company, and under this new law, they don't have to. To accomplish both of these goals – instilling good morale and creating an open atmosphere where employees feel comfortable speaking to managers – employers might consider instituting town hall meetings or other, similar touch-base meetings between management and employees, utilizing an anonymous hotline, hiring an ombudsperson, undertaking an immediate investigation of any complaints made (including those that do not meet the old standard of severe and pervasive), and providing and encouraging team-building activities. Perhaps most important, employers should ensure that management is present and engaged in all training and team-building activities and that management (not just those in human resources and legal) take immediate action with regard to any inappropriate behavior, not just behavior that meets the old standard of severe or pervasive.

New Domestic Violence Protections

On Aug. 20, Gov. Cuomo signed a law to (1) expand the definition of "victim of domestic violence," (2) specifically make victims of domestic violence a protected class in the NYSHRL and (3) require certain accommodations for victims of domestic violence. The law is effective Nov. 18.

The definition of domestic violence victim is now:

- [A]ny person over the age of sixteen, any married person or any parent accompanied by his or her minor child or children in situations in which such person or such person's child is a victim of an act which would constitute a violation of the penal law, including, but not limited to acts constituting disorderly conduct, harassment, aggravated harassment, sexual misconduct, forcible touching, sexual abuse, stalking, criminal mischief, menacing, reckless endangerment, kidnapping, assault, attempted assault, attempted murder, criminal obstruction of breathing or blood circulation, or strangulation; and
- (i) such act or acts have resulted in actual physical or emotional injury or have created a substantial risk of physical or emotional harm to such person or such person's child; and
 - (ii) such act or acts are or are alleged to have been committed by a family or household member.

Additionally, employers are now required to provide a reasonable accommodation to an employee who is a domestic violence victim who (when possible) provides notice that he or she is required to be absent from work for a reasonable amount of time for (1) seeking medical attention, including counseling, to treat any domestic

violence-related physical or mental injuries, including the treatment of children who are the victims of domestic violence; (2) obtaining services, including legal services as a result of domestic violence; and (3) participating in safety planning or relocation as a result of domestic violence. Such accommodations are required, unless the employer can show that the absence would cause an undue hardship. When an employee is unable to give advance notice for the need of an accommodation, employers are permitted to request a certification from the employee substantiating the domestic violence.

An employer is permitted to require the employee to use any paid time off the employee may have; otherwise, an employee should be granted the time off as unpaid. The employer is also required to continue any health insurance coverage to which the employee is otherwise entitled during any covered absence.

The law also requires that the employer, to the extent permitted by law, maintain the confidentiality of any information regarding an employee's domestic violence victim status.

Employers should ensure that their policies are updated to make sure domestic violence victims are included in their antidiscrimination/-harassment policies and that their policies reflect the newly permitted accommodations. Additionally, HR and supervisors should be trained on this new law to recognize when an accommodation should be provided.

New York Pay Equity Law Expanded and Statewide Salary History Ban Enacted

As we reported in our summer newsletter, the New York Legislature passed legislation to expand the pay equity law; the bill was signed into law and, as a result, effective Oct. 8, the New York Labor Law will prohibit pay inequity not just based on sex but based on any protected class protected by the New York State Human Rights Law. The amendment also expands the law by requiring equal pay not just for equal work but for “substantially similarly work, when viewed as a composite of skill, effort, and responsibility, and performed of similarly working conditions.” These amendments will make it far easier for an employee to show pay inequity and far more difficult for employers to monitor pay equity, and they are consistent with the pay equity law passed last year in New Jersey.

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.

Likewise, the New York state salary history ban we previously reported on in our summer newsletter was signed into law. As a result, employers are prohibited from asking about or relying on salary history for determining salary amounts for a new applicant or promoted employee, unless the employee voluntarily discloses his or her previous pay. The bill also prohibits



employers from retaliating against an applicant or employee on the basis of his or her disclosed salary and his or her refusal to disclose salary history. If, however, an employee voluntarily discloses salary history after an offer with compensation has been made in an attempt to negotiate a higher salary, an employer may confirm such salary history. At this point, it seems unlikely that an employer would be permitted to rely on information volunteered by an applicant prior to an offer with compensation. This is different from the New York City law and should be emphasized to those making hiring and compensation decisions.

All employers across the state will have to comply with this new law. As a result, employers will need to train all interviewing staff to refrain from asking about previous salaries and remove all inquiries from any application documents.

New Jersey's New Wage Theft Act Imposes Serious Penalties for Violations of Wage Laws

On Aug. 6, New Jersey Acting Gov. Sheila Oliver signed the Wage Theft Act (WTA), which amends the New Jersey Wage Payment Law, the New Jersey Wage and Hour Law and the New Jersey Wage Collection Law. The WTA provides for stiffer penalties for employers and lower thresholds for employees to provide violations, such as extending the time for employees to bring wage

violations from two years to six. Most of the WTA's provisions were effective immediately.

Perhaps most heartburn-inducing for employers is that the WTA provides that any termination, demotion or other action taken against an employee within 90 days of his or her filing a state wage complaint either via agency or lawsuit will presumptively be retaliation, unless the employer can prove by "clear and convincing evidence" that the adverse action was not motivated by the complaint. Additionally, the New Jersey Department of Labor & Workforce Development (NJDOL) has the power to investigate retaliation claims, even those based on internal wage complaints or conversations regarding wages with other employees. Adverse actions following internal wage complaints do not, however, become presumptively retaliatory. Retaliation will result in the employer having to pay the employee triple the pay that the adverse action cost the worker, attorneys' fees and costs. Additionally, employers will be required to offer reinstatement (or take other remedial actions to reverse any retaliation) to employees retaliated against.

The WTA also provides for a rebuttable presumption that an employee's claim for unpaid wages is accurate, unless the employer has records to show that the wages were paid. This makes the necessity of keeping accurate records even more imperative. The WTA also provides for treble damages, attorneys' fees and costs for failing to pay an employee wages, unless an employer is able to establish a good faith defense, the employer is able to



demonstrate that the violation was a first, the employer's actions were taken in good faith with reasonable grounds for believing that the action was not a violation, or the employer admits the violations and pays the amount owed within 30 days.

In addition to damages that would be required to be paid to a complainant, the WTA also provides potential fines and imprisonment for knowingly failing to pay wages to an employee or retaliating against an employee.

The NJDOL has increased power under the WTA. In addition to being able to hear retaliation claims, the NJDOL's jurisdictional limit is increased from \$30,000 to \$50,000, it may investigate claims dating back six years, and it may order liquidated damages. The WTA also specifically calls for an increase in NJDOL audits and mandates that when an employer is found to owe more than \$5,000 in wages, the NJDOL is to inform the employer of the NJDOL's right to audit the employer or successor entities and notify the Division of Taxation and recommend the Division of Taxation perform its own audit of payroll withholdings and other taxes. The NJDOL will also now have the power to direct other agencies to suspend licenses held by an employer or successor entity if it fails to pay wages and/or damages owed pursuant to an NJDOL determination or court order within 10 days of such determination/order. The NJDOL is also empowered to issue stop work orders against an employer until a violation has been corrected. If this occurs, an employer will be placed on probation and may be required to file periodic compliance reports. The WTA also expressly permits the NJDOL to publicly post the details of any wage violations and enforcement actions, which means that the names and addresses of employers that violate the wage and hour law, the nature of the claims, the number of affected employees, the amount of wages owed, penalties, and license suspensions may all become public information.

The WTA also will expand the entities that can be sued. The definition of employer now includes any successor entity or successor firm of the employer, and when employees do not receive pay pursuant to a contract, both the client employer and the labor contractor providing the worker to the client employer will be jointly and severally liable.

As always, employers should ensure they're following all federal and state wage laws. To do so, we recommend conducting an internal, privileged audit. And on that note, as a reminder, New Jersey's minimum wage increased to \$10 per hour for most employees on July 1 – employers should ensure that they made any necessary adjustments. Additionally, employers should immediately revise their policies to include an employee's statement of rights as required by the WTA (which will be provide by

the NJDOL) and strengthen their timekeeping policies and requirements. They should also reassess their recordkeeping to ensure that all timekeeping and pay records are accurate and train supervisors to ensure that all employees are following timekeeping policies.

New Jersey Appellate Division Case Reduces Burden to Prove Failure to Accommodate Claim Under NJLAD and Creates New Workers' Compensation Claim

A middle school teacher who was injured after she had a hypoglycemic event in front of her students as a result of low blood sugar levels, which she claimed occurred because the school failed to accommodate her disability (diabetes) by permitting her to have an earlier lunch period, appealed the trial court's order granting her employer summary judgment. The trial court had granted the school summary judgment on the basis that because she had not suffered an adverse employment action, she was unable to establish a prima facie case of failure to accommodate.



The Appellate Division reversed, finding that it is not necessary for a plaintiff claiming a failure to accommodate under the New Jersey Law Against Discrimination (NJLAD) to prove that she suffered an adverse employment action. As a result of her hypoglycemic event, the plaintiff fell and struck her head

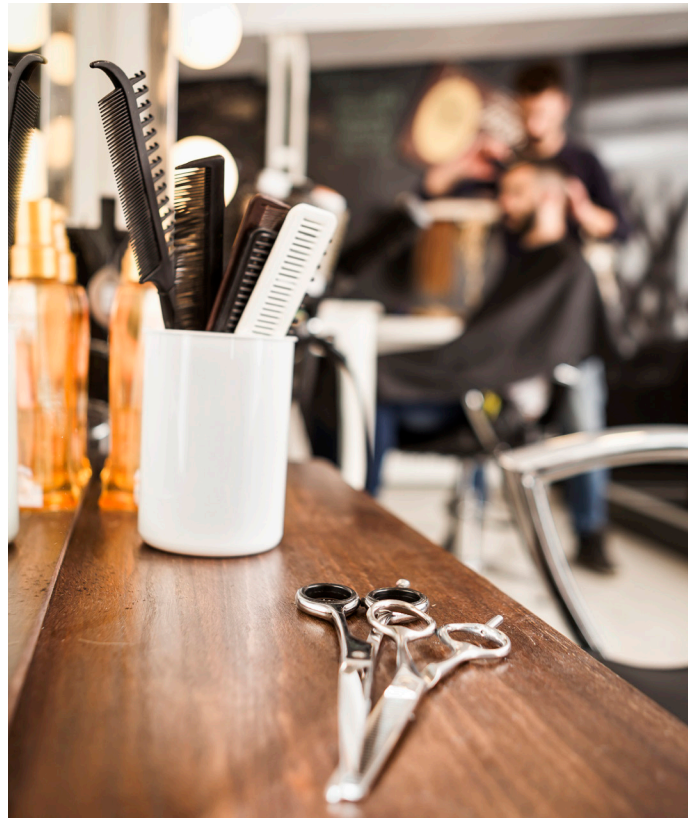
and face on a lab table and the floor, causing excessive bleeding and requiring her to go to the hospital. The plaintiff suffered several severe and permanent damages, including, but not limited to, total loss of smell and taste, dental and facial trauma, tinnitus, insomnia, tingling in her fingers, altered speech, neck and shoulder pain, vertigo, emotional distress, and decreased life expectancy. The Appellate Division based its decision on a previous New Jersey Supreme Court case which stressed that although an adverse action is generally recognized as a required element for a prima facie case, “identifying the elements of the prima facie case that are unique to the particular discrimination claim is critical to its evaluation.” That same case also made clear that, although unnecessary to be decided in that case, plaintiffs who suffered a failure to accommodate should be permitted to proceed, even if no adverse action could be proven, noting that such cases would be rare since typically an employee unable to secure an accommodation will suffer an adverse employment action. Ten years later, the state Supreme Court laid out the necessary elements of a prima facie case for a failure to accommodate and did not specifically include a requirement to prove an adverse action occurred. Based on these two New Jersey Supreme Court cases, the Appellate Division held that an adverse action was not necessary since “the employee could demonstrate that the failure to accommodate forced the employee to soldier on without a reasonable accommodation,” and the specific circumstances “cry out for a remedy.”

The Appellate Division also held that the New Jersey Workers’ Compensation Act does not bar the plaintiff’s bodily injury claim as a result of her fall, but did hold that any damages resulting from her bodily injury should be mitigated by any workers’ compensation pay she received from the injury. The Appellate Division found that since the workers’ compensation law does have an exception for intentional wrongdoing, and the employee alleges that her supervisor intentionally refused her request for an accommodation, which was substantially certain to lead to a hypoglycemic event that could cause injury, it was possible for the jury to conclude that this was an intentional wrong.

As a result, employers should make sure that they are engaging in the interactive process with employees and, as a best practice, such interactive process should be documented, so, if necessary, an employer can easily prove that they have engaged in an interactive process. It’s possible that this holding may result in additional failure to accommodate claims, particularly for employees who remain employed, so employers should not assume that just because an employee continues to work they are safe from a claim.

New York State Bans Race Discrimination Based on Hair Texture and Hairstyles

As many of you know, in February of this year, the NYC Commission on Human Rights issued legal enforcement guidance for employers regarding racial discrimination on the basis of hair under the New York City Human Rights Law (NYCHRL). Although that guidance does not reflect a change in the NYCHRL, it makes clear that employers’ grooming and appearance policies may not prohibit hairstyles historically associated with certain racial communities, such as those who identify as “African, African American, Afro-Caribbean, Afro-Latin-x/a/o or otherwise having African or Black ancestry.”



This summer, New York state went a step further by passing a law that amends the definition of “race” in the New York State Human Rights Law (NYSHRL) to include “traits historically associated with race, including but not limited to, hair texture and protective hairstyles.” This would include, but is not limited to, hairstyles such as “braids, locks, and twists.” As a result, the NYSHRL now prohibits racial discrimination based on natural hair or hairstyles. Interestingly, the amendment contemplates the protection of traits historically associated with race other than hair or hairstyles, which traits are not clearly identified in the law.

The passing of this law makes New York the second state, after California, to prohibit discrimination based on hairstyles. New Jersey is considering similar legislation.

New York employers should review their discrimination, harassment, grooming and appearance policies to ensure such policies prohibit discrimination based on traits historically associated with race, including, but not limited to, hair texture and protective hairstyles.

Employers should also train their human resources personnel and management about this new law. Our New York team is available to advise regarding this amendment and best practices for your company.

NLRB Holds That Misclassification of Employees Is Not Per Se a Violation of NLRA

On Aug. 29, the National Labor Relations Board (NLRB) held that an employer’s misclassification of its employees as independent contractors does not, standing alone, constitute a violation of the National Labor Relations Act (NLRA). *Velox Express Inc.* 15-CA-184006, 368 NLRB No. 61. The NLRB reasoned that an employer’s mere communication to its workers that they are independent contractors does not prohibit, or otherwise interfere with, the workers’ rights to organize under Section 7 of the NLRA, as is required for a violation of Section 8(1)(a). Indeed, the NLRB held that such communications are privileged legal opinions under Section 8(c) of the act – even when the classification turns out to be incorrect.

In determining that an employer’s misclassification is not a violation on its own, the NLRB focused on the

complicated, fact-specific nature of independent contractor determinations. The NLRB recognized that these determinations are governed by a variety of complex federal, state and local regulations, and “[u]nderstandably, employers struggle to navigate this legal maze.” As a result, the NLRB noted that “reasonable minds can, and often do, disagree about independent-contractor status when presented with the same factual circumstances.” In light of these considerations, the NLRB held that creating a stand-alone violation for misclassification of employees would not only penalize employers whenever they were mistaken, but also would “significantly chill” the creation of independent contractor relationships. The NLRB found that such a result would be contrary to both Supreme Court precedent and Congress’ intention when amending the act to exclude independent contractors from its scope. As a result, the NLRB declined to hold that an employer’s misclassification of its employees as independent contractors is itself a violation of the NLRA.

However, the NLRB held that *Velox* did, in fact, violate the NLRA when it terminated its employee after she complained about being misclassified as an independent contractor. Although the misclassification alone was not an NLRA violation, the adverse action taken against the employee in response to her complaint was. Thus, employers should remain cautious when making classification decisions and acting pursuant to those decisions.



Keep a Lookout

GENDA-Prompted Regulation Changes

As a result of the recent passage of the Gender Expression Non-Discrimination Act (GENDA), which amends the New York State Human Rights Law to include gender identity and expression as a protected class, the Division of Human Rights has proposed an amendment to its regulation prohibiting gender identity discrimination to mirror GENDA. Essentially, this includes amending the existing regulation to include a prohibition against not only discrimination on the basis of gender identity but also gender expression. The regulation does not make any substantive changes for employers, but instead makes the previously existing regulation consistent with GENDA.

Reminder – Oct. 9 Sexual Harassment Training Deadline for All Employers in New York State!

As you all hopefully know by now, New York employers have until Oct. 9 to complete their annual sexual harassment training, the contents of which must be compliant with the new(ish) state law. Employers must train all current employees by this date, and new employees should be trained as quickly as possible once their employment begins. Training must be completed for all employees every year.

If you have any questions regarding the required training, please contact us immediately.

Reminder to Submit EEO-1 Pay Data by Sept. 30 – One-Time Requirement?

By Sept. 30, employers with 100 or more employees are required to submit certain pay data for 2017 and 2018 (called the Component 2 EEO-1 survey) to the Equal Employment Opportunity Commission (EEOC). Employers must select a single pay period in both Q4 2017 and Q4 2018 and report pay data for those full- and part-time employees on the employer's payroll for each selected pay period. Employers required to submit EEO-1 data should have received a letter and email notification with the user ID needed to access the EEO-1 online filing system. The Component 2 EEO-1 online filing system home page allows employers to log in to the system,

receive Help Desk support and review specific instructions.

With that said, it looks like this Component 2 EEO-1 survey requirement might only be a one-time requirement – which would be fabulous news for employers across the nation. According to a Sept. 11 notice by the EEOC in the Federal Register, the EEOC may not renew the Component 2 EEO-1 survey requirement, as it says the burden and cost estimate for businesses to collect and submit the data is higher than previously expected and deserves some further consideration before the EEOC seeks approval for more pay reporting. Therefore, at this time, the EEOC is not seeking to renew Component 2 of the EEO-1.

Of course, this does not change this year's Sept. 30 Component 2 requirement (nor does it change the fact that the EEOC still intends to collect Component 1 data for the next three years, as it has done for decades), but there is hope for employers for future years!

DOL Finally Unveils Much-Anticipated Overtime Exemption Rule

One of the most important wage and hour regulatory initiatives of the U.S. Department of Labor (DOL) has been updating the Fair Labor Standards Act's (FLSA) "white collar" overtime exemptions. And on Sept. 24, the DOL published the final version of the much-anticipated FLSA rule. The final rule increases the salary threshold workers need to meet in order to qualify for the executive, administrative and professional exemptions from the current \$23,660 per year to \$35,568 per year (or from \$455 per week to \$684 per week). The final rule also permits employers to count nondiscretionary bonuses,



incentives and commissions as up to 10% of an employee's salary level as long as those payments are paid annually. In addition, the FLSA's exemption threshold for highly compensated employees will be increased from the current threshold of \$100,000 to \$107,432.

The rule will take effect on Jan. 1, 2020, and will replace the controversial 2016 rule that was blocked by a federal judge in Texas before it could take effect. Jan. 1 will be here before we know it, so employers should review their exempt employees and ensure that they will meet the new thresholds for exempt status.

Joint Employer Rules on the Horizon

Employers around the U.S. are also paying close attention to the issue of joint employment, which is when two or more businesses are found to be co-employers of the same workers. If two businesses are deemed joint employers under the Fair Labor Standards Act (FLSA), they share liability for any wage and hour violations. If deemed joint employers under the National Labor Relations Act (NLRA), they share liability for labor law violations and collective bargaining requirements.

As many of you know, the National Labor Relations Board (NLRB) and the U.S. Department of Labor (DOL) have each recently proposed regulations to update their standards.

Last year, the NLRB proposed a rule to clarify its joint employer test under the NLRA by reversing a standard set in the Browning-Ferris case. The NLRB's rule would reinstitute a prior standard under which an employer is a joint employer only if it has "direct and immediate control" of another's employees.

And earlier this year, the DOL proposed an update to its standard for analyzing joint employment under the FLSA. Under the DOL's proposed rule, joint employment should come down to whether a business's actions actually affect the terms and conditions of workers' employment.

Although we are not sure exactly when the final rules may be issued by the NLRB or the DOL, the comment period on both proposed rules expired earlier this year. This is considered to be a high priority for both agencies so we will continue to look out for both.

Tip Rule Still on the Lookout

The Office of Management and Budget is in the midst of finalizing the U.S. Department of Labor's (DOL) proposed rule to revise its standards for tipped workers. Among other things, the proposed rule is intended to prevent employers from keeping tips received by their employees. More specifically (and as reported in detail in our spring newsletter), the DOL said in the spring that it

will also revise its existing tip credit rule as it pertains to dual jobs, which currently allows employers to pay employees who perform both tipped and nontipped duties at a lower tipped minimum wage for service work as long as they pay at least the full minimum wage for nontipped tasks.



Last November, the DOL published an opinion letter that rescinded the "80-20 rule" (which prohibited employers from paying tipped workers at a lower wage if they spent more than 20% of their time on nontipped side work). Since then, several federal courts have rejected the DOL's opinion letter. The proposed rule, which had been under review at the White House Office of Information and Regulatory Affairs (OIRA), was recently removed from the OIRA website. This typically signals that the final rule is a step closer to being published.

We – as well as many hospitality employers – continue to wait for clearer and more consistent guidance on these tip issues.

Gig Economy Workers to Gain NYCHRL Protections

The New York City Council passed a bill expected to be signed by Mayor Bill de Blasio that explicitly provides for freelancers and independent contractors to be protected under the New York City Human Rights Law. This means that employers would be at risk from discrimination and/or harassment law suits or commission complaints from their independent contractors.

NLRB To Review Protections for Vulgar, Racial and Sexually Offensive Comments

Ever wondered whether you could curse out your boss and get away with it? That is the question the National Labor Relations Board is asking for help deciding. On Sept. 5, the board asked for comments regarding how profane, sexually offensive or racist an employee's comments must be to lose the protections of federal labor law.

Prompting the board's request is a case involving profane outbursts by a union committeeperson at General Motors who, in discussing a perceived overtime issue, made obscene and vulgar comments to a manager. Based on generally accepted workplace norms, you might be surprised to find that the board's administrative law judge found General Motors' suspension of the employee for the comments to be a violation of federal labor law. The administrative law judge based the decision on a series of rulings from the Obama administration board that gave employees broad protections to make profane, offensive or even racist comments if uttered in the context of a labor dispute.

Now the board's three Republican members want to know whether the Obama-era rulings went too far. The board has asked for the amicus briefs to consider a

variety of issues, including: when should sexually or racially offensive speech become unprotected; how should workplace norms and employer civility rules affect what type of speech is tolerated; and what relevance should antidiscrimination laws like Title VII play in determining the lawfulness of protected labor speech?

The board's actions in this matter are not wholly unexpected. One of the first decisions issued by the Republican-led board was to overturn Obama-era precedent that made many civility and decorum workplace rules unlawful. The board based that decision, in part, on the "employer's legal responsibility to maintain a work environment free of unlawful harassment based on sex, race or other protected characteristics." And as the board noted here, its treatment of profane and racially and sexually offensive language "has been criticized both as morally unacceptable and inconsistent with workplace laws by Federal judges as well as within the Board."

With this as a backdrop, it is likely that the board will continue to hold employees accountable for behavior deemed unacceptable in everyday society. This is good news for employers seeking to maintain a civil workplace and an environment free of unlawful discrimination and harassment.

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