NORTON ROSE FULBRIGHT

New York State and New York City employers face new compliance requirements

By David Gallai and Rachel M. Kurth

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Recently, New York State and New York City have continued the trend of enacting employee-friendly legislation and issuing broad enforcement guidance under their respective employment laws and regulations. New York State and New York City employers should be aware of the following recent developments from 2018 and early 2019, and should take action to review and update their practices and policies for compliance.

New York City lactation room and policy laws – new policy requirement

Federal and New York State laws already require employers to make reasonable efforts to provide a room other than a bathroom where a nursing employee can express breast milk in privacy. New York City recently passed two laws expanding those rights. Effective March 18, 2019, New York City employers will be subject to additional specific requirements regarding the lactation room that must be made available to nursing mothers. New York State law already requires that the lactation room be private, well-lit, and contain, at a minimum, a chair and small table, desk, counter, or other flat surface. The New York City law will require additional amenities in the lactation room, including an electrical outlet and nearby access to running water, and that the employer provide a refrigerator suitable for breast milk storage in reasonable proximity to the employee's work area. Also effective March 18, 2019, New York City employers will be required to implement a written lactation room policy that meets specified requirements, and provide a copy of the policy to all employees upon hiring. The policy must include a statement that employees have the right to request a lactation room, and identify a process by which employees may make such request (which process must meet certain minimum requirements).

"Cooperative Dialogue" amendments to New York City Human Rights Law

Effective October 15, 2018, New York City amended its Human Rights Law to require covered employers to engage in a "cooperative dialogue" with individuals who may be entitled to a reasonable accommodation related to religious beliefs, disability, pregnancy, childbirth or a related medical condition, or because the employee was a victim of domestic violence, sex offenses or stalking. The law requires that covered employers follow certain procedures when they receive a request for an accommodation, or when they have notice that an individual may need an accommodation, including the following:

- Engage, in good faith, in written or verbal dialogue to discuss an employee's accommodation needs;
  - If an employer cannot satisfy the employee's requested accommodation, it must discuss the difficulties that the request would pose for the employer and suggest potential alternatives that may address the employee's accommodation needs;
- These good faith discussions must continue until the request for accommodation is either granted or denied;
- Once the cooperative dialogue is complete, employers must make a final written determination as to whether any accommodation has been granted or denied; and

- The employer must provide a copy of this written determination to the employee who requested the accommodation (and we suggest that this written determination be provided to the employee promptly upon completion of this process).

Employers are prohibited from determining that no reasonable accommodation exists that would enable the requesting employee to perform his or her essential job duties unless the employer has engaged, or attempted to engage, in a "cooperative dialogue." Last year, the New York City Commission on Human Rights (the "Commission") issued a 146-page guide titled "Legal Enforcement Guidance on Discrimination on the Basis of Disability," which provides useful guidance for employers, including details on how to comply with the "cooperative dialogue" requirements and factors that will be considered by the Commission in determining whether an employer has engaged in the "cooperative dialogue" in good faith.

Note that, under this law, it is a stand-alone violation of the New York City Human Rights Law to fail to engage in this "cooperative dialogue" within a reasonable period of time with an employee who has requested an accommodation or who the employer has notice may require such an accommodation. New York City employers should ensure that managers, supervisors, and human resources personnel are properly trained on the "cooperative dialogue" requirements and procedures and that appropriate procedures are in place to address accommodation requests.

New York City Safe and Sick Time Act – policy updates required

Last year, New York City's sick time law was amended to expand the reasons for which employees can use sick time to include "safe time." "Safe time" is available to employees if they or their family members have been victims of a family offense matter, sexual offense, stalking, or human trafficking, and need time off from work for certain related reasons.

Subsequently, New York City issued revised rules and regulations regarding the mandatory New York City safe and sick time policies that all New York City employers are required to maintain. These revised rules include a new requirement that those polices include a description of the law's confidentiality requirements. The revised rules now also specify that employers maintain their safe and sick time policies in a single writing. It is mandatory for all New York City employers to maintain a written safe and sick time policy, and employers may not satisfy this requirement by distributing New York City's form "Notice of Employee Rights" in lieu of creating and distributing a customized safe and sick time policy. These written New York City safe and sick time policies must be distributed to each employee when an employee is hired, within 14 days of a policy change taking effect, and upon request by employees.

Mandatory sexual harassment prevention policies and training

Last year, New York State and New York City both passed a number of laws aimed at sexual harassment prevention. As part of the New York State law, effective October 9, 2018, every New York State employer (regardless of size and including those who employ only domestic and household employees) was required to adopt a sexual harassment prevention policy that meets specific requirements.

The New York State and New York City laws each have separate requirements to provide anti-sexual harassment training annually to all employees, as well as to new hires soon after hiring. The New York City training requirement applies to New York City employers with 15 or more employees, and goes into effect on April 1, 2019. The New York State training requirement applies to every New York State employer (regardless of size and including those who employ only domestic and household employees), and the first annual training must be conducted by October 9, 2019. The New York State and New York City training requirements are similar, but not identical, so covered New York City employers will need to ensure that their trainings comply with both the state and city laws.

In November 2018, the Commission issued Frequently Asked Questions regarding the New York City laws aimed at combating sexual harassment. The Commission is still in the process of developing an online training that employers can use to meet the training requirement, which should be available on or before April 1, 2019. The Commission and the New York State Division of Human Rights and New York State Department of Labor (NYSDOL) have announced that they are partnering to make sure that the Commission's online training module also meets the requirements of the New York State law. Employers may also choose to create and provide their own anti-sexual harassment training for employees.

New York City Temporary Schedule Change Law – workplace posting requirement

New York City employers should also be aware of the New York City Temporary Schedule Change Law, which took effect on July 18, 2018. Under this law, covered New York City employees who have been employed by their employer for at least 120 days have the right to a temporary change in work schedule on up to two occasions per calendar year to accommodate a personal event (e.g., child care needs and other family care needs, the need to attend certain legal provisions, and other reasons for which the employee may use leave under the New York City safe and sick time law). The Commission has issued Frequently Asked Questions regarding the Temporary Schedule Change Law that may be helpful to employers seeking guidance on how to comply with this recent law. Note that the law also includes requirements that employers post a notice about the Temporary Schedule Change Law in the workplace, and keep records documenting compliance with the law for at least three years.

New York State Gender Expression Non-Discrimination Act and broadened New York City protections from discrimination based on gender and sexual orientation

On January 25, 2019, Governor Cuomo signed the Gender Expression Non-Discrimination Act (GENDA), which amends New York State law (including the New York State Human Rights Law) to expressly include "gender identity or expression" as a protected category. GENDA defines "gender identity or expression" as meaning "a person's actual or perceived gender-related 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." GENDA will become effective on February 24, 2019.

New York City employers should note that discrimination on the basis of gender identity or expression is already prohibited under the New York City Human Rights Law's definition of "gender," and effective May 10, 2018, New York City updated its protections to reflect broader and more inclusive definitions of "gender" and "sexual orientation." The Commission has previously issued guidance on New York City's protections from discrimination based on gender identity or expression titled "Legal Enforcement Guidance on Discrimination on the Basis of Gender Identity or Expression" (which New York City employers may want to review for best practices) and proposed rules to clarify the scope of these protections (the proposed rules were recently approved by the Commission and are expected to be finalized by March 9, 2019).

New York State Paid Family Leave Law updates for 2019

New York State has issued updated guidance for 2019 under the New York State Paid Family Leave Benefits Leave Law (PFLBL), including updated Frequently Asked Questions. Note that eligible employees can take up to ten weeks of PFLBL leave in 2019, with a maximum weekly benefit of $746.41 for 2019. Additionally, effective February 3, 2019, the definition of "serious health condition" under the PFLBL has been amended to clarify that it includes "transplantation preparation and recovery from surgery related to organ or tissue donation" as long as the other elements of the definition are met. For more information about the PFLBL, see New York State's Frequently Asked Questions.

Proposed regulations under New York State wage and hour laws

In December 2018, the NYSDOL issued new proposed regulations regarding employee scheduling practices, which would apply to New York State employers of any size. Among other things, the proposed regulations would require New York State employers to provide "call in" pay to certain non-exempt employees in various circumstances, including when employers:

- Request an employee report to work but then send the employee home;
- Request an employee to work any shift that has not been scheduled at least 14 days in advance;
- Cancel an employee's shift without 14 days of advance notice; or
- Require an employee to work "on call" or be in contact with the employer within 72 hours of the start of a shift to confirm whether to report to work.

The amount of "call in" pay that would need to be provided would be either two hours or four hours, depending on the circumstance (or, in some circumstances, the number of hours that the employee is scheduled to work, if less than

four hours). "Call in" pay for time of actual attendance would be paid at the employee's regular rate or overtime rate, as applicable, whereas payments for other hours of "call in" pay would be paid at minimum wage.

The proposed regulations contain a number of exceptions, including for unscheduled shifts and cancelled shifts due to weather, and in certain cases, for workweeks when the employee's weekly wages exceed 40 times the applicable minimum wage. It is expected that the NYSDOL will issue final regulations in early 2019.

Covered New York City employers in the fast food and retail industries should note that they will also need to comply with New York City's predictive scheduling law, known as the New York City Fair Workweek Law, which went into effect in 2017, and which in some instances provides greater protections to workers. For example, the New York City Fair Workweek Law prohibits requiring retail employees to work "on call," whereas the New York State proposed regulations only require payment for "on call" work.

New York City mandatory paid personal time proposal

On January 9, 2019, Mayor de Blasio announced a proposal that New York City become the first city in the United States to mandate that workers receive paid personal time off for any reason. Mayor de Blasio announced that he will pursue legislation requiring private New York City employers with five or more employees to offer ten annual days of paid personal time that could be used for any purpose, including vacation, religious observances, bereavement, and time with family. These ten days per year would be in addition to the days of paid safe and sick leave already available under New York City's safe and sick time law. New York City employers will want to stay tuned to see whether the mayor's proposal becomes a bill that gains any traction in the legislature.

Employers outside of New York City

New York City is not the only locality in New York State passing a flurry of employee-friendly legislation. After New York City passed its "salary history ban" prohibiting private employers from asking about salary history during the hiring process in late 2017, Albany County quickly followed suit, Westchester County passed a similar salary history ban that went into effect on July 9, 2018, and Suffolk County passed its own salary history ban that will go into effect on June 30, 2019. Westchester County also followed New York City's lead in passing its own sick time law, which will take effect on March 30, 2019, and its own "ban the box" law, which will take effect on March 3, 2019. These employee-friendly trends can be seen throughout the tristate area. Effective January 1, 2019, Connecticut passed a statewide salary history ban. Effective October 29, 2018, New Jersey passed a statewide paid sick leave law that preempted the local sick leave ordinances that had previously been enacted in 13 New Jersey localities. Last year, New Jersey also strengthened its "ban the box" law, increased its protections for breastfeeding employees, and enacted an equal pay law. Employers with employees in these states and localities will want to make sure that they are complying with all applicable requirements, as each of the laws is similar but not identical.

Next steps for employers to take now

New York State and New York City employers continue to face many compliance challenges, and now is a good time to review existing policies and practices to determine whether any changes are needed to comply with any of these recent developments. Please contact us with any questions. We would be happy to assist your company with any of your compliance needs.

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