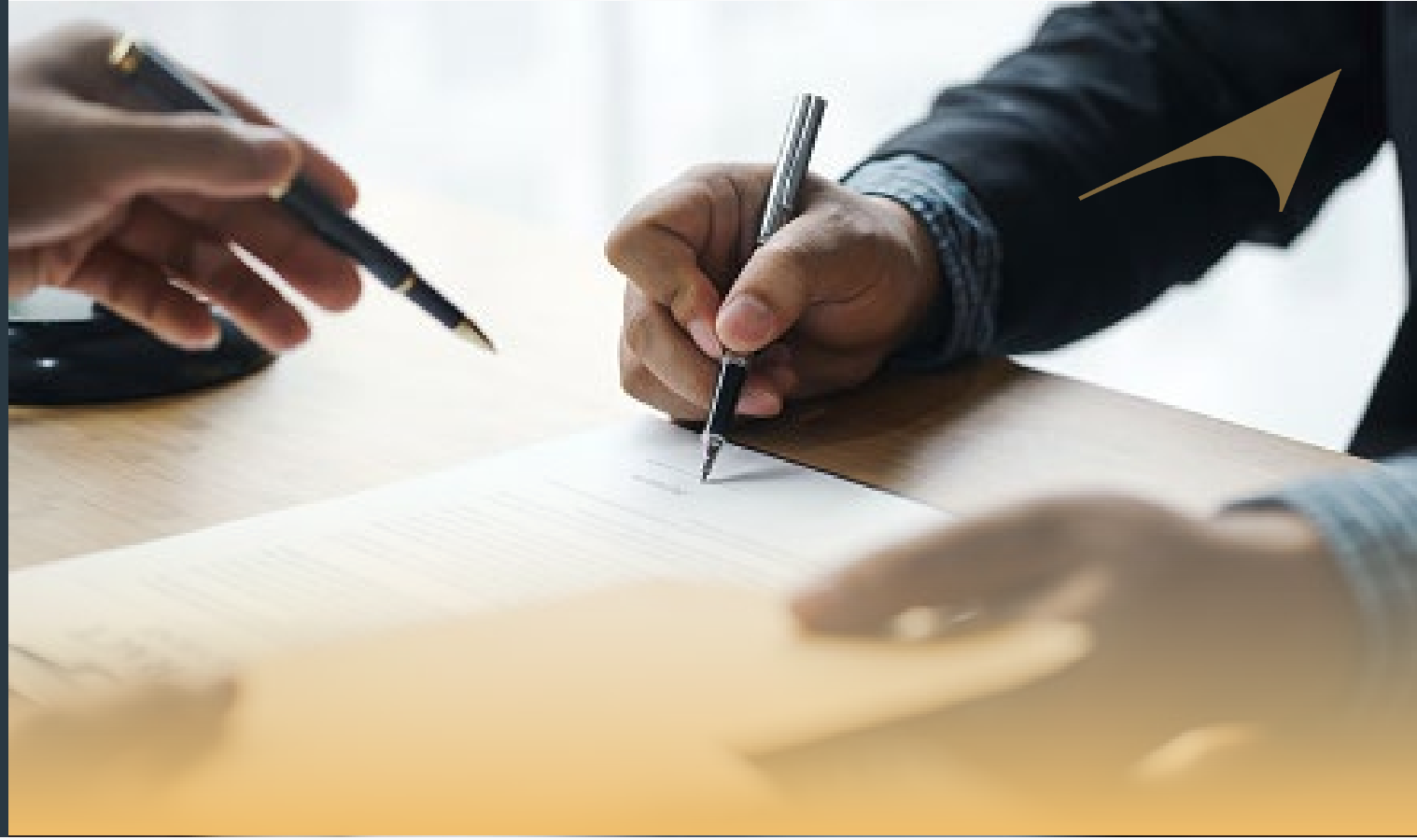
2024 Hot Topics: What Employers Need to Know



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Agenda

- Changes at the Federal Level
  - The Federal Trade Commission's ("FTC") Proposed Rule on Non-Compete Clauses
  - NLRB's continued protection of employee conduct
  - Pregnant Worker's Fairness Act ("PWFA")
  - Increases to salary thresholds under the FLSA
- Changes at the State Level
  - Wage and Hour Changes & Pay Transparency
  - Salary Threshold
  - "Freelance Isn't Free Act" Enactment & Employee "Property"
  - Employee Electronic Monitoring & Privacy
  - New Requirements for Settlement Agreements
  - Wage Underpayments Are Criminal Larceny
  - Expanded Protections for Pregnant and Nursing Employees
- Other Notable Changes

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FTC's Proposed Rule on Non-Competes

- On January 5, 2023, the FTC issued a proposed rule which imposes a complete ban non compete agreements and clauses.

- The FTC defines a non-compete as "a contractual term between an employer and a worker that prevents the worker from seeking or accepting employment with a person, or operating a business, after the conclusion of the worker's employment with the employer."

- "*De facto*" non competes will also be prohibited.
  - The FTC will apply a "Functionality Test" to determine if a clause is a *de facto* non-compete clause. Under the proposed rule, the functionality test takes into consideration whether a contractual term has the effect of prohibiting the worker from seeking or accepting employment with a person or operating a business after the worker's employment ends.
  - For example:
    - A non-disclosure agreement between an employer and a worker that is written so broadly that it effectively precludes the worker from working in the same field after the worker's employment ends.
    - A contractual term between the employer and worker that requires the worker to pay the employer or a third party entity for training costs if the worker's employment ends within a certain time frame, and the required payment is not reasonably related to the costs the employer incurred for training the worker.

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FTC's Proposed Rule on Non-Competes

- The FTC's proposed rule does not apply to a substantial owner, member or partner "holding at least a 25% ownership interest in a business entity."

- A "worker" impacted by the proposed rule is a "natural person who works, whether paid or unpaid, for the employer." This includes an employee, individual classified as an independent contractor, extern, intern, volunteer, apprentice, or sole proprietor who provides services to a client or customer.
    - The term "worker" does not include a franchisee in the context of a franchisee-franchisor relationship but does include an employee who works for the franchisor or franchisee.

- The proposed rule does not apply to a non-compete clause that is entered into by a person who is selling a business entity or otherwise disposing of the person's ownership interest in the business entity, or by a person selling all or substantially all of a business entity's operating assets, when the person restricted by the non-compete clause is a substantial owner, member, or partner in the business entity at the time the person enters into the non-compete clause.

FTC's Proposed Rule on Non-Competes

- The proposed rule would apply retroactively and requires employers to do the following:
  - **Existing non-competes**: Employers must rescind existing non-competes.
  - **Notice**: Employers must provide notice to the worker that the worker's non-compete clause is no longer in effect and may not be enforced against the worker within 45 days.
    - This notice must be given to former and current employees.
    - The FTC has proposed "model language" that constitutes sufficient notice under the new rule.
  - **Safe harbor**: Employers who comply with the rescission requirement under the rule enjoy a safe harbor.
- The FTC is set to vote on the proposed rule this April.
  - Goes into effect 180 days after the final rule is published.

NLRB's Continued Protection of Employee Conduct - *McLaren*

- In 2023, the NLRB decided a pivotal case that overturned its 2020 decision in *Baylor University Medical Center and IGT d/b/a International Game Technology*, which held that offering similar severance agreements to employees was not unlawful, by itself.
    - *McLaren's* holding required the employer to "cease and desist" from presenting the permanently furloughed employees with a severance agreement that prohibited them from making "statements to the [employer's] employees or to the general public which could disparage or harm the image of [the] employer … or from disclosing the terms of the severance agreement to 'any necessary third person, other than spouse, or as necessary to professional advisors for the purposes of obtaining legal counsel or tax advice, or unless legally compelled to do so by a court administrative agency…'"
- The *McLaren* decision generally does not apply to managers or supervisors.

NLRB's Continued Protection of Employee Conduct - *McLaren*

- **Confidentiality Agreement.** The Employee acknowledges that the terms of this Agreement are confidential and agrees not to disclose them to any third person, other than spouse, or as necessary to professional advisors for the purposes of obtaining legal counsel or tax advice, or unless legally compelled to do so by a court or administrative agency of competent jurisdiction.

- **Non-Disclosure.** At all times hereafter, the Employee promises and agrees not to disclose information, knowledge or materials of a confidential, privileged, or proprietary nature of which the Employee has or had knowledge of, or involvement with, by reason of the Employee's employment. At all times hereafter, the Employee agrees not to make statements to Employer's employees or to the general public which could disparage or harm the image of Employer, its parent and affiliated entities and their officers, directors, employees, agents, and representatives.

NLRB's Continued Protection of Employee Conduct - *McLaren*

- Key Takeaways:
  - Merely offering a severance agreement containing unlawful confidentiality/non-disparagement provisions violates the NLRA.
  - Likely would apply to non-disparagement and confidentiality language in commission agreements, non-disclosure agreements, and employment agreements.
- Open Issues:
  - Can disclaimer language in a severance agreement that exempts Section 7 rights cure problems with an agreement's confidentiality and non-disparagement provisions?
  - Will more narrowly drafted non-disparagement and confidentiality language meet the Board's approval?

NLRB's Continued Protection of Employee Conduct – *Stericycle Inc.*

- *Stericylce* overturned the Board's decision in *Boeing*, which held that policies violate the National Labor Relations Act when they could be "reasonably construed" as restricting union organizing and other concerted activity protected under the law.

- The test for evaluating whether an employer's conduct or statements violate Section 8(a)(1) of the Act is whether they have a reasonable tendency to interfere with, restrain, or coerce employees who may engage in activities protected by Section 7.
    - The General Counsel must prove that a rule has a reasonable tendency to interfere with, restrain, or coerce employees who contemplate engaging in protected activity.
    - The Board will "interpret a work rule from the perspective of the economically dependent employee who contemplates engaging in Section 7 activity."

NLRB's Continued Protection of Employee Conduct – *Stericycle Inc.*

- Key Takeaways:
  - Facially neutral workplace policies that could be interpreted to limit employee's rights under section 7 of the NLRA are "presumptively unlawful" unless the employer can prove that the rule advances a "legitimate and substantial business interest" ***and*** that the employer cannot advance that interest with a more narrowly tailored workplace rule.
  - Review employee handbooks and stand alone policies to ensure they are consistent with the new standard under *Stericycle*.
- Open Question(s):
  - As the Dissent pointed out, how might this new standard impede on an employers existing obligations under agency rules and regulations?

NLRB's Continued Protection of Employee Conduct – "Protected Concerted Activity"

- *Miller Plastic Products*, 372 NLRB No. 134 (Aug. 23, 2023).
  - In a 3-1 decision, the Board overruled its 2019 decision in *Alstate Maintenance*, which had narrowed the circumstances in which the Board considered solo protests to be concerted activity and, thus, protected activity under the NLRA.
  - Going forward, whether an employee's conduct is considered protected activity will depend on whether the employee's actions can be characterized as "concerted" based on a review of the "totality of the record evidence," including all surrounding facts and circumstances.
  - The Board's decision in *Miller Plastic* will likely lead to more decisions where an employee's solo action, such as voicing a complaint during a work meeting, is considered protected activity under the NLRA.
  - This decision will also make it more difficult to predict what solo actions are considered protected activity and which are merely personal gripes, as each case will be fact-specific.

NLRB's Continued Protection of Employee Conduct – Advocacy for Non-Union Employees

- *American Federation for Children*, 372 NLRB No. 137 (Aug. 26, 2023).
  - The NLRB overturned a prior Trump-era NLRB decision, *Amnesty International USA* and *Raed Jarrar*, which held that employees did not engage in mutual aid or protection when advocating for non-employees.
  - Now, employees act for "mutual aid or protection" even when the individual for whom they advocate is not a statutory employee under the NLRA.
  - The NLRB also affirmed the "solidarity principle," which stands for the proposition that employees can invoke Section 7 rights for issues affecting non-employees as long as those efforts also help statutory employees.

NLRB's Continued Protection of Employee Conduct

- In May 2023, NLRB General Counsel issued a Memo (GC 23-08) addressing non-compete agreements.
- According to the General Counsel non-compete agreements:
  - "[I]nterfere with employees' exercise of rights under Section 7 of the [NLRA]."
  - "Generally speaking, this denial of access to employment opportunities chills employees from engaging in Section 7 activity because:
    - employees know that they will have greater difficulty replacing their lost income if they are discharged for exercising their statutory rights to organize and act together to improve working conditions;
    - employees' bargaining power is undermined in the context of lockouts, strikes, and other labor disputes; and
    - an employer's former employees are unlikely to reunite at a local competitor's workplace, and, thus be unable to leverage their prior relationships – and the communication and solidarity engendered thereby – to encourage each other to exercise their rights to improve working conditions in their new workplace."
- Except in limited circumstances, "the proffer, maintenance, and enforcement of such agreements violate Section 8(a)(1) of the [NLRA]."

NLRB's Continued Protection of Employee Conduct

- Examples of permissible, narrowly tailored non-compete agreements, according to the General Counsel:
  - Provisions that clearly restrict only individuals' managerial or ownership interests in a competing business; and
  - "[T]here may be circumstances in which a narrowly tailored non-compete agreement's infringement on employee rights is justified by special circumstances."

Expanded Protections for Pregnant and Nursing Employees – PWFA

- The Pregnant Workers Fairness Act (PWFA) is a new federal anti-discrimination law that covers employers (including state and local governments) with 15 or more employees. Requires employers to make "reasonable accommodations" to a worker's known limitations related to pregnancy, childbirth, or related medical conditions, unless the accommodation will cause the employer an undue hardship.

- The PWFA expands upon rights that pregnant workers already have under federal law.
    - For example, Title VII of the Civil Rights Act already protects pregnant workers from being treated worse, harassed, or fired by their employer because they are pregnant. The same also says employers cannot retaliate against workers who complain of pregnancy discrimination.

- Congress passed the PWFA to provide pregnant employees and job applicants with ADA-style protections.
    - When a worker needs a change to the work environment or a change to their job, the employer should engage in the interactive process to ascertain what the employee needs.

Expanded Protections for Pregnant and Nursing Employees - PWFA

- PWFA does not require that employers provide an employee or applicant with the accommodation of his/her choice.
  - For example: An employer cannot require an employee to take leave from work – whether paid or unpaid – if another reasonable accommodation can be provided.

- Employers cannot take an adverse action against employees for requesting or receiving a reasonable accommodation for known limitations related to pregnancy, childbirth, or related medical conditions.
  - The EEOC started accepting PWFA charges on June 27, 2023.
  - The EEOC issued a Notice of Proposed Rulemaking to implement the PWFA. The comment period ended on Oct. 10, 2023.
  - Final regulations expected in 2024.

Expanded Protections for Pregnant and Nursing Employees – "PUMP Act"

- Pumping Breast Milk at Work ("PUMP Act")
  - Under the PUMP Act, most nursing employees have the right to reasonable break time and a place, other than a bathroom, that is shielded from view and free from intrusion to express breast milk while at work. This right is available for up to one year after the child's birth.
- Amends the Break Time for Nursing Mothers Act ("Break Time Act"), which was enacted in 2010 and entitled employees to reasonable break time and a private space, other than a bathroom, in which to pump breastmilk during the workday.
  - Under the FLSA, covered employers are required to provide all employees with reasonable break time and a private space, other than a restroom, in which to pump breastmilk during the workday.

Expanded Protections for Pregnant and Nursing Employees – "PUMP Act"

- Time spent pumping breastmilk is paid working time for purposes of calculating minimum wage and overtime if it is taken during an otherwise paid break or if the employee is not completely relieved from duty.
  - No deductions should be taken from the salary of an exempt employee because of pumping breaks.
- The PUMP Act does not eliminate the "small employer exception" of the Break Time Act.
  - Employers with fewer than 50 employees do not need to comply with the Break Time Act and/or PUMP Act where doing so would create an "undue hardship."
- Remedies: employees may seek monetary remedies in the event that their employer fails to comply with the PUMP Act.
  - Generally, employees are required to provide a notice of an alleged violation and a 10-day period in which to cure the violation before initiating a lawsuit.
- Took effect on December 29, 2022.

FLSA Exemptions and Salary Requirements

- On August 30, 2023, the US DOL submitted proposed revisions to the FLSA regulations that would increase the minimum salary level under the FLSA.
- The revisions would:
  - Increase the FLSA's minimum salary threshold from $684.00 per week to $1,059.00 per week.
    - Employees would need to earn at least $55,068 (up from $35,568) per year to potentially be exempt from overtime pay.
    - The proposed rule ties the minimum salary threshold to the 35th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region (currently the South).

FLSA Exemptions and Salary Requirements

- Significantly increase the total annual compensation threshold for the highly compensated employee exemption from to $107,432 to $143,988 (or $1,059 per week).
- Include a provision that provides for the automatic increase of the minimum salary threshold every three years.

- The DOL sets floor for minimum wage and salary requirements under the FLSA.
  - New York State has higher minimum wage and salary threshold requirements.

Wage and Hour Increases in New York

- In New York State, Governor Hochul recently signed legislation that will incrementally increase the minimum wage as follows:

Date	Downstate	Remainder of New York State
January 1, 2024	$16.00 per hour	$15.00 per hour
January 1, 2025	$16.50 per hour	$15.50 per hour
January 1, 2026	$17.00 per hour	$16.00 per hour

- Because the minimum salary level has historically been set at 75 times the minimum wage rate, we anticipate the New York minimum salary levels for executive and administrative employees will correspondingly increase as follows:

Date	Downstate	Remainder of New York State
January 1, 2024	$62,400 annually / $1,200 weekly	$58,500 annually / $1,125 weekly
January 1, 2025	$64,350 annually / $1,237.50 weekly	$60,450 annually / $1,162.50 weekly
January 1, 2026	$66,300 annually / $1,275 weekly	$62,400 annually / $1,200 weekly

New York Statewide Pay Transparency Law In Effect

- In New York, any employer with 4 or more employees must include the compensation or range of compensation in a job posting or advertisement as well as the description of the position if it exists at the time of the posting.
  - Applies to any job including a promotion or transfer if the job will be physically performed, at least in part, in New York.
  - Also applies to remote job postings if the employee will report to a supervisor, office or other worksite in New York.
  - Pay ranges must include minimum and maximum annual salary that the employer believes, in good faith, to be accurate when the job advertisement is posted. (e.g., $15 an hour and up is not an appropriate salary range).
    - "Good faith" is the range of pay you legitimately believe you are willing to pay at the time of the job posting.
    - Factors include: job market, current employee compensation levels, hiring budget, and the experience and education levels an employer is willing to accept for the role.
- Took effect on September 17, 2023.

New York WARN Act Amendments

- The NY WARN Act notice requirement is triggered when there will be a:
  - Mass Layoff – a reduction in workforce that (a) is not the result of a "plant closing", and (b) results in an employment loss at a single site of employment during any 90-day period for at least:
    - 250 employees (excluding part-time employees); or
    - 25 employees (excluding part-time employees) that constitute at least 33% of the employees at that site (excluding part-time employees).
  - Plant Closing – the permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss during any 90-day period at such site for at least 25 employees (excluding part-time employees).
  - Relocation – the removal of all or substantially all of the industrial or commercial operations of an employer to a different location at least 50 miles away from the original site of operations, where 25 or more employees (excluding part-time employees) suffer an employment loss.
    - Relocation of all or substantially all of the operations of an employer includes the relocation of an entire unit, product line, division, or other segment of the employer's operation.

New York WARN Act Amendments

- Again, the NY WARN Act notice must be provided to:
  - The New York Commissioner of Labor;
  - The local Workforce Investment Board;
  - Each affected employee; and
  - Each representative of an affected employee (i.e., union).
- The recent WARN Act Amendments added the following recipients:
  - The chief elected official of the unit or units of local government where the site of employment is located.
  - The school district or districts where the site of employment is located.
  - The locality that provides police, firefighting, emergency medical or ambulance services, or other emergency services, to the locale where the site of employment is located.
    - Where two or more villages, towns, cities, counties, or a combination thereof provide these services, each locality that provides the services must be notified.

New York WARN Act Amendments

- The notice to the Commissioner must now also include:
  - business addresses and email addresses for the employer's and employees' agents;
  - the personal telephone numbers, personal email addresses (if known), work locations, part-time/full-time status, method of payment (i.e., hourly, salary, or commission basis), and union affiliation for each affected employee;
  - the total number of full-time employees in NYS and at each affected site, as well as the number of affected employees at each affected site; and
  - the total number of part-time employees in NYS and at each affected site, as well as the number of affected employees at each affected site.

- Notice to affected employees must also include relevant information known at the time of the notice, such as information on severance packages or financial incentives if the employee remains and works until the effective date of the layoff, available dislocated worker assistance, and, if the planned action is expected to be temporary, the estimated duration.

New York WARN Act Amendments

- Employer Coverage – the definition of a covered employer has been expanded to include employees who work remotely but are "based at the employment site."

- Revisions to Sale-of-Business and Faltering-Company Exceptions:
  - Sellers will not have an obligation to give a notice if the transfer of employees in the sale is a good-faith condition of the purchase agreement, and the buyers does not uphold that condition.
    - In that scenario, the buyer would be responsible for providing notice.
  - Additionally, NY WARN's exceptions, which permit an employer in some cases to give less than the full 90 days' notice to affected employees, remain in place except:
    - The faltering company exception is now applicable only to plant closings (mirroring the federal WARN Act).
    - The unforeseeable business circumstances exception now include:
      - Public health emergencies, such as a pandemic, that result in a sudden and unexpected closure, and
      - A terrorist attack directly affecting operations.

New York WARN Act Amendments

- New Process for Claiming Eligibility for a NY WARN Exception:
  - Employers must now submit a request to the Commissioner of Labor to be considered eligible for an exception, within 10 business days of the required WARN notice being provided to the Commissioner, unless an extension of time is granted.
  - Employers must also provide documentation to demonstrate the applicability of the exception, including:
    - a statement explaining the reasons for the layoff, closure, or hours reduction;
    - a description as to why a shorter notice period is required; and
    - an affidavit signed under penalty of perjury confirming the documents are true and correct, among other documentation.
  - The Commissioner will then conduct an investigation and determine whether the employer qualifies for the exception.
  - If the Commissioner determines that the employer failed to establish the elements of an exception, the Commissioner will proceed to an enforcement action and determine the employer's liability for violating the NY WARN Act.

New Statewide Freelance Isn't Free Act

- On November 22, 2023, Governor Hochul signed Bill 5026 into law, a statewide "Freelance Isn't Free Act" (FIFA).
  - New York City first adopted a local FIFA in October 2016, the local law took effect in May 2017.
  - Protects freelance workers by requiring timely payment under contracts or "work for hire" (no later than 30 days) and requires that freelance agreements be in writing.
  - Prohibits retaliation
- The law applies to "freelance worker[s]," defined as individuals or organizations, "whether or not incorporated or employing a trade name," who are "hired or retained as an independent contractor by a hiring party to provide services in exchange" for compensation of at least $800, or $800 in aggregate over a period of 120 days.

New Statewide Freelance Isn't Free Act

- The law excludes contracts with:
  - sales representatives;
  - attorneys, or "any person engaged in the practice of law;"
  - licensed medical professionals; and
  - construction contractors.
- The law further defines a "[h]iring party" as "any person who retains a freelance worker to provide any service," aside from federal, state, and municipal government offices.
- Aggrieved workers or their "authorized representatives" to file a complaint with the Commissioner of Labor if the FIFA has been violated.
  - The Department of Labor will provide model contracts on its website for freelancers and hiring parties to use with terms that comply with FIFA.
- Law goes into effect on May 20, 2024.

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Employee Electronic Monitoring & Privacy

- Took effect on May 7, 2022.
- Requires all private-sector employers, regardless of size, with “a place of business in” New York State to notify employees of their electronic monitoring practices.
  - Specifically, employers must provide “prior written notice upon hiring,” which “shall be in writing, in an electronic record, or in another electronic form,” if the employer engages in monitoring or intercepting employees’ telephone, email, and internet access usage.
- Employers must also post the notice of electronic monitoring in a conspicuous location which is easily visible to all employees who are subject to the electronic monitoring.
- The law does not apply to processes that are:
  - Designed to manage the type or volume of incoming or outgoing email, voicemail, or internet usage;
  - Not targeted to monitor or intercept electronic activities of a particular individual; and
  - Performed solely for computer system maintenance and/or protection.

Employee Electronic Monitoring & Privacy

- The law does not prohibit management from monitoring employees' electronic communications. An employer retains the right to monitor employees' telephone, computer, and internet access and usage, so long as the employer informs the employees of such electronic monitoring.

- The New York State Attorney General has exclusive authority to enforce this new law.
  - Employers who are found to be in violation of the law will be subject to a maximum civil penalty of $500 for the first offense, $1,000 for the second offense, and $3,000 for the third and each subsequent offense.
  - Employees will not have a private right of action to commence a lawsuit under the new statute.

Employee IP Rights - Inventions

- On September 15, 2023 Governor Hochul signed into law Bill 5640 which restricts an employer's right to certain inventions an employee makes on their own time.
  - Specifically, the law makes unenforceable employment agreements that "require an employee to assign certain inventions that are made on the employee's own time and which do not use the employer's equipment, supplies, facilities, or trade secret information shall be unenforceable."
  - Exemptions: Inventions created on the employee's own time/equipment that:
    - At the time of conception or reduction to practice, relate to the employer's business, actual research or development, or anticipated research or development, ***or***
    - Result from the work that the employee performs for the employer.
- The law invalidates overbroad assignment of invention assignments but does not provide aggrieved employees with a private right of action.
  - Employers who violate the law are subject to fines and guilty of a misdemeanor under the Labor Law.
  - Took effect immediately upon signing.

Required Postings Must Be Available Electronically

- Effective December 26, 2022, Section 201 of the New York Labor Law requires employers to make all mandatory workplace postings available to employees electronically.
    - Previously, Section 201 required employers to post hard copies of New York State Department of Labor notices and posters in conspicuous places at the worksite.
    - The amendment added language requiring all such postings – as well as any other "document[s] required to be physically posted at a worksite pursuant to state or federal law or regulation" – also be provided to employees electronically.
- Specifically, employers must provide these postings "through the employer's website or by email."
- Employers are also required to provide notice to employees "that documents required for physical posting are also available electronically."

Wage Underpayments are Now Criminal Larceny in NY

- On September 6, 2023, Governor Hochul signed the Wage Theft Accountability Act (S2832-A/A154-A).
    - The Act took effect immediately upon signing.
- The Act amends the New York Penal Law to add “wage theft” to the types of activities included in the crime of larceny.
- Under the Act, wage theft means: “A person obtains property by wage theft when he or she hires a person to perform services and the person performs such services and the person does not pay wages, at the minimum wage rate and overtime, or promised wage, if greater than the minimum wage rate and overtime, to said person for work performed. In a prosecution for wage theft, for the purposes of venue, it is permissible to aggregate all nonpayments or underpayments to one person from one person, into one larceny count, even if the nonpayments or underpayments occurred in multiple counties. It is also permissible to aggregate nonpayments or underpayments from a workforce into one larceny count even if such nonpayments or underpayments occurred in multiple counties.

Wage Underpayments are Now Criminal Larceny in NY

- Employers can be charged with larceny if they do not pay wages at the minimum wage rate and overtime rate, or the promised wage rate (if greater), to an employee for work performed.
- The law allows aggregation of all non-payments or underpayments to one person from one person into one larceny count.
- The law also allows aggregation of all non-payments or underpayments from a workforce (defined as a group of one or more persons who work in exchange for wages) into one larceny count.

Employee's Right to Refuse a "Captive Audience" Meeting

- On September 6, 2023, Governor Hochul signed a Bill 4982, banning businesses from requiring employees to attend meetings or listen to communications where the "primary purpose" of such meetings or communications is for management to voice its views on certain religious matters or political matters, including joining a labor organization ("captive audience meetings").
  - Defines "political matters" to include the decision on whether to support or join a labor organization.
  - Defines "religious matters" to include religious affiliation and practice and the decision to join or support any religious organization or association.
- The new law does not prohibit:
  - Employers from communicating any information the employer is required to communicate by law, or that is necessary for the employee to perform his or her job duties;
  - Casual conversations between employees or between the employer (or an agent of the employer) and an employee so long as participation in the conversation is not required; or
  - A requirement that is only applicable to the employer's supervisors or managers.

Notice of Unemployment Insurance Eligibility is Required

- On September 14, 2023 Governor Hochul signed into law, an amendment to the Labor Law, requiring employers to provide a written notice of their right to file for unemployment insurance benefits.
    - Applies to employees who have been terminated or whose hours have been reduced.
- The law provides that an employer must notify employee's of their right to file an application for unemployment insurance benefits "at the time of each permanent or indefinite separation from employment, reduction in hours, temporary separation, and any other interruption of continued employment that results in total or partial unemployment."
    - Partial unemployment occurs when an employee works less than 30 hours in a week ***or*** earns less than $504 in a week, including seasonal employment.

Notice of Unemployment Insurance Eligibility is Required

WE ARE YOUR DOL

Department of Labor

Unemployment Insurance Division

Record of Employment

(For Unemployment Insurance purposes only.)

Employer: Complete and give this form to each worker who is permanently, indefinitely, or temporarily laid off; discharged; quits; or has their hours reduced to 30 or less each week.

Date given to employee:
□□/□□/□□□□

NYS Employer Registration No.:
□□-□□□□□

Federal Employer Identification No.:
□□-□□□□□□□

Employer Name:_____

Payroll Records are kept at:

Street:_____

Street:

City:_____ State:_____ Zip:_____

Optional if needed by employer to locate employee record:

Payroll or Clock No.: _____ Location of employment or code: _____

Employee: Keep this certificate. Have it with you if you apply for Unemployment Insurance (UI) benefits. This certificate shows that your job was insured. It does not necessarily mean you qualify for benefits. The UI Claims Center will make that determination if you apply. Please complete the following:

Your Name: _____ Social Security No.:□□□-□□-□□□□

This may not be used as an identification card.

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How to Apply For New York State Unemployment Insurance

Unemployment Insurance is temporary income for eligible workers who are out of work through no fault of their own. It provides them a weekly benefit while they look for work. If you become unemployed and want to apply for Unemployment Insurance benefits, apply online at www.labor.ny.gov for a quick and convenient way to file your claim or call the Telephone Claim Center toll free at (888) 209-8124.

Have the following information available when you apply:

1. Your Social Security number.
2. A valid New York State driver's license or Non-Driver Photo Identification Card number (if you have either one).
3. Your complete mailing address and ZIP code.
4. A telephone number, including area code, where we can contact you Monday through Friday between 8:00 am and 5:00 pm Eastern Time.
5. Your Alien Registration Number (A#) or USCIS Number, if you are not a United States citizen.
6. Details about your employment for the last 18 months:
   - Employer names, addresses, and phone numbers (including out-of-state employers)
   - NYS Employer Registration Number or Federal Employer Identification Number (FEIN) for each employer. The FEIN can be located on your W-2 form(s).
   - Your total gross earnings (before any deductions) for each employer. You may be asked for pay stubs, W-2 forms, or other payment records.
7. A copy of your Notice to Federal Employee about Unemployment Insurance, Form SF8, if you have employment with the federal government.
8. Form DD-214, member copy 4, if you have military employment. (If member copy 4 is not available, you may use copy 2-3, or 5-8, or DD-215. You can request a DD-214 through the U.S. National Archives and Records Administration website at: http://www.archives.gov/st-louis/military-personnel/standard-form-180.html.
9. A blank personal check so you may enter your bank routing and checking account numbers, if you want direct deposit of your weekly benefits. **The fastest way to receive your benefits is through direct deposit.**

You can file a claim without all of these documents. However, missing information could delay your first payment.

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New “Clean Slate Act” Will Affect Employer Hiring Practices

- Employers have existing obligations under the Fair Credit Reporting Act and Article 23-A of the Corrections Law regarding the consideration of an employee’s criminal history in employment decision making.

- On November 16, 2023, Governor Hochul signed into law the “Clean Slate Act” which requires certain records of past criminal convictions be sealed.

- The Clean Slate Act is “triggered” when an individual:
  - With a misdemeanor conviction, and it has been at least 3 year since the individual’s release from incarceration or the imposition of the sentence if no incarceration occurred
  - With a felony conviction, and it has been at least 8 years since the date the individual was released from incarceration if:
    - The individual does not have a criminal charge pending, and
    - The individual is not under the supervision of any probation or parole.
  - Does not apply to class A felonies (where a maximum sentence of life imprisonment may be imposed) and convictions requiring registration as a sex offender.

New “Clean Slate Act” Will Affect Employer Hiring Practices

- Provides a private right of action for aggrieved individuals and allows for damages against the person who disclosed the sealed conviction where:
  - There was a duty of care owed to the individual with a sealed conviction,
  - The person knowingly and willfully breached that duty
  - Disclosure caused injury, and
  - The breach of that duty was a substantial factor in the events that cause the injury
- Goes into effect on November 16, 2024.

New Year, New Statute of Limitations for SDHR Proceedings

- Previously, Complainants who filed with the New York State Division of Human Rights ("Division") had three-years to bring sexual harassment claims only.
  - The Division is the administrative agency that investigates and enforces New York State's Human Rights Law.

- On November 17, 2023, Governor Kathy Hochul signed into law Senate Bill S.3255, which amended Section 297-5 of the New York Executive Law extending the statute of limitations, from one year to three years, for all complaints of unlawful discrimination. These claims are generally filed with the Division.
- Such claims include discrimination based on a "protected class" such as:
  - Race,
  - Creed,
  - Color,
  - National origin,
  - Military status,
  - Sex,

New Year, New Statute of Limitations for SDHR Proceedings

- Protected class, continued:
  - Age,
  - Marital status,
  - Citizenship and immigration status,
  - Domestic violence victim status,
  - Disability,
  - Pregnancy-related condition,
  - Predisposing genetic characteristics,
  - Prior arrest or conviction record,
  - Gender identity or expression,
  - Familial status, and
  - Retaliation for opposing unlawful discriminatory practices.
- The new statute of limitations period goes into effect on February 15, 2024.

More Changes Applicable to SDHR Proceedings

- Private settlements after a finding of probable cause will not be accepted for cases filed after October 12, 2021. If you reach a settlement, you must use the Division's Stipulation of Settlement (or, at a minimum, negotiate with the Division concerning any potential changes). The language contained in the Division's Stipulation of Settlement has been approved by the Commissioner and generally must be strictly followed by the parties.

- After a probable cause determination, a complainant's attorney will be required to state in writing why they are seeking a discontinuance and, if the reason is private settlement, the discontinuance will not be granted. Parties will be encouraged to either settle the matter through an order after stipulation that indicates the terms of the settlement or to proceed through the agency's public hearing process.
  - The Division will continue to allow voluntary dismissals on the basis of settlement prior to a finding of probable cause—at least where the complainant is represented by private counsel.

- Information regarding private settlements can be found on the Division's website: https://dhr.ny.gov/law-2021

New Requirements for Settlement Agreements

- On November 17, 2023, Governor Hochul signed Bill S4516 into law, which amended the General Obligations Law in connection with settlement agreements involving claims of discrimination, harassment, or retaliation.

- Under the General Obligations Law, settlement agreements, the "factual foundation of which involves discrimination, harassment, or retaliation" may not:
  - Require the complainant to forfeit any consideration for the agreement if the complainant violates the nondisclosure or non-disparagement clause;
  - Require the complainant to pay liquidated damages if the complainant violates the nondisclosure or non-disparagement clause; or
  - Include or require an affirmative statement or disclaimer that the complainant was not subject to unlawful discrimination, including discriminatory harassment or retaliation.
- Settlement agreements with the above language are unenforceable.
  - Employers may still be required to pay the settlement amount.

New York City, Amendments to Local Code

- On November 22, 2023, New York City's new law banning employers from discriminating against applicants and employees based on their height or weight took effect.

- The law does not apply to:
  - Employers that consider height or weight in employment decisions when required by federal, state or local law and/or regulation.
  - Permitted uses under the NYC Commission on Human Rights and under circumstances where height and weight may prevent a person from performing essential requirements of a job and no alternative is available, or because height or weight criteria is reasonably necessary for the normal operation of the business.

New York City Changes to Safe and Sick Time Regulations

- On October 15, 2023, the NYC Department of Consumer and Worker Protection adopted amended rules for NYC's Earned Safe and Sick Time Act ("ESSTA").

- The changes include:
  - Clarifying employer size is determined based on the employer's total number of employees nationwide, and that employer size during a given calendar year is determined by counting the highest total number of employees concurrently employed at any point during the calendar year;
  - That part time employees must be considered employed each working day of the calendar week;
  - Employees who are jointly employed are counted by each employer; and
  - Clarified how ESSTA applied to remote employees
- Took effect on October 15, 2023

Practical Considerations for Employers

- Review existing handbooks, policies, severance agreements, settlement agreements, employment agreements and any other agreement used between employers and employees.

- Update handbooks and policies to reflect recent legal changes and anticipated changes.

- **Remain Informed**: While some laws are not currently in effect or were vetoed, they could make their way back in the upcoming legislative session. Additionally, some laws and regulations will not go into effect or be finalized until later this year.
    - Note: Political considerations tend to dictate certain changes at the federal level (e.g., New President generally means new Federal Agency Board members).
- Consult and engage counsel.

Questions?

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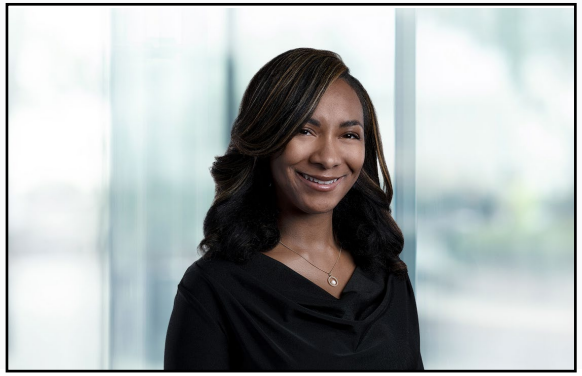

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