

The Ever Changing Landscape of Investigating and Defending Discrimination, Harassment, and Retaliation Complaints

Labor and Employment Webinar Series
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Elizabeth D. McPhail, Esq.
Christopher Massaroni, Esq.
Melissa J. Kathan, Esq.

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Agenda

- Statutory overview of Discrimination, Harassment, & Sexual Harassment Claims
 - Federal, Local, & State
 - Recent Trends
- Addressing Employee Claims of Discrimination, Harassment & Retaliation
 - Investigations
 - Discipline/Discharge
- Litigating Claims of Discrimination, Harassment & Retaliation
 - COVID impacts on administrative proceedings and courts
 - Impact of NYS Legislation

Statutory Overview

Discrimination Claims

Federal Statute Overview

- Title VII of the Civil Rights Act of 1964 (Title VII)
 - Race, color, sex (including pregnancy, gender identity, sexual orientation), national origin, religion
- Section 1981 of the Civil Rights Act of 1866 (Section 1981)
 - Race, color, ethnicity
- Title I and Title V of the Americans with Disabilities Act (ADA) & Americans with Disabilities Act Amendments Act (ADAAA)
 - Disability
- Rehabilitation Act (Rehab Act)
 - Disability in federal employment, federal contracts/certain subcontractors, and employers that receive federal funds
- Age Discrimination in Employment Act (ADEA)
 - Age of 40+

Federal Statute Overview

- Equal Pay Act (EPA)
 - Sex-based wage
- Genetic Information Nondiscrimination Act (GINA)
 - Genetic information
- Uniformed Services Employment and Reemployment Rights Act (USERRA)
 - Past, current, or prospective military service
- Immigration Reform and Control Act (ICRA)
 - Citizenship, national origin by certain employers, over-documentation in employment eligibility verification process

State Statute Overview

- New York State Human Rights Law
 - New York Executive Law Sections 290-301
 - Generally greater protections than federal law
 - Employers of ANY size
 - Generally protects: employees, applicants, interns, independent contractors
 - Sexual harassment and all other harassment-related claims: domestic workers, including housekeepers and babysitters
 - Generally does not protect: employees where employer is parent, spouse, or child.

State Statute Overview

- Bringing Claims
 - No exhaustion of administrative remedies
 - Statute of Limitations:
 - New York State Division of Human Rights:
 - Until August 12, 2020: 1 year after alleged unlawful discriminatory practice
 - As of August 12, 2020: 1 year, but 3 years for sexual harassment claims
 - New York State Courts
 - 3 years after alleged unlawful discriminatory practice

New York State Human Rights Law

■ Protected Categories:

1. Age
2. Color
3. Creed
4. Mental and physical disability
 - Gender dysphoria
 - Similar gender-related conditions
5. Familial status
 - Pregnant, has a child, in process of securing legal custody
6. Gender identity or expression, including status as transgender individual
7. Marital status
8. Military status
9. National origin, including ancestry
10. Predisposing genetic characteristic
11. Race
 - Traits historically associated with race including **hair texture & protective hairstyles** such as braids, locks, and twists
12. Sex, including pregnancy
13. Sexual orientation, including actual or perceived:
 - Heterosexuality, homosexuality, bisexuality, asexuality
14. Domestic violence victim status
15. Religion
 - Wearing of **any attire, clothing, or facial hair**
16. Sometimes: arrest records, past convictions

Local Statute Overview

New York City Human Rights Law:

- Age.
 - Alienage or citizenship status.
 - Caregiver status.
 - Color.
 - Creed.
 - Disability.
 - Gender, including the individual's actual or perceived sex and the individual's:
 - gender identity;
 - self-image;
 - appearance;
 - behavior; or
 - expression.
 - Marital status.
 - National origin, including ancestry.
 - Partnership status (meaning an individual's status as a domestic partner under New York City law).
 - Race.
 - Sexual orientation, including:
 - heterosexuality;
 - homosexuality; and
 - bisexuality.
 - Sexual and reproductive health decisions.
 - Unemployment status.
 - Uniformed service status.
 - Association with someone because of that person's actual or perceived:
 - age;
 - alienage or citizenship status.
 - color;
 - creed;
 - disability;
 - national origin;
 - race;
 - uniformed service status; or
 - sexual orientation.
- (N.Y.C. Admin. Code §§ 8-102 and 8-107.)

Statutory Overview

Harassment & Sexual Harassment Claims

Harassment

- Harassment is a prohibited form of discrimination under Title VII of the Civil Rights Act of 1964
- Case Law establishes two (2) forms of harassment applied in sexual harassment cases:
 - Quid Pro Quo
 - Hostile Work Environment

Harassment under NYSHRL

- An individual alleging a harassment claim:
 - Must prove that the conduct alleged rises above “petty slights or trivial inconveniences”
 - Does not need to prove that other individuals outside of claimant’s protected class were treated more favorably
 - *prior to Oct. 2019: the standard was “severe or pervasive” & allowed for employers to rely on *Faragher-Ellerth defense*
- Harassment is deemed unlawful “when it subjects an individual to inferior terms, conditions or privileges of employment because of the individual’s membership in one or more... protected categories.” This is true “regardless of whether such harassment would be considered severe or pervasive under precedent applied to harassment claims.”
 - An employee’s failure to make a complaint about the harassment to the employer “shall not be determinative” of whether the employer is liable.
 - The NYSHRL be construed liberally in favor of employees, “regardless of whether federal civil rights laws, including those with provisions worded comparably to [the NYSHRL], have been so construed.”

Sexual Harassment under NYSHRL

- Sexual harassment is a form of gender discrimination and includes harassment on the basis of sex, sexual orientation, self-identified or perceived sex, gender expression, gender identity, and the status of being transgender.
- Sexual harassment includes unwelcome conduct that is either:
 - Of a sexual nature; or
 - Directed at an individual because of that individual's sex when:
 - Submission to conduct is made (either explicitly or implicitly) a term or condition of an individual's employment.
 - Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual.
 - Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment.
 - Such conduct subjects an individual to inferior terms, conditions, or privileges of employment.

Sexual Harassment, cont'd.

- Hostile Work Environment Sexual Harassment:
 - Manager, co-worker or another who has contact “on the job” creates an intimidating, hostile work environment; interferes with work performance through words/deeds related to victim’s gender.
 - The working environment is so sexually polluted that it interferes with the psychological well-being of the employee.

Sexual Harassment, cont'd.

- Quid Pro Quo Sexual Harassment (“this for that”):
 - Threatening action usually between manager and subordinate where sexual favors are demanded or retaliation such as demotion or termination is implied.
 - Includes:
 - Offering or granting better working conditions or opportunities in exchange for a sexual relationship;
 - Threatening adverse working conditions (like demotions, shift alterations or work location changes) or denial of opportunities if a sexual relationship is refused;
 - Using pressure, threats or physical acts to force a sexual relationship; or
 - Retaliating for refusing to engage in a sexual relationship.

Training Requirements

- ALL New York employers (regardless of size) must conduct interactive sexual harassment prevention training that includes:
 - Explanation of sexual harassment
 - Examples of conduct constituting unlawful sexual harassment
 - Information regarding the federal and state statutory protections, remedies available under these statutes, information regarding employee's rights of redress and all available forums for seeking relief, and supervisor conduct and additional supervisor responsibilities.
- Conduct training annually
 - Conduct new-hire training as soon as possible
- May be web-based and not live

What Is Not Harassment or Discrimination

- It is not unlawful to treat employees differently based upon legitimate, non-discriminatory reasons (e.g., work performance).
- There is no law against bullying in the workplace.
 - Such laws have been proposed in the past, but have not been enacted.
- It is not harassment or discrimination for supervisors to manage – or even “micro-manage” – their subordinates on an even-handed basis.
- It is not harassment or discrimination for managers to request/direct employees to perform work tasks within their job description.
- However, treating individuals differently or harassing anyone based on any protected characteristic is **unlawful** under federal and state anti-discrimination and anti-harassment laws.

Statutory Overview

Retaliation Claims

Retaliation

- Any employee engaged in “protected activity” is protected by law from being retaliated against.
- Protected activities include:
 - making a complaint about discrimination or harassment or suspected discrimination or harassment;
 - providing information during an investigation; and
 - testifying in connection with complaint.

Retaliation, cont'd.

- Retaliation is any action taken to alter an employee's terms and conditions of employment **because** that individual engaged in protected activities.
- Retaliation can be any adverse action that could have the effect of discouraging a reasonable worker from making a complaint about discrimination or harassment, and may include
 - Sudden adverse change in work schedule or location
 - Demotion
 - Termination

Statutory Overview

Claims: Processes & Trends

Claims & Trends

- Often cross-filed among New York State Division of Human Rights (NYS DHR) and Equal Employment Opportunity Commission (EEOC)
 - Generally petition one agency to adopt findings of the other
- Claimants often raise multiple allegations in one claim of a mix of discrimination, harassment, and retaliation
- Expect to see an increase in cases brought directly to New York State with increase statute of limitations
- COVID-19 Litigation
- Documentation is crucial in defending claims

Addressing Employee Claims

Investigations

Complaints

- Complaints pursuant to Harassment, Discrimination, Retaliation Policy
 - Verbal
 - Written – on form, or via email, letter, etc...
- Complaints to Supervisors

Complaints - Supervisors' Responsibilities

- Supervisors and managers must report any sexual harassment that they observe or know of.
 - Even if no one is objecting to the conduct.
 - Even if the supervisor/manager thinks the conduct is trivial.
 - Even if the harassed individual asks that it not be reported or to keep complaint “confidential”.
- Supervisors/managers will be subject to discipline for failing to report suspected sexual harassment or otherwise knowingly allowing sexual harassment to continue.
- Supervisors/managers will also be subject to discipline for engaging in any unlawful retaliation.

Complaints - Scenarios

■ Scenario 1:

- An employee sends an email to their supervisor claiming that she did not receive the training manual provided to other male co-workers and she believes this is because she is female.
- This email constitutes a complaint of sexual harassment. True or False
- The supervisor has an obligation to report this to human resources. True or False

■ Scenario 2:

- Employee A is close friends with Employee B. Coincidentally, Employee B is the plant manager. Employee A asks Employee B for advice because one of his co-workers referred to him using a racial slur. Employee A does not want to make it in to a “big deal,” but wants Employee B’s advice about how to neutralize the behavior.
- Employee A has a reasonable expectation that Employee B will keep this issue confidential. True or False

Investigation of Complaints

- Employers must investigate **any** report of harassment, discrimination and/or retaliation it receives.
 - NY Law: Under the longstanding *Faragher-Ellerth* defense, an employer could defeat a harassment claim if (i) it attempted to prevent and correct the harassing conduct and had an internal complaint procedure; and (ii) the employee unreasonably failed to take advantage of preventative and corrective opportunities provided by the employer. The new law provides that an employee's failure to make a complaint about the harassment to the employer "shall not be determinative" of whether the employer is liable. The law instead adds a narrow affirmative defense if the employer can establish that "the harassing conduct does not rise above the level of what a reasonable victim of discrimination with the same protected characteristic would consider petty slights or trivial inconveniences."
 - Still a valid defense to a claim brought pursuant to Title VII
 - Also, even under NY Law, it will likely be factually persuasive for an employer to have commenced a timely investigation and have taken remedial action, when warranted
 - Moreover, an employer may actually be able to effectively address and remedy harassment to an extent that will appease the complaining employee

Investigation of Complaints (con't)

- Who Should Complete the Investigation?
 - Internal human resources professional
 - Legal counsel
 - Outside human resources professional
- Consider privileged issues
- Who will be present for the company's investigatory interviews?

Investigation of Complaints (con't)

- Investigations will be kept confidential to the extent possible.
 - Investigator must interview necessary witnesses to complete and full investigation
 - Avoid “town hall” meetings regarding claims of harassment, discrimination and retaliation
 - How will we manage the rumor mill and “buzz” of the internal investigation?
- All employees are required to fully cooperate with any investigation.
 - Consider highlighting this point to all employees, supervisory and otherwise, during annual training
 - Employees should have no expectation that participation and cooperation is optional
 - Can we assure an employee witness that their participating will not have consequences for employment?

Investigation of Complaints (con't)

- The 5 Ws: Who, What, Where, Why and When
- The 6th W: WITNESSES
 - To substantiate a claim of harassment, discrimination, and/retaliation, it is important to understand the details of the claim AND to have witnesses who can substantiate the claim – if it is just a “he said/she said,” employers find themselves doing a very difficult credibility analysis

Investigation of Complaints (con't)

- While the process may vary from case to case depending on the circumstances, an investigation of a report of sexual harassment or other violation of this policy will generally include the following steps:
 - Conduct an immediate review of the allegations and take any appropriate interim action.
 - Relevant documents and electronic communications will be collected and reviewed.
 - Interview the complainant, witnesses, and accused.
 - Create confidential written documentation of the investigation.
 - Notify the complainant(s) and the alleged harasser(s) that the investigation has concluded and any other relevant information where appropriate.
 - Implement any corrective action.

Investigation of Complaints (con't)

- Documentation of the Results of the Investigation
 - Investigation Report
 - Who is provided access to the report?
 - How do you report the results of the investigation to the accused and the accuser?
- Best Practices in Reporting back to Accuser at the Conclusion of the Investigation
 - Do not provide a copy of the full report (unless your policy requires that reporting, and if so, consider revising policy)
 - This report is the employer's property
 - Be mindful, however, when drafting that it may be helpful to provide this document at some future date to an administrative agency and/or that it could be discoverable in future litigation
 - Do make a timely report back to the accuser, including:
 - Results of the complaint – substantiated or unsubstantiated
 - If substantiated, indicate that corrective action will/has been taken (but do not provide specificity)
 - Advise employee of the protections against retaliation, and the employee's obligation to timely report any complaints of additional harassment, discrimination, or retaliation

Investigation of Complaints (con't)

■ Impact of the Coronavirus Pandemic

- Witness Availability
 - Are witnesses available for in-person interviews?
 - Are witnesses available through some virtual means, and to what extent do various witnesses have technological capabilities
 - It is possible to assess credibility when accuser, witnesses, and accused are interviewed remotely?
 - Can you still get a signed statement from accused, witnesses, and accused? And does securing necessary documentation delay the timely completing of the investigation?

- Documents
 - Are personnel file documents, emails, and other hard copy or electronic documents available to the investigator given the constraints of work from home arrangements

Investigations -- Scenarios

■ Scenario 1

- Employee A makes a claim of discrimination on the basis of age. He claims that Employees B, C and D have made comments about being “long in the tooth” and that his generation “cannot be expected to get computers” – meaning he is not adept at technology. Employee A reports that Employees E, F and G overheard the comments. The HR Director interviewed Employee A, and based on his complaint, interviewed Employees B, C, D, E, F, and G. The HR Director could not corroborate any of Employee A’s claims and so she held a meeting with all of the employees on the shift, almost 100 people, to see if anyone had overheard the claimed comments.
- The HR Director was probably right to share Employee A’s complaint with the entire shift to be sure she was able to “get to the bottom” of the allegations. True or False
- Employees B and C said they did not want to get in the middle of this issue and declined to be interviewed. This was misconduct that could result in disciplinary action against Employee B and C. True or False

Investigations -- Scenarios

■ Scenario 2

- In scenario 1, Employee A makes a claim of age discrimination, but he does not specify the comments allegedly made or by whom. He just says “I know this Company is out to get me because I am older.” The HR Director who is completing the investigation takes Employee A’s statement, but she does not ask about the content of any comments made to Employee A or who he alleges made these statement.
- Since Employee A did not identify any witnesses, the HR Director concluded the complaint was unsubstantiated. The HR Director complete a sufficient investigation because she interviewed Employee A. True or False
- The HR Director should have asked the 6 Ws: Who, What, Where, Why, When, and Witnesses. True or False

Investigations -- Scenarios

■ Scenario 3

- Employee X makes a complaint of discrimination on the basis of her religion. After the investigation is complete, the Company advises that her claims were unsubstantiated and accordingly, no additional action will be taken with regard to her claims. Employee X, who is angry, states that she wants to see all of the witness interview statements and the Company's report.
- The Company has an obligation to provide the report to Employee X. True or False
- Employee X gets a lawyer and now the lawyer wants a copy of the report and also a copy of Employee X's personnel file. Now the Company has an obligation to provide both. True or False

■ Scenario 4

- In scenario 3, the Company determines that Employee X did face discrimination on the basis of religion from a supervisor. That supervisor is given a final warning, a 3-day unpaid suspension, and individual training. Employee X, upon learning her complaint was substantiated, demands that the supervisor be terminated.
- Employee X can dictate that the supervisor be terminated? True or False

Investigations – Best Practices

- Document, document, document
- Specifically, document any delays or complications in the investigation created by the impact of the pandemic and work-from-home arrangements on the investigation
- Keep the investigation confidential to the extent possible
- BE TIMELY – even in the face of these difficult times
- Report back to the complainant

Addressing High Risk Employees

Discipline/Discharge

Discipline/Discharge

- Is the employee in a protected classification or classifications?
- If so, is there any connection between the protected classification and the misconduct?
- Has the employee made an internal complaint of harassment, discrimination, and/or retaliation?
- What was the outcome of the internal complaint? Substantiated or unsubstantiated
- What was the timing of the internal complaint versus the timing of the discipline

Discipline/Discharge (con't)

- Documentation.
- Evidence in support of misconduct/performance issues.
- Severity of misconduct/performance issues.
- Treatment of past misconduct/performance issues by employees not in protected classification.

Discipline/Discharge (con't)

- Personnel file
- At-will versus employment agreement
- CBA – “just cause” standard
- Policies

*Discipline/Discharge does not occur in a vacuum

Discharge

- Section 195 Letter

- Pursuant to Section 195(6) of the New York State Labor Law, all employer's shall *“notify any employee terminated from employment, in writing, of the exact date of such termination as well as the exact date of cancellation of employee benefits connected with such termination. In no case shall notice of such termination be provided more than five working days after the date of such termination. Failure to notify an employee of cancellation of accident or health insurance subjects an employer to an additional penalty pursuant to section two hundred seventeen of this chapter.”* (emphasis added)
- Separation date, benefits, and pay
- Company property
- Reason for separation
 - Truthfully explain the reason for termination
 - Use words that provide for additional detail in future proceedings, if necessary – example: “you are being terminated for poor performance, including...”

Discharge (con't)

- Severance Agreements
- Factors to Consider
 - Risks associate with termination – potential for claims of harassment, discrimination, and/or retaliation
 - Public perception
 - Tenure of employee
- Terms of Severance Agreement
 - General Release of Claims
 - Non-Admissions clause
 - Non-Disparagement clause
 - Confidentiality (caution with sexual harassment claims)

Discipline/Discharge -- Scenarios

■ Low/Medium/High Risk Discipline/Discharge

- Employee X has worked for the company for 3 years. He has been an excellent performer his entire tenure with the company. Recently, he applied for FMLA leave because of his own health issue. Although his time off has been consistent with medical certification documentation supporting his leave request, the company wants to discipline Employee X with a written warning based on the amount of time the Employee has been off work.
- Now Employee X is utilizing his FMLA, but he is not following the company's call-in procedures. The company wants to issue a written warning for this policy violation.
- Employee Z is a minority. When she reported to work, she appeared to be impaired, smelled of alcohol, and had slurred speech. She initially refused to go for a drug/alcohol test, but subsequently consented. She tested positive for alcohol. Under the company's drug and alcohol policy, Employee Z was offered EAP assistance in lieu of termination. She consented. Subsequent to treatment and returning to work, employee tested positive on a second occasion for alcohol at work. She was terminated. On her way out the door, Employee Z said "f-ck this racist company."
- Employee Y is a 65 year old Caucasian male who has worked at the company for 20 years. He is in a bargaining unit. The company finds out that he has been stealing supplies from the company, and after an investigation, it is determined that his has been going on for years. When HR and Employee Y's supervisor meet with him and his union representatives, the company intended to confront him with the irrefutable evidence and offer him a last chance agreement. During the meeting, despite the evidence, Employee Y adamantly denied the theft. Then, he looked at the supervisor and said, "I think you are out to get me. You just do not like me. You are an a-hole. I know where you live. You, your wife, and yoru children better sleep with one eye open." The company has a progressive disciplinary policy, but also lists severe misconduct that can warrant immediate termination, including for violence or threats of violence. The company plans to withdraw the offer of the last chance agreement and terminate the employee for his theft and threat of violence.

Discipline/Discharge -- Scenarios

■ Low/Medium/High Risk Discipline/Discharge

- Employee A is a short term employee who works as an at-will employee in a non-union setting. Employee A has been a habitual attendance abuser since his hire. The Company has a points-based attendance policy, and Employee A has reached the progressive level of termination pursuant to that policy. The company contemplates termination.
- Employee B is a minority female employee. In January, she announced that is pregnant. Her personnel file supports that she has been progressively disciplined for performance issues – she has been late on important financial reporting for her position in the finance department. In March, Employee B failed to submit documents to a grant source costing the employer \$30,000.00 in grant money. In her last written warning, the employee was advised that “any future similar discipline will result in additional discipline, up to and including termination.” The company contemplates termination.
- Employee C is a transgender man. He made a complaint of gender discrimination in March. Given that many employees are working from home because of the pandemic, the company was unable to complete its investigation until early August. The complaint was unsubstantiated. In late August, Employee C’s supervisor reported to human resources that Employee C “has to go.” The supervisor said Employee C is a “big problem” and “he/she – whatever she wants to call herself, is constantly making mistakes.” Those “mistakes” are not reflected in any prior warnings (verbal, written, final, or suspensions). The supervisor wants to the employee to be terminated.

Litigation of Employee Claims

Litigation of Employee Claims

- Forums:
 - NYS Division of Human Rights
 - EEOC
 - State Court
 - Federal Court
- COVID Issues
- 2019 Amendments to NYS Human Rights Law

Principles of Defending Claims

- Initial Investigation of Facts
 - What are the allegations?
 - Are there witnesses?
 - Was there really disparate treatment?
 - Is there a legitimate non-discriminatory reason for the employment action?
 - Did the Complainant report the alleged misconduct?
 - Gather documents, emails, recordings, video, etc.

Principles of Defending Claims

- Develop a theory of the case
- Consider Motion to Dismiss - Attack legal claims as much as possible
- Discovery
 - Truth-seeking
 - Fact-finding
- Motion practice – Summary Judgment
- Trial

COVID Impacts

- General Impacts of COVID on Litigation of Employee Claims:
 - Extended Statutes of Limitation
 - Procedures relaxed to allow for distancing
 - Cases Delayed

COVID Impacts

- NYS Division of Human Rights
 - Continuing to process claims
 - Accepting complaints by mail, email or fax
 - Notary not required
 - Must sign
 - Extended filing period
 - Investigations by telephone
 - Hearings by video conference

COVID Impacts

- EEOC
 - Continuing to process claims
 - Deadlines apply subject to equitable tolling (29 CFR § 1614.604(c))
 - No specific rules on distancing guidelines

COVID Impacts

- New York State Court
 - Executive Order extending Statute of Limitations
 - Leniency in Scheduling Orders
 - Limited access to Courts
 - No specific guidance on pre-trial procedures or depositions

COVID Impacts

- Federal Court
 - No guidance on Statutes of Limitation
 - No general guidance on pre-trial procedures
 - Aggressive use of virtual procedures
 - Depositions - virtual
 - Generally lenient on Scheduling Orders

COVID Impacts

- Impact to Truth-Seeking Mission
 - Virtual Depositions
 - Advantages
 - Safe
 - Convenient
 - Disadvantages
 - Connectivity
 - Voice over
 - Comfort of witness
 - Lack of formality
 - Lack of personal connection
 - Cheating???
 - Overall: the remote process makes the pursuit of truth more difficult

COVID Impacts

- Measures to Achieve In-Person Testimony:
 1. Seek extensions until in-person depositions are possible
 - Case Example
 - In Federal Court cannot count on extensions
 2. Seek testimony under distancing protocols
 - Case Example
 - Pre-testimony protocols
- Conclusion: these issues will be determined on a case by case basis

COVID Impacts

- Trials
 - NYS Courts began to open
 - Some consternation among the trial bar and bench
 - Witnesses out of state have travel restrictions
 - Difficulty with distancing
 - Office of Court Administration implemented plans for trials with distancing
 - Case Example
 - Jury trial in Saratoga County
 - Jury selection to be at the Saratoga County Civic Center
 - Use of large courtroom
 - How will jury deliberate?



As of November 13, 2020:
No new trials until further
notice

State of New York
Unified Court System



Lawrence K. Marks
Chief Administrative Judge

25 Beaver Street
New York, N.Y. 10004
(212) 428-2100

MEMORANDUM

November 13, 2020

To: Hon. George J. Silver
Hon. Vito C. Caruso

From: Lawrence K. Marks *LK*

Subject: Revised Pandemic Procedures in the Trial Courts

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In light of recent adverse trends in coronavirus transmission rates in New York State, discussions with our consultants and Governor Cuomo's most recent directives limiting congregation of groups of people in public and private locations, we are revising certain UCS statewide operational practices in the trial courts, **commencing Monday, November 16**, as follows:

- No new prospective trial jurors (criminal or civil) will be summoned for jury service until further notice. Pending criminal and civil jury trials will continue to conclusion.
- No new prospective grand jurors will be summoned for grand jury service until further notice. Pending grand juries will continue to conclusion.
- All future bench trials and hearings will be conducted virtually unless the respective Deputy Chief Administrative Judge permits otherwise. Pending bench trials will continue to conclusion.

Please note that socially-distanced in-person court conferences will continue. All coronavirus health and safety procedures should continue to be closely followed. Decisions about possible adjustment of staffing levels in the trial courts will be addressed in the coming days.

These practices may be further amended as the public health situation evolves.

Please distribute this memorandum and attachments to judges and non-judicial staff as appropriate.

c: Administrative Judges

COVID Impacts

- Impact of Delays on the Litigation Process
 - Plaintiffs and Plaintiffs' lawyers want cases to progress
 - Settlement dynamic has shifted
 - Greater willingness to settle?

2019 Amendment to NYS Human Rights Law

- Section 296
- It shall be an unlawful discriminatory practice :
- (h) For an employer.... to subject any individual to harassment because of an individual's age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, domestic violence victim status, or because the individual has opposed any practices forbidden under this article or because the individual has filed a complaint, testified or assisted in any proceeding under this article, **regardless of whether such harassment would be considered severe or pervasive under precedent applied to harassment claims.**

Analogous Cases Under the NYC Human Rights Law

- *Golston-Green v. City of New York*, Appellate Division Second Department May 13, 2020
- Allegation:
 - NYC police officer was told by her commanding Captain: he does not “like women on this job because they have babies.”
- Holding:
 - Under NYS Human Rights Law:
 - The conduct is not “severe and pervasive”
 - Dismissed
 - Under NYC Human Rights Law:
 - This is not a “truly insubstantial case”
 - Summary judgment DENIED

Analogous Cases Under the NYC Human Rights Law

- *Perard v. Jamaica Hospital Medical Center*, EDNY – September 20, 2020
- Allegation:
 - Plaintiff provided evidence of “a few discrete comments” stating that Plaintiff is black and a statement by her supervisor that he “did not like black Haitians”
- Holding:
 - NYS Human Rights Law:
 - Not “severe and pervasive”
 - Dismissed
 - NYC Human Rights Law:
 - “Even a single comment may be actionable”
 - Summary judgment DENIED

Analogous Cases Under the NYC Human Rights Law

- *Clark v. NYC Dept. of Education*, EDNY October 13, 2020
- Allegation:
 - Supervisor mocked Plaintiff's pregnancy, called her fat and imitated the way she walked while pregnant "rubbing his belly and waddling behind her."
- Holding:
 - NYS Human Rights Law
 - Not "severe and pervasive"
 - Dismissed
 - NYC Human Rights Law
 - "even a single comment may be actionable in appropriate circumstances"
 - Summary judgment DENIED

QUESTIONS?

Managing Change In A Pandemic Era: Recall of Employees, Reductions in Force, Business Closures and COBRA Complications

November 19, 2020

Presented By:

Glen P. Doherty

Andrew D. Drilling

Michael J. Flanagan

Charles H. Kaplan

Albany | Buffalo | Hackensack | New York City | Palm Beach | Saratoga Springs | Toronto
www.hodgsonruss.com



Agenda

❖ Recall of Employees

- ✓ Legal Considerations When Rehiring Employees

❖ Reductions in Force

- ✓ Planning, Involuntary Reductions, Voluntary Reductions and Liability Avoidance

❖ Business Closures

- ✓ WARN and mini-WARN

❖ COBRA Complications

- ✓ Continuing Coverage, Coronavirus and Communication

Recall of Employees

Recalling Employees: Potential Issues to Consider

- ❖ Potential issues to consider in connection with rehiring or recalling employees:
 - ✓ Rehiring/Recall Plan
 - ✓ Return to Work Letter
 - ✓ Employee Refusal to Return to Work
 - ✓ COVID-19-Related Restrictions
 - ✓ Pre-Employment Screening
 - ✓ Employment Agreements
 - ✓ Break-In-Service Issues
 - ✓ Accommodations and Leave Requests

Recalling Employees: Layoff vs. Furlough

- ❖ Different protocols may be required to bring back employees who were permanently laid off as compared to those who were temporarily furloughed.
 - ✓ Permanent v. temporary separation
- ❖ If an employer rehires a worker who was laid off with no expectation of recall, a new employment relationship may be formed.
 - ✓ Decide whether hiring protocols will be relaxed.
 - ✓ Even if an employer is willing to relax certain requirements, legally mandated steps in the hiring process must be observed.

Recalling Employees: Develop a Recall Plan

❖ Prepare a recall or rehiring plan.

- ✓ A written action plan that is carefully constructed and evaluated and that sets forth the criteria, plan and procedure for rehiring employees.
- ✓ Consult any applicable CBAs, employment contracts or employment policies for any potential limitations or applicable procedures.

Recall Plan: Discrimination Risks

- ❖ Employers who cannot or do not recall all of their employees should exercise caution in deciding who to bring back.
 - ✓ Employers should have a legitimate, non-discriminatory motive for choosing which employees will return.
 - e.g., seniority, operational needs, documented past performance or other relevant business considerations.

- ❖ Avoid decisions based on who is perceived to be at-risk or part of a vulnerable population.
 - ✓ The Americans with Disabilities Act prohibits an employer from excluding an employee (or taking any other adverse action) solely because the employee has a disability that the CDC identifies as placing him or her at a higher risk for severe illness due to COVID-19.

Recall Plan: Disparate Impact and Retaliation

- ❖ When bringing back a group of employees, conduct a “disparate impact” analysis to determine whether the proposed recall plan would have an unintended discriminatory effect on a protected group.
 - ✓ Disparate impact is discrimination that occurs when a facially neutral policy or practice has a disproportionately negative effect on a protected class.

- ❖ Avoid retaliation claims.
 - ✓ Pay careful attention to employees who have recently taken a protected form of leave, made protected complaints or filed for a protected form of benefits.

Recalling Employees: Return to Work Letter

❖ Return to Work Letter:

- ✓ Employers should treat the rehiring or recall process as any other formal offer of employment and memorialize the key terms in writing.
 - Make a formal, written offer of employment and create and retain records of any response or lack thereof.
- ✓ Contents of the return to work letter may include:
 - Return to work date;
 - An explanation of any required changes to schedule or compensation;
 - An explanation of operational changes, if any;
 - The status of employee benefits and an explanation of recent changes, if any;
 - A summary of COVID-19-related health and safety measures; and
 - A deadline to accept or reject the offer.

Recalling Employees: Employees Who Refuse to Return

- ❖ If an employee was previously laid off, and is offered rehire but refuses, the employer may move on to the next candidate.
 - ✓ Consider whether the Occupational Safety and Health Act or the National Labor Relations Act are implicated.
- ❖ Employers may warn employees that unemployment benefits are contingent upon no work being available and that failure to return to work may result in the termination of unemployment benefits.
- ❖ Take a proactive approach in addressing employee concerns about safety and develop a communication plan to address new social distancing policies and implementation of additional workplace health and safety protocols.

Recalling Employees: State and Local Reopening Requirements During COVID-19

- ❖ State and local laws concerning COVID-19 and workplace safety are constantly changing.
- ❖ NY FORWARD
 - ✓ Reopening Guidelines
 - Employers must abide by applicable reopening requirements or guidelines based upon the industry in which the employer is operating.
 - ✓ Travel-Related Mandatory Quarantine
 - New York recently revised its travel-related quarantine requirements, which currently require a mandatory 14-day quarantine for most out-of-state travel, with some limited exceptions.
 - Employees have the option to “test out” by taking two COVID-19 tests pursuant to established guidelines.
 - ✓ Micro-Cluster Action Initiative
 - This initiative divides existing clusters and the areas around them into three categories (yellow, orange and red) with successively higher restrictions within each category.

Recalling Employees: Returning to the Workplace During COVID-19

- ❖ Employers are permitted to screen returning employees and applicants for COVID-19.
 - ✓ EEOC guidance confirms that employers may check employees' temperatures and ask questions about COVID-19 symptoms and related travel.
 - ✓ In New York, most employers are required to implement certain mandatory screening procedures.

- ❖ Clearly communicate all COVID-19-related policies and restrictions to returning employees.
 - ✓ Employers in New York State must complete a required Safety Plan.

- ❖ Establish a process for determining if individual employees are safe to return and a protocol for returning employees who have tested positive.
 - ✓ New York Department of Health guidelines govern when employees can return to work after COVID-19 infection or exposure.

Recalling Employees: Pre-Employment Screening

❖ Background Checks and Substance Abuse Testing.

- ✓ Employers should consider their existing policies and decide whether to waive customary pre-employment processes for rehired employees where they may do so legally.
- ✓ If these conditions are waived, that decision should be applied consistently for similarly situated returning employees.
- ✓ Employers should ensure they receive updated authorization from the employee before conducting background checks, where required by law.
 - Check for “evergreen language” that provides consent to run background checks at any point during the employment relationship.

Recalling Employees: Form I-9 and Wage and Hour Issues

- ❖ Form I-9: When an employee is rehired, it triggers a new employment verification process.
 - ✓ If employment continued and the employee had a reasonable expectation of employment at all times, an employer can continue to use the employee's existing I-9.
 - ✓ A former employee rehired within three years from the date of the original Form I-9 may be able to rely on their previously executed document.

- ❖ Review terms and conditions of employment, if necessary.
 - ✓ Consider whether COVID-19 has caused work assignment or other organizational change.
 - ✓ Consider wage and hour compliance – are employees properly classified for purposes of overtime, or have changes to an employee's position converted the position to a non-exempt role?

Recalling Employees: Leave and Eligibility Requirements

❖ Leave Eligibility

- ✓ Review employee handbooks and applicable state law for grandfathering provisions that may apply to rehired employees.
 - The New York City Earned Safe and Sick Time Act requires previously accrued but unused leave to be reinstated if an employee is rehired within six months.
- ✓ The Family Medical Leave Act grants eligibility to employees who work for an employer for at least 12 months. If an employee's break in employment is less than seven years, any time worked prior to that break would count toward meeting the 12-month work requirement.

❖ Seniority

- ✓ Employers who offer compensation, benefits or perks based on length of service will have to decide whether they will give rehired employees credit for their prior service for seniority-based benefits.
 - Establish and communicate clear rules and apply them consistently.

Recalling Employees: New Hire Paperwork and Written Agreements

❖ Mandatory Notices

- ✓ Various federal, state and local laws require employers to provide certain notices to employees at the time of hire.
- ✓ For purposes of these notice requirements, employers may be required to treat rehired employees as new hires.

❖ Written Acknowledgments and Contracts

- ✓ If a new employment relationship is being formed, acknowledgments and contracts previously signed by the employee may need to be reaffirmed.
 - e.g., nondisclosure agreements or other restrictive covenants, arbitration agreements, and employee handbook.

Recalling Employees: Accommodations and the ADA

❖ Accommodations

- ✓ Employers should anticipate that some employees may be fearful of reentering the workplace and request accommodations.
- ✓ An employee who was already receiving a reasonable accommodation prior to the COVID-19 pandemic may be entitled to an additional or altered accommodation, absent undue hardship.
- ✓ EEOC guidance: Employers may invite employees with disabilities to request accommodations in advance of a recall.

Termination Planning and Releases

Agenda

❖ Pre-Termination Checklist

- ✓ Checklist Defined.
- ✓ Types of Terminations.
- ✓ Employment Contract Limitations.
- ✓ Handbook Limitations.
- ✓ Business Reason(s) for Termination.
- ✓ Absence of Discrimination.
- ✓ Proper Pay.

Agenda

❖ Use of Releases

- ✓ General Rule.
- ✓ OWBPA.
- ✓ Necessary and Typical Provisions.

❖ Questions

Pre-Termination Checklist

❖ What is a Pre-Termination Checklist?

- ✓ An outline of what should be done at various stages as an employer prepares to terminate an employee (or group of employees).
 - Allows for a smooth and predictable transition.
 - Avoids, or seeks to avoid, lawsuits.

Pre-Termination Checklist

❖ Background – Types of Terminations.

✓ Voluntary.

- Employee decides to leave on his/her own.
- Employee typically issues a resignation letter.

✓ Involuntary (primarily our focus today).

- Employer initiates a single or group termination for a variety of reasons.
 - Restructuring.
 - Downsizing.
 - Cause.
 - Performance.

Pre-Termination Checklist

- ❖ Before effectuating a termination, look for limitations and/or procedures in employment contracts, collective bargaining agreements and handbooks.
 - ✓ Be cognizant of term requirements in employment contracts.
 - Is the term at-will?
 - Is the term for a specific period of time?
 - ✓ Be cognizant of termination requirements in employment contracts.
 - How is “cause” defined?
 - Does “cause” exist?
 - Is any severance obligation triggered?
 - Is “notice” required?
 - Is “notice” satisfied?

Pre-Termination Checklist

- ✓ Collective bargaining agreements (CBA) generally state that an employer must establish “just cause” to discipline an employee.
 - CBAs generally mandate that layoffs or reductions in force be based on seniority.

Pre-Termination Checklist

- ✓ Be cognizant of handbook policies and procedures.
 - Confirm the absence of any “just cause” or progressive discipline language.
 - In the alternative, confirm that “just cause” exists and/or discipline steps have been followed.
 - Disclaimers are helpful, but generally do not negate “just cause” limitations or progressive termination procedures.
 - Follow termination procedures contained in handbook.

Pre-Termination Checklist

- ✓ Always have a “good” reason to terminate an employee.
 - Or at least shoot for the absence of a “bad” reason.

Pre-Termination Checklist

- ✓ Documentation is always the key.
- ✓ Documentation is one of the best ways to minimize legal risk.
 - Witness statements.
 - Time cards.
 - Performance records.
 - Surveillance videos.
 - Pictures.
 - Telephone records.
 - Recordings.
 - Selection criteria for reductions in force.
 - Length of service, skills, education, quantity of production, performance evaluations, etc.

Pre-Termination Checklist

- ✓ Confirm the absence of discrimination.
 - When the individual being considered for termination is a member of a protected class, double-check that there is a non-discriminatory business reason for the termination.
 - Confirm that this individual is being treated the same as all other employees, especially those outside the protected class at issue or any protected class.
 - When dealing with group terminations (i.e., RIFs) perform a “disparate impact” analysis of the preliminary list of employees to be released by comparing their demographics with those of workers to be retained in order to ensure that employees in protected classes are not inadvertently being selected for termination at a higher rate than their percentages in the workforce.

Pre-Termination Checklist

- Be on the lookout for possible retaliation scenarios.
 - Is the employee currently on leave and subject to any leave protections?
 - Has the employee recently returned from protected leave?
 - Has the employee recently given notice of his/her intent to take leave?
 - Has the employee recently advanced any sort of complaint?
 - Manager is sexually harassing someone.
 - Company is not following safety regulations.
 - Company's pay practices do not comply with the law.
 - Has the employee recently filed a workers' compensation claim?
 - Has the employee recently supported or affiliated with a union?

Pre-Termination Checklist

- ✓ Confirm that the employee has been properly paid for all time worked.
 - Is employee exempt (for real, not just classified as exempt).
 - Saying does not make it so.
 - Don't forget about New York's salary thresholds.
 - Significantly higher than federal salary thresholds (at least for the executive and administrative exemptions).
 - Has the employee been paid at the overtime rate for hours worked beyond 40 in a week?
 - Identify exposure and effectuate a plan (in advance of termination).

Pre-Termination Checklist

- ❖ Before effectuating a termination, consider the payment of severance in exchange for a release.
 - ✓ Severance payments can soften the blow of termination.
 - ✓ A release constitutes a waiver of claims.
 - ✓ A release must include certain provisions and can include other provisions of interest to an employer.

Pre-Termination Checklist

- ❖ Before turning to employment releases, a reminder to always provide a termination letter.
 - ✓ Under New York Labor Law 195(6), employers are required to provide written notice to any employee terminated from employment with “the exact date of such termination as well as the exact date of the cancellation of employee benefits connected with such termination.” This written notice must be provided within five working days after the employment relationship has ended. This notice requirement applies not only to those employees whose employment is terminated by the employer, but also to those employees who leave the employer because they resign, quit, retire or are laid off.
 - Failure to provide such a letter can subject an employer to civil fines and the former employee can bring a civil action.

Pre-Termination Checklist

- ✓ A sample termination letter.

Dear _____:

Please note that your employment with XYZ Inc. (“Company”) ended on _____.

In addition, your participation in all employee benefit plans, other than the Company’s health insurance plan, ended on _____. Your participation under the Company’s health insurance plan will end on _____. Under separate cover, you will receive additional information about your rights, if any, to continue your participation in the Company’s health insurance plan after _____.

If you have any questions or concerns, please do not hesitate to contact me. We wish you well in your future endeavors.

Very truly yours,

Pre-Termination Checklist

- ❖ COBRA or State continuation obligations are also triggered at termination.
 - ✓ More to follow on this subject later on in this segment.

Releases

❖ General rule of employment releases.

- ✓ Must be knowing, voluntary and for valuable consideration.
 - But the Older Workers Benefit Protection Act (OWBPA) has additional requirements that must be met to release claims under the federal Age Discrimination in Employment Act (ADEA).
 - ADEA prohibits discrimination against persons 40 years of age or older.

Releases

- ❖ A waiver is knowing and voluntary under the OWBPA only if specific requirements are met.
 - ✓ The waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate.
 - ✓ The waiver specifically refers to ADEA rights or claims.
 - ✓ The individual does not waive rights or claims that may arise after the date the waiver is executed.
 - ✓ The individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled.

Releases

- ✓ The individual is advised in writing to consult with an attorney prior to executing the agreement.
- ✓ The individual is given a period of at least 21 days within which to consider the agreement, or if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement.
- ✓ The agreement provides that for a period of at least seven days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired.

Releases

- ✓ If a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer must inform the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to –
 - Any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and
 - The job titles and ages of all individuals eligible or selected for the program and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

Releases

❖ Plain language requirement.

- ✓ Written in a manner calculated to be understood by the individual, or by the average individual eligible to participate in a workforce reduction plan.
 - Employers should take into account such factors as the level of comprehension and education of the participant or typical participants.
 - Eliminate technical jargon and use of long, complex sentences.

Releases

❖ Decisional unit.

- ✓ Employer must provide information about the ages of discharged and retained workers to employees who are considering releasing potential ADEA claims.
 - Any class, unit or group covered by program, eligibility factors and time limits.
 - Titles and ages of all individuals eligible or selected for the program and the ages of all individuals in same classification or unit who are not eligible or selected.
- ✓ Releases will be invalid if the “decisional unit” is inaccurately described.

Releases

❖ Typical and Required Provisions.

✓ Broadly define the employer.

- On behalf of itself, its parents, subsidiaries, and other corporate affiliates, and its and their respective present or former employees, officers, directors, owners, shareholders, members, and agents, individually and in their official capacities.

Releases

- ✓ Spell out the date of termination.
 - No compensation after this date.
 - No benefit continuation (unless some courtesy continuation is in play).
- ✓ Spell out the consideration.
 - Clearly state that the employee is only entitled to the consideration if he/she signs and complies with the release agreement.
 - Clearly state that the consideration does not affect retirement plans.
 - Be sure that the consideration granted under the release agreement is something that the employee is not otherwise entitled.

Releases

- ✓ Representation by employee that he/she has been fully compensated for any and all hours worked.
 - FLSA claims cannot be waived in private settlement.
- ✓ Waiver and Release.
 - Spell out as many laws as may be applicable.
 - Some statutes cannot be waived.
 - Be sure to address OWBPA/ADEA issues.
 - Specific reference to ADEA rights or claims.
 - No waiver of rights or claims that may arise after the release agreement is executed.
 - Carve out rights or claims that cannot be waived as a matter of law.

Releases

- ✓ Covenant not to sue.
 - Agreement never to file any claim based on the acts, occurrences or events encompassed by the release agreement.
- ✓ Future application for employment.
 - Covenant not to apply for future employment.
- ✓ Liens.
 - Representation as to the absence of liens applicable to the consideration being paid under the release agreement.
 - Indemnification obligations from the employee to the employer.

Releases

- ✓ Trade secrets and/or a non-compete (non-solicitation) clause.
 - Affirm existing obligations or establish additional provisions.
- ✓ Employment reference.
 - Confirm dates of employment and positions held.
 - Enhanced reference can be provided under specific circumstances.
- ✓ No admissions.
 - Nothing in the release agreement shall be construed as an admission of any sort on the part of the employer (or any party).

Releases

✓ Non-disclosure.

- Covenant not to publish or otherwise publicly disseminate the existence of the release agreement or the consideration paid.
- NY prohibits agreements barring the disclosure of facts and circumstances of a discrimination claim -- unless the condition of confidentiality is the employee's preference.
- Agreements that prevent the disclosure of factual information related to future claims of discrimination are void unless the provision includes a notification that the non-disclosure provision does not prohibit the employee from speaking with law enforcement, the EEOC, the NYSDHR, any local human rights commission, or any attorney retained by the employee.

✓ Non-disparagement.

- Covenant not to make or publish written or oral statements or remarks which are disparaging, deleterious, or damaging to the integrity, reputation or goodwill of the employer (or either party).

Releases

✓ Severability.

- If any provision of the release agreement is held invalid, such finding shall not affect the remainder of the document.

✓ Choice of law and venue.

- Release agreement governed by the laws of New York State, and all proceedings relating to the Agreement shall be held in New York State, County of Albany.

✓ Return of property

- Establish parameters to return property and require signed statement representing that all property has been referenced.

Releases

- ✓ Taxation.
 - No representation as to tax consequences.
 - Indemnification by the employee.
- ✓ Cooperation in subsequent litigation.
 - Covenant to assist and cooperate with employer in connection with subsequent litigation.
- ✓ IRS § 409(A) language.
 - Structure payments so as to be excluded from or to comply with §409(A) of the IRC of 1986, as amended.
- ✓ OWBPA issues.
 - Advised to consult with attorney.
 - 21 (or 45) days from receipt to consider release agreement (before signing).

Releases

- 7 days to revoke Agreement.
 - Release agreement is not effective until revocation period expires.
- Group termination disclosures.
 - Class, unit or group covered, any eligibility factors, and any time limits applicable to program.
 - Job titles and ages of all individuals eligible or selected for the program, and ages of all individuals in the same classification unit who are not eligible or selected for the program.

Releases

- ✓ Filing with EEOC or state or local agency.
 - Nothing in the release agreement shall prevent the employee from filing with EEOC or state or local agency, but the employee may waive monetary damages.
 - Covers participation in any investigation or proceeding.
- ✓ Whistleblower provisions.
 - Nothing in the release agreement shall prohibit the employee from reporting possible violations of all federal law or regulation to any government agency or entity, or making other disclosures that are protected under the whistleblower provisions of federal law or regulation.
 - May not require prior notification to employer.

Business Closures

Business Closures

1. Develop Uniform Selection Criteria
 - a. Use objective criteria (such as length of service, demonstrated skills, education, quantity of production, written performance evaluations, discipline history).
 - b. However, you may use subjective criteria (such as enthusiasm, versatility, personality) if you truly require them for the job and do not apply them in a discriminatory manner.
 - c. You cannot use unlawful criteria, such as age, race, sex, national origin, and other protected classes, and an employee's whistleblowing, use of disability, FMLA leave, or protected paid sick leave, making a workers' compensation claim, and supporting a labor union.

Business Closures

2. Review Preliminary Layoff Statistics
Need to avoid disparate impact on protected classes;
Age, Race, National Origin, Sex, etc.
3. Determine if Advance Notice Required Under Federal and State WARN Act
4. Determine if Severance Pay is Required
Severance Pay May be Governed by ERISA
Employer Should Consider Formal ERISA Severance Pay Plan

Business Closures

5. Consider Making Severance Pay Dependent on a Release
Need to Follow Group Termination Procedures Under ADEA for Valid Release

6. Remember to Cover Termination Basics
Payment of Wages and Accrued Vacation, COBRA, New York State Unemployment Insurance Notice, New York State Termination Notice

Business Closures

7. Different Procedures in Unionized Workplace
 - Follow Collective Bargaining Agreement's Layoff and Severance Pay Provisions
 - Bargain Over Effects of Shutdown of Business
 - Consider Potential Withdrawal Liability from Multiemployer Pension Plan

WARN Acts and Related Issues

1. Employers who are subject to the federal Worker Adjustment Retraining and Notification (“WARN”) Act are required to give a 60-day advance written notice before the employer effects a “plant closing” or “mass layoff” (as those terms are defined under the WARN Act), to employees who will be discharged as a result (or to their union representatives).
2. The employer must also give notice to the state dislocated worker unit, and to designated local government officials. Employers who fail to give the proper notice under WARN are subject to various civil remedies, including back pay and attorneys’ fees.

WARN Acts and Related Issues

3. Some states have “plant closing” or similar laws which impose obligations in addition to those arising under WARN.
4. New York and New Jersey both have state Mini-WARN Acts.
5. New York’s WARN Act requires a 90-day advance written notice, covers smaller employers (the federal threshold is 100 employees and the New York State threshold is 50 employees) and smaller layoffs (the federal threshold is 50 employees and the New York State threshold is 25 employees) than the federal WARN Act, and requires notice both to all employees and their union representative, as well as state and local authorities.

WARN Acts and Related Issues

6. The federal and New York State WARN Act requirement to provide 60 day' (federal) and 90 days' (NYS) advanced notice has not been suspended due to the COVID-19 pandemic because the both WARN Act already recognize that businesses cannot predict sudden and unexpected circumstances beyond an employer's control, such as government-mandated closures, the loss of your workforce due to school closings, or other specific circumstances due to the COVID-19 pandemic.
7. More Detailed Information About the NYS WARN Act
 - a. The NYS WARN Act requires businesses to give early warning of closing and layoffs. Businesses must give 90 days' advance notice to:
 - All affected employees
 - Any employee representative(s) [labor unions]
 - The New York State Department of Labor
 - The Local Workforce Investment Board
 - b. NYS WARN Act notices DO NOT need to be submitted from businesses that employ fewer than 50 full-time employees in New York State.

WARN Acts and Related Issues

- c. The NYS WARN Act applies to private businesses with 50 or more full time workers in New York State. It covers:
 - Closings affecting 25 or more workers
 - Mass layoffs involving 25 or more full-time workers (if the 25 or more workers make up at least 33% of all the workers at the site)
 - Mass layoffs involving 250 or more full-time workers
 - Certain other relocations and covered reductions in work hours
- d. This means that covered businesses must provide all employees with notice 90 days prior to a:
 - Plant closing
 - Mass layoff
 - Relocation
 - Other covered reduction in work hours
- e. Businesses that do not provide notice may be required to:
 - Pay back wages and benefits to workers
 - Pay the workers' attorneys' fees in a successful action by them under the Act
 - Pay a civil penalty

WARN Acts and Related Issues

8. Corporate transactions often trigger WARN notice requirements – on the part of the seller and/or the buyer. The workforce reductions that may precede or follow a change in corporate ownership may also trigger WARN.
9. WARN contains provisions designating responsibility for giving the required notice, as between buyers and sellers, in the case of a sale of all or part of a business. Nonetheless, the purchase agreement should address the buyer's and the seller's respective obligations to give WARN notices; and who will be responsible for paying any penalties if the proper notice is not given.
10. Under the federal WARN Act, "employment loss" means any layoff, other than a discharge for cause, exceeding six months or a reduction in hours of more than 50% during each month of any six-month period. Once an employer knows that its layoffs will continue for longer than six months, the employer must provide the affected employees with the required WARN Act notice. The "unforeseeable business circumstance" exception may shorten the notice period, but employers must still issue WARN Act notices after learning that their layoffs will continue for more than six months.

COBRA Complications

COBRA – Basics

Qualified beneficiaries who lose group health plan coverage because of a qualifying event may elect to continue coverage at their own cost.

COBRA – Qualifying Events

Qualifying events:

18-month qualifying events.

- Termination of employment.
- Reduction in hours.

36-month qualifying events:

- Death.
- Medicare entitlement of employee.
- Divorce.
- Maximum coverage age.

COBRA – Leaves of Absence

Leaves of absence. A leave of absence is a reduction of hours and is therefore a triggering event that may cause a loss of coverage.

- ✓ Review LOA policies.
- ✓ Review ERISA plan document.
- ✓ Review insurance policies.

COBRA – Notice Deadlines

Employer/Plan Administrator

- **44 days** to notify qualified beneficiary of COBRA election right.

Qualified Beneficiary

- **60 days** to notify employer of qualifying event.
- **60 days** to elect COBRA coverage.
- **45 day** initial grace period for paying COBRA premium.
- **30 day** grace period for paying COBRA premiums.

COBRA – COVID Relief

Department of Labor/IRS

COBRA deadline extensions during “Outbreak Period.”

- Outbreak Period – March 1, 2020 to 60 days after the announced end of the COVID-19 national emergency.

COBRA – Next Steps

Action Items:

1. Coordinate with insurance/stop-loss carriers.
2. Track individuals who have:
 - a) Experienced a qualifying event since March 1, 2020.
 - b) Terminated COBRA coverage since March 1, 2020 because of premium non-payment.
3. Notify individuals after the national emergency is declared over of their rights to elect and pay for coverage.

Credit Code

If you are interested in receiving credits, please email hsocial@hodgsonruss.com with the code:

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Questions?

Glen P. Doherty, Esq.

Hodgson Russ LLP

677 Broadway, Suite 301

Albany, NY 12207

gdoherty@hodgsonruss.com

Andrew D. Drilling, Esq.

Hodgson Russ LLP

140 Pearl Street, Suite 100

Buffalo, NY 14202

adrillin@hodgsonruss.com

Michael J. Flanagan, Esq.

Hodgson Russ LLP

140 Pearl Street, Suite 100

Buffalo, NY 14202

mflanaga@hodgsonruss.com

Charles H. Kaplan, Esq.

Hodgson Russ LLP

605 Third Avenue, Suite 2300

New York, NY 10158

ckaplan@hodgsonruss.com