MOSES & SINGER LLP

Client Alert January 2019

Employment Laws NY Employers Need to Know in 2019

By: Kimberly Klein and Shari Alexander

New York employers may still be reeling from all of the employment law changes in 2018. Below, we discuss 10 important changes in the law employers want to make sure they are implementing in 2019:

(1) increased leave under NYS Paid Family Leave;
(2) new NYS and NYC protections relating to sexual harassment;
(3) the expansion of earned sick time to include "safe time";
(4) increased minimum wage rates;
(5) increased salary thresholds for executive and administrative exemptions;
(6) required cooperative dialogue for employees with disabilities;
(7) new NYC lactation accommodations;
(8) expanded NYC protected classifications;
(9) temporary schedule change protections for NYC employees; and
(10) NYS revised proposed employee scheduling regulations.

Increased Paid Family Leave

Beginning January 1, 2019, New York employers must increase the amount of employee-funded paid family leave provided to applicable employees from eight weeks to 10 weeks. The leave, which applies to all NY employers, may be taken to bond with newly born, adopted, or fostered children, care for family members with a serious illness, or assist loved ones when a family member is deployed abroad on active military service. Full-time employees (who have worked 26 consecutive weeks) and part-time employees (who work less than 20 hours per week and have worked a total of 175 days) are eligible for the leave, which will increase again in 2021 to 12 weeks. Eligible employees will receive 55% of their average weekly wage capped at 55 percent of the NYS average weekly wage which, for 2019, is $1,357.11, making the maximum weekly benefit $746.41. To the extent employers wish New York paid family leave to run concurrent with leave under the federal Family and Medical Leave Act, as applicable, handbooks should be amended accordingly. Paid family leave and disability leave cannot be taken at the same time. See our earlier article for more detail concerning paid family leave [link].

NYS and NYC Protections Relating to Sexual Harassment

As previously reported [link], both NYS and NYC added substantial sexual-harassment related protections for employees, including:

- prohibition of mandatory arbitration clauses relating to allegations of sexual harassment in written contracts entered into on or after July 11, 2018 (unless otherwise permitted under federal law);
- special requirements for confidential settlements of sexual harassment claims;
- prohibition of sexual harassment of "non-employees";
- mandatory adoption of a sexual harassment prevention policy and interactive training programs;
- protection against gender discrimination for all NYC employees regardless of employer size (other discrimination statutes apply to employers with 4 or more employees);
- a three-year statute of limitations (extended from one year) for filing claims of gender-based discrimination with the NYC Human Rights Commission; and
- required display of an anti-sexual harassment rights and responsibilities poster for NYC employers.

To help implement these new protections, on October 1, 2018, New York State issued final versions of the following documents and resources, among others: (i) a model sexual harassment prevention policy; (ii) a model complaint form for reporting sexual harassment; (iii) a model sexual harassment prevention training program, including case studies; (iv) minimum standards for sexual harassment prevention policies (to be complied with if the model sexual harassment prevention policy is not adopted); (v) minimum standards for sexual harassment prevention training (to be complied with if the model sexual harassment prevention training program is not implemented); (vi) FAQs for combating sexual harassment; (vii) an optional sexual harassment prevention poster; and (viii) a sexual harassment prevention toolkit for employers. These documents can be found here.

By October 9, 2018, NYS employers were required to either adopt the model sexual harassment prevention policy or adopt a policy that meets or exceeds the minimum standards. NYS employers are also required to provide sexual harassment prevention training by October 9, 2019 (currently this training must be implemented by April 1, 2019 for all NYC employers with at least 15 employees). Employees must be trained at least once per year and new employees must be trained "as soon as possible." Although employers are not required to provide their harassment policy to or train non-employees, NYS law now imposes liability on employers for actions of contractors, so the State encourages employers to train and provide their policy to those providing services in the workplace.

Under the new NYC laws, on September 6, 2018, NYC employers were required to display an anti-sexual harassment poster and distribute an Information Sheet (containing the same information as the poster) to new employees at the time of hire. NYC is establishing an online training program to fulfill the training requirements.

Expansion of Earned Sick Time to Include "Safe Time"

Employee handbooks should be updated to include the changes made to the New York City Earned Sick Time Act, now known as the New York City Earned Safe and Sick Time Act ("ESSTA"). Effective May 5, 2018, employees in NYC may now use earned sick time for "safe time" if the employee or the employee's family member is a victim of a "family offense matter," sexual offense, stalking or human trafficking. ESSTA defines a "family offense matter" generally to cover harassment, sexual abuse, sexual misconduct, reckless endangerment, assault, identity theft, grand larceny and other offenses between spouses, former spouses, a parent and child, persons who have a child in common and persons who are or have been in an intimate relationship. ESSTA also broadens the use of sick and safe time by expanding the definition of "family members" for which such time can be used to include any blood relative of the employee, and any other individuals whose association with the employee is the equivalent of that of a family member.

Generally, qualifying safe time leave may be used to:

- obtain services from a domestic violence shelter, rape crisis center, or other shelter or services program;
- take actions to increase the safety of the employee or a family member of the employee, including to participate in safety planning or to relocate;
- meet with an attorney or social service provider;
- file a complaint or domestic incident report with law enforcement;
- meet with a district attorney's office;
- enroll children in a new school; or
- take other actions necessary to maintain, improve, or restore the physical, psychological, or economic health or safety of the employee or a family member of the employee or to protect those who associate or work with the employee.

Employers were required to provide written notice to their employees of their right to safe time by June 5, 2018, and new hires are required to receive written notice at the commencement of their employment.

Increased Minimum Wage Rates

Although the minimum wage rate under the federal Fair Labor Standards Act remains $7.25 per hour, employers in NY are required to comply with the new state minimum wage rate.

On December 31, 2018, the New York minimum wage increased as follows:

- Employers outside of New York City, Nassau, Suffolk, and Westchester counties: $11.10 per hour (increase of $0.70 per hour)
- Employers in Nassau, Suffolk, and Westchester counties: $12.00 per hour (increase of $1.00 per hour)
- Employers in New York City with 10 or fewer employees: $13.50 per hour (increase of $1.50 per hour)
- Employers in New York City with 11 or more employees: $15.00 per hour (increase of $2.00 per hour)

Fast food employees are entitled to an even higher minimum wage. These rates remain in effect until December 30, 2019 and are scheduled to increase each year on December 31 until they reach $15 per hour. Employers are required to post a Minimum Wage Information poster in their establishment.

A chart summarizing the minimum wage rates under the Miscellaneous Industries Wage Order can be found here. A chart summarizing the minimum wage rates under the Hospitality Industry Wage Order can be found here.

Increased Salary Thresholds for Executive and Administrative Exemptions

Although the U.S. Department of Labor has not issued any new proposed regulations to raise the minimum salary to qualify for a white-collar exemption from the overtime pay rules under federal law, employers in NY are required to comply with the new state salary threshold to qualify for the executive and administrative exemptions.

On December 31, 2018, the salary threshold to qualify for the executive and administrative exemptions increased as follows:

- Employers outside of New York City, Nassau, Suffolk, and Westchester counties: $832.00 per week (increase of $52.00 per week)
- Employers in Nassau, Suffolk, and Westchester counties: $900.00 per week (increase of $75.00 per week)
- Employers in New York City with 10 or fewer employees: $1,012.50 per week (increase of $112.50 per week)
- Employers in New York City with 11 or more employees: $1,125.00 per week (increase of $150.00 per week)

The minimum wage charts linked above contain exempt salary thresholds under the Miscellaneous Industries Wage Order and the Hospitality Industry Wage Order.

Reasonable Accommodation Cooperative Dialogue Requirements

While most employers know that they must engage in an interactive dialogue when an employee with a disability requests an accommodation, NYC has now formalized the process. Pursuant to an amendment, effective October 15, 2018, the NYC Human Rights Law began to require employers to engage in a "cooperative dialogue" with individuals who are or may be entitled to an accommodation under the law within a reasonable time of receiving a request for an accommodation or notice that an accommodation may be required. Notably, an employer's obligation to engage or attempt to engage in a cooperative dialogue need not be prompted or initiated by an accommodation request.

The term "cooperative dialogue" means the process of engaging in a good faith dialogue, either written or oral, regarding a person's accommodation needs. Under the amendment, employers must provide a written determination to the individual who requested the accommodation, which identifies the accommodation that has been granted or denied. A covered entity may only come to the determination that no reasonable accommodation is required to "enable a person to satisfy the essential requisites" of his or her job after it has engaged or attempted to engage in a cooperative dialogue.

New Accommodation Requirements for NYC Lactating Employees

Similar to NYS's Right of Nursing Mothers to Express Breast Milk, amendments to the NYC Human Rights Law will go into effect on March 18, 2019 that will require NYC employers with 15 or more employees to provide lactating employees with reasonable unpaid or paid break time and a private space to express milk. Under the new laws, employers will also be required to notify employees about their lactation rights in a written policy.

Previously, NYC law required that employers make "reasonable efforts" to provide employees a private location for purposes of expressing milk. Under the new law, which is similar but not identical to the NYS law, employers are required to designate a "lactation room" that should be "a sanitary place, other than a restroom, that can be used to express breast milk shielded from view and free from intrusion and that includes at a minimum an electrical outlet, a chair, a surface on which to place a breast pump and other personal items, and nearby access to running water." The lactation room must also be in reasonable proximity to the employee's work area, and employers must provide a refrigerator suitable for break milk storage that is also within reasonable proximity to the employee's work area. The designated room may be used for other purposes when the employee is not using it to express breast milk, however, employers must notify their employees that even though the lactation room may be used for other purposes, its use for expressing milk takes priority over any other purpose. If employers find that complying with any of these requirements would impose an undue hardship, they must engage in a cooperative dialogue with the requesting employee to determine whether a reasonable accommodation is available.

In addition, employers will be required to provide employees with a written policy that informs employees of their lactation accommodation rights and request form, which are being developed by the NYC Human Rights Commission and the Department of Health and Mental Hygiene and will be available on the Commission's website.

Expanded Protected Classifications Under the NYC Human Rights Law

Effective May 11, 2018, the NYC Human Rights Law, which prohibits discrimination against employees on the basis of sexual orientation and/or gender, was amended to provide employees additional protection by expanding the definitions of those terms. Under the new law, the definition of "sexual orientation," which previously covered "heterosexuality, homosexuality, or bisexuality" was amended to include an "individual's actual or perceived romantic, physical or sexual attraction to other persons, or lack thereof, on the basis of gender" and also includes protections for individuals who identify as asexual or pansexual. The amended law also revises the definition of "gender" to clarify that it includes "a person's

actual or perceived gender-related self-image, appearance, behavior, expression, or other gender-related characteristic, regardless of the sex assigned to that person at birth."

Temporary Schedule Change Protections for NYC Employees

The New York City Temporary Schedule Change Law went into effect on July 18, 2018. The law allows most NYC employees up to two temporary schedule changes (or permission to take unpaid time off) per calendar year when such changes are needed due to a "personal event" including: the need for a caregiver to provide care to a minor child or care recipient; an employee's need to attend a legal proceeding or hearing for subsistence benefits to which the employee, a family member, or the employee's care recipient is a party; or any circumstance that would constitute a basis for the permissible use of safe time or sick time under ESSTA.

An employee is eligible to request such temporary schedule changes if he or she (a) works in New York City for 80 or more hours in a calendar year, (b) has worked for the employer for at least 120 days, and (c) is not exempted through (i) a valid collective bargaining agreement or (ii) the entertainment industry exemption. Employees may request up to two separate schedule changes of up to one business day each, or one schedule change for up to two business days each year. Employees may propose the type of schedule change they prefer, such as (a) using unpaid leave or paid time off, (b) working remotely, (c) swapping shifts, or (d) shifting work hours. With limited exceptions, employers must grant the temporary schedule change or offer leave without pay, provided the employee has not already exhausted his or her annual right to make such requests. If an employer offers leave without pay instead of the requested change, this will not be considered a denial of the request. Employers may offer employees the ability to use paid time off (in lieu of taking unpaid leave) but may not require the employee to do so. Further, employers may not require the use of sick leave under ESSTA when an employee requests a temporary schedule change.

The law also prohibits retaliation against workers who request temporary schedule changes. Further information about and resources regarding the law, including a required poster, are available on the NYC Department of Consumer Affairs, Office of Labor & Policy Standards' website.

NYS Revised Proposed Employee Scheduling Regulations

On December 12, 2018, the NYS DOL published revised proposed regulations that would impose penalties designed to curtail several scheduling practices that are common among employers, such as on-call scheduling, last-minute cancellations (or new shifts), and call-in requirements. The proposed regulations will require, with some exceptions, covered employers to pay employees for a minimum number of hours if the employer: (i) fails to provide employees with 14 days' advance notice of either their scheduled work shift or the cancellation of their scheduled work shift; (ii) requires an employee to work "on-call" or to call in up to 72 hours ahead of their potential next shift; or (iii) decides to send a non-exempt employee home after the employee was instructed to report to work.

The revised proposed regulations amend the 2017 proposed regulations (which were not finalized within the requisite one-year period), and provide definitions and explanations for the "call-in pay" rules, including notice requirements, exemptions, and various employer obligations. In addition, the revised proposed regulations provide several significant clarifications to the 2017 proposed regulations as well as responses to comments made on the original proposed rules. If adopted in their present form, the revised proposed regulations will require many employers to change the way in which they currently schedule and/or pay their workers (although employers subject to the Hospitality Wage Order, such as hotels and restaurants, as well as the building services industry and farm workers, are not covered by the revised proposed regulations). The revised proposed regulations are subject to a 30-day comment period, ending January 11, 2019.

MOSES & SINGER LLP

Since 1919, Moses & Singer has provided legal services to diverse types of businesses and high-net-worth individuals. Among the firm's broad array of U.S. and international clients are leaders in banking and finance, entertainment, media, real estate, healthcare, advertising, and the hotel and hospitality industries.

In a world of giant, multi-office law businesses assembled by mergers, built on associate leverage and driven by billable hour quotas, the needs of clients can get lost. Moses & Singer offers a difference. That difference is the attention of leading practitioners-partners in the firm-with the experience and knowledge to provide our clients creative, cost effective, result-oriented representation. The direct involvement of our partners means aggressive, focused problem solving. The firm's attorneys concentrate their practices in the following areas:

- Accounting Law Practice
- Advertising
- Asset Protection
- Banking and Finance
- Business Reorganization, Bankruptcy and Creditors' Rights
- Corporate/M&A
- Corporate Trust and Agency
- Employment and Labor
- Entertainment
- Family Office
- Global Outsourcing and Procurement
- Healthcare
- Hospitality, Food Service and Restaurants
- Income Tax
- Intellectual Property
- Internet/Technology
- Legal Ethics and Law Firm Practice
- Litigation
- Matrimonial and Family Law
- Privacy
- Private Funds
- Promotions
- Real Estate
- Securities and Capital Markets
- Securities Litigation
- Trusts and Estates
- White Collar Criminal Defense and Government Investigations