Engage PEO Client Alert:

Tri State Area Updates – NY, NJ, CT

Please review the employment law updates below for New York (page 1-3), New Jersey (page 4) and Connecticut (page 4-5).

If you have any questions, as always, please reach out to your Engage HR contact.

New York Updates

The New York Legislature was very busy making legislative changes to state employment laws in the final days of June. Below is a sampling of the most impactful changes to employers.

- **Salary History Ban**

Governor Cuomo signed into law a state-wide Salary History Ban which previously was only the requirement in certain cities and counties throughout the state. The statewide law will go into effect on January 6, 2020. The law prohibits employers from requesting or relying on prior salary history information from job applicants.

Employers should refrain from asking about prior salary information, including but not limited to wages, benefits, and other compensation. Furthermore, employers should not consider such information when making an offer and negotiating salary or benefits. **The Engage employment application is already compliant and can be downloaded here.**

- **Equal Pay Expansion for all protected classes**

Governor Cuomo also signed Equal Pay legislation which now prohibits unequal pay on the basis of all protected characteristics. The law expands the definition of potential comparators as those performing substantially similar work when viewed as a composite of skill, effort and responsibility, and performed under similar working conditions. Prior to these changes the law was limited to gender as the protected group and limited comparators to wages for equal work for a role needing equal skill, effort and responsibility, and performed under similar working conditions. Employers may still have variations in pay that are justified and rooted in a neutral business reason including but not limited to, seniority, merit, quantity/quality of production system or another bona fide factor like experience, training and education.

The amendments will also allow penalties of a maximum of $500 for each violation to be assessed by the Department of Labor, for example differential in pay tied to a protected class. This is in addition to liquidated damages of up to 300% of the wage differences that were not paid willfully and attorney's fees available via a successful law suit.

- **Protected Hairstyles**

The Governor also signed a law making it illegal to discriminate under the NYS Human Rights Law on the basis of a protective hairstyle, that is a hairstyle historically associated with race, including but not limited to braids, locks and twists. The law is effective immediately.

New York Updates - Continued

- **Federal Arbitration Act preempts NYS Ban on Agreements to Arbitrate Sexual Harassment Claims**

  A recent federal court case, Latif v. Morgan Stanley & Co. LLC, et al., No. 1:18-cv-11528 (S.D.N.Y. June 26, 2019), held that the federal requirement that arbitration agreements be treated as equally as any other contract preempts the NYS prohibition on mandatory arbitration agreements where sexual harassment claims are involved - as long as the agreement is covered by the Federal Arbitration Act. This court also included a footnote that the recent legislative expansion of the prohibition of mandatory arbitration agreements for other claims of discrimination would also not be enforceable, should it be litigated. (See Harassment and Discrimination Changes and Expansion below.)

- **Harassment and Discrimination Changes and Expansion**

The most sweeping legislative change came in the form of expanded laws regarding harassment and discrimination for all protected classes. The Governor has promised to sign the bill, at which point it will be considered enacted.

Major changes to the NY Human Rights law regarding harassment and discrimination are listed below:

- **Effective Upon Signing**
  Effective immediately upon enactment, employers must distribute their sexual harassment prevention policy at the time of hire and during every annual sexual harassment prevention training. The notice should be provided in English and in the primary language identified by the employee (provided the State's model exists in that language). The state's current additional language resources can be found here: https://www.ny.gov/combating-sexual-harassment-workplace/employers

- **60 days from Governor's Signature**

  - First, the new law eliminates the Severe or Pervasive Standard for a Hostile Work Environment. The new standard will be that the conduct is unlawful "when it subjects an individual to inferior terms, conditions or privileges of employment because of the individual's membership in one or more of these protected categories" without respect to whether such harassment would be considered severe or pervasive. Employers will have the affirmative defense "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."
  - Second, Complainants will no longer need to show a comparator employee that was treated differently or better than they were.
  - A third common affirmative defense for employers has been eliminated, and therefore, for situations wherein the allegations include supervisor harassment it will no longer be a defense that the employee did not follow the company complaint procedure and did not have a tangible employment action taken against them. While this will continue to be a defense federally it will not be one for state law claims.

New York Updates - Continued

- Finally, the law for all discrimination and harassment claims, not just sexual harassment, will include "non-employees" in the workplace. Liability will be imposed "when the employer, its agents, or supervisors knew or should have known that such non-employee was subjected to an unlawful discriminatory practice in the employer's workplace, and the employer failed to take immediate and appropriate corrective action."
- Punitive Damages will be an available remedy for cases brought under NYSHRL.
- Either prevailing party may be able to collect attorney's fees for either the NYSDHR or court cases. However, for an employer to collect, it must show that the claim was frivolous.

o **180 Days from Governor's Signature**

- New York State's Human Rights Law will apply to all private employers regardless of size.

o **One Year from Governor's Signature**

- One year after the Governor signs the law, the statute of limitations for sexual harassment claims in court or at the Division of Human Rights will increase to 3 years whereas the statute of limitations for other unlawful discrimination will remain unchanged at one year.

o **Contracts entered into on and after January 1, 2020.**

- An important update to the law includes settlements and agreements which can no longer include a non-disclosure clause relating to claims of harassment or discrimination unless the individual is afforded a consideration and revocation period. Should an employer choose to include a non-disclosure clause in a settlement or other agreement then (i) all parties must be provided with the terms, (ii) the employee must have 21 days to review and consider the non-disclosure conditions, and (iii) the person must also be allowed a 7day revocation period after signing the agreement. This applies to all agreements regardless of whether they are made as part of or in anticipation of litigation. Employers may still require a Non-Disclosure Agreement that prohibits disclosure of the settlement amount or that an agreement exists and confidentiality may still be enforced if it is the complainant's preference. Mandatory arbitration clauses will also be prohibited for litigation under this specific law. However, recent developments in the Federal Courts likely make this unenforceable.

New Jersey Update

What a NJ employer should know about Medical Marijuana

NJ Employers will hopefully have more clarity regarding medical marijuana and its effects in the workplace soon, as the highest court in the State will be hearing Wild v. Carriage Funeral Holdings on appeal. The court is expected to shed light on whether employers will need to reasonably accommodate medical use of marijuana as they do other disabilities.

The Appellate Court ruled that the NJ Law Against Discrimination did require reasonable accommodation for off duty use of medical cannabis use which has been legally prescribed pursuant to NJ Compassionate Use of Medical Marijuana Act. After the ruling, the legislature passed amendments to the law including removing language that the law did not create an obligation on employers to accommodate an employee's use of medical marijuana. The amendments further require that if an employer drug tests, they give the applicants and employees a right to respond, in accordance with the law, to a drug test that yields a positive result for marijuana. After receiving a positive test result, the employer must provide written notice of such to the employee and then give the employee 3 working days to provide a legitimate medical explanation for the positive test result or request retesting. A legitimate medical reason can include proof of registration for medical marijuana use or a prescription or authorization for medical marijuana use by a health care provider.

Engage will keep clients updated.

Connecticut Updates

Much like its tri-state area neighbors, Connecticut was busy this Spring updating its employment laws. Below are a few notable highlights.

- **Connecticut Family Leave Law**

The Connecticut Family Leave Law has been expanded. With an anticipated start date of January 1, 2022, it will cover employers with just one employee, and employees who have worked for the employer for at least 12 weeks will be eligible for this leave. Unlike the federal Family Medical Leave Act, the Connecticut law does not have a minimum hours requirement.

Employees will be able to take up to 12 weeks of paid leave (14 if leave also includes incapacitation due to pregnancy) in a 12-month period. The leave is to care for the employee themselves, family members (spouse, parents, in-laws, children, siblings, grandparents, and grandchildren) and anyone else whose "close association," whether by blood or affinity, is the equivalent of a family member. The DOL is supposed to issue guidance regarding the definition of "close association" in the coming months.

This will be an employee funded program via a mandatory payroll tax. Taxes will begin to be withheld at 0.5% of the employee's income (capped at the amount subject to Social Security taxes) in January of 2021.

Benefits are expected to begin on January 1, 2022, with the possibility of earlier benefits for parental bonding if the fund allows. Benefits will be on a sliding scale with a cap not to exceed 60 times the

minimum wage. Lower wage employees will receive benefits of up to 95% of their regular weekly pay.

Employers will have the option of providing a private plan which must be at a minimum the same as the state plan.

Employees will need to provide advance notice of the need for time off and employers will be able to require some documentation to support the need. More information regarding these requirements will be available around January 1, 2020 when the Labor Commissioner is due to issue regulations regarding these changes.

- **Sexual Harassment Training**

Beginning October 1, 2019, Connecticut has also expanded its requirements for sexual harassment training. Employers with 3 or more employees will be required to provide training for all existing employees by October 1, 2020. New employees hired after 10/1/2019 must be trained within 6 months of their hire date. For employers with less than 3 employees, including family owned and run companies, supervisors must receive the training by 10/1/2020, and all employees new to a supervisory role must be trained within 6 months of taking the supervisory role. Unlike New York, the training needs to be periodic but does not need to be annual. Trainings should be given and updated at least every ten years.

The law also requires employers to post and distribute information regarding the illegality of sexual harassment and its remedies to all employees.

In addition to new training requirements, the new law also expands an employee's time frame to file a complaint of harassment and discrimination. Employees will now have 300 days (up from180 days), to file with the Commission on Human Rights and Opportunities (the Commission).

The new law will allow for penalties for non-compliance regarding the postings, trainings and the law, reasonable attorney fees and punitive damages in certain situations.

- **Minimum Wage**

Also in October, Connecticut employers will see the first step in the periodic increases meant to bring employees to a $15.00 an hour minimum wage.

The current minimum of $10.10 will rise to $11 on October 1, 2019. Future increases include $12.00 on Sept. 1, 2020, $13.00 on Aug. 1, 2021, to $14.00 per hour on July 1, 2022, and then to $15.00 per hour on June 1, 2023.