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2017
TENDING TO YOUR BUSINESS
Labor & Employment Briefing Series

It is Hard to Be an Employer in the City
Annual Update on Key Legal Developments for NYC Employers

NYC
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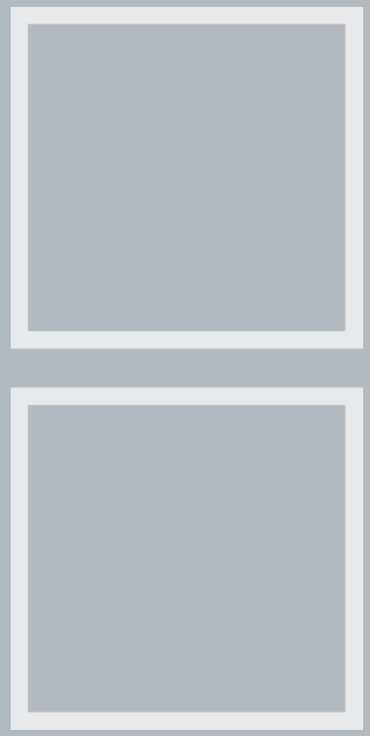

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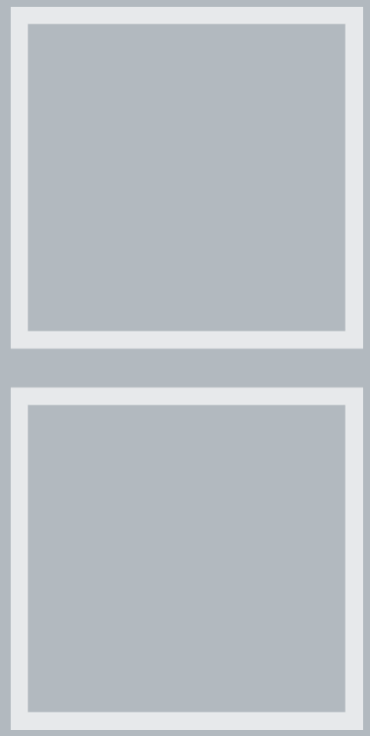

FLSA/New York -- Overtime

- **Status of "New" FLSA Rule re Salary Basis/Level**
  - Increase minimum salary level for exempt employees: from $23,660/yr ($455/wk) to $47,476/yr ($913/wk)
  - Supposed to be effective December 1, 2016
  - Texas federal district court issued nationwide injunction preventing rule from taking effect
  - DOL appeal expedited (Obama), but now delayed briefing (Trump) until end of June
  - What happens next?
    - DOL prevails on appeal by end of year, and Trump does nothing to stop rules from becoming effective
    - DOL prevails, and Trump DOL reissues a new set of regulations, perhaps with some compromise
    - DOL fails, then maybe no renewed effort, **but see** legislation re giving paid leave in exchange for overtime hours.
- **Takeaways/Action Items**
  - Do nothing; wait and see what happens
  - Roll back changes made in advance of rules becoming effective?
  - Ensure compliance with state minimum salary thresholds for overtime – see latest for NY

FLSA/New York -- Overtime

- **NYS – Minimum Salary Requirements for Overtime Exempt Status**
- 2016 minimum salary threshold was $675 per week ($35,100 annually)
- Changes made effective December 31, 2016
- **Employers in New York City**
  - ***Large employers (11 or more employees)***
    - As of 12/31/16: $825.00 per week ($42,900 annually)
    - As of 12/31/17: $975.00 per week ($50,700 annually)
    - As of 12/31/18: $1,125.00 per week ($58,500 annually)
  - ***Small employers (10 or fewer employees)***
    - As of 12/31/16: $787.50 per week ($40,950 annually)
    - As of 12/31/17: $900.00 per week ($46,800 annually)
    - As of 12/31/18: $1,012.50 per week ($52,650 annually)
    - As of 12/31/19: $1,125.00 per week ($58,500 annually)

FLSA/New York: Overtime

- **NYS – Minimum Salary Requirements for Overtime Exempt Status**
  - **Employers in Nassau, Suffolk, and Westchester Counties**
    - As of 12/31/16: $750.00 per week ($39,000 annually)
    - As of 12/31/17: $825.00 per week ($42,900 annually)
    - As of 12/31/18: $900.00 per week ($46,800 annually)
    - As of 12/31/19: $975.00 per week ($50,700 annually)
    - As of 12/31/20: $1,050.00 per week ($54,600 annually)
    - As of 12/31/21: $1,125.00 per week ($58,500 annually)
  - **Employers Outside of New York City, Nassau, Suffolk, and Westchester Counties**
    - As of 12/31/16: $727.50 per week ($37,830 annually)
    - As of 12/31/17: $780.00 per week ($40,560 annually)
    - As of 12/31/18: $832.00 per week ($43,264 annually)
    - As of 12/31/19: $885.00 per week ($46,020 annually)
    - As of 12/31/20: $937.50 per week ($48,750 annually)

Worker Misclassification/Freelancers/ICs: Latest Developments

- **NY Court of Appeals Guidance - *Yoga Vida NYC Inc.,* 28 N.Y.3d 1013 (2016)**
  - Facts/Background
    - Case involved non-staff yoga instructors
    - 2010 NY Department of Labor determination that the instructors were employees and the studio liable for unpaid unemployment contributions on the "wages" paid to the instructors
    - The studio fought the determination and lost all the way to the Court of Appeals and then won
  - Key Points from Court's Determination
    - Applied applicable multi-factor test, with emphasis on supervision, direction and control over worker
    - Instructors not employees because they:
      - Set their own hours
      - Chose whether to be paid hourly or on percentage of class sales taught
      - Were free to work at competitor studios and inform students about classes taught at other studios
      - Not required to attend meetings or receive training
  - Key Takeaways
    - Ray of hope, but fact-intensive, law-dependent analysis makes it less impactful
    - Careful approach to engaging contractors continues its run as a hot topic

Worker Misclassification/Freelancers/ICs: NYC Freelance Isn't Free Act

- **Rule**
  - Enacted November 16, 2016, effective May 15, 2017
  - Any agreement to engage a contractor to provide services for at least $800 (within a 120-day period) must be in writing that contains the following:
    - Name and mailing address of both hiring party and independent contractor
    - Itemization of services to be rendered
    - The date on which the hiring party must pay (and if no date specified, payment must be made within 30 days of completed services)
- **Penalties/Remedies**
  - Enforced by NYC Dep't of Consumer Affairs (Office of Labor Policy & Standards)
  - Private action
  - No written agreement: $250 civil penalty, plus attorneys' fees
  - Failure to pay: Underlying contact value, double damages, and attorneys' fees
  - Pattern and practice: NYC Corporate Counsel action may result in civil penalty up to $25,000.

Pay Equity: NYC Law Barring Salary History Inquiry

- **Rule**
  - Passed April 5, effective probably in October 2017 (180 days after mayor signs)
  - Prohibits private employers from:
    - Inquiring about an applicant's salary history
    - Relying on applicant's salary history in determining salary, benefits or other compensation for that applicant during hiring process
- **Penalties/Remedies**
  - Amends NYC's Human Rights Law
  - Private action
  - Compensatory damages (front/back pay), punitive damages, and attorneys' fees
  - NYC Commission on Human Rights enforcement
    - Civil Penalties: up to $125,000 ; and up to $250,000 for a "willful, wanton or malicious act."

Pay Equity: NYC Law Barring Salary History Inquiry

- **What is Prohibited?**
  - No inquiry into salary history or reliance on salary history to determine compensation (absent voluntary disclosure)
  - No questions or statements to applicant or prior employer for purposes of obtaining salary history
  - No searching of publicly available records to obtain salary history
  - No use of salary information in background check to determine applicant's compensation
- **What is Allowed?**
  - Inquiry and consideration is OK if applicant discloses salary history "voluntarily and without prompting"
  - Background checks are OK, provided no reliance on any salary information obtained
  - Discussions/exploration of applicant's:
    - Expectations re salary and compensation
    - Performance/Comp relating to objective measures of productivity (e.g., revenue, sales)
    - Unvested equity or deferred compensation subject to forfeiture when leaving current job
  - No application to existing employees or internal transfers or promotions

Pay Equity: NYC Law Barring Salary History Inquiry

- **Key Takeaways/Action Items**
  - Do nothing? Similar law in Philadelphia on hold following Chamber of Commerce court challenge
  - Remove salary history from all job application materials and background checks/verification inquiries
  - Revise any handbook provisions and policies regarding inquiry into applicant salary history
  - Train HR and all employees involved in the hiring process to:
    - Ensure they avoid making impermissible inquiries of applicants
    - Document any voluntary disclosure of salary history by an applicant

Pay Equity: NYS Fair Pay Act

- **Rule**
  - Effective January 2016; amending New York Labor Law §194
  - Prohibits private employers from:
    - Barring individual from disclosing/discussing compensation terms (subject to certain limitations)
    - Paying an employee less than an employee of the opposite sex for equal work unless difference based on:
      - a seniority system;
      - a merit system;
      - a system which measures earnings by
      - quantity or quality of production; or
      - a bona fide factor other than sex, such as education, training, or experience.
- **Penalties/Remedies**
  - Private action
  - Increased liquidated damages: up to 300% of wages found due
  - Attorneys' fees

Pay Equity: NYS Fair Pay Act

- **Key Elements – Wage Differential Rule**
  - Same Establishment: Employees working for same employer in same geographical region, no larger than a county, taking into account population distribution, economic activity, and presence of municipalities.
  - Equal Work: Work requiring equal skill, effort and responsibility that is performed under similar working conditions
  - Bona Fide Factor Other Than Sex is something that is:
    - not based upon or derived from a sex-based differential in compensation; and
    - job-related with respect to the particular position and consistent with business necessity
  - Bona Fide Factor Other Than Sex still fails as a defense if:
    - the employer's actions or practices cause a disparate impact on the basis of sex; and
    - the employer has not adopted an existing alternative practice that would serve the same business purpose and would not produce such an impact.

Pay Equity: NYS Fair Pay Act

- **Key Elements – Wage Discussion Rule**
  - Exceptions:
    - An employer may provide, in a written policy, reasonable workplace and workday limitations on the time, place and manner for inquiries about, discussion of, or the disclosure of wages, provided the rules do not:
      - Reference the inquiry, discussion, and disclosure of wages; or
      - So restrict employees as to remove completely the ability for discussion, inquiry, or disclosure
    - Employee who has access to wage information as part of their job may be limited
  - DOL Regulations issued in February 2017
    - Written policy limiting discussion must be issued either electronically, through publicly available posting, or by paper copy.
    - Policy may prohibit discussion of co-workers wages absent that co-workers consent, which may be given directly or indirectly in writing or orally – i.e., express, advance, voluntary authorization which may be withdrawn at any time.
    - No posting or notice requirements
    - Payroll record retention for 6 years

Pay Equity: NYS Fair Pay Act

- **Key Takeaways/Action Items**
  - Review employment policies and practices regarding pay transparency rules and remove prohibitions
  - Consider issuing a written policy that meets the law's requirements and exceptions
  - Update arbitration and class waivers to include equal pay claims
  - Train supervisors and HR
  - Make a written record: document business rationale/reasons for comp decision/disparity
  - Conduct regular audits in a privileged context

NYS Paid Family Leave ("PFL")

- **Effective January 1, 2018**/proposed regulations have not been signed into law but the public comment period closed in early April
- **Proposed Regulations provide:**
  - Full-time employees are eligible to take leave if they have been working for a covered employer for 26 or more consecutive weeks
  - Part-time employees are eligible for leave if they have worked for 175 consecutive days
  - Employees will apply directly to employer's disability insurance carrier for benefits, and carriers will make the final leave determination
  - Disability insurers will be required to offer PFL benefits or cease providing any disability coverage at all
  - Cannot require employees to use accrued time off for requested PFL
  - State disability and PFL will not run concurrently, but FMLA leave and PFL may
  - Claim-related disputes will be heard by arbitrator appointed by State Workers' Compensation Board; failure to provide PFL will be subject to fine of up to .5% of employer's weekly payroll plus not more than $500.

NYS Paid Family Leave (continued)

- **Comparison FMLA/PFL:**
  - PFL applies to every employer (i.e. employers with one or more employees)
  - No hours-worked requirement for eligibility under PFL
  - Similar job restoration benefits
  - Must maintain health benefits during leave under both PFL and FMLA
  - Definition of "family" under PFL more inclusive than FMLA – includes grandchild, grandparent and domestic partner

- **4-Year Phase-In Schedule**

Year	Max Leave	Percentage of Employee Salary	Max Wage
2018	8 weeks	50%	50%
2019	10 weeks	55%	55%
2020	10 weeks	60%	60%
2021	12 weeks	67%	67%

NYC Paid Sick Leave Law

- Applies to employers with 5 or more employees who work 80 or more hours in a calendar year
- **Key details:**
  - Must provide up to 40 hours of paid sick leave
  - Must provide or post (and comply with) written sick leave policy
  - May require documentation from a health care provider after an employee uses three consecutive workdays as sick leave
  - Employers must keep and maintain records of their compliance with Paid Sick Leave Law for three years
  - Penalties for non-compliance up to $500 per employee affected/$1000 each for subsequent violations

Affordable Care Act
Big Picture – How Does It Impact Employers?

(1) Employer Mandate: Excise taxes for failing to offer health coverage to at least 95% of full-time employees (and dependents)

(2) Tax Reporting: Annually complete Forms 1095-C for full-time employees (and enrollees in self-funded health coverage)

(3) Health FSA Annual Limits: For 2017, employees cannot contribute more than $2,600 into an account

(4) Cadillac Tax: Effective 2020, 40% excise tax on high-cost health coverage (approx. $11,000 self-only/$29,000 family coverage)

(5) Market Reforms: For example, 100% coverage for preventive services and dependent coverage up to age 26

Health Care Reform Under New Administration

- **The American Health Care Act**
  - Eliminates employer mandate penalties
  - Delays Cadillac Tax until 2026
  - Removes limit on health FSA contributions
  - Increases contribution limits for health savings accounts
- **The bill did <u>not</u> pass the House**
  - Speaker Ryan pulled the bill due to lack of votes

Renewed Efforts to Repeal and Replace ACA

- Recent meetings to reach a compromise
- Proposed amendment is being considered
- Deadline looming – Congress must pass with the budget
- If fail, other vehicles for health care reform include:
  - Tax Reform
  - Regulations
  - Non-Enforcement Period

ACA/Health Care Reform: Takeaway Points

- **The Affordable Care Act is <u>still the law</u>**
- **You may <u>still</u> be subject to <u>penalties</u> for noncompliance**
  - Indications of continued enforcement under Trump Administration:
    - New IRS webpage detailing employer mandate penalties
    - New HHS regulations aimed at stabilizing individual market

Hiring: NY Ban-The-Box Act (Fair Chance Act)

- Effective: Now
- Employer size: 4
- Prohibited conduct:
  - Inquiry re pending arrest and conviction
  - Cannot search publicly available sources
- When employer may make inquiry/conduct search: After conditional offer of employment

Hiring: Ban-The-Box cont.

- **Exceptions**
  - Required to conduct criminal background searches
  - Law bars employment in particular jobs if conviction record

Hiring: Notification

- **Notification: If conduct criminal record search post-conditional offer and made adverse action**
  - Written copy of inquiry (using NYCCHR form)
  - Perform analysis per Art. 23(a) NY Corrections Law
  - Provide applicant with copy of analysis (using NYCCHR form)
  - Allow applicant 3 business days to respond – keep position open
  - If conduct background check through consumer reporting agency, must comply with FCRA

Hiring: Notification - Art. 23(a) NY Corrections Law

- **Prohibits denial of employment because previously convicted of a crime, unless**:
  - Direct relationship between crime specific sought or held
  - Reasonable risk to property or to the safety or welfare of specific individuals or the general public

Hiring: Notification - Art. 23(a) NY Corrections Law

Factors considered:

- public policy to encourage employment of persons convicted
- specific duties and responsibilities necessarily related to job
- bearing of criminal offense on his fitness or ability to perform
- time elapsed since the occurrence of criminal offense
- age at time of occurrence of criminal offense
- seriousness of offense
- information produced by person re: rehabilitation and good conduct
- legitimate interest of the employer in protecting property, and the safety and welfare of specific individuals or the general public

– Written statement upon denial of license or employment.

- At request of person previously convicted, employer shall provide, within thirty days of a request, a written statement setting forth the reasons for such denial.

Hiring: Credit Check Act

- **Effective**: Now
- **Prohibits:**

  Inquiry into credit history

  - Credit reports
  - Credit score
  - Bankruptcy, judgment or liens
  - No. of credit accounts, late or missed payments, charged off debts
  - Items in collection
  - Credit limits or prior credit inquiries

Hiring: Credit Check Act

Exceptions:

- Signatory authority >$10,000
- Authority to bind ER to agreements >$10,000
- Authorization of modify digital security systems
- Non-clerical position w/access to trade secrets/national security
- Public safety positions
- Employer required to consider credit history by law or self- regulatory organization (per SEC)(i.e. FINRA)
- Bonding
- Security clearance

Hiring: I-9

- January 22, 2017
  - Similar to old form
  - Same documents

- Changes to format
  - Paper
  - Electronically, then print and sign (smart form)
    - Flags errors
    - Link to instructions
    - Hover & question mark: explanation
  - I-9 Vendor

Restrictive Covenants: Enforceability under New York Law

- A restrictive covenant is enforceable under NY law if it is:
  - (1) Reasonable in time and geographic area;
  - (2) Necessary to protect the employer's legitimate interest;
    - Including confidential information, trade secrets, harm to an employer currently benefitting from the special or unique services of its employee, and client relationships fostered by an employee at the employer's expense.
  - (3) Not harmful to the general public; and
  - (4) Not unreasonably burdensome to the employee.

Restrictive Covenants: Terminations Without Cause

- New York law is unsettled as to whether an employer may enforce a non-competition agreement against an employee who was terminated without cause.
  - Traditional view: Employers cannot enforce restrictive covenants against employees who are terminated without cause.
  - Recent holding restricted the termination "without cause" limitation.
    - *Hyde v. KLS Prof'l Advisors Group, LLC* (2d Cir. 2012): A termination "without cause" will only invalidate a restrictive covenant in the context of a "forfeiture for competition" clause.
    - In a "forfeiture for competition" clause, the employee has the option to either forfeit certain benefits (e.g., stock options) in order to compete with his/her former employer or to refrain from competing and retain the benefits.
  - Courts are now moving back toward a bright-line rule under which restrictive covenants are not enforceable against employees who are terminated without cause.
    - *Buchanan Capital Markets, LLC v. DeLucca* (App. Div. 2016): Restrictive covenants not enforceable against employee terminated without cause where employer "does not demonstrate continued willingness to employ the party covenanting not to compete."
    - *Random Ventures, Inc. v. Advanced Armament Corp., LLC* (S.D.N.Y. 2014): "New York courts will not enforce otherwise enforceable covenants where the employer terminates the employee without cause."
- Even if employee is terminated without cause, restrictive covenants may be valid if employer reincorporates the covenants into a severance agreement and provides the employee with severance benefits to which he/she would not otherwise be entitled.
  - *U.S. Security Assoc., Inc. v. Cresante* (Sup. Ct. 2016): Former employee signed a severance agreement under which he received 7 weeks of severance pay in exchange for the agreement to adhere to the non-competition restrictions in his initial employment agreement.

Restrictive Covenants: Choice of Law Provisions

- Important for New York employers with employees in other states.
  - E.g., non-competition agreements are enforceable in New York, but are statutorily barred in California.
  - Courts in New York are likely to honor a New York choice-of-law provision, whereas California courts would likely reject such a provision based on public policy.
    - *See Estee Lauder v. Batra* (S.D.N.Y. 2006): Applying New York law to California employee pursuant to choice-of-law provision because California's interest in the dispute was not "materially greater" than New York's.
    - *See Stryker Sales v. Zimmer Biomet* (E.D. Cal. 2017): There is a "trend among California courts of finding that §16600 [California's statute banning non-competes] represents a fundamental public policy interest in California and that it should override contractual choice-of-law provisions at least with respect to such restrictive covenants."

Restrictive Covenants: Forum Selection Clause

- Creates a greater likelihood that the lawsuit will be heard in New York, and therefore the court would be more likely to enforce the New York choice of law provision.
- In the case of a California employee who works for a New York company, a California court may be required to transfer the case to New York pursuant to the forum selection clause.
  - *See Britvan v. Cantor Fitzgerald* (C.D. Cal. 2016) (finding that California's public policy is not a consideration in determining whether to transfer venue based on a forum selection clause).

Arbitration Agreements/Class Waivers

- Generally allowable in the employment context.
- Federal Arbitration Act:
  - Embodies a "liberal federal policy favoring arbitration agreements."
  - Arbitration agreements are valid unless:
    (1) There is a legal or equitable basis for revoking the agreement; or
    (2) A "separate congressional command" overrides the FAA.
- *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011): consumer arbitration agreements containing class action waivers are valid under the FAA.
  - 5-4 decision written by Justice Scalia.

Arbitration Agreements/Class Waivers : the NLRB

- The NLRB has attacked class action waivers in employment arbitration agreements.
  - NLRB's Position: The NLRA provides a separate "congressional command" that overrides the enforceability of class action waivers in arbitration agreements.
  - Section 7 of the NLRA: Allows employees to engage in "other concerted activities for the purpose of… mutual aid or protection."
  - NLRB: Class/collective action waivers in arbitration agreements violate employees' Section 7 rights to engage in protected, concerted activity. *See, e.g., D.R. Horton*, *Inc.,* 57 NLRB No. 184 (2012).

Arbitration Agreements/Class Waivers: Federal Courts

- Circuit Split:
  - Class action waivers in arbitration agreements are valid in the employment context:
    - 2nd Circuit (*Sutherland v. Ernst & Young LLP* (2013)).
    - 5th Circuit (*D.R. Horton, Inc.* (2013)).
    - 8th Circuit (*Owen v. Bristol Care, Inc.* (2013)).
    - 11th Circuit (*Walthour v. Chipio Windshield Repair* (2014)).
  - Class action waivers in arbitration agreements are invalid in the employment context because they violate the NLRA:
    - 7th Circuit (*Lewis v. Epic Systems Corp.* (2016)).
    - 9th Circuit (*Morris v. Ernst & Young LLP* (2016)).

Arbitration Agreements/Class Waivers : U.S. Supreme Court Review

- January 2017: U.S. Supreme Court grants certiorari, indicating that it will resolve this issue.
- February 2017: Supreme Court announces it will hear the case in its October 2017 term.
- April 2017: Justice Neil Gorsuch is confirmed by the Senate to fill Justice Scalia's vacant seat.
  - As a Judge on the U.S. Court of Appeals for the 10th Circuit, Gorsuch:
    - Wrote opinions in favor of the FAA's broad arbitration mandate;
    - Was skeptical of deference to administrative agencies; and
    - Was reluctant to expand the scope of statutory protections beyond a statute's plain text.
- Resolution expected in late-2017 or early-2018.

Arbitration Agreements/Class Waivers: What Next?

- Given Justice Gorsuch's history, arbitration agreements and class waivers seem safe bets.
- Implementation Tips:
  - Scope of arbitration clause is key, but so are carve-outs
  - Use prevailing ADR options (AAA, JAMs, etc.) rather than international panels
  - Consideration: continued employment vs. mutuality of obligations
  - Limit their right to change, alter or terminate arbitration agreements
  - Fairness (i.e., neutral arbitrators, meaningful discovery, allow for all available relief, employer pays costs, written award at conclusion)
  - Forum selection convenient for employee.
  - Clear and conspicuous class waiver