LOEB & LOEB LLP

Employment and Labor

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New Year, New Employment Laws: Changes New York Employers Need to Know

The legal landscape for employers is rarely static for an extended period of time, and 2015 delivered several important changes for New York employers. Although some of these developments affect companies operating statewide, New York City employers in particular should be acquainted with new laws and ensure that their practices are in compliance as we enter 2016.

Restrictions on Using Credit and Criminal Histories in Employment Decisions

Two new laws restrict how an employer can inquire into — and use — information concerning an employee's credit history and criminal background. Both laws apply to nearly all New York City employers, with very limited exceptions and exemptions (which will be interpreted very narrowly). Both laws took effect in the fall of 2015, so companies that are not already in compliance should take immediate measures to do so.

First, NYC's Stop Credit Discrimination in Employment Act (SCDEA) took effect on Sept. 3, 2015, making it illegal for companies to request or obtain the consumer credit history of a job applicant or current employee (whether by asking the applicant or obtaining the information from a consumer reporting agency).

Some of the key takeaways for New York City employers:

- Just asking about credit history is a violation of the SCDEA. A company need not make an adverse employment decision based on credit history in order to be fined. That said, a company that does use credit history against a prospective or current employee commits a separate (and separately punishable) violation of SCDEA.
- "Consumer credit history" is defined broadly. An employer breaks the law by seeking information regarding information on debts, credit accounts, bankruptcies and liens.
- Fines are steep! Willful, wanton or malicious violations can result in fines up to $250,000, as well as back pay, compensatory damages and punitive damages.
- Exemptions are construed narrowly to ensure that employers use credit information only when legally required or directly relevant to a particular position. For example, exemptions for those with "fiduciary responsibility" apply to executives — not middle managers in finance.

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- Employers that claim exemptions must keep detailed records of the process.

Read our October 2015 alert for more information on SCDEA.

Similar in tone and objectives, New York City's Fair Chance Act went into effect in October 2015, prohibiting nearly all employers from inquiring into a job applicant's arrest or criminal history before extending a conditional job offer. Dubbed "ban the box," the law makes it illegal to include questions about criminal history on a written job application form.

As with the SCDEA, employers can get into trouble even if they seek information through less explicit means. Employers may not ask any questions about a candidate's arrest or conviction history during the application stage. After extending a conditional offer, employers *may* ask, but may only rescind an offer based on the applicant's criminal history after complying with Article 23-A of NYS Correction Law. Even if the employer determines that a sufficient nexus exists between the position's requirements and the applicant's history, the employer must first present its case and allow the applicant three business days to respond (keeping the job open in the meantime). For some positions, criminal histories may be "deal-breakers" and a company could be liable for negligent hiring if it ignores relevant disqualifying information.

Read more about the Fair Chance Act in our December 2015 alert.

Intern or Employee: Second Circuit Emphasizes That "Employee" Status Requires Individualized Inquiry

For decades, students (and often, recent graduates) have acquired work experience by taking on internships for little or no compensation. Class actions challenging the legality of unpaid internships have been percolating through the courts and, in July of last year, the U.S. Court of Appeals for the Second Circuit handed down a landmark decision (discussed in an alert here) establishing a new test for determining whether a person should be treated as an unpaid intern or a paid employee.

Glatt v. Fox Searchlight Pictures, Inc. involved claims brought by interns who worked on the Fox Searchlight film "Black Swan" (and sought to certify a larger class involving interns at various Fox divisions). In the appeal, the Second Circuit considered what standard to apply in determining whether an individual is an intern or an employee entitled to pay and other legal protections. The court concluded "the proper question is whether the intern or the employer is the primary beneficiary of the relationship." Within that general framework, however, the court enumerated seven factors bearing on the relative benefits and expectations. Specifically, courts should consider the extent to which:

- The intern and the employer clearly understand that there is no expectation of compensation.
- The internship provides training that would be similar to that provided in an educational environment.
- The internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
- The internship accommodates the intern's academic commitments by corresponding to the academic calendar.
- The internship's duration is limited to the period during which the internship provides the intern with beneficial learning.

- The intern's work complements, rather than displaces, the work of paid employees, while providing significant educational benefits to the intern.
- The intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

In the case before the court, there was evidence here that some Fox interns may have been treated as unpaid employees, performing duties with minimal educational value—making deliveries and making coffee, for example. Notably the Second Circuit vacated the district court's orders certifying the class in the litigation, finding that different internships carry different responsibilities, training opportunities and expectations, and balancing the various factors will usually require an individualized inquiry looking at the particular employer-intern relationship and the nature of the position.

For employers in New York (and Connecticut and Vermont), *Glatt* is a mixed ruling. Employers must keep in mind the educational objectives of internships — interns can perform "real work" (even if the intern displaces a paid worker), but the position should promote actual learning and be in accord with the intern's academic commitments. Employers should be explicit (in writing) that the internship is not compensated in any way and is not a path to paid employment with the company.

Bills to Eliminate Gender Inequality in the Workplace

In October, Gov. Andrew M. Cuomo signed into law a handful of bills targeting pay inequity and gender discrimination in the workplace. Key provisions include:

- Amending existing law, which prohibits pay inequity on the basis of sex, to further clarify that employers may not pay disparate amounts to employees performing the same job based on factors based upon or derived from sex-based pay differentials or factors that are not job-related and based on business necessity. The bill increases the penalty on employers that violate the pay inequity law.
- Giving all employees the right to inquire about other employees' pay and to disclose information about their wages. Notably, this provision applies to all employees, not just to women.
- Expanding the law against sexual harassment to cover all employers in New York, even if they have fewer than four employees.
- Allowing for successful plaintiffs in sex-discrimination cases to recover attorneys' fees.
- Expressly prohibiting employment discrimination based on familial status. Although family status is already protected under New York state law for housing and credit, the new bill will prohibit employers, licensing agencies or labor organizations from discriminating against employees based on familial status.
- Requiring employers to provide reasonable accommodations for pregnant women within the workplace.

Expansion of Transgender Rights

In the final months of 2015, transgender rights received a boost both in Albany and in New York City. Although New York City law has barred discrimination against transgender individuals since 2002, Gov. Cuomo signed an executive order declaring his intention

to expand statewide protections to transgender individuals and others suffering from gender dysphoria. While the regulations are still under development, employers throughout the state should be on notice of the administration's intention to treat the state's sex discrimination laws as encompassing discrimination on the basis of gender identity.

In New York City, meanwhile, the Commission on Human Rights released a guidance document in December 2015 describing how the city's human rights laws apply to gender identity. In general terms, the guidance affirms: "It is unlawful to refuse to hire, promote, or fire an individual because of a person's actual or perceived gender, including actual or perceived status as a transgender person. It is also unlawful to set different terms and conditions of employment because of an employee's gender."

Illegal discrimination may include refusing (or consistently failing) to use an employee's preferred name or pronoun, or denying individuals the right to use single-sex facilities, such as bathrooms or locker rooms, and participate in single-sex programs, consistent with their gender, regardless of their sex assigned at birth, anatomy, medical history, appearance or the sex indicated on their identification. It may also include maintaining sex stereotypes, such as by imposing and enforcing sex-specific dress codes. The guidance sets forth a number of specific scenarios, which New York City employers should review and incorporate into their policies and workplace culture.

Minimum Wage Raises — With More Increases Phasing In

New York is among the states and cities passing legislation to raise the minimum wage over the next several years. In 2016, the statewide minimum wage for almost all nonexempt employees rises to $9.00 per hour. Exempt executive and administrative workers will be subject to a $675 per week minimum, up from $656.25. Minimum wage increases will also affect workers in the state's hospitality and fast food industries. Tipped employees will now be entitled to $7.50 hourly, pretip; fast food workers in NYC will earn a minimum of $10.50 per hour, with a $9.75 minimum throughout the rest of the state. As employers in the fast food industry already will be aware, this harkens an increase to $15 per hour, to be phased in over the next several years.

Transportation Benefits

Beginning on Jan. 1, 2016, most NYC employers (with 20 employees or more) were required to offer their full-time employees the opportunity to use pretax earnings for qualified transportation fringe benefits (as defined in the federal tax code).

The law includes exemptions for government entities, workplaces covered by a collective bargaining agreement and other employers exempt from payroll tax requirements. Although the law is already in effect, companies have six months to comply without incurring civil penalties.

What's Next?

The labor and employment landscape is New York is dynamic and changing, and more changes may be on the horizon. At present, employers in New York should focus on compliance with the new laws and regulations that went into effect in 2015.

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Employment and Labor Practice

MARLA ASPINWALL	MASPINWALL@LOEB.COM	310.282.2377
IVY KAGAN BIERMAN	IBIERMAN@LOEB.COM	310.282.2327
MARC CHAMLIN	MCHAMLIN@LOEB.COM	212.407.4855
PAULA K. COLBATH	PCOLBATH@LOEB.COM	212.407.4905
MARK J. GOLDBERG	MGOLDBERG@LOEB.COM	212.407.4925
MICHELLE LA MAR	MLAMAR@LOEB.COM	310.282.2133
TAO Y. LEUNG	TLEUNG@LOEB.COM	310.282.2179
MICHAEL Z. MAIZNER	MMAIZNER@LOEB.COM	212.407.4176
ERIN M. SMITH	ESMITH@LOEB.COM	310.282.2113
MICHAEL P. ZWEIG	MZWEIG@LOEB.COM	212.407.4960