Top 5 New York Labor & Employment Law Takeaways for Companies in 2023

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By David Green, Esq.

Understanding the Difference: Retaliation vs. Discrimination Claims

Based on an often misunderstood and overlooked legal concept, a Hamptons real estate firm was recently ordered to pay both back pay and $200,000 in punitive damages for its retaliation against a former "at-will" agent who complained about racial discrimination and was thereafter terminated.

(See, https://www.eeoc.gov/facts-about-retaliation)

Notably, the award was not related to any discrimination or harassment itself, but the termination effectuated two weeks after the claimant complained that she was not provided with the same mentoring as her non-minority counterparts. Simply, retaliation does not require direct discrimination or harassment, but is equally important for employers to understand.

State and federal law protects employees who engage in "protected activities" such as 1) filing or being a witness in an EEOC (Equal Employment Opportunity Commission) or NYSDHR (NYS Division of Human Rights) charge, complaint, investigation, or civil lawsuit; 2) communicating with a supervisor or manager about employment discrimination, including harassment; 3) answering questions during an investigation of alleged harassment; 4) refusing to follow orders that would result in discrimination; 5) resisting sexual advances, or intervening to protect others; 6) requesting accommodation of a disability or for a religious practice; or 7) asking managers or co-workers about salary information to uncover potentially discriminatory wages. Any "retaliatory action" taken, if causally connected to the protected activity, exposes the employer to a claim. Such an action could include: 1) denial of promotion; 2) non-selection/refusal to hire; 3) denial of job benefits; 4) demotion; 5) suspension; 6) discharge; 7) threats; 8) reprimands; 9) negative evaluations; 10) harassment; or 11) other adverse treatment that is likely to deter reasonable people from pursuing their rights.

Uninformed employers often believe they are free to terminate an "at-will" employee for any non-discriminatory reason, sometimes exposing themselves to a retaliation claim. Instead, employers should implement policies specific to preventing retaliation, and take all necessary steps to address the "protected activities" and protected complaints of workers. ■

By Zachary Mike, Esq.

New York State Passes Legislation to Ban Non-Compete Agreements

Non-compete agreements could soon be a thing of the past in New York. The New York State Senate and then Assembly passed legislation banning provisions in employment contracts that restrict where the employee may work after their employment ends. The bill, A1278B/S3100A,[1] is now heading to Governor Hochul's desk for signature. If signed into law, it would go into effect on the 30th day after it becomes law and would prospectively apply to contracts entered into or modified on or after that date. However, if Governor Hochul does not sign the bill or proposes any amendments to it, it may not become law until next year when the New York Legislature reconvenes.

What the Proposed Law Bans

Under the proposed law, a non-compete agreement is defined as "any agreement, or clause contained in any agreement, between an employer and a covered individual that prohibits or restricts such covered individual from obtaining employment, after the conclusion of employment with the employer included as a party to the agreement."[2] The proposed legislation would prohibit employers from seeking, requiring, demanding, or accepting non-compete agreements with any "covered individual" regardless of their position and/or salary. The bill would not prohibit employment contracts that restrict "covered individuals" from disclosing trade secrets or confidential information, or from soliciting the employer's clients, so long as the agreement "does not otherwise restrict competition in violation of this section."[3]

Moreover, a covered individual is defined as "any other person who, whether or not employed un-

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der a contract of employment, performs services for another person on such terms and conditions that they are, in relation to that other person, in a position of economic dependence on, and under an obligation to perform duties for, that other person."[4] The language suggests that the restrictions could apply to both employees and independent contractors.

New York is following the trend of other states, as well as the Federal Trade Commission, in adopting restrictions on non-compete agreements.

The proposed law does raise some questions for business owners. While it does allow prohibitions on the non-solicitation of an employer's clients that the covered individual learned about during employment, it is silent on whether agreements may contain prohibitions on the non-solicitation of employees. Additionally, there is no evidence that the bill is intended to restrict the use of non-compete provisions in a sale-of-business transaction.

Private Enforcement of Non-Competes

In addition to the ban on non-compete agreements with covered individuals, the bill also would provide a covered individual with a private cause of action[5] with a two-year statute of limitations that runs from the later of "(i) when the prohibited non-compete agreement was signed; (ii) when the covered individual learns of the prohibited non-compete agreement; (iii) when the employment or contractual relationship is terminated; or (iv) when the employer takes any step to enforce the non-compete agreement."[6]

Additionally, courts would be granted the jurisdiction to void any unlawful non-compete agreement, enjoin the conduct of any person/employer, award lost compensation damages and reasonable attorneys' fees, and order the payment of liquidated damages (which would be required under the current language of the proposed law). However, such award of liquidated damages would be capped at $10,000.

Distinctions from the Proposed Ban on Non-Competes Published by the Federal Trade Commission

New York is following the trend of other states, as well as the Federal Trade Commission (the "FTC"), in adopting restrictions on non-compete agreements. However, there are a few noteworthy distinctions between this bill and the proposed ban on non-competes published by the FTC earlier this year. Unlike the FTC's proposed rule, the potential New York law:

- has no sale-of-business exception, which generally applies to mergers and acquisitions,
- would not require rescission of existing non-competes, and
- would not require employers to provide covered individuals with notice that their non-compete agreements have been voided. ■

[1] https://www.nysenate.gov/legislation/bills/2023/A1278/amendment/B
[2] New York Senate Bill S3100A § 191-d(1)(a).
[3] New York Senate Bill S3100A § 191-d(5).
[4] New York Senate Bill S3100A § 191-d(1)(b).
[5] In this case, a private cause of action allows a private plaintiff to bring a legal action based directly on a statute in order to recover damages.
[6] New York Senate Bill S3100A § 191-d(4).

By Zachary Mike, Esq.

U.S. Department of Labor Proposes New Independent Contractor Rule

In fall of 2022 the U.S. Department of Labor proposed an independent contractor rule under the Fair Labor Standards Act ("FLSA"), which would undo the current rule put in place by the Trump administration in 2021 (the "Proposed Rule"). After conducting a notice and comment period, the Department of Labor is currently finalizing the Proposed Rule. What does this mean for your business? Read on for what employers need to know about the new rule.

1. What is the current test to determine what constitutes an independent contractor under the FLSA?

The distinction between independent contractors and employees is important because under the FLSA, employees are entitled to minimum wage, overtime pay, and other benefits, while independent contractors are not.[1]

Under the current rule, there is a five-factor test for determining whether an individual is an independent contractor or employee. The test evaluates:

- the nature and degree of control over the work;
- the worker's opportunity for profit or risk of loss;
- the amount of skill required for the work;
- the degree of permanence of the working relationship; and
- whether the work is an integral part of the purported employer's business.

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This test considers the first two factors to be the most important, while the remaining three factors are considered less important. In other words, if an individual exercises substantial control over the work, or has a substantial opportunity for profit, or risk of loss, the individual will likely be classified as an independent contractor, without considering the other factors. This is significant because the current test makes it easier for employers to classify workers as independent contractors.

2. What is the test to determine what constitutes an independent contractor under the Department of Labor's Proposed Rule?

According to the Proposed Rule, the test for determining whether an individual is an independent contractor or employee would consist of six factors. Unlike the current rule, rather than any factor(s) weighing more than the others, the Proposed Rule looks at the totality of the circumstances. This test evaluates:

- the nature and degree of the potential employer's control;
- the permanency of the worker's relationship with the potential employer;
- the amount of the worker's investment in facilities, equipment, or helpers;
- the amount of skill, initiative, judgment, or foresight required for the worker's services;
- the worker's opportunities for profit or loss; and
- the extent of integration of the worker's services into the potential employer's business.

Although the Proposed Rule may be subject to change prior to a final decision, business owners should remain aware of the new distinctions to avoid investigations by the Department of Labor should their independent contractors be reclassified as employees.

Most notably, the Proposed Rule adds an additional factor which considers the amount of the worker's investment in facilities, equipment, or helpers, the lack of which makes it is more likely to be considered an employee. As a result, this new test would make it more difficult for workers to be classified as independent contractors. For example, even if an individual exercises substantial control over the work, or has a substantial opportunity for profit, or risk of loss, the individual may still be considered an employee, depending on the other four factors.

3. The Takeaway

Although the Proposed Rule may be subject to change prior to a final decision, business owners should remain aware of the new distinctions to avoid investigations by the Department of Labor should their independent contractors be reclassified as employees. Business owners should conduct an annual internal audit to make sure that all workers are properly classified. Please note that New York State law may have more stringent tests than the test proposed by U.S. Department of Labor. ■

[1] Allen Smith, DOL Will Issue New Independent-Contractor Proposed Rule, SHRM, June 6, 2022, https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/dol-will-issue-new-independent-contractor-proposed-rule.aspx.

By Zachary Mike, Esq.

New York State Amends Pay Transparency Law

New York State enacted the New York Pay Transparency Law (the "Law"), which requires most New York employers to provide salary ranges for all advertised jobs and promotions in New York State, effective as of September 17, 2023. However, Governor Kathy Hochul recently signed an amendment to the Law (the "Amendment")[1] that changes it in three major ways.

1. What constitutes a job "performed" in New York

Previously, the Law simply stated that the advertisement requirements would apply to any position that "can or will be performed in the state of New York." Now, the Amendment explains that the Law does not apply to jobs solely because they "can" hypothetically be performed in New York. Instead, covered advertisements for jobs, promotions, or transfer opportunities will be those that:

- "will physically be performed, at least in part, in the state of New York"; and
- "will physically be performed outside of New York but reports to a supervisor, office, or other work site in New York."

Essentially, the Law will apply to jobs where the employee will be physically located in New York in some capacity (whether full-time or as part of hybrid work), as well as to those who would be out-of-state employees, but report to a supervising contact of the covered employer who is physically located within the jurisdiction of New York State, similar to the New York City Pay Transparency Law.

2. Elimination of Recordkeeping Obligations

Furthermore, the Amendment wholly eliminates the Law's recordkeeping requirement regarding the "history of compensation ranges for each job, promotion, or transfer opportunity and the job descriptions for such positions," if they exist. While the Amendment has abolished this obligation, covered employers should consider maintaining such compensation records to ensure best practices.

3. Defining the Term "Advertise"

Lastly, the Amendment clarifies the previous ambiguity in the Law to provide a more concrete statutory definition of the term "advertise," which is now defined as "mak[ing] available to a pool of potential applicants for internal or public viewing, including electronically, a written description of an employment opportunity." Therefore, the Amendment confirms that the Law's salary disclosure requirement applies to both internal and external written job postings and is thus silent on word-of-mouth/verbal communications.

For additional information, please see the NYS Department of Labor's website at: https://dol.ny.gov/pay-transparency ■

[1] Senate Bill S1326; https://www.nysenate.gov/legislation/bills/2023/s1326.

By Vincent Costa, Esq.

Amendments to the New York State WARN Act

Amendments to the New York State Adjustment and Retraining Notification Act ("WARN Act") adopted in June 2023 are now in effect. The amendments expand the scope of the WARN Act.

The WARN Act requires covered businesses to provide 90 days' notice prior to mass layoffs or closures to all affected employees and employee representatives, as well as to the Commissioner of Labor and Local Workforce Development Boards. The WARN Act currently applies to private businesses with 50 or more full-time employees in New York. Currently, the Act covers:

- Closings affecting 25 or more employees,
- Mass layoffs involving 25 or more full-time employees, as long as the 25 or more employees make up at least one-third of all employees at the place of employment, and
- Mass layoffs involving 250 or more full-time employees.

The amendments expand the WARN Act in large part as follows:

- Employers covered include any business that employs 50 or more employees, whether or not they are full-time.
- The scope of employees that counts toward the 20-employee threshold for a "mass layoff" is expanded to include remote employees (in comparison to currently only including the employees "at" the site of employment), both part-time and full-time employees, employees who resign in anticipation of a facility closing, and employees placed on furloughs lasting more than three months (currently only applies to furlough that is for more than six months).
- New process by which employers seek an exception from the 90-day notice period requirement. The employer must submit certain required documentation demonstrating eligi-

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bility for the exception to the Commissioner of Labor, who will then decide whether an exception is warranted.
- The "unforeseeable business circumstances" exception to the notice requirement has been amended to include public health emergencies, such as a pandemic "that results in a sudden and unexpected closure" as an additional situation that may excuse full compliance with WARN.
- Notices can be provided electronically.

In addition to the governmental entities that already must receive notice, the employer must also notify (1) the chief elected official of the unit of local government, (2) the school district[s] where the site of employment is located, and (3) the locality that provides police, firefighters, and other emergency services where the employment site is located.

Moreover, employers are now required to give notice even when:
- The employer's actions were due to a physical disaster or an act of terrorism,
- The employer was actively seeking capital or business at the time notice was required,
- The need for notice was not reasonably foreseeable, and
- The closure or mass layoff was due to a natural disaster.

In lieu of notice, severance may be paid to employees, subject to a number of conditions:
- There must be an employment agreement or a uniformly applied company policy that requires that the employer give the employee a definite period of notice before a layoff or separation.
- The employee must be laid off or separated without the required notice.
- The employer must pay the employee a sum equal to the employee's regular wages and the value of the costs of any benefits, or an amount computed in accordance with a formula based on the employee's past earnings and benefits costs, for the required period of the notice. ■

For guidance on labor & employment law,
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