A SUMMARY OF FEDERAL AND NEW YORK EMPLOYMENT LAW REVISIONS IN RECENT YEARS

In the past couple of years, there have been a number of significant revisions in federal laws and New York State and City laws relating to personnel and employee relations that will likely have an impact on an employer's operations. Readers may want to consider if their organization should make changes in policies or procedures to meet these requirements.

Noncompetition Agreements

At present, there are no federal or New York statutes that prohibit or restrict an employer from requiring employees to sign agreements that prohibit them from leaving the employer and taking a position with a competitor or a customer. (Some other states, including California, have prohibited noncompetition agreements.) In New York, courts have upheld noncompetition agreements unless they are found to be excessive in scope (meaning that they place restrictions on the departing employee that are not justified by the employer's legitimate business interests) or are excessive in duration (generally, in New York, a one-year restricted period has been found to be reasonable).

In 2023, the New York State legislature passed a bill that would have prohibited employers from entering into noncompetition agreements with employees, with only limited exceptions. Governor Kathy Hochul vetoes this bill, so New York's standards on noncompetition agreements remain in effect. It is possible, however, that legislation on this subject will be re-introduced in the New York State legislature. A bill has been introduced in the New York City Council (covering employers in New York City) which, if enacted, will prohibit or restrict noncompetition agreements for any workers, including employees, independent contractors, freelancers, and executives and will require employers to inform anyone covered by this law that the noncompetition restrictions are cancelled.

On April 23, 2024, the Federal Trade Commission ("FTC") issued a Final Rule that would ban the enforcement of any current noncompetition agreements, except for defined highly-compensated senior executives, and would prohibit employers from entering into noncompetition agreements in the future with any employer, including senior executives. The FTC stated that entering into noncompetition agreements is "an unfair method of competition," that it believed trade secret laws and confidentiality/non-disclosure agreements provide adequate protection for employers' interests in protecting their proprietary and other sensitive information, and that "employers that wish to retain employees can compete pm the merits for the worker's labor services by improving wages and working conditions." The FTC Final Rule was slated to take effect on September 4, 2024. However, on August 20, 2024, in Ryan LLC v. Federal Trade Commission, the United States District Court for the Northern District of Texas issued Several legal challenges have been filed against the Final Rule seeking a nationwide permanent injunction against the FTC Final Rule on the basis that the FTC did not have authority to establish a rule to limit or prohibit noncompetition agreements. As of September 23, 2024, the FTC had not yet filed an appeal of the district court decision.

Employee Intellectual Property Rights

New York enacted a law rendering any employment agreement unenforceable if it requires employees to assign the rights to inventions developed using the employee's own property and time. An employer may still retain rights to intellectual property created by the employee with actual or anticipated research of the employer or from work performed by the employee during the course of employment.

Workers' Bill of Rights Poster

Following up on a New York City law adopted in December 2023, all employers are required to post in the workplace and to distribute to current employees and new employees a one-page poster about workers' rights. The poster consists of the words "Know your rights at work" in twelve different languages and a large quick-response (QR) code. The QR code directs workers to a page on the website of the NYC Department of Consumer and Worker Protection ("DCWP") titled "Workers' Bill of Rights" that provides information on state and federal workplace laws and links to relevant enforcement agencies. This requirement takes effect on July 1, 2024. The poster can be obtained from the DCWP website at https://www.nyc.gov/assets/dca/downloads/pdf/workers/KnowYourRightsAtWorkPoster.pdf.

New York State law has, since December 2022, required employers to make available to employees all mandatory workplace postings in an electronic form, either on the employer's website or by email—and to inform employees that the mandatory physical postings are available electronically. The Workers' Bill of Rights Poster will fall within this requirement.

Paid Leave for Prenatal Care

Beginning on January 1, 2025, employers in New York will be required to provide pregnant employees with up to 20 hours of paid time off in a 52 week period for health care services received by the employee related to pregnancy, including for physical exams, medical procedures, monitoring and testing, and discussions with health care providers. This paid time must be provided in hourly increments. As of September 23, 2024, the New York Department of Labor has not issued implementing rules for this new leave. Unless the Department of Labor issues rules to the contrary, it appears that entitlement to paid prenatal care leave does not accrue but is fully available immediately upon a new employee's hire. The paid time off for prenatal care is in addition to any paid or unpaid time off for sick leave provided to employees under the New York State or New York City paid sick leave laws.

Pregnant Worker Protections Under Federal Law

The federal Equal Employment Opportunity Commission has released final guidance for implementing the Pregnant Workers Fairness Act, which provisions generally track the requirements already found in New York law for pregnant worker accommodation. Employers should note that a pregnant employee's condition need not meet the definition of disability or handicap under federal or New York law but that an employee with a substantial limitation on their

major life activity may be entitled to accommodations under both the pregnant workers protection laws and the disability/handicap discrimination laws.

Paid Lactation Breaks

New York State and New York City laws, as well as federal law, have for several years required employers to provide time off for employees who need to express breast milk for a nursing child, and have established minimum conditions for the facility or location that the employee is provided for use to express breast milk. These laws have stated that lactation breaks can be as frequent as every three hours, must be reasonable in length, and may be unpaid unless the employee uses paid break or mealtimes. New York State recently adopted a revision to its law stating that a nursing employee must be provided paid thirty-minute breaks for this purpose, rather than being unpaid, and that if time needed to express breast milk exceeds thirty minutes, the employee is permitted to use paid break or mealtime for the additional time needed. This law took effect on June 19, 2024 and the New York State Department of Labor has issued guidance on the implementation of this law, including a model lactation policy.

Paid COVID-19 Sick Leave

Shortly after the COVID-19 pandemic began in 2020, the federal government and New York State enacted laws requiring employers to provide paid leave to employees who had contracted COVID-19 and to employees who were quarantined or who needed to be out of work to care for family members with COVID-19. Last spring, the federal government declared that the pandemic was over and federal requirements for paid COVID-19 leave were eliminated. However, the New York State requirement that employees subject to a mandatory or cautionary quarantining or isolation order due to COVID-19 are entitled to paid sick leave and certain other benefits was not eliminated at that time and remain in full force and effect. The State has enacted legislation that its paid sick leave requirement for COVID-19 will end on July 31, 2025.

New York City Earned Safe/Sick Leave Act

In fall 2023, the DCWP finalized new regulations concerning the New York City Earned Safe/Sick Leave Act to clarify how employer size will be determined for requiring paid safe/sick leave and the increased amount of paid leave for larger employers, how remote employees are to be counted, and notice and accrual obligations. Also, the City enacted a law permitting employees to file a private lawsuit to enforce their rights under this law, as an alternative to making a complaint to the DCWP.

Increased Salary Thresholds for Overtime Exemptions

The federal Fair Labor Standards Act ("FLSA") and New York State law require payment of overtime for all hours worked over 40 in a workweek to all non-exempt employees. Employees who are hourly-paid and those whose duties do not fall within the categories for exemption (such as managers and administrators) are entitled to overtime pay. In addition, salaried employees who do not receive a salary above an established minimum cannot be considered to be exempt from overtime. For many years, the federal salary minimum has been $35,568 per year ($684 per week).

In April 2024, the United States Department of Labor announced that on July 1, 2024 the federal threshold will increase to $43,888 per year ($884 per week) and on January 1, 2025 the federal threshold will increase to $58.656 per year ($1,128 per week). Lawsuits have been filed to try to block these increases in the federal threshold.

However, some states have established thresholds higher than the federal government, which they have the authority to do. New York is one state that has done so. In New York, the salary thresholds for exemption from overtime are now:

New York City and the rest of "downstate" (Nassau, Suffolk, and Westchester counties):

$1,200 per week ($62,400 per year) on January 1, 2024
$1,237.50 per week ($64,350 per year) on January 1, 2025
$1,275 per week ($66,300 per year) on January 1, 2026

The rest of New York State (areas outside of New York City and Nassau, Suffolk, and Westchester counties):

$1,124.20 per week ($58,458.40 per year) on January 1, 2024
$1,161.65 per week ($60,405.80 per year) on January 1, 2025
$1,199.10 per week ($62,353.20 per year) on January 1, 2026

Employers that have treated their salaried employees as exempt should review these thresholds to ensure that those who do not receive the minimum salary for exemption are provided overtime compensation when they work over 40 hours in a workweek.

Increase in Salary Threshold for Pay Frequency

Under New York law, "manual" employees must be paid weekly and other employees, which include office employees, must be paid at least twice a month. New York law provides an exception to this pay frequency rule for managerial, administrative and professional employees. The minimum threshold for an exception to this pay frequency rule had been $900 per week; effective March 13, 2024, the threshold has been increased to $1,300 per week.

Employee vs. Independent Contractor Under FLSA and NLRA

On January 10, 2024, the United States Department of Labor, Wage Hour Division issued a Final Rule on classification of independent contractors, creating a new test for determining independent contractor status that would result in more workers being defined as employees rather than independent contractors, which took effect on March 11, 2024. Lawsuits have been filed to set aside the new Final Rule, asserting that the Department of Labor did not have authority to issue legislative rules defining the employment relationship. Those lawsuits are ongoing.

"Freelance Isn't Free Act"

In 2017, the City of New York enacted a law establishing and enhancing protections for freelance workers, including the requirement that they be provided with a written contract, with timely and full payment, and with protection from retaliation. In 2024, the State of New York enacted a law providing similar protections for independent contractors (freelancers), which became effective on August 28, 2024 and applies to all employers throughout the State of New York.

Clean Slate Act

For many years, New York State law has placed restrictions on employers' rights to consider convictions and arrests in making hiring, termination, and other employment decisions. New York City law places similar restrictions on employers in this regard and establishes notice requirements to employees for whom adverse employment actions are taken because of a conviction record that are greater than are required by New York State law. Earlier this year, the State enacted a law that automatically seals certain convictions after a certain passage of time after the imposition of sentence, release from parole or probation, or if the defendant does not have a current charge pending. This law is in effect on November 16, 2024. Employers that utilize third-party entities to do employment background checks on applicants should ensure that their providers are aware of this change in New York law.

Prohibition Against Requiring Applicants/Employees to Provide Access to Social Media Accounts

Employers are now prohibited under New York law from requiring an applicant for employment or an employee to provide the employer with access to electronic personal accounts, such as social media accounts unless they relate to the employer's business or are needed for compliance with a court order. An employer may still review information on applicant/employee social media pages that are available publicly.

Employer Requirement to Notify Employees of Unemployment Benefit Rights

New York law now requires employers to provide a notice to employees that they may be eligible for unemployment benefits either because of a reduction in scheduled hours or an employee's employment is terminated. The form that must be provided can be downloaded at: https://dol.ny.gov/system/files/documents/2023/11/ia12.3_0.pdf.

Prohibition of Discrimination Based on Height or Weight or Immigration Status

The New York City Human Rights Law has been amended to prohibit discrimination based on height or weight in employment, housing, and public accommodations. The New York State Human Rights Law now prohibits discrimination based on citizenship or immigration status. Among other things, this change will require employers to address instances in which an employer receives a complaint or becomes aware that an employee has been subject to harassment because of their height or weight, or because of their citizenship or immigration status.
Unlawful Language in Settlements of Discrimination, Harassment and Retaliation Complaints

New York State law has for the past few years contained restrictions on provisions that may lawfully be included in agreements settling claims of discrimination, harassment or retaliation. With a recent revision to New York law, for a release of such claims to be enforceable, the release must provide the releasor with 21 days to consider the release (and for the release to be enforceable in a state court, the releasor must not execute the release until the completion of that 21 day period. In addition, a settlement agreement may not include a provision requiring that the facts related to the claims be kept confidential unless the releasor (the current or former employee or applicant) prefers inclusion of that confidentiality provision. Further, and of major significance, New York law has been amended to provide that no release of any claim involving factual allegations of discrimination, harassment or retaliation will be enforceable if the release includes:
A liquidated damages provision for the employee's violation of a nondisclosure clause or non-disparagement clause; or

A forfeiture provision requiring the employee to forfeit all or part of the consideration for the agreement for violation of a nondisclosure clause or nondisparagement clause; or

An affirmative statement, assertion, or disclaimer by the employee that the employee was not subject to unlawful discrimination, harassment, or retaliation.
These provisions of New York law are intended to curb the ability of employers to silence victims of discrimination, harassment or retaliation from discussing their claims with others or supporting other victims or claimed victims if they pursue claims against the employer or seek to speak publicly about their situations. Employers that are faced with discrimination claims should carefully craft any settlements to ensure that those settlements do not include provisions identified under New York law as improper, which may result in the invalidation of the release in that settlement agreement.

Pay Transparency

New York City law and now also New York State law requires that covered employers (every employer with at least 4 employees in New York or who report to a supervisor or office in New York) must include in all advertisements for a job, promotion or transfer opportunity the minimum and maximum annual salary or hourly rate that the employer believes in good faith they are willing to pay the successful applicant at the time of the posting.

Workplace Violence Prevention

New York State has enacted the Workplace Violence Prevention Law, which required employers to establish workplace violence prevention policies and to implement employee training programs on workplace violence prevention. In addition, New York State law now requires that effective January 1, 2027 retail employers with more than 500 employees nationwide install panic buttons or mobile-based panic buttons for employee cellphones.

Weapons on the Employer's Premises

As a consequence of the United States Supreme Court decision in 2022 making it simpler for New Yorkers to obtain a license to carry firearms in public, New York State law was amended to prohibit persons from carrying firearms, rifles, or shotguns on the employer's premises if the business owner posts clear and conspicuous signage stating that guns are not permitted on premises unless otherwise authorized by law. A form of this signage, issued by New York State, can be downloaded at: https://gunsafety.ny.gov/system/files/documents/2022/08/sensitivelocationsign.pdf.

Employers whose facilities are in office buildings or other common facilities may desire to contact their building owners or managers to determine whether such signage has been or will be posted at the entrances to the building or may consider posting such signage at the entrances to their office or facility.

Japanese Specialist J-1 Visa Program

On May 16, 2024, the Department of State announced that the United States and Japan have established a new J-1 Exchange Program, which will facilitate the exchange of Japanese language and culture specialists to observe U.S. educational methods and to share their knowledge of Japanese educational methods with U.S. colleagues. In contrast to the normal one- year maximum for J-1 visa holders, participants in the Japanese Specialist Program will be able to remain in the United States for three years.

Employers' Use of AI in Personnel Matters

The United States Department of Labor, Wage Hour Division has recently released guidance clarifying how employer may use automated systems and artificial intelligence in maintaining employee records and administering compensation and other programs for employees.

In *Mobley v. Workday, Inc*., decided in July 2024, the federal District Court for the Northern District of California found that an applicant stated a claim of race, age and disability discrimination against a human resources management services entity that provided a platform on the customer's (employer's) website to collect, process, and screen applications for employment using artificial intelligence and machine learning into its algorithmic decision-making tools, enabling the tools to make employment decisions. The complaint asserted that, in making decisions whether a candidate for employment should be advanced in the hiring process, the AI and machine learning tools were designed in a manner that reflects employer biases and relied on biased training data. Although this case has not been decided on its merits, employers that utilize AI and machine learning in their hiring processes as well as in their employee evaluation processes, whether through using their own tools or a human resources management services entity, should be aware of the possibility that their use of these tools may be subject to legal challenge by applicants or employees who contend that the tools have discriminatory biases embedded in them.

As can be seen, employment laws and regulations are ever-changing. Employers must keep up with these changes and make sure that their policies and procedures comply with the laws and regulations at all times. If you have any questions about these subjects or any other employment-related matters, please do not hesitate to contact us.