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With Baseball Season Approaching, Employers Need to Keep Their Eye on the Employment Law Ball

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While many employers have been focused on addressing bringing their workforce back into the office, the federal, state and city legislatures have passed many new laws impacting the employment relationship. Employers need to keep their eyes on the employment law ball to ensure compliance with new and existing laws.

Federal Government Prohibits Mandatory Arbitration of Workplace Sexual Harassment and Assault Claims

On March 3, 2022, President Biden signed The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, which took immediate effect. The law allows an individual alleging conduct constituting sexual harassment or assault under state or federal law to elect to invalidate a pre-dispute arbitration agreement or joint-action waiver and proceed with an action in court. Notably, the law does not void arbitration agreements that include provisions that cover sexual harassment and/or assault claims, and the law only applies to disputes that arise on or after March 3, 2022. Employers with arbitration agreements should be prepared for the potential for this election regardless of any arbitration agreement or policy in place.

New York Employers Must Provide Notice of Whistleblower Law

Amendments to New York's whistleblower law became effective January 26, 2022. The amendments significantly expanded the scope and coverage of whistleblower rights and protections for workers who allege they have been retaliated against for reporting suspected employer wrongdoing, making it easier for individuals to bring a retaliation claim under New York Labor Law § 740. First, the amendments expand the scope of protected activity by removing the requirement that the protected whistleblowing activity be linked to public health or safety. Instead, the whistleblower protections cover a reasonable belief that (i) a violation of law, rule, or regulation has occurred, or (ii) there is a substantial and specific danger to the public health or safety. In addition, the definition of employee was expanded to include former employees and independent contractors who "carry out work in furtherance of an employer's business enterprise and who are not themselves employers." The amendments also create exceptions to the employer notification and cure requirements and require only a "good faith effort" be made to notify the employer. Significantly, the amendments protect an employee's acts whether or not they are within the scope of the employee's job duties. This change virtually overrules a longstanding job duties exception that some courts have applied to employees who make disclosures as part of their job (e.g., compliance officers, in-house counsel, internal auditors, etc.).

The law extends the statute of limitations from one year to two years and adds the right to a jury trial. It also expands the available relief to include front pay, a civil penalty and punitive damages (if the violation is willful, malicious or wanton) none of which were previously available remedies under the law.

Notice of the law is required to be posted conspicuously in easily accessible and well-lighted places customarily frequented by employees and applicants for employment. For employers who have a significant portion of their workforce working remotely, we recommend providing electronic notice as well as posting the notice as required above. The New York State Department of Labor's model notice can be found here.

New York Employers Must Provide Notice of Intent to Electrically Monitor Employees

As of May 7, 2022, New York employers must provide employees notice of their intent to monitor or otherwise intercept employee telephone conversations, emails or internet use. The law does not apply to procedures and monitoring that are designed to manage the type or volume of incoming and outgoing email, telephone voicemail, or internet usage that is intended to maintain and/or protect

the employer's systems and not targeted to monitoring the use of a specific individual.

New York employers who engage in electronic monitoring should (i) prepare a notice advising employees of its monitoring practices; (ii) post the notice with their workplace posters; (iii) distribute the notice to all employees in advance of the May 7, 2022 effective date of the law and thereafter at the time of hire; and (iv) carefully monitor receipt of acknowledgement from all current employees and new hires. In order to streamline the notification to new hires, employers should consider including the notice in their employee handbooks with employees specifically acknowledging receipt of the notice in the employee handbook acknowledgement.

NYC Requires Disclosure of Salary Range in Job Advertisements

Effective May 15, 2022, New York City employers with more than 4 employees and/or independent contractors must list salary ranges in any advertisement for jobs, promotions, or transfer opportunities. The employer must list a salary range extending from the "lowest to the highest salary the employer in good faith believes at the time of the posting it would pay" for the advertised job.

NYC Amended Its Background Check Requirements Under the Fair Chance Act

When conducting background checks, New York City employers must comply with the amendments to the Fair Chance Act ("FCA"), which, effective July 29, 2021, significantly expanded the scope of protections for applicants, employees and independent contractors with criminal charges or arrests.

Employers should review their offer letters and background screening processes to ensure compliance as the FCA amendments alter the use of conditional offers of employment and the sequence of review of pre-employment screening for criminal background checks. Employers can only request and review criminal history information after favorably evaluating the candidate's non-criminal information. Thus, employers must bifurcate background checks so that reports containing criminal history information are only obtained and evaluated after all non-criminal information (e.g., consumer reports, reference checks, etc.) has been evaluated. Non-criminal background information must be reviewed first. After determining that an applicant passes review for non-criminal background information, employer may make a conditional offer of employment based on the applicant's criminal history and driving record (which may have reference to criminal history). Prior to rescinding a conditional offer or taking another adverse employment action, employer must engage in the Fair Chance Process.

The amended Fair Chance Process outlines the steps that must be taken by an employer prior to taking an adverse employment action based on an individual's criminal history. The Fair Chance Process now requires an employer to take the following steps:

- Solicit information from the candidate or employee regarding the at-issue conviction or pending criminal case (based either on the FCA Factors or the Article 23-A of the New York Corrections Law factors), which may be done through the FCA Notice;
- Provide the criminal background check to the applicant or employee;
- Provide the FCA analysis (based either on the FCA Factors or the Article 23-A of the New York Corrections Law factors) to the applicant or employee;
- Allow the candidate or employee at least 5 business days to respond to the FCA analysis prior to any adverse action.

As part of the Fair Chance Process, employers must use the appropriate multi-factor analysis to consider the impact of the applicant's criminal background. Under the amended FCA, applicants with criminal convictions are subject to the multi-factor analysis set forth in Article 23-A of the New York Corrections Law and applicants with pending criminal cases are subject to the factors set forth in the NYC Commission on Human Rights Legal Enforcement Guidance on the NYFCA (the "FCA Factors").

In addition, the FCA now applies to current employees and independent contractors who have a pending criminal case or post-employment/post-retention conviction. Employers must engage in the Fair Chance Process and use the FCA Factors to determine whether an adverse employment action may be taken against a current employee or contractor based on the criminal background information. An employer may place an employee on unpaid leave while the employer undertakes the Fair Chance

Process, but must allow the employee to use accrued paid leave, if available.

Employers who perform pre-employment criminal background checks should review the requirements more closely to ensure offer letters and background screening processes are compliant.

NYC Restricts the Use of Artificial Intelligence in Decision Making

Effective January 1, 2023, New York City employers will no longer be permitted to use automated employment decision tools to screen a candidate for employment or an employee for an employment decision unless: (1) the tool has been subject to a bias audit no less than one year prior to its use; and (2) a summary of the results of the most recent bias audit (and the distribution date of the tool) has been made publicly available on the employer or employment agency's website prior to use of the tool. The bias audit shall be an impartial evaluation by an independent auditor that includes, but is not limited to, an assessment of whether the automated employment decision tool has a disparate impact on minorities.

If an employer or employment agency decides to use an automated employment decision tool to screen a candidate or employee for an employment decision, the employer must notify the individual who resides[1] in New York City of the following:

- An automated employment decision tool is being used in connection with the evaluation of the candidate or employee. This notice must be made no less than 10 business days prior to use of the tool and allow a candidate to request an alternate selection process as an accommodation;
- The job qualifications and characteristics that the automated employment decision tool will use in assessing the candidate or employee. Such notice must be made no less than 10 business days prior to use of the tool; and
- If not disclosed on the employer or employment agency's website[2], information about the type of data collected for the automated employment decision tool, the source of the data, and that the employer or employment agency's data retention policy is available upon written request by the candidate or employee. If such a request is made, the information must be disclosed within 30 days.

Over the next year prior to the effective date of the legislation, employers and employment agencies currently using or considering implementing the use of automated employment decision tools should discuss with the product developers whether the tools have undergone bias audits or the plan to implement such audits to ensure compliance with New York City requirements. Monitoring for annual follow-up on the audit of such systems will need to be conducted as well. Users of such tools should also prepare to update their websites to disclose the required information and prepare notices to candidates and employees regarding their use of such tools.

Don't Strike Out on Wage and Hour Compliance

There is no better time than now for employers to keep their eye on wage and hour compliance as the plaintiffs' bar has renewed focus on class action litigation under the Fair Labor Standards Act and New York Labor Law.

Manual Laborers and Hospitality Workers Must Be Paid Weekly

Employers of manual laborers and hospitality workers beware of recent litigation trend relating to the timing of pay. Under the New York Labor Law ("NYLL") hospitality employees and manual laborers (e.g., construction workers, maintenance workers, retail employees and other workers who mainly perform manual work) must be paid on a weekly basis. Failure to do so may result in significant liability as the NYLL provides for liquidated damages (*i.e.*, double pay) for each week or period in which pay is late. This means that if, for example, an employer paid a

[1] The legislation requires notification to candidates or employees who reside in New York City but is silent as to whether candidates and employees who work within New York City but reside elsewhere are covered.

[2] Given the requirement that this information be disclosed on a website, it appears that this language is included to address the possibility that an employer or employment agency does not maintain a website.

manual laborer on a bi-weekly basis for one year, the employee would be entitled to **26 weeks of pay as damages.**

Recent class action cases against big box retailers on this issue have resulted in significant settlements awarded to employees. As a result, we have seen a noticeable increase in litigation on this issue. We recommend all employers of hospitality workers and manual laborers review their pay practices to ensure compliance.

New York Employers Must Issue Proper Notices of Pay

New York's Wage Theft Prevention Act requires that all New York employers provide a Notice of Pay form to all employees at the time of hire and 7 days in advance of a change in any information on the form, including the rate of pay, unless the change is included on an employee's paystub. The paystub exception does not apply to employers covered by the Hospitality Industry Wage Order who are required to provide a Notice of Pay upon a change in an employee's rate of pay.

The written Notice of Pay must be signed by both employer and employee and must be retained by the employer for at least six years. The Notice of Pay must also contain the following information:

- The employee's normal rate(s) of pay and the basis thereof[3];
- The employee's overtime rate of pay, if applicable[4];
- The employee's regular pay day;
- Any allowances claimed against the minimum wage (e.g., tip credit, meal credit, etc.);
- The name of the employer, including any "doing business as" name;
- The address of the employer's main office and a mailing address, if different; and
- The employer's telephone number.

The New York State Department of Labor ("NYSDOL") has issued sample Notice of Pay forms that employers may use, which can be found here. With the exception of employers in the hospitality industry, it is generally recommended that employers use these forms to ensure full compliance with New York law. Hospitality employers should consult with counsel about the proper Notice of Pay form as the form on the NYSDOL website designated for the hospitality industry is not compliant with the current law.

The Notice of Pay must be provided in both English and the employee's primary language (if not English), provided the NYSDOL has created a Notice of Pay form in the employee's native language. Failure to provide the notice can result in penalties up to $5,000 per employee.

New York Employers Must Ensure Compliance with Paystub Requirements

New York employers must also provide the following information on each paystub:

- The dates of work covered by the paycheck;
- The name of the employee;
- The name, address and phone number of the employer;
- The rates of pay (regular and overtime) and basis of pay;
- The number of hours worked (for non-exempt employees);
- Gross wages;
- A detailed listing of deductions;
- A listing of any allowances/credits claims as part of the minimum wage (i.e., any tip credit taken by hospitality employers);
- Net wages; and
- For New York City employers, sick leave/vacation/PTO accrual, use and balance.

Employers should not rely solely on their payroll company to ensure that paystubs are compliant as it is the employer's responsibility to ensure paystubs are accurate.

[3] If an employer is taking a tip credit for an employee, the employer should note the full minimum wage as the employee's hourly rate of pay, rather than the cash wage.

[4] If an employer is taking a tip credit for an employee, the employer should note the full overtime wage, rather than the cash overtime wage.

Please contact an attorney in MSF's Employment Group if you need assistance with respect to this information.

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