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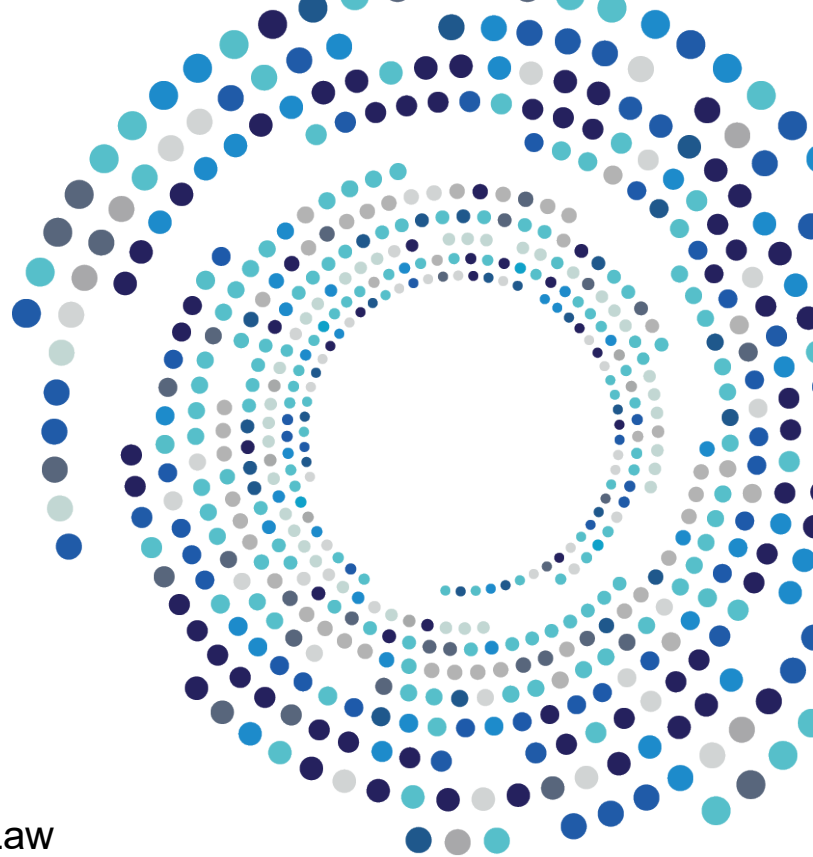

Past, Present, and Future:

A Review of 2021's Significant Labor and Employment Law Developments and What's On The Horizon

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What We've Seen And What's Ahead

- Last year, the New York State legislature ramped up its activity to become one of the leaders in employee-friendly legislation
  - Expansion of whistleblower law
  - Legalization of marijuana
  - Electronic monitoring
  - Shared work programs
- New York City has kept pace with that trend
  - New York City Biometric Identifier Ordinance
  - Automated employment decision tools
  - Fair Chance Act Amendment

What We've Seen And What's Ahead

- A continuing pandemic continues to complicate workplace issues
  - New York HERO Act
  - New York State Paid Vaccine Law
  - New York City Child Vaccination Time
  - New York City Vaccine Mandate
- Employees are leaving their jobs – and the workforce entirely – at unprecedented rates
- Social media is taking a front seat addressing workplace issues
- This climate has created new challenges for employers

Sweeping Expansion Of New York State's Whistleblower Law

New York State Expands Whistleblower Protection

- In October 2021, the governor signed a law expanding the scope of New York's whistleblower law. N.Y. Labor Law § 740. The law took effect on January 26, 2022
- Before the expansion, New York Labor Law Section 740 prohibited employers from retaliating against employees in the following narrow circumstances
  - An employee disclosed or threatened to disclose to a supervisor or public body, an activity, policy or practice of the employer that ***is in violation of law, rule or regulation*** which violation creates and presents a ***substantial and specific danger to the public health or safety***, or which ***constitutes health care fraud***
  - An employee provided information to, or testified before, any public body conducting an investigation, hearing or inquiry into any such activity, policy or practice by such employer
  - An employee objected to, or refused to participate in any such activity, policy or practice in violation of a law, rule or regulation

New York State Expands Whistleblower Protection

- ***Before*** the amendment:
  - Employees had one year in which to file a lawsuit
  - Employees could seek injunctive relief, reinstatement, backpay, benefits, and attorneys' fees
  - Employers were not required to post a notice or otherwise notify employees of the law
  - Employees generally had to provide notice to employers prior to disclosing the violation to a public body

New York State Expands Whistleblower Protection

- ***After the amendment:***
  - The new law expands protected activity and prohibits retaliation when an employee, former employee or independent contractor discloses or threatens to disclose to a supervisor or public body, or objects or refuses to participate in
    - "an activity that the employee ***reasonably believes*** is in violation of law, rule or regulation" or
    - "that the employee ***reasonably believes*** poses a substantial and specific danger to the public health or safety."
  - The amendment prohibits retaliation against employees, ***former employees*** and ***independent contractors***

New York State Expands Whistleblower Protection

- ***After the amendment:***
  - For disclosures to a "**public body**," **the employee must first in good faith** notify their employer by bringing the activity, policy or practice to the attention of a supervisor of the employer and give the employer a reasonable opportunity to correct it, ***unless***
    - there is an imminent and serious danger to the public health or safety
    - the employee reasonably believes that reporting to the supervisor would result in a destruction of evidence or other concealment of the activity, policy or practice
    - such activity, policy or practice could reasonably be expected to lead to endangering the welfare of a minor
    - the employee reasonably believes that reporting to the supervisor would result in physical harm to the employee or any other person; or
    - the employee reasonably believes that the supervisor is already aware of the activity, policy or practice and will not correct it

New York State Expands Whistleblower Protection

- The amendment applies to any law, rule, regulation, or executive order
- There no longer needs to be an ***actual violation*** of the law
- The statute of limitations has been extended to two years
- In addition to backpay, benefits and attorneys' fees, a prevailing party may also recover front pay and punitive damages
- Courts may assess a civil penalty of up to $10,000 against an employer
- The new law expressly provides for a jury trial

New York State Expands Whistleblower Protection

- **What should employers do?**
  - Review and update policies to ensure there is a reporting structure for whistleblower complaints
  - Train management on compliance with the amended whistleblower law and what could be construed as retaliation
  - Ensure personnel responsible for investigating whistleblower complaints are trained to handle investigations
  - Post a notice of employee whistleblower protections, rights, and obligations in an easily accessible place frequented by employees and applicants. The New York Department of Labor has indicated it may release a notice in February 2022

Legalization of Marijuana

New York Labor Law Section 201-d

- New York Labor Law Section 201-d makes it unlawful, with certain exceptions, “for any employer or employment agency to refuse to hire, employ or license, or to discharge from employment or otherwise discriminate against an individual in compensation, promotion or terms, conditions or privileges of employment because of [among other things]:”
  - an individual’s political activities outside of working hours, off the employer’s premises and without use of the employer’s equipment or other property, if such activities are legal
  - an individual’s legal recreational activities
  - an individual’s membership in a union
  - an individual’s legal use of consumable products prior to or after working hours, off the employer’s premises, and without the use of the employer’s equipment or other property

New York Labor Law Section 201-d

- Subject to certain limitations, including:
  - if the activity “creates a material conflict of interest related to the employer’s trade secrets, proprietary information or other proprietary or business interests”
  - with respect to any employee who is not employed by the state, political subdivision of the state, a public authority or other governmental agency or instrumentality thereof, if the activity “violates a collective bargaining agreement”

New York Labor Law Section 201-d

- On March 31, 2021, the governor signed the Marijuana Regulation and Taxation Act ("MRTA"), which
  - Legalizes cannabis for adults 21 and older
  - Clarifies that cannabis used in accordance with New York State law is a legal consumable product
- Therefore, employers cannot discriminate against employees based on their use of cannabis "outside of the workplace, outside of work hours, and without use of the employer's equipment or property"

New York Labor Law Section 201-d

- The New York State Department of Labor issued guidance on the law's impact on the workplace:
  - The law applies to all private employers in New York State regardless of size, industry or occupation, but does not apply to:
    - Individuals who are not employees, such as independent contractors
    - Individuals under the age of 21 (because cannabis use is not legal for those individuals)
  - Employers may prohibit employees from ***using cannabis during working hours***, which include ***for this purpose*** meal periods and rest breaks
    - This does not mean that meal periods are "work time" under other laws
    - Different standards apply for purposes of wage and hour law: Employees who do not receive a duty-free meal period should be paid for all time worked

New York Labor Law Section 201-d

- Employers may:
  - Prohibit employees from bringing cannabis to work, or on the employer's property, including in company vehicles, lockers and desks
  - Prohibit employees from using cannabis while on-call
  - Discipline employees who violate these prohibitions

New York Labor Law Section 201-d

- The new law impacts an employer's ability to discipline an employee under certain circumstances. Employers may impose disciplinary action, if:
  - The employee, while working, manifests specific articulable symptoms of cannabis impairment that interfere with the employer's obligation to provide a safe and healthy workplace as required by state and federal workplace safety law
  - The employee, while working, manifests specific articulable symptoms of cannabis impairment that decrease or lessen the employee's performance of the employee's tasks or duties

New York Labor Law Section 201-d

- Drug Testing
  - Drug testing for marijuana is not permitted except in very limited circumstances, for example, if a federal or state law requires drug testing or makes it a mandatory requirement of the position
  - The New York Department of Labor Guidance is clear that employers may not use drug testing as a basis for finding an articulable symptom of impairment

New York Labor Law Section 201-d

- **What should employers do?**
  - Confirm that policies do not prohibit cannabis use entirely (such as during the employee's non-working hours) unless an exception applies, for example, if required by statute, regulation, ordinance, or other state or federal government mandate
  - Update policies, as needed, to prohibit employees from using or possessing cannabis at work and during work hours, and from working impaired
  - Provide training on the new law to supervisors and personnel responsible for making employment decisions

New York City Biometric Identifier Information Ordinance

N.Y.C. Admin. Code §§ 22-1201, *et seq*.

- On January 10, 2021, New York City passed a new ordinance regulating how businesses can collect, store, and use biometric identifier information. This law became effective on July 9, 2021
  - "Biometric identifier information" is defined to include any "physiological or biological characteristic [used] . . . . singly or in combination, to identify, or assist in identifying, an individual," such as "retina or iris scan[s]," "fingerprint[s] or voiceprint[s]," or "scan[s] of hand or face geometry." N.Y.C. Admin. Code § 22-1201
- The law primarily places two new obligations on New York City businesses:
  - requiring certain disclosures by commercial establishments that collect, store, or disseminate their customer's biometric identifier information, and
  - prohibiting any individual or business from profiting from biometric identifier information

N.Y.C. Admin. Code § 22-1202(a) – Disclosure

- The ordinance requires a "commercial establishment" that "collects, retains, converts, stores, or shares biometric identifier information of customers," to "place a clear and conspicuous sign near all . . . customer entrances notifying the customers in plain, simple language, in a form and manner prescribed by the commissioner of consumer worker protection by rule, that customers' biometric identifier information is being collected, retained, converted, stored, or shared, as applicable." N.Y.C. Admin. Code § 22-1202(a)
- The NYC Department of Consumer and Worker Protection has published an approved sign, which can be found here

N.Y.C. Admin. Code § 22-1202(a) – Disclosure

- Because this disclosure obligation is limited to those who manage "customer" biometric identifier information—and the law defines "customer" to include only an actual or prospective purchaser or lessee of goods or services—it does not apply to businesses that merely collect their employees' biometric identifier information
- "[C]ommercial establishments" include:
  - "Place[s] of entertainment," such as a "theater, stadium, arena, racetrack, museum, amusement park, observatory, or other place where attractions, performances, concerts, exhibits, athletic games or contests are held." *See* N.Y.C. Admin. Code § 22-1201
  - "Retail store[s]," defined as "an establishment wherein consumer commodities are sold, displayed or offered for sale, or where services are provided to consumers at retail" *Id*.

N.Y.C. Admin. Code § 22-1202(a) – Disclosure

  - "Food and drink establishment[s]," defined as "an establishment that gives or offers for sale food or beverages to the public for consumption or use on or off the premises, or on or off a pushcart, stand or vehicle. *Id*.

- Section 22-1202(a) does not apply, however, to (i) financial institutions or (ii) biometric identifier information collected through photographs or video recordings, so long as that information is not analyzed with a software that identifies individuals based on physiological or biological characteristics and is not shared with third-parties (other than law enforcement)

N.Y.C. Admin. Code § 22-1202(b) – Profit

- The ordinance makes it generally unlawful "to sell, lease, trade, share in exchange for anything of value or otherwise profit from the transaction of biometric identifier information." N.Y.C. Admin. Code § 22-1202(b)
- This provision is not restricted to "commercial establishments," and applies generally to all businesses and individuals without limitation

N.Y.C. Admin. Code § 22-1203 – Private Right of Action

- The ordinance creates a private right of action to enforce its provisions. N.Y.C. Admin. Code § 22-1203
  - The suit may be brought by any "person who is aggrieved by a violation"
  - The claimant must provide a written notice to the business at least 30 days before filing suit, setting forth his or her allegations
    - If, within 30 days, the business cures the violation and provides the claimant with a written statement that the violation has been cured and no future violation will occur, the claimant cannot file suit
- A prevailing party can recover damages equal to (i) $500 for each violation of Section 22-1202(a), (ii) $500 for each negligent violation of 22-1202(b), (iii) $5,000 for each intentional or reckless violation of 22-1202(b), and (iv) reasonable attorneys' fees, costs, and other litigation expenses

Proposed: New York State Biometric Privacy Act (“BPA”)

Biometric Privacy Act (S.1933A / A.27)

- In January 2021, members of the New York State Senate and the New York State Assembly introduced two nearly identical bills which, if passed, would enact the New York Biometric Privacy Act ("BPA")
  - Both bills are still at the committee stage, with no hearings scheduled for S.1933A in the Senate Consumer Protection Committee. The assembly bill is still awaiting committee assignment
- BPA is modeled after the Illinois Biometric Privacy Act ("BIPA")
  - Illinois's BIPA has led to numerous lawsuits in Illinois due to the law's private right of action and statutory damages provisions which are not related to actual harm
  - Remaining apprised of the New York BPA bills' progressions in the legislature is important as their enactment would have a striking effect on employee privacy compliance efforts

Biometric Privacy Act (S.1933A / A.27) – Provisions

BPA has four notable provisions:

- Disclosure of data retention and destruction plan:
  - A private entity in possession of biometric information must develop a publicly available written policy that establishes a retention schedule and guidelines for destroying biometric information. BPA § 676-b(1)
- Consent before collection:
  - In order to collect or otherwise receive biometric information from a subject, a private entity must 1) inform the subject in writing of the information being collected, 2) inform the subject of the legal purpose for collection and duration of storing the biometric information, and 3) receive a written release executed by the subject or the subject's legally authorized representative. BPA § 676-b(2)

Biometric Privacy Act (S.1933A / A.27) – Provisions

- No profit:
  - No private entity can sell or otherwise profit from a person's biometric information. BPA § 676-b(3)
- Consent before disclosure:
  - A private entity can only disclose biometric information if the subject or the subject's authorized representative consents to the disclosure or the private entity is otherwise required by law to disclose. BPA § 676-b(4)

Biometric Privacy Act (S.1933A / A.27) – Enforcement

Private Right of Action

- The enacted law would create a private right of action to enforce its various provisions, allowing "[a]ny person aggrieved by a violation" to sue in a state supreme court. BPA § 676-c

Statutory Damages

- A prevailing party would be able to recover damages equal to 1) $1000 for each negligent violation of BPA, 2) $5000 for each intentional or reckless violation of BPA, and 3) reasonable attorneys' fees, costs, and other litigation expenses. BPA § 676-c

Electronic Monitoring

Notice of Electronic Monitoring

- On November 8, 2021, Governor Hochul signed a law requiring employers to notify employees if the employer monitors telephone calls, email, internet usage, and other electronic communications. The law is effective May 7, 2022. N.Y. Civil Rights Law § 52-c
- Employers must give “prior written notice upon hiring to all employees who are subject to electronic monitoring”
  - The notice must be in writing and acknowledged by the employee either in writing or electronically
  - The notice must be in a conspicuous place readily available for viewing by employees who are subject to electronic monitoring

Notice of Electronic Monitoring

- Any employer violating the law is subject to a penalty of $500.00 for the first offense, $1,000 for the second offense, and $3,000 for the third and each subsequent offense
- The notice must state :

  Any and all telephone conversations or transmissions, electronic mail or transmissions, or internet access or usage by an employee by any electronic device or system, including but not limited to the use of a computer, telephone, wire, radio or electromagnetic, photoelectronic or photo-optical systems may be subject to monitoring at any and all times and by any lawful means

Notice of Electronic Monitoring

- **What should employers do?**
- Employers that currently have the ability to monitor electronic communications will generally have written policies notifying employees of the employer's right to do so
- Employers that do not have policies advising employees of that right should consider updating its policies to include the notice employers are now required to give to new hires
- The amended law does not seem to require that notice, but including it would be prudent in all electronic monitoring policies
- Keep an eye out for additional guidance from New York State
  - Confirm that notice requirements remain limited to new hires
  - Confirm the notice need not be provided each year

Shared Work Programs

Shared Work Programs

- A shared work program allows an employer to reduce employee hours but keep the entire staff working to help avoid layoffs. New York State helps workers with reduced hours by providing unemployment assistance to cover part of those lost wages
- Any employer who has at least two full-time employees may apply to participate in a shared work program. N.Y. Labor Law § 605. An application will not be approved unless the employer:
  - certifies it will not eliminate or diminish health insurance, medical insurance, retirement benefits or other fringe benefits immediately prior to the application unless such benefits provided to employees that do not participate in the shared work program are reduced to the same extent as those who participate in the shared work program
  - certifies that any collective bargaining agent agreed to the program

Shared Work Programs

- certifies that if not for the shared work program, the employer would reduce or would have reduced its workforce to a degree equivalent to the total number of working hours proposed to be reduced or restricted for all included employees
- certifies it will not hire additional part-time or full-time employees for the affected workforce while the program is in operation
- agrees that no program participant will receive more than 26 weeks of benefits exclusive of the waiting week
- provides a description of how workers in the workforce will be notified of the shared work program in advance of it taking effect, if feasible, and if such notice is not feasible, provides an explanation of why such notice is not feasible

Shared Work Programs

  - provides an estimate of the number of workers who would be laid off if the employer could not participate in the shared work program
  - certifies that the terms of the employer's written plan and implementation shall be consistent with employer obligations under applicable federal and state laws
- On October 23, 2021 (and effective the same date) the Governor signed legislation allowing
  - “any group of employees who may reasonably be expected to experience an employment loss as a consequence of a reduction in workforce [to] petition in writing the employer of such group of employees to apply to participate in a shared work program” in order to avoid the work reduction or for purposes of re-hiring any former employee that was laid off due to a reduction. N.Y. Labor Law § 605-A
  - The employer must respond to the employee petition in writing within 7 days

Shared Work Programs

- The employer's response:
  - Must state the decision of the employer to apply or not apply to participate in a shared work program, the reason for the decision, and if the employer did apply, the outcome of the application, if available
- Employers are prohibited of discriminating, retaliating, or taking adverse action against any employee who exercises rights under the law

Salary Disclosure (New York City)

Salary Disclosure (New York City)

- The New York City Administrative Code was amended on January 15, 2022 making it an unlawful discriminatory practice for an "employment agency, employer, employee or agent thereof to advertise a job, promotion or transfer opportunity without stating the minimum and maximum salary for such position in such advertisement." N.Y.C. Admin. Code § 8-107(32)
  - The range may extend 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, promotion or transfer opportunity"
  - The law applies to employers with four or more persons "in its employ", including independent contractors
  - The law is effective May 15, 2022
  - The law does not apply to a job advertisement for temporary employment at a temporary help firm

Salary Disclosure (New York City)

- **What should employers do?**
  - Look for guidance from the New York City Commission on Human Rights in the coming months
  - Determine current salary ranges for positions and assess those ranges
  - Check job advertisements and postings to ensure salary ranges are included in postings by the effective date
  - Train personnel on the new law

Automated Employment Decision Tools (New York City)

Automated Employment Decision Tools

- The New York City Administrative Code was amended in relation to automated decision tools. N.Y.C. Admin. Code § 20-870, et seq.
- The law was adopted without the mayor's signature on December 11, 2021, with a delayed effective date of January 1, 2023
- The law provides that in New York City, "it shall be unlawful for an employer or an employment agency to use an automated employment decision tool to screen a candidate or employee for an employment decision unless:
  - Such tool has been the subject of a bias audit conducted no more than one year prior to the use of such tool; and

Automated Employment Decision Tools

- A summary of the results of the most recent bias audit of such tool as well as the distribution date of the tool to which such audit applies has been made publicly available on the website of the employer or employment agency prior to the use of such tool"

- What is an "automated decision tool"
  - Broadly defined as any
    - "computational process, derived from machine learning, statistical modeling, data analytics, or artificial intelligence, that issues simplified output, including a score, classification, or recommendation that is used to substantially assist or replace discretionary decision making for making employment decisions that impact natural persons.. . ."
    - "that is used to ***substantially assist or replace discretionary decision making for making employment decisions that impact natural persons***"

Automated Employment Decision Tools

- What is not an “automated decision tool”?
  - “. . . a tool that does not automate, support, substantially assist or replace discretionary decision-making processes and that does not materially impact natural persons including, but not limited to, a junk email filter, firewall, antivirus software, calculator, spreadsheet, database, data set, or other compilation of data.”
  - Testing, interviews, human review of resumes, third party or employer programs that screen based on experience, and game playing are examples of processes that are not automated decision tools

Automated Employment Decision Tools

- The law also requires that any employer or employment agency that "uses an automated employment decision tool to screen an employee or candidate who has applied for a position for an employment decision" to notify the employee or candidate who resides in the City of the following:
  - That an automated employment decision tool will be used in connection with the assessment or evaluation of the employee or candidate who resides in the City. The notice must be provided no less than 10 business days "before such use and allow a candidate to request an alternative selection process or accommodation";
  - The job qualifications and characteristics that the automated employment decision tool will use in the assessment of the candidate or employee. That notice must be made no less than 10 business days before the use; ***and***,

Automated Employment Decision Tools

- If not disclosed on the employer or employment agency's website, information about the type of data collected for the automated employment decision tool, the source of such data and that the employer or employment agency's data retention policy shall be available upon written request by a candidate or employee. This information must be provided within 30 days of the written request. Information shall not be disclosed if the disclosure would violate the law or interfere with a law enforcement investigation

Automated Employment Decision Tools

- Penalties for violations include:
  - A civil penalty of not more than $500 for a first violation and each additional violation occurring on the same day as the first violation, and not less than $500 nor more than $1,500 for each subsequent violation
  - Each day on which an automated employment decision tool is used in violation of the law “shall give rise to a separate violation”
  - Failure to provide notice to a candidate or an employee in violation of the law “shall constitute a separate violation”

COVID-19 Updates

COVID-19 Updates

Discrimination

Discrimination

- The New York State Commission on Human Rights reports a “drastic uptick in anti-Asian discrimination and violence that occurred during the COVID-19 pandemic”
- The New York City Commission on Human Rights reports a seven-fold increase in anti-Asian discrimination and harassment between 2019 and 2020 with nearly 150 reports in the first six months of 2021
- In 2020, the New York City Commission launched a COVID-19 Response Team to handle reports related to the pandemic
- Employers may see anti-Asian discrimination and harassment charges rise, and should take steps to minimize the risk of such charges through awareness and training

COVID-19 Updates

The New York HERO Act

New York HERO Act

- The New York State Health and Essential Rights Act (NY HERO Act) was signed into law on May 5, 2021. There are two "sections" to the NY HERO Act. Section 1 requires most employers to adopt an airborne infectious disease exposure prevention plan and take steps related to that plan. N.Y. Labor Law § 218-b. Section 2 deals with permitting employees to establish workplace safety committees. N.Y. Labor Law § 27-d
- The New York State Department of Labor issued "The Airborne Infectious Disease Exposure Prevention Standard" which provides guidance on employer obligations under the HERO Act

New York HERO Act

- New York State employers needed to adopt an airborne infectious disease exposure prevention plan no later than August 5, 2021. Employers were required to provide the plan to employees and post it at each worksite no later than September 4, 2021
  - The New York State Department of Labor provides template model plans, including model plans specific to certain industries
  - Employers must add their airborne infectious disease exposure prevention plan to their employee handbook, if they have one
- Section 1 of the HERO Act covers independent contractors, individuals working for staffing agencies and other workers not traditionally defined as employees

New York HERO Act

- The airborne infectious disease exposure prevention plan is implemented when the New York State Commissioner of Health designates an airborne disease as a “highly contagious communicable disease that presents a serious risk of harm to the public health”
- On September 6, 2021, the Commissioner designated COVID-19 as an airborne infectious disease. That designation is set to expire on February 15, 2022 unless extended
- Once designated as an airborne infectious disease, employers were required to conduct a verbal review of the plan with all employees

New York HERO Act

- Section 2 of the HERO Act was effective on November 1, 2021
- Section 2 requires employers who employ at least ten employees to permit employees to establish and administer a joint labor-management workplace safety committee
  - The workplace safety committee is composed of employee and employer designees, provided at least two-thirds are non-supervisory employees
  - Employee members are selected by, and from among, non-supervisory employees
  - Committees are co-chaired by a representative of the employer and non-supervisory employees
  - The collective bargaining representative, if applicable, is responsible for the selection of employees to serve as members of the committee

New York HERO Act

- The workplace safety committee can, among other things:
  - raise health and safety concerns, hazards, complaints and violations to the employer to which the employer must respond
  - review any policy put into place in the workplace relating to occupational safety and health, and provide feedback
  - review the adoption of any policy in the workplace in response to any health or safety law, ordinance, rule, regulation, executive order or other related directive
  - participate in any site visit by any governmental entity responsible for enforcing safety and health standards unless otherwise prohibited by law
  - review any report an employer files related to health and safety of the workplace
  - regularly schedule a meeting during work hours at least once a quarter that shall last no longer than two hours

New York HERO Act

- Employers must permit safety committee designees to attend a training of no longer than four hours without a loss of pay. The training may cover the function of worker safety committees, rights established under Section 2 of the Act, and an introduction to occupational safety and health
- Section 2 expressly prohibits employers from retaliating against any employee who participates in the activities or establishment of the workplace safety committee
- Proposed regulations relating to the workplace safety committee have been introduced

New York HERO Act

- Employers may be assessed a civil penalty of not less than $50 per day for ***failure to adopt*** an airborne infectious disease exposure prevention plan, or not less than $1,000 nor more than $10,000 for ***failure to abide by*** an adopted airborne infectious disease exposure prevention plan
- Penalties may increase for repeat violations. If an employer violated the HERO Act in the past six years, a civil penalty of not less than $200 per day for ***failure to adopt*** an airborne infectious disease exposure prevention plan may be assessed, or not less than $1,000 nor more than $20,000 for ***failure to abide by*** an adopted airborne infectious disease exposure prevention plan

New York HERO Act

- Litigation is possible, but the burden is high
  - An employee may file a lawsuit against his or her employer alleging that the plan was violated in a manner that creates a "substantial probability that death or serious physical harm could result to the employee from a condition which exists, or practices that are adopted or are in use, by the employer at the work site"
    - An employer has an affirmative defense if it did not and could not with the exercise of reasonable diligence, have known of the violation
- An employee must give the employer notice of the alleged violation before filing a lawsuit and wait 30 days before filing any lawsuit, unless an employee alleges with particularity that the employer demonstrated an unwillingness to cure a violation in bad faith

New York HERO Act

- The employee must file suit within six months from the date the employee had knowledge of the alleged violation
- Courts may order “appropriate relief”, including enjoining the conduct of the employer and awarding costs and reasonable attorneys' fees to the employee
- Employers may be awarded costs and reasonable attorneys’ fees if the lawsuit is found to be frivolous

New York HERO Act

- **What should covered employers do?**
  - Employers should, to the extent they have not already done so, adopt and implement a plan, ***and*** provide the plan ***and*** required training to all employees
  - Any employer covered by Section 2 that modifies its airborne infectious disease exposure prevention plan must now review the new or modified plan with the workplace safety committee, if one has been established
  - Be sure personnel understand the importance of adhering to the plan and become familiar with the employer's obligations including those relative to the workplace safety committee

COVID-19 Updates

NEW YORK STATE – PAID VACCINE LEAVE

New York State – Paid Vaccine Leave

- On March 12, 2021, the Governor signed legislation giving employees up to four hours of paid leave for COVID-19 vaccinations. N.Y. Labor Law § 196-C
  - Includes boosters
- The law applies to all employers regardless of size
- The law is effective from March 12, 2021 through December 31, 2022
- Paid leave for COVID-19 vaccinations is ***in addition*** to any other leave to which the employee may be entitled (including leave under the New York State paid sick leave law and the New York City Earned Safe and Sick Time Law)

New York State – Paid Vaccine Leave

- Employers cannot discharge, threaten, penalize, or in any other manner discriminate or retaliate against any employee for exercising his or her right under the law, including but not limited to requesting or obtaining a leave of absence for a COVID-19 vaccine
- Paid leave under the State law does not extend to assisting a relative or another person in getting a vaccine
- Paid Vaccine Leave is not available to recover from the side effects of the COVID-19 vaccine, but employees may use other accrued leave for that purpose
- Paid leave for vaccines may be waived by a collective bargaining agreement, provided that the waiver explicitly references New York Labor Law Section 196-C

COVID-19 Updates

NEW YORK CITY – CHILD VACCINATION TIME

COVID-19 Child Vaccination Time (NYC)

- Effective December 24, 2021, the New York City Earned Safe and Sick Time Act was amended to permit employees who are parents or legal guardians of children under 18, or an older child who is incapable of self-care because of a mental or physical disability, to use up to four hours of COVID-19 child vaccination time for the following purposes
  - Taking a child to get a COVID-19 vaccine
  - Caring for a child experiencing side effects from the COVID-19 vaccine
- The law is effective from November 2, 2021 through December 31, 2022
  - Applied retroactively to the date vaccines were approved for children
- The law applies for ***each child*** and ***each vaccine injection or incident of side effects***

COVID-19 Child Vaccination Time (NYC)

- COVID-19 Child Vaccination Time is in addition to any other accrued time off
- Unlike the State law and the safe/sick leave provisions of the New York City Earned Safe and sick Time Act, COVID-19 Child Vaccination Time cannot be waived by a collective bargaining agreement
- Potential liability for failure to comply includes:
  - For each instance of COVID-19 child vaccination time taken by an employee but unlawfully not compensated by the employer, ***the greater of*** three times the wages that should have been paid or $250.00
  - for each instance of COVID-19 child vaccination time unlawfully denied or charged against an employee's paid safe/sick time accruals, $500.00

COVID-19 Updates

NEW YORK CITY – VACCINE MANDATE

New York City Vaccine Mandate

- On December 6, 2021, former Mayor Bill de Blasio announced expansions to the “Key to NYC” program
- Effective December 27, 2021, employers must ***exclude from the workplace*** any worker who has not provided proof of vaccination against COVID-19 unless an exception for a religious or medical accommodation applies or the worker “only ever enters the workplace for a quick and limited purpose”
  - A “worker” means a full-time or part-time staff member, employer, employee, intern, volunteer or contractor

New York City Vaccine Mandate

- By December 27, 2021, the worker must have presented proof that the worker is fully vaccinated, received one dose of a single dose vaccine, or received one dose of a two dose vaccine provided the worker gets the second dose within 45 days.
- Employers must verify a worker's proof of vaccination and one form of identification
- Acceptable proof of vaccination:
  - A photo or hard copy of the CDC vaccination card
  - NYC COVID Safe App
  - New York State Excelsior Pass
  - CLEAR's Digital Vaccine Card, CLEAR Health Pass

New York City Vaccine Mandate

  - Official vaccine record
  - A photo or hard copy of an official vaccination record of a vaccine administered outside the United States for one of the following vaccines: AstraZeneca/SK Bioscience, Serum Institute of India/COVISHIELD and Vaxzevria, Sinopharm, or Sinovac
- Employers must check proof of vaccination for contractors visiting the workplace who are employed by another company
  - Employers may check each contractor individually
  - Alternatively, employers may request that the contractor's employer confirm the contractor is vaccinated
  - Employers must keep a record of the request and the contractor's employer's confirmation that the contractor is vaccinated

New York City Vaccine Mandate

- Dealing with a remote workforce:
  - The mandate does not require fully remote workers to get vaccinated if they are not entering the workplace
  - If a “remote” worker is in the office for more than “a quick and limited purpose” they are covered and must be vaccinated
    - Remote workers visiting the office for a meeting or intermittently must be vaccinated

COVID-19 Updates

NEW YORK CITY – VACCINE MANDATE:
What's An Employer To Do?

New York City Vaccine Mandate

- Employers must adhere to specific recordkeeping provisions
  - Vaccination information should be collected and stored in a secure manner to ensure the information's privacy and security is protected
  - Information should only be accessed by employees or other individuals who have a legitimate need to access the information for purposes of complying with the order, or other governmental orders, laws, or regulations
  - Vaccination information should not be used for other purposes

New York City Vaccine Mandate

- The New York City Vaccine mandate does not necessarily require an employer to exclude from the workplace an employee who has an accommodation for a sincerely held religious belief (not a social or political belief) or a medical condition that prevents them from being vaccinated
  - New York City provides a reasonable accommodation checklist that can be found COVID-19: Vaccination Workplace Requirement - NYC Health, at the "Guidance for Accommodations for Workers" link
  - Employers may deny a reasonable accommodation if there is an undue hardship. Several factors should be considered in determining if there is an undue hardship, including
    - Nature and cost of the accommodation needed
    - Overall financial resources of the facility and the number of people
    - The impact of the accommodation on the operation of the facility
    - The type of operation

New York City Vaccine Mandate

- Accommodations may include
  - Weekly testing, masking and social distancing
  - Remote work
  - Unpaid leave of absence
- If a reasonable accommodation is granted in lieu of requiring proof of vaccination, the employer must keep certain records to comply with the mandate:
  - A record of when the employer granted the reasonable accommodation
  - The basis for granting the accommodation
  - Documents the worker provided supporting the reasonable accommodation

New York City Vaccine Mandate – What's An Employer To Do?

- Complete a certification of compliance and post it in a conspicuous location
  - The Department of Health and Mental Hygiene created a one-page attestation that employers must complete and post in a conspicuous location at each business location covered by the order
  - The form of attestation is available at COVID-19: Vaccination Workplace Requirement - NYC Health, at the "Affirmation of Compliance with Workplace Vaccination Requirements" link
  - The attestation states that the employer is complying with New York City's Vaccine Mandate
- Businesses that refuse to comply with the mandate are subject to a $1,000 fine and escalating penalties for continuing violations

New York City’s Fair Chance Act

New York City's Fair Chance Act

- On January 11, 2021, the Fair Chance Act was amended. Effective July 29, 2021, the Act's protections were expanded
- The New York City Commission on Human Rights' Enforcement Guidance on the Fair Chance Act and Employment Discrimination on the Basis of Criminal History clarifies:

> The NYCHRL also prohibits employers from asking about or considering information about an applicant's conviction history or pending cases until ***after the employer has assessed all other job qualifications and made a conditional offer of employment to the applicant***. After the conditional offer, employers who wish to withdraw the conditional offer based on the applicant's criminal history must comply with specific requirements of the Fair Chance Process and can only withdraw the offer in limited circumstances.

New York City's Fair Chance Act

- All reference, education and previous employment checks, and other (non-criminal) pre-employment requirements must be complete before an offer conditioned on the outcome of a criminal history search can be extended
- The Commission has indicated that if an applicant for employment resides in New York City, but is hired into and works from an office located outside of New York City, the conditional offer process does not apply
- The process applies to applicants who reside in New York City, are hired into an office outside of New York City, and will be hired to work remotely from their residence in New York City

New York City's Fair Chance Act

- Employers must consider certain factors when considering the results of a criminal background check
- Employers must provide notice setting forth the basis for any disqualification decision and review any responsive information the applicant or employee submits before making a final employment decision

New York City's Fair Chance Act

- Last year, the New York City Commission on Human Rights pursued violations of the New York City Fair Chance Act
  - The Commission filed a complaint against a company for advertising that it conducted drug and background screening for new hires. Among other things, the company agreed to pay a $60,000 civil penalty and submit to two years of monitoring by the Commission
  - The Commission and an employer agreed to a monetary settlement and civil penalties totaling $20,000, revisions to hiring policies and training when a company withdrew an offer of employment without considering the Fair Chance Act factors

New York City's Fair Chance Act

- **What does this mean for employers?**
  - Employers extending job offers conditioned on reference checks, criminal background checks, and other pre-employment requirements should change their procedures to ensure that all pre-employment requirements (except criminal background checks) are fulfilled before extending a conditional offer of employment
  - Ensure all supervisory personnel are trained on New York City's Fair Chance Act and its amendments, including factors that should be considered when evaluating the results of a criminal background check
  - Remove any reference in job advertisements or applications to background checks

Enforcement Action

An Active NYC Commission on Human Rights

- During the fiscal year July 1, 2020 through June 30, 2021, the Commission received 1,373 inquiries relating to employment discrimination. Of those inquiries, there were 229 inquiries regarding gender discrimination; 271 regarding disability discrimination; 219 regarding retaliation; and, 173 regarding race
- The Commission filed 643 complaints of discrimination in the fiscal year 2021. 63% of those cases were employment related
- The Commission assessed more than $4.4 million in damages and penalties for workplace sexual harassment violations

An Active New York State Division Of Human Rights

- During fiscal years 2020 and 2021, the New York State Division Of Human Rights received 10,072 new complaints
- During fiscal years 2020 and 2021, approximately 83% of the complaints were employment related. The majority of the complaints involved disability, retaliation, race/color, sex, and age
- During fiscal years 2020 and 2021, monetary awards of almost $9 million were made either through conciliation or the Commissioner's Order

A Few Reminders....

Salary Thresholds For Exempt Employees And Minimum Wage Requirements

Minimum Wage for Most Employees

Locality	December 31, 2021 - December 30, 2022*
New York City	$15.00
Nassau, Suffolk, Westchester counties	$15.00
Other New York State counties	$13.20

* The minimum wage for fast food workers is $15.00 per hour throughout New York state

Minimum Wage for Tipped Food Service Workers

Locality	December 31, 2021 - December 30, 2022
New York City	$10.00 cash wage $5.00 tip credit
Nassau, Suffolk, Westchester counties	$10.00 cash wage $5.00 tip credit
Other New York State counties	$8.80 cash wage $4.40 tip credit

Salary Thresholds for Exempt Employees

Locality	December 31, 2021 - December 30, 2022
New York City	$1,125.00 (week) $58,500.00 (year)
Nassau, Suffolk, Westchester counties	$1,125.00 (week) $58,500.00 (year)
Other New York State counties	$990.00 (week) $51,480.00 (year)

The salary thresholds apply to the administrative and executive exemptions, but not the professional exemption

New York State Paid Family Leave

- New York State began phasing in paid family leave in 2018. The phase-in period is complete this year and New York State Paid Family Leave benefits are at their target levels
- Eligible employees receive up to 12 weeks of job protected, paid time off to bond with a new child, care for a family member with a serious health condition, or to assist when a family member is deployed abroad on active military service

New York State Paid Family Leave

- Paid family leave may be available in situations when an employee or their minor, dependent child is under an order of quarantine or isolation due to COVID-19
- On November 1, 2021, Governor Hochul signed an amendment to the PFL expanding the definition of family member. Effective January 1, 2023, the definition of "family member" will expand from a child, parent, grandparent, grandchild, spouse or domestic partner and include a "sibling," defined as a biological or adopted sibling, a half-sibling or a step-sibling

New York State Paid Family Leave – Quarantine Leave

- In April 2020, quarantine leave was added to New York State Paid Family Leave
  - An employee may take protected leave if the ***employee*** or the ***employee's minor dependent child*** is under an order of quarantine or isolation due to COVID-19
  - Employees using **leave *for themselves*** are compensated first by using emergency COVID-19 paid sick leave:

No. of employees/net income	No. COVID sick days
100 or more employees Public employers	14 paid sick days
10 or less employees (with 2019 net income of over $1 million) 11-99 employees	5 paid sick days
10 or less employees (with 2019 net income of $1 million or less)	N/A (use PFL/disability)

New York State Paid Family Leave – Quarantine Leave

- If the COVID emergency paid sick leave does not cover the employee's entire quarantine or isolation period, then the employee may use a combination of short-term disability and PFL
- PFL is 67% of the employee's average weekly wage capped at $840.70 per week. Disability benefits are capped at $2,043.92 per week
- When an employee's minor dependent child is subject to the quarantine or isolation order, the employee must meet the general eligibility requirements of PFL to receive benefits. An employee receives up to 67% of his average weekly wage, capped at $840.70

NEW YORK STATE | Paid Family Leave

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Jeff Kohn represents clients in a broad range of employment and labor law disputes. Jeff's clients span a variety of industries, including sports, entertainment and media, financial services, airlines, pharmaceuticals, professional services, and transportation, among others.

The New York Regional Head of Litigation, Jeff serves as a strategic legal advisor on labor-management relations, including collective bargaining, labor arbitrations, and NLRB and NMB matters for a variety of clients. Jeff has an active employment litigation practice, including employment discrimination, employment contract, wage and hour, executive compensation, and trade secret litigation. He also has substantial experience as a strategic advisor for clients who need to restructure their operations or reorganize in bankruptcy. Jeff also manages sensitive internal investigations for clients across a variety of industries.

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Sloane Ackerman represents employers in the full spectrum of labor and employment matters. She defends clients in high-stakes employment litigation and arbitration. Sloane's practice also focuses on traditional labor matters under the Railway Labor Act and the National Labor Relations Act, including collective bargaining and labor arbitrations. Sloane also regularly advises employers in a wide range of operational and strategic labor and employment matters, including issues arising out of mergers and acquisitions.

In addition to Sloane's extensive experience in the airline industry, she represents employers from nearly every sector of the economy, including financial services, insurance, professional services, media, technology, entertainment, apparel, gaming, healthcare and pharmaceuticals, and food and beverage.

Sloane is frequently quoted in various publications, including *Bloomberg*, *The Boston Globe*, and *Corporate Counsel*.

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Karen Gillen is an experienced litigator representing employers in class, representative and collective actions, and single and multi-plaintiff lawsuits in employment matters. Her litigation practice focuses on a broad range of employment law issues including wage and hour, ERISA, discrimination, retaliation, and wrongful termination. She also focuses on litigating breach of employment contract and restrictive covenant disputes. Karen regularly represents employers before administrative agencies including the Equal Employment Opportunity Commission, the New York State Division of Human Rights, the New York City Commission on Human Rights, and other state and local administrative agencies.

Karen is a trusted advisor to clients and serves as a strategic partner to assist with challenges clients face. She works closely with organizations on compliance, sensitive investigations, classification issues, and termination decisions, to name a few. Clients turn to Karen to assist with planning workplace reductions, mergers, and guidance on executive departures. Karen offers practical plans and solutions for even the most complex issues. Most recently, clients have come to rely on Karen for her practical guidance relating to COVID-19 matters that impact the workplace, including OSHA's emergency temporary standard, state and local laws addressing pandemic issues, and various executive orders.

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