COLLAZO FLORENTINO & KEIL LLP *Client Advisory*

For Clients And Friends Of The Firm

October 26, 2017

NEW YORK LABOR AND EMPLOYMENT LAW UPDATE

The past few weeks have seen a flurry of new developments in the New York labor and employment law landscape. Specifically, new forms related to Paid Family Leave are now available on the state Paid Family Leave website, the New York City Commission on Human Rights has issued guidance on the impending law prohibiting employers from asking applicants about their salary histories, the New York City Council has passed legislation further expanding the City's Earned Sick Time Act, and the New York City Human Rights Law amendment prohibiting discrimination on the basis of uniformed service will soon go into effect. A summary of these new developments is below.

PAID FAMILY LEAVE FORMS RELEASED

As discussed in earlier client alerts (here and here), the New York State Paid Family Leave Law ("PFL Law") goes into effect January 1, 2018. In anticipation of the effective date, a number of new forms are now available on the PFL website, including the forms employees should complete if they want to request PFL for bonding, care of a family member, or a qualifying military exigency.

Of particular note for employers is the release of the Paid Family Leave Waiver form. Employees whose regular schedule is 20 hours or more per week, but who will not work for 26 consecutive weeks (*e.g.*, seasonal employees), and employees who are regularly scheduled for less than 20 hours per week and will not work 175 days in a consecutive 52-week period *must* be given the option to waive PFL benefits and contributions. Employers must retain a copy of any executed waiver for at least as long as the relevant employee remains employed.

Importantly, these employees are not *required* to opt out, and it is solely their decision whether or not to do so. If the employee decides not to opt out, the employee must make the relevant PFL contributions and the employer must provide PFL when the employee is eligible. If an employee does waive PFL benefits, and the employee's schedule thereafter changes so that the employee will either work for 26 consecutive weeks or 175 days in a consecutive 52-week period (whichever is applicable), then the waiver must be deemed revoked. Within 8 weeks of the employee's schedule change, the employer must notify the employee of the revocation of the waiver and begin making deductions for PFL, including any retroactive amount due from date of hire.

NYC COMMISSION ON HUMAN RIGHTS ISSUES SALARY HISTORY FAQS

In advance of the October 31, 2017 effective date, the New York City Commission on Human Rights (the "Commission") has issued frequently asked questions and employer and applicant

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fact sheets on the new legislation which prohibits employers from inquiring about or discussing an applicant's salary history (see our prior client alert on this new law here). Although ambiguities in the law remain, the FAQs provide some additional information that is helpful to employers in navigating this new law.

Scope: The law defines "salary history" as including "benefits" and "other compensation". The FAQs clarify that these terms should be interpreted broadly, and that they explicitly include items such as car allowances, retirement plans, bonuses, and commissions. Also off-limits are questions about an applicant's current or former profit percentage; however, questions about the size of an applicant's book of business, profits generated, or other performance indicators such as volume, value, or frequency of an individual's sales, are permissible.

The new guidance makes clear that the prohibition on inquiring into salary history generally applies to all employers and all applicants for employment in New York City, as well as to independent contractors who do not themselves have employees. The law does not apply to applicants for internal transfer or promotion with their employer.

The geographical reach of the law, however, is unsettled. Mere residency of the applicant in New York City is insufficient for the salary history restrictions to apply if the New York City resident is interviewed outside of New York City for a position located outside of New York City. However, the FAQs state the prohibition *may* apply if the job is located outside New York City, but the interview occurs in New York City. Employers with multiple locations should also note that the guidance prohibits employers from including questions about salary history on their employment applications, even if the application states that individuals applying in New York City need not answer the question or if the application notes that a response is voluntary.

Potential Pitfalls: Although most employers are aware that they cannot ask applicants about their salary history directly or through an agent (such as a recruiter), there are other potential pitfalls of which employers should be mindful. For example, employers cannot try to obtain an applicant's salary history information indirectly by searching websites that collect salary history information for an applicant's title at the applicant's current or former place of employment (*e.g.*, Glassdoor). General market research on industry standards, however, is permissible, and a potential employer will not be liable under the law if it accidentally learns about the applicant's salary history; but in that instance, it cannot rely on that information in determining what compensation to offer the applicant. Additionally, employers who are contacted by headhunters regarding a particular candidate should take care before relying on a headhunter's representation of an applicant's salary. Specifically, the FAQs advise that "[t]o protect against liability, prospective employers should obtain a copy of the applicant's written consent authorizing the headhunter to disclose [salary] information before relying on a headhunter's representations about an applicant's salary history." The FAQs also point out that, though there are exemptions that would allow employers to ask salary history questions to comply with federal, state, or local law, there are no exemptions for actions taken in accordance with foreign or international law. There are also no exemptions from the law for private sector positions (as opposed to public sector jobs) for which compensation is set by a collective bargaining agreement. Finally, the FAQs hint that *former* employers may be liable for "intentionally aiding and abetting" a violation of the law by disclosing salary information to a hiring employer. Employers should therefore consider obtaining an employee's written consent to the release of salary information in the event

the employer is contacted by a third party for verification, to avoid potential "aiding and abetting" liability.

What *Can* Employers Do?: Employers may ask an applicant about salary expectations and discuss the proposed salary or salary range of the position with the applicant. Employers are also entitled to rely on information about the applicant's salary history in determining salary, benefits and compensation if the applicant "voluntarily and without prompting" discloses that information. Although still vague, the FAQs provide some guidance on what a voluntary and unprompted disclosure would look like; specifically noting that a disclosure is made "without prompting" if the average applicant would not think the employer encouraged the disclosure based on the employer's words, actions, and the overall context. It is unclear how far an employer may probe for specific details when an applicant voluntarily raises salary history, though some follow-up appears to be contemplated by the guidance. The FAQs state that, following a voluntary and unprompted disclosure, the potential employer may "discuss or inquire" about the applicant's salary history and verify the applicant's representations, including by asking for an applicant's W-2. Employers may also ask whether an applicant will forfeit deferred compensation or unvested equity from their current employer by taking the new position, and may inquire as to the value and structure of the deferred compensation or unvested equity. Employers may also request documentation to verify such representations regarding forfeiture and consider this information when making an offer. Finally, employers may ask applicants about competing offers and counter-offers, as well as the value of those offers.

Corporate Acquisitions: The FAQs also provide information on whether corporations may consider salary history in the context of corporate acquisitions. A company seeking to acquire a target may obtain salary information about the employees of the target company as part of its due diligence. However, the acquiring entity may not always be able to use that information in setting the salary of the employees it will be absorbing from the target company. If employees are being absorbed and compensation and structural decisions are being made on a non-individualized basis, then salary history may be considered by the acquirer. If, however, employees of the target company are interviewing for positions with the acquiring company, then the salary history law may be implicated. In those instances, the Commission recommends salary information not be shared with the hiring managers making compensation decisions.

Next Steps: To ensure compliance with the salary history guidance, employers should examine their employment applications and recruiting procedures to ensure they are compliant with the New York City requirements. Employers should also undertake to train their recruiters, interviewers, and human resources personnel to ensure they have an appropriate understanding of what can and cannot be discussed in terms of salary. Finally, many other states and municipalities are enacting laws similar to the New York City salary history prohibition (*e.g.*, Philadelphia, San Francisco, California, Delaware, Massachusetts, and Oregon). Employers with offices in multiple locations should therefore take steps to ensure they are in compliance with all laws which potentially could apply to their recruiting process. Given the complexities of these legal requirements, we advise working with counsel to ensure that your recruiting procedures are compliant.

POSSIBLE EXPANSION OF NYC EARNED SICK TIME

Under the New York City Earned Sick Time Act (the "Act"), most employers are required to provide employees with paid or unpaid sick time that the employee may use for (1) such employee's mental or physical illness, injury, health condition, medical diagnosis or preventative medical care; (2) care of a family member who needs medical diagnosis, care or treatment of a mental or physical illness, injury or health condition or who needs preventive medical care; or (3) closure of the employee's place of business due to a public health emergency or such employee's need to care for a child whose school or childcare provider has been closed due to a public health emergency. Last week, the New York City Council passed a bill that, if signed by the Mayor, would expand employee entitlements under the Act.

New Definition of "Family Member": The Act currently defines "family member" as an employee's child, spouse, domestic partner, parent, sibling, grandchild, grandparent or the child or parent of an employee's spouse or domestic partner. However, the newly passed bill would expand this definition to include "any other individual related by blood to the employee" and "any other individual whose close association with the employee is the equivalent of a family relationship." The law does not currently define what it means for an individual to be "related by blood" or what constitutes a "close association . . . the equivalent of a family relationship"; however, given the robust guidance issued previously regarding other aspects of the Act, additional clarification may reasonably be anticipated.

"Safe Time": The new bill would also expand the purposes for which sick leave can be used to include certain situations where the employee or the employee's family member has been the victim of a family offense matter (which includes, but is not limited to, acts or threats of disorderly conduct, harassment, menacing, reckless endangerment, identity theft, grand larceny, and criminal mischief), sexual offense, stalking, or human trafficking (collectively, "relevant offenses"). Specifically, the bill would allow such an employee to use leave (referred to as "safe time") for any of the following reasons:

1. to obtain services from a domestic violence shelter, rape crisis center, or other shelter or services program for relief from any of the relevant offenses;
2. to participate in safety planning, temporarily or permanently relocate, or take other actions to increase the safety of the employee or employee's family members from future relevant offenses;
3. to meet with a civil attorney or other social service provider to obtain information and advice on, and prepare for or participate in any criminal or civil proceeding, including but not limited to, matters related to a family offense matter, sexual offense, stalking, human trafficking, custody, visitation, matrimonial issues, orders of protection, immigration, housing, discrimination in employment, housing or consumer credit;
4. to file a complaint or domestic incident report with law enforcement;
5. to meet with a district attorney's office;
6. to enroll children in a new school; or
7. to take other actions necessary to maintain, improve, or restore the physical, psychological, or economic health or safety of the employee or the employee's family member or to protect those who associate or work with the employee.

Documentation: As with other sick leave purposes, if an employee takes more than three consecutive days of safe time, an employer may require reasonable documentation that the use of safe time is for one of the purposes outlined above. Reasonable documentation includes documentation signed by an employee, agent, or volunteer of a victim services organization, an attorney, a member of the clergy, or a medical or other professional service provider who assisted the employee or the employee's family member in addressing any relevant offenses and their effects; a police or court record; or a notarized letter from the employee explaining the need for such time. Regardless of the type of documentation provided, an employer may not require that an employee specify the details of the family offense matter, sexual offense, stalking, or human trafficking.

Notice: The requirements regarding notice under the Act apply to safe time as well. Specifically, for foreseeable leave, employees should notify their employers 7 days prior to the time leave is scheduled to begin; for unforeseeable leave, notice should be provided as soon as practicable. Similarly, employers must update their required notice to employees to include information regarding safe time as well as sick time. This updated notice must be provided to new employees as well as current employees – the latter within 30 days of the effective date of the new law. The Department of Consumer Affairs is expected to revise their sample notices accordingly.

Next Steps: If the Mayor signs the bill into law, as he is expected to do, the law will take effect 180 days after his signature. If enacted, employers should begin the process of reviewing and revising their sick leave policies to reflect employees' rights to take safe time for the purposes outlined above and to account for the expanded definition of "family member". Employers should also be mindful of the revised notice requirements, including the requirement to provide updated notices to current employees.

UNIFORMED SERVICE ADDED AS PROTECTED CATEGORY

Effective November 19, 2017, "uniformed service" will be included as an additional category protected by the already expansive New York City Human Rights Law ("NYCHRL"). "Uniformed service" is defined to include, but is not limited to, current or past service in the armed forces, the national guard, the commissioned corps of the national oceanic and atmospheric administration, the commissioned corps of the U.S. public health services, the organized militia of a state or territory, membership in the reserves of the U.S. armed forces or coast guard, or being listed on the state reserve or state retired list. Although the NYCHRL prohibits discrimination in employment on the basis of uniformed service, the amended law explicitly states that it is not discriminatory under NYC law to afford an individual a preference or privilege based on his or her uniformed service or to indicate such a preference on an application or job advertisement, unless otherwise prohibited by law.

If you have any questions about any of the above legislation, please contact Tina Grimshaw, Amanda Baker, or any other attorney at the Firm.