



LABOR & EMPLOYMENT PRACTICE GROUP

Meltzer Lippe is home to a large, experienced Labor and Employment Law Practice Group.

We are an integral component to the human resource chain and the first stop before taking action that impacts the employee – employer relationship.

Exclusively representing management, our attorneys are indispensable advisors to senior executives and the HR team. While some business owners and companies rely on our experience and depth to supplement in-house general counsel expertise, others lean on us to resolve their labor disruptions or employ our tenacity in collective bargaining.

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A RECAP OF RECENTLY ENACTED LAWS AND WHAT EMPLOYERS NEED TO KNOW AS 2023 CONTINUES

With the first quarter of the New Year “in the books,” here is a quick recap of some important employment law updates enacted in late 2022 and Q1 of 2023, as well as a look ahead to what’s to come later this year. Large or small businesses would benefit from engaging with experienced employment law attorneys to conduct an internal audit of their current policies to ensure they comply with the following:

Digital Postings: As of December 16, 2022, the New York Labor Law requires employers to electronically publish to all employees all “notice” documentation that is traditionally posted in employee breakrooms. Employers must post digital versions of all federally and state mandated notices on the employer’s website or provide them to their employees by email.

Memorandum of Understanding (MOU) Between Internal Revenue Service and U.S. Department of Labor: On December 22, 2022, the IRS and DOL entered into a joint initiative with the goal of improving employer compliance with wage and hour and tax laws. Under the agreement, the DOL and IRS will collaborate and share information “to assist in the identification of emerging and ongoing employment tax compliance issues related to misclassification.” The singular focus of this collaborative effort is to identify employers who have misclassified individuals as independent contractors and/or issuing 1099 to individuals who are deemed “employees.” In these cases, the DOL will refer to the IRS information obtained in their investigations that relates to the employer’s potential liability for non-payment of payroll and related taxes. This referral will ostensibly trigger the IRS to open an independent audit into the employer’s compliance with payroll taxes. However, the MOU makes clear this collaboration and subsequent audits will largely ensue in cases where the IRS is likely to collect on underpayments and where the sales of the employer in question exceed \$500,000. The MOU expires December 31, 2028.

New York Human Rights Law (HRL) Amendments: On December 23, 2022, New York State amended the HRL to make it unlawful for an employer to discriminate against employees and job applicants based upon citizenship or immigration status. The statute now defines “citizenship or immigration status” as “the citizenship of any person or the immigration status of any person who is not a citizen of the United States.” The law does not prohibit employers from verifying citizenship or immigration status, or taking adverse action based on such status, where required by law.

PUMP Act: On December 29, 2022, the Pump Act expanded the existing rights for nursing mothers under the Fair Labor Standards Act (which are similar to, but less protective than, New York law). Federal protections now cover all employees, rather than only non-exempt workers who were not covered under the prior law. The amendment also increases the period of time the employer must accommodate a breastfeeding mother from one to two years after the need arises. Time spent to express breast milk must be considered hours worked if the employee continues to work during that time. Exempt employees must be paid their full salary regardless of whether they take breaks to express breast milk. Employees must also first notify their employer of any non-compliance with the law and provide a 10-day cure period prior to filing a lawsuit. Importantly, this law does not preempt state or local laws that provide greater protections to employees.

Veteran’s Rights Poster: As of January 1, 2023, all New York State employers with 50 or more employees must display the Veterans’ Benefits and Services poster in the workplace. Employers can download and print the poster from the New York Department of Labor website (<https://dol.ny.gov/system/files/documents/2023/03/p37-vets-benefits-and-services-3-8-23.pdf>).

Limitations on Confidentiality and Non-Disparagement Clauses in Severance Agreements (*McLaren Macomb*, 372 NLRB No. 58 (2023)): On February 21, 2023, the National Labor Relations Board (“NLRB”) held that employers may not offer employees severance agreements that require employees to broadly waive their rights under the National Labor Relations Act (“Act”). The prohibition targets broad non-disparagement and confidentiality clauses traditionally found in severance agreements, which may be interpreted to prohibit employees from engaging in concerted activity. As noted in the NLRB’s General Counsel’s memorandum providing guidance on the *Macomb* decision to its Field Offices, an employer can be found liable even if the employee does not sign the severance agreement, and the *Macomb* decision may extend into other clauses typically contained in severance agreements such as non-compete and non-solicitation clauses if they are drafted too broadly. As a result, employers should narrowly tailor severance agreements to avoid broad confidentiality or non-disparagement clauses that essentially prohibit the employee from exercising his rights under the Act as well as consider a “savings clause” or disclaimer, which specifically informs the employee that they are free to engage in activities protected by the Act.

Updates to the New York State Sexual Harassment Model Policy: On April 11, 2023, the New York State Department of Labor (“NYSDOL”) finalized updates to the Sexual Harassment Model Policy to aide employers in complying with New York State laws prohibiting sexual harassment in the workplace. The NYSDOL also released an updated training video and new model training presentation slides that incorporate the additions to the new policy. Since October 9, 2018, employers in New York State are required to have a written sexual harassment prevention policy that meets or exceeds the minimum standards set forth in Section 201-g of the New York State Labor Law or the employer can adopt the model policy. The updated policy’s revisions include, but are not limited to, additional examples of sexual harassment, discrimination, and retaliation that can occur with employees working remotely and also emphasize that harassment and discrimination goes beyond sexual contact or sexually suggestive conduct – which includes stereotyping or treating employees differently because they identify as cisgender, transgender, or nonbinary. Another key change in the model policy is that it highlights the Equal Employment Opportunity Commission’s (EEOC) conciliation program and expressly states that should the matter fail to settle “the EEOC . . . will decide whether to file a lawsuit.” Copies of the updated model policy can be accessed at this website (<https://www.ny.gov/combating-sexual-harassment-workplace/sexual-harassment-prevention-model-policy-and-training>).

EMPLOYERS SHOULD PREPARE FOR THE FOLLOWING UPCOMING LAWS IN 2023

NYS Nursing Mothers in the Workplace Act Amendments: This law currently requires employers to provide nursing mothers reasonable unpaid break time, or permit a nursing mother to use paid break or mealtime, each day to express breast milk for up to three years after childbirth. Employers must also make reasonable efforts to provide a private space to the employee for this purpose. Starting June 7, 2023, the law will require (as opposed to encourage) New York State employers to designate a space for expression upon request from a nursing employee. The designated space must be in close proximity to the workspace, well-lit, private, and contain a chair, flat work surface, access to running water, refrigeration, and an electrical outlet. The space cannot be a bathroom or toilet stall. Where compliance with these requirements poses an undue hardship on the employer, it must nevertheless make reasonable efforts to provide a space in close proximity to the work area where the employee can express breast milk in privacy, but there is no exception to the break time requirement. The State will issue a policy regarding the rights of nursing employees, which employers must provide to employees returning to work following childbirth, and to all employees upon hire and annually. Employers are also prohibited from discriminating/retaliating against employees who exercise their rights under this law.

NYC Artificial Intelligence in Recruitment, Hiring and Promotion: New York City amended its administrative code to mandate employers who use artificial intelligence (“AI”) to recruit, hire, or promote employees to conduct independent audits for discriminatory bias. Importantly, employers who utilize AI tools must disclose the use of AI tools to job candidates who live in New York City and make the results of the bias audit publicly available. On April 5, 2023, New York City published final regulations which sought to address the ambiguity of what AI tools qualify and what constitutes an “independent audit.” Enforcement of this law will begin on July 5, 2023.

NYS Wage Transparency Law: Beginning September 17, 2023, New York’s statewide salary transparency law will require all employers with 4 or more employees advertising a job, promotion, or transfer opportunity to disclose the minimum and maximum salary or hourly rate that the employer believes in good faith to be accurate at the time of

posting. Employers must also include a job description, if it exists. The requirement will apply to all jobs that can or will, at least in part, be performed in New York. Employers must maintain records of the compensation ranges and job descriptions for each posted job for six years. The law does not provide a private right of action, but allows aggrieved persons to file a complaint with the State Department of Labor, which can issue civil penalties up to \$3,000 for multiple violations.

Meltzer, Lippe, Goldstein & Breitstone, LLP will continue to keep employers abreast of further developments on what's to come later this year. Employers with questions relative to the foregoing are encouraged to reach out to your Meltzer Lippe advisor or contact Mark A. Radi or Nicholas P. Melito at Meltzer, Lippe, Goldstein & Breitstone, LLP.

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