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New York Employers Facing New Employment Laws

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New York recently enacted several new employment laws impacting employers in the Empire State. In this alert, we've highlighted what employers need to know about these laws.

Inventions assignment limitations

Under A05295, which took effect on September 15, 2023, employers cannot require an employee to assign certain inventions that are made on the employee's own time **and** do not use an employer's equipment, supplies, facilities or trade secret information, unless such inventions either:

1. At the time of conception or reduction to practice, relate to the employer's business, actual research or development, or anticipated research or development.
2. Result from any work performed by the employee for the employer.

To the extent any agreement purports to require such an assignment, it will be deemed unenforceable. Notably, this law does not create a private right of action. In addition, while A05295 is similar to protections in other states (such as California's Labor Code Section 2870), it does not affirmatively require employers to provide employees with a specific notice regarding such unassignable inventions.

Limitations on nondisclosure provisions in settlement agreements

Signed into law on November 17, 2023, S4516 makes significant changes to employers' ability to include nondisclosure provisions in settlement agreements that resolve claims of discrimination or harassment. The law prohibits such settlement agreements from:

- Requiring a complainant to pay an employer liquidated damages in the event they violate a nondisclosure or nondisparagement provision.
- Requiring a complainant to forfeit all or part of the consideration received as part of the settlement for violating a nondisclosure or nondisparagement provision.
- Containing an affirmative statement that a complainant was not subject to discrimination or retaliation.

S4516 also modified existing requirements prohibiting settlement agreements from including a nondisclosure provision unless confidentiality is the complainant's preference. Under the amendments, this requirement now applies to independent contractors who settle discrimination claims, not just employees and potential employees. In addition, while complainants were previously required to wait 21 days after receiving an agreement memorializing their preference to maintain confidentiality before executing the agreement, S4516 permits them to sign **within** the 21-day window. The seven-day period during which an employee may revoke their acceptance remains unchanged. The law applies to agreements entered on or after November 17, 2023.

Prohibition on requiring social media account information

Effective March 12, 2024, S2518A prohibits employers from requesting or requiring that employees or applicants for employment:

- Disclose any username and password to a personal social media account.
- Access their personal social media account in the employer's presence.
- Reproduce photos, videos or other information contained in a personal social media account obtained by prohibited means.

An applicable account under this law is defined as any account or profile on an electronic medium "where users may create, share, and view user-generated content" that is used exclusively for personal purposes. This prohibition on access information does not apply to:

- Accounts provided by the employer that are used for business purposes.
- Accounts known to the employer to be used for business purposes.
- Access to an "electronic communications device" paid for by the employer where "the provision of or payment for such electronic communications device was conditioned on the employer's right to access such device and the employee was provided prior notice of and explicitly agreed to such conditions."
- Access pursuant to a court order.

The law does not prohibit employers from accessing information about an employee or applicant that is available in the public domain or accessing information voluntarily shared by an employee in the course of investigating misconduct.

Updates to New York City's Earned Safe and Sick Time Act (ESSTA)

NYC's Department of Consumer and Worker Protection recently adopted final rules to the ESSTA, which took effect October 15, 2023. We've outlined significant changes below.

Employer size

The rules clarify that an employer's size, for purposes of determining the amount of safe/sick time required to be provided, is based on the employer's total number of employees nationwide – not just those working in New York state or NYC. Employer size is determined by counting the highest total number of employees concurrently employed at any point during the calendar year to date, and must include full-time and part-time employees, employees jointly employed by one or more employers, and employees on leaves of absence, suspension or other temporary absences.

The rules also provide for different threshold levels of safe/sick leave coverage when an employer's applicable workforce increases or decreases. For example, when the applicable headcount increases from less than five to between five and 99 employees, employers must provide 40 hours of safe/sick time prospectively from the date of the increase in the number of employees. When an employer's headcount decreases, however, the rules explain that the entitlements to safe/sick time cannot be reduced until the following calendar year.

Covered employees

The rules clarify that employees are covered under the ESSTA if they either:

- Perform work (including by telecommuting) while physically located in NYC, regardless of where the employer is located.
- Have a primary work location outside NYC but regularly perform or are expected to regularly perform work in NYC during a calendar year.

However, only hours worked in the city "count" as hours worked for purposes of safe/sick time usage and accrual. Employees are not covered if they only perform work (including by telecommuting) while physically located outside NYC, even if the employer is located in NYC. Notably, the rules also eliminated references to the 120-day waiting period for employees to use safe/sick time.

Documentation

When an employee's use of safe/sick time results in an absence of more than three consecutive workdays, employers may require reasonable written documentation that the use of safe/sick time was authorized under the ESSTA. The rules explain that employers requiring such documentation must include in their policy information the types of reasonable written documentation the employer will accept and instructions on how employees can submit the documentation. Further, employers cannot require employees to submit

documentation before returning to work. Employers also must reimburse employees for fees or costs incurred to obtain any requested documentation.

Foreseeability and notice

Under the ESSTA, an employer may require notice of the need to use safe/sick time where the need is not foreseeable. The rules clarify that an absence is "foreseeable" when an employee is aware of the need to use the time seven days or more before the use; otherwise, the need is considered "unforeseeable." Employers who require such advance notice must include in their written policies reasonable procedures for employees to provide the notice. The rules contain examples of ways to provide "reasonable methods" of advance notice. For example, employees can send an email to a designated email address or submit a leave request in a scheduling software system, provided the employees have access to the system on nonwork time – and have been trained on and given written instructions on how to use it.

Pay statements information

Employees' pay statements must include the amount of safe/sick time they have accrued and used during a relevant pay period, as well as the total balance available for use. Employers using an electronic system to issue pay statements or other documentation related to safe/sick time may comply with this requirement by:

1. Alerting employees electronically each pay period on the availability of the required information.
2. Making the required content readily accessible by employees outside the workplace within the electronic system.
3. Maintaining accrual, use and balance information for any past pay period in the electronic system.

Written policy

In addition to the required documentation information described above, employers' policies addressing safe/sick time also must contain a statement that they will not ask employees to provide details about the medical condition or personal situation that led them to use safe/sick time, and that information the employer receives about any employee's use of safe/sick time will be kept confidential, and it will not be disclosed to anyone without the employee's written permission or as required by law.

'Reasonable inference' of violation

There is now a "reasonable inference" that an employer committed a violation of the safe/sick time laws if the employer fails to maintain or distribute a written safe/sick time policy and fails to maintain adequate records of employees' accrued safe/sick time use and balances.

Unemployment insurance eligibility notice

Effective November 13, 2023, S04878 expands the circumstances under which employers are required to provide a written notice of the right to file for unemployment benefits to any employee. Under this update, such notice must be provided at the time of permanent or indefinite separation from employment, reduction in hours, temporary separation, and "any other interruption of continued employment that results in total or partial unemployment." Employers should use the updated form on the DOL's website.

Discipline prohibited for refusing to attend captive audience meetings

Similar to several other states that have recently enacted legislation regarding captive audience meetings, effective September 6, 2023, S4982 prohibits disciplining employees for their refusal to attend employer-sponsored meetings, listen to speeches, or watch presentations if the primary purpose of which is to communicate the employer's opinion concerning "religious or political matters." "Political matters" includes matters relating to elections for political office, as well as decisions to join or support any political party or civic or community organization. "Religious matters" includes matters relating to religious affiliation and practice, including the decision to join or support any religious organization or association. The prohibition does not apply to "casual conversations" between an employer or an employer's agent or representative and employees, as long as participation in such conversations is not required. The law also requires employers to post a notice in their workplace informing employees of their rights under the law.

Failure to pay wages constitutes criminal larceny

Effective September 6, 2023, S2832A treats any failure to pay wages (including any "promised wage" beyond minimum wage or overtime) as a form of criminal larceny, by amending the definition of property to include "compensation for labor or services." The law also permits aggregation of all nonpayments or underpayments into one larceny count, even if the violations occurred in multiple counties, making it easier for employers to be prosecuted for wage theft. This law follows pledges earlier this year by Manhattan District Attorney Alvin Bragg Jr. to more aggressively pursue wage theft and other "forms of worker harassment and exploitation," as well as the creation of a Worker Protection Unit to pursue criminal charges against individuals and corporations in violation of wage laws. Employers with limited capital, such as startups, should be mindful of creating written records that reflect an intention to not pay employees at least the minimum wage.

Proposed exempt salary thresholds

As we reported on June 7, 2023, the New York State Department of Labor (DOL) increased the state's minimum wage effective January 1, 2024. Keeping in line with a historical exempt employee salary basis threshold of roughly 75 times the minimum wage, the DOL recently proposed regulations updating the exempt employee salary basis thresholds to the following levels beginning January 1, 2024.

Effective date of exempt salary threshold increase	NYC, Long Island and Westchester	Rest of New York State
Current	$1,125 weekly ($58,500 annually)	$1,064.25 weekly ($55,341 annually)
January 1, 2024	$1,200.00 weekly ($62,400 annually)	$1,124.20 weekly ($58,458.40 annually)
January 1, 2025	$1,237.50 weekly ($64,350 annually)	$1,161.65 weekly ($60,405.80 annually)
January 1, 2026	$1,275.00 weekly ($66,300 annually)	$1,199.10 weekly ($62,353.20 annually)

Next steps

New York employers should revise their form separation and settlement agreements in accordance with the new limitations on nondisclosure provisions and the modified review period. They also should ensure that their employment policies and agreements – including those relating to intellectual property, safe/sick time leave, and social media use – are updated for compliance with these laws, and review their pay practices and prepare to adjust their budgets in line with the proposed increase in exempt employee salary basis thresholds. In addition, employers should verify that they are keeping accurate pay records and statements, including ensuring employees are paid for all time worked, in light of the new criminal penalties for wage theft. Finally, employers should keep an eye out for more developments to come from the state before the end of 2023, including with respect to S3100A – the state's proposed noncompete ban – and additional legislation pending before Gov.

Kathy Hochul.

If you have any questions about these laws or how to comply, please contact a member of Cooley's employment group.

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