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NYSBCA

Legal Update: Trends in Employment Law

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Legal Update: Trends in Employment Law

FEDERAL

- Overtime Exemptions
- Workplace Rules
- Religious Accommodations
- Heat Exposure

NEW YORK

- New Protected Classifications
- Captive Audience Meetings
- Pay Transparency
- Social Media Demands

Trends in **Federal** Employment Laws


Overtime Exemptions Legal Trends

- **DOL proposed rule to raise the FLSA's annual salary-level thresholds**
 - **60-day comment period ends November 7**
 - **Automatic hikes every three years**
- **NY not yet announced – typically 75 times the minimum wage***

	Old	New
Executive, Professional, and Administrative (“White-Collar”)	\$36,568	\$55,068
Highly Compensated	\$107,432	\$143,988
New York City, Nassau, Suffolk, and Westchester County	\$58,500	\$62,400*
New York State	\$55,341	\$58,500*

- **Workers with a salary below threshold must be paid overtime if they work more than 40 hours a week**

4

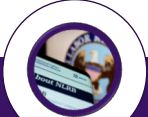


Overtime Exemptions Implications for Employers

- Convert exempt employees to non-exempt
 - Do the employees currently work more than 40 hours per week?
 - Employee pushback
 - Communication plan
- Pay exempt employees above the threshold
- Perfect time to reassess
 - Does the employee perform primarily executive, administrative or professional duties?

5

Workplace Rules Under Scrutiny




Cemex

1. Lower threshold for Board to issue bargaining order
2. If union presents employer with:
 - Demand for recognition; **and**
 - Authorization cards

The employer must either:

 - i. Recognize union; **or**
 - ii. "Promptly" file an RM petition



Stericycle

Old Rule	New Rule
Balancing rule's potential impact against the rule's legitimate justifications	Presumptively unlawful if rule could be interpreted to limit employee rights

6

Workplace Rules Strategies for Employers

- 1 Review workplace rules
- 2 Facially neutral policy could lead to bargaining order
- 3 File RM petition within the 2-week timeframe
- 4 Focus on compliance
- 5 Err on the side of caution
- 6 Perform supervisory analysis before recognition demand

7

Religious Accommodations – A New Standard

- Reasonably accommodate sincerely held religious beliefs or observances, unless doing so would create an **undue hardship**
 - Change from *de-minimus*
- “Undue hardship” is a substantial burden in the overall context of a business
 - Burden would result in substantial increased costs in relation to the employer’s particular business
 - Take into account all relevant factors including:
 - Particular accommodations at issue
 - Their practical impact in light of the nature, size, and operating cost
- Co-worker’s dislike of religious practice or animosity to a particular religion is not a factor in the undue hardship inquiry.

8

Religious Accommodations – Implications for Employers

- | | |
|---|--|
| <p>1 Prepare for an increase in accommodation requests</p> <p>2 Reconsider recently denied accommodations</p> <p>3 Update policies/practices on religious accommodations</p> <p>4 Assess requests under the new undue hardship standard</p> | <p>5 Consider interactive process</p> <p>6 Look for alternative accommodations</p> <p>7 Be aware of the risk of negative comments, frustration, and potential harassment</p> <p>8 Train managers</p> |
|---|--|

9

OSHA’s Imminent Regulations Surrounding Heat Exposure

Impending federal rule

- Drafting guidelines for indoor and outdoor work in heat
- Could allow OSHA to fine employers that violate its recommendations
- **By early next year**, the agency could lay out a timeline for a rule proposal

Current rules

- **OSHA**: premises "free from recognized hazards [including heat] that are causing or likely to cause death or serious harm to employees"
- **New York** has not passed any laws requiring the promulgation of heat exposure standards
 - Introduced legislation to establish high heat temperature maximum exposure levels for all delivery companies

New California rules

- Train all employees about heat illness prevention
- Provide fresh water so each employee can drink one quart per hour and encourage them to do so
- Provide access to shade and encourage employees to take a cool-down rest
- Develop and implement written procedures for compliance

10

OSHA Heat Exposure Regulations – Implications for Employers

Review policies and procedures surrounding heat exposure

Train employees and managers about heat illness prevention

Stay informed on OSHA and New York regulations

11

Trends in **New York** Employment Laws



New Protected Classifications – Height and Weight


- NYC passed legislation adding weight and height as protected categories
 - Effective November 22, 2023
- Prohibits employment discrimination based on height and weight
- Similar legislation proposed in NYS 2023-2024 legislative session

13



- 1 Is height or weight an essential qualification for performing the job?
- 2 Review existing job descriptions for potentially problematic requirements
- 3 Train managers and employees
- 4 Update anti-discrimination and anti-harassment policies
- 5 Stay apprised of new legislation

14



Captive Audience Meetings – NY’s New Prohibition

- May not discriminate against employees who refuse to attend meetings or listen to communications regarding unionization
 - Even when no campaign is ongoing
- Does **not** prohibit nonmandatory casual conversations concerning unionization
- Similar state statutes are being challenged for:
 - Being preempted by the NLRA
 - Violating the 1st and 14th Amendments by “chilling and prohibiting employer speech” with their workers
- NLRB General Counsel Jennifer Abruzzo maintains such meetings violate NLRA

15

Captive Audience Meetings – Employer Takeaways

Do not discipline employees who choose not to attend a meeting regarding unionization	Modify existing policies to include restrictions on captive audience meetings
Educate supervisors about the prohibitions on captive audience meetings	Ensure a captive audience meeting is necessary for your organization

16

Pay Transparency: Legal Trends



New York City

Employers must disclose in job postings:

- Anticipated minimum salary and maximum salary or hourly wage for the job

Applies to jobs that:

- Can or will be performed, in whole or in part, in New York City whether from an office, in the field, or remotely from the employee's home



New York State

Employers must disclose in job postings:

- Anticipated compensation range for the position
- Job description, if one exists

Applies to jobs:

- Physically performed in NY
- Physically performed outside of NY but report to a supervisor, office, or other work site in NY



- 1 Do not prevent wage discussion
- 2 Assess basis for the range – experience and education
- 3 Employees gaining access to wage information
- 4 Train managers to ensure compliance
- 5 Keep pay practices consistent

Social Media Demands: Prohibited Requests

Prohibited – effective March 2024

“Unlawful for any employer to request, require or coerce any employee or applicant for employment to:“

1. Disclose any authentication information for accessing a personal account through an electronic communications device
2. Access the employee's or applicant's personal account in the presence of the employer
3. Reproduce photographs, video or other information contained within a personal account obtained by prohibited means

Allowable

- Requiring disclosure of access information to an account used for business purposes
- Accessing devices paid for in whole or in part by the employer*
- Restricting access to certain websites using the employer's network or devices paid in whole or in part by the employer*
- Utilizing information that is publicly available or is voluntarily shared by the employee

*where the provision of or payment for such device was conditioned on the employer's right to access such device and the employee had notice of that right and explicitly agreed to such conditions.

Social Media Demands – Employer Response

Review and adjust hiring practices

Revise social media policies, including prohibiting retaliation against employees who refuse to provide access to personal accounts

Clearly state the provision of electronic devices is conditioned on the employer's right to access

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Questions?

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Thank you.