Labor & Employment Issues
In Focus

Pitta LLP
For Clients and Friends
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BUSINESS NOT USUAL IN NY STATE

New York State ("NYS") has enacted and Governor Cuomo will soon sign, an anti-harassment/anti-discrimination law that squarely places the onus of prevention on employers - private, public and unions. These amendments to the NYS Human Rights Law, passed June 19, 2019, make it far easier for plaintiffs to bring a case to trial and prevail for substantial damages against those employers who do not take pro-active steps now. Here is what the new law does, and what to do about it.

The law makes it easier for plaintiffs by removing two barriers that courts have used to dismiss harassment lawsuits before trial. Federal and NYS law had always required that to bring a sexual harassment lawsuit, the offensive sex based conduct must be either "severe" or "pervasive." The amended NYS law removes these requirements, substituting instead that the offensive sex based conduct need only subject an individual to "inferior terms, conditions or privileges of employment" and rise above the level of "petty slights and trivial inconveniences" to a reasonable victim. Second, under prior NYS law, employers could block a lawsuit by showing an effective anti-harassment policy and complaint process which plaintiff failed to use. The amendments demote this defense to just one factor for the jury to consider, "which shall not be determinative." The new law also extends its provisions beyond sex to all protected categories under the NYS Human Rights law – race, religion, national origin, disability, gender identity or expression, color, creed, age, sexual orientation and more; provides for punitive damages and mandatory attorney's fees to the prevailing plaintiff; largely bars non-disclosure and mandatory arbitration; and establishes a three year limitations period. To ensure pro-plaintiff judicial application, the law directs that its provisions should be "construed liberally" but its exceptions and exemptions narrowly "in order to maximize deterrence . . ." The new law largely takes effect 60 days after enactment.

While now facing perhaps the most vigorous and plaintiff friendly state or local law, New York employers should avoid panic and instead focus on what they can do to preclude liabilities. After all, as the law's proponents have argued, NYS law now parallels New York City's human rights law which has been in effect for years without cataclysm. The keys are effective anti-discrimination/anti-harassment policies, procedures and relief. Since the definition of actionable conduct has been set so low, no longer requiring that offensive conduct based on sex be severe or frequent, it is more imperative than ever for all to understand that such crude behavior cannot be shrugged aside or dismissed as bad humor, hence the need for intense in person training and clear policy. Since employer liability can so easily arise, employers' agents – supervisors – must form the first defensive line detecting, reporting and intervening against such behavior under well-defined employer procedures. And since the human and legal costs run so high, employers must be sure to promptly and thoroughly investigate and, where warranted, provide fair and effective relief and discipline.

This is not easy, but it is doable, and it is the law. Pitta LLP will provide more detail in the days ahead on this and related anti-discrimination laws passed this same session.

NEW YORK NOW REQUIRES PAID LEAVE FOR VOTING

In the crush of business at the end of the New York State legislative session, it was easy to overlook legislation from earlier in the year. On April 1, 2019, New York State amended its Election Law § 3-110, to provide all employees with three hours of paid time off to vote. The amendments provide:

- All registered voters with three hour of paid time off to vote in any election;
- Paid time off must be provided regardless of an employee's schedule;
- An employee must provide at least two days of advance notice of the need to vote; and
- Employers must post a notice setting forth these requirements no less than 10 days before every election. The notice must remain posted until the polls close.

These amendments were included as part of the 2019-2020 New York State budget.

The law provides that employees are permitted to take time off to vote only at the beginning or end of their shift, unless otherwise agreed upon by both the employer and the employee. If an employee decides to request time off to vote, they must notify their employer "not less than two working days" before the election. Wages are then paid as normal at the employee's regular hourly rate or the hourly rate they would have earned had they not taken leave. Tipped employees for whom the employer takes a tip credit are to be paid at the regular minimum wage. Employers are prohibited from making any deductions to an exempt employee's pay for partial day absences, including for taking voting leave permissible under New York law.

The prior law required employers to pay for "up to two" hours of paid time off if the employee had less than four consecutive hours between the opening of the polls and the beginning of his/her work shift, or between the end of his/her work shift and the closing of the polls. Since New York polls generally remain open until 9:00 p.m., under the previous law, any worker whose workday ended at or before 5:00 p.m. was essentially not entitled to paid time off. This four hour requirement is no longer a pre-requisite for receiving paid time off to vote. As such, all employees are essentially guaranteed payment for up to three hours to vote at any election.

As this law has taken effect, employers should review their time off policies to ensure compliance and should also ensure timely compliance with the posting requirement. In addition, employers may want to update their employee handbooks, leave policies, and election notices.

FY 2018 EBSA ENFORCEMENT STATISTICS

Recently, the U.S. Department of Labor's Employee Benefits Security Administration (EBSA) issued its Fiscal Year (FY) 2018 Fact Sheet showing that its total monetary recovery for employee benefit plans, participants and beneficiaries exceeded the FY 2017 recoveries by $500 million. Clearly, EBSA continues to obtain significant recoveries from its enforcement actions.

Pursuit to its investigating and enforcement activities under the Employee Retirement Income Security Act of 1974, as amended (ERISA), EBSA ensures the integrity of the private employee benefit plan system. It has oversight authority for nearly 694,000 retirement plans,

approximately 2.2 million health plans, and a similar number of other welfare benefit plans, such as those providing life or disability insurance.

The Fact Sheet shows that in FY 2018, EBSA recovered $1.6 billion, including $1.1 billion from enforcement actions. It's worth noting that of the $1.1 billion, EBSA's enforcement program helped terminated vested participants in defined benefit plans collect benefits of over $807.7 million due and owing to them. EBSA increased its recovery efforts in this single area by more than 200% over the prior year (i.e., $326.7 million recovered in FY 2017). Investigations involving missing or lost terminated vested participants continues to be a significant enforcement priority for EBSA, and many large ERISA defined benefit plans have been the subject of these investigations. The recoveries from this project, alone, were more than half of EBSA's total monetary enforcement recoveries for FY 2018.

Other EBSA initiatives include:

- Employee Stock Ownership Plans (ESOPs)
- Health Enforcement Initiatives
- Protecting Benefits Distribution (PBD)
- Plan Investment Conflicts
- Contributory Plans Criminal Project

For more information about these initiatives and other EBSA National Enforcement Projects visit: https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/enforcement

The following chart sets forth EBSA's FY 2018 enforcement statistics as compared to the figures from FY 2017:

	FY 2018	FY 2017
Total Monetary Recoveries		
Total Recoveries	$1.6B	$1.1B
Recoveries from Enforcement Actions	$1.1B	$682.3M
Voluntary Fiduciary Correction Program	$10.8M	$10M
Abandoned Plan Program	$33.4M	$27.9M
Monetary Benefit Recoveries from Informal Complaint Resolution	$443.2M	$418.7M
Civil Investigations		
Civil Investigations Closed	1,329	1,707
Civil Investigations Closed with Results	860	1,114
Percent Civil Investigations		

Closed with Results	64.7%	65.3%
Civil Investigations Referred for Litigation	111	134
Civil Cases with Litigation Filed	56	50
Criminal Investigations		
Criminal Investigations Closed	268	307
Criminal Investigations Closed with Guilty Pleas or Convictions	87	79
Number of Individuals Indicted	142	113
Correction Programs		
VFCP Applications Received	1,414	1,303
DFVCP Filings Received	19,937	22,139
Inquiry Statistics		
Total Inquiries	170,909	174,603
Monetary Benefit Recoveries from Informal Complaint Resolution	$443.2M	$418.7M
Investigations Opened from Inquiry Referrals	524	617

To Our Clients: If you have any questions regarding any of the matters addressed in this newsletter, or any other labor or employment related issues in general, please contact the Pitta LLP attorney with whom you usually work.

To Our Clients and Friends: To request that copies of this publication be sent to a new address or fax number, to unsubscribe, or to comment on its contents, please contact Aseneth Wheeler-Russell at arussell@pittalaw.com or (212) 652-3797.