LABOR AND EMPLOYMENT LAW
INFORMATION MEMO
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Court Permanently Enjoins New York from Enforcing Employee Reproductive Rights Notice Provision

On March 29, 2022, a federal court in Upstate New York permanently enjoined New York State from requiring employers to include a government-issued "notice" of workers' rights and remedies in their employee handbooks regarding reproductive health decisions.

The original law, New York Labor Law Section 203-e, was enacted in November of 2019, and prohibits employers from discriminating or taking retaliatory action against employees based on their reproductive health decisions, including using or accessing a particular drug, device or medical service. The law also required employers to post a notice of these employee rights and remedies in their employee handbooks. Judge McAvoy of the Northern District of New York struck down this particular notice requirement. For more background information on Section 203-e, please see our prior blog post.

In this recent case, captioned *CompassCare et al. v. Cuomo,* several religious organizations sought injunctive relief against the state, claiming that the notice provision in Section 203-e violates the First Amendment of the United States Constitution. These plaintiffs contended that the struck-down requirement compelled them to convey a message with which they disagree (specifically, as it undermines their purpose as organizations opposed to abortion). In response, the State of New York attorneys argued that the notice provision only requires inclusion of factual information in an employee handbook concerning the existence of rights under New York law. Moreover, state representatives argued that covered employers are not required to take a position on the statute or its protections, and the law does not even require employers to provide employees with written handbooks in the first place.

The Court agreed with the plaintiffs and found that the law's notice provision violates the First Amendment. More specifically, the Court found that the notice requirement compelled the plaintiffs to deliver a message contrary to their religious beliefs as they relate to reproductive health decisions. The Court reasoned that the plaintiffs' employee handbooks contain rules that govern the workplace, the values of the organizations and the religious perspective that guides the organizations' operations. Therefore, the Court held:

"[R]equiring that Plaintiffs also include in those handbooks a statement that the law protects employees who engage in behavior contrary to that promoted by the Plaintiffs would compel them to promote a message about conduct contrary to their religious perspective."

In applying "strict scrutiny" analysis of the Constitutional issue, the Court found that, although the state has a compelling interest in protecting employee privacy involving reproductive health decisions, state officials failed to demonstrate that the notice requirement was the least restrictive means of achieving that compelling interest. In reaching this conclusion, the Court highlighted evidence showing that the state has previously offered information on workers' rights and remedies "in a variety of other ways," besides mandatory handbook postings. These other ways included, according to the Court, "advertising the [statutory] provision generally, producing posters to be placed in workers' view at the job site, and

in general statements of workers' rights provided by the [New York] Department [of Labor] itself." As such, the Court found less restrictive methods were available that would not require the plaintiffs to produce such speech themselves or include the speech in a handbook produced under the employer's endorsement. It is presently uncertain whether or not the state intends to appeal the Court's decision.

Notably, Judge McAvoy's ruling did not invalidate the law's protections for employees and their reproductive decisions—those anti-discrimination and anti-retaliation protections remain in place. And while the statute's "notice" requirement was deemed to violate the First Amendment, the decision does not compel covered employers to remove any existing handbook language. Before taking such action, employers should discuss this potential course of action with legal counsel.

If you have any questions about the information presented in this memo, please contact Gianelle Duby, any attorney in our Labor and Employment practice or the attorney at the firm with whom you are regularly in contact.

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