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Introduction



Adam P. Mastroleo

Member

amastroleo@bsk.com

Syracuse, NY

EEOC Issues New “Know Your Rights” Poster



Theresa E. Rusnak

Associate

trusnak@bsk.com

Rochester, NY

EEOC Releases Revised Poster

- On Oct. 20, 2022, the Equal Employment Opportunity Commission (EEOC) released an updated poster, titled “[Know Your Rights](#)”
- Replaces the “EEO is the Law” Poster
- Poster can be found here: <https://www.eeoc.gov/poster>

EEOC Releases Revised Poster

- Revised poster contains bullet points instead of long paragraphs and uses concise language.
- Contains information on harassment as a form of discrimination.
- Adds pregnancy, sexual orientation, and gender identity as types of sex discrimination.
- Contains a QR code that links to EEOC complaint form.

EEOC Releases Revised Poster

- No specific date by which to post the revised poster, but the EEOC released guidance saying it should be “within a reasonable amount of time.”
- Poster must be placed in a conspicuous location where notices to applicants and employees are customarily posted
 - This is the case for every physical work location.

EEOC Releases Revised Poster

- Poster may be distributed electronically, and there is a version for screen readers
- However, electronic posting does not replace obligation to post in physical work location(s)
- Poster is presently available in English and Spanish.

EEOC Releases Revised Poster

- Penalties can include a \$612 fine for failure to post (applies per non-compliant location)
- Can also lead to statutory deadlines being extended for lack of notice of said deadlines to complainants
- Easy target in a DOL audit

Adult Survivors Act Update



Richard L. Weber

Member

rweber@bsk.com

Syracuse, NY

Adult Survivors Act Key Points:

- The new law creates a one-year “revival window” for claims of sexual abuse that would otherwise be barred by applicable statute(s) of limitations
- Effective date = **November 24, 2022** – November 23, 2023
- Similar to the Child Victims Act (which generated nearly 11,000 lawsuits throughout the state) . . .
- . . . But this law is *not* limited to youth-focused organizations
- The new law is *not a criminal* statute: It opens a window for civil lawsuits for monetary compensation related to sexual abuse offenses committed against individuals who were eighteen (18) or older at the time of the alleged assault

Adult Survivors Act Key Points:

- The new law is *not* limited to the intentional acts of the individual abuser: the alleged victim may pursue claims against third-parties (such as employers, business owners and property owners) under theories such as negligent hiring, negligent supervision, negligent retention, negligent training, etc...)
- The new law allows recovery for “physical, psychological or other injury or condition” resulting from “conduct which would constitute a sexual offense . . . or incest”
- The new law incorporates criminal law terms (from Penal Law 130) concerning specific conduct that falls within the scope of the “revival” statute: rape, criminal sexual act, forcible touching, etc...

Adult Survivors Act Key Points:

- What is “Forcible Touching”?:
 - A person is guilty of Forcible Touching when he or she intentionally, and for no legitimate purpose, forcibly touches the sexual or other intimate parts of another person for the purpose of degrading or abusing such person or for the purpose of gratifying the actor’s sexual desire.
 - Includes conduct such as grabbing, pinching, rubbing, squeezing, etc.
- Claims of “Facilitating a Sex Offense with a Controlled Substance” – i.e. Date Rape Drug Claims – are also revived
- NO limit on the “age” of claims that may arise as a result of the new law.
- For a potential defendant, early identification of potential insurance coverage and old policies and procedures are key

NLRB GC Memo: Electronic Monitoring, AI, and Section 7 Rights



Lisa R. Feldman

Associate

lfeldman@bsk.com

New York, NY

NLRB GC Memo – Oct. 31, 2022

- Potential Section 7 violations - by “significantly impairing or negating employees’ ability to engage in protected activity and keep that activity confidential from their employer[.]”
- Announced intent to urge the Board to “zealously enforc[e]” existing Board precedent in this context
- Employers right to new technology “not unlimited”

GC's Proposed Burden-Shifting Framework

- GC plans to “urge the Board” to find a ***presumptive 8(a)(1) violation*** “where the employer’s surveillance and management practices, viewed as a whole, would tend to interfere with or prevent a **reasonable employee** from engaging in activity protected by the Act.”
- Then, “if the employer establishes that the practices at issue are **narrowly tailored** to address a **legitimate business need**—i.e., that its need cannot be met through means less damaging to employee rights,” Board is urged to balance employer and employee rights.
- If Board weighs in employer’s favor, then absent the employer successfully establishing “special circumstances” necessitating covert use, the Board will be urged “to require the employer to **disclose to employees the technologies** it uses,” including the employer’s **reasons** and **how it is utilizing the information**.
- GC states new framework is consistent with the Board’s analysis of facially neutral work rules cases.

Examples of NLRA Violations

- GC notes several specific ways an employer can violate the Act using Electronic Monitoring and related tools:
 - Section 8(1)(a):
 - “[I]nstitutes new monitoring technologies in response to activity protected by Section 7; utilizes technologies already in place for the purpose of discovering that activity, including by reviewing security-camera footage or employees’ social-media accounts; *or creates the impression that it is doing such things.*” (emphasis added)
 - “[C]ertain conduct can be unlawful even if it merely creates an impression of surveillance”
 - Employer surveillance of Section 7 activity = unlawful, whether overt or covert

Examples of NLRA Violations

- Section 8(a)(3):
 - Employers (and third-party software providers) may be in violation if they “rely on artificial intelligence to screen job applicants or issue discipline”—“if the underlying algorithm is making decisions based on employees’ protected activity”; or
 - “[B]y discriminatorily applying production quotas or efficiency standards to rid themselves of union supporters.”
- Section 8(a)(5):
 - If “where employees have union representation,” “if [employers] fail to provide information about, and bargain over, the implementation of tracking technologies and their use of the data they accumulate.”

New Language for Settlement Agreements

- For “cases that do not proceed to a Board decision,” Memo suggests Regions include this specific language in “appropriate cases”:
- *“The Charged Party will report to the U.S. Department of Labor, Office of Labor-Management Standards, via its Form LM-10, the amount of any payments or expenditures made in conjunction with the conduct at issue in this case”* (meaning, employer’s cost for use of the technology in question)

Interagency Approach

- Continuing a recent trend, GC announced intent to take an interagency approach to this, along with:
 - Federal Trade Commission
 - Consumer Financial Protection Bureau
 - Department of Justice
 - Equal Employment Opportunity Commission, and
 - Department of Labor

What Employers Should Do Now

- Not yet clear whether Board will adopt these recommendations
- Employers should evaluate their use of Electronic Monitoring and AI practices and whether any such practice could potentially violate the NLRA
- Additionally, be mindful of state and local laws on these issues
 - NYS - [Electronic Monitoring Law](#) that went into effect earlier this year
 - NYC - new [AI law](#) - going into effect January 2023

COVID Paid Leave – Where Are We Now?



Adam P. Mastroleo

Member

amastroleo@bsk.com

Syracuse, NY

COVID-19 Paid Leave

- NY Paid COVID Leave (March 18, 2020)
 - Public and private employers
 - Employers must provide up to 14 days of paid leave, depending on size
 - Employees subject to a mandatory or precautionary order of isolation OR quarantine issued by the State of NY, Department of Health, or any governmental entity authorized to issue a quarantine order
 - Job protection
 - Cannot be charged against other leave, including sick leave
 - Amount the worker would have otherwise received during period (5 or 14 days)
 - No expiration

COVID-19 Paid Leave

- NY Paid COVID Leave (Cont'd)
 - [Paid COVID Leave FAQs](#)
 - 3 periods of leave based on orders of quarantine or isolation
 - 2nd and 3rd periods of leave must be based on positive test “and the employee must submit documentation from a licensed medical provider or testing facility attesting that the employee has tested positive for COVID-19. The employee does not need to submit documentation of a positive result if the employee’s employer gave the employee the test for COVID-19 that showed the positive result.”

COVID-19 Paid Leave

- NY Paid COVID Leave (Cont'd)
 - [Paid COVID Leave FAQs](#)
 - “If an employer mandates that an employee who is not otherwise subject to a mandatory or precautionary order of quarantine or isolation remain out of work due to exposure or potential exposure to COVID-19, regardless of whether the exposure was in the workplace, the employer must continue to pay the employee at the employee’s regular rate of pay until the employer permits the employee to return to work or the employee becomes subject to a mandatory or precautionary order of quarantine or isolation, at which time the employee shall receive COVID-19 quarantine leave as required by [NY’s COVID-19 legislation](#), in accordance with the Department of Labor guidance, for the period of time the employee is subject to such mandatory or precautionary order of quarantine or isolation.”

COVID-19 Paid Leave

- NY PFL
 - Available where employee must care for dependent under quarantine order
 - Other qualifying rules
 - [Request for COVID-19 Quarantine PFL](#)
- NY Disability

Paid Leave FAQs

- Do I have to pay COVID leave for someone who was exposed to COVID-19?
 - New York now follows the CDC rules for exposure
 - NO quarantine is required following exposure (without symptoms), but there are precautions that should be taken

Paid Leave FAQs

- Do I have to accept at-home positive test for COVID leave?
 - No, for second and third periods of leave (see FAQs)
 - Significant risk of falsification
 - Difficulty in obtaining PCR or rapid tests
 - Possible approaches:
 - Accept at-home test with nothing more
 - Accept at-home test with additional proof: Require a copy of the positive test AND proof that the individual has self-reported a positive test with the County Health Department to receive COVID pay OR picture with ID
 - Conditionally accept at-home test and provide regular paid sick leave, require the employee to get a test from a medical provider or testing facility, and ONLY convert the sick time to COVID leave after a confirming positive is received

Paid Leave FAQs

- If an employee who tests positive remains symptomatic after 5 days, do I have to continue to pay NY COVID leave?
 - Neither the Statute nor FAQs addresses
 - Current isolation rules only allow individual to break isolation after 5 calendar days if asymptomatic or if symptoms are resolving
 - Employee whose symptoms are not resolving must continue isolation

Paid Leave FAQs

- Do I have to pay COVID leave if an employee is positive, but is able to work from home?
 - If the employee is able to work from home, and is healthy enough to work, they can work from home and no COVID pay is required
 - If the employee is able to work from home, but not healthy enough to work and is subject to an Isolation Order, they are entitled to COVID pay

Paid Leave FAQs

- Do I have to pay COVID leave for an employee who tests positive, but who voluntarily chose not to be vaccinated?
 - No exception in the Statute or FAQs for unvaccinated employees

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COVID Paid Leave – Where Are We Now?

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New York Employment Law: The Essential Guide

NYS Bar Association Members can buy the book from the bar [here](#).

Non-NYS Bar Association Members can purchase through Amazon [here](#).

Thank You

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It is not to be considered as legal advice.
Laws can change often, and information may become outdated.

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