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2019 Year in Review – Labor & Employment Law

January 13, 2020



Topics

- I. Introduction
- II. Extensive Changes to the NY Human Rights and Labor Laws
- III. Wage & Hour Updates for the State and Federal Level
- IV. Family and Medical Leave Act
- V. Equal Pay Claims and Other Class Action Developments
- VI. The NLRB Turns Back the Clock
- VII. 2020: What Lies Ahead?



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Extensive Changes to the NY Human Rights and Labor Laws



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Amended Definition of Race

- Effective July 12, 2019
- “Race” is now defined to include “traits historically associated with race, including, but not limited to, hair texture and protective hairstyles”
 - Protective hairstyles include “braids, locks, and twists”
 - Note: “hair texture and protective hairstyles” are just examples of protected traits, other traits associated with race will also be protected



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Expansion of Religious Protections

- Effective October 8, 2019
- Prohibits employers from discriminating against employees for wearing “any attire, clothing, or facial hair in accordance with the requirements of his or her religion”
- Applies to turbans, headscarves, hijabs, burqas, yarmulkes, and beards
- Unclear if this would apply to jewelry, body piercings, or tattoos with religious significance
- Undue hardship exception applies



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Protection of Racial Traits and Religious Attire

- *Takeaways*
 - Consider referencing “traits historically associated with race” in EEO policies
 - Review dress codes and grooming policies
 - Ensure they do not contain prohibitions that discriminate against racial traits (e.g., afros, dreadlocks)
 - Consider addressing reasonable accommodation of religious practices
 - Train supervisors
 - Update references to protected classes in policies



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Protection of Non-Employees

- Effective October 11, 2019
- The New York Human Rights Law now protects contractors, vendors, consultants and others providing services in the workplace pursuant to a contract from all forms of discrimination and harassment
 - Currently these individuals are only protected from sexual harassment



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Harassment

- Effective October 11, 2019
- Employees can file sexual harassment complaints with the NYSDHR up to 3 years after the last discriminatory act (formerly 1 year); *but* see Education Law § 3813
- Employees no longer need to establish they were subjected to “severe or pervasive” harassment
 - New standard – subjected to “inferior terms, conditions or privileges of employment” because of their protected status



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Harassment

- Employees' failure to make a complaint to the employer about the harassment is no longer a valid defense
- To avoid liability, an employer must establish that a reasonable victim of discrimination with the same protected characteristic would consider the conduct a "petty slight" or "trivial inconvenience"



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Examples of "Less Well" Treatment

- Superintendent told female employee she needed to respect male employees because of their "more powerful" status over women and when male employees routinely rated the appearance of female employees and openly discussed trips to strip clubs
- Supervisor made sexual gestures to a female employee, repeatedly informed her he wanted to hug her, commented on her body, expressed romantic attention in her and invited her to his home
- Supervisors regularly commented that an employee's age made him slow, lazy and incompetent



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Examples of “Petty Slight” and “Trivial Inconveniences”

- Male supervisor summoning a female employee to his office and then opening the door shirtless
- Male supervisor telling a female employee she should consider getting breast implants
- Telling a Columbian employee she did “not belong here” and needed to “go back to Columbia”
- A supervisor calling his female assistant “my bitch” and commenting that “her boobs are always popping out” and “she is wearing a thong today”



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Harassment Policies/Training

- Effective October 11, 2019
- At the time of hire and at the time annual sexual harassment training is conducted, employers must provide employees with a “notice” (in writing in English and in the employee’s primary language) containing
 - A copy of the sexual harassment policy and
 - The information presented at the employer’s sexual harassment training



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Bond provides live and online training



<https://www.bsk.com/sexual-and-other-workplace-harassment-training/overview>



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Harassment

- *Takeaways*
 - Review and if necessary revise your harassment policy
 - Re-evaluate approach to training both supervisory and nonsupervisory employees
 - Ensure policies and training materials are properly distributed and document such



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Scope of Coverage and Remedies

Change	Prior Law	New Law	Effective Date
"Employer"	Employers with 4+ employees, except all employers for sexual harassment	All employers	February 8, 2020
Punitive Damages	Not available	Available against private employers and not capped	October 11, 2019
Attorneys' Fees	Potentially available only for sex discrimination	Automatically awarded for all employment discrimination	October 11, 2019



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Mandatory Arbitration Clauses

- **Old:** No mandatory arbitration of sexual harassment claims
- **Current:** Broadened to any and all discrimination claims
- Still open questions about whether this law is pre-empted by federal law
 - One federal court has said yes!



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Non-Disclosure / Confidentiality

- Old Law: No confidentiality provisions prohibiting employee disclosure of underlying facts / circumstances of sexual harassment claim, unless complainant's preference
 - Full 21 day consideration period
 - 7 days to revoke
 - Agreement re: preference
 - Second agreement containing term



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Non-Disclosure / Confidentiality

- Current Law: Expands to discrimination claims
- Confidentiality provision cannot limit subpoena-related activity, governmental cooperation; or disclosing information for certain benefits
- Must in “plain English” and primary language
- Provisions cannot bar disclosure of facts of any future discrimination claims, unless expressly excludes disclosure to law enforcement, EEOC, DHR, local commissions, or employee's attorney



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Gender Expression Non-Discrimination Act (GENDA)

- “Gender identity or expression” is a protected category under the New York Human Rights Law
- Same protected status as other protected categories such as race, sex, religion, age
- *Takeaways*
 - Ensure that your list of protected classes includes “gender identity or expression”
 - Educate supervisors and managers, if not all employees



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Domestic Violence Victims

- Employers must permit victims to take reasonable time off from work to:
 - Seek medical attention for self or child*
 - Obtain services from a DV shelter/program or rape crisis center
 - Obtain psychological counseling for self or child*
 - Participate in safety planning
 - Obtain legal services
 - Act to increase safety from future incidents (including permanent or temporary relocation)
 - Appear in court or assist in prosecution of DV offense

* Unless employee is perpetrator of DV against child



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Domestic Violence Victims (cont.)

- Undue hardship exception: factors considered include:
 - Overall size of employer (number of employees, number and type of facilities, budget size)
 - Type of operation (including composition and structure of workforce)
- Employer may require employee to use paid time off, unless otherwise stated in collective bargaining agreement or written policy
- Any further time off will be unpaid



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Domestic Violence Victims (cont.)

- Employee must provide reasonable advance notice of absence, if feasible
- If not feasible, employee must provide certification to employer if requested
 - Police report, indicating employee or child is DV victim
 - Court order protecting or separating employee or child from DV perpetrator
 - Evidence from court or prosecutor that employee appeared in court
 - Documentation from medical professional, DV advocate, health care provider, or counselor, stating that employee or child received counseling/treatment



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Domestic Violence Victims (cont.)

- Employer must keep information about DV victim status confidential
- Takeaways
 - Keep in mind there may be other legal issues (e.g., disability, PFL, FMLA)
 - Update / create accommodations policy or DV policy
 - Train supervisors and managers



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Protection of Reproductive Health Decisions

- New law prohibits employers from discriminating against an employee based on an employee's or dependent's reproductive health decision making, including use of a particular drug, device or medical service
- Requires employers to include in their handbook a notice of these rights and available remedies
- *Takeaway – Update your handbook to include required language!*



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Prohibition of Salary Inquiries

- All New York employers may not:
 - Request wage history from (i) an applicant or current employee, (ii) a current or former employer of applicant/employee, or (iii) agent of applicant/employee
 - Rely on wage history of an applicant in determining whether to offer employment or setting the wage level
 - Retaliate against applicant or employee for (i) complaining about violation of this law, (ii) failing to provide wage history
 - Refuse to interview, hire, promote, employee/individual based on prior wage history



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Prohibition of Salary Inquiries (cont.)

- Applicant/employee may voluntarily (without prompting) disclose wage history (e.g., in negotiating salary)
 - Employers may verify salary history if after offer is made, individual voluntarily discloses wage history to request higher compensation
- *Takeaways*
 - Ensure there are no questions regarding salary history on applications or pre-employment forms
 - Train personnel who interview candidates
 - Train all supervisors and managers



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Protection of Immigrant Employees

- Employers are prohibited from threatening, penalizing, or discriminating against an employee for making Labor Law complaint
- New legislation provides that retaliation includes threatening to contact United States immigration authorities or otherwise reporting (or threatening to report) an employee or their family or household members



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Wage & Hour Updates at the State and Federal Level



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Federal and New York State Minimum Wage					
Date	Federal	“Upstate” Employers	“Large” NYC Employers	“Small” NYC Employers	Nassau, Suffolk, & Westchester
12/31/18	\$7.25	\$11.10	\$15.00	\$13.50	\$12.00
12/31/19	\$7.25	\$11.80	\$15.00	\$15.00	\$13.00
12/31/20	\$7.25	\$12.50	\$15.00	\$15.00	\$14.00



Federal and New York** State Exempt Salary Threshold					
Date	Federal	“Upstate” Employers	“Large” NYC Employers	“Small” NYC Employers	Nassau, Suffolk, & Westchester
12/31/18	\$455	\$832.50	\$1,125	\$1,012.50	\$900
12/31/19	\$684*	\$885	\$1,125	\$1,125	\$975
12/31/20	\$684*	\$937.50	\$1,125	\$1,125	\$1,050

* New federal requirement, effective January 1, 2020


** Remember, New York salary levels apply to executive and administrative employees only – not professional employees. Employers must still comply with the federal salary level for professional employees.

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FLSA: Non-discretionary Bonuses and Incentive Pay

- New regulations will allow bonuses, commissions, and incentive payments (paid annually or more frequently) to count toward up to 10 percent of the new salary level under FLSA
- Permits “catch up” payment at end of 52-week period

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FLSA: Highly Compensated Employees

- FLSA's "Highly Compensated Employee" threshold
 - Increased from \$100,000 per year to \$107,432 per year



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FLSA: Regular Rate Changes

- **Effective January 15, 2020**
- USDOL updated its "regular rate" regulations
- These changes clarify what perks and benefits can be excluded from regular rate
- USDOL provided also additional guidance on bonuses and basic rate
- USDOL also eliminated the requirement that call-back pay must be "infrequent and sporadic" to be excluded from regular rate



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Takeaways

- Ensure the salaries of your exempt employees satisfy the applicable threshold
 - Note – federal standard will only apply to exempt professionals in NY
- Plan for future increases



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Update on Family and Medical Leave Act



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Can Employees Choose Not to Exercise Their Rights Under the FMLA?

- In 2014, the 9th Circuit Court of Appeals held that workers have the right to defer FMLA leave and utilize other paid time off instead
- In an opinion letter issued March 14, 2019, the US DOL concluded
 - An employer may **not** delay the designation of FMLA-qualifying leave
 - When an employer determines that leave is for an FMLA-qualifying reason, the leave is protected and counts toward the FMLA entitlement

(cont'd)

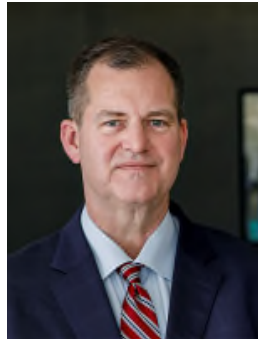


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Equal Pay Claims and Other Class Action Developments



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Expansion of NY's Equal Pay Act

- The Equal Pay Act
 - Extends to all classes and characteristics protected by the NYHRL
 - Previously the Equal Pay Act prohibited pay differentials only when based on sex/gender
 - Requires equal pay for “substantially similar work, when viewed as a composite of skill, effort, and responsibility and performed under similar working conditions”
 - Previously equal pay was required for “equal work on a job requiring equal skill, effort and responsibility and performed under similar working conditions”



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Expansion of NY's Equal Pay Act

- If a pay differential is found, an employer must demonstrate the differential is based on:
 - A seniority system;
 - A merit system;
 - A system that measures earnings by quantity or quality of production; or
 - A “bona fide” factor other than sex, such as education, training or experience



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Expansion of NY's Equal Pay Act

- A “bona fide” factor other than sex is:
 - “not based on or derived from a sex-based differential in compensation”;
 - “job-related and consistent with business necessity”
 - Education, Training, Experience, “Other”



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Expansion of NY's Equal Pay Act

- Damages/Penalties – NY's Equal Pay Act
 - Has a 6 year statute of limitations
 - Imposes 300% liquidated damages for willful violations
 - Attorneys' Fees
 - Prejudgment Interest
- Similar expansion of pay equity requirements applicable to NY public sector employees signed into law on Dec. 26, 2019



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Expansion of NY's Equal Pay Act

- *Takeaways*
 - Review your payroll, benefits and compensation programs to ensure employees performing substantially similar work are equally compensated (absent a bona fide basis for a pay differential)
 - Be prepared to defend pay differentials – Document! Document! Document!
 - Give serious consideration to implementing a pay equity review (paying particular attention to “outlier employees”)
 - The revised law is likely to spawn class action litigation



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Pay Equity

- New York's expanded Equal Pay Act requirements will likely trigger class action litigation because
 - 6 year statute of limitations
 - Potential for triple damages
 - Attorneys' fees
 - Prejudgment Interest
- Hydraulic pressure to settle when EPA claims leveraged when class action



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Class Action Developments

- ***Mei Xing Yu v. Hasaki Restaurant, Inc.***, No. 17-CV-3388 (2nd Circuit, December 6, 2019)
 - Court approval of settlement not required where accepted Offer of Judgment
- ***Vega v. CM & Associates Construction Management, LLC***, No. 9733, 2019 BL 338010 (App Div, 1st Dep't, Sept. 10, 2019).
 - "Manual workers" paid in full, but on a biweekly basis, had a private right of action



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Class Action Developments (cont.)

- ***Marin v. Dave & Busters, Inc., et al.***, 1:15-cv-03608-AKH (S.D.N.Y.) – July 2019 Settlement Approved/Judgment Entered
 - \$7.4M settlement (with \$2.2M of this amount awarded to Plaintiff's class counsel)
 - Alleged violation of Section 510 of The Employee Retirement Income Security Act of 1974 (ERISA)
 - Restaurant chain cut hours to less than 30 hours/week so employees not eligible for Affordable Care Act health insurance coverage



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Class Action Developments (cont.)

- ***Increased Rise of Class Action Litigation Under Title III of the Americans with Disabilities Act – Accessibility Lawsuits***
 - Physical accessibility to places of accommodation (restaurants, retail stores, office buildings)
 - Website accessibility lawsuits
 - Gift cards
 - Drive-thru windows



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The NLRB Turns Back the Clock



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Back to the... NLRB!



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“New” Board Rulings & Regs.

- Handbook & Other Employee Policies
- Employee E-mail Usage
- Confidentiality in Workplace Investigations
- Not So Quickie” Union Elections

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“New” Board Rulings & Regs.

- Arbitration Deferral
- Independent Contractors
- Unilateral Changes
- Non-Employee Solicitation
- Remittance of Union Dues

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But...coming at some point

Back to the... NLRB
Part II



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2020: What Lies Ahead



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Things You Should Stay Tuned For...



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NLRB

- Joint-Employer Status
- Election Protection
- Student Assistants
- And... More Case-by-Case Changes



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Potential USDOL Changes

- USDOL has proposed revising optional FMLA forms
- USDOL has proposed a rule to clarify use of fluctuating workweek method for overtime calculation



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Potential NY Changes

- NY may expand the definition of “employment” and make it more difficult to classify workers as independent contractors
- NY may limit employers’ ability to ask about criminal convictions at the start of the application process
- NY considering legislation that would eliminate an employer’s abilities to require arbitration agreements (other than in CBAs)



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Stay on Top of New Legal Changes

- Receive prompt employment law updates for New York and federal law at <https://www.bsk.com/new-york-labor-and-employment-law-report>



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Wrap up

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