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Labor and Employment Updates for the Manufacturing Industry

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October 29, 2019

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Roadmap

- Amendments to the New York Human Rights law
- Salary history inquiries
- Voting leave law amendments
- Status update on the legalization of recreational marijuana

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New York Human Rights Law Amendments

Gender Expression Non-Discrimination Act

- Passed the Senate and Assembly on January 15, 2019
- Signed by Gov. Cuomo on January 25, 2019
- Workplace discrimination provision took effect on February 24, 2019
- Additional provisions amending NY's hate crime laws

Gender Expression Non-Discrimination Act

- Workplace discrimination based on gender identity or expression is unlawful
- Gender identity or expression is defined as:
  - a person's actual or perceived gender-related identity, appearance, behavior, expression or other gender-related characteristic regardless of the sex assigned to that person at birth, including, but not limited to, the status of being transgender

5

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Gender Expression Non-Discrimination Act

- *Takeaways*
  - Add this protected class to policies and employee handbooks
  - Incorporate into training
  - Allow employees to select their pronoun preference
  - Allow latitude on dress and grooming
  - Be mindful of information privacy
  - Don't require a court order for a name change

6

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Amended Definition of Race

- "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

7

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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

8

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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 in written policy
  - Train supervisors

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N.Y. Expands the 2018 Anti-Harassment Amendments

- 2018 "Sexual Harassment" Amendments
  - Prohibition on Confidentiality Agreements
  - Prohibition on Arbitration Agreements
  - Protection of Non-Employees in the Workplace
  - Mandatory Policy & Training
  - Other New Requirements

These requirements all focused on sexual harassment!

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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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Deadline to File Division Complaint

- Effective August 12, 2020
- Current: One year to file complaint with Division of Human Rights or three years to file complaint in court
- New: Three years to file sexual harassment claims court or with the Division of Human Rights

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Protection of Non-Employees

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

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Mandatory Arbitration Clauses

- Old: No mandatory arbitration of sexual harassment claims
- New: 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!

Changes effective October 11, 2019

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Non-Disclosure / Confidentiality

- Old Law: No confidentiality provisions prohibiting employee disclosure of underlying facts or 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

- New Law: Effective October 11, 2019
- Expands provision to all discrimination claims
- Confidentiality provision cannot limit:
  - Subpoena-related activity, *e.g.,* initiating, testifying, assisting or complying with subpoena from government agency
  - Cooperating or participating with government agency
  - Filing or disclosing information relating to unemployment insurance, Medicaid, or other public benefit claims

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Non-Disclosure / Confidentiality

- Requires term to be written in "plain English" and the primary language of the complainant (if applicable)
- 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
  - Applies only to contacts entered into on or after January 1, 2020

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Sexual Harassment Policy

- Old: Must give employees sexual harassment prevention policy in writing
- New: Policy must be provided "at the time of hiring" and at every annual training program
- New: Policy must be provided in English and in other "primary language" of employees (if state provides model policy in that language)

Changes effective August 12, 2019

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Sexual Harassment Training

- Old: Must give employees annual sexual harassment training
  - sexual harassment prevention policy in writing
- New: Must give employees "information presented" at the sexual harassment training must be provided in English and in other "primary language" of employees (if state provides model templates in that language)

Changes effective August 12, 2019

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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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Lower Harassment Burden for Employees Under NYSHRL

- Old: Conduct must be "severe or pervasive"
  - Still applicable under federal law, e.g., Title VII
- New: Conduct that "subjects an individual to inferior terms, conditions, or privileges of employment" beyond "petty slights or trivial inconveniences"
  - No "comparator" evidence required
- *Changes effective October 11, 2019*

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Limitations on Employer HRL Defenses

- Remaining *respondeat superior* defense?
  - Employer not liable for an employee's discriminatory act unless it became a party by "encouraging, condoning, or approving it."
- Limited Affirmative Defense
  - "Petty Slights" and "Trivial Inconveniences" Not Actionable
  - May be a small comfort!

Changes effective October 11, 2019

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Examples of "Less Well" Treatment

- CEO 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

(cont'd)

Examples of "Less Well" Treatment

- Supervisors regularly commented that an employee's age made him slow, lazy and incompetent
- Coworkers spread a rumor about a female employee attending a meeting without a bra and supervisors failed to address the employees who spread the rumors

Examples of "Petty Slights" 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 b---h" and commenting that "her boobs are always popping out" and "she is wearing a thong today"

Practical Recommendations

1) Revise mandatory sexual harassment training program and policy, as needed
   - Consider separate training for managers and supervisors
2) Obtain translations of sexual harassment training and policy materials, as necessary
3) Review existing personnel agreements to address confidentiality and arbitration issues, including employment, severance, confidentiality and non-compete agreements

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Practical Recommendations (Cont.)

4) Educate leadership about significant changes, especially new lower threshold for harassment claims
5) Create or review investigatory procedures and plans
6) Carefully document all employee complaints – remember the standard is now just something more than "trivial" or "petty"!
7) Keep spreading the word: Be respectful 100% of the time!!!

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Domestic Violence Victims

- Effective November 18, 2019
- 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

- 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

- 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

- 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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Salary History Inquiries

32

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Prohibition of Salary Inquiries

- Effective January 6, 2020, 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

Prohibition of Salary Inquiries

- Applies regardless of size
- Applicant/employee may voluntarily disclose wage history
  - Employers may verify salary history <u>if</u> 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 mangers

Voting Leave Law

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The Old Law

Former Election Law § 3-110:

1. If a registered voter does not have sufficient time outside of his working hours, within which to vote at any election, he may, without loss of pay for up to two hours, take off so much working time as will, when added to his voting time outside his working hours, enable him to vote.
2. If an employee has four consecutive hours either between the opening of the polls and the beginning of his working shift, or between the end of his working shift and the closing of the polls, he shall be deemed to have sufficient time outside his working hours within which to vote. If he has less than four consecutive hours he may take off so much working time as will when added to his voting time outside his working hours enable him to vote, but not more than two hours of which shall be without loss of pay, provided that he shall be allowed time off for voting only at the beginning or end of his working shift, as the employer may designate, unless otherwise mutually agreed.
3. If the employee requires working time off to vote he shall notify his employer not more than ten nor less than two working days before the day of the election that he requires time off to vote in accordance with the provisions of this section.
4. Not less than ten working days before every election, every employer shall post conspicuously in the place of work where it can be seen as employees come or go to their place of work, a notice setting forth the provisions of this section. Such notice shall be kept posted until the close of the polls on election day.

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The New Law

Current Election Law § 3-110

1. A registered voter may, without loss of pay for up to three hours, take off so much working time as will enable him or her to vote at any election.
2. The employee shall be allowed time off for voting only at the beginning or end of his or her working shift, as the employer may designate, unless otherwise mutually agreed.
3. If the employee requires working time off to vote the employee shall notify his or her employer not less than two working days before the day of the election that he or she requires time off to vote in accordance with the provisions of this section.
4. Not less than ten working days before every election, every employer shall post conspicuously in the place of work where it can be seen as employees come or go to their place of work, a notice setting forth the provisions of this section. Such notice shall be kept posted until the close of the polls on election day.

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What are the changes and what do they mean for employers?

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Up to three hours, for all

[~~If a~~] **A** registered voter [~~**does not have sufficient time outside of his working hours, within which to vote at any election, he**~~] may, without loss of pay for up to [~~**two**~~] **three** hours, take off so much working time as will[~~**, when added to his voting time outside his working hours,**~~] enable him **or her** to vote **at any election**.

- *Voting leave is available to Full-Time and Part-Time employees*
- *To receive time off, an employee must be scheduled to work on Election Day.*
- *But, if an employee is on the schedule for Election Day, the number of scheduled hours does not matter.*

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No more four-hour presumption

[~~**If an employee has four consecutive hours either between the opening of the polls and the beginning of his working shift, or between the end of his working shift and the closing of the polls, he shall be deemed to have sufficient time outside his working hours within which to vote. If he has less than four consecutive hours he may take off so much working time as will when added to his voting time outside his working hours enable him to vote, but not more than two hours of which shall be without loss of pay, provided that he**~~] **The employee** shall be allowed time off for voting only at the beginning or end of his **or her** working shift, as the employer may designate, unless otherwise mutually agreed.

- *Employees are technically only entitled to take off "so much working time as will enable them to vote."*
- ***However**, an employer runs the risk of violating the law if the employer does not provide full amount requested by the employee (up to 3 hours).*

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Employee's Required Notice

If the employee requires working time off to vote [~~**he**~~] **the employee** shall notify his **or her** employer not [~~**more than ten nor**~~] less than two working days before the day of the election that he **or she** requires time off to vote in accordance with the provisions of this section.

- *"Working Days," according to the Board of Elections, refers to any day that the employer is operating and/or open for business.*

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Employer's Required Notice

Not less than ten working days before every election, every employer shall post conspicuously in the place of work where it can be seen as employees come or go to their place of work, a notice setting forth the provisions of this section. Such notice shall be kept posted until the close of the polls on election day.

- *The Board of Elections' form notice is available at: www.elections.ny.gov/NYSBOE/elections/AttentionEmployees.pdf*

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Which elections?

- Time off must be provided for all elections governed by the Election Law
  - That includes: primary and general elections as well as special elections called by the Governor
  - It does not include: school district elections, library district elections, fire district elections or special town elections
  - It also does not include early voting periods

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Can employers ask for proof?

- The law is silent on whether an employer can require proof or verification of:
  - Voter registration; or
  - Actual voting.
- The purpose of the law and guidance from the Board of Elections indicate conflicting views.

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What about using PTO?

- Employees cannot be required to use their personal time off (PTO, vacation, etc.) to comply with the voting leave requirements.
- Employees must be given up to three hours of voting leave "without loss of pay."

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What happens if an employer does not comply?

- Private right of action by employees for unpaid wages
- Misdemeanor criminal charges in instances of employers "knowingly and willfully" violating the law

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Legalization of Recreational Marijuana

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National trends

Medical

- 33 states have adopted programs to permit the medical use of cannabis (including NY)
- At least 14 more states have approved low THC/high cannabidiol (CBD) products for medicinal use

Recreational

- 10 states, D.C. and Canada have legalized recreational marijuana use

Approx. 25% of U.S. population now lives in a jurisdiction where recreational use is legal

- At least 13 more states decriminalized lower-level marijuana possession offenses (including NY)

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"The Times They Are – a Changin"

- "It's a gateway drug, and marijuana leads to other drugs and there's a lot of proof that that's true."

  -*Governor Andrew Cuomo, 2/17*

- "Let's legalize the adult use of recreational marijuana once and for all."

  -*Governor Andrew Cuomo, 12/18*

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Economic Data

- Nationally:
  - Legal cannabis market estimated at $7.2B in 2016
  - Projected to grow by 17% annually
  - Recreational sales projected at $11.2B by 2020

    (per New Frontier Date, 2017 Cannabis Industry Report)
  - Est. between 165K-230K FT and PT marijuana industry jobs

    (per 7/2018 NYSDOH report)
- By some estimates, legalizing recreational marijuana in NY will:
  - Generate $300M in new state tax revenue annually

    (per Gov. Cuomo 2019 Justice Agenda)
  - Create a $3.1B market *(per Scott Stringer, NYC Comptroller)*

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However…

- Recreational use of marijuana failed to be passed in the most recent legislative session
- And failed to be included in the next year's budget bill …
- Did decriminalize less than 2 ounces of marijuana
  - From misdemeanor to violation
  - Fine – no criminal charges

➢Using marijuana is still illegal

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But, Remember…
The Compassionate Care Act

- Passed in 2014 and legalized t/regulated the manufacture, sale and use of medical marijuana in NY
- To be eligible, a patient must be certified by a CCA-registered physician as having a:
  - Severe, debilitating or life threatening condition;
  - Accompanied by a qualifying or complicating condition
- Patient must obtain medical marijuana from a licensed dispensary

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Takeaways for Medical Marijuana

1. Require employees to identify whether they are on any medication which could impair performance or judgment
   - Disability-related inquiries are lawful if job-related and consistent with business necessity
2. Adopt a drug-testing program, especially for safety-sensitive positons
   - Pre-employment, reasonable suspicion and random
3. Be prepared to offer reasonable accommodations
   - E.g., eliminating tangential functions, leave of absence, reassignment to vacant position

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Takeaways for Medical Marijuana

To prepare for this:

1. Review and revise job descriptions
2. Train managers and supervisors to identify and document “impairment”
3. Consider other ways to gather evidence

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Training

- For medical marijuana, a positive drug test will not be enough to justify termination
- The information required to make this showing will typically come from supervisors or managers overseeing the employee's work
- Supervisors/managers need to know how to properly collect and document relevant information
  - It is not enough to simply testify that someone looked or acted "high"

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Additional Steps For Employers

- If an employer suspects that an employee is under the influence of marijuana or any other substance, it must always arrange for the employee's transportation home or, as appropriate, to drug-testing facilities
- Must ensure that the employee stops work immediately

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Take-aways for Recreational Marijuana

- Continue to track the legal status of recreational marijuana

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