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The Top 10 Employer Resolutions For 2020

By **Allegra Lawrence-Hardy and Lisa Haldar** (January 1, 2020, 12:35 PM EST)

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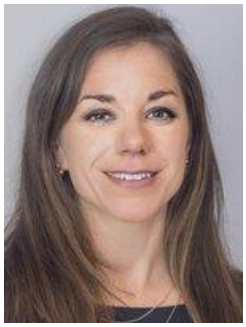

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Happy New Year as we enter this new decade. 2019 saw a number of changes in the employment law landscape, and this year will undoubtedly see even more. And while employers will likely, and appropriately, be concerned about the changing landscape, and its lean toward employees, staying abreast of the issues and being proactive in managing them will mitigate their impact.

With that said, let us resolve this year to maintain awareness (and address as necessary) the following top 10 employment law developments for 2020.

1. Stay up to date on legislative responses to #MeToo.

Since its beginnings in 2017, the #MeToo movement has evolved into a powerful obstacle for employers trying to resolve employees' allegations of sexual harassment. Indeed, the passage of responsive legislation in many states evidences the obvious impact of the #MeToo movement in the workplace. Specific areas of focus impacted by the movement include:

Nondisclosure Agreements

As a way to avoid negative publicity associated with alleged sexual harassment in the workplace (and many times, to protect the victims), employers have historically sought to include nondisclosure provisions in agreements settling sexual harassment claims. Because of the #MeToo movement, however, a number of legislatures began viewing nondisclosure agreements as an impermissible shield against employer accountability.

States such as New York, California, New Jersey, Tennessee, Vermont and Washington have adopted laws that either prohibit or limit the use of nondisclosure agreements in the settlement of a sexual harassment claim. And this year, a number of these states (including New York, New Jersey and California) have further expanded their legislation to encompass more than just claims of sexual harassment.

In New York, for example, settlements resolving any type of discrimination claim cannot include a nondisclosure provision unless the employee prefers to include one (and satisfaction of the preference

exception has its own host of separate requirements).[1]

Mandatory Arbitration Agreements

With the onset of the #MeToo movement, concern has also grown regarding forced arbitration agreements where allegations of sexual harassment are involved, with a number of states passing legislation prohibiting such agreements.[2] Although these state laws will likely be preempted by the Federal Arbitration Act,[3] employers should not ignore this push toward creating state legislation and instead keep abreast of relevant states' laws (and any subsequent judicial determinations interpreting the laws).

Training

Other notable reactions to the #MeToo movement have involved states' passages of legislation requiring mandatory sexual harassment training. For example, California revised its sexual harassment training rules to require employers with five or more employees to provide, by Jan. 1, 2021, at least two hours of sexual harassment training to supervisory employees and one hour of sexual harassment training to nonsupervisory employees.[4] This training must be repeated once every two years.[5]

Similarly, Delaware enacted a state law effective Jan. 1, 2019, requiring employers with 50 or more employees to provide sexual harassment training to all employees.[6] Under this law, employers must provide the training to new employees within one year of their hire date, and by Jan. 1, 2020, for current employees.[7] And like California's law, the training must be repeated every two years thereafter.[8]

Passing legislation of this nature demonstrates a growing number of states' acknowledgments that proper education on sexual harassment will reduce the overall reporting of claims and increase the accuracy of handling those claims.

In sum, employers — particularly those conducting business in multiple jurisdictions — should stay abreast of the many changes taking place in response to the #MeToo movement and the overwhelming societal push toward policy reform regarding sexual harassment in the workplace. Employers should also review their current employment law policies, procedures and agreements to ensure they remain both proactive and compliant with this constantly evolving body of law.

2. Address bans on salary history questions in applications and interviews.

Many state and local governments are passing laws that prohibit an employer from asking job applicants about their salaries. As of the date of writing this article, there are 17 statewide bans and 20 local bans that prevent an employer from asking about potential applicants' current or past salaries or benefits.[9] For example, to combat pay inequities, in February 2019, the city of Atlanta banned all salary history questions for all city of Atlanta job applicants.[10]

Where a ban on salary history questions exists, employers may generally inquire only about salary requirements and the employee's desired expectations for the position. Employers can also still consider salary information voluntarily provided by a potential applicant.

As the trend toward addressing gender pay inequality in the workplace continues to grow,[11] however, more laws banning salary history questions may be on the horizon. Accordingly, employers in this new

year should monitor their respective state and local laws and be prepared as necessary to modify job applications and interviewing procedures.

3. Prepare to create policies that address marijuana legalization.

With the expanding legalization of marijuana use, whether for recreational or medicinal purposes, the impact on employers cannot be ignored. Although federal law still prohibits its use, state laws in place afford protections to marijuana users for recreational purposes and employment protections for those who partake of the drug for medicinal reasons.

As of the date of writing this article, 33 states, Puerto Rico and Washington, D.C., all have laws in place that legalize the use of marijuana in some capacity. In addition, both Nevada and New York City have laws in place (scheduled to become effective Jan. 1, 2020, and May 10, 2020, respectively) that will prohibit preemployment marijuana testing — both with the caveat, however, that the position applied for cannot be one that traditionally involves maintaining the safety of others (e.g., fireman, police officer) or requires such testing under state or federal law.

This burgeoning area of law means that employers should be prepared to create policies that will both comply with federal, state and local laws, as well as maintain a safe workplace. Employers should also be prepared to respond to an increase in marijuana use in the workforce; positive drug test results due to legally permissive use; and resultant challenges to any employer action taken in response to a positive test result (e.g., denial of employment for an applicant or termination of an employee).

4. Update grooming policies for hair bias bans.

Early in 2019, California passed a state law effective Jan. 1, 2020, that bans racial discrimination based on individuals' natural hairstyles. This law, referred to as the Create a Respectful and Open Workplace for Natural Hair, or CROWN, Act, modified the definition of "race" to include "traits historically associated with race, including, but not limited to, hair texture and protective hairstyles."[12]

California's CROWN Act bans both employers and schools from enforcing grooming policies that appear to be racially neutral but nevertheless disparately impact people of color. Following in the footsteps of California, New York was the second state to enact laws prohibiting discrimination based on natural hairstyle, again amending prior statutory definitions of "race" to include "hair texture and protective hairstyles."[13] New York's laws became effective in 2019.[14]

Both California's and New York's proactive efforts to address this developing issue are likely the start of a growing trend. Indeed, on Dec. 19, 2019, New Jersey became the third state to enact a law banning hair discrimination, with the governor signing into law the state's own CROWN Act "to clarify that prohibited race discrimination includes discrimination on the basis of 'traits historically associated with race, including, but not limited to, hair texture, hair type, and protective hairstyles.'"[15]

Employers should thus continue to monitor current state laws for any changes to or modifications of existing laws that address discrimination based on race and be prepared to modify their current workplace policies if necessary.

5. Monitor LGBTQ Title VII Discrimination protections for employees.

The U.S. Supreme Court recently granted petitions for writ of certiorari for three cases involving

whether federal anti-discrimination law protections should be extended to apply to sexual orientation and gender identity in the workplace. Two of those cases, Altitude Express Inc. v. Zarda[16] and Bostock v. Clayton County, Georgia,[17] were consolidated because they both involved a claim regarding workplace discrimination based on sexual orientation.

The third case, R.G. & G.R. Harris Funeral Homes Inc. v. U.S. Equal Employment Opportunity Commission,[18] involves a claim about workplace discrimination based on the employee's status as a transgender worker. The Supreme Court's decisions on these matters will likely emerge toward the end of 2020.

6. Consider obesity as a potential newly protected class.

Earlier last year, the Washington Supreme Court held for the first time that obesity is a protected disability under the state's anti-discrimination law.[19] Contrary to other federal court decisions on the matter, which have held that obesity must be linked to a separate physiological disorder to qualify as an impairment under federal law, the high court of Washington held that obesity was an impairment under the state's disability laws and did not have to be caused by a separate physiological disorder or condition.[20]

While a directly applicable and ground-breaking decision for those employers conducting business in Washington, the ruling also lays the potential foundation for similar claims to be made in other states alleging obesity protections under state anti-discrimination laws. Depending on the shift of the pendulum, other favorable decisions along this line could impact prescreenings for employment and physical examinations, or medical questionnaires utilized in the hiring process.

7. Review salaries under the DOL's new overtime rule.

As of Jan. 1, 2020, the salary threshold under the Fair Labor Standards Act has increased from $455 per week ($23,660 annually) to $684 per week ($35,568 annually) for the executive, administrative, professional and salaried computer employee exemptions. The new rule also raises the salary threshold for the highly compensated employee exemption from $100,000 to $107,432 annually.

This new rule, administered by the U.S. Department of Labor, replaces the salary thresholds that have been in place since 2004 (since the DOL's 2016 proposed rule was invalidated by the U.S. District Court for the Eastern District of Texas in 2016).

The new rule at least allows employers some flexibility in paying the increased salary requirement, however. Employers may use incentive payments, including commissions and nondiscretionary bonuses, to meet up to 10% of the salary threshold requirement (so long as the payments occur at least annually and are subject to a single catch-up payment made within one pay period after the end of the year to bring an employee's compensation up to the required level). The FLSA's various duties tests remain unchanged with the new rule.

Employers will need to review the salaries of their current exempt employees and determine whether their salaries should be increased or if the employees should be reclassified as nonexempt (subject to overtime).

8. Stay informed on state laws banning noncompetes for low-wage employees.

This past year has seen the addition of five states (Maryland, Maine, New Hampshire, Rhode Island and Washington) to join the emerging trend of enacting legislation that prohibits an employer from utilizing noncompete agreements for certain low-wage positions. In Maryland, for example, the Noncompete and Conflict of Interest Clauses Act, or NCICA, voided all noncompete agreements entered into with employees that earned equal to or less than $31,200 per year or $15 per hour.

Part of the impetus behind NCICA was preventing employers from taking advantage of employees who might otherwise quit a position but for their fear of an unaffordable lawsuit should they work for a competitor. While NCICA contains no language on how to enforce violations of the law, it purports to apply even if the noncompete agreement was formed in another state. NCICA does not, however, prohibit employment contracts that restrict the use of a former employer's proprietary information.

The influx of states adopting such legislation indicates an increased interest by lawmakers in regulating noncompetes, and employers should stay informed as to any states that may follow suit.

9. Revisit independent contractor status in California.

Starting this year, employers in California will face much more difficulty in treating workers as independent contractors. This significant change to California's independent contractor landscape was sparked by the California Supreme Court's landmark 2018 decision in Dynamex Operations West Inc. v. Superior Court of Los Angeles.[21]

The state's high court determined that an individual is considered an employee unless the company hiring the individual could establish three conditions: (1) that the individual is free from the control and direction of the hirer; (2) that the work performed is outside the usual course of the hirer's business; and (3) the individual is customarily engaged in an independently established trade, occupation or business of the same nature as that of the work performed for the hirer.[22]

About a year after the decision, the California Legislature enacted a law incorporating the Dynamex independent-contractor test.[23] Effective Jan. 1, 2020, with a retroactive application for existing claims and actions, employers must now ensure compliance with the Dynamex test before classifying hired individuals as independent contractors.

Employers conducting business in California should thus take care in how they categorize newly hired individuals to ensure compliance with the new law and should further consider audits of existing independent contractors to determine whether reclassification may be warranted.

10. Consider employer liability for an employee's failure to read.

Recently, the U. S. Supreme Court heard oral arguments in Intel Corp. Investment Policy Committee v. Sulyma, a case involving a former employee's lawsuit against his employer's retirement plan committee, alleging the committee breached its duty under the Employee Retirement Income Security Act for making poor investment decisions.[24] The retirement plan committee argued that the former employee's suit was untimely because ERISA's three-year statute of limitations period had lapsed.

The U.S. Court of Appeals for the Ninth Circuit Court reversed a summary judgment ruling to the employer, holding that there was a dispute of material fact over whether the former employee had actual knowledge of the breach — given the former employee's assertion that he did not recall reading the investment information until just before filing his lawsuit.

An affirmance by the Supreme Court may open a pathway for other potential litigants to argue similar unintentional-oversight/failed-recollection arguments in various types of breached contract or fiduciary duty claims against employers. Affirmance may further support a deviation from or minimization of the level of responsibility and due care that is generally required of employees to review employment documents and policies.

While awaiting the Supreme Court's decision, which will likely issue sometime in 2020, employers may consider an increased use of employee acknowledgments for various employment policies and plan documents.

Conclusion

As we enter this new year, let us resolve to review these new developments and pay attention to the resolution of those issues still pending. Where modification to employment policies, procedures or agreements may be necessary, employers should consult with legal counsel as appropriate and follow up any policy or procedure modifications with corresponding employee training.

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[1] N.Y. Gen. Oblig. Law § 5-336.

[2] Allegra Lawrence-Hardy, Kathy Glennon, #MeToo Today: The Evolution of the Movement and Practical Tips for Employers, Corporate Compliance Insights (October 10, 2019), https://www.corporatecomplianceinsights.com/metoo-today/.

[3] See, e.g., Latif v. Morgan Stanley & Co. LLC, No. 18CV11528 (DLC), 2019 WL 2610985, at *4 (S.D.N.Y. June 26, 2019) (holding an agreement to arbitrate sexual harassment claims enforceable despite state law providing otherwise).

[4] Cal. Gov't Code § 12950.1(a).

[5] Id.

[6] Del. Code Ann. tit. 19, § 711A(g).

[7] Id.

[8] Id.

[9] See Salary history bans, HRDIVE, https://www.hrdive.com/news/salary-history-ban-states-list/516662/ (updated Dec. 6, 2019).

[10] See Press Release, Mayor Keisha Lance Bottoms Bans "Salary History Box" Requirement on City of Atlanta Applications (Feb. 18, 2019), https://www.atlantaga.gov/Home/Components/News/News/11942/672.

[11] Among other states, California, Connecticut and Hawaii also ban an employer from inquiring about a job applicant's salary history.

[12] See Liam Stack, California Is First State to Ban Discrimination Based on Natural Hair, N.Y. Times, June 28, 2019; see also Cal. Educ. Code § 212.1.

[13] N.Y. Exec. Law § 292 (Human Rights Act); N.Y. Educ. Law § 11 (Dignity for All Students Act).

[14] Id.

[15] Governor Murphy Signs Legislation Clarifying that Discrimination Based on Hairstyles Associated with Race is Illegal, NJ.gov, Dec. 19, 2019, https://nj.gov/governor/news/news/562019/approved/20191219c.shtml.

[16] 883 F.3d 100 (2d Cir. 2018).

[17] 723 F. App'x (11th Cir. 2018).

[18] E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, 884 F.3d 560 (6th Cir. 2018).

[19] Taylor v. Burlington Northern Railroad Holdings, Inc., 444 P.3d 606 (Wash. 2019).

[20] Id. at 609.

[21] 416 P.3d 1 (Cal. 2018).

[22] Id. at 7.

[23] Cal. Lab. Code § 2750.3.

[24] See Sulyma v. Intel Corp. Inv. Policy Comm., 909 F.3d 1069 (9th Cir. 2018), cert. granted, 139 S. Ct. 2692 (2019).