> Client Alert

New York Employment Law Updates for 2023

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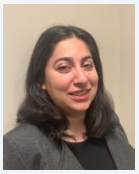

On and after January 1, 2023, new and amended provisions of law — for New York City and State — will come into effect and require vigilant employers to take heed and modify their employment practices to comply with each of them. Here are those which are most important in the near term.

I. Automated Employment Decision Tools

On January 1, 2023, New York City Local Law 144, governing the use of automated employment decision tools ("AEDTs"), took effect. Due to overwhelming public comment, however, the New York City Department of Consumer and Worker Protection (DCWP) has indicated that it will hold further public hearings and will take no steps to enforce the new law until April 15, 2023.

Local Law 144 defines an AEDT as "any computational process, derived from machine learning, statistical modeling, data analytics, or artificial intelligence, that issues simplified output, including a score, classification, or recommendation, that is used to substantially assist or replace discretionary decision making for making employment decisions that impact natural persons." An AEDT may include, for example, a computer program that scans job applications and automatically ranks applicants, selecting only those with the highest rankings for job openings.

Although such technological assistance and interventions are typically regarded as neutral and thus arguably less prone to bias than human decision-makers, there is growing concern that automated programs might inadvertently lead to employment decisions that have a disparate impact on certain protected groups. For example, a computerized screening tool that automatically eliminates from the selection process candidates with gaps in their employment history might disproportionately exclude from consideration women who have taken breaks from the workforce due to pregnancy, or otherwise qualified job candidates who have had long periods of unemployment between jobs due to other reasons such as incarceration.

What are Employers Now Required to Do?

Employers who wish to commence or continue to use AEDTs in New York City "to substantially assist or replace discretionary decision making" must only use tools that have been subjected to a "bias audit" within the past year. A "bias

audit" is an evaluation conducted by an independent auditor which determines whether the AEDT might have a disparate impact on candidates based on their race or sex. Significantly, the results summary of the bias audit must be made publicly available on the employer's website.

Under DCWP's currently proposed enforcement rules, the law would apply where an employer relies *solely* or *most heavily* on a simplified output from an AEDT (such as a score, ranking, etc.), or where the output is used to overrule or modify conclusions derived from other factors (such as human decision-making). DCWP's proposed rules, which are still under review, further specify *how* the bias audit should be conducted, including that an independent evaluator should use historical data to calculate the AEDT's "impact ratio," defined as how the selection rate for each category of sex and race compares to the selection rate for the most selected category.

Prior to an employer's use of an AEDT to substantially assist in the screening applicants for employment or promotional opportunities, the employer must notify candidates at least 10 business days prior to its use that an AEDT will be used. Employees must also be notified of the job qualifications that the AEDT will assess, and allow the candidate to request an alternative selection process or a reasonable accommodation. An employer, however, is not required to provide an alternative selection process. Employers and employment agencies must also disclose, upon written request, if not already listed on their website, information about the type of data collected for the AEDT screening, the source of such data, and the data retention policy. This information shall be provided within 30 days of a written request.

DCWP has proposed that employers be permitted to provide the requisite notice to employees any of the following methods: (a) including the information in a "clear and conspicuous" manner on the employer's website; (b) including the notice in a job posting, provided that the job is posted at least 10 days prior to the use of the AEDT; or (c) providing written notice to the candidate or employee via mail, email, or in-person at least 10 business days prior to the use of an AEDT. If employers choose not to post the notice on their websites, they should post instructions on how to make a written request for such information.

Enforcement / Compliance

Once enforcement begins, employers who fail to comply will be subject to a civil penalty of not more than $500 for a first violation and between $500 and $1,500 for each subsequent violation. It is important for employers to note that each day on which an AEDT is used in violation of the law shall be considered a separate violation. Local Law 144 may be enforced both by the New York City Commission on Human Rights and by private aggrieved individuals.

Employers should assess the current tools they are using to screen job applicants and candidates for promotion. To the extent any of these tools are used as the exclusive or substantial means of assessment or in a manner that overrides human decision-making in the selection process, employers should make sure that such tools have been subject to an independent audit in the past year and that proper notice is given to applicants residing in New York City.

II. No Fault Attendance Policies

As of February 19, 2023, New York employers cannot penalize workers for taking lawful absences under the guise of "no fault" or points-based attendance policies. Employers are prohibited from retaliating against employees who take absences that are legally protected under federal, state, or local law. Legally protected absences include those to care for an ill family member protected under the Family and Medical Leave Act ("FMLA") or under New York City Sick Leave Law. Prohibited retaliatory acts include, but are not limited to, failure to promote, a loss of pay, or disciplinary action up to and including termination.

If an employer uses an attendance points system to determine, in whole or in part, eligibility for promotion or to otherwise penalize employees, the employer should make clear that legally protected absences will not result in an adverse employment outcome.

III. Potential Minimum Wage Increase for Food Delivery Drivers

The New York City Department of Consumer and Worker Protection has proposed increases to the minimum hourly wage for app-based food delivery drivers to $23.82 per hour (exclusive of tips) by April 2025. The proposed wage increase would include gradual increases in the minimum wage, first to $17.87 per hour on January 1, 2023, then to $17.87 per hour adjusted for inflation on or after April 1, 2023, then to $20.25 per hour, adjusted for inflation by April 1, 2024. These proposed hourly rates are intended to include both a base pay rate and a component designed to cover expenses such as bicycle safety equipment needed in order for delivery workers to perform their duties in a safe manner.

The proposed rules also include new definitions for time periods which require specific recordation by employers in connection with the wage and hour process. More specifically, there are new definitions for "on-call time" and "trip time." "On-call time" is time when a worker is connected to an application and available to accept assignments, and "trip time" is the time a worker spends between accepting an offer to perform a delivery and the time that delivery is completed or canceled. They are mutually exclusive, i.e., an employee cannot be on "on-call time" and "trip time" simultaneously. Employers must henceforth maintain records of workers' on-call time and trip time as part of their regular business operations.

IV. Siblings Covered by New York State Paid Family Leave Law

As of January 1, 2023, New York workers' eligibility for taking Paid Family Leave of up to 12 weeks to care family members shall now extend to the care of a sibling with a serious health condition. The law previously limited eligible leave for care of a sick family member to spouses / domestic partners, children / step-children, parents / parents-in-law, grandparents, and grandchildren. With the broadened definition of those whose care provides for covered leave, the addition of siblings will include biological, adopted, step, and half siblings.

V. Electronic Workplace Postings

On December 16, 2022, Governor Hochul signed New York's new electronic postings law, which requires that employers make copies of documents available to employees electronically that the law already requires employers to post physically in the workplace. The law sets forth that digital versions of these posters can be made available through the employer's website/intranet, or may be distributed via email. Employers also must provide their employees with notice that documents required for physical posting are also available electronically.

VI. Pay Frequency Litigation Continues

The trend of New York employees paid on bi-weekly basis challenging their pay frequency and claiming entitlement to be paid weekly shows no signs of slowing down. New York Labor Law ("NYLL") requires that employees who spend more than 25% of their working time performing physical labor be compensated on a weekly basis. Physical labor has been construed broadly to include, by way of example, chauffeurs who sometimes perform heavy lifting. In 2019, the First Department of the New York State Appellate Division found that a private right of action exists for employees who seek to challenge their pay frequency under NYLL. Since then, many employees who historically have been paid bi-weekly, including retail sales

workers and make-up artists, have asserted that their work entails more than 25% physical labor and that they should be compensated on a weekly basis.

In several recent cases, Courts have denied employers' requests for early dismissal of these cases prior to discovery. These cases will now proceed to discovery on the workers' precise duties and whether such work can thus be considered manual labor.

Employers should be mindful that the determination of who is a manual worker is a case-by-case analysis, and that it is possible that two individuals employed in the same title or location may perform slightly different tasks such that one will be considered a manual worker under the law while the other is not. Thus, even if a Court were ultimately to find that certain retail sales workers are not physical laborers, it would not preclude other retail sales workers from coming forward and asserting that more than a quarter of their work time consists of performing physical labor. In short, the issue remains in flux and employers paying hourly employees on a less-frequent basis than weekly continue to run the risk of an adverse determination, with fines and liquidated damages equal to the amount of all wages received later than on a weekly basis (up to a half years' wages if the employee was paid bi-weekly) as the potential consequences thereof.

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The Morrison Cohen LLP Labor & Employment Team is available to provide legal advice regarding any of the above-referenced new and updated laws. Morrison Cohen's Labor & Employment team can assist in auditing, updating, advising and counseling regarding these legal issues or any other employment law questions.