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Client Alert

Recent Developments in New York Employment Law

August 19, 2019 – The summer of 2019 has featured several important new developments in New York employment law. In June, New York lawmakers passed two pieces of legislation that could have a significant impact on employers in the state. The first, New York State Senate Bill S2844B (the "Employee Wage Lien bill"), would allow employees asserting certain wage and hour violations to obtain liens on their current and former employers' real and personal property regardless of whether those allegations have been proven as a matter of law. The second, New York State Assembly Bill A08421, signed into law by Governor Andrew M. Cuomo on August 12, 2019, among other things, lessens the burden for employees to prove discrimination, eliminating the legal requirements that (i) a claimant prove that the conduct on which the claim is based is "severe and pervasive," and (ii) a victim of harassment provide his or her employer with notice before filing a lawsuit. Set forth below is a brief overview of the new legislation and its prospective impact on New York employers.

The Employee Wage Lien Bill

The recently passed Employee Wage Lien bill, if and when signed into law by Governor Cuomo, would allow employees asserting a wage claim to obtain liens against their current or former employers' personal or real property located in New York State based solely on allegations of wage related violations alone. To make matters potentially worse for employers, the bill adopts the broad definition of "employer" under the New York Labor Law (NYLL) and Fair Labor Standards Act (FLSA), which would not only include corporate entities, but potentially also managers, executives, supervisors, owners, shareholders, human resources professionals and any other persons or entities who maintain control over employees' working conditions. Under the proposed law, a "wage claim" is defined as any claim under the NYLL or FLSA for unpaid wages, overtime, spread of hours, call-in pay, uniform maintenance pay, withheld gratuities, unlawful deductions from wages, unpaid charges that purport to be gratuities, or improperly taking meal and tip credits, as well as unpaid compensation pursuant to an employment contract or any claim that the employer violated a wage order promulgated by the New York Commissioner of Labor.

In addition to the employee being able to obtain such liens against their current or former employer, the New York State Department of Labor (NYSDOL) and the New York State Attorney General (NYAG) would also be authorized to obtain a lien on behalf of any employee

if the individual has filed a complaint with either government entity. The NYDOL and NYAG would also be authorized to file liens on behalf of a putative class of individuals, though an individual employee would not be permitted to file the same for any other person or on behalf of a class other than himself or herself.

Employees or governmental entities pursuing such claims would be entitled to obtain a lien equal to the amount of wages purportedly owed, including the amount of liquidated damages (*i.e.*, double the wage amount) that might also be owed pursuant to the NYLL or FLSA. The lien must be filed within three years of the employee's last date of employment. Moreover, the employee, must serve a copy of the lien on the employer within five days before or thirty days after filing the notice of the lien with the County Clerk for the county in which the applicable property is located. If proof of such service is not filed with the County Clerk within 35 days after the notice of lien is filed, then the lien will be terminated automatically.

In the event an action is filed based on a wage claim within one year of obtaining the lien, the lien shall automatically be extended during the pendency of the action and for an additional 120 days following the entry of the final judgment in that action. In the event the employee fails to bring a wage claim action within a year following the filing of the lien, however, the lien would automatically be extinguished.

To avoid an employer's business or ability to operate being adversely affected by these new rights being granted to current and former employees, such employer may purchase a bond to discharge the lien at any time. The bill also provides that a lien will be discharged where the employer can provide proof that the wage claim was willfully exaggerated. In that instance, the employee would be forever barred from obtaining another lien against the employer.

The Employee Wage Lien bill has passed both the State Assembly and Senate and is scheduled to be delivered to the Governor in the near future. It is assumed that if and when the bill becomes law, it will likely become the subject of vigorous legal attacks in the courts by employers and those affected by the liens. In the interim, New York employers should consider revisiting their payroll practices to ensure compliance with applicable wage and hour and related labor laws to avoid these potential issues. As we noted in our prior alert, relying on payroll providers will not shield employers from potential liability, and, upon the signing of this bill, from avoiding potential liens against their personal and real property. Accordingly, we strongly encourage employers to seek legal guidance on compliance with wage and hour laws from seasoned employment counsel as matter of good business practice.

The New Lower Bar for Proving Workplace Discrimination

In the wake of the #MeToo movement and the hundreds of cases that have since been filed in New York alone, New York State lawmakers also recently passed and Governor Cuomo signed into law, Assembly Bill A08421. The bill eases the burden of proof for employees to prevail in workplace discrimination lawsuits—especially those involving claims of sexual harassment—by eliminating the requirement that a claimant prove that the alleged discriminatory conduct complained of was "severe and pervasive"—the standard which has been in place for more than 30 years in this country. It also removes the requirement that a victim of sexual harassment put his or her employer on notice prior to filing suit, as the absence of such notice, prior to enactment, served as legitimate and credible defense to such a claim.

The longstanding "severe and pervasive" standard of proof was adopted in New York after the U.S. Supreme Court's decision in *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (U.S. 1986). *Meritor*, which first pronounced that Title VII's proscription against gender discrimination included sexual harassment, also held that such harassment was actionable only where the unwanted advances or other behavior was "severe or pervasive" enough "to alter the conditions of [the victim's] employment and created an abusive working environment." The new bill supplants this federal standard with a significantly lower threshold in New York, such that the alleged harassment or discrimination only rise above the level of "petty slights or trivial inconveniences." As such, employees across New York State will have a markedly easier burden to satisfy in proving workplace discrimination or sexual harassment.

The bill also undermines part of the so-called *Faragher-Ellerth* defense, named after a pair 1998 U.S. Supreme Court decisions, which was meant to shield unwitting employers from liability where the accuser "unreasonably failed to take advantage of any preventative or corrective opportunities" the employer provided them, including setting forth procedures for providing the employer with notice of the harassment in order to take prompt and corrective action. Recognizing the reality that many employees choose not to report their harassment out of apparent fear of retaliation or due to a sense of futility, the new law provides that whether or not an employee complains to his or her employer about perceived discriminatory treatment "shall not be determinative" of an employer's ultimate liability.

The new lower standard of more than "petty slights or trivial inconveniences" but less than "severe and pervasive," and the elimination of the *Faragher-Ellerth* defense take effect on October 11, 2019—60 days after the bill was signed into law. Other sections of the bill which take effect at the same time include:

- Extending protections against all types of discrimination to all contractors, subcontractors, vendors, consultants and others providing services (as opposed to solely for sexual harassment which was previously the law);

- Prohibiting employers from including any term or condition in a settlement or nondisclosure agreement which would prevent the disclosure of the underlying facts and circumstances surrounding any claim of discrimination, thereby permitting employees to file harassment or discrimination complaints and/or assist or comply with a subpoena (there is method through which employers may obtain confidentiality in such settlement agreements as we wrote about on page 3 of our prior alert);

- Prohibiting mandatory arbitration clauses in contracts for claims of employment discrimination; and

- Providing a right to seek punitive damages in cases of employment discrimination (thus mimicking existing federal law).

Additionally, on February 8, 2020, the definition of "Employer" will be expanded to include "all employers within the state" of New York and thus no longer exclude those employers with fewer than 4 employees.

Of great significance, the new law will extend an employee's time within which to file a complaint alleging sexual harassment with the New York State Division of Human Rights from one year to three years. This major enlargement of the time to file an administrative complaint in New York becomes effective on August 12, 2020—one year after the bill was signed into law.

Based on these significant amendments to existing New York law, employers must be even more vigilant in responding to sexual harassment claims and those alleging other forms of discrimination in the workplace. This includes updating anti-harassment or discrimination policies to reflect the lower threshold for liability and encouraging employees to address these issues internally before initiating litigation. It also calls for updates to employers' annual mandatory anti-harassment and discrimination training[1], and may warrant more in-person training rather than the generalized platforms accessible online. Again, we strongly recommend consulting with seasoned employment counsel such as the undersigned attorneys in connection with these issues, as these new laws expose unwitting employers to considerably greater risk of liability than ever before.

If you have questions about these new legal developments, or any other legal questions pertaining to federal or New York State employment law, please feel free to contact us.

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[1] Note that applicable law mandates that employers provide notice containing the employer's sexual harassment prevention policy and the information presented at the employer's sexual harassment prevention training program, in English and in the primary language of each employee, at the time of hire and at every annual sexual harassment preventing training session.