NEW LAWS EFFECTING THE EMPLOYMENT RELATIONSHIP

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Today’s Agenda

1. Prohibition on Salary Inquiries

2. New York State Paid Family Leave Law: The Final Regulations

3. NYC “Ban the Box:” A Brief Refresher
PROHIBITION ON SALARY INQUIRIES: HALLOWEEN WILL BE MORE THAN JUST TRICK OR TREAT!
PROHIBITION ON SALARY INQUIRIES

The Mechanics

• Passed By NYC Council on April 5, 2017

• Signed by Mayor De Blasio on May 4, 2017

• Effective 180 days after signed – October 31, 2017

• NYC followed Philadelphia and Massachusetts in seeking to improve pay equity by banning salary history inquiries – BECAUSE – such perpetuate wage gap based on historical wage discrimination
PROHIBITION ON SALARY INQUIRIES

What is Prohibited?

1. Unlawful To Inquire About Applicant’s Salary History

2. Cannot Rely on Salary History To Determine Salary, Benefits or Other Compensation

3. Prohibits A Search of Publicly Available Records or Reports For The Purpose of Obtaining An Applicant’s Salary History

4. Applies to Public and Private Employees – No Size Too Small
PROHIBITION ON SALARY INQUIRIES

Definitions

1. “Salary History” Includes:
   - Wages
   - Benefits
   - Other Compensation

2. “To Inquire”: To Communicate (writing or otherwise) Any Question or Statement
   - Applicant
   - Current/Former Employer
   - Current/Former Employee or Agent of Current/Former Employer
WHAT ACTIVITIES ARE PERMISSIBLE?

- Inform the applicant about anticipated salary or salary range;
- Engage in a discussion with the applicant about his or her *expectations* with respect to salary, benefits, and other compensation;
- Inquire about unvested equity or deferred compensation that an applicant would forfeit;
- Consider the prior salary of a current employee who is seeking an internal transfer or promotion; and
- Perform a background check, so long as:
  - the check does not include a request for, or confirmation of, prior salary history, and
  - the employer does not, if the background check does disclose such information, utilize same for purposes of determining the salary, benefits, or other compensation of the applicant.
PENALTIES

1. Civil Penalties Up to $250,000

2. Where Pursue a Judicial Remedy
   • Compensatory Damages
   • Punitive Damages
   • Injunctive Relief
   • Attorney’s Fees and Costs
TAKE AWAY: What NYC Employers Should Do

1. Remove Questions About Salary History
2. Do Not Seek Salary History on Background Checks
3. Coordinate With Your Vendors
4. Reach Out To Your Recruiters
5. Train HR Staff and Others
6. Memorialize Any Voluntary Disclosures
NEW YORK STATE PAID FAMILY LEAVE BENEFIT LAW
On March 31, 2016, New York State Governor Andrew Cuomo signed a bill enacting the Paid Family Leave Benefits Law.

Beginning January 1, 2018, employees working 20 hours or more per week who have worked for a covered employer for 26 or more consecutive weeks, and employees working fewer than 20 hours per week who have worked for 175 days (still an open question of how the 175 days are counted) will be eligible for paid family leave and benefits.

The law will provide job protection and pay during leave.

The law will initially provide 8 weeks of leave and gradually increase to 12 weeks of leave by 2021 (Specifics on pay will follow).
Family leave benefits may be used for the following purposes:

- For a family member’s serious health condition
- To bond with the employee’s child during the first 12 months after the child’s birth, or the first 12 months after the placement of the child for adoption or foster care with the employee
- Because of any qualifying exigency as interpreted under the federal Family and Medical Leave Act arising out of the fact that the spouse, domestic partner, child, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the U.S. Armed Forces
Pay While on Leave
NYS Paid Family Leave Benefits Law

Payments and Annual Increases

<table>
<thead>
<tr>
<th>Date</th>
<th>Length of Benefits Within a 52-Week Calendar Period</th>
<th>Amount of Benefits</th>
</tr>
</thead>
<tbody>
<tr>
<td>January 1, 2018</td>
<td>8 weeks</td>
<td>50% of average weekly wage, not to exceed 50% of the state average weekly wage</td>
</tr>
<tr>
<td>January 1, 2019</td>
<td>10 weeks</td>
<td>55% of average weekly wage, not to exceed 55% of the state average weekly wage</td>
</tr>
<tr>
<td>January 1, 2020</td>
<td>10 weeks</td>
<td>60% of average weekly wage, not to exceed 60% of the state average weekly wage</td>
</tr>
<tr>
<td>January 1, 2021</td>
<td>12 weeks</td>
<td>67% of average weekly wage, not to exceed 67% of the state average weekly wage</td>
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- Based on the current average weekly wage of $1,305.92, the maximum amount of PFL benefits will be $652.96/week as of January 1, 2018
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ELIGIBILITY AND MECHANICS

• “Covered Employer” – 1 or more employees at least 30 days in any calendar year

• Working 20 or more hours/week - 26 or more consecutive weeks prior to start of leave

• Working fewer than 20 hours/week - At least 175 days (Counting Still An Open Issue)

• Employer Secures The Policy

• Funded By Employees Through Payroll Deductions
WAIVER [EXTREME CAUTION]

• Only available for Employees Not Eligible

• Gives Those Employees An Option For Exemption From Payroll Deductions

• CAUTION – Employees May Become Ineligible For Waiver At A Later Time

• Check-In With Your Carrier
Calculating Leave

• 52 Consecutive week period measured on a “rolling backwards” basis

• Amount of Leave available measured by reviewing how much taken in the previous 52 weeks, as of the start date of PFL

• Intermittent Leave

  • Employees Working at least 5 days/week may take up to 60 days of PFL/year (once benefit is at 12 weeks)

  • Eligible employees who work fewer days who takes leave in daily increments will receive proportional amount of leave. Example – Part-time Employee who works 3 days/week, will get 60% of the current max of 40 days (8 weeks x 5 days) = 24 days
INTERACTION WITH OTHER LAWS AND BENEFITS

1. Interaction Between Leave and Benefits in 2017 and 2018
   • Employee who took leave for birth, adoption or foster care in 2017 does not impact same employee’s eligibility to take leave under PFLBL in 2018

2. Disability Benefits
   • Cannot receive both STD and PFL for same time period
   • Combined total limited to 26 weeks of STD and PFL in 52 week period

3. FMLA
   • Concurrent Designation – Reminder to notify the Employee
   • Where Employee eligible for both and declines to apply for PFL payments, Employer may still designate leave under both FMLA and PFL Leave
   • Remember – Employee CANNOT take PFL for own serious health condition under PFL – ONLY under FMLA
   • Paid vs Unpaid Leave
INTERACTION WITH OTHER LAWS AND BENEFITS (cont’d)

4. Employer Provided Benefits
   • Employee can choose PFL or accrued leave
   • Employers cannot require use of paid leave
   • Employer Reimbursement

5. Health Benefits
   • Employer will be required to maintain - - but employee may be required to continue employee contributions as under the FMLA
REINSTATEMENT AND NON-DISCRIMINATION/ NON RETALIATION RIGHTS

• No Discrimination/No Retaliation

• Reinstatement to position held – or comparable position with comparable benefits, pay and other terms and conditions

• Layoff? Employer must show it was not retaliatory
TAX TREATMENT

According to the New York State Department of Taxation and Finance:

• Must be included in federal gross income;
• Taxes not automatically withheld, but employees can request
• Premiums will be deducted from employees’ after-tax wages;
• Employers should report employee contributions on IRS Form W-2 using Box 14 – State disability insurance taxes withheld; and
• Benefits should be reported by the State Insurance Fund on Form 1099-G and by all other payers on Form 1099-MISC.
DOMESTIC VIOLENCE

The PFLBL addresses domestic violence in two notable ways:

• A carrier or self-insured employer may deny a claim of a perpetrator of domestic violence or child abuse against the care recipient for whom the perpetrator-employee is seeking to take PFL.

• A health care provider may refuse to supply a certification for PFL when the employee requesting the leave is the perpetrator of domestic violence or child abuse against the care recipient.
ARBITRATION OF PFL-RELATED CLAIMS

• An arbitration procedure has been established for all claims related to PFL, including eligibility, benefit rate, and the duration of paid leave.

• The arbitration procedure will be governed by the Workers’ Compensation Law.
IF EMPLOYER FAILS TO PROVIDE COVERAGE

• 5 percent of weekly payroll where not covered, plus $500 fine

• If Employer does not (1) collect contributions; and (2) fails to provide coverage, Employer is

  a) Fully liable for PFL Benefits; and

  b) Waives right to collect applicable employee contributions for period when coverage was not provided
TAKE AWAY: WHAT NEW YORK EMPLOYERS SHOULD DO NOW

• Revise family leave policies to provide information regarding the PFLBL, including employees’ right to leave and benefits and information on filing a claim for PFL benefits.

• Prepare to obtain coverage, either through an insurance carrier or as a self-insured employer, under the PFLBL.

• Prepare to begin payroll deductions with your payroll service provider—such deductions could have begun as early as July 1, 2017.
Ban the Box
Fair Credit Reporting Act
Despite having the name “credit” in its name, the FCRA applies to all types of information about individuals, including:

- Criminal background checks
- Credit checks
- Educational references
- Job references
- Past addresses
- Social media searches

The FCRA only applies when the employer uses a third-party “consumer reporting agency” (“CRA”) to perform the background check, and not when the employer conducts the background check itself.
Need Disclosure and Authorization

- Disclosure To Applicant/Written Authorization
- Must be separate from other pre-employment documentation
- Attach the following:
  - Consumer Protection Financial Board’s “Summary of Your Rights”
  - State-specific notices
    - NY – Article 23-A of the Correction Law
When Can You Request a Background Check?
“Ban The Box”
Eliminating the Criminal Conviction Question on the Application

- At least 25 states have enacted ban-the-box laws
  - 9 of those states (Connecticut, Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Oregon, Rhode Island and Vermont) have laws that cover private employers
- Over 150 cities and counties including New York City, San Francisco, Philadelphia, as well as the District of Columbia also have similar laws
Refresher On: New York City’s Fair Chance Act

- Effective as of 10/27/2015
- Prohibits employers from stating in job advertisements that expresses any limitation based on a person’s arrest or criminal conviction
- Requires employers to wait until after a conditional offer is made to ask about criminal convictions or arrests
- If employer wishes to revoke offer after obtaining results of a background check, employer must go through the Fair Chance Process:
  - Provide applicant with a copy of the report
  - Provide applicant with information about why the employer made the decision, including its analysis under Correction Law Article 23-A
  - Hold job open for 3 business days so that applicant can contest results
Taking Adverse Action Based on Background Check
“It shall be an unlawful discriminatory practice for any person, agency, bureau, corporation or association ... to deny ... employment to any individual by reason of his or her having been convicted of one or more criminal offenses, or by reason of a finding of a lack of “good moral character” which is based upon his or her having been convicted of one or more criminal offenses, when such denial is in violation of the provisions of article twenty-three-A of the correction law.”

The law provides a rebuttable presumption in favor of employers who evaluate the factors set forth in the Correction Law, and make a reasonable, good faith determination that such factors militate in favor of hire or retention of that applicant or employee.
This eight-factor test is to be used by an employer before the employer makes a determination on an applicant based in whole or in part on the applicant’s criminal conviction record:

1. Public Policy of the State of New York;

2. Specific Duties and Responsibilities;

3. Bearing, if any, the criminal offense or offenses will have on fitness or ability to perform one or more such duties or responsibilities;

4. Time which has elapsed since the occurrence of the criminal offense or offenses;
Background Check Reveals Criminal Conviction
Special New York Eight-Factor Test (NY Correction Law Art. 23-A) (cont’d)

5. Age of the person at the time of occurrence;

6. Seriousness of the offense or offenses;

7. Information produced by the person, or produced on his/her behalf, in regard to his/her rehabilitation and good conduct; and

8. Legitimate interest of the employer in protecting property, and the safety and welfare of specific individuals or the general public

- Employers should also consider “a certificate of relief from disabilities or a certificate of good conduct”, which creates a presumption of rehabilitation in regard to the offense(s)
Pending Arrests

- The EEOC’s 2012 Enforcement Guidance stated that employers should generally not use evidence of arrests in making employment decisions, as it could lead to a disparate impact.
  - In 2010, 28% of all arrests were of African Americans, even though African Americans only comprised approximately 14% of the general population.

- New York State law permits employers to consider a pending arrest in making employment decisions.

- New York City’s Fair Chance Act continues to permit employers to consider pending arrests, but an employer may not ask about pending arrests until a conditional offer of employment has been made.
New York City Fair Chance Process

Taking Adverse Action

- Evaluate the conviction under the eight-factor test under Article 23-A
- Share the written evaluation under 23-A with the applicant/employee (the “Fair Chance Analysis”)
- Give the applicant/employee a copy of any report gathered to make the adverse decision
- Allow at least three business days from when the applicant/employee received the notice of intent for the applicant/employee to respond to the employer (during which period the position must be kept open and available to the employee/applicant)
Pre-Adverse Action Notice

- The employer must attach to each Pre-Adverse Action Notice:
  - Copy of Background Check
  - CFPB’s Summary of Rights Form
  - State-specific notice
    - New York: Article 23-A and Fair Chance Analysis
Many applicants will not respond to the Notice of Intent

However, if an applicant does provide additional information, the employer should consider whether such information will be sufficient to outweigh the initial determination to withdraw the offer of employment.
Taking Adverse Action Based on Background Check

Notification of Adverse Action

After the five business day “Abeyance” period:

- Send Notice of Adverse Action, including:
  - Consumer Reporting Agency Information
  - State that the CRA did not make the decision
  - Inform recipient
    - May request a free copy from the CRA
    - Have the right to dispute information in Report
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