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Recent Amendments To New York Labor and Employment Law

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Despite the gridlock that has strangled Albany, this past legislative term, the New York Legislature passed, and the Governor signed, a number of new laws that will impact all New York employers.

Workplace Protections for Victims of Domestic Violence

On July 7, 2009, Governor David A. Patterson signed legislation amending the New York State Human Rights Law to protect victims of domestic violence. The amendment takes immediate effect.

The New York State Human Rights Law prohibits employers from discriminating against employees or prospective employees on the basis of age, race, creed, color, national origin, sex, sexual orientation, disability, genetic predisposition or carrier status, or marital status. With the passage of this amendment, New York has now extended such protections to victims of domestic violence.

The amendment defines a "domestic violence victim" to be "an individual who is a victim of an act which would constitute a family offense" under Family Court Act section 812(1). A "family offense" under Family Court Act section 812(1) is one in which an act of harassment, stalking, menacing, reckless endangerment, criminal mischief, assault, or attempted assault (as those terms are defined under the New York Penal Law) is committed between members of the same family or household.

As a result of this amendment, being a victim of domestic violence is now a protected characteristic under New York's anti-discrimination statute. Accordingly, employers should consider:

- Including information on the appropriate way to view and treat victims of domestic violence in the workplace as part of their discrimination and harassment training programs.
- Accommodating victims of domestic abuse if the employer is aware of the situation. For example, an employer may have a duty to accommodate a victim of domestic abuse by providing him or her additional sick days.
- Consulting with counsel before disciplining or terminating the employment of an employee who the employer knows is a victim of domestic abuse.

Civil Penalties for Violations of the New York State Human Rights Law

Prior to July 6, 2009, if an employer violated the New York State Human Rights Law, the aggrieved employee or prospective employee could only obtain: (i) compensatory damages; (ii) injunctive relief requiring the employer to cease and desist from committing unlawful employment practices, to train employees, or to hire, reinstate, or promote employees; and (iii) the disgorgement of profits earned as a result of the discrimination. Punitive damages, civil fines, and attorneys' fees, however, were not available. On July 6, 2009, this changed, when Governor Patterson signed legislation amending the New York State Human Rights Law to allow successful litigants to obtain civil penalties of up to $50,000 (increased to $100,000 if maliciousness is proven).

The civil fines may be awarded by a court of competent jurisdiction or by the New York State Division of Human Rights. Any civil fine assessed is paid not to the successful plaintiff, but rather, to New York State's General Fund. For small employers (those with less than 50 employees), any such fine may be paid in installments, although statutory interest, which is currently 9% per annum, may be added.

Notification of Pay Rates to New Hires

Effective October 26, 2009, employers must notify all new hires, in writing, of: (i) their regular pay day designated by the employer; (ii) their rate of pay; and, (iii) if applicable, of their overtime rate of pay. In addition, employers must obtain an acknowledgement from each employee of receipt of this information. The acknowledgment must conform to the requirements established by the New York State Department of Labor, which are currently pending.

The requirement to provide information about a new hire's overtime rate of pay may be particularly troublesome for some employers. Under the Fair Labor Standards Act, the overtime rate of pay is 1.5 times the regular rate of pay. An employee's regular rate of pay is an hourly rate (even if the employee receives compensation on other than an hourly basis) calculated by workweek, not by payroll period. It is the division of the remuneration received for all work performed in each workweek by the number of hours worked in each workweek. It excludes eight forms of pay, such as pay for time not worked (e.g., sick time, vacation time, and PTO) and, therefore, not only requires careful calculation but potentially yields differing sums for each workweek. As a result, it is often not possible to specify an employee's overtime rate of pay in advance. It is possible to specify only the method that the employer will use to calculate overtime. Accordingly, when providing information about new hires' overtime rates, employers should consider providing an explanation about how overtime is calculated to avoid violating New York law and the Fair Labor Standards Act

In addition, employers should review offer letters and any paperwork given to newly hired employees to make sure that these written communications contain information about the new hire's rate of pay, regular pay day, and, if applicable, the overtime rate of pay. Further, should the New York State Department of Labor fail to issue guidelines concerning the acknowledgment form prior to October 26 – a distinct possibility based on the agency's track record – employers should consider creating a simple acknowledgement form, which states that the new hire has received information about his or her rate of pay, regular pay day, and overtime rate of pay.

Expanded Health Insurance Coverage

Employers who provide health insurance benefits are very familiar with COBRA. However, many employers are not familiar with New York State Insurance Law section 3221(m). While similar to

COBRA in most respects, Insurance Law section 3221(m) has two key provisions that differ from COBRA. First, it applies to all employers that provide health insurance benefits to their employees; COBRA only applies to those employers with 20 or more employees. Second, Insurance Law section 3221(m) does not disqualify those employees whose employment was terminated for gross misconduct from eligibility to continue their health insurance coverage.

Effective July 1, 2009 there is a third difference. Under an amendment to Insurance Law section 3221(m), employees who lose their health insurance as a result of an employment loss or reduction in hours can elect to continue their health insurance benefits for up to 36 months at their own cost unless it is subsidized under the American Recovery and Reinvestment Act of 2009. Generally, under COBRA, employees who lose their health insurance benefits can elect to continue their health insurance benefits for up to 18 months only. This amendment to the Insurance Law applies to all employers with New York operations, expect those who provide self-funded group health plans.

To comply with this change to the New York Insurance Law, employers should review and modify their COBRA and/or Insurance Law notices. In addition, if applicable, they should notify their third-party COBRA administrators to ensure that they comply with this new requirement.

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If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

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