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"The Ever-Changing Minefield of Employment Law in New York," by Aaron Solomon, Esq. and Taimur Alamgir, Esq., The New York Law Journal, 4-13-2023

This article will address some significant recent changes and new legislation that have recently become effective or will be enforced in the very near future. Also, this article will address a recent trend in wage-and-hour jurisprudence in New York with significant implications for employers. New York state and New York City labor and employment laws are a shifting minefield. Laws may change so swiftly that an employer who is in compliance at one time may find itself quickly out of compliance once New York State or New York City passes a new law. Employers must keep up or face potential peril.

First, New York state has now restricted the electronic monitoring of an employee's activity. Some employers have traditionally monitored an employee's use of the company's electronic systems. Such monitoring can be a useful tool to prevent misuse of an employer's electronic systems for many reasons. For example, an employer could monitor how an employee accesses and uses confidential information. In the past, unless the employer disclosed that such monitoring was ongoing, an employee may not know it was occurring. However, New York employers are now required to provide a notice to their employees to advise them if certain activities would be monitored. Specifically, employers must obtain an acknowledgement from their employees (which in can be written or electronic form) from all new hires and to conspicuously post notice concerning electronic monitoring. Failure to comply with this statute can lead to civil penalties. As such, any employers who are not in compliance with this law must obtain acknowledgement forms and post notice immediately.

Significant amendments to Section 740 of the New York Labor Law (the whistleblower law) occurred last year. Under the newly amended statute, employees need only complain to their employer about what they reasonably believe constitutes a violation of the law or that poses a substantial and specific danger to public health or safety before notifying a governmental agency. Previously, an employee needed to make a complaint about an actual violation.

Also, before the law was amended, an employee had to notify the employer about the alleged violation and afford the employer a reasonable amount of time to cure it before the employee could disclose the violation to a public agency. Now, employees only must make a "good faith effort" to notify their employer of any potential violation. And, in certain circumstances, such as a situation where an employee believes that telling the employer would result in destruction of evidence, the employee need not notify the employer at all. The law not only broadens the scope of what activity is protected, it also expands the scope of what actions constitute retaliation. For example, an employer's threat to contact immigration authorities or threatening to report the citizenship status of an employee (or an employee's family or household member as defined by law) is unlawful.

How can employers navigate this new law? First, an employer must have an employee complaint and investigation procedure. If the employer does not, then it must create one. If the employer does, then it needs to review it and make it stronger to ensure that the procedure can address the expanded universe of complaints that are now protected. Second, the statute requires the posting of a notice. Some employers forget to post notices. The New York State Department of Labor has promulgated such a notice. Employers must immediately use it. Third, employers must ensure that their managers and supervisors are trained appropriately. Retaliation claims can arise when a supervisor engages in misbehavior that is contemporaneously unknown to the employer. If this occurs, the employer can suddenly find itself "on the hook" for a violation.

Another new statute addresses employee absences. Many employers discipline employees for absences. To address absences, many employers use a "no fault" attendance policy that operates by penalizing an employee for absence or tardiness through a "point system." If an employee misses work, they lose a "point." If too many "points" are lost, then discipline can occur. The Legislature believed that these "no fault" policies could discourage employees from taking protected leave. As such, the Legislature decided to curtail these policies by passing the "Lawful Absence Law." This law, which just took effect on Feb.19, prohibits an employer from "assessing any demerit, occurrence, or any other point, or deductions from an allotted bank of time, which subjects or could subject an employee to disciplinary action" for the use of any "legally protected absence under federal, local, or state law." That includes leave permitted under numerous statutes including the Family and Medical Leave Act, the New York Paid Sick Leave Law, and the New York City Safe and Sick Leave Law. Issuing discipline for protected absences can constitute retaliation. Accordingly, if an employer has not already evaluated its absence policies, it must do so immediately.

A more interesting change in the law occurred in New York City concerning the use of "artificial intelligence" to assist an employer with "employment decision-making." The use of such systems has certainly created a myriad of concerns. Of note, given the complicated nature of artificial intelligence, how a system makes certain decisions may not be readily discernable. There is a concern that the way a system computes, scores, classifies and "screens" candidates could lead to biased decision-making. Indeed, such systems remove human analysis from certain key steps of the employment decision-making process. As such, the city has adopted a law to regulate the use of such systems by requiring that a system be audited by an impartial "bias auditor" who will review the system's activities to ensure that there is no "disparate impact" that would disadvantage particular protected classes. The results of this audit must be publicly available. Additionally, New York City employers must tell candidates that such a system will be used and the job qualifications or characterizations that the system will consider. As well, a candidate must be given the opportunity to request an alternate process. Also, if asked, an employer must, within 30 days of a request for additional information, describe the type of data that the system collects, the source of the data, and the employer's data retention policy. Violations of the law will result in civil penalties. And, most importantly, each day a noncompliant system is in use constitutes a separate violation. As it presently stands, enforcement of this law will commence on April 15. As such, employers have a month to review their systems to ensure compliance.

Finally, employers seeking to avoid the expense and frustration of wage-and-hour litigation should note a significant recent development in jurisprudence. Claims on behalf of "manual workers" (or liquidated damages based solely on delayed payment of wages) have rapidly resulted in significant liability for a broad spectrum of employers. This novel private right of action was first recognized in Vega v. CM & Associates Construction Management, which held that liquidated damages under NYLL Section 191(1)(a) for underpayment of wages are available for each week that a "manual worker" (defined by the NYS Department of Labor as an employee who spends more than 25% of their working time performing manual labor) is not compensated. Under Vega, "the moment that an employer fails to pay wages [weekly] in compliance with Section 191(1)(a), the employer pays less than what is required." As a result, employers accused of paying "manual workers" bi-weekly or monthly, as opposed to weekly, face significant liability.

Although the Court of Appeals of New York has yet to address NYLL Section 191(1)(a), Vega has been followed by almost all federal and state courts. As such, the new "manual worker" cause of action has proven a windfall for the wage-and-hour plaintiff's bar. National employers operating in New York (many of which maintained large New York workforces subject to bi-weekly payroll) have been especially hard hit by "manual worker" class action lawsuits against their New York state operations. To avoid increasingly ubiquitous and costly wage-and-hour litigation, employers of "manual workers" would be well-advised to pay them weekly.

Aaron N. Solomon, a partner with Kaufman Dolowich Voluck focuses his practice primarily on labor and employment law. Taimur Alamgir, an attorney with the firm, focuses his practice on representing management in labor and employment matters.

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