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New York Employment Law Update 2021

by Marc B. Zimmerman and Kathryn T. Lundy

A FREEBORN & PETERS LLP CLIENT ALERT

With a new year comes several changes to New York State labor and employment laws. Employee eligibility for paid sick leave, wage and hour laws, rules pertaining to independent contractors, and COVID-19 considerations have been affected. Employers must continually monitor these updates and modify their policies accordingly to ensure compliance. This Freeborn & Peters LLP client alert provides an overview of these notable new rules and regulations for New York State employers.

A. New York State Paid Sick Leave

2021 marks the beginning of employee eligibility for New York Paid Sick Leave law, which covers all private sector employees in New York State. We summarize some key provisions below:

Amount: The amount of paid leave is based on the size of the employer, as follows:
- Employers with 1 to 4 employees and net income of $1 million or less must provide up to 40 hours of unpaid sick leave per calendar year;
- Employers with 1 to 4 employees and net income of more than $1 million, and employers with 5 to 99 employees (regardless of net income) must provide up to 40 hours of paid sick leave per calendar year;
- Employers with 100 or more employees must provide up to 56 hours of paid sick leave per calendar year.

Accrual: Employers may either frontload the maximum annual sick leave entitlement or accrue the leave at a rate of 1 hour of paid sick leave for every 30 hours worked. Employers who opt for the accrual method must give accrual credit for all hours worked from September 30, 2020. There is no post-hire waiting period for accrual of, or use of accrued, paid sick time.

Carryover: Employers must permit carryover of unused paid sick leave at the end of a calendar year, but are not required to permit the use of more than the annual maximum. For those employers who use the accrual method for paid leave, carryover simply permits employees to have paid sick leave available for use at the beginning of a calendar year – it does not increase the maximum amount of leave for a calendar year. Carryover has no practical effect for employers who frontload paid sick leave, as the full amount is available on January 1.

Pay Rate and Leave Increments: Employees must be paid their normal rate of pay for paid leave. Employers may require employee use of leave in minimum increments, but may not set the minimum increment at more than 4 hours.

No Payout at Separation: Employers are not required to pay employees for unused sick leave upon an employee's voluntary or involuntary separation from employment.

Permissible Uses: Employees can use paid sick leave for a wide array of purposes, including diagnosis, care or treatment (or need for diagnosis or preventive care) of a mental or physical illness, injury or health condition of the employee or a family member for whom the employee provides care or assistance. Paid safe leave also is permissible for absences due to domestic violence, to enroll children in a new school or to take other actions necessary to ensure the health or safety of the employee or the employee's family.

No Retaliation: Retaliation is prohibited against employees exercising rights to use sick leave and employees returning from leave must be restored to their previous position occupied prior to taking leave.

Recordkeeping: Employers must keep payroll records for 6 years, including the amount of sick leave accrued and used by each employee on a weekly basis. Employers must, within 3 days of the request of an employee, provide a summary of the sick leave accrued and used by an employee in the current and any prior calendar year. Employers who provide generally-applicable paid time off (PTO) as opposed to sick time should separately track paid sick leave time to ensure compliance.

Policies: Employers should be sure to review their existing written leave policies to ensure they are updated to comply with NYS law. An employer's existing policy that meets or exceeds the accrual, carryover and use requirements is sufficient under the law.

B. New York State Wage and Hour Law

Two key updates to the NYS wage payment laws are the increases to state minimum wage and the salary threshold required to classify a worker as exempt from overtime compensation. The NYS Department of Labor and private employee advocates are extremely active and aggressive in pursuing actions against employers who are not vigilant in their wage payment practices and policies. It is recommended to frequently review appropriate wage and hour practices to ensure compliance with applicable law.

NYS Minimum Wage:
Updated minimum wages for most NYS employees are:
New York City: $15.00/hour
Long Island and Westchester: $14.00/hour
Remainder of NYS: $12.50/hour

Salary Basis Test for Exempt Employees:
Application of the exemption from applicable minimum wage and/or overtime compensation laws requires satisfying both a salary test and a duties test. Historically, the analysis largely rested on the duties test, since the threshold for meeting the salary test was artificially low. However, unlike under federal law, where the required salary threshold remains relatively low, New York State's salary threshold has increased to a dollar amount significant enough to render many New York employees non-exempt (and therefore subject to minimum wage and overtime premium pay requirements) without even reaching the duties test. The minimum weekly salary required to satisfy the exemption standard are:

New York City: $1,125/week ($58,500 annualized)
Long Island and Westchester: $1,050/week ($54,600 annualized)
Remainder of NYS: $937.50/week ($48,750 annualized)

Electronic Paystubs for Employees Receiving Direct Deposit:
Additionally, effective April 5, 2021, an employee who requests direct deposit of a paycheck may opt-out (at the employee's discretion) of receiving a paper pay stub and instead receive electronic confirmation of the information that would otherwise be included in the pay stub. Employers must continue to provide pay stubs to those employees who do not opt out of such requirement.

C. Independent Contractors

Earlier this month, the U.S. Department of Labor published a final rule (effective on March 8, 2021) clarifying under what circumstances an individual properly can be classified as an independent contractor (as opposed to an employee) under the Fair Labor Standards Act (the federal wage and hour law) and therefore not subject to its minimum wage, overtime or recordkeeping requirements. While it is widely speculated that the new administration will abandon the rule before its effective date, for now it is on the books.

The DOL test is based on the "economic reality" model, which analyzes whether a worker largely is independent of an employer (e.g., contractors in business for themselves) or economically dependent on an employer (e.g., employees serving an employer). The test hinges on two "core factors" that define the relationship and three other factors which are "additional guideposts" used where the core factors do not definitively point to a classification. The DOL makes clear the analysis is based upon the "actual practice" of the relationship rather that what may be "contractually or theoretically possible" which signifies it will look into the relationship itself as opposed to a carefully drafted scope of work contained in an independent contractor agreement. The two core factors are:

- The nature and degree of control over the work; and
- The worker's opportunity for profit or loss based on initiative and/or investment.

Workers who exercise substantial control over key aspects of the work, including by setting their work schedules, choosing their own assignments, working without (or with little) supervision and being able to work for others, including competitors, suggest a contractor relationship. Similarly, workers who bear risk (gain or loss) from their own personal initiative (such as industry skill) or by managing their own business (such as purchasing equipment or hiring their own employees) support contractor status. Speaking to one often discussed issue, the DOL indicates that while providing a worker benefits does not automatically establish employee status, including that worker in the same employer-provided health or retirement plans on terms given to employees "may indicate" an employer-employee relationship.

The two core factors are the most important. However, if they are not determinative, or are contradictory, the following three factors can provide additional guides:

- The amount of skill required for the work;
- The degree of permanence of the working relationship between the worker and the potential employer; and
- Whether the work is part of an integrated unit of production.

Although it remains to be seen whether this rule will survive the next few months, it is clear that misclassification issues relating to independent contractors remains a hot topic in a changing economy. Many courts, and now the DOL, have been trending towards a more "realistic" analysis of work relationships, which suggests the need for a more consistent approach.

Importantly, the fate of the DOL rule affects only worker status under the FLSA – not under other federal, state or local tests and standards under wage and hour and other laws. Therefore, employers must be aware of differences, for example, in states that have enacted more rigid classification standards.

D. COVID-19 Considerations

The pandemic has required employers to refocus their efforts on workplace health and safety and be increasingly vigilant in implementing and policing policies and practices that are (1) compliant with up to date laws, regulations and guidance; (2) consistent with their business needs and an efficient, effective workforce; and (3) conscious of individuals' unease during these challenging times.

All employers should be sure to take appropriate actions designed to minimize the risk of spread of COVID-19 in the workplace. The now-common preventive measures such as face coverings, washing hands, cleaning and disinfecting work areas and common surfaces and maintaining appropriate social distancing are proven effective. Employers are well-advised to direct their supervisors to be aware, and insistent, that their reports comply with company protocols. As with all policies, effectiveness is not guaranteed simply by promulgating guidelines, but by actively ensuring they are being complied with and consistently enforced.

A recurring issue for many employers is effective internal due diligence in identifying close contact with known cases. Even the safest employers cannot protect its employees fully against transmission of the virus, particularly when employees leave the premises. Therefore, it is critical for employers to have an internal process designed to promptly identify, as best as possible, those who are at an increased risk of contracting the virus from known cases. Employers should designate individuals to work through a thorough list of questions designed to identify others who may be at risk of exposure to known cases (e.g., those working in shared spaces or who commute together) and promptly deny them access to the workplace. An effective and composed internal process can temper employee worry (or a full-scale workplace panic) and supplement (if not replace) the now-common company-wide e-mail alerting everyone to the existence of a nameless positive case (remember, of course that it is critical to avoid disclosure of protected information, such as identifying that a particular individual has tested positive for COVID-19, other than on a need to know basis).

The rollout of COVID-19 vaccines has given rise to a new question: can employers require employees to vaccinate. While the short answer is (generally) yes, there are legal and practical limitations that swing the pendulum and suggest that employers should consider making employee vaccination decisions voluntary. On the legal side, an employer's mandatory vaccine policy must provide exceptions for disability and religious accommodations. Practically, the vaccine rollout has been notoriously slow and inefficient, making full, widespread access to the vaccine challenging. Additionally, many individuals (particularly in lower-risk categories) are hesitant to vaccinate absent longer-term vaccine safety testing. Therefore, employers mandating employees vaccinate by a date certain may have to address challenges such as employees who want to vaccinate but have no access and those who refuse to vaccinate but are valuable to the employer.

Of course, the pandemic has presented other daily challenges and considerations for employers, ranging from issues of workplace safety, protected leave, remote work to workforce reductions. While we do not purport to cover all these issues here, employers must continue to be aware of, and responsive to, legal developments and employee (and workforce) concerns that may require modifications or updates to non-conforming business policies and practices.

We are always available to assist. If you have any questions, please contact Marc B. Zimmerman (mzimmerman@freeborn.com; (646) 993-4432), Kathryn T. Lundy (klundy@freeborn.com; (646) 993-4434), or another member of Freeborn's Labor and Employment Practice Group.

ABOUT THE AUTHORS

Marc B. Zimmerman
Partner
New York Office
(646) 993-4432
mzimmerman@freeborn.com

Kathryn T. Lundy
Partner
New York Office
(646) 993-4434
klundy@freeborn.com

Marc advises clients on a wide range of labor relations and business issues, including wage and hour compliance, classification issues, restrictive covenants, discipline, management training, policy development, reductions in force and more. He is also a sought-after negotiator and routinely assists management and executives in structuring, drafting and reviewing employment contracts, contractor agreements, separation agreements, restrictive covenants and executive compensation issues.

Kathryn is regularly called upon for advice and counsel regarding the gamut of complex employment issues including executive compensation or termination issues, wage and hour compliance, classification issues, restrictive covenants, discipline, management training, policy development, reductions in force, investigations, or guidance having to do with compliance with local, state, and federal employment laws, including workplace operations during COVID-19. Kathryn – for so many businesses – is a go-to attorney.

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CHICAGO
311 South Wacker Drive
Suite 3000
Chicago, IL 60606
(312) 360-6000
(312) 360-6520 fax

NEW YORK
230 Park Avenue
Suite 630
New York, NY 10169
(212) 218-8760
(212) 218-8761 fax

SPRINGFIELD
217 East Monroe Street
Suite 202
Springfield, IL 62701
(217) 535-1060
(217) 535-1069 fax

RICHMOND
901 East Byrd Street
Suite 950
Richmond, VA 23219
(804) 644-1300
(804) 644-1354 fax

TAMPA
1 Tampa City Center
201 North Franklin Street
Suite 3550
Tampa, FL 33602
(813) 488-2920

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