Client Alert | Employment, Compensation & Benefits

Two New Rules for New York City Employers

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Prohibition with Respect to Salary Histories

In an effort to combat gender pay inequality, New York City will join Philadelphia and Massachusetts in prohibiting employers from inquiring about the salary histories of job applicants. The New York City Council recently passed a law to amend the New York City Human Rights Law to make it an unlawful discriminatory practice to inquire about a job applicant's salary history or to rely on such salary history in determining salary, benefits or other compensation for job applicants. The law is expected to go into effect in October 2017 (180 days after signature by Mayor de Blasio, which is expected to occur soon).

New York City's new law does not prohibit an employer from discussing with applicants their expectations with respect to salary, benefits or other compensation, including but not limited to unvested equity or deferred compensation that applicants would forfeit as a result of their resignation to their current employer. The new law also permits consideration and verification of salary history if the job applicant "voluntarily and without prompting discloses" salary history to the employer. Lastly, the new law does not apply to: (i) actions taken pursuant to applicable law that specifically authorizes disclosure or verification of salary history for employment purposes or specifically requires knowledge of salary history to determine an employee's compensation; (ii) current employees applying for internal promotion or transfer; and (iii) public employee positions in which collective bargaining is used to determine salary, benefits and other compensation.

We note that Philadelphia passed a similar law that is now facing constitutional challenges from Philadelphia's Chamber of Commerce (the "Chamber") with respect to, among other things, employers' free speech rights, and that on April 19, 2017, a Pennsylvania federal court issued a temporary stay of the law (which was to take effect May 23, 2017) pending resolution of the Chamber's motion for preliminary injunction. Subsequently, Philadelphia agreed to an indefinite delay of the law's implementation. Similar constitutional challenges may be asserted in the future against the New York City law.

NYC Freelance Workers (i.e., Independent Contractors)

The New York City Council passed last year the Freelance Isn't Free Act, which establishes and enhances protections for freelance workers against nonpayment. The act defines a "freelance worker" as a natural person (or an organization composed of no more than one natural person) "hired or retained as an independent contractor by a hiring party to provide services in exchange for compensation," but does not apply to sales representatives (as defined in the New York State Labor Law), attorneys and medical professionals. The law requires the hiring party (i.e., any person who retains the services of a freelance worker) to establish a written contract whenever the contracted-for services will have a value of $800 or more, either by itself or when aggregated with all other services provided by the freelance worker to that hiring party within the immediately preceding 120 days. The written contract must include, among other things, the rate and method of compensation and the date on which payment will be made or the mechanism by which such date will be determined; if no date or mechanism is specified, such payment date shall be no later than 30 days after the completion of the services

under the contract. The act also prohibits (i) requiring that the freelance worker accept less compensation as a condition of timely payment, once the services have commenced pursuant to the contract, and (ii) retaliation against freelance workers for exercising their rights under the act. The act goes into effect on May 15, 2017.

The act provides for a private right of action, as well as enforcement through the Director of the Office of Labor Standards. If a freelance worker solely alleges a violation of the requirement to have a written contract (and not underpayment or retaliation), then the freelance worker must prove that he or she requested a written contract before the contracted work began and will be eligible for statutory damages of $250, plus reasonable attorney's fees and costs. The act also provides for the possibility of statutory damages equal to the value of the underlying contract and/or double damages and injunctive relief, in addition to reasonable attorney's fees and costs, for other violations of the act. Notably, failure to comply with the act does **not** render the underlying contract void or voidable or constitute a defense to any action to enforce, or for breach of, such contract.

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