

# Employment Law Roundup: Summary of Recent Changes Affecting New York Employers

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## Overview

Private employers in New York should be aware of a number of employment law changes over the past year that affect background checks (both credit and criminal history), anti-discrimination protections and reasonable accommodations, paid family leave and minimum wage. In addition, there have been recent changes to forms used pursuant to the federal Family and Medical Leave Act, minimum salary levels needed to satisfy the federal “white collar exemptions” from overtime pay and new federal trade secret protections, each of which is applicable to employers with employees in and outside of New York. We summarize these changes briefly below.

### Credit Checks Prohibited in Most Circumstances (NYC)

The Stop Credit Discrimination in Employment Act (“SCDEA”) amended the New York City Human Rights Law (“NYCHRL”) to prohibit most private employers from requesting or considering the “consumer credit history” of job applicants or current employees when making employment decisions. “Consumer credit history” means an individual’s “credit worthiness, credit standing, credit capacity, or payment history” indicated by a consumer credit report, credit score, or certain other credit-related information an employer obtains directly from the individual.

The SCDEA contains specific exceptions, including the following:

- when required by state or federal law or regulations, or by a self-regulatory organization (as defined by the Securities Exchange Act of 1934), e.g., for securities brokers subject to FINRA requirements;
- employment in non-clerical positions with frequent access to trade secrets, intelligence information, or national security information;
- employment involving “signatory authority over third-party funds or assets valued at \$10,000 or more,” or involving “a fiduciary responsibility to the employer with the authority to enter financial agreements valued at \$10,000 or more on behalf of the employer”; or
- employment in which regular duties involve modifying “digital security systems established to prevent the unauthorized use of the employer’s or client’s networks or databases.”

The exemptions to coverage will be construed narrowly, and employers availing themselves of exemptions should inform applicants or employees of the claimed exemptions and should maintain records of their use of exemptions for five years. The employer should maintain an exemption log that includes the following information.

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- why the claimed exemption covers the exempted position;
  - the name and contact information of all applicants or employees considered for the exempted position;
  - the job duties and qualifications for the exempted position;
  - copy of the applicant's or employee's credit history that was obtained pursuant to the claimed exemption; and
  - how the credit history was obtained and used for the employment decision.

### **Criminal Checks Prohibited Before Conditional Offer of Employment (NYC)**

The Fair Chance Act ("FCA") amended the NYCHRL to prohibit most private employers from engaging in the following conduct:

- Inquiring about, or otherwise considering, an individual's criminal history on job applications and before providing a conditional offer of employment.
- Stating on a job advertisement, solicitation, or other publication that employment is conditioned upon or limited based on an applicant's criminal history.
- Withdrawing a conditional job offer based on an applicant's criminal history before engaging in the "Fair Chance Process" described below.
- Taking an adverse employment action because of certain non-convictions (criminal actions, not currently pending, that were terminated in favor of the individual, as defined by New York Criminal Procedure Law ("CPL") 160.50, even if not sealed; adjudication as a youthful offender, as defined by CPL 720.35, even if not sealed; conviction of a non-criminal violation that has been sealed under CPL 160.55; and convictions that have been sealed under CPL 160.58).

Employers who might consider withdrawing conditional job offers of employment based on an applicant's criminal conduct (or terminating such person's employment if he or she has already started working) must first review the following factors:

- New York's public policy that encourages the employment of people with criminal records;
- the specific duties and responsibilities of the job;
- the bearing, if any, of an individual's criminal record on their ability to do the job;
- the amount of time that has passed since the criminal conduct;
- the age when the individual engaged in criminal conduct;
- the seriousness of the conviction record;
- positive information the individual has in their favor; and
- the legitimate interest of the employer in protecting property and the safety and welfare of specific individuals or the general public. Inquiring about, or otherwise considering, an individual's criminal history on job applications and before providing a conditional offer of employment.

Employers must also consider if an individual has a certificate of relief from disabilities or a certificate of good conduct, as this creates a presumption of rehabilitation regarding the relevant conviction.

After considering these factors, an employer may decide not to hire an applicant because a direct relationship exists between the conviction and the job; or because the conviction history creates an unreasonable risk to people or property. If an employer decides to withdraw the offer of employment or terminate employment for one of the permitted reasons, it must still comply with the following "Fair Chance Process":

- Disclose to the applicant a written copy of any inquiry the employer conducted into the applicant's criminal history (i.e., the background check on which the employer relied);

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- Share with the applicant a written copy of the employer’s analysis of the New York state law factors (by, for example, using the “Fair Chance Act Notice”<sup>1</sup> recently published by the New York City Commission on Human Rights (“NYCCHR”), though employers may adapt this notice as long as the material substance does not change); and
  - Allow the applicant at least three (3) business days from his or her receipt of the analysis or Fair Chance Act Notice to provide additional information (including a certificate of good conduct, if available) or advise the employer of any errors in the background check.

This law does not require employers to hire individuals with a criminal record and does not apply in certain circumstances, including, but not limited to: (i) employers required by a self-regulatory organization to conduct a criminal background check of regulated persons, and (ii) employers hiring for positions where federal, state, or local law requires criminal background checks or bars employment based on certain criminal convictions. The exemptions to coverage will be construed narrowly, and employers availing themselves of exemptions should inform applicants or employees of the claimed exemptions and maintain records of their use of exemptions for five years. The Fair Chance Process covers both potential and current employees and applies to employers’ actions in employment decisions such as hiring, termination, transfers, and promotions.

### New Anti-Discrimination Protections (NYS and NYC)

The Women’s Equality Act (“WEA”) in part amended the New York State Human Rights Law (“NYSHRL”) to expand protections for certain employees. Some of the highlights are as follows:

- Discrimination based on **familial status** is prohibited. “Familial status” means (a) any person who is pregnant or has a child or is in the process of securing legal custody of a child, or (b) one or more individuals under 18 years of age being domiciled with (i) a parent or another person with legal custody, or (ii) the designee of such parent.
- **Equal pay** protections are strengthened under the NYS Labor Law, including narrowing an exception to require a “bona fide factor other than sex, such as education, training and experience” to account for differentials in pay and providing that employers cannot prohibit an employee from sharing wage information with another employee (similar to protections already available to non-supervisory employees under the federal National Labor Relations Act).
- Employers must provide **reasonable accommodations** to employees affected by pregnancy, childbirth, or related medical conditions, unless such accommodations would create an undue hardship for such employers (already required under the NYCHRL and possibly the federal Americans with Disabilities Act).
- All employers, regardless of size, are prohibited from engaging in **sexual harassment** (the law previously applied only to employers with four (4) or more employees).

Separately, regulations issued by the NYS Division of Human Rights clarify that (i) discrimination on the basis of **gender identity** is sex discrimination, (ii) harassment on the basis of **gender identity** or **transgender status** is sexual harassment, and (iii) discrimination or harassment on the basis of **gender dysphoria** is disability discrimination or harassment based on disability.

In addition, the NYCHRL was amended to prohibit discrimination based on an individual’s status as a “**caregiver**.” A “caregiver” is a person who provides direct and ongoing care for a minor child or care recipient (i.e., certain persons with disabilities or illnesses).

As a reminder, the NYSHRL was previously amended to extend coverage to **unpaid interns**, and the NYCHRL was previously amended to extend coverage to **interns, whether paid or unpaid**, and to prohibit discrimination based on an **applicant’s status as being unemployed**, unless there is a substantially job-related reason for doing so.

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<sup>1</sup> [http://www.nyc.gov/html/cchr/downloads/pdf/FairChance\\_Form23-A\\_distributed.pdf](http://www.nyc.gov/html/cchr/downloads/pdf/FairChance_Form23-A_distributed.pdf)

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## Employees Eligible for Paid Family Leave (NYS)

Effective January 1, 2018, New York State will require employers to provide eligible employees with up to eight (8) weeks per year of paid family leave (i.e., partial wage replacement), rising to 10 weeks per year in 2019 and 2020, and 12 weeks per year starting in 2021, for purposes of, among other things:

- caring for a family member with a serious health condition (including physical or psychological care);
- bonding with a new child during the first 12 months following the child's birth or placement of the child for adoption or foster care; or
- for a qualifying exigency when certain family members are called to active military service.

Paid family leave will start in 2018 at 50% of an employee's average weekly wage, capped at 50% of the statewide average weekly wage (which was \$1,296.48 for 2015), and will gradually increase until 2021 to 67% of an employee's average weekly wage, capped at 67% of the statewide average weekly wage.

Employees may not receive paid family leave benefits and state disability benefits at the same time. Employers may require that this paid family leave run concurrently with unpaid leave under the federal Family and Medical Leave Act. Employees who take paid family leave or otherwise exercise their rights under the law are protected from retaliation, receive job protection with respect to the leave, and also have the right to continue health care benefits during such leave. However, employees are not entitled to accrual of seniority when taking paid family leave, and employers are not required to provide paid family leave to an employee if the employee seeks to use the leave simultaneously with another employee for the care of the same family member as each other.

## Minimum Wage Will Increase to \$15 per hour (NYS)

New York has enacted the following minimum wage increases (subject to temporary suspension of the scheduled increases under certain circumstances):

- For employees in NYC who work for **large** businesses (i.e., those with at least 11 employees), the current \$9.00 state minimum wage increases to \$11 at the end of 2016, then an additional \$2 per year thereafter, capping out at \$15 on December 31, 2018.
- For employees in NYC who work for **small** businesses (i.e., those with 10 or fewer employees), the minimum wage increases to \$10.50 at the end of 2016, then an additional \$1.50 per year thereafter, capping out at \$15 on December 31, 2019.
- For employees in Nassau, Suffolk and Westchester Counties, the minimum wage increases to \$10 at the end of 2016, then an additional \$1 per year thereafter, capping out at \$15 on December 31, 2021.
- For employees in the rest of New York State, the minimum wage increases to \$9.70 at the end of 2016, then an additional \$.70 per year thereafter until reaching \$12.50 on December 31, 2020, and then continuing to increase to \$15 on an indexed schedule to be set in the future.

Different schedules apply to fast food workers in NY:

- For fast food employees in NYC, the minimum wage increases to \$12 at the end of 2016, then an additional \$1.50 per year thereafter, capping out at \$15 on December 31, 2018.
- For fast food employees outside of NYC, the minimum wage increases to \$10.75 at the end of 2016, then an additional \$1 per year at the end of 2017, 2018, and 2019, and increases to \$14.50 at the end of 2020, capping out at \$15 on December 31, 2021.

## New FMLA Poster, Notices and Forms (Federal)

The U.S. Department of Labor (the "DOL") issued new versions of the poster, template notices and certification forms for use pursuant to the federal Family and Medical Leave Act ("FMLA"), including the addition of certain "safe harbor" language to the certification forms intended to comply with the federal Genetic Information and Nondiscrimination Act ("GINA"). The new forms will be in use until May 31, 2018.

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## Trade Secrets Now Protected by Federal Law (Federal)

Congress enacted the Defend Trade Secrets Act of 2016 (“DTSA”) to provide alternative grounds to protect employers from misappropriation of trade secrets by creating new federal statutory civil remedies, including but not limited to: ex parte seizure, exemplary damages, injunctive relief, and attorney’s fees. In order to seek exemplary damages and attorney’s fees, employers must ensure that their agreements with employees include notice on whistleblower immunity stating certain exceptions for lawful disclosure of trade secrets or reference policies that contain such notice. The DTSA is in addition to, and does not preempt, state trade secret law. A separate White & Case Client Alert<sup>2</sup> provides additional details on the DTSA.

## New DOL White Collar Exemption Regulations (Federal)

On May 18, 2016, the DOL published its final rule (the “Final Rule”) updating overtime regulations and more than doubling the salary threshold necessary to meet the requirements of the white collar overtime exemptions under the federal Fair Labor Standards Act (the “FLSA”). That threshold now will be \$47,476 per year (or \$913 per week), effective December 1, 2016, for meeting the executive, administrative, professional, computer, and highly-compensated employees exemptions (although up to 10% of the salary can be satisfied by certain incentive compensation paid to the employee, so long as such incentive compensation is paid no less often than quarterly). This represents a substantial increase from the \$23,600 per year (or \$455 per week) currently needed to satisfy these exemptions. There is also a change to the annual salary requirement needed to satisfy the highly-compensated employee exemption—an increase from \$100,000 to \$134,004. There is no change to the “duties” tests also needed to satisfy these exemptions: an employee’s “primary duties” for these purposes will continue to be evaluated on a qualitative rather than a quantitative basis. Our separate Client Alert<sup>3</sup> on the new DOL overtime regulations provides additional details.

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<sup>2</sup> [http://www.whitecase.com/publications/alert/defend-trade-secrets-act-new-era-intellectual-property-protection?s=defend trade secrets](http://www.whitecase.com/publications/alert/defend-trade-secrets-act-new-era-intellectual-property-protection?s=defend+trade+secrets)

<sup>3</sup> [http://www.whitecase.com/publications/alert/department-labor-issues-final-regulations-trimming-flsa-overtime-exemption-white?s=overtime regulation](http://www.whitecase.com/publications/alert/department-labor-issues-final-regulations-trimming-flsa-overtime-exemption-white?s=overtime+regulation)