

# What's NEXT: Law



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# 5 HR matters employers must focus on now

Employment Attorney Gregory S. Lisi discusses the top employment law issues impacting LI employers

Over the past year, Long Island employers have had to grapple with a pandemic and an economic downturn. However, compliance requirements with laws governing the employer-employee relationship have not gone away; in fact, these requirements have grown more stringent, as new federal and New York State laws imposing new requirements on employers have taken effect over the past couple of years.

As penalties for noncompliance can be significant, it's imperative that employers take a careful look at their policies and procedures and make sure they are in compliance with regulations, says attorney Gregory S. Lisi, who is a Partner and Head of the Employment and Labor Practice at Uniondale-based Forchelli Deegan Terrana LLP, a full-service law firm, and who was recently sworn in as President of the Nassau County Bar Association. Below, Mr. Lisi provides an in-depth look at five important employment law areas that employers need to review.

## Anti-Sexual Harassment Policies

The #MeToo movement ushered in a wave of new laws and compliance requirements to combat sexual harassment in the workplace. Every employer in New York State is required to adopt a sexual harassment prevention policy that meets certain criteria. Additionally, employers must annually provide employees with interactive sexual harassment prevention training. Among other criteria, this training must include an explanation and examples of conduct that would constitute unlawful sexual harassment and provide information concerning remedies available to victims of sexual harassment.

Mr. Lisi points out that with many workplaces going remote during the pandemic, anti-harassment training took a backseat for some employers. It's important for employers to get back in compliance and ensure they are up to date with annual training, as well as training for new employees. Training can be online or in-person. While either is acceptable, he usually recommends live training, because it gives employees the opportunity to ask questions and provides important feedback for employers about what is going on in their workplace. Further, with many workplaces going remote, and the proliferation of new communication formats, the lines between friendship and colleagues have never been more blurred. Employers should be reminded that workplace harassment rules extend beyond the office and supervisors and employees should have training adapted to these new workplace norms.

Whether you have one employee or 10,000, it's incumbent on the employer to know what's going on in your workplace, whether in person or remote, and to have a procedure in place by which employees can make complaints and remedial action can be taken as necessary.

## Anti-Discrimination Policies

Similar to sexual harassment, New York State laws have become much more focused on prevention of discrimination and punishment for violations. Regulations increasingly are putting the onus on employers to know what's going on in their workplace and to

have systems in place to avoid discriminatory practices.

Employers are prohibited from discriminating against employees based on a protected characteristic, which are defined in the New York State Human Rights Law as: age, race, creed, color, national origin, sexual orientation, military status, sex, disability, marital status, domestic violence victim status, gender identity or expression, familial status, predisposing genetic characteristics, and criminal history. It is incumbent on employers to treat these protected classes of workers the same.

One of the areas where companies often get into trouble is when they have different salaries for people in different protected classes – such as gender. If similarly situated women and men are performing the same job function, and women are paid less, this could lead to a lawsuit. Many of these types of cases become class action suits, which can cost an employer a tremendous amount of money if multiple employees are affected. If employees earn different salaries for similar work, the employer must have a legitimate business reason – such as someone commands a higher salary because that person has more seniority or a higher level of education. There are other defenses as well, but an employer must be vigilant in reassessing its reasons for disparate pay.

Besides pay equality, similarly situated employees in different protected classes are entitled to similar working conditions. For instance, if you give employees of a certain religion time off for their religious holidays, you need to give employees of other religions time off for their religious holidays. If you offer maternity leave for women, you need to offer equal paternity leave for men – and make sure they are not discriminated against for taking such leave. If there is an open position, an employer should document why it chose a certain candidate so as to be ready should a person from a different protected class believe discrimination played a part in his or her not receiving such promotion.

Employers should be warned that employees can file harassment or discrimination claims with the Equal Employment Opportunity Commission or the New York State Division of Human Rights for free, and without even engaging the services of an attorney. Either government agency would then investigate to determine whether it believes sexual harassment or discrimination has occurred.

## Wage-and-Hour Matters

Government agencies and plaintiffs attorneys are keeping a close eye on wage-and-hour matters, particularly issues concerning overtime and minimum wage.

Further, many employers are unaware of New York State's "Spread of Hours" law, which requires that certain non-exempt employees be paid for an extra hour of work at minimum wage if their work day exceeds 10 hours or more (including breaks). This applies to employees in service industries who are paid at or near the minimum wage. Companies who do not know or forget about this law can wind up paying an excessive amount of money if they are sued and multiple employees are impacted; New York State wage-and-hour laws have a look-back

period of six years.

Employers are required to keep track of employee hours. They can do so in various ways, including punch clocks, hand or eye recognition time clocks, having employees sign in on their computers or having employees sign in on time sheets. However, with so many people working remotely during the pandemic, some employers' systems for tracking hours were disrupted. It's imperative that employers have an accurate system for keeping track of time worked by hourly employees.

Employees are considered hourly and entitled to overtime unless they are exempt. To be exempt from overtime, employees who work in Nassau or Suffolk counties must now earn a minimum of \$1,050 per week or \$54,600 annually and meet certain other criteria. For instance, to qualify for an executive exemption, the employee must manage two or more full-time employees, among other requirements. Further, to qualify for an administrative exemption, the employee must work in a white-collar position that allows discretion and independent judgment. Minimum salary thresholds for exempt employees have risen dramatically over the past few years, and employers who have not complied have left themselves open to costly misclassification lawsuits.

Another misclassification error that can land employers in hot water is classifying employees as independent contractors when they should really be employees. In recent years, the Department of Labor and the courts have taken a much closer look at workers' job duties and other factors to determine if the worker was truly an employee and therefore entitled to employee benefits, including overtime pay if applicable.

Coming out of COVID-19, many workers have been asking their employers, for various reasons, if they could be paid off the books. Not only can employers who do this run afoul of taxing authorities, but many times, employers who pay off the books do not keep good records of hours worked and pay given to the employee. In the event of a lawsuit, employers will need to produce records showing that they paid employees at least minimum wage, time and a half for overtime, spread of hours, if applicable, and that they gave wage notices required by New York State.

Employers must give employee wage notices – which list pay rates, how the employee is paid and other information – to all new employees and to employees who have a change in pay. These notices must be given in the employee's first language, whether it be English, Spanish, Korean, Polish or some other language. Many employers forget about the first-language requirement. The penalty for failing to give proper notices can be \$10,000 per employee. Thus, if you fail to give wage notice requirements to 200 employees, that could be \$2 million. Plaintiff's attorneys willingly take cases based on wage notice requirements alone, on contingency, so it costs the employees practically nothing to bring these types of law suits.

## Hiring Practices

Several laws concerning hiring practices have been passed in recent years, and it's important to ensure your application forms and recruiting and interviewing procedures



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are up to date. The so-called "Ban the Box" Law prohibits New York City employers from asking about criminal history on an employee's initial job application or doing a background check until after making a conditional job offer. Further, employers cannot ask about the prospect's salary history or about religious or disability accommodations at the interview. You can, however, ask candidates what salary they desire.

Pre-employment and even post-employment drug tests have also becoming more problematic, with New York City recently banning pre-employment drug testing for marijuana with limited exceptions. In particular, changes to laws regarding marijuana have thrown a monkey wrench into the process. While marijuana use is legal in New York State, it is not legal on the federal level, so there are competing laws governing marijuana use and the workplace. Some state legislatures are trying to ignore federal laws, but the courts are taking the position that federal laws cannot just be ignored. This convergence of competing laws and their impact on employment practices will be a big issue in the future.

## COVID Policies/Union Contracts

As companies return to work from the pandemic, there are many short-term issues related to COVID-19, particularly for employers with unionized labor. Interpretation of union contracts is a major issue, especially if there is conflict over new rules or when, and how, the workforce can return to the office. If, for instance, the company requires that employees get COVID vaccines or that workers return to the office full-time by a certain date, and the union disagrees, there may be contract issues as well as animosity in the workplace.

Fear of COVID is not a valid reason for employees to refuse to return to the office, but employers need to make reasonable accommodations related to COVID for people with disabilities. Further, employers are allowed to have a policy requiring employees to be vaccinated. However, reasonable accommodations must be made based on disabilities or religious beliefs.

The employment and labor practice at Forchelli Deegan Terrana LLP provides counseling and litigation services to management, human resources and personnel professionals on various employment and labor law matters. They have a powerful team ready to assist employers with the issues discussed as well as any litigation, prevention, terminations and discipline, or legal interpretation problems that arise.

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