

## Outside Counsel

# HR and Employment Issues Facing NY Employers in 2022

**D**espite COVID-fatigue, it is increasingly apparent that employers are likely to continue to deal with COVID-19 related employment issues throughout 2022. Just as we hoped the disruptions that had defined 2020 and 2021 would dissipate into the New Year, the Omicron variant reignited the proverbial fire. Still, notwithstanding the focus on COVID-19, the New Year is slated to bring a host of other employment law issues affecting New York employers.

### Vaccination Mandates

Although experts are still studying the Omicron variant, data suggests that it is more transmissible than other COVID-19 variants, leading governmental officials and employers to re-evaluate current COVID-19 safety protocols. Com-

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panies which had not previously instituted mandatory vaccination policies have been reconsidering as the virus continues to disrupt workplaces and in order to adapt

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to the changing legal landscape.

New York employers are particularly impacted by several COVID-19 measures enacted over the past few months and which will continue to remain in effect at least through early 2022, including, without limitation:

- the New York State Health and Essential Rights Act (HERO Act), which requires employers to implement different face covering requirements depending on whether all individuals, including, but not limited to, employees, on the premises are fully vaccinated;
- the NYS Health Commissioner's December 10th Determination on Indoor Masking, which largely tracks the face covering requirements of the HERO Act; and
- the New York City private employer vaccine mandate, which requires workers who perform in-person work or interact with the public in NYC to have submitted proof they received at least one dose of a COVID-19 vaccine by Dec. 27, 2021, and a second dose, if needed to be fully vaccinated, within 45 days thereafter.

Employers implementing mandatory vaccination policies, whether

voluntarily or to comply with a legal requirement, should ensure that their policies address the need for accommodations based on a qualified individual's disability or sincerely held religious belief, and for other qualifying reasons, such as pregnancy.

As we have seen this past year in the courts, a failure to consider the need for an accommodation runs the risk that a vaccine policy or mandate will be determined unlawful. Accordingly, employers should ensure that any mandatory vaccination policy they implement specifies the process by which employees can request an accommodation and that, if employees do request an accommodation, employers are engaging in interactive dialogues with those employees to determine, on a case-by-case basis, whether reasonable accommodations can be made absent undue hardship.

Employers should consider providing employees with educational materials about the benefits of COVID-19 vaccination; offering incentives to those who are unvaccinated to get vaccinated; requiring proof of vaccination; and granting paid time off to receive initial vaccinations and booster shots as required by applicable law, including New York State's paid vaccination leave law and other paid sick leave laws.

In addition, employers should consider how to address boost-

er shots under their vaccination policies. While the Centers for Disease Control and Prevention's definition of "fully vaccinated" is unchanged as of the time of writing this (i.e., two weeks after a second dose in a two-dose vaccine series (such as Pfizer or Moderna), or two weeks after a single-dose vaccine (such as Johnson & Johnson)), there are several proponents of updating that definition to include booster shots. If not requiring, employers with mandatory vaccination policies should be encouraging booster shots when appropriate.

### Whistleblower Protections

On Jan. 26, 2022, amendments to §740 of the New York Labor Law will take effect, vastly enhancing whistleblower protections in New York and requiring New York employers to take certain steps to ensure compliance.

Notably, under the amended law, employers are prohibited from taking adverse action against employees when, among other things, they disclose or threaten to disclose an activity, policy, or practice that they "reasonably believe" violates any law, rule, or regulation. Previously, this whistleblower law applied only to actual violations of the law that created and presented a substantial and specific danger to public health or safety or health

care fraud; the law is no longer so limited.

The amendments also expand the class of individuals covered by the law to include former employees and independent contractors, lengthen the statute of limitations from one year to two years, broaden the types of actions considered retaliatory, and increase the remedies available. Significantly, the law now entitles plaintiffs to a jury trial and front pay, civil penalties up to \$10,000, and punitive damages as potential remedies, on top of the previous remedies of injunctive relief, reinstatement, lost wages and benefits, attorney fees and costs, etc. Employers must inform employees of their rights under this whistleblower law by conspicuously posting a notice in an easily accessible and well-lit place frequented by employees and applicants for employment.

The shift from requiring an actual violation to providing protections based on an employee's reasonable belief of a violation, combined with the broadened definitions of covered persons and retaliatory actions and expanded remedies, greatly increases the risk for employers who take adverse action against a current or former employee or independent contractor. To minimize such risk, employers should review existing policies and procedures

regarding the management of complaints and ensure their managers are well trained.

### **Electronic Monitoring of Employees**

Effective May 7, 2022, employers who are engaged in electronic monitoring (including accessing, keeping records of, or monitoring emails, telephone activity, or Internet activity) will be required to give prior written notice upon hiring to all New York employees who are subject to electronic monitoring, and to post notice of their electronic monitoring in a conspicuous place readily available to such employees. Employees must acknowledge their receipt of such notice and employers must maintain records of the acknowledgements.

While civil penalties for violations range from \$500 for first offenses, \$1,000 for second offenses, and \$3,000 for subsequent offenses, employees have no private right of action for violations of the law. Additionally, the law does not apply to processes performed solely for the purpose of computer system maintenance or protection so long as such processes do not target an individual employee. That said, employer compliance remains important to avoid any penalties and defeat an employee's claim that they had

an expectation of privacy in their communications when using company resources.

### **Anti-Harassment Training In a Remote Environment**

Despite the litany of COVID-19 related disruptions to businesses over the past two years, both NYS and NYC remain adamant in enforcing their requirements for anti-harassment training programs. While virtual training programs have been and will continue to be permitted, employers must ensure that their programs satisfy

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all applicable requirements.

Both NYS and NYC require that sexual harassment training be "interactive" and include: (1) definitions and examples of conduct that constitute unlawful sexual harassment, (2) an explanation of remedies available to victims of sexual harassment under applicable statutory provisions, (3) information concerning employees' rights of redress and available forums for adjudicating complaints, and (4) descriptions

of supervisor responsibilities with respect to sexual harassment. NYC additionally requires that the training, inter alia, cover unlawful retaliation for reporting sexual harassment with examples and provide information regarding bystander intervention.

### **Diversity and Inclusion**

New York employers should refine their diversity and inclusion goals in 2022 to strengthen their workforces and as they will be held accountable by their customers, clients, workforces, and community. Employers may need to be flexible and creative in their retention and recruiting practices to meet their goals in light of the ongoing war for talent.

### **Looking Ahead**

In 2022, employers will continue to deal with the ever increasing amount of employment related legislation passed in New York State and New York City. During the first quarter of 2022, we can expect COVID-19 to remain at the forefront of employers' minds. However, other fundamental compliance issues should not fall by the wayside and it is imperative that employers stay abreast of the perpetually developing legal landscape.