ALERTS

Employment Law Updates

February 24, 2023

On Dec. 29, 2022, President Joe Biden signed an omnibus spending bill, which included the Pregnant Workers Fairness Act ("PWFA") and the Providing Urgent Maternal Protections for Nursing Mothers Act ("PUMP Act"). The measures expand protections for pregnant and nursing workers.

The PWFA, which goes into effect on June 27, 2023, requires employers with 15 or more employees to make reasonable accommodations for a qualified employee affected by pregnancy, childbirth or related medical conditions, provided the accommodation would not impose an undue hardship on the employer. A "qualified employee" is an employee or applicant who, with or without reasonable accommodation, can perform the essential functions of their position.[1] The PWFA makes it unlawful for an employer to require a qualified employee to accept an accommodation other than any reasonable accommodation arrived at through an interactive process, or require a qualified employee to take paid or unpaid leave if another reasonable accommodation can be provided. Employers may not deny employment opportunities to, or take adverse action against, qualified employees on the basis of an employee needing, requesting or using a reasonable accommodation.

The PUMP Act, which goes into effect April 28, 2023, expands existing employer obligations under the Fair Labor Standards Act to provide accommodations in the workplace for nursing employees. Employers in New York State and City are already subject to lactation accommodation laws, discussed here and here, which afford nursing employees broad protections.

The PUMP Act mandates that an employer shall provide (1) an employee with reasonable break times to express breast milk for the employee's nursing child for one year after the child's birth and (2) a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk. The Act clarifies that while employees are not entitled to compensation if no work is being performed, the breaks will be considered "hours worked" subject to compensation if the employee is not completely relieved from duty for the entirety of each break. Employers with fewer than 50 employees may be exempt from complying if they can establish that doing so would impose an undue hardship by causing the employer significant difficulty or expense. Employees have a private right of action under the PUMP Act, though an employee alleging a violation of the Act's lactation space requirement must notify their employer of the violation and allow the employer 10 days to remedy the situation before the employee may commence any action. Damages for violations of the PUMP Act include the payment of unpaid wages, reinstatement, back and front pay, and liquidated damages.

New York State Poster Requirements

All New York State employers with more than 50 full-time employees are now required to display the Veterans' Benefits & Services poster in a conspicuous place accessible to employees in the workplace. Additionally, an amendment to New York State Labor Law Section 201, now mandates that employers make notices required to be physically posted at a worksite under federal and state law also be available digitally through the employer's website or by email. The employer must also provide notice that documents required for physical posting are available electronically. Although the State law does not require posters required by local law, such as by New York City, be made available electronically, employers may do so.

New York State Adds Citizenship and Immigration Status as Protected Characteristics

The New York State Human Rights Law was amended to add citizenship and immigration status to the list of covered protected characteristics. Covered employers are now prohibited from discriminating, harassing or

retaliating against any individual because of their citizenship or immigration status. The law defines "citizenship or immigration status" as "citizenship of any person or the immigration status of any person who is not a citizen of the United States."

Artificial Intelligence Tools Updates

On Dec. 23, 2022, the New York City Department of Consumer and Worker Protection ("DCWP") issued a notice with updated proposed rules to the Automated Employment Decision Tools ("AEDT") law, previously discussed here. The proposed changes clarify certain standards for conducting bias audits, including requiring a separate calculation of "impact ratio" comparing AEDT's impact on race, ethnicity and sex categories. The enforcement date for the proposed law was recently pushed back four months to begin on April 15, 2023.

The federal Equal Employment Opportunity Commission ("EEOC") has indicated that the agency will focus on targeting potential bias from artificial intelligence ("AI") tools used by employers. While there is no current guidance on preventing AI bias for protected groups other than disability, it is expected that the EEOC and the Department of Justice will increase their focus on the use of AI in hiring and recruiting across all protected groups in the coming years.

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

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[1] If an employee or applicant's inability to perform such essential functions is temporary, the individual should still be considered "qualified," so long as the essential function could be performed in the near future and the inability to perform the essential function can be reasonably accommodated.

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