WORKING WISE - VOLUME 2

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Labor, Employment and Workplace Safety Alert

By: David J. Garraux

1. A LAW WITH (INCREDIBLY SHARP) TEETH: NEW JERSEY ENACTS LANDMARK WAGE THEFT LAW

Liability for non-payment of wages just got a lot more serious — and more expensive — in New Jersey due to the state's brand new wage theft law. Here's how:

- **Liquidated damages of 200% –** In addition to unpaid wages, employees can receive up to 200% of those wages as liquidated damages, plus reasonable costs and attorneys' fees (liquidated damages previously were not available for wage claims).
- **Longer statute of limitations –** Employees now have 6 years to file claims, up from two.
- **More potential defendants –** The new law has specific provisions relating to joint, successor, and individual liability, and prevents parties from waiving some of those provisions by contract or agreement.
- **Fines and criminal penalties –** The law beefs up penalties and creates a new crime of "pattern of wage nonpayment," i.e., where a person has been convicted of a wage and hour law violation on two or more occasions.
- **Stronger Anti-retaliation provisions –** The law expands the definition of retaliation and creates a presumption of retaliation for adverse employment actions taken within 90 days of filing a complaint with the New Jersey Department of Labor or in court.
- **Easier/more costly collective actions –** "Similarly situated" employees can now bring collective actions relating to any form of unpaid wages (not just minimum wage violations, as before) and seek unpaid wages, liquidated damages, attorneys' fees, and costs going back 6 years.

Why It's Important? New Jersey's Wage Theft Act is one of — if not *the* — strongest of its type in the country, and drastically expands employers' potential liability for wage and hour violations. If you have operations in New Jersey and have been looking for a reason to do a wage-and-hour audit, handbook update, and/or employment/termination/release agreement review, now is a great time.

2. ILLINOIS AND NEW JERSEY JUMP ON THE SALARY HISTORY BAN BANDWAGON

Illinois and New Jersey recently joined a growing number of states and cities that prohibit employers from asking job applicants about their salary history. The highlights:

- Both laws prevent employers from screening applicants based on salary history.
- New Jersey employers can consider a voluntary disclosure of salary history to determine compensation and, once an offer is made, may obtain a written authorization from the applicant to confirm salary history. By contrast, the Illinois law prohibits employers from considering voluntary disclosures of salary history in hiring or compensation decisions.
- Neither law protects current employees seeking a transfer or promotion within the same employer.

The Illinois law also protects employees' rights to discuss salary and benefits with others — contracts or other agreements that prohibit those discussions are unlawful. The laws take effect on September 29, 2019 (Illinois) and January 1, 2020 (New Jersey), and include civil penalties for violations.

Why It's Important? Salary history bans have been popping up in states and cities across the United States; among them are California, Connecticut, Delaware, Georgia, Hawaii, Maine, Massachusetts, Vermont, Washington, San Francisco, New York City, and Philadelphia, with more likely to follow. If you do business in a state or city with such a ban, it's a good time to review and update your employment applications, (re)train recruiters and other employees involved in the hiring process and amend your handbooks, policies, and employment agreements to ensure compliance.

3. TRENDSETTER ALERT: ILLINOIS BECOMES FIRST STATE TO REGULATE USE OF AI IN VIDEO INTERVIEWS

Illinois has a new Artificial Intelligence Video Interview Act (the "Act") — the first of its kind in the United States — regulating an employer's use of artificial intelligence (AI) to analyze video interviews for "positions based in Illinois." In a nutshell, the Act requires that employers:

- Notify applicants that AI may be used to analyze video interviews;
- Explain how the AI technology works and will be used to evaluate applicants;
- Obtain applicants' consent to have their interview videotaped and to use AI to analyze it;
- Destroy any video of backup copies within 30 days of an applicant's request; and
- Limit sharing of the video interviews to those whose expertise is required to evaluate the candidate.

The Act takes effect on January 1, 2020.

Why It's Important? While employers are increasingly using AI in recruitment, the area has largely gone unregulated. The Illinois Act provides employers with some structure, but it isn't perfect — noticeably absent from the Act are definitions of employers and "positions based in Illinois"; how the Act will be enforced (whether through a private right of action by the applicant or another means); how specific employers must be in explaining the AI technology they've elected the use (an issue that may be hamstrung by the proprietary nature of the technology itself); and whether employers may not consider an applicant who does not consent to the use of AI/videotaping. That said, AI in recruitment (and employment, generally) is a topic that isn't going away, and we can expect other states to follow Illinois' lead with similar legislation.

4. NEW YORK EMPLOYERS TAKE NOTE: NEW LAWS PROTECT HAIRSTYLE, RELIGIOUS DRESS, FACIAL HAIR, AND SEXUAL HARASSMENT VICTIMS

It was a busy summer in New York, with the passage of several new employment laws. Here's what New York employers need to know:

- **Hairstyle.** Following California's lead, New York now prohibits discrimination based on hairstyle, including hair texture and protective hairstyles such as braids, locks, and twists, the thought being that restrictive dress and grooming codes have a disparate impact on African American employees and applicants. The law immediately took effect.
- **Religious garb and facial hair.** New York employers can't discriminate against employees for donning religion-based attire or facial hair at work (i.e., turbans, yarmulke, headscarves, burqas, or hijabs). And, the burden is on the employer to show that it cannot reasonably accommodate the employee (by permitting the attire or facial hair) without undue hardship. The law takes effect on October 8, 2019.
- **Sexual harassment.** Sexual harassment no longer needs to be "severe or pervasive" to be actionable under New York state law, and employees now have three years (up from one) to file sexual harassment claims with the New York State Division of Human Rights (NYSDOHR). The law takes effect on October 11, 2019.
- **Faragher-Ellerth Affirmative Defense Eliminated.** Also effective October 11, 2019, New York has eliminated the "Faragher-Ellerth" defense by amending state law such that employees are no longer required to file a complaint about harassment in order to hold an employer liable.

Why It's Important? These personal-appearance laws do not prevent employers from having grooming and attire policies in place, but make clear that they can't disparately impact protected classes. Employers should review existing policies to ensure compliance. Separately, due to the relaxed standard and the elimination of the long-standing Faragher-Ellerth defense in New York, we can expect to see more sexual harassment claims in that jurisdiction, underscoring the need for employers to proactively eradicate inappropriate conduct in the workplace and to take seriously and adequately investigate allegations of sexual harassment.

5. THE NATIONAL LABOR RELATIONS BOARD (NLRB) ON ARBITRATION AGREEMENTS

The pro-employer NLRB issued some important decisions in August relating to mandatory arbitration agreements, one in favor of these commonly-used agreements and one against. According to the NLRB:

- Employers can change mandatory arbitration agreements in response to wage and hour class or collective actions under the Fair Labor Standards Act or state law. Going further, employers can also threaten to discipline employees who refuse to sign them.
- Employers cannot, however, confine "all claims and controversies" solely to the arbitration process; instead, employees must be permitted to exercise their rights under the National Labor Relations Act and file charges with the NLRB.

Why It's Important? Arbitration agreements are popular in employment for a number of reasons. While employers now have another weapon in their arsenal to counter — or stem the tide of — class or collective

actions, the NLRB is clear that the use of mandatory arbitration agreements is not without limits. Employers should review mandatory arbitration provisions in light of these rulings.

KEY CONTACTS

DAVID J. GARRAUX
PARTNER

PITTSBURGH
+1.412.355.6580
DAVID.GARRAUX@KLGATES.COM

