

# Harter Secrest & Emery LLP

ATTORNEYS AND COUNSELORS

## 2023 Labor and Employment Law Update

*for the Kenmore-Tonawanda Chamber of Commerce*

April 19, 2023



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## Presenters



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## Agenda

### New York

- Minimum wage and salary increases
- Sexual harassment model policy/training updates
- Wage transparency law
- Electronic poster requirements
- Protection for lawful absences
- Paid Family Leave updates
- Lactation accommodation expansion
- Increased protections against discrimination and retaliation
- COVID-19 updates: leave and safety

### Federal

- NLRB Decision Regarding Severance Agreements
- Pre-dispute agreements related to sexual harassment and sexual assault



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## NYS Sexual Harassment Resources

- New York Labor Law § 201-g
- Added in 2018 and requires all employers to adopt anti-sexual harassment policies and training programs that **meet or exceed** certain minimum standards.
- Employers can create their own policy and training materials (or use an outside trainer), or adopt the state's model policy and use the state's training materials.
- On April 11, 2023, the state published **a revised model sexual harassment policy and new training materials.**



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## NYS Sexual Harassment Resources *(cont.)*

- The updates include:
  - more discussion regarding sex/gender terminology
  - emphasis on the prohibition of harassment and discrimination based on all protected identities
  - a focus on analyzing bad conduct based on impact, rather than intent
  - detail on reporting methods, including the new DHR complaint hotline
  - more detail on the responsibilities of managers and supervisors
  - information on bystander intervention methods
  - new examples of sexual harassment
  - references to remote work



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## NYS Sexual Harassment Resources *(cont.)*

### **What should employers do?**

- Replace their current policy with the revised policy if they use the model policy or, compare their own policy with the revised policy and update as needed.
- Ensure their training materials continue to meet the state's minimum standards.



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## NYS Wage Increases

All Employees	
2022 Rate	2023 Rate
\$13.20	\$14.20

  

Service Employees	
2022 Rate	2023 Rate
\$11.00 Cash Wage \$2.20 Tip Credit	\$11.85 Cash Wage \$2.35 Tip Credit

  

Food Service Workers	
2022 Rate	2023 Rate
\$8.80 Cash Wage \$4.40 Tip Credit	\$9.45 Cash Wage \$4.75 Tip Credit

\*Different rates apply in NYC, Long Island, Westchester County



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## NYS Salary Increases

Administrative and Executive Employees	
2022 Min. Salary	2023 Min. Salary
\$990.00/week	\$1064.25/week

***Exempt professional employees are subject to the current federal minimum of \$684/week.***

\*Different rates apply in NYC, Long Island, Westchester County



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## NYS Pay Transparency Law

### What are we talking about?

- New York Labor Law § 194-b
- Effective **September 17, 2023**
- Employers with 4+ employees and recruiting agencies must include in posts for **jobs, promotions or transfers**:
  1. The compensation or range of compensation, and
  2. The job description, if one exists

***"Range of compensation"** = min. and max. annual salary or hourly range of compensation for the job, posting or transfer that the employer in good faith believes to be accurate at the time of posting*
- Jobs physically performed, at least in part, in NYS, plus jobs physically performed outside NYS but that report to a supervisor, office or worksite in NYS
- Ads for commission-only jobs must state they are paid on commission
- Does not supersede local pay transparency laws (NYC, Ithaca and Westchester County)
- Anti-retaliation provisions and civil penalties



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## NYS Pay Transparency Law (cont.)

### Let's Review a Similar NYC Law and Guidance...

- Effective November 1, 2022
- Employers with 4+ employees and employment agencies must post a good faith pay range in all ads for jobs, promotions or transfers
- Guidance issued:
  - Includes internal postings, internet ads, printed flyers at job fairs, and newspaper ads
  - Includes remote work positions as long as the job can be performed in whole or in part in NYC
  - The salary range cannot be open-ended, e.g., "\$15/hour and up" or "maximum \$50,000 per year"
  - The min. and max. salary may be identical, e.g., "\$20/hour"
  - The requirement to post salary does not include other forms of compensation or benefits, e.g., insurance, PTO, severance, OT, tips, bonuses, etc.



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## NYS Pay Transparency Law *(cont.)*

### What issues should employers anticipate?

- Determining the appropriate range
- Handling discrepancies between current employee pay and job postings
- Dealing with pay disparities between candidates with similar positions
- Managing remote work positions
- Tying salary/wage expectations to candidate's experience level, and handling wide ranges between new hires and more experienced employees
- Conducting small scope, word-of-mouth searches for high-level executives
- Offering more to a candidate with competitive offers
- Fielding questions from current employees and job candidates



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## NYS Pay Transparency Law *(cont.)*

### How should employers prepare?

- Conduct pay equity analysis
- Review and update current job descriptions, if they exist
- Document pay analysis, factors considered, and reasons for all compensation decisions
- Train employees responsible for the hiring process and pay decisions

*And watch out for forthcoming NYS Department of Labor regulations!*



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## Electronic Posting Requirements

- New York Labor Law § 201
- Effective: December 16, 2022
- Employers must **provide employee-rights posters electronically** through the employer's website or email
  - Website vs. intranet; employee access to email
- This includes **all** documents required to be physically posted at a worksite pursuant to federal or state law or regulation
- Must also **provide employees with notice** that posters will be available electronically



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## Electronic Posting Requirements *(cont.)*

- New York Posters:
  - <https://dol.ny.gov/posting-requirements-0>
- Federal Posters:
  - <https://www.dol.gov/general/topics/posters>



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## Electronic Posting Requirements *(cont.)*

- Where will you post?
- How will you notify employees?
- Recommend posting links that tie to the .pdf version on the government website
- Update links when new posters become available



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## Protection for Lawful Absences

- New York Labor Law § 215 – amended
- Effective **February 19, 2023**
- **Protected activity includes** taking legally protected absences under state, federal and local law
- **Retaliation includes** “assessing any demerit, occurrence, any other point, or deductions from an allotted bank of time, which subjects or could subject an employee to disciplinary action, which may include but not be limited to failure to receive a promotion or loss of pay”
- 2-year statute of limitations
- May recover lost compensation, liquidated damages, costs, and attorney’s fees, along with front pay or reinstatement



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## Protection of Lawful Absences *(cont.)*

### Action Steps:

- Understand what absences/leaves are legally protected
- Review and revise attendance and leave policies
- “No fault” policies should be revised to specifically exclude legally protected absences
- Appropriate non-retaliation language should be added to attendance and leave policies
- Ensure other employment decisions do not improperly consider legally-protected leave (promotion, salary increases, etc.)



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## NYS Paid Family Leave

### Coverage Extended

- Effective January 1, 2023
- Employees are now permitted to take paid family leave to care for a **sibling** with a serious health condition
- Includes biological, adopted, step- and half-siblings

### Benefit and Rate Changes

	2022	2023
Maximum Weekly Benefit	67% of AWW, up to a max. of \$1068.36	67% of AWW, up to max. of \$1131.08
Employee Contribution Rate	0.511% of gross wages, up to max. of \$423.71	0.455% of gross wages, up to max. of \$399.43



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## Breastfeeding Accommodations

New York Amendments to Labor Law 206-c	Federal PUMP for Nursing Mothers Act
<ul style="list-style-type: none"> <li>Effective June 7, 2023</li> <li>Employees must be permitted to pump <u>each time</u> they have need</li> <li>No exceptions to the requirement to allow employees to pump</li> <li>Employer must provide a room for employees to pump, or make reasonable efforts to do so if it would pose an undue hardship</li> <li>State-created written policy</li> </ul>	<ul style="list-style-type: none"> <li>Effective April 28, 2023</li> <li>Coverage extended to all employees, not just non-exempt workers</li> <li>Time must be paid if employee is not completely relieved from duty</li> <li>Exemptions for employers with less than 50 employees if the requirements would pose an undue hardship, and for air carriers</li> </ul>



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## NYS Breastfeeding Accommodations

- New York Labor Law § 206-c
- Effective June 7, 2023
- Employees must be allowed to express breast milk **each time** the employee has a reasonable need for three years following childbirth – **no exceptions!**
- May be unpaid break time
- Employers must provide a state-created policy (1) upon hire, (2) annually thereafter, and (3) following the birth of a child  
*Written policy from the state forthcoming!*
- Employers must respond to a request for a room to pump in no more than five days



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## NYS Breastfeeding Accommodations *(cont.)*

- Employers must provide a room upon request, and:
  - The room cannot be a restroom or toilet stall
  - The room must be (1) in close proximity to the work area, (2) well lit, (3) shielded from view, and (4) free from intrusion from other people
  - The room must have a chair, working surface, nearby access to clean running water and, if the workplace has electricity, an electrical outlet
  - The room must be available when needed and not used for any other purpose when in use by nursing employee
  - Employers must provide notice to all employees as soon as practicable when a room is designated for this purpose
  - If the workplace has refrigeration, the employer must allow access



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## NYS Breastfeeding Accommodations *(cont.)*

- If this would pose an undue hardship, the employer must still make **reasonable efforts** to provide a room that is not a bathroom for nursing employees



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## Discrimination and Retaliation in NYS

- New York Exec. Law § 296
- Effective December 23, 2022
- Adds “**citizenship or immigration status**” as a protected category under the New York State Human Rights Law
- 2022 Amendments included expanding unlawful retaliation to include **disclosing an employee's personnel files** because the employer has engaged in protected activity, unless the disclosure was made in the course of a proceeding



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## NYS COVID-19 Vaccination Leave

- Effective March 12, 2021
- Extended until **December 31, 2023**
- Here's a refresher:
  - All public and private employers
  - Up to 4 hours of paid leave per injection to receive COVID-19 vaccine
  - Includes boosters
  - Cannot be charged against any other leave to which employee is entitled
  - Paid at regular rate of pay
  - No discrimination or retaliation
- NOTE: COVID-19 Quarantine Leave is still in effect



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## NYS HERO Act

- As of March 17, 2022, COVID-19 is **no longer** a designated airborne infectious disease under the HERO Act
- Employers must still have an infectious disease plan, which must be
  - posted in the workplace,
  - provided to employees, and
  - included in the employee handbook
 ...but the plan does not need to be implemented
- For employers with **at least 10 employees**: if an employee requests to form a workplace safety committee, an employer must recognize the committee within **five business days** or face penalties of \$50/day



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## NLRB Decision Regarding Severance Agreements

- McLaren Macomb, 372 NLRB No. 58 (2023)
- The NLRB held **confidentiality** and **non-disparagement** terms in severance agreements restrict the exercise of employees' NLRA Section 7 rights to engage in protected, concerted activities.
- On March 22, 2023, the NLRB General Counsel issued a memorandum, which indicates **narrowly-tailored** confidentiality and non-disparagement provisions may be considered lawful.
- Disclaimers are useful tools, but the GC has indicated "would not necessarily cure overly broad provisions"
- If you are drafting a separation/severance or settlement agreement, consider whether to include confidentiality and non-disparagement provisions. If you do, they should be narrowly-tailored, and you should consider using a disclaimer that Section 7 activities are not prohibited.



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## Federal Speak Out Act

- Effective December 7, 2022
- Prohibits **non-disclosure and non-disparagement** clauses in contracts or agreements agreed to **before** a dispute arises involving sexual assault or sexual harassment
- Includes agreements between employers and current, former and prospective employees, and independent contractors, as well as providers of goods/services and consumers
- Applies to claims filed on or after December 7, 2022
- Employers may still protect trade secrets and proprietary information
- Does not apply to separation and settlement agreements **BUT New York State already prohibits confidentiality in employment discrimination and harassment settlement agreements** unless the victim requests it



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## Questions?



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## Contact Us



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