PHILLIPS NIZER LLP

EMPLOYMENT & LABOR LAW

Mid-Year Review

2018 All-Stars of Employment Law

Disclaimer: This information is provided as a public service to highlight matters of current interest and does not imply an attorney-client relationship. It is not intended to constitute a full review of any subject matter, nor is it a substitute for obtaining specific legal advice from competent, independent counsel.

This year has been "Epic" in terms of pivotal developments in the field of employment law. Now that Major League Baseball has celebrated its annual Midsummer Classic, we likewise pause to evaluate the major events in employment law during the first half of 2018.

Leading Off – Preventing Sexual Harassment through Workplace Policies and Training

The first big hits this year came off the bats of the "TIME'S UP" and "#MeToo" movements.

NYS changes (effective October 9, 2018):

- All employers required to distribute written anti-harassment policies.
- All employers required to implement mandatory annual training programs.

The New York State Department of Labor and New York State Division of Human Rights will be developing model policies and training programs; employers can either adopt those models, or can develop their own policies and training programs that meet or exceed the state models.

NYC changes:

- Effective September 6, 2018, all employers **must** display a poster on anti-sexual harassment rights and responsibilities, and must distribute an information sheet on sexual harassment to employees at the time of hiring.
- Effective April 2019, all employers with 15 or more employees (including interns) must provide anti-sexual harassment training to all employees, supervisors and managers ***within ninety (90) days of hire and annually***, and must maintain records for three years.

Hitting Clean-Up – Additional Legal Changes Impacting Claims of Sexual or Gender-Based Harassment or Discrimination

NYS Human Rights Law changes relating to claims of sexual harassment:

- Protections expanded to cover a company's contractors, sub-contractors, vendors, consultants and others.
- Employers are prohibited from requiring non-disclosure and confidentiality provisions in

employment, severance and separation agreements.
- Mandatory arbitration of sexual harassment claims is prohibited (unless provided by Federal law or collective bargaining agreement).

NYC Human Rights Law changes relating to claims of sexual or gender-based harassment:

- Now applies to all employers regardless of size.
- Now covers interns in the same manner as employees.
- "Sexual orientation" includes full continuum of heterosexuality, homo-sexuality, bisexuality, asexuality and pansexuality; "gender" encompasses gender identity and gender expression, including a person's actual or perceived gender-related self-image.
- Statute of limitations for filing complaints of sexual or gender-based harassment extended to three years.
- As of October 15, 2018, employers will be required to engage in a good faith "cooperative dialogue" with an employee to determine a reasonable accommodation for the employee's religion, disability, pregnancy/childbirth or status as a victim of domestic violence that would allow the employee to "satisfy the essential requisites" of her/his job.

The Rest of the Lineup – Other Changes in Labor and Employment Laws

NYS Paid Family Leave Benefits Law (effective January 1, 2018):

- Eligible employees receive 8 weeks of paid leave in 2018, increasing to 10 weeks in 2019 and 12 weeks in 2021.
- Eligible employees are entitled to job protection and continuation of certain benefits during family leave, funded through employee payroll deductions.

NYC Earned Safe and Sick Time Act:

- Now covers "safe time leave" for victims of domestic violence, sexual offenses, stalking and human trafficking.
- Employers **must** grant schedule changes under certain circum-stances.
- Employers **must** give written notice of available leave to current employees and new hires.

Pitching Change – *Epic Systems* and Arbitration Provisions in Employment Agreements

The second big hit of the year came from the Supreme Court on May 21, 2018, in *Epic Systems Corp. v. Lewis*. By a vote of five to four, Justice Gorsuch's majority opinion held that provisions in employment contracts that require individual arbitration proceedings and bar employees from seeking relief in class or collective actions (class action waivers) are valid and enforceable, and do not violate the National Labor Relations Act. Justice Ginsburg issued a strong dissent, calling the majority's decision "egregiously wrong".

Since the decision, courts all over the country have seen a surge of motions seeking to deny collective/class certifications and to dismiss claims in favor of individual arbitration proceedings. Cases most likely to be affected will be those under the Fair Labor Standards Act, as well as claims of pay disparity or other unlawful discrimination under Title VII. It is not as likely that *Epic Systems* will have much impact on claims of sexual harassment.

There are many considerations in deciding whether to include mandatory arbitration provisions in employment agreements, such as potential negative publicity and damage to business reputations. The ultimate effect of *Epic Systems* on employer-employee relations remains to be seen.

Game-Winning Strategies

Employers should take the following steps to ensure legal compliance:

- **REVIEW AND UPDATE EMPLOYEE HANDBOOKS.**
- **SCHEDULE ANTI-HARASSMENT TRAINING.**
- **REVIEW AND UPDATE EMPLOYMENT-RELATED AGREEMENTS.**
- **CONSULT WITH COUNSEL.**

The Closer

The experienced attorneys in Phillips Nizer LLP's Employment and Labor Practice are available to help keep you on a winning streak by creating new or reviewing existing handbooks, policies, training programs, and agreements affecting employment and general employee relations.

Full Report Available

For a more expanded analysis of the issues presented in this Mid-Year Review, please e-mail **Regina Faul**, Chair, (rfaul@phillipsnizer.com) for a copy.

About the Labor & Employment Law Practice

Members of Phillips Nizer's Labor & Employment Practice have expertise in all aspects of labor-management and employee relations, including collective bargaining negotiations, arbitrations, disputes regarding multi-employer pension funds, proceedings before the National Labor Relations Board, the defense of employment discrimination, sexual harassment and wrongful discharge claims, defense of wage and hour claims, restrictive covenants and providing general advice and counseling concerning day-to-day employment-related issues on behalf of management. We also counsel employers with respect to employment compensation agreements, consultation agreements, executive employment contracts, employment practices audits, handbooks, and employee/supervisor training.

We have long been recognized as having one of the nation's quality labor practices representing management. Attorneys active in this area represent corporations, professional associations and businesses of every size. Our attorneys are proficient in dealing with union organizing efforts, employee benefit and pension matters, executive compensation programs and law compliance matters. We prepare well planned strategies, skillfully drafted briefs and thoroughly researched legal opinions without forgetting our clients' desires for efficient and economical performance.

We have a personal style that is responsive. In the courtroom and across the bargaining table, we aggressively represent our clients' interests; but we also see our role in the broader perspective as counselors to our clients regarding their business concerns. We believe that our special attention to the urgency of labor matters is a key ingredient to our success. Our aim is to build a long term relationship of trust and confidence with each client and to work side-by-side with clients in achieving their business goals.

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