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No Federal Action? No Problem. How New York State May Pick Up the Slack on Employee Protections

Employee Protections

Less than three months into his presidency, President Donald Trump appears intent on honoring his pledge to cut regulations on businesses, and has even signed an Executive Order requiring that, for every new federal regulation implemented, two must be cut. However, while many employers may be breathing a sigh of relief at the prospect of less pervasive regulatory burdens, such celebration may be premature. With the U.S. Department of Labor—among other federal agencies—expected to take a less ''active'' regulatory stance, state and local governments may pick up the slack and, in some instances, specifically carry forward initiatives that were once on the federal agenda. In this *Bloomberg Law* Insights article, Venable attorneys Brian Turoff and David Katz discuss efforts underway in New York to continue the push for additional employee protections, even in the absence of federal action.

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Throughout his campaign, President Donald Trump vowed to cut regulations on businesses. Less than three months into his presidency, he appears intent on honoring this pledge, and has even signed an Executive Order requiring that, for every new federal regulation implemented, two must be cut. *See* ''Presidential Executive Order on Reducing Regulation and Controlling Regulatory Costs'' (Jan. 30, 2017), at https://www.whitehouse.gov/the-press-office/2017/01/30/presidential-executive-order-reducing-regulation-and-controlling.

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New York may be a leader in this effort. Indeed, New York State Attorney General Eric Schneiderman has made it an express priority to continue the state's push for additional employee protections, even in the absence of federal action. In a recent press release, Schneiderman made clear that ''if the federal government falls down on the job, we won't hesitate to act to protect workers.'' *See* ''Statement from A.G. Schneiderman on The Repeal of Workplace Protections, N.Y. State Office of the Attorney General'' (March 27, 2017), at https://ag.ny.gov/press-release/statement-ag-schneiderman-repeal-workplace-protections.

The forthcoming and anticipated laws described below illustrate this active regulatory approach, and may be only the tip of the iceberg.

Restrictions on Noncompetition Agreements In 2016, the Obama administration took a strong stance against employers' perceived overreaching in the use of ''restrictive covenants,'' namely noncompetition and nonsolicitation agreements, issuing various Executive

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Orders and White House reports aimed at curtailing their use. Specifically, a May 2016 White House report concluded that, ''[a]lthough non-competes can play a beneficial role when used in a limited way, evidence suggests that in certain cases, non-competes can reduce the welfare of workers and hamper the efficiency of the economy as a whole by depressing wages, limiting mobility, and inhibiting innovation.'' *See* ''Non-Compete Agreements: Analysis of the Usage, Potential Issues, and State Responses, White House Report'' (May 2016), at https://obamawhitehouse.archives.gov/sites/default/files/non-competes_report_final2.pdf. In October 2016, the Obama administration then backed a range of federal initiatives to limit the use of noncompetition agreements.

Although it is unclear whether the Trump administration has definitively abandoned this pursuit, it is correspondingly clear that New York State has not. Indeed, in October 2016, Schneiderman promised that he would propose comprehensive legislation in 2017 that would severely restrict the ability of New York employers to use noncompetition agreements.

According to Schneiderman, the proposed bill ''will protect workers' rights to seek new and better opportunities, particularly low-wage workers who have been locked into minimum wage jobs due to non-competes. It will also ensure that businesses can hire the best worker for the job.'' *See* ''A.G. Schneiderman Proposes Nation's Most Comprehensive Bill to Curb Widespread Misuse Of Non-Compete Agreements, N.Y. State Office of the Attorney General'' (Oct. 25, 2016), at https://ag.ny.gov/press-release/ag-schneiderman-proposes-nations-most-comprehensive-bill-curb-widespread-misuse-non. Among other things, the proposed bill would:

- Prohibit the use of noncompetition agreements for any employee below the salary threshold set by New York Labor Law Section 190(7), currently $900 per week (or $46,800 per year);
- Prohibit noncompetition agreements that are broader than needed to protect an employer's trade secrets or confidential information;
- Require that noncompetition agreements be provided to employees *before* a job offer is extended;
- Require employers to pay employees additional consideration in exchange for signing noncompetition agreements;
- Limit the permissible duration of noncompetition restrictions; and
- Create a private right of action with remedies, including liquidated damages for violations of the foregoing provisions.

If signed into law, these New York-specific restrictions would be among the strictest in the nation, and would dramatically alter employers' ability to use noncompetition agreements in all but the narrowest of circumstances, thus realizing the objective of the Obama administration.

Paid Family Leave While both Democrats and Republicans have each proposed would-be federal legislation mandating some form of paid parental leave—including specific comments to this effect by President Trump during a Feb. 28, 2017, address to a Joint Session of Congress—to date, no such law has been passed, nor is the future of such legislation clear at present. New York, on the other hand, has taken matters into its own hands. In April 2016, New York Gov. Andrew Cuomo (D) signed into law the New York Paid Family Leave Act (the ''Act''), one of the first paid family leave laws in the nation.

The Act will phase in incrementally on an annual basis, beginning on Jan. 1, 2018. At the outset, employees who have been employed for at least 26 consecutive weeks will be entitled to a maximum of eight weeks of family leave per year (increasing to 12 weeks by Jan. 1, 2021), at a rate of 50 percent of the employee's average weekly wages, not to exceed 50 percent of New York State's average weekly wage (increasing to 67 percent by Jan. 1, 2021). Such compensation will be financed by deductions taken directly from employee wages; employers will have no direct compensation obligations. Notably, rumored federal ''paid leave'' legislation, even if passed, currently contemplates only six weeks of paid leave.

Pursuant to the Act, eligible employees will be entitled to take paid family leave to (i) provide care for a family member because of the family member's serious health condition, (ii) bond with their child during the first 12 months after the child's birth or adoption, or (iii) attend to exigencies arising in connection with a spouse, child, or parent who is serving on active military duty. Thus, again, in the absence of federal action, New York continues to press forward with employment-related regulations with which employers must comply.

Questions Regarding Employee Salary History While closing the pay gap for female and minority employees has been a topic of federal attention, to date no formal legislation has been passed. On the other hand, in August 2016, Massachusetts became the first state to prohibit employers from asking about an employee's salary history during a job interview. In so doing, this law seeks to break the cycle of gender- and race-based pay disparities and prevent such disparities from following employees throughout their careers. Instead, Massachusetts employers must now set forth salary offers upfront, based on objective market considerations, experience, and qualifications.

Signaling action on the city and local levels in New York, in November 2016, New York City Mayor Bill de Blasio (D) signed an Executive Order similarly prohibiting New York City agencies from inquiring into employee salary history. Shortly thereafter, in January 2017, Gov. Cuomo signed an Executive Order for New York State agencies. Moreover, the legislatures of New York State and New York City are considering bills that would extend the foregoing prohibition to private employers as well.

What Should Employers Do? If the above-noted examples foretell anything, it is that the prospect of limited federal regulation should not breed complacency among employers. To the contrary, employers—particularly those who conduct business in multiple states and cities—must remain vigilant for forthcoming and potential changes to state and local employment laws. And as individual state and local governments separately take up the cause of promoting employee protections, the web of regulations will become more,

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not less, complex. Employers must therefore be careful not to fall asleep at the federal wheel.

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