

# Bond

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## 2022 Overview of Employment Laws and Regulations

# Topics

- Legal developments and changes to the New York State Human Rights Law and the New York State Whistleblower Law concerning discrimination and retaliation in the workplace
  - How best to approach claims of discrimination and/or retaliation given these changes
- Evaluation of requests for exemption from the COVID-19 vaccine mandate based upon religious beliefs or medical reasons
  - Workplace vaccine mandate exemption lawsuits
- Fair Labor Standards Act (FLSA)
  - Employee Classifications

# NEW YORK STATE HUMAN RIGHTS LAW AND NEW YORK LABOR LAW SECTION 740

# New York State Human Rights Law

- 2021 Changes
  - Discontinuance of Private Settlements
    - The Division of Human Rights will no longer discontinue complaints as a result of a private settlement between the parties.
    - Parties must settle the matter through an Order after stipulation that states the terms of the settlement.
  - New Protections for Domestic Workers
    - Domestic workers are now considered “employees” for all purposes under the Human Rights Law and have full protections of the Law’s employment provisions.

# New York State Human Rights Law

- 2022 Changes
  - Effective July 14, 2022, the Division must establish a toll-free, confidential, and safe legal hotline for reporting workplace sexual harassment.
    - Connects complainants with experienced pro bono attorneys
  - Changes definition of employer to include the State
    - The State is now considered direct employer of elected and appointed officials and their staff for the purposes of the Human Rights Law.
  - Effective March 16, 2022, release of an employee's personnel files because of an employee's filing of a complaint or cooperation with an investigation counts as **unlawful retaliation** and is completely prohibited, except where such release is necessary to comply with an investigation or an administrative or judicial proceeding.

# NEW YORK LABOR LAW SECTION 740

# Whistleblower Law

NYLL 740 prohibited employers from retaliating against employees who disclose illegal or improper actions by the employer. Prior to amendment, NYLL 740 protected only those employees who disclosed employer activity that violated a law relating to public health and safety or healthcare fraud.

# Whistleblower Law

- **Changes to NYLL 740**

- The definition of “employee” will include former employees and independent contractors.
- Executive orders and judicial or administrative decisions, rulings and orders will be within the definition of “law, rule, or regulation.”
- The revised law clarifies that for employer actions to be considered “retaliatory,” they need not be “personnel” actions.
- In addition to actions that would commonly be understood to constitute retaliation, such as actual or threatened termination, suspension or demotion, employers may not (1) take action that would harm a former employee’s current or future employment, such as “blackballing” within an industry; or (2) report or threaten to report the immigration status of the employee or the employee’s family member.

# Whistleblower Law

- **Changes to NYLL 740**

- Employees will be protected if they disclose or threaten to disclose to a supervisor or public body an activity, policy or practice that the employee *reasonably believes* (1) violates a law, rule or regulation; **or** (2) poses a substantial and specific danger to public health and safety.
  - The employee will not have to establish that the employer actually violated a law. The employee's reasonable belief is enough.
  - Employees will also be protected for disclosing an employer activity that presents a danger to public safety, even if that activity is not unlawful.
- Statute of limitations is increased to two years and the parties are also entitled to a jury trial.
- Employers can be liable for punitive damages if the violation was willful, malicious or wanton. Front pay will be available to employees. Employers can also be assessed a civil penalty up to \$10,000.

# Whistleblower Law

- Changes to NYLL 704
  - Under the revised law, an employee will only have to make a “good faith effort” to notify the employer.
    - The employee will not have to make a good faith effort to notify the employer if the employee reasonable believes that:
      - There is imminent danger to public safety; or
      - The employer will destroy evidence; or
      - Physical harm would result; or
      - The employer is already aware of the activity and will not correct it.
  - Employers are required to post notice of employees’ rights under the law in conspicuous places customarily frequented by employees and applicants for employment.

# Required Updates under NYLL 740

- The Not-for-profit Corporation Law only requires whistleblower policies for organizations reaching specific employment and revenue thresholds. Labor Law Section 740, on the other hand, applies to all employers having at least one employee. Accordingly, all New York nonprofits having at least one employee should now consider adopting a policy.
- Labor Law Section 740 protects not only current employees from retaliatory action but also *former* employees as well as independent contractors, who are not typically covered under current whistleblower policies. Policies should thus be expanded to include former employees and independent contractors, and otherwise modified to ensure everyone covered by Labor Law 740 is included.
- Labor Law Section 740 now protects employees who make reports whenever they “*reasonably believe*” there is a violation, whereas NPCL Section 715-b requires protection where there is a “*good faith*” report of a violation. Policies should be updated carefully to include both terms in ways that do not result in a violation of either requirement.

# COVID-19: Workplace Vaccine Mandates

# COVID-19: Workplace Vaccine Mandates

## New York State Vaccine Mandate

- All healthcare facilities regulated by New York State must require personnel to receive a COVID-19 booster dose or supplemental dose as recommended by the CDC, on top of the primary series of a COVID-19 vaccine.
- Consistent with the prior regulation requiring personnel to receive primary series of the COVID-19 vaccine, there is no religious exemption to the vaccine, only a medical exemption.
- The amendment adding the COVID-19 booster requirement for healthcare workers became effective on January 21, 2022. The original requirement for vaccination took effect on August 26, 2021.
- Other employees may be subject to vaccine requirements by an employer. There is currently no ban on private business vaccination mandates in NYS.

# Assessing COVID-19 Vaccine Mandate Exemption Requests

## Religious Accommodations

- New York State regulations do not permit religious exemption to vaccine mandate for health care workers. Courts have upheld NYS regulation but noted there could be a religious accommodation to the vaccine mandate.

# Assessing COVID-19 Vaccine Exemption Requests

## Religious Accommodation

- EEOC updated its guidance regarding religious accommodations for the COVID-19 vaccine mandate.
  - Employer may make a “limited factual inquiry” and seek “additional supporting information” from the employee regarding the employee’s request for a religious accommodation if the employer has an objective basis for questioning the religious nature of the request or the sincerity of the employee’s asserted religious belief.
  - Employer may ask the employee to explain the religious nature of their belief. This is especially helpful in situations where the employee’s asserted religious belief is nontraditional or unfamiliar to the employer.
  - Title VII does not protect “social, political, or economic views, or personal preferences.” Accordingly, an employee who makes a request purely based on a social, political or economic view or based on a personal preference would not be entitled to a religious accommodation.
  - Other “nonreligious concerns” such as a concern about the possible effects of the vaccine are not protected.

# Sincerely Held Religious Belief

- Employers may evaluate whether the asserted religious belief is sincerely held.
- The sincerity of an employee's religious belief can be challenged if the following factors are present:
  - Employee has acted in a manner inconsistent with the possessed belief;
  - The accommodation sought is a particularly desirable benefit that is likely to be sought for nonreligious reasons;
  - Timing of the request renders it suspect (i.e., following an earlier request by the employee for the same benefit for secular reasons); and
  - The employer otherwise has reason to believe the accommodation is not sought for religious reasons

# Undue Hardship

- When would a requested accommodation constitute an undue hardship?
  - An accommodation that would require an employer to bear more than a minimal cost is an “undue hardship.”
  - Employers can consider whether:
    - The risk associated with unvaccinated employee spreading COVID-19 to other employees or to the public;
    - The accommodation would burden the conduct of the employer’s business;
    - The accommodation would violate federal law;
    - The accommodation would impair workplace safety;
    - The accommodation would diminish efficiency in other jobs; or
    - The accommodation would cause coworkers to carry the accommodated employee’s share of potentially hazardous or burdensome work.

# UNDUE HARDSHIP

- Other factors relevant during the COVID-19 pandemic when an employee is requesting a religious accommodation to the COVID-19 vaccination requirement include:
  - Whether the employee works outdoors or indoors;
  - Whether the employee works in a solitary or group work setting;
  - Whether the employee has close contact with other employees or members of the public (especially medically vulnerable individuals); or
  - Whether many employees are seeking a similar accommodation (i.e., the cumulative cost or burden on the employer).

# Assessing COVID-19 Vaccine Mandate Exemption Requests (cont.)

## Medical Accommodations

- Requests for ADA exemptions must identify a specific condition that makes getting the vaccine a health risk, which must be supported by documentation from a physician.
- Employers are advised to consider all the options before denying an accommodation request, including number of vaccinated employees in the workplace and extent of employee contact

# FAIR LABOR STANDARDS ACT

# Fair Labor Standards Act (FLSA)

- Establishes minimum wage, overtime pay, recordkeeping, and youth employment standards affecting employees in the private sector and in Federal, State, and local governments
- Covers only **employees**, not independent contractors
- Misclassification of employees as independent contractors presents serious issues
  - Denial of benefits and protections
  - Damaging effects on business
  - Hardship on employee

# Classifications under the Fair Labor Standards Act

- Exempt Employees
  - Under the FLSA, all employees are considered non-exempt unless the employer establishes that the employee's position meets specific exemption criteria. Exempt employees are employees who meet one of the FLSA exemption tests and who are paid on a fixed salary basis and not entitled to overtime. Employees who are exempt include:
    - **Administrative employees** whose primary duty is the performance of office or non-manual work *directly related to the management or general business operations* of the employer or the employer's customers; and includes the exercise of *discretion and independent judgment* with respect to matters of significance.
    - **Executive employee** whose primary duty is managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise and who customarily and regularly directs the work of two or more other full-time employees; and has the authority to hire or fire other employees.
    - **Learned Professional** who performs work requiring advanced knowledge in a field of science or learning; and advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

# Classifications under the Fair Labor Standards Act

- Exempt Employees
  - **Computer Professional** whose primary duty consists of the application of systems analysis techniques and procedures; or the design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications; or the design, documentation, testing, creation or modification of computer programs related to machine operating systems.
  - **Highly Compensated Employees** are employees whose total annual compensation of \$107,432 and customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee.
  - **Outside Sales** whose primary duty is making “sales,” or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and is customarily and regularly engaged away from the employer’s place or places of business in performing such duty.

# Classifications under the FLSA

- **NON-EXEMPT EMPLOYEES**

- Hourly employee who must be paid at least the applicable minimum wage for each hour worked. Non-exempt employees are entitled to overtime at time and one half their salary whenever they work more than 40 hours in a workweek

- **INDEPENDENT CONTRACTORS**

- The legal test to consider when determining if an individual is an employee or an independent contractor is whether the individual has the right to direct and control the means of the work. There are several factors which must be considered including whether they:
  - Run their own business
  - Are paid upon completion of project
  - Provides own materials, tools and equipment
  - Works with multiple clients
  - Is a temporary relationship
  - Decides how and when they will perform the work
  - Decides what work they will do

# Common Misclassifications of Employees

- Designating a worker as an independent contractor when they are an employee
- Classifying an exempt employee as a non-exempt employee

## **Recommendations for Employers:**

- Always verify that your classifications are consistent not only with the FLSA, but with any applicable state and local laws!

# Questions?

# Presenter



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