Engage PEO Client Alert – New York

Changes to Cannabis Use, Exempt Employee Salary Thresholds, and Whistleblower Law

New York State Updates

New York Department of Labor Issues Guidance About Lawful Use of Cannabis and Drug Testing

Earlier this year, NY legalized the use of recreational marijuana for people 21 years and older. **Under NY law, employment discrimination based on lawful activities conducted outside of work, including the use of recreational cannabis, is prohibited. The law applies to all private and public employers in New York State.**

Employers may not restrict the use of cannabis during non-working hours and off company premises but may restrict the possession of cannabis on employer property and during "work hours," including when an employee is on call and during paid and unpaid breaks and meal periods.

Employers may take adverse action against an employee for their use of cannabis, where:

- "An employer is/was required to take such action by state or federal statute, regulation, or ordinance, or other state or federal governmental mandate
- The employer would be in violation of federal law
- The employer would lose a federal contract or federal funding
- The employee, while working, manifests specific articulable symptoms of cannabis impairment that decrease or lessen the employee's performance of the employee's tasks or duties
- The employee, while working, manifests specific articulable symptoms of cannabis impairment that interfere with the employer's obligation to provide a safe and healthy workplace as required by state and federal workplace safety laws."

The State did not provide an exhaustive list of "articulable symptoms of impairment," but advised that "articulable symptoms of impairment are objectively observable indications that the employee's performance of the duties of the position of their position are decreased or lessened." However, the State cautioned that protected disabilities may also manifest as "articulable symptoms of impairment," and advised employers to "consult with appropriate professionals regarding applicable local, state, and federal laws that prohibit disability discrimination."

New York to Increase Salary Threshold

The New York State Department of Labor Wage Orders incrementally increase the salary threshold for New York employees classified under the Executive and Administrative exemptions. **The new Wage Order increases take effect on December 31, 2021**. Employers working in multiple locations in New York State will need to apply different salary thresholds depending on their employees' location within the state. The salary base increases are detailed in the chart below.

Base Salary Per Week For Exempt Executive and Administrative Employees		
Area	**Effective Date**	**Rate of Pay**
NYC Large Employers (11 or more employees)	12/31/2018	$1,125.00 Weekly ($58,500 annually)

NYC Small Employers (10 or fewer employees)	12/31/2019	$1,125.00 Weekly ($58,500 annually)
Nassau, Suffolk, Westchester Counties	**12/31/2021**	**$1,125.00 Weekly ($58,500 annually)**
Employers in All other NYS Counties	12/31/2021	$990.00 Weekly ($51,480 annually)

New York employers must provide employees with written notice of changes to compensation and other terms of employment at least seven days in advance of those changes going into effect. However, other than hospitality employers, notice is not required for each increase in pay, where the increased rate of pay is reflected on the employee's next wage statement. Notably, where an employee's wage rate is reduced, an employer must notify the employee in writing, prior to implementation of the reduction. Hospitality industry employers must provide a new notice to employees every time that their wage rate changes.

Although employers are not required to use the state provided forms, doing so ensures compliance and also may be beneficial, as they are available in multiple languages. For downloadable forms in multiple languages visit the NYS DOL website. Employers planning to change the wage or status of a New York employee from non-exempt to exempt or vice versa should provide a Wage Notice.

New York Revises Whistleblower Law

Effective January 26, 2022, New York employers are prohibited from retaliating against an employee for whistleblowing, which is defined as disclosing or threatening to disclose to a supervisor or public body, employer activity that the employee reasonably believes is a violation of any law or poses a substantial and specific danger to public health and safety. Employees will have two years from the last retaliatory incident to make a claim.

"Employee" is defined broadly to include active, regardless of full-time status, and former employees. As drafted the definition will also include independent contractors who carry out work in furtherance of an employer's business enterprise who are not themselves employers.

The law broadly defines "retaliatory action" as "an adverse action taken by an employer or his or her agent to discharge, threaten, penalize, or in any other manner discriminate against any employee or former employee exercising his or her rights under [the whistleblower law], including:

(i) adverse employment actions or threats to take such adverse employment actions against an employee in the terms of conditions of employment including but not limited to discharge, suspension, or demotion;

(ii) actions or threats to take such actions that would adversely impact a former employee's current or future employment; or

(iii) threatening to contact or contacting United states immigration authorities or otherwise report or threatening to report an employee's suspected citizenship or immigration status or the suspected citizenship or immigration status of an employee's family or household member… to a federal, state, or local agency."

Also, New York City has a new COVID-19 Vaccine Mandate for all private sector employers. Please check our Client Alert.

New York Sexual Harassment Training

As a reminder, employees in New York State and New York City are required to complete interactive harassment training on an annual basis. Annual may be defined by the employer.

Engage's training, which satisfies both the New York City and New York State harassment requirements, is available here.

Clients with questions or concerns about any of the content in this alert should contact their Engage HR Consultant.