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HR Update 2011: Recent Changes in New York State Employment Law

By Wendy Lau
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As workplace challenges continue to evolve, employment law continues to change rapidly. Nowhere is this more true than in New York State, where drastic changes were made in 2010, and where courts are taking new approaches to existing law. To keep business operations running smoothly, HR will once again need to help employers adjust to new policies and meet new obligations.

Partner Andrew W. Singer, Esq. and Associate Jason B. Klimpl, Esq. of Tannenbaum Helpen Syracuse & Hirschtritt LLP visited TemPositions' HR Roundtable Series on Thursday, February 24, 2011 to offer a year-in-review update on New York employment law developments. Together, they covered a wide variety of necessary policy implementations, along with new requirements for payroll, recordkeeping and anti-discrimination compliance.

Throughout, Singer stressed that policies must be specific, realistic and enforceable. Generalized policies and procedures leave room for misinterpretation, he explained. And such confusion can put companies at risk. As employers themselves come to understand the new laws, they must clearly communicate to employees, in writing, what is both permitted and prohibited in the workplace—and what policies and procedures are now non-negotiable parts of employment.

Social Media Developments: National Labor Relations Act

Two years ago, social media was not at the forefront of employment law. But today, it's one of the biggest issues facing employers. Regulating employees' use of social media can be a daunting task, Singer acknowledged. But recent case law begins to instruct companies on how they must manage the use of social media in the workplace.

Social media is still a relatively new channel, but both employers and employees are increasingly incorporating it into daily workplace activities. A growing number of companies today use social media for recruitment. And leadership encourages certain types of employees to use social media to strengthen relationships among peers, clients and business partners.

As social media becomes an increasingly important method for employers and employees to communicate with each other (and others), legal experts anticipate a greater number of cases and

potential legal disputes. Recent guidance, Singer noted, offer insight into how employers should now draft their policies and procedures—and enforce them.

He offered cases involving the National Labor Relations Board (NLRB) as critical guides. The NLRB is a federal agency that enforces compliance with the National Labor Relations Act (NLRA), which defines certain protected employee activities.

Many companies are not aware that the NLRA also regulates non-unionized work places, Singer explained. However, companies with union and non-union workers alike will be impacted by NLRB legal actions related to social media.

In November 2010, the NLRB filed a complaint against American Medical Response (AMR) of Connecticut, arguing that its social media policy was too broad. An AMR employee had been terminated for violating the company's Internet and blogging policy when she criticized her supervisor on Facebook.

AMR's policy prohibited employees from making disparaging, discriminatory or defamatory comments about the company or its employees. But the NLRB stated that this policy was unlawful. They argued that it infringed upon the NLRA rights of employees to engage in a protected activity: discussing terms and conditions of employment.

In February 2011, the NLRB filed a similar suit against Student Transportation of America. Again, they maintained that a social media policy was too broad and that its establishment was an unfair labor practice. Student Transportation's policy prohibited the use of social media "in a manner that may target, offend, disparage, or harm customers, passengers, or employees; or in a manner that violate [sic] any other company policy." But again, the NLRB invoked the NLRA.

To protect their companies from suits, Singer urged attendees to exercise caution and clarity when drafting and enforcing social media policies. Become familiar with the NLRA. Avoid generalities, keep day-to-day realities of the workplace in mind, and include a disclaimer that states the company understands and respects every employee's NLRA protections.

It may seem excessive or hasty to accept the NLRB's take on social media, Singer conceded. But absent a federal law specifically governing its use in the workplace, employers can only protect themselves by studying case law and anticipating risks. The NLRB has taken a very broad and expansive view on what is a violation. Moreover, even when no wrong is committed, lawsuits can end up costing employers a great deal in both money and time.

The General Counsel has taken a very aggressive view on how government is going to enforce the NLRA, Singer stated as he wrapped up the topic, and they're doing things they've never done before. The only solution, for now, is to craft policies that show respect for the NLRA.

Employee Privacy Rights and Electronic Usage

Today's workplace is full of technology. Laptops, email accounts, cell phones and tablets can all be productive tools. But they also present opportunities for workers to misuse company resources

or violate company policies. And, as Singer noted, the information they contain can also be misused by the company—threatening workers’ privacy.

As a result, clear lines must be drawn on electronic usage as it relates to employee privacy rights. As Singer explained, courts go through policies word by word, combing through fine details to make their decisions. So these policies need to be carefully written and highly specific. They should also be regularly reviewed. As technologies evolve, the practical meaning of the language in these policies may also change.

As an example, Singer shared an overview of *Stengart v. Loving Care Agency, Inc.* in New Jersey (2010). In that case, an employee used her laptop to send emails to her attorney via her password-protected Yahoo! account. Although the company had electronic monitoring/usage policies in place, the court ruled that these emails were protected by attorney-client privilege.

Loving Care Agency lost, Singer explained, because (among other things) a single line in its policy allowed for “occasional personal use” of company electronics. This detail made it impossible for the company to claim that the employee had no reasonable expectation of privacy for such emails.

Based on this case, Singer urged attendees to draft e-mail and Internet usage policies clearly stating that the company reserves the right to monitor employee e-mails sent through or using the company’s computer systems (including personal e-mails). They should also warn employees that all company equipment, systems and files (including personal and deleted files) are subject to search and monitoring.

Per Singer, it’s equally important that policy align with practice. “It’s not about having a policy and putting it away in a drawer,” he explained. “The magic is in the language of the policy and how the company enforces the policy on a day-to-day basis.” Consistency is essential.

If a company’s policy prohibits employees from using company-owned computers and laptops for personal use, Singer explained, the company must take consistent action whenever employees violate its policy. If the employer knows that workers occasionally use computers for personal tasks and they permit this misuse, an attorney may argue that the company’s practices, in spite of its policy, create an expectation of privacy.

Matching practice and policy remains essential across all areas, from electronic usage to annual reviews to anti-discrimination guidelines. Don’t give courts a chance to question whether a paragraph in the handbook really is the company’s policy.

New Administrative and Recording-keeping Requirements: Wage Theft Prevention Act

The last law signed by former Governor David Paterson increases employers’ obligations and penalties on pay notice requirements and recordkeeping. Effective April 9, 2011, the Wage Theft Prevention Act (WTPA) expands on New York Labor Law Section 195(1), which, to date, had required, among other things, that employers to notify new hires in writing of their pay rate(s), regular pay day, and overtime pay rate.

The WTPA will require companies to provide employees with these notifications both at the time of hire and on an ongoing, annual basis (on or before February 1). The notification must be presented in both English and the employee's identified primary language, if the New York State Department of Labor (NYSDOL) offers a template in that language. And employers must collect signed, dated acknowledgement forms from workers confirming that all materials were received.

Written notifications under WTPA must include:

- Rate(s) of pay (hourly, shift, day, week, salary, piece, commission or other)
- Allowances (claimed as part of the minimum wage, tips, meal or lodging)
- Regular pay day
- Name of the employer, including any DBA ("doing business as") names
- Physical address of main office or principal place of business and a mailing address (if different)
- Employer telephone number
- For non-exempt employees only: regular and overtime pay rate(s)
- For non-exempt employees only: basis for their exemption

Staffing companies may not be required to follow all of these procedures, Singer noted. The WTPA has granted the Commissioner of Labor the discretion to waive or alter these requirements for such companies.

Finally, employers must also keep all appropriate paperwork (records of compliance) on file for no less than six years.

Post-Termination Commission Policy

Per New York Labor Law Section 191(c), employers are required to maintain written agreements with commissioned employees. These agreements specify how and when commissions are paid while workers are with the company. But terminations do take place, and complications may arise if a company does not set a clear post-termination commission policy.

To avoid disputes, Singer recommended that companies carefully draft policies that specify the conditions under which commissions are earned. It's appropriate to require that a worker meet "all conditions" to earn their commission—including being employed at the time a transaction is completed. Indeed, what constitutes a completed transaction must be clarified.

Singer shared the New York case of *Arbeeney v. Kennedy Executive Search, Inc.* as a cautionary tale. In this case, a recruiter's agreement defined a commission as "earned" once an employment placement was "arranged". The agreement also clearly stated that no commissions were due if the employee was no longer employed when the commissions would otherwise be payable. But the court ruled that the recruiter was entitled to their commissions after termination, because the policy defined those commissions as earned as soon as the placements were "arranged."

The spirit of this law, Singer explained, is to protect workers from being deprived of earned wages. To protect against legal action—and avoid paying workers unnecessarily—he urged caution when using the term “earned” in company policies. When it must be used, exercise clarity in defining it.

Employer Liabilities: New York City Human Rights Law

Recent cases have helped to define harassment standards in New York City. As Singer explained, an employer is liable under the New York City Human Rights Law (NYCHRL), when workers can prove they were treated “less well” because of they were part of a protected category.

This standard is quite different from that of federal and New York State anti-discrimination laws; under those statutes, harassment is actionable only when it is deemed “severe and pervasive.” (For a thorough review of sexual harassment law in New York, please see Singer’s previous HR Roundtable summary at:

http://www.tempositions.com/site/hrnews/HR_Roundtable_Sexual_Harassment.pdf).

Allegations of sexual harassment are particularly threatening. “Many New York City employers do not realize how much easier it is for employees to bring a sexual harassment case against them,” Singer noted. Companies must now train their workers and leadership to understand, recognize and report sexual harassment—with a policy of near-zero (if not zero) tolerance.

In the case of *Zakrzewska v. New School* (2010), the New York Court of Appeals held that employers are strictly liable under NYCHRL for harassment by a manager or supervisor. In the past, using the “Faragher/ Ellerth defense” (named for a landmark case), employers could potentially avoid liability by showing that they took reasonable steps to prevent or promptly correct alleged sexual harassment—establishing that the complainant failed to take advantage of preventative measures offered by the company.

Those days are over for New York City employers, Singer said. The new harassment standards established by NYCHRL require employers to re-evaluate their policies and enforcement practices that address sexual harassment, as well as those that shield workers in protected categories from discrimination.

Whistleblower Protections: New York State False Claims Act, Dodd-Frank Wall Street Reform and Consumer Protection Act

Whistleblowing is the act of informing authorities about dishonest or illegal activities within a company or governmental agency. Generally, Singer noted, New York State and New York City have not offered many employment/workplace protections for whistleblowers. But new protections added to the False Claims Act (FCA) in 2010 have changed that.

Before last year, only employees of private and public companies were protected from retaliation for whistleblowing. Today, FCA protection expands to “any current or former employee, contractor, or agent of any private or public employer.” The law also protects individuals who

violate “a contract, employment term, or duty owed to the employer or contractor” in order to obtain an employer’s confidential documents to support a claim.

Whistleblowers stand to reap great financial gain when reporting financial fraud to the Securities and Exchange Commission (SEC). In addition to other protections under the Dodd-Frank Wall Street Reform and Consumer Protection Act (signed into law by President Obama on July 21, 2010), the SEC offers a reward: up to 30% of monies recovered for information that leads to a case.

Of course, Singer noted, compliance with all laws is always the best protection against whistleblowers.

Intern Utilization: Guidance from the NYSDOL

“The utilization of an intern in the workplace is one of the most misunderstood areas of employment law,” Singer stated. Many companies employ interns—junior employees who do menial tasks and are ostensibly in the workplace to learn about the business. But many companies do not have a good understanding of what defines an intern, or when an internship may be unpaid. And misclassifying such workers can lead to risk.

The recent recession caused interns in the workplace to become a much bigger issue. Faced with an overcrowded market of experienced and unemployed candidates, companies were enticed to tap into the market for “free workers.” They engaged individuals who were well-qualified for positions, but labeled them as interns and gave them no pay.

But the NYSDOL has a clearly-defined position on what constitutes an intern, Singer warned. In an opinion letter dated December 21, 2010, the NYSDOL set strict criteria defining how interns may be used and specifying under what conditions they may not be subject to New York’s minimum wage and other employment laws.

For the NYSDOL to consider a worker an intern, all criteria listed below must apply:

1. The training, even though it includes operations of the facilities of the employer, is similar to training that would be given in an educational environment
2. The training is for the benefit of the intern
3. The interns do not displace regular employees and any work they may do is under close supervision
4. The employer who provides the training derives no immediate advantage from the activities of the trainees or students and, on occasion, their operations may actually be impeded
5. The trainees or students are not necessarily entitled to a job at the conclusion of the training period and are free to take employment elsewhere in the same field
6. The trainees or students have been notified, in writing, that they will not receive any wages for such training and are not considered to be employees for minimum wage purposes

7. Any clinical training is performed under the supervision and direction of individuals knowledgeable and experienced in the activities being performed
8. The trainees and students do not receive employee benefits
9. The training is general, so as to qualify the trainees or students to work in any similar business, rather than designed specifically for a job with the employer
10. The screening process for the internship program is not the same as for employment and does not appear to be for that purpose, but involves only criteria relevant for admission to an independent educational program
11. Advertisement for the program is couched clearly in terms of education or training rather than employment (although employers may indicate that qualified graduates may be considered for employment)

The courts do not look favorably on companies that try to subvert basic wage and hour requirements, Singer warned. Before bringing on an intern, employers must carefully review these criteria.

Same-Sex Couples Bereavement Leave Rights

A new Bereavement Leave Rights law for same-sex committed partners became effective on October 29, 2010. Under this law, employers that offer certain funeral or bereavement leave for married workers are now required to extend it to workers in same-sex, committed relationships. Leave is granted for the death of the employee's same-sex committed partner or the child, parent or other relative of the committed partner.

The law defines same-sex committed partners as those who are financially and emotionally interdependent in a manner commonly presumed of spouses. And Singer expects the continued expansion of their rights.

Hospitality Industry: The Wage Order

Wage regulations for the restaurant and hotel industries have been consolidated under the NYSDOL Wage Order, effective January 1, 2011. These rules regulate the specific circumstances of the hospitality industry, in which workers may combine wages and tips to make a living and often work a non-traditional schedule.

Under the Wage Order, companies are required to reduce the maximum tip credit they apply toward satisfying the New York minimum wage of \$7.25/hour. The maximum tip credit for food service workers will now be \$2.25/hour, and it will be only \$1.60/hour for other workers.

Service employees' and food service workers' pay for the day is not subject to tip credit if they are engaged in non-tipped activities for two hours or more, or for more than 20% of their shift (whichever is less). And employers are required to remit any tips charged on a credit card to employees, minus any pro-rata processing fees charged by the credit card company.

Employees covered under the Wage Order must now be compensated on an hourly basis. Salaries, weekly rates, per diem rates and piece rates are no longer acceptable, even if they raise

the worker's compensation above minimum wage. (Exceptions include exempt and commissioned salespeople.)

All non-exempt employees are now due "spread of hours pay," which guarantees an extra hour of compensation at minimum wage when an employee's workday spans more than 10 hours. (This applies even if an employee receives time off during that workday.) Companies may not phase out spread of hours pay, even if they increase an employee's wage rate over the minimum wage.

The rules also create requirements for notifying customers of certain service or administrative charges, Singer noted. On all customer checks, companies must clearly indicate whenever a service or other administrative charge is not intended to be a gratuity. Otherwise, it will be presumed that the charge was intended to be a tip for the servers.

Call-in and uniform maintenance pay is due to all non-exempt employees without regard to their rates of pay. And additional provisions in the Wage Order regulate the sharing and pooling of tips, recordkeeping, wage deductions and meal allowances.

For many in the hospitality industry, Singer noted, these will be big changes.

Domestic Workers' Bill of Rights: Updates and Their Effects

New York State defines a domestic worker as someone who is employed in another person's home. Typically, domestic workers perform tasks like housekeeping, caring for children or aiding the sick or elderly. (It's important to note that part-time babysitters, certain types of paid companions and helpful relatives do not qualify as domestic workers under the law.)

Under the new Domestic Worker's Bill of Rights (effective November 9, 2010), workers now have many more rights and protections—including the right to sue for discrimination or sexual harassment. Previously, New York State law specified that an employer had to have four or more employees to be sued for discrimination. This requirement kept many suits out of the courts, Singer noted. With its removal for domestic workers, the number of cases will likely increase.

Among other things, the Domestic Workers' Bill of Rights now mandates the following:

- Pay is to be distributed weekly (minimum wage: \$7.25/hour)
- Overtime pay at time-and-a-half must be paid for every hour in excess of 40 for the week (if worker lives at employer's home, overtime is paid after 44 hours)
- Workers are entitled to 24 hours of rest every seven days, or overtime pay if the worker agrees to work on their day of rest
- After one year of work for the same employer, workers are entitled to three paid days of rest each year
- Certain anti-discrimination/harassment protections under the New York State Human Rights Law (NYSHRL) will now apply to domestic workers
- Domestic workers are extended statutory disability rights under the Workers' Compensation Law

- Employers are required to maintain recordkeeping of certain detailed payroll and time records for a minimum of six years
- Employers must provide domestic workers written notice about policies on sick leave, vacation, personal leave, holidays, hours of work, regular and overtime rates of pay and their regular payday (among other details)

New Year, New Rules

The changes now taking effect in employment law are significant, Singer acknowledged in closing. But ultimately, these laws have been put in place to protect both employees and employers. To reap the benefits and reduce risk, HR must take the lead as companies review current policies, draft new ones and create enforcement plans.

Remember, he stressed: be specific, think practically, create clear policies and then enforce them consistently. By taking these methodical steps, companies can absorb the significant number of changes in the law—with fewer risks to their business.

*Nothing in this article is intended to be legal or tax advice
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