FRANKLIN, GRINGER & COHEN, P.C.

ATTORNEYS AT LAW

LEGAL BRIEFING

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IMPORTANT LAW UPDATE FOR ALL EMPLOYERS IN THE STATE OF NEW YORK

On April 12, 2018, Governor Andrew Cuomo signed the New York State 2019 Budget Bill, which contains, among other things, provisions regarding sexual harassment claims and policies in the workplace.

EFFECTIVE IMMEDIATELY

• Under the New York State Human Rights Law, liability will be imposed on employers for permitting sexual harassment against non-employees, including contractors, subcontractors, vendors, and others providing services pursuant to a contract in the workplace.

EFFECTIVE JULY 11, 2018:

• It will be prohibited to use non-disclosure agreements in connection with the resolution of sexual harassment claims unless the claimant prefers confidentiality.

• It will also be prohibited to have mandatory arbitration clauses requiring the arbitration of sexual harassment claims in written contracts.

EFFECTIVE OCTOBER 9, 2018

• Employers will be required to distribute written anti-harassment policies in the workplace and provide anti-harassment training for all employees. All employees must receive the policy immediately. The training must be completed before October 9, 2019.

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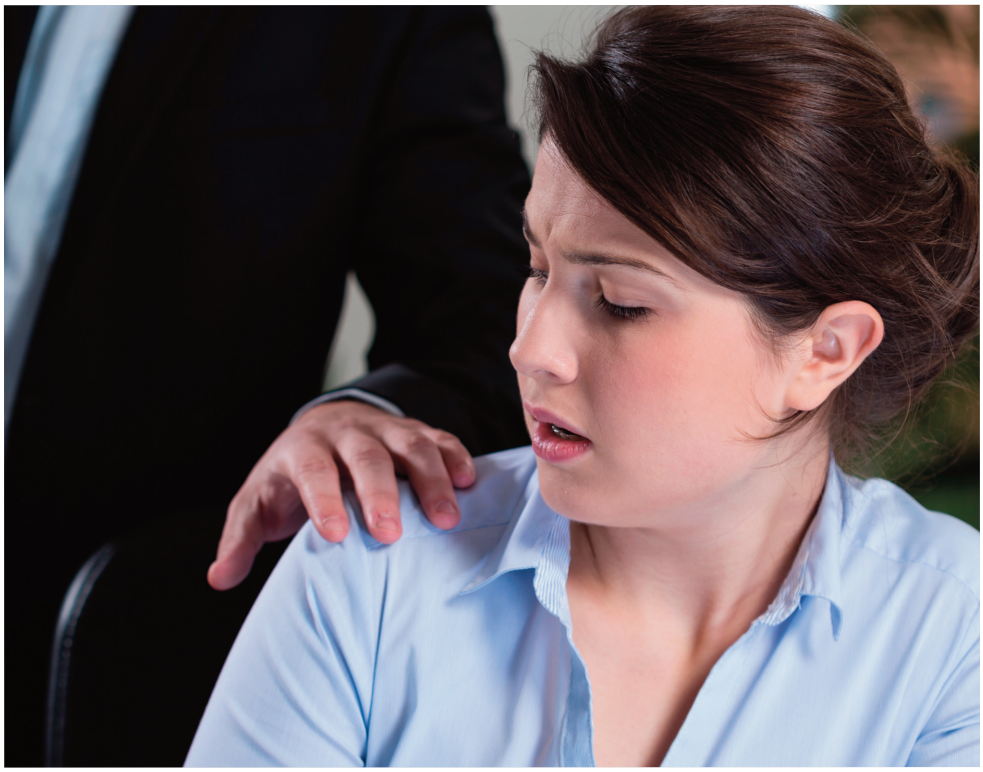

IMPORTANT LAW UPDATE FOR ALL EMPLOYERS IN NEW YORK CITY

On May 9, 2018, Mayor Bill de Blasio signed the "Stop Sexual Harassment in NYC" Act into law.

EFFECTIVE IMMEDIATELY:

• The New York City Human Rights Law ("NYCHRL") is amended to permit claims of gender-based harassment by all employees, regardless of the size of the employer. Previously, the anti-discrimination provisions of the NYCHRL applied only to employers with 4 or more employees.

• The statute of limitations for filing gender-based harassment claims under the NYCHRL is extended from 1 year to 3 years after the alleged harassing conduct occurred.

EFFECTIVE JULY 8, 2018:

• City contractors will be required to include their practices, policies, and procedures "relating to preventing and addressing sexual harassment" as part of an existing report required for certain contracts pursuant to the City Charter and corresponding rules.

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EMPLOYMENT LAW LIABILITY AUDITS: A WAY TO MINIMIZE EXPOSURE TO LITIGATION

In recent years, we have seen the cost of employment litigation skyrocket. Under these circumstances, we firmly believe that the best result is the lawsuit that does not happen in the first place. We recommend that employers examine their possible exposure to employment litigation and adopt a program to minimize their exposure to such litigation The elements of an Employment Law Liability Audit (ELLA) should include the following:

1. ADOPTION OF ANTI-DISCRIMINATION AND ANTI-HARASSMENT POLICIES:

An employer is liable for the sexually harassing conduct of its supervisors unless the employer can show that the employer exercised reasonable care to prevent and correct any sexually harassing behavior promptly and that the victimized employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.

Effective October 9, 2018, Employers in New York State will be required to distribute written anti-harassment policies in the workplace and provide anti-harassment training for all employees, including supervisors and managers, based on models developed by the New York State Division of Human Rights (NYSDHR) and Department of Labor (NYSDOL). For details, see article on page 1.

Effective April 1, 2019, Employers in New York City with 15 or more employees (including interns) will be required to conduct annual anti-sexual harassment training for all employees, including supervisory and managerial employees. For details, see article on page 1.

2. TRAINING SESSIONS FOR SUPERVISORS:

As stated above, New York State law now mandates such training. However, even if the law did not require it, we have always recommended training for managers and supervisors. The benefits of such semi-

nars are two-fold: (1) They educate supervisory and management staff how to avoid such conduct; and (2) The existence of such seminars for managerial and supervisory staff constitutes evidence that the employer has met its burdens of showing it exercised reasonable care to prevent sexually harassing behavior.

3. MANDATORY ARBITRATION:

Employers may include in their employment agreements with employees, provisions mandating compulsory arbitration of employment claims.

In *Epic Systems Corp. v. Lewis*, the Supreme Court of the United States held that employees can waive their rights to pursue their wage and hour claims in court and their right to pursue them on a class action or collective action basis by entering into agreements with their employers to arbitrate disputes. As a result, many employers are considering whether it makes sense to enter into such arbitration agreements with their employees. There are both pros and cons to the use of these agreements.

Employers considering such agreements are encouraged to contact us to discuss whether it makes sense to have such agreements and the procedure for implementing such agreements.

4. EMPLOYEE HANDBOOKS:

Employers can reduce the threat of employment litigation by putting their policies in writing and promulgating them to all employees. Employees will be less likely to be able to show discrimination when policies are applied on a consistent basis and there is no question that the policies exist. Such handbooks must contain the anti-discrimination and anti-harassment policies discussed above.

5. PROMPT AND THOROUGH INVESTIGATION OF COMPLAINTS:

Employers must conduct a thorough, impartial and prompt investigation of harassment and discrimination complaints pursuant to their procedures without any threat of retaliation to complaining employees.

6. PROGRESSIVE DISCIPLINE AND DOCUMENTATION:

Supervisors must be trained how to progressively discipline employees and document disciplinary incidents on a consistent basis so that the company will be able to effectively respond to EEOC charges and employment discrimination lawsuits.

7. USE OF RELEASES:

An employer can avoid litigation exposure from a termination by getting a release from the terminated employee in exchange for some consideration to which the employee was not otherwise entitled. However, to be valid for age discrimination cases such releases must comply with the provisions of the Older Workers' Benefit Protection Act.

8. WAGE AND HOUR COMPLIANCE:

The fastest growing area of employment litigation is wage and hour litigation. Plaintiff's lawyers are working "overtime" in bringing these lawsuits, often on a class action basis, which can result in double damages and awards of attorneys' fees to plaintiffs. Employers must be certain that there is a legal basis for not paying time and a half to employees who work over 40 hours per week. Also, employers must provide each employee with certain documents that inform employees of their rate of pay, overtime rate, and other pertinent information.

9. FAMILY AND MEDICAL LEAVE ACT (FMLA) COMPLIANCE:

Companies with more than fifty employees within a seventy-five-mile radius must provide its employees with twelve weeks of unpaid leave who have a serious health condition, who have to care for a member of the immediate family with a serious health condition, or to provide child care for a newborn or adopted baby. Recordkeeping procedures must be in place to track which absences qualify for such leave and to notify employees of their usage of this leave.

10. NEW YORK PAID FAMILY LEAVE LAW:

Companies in New York, regardless of the number of employees they have, are subject to this law, which provides eligible employees in New York with paid, job-protected leave for eight to twelve weeks. Eligible employees can take this leave for certain family and medical reasons or to address certain qualifying exigencies arising out of the fact that the employee's spouse, domestic partner, child or parent is on or has been called to active duty status as a member of the Armed Forces. NYPFL benefits are funded by statutory employee payroll contributions, which are based on a percentage of the employee's average weekly wage. Employers must comply with notification requirements to employees and coordinate this leave with employees' other leaves (e.g., FMLA, vacation, sick, etc.). Failure to provide employees with the proper notification or leave may result in penalties.

11. EPLI INSURANCE:

It is worthwhile for companies to explore obtaining such coverage. However, employers must remember these policies do not cover punitive damages or intentional violations and there may be other exclusions as well. Even with such exclusions, a policy can do much to substantially reduce the exposure to employment discrimination litigation.

We will be happy to review any policy you are considering.

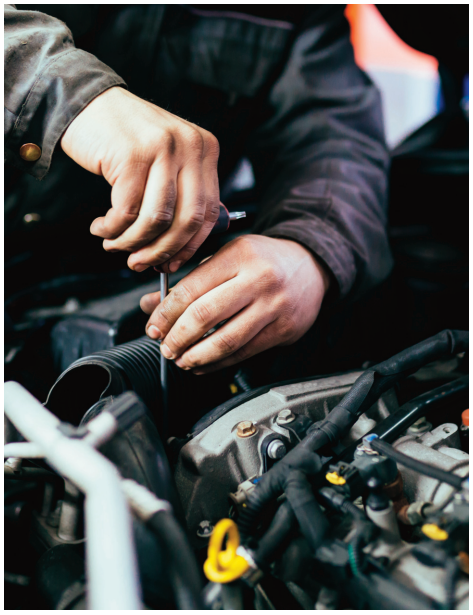
CONCLUSION

We understand how easy it is for companies to continue putting off the adoption of such a comprehensive program. However, we have also witnessed what happens when a company is faced for the first time with the expense and exposure of an employment lawsuit. It has been our experience that the adoption of such measures can reduce the risk of a lawsuit happening in the first place and minimize exposure if one is ever filed.

SUPREME COURT HOLDS THAT SERVICE ADVISORS IN CAR DEALERSHIPS ARE EXEMPT FROM OVERTIME

In *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134 (2018), service advisors for an automobile dealership brought an action against the dealership, alleging that it violated the Fair Labor Standards Act (FLSA) by failing to pay them overtime compensation. The dealership moved to dismiss the case, arguing that service advisors are exempt from overtime under one of the exemptions of the FLSA, which applies to "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks or farm implements." The District Court agreed with the dealership and dismissed the case. The Court of Appeals for the Ninth Circuit reversed the District Court's decision, finding the statute ambiguous and interpreting it narrowly to exclude service advisors. The dealership appealed and the Supreme Court of the United States decided to review the case.

The Supreme Court held that service advisors were exempt from the overtime requirements of the FLSA for several reasons. First, a service advisor is a "salesman" under



the ordinary meaning of the word, which is used to describe someone who sells goods or services. Service advisors suggest repairs and maintenance services and sell new accessories and replacement parts. Secondly, service advisors are also "primarily engaged in . . . servicing automobiles." Service advisors are integral to the service process because they meet customers, listen to their concerns, record service orders, follow up with customers as the services are performed, and explain the repair and maintenance work when customers return for their vehicles. The Court rejected the Ninth Circuit's narrow interpretation of the FLSA's overtime exemptions because the FLSA gives no textual indication that its exemptions should be construed narrowly. The exemptions, the Court held, are as much part of the FLSA's purpose as the overtime-pay requirement and should be given a "fair reading."

Although the Supreme Court interpreted the overtime exemptions in this case broadly, courts often interpret the exemptions narrowly. Before determining whether an employee is exempt from overtime, call us so that we can help you determine whether any of the numerous overtime exemptions are applicable.

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IMPORTANT LAW UPDATE FOR ALL EMPLOYERS IN THE STATE OF NEW YORK

• The written polices and training will be based on models developed by the New York State Division of Human Rights and Department of Labor.

EFFECTIVE JANUARY 1, 2019

• Bids on certain state contracts will have to contain language showing that the bidder has provided employees with written policies addressing sexual harassment at work and annual sexual harassment training.

Franklin, Gringer & Cohen, P.C. has been providing interactive sexual harassment training seminars for years. If you have any questions or concerns regarding this or any other labor and employment law issues, please contact an attorney from Franklin, Gringer & Cohen, P.C. at (516) 228-3131.

EMPLOYEE V. INDEPENDENT CONTRACTOR

In *Agerbrink v. Model Serv. LLC*, 293 F. Supp. 3d 470, 476 (S.D.N.Y. 2018), a model brought an action against a modeling agency, alleging that she was misclassified as an independent contractor, in violation of the Fair Labor Standards Act (FLSA) and the New York Labor Law (NYLL). The model entered into a contract with the modeling agency. The contract required the model to use her best efforts to further her modeling career, seek advice from the modeling agency's counsel, and perform her services in a professional and timely manner. The contract provided that the modeling agency would receive a commission of twenty percent of the model's hourly rate, including payments from clients to whom the model was introduced by the modeling agency. The contract specifically stated that the model was an independent contractor. It also indicated that it would not supervise the model's professional activities and would not control the terms and conditions that governed the model's relationship with clients.

In figuring out whether an individual is an employee under the FLSA, courts consider the following factors: (1) the degree of control exercised by the employer over the workers; (2) the workers' opportunity for profit or loss and their investment in the business; (3) the degree of skill and independent initiative required to perform the work; (4) the permanence or duration of the working relationship; and (5) the extent to which the work is an integral part of the employer's business. However, the Second Circuit has cautioned that courts should not focus narrowly on these factors, because doing so risks losing sight of the ultimate concern, which is whether, as a matter of economic reality, the worker depended upon someone else's business for the opportunity to work or are in business for themselves.

The NYLL test is similar to the FLSA test, although it focuses more on the degree of control rather than economic reality. The critical inquiry is the degree of control exercised by the purported employer over the results produced or the means used to achieve the results. The following factors apply: whether the worker (1) worked at his own convenience; (2) was free to engage in other employment; (3) received fringe benefits; (4) was on the employer's payroll; and (5) was on a fixed schedule.

The court here found that the model was an independent contractor who hired the modeling agency to manage her career. The court found that the degree-of-control and opportunity-for-profit-and-loss factors weighed in favor of independent contractor status because the model set her own schedule, chose how much to work, if at all, and also had a final say on which clients to work for. The model could also negotiate her rate, had the ultimate say about her hourly rate, and her contract stated that she was an independent contractor. Additionally, in the economic realities test, large capital expenditures are highly relevant to determine whether an individual is an employee or an independent contractor. Here, the model paid for her own travel expenses, a rental apartment, professional photographs and also paid a monthly fee to be featured on the modeling agency's website. Although some of the other factors weighed in favor of employee status, the court held that the totality of the circumstances leaned towards independent contractor status under both the FLSA and the NYLL.

Employers should understand that sometimes the line between employee and independent contractor status is blurry. If you have a question regarding an individual's classification, we can help you determine the proper classification.

EQUAL PAY ACT AND SALARY HISTORY

In *Rizo v. Yovino*, 887 F.3d 453 (9th Cir. 2018), a math consultant filed a lawsuit, asserting claims for violations of the Equal Pay Act. The County had a hiring schedule consisting of ten stepped salary levels, each containing ten salary steps within it. A new hire's salary was determined by taking the hired individual's previous salary, adding 5%, and placing the new employee on the corresponding step of the salary schedule. The employee was placed at step 1 of level 1 of the hiring schedule. One day, during lunch with colleagues, she learned that her male colleagues had been subsequently hired for the same position at higher salary steps. She filed a claim, but the County claimed that although she was paid less than her male counterparts, the discrepancy was based on her previous salary.

The Equal Pay Act stands for the principle that men and women should receive equal pay for equal work, regardless of sex. The Act creates a type of strict liability for employers who pay men and women different wages for the same work. Once an employee shows a wage disparity, she is not required to prove that there was discriminatory intent. However, not all differentials in pay for equal work violate the Act. There are four exceptions: 1) a seniority system; 2) a merit system; 3) a system which measures earnings by quantity or quality of production; or 4) a differential based on any factor other than sex.

Here, the County argued that the fourth exception includes an employee's prior salary and applies when her starting salary is based on her prior salary. The court held that the fourth exception is limited to legitimate, job-related factors, such as a prospective employee's experience, educational background, ability, or prior job performance. The court found it inconceivable that a law whose purpose was to eliminate long-existing, sex-based wage disparities would create an exception for basing new hires' salaries on those same disparities. The court held that prior salary, whether considered alone or with other factors, is not job-related and is, therefore, not a differential based on any factor other than sex.

In October 2017, New York City passed a law prohibiting employers from asking applicants about their salary history throughout the hiring process in an effort to combat wage disparity between men and women. New York State is likely to follow suit in the near future. Employers are encouraged to ask applicants about their salary expectations, rather than their salary history, in order to reduce the likelihood of a claim for wage disparity.

"COOPERATIVE DIALOGUE" LAW IN NEW YORK CITY

• Effective October 15, 2018, the New York City Human Rights Law (NYCHRL) will require all New York City employers with four or more employees to engage in a "cooperative dialogue" with individuals who may be entitled to an accommodation for the following reasons:

- Religious needs;
- Due to a disability;
- As a result of pregnancy, childbirth or a related medical condition; or
- As a result of domestic violence, sex offenses or stalking.

• The dialogue, which can be written or oral, must include an evaluation of:

- The individual's needs;
- The nature of the requested accommodation;
- The burden to the employer if it were to be granted; and
- Potential alternatives to the requested accommodation.

• Upon the conclusion of this "cooperative dialogue," the employer must then provide the person requesting the accommodation "with a final written determination identifying any accommodation granted or denied."

• Failure to engage in this "cooperative dialogue" within a reasonable time or provide a written determination will constitute unlawful discriminatory practices under the NYCHRL.

If you have any questions regarding this or any other labor and employment law matter, please contact an attorney at Franklin, Gringer & Cohen, P.C. at (516) 228-3131.

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IMPORTANT LAW UPDATE FOR ALL EMPLOYERS IN NEW YORK CITY

EFFECTIVE SEPTEMBER 6, 2018:

• Employers will be required to conspicuously display an anti-sexual harassment rights and responsibilities poster and distribute an information sheet on sexual harassment to new hires, both of which will be promulgated by the City Commission.

EFFECTIVE APRIL 1, 2019:

• Employers with 15 or more employees (including interns) will be required to conduct annual anti-sexual harassment training for all employees, including supervisory and managerial employees.

• The training must be "interactive."

• The training must cover several topics, including:

- Definitions and examples of sexual harassment.
- Education on bystander intervention.
- Explanations on how to file complaints internally and with federal, state, and city administrative agencies.

• Employers will be required to obtain a signed acknowledgement from each employee verifying that he or she attended the training.

Franklin, Gringer & Cohen, P.C. has been providing interactive sexual harassment prevention trainings for many years. If you have any questions or concerns regarding this or any other labor and employment law issues, please contact an attorney at Franklin, Gringer & Cohen, P.C. at (516) 228-3131.

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We have over ninety years of combined experience representing employers in labor relations and employment law matters. We believe that there are numerous advantages for a company to look to a firm that has practiced labor and employment law for many years in both preventing and defending employment discrimination litigation. Our foremost concern is to avoid litigation whenever possible through preventive planning. Our clients consult with us on a regular basis before taking action to avoid labor disputes and costly lawsuits. The best result for a client is the lawsuit that does not happen in the first place.

We have been giving seminars and writing articles for many years on how to avoid litigation through the use of progressive discipline, documentation, consistent treatment, adoption of anti-harassment policies, employee handbooks, and proper training of supervisory staff. We give this advice because we have seen that it has worked for our clients. Our long-term clients who regularly consult with us before taking adverse disciplinary action rarely face litigation over those decisions.

OUR FIRM ALSO PRACTICES IN THE FOLLOWING AREAS

LABOR RELATIONS AND EMPLOYMENT LAW ON BEHALF OF MANAGEMENT
COMMERCIAL TRANSACTIONS AND LITIGATION
COMMERCIAL AND RESIDENTIAL REAL ESTATE
MATRIMONIAL AND FAMILY LAW
PERSONAL INJURY AND MEDICAL MALPRACTICE LITIGATION
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