Hedge Up: A Heads-Up on Employment Issues Confronting the Investment Management Industry

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2020 Vision: New N.Y. Employment Laws Awaiting Firms in 2020

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Key Points

- Whistleblower Carve-Out: For all employment-related agreements containing non-disclosure provisions signed on or after January 1, 2020, firms should include new "whistleblower carve-out" language as dictated by New York state law.
- Employee Reproductive Rights: Effective January 7, 2020, firms with employee handbooks must update them to include a notice of employee rights relating to employees' (and their dependents') reproductive health decisions.
- Notice of Anti-Harassment Policy: In accordance with recent guidance, firms also must distribute a notice to new hires and to existing employees (on an annual basis), including a copy of the firm's anti-sexual harassment policy and information presented at the firm's annual anti-sexual harassment training.

New N.Y. Employment Laws in 2020

New York-based firms could breathe a sigh of relief on New Year's Day when Governor Andrew Cuomo vetoed the Securing Wages Earned Against Theft Act (or "SWEAT"), which would have given employees the ability to place liens on their firm's assets with respect to "wages" allegedly due to the employees. Despite this "near miss," however, firms face several new employment law developments in 2020.

1. New Whistleblower Carve-Out Language Required for New York Firms

In the wake of the Securities and Exchange Commission's crackdown on contractual provisions that the agency believes hinder "whistleblowers'" ability to come forward, whistleblower carve-out language has become a staple of employment-related policies and agreements containing confidentiality and non-disparagement provisions. By their terms, these carve-outs permit employees to approach regulators with securities law-related concerns and share information (including "confidential" information) with such agencies.

Under a new New York state law, however, firms will need to modify their carve-out language for employment-related contracts entered into on or after January 1, 2020. As originally discussed in our August 12, 2019, Hedge Up article (here), any

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contractual provision preventing the disclosure of factual information related to any future claim of discrimination will be "void and unenforceable" unless the provision also "notifies the employee or potential employee that it does not prohibit him or her from speaking with law enforcement, the equal employment opportunity commission, the state division of human rights, a local commission on human rights, or an attorney retained by the employee or potential employee."[1] Firms thus should promptly modify their existing carve-out language accordingly.

2. Notice of Employee Rights Regarding Reproductive Health Decisions

Effective January 7, 2020, a new New York state law prohibits firms from discriminating against employees with respect to their reproductive health decisions.[2] While a similar New York City law already is in effect, the new state law contains additional requirements, including requiring firms to update their employee handbooks to include a "notice of employee rights and remedies" under the law.

Under the state law, "reproductive health decisions" include choices to "use or access a particular drug, device or medical service." Such reproductive health decisions include, for example, a decision to use birth control, get an abortion or seek fertility treatment. The law prohibits firms from discriminating or taking any "retaliatory personnel action" against an employee on the basis of such decisions by the employee or the employee's dependents. Firms also cannot require an employee to sign a waiver or other document that could deny the employee's right to make a reproductive health care decision. In addition, the new law prohibits firms from accessing personal information regarding an employee's (or a dependent's) reproductive health decisions without the employee's prior written consent.

Employees who believe their rights under the new law have been violated are entitled to bring a civil lawsuit (or arbitration, if applicable) for relief. Among the available remedies are monetary damages, reasonable attorneys' fees and costs, injunctive relief and reinstatement. Firms found to have "retaliated" against employees who exercise their rights under the law also can be subject to civil penalties.

The New York State Department of Labor has not yet issued guidance on the notice requirements imposed by the state law, but we expect that such guidance is forthcoming.

3. Written Notice Regarding Anti-Sexual Harassment Policy and Training Materials

The New York State Division of Human Rights recently issued guidance (available here) regarding firms' notice obligations with respect to the state's Anti-Harassment laws. Under such guidance, firms must provide the required notice to (a) new hires, at the time of hire, and (b) all other employees, at the time the firm provides its annual anti-harassment training. These notice obligations are in addition to the anti-sexual harassment notice obligations imposed by New York City law (see our Hedge Up article dated April 19, 2019, discussing them here).

A model notice, as drafted by New York state, is available here. The notice also must include a copy of (a) the firm's anti-sexual harassment prevention policy, and (b) the materials presented at the firm's annual anti-sexual harassment training. According to the guidance, the training materials must include "any printed materials, scripts, Q&As, outlines, handouts, PowerPoint slides, etc." Notices generally can be provided

electronically or in hard copy. If a firm provides its annual training by software or video, it can provide a link to or an electronic or print copy of the training module and/or make "reasonable efforts" to provide training materials such as scripts and PowerPoint slides.

For employees whose primary language is Spanish, Chinese, Korean, Polish, Russian, Haitian-Creole, Bengali or Italian, firms must provide the training materials both in English and in the employee's primary language. As an alternative, firms can supply such employees with the applicable modules the New York State Division of Human Rights has prepared in such languages. A link to such materials is as follows: https://www.ny.gov/combating-sexual-harassment-workplace/combat-harassment-translations. To the extent the State Division publishes training materials in other languages in the future, firms will be responsible for providing materials in such languages as well.

Next Steps

New York-based firms should review and revise their current employment-related agreements, employee handbooks and human resources protocols to ensure they are in compliance with the laws and guidance discussed above. Firms also should remain on the lookout for guidance regarding the new reproductive health decision-making law.

[1]See N.Y. Gen. Obligations Law, § 5-336(2).

[2] See N.Y.L.L., § 203-E.

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