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

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So, What'd I Miss??? A Flurry of New Employment Laws Impact New York Firms

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Key Points

- The past eight months have featured the introduction of myriad new state and city laws impacting New York firms.
- From amendments to the NYC Fair Chance Act and NYS Paid Family Leave Law, to the expansion of the NYS whistleblower law and new requirements for electronic monitoring, the use of AI, the posting of salary information for open positions and beyond, these new measures alter the employment and human resources landscape.
- This article brings investment managers up to speed on these developments and what they mean for New York firms.

In a roof-raising number from the Broadway hit, *Hamilton*, Thomas Jefferson returns from his Ambassadorship in France, having sidestepped six years of grueling American political infighting, to guilelessly ask, "*So, what'd I miss?*" The answer, of course, was "*a ton!*"

In-house counsel and human resources professionals at New York investment managers could be forgiven for asking a similar question following the dizzying developments in employment law since last summer. Indeed, even aside from the myriad regulatory enactments regarding COVID-19 (addressed here), and the groundbreaking passage of the federal Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (discussed here), the past seven months have seen the introduction of numerous new measures governing the workplace. A recap of these developments follows.

1. New York City Fair Chance Act Amendments Require Two-Step Process for Background Checks

The New York City (NYC) Council kicked things off last summer, when it expanded the reach of the NYC Fair Chance Act (FCA), including adding new procedural requirements for firms to follow.

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In its original form, the FCA prohibited firms from conducting inquiries into a job applicant's criminal conviction history until after making a conditional offer of employment. The law further required firms wishing to withdraw a conditional offer of employment based on a prior criminal conviction to first analyze various factors with respect to the seriousness and job-relatedness of the conviction at issue.

The FCA amendments extend coverage of the law to apply to a firm's existing employees and independent contractors, in addition to job applicants, and broaden the types of criminal history covered to include pending arrests and criminal accusations. The amendments also add certain procedural requirements, which are a trap for the unwary:

First, prior to extending a conditional offer of employment, a firm must complete its review of any non-criminal background information that it plans to consider. All background checks *other than* a criminal check must be completed and analyzed at this stage. Should any criminal history information inadvertently come to light during this phase, the information must be quarantined and not shared with the individual(s) making the hiring decision.

Second, *after* all non-criminal background checks have been completed,[1] and a conditional offer of employment has been extended, a firm can conduct a criminal record review regarding the candidate. Should criminal history information be revealed during this process, the firm cannot withdraw the offer of employment unless it (i) determines that there is a direct relationship between the applicant's conviction history or pending charges, on the one hand, and the relevant position, on the other; or (ii) can show that hiring the applicant "would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public." Similarly, should criminal history information come to light regarding an existing employee or independent contractor, the relationship with such individual cannot be terminated absent satisfying the "direct relationship" or "unreasonable risk" analysis.

When assessing whether a "direct relationship" exists or whether an individual poses an "unreasonable risk," firms must consider certain relevant factors, as follows:

1. If a firm is considering revoking a conditional offer to a candidate with one or more *pre-employment convictions*, the firm must analyze the situation by applying the "Article 23-A Factors" under the New York Corrections Law (available in the New York City Commission on Human Rights' (NYCCHR) Legal Enforcement Guidance).[2]
2. If a firm is considering taking an adverse action against a candidate with a *pending criminal case*, or against a *current employee or contractor* with either a pending criminal case or a conviction, it must analyze the situation using new "NYC Fair Chance Factors" (also available in the Legal Enforcement Guidance), which are similar, but not identical, to the Article 23-A Factors.[3]

If a firm wishes to withdraw an offer of employment or terminate an individual based on the "direct threat" or "unreasonable risk" analysis, it must first:

1. Share a written copy of any criminal history inquiry it conducted with the individual at issue;
2. Share a written copy of the firm's Fair Chance Analysis (including a copy of the NYCCHR's new Fair Chance Act Notice) with the individual; and

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3. Allow the individual at least five business days to respond to the firm's concerns.

The FCA amendments also prohibit firms from asking applicants, employees or independent contractors about, or taking adverse action against them for: (i) any non-pending arrest or criminal accusation; (ii) any conviction for a "violation" of the New York Penal Law (defined as an offense, other than a traffic infraction, with a potential term of imprisonment of no more than fifteen days); (iii) any conviction for a noncriminal offense in another state; (iv) adjournments in contemplation of dismissal; (v) youthful offender adjudications; or (vi) sealed offenses.

2. Expansion of the NYS Whistleblower Law

Effective January 26, 2022, New York amended its general employee whistleblower statute (New York Labor Law § 740), dramatically expanding its scope.

Prior to the amendments, the New York State (NYS) whistleblower statute was quite narrow in nature, protecting whistleblowers who called attention to legal violations that threatened the public safety. The law protected employees from retaliation for disclosing, or threatening to disclose, activity "that is in violation of law, rule or regulation *which violation creates and presents a substantial and specific danger to the public health or safety*, or which constitutes health care fraud." (Emphasis added). Given its limited reach, the statute has not been the source of significant litigation.

As amended, however, the whistleblower statute is now far more expansive. The amendments broaden the types of whistleblower activity covered, the categories of whistleblowers to whom the law applies and the potential remedies available, thus likely increasing the law's attractiveness to the plaintiffs' bar. Among the key changes are the following:

- *No Requirement of Danger to Public Health or Safety* – Perhaps most notably, the amended statute no longer is limited to whistleblower activity related to threats to "public health or safety." Instead, the law now protects whistleblowers who raise (or threaten to raise) a concern regarding *any* "violation of law, rule or regulation."
- *Whom the Law Covers* – In addition to protecting employee whistleblowers, the NYS statute will now also cover former employees and individual independent contractors, allowing them to assert claims under the law.
- *No Actual Violation of Law Needed* – As amended, the statute no longer predicates recovery on an actual violation of law having occurred (*i.e.*, on the whistleblower having been correct in identifying a legal violation). Rather, a whistleblower now is protected if he or she "reasonably believes" that the law has been violated. Similarly, while the prior version of the statute protected a whistleblower's right to refuse to engage in unlawful activity, the amendments expand this right to permit whistleblowers to refuse to engage in any practice that they "reasonably believe" is unlawful (regardless of whether they are correct in that belief).
- *Prior Notice to Firm Not Always Required* – Prior to the recent amendments, a whistleblower was required to raise his or her concerns internally, through a supervisor, before complaining to a public authority. Presumably, this requirement was intended to avoid misunderstandings that could be resolved through such dialogue. The amended statute, however, weakens this obligation: First, rather than affirmatively requiring the whistleblower to bring his or her concerns to a supervisor, the law now requires only a "good faith effort" to notify the firm before pursuing a

complaint with a public body. Further, no prior notice is required where there is a danger to public health or safety or where the whistleblower "reasonably believes" (i) that notifying the firm will lead to the destruction of evidence or the risk of physical harm to the whistleblower or someone else, or (ii) that a supervisor is already aware of the issue but "will not correct such activity, policy or practice."

- *Expanded Definition of Prohibited "Retaliatory Action"* – The amendments also expand the definition of "retaliation" under the law. In addition to prohibiting adverse employment actions, such as terminations and demotions, the statute now also proscribes *threatening* to take such an action, as well as threatening or taking any action that would adversely affect the whistleblower's future employment (including, *e.g.*, threats to "blacklist" an individual in the industry).
- *Enhanced Remedies; Right to Jury Trial* – In addition to the remedies previously available under the whistleblower law (which included, *e.g.*, back pay and attorneys' fees), the amendments now allow plaintiffs to recover front pay; punitive damages for willful, malicious or wanton violations; and a civil penalty of up to $10,000. Plaintiffs pursuing their claims in court also now have a right to a jury trial.
- *Lengthened Statute of Limitations* – The amendments increase the law's statute of limitations from one year to two years.
- *New Posting Requirement* – The statute also contains a new posting requirement, requiring firms to affix a notice regarding the law in a location frequented by employees and job applicants. The NYS Department of Labor has prepared a model notice, which is available here.

3. New York City Will Require Disclosure of Salary Ranges in Job Postings

Beginning May 15, 2022, NYC-based firms with four or more employees[4] will be required to list the minimum and maximum salary for a position in any advertisement or posting about the position, including in the case of a promotion or transfer opportunity. The salary figures firms provide must "extend from the lowest to the highest salary the [firm] in good faith believes at the time of the posting it would pay for the advertised job, promotion or transfer opportunity."[5]

The passage of the NYC salary range law follows the enactment of a similar statute in Connecticut last October.[6] That law requires Connecticut firms to share wage ranges for a position with job applicants who request such information or are offered the position, and to existing employees at the time of hire or when being transferred or promoted to a new job.[7]

The NYC law contains numerous vagaries as drafted. Most basically, it fails to define "advertisements" or "postings," thus raising substantial confusion over when the requirements of the statute will be triggered. The statute also does not define "salary," or address whether other forms of compensation (bonuses, equity awards, *etc*.) are included within such definition. (By comparison, the Connecticut statute does affirmatively include bonuses within the definition of covered wages). We expect the NYCCHR to issue interpretive guidance addressing these issues in the coming weeks or months.

The NYC salary range law amends the NYC Human Rights Law, which provides employees and applicants with a private right of action. The NYCCHR also can impose

a civil penalty of up to $125,000 per violation of the new law, or $250,000 for violations that result from a firm's willful, wanton or malicious conduct.

4. Clarifications on Intermittent Leave under New York's Paid Family Leave Law

NYS's Paid Family Leave Law (PFLL), which we previously discussed here and here, was amended effective January 1, 2022 to remove a sixty-hour cap on the amount of intermittent leave an employee can take under the statute.

Under the PFLL, eligible employees can take up to twelve weeks of paid family leave over a fifty-two week period. Historically, when employees used paid family leave on an intermittent basis, the maximum amount of leave was capped at sixty hours, essentially assuming a maximum of a five-day work week (*i.e.*, twelve weeks of working five days per week equals sixty days). The revised regulation removes the sixty-day cap, thus permitting employees who work *more than* five days per week to take additional intermittent paid family leave. For example, an employee who works an average of six days per week will be entitled to seventy-two days of paid family leave to be used intermittently over a fifty-two week period (*i.e.*, twelve weeks of working six days per week equals seventy-two days), and employees who work an average of seven days per week will be entitled to eighty-four days of paid family leave to be used intermittently over a fifty-two week period (*i.e.*, twelve weeks of working seven days per week equals eighty-four days).

5. New York's PFLL Expanded to Include Care for Siblings

Beginning in 2023, the group of family members for whom employees can take New York paid family leave also will be expanded. Currently, this group includes an employee's spouse, domestic partner, children, step-children, parents, step-parents, parents-in-law, grandparents and grandchildren. As of January 1, 2023, it also will include an employee's biological, adopted, step and half siblings.

6. New Requirements for Electronic Monitoring of Employees in NYS

Effective May 7, 2022, New York firms will be required to provide advance written notice to employees before subjecting them to electronic monitoring in the workplace. While most investment managers already provide such notice via disclosures in their compliance manuals and/or employee handbooks, the new law contains additional specific requirements. A copy of the statute, which amends the New York Civil Rights Law, is available here.

The required notice will need to be in written or electronic form, and be acknowledged by employees in writing or electronically. It will need to be provided to new hires and existing employees, and posted in a conspicuous location in the workplace. The notice will need to inform employees that their communications are subject to monitoring at all times, including (to the extent applicable) their electronic mail or transmissions, telephone conversations, internet usage and/or usage of an electronic device or system, including but not limited to the use of a computer; telephone; wire; radio; and/or electromagnetic, photoelectronic or photo-optical system. The NYS Department of Labor is expected to issue a model notice that firms can utilize, but has not yet done so as of the publishing of this article.

The new law will not apply to processes that (i) are not targeted to monitor or intercept the electronic mail or telephone voice mail or internet usage of a particular individual, (ii) are designed to manage the type or volume of incoming or outgoing electronic mail or telephone voice mail or internet usage, and (iii) are performed solely for the purpose of computer system maintenance and/or protection.

The NYS Attorney General will enforce the electronic monitoring law, with no right of private action for employees. Firms that fail to provide the required notice will be subject to a maximum civil penalty of $500 for the first offense, $1,000 for the second offense and $3,000 for the third and each subsequent offense.

7. Employees Facing Layoff in New York May Petition to Participate in a Shared Work Program

Effective October 23, 2021, the New York Labor Law was amended to allow employees who are facing a potential layoff to petition their employer to instead initiate a shared work program. Under such a program, a firm would reduce employees' working hours in lieu of layoffs, and unemployment insurance would help employees offset their reductions in pay.

Any group of employees who face an employment loss may submit a request for a shared work program under the law. Such a request must be in writing, and must be made either before a layoff or within ten days thereafter. A firm must respond to such a request in writing within seven days, but is not required to implement the requested program.

The new law covers firms if they have: (i) two or more full-time employees working in NYS, and (ii) paid unemployment insurance contributions, or elected reimbursement of benefits paid to former employees in lieu of contributions, for the previous four consecutive calendar quarters.

8. New York City Restricts the Use of Artificial Intelligence-Based Hiring and Promotion Tools

Beginning January 1, 2023, NYC-based firms will be prohibited from using automated employment decision tools (AEDTs) to screen employees or candidates for employment or promotion unless the tool has undergone a "bias audit" no more than one year prior to its use. AEDTs are broadly defined to include "any computational process, derived from machine learning, statistical modeling, data analytics, or artificial intelligence, that issues simplified output, including a score, classification, or recommendation, that is used to substantially assist or replace discretionary decision making for making employment decisions that impact natural persons." Exempted from the definition of AEDT are tools that "[do] not automate, support, substantially assist or replace discretionary decision-making processes and that [do] not materially impact natural persons," such as junk email filters, firewalls, calculators, spreadsheets, databases, data sets or other data compilations.

Firms using an AEDT to screen a candidate for employment or an employee for promotion will need to:

1. Arrange for an independent "bias audit" of the AEDT at least once every twelve months to assess the tool's disparate impact on individuals based on their race, ethnicity or sex.[8]

2. Post a summary of the results of the most recent bias audit, and the distribution date of the AEDT to which such audit applies, on the firm's website before the AEDT is used.
3. Provide candidates for employment and employees who reside in NYC with the following at least ten business days before using the AEDT:
    a. Notice that an AEDT will be used as part of the firm's assessment or evaluation;
    b. Notice that the candidate may request an alternative selection process or accommodation (though the law does not explicitly require firms to agree to any such alternative process or accommodation); and
    c. A description of the job qualifications and characteristics that the AEDT will be assessing.
4. Additionally, within thirty days of a written request by a candidate or employee, a firm must provide information regarding the type of data collected for use by the AEDT, the source of such data and information about the firm's data retention policies. Alternatively, this information may be disclosed on a firm's website. The law provides an exception to these disclosure requirements where disclosure would violate a local, state or federal law, or interfere with a law enforcement investigation.

The Artificial Intelligence (AI) law will be enforced by the NYC Council's Corporation Counsel and does not contain a private right of action. Penalties for failing to comply with the law range from $500 to $1,500 per violation.

A copy of the AI law is available here, and another Akin Gump alert discussing it is available here. NYC has not yet issued guidance on this law.

The NYS and NYC laws described above impose numerous new requirements on firms, including new posting obligations, new protocols for job and candidate searches and new steps for employee and candidate screening. These new measures also may require modifications to firms' employee handbook and agreement templates. Should you have questions regarding these developments, please feel free to contact us.

[1] Background checks also must comply with the federal Fair Credit Reporting Act, the New York State Fair Credit Reporting Act, and the New York City Stop Credit Discrimination in Employment Act, including the notice and certification requirements thereof.

[2] These factors include (i) New York State's (NYS) public policy encouraging the employment of individuals previously convicted of a criminal offense; (ii) the specific duties and responsibilities of the position at issue; (iii) the bearing (if any) of the criminal offense on the candidate's ability to perform such duties and responsibilities; (iv) the time that has elapsed since the criminal offense; (v) the age of the candidate at the time of the criminal offense; (vi) the seriousness of the criminal offense; (vii) any information produced by the candidate with regard to his or her rehabilitation and good conduct; and (viii) the legitimate interest of the employer in protecting property and ensuring the safety of the workplace and the general public.

[3] These factors include (i) the policy of NYC to overcome stigma toward, and exclusion from employment of persons with, criminal records; (ii) the specific duties and responsibilities of the position at issue; (iii) the bearing, if any, of the criminal offense on the individual's fitness for the relevant position; (iv) whether the individual was twenty-five or younger at the time of the offense; (v) the seriousness of such offense; (vi) the legitimate interest of the employer in protecting property and the safety of the workplace or general public; and (vii) any additional information regarding the individual's rehabilitation or good conduct, including but not limited to a history of positive performance on the job or in the community.

[4] In calculating the number of employees, the law incongruously requires firms to count individual independent contractors as "employees."

[5] The NYC measure does not apply to temporary positions advertised by temporary staffing agencies.

[6] *See* Public Act 21-30, "An Act Concerning the Disclosure of Salary Range for a Vacant Position" (2021).

[7] The Connecticut statute also expands the state's equal pay law with respect to discrimination with respect to compensation.

[8] Because NYC has not yet released guidance on the law, it is unclear what such a bias audit will entail and/or who would need to conduct it.