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Employment Law Developments Impacting Fund Managers: Workplace Challenges in the #MeToo Era and Beyond

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2019 has been a busy year for developments in workplace law. With the current administration in Washington taking a very passive stance on regulation of employers, States and Cities have led the charge to expand workers' rights and protections. Organizations, including investment funds, are facing new challenges to keep up the proliferation of new state and local laws. Here are some of the recent developments of particular interest to fund managers with offices in New York, Connecticut, and California.

Sexual Harassment Training

New York – October 9, 2019 is the deadline for New York employers to complete the first annual mandatory sexual harassment training requirement for all employees. The training must be interactive and meet or exceed certain minimum standards on subject matter. Employers in New York City with 15 or more employees must also comply with the City's sexual harassment training requirements, which largely align with the state requirements but require some additional topics. The deadline for completing the first annual NYC-required training is December 31, 2019; most employers will combine the state and city training into a single offering.

Connecticut – Effective October 1, 2019, Connecticut employers with three or more employees must provide sexual harassment training to *all* employees by no later than October 1, 2020, and to provide supplemental training not less frequently than every ten years. Employers with three or more employees also must post a notice regarding the illegality of sexual harassment, and provide new employees with a copy of such information within three months of hire.

California – By January 1, 2020, and every other year thereafter, employers with five or more employees must provide interactive training on sexual harassment and related topics (including gender identity and expression harassment, as well as bullying) to all employees. For supervisors, the training must be a minimum of two hours; for others, a minimum of one hour.

Other Expansions of Anti-Harassment Protections

New York – Effective August 12, 2019, New York employers are required to provide employees, both at the time of hire and at every annual sexual harassment prevention training, with a copy of the **employer's sexual harassment prevention policy** and "the information presented at the … training program."

New York – Effective October 11, 2019, employees will no longer be required to show that alleged sexual or other harassment is "severe or pervasive" in order to succeed on a state law harassment claim. Rather, they will only have to show that they were subjected to "inferior terms, conditions or privileges of employment" based on a protected characteristic (*e.g.*, gender, race, age, etc.). The employer can defend on the ground that the conduct amounts only to "petty slights or trivial inconveniences."

Limitations on Mandatory Arbitration

New York – Effective October 11, 2019, New York's prohibition of mandatory pre-dispute agreements to arbitrate sexual harassment claims will be expanded to encompass *all* claims of employment discrimination. The new law is on shaky ground, however—a New York federal court recently held that the arbitration ban for harassment claims is preempted by the Federal Arbitration Act where both laws apply, and the same analysis would presumably apply to the new law. In California, similar measures restricting mandatory arbitration of sexual harassment claims had been vetoed by former Governor Jerry Brown, though a new bill on the subject is under consideration by the state legislature.

Expansion of Discrimination Protections to Contractors

New York – Effective October 11, 2019, **protections against discrimination on the basis of any protected category under New York law will be extended to "non-employees,"** including contractors, subcontractors, vendors, consultants, or others providing services pursuant to a contract. This will be a sea change for most employers.

Pay Equity

New York – Effective October 8, 2019, New York's Equal Pay Law—which historically has prohibited compensation discrepancies based on gender—will be expanded to prohibit discrepancies based on any personal characteristics protected by the state's anti-discrimination law (e.g., race, religion, disability, age, etc.). The law will require equal pay for either equal work or "substantially similar work, when viewed as a composite of skill, effort and responsibility, and performed under similar working conditions." Employers will still have the ability to defend discrepancies in pay on the ground that they are justified by, among other things, bona fide factors including education, training, and experience.

Salary History

New York – Effective January 6, 2020, New York State will follow the lead of New York City, Westchester County, Suffolk County, California, Connecticut, and other states and cities across the country in prohibiting employers from requesting or relying on the compensation history of a job applicant in determining whether to offer employment or in determining compensation. As with New York City's (and others') salary inquiry laws, candidates may voluntarily and without prompting disclose their compensation history, at which point employers can rely on the information as part of their decision-making process.

Drug Testing

New York – Effective May 10, 2020, most **New York City** employers will be prohibited from requiring applicants to submit to pre-employment drug tests for marijuana as a condition of employment. The law contains certain exceptions, including where testing is required by "any federal or state statute, regulation, or order that requires drug testing or prospective employees for purposes of safety or security."

Limitations on Non-Disclosure Provisions

New York – Effective October 11, 2019, employers in New York will be **prohibited from including nondisclosure provisions in any agreement resolving a claim involving allegations of discrimination**, unless it is the "preference" of the employee to do so**.** Similar to existing statewide restrictions on the use of nondisclosure provisions involving sexual harassment claims, the employee must have 21 days to consider the nondisclosure provision and the "preference" must be memorialized in an agreement signed by all parties after the 21-day period, after which the employee will have seven days to revoke the consent.

Appearance and Grooming Policies

New York – Effective July 12, 2019, the definition of "race" under the New York's anti-discrimination law was expanded to include "traits historically associated with race, including but not limited to, hair texture and protective hairstyles," making it unlawful to discriminate on the basis of such traits. The law defines "protective hairstyles" as including but not limited to "braids, locks, and twists." In February 2019, New York City also released enforcement guidance on appearance policies, prohibiting policies that ban or restrict naturally curly hair, dreadlocks, braids, cornrows, and other hairstyles in the absence of legitimate health or safety concerns.

California – Effective January 1, 2020, the definition of "race or ethnicity" will be expanded under California's anti-discrimination law to include "traits historically associated with race, including, but not limited to, hair texture and protective hairstyles," such as braids, locks, and twists.

New York – Effective October 8, 2019, it will be unlawful for a New York employer to impose any terms that would require an applicant or employee to violate or forego a sincerely held practice of their religion as a condition or hire or continued employment. Such practices include wearing "any attire, clothing, or [having] facial hair in accordance with the requirements of [the employee's] religion."

Leave Laws

Connecticut – Effective January 2022, eligible Connecticut employees will be entitled to receive up to 12 weeks of partially paid family and medical leave in a 12-month period for reasons including their own serious health condition or that of a covered family member, and caring for a new child. In addition, eligible employees who experience a pregnancy-related serious health condition that results in incapacitation will be entitled to two additional weeks of paid leave, for a maximum of 14 weeks. All employers in the state will be covered by the law, and employees become eligible for paid leave after working for an employer for 12 weeks. The paid leave benefit will be funded by an employee payroll tax of up to 0.5%, with contributions beginning on January 1, 2021.

New York – Effective April 10, 2019, **Westchester County** enacted a paid sick leave law that provides covered employees with up to 40 hours of leave per year for their own medical needs, those of a family member, or other covered reasons. Employers with five or more employees working in Westchester must provide paid sick leave. In addition, effective October 30, 2019, Westchester employers must provide up to 40 hours of paid leave per year to employees who are victims of domestic violence, sexual abuse, stalking, or other related crimes.

New York – Effective April 2019, New York employers must provide employees with up to three hours of paid time off to vote in any election. Employers may require that the time be taken either at the beginning or end of the employee's shift, and may require notice of the need for time off to vote.

Lactation Accommodation

New York – Effective March 17, 2019, **New York City** employers must now provide breastfeeding employees with access to a lactation room containing certain features, as well as a refrigerator suitable for breast milk storage, "in reasonable proximity" to the employee's work area. This requirement expands upon the existing obligations to provide reasonable break time to employees needing to express breast milk. Employers must also implement a written policy regarding the provision of a lactation room, to be distributed to all new employees upon hire.

California – Effective September 30, 2018, California employers must make reasonable efforts to provide an employee with the use of a room or other location to express breast milk, other than a bathroom. The state legislature is also currently considering a bill that would establish certain requirements for a lactation space, and require employers to develop and implement a policy regarding lactation accommodation.

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