Moritt Hock & Hamroff LLP
ATTORNEYS AT LAW
STRENGTH IN PARTNERSHIP

ALERT

July 2015

EMPLOYMENT LAW ROUNDUP

Moritt Hock & Hamroff LLP is pleased to offer our clients and friends an overview of recent employment law developments that may impact New York businesses.

New York City "Ban the Box" Legislation

On June 29, 2015, Mayor de Blasio signed the "Fair Chance Act," which is scheduled to take effect on October 27, 2015.[i] The Act prohibits New York City employers with four or more employees from inquiring about an applicant's criminal background history until after a conditional offer of employment has been extended. The Act also prohibits employers from searching publicly available sources to obtain information about an applicant's criminal history or indicating in job advertisements that an applicant's arrest or criminal conviction record will in any way limit the applicant's eligibility for employment.

Under the Act, an employer may inquire about and/or investigate an applicant's criminal history after making the employee a conditional offer of employment. If an employer decides to withdraw an offer of employment based on criminal conviction information the employer receives, it must:

1. provide the applicant with a written explanation of its decision, consistent with an eight-factor balancing test set forth under New York Correction Law Article 23-A as well as a copy of the criminal background information the employer obtained; and

2. hold the position open for a reasonable time (no less than three business days from that date), during which time the applicant must be provided with a chance to respond to the employer or background screening company and explain any inconsistencies in the report or any evidence of rehabilitation that could affect the employer's decision.

It is unclear how courts will construe the Act. However, in cases interpreting the New York State Human Rights Law, which prohibits discrimination in hiring and incorporates by reference the Correction Law's eight-factor test, courts give a level of deference to employers who have expressly considered each of the eight factors in connection with a particular job applicant, and concluded that the risk of hiring that person is unreasonable.[ii]

While the Act applies to most jobs, there are limited exceptions. The exceptions mainly relate to jobs for which the employer is required to conduct criminal background checks or where a conviction would bar employment, such as certain

law enforcement positions, and other jobs where bribery or other forms of corruption are of heightened concern.

Extending Overtime to Millions More Americans

On June 22, 2015, President Obama announced his plan to revise the Fair Labor Standards Act ("FLSA") regulations to raise the threshold salary under which workers automatically qualify for time-and-a-half overtime wages (the "Proposed Rule").[iii] Under the Proposed Rule, the United States Department of Labor ("DOL") will set the demarcation line for exempt and non-exempt employees to the 40th percentile of wage earners in the United States, which the DOL estimates is now about $47,892.00 and will be approximately $50,440.00, beginning in 2016. The DOL will be responsible for insuring that this threshold salary remains current by continually considering current salary and compensation levels.

The DOL estimates that the Proposed Rule, which is projected to come into effect in 2016, will affect nearly five million workers in the short term. Some economists have predicted that businesses will scale back hours in an attempt to avoiding paying overtime, an effect that might increase hiring.[iv]

Unpaid Interns Need Not Be Paid

On July 2, 2015, the United States Court of Appeals for the Second Circuit announced new rules for distinguishing workers who may lawfully be classified as (unpaid) interns as opposed to (paid) employees. In *Glatt v. Fox Searchlight Pictures, Inc.,*[v] the Court of Appeals held that if the worker is the "primary beneficiary" of the work experience, then an employer may lawfully characterize the worker as an intern. However, if the employer is the primary beneficiary, then the worker must be classified as an employee.

The Court of Appeals gave guidance as to how to determine the "primary beneficiary," offering a non-exclusive list of factors. These factors include but are not limited to: whether there is an expectation of compensation; whether the worker is a student and, if so, how closely tied the worker's duties are to his/her academic responsibilities; how the position benefits both parties; and to what extent the intern's work complements, rather than displaces, the work of a paid employee.[vi] The Court of Appeals referred the case back to the trial court to apply these factors based on the trial court's factual findings.

In so holding, the Court of Appeals declined to follow a standard developed by the United States Department of Labor ("DOL"). Under the DOL's six-factor test, among other things, the employer had to prove that the working "experience was for the benefit of the intern" and that the employer "derives no immediate advantage from the [intern's] activities."[vii] The same day that the Second Circuit decided *Glatt*, it

This Alert was written by A. Jonathan Trafimow.

Mr. Trafimow, a partner with the firm, heads the firm's employment practice where he represents employers in all areas of workplace discrimination, retaliation, harassment and civil rights claims, and class actions. He also routinely advises employers on compliance with local and federal employment laws and regulations.

Stephen Breidenbach, a summer associate with the firm, assisted with the research and preparation of this Alert.

Any questions concerning the matters raised in the Alert should be addressed to Mr. Trafimow. He can be reached at (516) 873-2000 or by email at jtrafimow@moritthock.com

also decided *Wang v. Hearst Corp.,*[viii] a case that reiterated the "primary beneficiary" standard and referred to the "non-exhaustive set of factors" set forth in *Glatt* as for guidance in applying the standard.

We can assist you in understanding and addressing your obligations under the "Ban the Box" law, other anti-discrimination laws, the Fair Labor Standards Act and the New York Labor Law. For employers subject to the "Ban the Box" law, it may make sense to revise job application forms, train recruiters and persons involved in the interview and hiring process, revise offer letters, and take other steps to promote compliance. Employers should also closely follow the proposed increase in the threshold salary under the FLSA, and make sure they are otherwise complying with the overtime and minimum wage requirements of the FLSA and the NYLL.

◆ ◆ ◆ ◆ ◆

---

[i] *Mayor de Blasio Signs "Fair Chance Act",* City of N.Y. (June 29, 2015), http://www1.nyc.gov/office-of-the-mayor/news/456-15/mayor-de-blasio-signs-fair-chance-act-#/0.
[ii] *Dempsey v. New York City Dep't of Educ.*, 25 N.Y.3d 291 (2015).
[iii] *Notice of Proposed Rulemaking: Overtime*, U.S. Dep't of Labor, Wage and Hour Division, http://www.dol.gov/whd/overtime/NPRM2015/ (last visited July 10, 2015).
[iv] Noam Scheiber, *Obama Making Millions More Americans Eligible for Overtime,* N.Y. Times (June 29, 2015), http://www.nytimes.com/2015/06/30/business/obama-plan-would-make-more-americans-eligible-for-overtime.html?_r=0.
[v] *Glatt v. Fox Searchlight Pictures, Inc.*, No. 13-4478-CV, 2015 WL 4033018 (2d Cir. July 2, 2015).
[vi] *Id*. at *6.
[vii] *Id*. at *4.
[viii] *Wang v. Hearst Corp.*, No. 13-4480-CV, 2015 WL 4033091, at *1 (2d Cir. July 2, 2015).

Attorney Advertising