BUSINESS IN 2024

WEEKLY WEBINAR SERIES

BOND SCHOENECK & KING ATTORNEYS

Your Host

Gabriel S. Oberfield

Senior Counsel
goberfield@bsk.com
New York, NY

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TODAY'S AGENDA

Gabe Oberfield – (12:00PM-12:05PM)

- Agenda

Jackson Somes – (12:05PM-12:15PM)

- Marriott to Overhaul Data Security System in FTC Settlement

Jennifer Tsyn – (12:15PM-12:25PM)

- Data Privacy and Cybersecurity in the Hospitality Industry

Travis Talerico – (12:25PM-12:35PM)

- NYDOL's Proposed Regulations Concerning Pay Transparency Law Have Expired

Kelly McKinney – (12:35PM-12:45PM)

- Pregnant Workers' Fairness Act Litigation Heats Up

G. Oberfield – (12:45PM)

- Your Questions / Announcements

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Marriott to Overhaul Data Security System in FTC Settlement

Jackson K. Somes
Associate
jsomes@bsk.com
Rochester, NY

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Marriott International Data Breach Timeline

- Starwood Acquisition – November 2015
- First Data Breach – Announced Four Days Later
- Second Data Breach – November 2018
- Third Data Breach – March 2020

FTC Settlement Order

- Allegations
  - failure to implement appropriate password controls;
  - failure to patch outdated software;
  - failure to adequately monitor network environments;
  - failure to implement access controls;
  - failure to implement appropriate firewall controls; and
  - failure to apply appropriate multifactor authentication to protect sensitive information.

- Settlement Highlights
  - Implement new data security system
  - Biennial third-party assessment for the next 20 years
  - Annual certification of compliance
  - Provide customers with process to request Marriott delete their personal information
  - Can only retain personal information for as long as necessary to fulfil the purpose of which it was collected

Other Notable Actions

- Settlement with State Attorneys General
  - Marriott agreed to pay a $52 million fine related to the breaches.

- Class Action
  - On-going class action lawsuit related to the breaches that began in 2019

Data Privacy and Cybersecurity in the Hospitality Industry

Jennifer L. Tsyn

Member
jtsyn@bsk.com
Albany, NY

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NYDOL's Proposed Regulations Concerning Pay Transparency Law Have Expired

Travis R. Talerico

Associate
ttalerico@bsk.com
Rochester, NY

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What is “pay transparency?”

- Sharing more information about pay
- Intended to help close the pay disparity or to reduce/eliminate pay inequity
  - Somewhat related to NY 194-a (ban on asking about pay history) intended to disrupt systemic underpayment or pay discrimination based on protected characteristics
- Pay transparency laws generally require employers to disclose information regarding pay or compensation range for that position during hiring process (job posting)

Recall…

- **NYS Pay Transparency Law**
  - **Enacted**: December 21, 2022
  - **Effective: September 17, 2023**

- Adds new New York Labor Law § 194-b which requires covered employers to post range of pay on job ads, creates recordkeeping obligations, and recourse for aggrieved persons/penalties for violations

Who does the law apply to?

- Applies to private sector employers with 4+ employees, employment agents and recruiters
  - Does not apply to public sector
  - Does not apply to “temporary help firms” as defined in NYLL 916(5)

**Temporary Help Firm - means a business which recruits and hires its own employees, and assigns those employees to perform work at or services for other organizations, to support or supplement the other organization's workforce, or to provide assistance in special work situations such as, but not limited to, employee absences, skill shortages, seasonal workloads, or to perform special assignments or projects. Temporary help firm not PEO.*

What does this law require?

- Employers must ensure that any advertisements for job, transfer opportunities, **and** promotions that can or will be performed (even in part) in NYS must disclose:
  - Compensation or a range of compensation for the position
  - Job description for the position, if one exists

What must be disclosed?

- "Compensation or range of compensation"
  - Range = "minimum and maximum annual salary or hourly range" that the employer "in good faith believes to be accurate at the time of the posting" of the advertisement
  - If the position is solely paid by commission, employer to comply with the law's requirements by "disclosing in writing a general statement that compensation shall be based on commission."

Anti-Retaliation

- Employers are prohibited from refusing to interview, hire, promote, employ, or otherwise retaliating against an applicant or current employee for exercising their rights under the new law

Remedies for Violations

- Person claiming to be aggrieved under this new law can file complaint with NYS Department of Labor

- NYSDOL will investigate and can impose civil penalties of $1,000 up to $3,000 for violations of the law

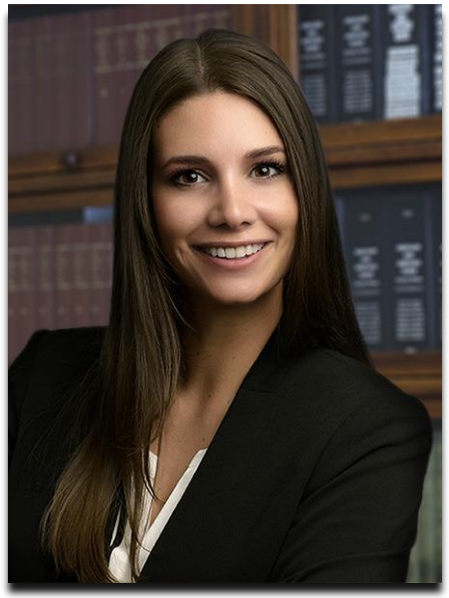
Major Requirements/Definitions

- *Applies to jobs that* ***"will physically be performed, at least in part, in the state of New York, including a job, promotion, or transfer opportunity that will physically be performed outside of New York but reports to a supervisor, office, or other work site in New York"***
- "**Advertise**" is defined as ***"to make available to a pool of potential applicants for internal or public viewing, including electronically, a written description of an employment opportunity."***
- **"Range of compensation"** means the minimum and maximum annual salary or hourly range of compensation for a job, promotion, or transfer opportunity that the employer in good faith believes to be accurate at the time of the posting of an advertisement for such opportunity.

Expiration of Proposed Rules

- On September 13, 2024, the Department of Labor published a Notice of Proposed Rulemaking to clarify a variety of ambiguities about Labor Law Section 194-b, which expired on September 12, 2024.
- While the proposed rulemaking set forth a plethora of clarifications as to what exactly was required, for example a definition of what an “advertisement” consisted of, this rulemaking was never finalized, so we are left with the plain reading of Section 194-b, as it is presently drafted.

Pregnant Workers' Fairness Act Litigation



Kelly L. McKinney

Associate

kmckinney@bsk.com

Garden City, NY

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Pregnant Workers Fairness Act

- Went into effect on June 27, 2023
- Requires that employers with at least 15 employees provide reasonable accommodations to qualified employees or applicants with known limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions
- Exception: employer does not need to provide an accommodation that would constitute an undue hardship

Reasonable Accommodation

- Defined as a “change in the work environment or how things are usually done”

- Includes:
  - Frequent breaks;
  - Sitting/standing;
  - Schedule changes, part-time work, paid and unpaid leave;
  - Telework;
  - Light duty;
  - Temporarily suspending one or more essential functions.

**Non-exhaustive list

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Undue Hardship

- Defined as “significant difficulty or expense for the operation of the employer”

- Factors to be considered:
  - Consideration of the length of time that employee is unable to perform the essential functions;
  - Nature of the essential function, including its frequency;
  - Whether there are other employees who can perform or be temporarily hired to perform the essential functions; or
  - Whether the essential function can be postponed for a period of time.

**Non-exhaustive.

EEOC v. Polaris Industries, Inc.

- Employer is a vehicle manufacturer
- Employee notified employer that she was pregnant at “new employee orientation”
- Employer assigned employee to Line 1, which required overtime
- There were other lines that did not require overtime, and open positions on those lines.

EEOC v. Polaris Industries, Inc.

- Employer refused to excuse employee's pregnancy-related absences
  - Employer assessed "attendance points" against her for her absences – certain number of points would lead to discipline, including termination

- Employer required employee to work mandatory overtime, despite knowing her doctor restricted her from working overtime
  - Employee specifically requested a temporary accommodation to not work overtime
  - Employer denied: "We cannot accommodate this restriction as overtime is an essential function of the position"

EEOC v. Urologic Specialists of Oklahoma, Inc.

- Employer is a specialty medical practice
- Employee was hired as a medical assistant
- Medical assistants are required to be on their feet 80-95% of the day, and are not permitted to complete their duties while sitting
- Medical assistants are not guaranteed breaks

EEOC v. Urologic Specialists of Oklahoma, Inc.

- Employee told employer she was pregnant
- Employee's doctor later advised that employee needed to periodically sit, take short breaks to eat or drink, and occasionally prop her feet up to reduce swelling and pain
- Employer refused to provide accommodations allowing employee to sit or take breaks
  - Employee was told that sitting and eating were not part of job description, and she would be sent home if she needed to sit while at work

EEOC Claims & Requested Remedies

- EEOC is alleging that the employees were qualified under the PWFA because:
  - Any inability to perform any essential job functions were temporary, and could be performed in the near future, and
  - The inability to perform could be reasonably accommodated

- EEOC is seeking backpay, pain & suffering damages, and punitive damages for violations of the PWFA

Key Takeaway

- PWFA differs from the ADA
- Under the ADA, employee must show that he/she can perform the essential functions of the job, with or without accommodations
- Under the PWFA, employer must provide accommodation even if the employee is still temporarily unable to perform the essential functions of the job

Questions?

Gabriel S. Oberfield

Senior Counsel
ksmith@bsk.com
New York, NY

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The NYS Clean Slate Act: Are you ready?

Special Edition Webinar
October 22, 2024
12:00 – 12:45 p.m.

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The Pregnant Worker:

What to Expect When an Employee is Expecting

Labor and Employment Law Fall 2024 Breakfast Briefing

Albany • October 31
Binghamton • September 17
Buffalo • October 3
Corning • September 26
Ithaca • September 24
Melville • October 1
New York City • September 25
Rochester • September 19
Saratoga Springs • October 23
Syracuse • October 10
Utica • October 15
Watertown • October 24
Westchester • October 10

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Thank You

The information in this presentation is intended as general background information.
It is not to be considered as legal advice.
Laws can change often, and information may become outdated.