

New York Legislative Developments

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New York State has enacted new compliance obligations for non-profit employers, transporters of commercial goods, and health care employers.

New York Non-Profit Revitalization Act of 2013

The New York Non-Profit Revitalization Act of 2013 is the first major overhaul of the law governing New York State non-profit corporations in four decades. The new law limits the types of non-profit corporations to charitable and non-charitable, requires certain internal governance controls, and revises financial reporting and audit procedures for these corporations. It becomes effective on July 1, 2014. Following are the law's employment-related mandates.

Whistleblower Policy

Non-profits with at least 20 employees and annual revenue in excess of \$1 million in the prior fiscal year must adopt a whistleblower policy to protect those who report suspected improper conduct from retaliation (Section 715 -b). The policy must include:

- (1) procedures for reporting violations and suspected violations of laws or policies, including for preserving the confidentiality of reported information;
- (2) a designated employee, officer or director tasked with administering the policy and reporting to the audit or other committee of independent directors or, if no such committee exists, to the board; and
- (3) a requirement that copies of the policy be provided to employees, officers, directors and volunteers.

Larger non-profit health care employers likely already have a similar policy relating to fraud, but all corporations must review or develop a compliant policy.

Conflict of Interest Policy

The law requires adoption of a conflict of interest policy requiring the covered corporation's directors, officers and key employees act in the non-profit's best interest. The policy must include, among other things:

- (1) a definition of what constitutes a conflict of interest;
- (2) procedures for disclosing a conflict of interest to the audit committee or board;
- (3) a prohibition against any attempt by the person with the conflict of interest to influence improperly the deliberation of or voting on the matter giving rise to the conflict; and
- (4) a requirement that the existence and resolution of the conflict be documented in the non-profit's records, including the minutes of any meeting at which the conflict was discussed or voted upon.

Non-profit corporations must review current policy and revise as needed.

Executive Compensation

The law continues to allow reasonable compensation of executives; however, an executive is prohibited from being involved in the deliberation or vote concerning his or her compensation. Further, the law prohibits any employee from serving as chair of the board of a covered entity.

New York State Commercial Goods Transportation Industry Fair Play Act

Consistent with the state's focus on alleged employer misclassification of service providers as independent contractors rather than employees (as seen in the Construction Industry Fair Play Act), and to level the playing field for employers who incur the costs related to classifying workers as employees and prevent the improper use of "owner-operators," the New York State Commercial Goods Transportation Industry Fair Play Act limits use of independent contractors in the commercial goods transportation services industry.

Effective March 11, 2014, all persons with a New York State-issued commercial driver's license who transport goods in New York for commercial goods transportation contractors or subcontractors (any business that compensates commercial vehicle drivers who possess state-issued commercial driver's licenses to transport goods in the state) are presumed to be employees. To overcome the presumption, the individual must be a separate business entity *or* all of the following criteria must be met:

(A) the individual must be free from direction and control in performance of the job (under contract and in fact);

(B) the service performed must be outside the usual course of business for which the service is performed; and

(C) the individual must be customarily engaged in an independently established trade, occupation, profession or business similar to the service at issue.

To satisfy the "separate business entity" requirement, the business entity, among other things, must have substantial investments of capital in the underlying business, the ability to provide services to others and specific language must be included in written contracts. The law provides that neither the contractor's failure to make unemployment contributions or withhold income taxes or the service provider's purchase of workers' compensation coverage affects the presumption.

Covered entities must post a notice in the workplace promulgated by the Commissioner of Labor summarizing the requirements and containing the Department of Labor's contact information to report an alleged violation. In addition to English, postings in other languages are required and the notice must be weatherproof. Violation of the posting requirements subjects the business to civil penalties of up to \$500 for a first violation and up to \$5,000 for a subsequent violation within a five-day period.

Penalties for "willful" misclassification are more severe. A contractor "willfully violates" the law when it knew or should have known that he or she was committing a violation. The law provides for civil penalties of up to \$2,500 for each misclassified employee for the first violation, and up to \$5,000 for each subsequent misclassification within a five-year period. Possible criminal penalties include imprisonment for not more than 30 days or a fine not to exceed \$25,000 for the first violation, and imprisonment for not more than 60 days or a fine not to exceed \$50,000 for each subsequent offense. The law expressly does not limit the misclassified individual's right to seek remedies in other forums.

Corporate officers, directors and shareholders who control at least 10 percent of the corporation's stock are at risk of personal liability if they knowingly permitted the corporation to willfully misclassify employees. A conviction for a willful violation also can preclude the contractor or individual from bidding on public contracts for up to one year from the date of the conviction, or up to five years for subsequent convictions. A covered entity that misclassifies workers, of course, also is subject to all applicable contributions, payments and penalties under other statutes, including unemployment insurance and workers' compensation insurance.

The statute also prohibits retaliation against any individual who makes or threatens to make a complaint under the statute or provides information or testimony. The law provides for a private cause of action regardless of whether civil penalties can be imposed on the business.

Businesses in the commercial goods transportation industry must review their classification practices for compliance.

Further Smoking Prohibitions at Health Care Facilities

The Public Health Law now prohibits smoking within 15 feet of a hospital or residential health care facility entrance or exit. While the law specifically permits smoking by “a patient or a visitor or guest of a patient of a residential health care facility” in a specially designated area on the grounds of a facility, this exemption does not apply to employees of a hospital or residential health care facility. Covered employers must ensure their smoking policies are consistent with the law’s requirements.

In addition to these new laws, New York employers must ensure compliance with the enhanced minimum wage and, if they are located in New York City, the new pregnancy accommodation requirements and the upcoming paid sick leave requirements. (See our article, Summary of Major State and Local Law Developments in 2013.)

If you have any questions regarding these and other legislation affecting the workplace, please contact the Jackson Lewis attorney with whom you regularly work or Richard I. Greenberg, GreenbeR@jacksonlewis.com, David S. Greenhaus, GreenhausD@jacksonlewis.com, Noel P. Tripp, TrippN@jacksonlewis.com.

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practices

Management and Employee Training