

Employees in Multiple States: Keeping track of changing laws and policies

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Many employers based in the Carolinas have employees across the country, meaning they must keep up to speed on legal developments affecting employers in the states where they have workers.

Below is a summary of recent employment-related developments in three Northeastern states, imposing additional restrictions on non-compete agreements, allowing more employees to file pay discrimination claims, and requiring more detailed sexual harassment policies and training.

Massachusetts

The Massachusetts Noncompetition Act changes requirements for non-compete agreements signed on or after Oct. 1, 2018. Non-competes must now 1) be in writing; 2) be signed by the employer and the employee; 3) expressly affirm the employee's right to consult with counsel prior to signing; and 4) be provided to the employee either before a formal offer letter or at least 10 business days before the start of employment, whichever comes first (or in the case of a current employee, at least 10 business days before the effective date).

The new law prohibits non-competes for employees who are non-exempt under the Fair Labor Standards Act, less than 18 years old, or part-time college or graduate students. And non-competes must now be supported by "garden leave pay" or "other mutually agreed-upon consideration." (Garden leave pay is payment of at least 50 percent of the employee's highest base salary during the preceding two years for the duration of the restricted period.)

Also, non-competes cannot extend beyond "the geographic areas in which the employee . . . provided services or had a material presence or influence (within the last two years of employment)." Nor can they extend beyond 12 months unless there is a breach of fiduciary duty or misappropriation by the employee, in which case the non-compete restriction may last for up to two years.

The bottom line is that to be enforceable, non-competes in Massachusetts will now have to be much more narrowly tailored.

New Jersey

New Jersey's Law Against Discrimination (LAD) has been expanded to target allegedly discriminatory pay practices beyond those based on gender; it became effective July 1, 2018. Now, if an employee in any class protected by state law (including race, national origin, age, marital status, and sexual orientation) is paid less than someone outside the class for "substantially similar work, when viewed as a composite of skill, effort and responsibility," the employer could be liable for six years of back pay and treble damages, as well as the other remedies provided by the LAD (like compensatory damages, punitive damages and attorneys' fees and costs).

To avoid liability, employers would have to demonstrate "that the [pay] differential is made pursuant to a seniority system [or] a merit system." Otherwise, employers would have to show that the pay differential is based on a "bona fide factor other than the characteristics of members of the protected class, such as training, education or experience, or the quantity or quality of production" and other factors, taking into account wage rates across all operations and facilities of the employer.

Employers with employees in New Jersey will now have to undertake a comprehensive review of pay practices and policies to ensure compliance with the LAD expansion.

New York

New legislation in New York requires all employers to adopt a model anti-sexual harassment policy published by the state, or a customized version of that policy that meets eight specific minimum standards and includes a complaint form, by Oct. 9, 2018. The measure also mandates that by Jan. 21, 2019, employers provide interactive anti-harassment training to all employees and contractors that meets specific criteria; new employees must be given the training within 30 days of hire. The state has published a fully scripted model training packet that employers can consider using.

New York City employers with 15 or more workers, in addition to meeting the new state requirements, must provide all employees with annual sexual harassment training that covers specific topics, some of which are different from the state topics. The deadline for training current employees was Sept. 16, 2018. The city also has issued a new poster that employers must use.

These developments make it clear that employers in the Carolinas need to be familiar with legal requirements in all jurisdictions where they have employees. If you have any questions regarding this or other related issues, contact the Nexsen Pruet Employment & Labor Law team.

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