Special Report

2021 New York State, City Legislative and Related Developments; 2022 Outlook

By Richard I. Greenberg, Daniel J. Jacobs, Christopher M. Valentino & Henry S. Shapiro

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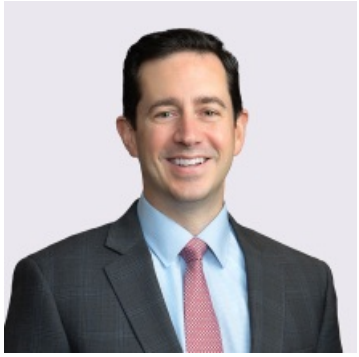
Meet the Authors

Richard I. Greenberg

(Rich)
Principal
(212) 545-4080
Richard.Greenberg@jacksonlewis.com

Daniel J. Jacobs

(He/Him)
Principal
(212) 545-4049
Daniel.Jacobs@jacksonlewis.com



While most of our focus over the last year has been on COVID-19-related developments, New York State and New York City employers also must ensure compliance with other recent and upcoming legal changes.

Summarized below are some significant recent and upcoming COVID-19- and non-COVID-19-related developments.

COVID-19

New York State

While the mandates of NY Forward have ended, the New York Health and Essential Rights Act (HERO Act) and Governor Kathy Hochul's subsequent declaration of an airborne communicable disease emergency continue to impact all New York State employers.

Section 1 of the HERO Act requires all private employers in New York State to adopt a safety and health plan to protect their employees from airborne infectious diseases. Section 1 applies to individuals who work at locations over which employers have the ability to exercise control. These individuals include independent contractors, individuals working for staffing agencies, and other workers not traditionally defined as employees. However, the HERO Act does not apply to employees at locations at which work is performed for which the employer does not have the ability to exercise control, such as those who telework from private residences. Under Section 1, employers must create an airborne infectious disease exposure prevention plan, provide a copy of the plan to employees and to new employees upon hire, post the plan in conspicuous locations at each worksite, and update the plan as needed, among other obligations. Employers may be required to pay penalties of $50 or more per day for not creating a plan and up to $10,000 for not following an adopted plan. Section 1 also allows employees to bring a private right of action against their employer for not adopting a plan or not following a plan in certain situations. As the airborne communicable disease emergency remains in place through at least February 15, 2022, all covered New York State employers must ensure compliance and follow their adopted plan through that date and any extension thereof.

Under Section 2 of the HERO Act, employers with 10 or more employees must allow employees to create a joint labor-management workplace safety committee. The objective of this committee is to ensure that workers have an integral role in worksite safety and have an avenue to raise safety and health concerns directly with management. Among other things, such a committee can review workplace policies relating to occupational safety and health. The HERO Act requires that committees be composed of employee and employer representatives, with all

Christopher M. Valentino
Principal
(631) 247-4653
Christopher.Valentino@jacksonlewis.com

Henry S. Shapiro
Principal
(631) 247-4651
Henry.Shapiro@jacksonlewis.com

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Background Checks
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Wage and Hour
Workplace Safety and Health

employee representatives being selected by non-supervisory employees, and at least two-thirds of the committee being comprised of non-supervisory employees. Regulations are pending.

As to *masks,* on December 13, 2021, Governor Hochul instituted a mask mandate requiring that all individuals wear a face covering in indoor public spaces, subject to the exception described below. The mandate broadly defines "indoor public place" as any indoor space that is not a private residence. Excepted from this requirement is any entity that ensures all on the premises are fully vaccinated and proof of vaccination is required upon entry (meaning, two weeks have passed from receipt of the last shot of the vaccine for which an employee is eligible, although a booster shot is not required under this mandate). On January 15, 2022, Governor Hochul revisited the mandate and, due to the ongoing surge of COVID-19 cases, extended the requirement until at least February 1, 2022. The mandate will be revisited at that time. However, even if this mandate is eliminated, as long as the HERO Act remains effective, employers must comply with any Centers for Disease Control and Prevention (CDC) mask guidance. (Please note: On January 24, 2022, a judge in New York State Supreme Court in Nassau County found the mask mandate to be unconstitutional and unenforceable. The judge held Governor Hochul did not have the power to impose such a mandate without legislative input. Governor Hochul immediately appealed the decision, but the decision has been stayed and the mandate remains in effect.)

For more information, see New York Health Commissioner Issues Order, Guidance on New State COVID-19 Mask Mandate.

As to *vaccination requirements,* while there is no overriding New York State vaccination mandate for the private sector, vaccination mandates apply to certain employees, primarily covered healthcare workers. Covered healthcare workers must receive a booster by February 21, 2022 (or within 30 days of becoming eligible, whichever applies). Moreover, while religious exemptions are not available under the New York State healthcare mandate, proceeding with an interactive dialogue with healthcare employees seeking religious accommodations remains a best practice. Healthcare industry employers also must ensure compliance, as applicable, with the Centers for Medicare & Medicaid Services vaccination mandate.

As to *isolation/quarantine obligations,* in general, New York State has adopted CDC guidance, which can limit isolation/quarantine periods to five days for asymptomatic exposure and positive tests. Further, those who have received boosters, are not eligible for a booster, or tested positive for COVID-19 in the previous 90 days need not quarantine if they are asymptomatic following close contact.

As to *pay obligations for isolation and quarantine,* the New York State Quarantine Leave Law remains in effect.

On March 18, 2020, New York State enacted legislation authorizing paid time off for employees subject to a mandatory or precautionary order of quarantine or isolation due to COVID-19. The Quarantine Leave Law entitles employees to paid time off based on employer size. Under the law, employers with over 100 employees

(interpreted by the New York State Department of Labor [NYSDOL] as nationwide) must pay employees for the lesser of what the employee would have earned during their quarantine/isolation period or the first 14 calendar days of such period. For employers with 11 to 99 employees, or employers with 10 or fewer employees (with their 2019 net income over $1 million), the pay obligation is limited to what the employee would have earned in a one-week period. Employers with 10 or fewer employees (with 2019 net income under $1 million) must provide unpaid time off. Employers generally can require an employee to provide a quarantine/isolation order to access this benefit. This paid leave is in addition to any other paid time or sick leave otherwise provided by the employer pursuant to applicable law or company policies. Currently, there is no expiration date for this law.

On January 20, 2021, the NYSDOL released guidance clarifying its view of employer obligations. Under the guidance, an employee is eligible for quarantine leave and the accompanying pay for up to three occasions with the second and third occasion reserved for positive tests. Further, if an employer mandates that an employee who is not otherwise subject to a mandatory or precautionary order of quarantine or isolation remain out of work due to exposure or potential exposure to COVID-19, regardless of whether such exposure or potential exposure was in the workplace, the employer must continue to pay the employee at the employee's regular rate of pay until the employer permits the employee to return to work or the employee becomes subject to a mandatory or precautionary order of quarantine or isolation, at which time the employee will be eligible for quarantine leave.

Additionally, New York State has promulgated a*paid vaccination time mandate.*On March 12, 2021, former Governor Andrew Cuomo signed a new law granting employees paid leave time to receive COVID-19 vaccinations, enacted under Labor Law § 196-c. According to the law, each employee is to be provided a paid leave of absence for a sufficient period of time, not to exceed four hours per injection, to receive a COVID-19 vaccination. The paid leave will be at the employee's regular rate of pay and will not be counted against any other leave time the employee is entitled to receive. This leave time also applies to booster shots. The law is effective through the end of 202.2

New York City

New York City employers have had to manage a separate and distinct set of compliance obligations.

As to *vaccine mandates,* obligations initially were imposed on City human services contractors and hospitality-based employers. Now, practically all New York City employers must mandate vaccination for their employees, subject to religious and disability exemptions.

As to the *City-wide vaccination mandate,* as of December 27, 2021, employees who are onsite in New York City or interact with the public during the course of business must show their employer proof of having received at least one dose of a COVID-19 vaccine. Employees will have 45 days to show proof of a second dose.

Each private business must verify and keep a record of workers' proof of vaccination. Records created or maintained must be treated as confidential.

There are three ways to track proof:

1. Businesses can keep copies of workers' proof of vaccination or, if applicable, record of a reasonable accommodation with supporting documentation; or
2. Businesses can maintain a record of proof of vaccination if the record includes:
    a. The worker's name;
    b. Whether the person is fully vaccinated; and
    c. For workers who only submitted proof of a first dose of a two-dose vaccine, the date by which proof of the second dose must be provided (no later than 45 days after the proof of the first dose was recorded); and
    d. For workers who do not have proof of vaccination due to a reasonable accommodation, a record of the accommodation provided and separate records stating the basis for the accommodation and supporting documentation provided by the worker; or
3. Businesses can check the proof of vaccination before allowing a worker to enter and maintain a record of the verification.

For non-employee workers, such as a contractor, the business may ask the worker's employer to confirm proof of vaccination and maintain a record of the request and confirmation.

Businesses must post an affirmation of compliance with the vaccine requirements in a public-facing location within the workplace no later than December 27, 2021. The certificate of affirmation is provided by the Department of Health. Businesses do not have to fire or discipline employees who fail to show proof of vaccination. These workers must only be kept out of the workplace. Businesses may be subject to a $1,000 fine for violations and escalating penalties if the violations continue. OSHA's withdrawal of the OSHA ETS vaccination or testing requirement did not impact this obligation.

For more information, see New York City Issues Order, Guidance on COVID-19 Vaccine Requirement for Private Sector Businesses.

Additionally, to encourage vaccination, effective retroactively to November 2, 2021, New York City employers are required to provide up to *four hours of paid time off per injection for vaccination of a child.* The New York City Earned Safe and Sick Time Act *has been expanded to* require private employers to provide parents with four hours of paid COVID-19 child vaccination time for each vaccine injection for each child, whether to use for the vaccination time itself or side effects. Under the new law, parents generally include biological, foster, step, adoptive, a legal guardian, or a person who stands in loco parentis. Covered children include those under 18 and those older than 18 who are incapable of self-care because of a mental or physical disability. Employers may require reasonable notice before employees use the COVID-19 child vaccination leave if the leave is foreseeable, but they cannot require more than seven days' notice prior to use of the time. For more information, see New York City Enacts Paid COVID-19 Child Vaccination Leave

To assist employers in understanding their COVID-19-related obligations related to the New York City Human Right Law, *the New York City Commission on Human Rights issued guidance on employer vaccination and COVID-19 policy considerations.*

The Commission adopted the "Pandemic Preparedness in the Workplace and the Americans with Disabilities Act" guidance and specific portions of the "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws" guidance issued by the Equal Employment Opportunity Commission (EEOC), both of which relate to the treatment of COVID-19 as a disability under federal law.

While the Commission's adoption of the EEOC guidance does not constitute a wholesale adoption of federal anti-discrimination law, it provides information regarding general prohibitions against discrimination, the accommodation process, the undue hardship analysis, and remote work accommodations.

The November 1, 2021, updates include the following:

- Employers can request documents from an employee's medical provider, specifying that the employee needs a particular accommodation.
- Employers are not required to provide accommodations based solely on any of the following:
  - An employee's generalized fears of catching COVID-19;
  - Age;
  - Caregiver status or relationship to or association with someone with protected status; or
  - Inability to secure childcare.
- Employers that administer vaccines to employees are permitted to prioritize vaccines for workers based on certain protected statuses, such as age or disability, consistent with recommendations of public health authorities.
- Employers are permitted to require employees to provide evidence of their ability to safely return to the workplace after recovering from COVID-19 and can mandate safety precautions, such as vaccination requirements, distancing measures and mask requirements.

Non-COVID-19 Developments

New York State

1. Whistleblower Protections

New York State expanded whistleblower protections by amending the New York Labor Law in October 2021. These expanded protections take effect on January 26, 2022. Specifically, the definition of "retaliatory action" under Labor Law Section 740, Subsection 1 is far more expansive (see below). Previously, general anti-retaliation protections under Section 740 were limited to actual violations of a law, rule, or regulation that caused a specific, substantial danger to the public health or safety or constituted health care fraud.

Under the amendment, "employee" includes former employees and independent contractors. Importantly, "retaliatory action" was *broadened* to include actions or threats to take actions that would adversely impact a former employee's current or future employment and contacting or threats to contact immigration authorities, *regardless* of whether employees were acting within the scope of their job duties. The provision further protects employees who disclose or threaten to disclose to a supervisor or to a public body an employer activity, policy, or practice that the employee *reasonably believes* is in violation of law, rule, or regulation or

that the employee reasonably believes poses a *substantial and specific danger to the public health or safety.* Employees are no longer required to report the challenged conduct to the employer prior to reporting it to a public body, but they must make a "good faith effort" to do so. Employer notification by employees is excused entirely if:

1. There is an imminent and serious danger to public health and safety,
2. The employee reasonably believes that reporting would result in the destruction of evidence or concealment of the conduct,
3. The conduct could reasonably be expected to endanger the health of a minor,
4. The employee reasonably believes that reporting would result in physical harm to the employee or another person, or
5. The employee reasonably believes their supervisor is aware of the conduct and will not correct.

Healthcare employers have an obligation to post a notification of rights under Section 741 of the Labor Law and all private employers are required to post a notification of rights under Section 740 of the Labor Law. As of the publishing of this article, employers continue to await additional guidance regarding the posting requirement, including the NYSDOL's publication of a model poster.

2. Electronic Monitoring

Signed by Governor Hochul on November 8, 2021, an amendment to New York State's Civil Rights Law requires notice of electronic monitoring in writing and through a posting. Effective May 7, 2022, Section 52-c(a) requires employers who monitor or otherwise intercept telephone, electronic mail, or internet transmissions through devices to provide notice upon hiring to those employees who are subject to monitoring in writing, in an electronic record or form, and the notice must be signed by the monitored employees. The update requires employers to post the notice "in a conspicuous place which is readily available for viewing by its employees who are subject to … monitoring." Additional guidance regarding the notice requirements is expected to be published prior to the May 7, 2022, effective date.

Employers who violate this provision are subject to progressively increasing civil penalties of $500 for the first offense, $1,000 for the second, and $3,000 for the third and each offense thereafter. Monitoring processes "designed to manage the type or volume of" mail, voicemail, or internet use (rather than monitor or intercept individual's use) for the purpose of maintenance are exempt from this provision.

3. Retirement Benefits

On October 21, 2021, Governor Hochul signed legislation focused on ensuring retirement plan security for New York private sector employees. Effective immediately, the recently enacted New York Secure Choice Savings Program Law (NYS Savings Program) requires New York employers to automatically enroll their employees in a state-run IRA retirement savings program, unless the employer already offers a retirement program. This NYS Savings Program applies to both public and private sector employers, for and not-for profit, that have been in business for at least two years, employed at least 10 employees in New York State,

and do not already offer a qualified retirement plan (including defined benefit plans and 401(k)/403(b) plans).

The IRS limits for the NYS Savings Program are considerably higher than the general IRA limits, offering employees more opportunities to save their money for retirement. In 2022, the maximum 401(k) contribution is $20,500 ($27,000 if you're age 50 or older), while the IRA limit is $6,000 ($7,000 if you're age 50 or older).

The New York City Retirement Security for All Act (NYC Act) may not ultimately take effect because of the NYS Savings Program, as the NYC Act provides for its termination should the state establish a retirement savings program covering employers who would otherwise be covered by the NYC Act.

Employers already offering a qualified retirement plan cannot terminate that plan to participate in the NYS Savings Program.

4. Minimum Wage

Effective December 31, 2021, the minimum wage in Long Island and Westchester was raised to $15 per hour for all workers. The minimum wage for New York City remains at $15 per hour, and the rate in upstate New York remains $13.20 per hour for all workers except fast food employees. For upstate New York, future increases will be based on an indexed schedule to be set by the Director of the Division of the Budget in consultation with the Department of Labor following an annual review of the impact. These increases will continue until the minimum wage for all employees in upstate New York is $15 per hour.

In addition, the weekly minimum salary for exempt white-collar employees increased because the minimum wage increased. The minimum weekly salary is 75 times the applicable minimum wage.

5. Paid Family Leave – Amendments Effective in 2023

On November 1, 2021, Governor Hochul signed an amendment to the New York Paid Family Leave Law that expands the ability to take leave to include caring for siblings with a serious health condition. Effective January 1, 2023, the definition of "covered family members" will include an employee's biological, adopted, step, and half-sibling(s).

6. Final NYS Paid Sick Leave Regulations

On December 22, 2021, the NYSDOL published final regulations regarding New York State Paid Sick Leave Law (NYSPSLL). The final regulations clarify a few issues:

- Employers should count employees employed nationwide when determining employer size for purposes of determining if the maximum annual accrual and usage per employee is 56 hours (100 or more employees) or 40 hours.
- Employers may (1) give employees the option to be paid for unused sick leave prior to the end of the calendar year, or, in the alternative, carry over unused sick leave; or (2) permit employees only to carry over unused sick leave. There is no limit on the number of hours an employee can carry over to the following calendar year, even when an employer frontloads the leave. This is a frustrating concept as leave usage in a year is limited to 56 or 40 hours depending on

employer size and many employers who frontload the entitlement do not wish to carryover or pay out time.
- Sick leave is accrued on a fractional basis. Accrual must account for all time worked regardless of whether time worked is less than a 30-hour increment and, in calculating accrual, "employers may round accrued leave to the nearest 5 minutes, or to the nearest one-tenth or quarter of an hour."
- Employees must be allowed to use sick leave as soon as it is available upon accrual.
- "Confidential information" is defined as "individually identifiable health or mental health information, including but not limited to, diagnosis and treatment records" (or other information that is treated as confidential or prohibited from disclosure by law). Employers may not require employees to disclose "the nature of an illness, its prognosis, treatment, or other related information" pertaining to an employee's use of sick leave.
- Employers generally may request documentation from employees to verify their eligibility to use sick leave under the NYSPSLL, but only when an employee uses leave for three or more consecutive workdays. Employers may request only the following documentation: (1) an attestation from a medical provider "supporting the existence of a need for sick leave," the amount of leave needed, and the date the employee is expected to return to work; or (2) an attestation from the employee concerning their eligibility to use the sick leave. Under either option, employers cannot require the employee or medical provider to disclose the reason for the sick leave usage. NYSDOL will publish a template for employee attestation following an absence of three or more consecutive days. Employers cannot require the employee to pay any costs or fees associated with obtaining medical or other verification of eligibility for use of sick leave.
- Employees do not need to provide advance notice for foreseeable leaves, unlike the New York City Earned Safe and Sick Time Act.
- Employers do not need to provide notice of the law's requirements to employees, unlike the New York City Earned Safe and Sick Time Act.

Proposed Employment Legislation in Governor Hochul's FY2023 Budget

Governor Hochul has proposed certain worker protections in her budget, including proposed legislation regarding restrictive covenants and wage theft.

1. Restrictive Covenants

Governor Hochul proposed legislation that would prohibit or limit the use of non-compete agreements by New York State employers. Under the proposed legislation, employers are prohibited from seeking, demanding, requiring, or accepting a non-compete agreement with a covered employee or prospective covered employee (defined as an individual who will earn less than the median wage in New York State as determined and published on the Department of Labor's website).

For all employees other than covered employees, no employer may seek, require, demand, or accept a non-compete agreement from any employee, unless the non-compete agreement meets the following requirements:

a. Be strictly limited to be no more expansive than as required for the protection

of the legitimate interest of the employer;
b. Not impose undue hardship on the employee;
c. Not be injurious to the public;
d. Be disclosed in a written offer of employment or in a written offer of a promotion at least 10 days before the effective date of such employment or promotion;
e. Be written in the primary language identified by the employee;
f. Be written at a reading comprehension level not exceeding that of the employee;
g. Not contain a term of more than one year after the employment has ended;
h. Not require that an employee adjudicate, including litigation or arbitration, outside of the state of New York a claim arising in the state of New York;
i. Be maintained by the employer for a period of not less than six years from the end of the agreement;
j. Be voidable, at the option of the employee, if the employer cannot demonstrate a continued willingness to employ the employee; and
k. Not deprive an employee of the substantive protection of New York law with respect to a controversy arising in the state of New York.

The proposed legislation would not apply to (a) the enforcement of covenants to not disclose trade secrets, (b) certain excluded employees, or (c) agreements between bona fide owners or partners of a business.

Governor Hochul also proposed legislation that would prohibit the use of non-solicitation agreements. Under the proposed legislation, employers would be prohibited from entering into a restrictive employment agreement that prohibits or restricts any employer's ability to solicit or hire another employer's current or former employees. Further, it would be unlawful for any entity to enter into such a restrictive employment agreement or to enforce or threaten to enforce such a restrictive employment agreement. For purposes of this legislation, the terms "employer" and "employee" have the same meanings as defined pursuant to Section Two of the Labor Law.

2. Wage Theft

Governor Hochul also proposed to increase criminal penalties for employers who knowingly or intentionally commit wage theft violations to align with penalties more closely for other forms of theft.

3. Recreational Marijuana Legislation

New York State legalized the use of recreational marijuana as of March 31, 2021 (even though retail sales are not expected until mid-to-late 2022 at the earliest). Of relevance to all employers, the legislation prohibits New York employers from refusing to hire, employ, discharge, or otherwise discriminating against someone who uses cannabis lawfully while off-duty and off-premises and while not using the employer's equipment or other property.

For more information, see: New York Legalizes Recreational Marijuana.

New York City

1. New York City Artificial Intelligence Usage

On November 10, 2021, the New York City Council passed a bill prohibiting employers and employment agencies from using automated employment decision tools (AEDT) to screen candidates or employees, unless a bias audit has been conducted prior to deploying the tool. The law becomes effective on January 1, 2023.

An "automated employment decision tool" is defined as any computational process (either derived from machine learning, statistical modeling, data analytics, or artificial intelligence) that issues a simplified output (*e.g.,* a score, classification or recommendation) to substantially assist or replace human decision-making for employment decisions that have an impact on natural persons.

An employer or employment agency is not permitted to use an AEDT to screen a candidate or employee for an employment decision unless (1) the tool has been the subject of a bias audit (*i.e.,* an impartial evaluation by an independent auditor) conducted no more than one year prior to the use of the tool, and (2) a summary of the tool's most recent bias audit and the distribution date of the tool subject to the audit is made publicly available on the employer or employment agency's website.

For employees or candidates that are New York City residents, employers or employment agencies are required to provide notice, no less than 10 business days before using the tool, that an AEDT will be used to assess or evaluate their candidacy and the job qualifications and characteristics that the tool will use to make the assessment. Candidates also have the right to request an alternative selection process or accommodation.

Due to the one-year-prior-bias-audit requirements, employers who wish to continue to use or use AEDTs as of January 2023 must conduct the bias audit immediately,

2. New York City Biometric Protections

On January 11, 2021, the New York City Council passed legislation that restricts the collection, use, and retention of biometric identifier information. Effective July 9, 2021, the law requires commercial establishments to (i) disclose how they use a customer's (*i.e.,* purchasers, lessees, and prospective purchasers of goods or services) biometric identifier information (*i.e.,* a physiological or biological characteristic that is used to identify, or assist in identifying, an individual) and (ii) refrain from selling or profiting from biometric identifier information. The law does not apply to government agencies, employees, or agents' collection and use of biometric identifier information

Only commercial establishments (defined as retail stores, places of entertainment, and food and drink establishments, which include any business "that gives or offers for sale food or beverages to the public for consumption or use on or off the premises, or on or off a pushcart, stand or vehicle") are subject to the disclosure requirement. The disclosure requirement does not apply to financial institutions. All commercial establishments that collect, retain, convert, store, or share customers' biometric identifier information are required to place a "clear and conspicuous

sign" by all customer entrances, unless the commercial establishment (i) collects biometric identifier information from video recordings or photographs that are "not analyzed by software or applications that identify, or that assist with the identification of, individuals based on physiological or biological characteristics" and (ii) the information is not shared with, sold, or leased to third parties other than law enforcement agencies. A sample Biometric Identifier Disclosure sign is available.

3. New York City Job Advertisements Must Include Salary Ranges

On December 15, 2021, the New York City Council passed legislation that requires employers to include salary information on all job postings for positions performed within New York City. Effective May 15, 2022, employers with four or more employees must include a "good faith" minimum and maximum salary range on all advertised New York City job, promotion or transfer opportunities. The law also makes the failure to include the salary range as an unlawful discriminatory practice under the NYC Human Rights Law. *See* New York City Employers Will Soon Be Required to Include Salary Ranges on Job Advertisements for further information.

4. New York City Labor Peace Obligations for City Human Services Contractors

On August 18, 2021, New York City enacted Local Law 87 to require contractors and subcontractors to enter into labor peace agreements with labor organizations as a condition to being awarded or renewing a city service contract with New York City agencies. The law went into effect on November 16, 2021. The law applies to any contractor or subcontractor that enters into city service contracts with New York City agencies, but exempts building service employees and subcontractors whose principal purpose is to provide supplies or administrative services, technical support, or other similar services that do not directly relate to the performance of human services. Covered employers must submit certifications to New York City agencies along with their bid for a service contract or request for a renewal, which must be updated annually. In addition, covered employers must submit an attestation within 90 days of entering into a city service contract confirming the status of the labor peace agreement.

On December 29, 2021, the Human Services Council of New York filed a complaint against the City of New York alleging that the new law is preempted by the National Labor Relations Act (NLRA), interferes with a worker's NLRA-protected right to engage in concerted activities, and gives excessive power to unions to make decisions concerning the contracts and workers.

Further, on November 23, 2021, New York City passed a bill to require restaurants and shops in future city-aided developments to sign "labor-peace agreements" with unions seeking to represent their workers. Effective April 23, 2022, New York City retail stores, food establishments, or distribution centers that have at least 10 employees and are located in developments that received at least a total present value of $500,000 in city aid must refrain from interfering with union organizing efforts, and the union at these establishments must agree to not go on strike or otherwise stop work.

5. NYC Fair Chance Act Amendments

On January 10, 2021, New York City amended the New York City Fair Chance Act (FCA) to expand the scope of the FCA by imposing new restrictions on an employer's ability to take adverse action against job applicants, current employees, and independent contractors based on pending criminal charges, arrests, or convictions. Effective July 29, 2021, the amendments, among other things, (i) extended the FCA's application to independent contractors and freelance workers, (ii) reiterate that employers may take adverse action against an applicant or employee who made "intentional misrepresentations" regarding an arrest or a conviction, provided that such adverse action is not based on a failure to disclose information that a person is not required to divulge and the individual was given an opportunity to explain the omission, (iii) provide slightly different Fair Chance Factors to be considered based on the situation, and (iv) require that a criminal check be the final step of the background check process.

The New York City Commission on Human Rights issued a Legal Enforcement Guidance and Frequently Asked Questions About New York City's Employment Protections Based on Criminal History.

For more information, see New York City Issues Guidance on Fair Chance Act Amendments Effective July 29, 2021.

6. New York City Fair Workweek Law Amendments Impacting Fast Food Industry Employers

On January 5, 2021, New York City amended the New York City Fair Workweek Law to provide greater protections for fast food employees. The amendments include "just cause" protection from discharge and significant reductions in hours, require employers to engage in seniority-based reductions and rehiring if staff reductions are due to bona fide economic reasons (*i.e.,* the full or partial closing of operations or technological or organizational changes to the business in response to a reduction in volume of production, sales, or profit), modify the existing obligation to provide good faith estimates of the employee's workdays and hours on or before the first day of work, and provide for a private right of action. The law went into effect on July 5, 2021.

Covered fast food employers may not discharge, reduce the hours of employees by 15 percent of their regular schedule or by 15 percent of any weekly work schedule, or indefinitely suspend employees (absent "bona fide economic reasons") without just cause. The just cause factors include:

1. Whether the fast food employee knew or should have known of the fast food employer's policy, rule, or practice that is the basis for progressive discipline or discharge;
2. Whether the food fast employer provided relevant and adequate training to the fast food employee;
3. Whether the fast food employer's policy, rule, or practice, including the utilization of progressive discipline, was reasonable and applied consistently;
4. Whether the fast food employer undertook a fair and objective investigation into the job performance or misconduct; and
5. Whether the fast food employee violated the policy, rule, or practice or committed the misconduct that is the basis for progressive discipline or

discharge.

When laying off workers for bona fide economic reasons, the fast food employer must do so in reverse order of seniority. The employer also must offer reinstatement based on seniority to laid-off workers before hiring new workers.

Covered fast food employers must adopt "scheduling practices that provide each fast food employee with a regular schedule that is a predictable, regular set of recurring weekly shifts the employee will work each week." The employer may not reduce the total hours in a fast food employee's regular schedule by more than 15 percent from the highest total hours contained in such employee's regular schedule at any time within the previous 12 months, unless the employee has previously consented to or requested such reduction in writing, or the reduction was consistent with the restrictions on discharges.

Aggrieved fast food employees who were allegedly subjected to a prohibited job action without just cause or a properly implemented seniority-based action for a bona fide economic reason appear to have the right to bring a civil action in court or, after January 1, 2022, file an arbitration proceeding.

For more information, see: New York City Enacts Legislation Expanding New York City's Fair Workweek Law.

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If you have questions about your compliance obligations under applicable federal,

New York State, and New York City law related to COVID-19 or non-COVID 19 issues, please reach out to the Jackson Lewis attorney with whom you regularly work.

(Associate Cliff LaFemina and law clerks Victoria Scaglione and Jamie Levitt contributed to this special report.)