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Protections Continue to Grow for Individuals in the Workplace

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Client Alerts

- Labor & Employment
- All Federal

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Written Contracts Required for Freelance Work in New York City Starting May 15, 2017

On May 15, 2017, the *New York City Freelance Isn't Free Act ("FIFA")* will become effective. The Act, which aims to ensure timely and full payment to freelancers, imposes several significant requirements on freelance work arrangements.

FIFA protects freelance workers in New York City, whom the Act defines broadly as "any natural person or organization composed of no more than one natural person, whether or not incorporated or employing a trade name, that is hired or retained as an independent contractor by a hiring party to provide services in exchange for compensation." Moreover, it applies broadly to any "hiring party," which it defines as "any person who retains a freelance worker to provide any service" other than federal, state, and local governments and any foreign governments.

In sum, FIFA requires a hiring party and freelancer to enter into a written contract whenever a hiring party retains the services of a freelance worker in New York City, and the contracted work has "a value of $800 or more, either by itself or when aggregated with all the contracts for services..." Significantly, FIFA applies prospectively – only to contracts entered into on or after the upcoming May 15, 2017 effective date. The Act requires that such written contract include at least:

1. the name and mailing address of both the hiring party and the freelance worker;

2. an itemization of all services to be provided by the freelance worker;
3. the value of the services to be provided pursuant to the contract;
4. the rate and method of compensation; and
5. the date on which the hiring party must pay the contracted compensation or the mechanism by which such date will be determined.

In addition, the Act requires that the hiring party pay the compensation to the freelancer on or before the date the payment is due under the contract. If the contract does not provide when the hiring party will pay the compensation, even though it is required to include a payment date or a mechanism for determining a payment date, the hiring party must pay it no later than 30 days after completion of the freelance work. Further, once a freelance worker in New York City has started working, FIFA prohibits the hiring party from requiring, as a condition of timely payment, that the freelancer accept a lower payment than the amount to which the hiring party and the freelancer originally agreed. The Act also prohibits retaliation or any action on the part of the hiring party that penalizes or is reasonably likely to deter a freelancer from exercising or attempting to exercise any of the rights provided for in the Act.

Violations of the Act could be costly to companies. FIFA includes a private right of action in New York State court for aggrieved freelancers. The Act provides remedies that include an award of double damages, injunctive relief, and requiring the defendant hiring party to pay the prevailing freelancer's attorneys' fees. Additionally, the Act provides a right of action on behalf of the City against a hiring party who is engaged in a "pattern or practice" of violations which could result in a civil penalty of up to $25,000.

New York City Employers Will No Longer Be Allowed to Ask Applicants About Salary Histories

On April 5, 2017, a day after "Equal Pay Day," the New York City Council passed legislation restricting employers from asking job applicants about their salary, benefits, or other compensation history during the hiring process. Notably, the legislation amends the New York City Human Rights Law (HRL) and applies to all employers, both public and private, in New York. It is slated to go into e ect 180 days after it is signed. It is expected that it will be signed by Mayor de Blasio without delay.

The law will make it an unlawful discriminatory practice for an employer to ask about the salary history of a job applicant, which includes the applicant's current or prior wage, bene ts, or other compensation, or otherwise rely on salary history during the hiring process. In the same vein, NY employers are also prohibited from communicating such inquiries to an applicant's current or prior employer. The new law also makes it unlawful for an employer to conduct a search of publicly available records or reports for the purpose of obtaining an applicant's salary history.

Although the new law will significantly restrict an employer's ability to ask job applicants about their salary, benefits, and other compensation history during the

hiring process, the law does not prohibit all communications about salary histories. For instance, if a job applicant voluntarily, without any prompting, discloses his or her salary history, the employer may consider that salary history to determine the applicant's compensation and may verify it. Moreover, so long as employers do not inquire about salary history, employers may still engage in a discussion with a job applicant about his or her "expectations with respect to salary, benefits, and other compensation." Similarly, employers are permitted to inform applicants in writing or otherwise about the position's proposed or anticipated salary or salary range. Additionally, the law only applies to applicants - not existing employees.

Under this law, employers that improperly inquire about or rely upon a job applicant's salary history may be subject to compensatory damages, including back and front pay, punitive damages, and attorneys' fees. Furthermore, the New York City Commission on Human Rights may impose a civil penalty for violations and can seek punitive damages for willful violations. Specifically, the Commission will impose a civil penalty of up to $125 for an intentional violation, and up to $250,000 for an "intentional malicious violation."

7th Circuit Rules that Civil Rights Laws Protect LGBT Employees from Workplace Bias in Landmark Case

On April 4th, the Seventh Circuit Court of Appeals made history by becoming the first federal circuit court to hold that workplace discrimination on the basis of sexual orientation violates Title VII of the Civil Rights Act of 1964. The April 4th ruling is important to employers because it broadens the class of potential plaintiffs who can bring workplace claims against them, and will require employers to ensure fair and equal treatment to all applicants and workers regardless of their sexual orientation.

Before this ruling, federal appeals courts throughout the country have consistently ruled that Title VII's protections against discrimination based on "sex" do not extend to sexual orientation. Specifically, appellate courts have routinely interpreted Title VII's use of the word "sex" as related to a person's gender, not a person's sexual orientation. Instead, Courts have reiterated that employees, regardless of sexual orientation, can sue under Title VII to seek relief for harassment, discrimination and retaliation, but only if the discrimination is related to alleged gender nonconformity. As a result, in order to survive dismissal, LGBT employees have been compelled to characterize sexual orientation discrimination claims as legally valid gender non-conforming claims under Title VII. Significantly, the Seventh Circuit's April 4th decision may signal that such back door pleading is no longer necessary.

In Hively v. Ivy Tech Community College, a part-time adjunct professor alleged that the community college provided her with a negative performance evaluation and declined to o er her an interview for a full-time position because she was a lesbian. The college argued that the plaintiff had no legal remedy because Title VII does not prohibit discrimination on the basis of sexual orientation.

Notably, last summer, in the original Seventh Circuit decision, the three-judge panel ruled against Hively, holding that Title VII does not prohibit discrimination in employment on the basis of sexual orientation. However, the Court appeared to struggle to follow precedent declining to extend Title VII to sexual orientation

claims. For example, the court observed the apparent unfairness that an employee could legally get married to a same-sex partner one day and then be legally red the next day for just that. Moreover, the opinion carefully discussed the struggle of drawing lines between cases based on what the court called “sex stereotyping,” and those based on sexual orientation. Shortly after the original Hively opinion was issued, Hively requested a rehearing in the case, this time requesting it be heard before all eleven judges of the Seventh Circuit. Though it is rare, the court granted Hively’s petition for en banc review and agreed to rehear argument in the case before all judges of the court, “in light of the importance of the issue.”

The majority decision, written by Chief Judge Diane P. Wood, concluded that “a person who alleges that she experienced employment discrimination on the basis of sexual orientation has put forth a case of sex discrimination for Title VII purposes.” Chief Judge Diane P. Wood reasoned, “Viewed through the lens of the gender non-conformity line of cases, Hively represents the ultimate case of failure to conform to the female stereotype (at least as understood in a place such as modern America, which views heterosexuality as the norm and other forms of sexuality as exceptional); she is not heterosexual.”

Chief Judge Wood further wrote, “Hively’s claim is no di erent from the claims brought by women who were rejected for jobs in traditionally male workplaces, such as re departments, construction, and policing. The employers in those cases were policing the boundaries of what jobs or behaviors they found acceptable for a woman (or in some cases, for a man).”

The Hively decision is particularly signi cant, as it creates a circuit split with other appellate courts continuing to hold that sexual orientation discrimination claims are not cognizable under Title VII. While the timing is not yet certain, the Supreme Court will likely be called upon to resolve the question of just how far Title VII’s sex discrimination protections extend when it comes to sexual orientation. We will continue to keep you updated as this issue develops.

Employer Tips

Companies should assess their relationships with “freelancers” in NY City to ensure that starting May 15, 2017, any new arrangements are put in a written agreement that adequately describes the terms of their engagement in order to fully comply with the new law.

NY City employers should also review their current hiring process and should avoid using applications that seek or require applicants to disclose their prior salaries, bene ts, or other compensation. Companies should also conduct training of their HR personnel and anyone involved in the hiring process, to ensure that they are not asking questions that call for providing one’s salary history as part of a job interview or reference check.

In NY and NJ discrimination on the basis of sexual orientation is prohibited on the state and city levels, so the 7th Circuit decision is only relevant to federal claims, not claims under state/city law in our area.

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