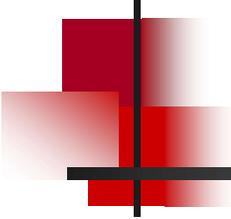


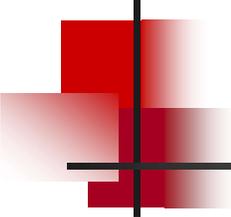
PANEL I
EMPLOYMENT AND LABOR LAW
MATERIALS



RECENT UPDATES IN EMPLOYMENT LAW: New Jersey and New York

Scott A. Ohnegian
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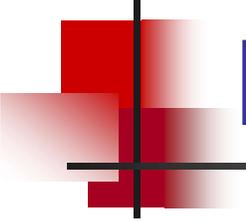
Riker Danzig Scherer Hyland & Perretti LLP
October 19, 2019



New Jersey

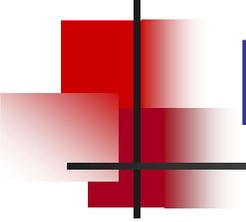
Recent notable legislative activity in New Jersey includes:

- the **New Jersey Earned Sick Leave Law**;
- the **Diane B. Allen Equal Pay Act**;
- amendments to **New Jersey's Family Leave Act**, **Temporary Disability Benefits Law**, and the **Security and Financial Empowerment Act**;
- an **increase in the state's minimum wage**;
- legislation affecting the **enforceability of arbitration clauses and non-disclosure agreements in employment contracts and settlement agreements**;
- the **New Jersey Wage Theft Law**; and
- a **prohibition on inquiry into a job applicant's salary history**.



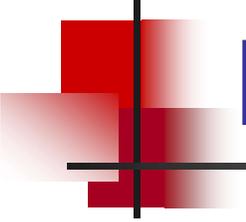
New Jersey Earned Sick Leave Law

- Went into effect on October 29, 2018
- Covers all employees working in New Jersey except:
 - those in the construction industry whose employment is governed by a collective bargaining agreement;
 - “per diem health care employee[s],” N.J.S.A. 34:11D-1; and
 - public employees who receive sick leave benefits under another New Jersey law, rule, or regulation
- Applies to all employers with employees in the state, except public employers that must provide paid sick leave under another New Jersey law or rule



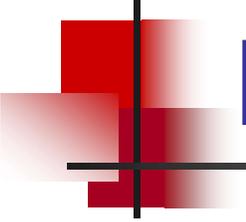
New Jersey Earned Sick Leave Law

- Employees earn one hour of paid sick leave for every 30 hours worked
 - May accrue up to 40 hours of leave each benefit year
- Employers may choose to make available – on the first day of the benefit year – the full amount of earned sick leave for the year



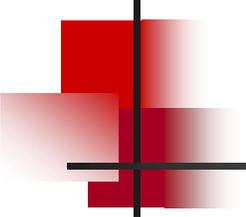
New Jersey Earned Sick Leave Law

- Sick leave may be used for:
 - employee's or family member's health;
 - medical attention, counseling, or legal services as a result of being a victim of domestic or sexual violence;
 - absence from work due to a public health emergency; or
 - a school-related event or a meeting regarding the employee's child's health
- Employers may restrict the use of paid sick leave by
 - requiring notice before use;
 - prohibiting use on certain dates; or
 - requiring reasonable documentation that the leave is for a permitted purpose



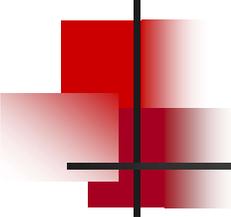
New Jersey Earned Sick Leave Law

- Employers need not allow employees to carry over more than 40 hours of leave into the next year
- Employers may offer to pay an employee for his unused sick leave
 - Employee may accept payment for all or 50% of unused leave, with the right to carry over the rest
- Employers who advance the full amount of leave must either carry over any unused leave or pay the employee for all unused leave and “forgo[], with respect to that employee, the accrual process . . . during the next benefit year,” N.J.S.A. 34:11D-3(d)



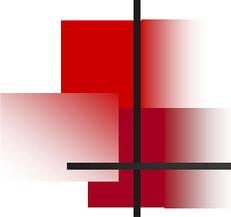
Diane B. Allen Equal Pay Act

- Effective July 1, 2018
- Amended the New Jersey Law Against Discrimination (“LAD”), N.J.S.A. 10:5-1 et seq., to:
 - include “discrimination in compensation or in the financial terms or conditions of employment” as an unlawful employment practice, N.J.S.A. 10:5-12(a);
 - expand the prohibition on retaliation; and
 - increase the damages available for a violation of either of the two aforementioned amendments



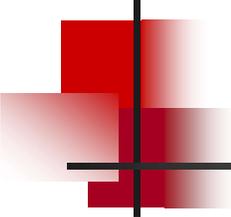
Diane B. Allen Equal Pay Act

- Employers may not pay employees in a protected class less than it pays employees who are not in that class for “substantially similar work,” N.J.S.A. 10:5-12(t)
 - That is, employers may not pay an employee less based on:
 - race; - genetic information;
 - creed; - affectional or sexual orientation;
 - color; - gender identity or expression;
 - age; - disability/atypical hereditary trait;
 - nationality; - liability for service in the armed forces
 - ancestry; - pregnancy; or
 - national origin; - marital, civil union or domestic partnership
 - sex; status



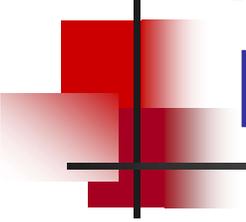
Diane B. Allen Equal Pay Act

- An employer may only pay employees at different rates if it makes a particular showing.
- Aggrieved employees may file suit to recover, among other forms of relief, back pay and may be entitled to treble damages.
- An employer may be liable for every instance where a person is affected by a discriminatory decision, including “each occasion that wages, benefits, or other compensation are paid, resulting in whole or in part from the decision or other practice.” N.J.S.A. 10:5-12(a).



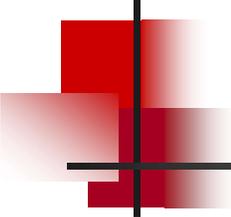
Diane B. Allen Equal Pay Act

- Also amended the LAD to prohibit, inter alia:
 - retaliation for an employee's disclosure to another employee, "a lawyer . . . , or any government agency" the following regarding himself or another of the employer's employees:
 - "information regarding . . . job title, occupational category, and rate of compensation, including benefits"; or
 - "gender, race, ethnicity, military status, or national origin."
N.J.S.A. 10:5-12(r).
 - requiring an employee to agree not to make those disclosures.
- An employee who files suit against an employer for violating either of those proscriptions is also entitled to treble damages.



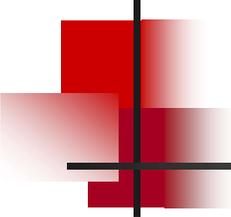
Amendments to New Jersey's Family Leave Laws

- On February 19, 2019, Governor Phil Murphy signed into law A 3975, amending, among other statutes:
 - New Jersey's Family Leave Act ("FLA");
 - New Jersey's Temporary Disability Benefits Law ("TDBL"); and
 - the New Jersey Security and Financial Empowerment Act ("NJ SAFE Act").



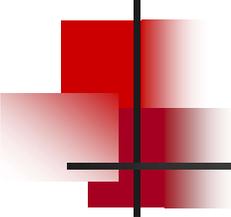
Amendments to New Jersey Family Leave Laws

- The FLA now, among other things:
 - Applies to employers with 30 or more employees;
 - Permits leave for an employee to care for, inter alia, his child born via a surrogate, foster child, parent-in-law, blood relative, and any individual with whom he has “the equivalent of a family relationship,” N.J.S.A. 34:11B-3(j); and
 - Does not require an employer’s consent for an employee to take intermittent leave relating to his child’s birth, adoption, or foster care placement, but does require that he provide fifteen days’ notice (if possible) of such leave



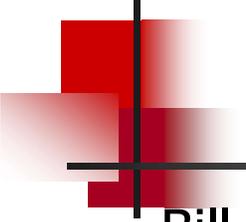
Amendments to New Jersey Family Leave Laws

- As of July 1, 2020, the TDBL increases:
 - The period during which benefits are payable during a 12-month period for:
 - family temporary disability leave to up to 12 weeks; and
 - intermittent family temporary disability leave to up to 56 days
 - An employee's weekly benefit rate to 85% of his average weekly wage (capped at 70% of the statewide average) for disability leave
- The amended TDBL also prohibits:
 - employers from requiring an employee to use paid leave before using family temporary disability leave benefits;
 - retaliation due to an employee's having requested or taken temporary disability benefits, and permits a private right of action against an employer who does so



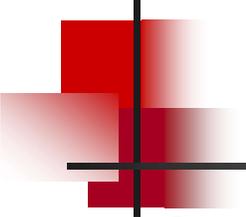
Amendments to New Jersey Family Leave Laws

- As amended, the NJ SAFE Act:
 - permits an employee to take unpaid leave if his blood relative or an individual with whom he has “the equivalent of a family relationship” was a victim of domestic violence or a sexually violent offense, N.J.S.A. 34:11C-3(a);
 - prohibits an employer from requiring, but allows an employee’s use of “accrued paid vacation leave, personal leave, or medical or sick leave . . . , or any family temporary disability leave benefits” during the unpaid leave taken under SAFE, id.



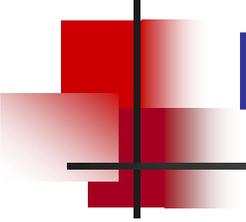
New Jersey's Increased Minimum Wage

- Bill A-15, signed into law in February 2019, ensures a \$15 minimum wage in the state by 2024 via gradual annual increases
- The minimum wage will increase accordingly:
 - July 1, 2019: \$10.00 per hour;
 - January 1, 2020: \$11.00 per hour;
 - January 1, 2021: \$12.00 per hour;
 - January 1, 2022: \$13.00 per hour;
 - January 1, 2023: \$14.00 per hour;
 - January 1, 2024: \$15.00 per hour.
 - Thereafter, the minimum wage will increase per “the consumer price index for all urban wage earners and clerical workers . . . as calculated by the federal government for the 12 months prior to the September 30 preceding that January 1,” N.J.S.A. 34:11-56a4(a).
- Per the statute, New Jersey's minimum wage will be increased to match the federal wage if the latter surpasses the former



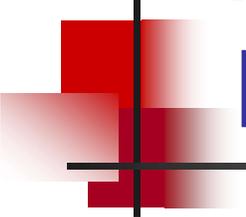
New Jersey's Increased Minimum Wage

- Some employees will reach a \$15 minimum wage at a later point
 - Employees of a “small employer” and seasonal employees are to earn \$15 per hour by 2026; and
 - Certain agricultural workers are set to earn \$12.50 per hour by 2024 and \$15.00 by 2027
- An employer of employees who receive tips may credit tips against the hourly wage the employees would otherwise earn:
 - after Dec. 31, 2018 and before July 1, 2019: \$6.72 per hour
 - after June 30, 2019 and before Jan. 1, 2020: \$7.37 per hour
 - 2020, 2021 and 2022: \$7.87 per hour
 - 2023: \$8.87 per hour
 - 2024 and thereafter: \$9.87 per hour



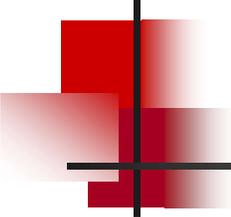
Arbitration Clauses and Non-Disclosure Agreements

- Effective March 18, 2019, the LAD was amended to provide that:
 - clauses in employment contracts waiving rights or remedies concerning claims of harassment, discrimination, or retaliation may not be enforced;
 - and that statutory and common law rights and remedies may not be prospectively waived;
 - except as it relates to collective bargaining agreements



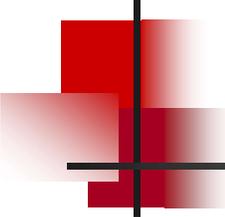
Arbitration Clauses and Non-Disclosure Agreements

- Clauses in employment contracts or settlement agreements that aim to or do “conceal[] the details relating to a claim of discrimination, retaliation, or harassment,” N.J.S.A. 10:5-12.8(a), may not be enforced against
 - an employee who is a party to that document; or
 - an employer if the employer becomes reasonably identifiable due to the employee’s public revelation of the claim’s details
 - Such a statement must be included in the settlement agreement



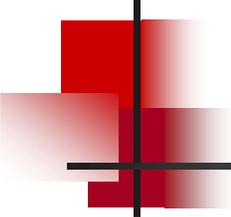
Arbitration Clauses and Non-Disclosure Agreements

- The amendments also:
 - prohibit retaliation against a person for declining to become party to an agreement that contains one of the aforementioned provisions;
 - require that a person attempting to enforce one such provision pay the reasonable attorney fees and costs of the employee; and
 - provide a private right of action for a violation of the amendments, along with attorney fees and costs to a prevailing plaintiff



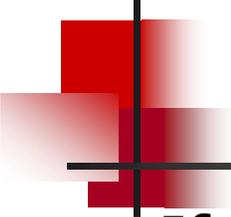
New Jersey Wage Theft Law

- Provides sharp teeth to state wage and hour laws
- Amends New Jersey's Wage Payment Law and its Wage and Hour Law to:
 - make it a disorderly persons offense to retaliate against an employee who complains of a statutory violation or notifies another employee of state wage and hour laws and to increase the punishment for such a conviction; and
 - include a presumption of retaliation (for purposes of the disorderly persons offense) if an employer takes an adverse action against an employee within 90 days of the filing of a complaint



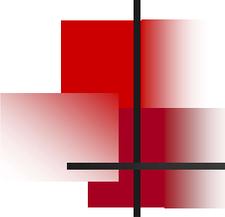
New Jersey Wage Theft Law

- Amends the Wage Payment Law to include an express right of action for employees who are not paid the full amount of wages owed
 - Employees may recover: (1) wages due; (2) liquidated damages in the amount of 200% of those wages; and (3) costs and reasonable attorney's fees.
 - Upon satisfaction of certain criteria, an employer need not pay liquidated damages for its first violation of the legislation.
- Amends the Wage and Hour Law to provide a six-year statute of limitations on claims for damages



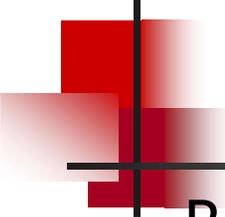
New Jersey Wage Theft Law

- If an employer does not timely comply with a determination or judgment to pay wages or damages, the Commissioner of the Department of Labor and Workforce Development may:
 - direct the suspension of one or more of the employer's licenses until it complies; and/or
 - issue a stop-work order against the employer, which will remain in place until the Commissioner finds that the violation has been corrected
- The Commissioner must publish on a website, among other things, the name and address of an employer found to have violated a wage and hour law within the last year.



Salary History Inquiry Law

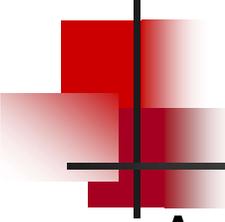
- As of January 1, 2020, employers generally may not screen applicants based on salary history or require that history to meet any minimum or maximum criteria
- They may, however:
 - verify any voluntarily provided salary history and use that information when determining an applicant's compensation; and
 - request written authorization to confirm salary history after offering the applicant a job and explaining the offered compensation package
- Unless an applicant gives his express consent in writing, employment agencies may not share his salary history with potential employers
- Violation of this law by an employer subjects it to civil penalties and, if the applicant belongs to a protected class, the LAD.
 - Remedies in a civil action relating to such a violation do not include punitive damages or attorney's fees



New York

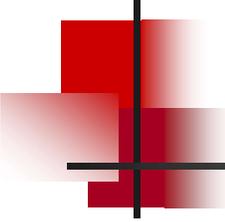
Recent notable legislative activity in New York includes:

1. amendments to the **New York State Human Rights Law** regarding **sexual harassment**;
2. the **New York Paid Family Leave Law**;
3. the **Gender Expression Non-Discrimination Act**;
4. the increase in **New York's minimum wage**;
5. New York's **Employee Wage Lien Bill**;
6. New York's **Salary History Ban**;
7. the **Stop Sexual Harassment in New York City Act**;
8. an amendment to the **New York City Human Rights Law**;
9. the **New York City Earned Safe and Sick Time Act**;
10. **New York City's Lactation Accommodation**; and
11. **Westchester's Earned Sick Leave Law**



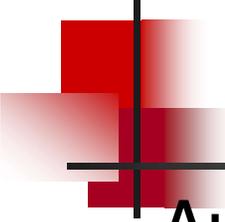
New York State Human Rights Law

- Amended in April 2018 and August 2019
- Highlights of both amendments include:
 - liability for employers (as of October 11, 2019) who do not take corrective action when they knew or should have known that contractors, vendors, consultants or their employees suffered discrimination in the employer's workplace;
 - April 2018: liable for not correcting sexual harassment
 - prohibition (as of October 11, 2019) of contractual clauses mandating arbitration of discrimination claims;
 - July 2018: prohibition of provisions mandating arbitration of sexual harassment claims
 - prohibition (as of October 11, 2019) of terms or conditions in a settlement agreement that prevent disclosure of facts of underlying claim or cause of action involving discrimination (exceptions apply)
 - July 2018: prohibition where claims or causes of action involved sexual harassment



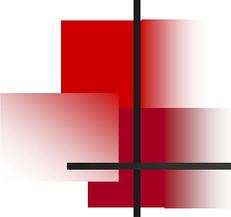
New York State Human Rights Law

- Highlights of both amendments include:
 - requirement (as of October 2018) that employers adopt a sexual harassment prevention policy, provide that policy to employees in writing, and make it publicly available
 - requirement (as of October 2018) that employers implement a sexual harassment prevention training program and provide that program to all employees annually
 - requirement (as of August 12, 2019) that employers provide employees with a notice containing the policy and the information presented at the training program
 - when hiring an employee and during annual training
 - in English and the employee's primary language



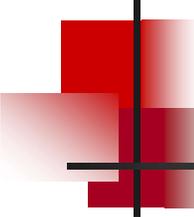
New York State Human Rights Law

- August 2019 amendments also made the following changes, among others:
 - renders (as of October 11, 2019) workplace harassment based on a protected category an unlawful discriminatory practice “regardless of whether [it] would be considered severe or pervasive,” N.Y. Exec. Law § 296(1)(h);
 - renders (as of October 11, 2019) the lack of a complaint to the employer of harassment not determinative of the employer’s liability;
 - provides (as of October 11, 2019) employers the affirmative defense “that the harassing conduct does not rise above the level of . . . petty slights or trivial inconveniences,” id.;



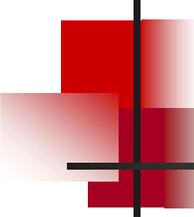
New York State Human Rights Law

- August 2019 amendments also made the following changes, among others:
 - permits (as of October 11, 2019) those complaining of discrimination by a private employer to seek punitive damages;
 - includes (as of February 8, 2020) within the definition of “employer” all employers, not just those with four or more employees; and
 - increases (as of August 12, 2020) the time to file a sexual harassment complaint with the Division of Human Rights from one year to three years



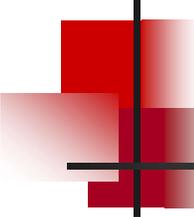
New York Paid Family Leave Law

- Paid leave to:
 - care for a family member with a serious health condition;
 - bond with his child after birth or placement for adoption or foster care; or
 - tend to a “qualifying exigency . . . arising out of the fact that the [employee’s] spouse, domestic partner, child, or parent” is called to active duty, N.Y. Work. Comp. § 201(15)
- May receive benefits for leave taken intermittently
- Benefits are payable on the full first day of leave



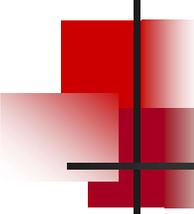
New York Paid Family Leave Law

- Eligible employees:
 - those who regularly work 20 or more hours per week and have completed at least 26 consecutive weeks of employment with a covered employer; and
 - those who regularly work less than 20 hours per week and have completed at least 175 days of employment with a covered employer
- Must provide 30 days' notice of leave if the need for the leave is foreseeable
 - But if leave must begin in less than 30 days due to the date of the birth or placement of a child, or planned medical treatment, must provide notice as soon as practicable



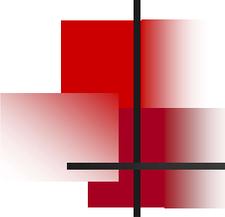
New York Paid Family Leave Law

- Allowable leave during one 52-week calendar period:
 - 2018: 8 weeks;
 - 2019: 10 weeks;
 - 2020: 10 weeks; and
 - 2021 and thereafter: 12 weeks.
- Weekly benefit rate
 - 2018: 50% of the employee's average weekly wage but no more than 50% of the state average;
 - 2019: 55% of the employee's average weekly wage but no more than 55% of the state average;
 - 2020: 60% of the employee's average weekly wage but no more than 60% of the state average; and
 - 2021 and thereafter: 67% of the employee's average weekly wage but no more than 67% of the state average.



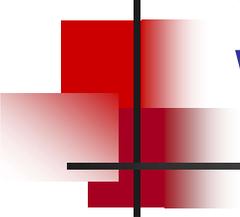
Gender Expression Non-Discrimination Act

- Went into effect on February 24, 2019
- Defines “gender identity or expression” as “a person’s actual or perceived . . . gender-related characteristic regardless of the sex assigned to that person at birth, including, but not limited to, the status of being transgender”
- With regard to employment law, this act:
 - renders it an unlawful discriminatory practice for an employer, licensing agency, employment agency, or labor organization to discriminate against a person on the basis of his gender identity or expression; and
 - prohibits employers from harassing domestic workers on the basis of sexual orientation or gender identity or expression, where that harassment would create a hostile working environment



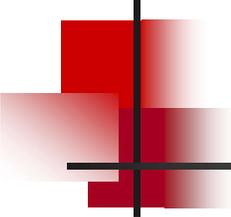
Increase in New York's Minimum Wage

- Minimum wage will increase yearly to reach \$15.00 across the state
- On December 31, 2018, the following wages went into effect:
 - New York City
 - Employers with eleven or more employees:
 - \$15.00 per hour
 - Employers with ten or fewer employees:
 - \$13.50 per hour
 - \$15 minimum wage starting December 31, 2019



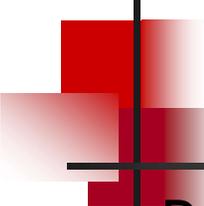
Increase in New York's Minimum Wage

- On December 31, 2018, the following wages went into effect:
 - Nassau, Suffolk, and Westchester Counties
 - \$12.00 per hour
 - \$1 increase annually, reaching \$15.00 on December 31, 2021
 - The remainder of the state
 - \$11.10 on December 31, 2018
 - \$0.70 increase annually, reaching \$12.50 on December 31, 2020; thereafter, minimum wage is determined according to a schedule set by the state



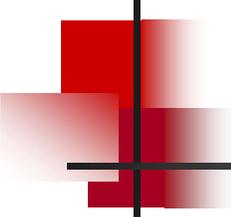
Increase in New York's Minimum Wage

- The following minimum wage rates were applicable to these workers as of December 31, 2018:
 - Food service workers receiving tips*:
 - NYC Large Employer: \$10.00/hour
 - NYC Small Employer: \$9.00/hour
 - Nassau, Suffolk and Westchester Counties: \$8.00/hour
 - Remainder of the state: \$7.50/hour
 - *These amounts reflect the minimum base wage paid by the employer
 - Fast food workers :
 - New York City: \$15.00/hour
 - The rest of the state: \$12.75/hour
- Beginning January 1, 2019, the New York State Division of Budget will assess the state's economy and the effect of the wage increases



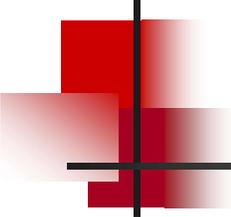
New York Employee Wage Lien Bill

- Passed both the state Senate and Assembly but **not (yet) enacted**
- Provides an employee with a “wage claim” the right to obtain a lien on his employer’s property in the amount of the claim, including liquidated damages
 - Lien extends to real property and “sufficiently described” personal property, but not deposit accounts or goods
 - Must file notice of a lien within three years of leaving employment
 - Must serve the notice on the employer “[w]ithin five days before or thirty days after filing the notice” and file proof of service within 35 days of filing the notice



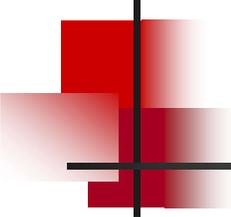
New York Employee Wage Lien Bill

- Liens are only valid for up to one year, absent an extension
- Automatically extinguished if not continued by a court order and if the employee does not file suit to foreclose it or sue on the wage claim within the extension
- Lien is deemed void if a court finds that an employee willfully exaggerated its amount in the notice
- Permits employees to seek an attachment order
 - May require employees to post an undertaking of no more than \$500
 - Exempts employees from liability to the prevailing employer for costs and damages due to the attachment



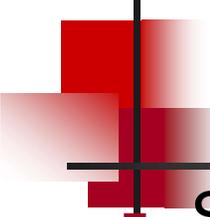
New York Salary History Ban

- Signed July 10, 2019 and effective January 6, 2020
- “Employers” may not:
 - rely on an applicant’s salary history when determining his compensation or whether to offer employment;
 - request or require salary history from an applicant or employee as a condition of consideration or employment;
 - request or require salary history from certain third parties; or
 - retaliate against an applicant or employee based on salary history, his refusal to provide such, or his filing of an administrative complaint alleging a violation of the ban



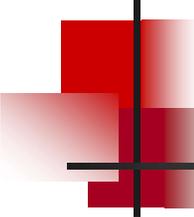
New York Salary History Ban

- Employers may confirm salary history if:
 - they make an offer of employment with compensation; and
 - the applicant or employee, in response, provides salary history information to support a higher offer of compensation
- Applicants and employees may voluntarily disclose or verify salary history
- Private right of action for violation of the ban
 - Prevailing plaintiffs may be able to recover injunctive relief and reasonable attorneys' fees



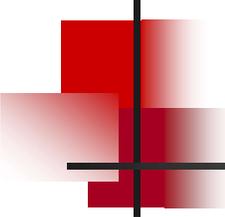
Stop Sexual Harassment in New York City Act

- Signed in April 2018
- Requires private employers who have at least 15 employees to **(as of April 1, 2019)**, among other things:
 - conduct yearly interactive anti-sexual harassment training for all employees employed within New York City; and
 - keep a record of trainings for at least three years
- Requires all employers to **(as of September 6, 2018)**:
 - display a poster concerning anti-sexual harassment rights and responsibilities; and
 - distribute a sexual harassment information sheet upon hiring an employee



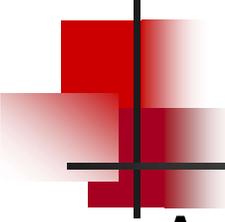
Stop Sexual Harassment in New York City Act

- Expands liability (**as of May 9, 2018**) for “unlawful discriminatory practice based on . . . claim[s] of gender-based harassment” to all employers, even those with fewer than four employees
- Extends (**as of May 9, 2018**) the period within which to file a complaint with the New York City Commission on Human Rights concerning gender-based harassment from one year to three years



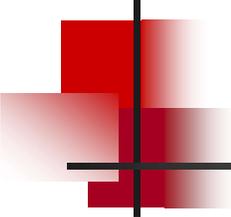
New York City Human Rights Law Amendments

- Effective May 2018, the New York City Human Rights Law:
 - includes within the definition of “sexual orientation” a person’s “actual or perceived romantic, physical or sexual attraction to other persons, or lack thereof, on the basis of gender,” and provide that “[a] continuum of sexual orientation exists and includes, but is not limited to, heterosexuality, homosexuality, bisexuality, asexuality and pansexuality,” N.Y.C.C. § 8-102(20)
 - defines “gender” as including “actual or perceived sex, gender identity, and gender expression, including a person’s actual or perceived gender-related self-image, appearance, behavior, expression, or other gender-related characteristic, regardless of the sex assigned to that person at birth,” N.Y.C.C. § 8-102(23)



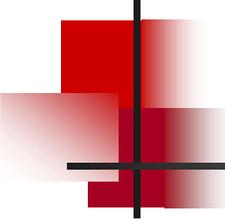
New York City Earned Safe and Sick Time Act

- Amendments require covered employers to provide paid safe time to employees as of May 5, 2018
 - Employees not entitled to paid safe time are entitled to unpaid safe time
- Generally, entitled to at least 1 hour of safe or sick time for every 30 hours worked, up to 40 hours per year
- May use safe time to take certain actions when employee or his family member “has been the victim of a family offense matter, sexual offense, stalking, or human trafficking,” N.Y.C. 20-914(b)(1)
 - As amended, an employee’s blood relatives and those with whom he has “the equivalent of a family relationship” are “family member[s],” N.Y.C. 20-912(h)



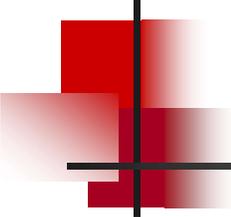
New York City Earned Safe and Sick Time Act

- Employers:
 - may require up to seven days' notice if the need to use safe time is foreseeable or notice as soon as practicable if not foreseeable;
 - may require an employee who is absent for more than three consecutive work days to provide reasonable documentation of the proper use of safe time;
 - must provide employees notice of their rights regarding safe and sick time



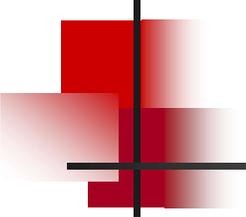
New York City Lactation Accommodation

- Effective March 18, 2019
- Employers must provide both a lactation room and a refrigerator suitable to store breast milk that are reasonably close to an employee's work area;
 - Lactation room: a sanitary place (that is not a restroom) where an employee may express breast milk without intrusion
 - Must include at least a chair, an electrical outlet, and a surface upon which to place personal items including a breast pump, and must have access to running water nearby



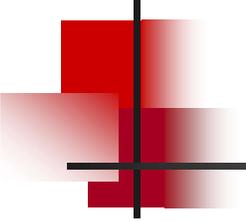
New York City Lactation Accommodation

- Employers must:
 - develop, implement, and distribute a lactation room policy that informs employees of their right to request a lactation room and how to do so
 - respond to such a request within a reasonable time but within no more than five business days; and
 - provide a reasonable break for employees to express breast milk



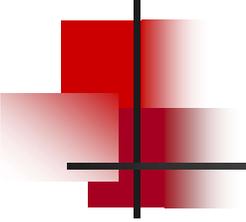
Westchester's Earned Sick Leave Law

- Employers with at least five employees must (**as of April 10, 2019**) provide employees with paid sick leave, which may be used, among other things:
 - for an employee's own illness or injury;
 - to care for an ill or injured family member; or
 - when an employee's place of business or their child's school or day care facility is closed due to a public health emergency
- Employees are entitled to up to 40 hours of sick leave annually



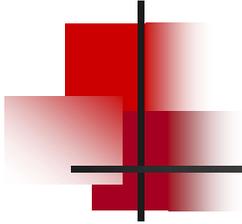
Westchester's Earned Sick Leave Law

- Non-domestic worker employees accrue at least one hour of sick time for every 30 hours worked
 - Accrual is capped at 40 hours per year
- Employees may carry over unused sick time to the following year, subject to an annual 40-hour cap on sick leave
- Employers may provide at least 40 hours of sick and personal time per year rather than calculate accrual
 - If so, employees may take sick leave without first giving notice



Westchester's Earned Sick Leave Law

- Employers
 - may not interfere with the right to use sick leave or retaliate against employees who do or ask to use it
 - may require reasonable documentation that sick leave was used for a covered purpose if the leave is for more than 3 consecutive days
- Employees must attempt in good faith to provide advance notice of the use of sick leave if foreseeable



Thank You

The materials in this publication are for educational purposes only. They do not constitute legal advice.