Employee Leave Laws, Background Check Claims, and Immigration Issues. How to Keep It All Straight

Welcome

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OVERVIEW OF TOPICS COVERED

1. Family Leave Laws, Disability Leave Laws, Paid Time off Requirements, and Maternal Care/Lactating Workplace Accommodations
2. Criminal Background Checks
3. Immigration Requirements

Paid and Unpaid Leave Laws

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IMPORTANT POINTS TO START

- Right to Leave vs. Right to be Paid While on Leave (some laws only allow employee the right to take time off and return to work, while others mandate that employee be paid on such time off from work)
- Job Protected Leave vs. Non-Protected (some laws require reinstatement to work post-leave, others do not)
- Accrual of Time – Can be based on seniority, accrue-as-you-go, leave granted on anniversary of hire
- What happens to accumulated paid time off at certain points in time; (1) anniversary of hire, (2) end of calendar year, (3) end of employment?
- Does the law require written notice of leave law/policy or not?

FEDERAL FAMILY AND MEDICAL LEAVE ACT

The FMLA applies to employers with 50 or more employees.

It allows eligible employees to take up to 12 weeks of **unpaid** job-protected leave during a 52-week period for, among other reasons:

- To care for his/her spouse, child, or parent who has a serious health condition;
- For a serious health condition that makes the employee unable to perform the essential functions of his or her job.

Eligible employees are those who:

- Have been employed by the employer for at least 12 months;
- Have worked at least 1,250 hours for the employer during the 12 month period preceding the leave; and
- Work in a location where the employer has 50 or more employees in a 75 mile radius.

NY PAID FAMILY LEAVE LAW

Paid Family Leave provides eligible employees job-protected, paid time off to:

- Bond with a newly born, adopted or fostered child,
- Care for a family member with a serious health condition, or
- Assist loved ones when a spouse, domestic partner, child or parent is deployed abroad on active military service.

Coverage Applies to:

- Private employers that employ 1 or more persons in NYS on each of 30 days in any calendar year, and the employer becomes covered 4 weeks after the 30th day of such employment.
- Coverage is determined by the carrier; if in doubt about whether a specific case is covered, submit the claim to the carrier and let them decide (e.g., employee moves to NYS in January from Maine. Employee seeks to go on maternity leave in July – the employee might have enough "payments" into the NYS PFL system by the time that they deliver the baby to qualify for PFL. But this question will need to be determined by your carrier).

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AMERICANS WITH DISABILITIES ACT

- The federal ADA covers employers with 15 or more employees. **But, in New York, employers with at least 1 employee are covered by the NYS Human Rights Law which includes accommodations obligations.**
- Obligation to provide reasonable accommodations for qualified individuals with disabilities, except where accommodation would result in undue hardship.
- Under the ADA, an “individual with a disability” is “any person who (1) has a physical or mental impairment that substantially limits one or more major life activities, (2) has a record of such an impairment, or (3) is regarded as having such an impairment.”
- Local anti-discrimination standards may be broader.

WORKERS' COMPENSATION AND SHORT-TERM DISABILITY

- Provides for income replacement to employees who take time off due to work-related (in the case of workers' compensation) or non-work related (in the case of short-term disability) qualifying injuries and/or disabilities
- Does not provide for job protected leave per se but it does prohibit discrimination against an employee because such employee claimed or attempted to claim compensation from such employer, requested a claim form for injuries received in the course of employment, or claimed or attempted to claim any benefits provided under this chapter or because he or she has testified or is about to testify in a proceeding under this chapter and no other valid reason is shown to exist for such action by the employer.

PREGNANT EMPLOYEES

- Effective January 1, 2025, New York employers will be required to provide up to 20 hours of paid leave in a 52-week period for pregnant employees to attend prenatal medical appointments and procedures.
- This “paid prenatal personal leave,” as it is called in the amendment, can be used by pregnant employees for healthcare services, testing or procedures that relate to their pregnancy.
- Paid prenatal leave does not appear to be an accrued benefit and the text of the amendment suggests it must be made immediately available to employees in its entirety at the time they are hired.
- The 20 hours of paid leave can be taken in hourly increments. Per the amendment, employees are to receive compensation for paid prenatal personal leave at the employee’s regular rate of pay or the applicable minimum wage, whichever is greater.
- **Paid prenatal personal leave is in addition to paid sick and safe leave** (40 or 56 hours, depending on the size of the employer) **and paid family leave employees in New York are currently entitled to, and in addition to the separate bank of paid safe leave available to employees working in Westchester County, N.Y**.
- The statute does not restrict the number of times paid prenatal leave can be taken by a single employee over time, other than to limit the use to 20 hours in a 52-week period.
- The amended law provides that unused paid prenatal personal leave is not a benefit that needs to be paid out upon an employee’s termination, resignation or other separation from employment.

LACTATING MOTHERS

- As of June 19, 2024, Labor Law Section 206-c provides all employees with the right to paid break time to express breast milk in the workplace regardless of the size of their employer or the industry they work in.
  - Employers must provide thirty (30) minutes of paid break time for their employees to express breast milk when the employee has a reasonable need to express breast milk.
  - Employees must be permitted to use existing paid break or meal time if they need additional time for breast milk expression beyond the paid 30 minutes.
    - Employers must provide paid break time as often as an employee reasonably needs to express breast milk. The number of paid breaks an employee will need to express breast milk is unique to each employee and employers must provide reasonable break times based on the individual.
    - This time must be provided for up to 3 years following childbirth.
- Employers are required to tell employees about their rights regarding breast milk expression by providing them the NYSDOL Policy on the Rights of Employees to Express Breast Milk in the Workplace when they start a new job and annually thereafter.
  - Model policy and notice (translated) has been made available by NYS DOL.

PAID SICK LEAVE LAWS

- **New York State Paid Safe and Sick Leave Law**
  - 0-4 employees: paid or unpaid benefits depend on company's net income (up to 40 hrs)
  - 5-99 employees: 40 hours per year
  - 100 + employes : up to 56 hours per year
  - Sick Leave can be used for: (a) For mental or physical illness, injury, or health condition, regardless of whether it has been diagnosed or requires medical care at the time of the request for leave (including recovery from side effects of COVID vaccine); or (b) For the diagnosis, care, or treatment of a mental or physical illness, injury or health condition; or need for medical diagnosis or preventive care. "Safe leave" is also available.
- **New York City Sick Leave Law**
  - Largely tracks NYS except, NYC sick leave law can also be used if the employer's place of business is closed due to a public health emergency ("PHE") or the employee needs to care for a child whose school or childcare provider is closed due to a PHE.

Criminal Background Checks

N.Y. PUBLIC HEALTH LAW REQUIRING CRIMINAL BACKGROUND CHECKS

- Under New York law, applicants for employment involving home health aides are required to submit to criminal background checks.
- The Criminal History Records Check Legal Review Unit ("CHRC Unit") is the administration unit within the New York State Department of Health ("DOH") tasked with fulfilling that statutory obligation.
  - The CHRC is a fingerprint-based, national FBI criminal history record check.
  - These checks are submitted and processed using the Criminal History Record Check (CHR) application, which is housed within the Health Commerce System (HCS).
- Article 28-E of the Public Health Law requires a CHRC be conducted for all prospective employees that provide direct care to members under the age of 21, including Health Home Care Managers and other applicable Health Home employees.
- The CHRC must be completed for staff who will provide direct care or supervision. Health Home Care Managers and other applicable Health Home employees who previously had Criminal Background Checks (CBC) completed through the NYS Justice Center are required to have the CHRC because the previously conducted checks do not transfer, and the CBC does not meet the requirements of the CHRC.

N.Y. PUBLIC HEALTH LAW REQUIRING CRIMINAL BACKGROUND CHECKS

- The protections of Article 23-A prevent employers from arbitrarily denying an applicant a job based on a criminal conviction.
- An employer is prohibited from rejecting an otherwise qualified job applicant because of their conviction record unless there is a direct relationship between the conviction and the job or an unreasonable risk to people or property, taking into account specific considerations, such as:
  - the recency and severity of the offense,
  - its relationship to the nature of the job, and
  - evidence of rehabilitation.

In addition, New York State and New York City have their own anti-discrimination laws and procedural safeguards designed to protect individuals with criminal convictions from being denied employment unfairly.

FAIR CHANCE ACT ("FCA")

only applicable to individuals working in New York City

- The FCA was added to the NYCHRL on October 27, 2015, because the City determined that, despite the requirement that employers must fairly assess candidates under Article 23-A of the Correction Law, many employers were disregarding candidates who disclosed criminal histories early in the hiring process.
- The FCA makes it an unlawful discriminatory practice for most employers, labor organizations, and employment agencies to inquire about or consider the criminal history of job applicants prior to extending a conditional offer of employment.
- The FCA also requires employers seeking to withdraw a conditional job offer based on the applicant's conviction history to provide the applicant a meaningful opportunity to respond to the employer's assessment before the employer finalizes its decision.
- Local Law 4 of 2021, effective July 29, 2021, adds new protections for people whose criminal history includes unsealed violations and unsealed non-criminal offenses.
- Local Law 4 also expands the protections of the Fair Chance Act to cover current employees and to reach pending cases.

CHRC in HIRING

DOH will provide a copy of the applicant's criminal record to you and notify a provider either that:

- nothing in the applicant's criminal record requires you to reject the applicant, ***or***
- you must reject the applicant for employment.

If the DOH notifies the provider that **nothing in the applicant's criminal record requires you to reject the applicant**, provider may hire the applicant or reject the applicant, subject to your review of the employee's overall qualifications for the position.

- Note, the law does not require you to hire an employee/applicant with a prior criminal history or a pending history. **The law just limits how you can use this criminal background information in making the employment decision.**
- Remember that an employer can be held liable for negligent hiring. Thus, you are responsible for ensuring the employee's overall characteristics – including any facts that underlie prior criminal conduct.
- If you hire an individual who will harm a patient, you can be liable for negligent hiring or negligent retention of the employee under general tort principles.
- Thus, the limits of the law that prohibit you from denying employment solely on the basis of a criminal conviction have to be weighed against the obligation you have to ensure that a potentially dangerous employee is not assigned to work with patients.

CHRC in HIRING

If the DOH notifies the provider that nothing in the applicant's criminal record requires the employer to reject the applicant, but the employer - upon review of the applicant's criminal record - has concerns about hiring that applicant, then the employer must:

1. Conduct a **Fair Chance Analysis** of the applicant's criminal history **and either:**
   - ❑ Determine that there is a direct relationship between the applicant's conviction history or pending case and the prospective job ***OR***
   - ❑ Show that employing the applicant would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.

   - ❑ If you choose not to hire the applicant based on the above analysis, you must:
     i. Disclose to the applicant a written copy of any inquiry you conducted into the applicant's criminal history;
     ii. Share with the applicant a written copy of your Fair Chance Analysis (or a similar document describing detailed explanations of conclusions drawn); **and**
     iii. Allow the applicant a reasonable period of at least 5 business days from receipt of the inquiry and analysis to respond to the employer's concerns.

APPLICATION OF THE FAIR CHANCE AND/OR NYS CORRECTION LAW PROCESS

If the CHRC gives the employer the discretion to hire but the employer decides to reject the applicant, then **before rejecting the applicant, the employer must complete the following 3 steps.**

- **Step 1: Conduct a Fair Chance Analysis and Article 23- A Factors**
  - If an applicant has prior convictions (i.e., they are not pending criminal matters but were previously disposed of) the employer must analyze the following **Article 23-A Factors** and document the consideration and analysis of these factors (you will keep this analysis in the personnel file for the employee/applicant)
    - *(see next slide for factors)*

THE FACTORS

1. The public policy of New York State to encourage the licensure and employment of persons previously convicted of one or more criminal offenses.
2. The specific duties and responsibilities necessarily related to the employment sought or held by the person.
    - ***For example, a DWI conviction is not related to an aide job that will never require the aide to operate a vehicle and drive the patient around.***
3. The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on the person's fitness or ability to perform one or more such duties or responsibilities.
    - ***Please refer to the example above, because a DWI would have no bearing on the aide's fitness for the job.***
4. The time which has elapsed since the occurrence of the criminal offense or offenses. If the employee/new hire was a child when they committed the crime and they are now an adult, a lot of time has lapsed, then the law will require the employer to assume that the employee has been "rehabilitated" from any criminality. Thus, the more time that has passed between the crime and the present time, the more likely that the law will expect the employer to not "hold the crime against the aide."
5. The age of the person at the time of occurrence of the criminal offense or offenses. See the above example please.
6. The seriousness of the offense or offenses.
7. Any information produced by the person, or produced on the person's behalf, in regard to their rehabilitation and good conduct.
8. The legitimate interest of the employer in protecting property and the safety and welfare of specific individuals or the general public.
9. Whether the person has a certificate or relief from disabilities or good conduct, which create a presumption of rehabilitation.

NYC FAIR CHANCE FACTORS

If there is a currently pending criminal case against the applicant, the employer must analyze the following New York City Fair Chance Factors:

1. The policy of New York City to overcome stigma toward and unnecessary exclusion from employment of persons with criminal justice involvement;
2. The specific duties and responsibilities necessarily related to the employment held by the person;
3. The bearing, if any, of the criminal offense or offenses for which the applicant or employee was convicted, or that are alleged in the case of pending arrests or criminal accusations, on the applicant or employee's fitness or ability to perform one or more such duties or responsibilities;
4. Whether the person was 25 years of age or younger at the time of occurrence of the criminal offense or offenses for which the person was convicted, or that are alleged in the case of pending arrests or criminal accusations, which shall serve as a mitigating factor;
5. The seriousness of such offense or offenses;
6. The legitimate interest of the employer in protecting property and the safety and welfare of specific individuals or the general public; and
7. Any additional information produced by the applicant or employee, or produced on their behalf, in regards to their rehabilitation or good conduct, including but not limited to history of positive performance and conduct on the job or in the community.

THE NEXT STEPS

Step 2: The employer cannot deny employment based on an applicant's conviction history or pending case until the employer properly: (a) Determines that there is a direct relationship between the applicant's conviction history or pending case and the prospective job, **OR** (b) Shows that employing the applicant would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.

Step 3: If, after evaluating the applicant according to the relevant fair chance factors, the employer finds a direct relationship between the criminal record and the job or an unreasonable risk to people or property, the employer must:

- ✓ Disclose to the applicant a written copy of any inquiry it conducted into the applicant's criminal history;
- ✓ Share with the applicant a written copy of its Fair Chance Analysis (or a similar document describing detailed explanations of conclusions drawn); **and**
- ✓ Allow the applicant a reasonable period of at least five business days from receipt of the inquiry and analysis to respond to the employer's concerns.

SOME STEPS FOR NYC PROVIDERS

- The NYC Commission on Human Rights has prepared a Fair Chance Notice that providers may use to comply with the notice requirement. Employers may adapt to your preferred format as long as the material substance concerning the specific factors in the Fair Chance Analysis does not change.
- The Notice informs the applicant of their time to respond, which must be reasonable and no fewer than five business days, and provides contact information for the person to whom the response must be sent, including the contact person's phone number or email address.
- The Notice requires employers to evaluate each relevant fair chance factor and state whether the employer has identified a direct relationship to the job or an unreasonable risk to people or property.
- The Notice also contains space where the employer must articulate its conclusion. Boilerplate denials that simply list the relevant fair chance factors violate the NYCHRL. For example, you cannot simply say you considered the time since the alleged or convicted criminal conduct; you must identify how many years and/or months have elapsed.
- You also cannot list specific facts but then fail to describe how, based upon those facts, you concluded that the applicant's record evidenced either a direct relationship to the job or an unreasonable risk to people or property. Rather, you must explain how its weighing of all of the factors in the Fair Chance Analysis contributed to its determination to withdraw the conditional offer.
- Finally, the Notice requests evidence of good conduct and evidence of rehabilitation. Employers may identify specific examples of rehabilitation or good conduct that would be most relevant to its analysis, but examples must be included.

RESPONSE AND NOTICE REQUIREMENTS (for NYC employers)

Allowing Time to Respond

- Providers must give applicants a reasonable period of at least five business days to respond to the inquiry and Notice.
- The 5-day period begins running when an applicant receives both the inquiry and Notice.
- Providers may wish to confirm receipt by disclosing the information in person, electronically, or by registered mail.
- After receiving additional information from an applicant, provider must examine whether the new information changes the provider's Fair Chance Analysis.
- If, after communicating with an applicant, the provider decides not to hire them, you must relay that decision to the applicant in writing within a reasonable period of time.

Immigration Law Issues with Home Health Aides and in Hiring

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OVERVIEW OF IMMIGRATION PRINCIPLES

- U.S. employers are required to ensure that all employees, regardless of citizenship or national origin, are authorized to work in the United States.
- E-Verify is not required to be used.
- Having an Employment Authorization Document (Form I-766/EAD) is one way to prove that a worker is authorized to work in the United States for a specific time period. To request an EAD, the employee generally must file Form I-765, Application for Employment Authorization ("EAD"):
  - Are authorized to work in the United States because of your immigration status or circumstances (for example, you are an asylee, refugee, or U nonimmigrant) and need evidence of that employment authorization, or
  - Are required to apply for permission to work (that is, you need to request employment authorization itself) because:
    - They have have a pending Form I-485, Application to Register Permanent Residence or Adjust Status.
    - They have a pending Form I-589, Application for Asylum and for Withholding of Removal.
    - They have a nonimmigrant status or circumstance that allows the worker to be in the United States but does not allow you to work in the United States without first seeking permission from USCIS (such as an F-1 or M-1 student).
- Workers do not need to apply for an EAD if he/she is a lawful permanent resident (i.e., green card holder)

I-9 ISSUES IN HOME CARE

- When to complete the I-9?
  - Per the USCIS, the employee must complete section 1 of the I-9 form no later than the first day of work for pay.
  - The employer must complete Section 2 of the form no later than 3d business day after the employee starts work for pay.
- Who completes the I-9 form as the employer for CDPAP?

Thank You

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