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California
Employment Law Letter

KICKER

2023 changes to California Fair Chance Act provide clarity

by Poline Pourmorady, Duane Morris

On October 1, 2023, revisions to the California Fair Chance Act (FCA) went into effect. Since 2018, the FCA has governed how and when employers may inquire about and consider job applicants' criminal history. With these new changes, employers have new clarity on their obligations.

Basic framework for evaluating applicants' criminal history

Popularly known as the "ban the box" law, the FCA prohibits employers from inquiring about an applicant's criminal history until after a conditional offer of employment is made. It also prohibits employers from inquiring about or considering certain types of criminal convictions in employment decisions, such as juvenile offenses or misdemeanor marijuana convictions more than 2 years old.

Once a conditional offer of employment is made and a background check reveals a criminal history that causes the employer to reconsider the offer, the employer must engage in a three-step assessment before making any final decision regarding the job offer:

Step 1: The employer must first consider all of the following factors with regard to any criminal history:

- The nature and gravity of the offense or conduct;
- The amount of time that has passed since the offense or conduct and/or completion of the sentence;
- The nature of the job held or sought; and
- To the extent that any evidence of rehabilitation or mitigating circumstances is voluntarily provided by the applicant or by another party at the applicant's request, before or during the initial individualized assessment, that evidence must be considered as part of the initial individualized assessment.

Step 2: If the employer is considering rescinding the offer after completing step 1, it must notify the applicant in writing and give the applicant at least five business days to respond with additional information and documents, including rehabilitation efforts or mitigating circumstances.

Step 3: If, after receiving and considering any new information or a lack of response, the employer decides not to hire the individual, it must send a written notice to the applicant regarding its decision and notify them of their rights, including the right to file a charge with the California Civil Rights Department.

Changes refine and clarify obligations, don't impose new ones

The FCA's basic three-step framework remains in place, and employers are still subject to the same obligations.

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The 2023 changes offer clarity to employers. They clarify some key definitions and some specific behaviors the Act either requires or prohibits.

Broader definition of "employer." The new regulations broaden the definition of "employer" to include not only direct employers but also entities acting as agents or evaluating an applicant's criminal history on behalf of an employer, staffing agencies, and entities selecting workers from a pool or availability list.

Broader definition of "applicant." In addition to applicants or current employees who are applying for a position within the company, the term "applicant" now includes existing employees who undergo a background check in connection with a change in ownership, a change in management, or a change in policy or practice.

Voluntarily disclosed information. Information about criminal history that is voluntarily disclosed before receiving a conditional offer cannot be considered by the employer.

Restrictions on advertisements, applications, or other materials. Employers must not include statements in job advertisements, applications, or other material that persons with criminal history won't be considered for hire (e.g., "Must have clean record" or "No felons").

Violations and waiver of the ability to consider criminal history. Employers that violate the prohibition on inquiring into criminal history before making a conditional offer of employment may not, after extending a conditional offer of employment, use an applicant's failure to disclose criminal history before the conditional offer as a factor in subsequent employment decisions, including denial of the position conditionally offered.

Additionally, when employers evaluated candidates under the three-step analysis above, there were often questions about how the analysis in step 1 (evaluating the nature and gravity of the conduct, the amount of time passed, the nature of the position, and any evidence of rehabilitation) should be conducted and what sorts of subfactors can and cannot be considered. The new FCA now provides additional guidance on how the analysis in step 1 above must be conducted:

- **Nature and gravity of the offense or conduct.** Consideration of this factor may include—but is not limited to—the specific personal conduct of the applicant that resulted in the conviction; whether the harm was to property or people; the degree of harm; the permanence of the harm (e.g., amount of loss in theft); the context in which the offense occurred; whether a disability contributed to the offense or conduct; whether trauma, domestic or dating violence, sexual assault, stalking, human trafficking, duress, or other similar factors contributed to the offense or conduct; and/or the age of the applicant when the conduct occurred.
- **Amount of time that has passed since the offense or conduct and/or completion of the sentence.** Consideration of this factor may include—but is not limited to—the amount of time that has passed since the conduct underlying the conviction and/or the amount of time since release from incarceration.
- **Nature of the job held or sought.** Consideration of this factor may include—but is not limited to—the specific duties of the job; whether the context in which the conviction occurred is likely to arise in the workplace; and/or whether the type or degree of harm that resulted from the conviction is likely to occur in the workplace.
- **Any evidence of rehabilitation or mitigating circumstances.** Consideration of this factor may include—but is not limited to—facts/circumstances surrounding the offense or conduct; participation in self-improvement efforts; length and consistency of employment history before and after the offense/conduct; and/or certificates of participation in, enrollment in, or completion of an educational, vocational, or rehabilitation program.

Given that much of this information isn't publicly available or provided in background check reports, you should consider requesting this information from applicants before conducting the analysis in step 1. However, the applicant isn't required to respond, and any information they provide must be taken into consideration.

Finally, the FCA requires that employers allow applicants at least five business days from receipt of the pre-adverse action letter to provide a response. However, it wasn't clear when this five-day clock would actually begin running, especially if the delivery method didn't provide a read receipt or delivery receipt. The new regulations provide employers with guidelines to determine when this five-day period starts in situations where you cannot confirm when the notice was received.

If notice is transmitted through email, it shall be deemed received two business days after it is sent.

If notice is sent through the mail, it shall be deemed received:

- Five calendar days from the date of mailing if sent to an address in California;
- 10 calendar days from the date of mailing if sent to a U.S. address outside of California; or
- 20 calendar days from the date of mailing if sent to an address outside of the United States.

Note that if the applicant timely notifies you in writing that they dispute the accuracy of the conviction history being relied upon and are taking specific steps to obtain evidence supporting their assertion, then you must permit them no fewer than five additional business days to respond to the notice before your decision to rescind the employment offer becomes final.

Bottom line

With the new regulation already in effect, you must act fast. Given the complexities of the existing law, along with its amendments, you should work with legal counsel to ensure your current background check policies are reviewed and updated. Ensure employees who are involved in recruitment and hiring are trained in these updates and are monitored to ensure they comply accordingly.

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PERFORMANCE EVALUATIONS

Importance of evaluating your employees—the good and the bad

by Jeffrey M. Cropp, Steptoe & Johnson PLLC

As we approach the end of another year, some of you may be gearing up for the year-end performance evaluation season. Conducting proper performance evaluations can play a critical role in your organization's ability to address issues with poor performing employees, as well as retain your good employees. The purpose of this article is to provide some guidance to help you navigate through the performance evaluation process and to identify potential legal issues that could arise.

Address issues that need to be addressed

An important part of the evaluation process is that it gives the company the opportunity to highlight performance issues and address them before it's too late. From a legal perspective, it's critical that any performance issues are identified in the performance evaluation and documented. Sometimes it's difficult to properly evaluate an employee who is underperforming and even more difficult to have a face-to-face conversation with them about those issues. If you let a performance issue slide, however, it can become difficult to take the necessary steps later to deal with the performance issues.

For instance, if an employer decides to discipline or discharge an employee because of a performance issue, and if a subsequent lawsuit or grievance is filed, one of the important issues in the case will be to determine what the employee's past performance evaluations say.

If your supervisor has neglected to document the same past performance issues in the evaluation, it makes it more difficult for you to have a solid defense for your disciplinary decision. In fact, if the employee's performance evaluations don't support that the employee is a poor performer, your employee can use your own performance evaluations against you to argue that your actual reason for disciplining or discharging them was an illegal reason.

By contrast, if your supervisor has properly documented the performance issues in the evaluation, it places you in a much better position. First, it shows you have previously advised the employee about correcting the performance and that you have given them the opportunity to correct the behavior. In a lawsuit, the jury tends to like when you have been fair to the employee and giving them a chance to correct behavior is a good way to show fairness.

Also, if there is a history of documenting and warning the employee about the performance issue, it's easier to show you had a legitimate reason for deciding to discipline or discharge them.

Be objective

To the extent you can, your performance evaluations should focus on objective factors, such as production goals or some other type of hard number. Objective factors help to remove the subjectiveness that can be associated with performance evaluations. Subjective factors, based on the opinion of the evaluator, can be harder to defend or explain.

While it's difficult to remove all subjectiveness associated with a performance evaluation, the more objective you can make it, the better you will be able to defend the evaluation.

Documentation

You may have heard the expression: "If it's not documented, it didn't happen." In all areas of employment law, this is a good rule of thumb to follow.

If there's an issue with an employee's performance, it needs to be documented in the performance evaluation. Verbal discussions of a performance issue, without any documentation regarding the discussions, simply isn't a good practice. In a lawsuit over a decision to discharge an employee over work performance issues, you don't want to find yourself in the position of relying on a supervisor to testify about the times she verbally talked with the employee about the issue. If it's important enough to talk with the employee about, it's important enough to document the discussion.

If your supervisor doesn't document the verbal discussions as they occur, they should certainly mention the prior verbal discussions in the employee's yearly performance evaluation. It creates a record showing the supervisor talked with the employee before about the issue and creates a record that reminds the employee again about the issue.

Train your evaluators

Depending on the size of your organization, you could have multiple supervisors involved in evaluating employees. Because not everyone thinks the same way in evaluating employee performance, there's a risk that each supervisor will evaluate their employees differently.

For instance, if you have a five-point scale, with one being the lowest score and five being the highest score, one supervisor may have a tendency to award the highest score while another may have a tendency to award a lower score. This creates the possibility of having inconsistent evaluations among your employees based on the same level of performance. As a result, you may not obtain an accurate measure of how an employee is performing or whether any issues need to be addressed.

To address this potential dilemma, it's important to provide some training to individuals who complete the performance evaluations. The training should provide some guidance on what the point scale means on the form and the company's expectations for how that point scale is to be applied.

While it may not completely stop this dilemma from arising, some training will place the supervisors in a better position to understand how you want the employees to be evaluated and how the evaluation form is intended to be used.

Self-assessment

You should consider having your employees complete a self-assessment of their performance. This helps to show the employees what you think is important about their work performance, and it provides you with a view into how the employee thinks he performed over the past year.

If there's a significant difference between how the employee thinks he performed and how the supervisor thinks the employee performed, it's important to address that difference so the employee and the supervisor develop a similar understanding of how the employee is performing. Also, some employees may recognize if they have a problem area and may admit in their own self-assessment that there's an area that they need to fix.

California News in Brief

Los Angeles-area poultry processors ordered to pay $1.2 million in back wages. The U.S. Department of Labor (DOL) announced on September 28 that a federal court had ordered the operators of La Puente poultry processing plant to pay more than $1 million after an investigation found the employers deliberately denied overtime wages earned by 113 workers. The action by the U.S. District Court for the Central District of California ended the DOL's long-running litigation against TL Foods Inc. and its owner Lily "Mei" Tseng, Express Poultry Services Inc. and its owner Jimmy Huynh, and joint employers Aiwa Tang-Ton, Kevin Truong, and KP Poultry Inc. for violations of the Fair Labor Standards Act (FLSA). The judgments require Tseng and TL Foods Inc. to pay more than $1 million in back wages and damages and Huynh and Express Poultry Services Inc. to pay $210,438 in back wages and damages to the affected workers. The other co-defendants had previously agreed to pay back wages, damages, interest, and penalties.

Bay Area Subway locations ordered to pay nearly $1 million and sell or close. The U.S. District Court for the Northern District of California has ordered the owners and operators of 14 Bay Area Subway restaurants to pay employees nearly $1 million in back wages and damages after federal investigators found they directed children as young as 14 and 15 to use dangerous equipment and assigned minors to work hours not permitted by law. The restaurants also were found to have not paid employees regularly—including by issuing hundreds of bad checks. They also were found to have illegally kept tips left by customers. The U.S. Department of Labor announced the court's order on September 29 and called the court's action sale or closure rare. The order requires the owners to sell or shut down their businesses by November 27, 2023, a term the department insisted on to resolve the case.

State secures settlement in pay data lawsuit. The California Civil Rights Department (CRD) announced on October 2 that it had secured a nearly $100,000 settlement to resolve a lawsuit against Cambrian Homecare Inc. in July over the company's alleged failure to report employee pay data. Under state law, private employers of 100 or more employees or contractors are required to annually report pay, demographic, and other workforce data to the state. The law is aimed at combatting gender and racial pay gaps. It requires employers to provide information on the number of employees by race, ethnicity, and sex in certain job categories and by category of rate of pay to CRD on an annual basis. Despite warnings, Cambrian allegedly failed to submit data for 2020, 2021, and 2022 until after the CRD's lawsuit was filed. ■

Retain good employees

While you certainly want to address problem areas when they arise, you will also want to use the performance evaluation process to provide positive feedback to employees when it is deserved. This positive feedback not only tends to assist with keeping your employee on the same productive path, but it also may help you to retain your good employees.

Your good performers want to hear when they are doing well, and you should positively reinforce their good performance. While we live in a time where employees jump from employer to employer, telling your good performers in a performance evaluation that their work is appreciated is a simple step you can take to help keep them with your company. An employee who feels underappreciated may be more likely to look for other opportunities.

Bottom line

The yearly performance evaluation process is an important part of any good business practice. It helps to keep your good performers moving in the same direction, and it helps to identify problem areas that need to be addressed.

If you find you need to discipline or discharge an employee for work performance issues, failing to conduct proper performance evaluations could place you in a difficult and potentially expensive position. ■

HARASSMENT

Proposed harassment guidance broadens employers' obligations under EEO law

by Allison Hawkins and Amy Wilkes, Burr & Forman LLP

On October 2, 2023, the U.S. Equal Employment Opportunity Commission (EEOC) published in the Federal Register its notice of proposed guidance on "Enforcement Guidance of Harassment in the Workplace." The guidance incorporates updates reflecting current case law governing workplace harassment and addresses the proliferation of digital technology and how social media postings and other off-work conduct could contribute to a hostile work environment. It further illustrates a wide range of scenarios showcasing actionable harassment.

Covered basis

The guidance makes clear that federal equal employment opportunity (EEO) statutes only protect against harassment if it's based on an employee's legally protected characteristics, such as race, color, national origin, religion, sex, age, physical and mental disability, and genetic information.

Building in part on case law over the past 25 years and in part on positions taken by the commission, it goes on to provide that "sex-based" discrimination includes harassment based on pregnancy, childbirth, and other related medical conditions such as a worker's "reproductive decisions" including "contraception or abortion" and that "sex-based" discrimination incorporates protections for LGBTQ+ workers against harassment based on sexual orientation and gender identity. It also provides protections for "sex-based" stereotyping.

Notably, under the proposed guidance, the EEOC would recognize claims for perceptional-based harassment where harassment is based on the perception that an individual has a particular protected characteristic, even if that perception turns out to be incorrect. Moreover, the EEOC would recognize claims under federal EEO law for "association harassment," where a complainant associates with someone in a different protected class or suffers harassment because they associate with someone in the same protected class.

Causation

The guidance reaffirms that a causation determination of whether hostile workplace harassment is based on a protected characteristic will depend on the totality of the circumstances. It provides numerous examples that reflect a wide range of scenarios wherein causation may or may not be established.

The scenarios reflect findings where the conduct involved alleges facially discriminatory conduct, stereotyping, situational context evaluations, close timing, and comparator evidence.

Narrowing the objective standard

To establish a hostile work environment, an employee must show there's conduct that is both subjectively and objectively hostile. Notably, the guidance states that whether conduct is objectively hostile "should be made from the perspective of a reasonable person of the complainant's protected class."

The traditional "reasonable person" standard wasn't so limited. In the EEOC's view, "personal or situational characteristics," such as age differential or undocumented worker status, also affect both the objective and subjective reasonableness assessment—a position not shared by all the courts.

Conduct not directed at the employee

The guidance provides that an individual who hasn't personally been subjected to unlawful harassment based on their protected status may be able to file an EEOC charge and a lawsuit alleging they have been harmed by unlawful harassment of a third party.

For example, an employee who is forced to engage in unlawful harassment of another employee may have their own claim under the law, even though they weren't personally subjected to unlawful harassment.

Conduct outside the workplace

The guidance broadly considers conduct occurring in a non-work-related context as part of a hostile work environment. The EEOC provides several examples where an employer may have an obligation to take action against conduct that occurs in a non-work-related context.

In the commission's view, an employer may be liable for harassment if the conduct simply "impacts the workplace." Here are two examples that illustrate this:

- If "a Black employee is subjected to racist slurs and physically assaulted by white coworkers who encounter him on a city street, the presence of those same coworkers in the Black employee's workplace can result in a hostile work environment."
- If "an Arab-American employee is the subject of ethnic epithets that a coworker posts on a personal social media page, and either the employee learns about the post directly, or other coworkers see the comment and discuss it at work, then the social media posting can contribute to a racially hostile work environment."

The guidance significantly stretches current case law, which typically only considers outside-of-work conduct when it's carried out by an employee with direct supervisory authority, occurs at a work-related event, or occurs between coworkers who constantly work with and see each other inside the workplace. The guidance notes that the EEOC's broadened stance is in light of the proliferation of digital technology, such as electronic communications using private phones, computers, or social media accounts, that often bleeds into the workplace.

Framework of liability

Consistent with governing case law, the guidance sets forth several frameworks under which harassment claims will be analyzed. Which framework is applicable depends on the relationship of the harasser to the employer and the nature of the hostile work environment. Once the status of the harasser is determined, the appropriate standard will be applied to assess employer liability for a hostile work environment.

Automatic liability. An employer is always liable if a supervisor's harassment creates a hostile work environment that includes a tangible employment action.

Vicarious liability. If harassment by a supervisor creates a hostile work environment that doesn't include a tangible employment action, the employer can raise an affirmative defense to liability or damages.

Negligence. If harassment comes from a nonsupervisory employee or nonemployee, the negligence standard is principally applied.

Expansion of liability standards that apply in harassment cases

The guidance also expands on the circumstances in which an employer may be subject to automatic liability. Since the Supreme Court's *Faragher/Ellerth* rulings, the "supervisor" designation often becomes a key issue in determining an employer's liability.

In the EEOC's view, a coworker is a supervisor if the complainant reasonably believed the coworker had the power to recommend or influence tangible employment actions (e.g., hiring, firing, and demotions) against them. This "reasonable belief" approach would allow a coworker to be considered a supervisor even if the coworker had no power to take or influence tangible employment actions against a complainant.

This guidance appears to contradict the Supreme Court's instruction to limit the supervisor's inquiry into whether the harasser actually was empowered by the employer to take tangible employment actions against the complainant.

Employer's reporting mechanism not required

An employer has an affirmative defense to hostile work environment harassment when it can show both that it took reasonable steps to prevent and correct harassment and the employee unreasonably failed to take advantage of those opportunities or take other steps to avoid the harassment.

The guidance provides that, even if the employee didn't use the employer's reporting mechanism to complain of harassment, other actions—such as filing a grievance with a union—may mean the employer has been notified of the concern, and the affirmative defense cannot be used.

Bottom line

The public is invited to submit comments and view the document via the federal e-regulation website until November 1.

Notably, EEOC guidance doesn't have the force of law, but it provides insight into how the EEOC will interpret and seek to enforce the federal EEO laws.

Regardless of changes, management and HR executives will need to continue antiharassment efforts that have been put into place over the last 25 years. Maintain clear and robust antiharassment policies, provide training, thoroughly investigate complaints of harassment, and take appropriate corrective action when an investigation indicates inappropriate conduct. ■

RETALIATION

Retaliation: The most successful discrimination claim

by Roberta Fields, McAfee & Taft

A retaliation claim can be successful even when the original discrimination claim fails to establish a violation of law. The same laws—federal and typically state laws—that prohibit discrimination based on race, color, sex, religion, national origin, age, disability, or genetic information also prohibit retaliation against individuals who oppose discrimination or participate in an employment discrimination proceeding.

Why are the laws written this way? Well, if employees are unwilling to come forward and speak out or are unwilling to participate when someone else has alleged a complaint, then discrimination cannot be addressed. In other words, retaliation is illegal because it has a "chilling" effect on the willingness of individuals to come forward.

Employment protections

Individuals who file a claim believing they have experienced discrimination are protected. Individuals who are interviewed, or give statements, or who testify about the alleged wrongful employment action are also protected.

What kind of "participation" activity is protected?

- Filing a charge, internal complaint, or lawsuit alleging discrimination;
- Being a witness in an investigation or formal proceeding of a charge or lawsuit;
- Communicating with a manager or supervisor about discrimination or harassment;
- Answering questions during an employer investigation of discrimination or harassment;
- Refusing to follow company practice, policy, or management orders that would result in discrimination;
- Resisting sexual advances or intervening to protect others;
- Requesting a disability or religious accommodation; and
- Asking managers or coworkers about salary information to uncover potentially discriminatory wages.

This isn't a complete list. Any activity that brings discrimination to light is protected under discrimination laws. Each of these examples describes behavior that must be protected so discrimination in the workplace can be investigated and eliminated.

Examples of retaliatory actions

A company cannot fire, demote, harass, or otherwise retaliate against a person for engaging in protected activity. The following are examples where the Equal Employment Opportunity Commission (EEOC) found retaliation:

- A manager placed information about prior discrimination complaints in an employee's personnel file to prevent her from obtaining a promotion.
- Two panelists who were interviewing candidates for a promotion were involved in either current or prior discrimination complaints filed by one of the employees.
- An employer took away a perk (use of a company car) from an employee who had recently filed a discrimination claim.
- An employee was given a lower performance appraisal than was warranted.
- An employee was transferred to a less desirable position.
- An employee received increased scrutiny.
- Management made work more difficult by purposefully changing a work schedule to conflict with family responsibilities.
- Management engaged in verbal or physical abuse with an employee.

Close proximity in time is also a factor reviewed by courts and the EEOC to determine when an action against an employee is retaliatory. The closer in time the alleged retaliatory behavior is to the charge or the participation in the discrimination proceeding, the more likely it will be found to be retaliation.

If someone files a charge, or participates in an investigation, are they protected forever? No. You're free to discipline or fire workers if the reason is nondiscriminatory and nonretaliatory. However, you will carry the burden of proof to establish a nondiscriminatory and nonretaliatory reason for the action.

The EEOC will file suit against companies that allegedly retaliate. In a recent news release, it announced it had filed suit against TCI of Alabama, a recycler of electrical equipment at a plant in Pell City, Alabama. According to the lawsuit, after a female filed an EEOC discrimination charge for failure to hire based on gender, TCI interviewed a management employee who supported the allegation saying TCI had a longtime practice of not hiring female laborers. When the company was unsuccessful in getting the manager to change his statement, it terminated his employment. The EEOC filed suit on his behalf seeking money damages, compensatory and punitive, and injunctive relief to prevent such unlawful conduct in the future.

Best practices

Here are some best practices you should consider implementing to reduce your liability for retaliation claims:

- Have a policy that your company will not tolerate discrimination or retaliation and that employees who come forward in good faith will be protected.
- Have a policy that provides several ways for employees to complain about discrimination (e.g., hotline, HR, certain executives).
- Investigate every complaint.
- Document performance so that when you want to terminate an employee who has complained or participated, you will have documentation of poor performance before the discrimination charge was filed. ■

LABOR LAW

NLRB announces new employee-friendly joint-employer test

by Gary S. Fealk, Bodman PLC

On October 26, 2023, the National Labor Relations Board (NLRB) issued a final rule addressing the standard for determining joint-employer status under the National Labor Relations Act (NLRA). The new standard will make it more likely one entity can be held liable for unfair labor practices of another entity when some element of employment interrelation exists.

Out with the old rule

In 2020, the NLRB issued a rule stating that to be considered a joint employer, a company must exercise "actual and substantial direct and immediate control" over another employer's employees' essential terms of employment. Terms and conditions of employment under the 2020 rule were defined as wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction. The rule also required that the company must exercise control over the terms and conditions in such a way that it "meaningfully affects matters relating to the employment relationship with those employees."

In with the new

The 2023 final rule announces a new standard and rescinds the old one. Under the new rule an entity may be considered a joint employer of a group of employees if each entity has an employment relationship with the employees and they share or codetermine one or more of the employees' essential terms and conditions of employment. It defines terms and conditions exclusively as:

- Wages, benefits, and other compensation;
- Hours of work and scheduling;
- Assignment of duties to be performed;
- Supervision of the performance of duties;
- Work rules and directions governing the manner, means, and methods of the performance of duties and the grounds for discipline;
- Tenure of employment, including hiring and discharge; and
- Working conditions related to the safety and health of employees.

Bottom line

The effect of the change is that employers who lease from or contract with other employers will be more likely to be held liable for the other employers' unfair labor practices, even when they have minimal influence over the employees' terms and conditions of employment. The new rule will go into effect on December 26, 2023. ■

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