Labor & Employment

PTO for the WIN: Why Businesses Should Make the Switch

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BY ROBERT G. BRODY
AND LINDSAY M. RINEHART

Companies of all shapes, sizes and industries all across the country have been deciding to ditch their traditional vacation and sick time policies in favor of an integrated Paid-Time-Off (PTO) system. Implementing a PTO system can have numerous advantages for employers and their businesses, saving you time, money and energy in managing your staff's time off benefits. With the current trend moving away from traditional leave systems, now might be a good time to ask yourself: Is PTO right for your business?

Traditional Leave Policies

Traditionally, employees are granted an array of different types of time off, including vacation, sick, and personal days. For example, under the traditional system, an employer might offer employees 10 paid holidays, a week of paid vacation, three personal days, and five sick leave days per year. The type of leave dictates how those days are to be used. PTO, however, permits more flexibility and allows the employee to use those days however he or she wishes. Not only do most employees prefer it, but it reduces administrative burden on the employer. Everyone wins.

So, What Is PTO?

PTO is a single bank of days from which employees can draw time off for sick days, vacations, doctor's appointments, child care snafus, personal days, etc. It is up to the employee to use the days as he or she wishes or needs. Under a PTO system, there is no need for employees to justify their earned time off—they simply take their earned time and use it as they will.

Pros of Offering PTO

Attract Top-Talent. A PTO system makes your business more attractive to prospective employees by increasing the number of days they can take off for vacation and personal days if they are rarely sick. A major complaint by employees regarding traditional sick time is it only rewards those who are sick—healthy employees get no benefits. PTO on the other hand allows an employee who never calls in sick to use the days that would otherwise be allotted for sick time to do other things, like take a personal day or extra few days of vacation. Who doesn't love that?

Are you ready to make the switch? Think about it. When you're ready, seek competent counsel in your state to make sure your plan will work for your business.

Deter the Over-Use of Calling Out. Unexpected call-outs are costly for employers when you consider lost productivity due to suboptimal staffing and possible overtime costs paid to an employee who is called at the last minute to fill in for the calling out employee. Not to mention the morale issues that come along with calling someone in to take on the work-load of another or simply raising the work demands for the employees who come in as scheduled. Call-outs are never fun for those left holding the bag but if it is the only way to get every possible day off, that is exactly what some will employees will do.

Not only does an effective PTO system reward hard-working and devoted employees who never take a sick day, it also deters the abusive and unnecessary use of sick days. The fear that I won't get my full number of days off if I don't call I sick is gone. While the number of days available to call-out might remain the same, the "always sick" employee will be forced with the inevitable choice—call in sick and forfeit my vacation or work through my minor sniffles and take that weeks' vacation to Mexico in the fall—decisions, decisions. Knowing that a sick day might eat into their vacation time might be just the sort of deterrent these employees need.

Be mindful, however, that this might require you as an employer to address employees who come to work on their deathbed. While they might not want to call out and use a day of PTO for their illness, it's not worth them getting the whole office sick. Take a stand and send him or her home if they are a risk to the rest of your employees or yourself.

Promote a Better Work-Life Balance. A PTO system also allows employees to miss work for things that are important to them without having to feel guilty about taking time off. Taking care of loved ones, going to school events, and enjoying an occasional day off just for fun are all allowed. Your bottom line will be helped because nothing helps a business like happy, well-rested employees.

Avoid Playing the Hall Monitor. Employers who offer vacation, personal and sick days have three separate banks of accruals they need to manage, monitor and maintain. Not only do these employers have to keep track of how many paid days off an employee has left but they have to know what "type" of absence it is. The employer also somehow has to make sure each day off is used for the allowed reason. Essentially, they have to play hall monitor. Are they sick? Is their child sick? Did their babysitter cancel? Car break-down? Does any of this really matter? It's time consuming and beyond all else—exhausting!

Not only is managing different banks of accruals a waste of management's time, it presents an impossible task: determining which of your employees is abusing their time/lying. While an employer can require employees to turn in a doctor's note when they are off for more than three consecutive days and cite sickness as the reason, they cannot require an employee to submit a note every single time they take a sick day. An employer with a doctor's note policy must also be careful to apply the policy uniformly and avoid asking questions that run afoul of the Americans With Disabilities Act (ADA) and state and federal privacy laws. With so much risk at stake, why take the chance?

Things to Consider Before Making the Switch

Paying Out Unused PTO Upon Resignation or Termination. A possible down-side for employers is the possibility an employee banks a large quantity of PTO days and leaves the company. Certain states require employers to pay out accrued but unused PTO » Page 10

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Are **Non-Compete Agreements** Getting Kicked to the Curb?

BY EVE I. KLEIN
AND KATELYNN M. GRAY

Picture this: Melissa, excited to start her receptionist job in a New York accounting firm, quickly fills out her employment paperwork. She glances it over and scribbles her signature on the non-compete agreement preventing her from working at any similar businesses across the country for three years after leaving the firm. Eight months later, the firm fires Melissa without cause and without any severance package. Is Melissa's non-compete enforceable?

New York courts generally disfavor restrictive covenants and will only enforce non-competes that are necessary to protect an employer's legitimate interests, do not impose an undue hardship on the employee, do not harm the public, and are reasonable in duration and geographic scope. *Johnson Controls v. A.P.T. Critical Sys.*, 323 F. Supp. 2d 525, 533 (S.D.N.Y. 2004) (citing *Reed, Roberts Associates v. Strauman*, 353 N.E.2d 590, 593 (1976)); Barbara D. Underwood, N.Y. State Att'y Gen.'s Office, *Non-Compete Agreements in New York State* (2018). An employer's legitimate interests include preventing disclosure of trade secrets, client lists, and confidential information and loss of highly skilled and specialized employees. *Johnson Controls*, 323 F. Supp. 2d 534-35. And while governmental resistance to non-competes is nothing new, New York is seeing a fresh wave of legislation and efforts to restrict non-compete use. Underwood, *supra* at 3. So what does this mean for Melissa?

As a low-wage, low-level employee, Melissa's non-compete is very likely unenforceable in court. Moreover, concern over the negative economic impact of non-compete agreements and their restraint on free trade and freedom of profession has recently prompted the Attorney General of New York (NYAG) to conduct a number of investigations into the "rampant misuse" of non-competes. *A.G. Underwood Announces Settlement With WeWork to End Use of Overly Broad Non-Competes That Restricted Workers' Ability to Take New Jobs*, N.Y. St. Off. Att'y Gen. (Sept. 18, 2018) ("*WeWork Settlement*"). Section 63(12) of New York's Executive Law gives the NYAG authority to investigate and bring indepen- » Page 12

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Managing New **Leave Laws** in Conjunction With **ADA, FMLA** and **Workers' Comp**

BY BRIAN ARBETTER

At a breathtaking rate, states and cities throughout the United States (including New York) are enacting various paid employee leave laws. While almost all of these new laws require employers to pay for the time off, they vary greatly in what qualifies for leave and how pay is to be determined. Worse, existing disability and workers' compensation laws compound the difficulties for employers in managing employee needs for leave while balancing the various requirements of these different laws.

This article reviews the new laws, how each works, and what each requires. Additionally, guidance is provided on how to coordinate these new requirements with longstanding requirements under laws like the Americans with Disabilities Act, the Family Medical Leave Act, and workers' compensation laws. Discussion of leave laws globally is also included. This piece concludes with recommended best practices for employers to follow going forward.

Background

To best understand the current trend of state and city level paid employee leave laws, it is important to first review the federal law backdrop from which the current local movement has grown. Passed in 1993, the US Family Medical Leave Act (FMLA) is the primary federal law to guarantee employees the right to a leave of absence for a new child or medical need.

Significantly, this law's entitlement is for an *unpaid* leave, and it only applies to work locations where an employer has 50 or more employees within 75 geographical miles. Further, it only covers workers who have been employed for at least a year and have worked at least 1,250 hours in the past year. The FMLA guarantees leaves as long as 12 weeks, continued health insurance coverage during the leave and protects the job so that the employee can return to work at the end of the leave.

State and City Movement

Realizing that unpaid leave causes many workers to not be able to make use of the FMLA entitlement (because they still need to earn a paycheck), many states and cities over the past several years have enacted various forms of paid leave laws.

The state of New York and New York City have recently both done so. Effective Jan. 1, 2018, the state of New York enacted a paid leave law with a four-year phase in. Funded through employer insurance, this law covers all employees who need to take a leave for reasons similar to those already set out in the FMLA. While starting now at lower levels, when fully implemented in 2021, employees will be entitled to take up to 12 weeks of paid leave at the lesser of 67 percent of their salary or 67 percent of the New York average weekly wage.

At the New York City level, effective May 5, 2018, employers in the city with five or more employees who work more than 80 hours per year must provide one hour of paid leave per every 30 hours worked with a mandatory annual carryover of 40 hours. Covered leave purposes include those similar to the FMLA, as well as domestic violence and human trafficking related assistance needs.

Beyond New York, the following states are among those that have enacted various forms of paid leave laws covering purposes similar to the FMLA: California (Jan. 1, 2018), Connecticut (2012), District of Columbia (May 13, 2008), Oregon (Jan. 1, 2016) and the state of Washington (effective 2020).

In addition, the following cities and counties are among those that have enacted paid leave laws:

Emeryville, Calif. (July 1, 2015), Oakland, Calif. (March 2, 2015), San Diego, Calif. (July 11, 2016), San Francisco, Calif. (Jan. 1, 2017), Montgomery County, Md. (Oct. 1, 2016), Bloomfield/East Orange/Elizabeth/Irvington/Jersey City/Montclair/Newark/Passaic/Paterson/Trenton, N.J. (Jan. 24, 2014), New Brunswick, N.J. (Jan. 6, 2016), Portland, » Page 10

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Big Data Analytics May Haunt Employers

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BY ROBERT O. SHERIDAN AND BRET A. COHEN

On Sept. 18, 2018, the American Civil Liberties Union (ACLU) filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) against Facebook with respect to Facebook's employment advertising practices, the result of which could have major implications in the way companies use big data. This case illuminates a legal issue that is rapidly evolving into an area of exposure for the way in which companies who utilize big data technology target their intended audience. Companies that wish to continue their big data practices must ensure that they carefully evaluate their use of these technological tools to avoid lawsuits and regulatory ire for potentially discriminatory conduct.

What Is Big Data?

We begin with the fundamental question: What is big data? Big data has been described as "extensive datasets—primarily in the characteristics of volume, velocity, and/or variability—that require a scalable architecture for efficient storage, manipulation, and analysis." *What Is Big Data?*, University of Wisconsin, Data Science (2018). In the consumer context, an online retailer might use big data analytics to mine your online purchase history to help predict what your next purchase will be and provide advertisements for products the retailer predicts you might buy. In the employment context, companies might use big data algorithms to find job applicants with a better chance of generating a positive job performance. In the ACLU's case most recent case against Facebook, the issue centers on the alleged use of big data to target specific consumer groups for employment opportunities.

The EEOC Complaint

The ACLU, on behalf of three individuals and a putative class comprised of the Communications Workers of America (the plaintiffs), filed a charge against Facebook and 10 Facebook employers, alleging that Facebook's employment advertising algorithm unlawfully discriminated on the basis of age and gender in violation of Title VII of the Civil Rights Act (the charge). See *Facebook EEOC Complaint—Charge of Discrimination*, ¶ 2, American Civil Liberties Union (Sept. 18, 2018). The charge alleges that Facebook used big data algorithms to purposely exclude women, nonbinary users, and older workers from receiving certain employment advertisements. According to the allegations in the charge, Facebook then created and sent advertisements strictly to young men for employment in male-dominated fields. See id. at ¶ 4. The plaintiffs' claims rest on their classification of Facebook as both an employer and an employment agency. See id. at ¶ 2. As such, Facebook allegedly targeted and sent job advertisements as well as recruitment and hiring opportunities to male Facebook users as prospective job applicants. See id. According to the plaintiffs' allegations, this targeted advertising purportedly excluded female prospective job applicants in violation of Title VII. See id.

The plaintiffs allege that Facebook's account opening procedures facilitated the use of big data in a discriminatory manner. See *Facebook EEOC Complaint—Charge of Discrimination*, ¶¶ 22-24, American Civil Liberties Union (Sept. 18, 2018). Those procedures require all new users to identify their gender and age when opening an account. See id. Plaintiffs allege that Facebook uses this stored information in its advertising platform, which, "enables, encourages, and assists employers to target advertisements and recruitment based on the user's gender, by allowing advertisers to select either 'All,' 'Male,' or 'Female' users to receive the ad." See id. at ¶ 3. The plaintiffs also allege that this use of big data with respect to users' personal information results in a discriminatory effect against female and older users. See id. As a result, the plaintiffs are seeking monetary damages as well as injunctive relief. See id. at ¶ 64.

Title VII of the Civil Rights Act of 1964

Section 703(a) of Title VII addresses discriminatory *employer* practices:

> It shall be unlawful employment practice for an employer: (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. §2000e-2(a) (1964).

Section 703(b) of Title VII, meanwhile, addresses discriminatory *employment agency* practices:

> It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

42 U.S.C. §2000e-2(b) (1964).

Here, the plaintiffs' claims are based on both §703(a) and (b), as the charge alleges Facebook: (1) by allowing employers to post job advertisements through Facebook, acts as an employment agency because it regularly undertook procurement of employment opportunities for employers through its advertising platform in return for compensation, and is allegedly involved in the entire employment advertisement process from ad creation to connecting employers to potential applicants; and (2) is acting as an employer because Facebook is engaged in an industry affecting commerce who has 15 or more employees. See *Facebook EEOC Complaint—Charge of Discrimination*, ¶¶ 19, 25, American Civil Liberties Union (Sept. 18, 2018). Plaintiffs further allege that because Facebook meets Title VII's definition of employer and employment agency, Facebook's conduct is under the purview of Title VII's protections against discrimination. See id. at ¶ 61-62.

Facebook's Alleged Misstep

As advertisements account for much of Facebook's revenues it should come as no surprise that Facebook is attempting to maintain flexibility with what options the company provides to its advertising clients. See Prasad Ramesh, *ACLU Sues Facebook for Enabling Sex and Age Discrimination Through Targeted Ads*, Packtpub (Sept. 19, 2018). Indeed, by allowing advertising clients to target their advertisements to their desired demographics, advertisers are more likely to maximize the return on their advertising dollar. Id. The EEOC, however, previously issued warnings about how the use of big data in recruitment and screening could violate Title VII.

According to the charge, Facebook may have overlooked the EEOC's warnings in an attempt to provide advertising flexibility to the company's clients. In allowing employers to choose who does and does not see their advertisements, the charge alleges that Facebook may have run afoul of Title VII. Id. The ACLU's new lawsuit, however, is not the first time Facebook has come under scrutiny for their advertising practices. In October 2016, Pro Publica, an online investigative journalism agency, released a report that alleged Facebook allowed advertising clients to target consumers for housing advertisements based on that Facebook user's ethnicity. See Xavier Harding, *ACLU Files Discrimination Charges Against Facebook for Serving Job Posts to Only Men*, Mic (Sept. 18, 2018).

> Companies that wish to continue their big data practices must ensure that they **carefully evaluate their use of these technological tools** to avoid lawsuits and regulatory ire for potentially discriminatory conduct.

Further, the Department of Housing and Urban Development (HUD) filed a complaint against Facebook in August 2018 claiming Facebook's advertisement platform allowed advertisers to restrict who received housing advertisements based upon their race, color, religion, sex, familial status, national origin, and disability. See Kevin Kelleher, *Facebook Ads 'Unlawfully Discriminate' by Race, Gender, Disability, HUD Complaint Charges*, Fortune (Aug. 17, 2018). The HUD's complaint further alleged that the discriminatory advertising was made possible by Facebook's utilization of big data to classify Facebook users based upon protected characteristics. Id. Thereafter, Facebook announced it would seek to resolve the discriminatory advertising effects of their big data algorithms by removing over 5,000 ad-targeting options available to their advertising clientele, which included targeting factors such as ethnicity or religion. See Jonathan Vanian, *ACLU, Labor Union, Allege Facebook's Ad Targeting Discriminates By Gender*, Fortune (Sept. 18, 2018).

Notwithstanding this negative publicity, by allowing clients advertising employment opportunities to target demographics, the charge alleges that Facebook may have engaged in similarly discriminatory practices through its advertising algorithms. See generally *Facebook EEOC Complaint—Charge of Discrimination*, American Civil Liberties Union (Sept. 18, 2018).

Facebook denied the plaintiffs' allegations in a statement by Spokesman Joe Osborne, which stated, "[Discrimination is] strictly prohibited in our policies, and over the past year, we've strengthened our systems to further protect against misuse … [w]e are reviewing the complaint and look forward to defending our practices." See Janet Burns, *ACLU Lawsuit Says Facebook's Targeted Jobs Exclude Women, Older Men*, Forbes (Sept. 20, 2018).

Implications for Companies Using Big Data in Recruiting

Companies using big data as a means to better reach their intended consumer may still do so. The Internet has matured, and increased regulation of cyber activity has coupled with existing consumer protection laws to create a modern paradigm: companies involved in online employment activities must now contend with a host of legally-sophisticated issues.

• Whether a company has been implementing big data as part of its marketing and hiring strategies with seemingly no issues, or a company seeks to begin utilizing the benefits of big data, the plaintiffs' suit against Facebook should come as a cautionary tale: commercial big data practices create potential vulnerabilities for inadequately prepared companies.

• A company's adoption of procedures designed to limit the disparate impact of consumer targeted advertisements will be indispensable towards limiting exposure to lawsuits. This means not only adopting preventative measures to ensure compliance with federal and state anti-discrimination laws when launching certain marketing and employment practices, but also remaining diligent to ensure conduct that appears non-discriminatory on its face does not in fact have a discriminatory impact.

• Enacting express procedures for marketing and employment practices that use big data will help companies maintain a transparent company-wide policy that limits exposure to lawsuits. For Facebook, by example, this means the company may be required to narrow advertisement targeting options for their clientele, and may require their advertising clients to provide additional disclosures and assurances about their advertising efforts to ensure these efforts will not have a discriminatory effect. See Greg Sterling, *Facebook Job Ads Excluded Women, ACLU Complaint Says*, Marketing Land (Sept. 18, 2018).

As the use of big data analytics becomes more prevalent in the screening and recruiting of employees, companies and practitioners must maintain a vigilant watch and think creatively as to how older laws like Title VII might apply to new technology like big data analytics. If there is any question, companies should consult their inside or outside employment counsel to ensure that any current or anticipated recruiting or candidate screening initiatives do not open the door to discrimination claims. In this rapidly changing area of the law, a company will want to avoid spooking investors by becoming the next test case for novel EEOC claims.

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PTO

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when an employee leaves. Other states require you to do so only when you yourself establish such a policy, and some don't seem to care one way or another.

Buying Back Unused PTO. Something to consider when instituting a PTO policy is whether or not you offer employees a "buy-back" at the end of the year. Instead of having employees carry over unused days into a new year, some employers chose to allow their employees to receive pay in exchange for those days, essentially resulting in a year-end bonus for days not taken. It is not recommended that employers buy back unused PTO days at 100 percent of an employee's wage as productivity is helped when employees have time off to recharge their batteries. However, buying back at 50 or 75 percent of an employee's regular wage is a win-win: the employer saves money and the employee walks away with some extra year-end spending money but usually chooses to use some of their time off during the year.

Increasing the Number of Days Employees Take Off. Offering a PTO policy might also lead to employees taking off more time than usual, which may or may not be a bad thing. Studies have long shown that the ability to take time off leads to a more motivated workforce. Some of the larger tech companies in the United States have even begun offering "unlimited PTO," and, contrary to popular belief, their employees are actually taking less time off than normal. While offering unlimited PTO is an extreme, it's clear there is a growing trend towards offering PTO instead of traditional vacation and sick time.

> PTO essentially **gives employees carte blanche** over how they use their time off, leaving employers time to worry about more important things.

Conclusion

While there are advantages to both leave options, and compelling arguments on either side, the trend is in favor of PTO. PTO essentially gives employees carte blanche over how they use their time off, leaving employers time to worry about more important things.

Are you ready to make the switch? Think about it. When you're ready, seek competent counsel in your state to make sure your plan will work for your business.

Leave

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Ore. (Jan. 1, 2014), Seattle, Wash. (Sept. 1, 2012), Spokane, Wash. (Jan. 1, 2017), and Tacoma, Wash. (Feb. 1, 2016).

And beyond the United States, almost every country in the world has enacted paid employee leave laws. To emphasize this point, here is a summary of just the "A" countries:

- Afghanistan, 20 days of vacation and 15 holidays
- Albania, 20 days of annual leave and 12 holidays
- Algeria, 2½ days of leave per month of work up to 30 days per year, and 11 holidays
- Andorra, 31 days of leave after one year of employment, before is 2½ days per month worked, and leave must be given at least 2 weeks straight plus 14 holidays
- Angola, 22 days per year plus 11 holidays
- Antigua and Barbuda, 1 day per month, plus 11 holidays (after probation)
- Argentina, 14 days (up to 5 years), 21 days (5 to 10 years), 28 days (10 to 20 years) and 35 days (after 20 years), plus 11 holidays
- Armenia, 20 days (up to 25 for certain reasons, including stress), plus 12 holidays
- Australia, 4 weeks per year worked (shift workers get 5 weeks), plus 10-13 holidays
- Austria, 25 days per year, 30 days if 25 years or more of service, plus 13 holidays
- Azerbaijan, 21 days per year, skilled employees get 30 days, plus 2 extra days every five years, plus 19 holidays

Other Laws Providing for Leave

Beyond explicit leave of absence laws, there are two other primary laws that also can entitle an employee to the right to take a protected leave of absence. The first is the U.S. Americans With Disabilities Act (ADA). Enacted in 1994, this law protects employees with physical or mental disabilities from discrimination in the workplace by requiring that employers provide such employees with reasonable accommodations to enable them to do their jobs. Courts have interpreted the ADA to require an employer to allow a covered employee to take a leave of absence where such leave is defined in scope and term (has a known end date) and does not cause an undue hardship on the employer.

> With so many different laws providing so many different types of leave rights, **it can often be confusing** for the in-house employment counsel or human resources manager to coordinate and manage all of the requirements.

The other primary law that can entitle an employee to a leave of absence is workers' compensation, which protects employees who have been injured in the course and scope of their employment. Where an injured employee needs time off to recover or obtain treatment, many state workers' compensation laws provide such a right.

Coordination And Best Practices

With so many different laws providing so many different types of leave rights, it can often be confusing for the in-house employment counsel or human resources manager to coordinate and manage all of the requirements. Some best pieces of advice to help are:

(1) Think about and check every leave law where your employee works to ensure that you are accounting for every possible entitlement and informing the employee of all of their rights when the company first becomes aware of facts that could give rise to the need for a leave. Some leave laws cover employees if they work there, even if the company does not itself have an office there.

(2) There is no one-size-fits-all solution. You must prepare the correct policies, notices, forms and certifications as required by each law. Because every company is different in terms of which laws apply, you need to develop documents specific to your operations.

(3) You must accurately track employee accruals and uses of leave entitlements. This includes training managers to spot factors giving rise to leave and to then notify human resources. Often, under leave laws, it is the employer's burden to spot and inform the employee of their entitlement to leave.

(4) Don't be afraid to call legal counsel for guidance; getting this wrong can be costly. At a minimum, it may result in an employee taking a leave of absence and then being able to claim that because the employer didn't tell the employee the leave was covered by a certain law, being able to use that law after the initial leave ends to extend the leave further and start all over. In a worst case, it can result in litigation for discrimination and legal violation.

Be Careful What You Ask for In **Employment Arbitration**

The case for offers of judgment

BY MICHAEL WEBER

As recent Supreme Court decisions have surveyed and expanded the landscape of arbitration and arbitration agreements, employers have placed greater focus on whether arbitration is actually the right fit for their company. Arbitration offers many benefits including privacy, confidentiality and avoidance of emotional jury awards to mention a few. Among the most cited drawbacks of arbitration are the cost of arbitration fees, the lack of summary disposition and the impossibly narrow scope of appeal. It is not uncommon for an employer to receive a statement from an arbitration provider that is in excess of $35,000 for the cost to administer and try an employment arbitration. See "Employment Arbitration: A Practical Assessment of Advantages and Disadvantages," New York Law Journal (Nov. 27, 2017).

In addition, a growing number of employers now say that the absence of a mechanism in arbitration to incentivize reasonable settlement offers also gives them pause. If you practice in certain states, the state's offer-of-judgment rules (akin to FRCP 68) explicitly apply to the arbitration setting. The rest of us are left to fashion a similar settlement apparatus through the arbitration agreement.

Employers should see this as an opportunity. If properly tailored, the adaptation of offer-of-judgment rules to arbitration can bring it closer to its promise of an equitable dispute-resolution forum that saves both parties time and money.

Barriers to Settlement In Arbitration

As much as arbitration is designed to bring about the speedy resolution of claims, there are aspects inherent to the process that discourage claimants from making reasonable, early offers of settlement.

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Specifically, because employers must, by virtue of case law or adoption of provider rules, accept the rather substantial costs of arbitrator and arbitration fees, claimants often include an approximation of these costs into any pre-hearing settlement offers. In other words, a claimant will often determine the reasonable value of a case, add to that its estimate of the arbitrator and arbitration fees at hearing, and present the sum as his or her settlement offer. There is little disincentive for a claimant to take these fees and costs off the table, but this "premium" often means the difference between settling the matter and going to hearing.

In essence, arbitration creates an imbalance between the parties regarding the cost of trying a case that does not exist in normal litigation. Inserting a viable offer-of-judgment mechanism into arbitration can level the playing field in this regard, and incentivize reasonable settlements.

Adopting the Offer Of Judgment to The Arbitration Setting

Judges enjoy the luxury (or burden) of knowing that they will always have a steady stream of customers seeking to resolve their disputes. Many arbitrators, of course, do not. So there is widespread belief, justified or not, that arbitrators may be tempted to refrain from doing anything that will diminish their likelihood of being chosen by either side at future arbitrations, leading to the proverbial "splitting the baby." Likewise, because one of the specified grounds for vacating an award is an arbitrator's "refusing to hear evidence pertinent and material to the controversy" (9 U.S.C. §10(a)(3)), some arbitrators will refrain from granting dispositive motions except in the clearest of cases in favor of sorting everything out once the parties have spoken their piece at the arbitration hearing.

These aspects of arbitration practice suggest the desirability of a workable offer-of-judgment system in arbitration. Offer-of-judgment rules operate by inducing careful consideration of settlement offers made to claimants. Under Federal Rule of Civil Procedure 68, for example, if a plaintiff ultimately prevails at trial for an amount less than the defendant's offer of judgment, then the plaintiff is precluded from recovering his or her right to attorney fees and costs after the date of the offer. In the context of employment law, where costs are statutorily defined to include attorney fees, the magnitude of the potential waiver can be substantial.

However, in jurisdictions where offer of judgment rules have not been legislatively extended to arbitration proceedings, employers desiring to rebalance the playing field through the offer of judgment device should consider including the right of either party to make the offer in the arbitration agreement itself. For example, the arbitration agreement can include an express provision allowing for offers of judgment in a manner consistent with, and within the time limitations, consequences, and effects provided in Rule 68 of the Federal Rules of Civil Procedure. Thus, the arbitration agreement would allow a party to serve the other side with a sealed offer of settlement that is visible to the offeree, but not to the arbitrator until after he or she has issued the final award of liability. This protocol ensures that the offeree has some skin in the game heading into the hearing and that the arbitrator (like a judge under Rule 68) is not influenced by the offer.

As much as arbitration is designed to bring about the speedy resolution of claims, there are aspects inherent to the process that **discourage claimants from making reasonable, early offers of settlement**.

Another approach suited to the arbitration setting is the "Last Best Offer" rule, also known as the "Baseball" rule. This system requires the arbitrator to issue only one of two possible awards: the claimant's offer or the respondent's offer. This rule prevents the arbitrator from dulling the efficacy of the offer process, while encouraging each side to put forth only reasonable offers. The International Centre for Dispute Resolution and the American Arbitration Association have published a series of "Final Offer" rules, which can be incorporated by reference into an arbitration agreement. The cost shifting discussed above would apply in this scenario as well.

Crafting a Conscionable Settlement Incentive

While a waiver of the recovery of attorney fees and costs (and potentially paying the respondent's attorney fees and costs up to the amount of the award) can mean giving up a substantial amount of money in a court setting, there often is less predictability in this regard in the arbitral setting, unless the parties' agreement provides clear rules of the road. One should proceed with caution on this front.

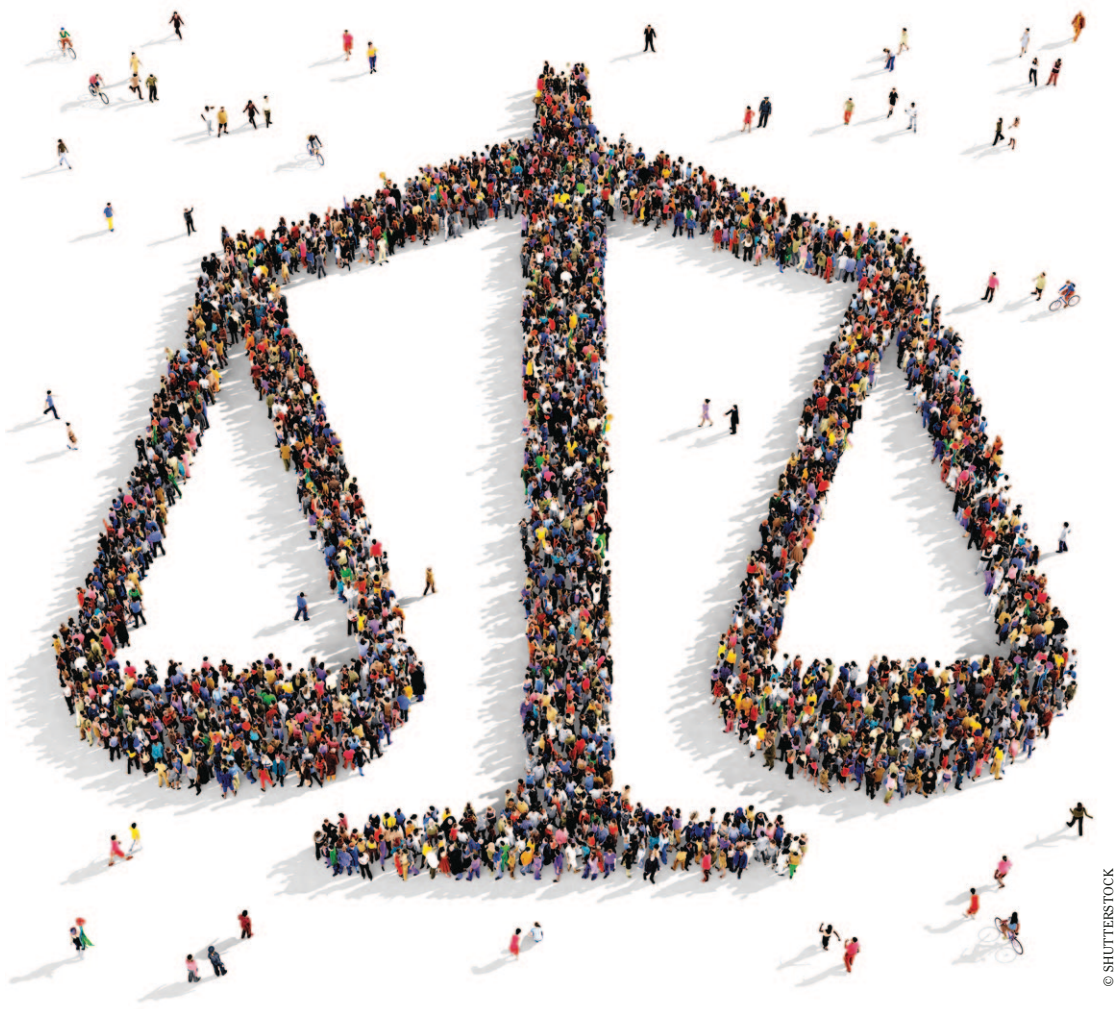
Because arbitration lacks the oversight of a judge, arbitration agreements are often subject to challenges that they are unconscionable or otherwise in violation of public policy. Offer-of-judgment mechanisms set forth within these agreements are no-less susceptible, particularly if they impose downsides on a claimant's rejection of an offer that go beyond what might be expected in court under Rule 68. For example, it is virtually a settled matter that for an arbitration agreement to pass muster, at least where there are statutory or other public policy claims, the employer alone must pay the arbitrator's and arbitration fees.

Similarly, an arrangement that requires a claimant to pick up the employer's attorney fees in the event that the award is less than the previous offer could also be vulnerable to challenge. One need only think of the ostensibly prevailing minimum-wage worker saddled with many thousands in legal fees to see the obvious perils of such an approach.

Nevertheless, a more equitable approach should be considered with the use of offers of judgment in arbitration. For example, some agreements shift the cost of electronic discovery or expert witness fees to claimants where the award is less than the offer. This approach would encourage greater a measure of pause for the offeree than if a mere waiver was involved. However, any such incentive mechanism should be designed with an eye towards its overall conscionability. An agreement tracking Rule 68 will be more likely to pass judicial muster.

Conclusion

Employers' views of arbitration have evolved considerably since courts began blessing the use of arbitration agreements in the employment context. In many cases, arbitration does not always live up to its potential as a cost-effective means of resolving disputes. However, adapting the offer-of-judgment model to arbitration, and tailoring it to the unique incentives present in that setting, would help bring arbitration closer to that promise.



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Agreements

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dent causes of action for fraud, which includes "unconscionable contractual provisions." N.Y. Exec. Law §63(12) (Consol. 2018); *In re People by Eric T. Schneiderman v. Trump Entrepreneur Initiative*, 26 N.Y.S.3d 66, 73 (N.Y. App. Div. 2016).

Traditionally, non-compete agreements were intended to protect trade secrets, intellectual property, and the like from being transferred by senior managers and executives to competitors. Increasingly, however, employees like Melissa, with little access to such information, are required to sign non-competes. Office of Econ. Policy, U.S. Dept. of the Treasury, Non-Compete Contracts: Economic Effects and Policy Implications (2016). Still, some companies assert that because technology has made it easier to steal confidential information, non-competes are necessary at all levels to protect business interests. Lorraine Mirabella, *Employers Use Non-Compete Agreements Even for Low-Wage Workers*, Balt. Sun (July 7, 2017, 4:00 PM).

In September 2018, NYAG Barbara Underwood, together with Illinois Attorney General Lisa Madigan, reached a settlement with WeWork wherein the co-working company agreed to completely eliminate or curtail overly broad non-competes (i.e., slash both the duration and scope) for all but 100 of its almost 3,300 employees. *WeWork Settlement*, supra. Prior to the settlement, WeWork required all employees, even cleaning staff and receptionists, to sign strict non-competes as an employment condition. Id. The WeWork settlement comes after other companies have agreed with the NYAG to eliminate non-competes for certain lower-wage employees: Jimmy John's, a sandwich chain, eliminated non-competes for sandwich makers; Law360 eliminated non-competes for editorial employees; and ESMI, a medical information services company, eliminated non-competes for phlebotomists. Underwood, supra at 3.

Even if Melissa was held to some form of non-compete, the terms of her non-compete may be overly broad. What New York courts consider to be reasonable in time and geographic scope varies, and often, both terms are considered together in this highly fact-sensitive inquiry. On a number of occasions, agreements lasting six months or less were deemed reasonable. See, e.g., *Lumex v. Highsmith*, 919 F. Supp. 624 (E.D.N.Y. 1996); *Ticor Title Ins. Co. v. Cohen*, 173 F.3d 63, 70 (2d Cir. 1999); *Natsource v. Paribello*, 151 F. Supp. 2d 465, 470-71 (S.D.N.Y. 2001); *Maltby v. Harlow Meyer Savage*, 633 N.Y.S.2d 926, 930 (Sup. Ct. 1995). Geographically, courts have discussed instances where a scope amounting to a worldwide prohibition would be reasonable as workers can "'telecommute' to their jobs from anywhere in the world," *GFI Brokers v. Santana*, Nos. 06 Civ. 3988, 06 Civ. 4611, 2008 U.S. Dist. LEXIS 59219, at *24 (S.D.N.Y. Aug. 6, 2008), but have also rejected similar worldwide restrictions for employees providing purely local services (e.g., fitness instructors) as overbroad. *Pure Power Boot Camp v. Warrior Fitness Boot Camp*, 813 F. Supp. 2d 489, 507 (S.D.N.Y. 2011). A judge would certainly be hard-pressed to rule that an agreement like Melissa's, prohibiting her from working at any similar businesses across the country for three years after leaving the firm, is reasonable, especially given her low-level position.

It remains to be seen whether **a complete ban on non-competes** for certain employees in New York will become the law of the land.

The overly broad application of non-competes to low-wage employees has caused the NYAG to propose legislation banning non-competes for employees earning below $75,000 per year. Assemb. B. A7864A, 2017-2018 Legislative Session (N.Y. May 17, 2017); S.B. S6554, 2017-2018 Legislative Session (N.Y. June 2, 2017). Similar legislation to amend the New York City administrative code is under consideration. Int. No. 1663-2017, 2017 Session (N.Y.C. Council July 20, 2017). Currently, though, no New York statute concerning the general enforceability of non-competes exists. There are, however, statutes governing the enforceability of non-competes within specific industries, like broadcasting, where such agreements are prohibited. N.Y. Lab. Law §202-k (Consol. 2018). Similarly, as set forth by the New York Rules of Professional Conduct, with minor exceptions, attorneys may not enter into agreements restricting the right to practice after termination of an employment, partnership, or other similar relationship. N.Y. Comp. Codes R. & Regs. tit. 22, §1200.0 (2018). Within the financial sector, FINRA rules do not outright prohibit non-competes, but members have a limited ability to restrict the customer right to choose with whom they desire to conduct business. See, e.g., FINRA Rule 2140. This means while former employees may not be able to solicit certain clients, clients may be able to solicit those former employees. *First Empire Sec. v. Miele*, 851 N.Y.S.2d 57 (N.Y. Sup. Ct. 2007).

New York is not alone. Across the country, lawmakers and enforcers have been cracking down on non-competes. Illinois, for example, deems non-compete agreements with low-wage workers to be illegal and void, 820 Ill. Comp. Stat. 90 (2018), and prohibits non-competes for certain subsets of employees, such as broadcasters, 820 Ill. Comp. Stat. 17 (2018). Massachusetts statutes prohibit non-competes for social workers, Mass. Gen. Laws ch. 112, §135C (2018), physicians, §12X, nurses, §74D, psychologists, §129B, and broadcasters, ch. 149, §186. Massachusetts also recently enacted a law requiring employers to pay former employees bound to non-competes during the period in which they cannot work. Mass. Gen. Laws ch. 149, §24L. Many other states have proposed legislation that, if enacted, would reduce non-compete enforceability. Kevin Burns & Brian Ellixson, *The Latest on State-Level Noncompete Reform*, Law360 (June 11, 2018).

Even if Melissa was not a low-wage employee and her non-compete was reasonable in scope, the firm would face yet another hurdle in attempting to enforce her agreement: she was terminated *without cause*. New York courts have held that, when fired without cause, a non-compete is unenforceable; there must be a "continued willingness to employ the party covenanting not to compete." *Buchanan Capital Mkts. v. DeLucca*, 41 N.Y.S.3d 229, 230 (App. Div. 2016) (quoting *Post v. Merrill Lynch, Pierce, Fenner & Smith*, 397 N.E.2d 358, 360-61 (1979)). The court may find that enforcing a non-compete against Melissa, who has been fired without cause, "would be 'unconscionable' because it would destroy the mutuality of obligation on which a covenant not to compete is based." *Arakelian v. Omnicare*, 735 F. Supp. 2d 22, 41 (S.D.N.Y. 2010) (quoting *Morris v. Schroder Capital Mgmt. Int'l*, 445 F.3d 525, 529-30 (2d Cir. 2006)).

But what if Melissa was offered a severance package, receipt of which was conditioned on the company's ability to enforce her otherwise unenforceable non-compete agreement? A New York court recently ruled that even if an employee is fired without cause, a non-compete may be enforceable when the employee accepts additional severance benefits she is not entitled to in exchange for being bound to the non-compete agreement. See *U.S. Sec. Assoc. v. Cresante*, 2016 N.Y. Misc. LEXIS 3662 (2016). In other words, stopping Melissa from competing comes with a price tag.

The landscape of non-competes is shifting. These agreements are becoming harder to enforce against low-wage employees, at least without being substantially curtailed. It remains to be seen whether a complete ban on non-competes for certain employees in New York will become the law of the land.