GANFER SHORE LEEDS & ZAUDERER LLP

CLIENT ADVISORY

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UPDATE ON RECENT EMPLOYMENT LEGISLATION

New York State has recently enacted three new employment-related laws of which employers should be aware. One of the new state laws – paralleling legislation already in effect in New York City – prohibits employers from requesting information regarding salary history from job applicants, or considering an applicant's salary history in deciding whether to offer employment or the amount of salary to be offered. The employer also may not retaliate against an applicant for refusing to divulge this information, although an applicant may voluntarily provide the information if he or she is not coerced into doing so. The law applies both to outside applicants, as well as current employees seeking promotion. The new statewide legislation will take effect on January 6, 2020.

A second new law strengthens the prohibition against an employer's paying employees differently based on their membership in a protected class, such as classes based on age, race, sexual orientation, or disability. As revised, a plaintiff claiming discrimination will need to show that he or she was performing "substantially similar work" as better-paid employees, rather than "equal" work as previously required. This change will take effect on October 8, 2019.

Finally, the prohibition against race discrimination contained in the Human Rights Law will now prohibit discrimination based on "traits historically associated with race, including but not limited to, hair texture" and "such hairstyles as braids, locks and twists." Again, this protection already exists in New York City, but will now be applicable throughout New York State.

ANOTHER REMINDER: EMPLOYERS MUST TRAIN EMPLOYEES REGARDING SEXUAL HARASSMENT

We have previously reported on New York State's and New York City's new laws requiring employers to provide mandatory training programs for their employees on the prevention and reporting of sexual harassment. The deadline for the first training session is October 9, 2019 for employers in New York City and December 31, 2019 for employers in the rest of New York State. For employees who are members of a labor union, several of the unions will provide the training. However, it remains the employer's responsibility to ensure that all employees attend and that records of their attendance are kept. For non-union employers or employees, the employer must arrange for the training to take place. Employers, including cooperative and condominium boards and landlords, that have not yet set up their training programs should act promptly to make sure they meet the deadlines. Ganfer Shore Leeds & Zauderer LLP is available to provide the required training to employees of clients of the firm.

NEW RENT LAWS: TENANTS MAY BE ABLE TO RECOVER DAMAGES FOR EXCESSIVE SECURITY DEPOSITS

In last month's issue of this *Client Advisory*, we reported on several provisions of the Housing Stability and Tenant Protection Act of 2019 that, in addition to affecting residential rentals, also are drafted so as to appear applicable to cooperatives. One of these provisions amended General Obligations Law § 7-108 to limit

360 Lexington Avenue, New York, New York 10017 Tel: (212) 922-9250 Fax: (212) 922-9335 http://www.ganfershore.com

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the amount of any security "deposit or advance" to one month's rent. In addition to limiting the amounts of traditional security deposits, this provision may also be interpreted to limit the amount that tenant-shareholders are required to deposit under maintenance escrow agreements and alteration agreements. It should be noted that § 7-108 provides that "any person" who violates the statute "shall be liable for actual damages" and that if the person is found to have "willfully violated" the law, the person "shall be liable for punitive damages of up to twice the amount of the deposit or advance." Cooperative boards and landlords facing issues under this or other provisions of the new law should consult with their counsel regarding their obligations as well as possible alternative means of meeting their objectives without violating the law.

PURCHASER RECOVERS DOWN PAYMENT ON CANCELED SALE OF COOPERATIVE APARTMENT

When a contract to purchase real property is canceled, the parties often dispute who is entitled to the down payment. Contracts typically provide that in the event of a purchaser default, the seller may retain the down payment as liquidated damages. In **Paradise v. Wood, 2019 N.Y. Misc. LEXIS 3623, 2019 N.Y. Slip Op. 29203 (Sup. Ct. Westchester Co. July 9, 2019)**, the court concluded that the purchaser did not default because she did not obtain unconditional board approval for the purchase of a cooperative apartment.

The parties entered into a purchase contract for the apartment, which was subject to "the unconditional consent" of the Cooperative. In the contract, the purchaser listed herself as the only proposed occupant for the unit. However, in her application package submitted to the Board, the purchaser indicated that the occupants would be her parents. The Board approved the application "upon the specific condition that [purchaser's] parents, who will occupy the apartment, will have their names added to the stock and lease." The purchaser declined to add her parents' names to the stock and lease, which would have made them co-owners of the unit. Instead, she decided to cancel the contract and demanded the return of her down payment. The seller's counsel issued a "time of the essence" letter and declared the purchaser in default when she failed to close.

In the ensuing litigation, the seller asserted that the purchaser willfully failed to comply with the Board's requirement that the intended occupants of the apartment must be included on the shareholder certificates, thus breaching the contract. The seller also asserted a claim for fraud, on the theory that the purchaser failed to disclose her intention to have other occupants in the apartment. The purchaser asserted that she already owns and resides, with her family, in another unit in the same building, and that she disclosed that this apartment would be occupied by her parents both to the seller and the Board before the contract was signed.

In its opinion, the court stated that it had not located prior caselaw dealing with this specific factual scenario. However, in analogous cases in which a purchase contract is subject to a mortgage contingency, the purchaser is generally permitted to cancel the contract if he or she is unable to obtain a mortgage, unless it is established that the failure to obtain a mortgage commitment is due to the purchaser's own conduct. Applying this rule by analogy, the court held that the purchaser would be entitled to return of her down payment if she acted in good faith in seeking board approval. The court found that the purchaser acted in good faith because there was evidence that the seller was aware that the apartment was being acquired for occupancy by the purchaser's parents, even though the contract failed to recite such fact.

The court concluded that "[b]ecause the sale was subject to the [Cooperative] corporation's unconditional consent and the [Cooperative] did not give its unconditional consent, and in the absence of any showing that [purchaser] acted in bad faith in order to create the lack of unconditional consent, [purchaser] had the right to cancel the contract and receive the return of her down payment." In addition, "[n]otably, the board's imposed condition was not an inconsequential technicality; it would have a significant impact, which [purchaser] was reasonably entitled to reject." Going forward, boards may wish to bear in mind that imposing conditions on an application may result in the contract purchaser's having the right to cancel the transaction.