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# NEW REQUIREMENTS FOR NEW YORK BUSINESSES EMPLOYING NURSING MOTHERS

## INSIGHT

New York employers must re-evaluate their obligations to nursing mothers in the workplace under an amendment to the state Labor Law that expands accommodations to nursing mothers.

The amended **law requires employers to designate a specific room or location for lactation and adds details on what the room or location must have**. Specifically, employers must designate a lactation room/location which is:

- not a restroom
- well lit
- shielded from view and free from intrusion of other people
- includes a chair
- includes a work surface (e.g., a table or desk)
- has access to running water
- has an electrical outlet, if the workplace is otherwise supplied with electricity

Further, if the workplace has access to a refrigerator, employers must provide nursing mothers with access to the refrigerator for the purpose of storing expressed milk.

Employers are required to provide notice to employees as soon as practicable when the lactation room is designated. If, due to space or other considerations a separate room is not possible (i.e., a room only to be used for lactation), employers must designate a room for lactation use that must be made available when needed by a nursing mother.

Employers can proactively create a designated lactation space or respond to employee requests for such a space. Employers must respond to such requests within five days.

The new law also directs the Department of Labor to develop a written policy setting forth the rights of nursing employees to express breast milk in the workplace. Employers must provide the policy to all employees in three separate circumstances: upon hiring, annually, and to an employee returning to work after the birth of a child.

The law goes into effect on June 7, 2023. Employers should consider what changes, if any, they need to make to their workplace. The law contains certain exceptions for employers who will face “significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business.” Even in these cases however, employers still must make “reasonable efforts” to set up a private, non-restroom location for lactation.

Should you need help complying with the new law or have questions, please contact Harris Beach Attorneys **Ibrahim Tariq**, at (585) 419-8556 and **itariq@harrisbeach.com**, or **Douglas Gerhardt** (518) 701-2738 and **dgerhardt@harrisbeach.com** who advise public and private employers in all areas of labor and employment law or the Harris Beach attorney with whom you most frequently work.

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## AUTHORS

**Douglas E. Gerhardt**
Member
(518) 701-2738
dgerhardt@harrisbeach.com

**Ibrahim Tariq**
Associate
(585) 419-8556
itariq@harrisbeach.com

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# NEW YORK ENACTS STATEWIDE PAY TRANSPARENCY LAW

## INSIGHT

As of September 17, 2023, most private-sector employers in New York State will be required to post a job description and pay range for any job opening, promotion or transfer opportunity the employer advertises.

**Governor Hochul's signing of the new pay transparency legislation** into law comes on the heels of New York City enacting similar legislation, which became effective November 1, 2022. Under New York City's Pay Transparency Law, all employers with four or more employees (at least one of whom works in New York City) must disclose the pay range for any advertised job openings. Our earlier alert on the New York City law is **available here**.

### COVERED EMPLOYERS UNDER NEW YORK STATE PAY TRANSPARENCY LAW

The new state law covers any private-sector employer that employs four or more employees. The law also covers recruiters who help prospective employers connect with job applicants. Temporary help firms, however, are not subject to the new requirements.

### JOB ADVERTISEMENTS: WHAT MUST BE INCLUDED

The law requires that when posting an advertisement for a job (or an internal promotion or transfer opportunity), covered employers must include a "range of compensation" for the position, as well as a "job description," if such a description already exists.

The "range of compensation" is defined by the law as "the minimum and maximum annual salary or hourly range of compensation" that the employer, in good faith, believes to be accurate. In other words: job postings will need to include both minimum and maximum possible pay for the position.

If the job posting is for a position which will be paid solely based on commission, however, employers may make a general statement in the advertisement that compensation will be commission-based.

The law adds record-keeping obligations, too, requiring employers to keep records on the history of compensation ranges for particular jobs, as well their job descriptions.

## POTENTIAL DIFFERENCES WITH NEW YORK CITY PAY TRANSPARENCY LAW

**Guidance issued by New York City** clarified some items that remain undetermined under the new state law. Under New York City's Pay Transparency Law, employers do not need to provide pay information if a job opening is not advertised. City guidance also clarified that certain information does not need to be included in job ads, such as details on overtime pay, vacation pay, bonuses and other benefits.

By contrast, the new state law does not expressly address these questions. The law directs the state's Department of Labor (DOL) to issue regulations further implementing the law, which will hopefully answer these (and other) questions.

## ENFORCEMENT

Aggrieved job applicants may file a complaint with the Department of Labor. Employers found to be in violation will face civil penalties. The DOL may also require other remedies sought by a complaining applicant.

## IMPACT AND PLANNING

As mentioned above, the law takes effect September 17, 2023. Employers in New York state should start planning now for the changes required to their job postings for positions that could potentially be performed by a worker located within the state.
The law is the latest in a series of pay-transparency laws enacted throughout the country. Employers with locations in multiple jurisdictions, including New York City, Connecticut, Colorado, Washington state, Maryland or Nevada, should continue to monitor whether their business is covered by a growing patchwork of state or local pay-transparency laws.

If you have questions about the new law and would like to speak with an experienced attorney, please reach out to **Dan Moore** at (585)-419-8626 or **dmoore@harrisbeach.com**; **Scott Piper** at (585)-419-8621 or **spiper@harrisbeach.com**; or to **Ibrahim Tariq** at (585)-419-8556 or **itariq@harrisbeach.com**.

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## AUTHORS

**Daniel J. Moore**
Member
(585) 419-8626
dmoore@harrisbeach.com

**Scott D. Piper**
Member
(585) 419-8621
spiper@harrisbeach.com

**Ibrahim Tariq**
Associate
(585) 419-8556
itariq@harrisbeach.com

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ATTORNEYS AT LAW
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# ELECTRONIC RECORDS AVAILABLE? THAT MAY MEAN NO CHARGE

## INSIGHT

As Buffalo was dealt a deluge of snow, Albany found a flurry of legislation being signed into law by Governor Hochul. One measure, while seemingly benign, addresses a change to New York's Freedom of Information Law. It is a simple change but one which all records access officers must keep in mind.

Currently, FOIL allows state and local governments to charge fees for producing copies of public records (up to $0.25/page) or the actual cost of reproducing any other record. When records are requested, the records access officer engages a diligent search. (S)he then advises the requester of the records which meet the reasonably described request. If copies are required to be made the records access officer determines the amount and how much will be charged (based on the above).

Chapter 445 of the Laws of 2022 amends Public Officers Law Section 87(1)(b)(iii) and still permits the charging for records; but it also amends it a bit. The change now requires taking into account when the same records are requested by multiple people. Chapter 445 envisions a record request being made and another identical request being made within 6 months of the first. When that happens and the first request is fulfilled electronically, the second request must also be fulfilled at no charge. Further, if a records request is made and another identical request comes in prior to the first being fulfilled, any costs associated with fulfilling the requests are to be shared equally amongst the multiple requesters.

While the justification for the new law is not made entirely clear, presumably, it is to recognize the reality of multiple FOIL requests for the same documents and not charging for performing essentially the same work twice. In this new era where document requests from state and local governments is on the rise, this new law may find greater application. Records access officers should be mindful. Local governments may find it useful to post commonly requested records (e.g. collective bargaining agreements) directly on websites. This aids open government and may reduce work from often-strained public information offices.

Questions about the law or this alert may be directed to **Douglas Gerhardt** at **dgerhardt@harrisbeach.com** and (518) 701-2738 or the Harris Beach attorney you typically work with.

# AUTHORS

**Douglas E. Gerhardt**
Member
(518) 701-2738
dgerhardt@harrisbeach.com

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ATTORNEYS AT LAW
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# NEW YORK COMMISSIONER OF EDUCATION REMINDS SCHOOL DISTRICTS THAT TENURE APPOINTMENTS, SENIORITY LISTS AND RESOLUTIONS MAKING APPOINTMENTS MUST BE LEGALLY COMPLIANT

## INSIGHT

Teacher tenure areas and seniority rights of certified employees are governed by state law and regulation. A recent Commissioner of Education decision provides a good reminder of the obligation to follow these requirements.

In ***Appeal of Kaabe***, Decision No. 18,216 (December 13, 2022) [**http://www.counsel.nysed.gov/Decisions/volume62/d18216**], a library media specialist position was abolished by board of education resolution on June 18, 2020. The petitioner was accordingly laid off from employment, as the school district determined she was least senior in the library media specialist tenure area. Petitioner challenged the district's action and named three other employees of the district in her appeal (referred to here as A, B and C.) According to the petitioner, A, B and C worked as library media specialists and were less senior.

The Commissioner found the facts in the record related to tenure area sparse. A summary of the record concerning each individual's tenure area was:

- 'A' asserted being appointed to the tenure area of Elementary Education, Grades 1-6 "before the 2017-2018 school year." Copies of board minutes indicate a job title as "Media Specialist" (May 23, 2019) and "Library Media Specialist" (July 25, 2019);
- 'B' asserted being appointed to the tenure area of "Education Technology Specialist … before the 2019-2020 school year." The Commissioner noted that no such tenure area exists. The Commissioner explained that while Educational Technology Specialist is a certificate title, it is not a tenure area identified in Part 30 of the Rules of the Board of Regents.
- 'C' identified as an "Educational Technology Specialist" (not a recognized tenure area) but did not indicate the tenure area to which she was appointed.

Petitioner submitted copies of the board resolutions appointing A, B and C. None of the resolutions indicate the proper tenure area. As a result, the Commissioner determined the question of who was appointed to which tenure area(s) remained unclear. She found, however, the petitioner sufficiently proved two key conditions necessitating the school district re-evaluate petitioner's abolishment.

First, she found petitioner demonstrated A was at least for some time in the media specialist tenure area. Second, the Commissioner agreed that the petitioner demonstrated B and C were appointed to a non-existent tenure area. The remedy for that error is to retroactively appoint each to the tenure area most closely fitting their duties. That is likely the library media specialist tenure area.

Based on these findings, the Commissioner remanded the case back to the district to make decisions consistent with the above findings. In so doing, the Commissioner, admonished the district to comply with Part 30 of the Rules of the Board of Regents in appointing individuals to tenure-eligible positions. She stated it is unacceptable the district was unable to produce a single document establishing the tenure areas to which petitioner and the other professional educators were appointed, despite that a Board of Regents regulation specifically requires that the appointing resolution must contain this information.

The Commissioner's admonishment ('follow the law') may be intuitive, but serves as a good reminder. Teacher tenure areas are clear and well-defined in Part 30 of the Commissioner's regulations. They leave no ambiguity. While it is possible that certification areas do not match up with Part 30 tenure areas, it is critical not to conflate the two. The Part 30 tenure area has "***must***" be listed in every appointment, even when the certification area is something slightly different.

When a school district makes a new appointment, it must be sure each resolution meets regulatory requirements and includes the following information:

- the name of the appointee;
- the tenure area or areas in which the professional educator will devote a substantial portion of time;
- the date of commencement of probationary service or service on tenure in each such area;
- the expiration date of the appointment, if made on a probationary basis (including any conditional tenure language required for those subject to APPR); and
- the certification status of the appointee in reference to the position to which such individual is appointed.

Corollary to this is maintaining up-to-date and accurate seniority lists. That way, if abolishing positions becomes necessary, seniority and who is least senior is clear and unambiguous. Periodically conferring with unions on seniority lists can further help avoid conflict or questions.

For questions about this subject or the matters contained in this alert please contact **Douglas Gerhardt** at **dgerhardt@harrisbeach.com** & (518) 701-2738, or **Sara Visingard** at **svisingard@harrisbeach.com** & (585) 419-8748 or the Harris Beach attorney with whom you work most closely.

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## AUTHORS

**Douglas E. Gerhardt**
Member
(518) 701-2738
dgerhardt@harrisbeach.com

**Sara E. Visingard**
Member
(585) 419-8748
svisingard@harrisbeach.com

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ATTORNEYS AT LAW
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# NOTABLE LABOR AND EMPLOYMENT LAW DEVELOPMENTS OF 2022

## INSIGHT

### A YEAR IN REVIEW: NOTABLE LABOR AND EMPLOYMENT LAW DEVELOPMENTS OF 2022

The year-end provides an opportune time to review some of the notable developments in the world of labor and employment law from this past year – and to take a look ahead at changes coming in 2023, including increased minimum wage and salary thresholds for employers in much of New York.

***UPDATES AND CHANGES IN 2022***

### NEW YORK STATE WHISTLEBLOWER LAW UPDATED

Early this year, Section 740 of the New York Labor Law was amended to expand whistleblower protections with regard to the scope of both protected individuals and protected activities. Effective Jan. 26, 2022, the amended whistleblower law prohibits retaliation against employees who hold simply a "reasonable belief" that an employer's activity, policy or practice is in violation of the law. Prior to the amendment, the law only applied to retaliatory actions taken against employees who disclosed or threatened to disclose a "substantial and specific" danger to public health and safety. The amendment also expanded the range of covered employees, now covering both "former employees" and "independent contractors" - a notable evolution with respect to the individuals protected under the New York Labor Law.

## BRAND NEW ELECTRONIC MONITORING LAW FOR NEW YORK STATE

Effective May 7, 2022, the New York Civil Rights Law was amended to add Section 52-c, which broadly requires all private sector employers to provide notice to their employees regarding any electronic monitoring policies and practices. In particular, the notice must be provided to employees upon hiring, must also be posted in a conspicuous place in the workplace, and the employee must acknowledge the receipt of the notice in writing, or electronically.

## UPDATES TO NEW YORK STATE'S ANTI-HARASSMENT AND DISCRIMINATION LAWS

**A few notable updates were made to New York's workplace anti-harassment and discrimination laws in 2022**. First, the N.Y. State Division of Human Rights established a "Toll Free Confidential Hotline," to be used for assisting individuals with workplace sexual harassment complaints. Additionally, the New York State Human Rights Law ("HRL") (New York State's principal law prohibiting discrimination and retaliation in the employment setting), was amended to prohibit employers from disclosing the personnel file of any employee who opposed unlawful discrimination, filed a complaint, or testified or assisted in a legal proceeding to an unauthorized third party.

Rounding out the changes was another amendment to the HRL modifying the scope of covered "employees" under the law. The language of the law now explicitly covers employees working in state offices and certain political offices, as "the state of New York shall be considered an employer of any employee or official, including any elected official, of the New York state executive, legislature or judiciary, including persons serving in any judicial capacity, and persons serving on the staff of any elected official in New York state."

## NLRB TRENDS

The year marked a notable changing of the tides for employers with a union presence. Perhaps most prominent was the overarching trend towards aggressive enforcement proceedings by the National Labor Relations Board ("NLRB"). Cases overall in the NLRB jumped 13%; union representation petitions jumped 53%; and unfair labor practice charges rose by 19%. Employers should be ready for an increased number of charges in 2023.

Employers without a union presence should be mindful of efforts by workers to form unions in currently non-unionized workplaces. Employers should also prepare for the possibility of increasingly aggressive enforcement practices from the NLRB. **The NLRB ended the year with a pair of decisions that illustrate these coming risks for employers**.

## NEW YORK STATE ENDS DESIGNATION OF COVID-19 UNDER THE HERO ACT

Effective March 17, 2022, New York State Commissioner of Health removed its designation of COVID-19 as an airborne infectious disease under New York's HERO Act. **The removal functioned as an "off-switch" for private-sector employers' infectious disease prevention plan and protocols**.

Despite the removal of the COVID designation, the HERO Act continues to mandate that New York employers do the following: create and or have an airborne infectious disease exposure prevention plan, provide a copy of the plan to employees within 30 days, provide a copy of the prevention plan to newly hired employees, post a copy of the plan at the work site, and update the plan as necessary.

## NEW PAY TRANSPARENCY LAWS FOR NEW YORK STATE AND NEW YORK CITY

**On November 1, 2022, New York City's Pay Transparency Law went into effect**, broadly requiring employers make pay ranges available when positing advertisements for available positions. The law mandates all employers with four or more employees (at least one of whom works, in whole or in part, in New York City) must include a pay range in their job postings. Notably, fully remote positions may fall under the purview of the new law if a job candidate could perform the role from their home in New York City.

Shortly after the New York City law went into effect, **New York State Governor Kathy Hochul signed statewide pay transparency legislation into law on December 21, 2022**. The law goes into effect on Sept. 17, 2023. Similar to the New York City Pay Transparency Law, the statewide Pay Transparency Law mandates that any New York State employer with four or more employees post a requisite "range of compensation" (i.e., the minimum and maximum annual salary or hourly range of compensation that an employer, in good faith, believes to be accurate). Additionally, the statewide law requires that employers post a "job description" and also imposes certain record-keeping obligations.

## RISE IN FREQUENCY-OF-PAY CLAIMS

Section 191 of the New York Labor Law requires companies employing "manual workers," pay such workers their wages every week. The definition of a "manual worker" can include workers who spend at least 25% of their time worked engaging in "physical labor," which includes such common tasks like sweeping, carrying and standing for long periods of time.

For decades, the law went mostly unnoticed as industries shifted to robust time-and-pay keeping systems and courts consistently ruled that Section 191 did not provide a basis for valid lawsuits. That changed in 2019 when an appellate court, the First Department of the N.Y. Appellate Division, ruled that paying wages less-than-weekly (i.e., every two weeks rather than every week) triggered damages to affected employees.

The ruling has generated a wave of litigation against businesses that employ "manual" workers, notwithstanding the fact the workers received their full pay, albeit every other week rather than every single week.

Employers maintaining a bi-weekly pay practice should work with experienced employment counsel to assess and mitigate potential risk.

## REQUIRING DIGITAL COPIES OF WORKPLACE POSTINGS

Effective December 16th, **employers must ensure their workers have access to digital copies** of mandatory workplace postings. The update presents an opportunity for employers to review their company handbooks and other workplace policies.

## ***COMING IN 2023:***

## INCREASED MINIMUM WAGE AND MINIMUM SALARY FOR OVERTIME EXEMPTION

Employers outside the downstate area – that is, New York City, Long Island, and Westchester County – will be required to pay higher wages to hourly workers and increased salary to overtime-exempt employees.

As of December 31, 2022, the minimum wage for employers located outside of downstate rises to $14.20 per hour, a one-dollar increase from the $13.20 per hour rate required in 2022. In the downstate area (NYC, Long Island, and Westchester) the minimum wage remains $15.00 per hour.

The minimum salary threshold for overtime exemptions also rises for employers outside of NYC, Long Island and Westchester County. Employers with employees in the "Executive" and/or "Administrative" exemptions from overtime will need to ensure these employees are paid at least $1064.25 per week, an increase of the previous minimum salary of $990.00 per week. In the downstate area (NYC, Long Island, and Westchester), the minimum salary threshold for these exemptions remains $1,125.00 per week.

## INCREASED WAGES FOR SERVICE WORKERS

Similar to the minimum wage increase, employers in the hospitality industry (e.g., food and beverage) should take note of an increased wage for service workers who earn tips. Employers outside of New York City, Long Island, and Westchester County must ensure tipped food service employees earn at least $9.45 per hour, with an hourly tip credit increased to $4.75. Those same employers should ensure other tipped service employees (i.e., those not in food service) earn at least $11.85 per hour, with an hourly tip credit increased to $2.35.

## PROHIBITION ON "NO-FAULT" ATTENDANCE POLICIES

Effective Feb. 19 2023, **"no-fault" attendance policies will be significantly curtailed** as an amendment to the state Labor Law prohibits employers from using lawful absences as a "point" on no-fault attendance policies.
Employers utilizing such policies should start planning now for changes to attendance policies, and ensure their managers are aware of the change.

## EMPLOYEE VS. INDEPENDENT CONTRACTOR STATUS UNDER FLSA

On Oct. 13, 2022, the U.S. Department of Labor published a proposed rule which would modify how workers are classified as either employees or independent contractors under the Fair Labor Standards Act ("FLSA"), the primary federal wage-and-hour law.

Under the proposed rule, determining whether a worker should be regarded as an employee or an independent contractor would focus more closely on the economic realities of the worker's relationship with the employer and whether the worker is economically independent from, or alternatively, dependent on, their employer. Additionally, under the proposed rule, the determination as to whether a worker is "economically dependent" on an employer would involve as inquiry into the totality of the circumstances, where no one factor is dispositive.

The proposed rule, if adopted, could very well lead to more determinations that a worker is an "employee" rather than an independent contractor.

## LIMITS ON AUTOMATED EMPLOYMENT DECISION TOOLS IN NEW YORK CITY

Effective Jan. 1, 2023, NYC Local Law 144 will effectively prohibit employers from implementing automated employment decision tools, commonly referred to as "AEDTs," unless certain requirements are met with respect to their usage. Although the use of AEDTs is generally prohibited, employers may choose to keep these automated decision tools in place so long as it has been subject to a basis audit within the past year, and a summary of those most recent audits are made available on the employer's website. Under the new law, an AEDT definitionally includes "any computational process, derived from machine learning, statistical modeling, data analytics, or artificial intelligence, that issues simplified output, including a score, classification, or recommendation, that is used to substantially assist or replace discretionary decision making" for employment decisions.

## "SIBLINGS" ADDED TO NEW YORK PAID FAMILY LEAVE, AND INCREASED BENEFITS FOR LEAVE

Effective Jan. 1, 2023, New York's Paid Family Leave Law ("PFL") will allow employees to take leave if a sibling is suffering from a serious health condition. The update expands the list of family members that employees can take leave to care for. "Siblings" will include biological siblings, adopted siblings, stepsiblings, and half-siblings.

Paid benefits under PFL will also increase. Capped at 67% of the statewide average weekly wage, the maximum benefit will rise to $1,131.08 per week.

## CONTINUED COVID SICK LEAVE AND PAID VACCINATION LEAVE

New York's Paid COVID Sick Leave remains in effect. Employees' leave eligibility is dependent upon the employee's isolation status and their employer's size. More information is available on the **state's COVID Sick Leave website**.

New York also continued the state's Paid Vaccination Leave, enabling employees to take up to four paid hours off work to receive a COVID vaccination. The law is slated to remain in effect until Dec. 31, 2023.

## HARRIS BEACH LABOR SERIES

Should you have questions about any of these developments or upcoming changes, please feel free to reach out to **Dan Moore** at (585)419-8626 or **dmoore@harrisbeach.com**; **Ibrahim Tariq** at (585)419-8556 or **itariq@harrisbeach.com**; **Scott D, Piper** at (585)419-8621 or **spiper@harrisbeach.com** or to the Harris Beach attorney with whom you most frequently work.

The Harris Beach Labor and Employment team hosts a regular webinar series to discuss critical labor and employment law developments. These webinars are designed for employers of all sizes, including professionals and in-house counsel who manage human resources issues. SHRM credit is available for all webinars. If you would like information on the 2023 webinar series, please reach out to the authors.

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## AUTHORS


**Daniel J. Moore**
Member
(585) 419-8626
dmoore@harrisbeach.com

**Scott D. Piper**
Member
(585) 419-8621
spiper@harrisbeach.com

**Ibrahim Tariq**
Associate
(585) 419-8556
itariq@harrisbeach.com

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# NEW YORK COMMISSION ANNOUNCES NEW TRAINING REQUIREMENT FOR LOBBYISTS AND CLIENTS OF LOBBYISTS

## INSIGHT

Beginning in 2023, the New York State Commission on Ethics and Lobbying in Government ("CELG"), formerly known as the Joint Commission on Public Ethics (commonly referred to as "JCOPE"), will mandate a new ethics training requirement for all registered lobbyists, including principal lobbyists, individual lobbyists, and in-house lobbyists. Further, an emergency rulemaking issued in December 2022 clarified that all clients of a lobbyist will be required to complete the new ethics training.

The new ethics training will launch online after January 18, 2023, and must be completed no later than March 18, 2023. All lobbyists and chief administrative officers ("CAOs") of clients of a lobbyist will be required to certify they have completed the training within CELG's Lobbying Application. Compliance statistics will be reported quarterly to the Governor and New York State Legislature.

If you have questions about the new ethics training requirement for lobbyists, or are the client of a lobbyist and do not have access to your organization's account on CELG's Lobbying Application, please reach out to **Jared Kasschau** at (516) 880-8106 or **jkasschau@harrisbeach.com**, or **Kelsey Hanson** at (518) 701-2745 or **khanson@harrisbeach.com**, or the Harris Beach attorney with whom you regularly work.

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## AUTHORS

**Kelsey L. Hanson**
Associate
(518) 701-2745
khanson@harrisbeach.com

**Jared A. Kasschau**
Member
(516) 880-8106
jkasschau@harrisbeach.com