

Client Alert **Employment & Labor**

Uncharted Territory for Tristate Employers: Part 1 – New Jersey

In recent months, New Jersey and New York have drastically altered the employment law landscape by providing additional protections to employees. We will report on New York developments in our next alert, but New Jersey has recently enacted a series of laws designed to provide employees with additional wage protections and compensation parity, while also increasing the availability of paid sick leave.

Equal Pay Act

On April 24, 2018, Governor Murphy signed the “Diane P. Allen Equal Pay Act,” which has been called the most sweeping and protective equal pay law in the country. The law makes significant changes to provisions of the New Jersey Law Against Discrimination (LAD), and poses considerable risks to those employers that fail to comply.

The new provisions, which become effective July 1, 2018, afford broad compensation protections to those employees who fall within one of the LAD’s traditional “protected classes,” whereas the federal Equal Pay Act only requires parity based on sex. The law provides that an employer commits an unfair employment practice by paying any protected employee at a rate that is less than an employee who is not a member of the protected class, for work that is “substantially similar.” In fact, an employer violates the new law each and every time the aggrieved employee is affected by the discriminatory compensation scheme (i.e. every pay day).

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An employer is only permitted to continue a practice of pay differentials when it is based on a seniority system, merit system, or other legitimate, non-discriminatory factors. Those factors must be job-related and must account for the entire pay differential. In the event that an employer is not able to justify a pay differential based on a neutral system, the law expressly forbids reducing the compensation of other employees in order to equalize pay among workers.

Importantly, the law attempts to address the systemic factors that perpetuate discriminatory payment structures. As amended, the non-retaliation provisions of the LAD now expressly forbid reprisals against employees for asking coworkers about their compensation. Further, employers cannot condition employment on an employee's agreement not to disclose the terms of their compensation or request those terms from other employees.

Employers that fail to correct or justify current pay differentials amongst similarly situated employees face perilous financial penalties. First, an employee who prevails in a claim of discriminatory compensation will be entitled to recover up to six (6) years of back pay. Further, in the event that a jury returns a judgment in favor of an employee claiming discriminatory compensation, the act mandates the imposition of triple damages, and as always for a violation of the LAD, attorneys' fees.

New Jersey's Paid Sick Leave Act

After several years of a patchwork of municipal paid sick leave laws, New Jersey's sick leave act, signed by Governor Murphy on May 2, 2018 and effective October 29, 2018, requires employers to provide paid sick leave to any employee working in New Jersey. Clearly pursuing uniformity, the law explicitly invalidates the prior municipal paid sick leave laws and prohibits any local entity from passing new ordinances regarding sick leave benefits. The new law contains broad and detailed enforcement and notification provisions to accompany the new requirements. Further, as is the case with most new employment requirements, the new law carries anti-discrimination and anti-retaliation provisions.

The application of the new sick leave requirement is broad. There is virtually no limitation based on employer size or industry. Beyond a few limited exceptions, any person or entity that employs individuals in the State of New Jersey is subject to the requirements contained in the new "sick leave" law.

Covered employers are now required to provide one (1) hour of earned sick leave for every thirty (30) hours of work performed by the employee. However, the law does not require that employers allow employees to accrue or use more than forty (40) hours of

sick leave in a 12-month period. Employers that already provide paid time off generally will be compliant with the new law, assuming that the policies provide fully-paid days off at a rate equal or greater than the 30-to-1 rate of accrual and meet the other requirements.

The law further provides that employers are required to allow employees to use accrued sick leave for a broad array of specific reasons. Indeed, some justifications relate to activities that are not directly related to health or illness, but rather to child care.

The new sick leave law provides that employers may not discriminate or retaliate against employees due to their request or use of sick leave, informing other employees of their rights under the law, or for filing a complaint alleging violation of the law. Most significantly, the law creates a “rebuttable presumption” of retaliation where any employer takes adverse action against an employee within ninety (90) days of filing a complaint claiming a violation of the act, or informing any person of any alleged discrimination/retaliation, or cooperating with any investigation into such a violation. This provision will obviously have a significant impact on inevitable litigation stemming from this law.

On the Horizon: Sexual Harassment Non-Disclosure Agreements and Limitations on Restrictive Covenant Agreements

We are closely monitoring the advancement of several bills currently before the New Jersey legislature: a bill making any agreement unenforceable if it seeks to conceal an employee’s claims of discrimination, retaliation, or harassment, and a bill drastically limiting an employer’s ability to rely on non-competition covenants to restrict an employee’s post-employment opportunities. These bills, which various business groups are actively opposing, are likely to be enacted this year though they are still going through the amendment phase.

Employer Tips

There are significant changes on the horizon for employers located in New Jersey. The most immediate concerns require a thorough review of compensation and benefits practices.

New Jersey’s new sick leave law is nuanced and complicated, and includes other elements relating to notice, usage and documentation not summarized in this alert. Employers must take steps to provide proper notices to their employees of their new “sick leave” benefits, identify their “benefit year,” and confirm the compliance of any existing PTO policies.

With regard to the new equal pay law, employers will need to first self-audit the compensation of similarly situated individuals to ensure compliance. Employers will then need to identify those job-related factors that will be relied on to justify the existing compensation structure or review and correct any pay differentials. Avoiding the steep penalties of the new act will require reviewing the current compensation and benefits practices companywide, and establishing those factors that will be consistently applied to justify any existing or future pay differentials.

Employers should consult with legal professionals to ensure that their policies and practices comply with these new requirements.

The following attorneys in our Employment and Labor Law Practice Group can assist employers in drafting policies and answering questions about these new requirements for employers located in New Jersey.

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