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Labor & Employment Law Alert
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LABOR & EMPLOYMENT LAW CONTINUES TO EXPAND

In both New Jersey and New York, the law continues to expand the availability of protections and benefits for employees in the workplace. Federal law is following a similar trend. Employers must remain attentive to the full range of such developments which will impact on day-to-day business operations and the cost of conducting those operations in compliance with the new laws.

New Jersey Update

Expanded Protections to Employees on the Basis of Religious Beliefs

New Jersey's Law Against Discrimination ("LAD") has long prohibited discrimination on the basis of religion. One recent development provides additional protections against religious bias in the workplace. Effective January 13, 2008, the LAD, N.J.S.A. 2A:10:5-1 et seq., prohibits employer discrimination based on workers' religious affiliations, and forbids employers from engaging in any practice that would require a person to violate or forego a "sincerely-held religious practice or religious observance." Employers must make good-faith attempts to accommodate the religious observances of applicants and employees, unless to do so would impose an undue burden. Absences for those purposes may be made up at mutually-agreed times or charged against sick, vacation or personal days.

An "undue hardship" is defined as an "accommodation requiring (1) unreasonable expense or difficulty, (2) unreasonable interference with the safe or efficient operation of the workplace, (3) a violation of a bona fide seniority system, or (4) a violation of any provision of a bona fide collective bargaining agreement." Factors employers should consider in determining whether an accommodation constitutes an undue hardship include "the identifiable cost of the accommodation, including the cost of loss of productivity and of retaining or hiring employees or transferring employees from one facility to another, in relation to the size and operating cost of the employer," as well as "the number of individuals who will need the particular accommodation." Finally, two "safe harbor" provisions provide that (1) "an accommodation shall be considered to constitute an undue hardship if it will result in the inability of an employee to perform the essential functions of the position in which he or she is employed," and (2) no accommodation is required "where the uniform application of terms and conditions of attendance to employees is essential to prevent undue hardship to the employer."

Under the LAD amendments, if an employer grants a schedule change as an accommodation, the employee is not entitled to any "premium wages" (such as premium pay for night, weekend or holiday work) or "premium benefits" (including seniority, sick leave or annual leave) that would ordinarily be applicable to the hours worked by the employee as an accommodation. However, the employer will still have to pay overtime wages and any entitlements to premium wages or benefits under a collective bargaining agreement, as such agreements will not be superseded by the amendments. Additionally, the employer must count any hours worked by an employee as an accommodation "towards the accruing of seniority, pension and other benefits."

Employers' Notice Obligations Are Expanded Under the New Jersey Warn Act

Recently, the Millville Dallas Airmotive Plant Job Loss Notification Act, informally known as the "N.J. Warn Act," was amended to provide certain requirements for New Jersey employers with 100 or more employees who are contemplating a transfer or closure of operations that impacts 50 or more employees, or a "mass layoff." The N.J. Warn Act was drafted to address perceived inadequacies in the federal Worker Adjustment and Retraining

Notification Act, 29 U.S.C. § 2102 et. seq. ("WARN Act"), and creates financial penalties for employers who fail to provide employees 60 days notice in the event of an impending plant closing or transfer of operations. Additionally, the N.J. Warn Act requires that notice be given in various other circumstances and creates increased penalties for failure to provide required notice.

Employers who fail to provide adequate notice must pay impacted employees severance of one week of pay for each full year of employment. This payment is in addition to any other severance the employer is required to pay to terminated employees.

The required notice must be provided to (1) each employee whose employment is to be terminated; (2) the Commissioner of Labor and Workforce Development; (3) the chief elected official of the municipality where the establishment is located; and (4) any collective bargaining units of employees at the establishment. The notice must include (1) the number of employees to be terminated; (2) the date each termination will occur; (3) the reasons for the mass layoff or "transfer or termination of operations;" (4) a statement of employment available at any other establishment operated by the employer; (5) a statement of employee rights with respect to wages, severance pay, benefits, pension or other terms of employment; (6) disclosure of the amount of severance pay being provided for the employer's failure to make timely notice (if applicable); and (7) a statement of the employees' right to receive information, referral and counseling from the New Jersey Department of Labor and Workforce Development's Response Team.

Under the federal WARN Act, an employer must provide notice of a "plant closing" that impacts 50 or more employees or a "mass layoff" that results in the layoff or termination of 500 or more full-time employees, or 50 or more employees who represent one-third of the work force at a single site. Under these circumstances, an employer's obligation to provide additional information required under the N.J. Warn Act would also be triggered, unless the employer has operated the facility for less than three years.

Unlike the federal WARN Act, however, the transfer of a number of small operating units that results in the layoff or termination of as few as 50 employees at an employer's establishment in New Jersey would also trigger the N.J. Warn Act's notice requirements.

Paid Family Leave Bill Is Passed by New Jersey Senate

A bill, recently passed by the State Senate, would extend the state's Temporary Disability Insurance ("TDI") system to pay for up to 6 weeks of paid leave for employees to care for a family member, including a newborn or adopted child. Workers would get two-thirds of their salary, up to $524 per week. Currently, employers are required to allow 12 weeks of leave, but it is unpaid, and companies with fewer than 50 employees are exempt. Funding for the paid leave would come from a new payroll tax on employees.

Employers would have the option of using the state-operated plan or a private plan through self-insurance or an insurance policy, so long as employees are not charged more, the benefits are not lower and eligibility is not more restrictive than under the state plan.

This heavily debated bill recently passed in the Senate despite strong opposition from the business community which raised concerns regarding decreased productivity due to the anticipated lack of competent, temporary replacements for the skilled workers on leave. Sponsors of the legislation state there are employer-friendly stipulations in the bill that prevent workers from abusing paid leave, such as requiring them to first exhaust up to two weeks of available vacation or sick leave. This bill, now passed by the Senate, needs to be approved by the State Assembly and signed by the Governor to become law.

Bias Crimes Now Include Protections Based on National Origin and Gender Identity or Expression

On January 15, 2008, Governor Jon Corzine signed into law a new provision which adds "gender identity or expression" and "national origin" to the classes for which bias intimidation is a crime under N.J.S.A. 2C:16-1. The law is to take effect sixty days from the date of signing. N.J.S.A. 2C:16-1 already protects race, color, religion, gender, handicap (renamed "disability"), sexual orientation and ethnicity.

"Gender identity or expression" is defined as "being perceived as having a gender-related identity or expression, whether or not stereotypically associated with a person's assigned sex at birth." The law adds the same new language to N.J.S.A. 2A:53A-21, which makes bias intimidation a civil offense for which damages, including punitive damages, and attorneys' fees and costs can be recovered.

The existing statute defines bias intimidation as committing or attempting, conspiring or threatening to commit certain listed crimes against an individual or group with bias as a motive. Bias intimidation is generally a crime one degree higher than the most serious underlying crime charged.

In addition to any fine or term of imprisonment, the law provides that one convicted under N.J.S.A. 2C:16-1 may be ordered to "(1) complete a class or program on sensitivity to diverse communities, or other training in the area of civil rights; (2) complete a counseling program intended to reduce the tendency toward violent and antisocial behavior; and (3) make payments . . . to a community-based program or local agency that provides services to victims of bias intimidation."

The law also adds a clause to the statute, specifying that it is no defense that the offender was mistaken as to the race, color, religion, gender, disability, sexual orientation, gender identity or expression, national origin, or ethnicity of the victim.

Finally, the law amends N.J.S.A. 52:4B-11 to add bias intimidation to the list of crimes for which the Victims Crimes Compensation Agency may order compensation for personal injury or death.

New York Update

Contracts Required for New York Commissioned Sales Personnel

Effective October 16, 2007, the New York Labor Law § 191(c) requires that employers in New York provide written terms of employment for commissioned salespeople or risk adverse impact of decisions rendered in any wage action brought against the employer. In the absence of a written document setting forth the terms of employment of commissioned salespeople, the New York Department of Labor will rule in favor of the terms alleged by the salesperson bringing forth the complaint.

Under the terms of the legislation, the following must be included in the written documentation: (1) the method of calculation of wages, salary, commissions, draws against commissions and any other moneys earned; (2) when a commission payment is considered "earned;" (3) when a commission payment will be made to the salesperson; (4) how often a recoverable draw will be reconciled; and (5) what commissions will be payable in the event of termination, and when they will be paid. Additionally, the law requires that employers maintain the agreements for three years.

Federal Law Update

Amendments to Federal Family and Medical Leave Act Impact Military Families

On January 28, 2008, President Bush signed into law H.R. 4986, the National Defense Authorization Act for Fiscal Year 2008, which amends the Family and Medical Leave Act ("FMLA"), to provide additional leave to employees with family members serving in the military. This is the FMLA's first expansion since 1993.

Leave to Care for Wounded Service Member
Under the Act, eligible employees may take up to 26 weeks of leave to care for spouses, children, parents or next of kin who are service members with serious illnesses or injuries incurred during active duty in the Armed Forces. This leave is available only during a single 12-month period. During that 12-month period, an eligible employee will be entitled to a combined total of 26 weeks of such leave and any other leave taken under the FMLA. Similar to all other FMLA leaves, the time is unpaid, although employers may require employees (and employees may elect) to use any accrued paid time off.

Leave Related to Active Duty or Call to Duty
Additionally, the Act provides that eligible employees may take up to 12 weeks of FMLA leave in a 12-month period to deal with "any qualifying exigency" arising out of a spouse's, child's or parent's active duty in the Armed Forces, including an order or call to duty. This leave is not confined to a single 12-month period. The 12 weeks is reduced by leave for any other qualifying FMLA event during the 12-month period.

EEOC Provides Guidance for Employers Concerning Veterans with Service-Connected Disabilities
The U.S. Equal Employment Opportunity Commission ("EEOC") has issued two question-and-answer (Q&A) guides addressing workplace issues relating to veterans with service-connected disabilities. These guides focus on explaining the differences in protections for veterans with service-connected disabilities under the Americans with Disabilities Act (ADA) and the Uniformed Services Employment and Reemployment Rights Act (USERRA). The EEOC enforces the ADA while the U.S. Department of Labor enforces USERRA.

For example, the guides explain that the ADA prohibits employers from discriminating against individuals with disabilities with respect to terms and conditions, and privileges of employment, while the USERRA prohibits employers from discriminating against employees or applicants for employment on the basis of their military status or military obligations, and protects the reemployment rights of those who leave their civilian jobs to serve in the uniformed services. Another difference is found in the area of "reasonable accommodations." While both the ADA and USERRA include reasonable accommodation obligations, the USERRA requires employers to make reasonable efforts to assist a veteran who is returning to employment in becoming qualified for a job. Under the USERRA, an employer must help the veteran become qualified to perform the duties of the position whether or not the veteran has a service-connected disability requiring reasonable accommodation.

Employers facing the reemployment or hiring of a disabled veteran should review the EEOC's new Q&A guidance or consult with employment counsel to insure full compliance with the applicable laws.

This *Labor & Employment Law Alert* was written by Annmarie Simeone and Erin Welsh.

Norris McLaughlin & Marcus Labor & Employment Group

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If you have any questions regarding the information in this alert or about labor & employment law, please feel free to contact any of the attorneys in the Norris McLaughlin & Marcus Labor & Employment Group.

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Save The Date

Labor & Employment Law

2008 Hot Topics in Employment Law Seminar

June 17, 2008
8:30 a.m. - 12 p.m.

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