Proskauer

Trends in New Jersey Employment Law

December 2014

2014 Year in Review—the Top 10 Trends in New Jersey Employment Law

2014 was another busy year for developments in New Jersey employment law. This newsletter examines noteworthy developments in ten key areas—whistleblowing, pre-employment inquiries/background checks, amendments to the Law Against Discrimination ("LAD"), LAD litigation, wage and hour, the Family Medical Leave Act ("FMLA"), sick leave, states of emergency, arbitration, and "unemployment discrimination."

Whistleblowing

Conscientious Employee Protection Act

In 2014, New Jersey's lawmakers proposed a further expansion of the state's already broad whistleblower protection statute, the Conscientious Employee Protection Act ("CEPA"). In the wake of the "Bridgegate" scandal (a term that refers to employees in the Governor's office allegedly directing the closure of lanes leading to the George Washington Bridge), the Senate Labor Committee approved a bill (S768) that would provide *public* employees with express protection against retaliation when reporting a "substantial waste of public funds by a governmental entity or . . . an abuse of authority or gross mismanagement." The bill is now before the full Senate. For more on S768, please see our prior blog post.

2014 also saw significant whistleblowing cases reach the New Jersey Supreme Court. Earlier this year, the New Jersey Supreme Court refused to lower the bar for bringing a CEPA claim in *Hitesman v. Bridgeway, Inc.*, 214 N.J. 235 (2014). According to the Court, to bring a CEPA claim based on complaints concerning "improper quality of patient care or conduct" or implicating "a clear mandate of public policy concerning the public health," a plaintiff must at a minimum, identify a source of law or other authority that sets forth a standard demonstrating a reasonable belief the employer engaged in the alleged misconduct. For more on *Hitesman*, please see our CEPA Roundup.

In another high profile case, *Lippman v. Ethicon, Inc.*, No. A-65/66-13, the high court is considering the fate of the so-called "job-duties" exception to CEPA. Breaking with longstanding precedent, the Appellate Division had concluded that the plaintiff here could blow the whistle by merely performing the job functions for which he was hired to perform. For more on *Lippman*, check out our blog post/amicus brief filed before the NJ Supreme Court.

Also quite recently, the New Jersey Supreme Court agreed to hear another CEPA case in *State v. Saavedra*, No. A-68-13. In that case, the Appellate Division affirmed that a public employee may be indicted for stealing her employer's confidential documents, even where the employee took the documents to support her discrimination claims. The Appellate Division distinguished the *criminal* case in *Saavedra* from *Quinlan*, a *civil* matter in which the New Jersey Supreme Court opined that in some situations employees may be protected from discipline for using confidential company documents to support discrimination claims. For more on *Saavedra*, please see our Appellate Division Roundup.

Similarly, in *Stark v. South Jersey Transit Auth.*, No. A-1758-11T2, 2014 N.J. Super. Unpub. LEXIS 1150 (App. Div. May 21, 2014), the Appellate Division held that the illegal recording of a private conversation also did not constitute protected activity under *Quinlan.* Though the plaintiffs had not alleged that their employer engaged in any specific acts of discrimination, for purposes of "completeness," the Appellate Division still engaged in the multi-factor inquiry under *Quinlan* only to reach the same conclusion that the recording was not protected activity and should be excluded as evidence. Given that the plaintiffs' conduct appeared to violate both the law and company policy, the Court also held that such "substantiated disciplinary charges [we]re not retaliatory" under CEPA. For more on *Stark*, please see our CEPA Roundup.

Federal Whistleblowing Cases

New Jersey courts also addressed important federal whistleblowing cases. In *Foglia v. Renal Ventures Mgmt., LLC*, 754 F.3d 153 (3d Cir. 2014), the Third Circuitheld that, to avoid dismissal, a relator in a *qui tam* suit need only allege the "particular details" of a claims scheme and a "sufficient indicia" of the false claims. By way of background, *qui tam* actions under the False Claims Act (or FCA) allow a plaintiff, here called a relator, to bring a claim on behalf of the government if he or she has knowledge of fraud perpetrated on it. The holding in *Foglia* stands in contrast to other federal circuit courts of appeal that have held that FCA relators must comply with Federal Rule of Civil Procedure 9(b) requiring plaintiffs to plead claims of fraud with particularity. Given this split, expect a challenge before the U.S. Supreme Court in the future. For more on *Foglia*, please see our prior blog post.

In another FCA case, *United States v. Boston Scientific Neuromodulation Corp.*, No. 2:11-CV-1210 (SDW) (MCA), 2014 WL 4402118 (D.N.J. Sept. 4, 2014),a New Jersey federal court allowed a medical device maker to proceed with counterclaims against two of its former employees for allegedly violating their contracts with the company by retaining and disclosing company proprietary data after their terminations. Accepting the factual allegations in the counterclaims as true for purposes of deciding the former employees' motion to dismiss, the court succinctly held that "[t]he amended counterclaims state with sufficient particularity the circumstances constituting the Relators' breach of contract." For more on *Boston Scientific*, see our prior blog post.

Finally, the Third Circuit recently made news regarding the securities anti-retaliation provision in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. In *Khazin v. TD Ameritrade Holding Corp.*, No. 14–1689, 2014 WL 6871393 (3d Cir. Oct. 24, 2014), the Third Circuit ruled that the "text and structure of Dodd-Frank compel the conclusion that whistleblower retaliation claims brought pursuant to 15 U.S.C. §78u-6(h) are not exempt from predispute arbitration agreements." For more on *Khazin*, please click here.

Pre-Employment Inquiries/Background Checks

Statutory Developments

This year saw New Jersey "ban the box," a growing trend which refers to the elimination of the check box on job applications asking whether the applicant has a criminal history. The Opportunity to Compete Act, which takes effect March 1, 2015, covers any employer that (i) has 15 or more employees over 20 calendar weeks and (ii) conducts business, employs persons, or takes applications for employment within the State of New Jersey. Under the Act, an employer may not require an applicant to complete an employment application that makes any inquiries regarding an applicant's criminal record during the "initial employment application process." An employer also may not make any oral or written inquiry regarding an applicant's criminal record during the initial employment application process, or post any advertisement stating that it will not consider an applicant with a past arrest or conviction.

For purposes of the law, the initial employment application process begins when an applicant *or* the employer first inquires of the other about a prospective employment position or job vacancy, and ends when an employer has conducted a first interview of the applicant (whether in person or by any other means). "Applicants" include applicants for paid employment, including work that is temporary or seasonal, contingent, or through an employment agency, as well as apprenticeships or internships. Under the Act, current employees of the employer also can qualify as "applicants" (*i.e.*, when an employee applies for a position internally).

After the initial employment application process has concluded, an employer may inquire into an applicant's criminal record (consistent with applicable state and federal law), and may refuse to hire the applicant based on the results, unless the record was expunged or erased through executive pardon *and* provided that the refusal does not run afoul of any other laws, rules, and regulations.

The prohibitions of the Act do not apply to: (i) positions sought in law enforcement, corrections, the judiciary, homeland security, or emergency management; (ii) where the employer is required to run a criminal background check by law, rule, or regulation (that is not preempted by the Act); (iii) where an arrest or conviction would serve as a bar to employment under any law, rule, or regulation (that is not preempted by the Act); or (iv) where any law, rule, or regulation (that is not preempted by the Act) restricts an employer's ability to engage in specified business activities based on the criminal records of its employees. Additionally, the Act permits an employer to inquire into an applicant's criminal history during the initial application process where (i) the applicant voluntarily discloses his or her criminal record or (ii) as part of a program or systematic effort designed predominantly to encourage the employment of persons with criminal histories.

Significantly, the Act preempts any ordinance, resolution, law, rule or regulation adopted by a county or municipality regarding criminal histories in the employment context, except for ordinances adopted to regulate municipal operations. As such, starting March 1, 2015, the Act preempts the "ban the box" ordinance adopted by the City of Newark as it relates to private employers.

The Act does not provide for lawsuits in court; the "sole remedy" is a monetary fine of no more than $1,000 for the first violation, $5,000 for the second violation, and $10,000 for each subsequent violation. For more on the Act, please see our prior alert and our article in the New Jersey Law Journal.

Case Law Developments

New Jersey's federal district court recently rendered a decision regarding the Fair Credit Reporting Act (FCRA)—the federal law that regulates employer background checks when run through a third-party vendor known as a consumer reporting agency ("CRA"). FCRA specifically contains a provision that bars state law claims against employers who "furnish information" to CRAs. In *Saget v. Wells Fargo*, No. 2:13-03544(WJM), 2014 WL 4494801 (D.N.J. Sept. 10, 2014), the D.N.J held that FCRA, in fact, preempted the plaintiff's state law claim for tortious interference with prospective economic advantage where the defendant had filed a report regarding the plaintiff's "unfavorable employment record" (*i.e.,* "furnished information") with a CRA. For more on *Saget*, see our blog post.

LAD Legislation

Pay Equity

After several delays, a New Jersey law requiring employers to post and distribute notice about gender pay equity finally took effect this year. The law requires employers in New Jersey with 50 or more employees to post and distribute a notice detailing "the right to be free of gender inequity or bias in pay, compensation, benefits or other terms or conditions of employment under LAD, Title VII, and the Equal Pay Act." Under the law, employers need to comply with the following posting and distribution mandates:

- Conspicuously post the notice in English and Spanish in a place accessible to all employees in each of the employer's workplaces.
- Provide employees hired on January 7, 2014 and thereafter with a copy of the notice in English and Spanish at the time of the employee's hiring.
- No later than February 5, 2014, to have provided each employee hired on or before January 6, 2014 with a copy of the notice in English and Spanish.
- Provide each employee with a copy of the notice upon the employee's first request.

After satisfying the initial distribution requirements, employers also must provide each employee with a copy of the notice annually on or before December 31 of each year. Whenever the notice is distributed to an employee, the employer must include an acknowledgment in English and Spanish that the employee has received it, and has read and understood its terms. The acknowledgment must be signed by the employee, in writing or by means of electronic verification, and returned to the employer within 30 days of receipt. The notice and acknowledgment forms are available in English and Spanish on the New Jersey Department of Labor's website. For more on the posting and distribution requirements of the amendment, please see our prior alert.

Pregnancy

Governor Chris Christie also signed into law an amendment to the LAD to expand protections against discrimination for employees affected by pregnancy. The amendment, which is similar to a recent New York City law and other state laws, took effect in January 2014. In addition to making pregnancy an expressly protected characteristic under the LAD, the amendment requires that an employer provide reasonable accommodation to an employee based upon pregnancy, childbirth, or medical conditions related to pregnancy or childbirth, including recovery from childbirth, when the employee requests the accommodation based on the advice of her physician. The amendment also prohibits an employer from penalizing an employee for requesting or using an accommodation. Note that employers can otherwise refuse to provide a pregnant employee with a reasonable accommodation if it would constitute an undue hardship. For more on the law, see our alert.

LAD Litigation

New Jersey courts also had occasion to rule on significant cases brought under LAD. In *Smith v. Millville Rescue Squad*, No. A-1717-12T3, 2014 WL 2894924 (App. Div. June 27, 2014), the Appellate Division for the first time defined the scope of "marital status" protection under LAD to encompass the "state of being divorced." Though the Appellate Division still recognized that the "LAD does not bar an employer from taking employment action against a divorcing employee who actually demonstrates antagonism, incivility, or lack of professionalism," here the court held that the defendant unlawfully terminated the plaintiff "because of stereotypes about divorcing persons" (*i.e.*, "to avoid the feared impact of an 'ugly divorce' on the workplace"). The New Jersey Supreme Court has agreed to hear the case. For more on *Millville*, please see our LAD Roundup.

Also with regard to LAD, in *Rodriguez v. Raymours Furniture Co., Inc.*, No. A-4329-12T3, 2014 WL 2765273 (App. Div. June 19, 2014), the Appellate Division upheld a provision in a job application that limited the time in which an employee could sue the company to no more than 6 months after an alleged adverse employment action, notwithstanding a longer statute of limitations (in this case, the 2-year SOL under the LAD). The New Jersey Supreme Court has granted certification on this issue as well. For more on *Rodriguez*, see our prior alert.

Wage and Hour

By constitutional amendment, New Jersey's minimum wage rose from $7.25 to $8.25 per hour on January 1, 2014. The amendment further mandated an automatic yearly increase based on the Consumer Price Index ("CPI") beginning on September 30, 2014, and taking effect every January 1st in perpetuity. Due to an increase in the CPI, New Jersey's minimum wage will rise to $8.38 per hour starting January 1, 2015. The amendment applies to any employee subject to New Jersey's State Wage and Hour law, which includes non-exempt employees eligible for overtime. For more on the amendment, please see our prior blog post.

Continuing on minimum wage, on March 24, 2014, the New Jersey Assembly Labor Committee advanced a bill (A857) that, should it become law, would dramatically raise the state's minimum wage for tipped workers. Under the framework proposed by A857, the tip credited hourly wage in New Jersey would increase in two phases—first to 40% of the state's regular minimum wage on December 31, 2014, and then to 69% one year later. For more on the proposed increase, please see our prior blog post.

Late in 2013, the New Jersey State Senate approved a bill (S-3064) to protect unpaid interns from employment discrimination by amending LAD, CEPA, and the Worker Freedom from Employer Intimidation Act (or WFEIA). The proposal would make it unlawful under the LAD for employers to discriminate or retaliate against unpaid interns on the basis of protected characteristics. Furthermore, the proposal would grant unpaid interns standing to assert CEPA or WFEIA claims. Under the proposed amendment, unpaid interns could seek legal or equitable relief, including compensatory and punitive damages, reinstatement and attorney's fees. For more, please see our alert.

Finally, this year, the Third Circuit decided a noteworthy case under the Fair Labor Standards Act (FLSA). In *Davis v. Abington Mem'l Hosp.*, 765 F.3d 236 (3d Cir. 2014), the court affirmed the dismissal of several similar putative collective and class actions stemming from the plaintiffs' allegations that their employers implemented timekeeping and pay policies in violation of the FLSA. The court held that the plaintiffs failed to plead with the necessary particularity that their work weeks were over 40 hours. According to the Third Circuit, it was insufficient for the plaintiffs to plead that he or she "typically" worked shifts between 32 and 40 hours per week and that he or she "frequently" worked extra time. For more on *Davis*, please see our prior newsletter.

Family and Medical Leave Act (FMLA)

This year, the Third Circuit also rendered two significant decisions regarding the FMLA. In *Lupyan v. Corinthian Colleges Inc.*, No. 13-1843, 2014 WL 3824309 (3d Cir. Aug. 5, 2014), the Third Circuit held that, to establish that an employee received the written notice of rights required under the FMLA, the employer could not merely furnish affidavits from mailroom or HR personnel attesting that the notice had been mailed. In rejecting the so-called "mailbox rule," the court stressed that "[defendant] provided no corroborating evidence that [plaintiff] received the Letter." It specifically emphasized that "[t]he Letter was not sent by registered or certified mail, nor did CCI request a return receipt or use any of the now common ways of assigning a tracking number to the Letter." For more on *Lupyan* and ways to establish receipt of the FMLA notice, please see our prior newsletter.

In *Budhun v. Reading Hosp. & Med. Ctr.*, 765 F.3d 245 (3d Cir. 2014), the Third Circuit also addressed for the first time "what constitutes invocation of one's right to return to work" under the FMLA. The case involved a detailed set of facts (a more comprehensive treatment of which can be found here). The Third Circuit ultimately determined that the record allowed a reasonable jury to conclude that the plaintiff attempted to invoke her right to return to work, and that the defendant interfered with this right when it told her she could not return (despite subsequent correspondence from the plaintiff's doctor that she needed more leave time). For more on *Budhun*, please see our prior newsletter.

Sick Leave

As you may recall from last year's Top 10 roundup, Jersey City's sick leave ordinance passed the city's council in late 2013 and took effect in January of this year. For more on the Jersey City ordinance and its notice/posting requirements, please see our prior alerts found here and here. 2014 certainly was a year for local New Jersey sick leave laws, as Newark, Passaic, Paterson, Irvington, East Orange, Trenton, and Montclair joined the trend (collectively, the "new laws").

These new laws cover employees who work at least 80 hours a year in their respective municipalities, with a couple of exceptions. Under these laws, employees can accrue up to 40 hours of paid sick leave a year if they work for an employer with 10 or more employees. If the employer has 10 or fewer employees, employees can accrue up to 24 hours of paid sick leave, with certain exceptions. The rate of accrual is at least 1 hour of paid sick time for every 30 hours worked. Employees are entitled to carryover up to 40 hours of unused, accrued sick leave from one calendar year to the next; however, an employee is not entitled to take more than 40 hours of sick leave per calendar year. Employers may, but are not required to, pay an employee for any unused sick leave at the end of the year.

Each of these new laws have notice and posting requirements, records retention obligations, anti-retaliation protections, and provide for a private right of action. For more on the Newark sick leave law and the notice/poster obligations (which took effect earlier this year), please see our prior alerts here and here; for more on the other municipal sick leave laws (and their effective dates), please see our prior blog posts here and here.

It also is worth noting that, on December 15, 2014, the New Jersey Assembly Budget Committee approved a state-wide paid sick leave bill. Significantly, in its current form, the bill would not preempt the numerous municipal laws.

States of Emergency and Employment

Ebola

Following the first diagnosis of Ebola in New York, employers around the country contemplated what effect the virus could have on their businesses and how they should respond, if at all. Specifically, employers needed to consider, among other things, the application of the FMLA to employees who potentially had the virus. Indeed, if an employee were diagnosed with Ebola, time out of the office may qualify as an FMLA absence. Though fears of an epidemic seem to have passed, should they resurge, employers should monitor Proskauer's Law and the Workplace Blog for continued guidance.

Sandy

Also in the news this year, in the wake of Hurricane Sandy, Governor Christie signed a law (the "Sandy Law") to expand the eligibility for leave under the NJ Family Leave Act (FLA) and the Security and Financial Empowerment Act (SAFE Act). To qualify for protection under the FLA or the SAFE Act, employee must have been employed for at least 12 months and have worked at least 1,000 base hours in the immediately preceding 12-month period. The Sandy Law permits employees who are furloughed or laid off because of a "state of emergency," like Hurricane Sandy, to credit up to ninety calendar days of that time as if it were time worked for purposes of determining whether an employee has met these eligibility requirements. The law applies to any furlough or layoff due to a "curtailment of operations" because of a state of emergency declared after October 22, 2012 (thus encompassing employees who have been furloughed or laid off due to Hurricane Sandy, which made landfall on October 29, 2012).

To calculate the base number of hours to be credited for each week the employee was on layoff or furlough, the employer must use the average weekly hours the employee worked during the rest of the 12-month period.

The new law also provides that an employee will be able to use up to thirteen weeks as "base weeks" for purposes of meeting eligibility requirements for temporary disability and family leave insurance benefits (but not for purposes of calculating the "average weekly wage"). For more on the Sandy Law, please see our prior client alert.

Arbitration

There were a couple of notable New Jersey decisions related to employment arbitrations. In *Raymours Furniture Co., Inc. v. Rossi*, No. 13-4440, 2014 U.S. Dist. LEXIS 1006 (D.N.J. Jan. 2, 2014), New Jersey's federal district court refused to enforce an arbitration clause because it was part of an employment policy manual that contained a standard at-will employment disclaimer unequivocally stating the manual was not a contract. The Court also found the clause unenforceable because the employer could unilaterally modify any provision of the handbook without notice to or consent of the employee. For more on *Raymours*, please see our prior client alert.

And, in *Vargas v. INX Int'l, Inc.*, No. A-3993-12T3, 2014 WL 3407245 (App. Div. July 15, 2014), the Appellate Division held that the plaintiff was required to arbitrate his LAD claims against his former employer pursuant to a mandatory arbitration agreement. However, the plaintiff could file suit against another entity that was legally intertwined with his employer, but not a signatory to the arbitration agreement. For more on *Vargas*, please see here.

Anti-Discrimination Protections for the Unemployed

In 2011 New Jersey became the first jurisdiction in the country to limit discrimination against the unemployed by prohibiting job postings stating, in essence, that the unemployed need not apply. This year, the Appellate Division upheld the constitutionality of the 2011 law in response to a First Amendment challenge in *New Jersey Dep't of Labor & Workforce Development v. Crest Ultrasonics*, 434 N.J. Super. 34 (App. Div. 2014). The case is now before the New Jersey Supreme Court. For more on this case, please see our prior newsletter.

S1440, which passed the NJ Legislature, would have expanded the 2011 law to limit employers from *considering* an applicant's unemployment status in decisions regarding hiring, compensation, or others terms, conditions or privileges of employment. However, in September, Governor Christie vetoed the legislation, as discussed in our prior blog post.

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If you have any questions or concerns regarding these recent developments, please contact your Proskauer lawyer.

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