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Advisory | Labor & Employment

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GT's Labor & Employment Law Update 2017

The past year saw many significant developments in the area of labor and employment law at all levels of government. Simply by way of example, new legislation imposed additional obligations on employers that operate in New Jersey and New York; federal Courts of Appeals "clarified" standards applicable to workplace discrimination claims; and under the Trump Administration, several agencies—particularly the NLRB—began to rein in some of the more far-reaching policies and decisions from the Obama era.

This GT Alert looks back at some of the most significant developments of 2017 in labor and employment law for New Jersey and New York businesses, and those employers with a presence in these states.

Legislative Developments

Below is significant legislation enacted in 2017 in New Jersey and New York, including New York City.

New Jersey Legislation

Breastfeeding Is Now Protected under the New Jersey Law Against Discrimination

Shortly before leaving office, Governor Chris Christie signed legislation explicitly protecting breastfeeding and the expression of breast milk under New Jersey's Law Against Discrimination (LAD). Employers (of all sizes) are now prohibited from discriminating or retaliating against employees they know, or have reason to know, are breastfeeding, and must offer reasonable accommodation to those needing to express milk during working hours. The law requires employers to provide breastfeeding employees with a private place to breastfeed (not simply a toilet stall), and the reasonable time needed to express milk. While not

previously designated a protected class under LAD, many employers were already sensitive to the needs of breastfeeding employees based on existing laws protecting against sex and pregnancy discrimination, as well as under express breastfeeding requirements contained in the Affordable Care Act's 2010 amendment to the Fair Labor Standards Act (FLSA). The full panoply of remedies available under LAD now apply to breastfeeding-related discrimination or retaliation.

New Jersey Expands "Ban the Box" Legislation

On Dec. 20, 2017, Governor Christie signed legislation designed to protect job applicants from being asked about expunged criminal records, expanding existing law. Under current "ban the box" laws, an employer may not ask a prospective job applicant, orally or in writing, about their criminal record during the employment application process. Beginning Oct. 1, 2018, employers will likewise be prohibited from inquiring about a candidate's expunged criminal record. Related legislation expands upon the existing expungement procedures in New Jersey, shortening waiting periods and increasing the number of convictions eligible for expungement.

New Jersey Rejects Salary Ban Legislation – For Now . . .

Governor Christie vetoed legislation last year that would have amended the Law Against Discrimination (LAD) to prohibit employers from asking job candidates about their salary history. The legislation would have prevented employers from asking about an applicant's most recent compensation, and from relying on that information to arrive at an employee's compensation. The proposed legislation also included a provision prohibiting employers from retaliating against either an active employee or job candidate based upon their salary history or because they opposed an act made unlawful by the amendment. Employers should keep watch as this legislation may likely return under the new governor, Phil Murphy.

New York Legislation

New York State Introduces New York Paid Family Leave

New York State passed its own Paid Family Leave law (NYPFL) last year. It went into effect on Jan. 1, 2018. The law is similar in many respects to its federal analogue, the Family and Medical Leave Act (FMLA), which provides job protection for employees requiring time off to care for close family members or the birth/adoption of a child. Unlike the FMLA, however, the NYPFL additionally mandates that private employers provide qualified employees with up to eight weeks of compensation (50 percent of their weekly pay, up to a maximum of $652.96) and benefits. The employer's disability carrier (or a self-funded employer) will administer the benefits. Leave may be taken to (1) care for a close relative with a serious health condition, (2) bond with a newborn, newly adopted, or newly placed child, or (3) address needs arising from a spouse/domestic partner, child, or parent being called to active military service. Employees seeking to take paid family leave are expected to provide 30 days' advance notice when possible. Like New Jersey's Family Leave Act, leave is unavailable under this law for an employee's own serious health condition. Employers cannot discriminate or retaliate against employees for taking leave under the NYPFL.

Employers who have not already done so may want to ensure they obtain appropriate insurance coverage, modify their existing policies to comply with the law's requirements, and notify their employees through required postings.

For more information please read our prior GT Alert, "New York Paid Family Leave law Becomes Effective Jan. 1, 2018."

New York City Introduces Paid Leave for Victims of Domestic Violence

In November 2017, Mayor Bill de Blasio signed the "Paid Safe Leave" law, which goes into effect in May. The law, intended to help victims of domestic violence, sexual assault, human trafficking, and stalking, provides victims with the right to request paid leave related to their recovery from these crimes, as well as to attend court hearings, meet with their attorneys, and attend counseling sessions. Generally, employers with five or more employees who complete more than 80 hours of work per calendar year must provide paid leave, and smaller employers must provide unpaid leave.

New York City Adopts Law Prohibiting Wage History Inquiries

In May 2017, the New York City Council amended the City's Human Rights Law to join the growing number of municipalities that prohibit employers from inquiring about applicants' wage history. As of Oct. 31, it is now "an unlawful discriminatory practice" under City law for an employer (i) to inquire about the salary history of an applicant, or (ii) to rely on the salary history of an applicant in determining compensation during the hiring process. The law does not prohibit (i) inquiries into objective productivity metrics "such as revenue, sales, or other production reports," (ii) discussing with an applicant "their expectations with respect to salary, benefits and other compensation," or (iii) verifying and considering an applicant's salary history where he or she "voluntarily and without prompting discloses" it. Violations of the law may expose employers to the full panoply of remedies available under the City's Human Rights Law.

For more information please read our prior GT Alert, "New York City to Prohibit Employer Inquiries into Salary History."

Administrative Developments

Discussed below are a number of significant decisions by the Department of Labor (DOL), Equal Employment Opportunity Commission (EEOC), and National Labor Relations Board (NLRB).

Department of Labor

With Its Overtime Rule Amendment Declared Invalid, DOL Goes Back to the Drawing Board

On Nov. 22, 2016, a Texas federal court stayed implementation of the DOL's Obama-era rule amendment which would have roughly doubled the minimum salary threshold for many employees to be considered exempt from federal overtime requirements under the FLSA. On Aug. 31, 2017, the same court declared that the DOL's rule amendment "is invalid" as a matter of law, reasoning that the DOL exceeded its authority by adopting "a salary-level test that will effectively eliminate the duties test" that Congress established in the FLSA.

Meanwhile, on July 26, 2017, the Trump DOL published a Request for Information (RFI), Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees. The DOL's RFI sought public input on questions related to the salary level test, the duties test, inclusion of non-discretionary bonuses and incentive payments to meet the salary level test, the salary test for highly compensated employees, and possible automatic updating of the salary level

test. According to a January 2018 announcement published on its website, the DOL is currently "undertaking rulemaking to revise" the overtime regulations.

For more information please read our prior GT Alert, "Court Invalidates DOL Overtime Rule, Holds Increased Salary Test is Contrary to Congressional Intent and Exceeds DOL Authority."

DOL Clarifies When Interns Are Employees under the FLSA

On Dec. 19, 2017, the Ninth Circuit joined three other federal appellate courts in expressly rejecting the DOL's multi-factor test for determining whether interns and students working for for-profit employers are "employees" covered by the FLSA. In the wake of those decisions, the DOL announced on Jan. 5 that "going forward, the Department will conform to those appellate court rulings by using the same 'primary beneficiary' test that these courts use to determine whether interns are employees under the FLSA." The DOL said its clarification will "eliminate unnecessary confusion among the regulated community" and afford its investigators "increased flexibility to holistically analyze internships on a case-by-case basis."

For more information please read our prior GT Alert, "U.S. Department of Labor Reverses Course on Employment Status of Interns."

DOL Announces Reversal of Employee/Independent Contractor and Joint Employer Guidance

On June 7, the DOL announced that it was reversing two prior guidance letters, known as Administrator Interpretations, that had broadened the circumstances under which employers could be held liable for misclassifying employees as independent contractors, or considered a joint employer with a separate company. Secretary Alex Acosta announced the DOL would withdraw two guidance letters: (1) a 2015 letter that encourage scrutiny of employer/independent contractor relationships under the so-called "economic realities" test, and (2) a 2016 letter that interpreted joint employment under the FLSA as occurring where both companies exercised "indirect" control over the worker. Although the letters were not legally binding, they were often cited as persuasive authority by plaintiffs' attorneys urging courts to take a more expansive view of employers' obligations under the law.

For more information please read our prior GT Alert, "DOL Announces Reversal of Employee/Independent Contractor Classification & Joint Employer Guidance."

Equal Employment Opportunity Commission

EEOC Shelves Payroll Data Collection Plans

In September 2016, the Equal Employment Opportunity Commission (EEOC) announced plans to require certain private sector employers to report payroll data on their annual Form EEO-1 filings. On Aug. 29, however, the Office of Management and Budget informed the EEOC that it was initiating a review and immediate stay of those pay data collection aspects of the proposed EEO-1, pursuant to its authority under the Paperwork Reduction Act. Employers thus need not report payroll data by the previously set filing date of March 2018. Furthermore, the Trump administration is widely expected to reduce, if not eliminate, the EEOC's payroll data collection plans.

For more information please read our prior GT Alert, "EEOC Publishes Revised Proposal to Collect Data on Employees' Compensation and Hours Worked."

National Labor Relations Board

NLRB Reverses *Browning Ferris* and Readopts Prior Joint Employer Standard

In *Hy-Brand Industrial Contractors*, 365 NLRB No. 156 (Dec. 14, 2017), the NLRB overruled its 2015 decision in *Browning-Ferris Industries*, 362 NLRB No. 186 (2015), which greatly expanded the concept of "joint employer" status under the NLRA. In *Browning Ferris*, the Board departed from long-standing NLRB precedent in holding that even when two entities have never exercised joint control over employees' essential terms and conditions of employment, and when any joint control is not "direct and immediate," the two entities will still be joint employers because of the mere existence of "reserved" joint control, or because of indirect control, or control that is "limited and routine."

In overruling *Browning Ferris*, the Board in *Hy-Brand* returned to the principles governing joint-employer status that existed prior to that decision. In restoring its prior joint-employer standard, the Board held that a finding of joint-employer status requires proof that the alleged joint-employer entities have exercised joint control over employees' essential terms and conditions of employment (rather than merely having "reserved" the right to exercise control), the control must be "direct and immediate" (rather than indirect), and joint-employer status will not result from control that is "limited and routine." Thus, contractually-reserved control that has never been exercised, indirect control, or limited and routine control will be insufficient to establish a joint-employer relationship.

NLRB Overturns *Lutheran Heritage* and Adopts New Standard for Evaluating Lawfulness of Facially Neutral Work Rules, Policies, and Handbook Provisions

In *The Boeing Company*, 365 NLRB No. 154 (Dec. 14, 2017), the Board overruled the "reasonably construe" standard for evaluating the lawfulness of facially neutral employment policies set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), which held that if a work rule does not explicitly restrict activity protected under Section 7 of the NLRA, the rule will violate the Act if employees would reasonably construe the language to prohibit such activity. In *Boeing*, the Board held that it will no longer find unlawful the mere maintenance of facially neutral policies based on a single inquiry, which turned on whether an employee would reasonably construe a rule to prohibit some type of potential Section 7 activity that might (or might not) occur in the future.

Under the new standard, when evaluating a facially neutral policy that, when reasonably interpreted, would potentially interfere with the exercise of rights under the Act, the Board will evaluate: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule. The Board delineated three categories of policies, which are not part of the test, but represent a classification of results from the application of the test.

- *Category 1* includes rules that the Board designates as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of rights under the Act; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule.
- *Category 2* includes rules that warrant individualized scrutiny as to whether the rule would prohibit or interfere with rights under the Act, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.
- *Category 3* includes rules that the Board will designate as unlawful to maintain because they would prohibit or limit conduct protected under the Act, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule.

NLRB Overrules *DuPont* and Clarifies Employers' Duty to Bargain Over "Changes" Consistent with Past Practice

In *Raytheon Network Centric Systems*, 365 NLRB No. 161 (Dec. 15, 2017), the NLRB overruled *E.I du Pont de Nemours*, 364 NLRB No. 113 (2016), which dramatically altered what constitutes a "change" requiring notice to a union and the opportunity for bargaining prior to implementation. In *DuPont*, the Board held that when evaluating whether an employer's new actions taken pursuant to a past practice constitute a "change," which would require notice to the union and an opportunity to bargaining before implementation, the parties could not just compare the new actions to the past actions as they'd done previously. Rather, the parties had to look at whether other things had changed, such as whether a CBA previously existed, whether the prior CBAs contained language conferring on the employer the right to take the actions in question, and whether a new CBA exists containing the same language. If not, then the employer's new actions constitute a "change" even though they may be identical to actions that it took many times in the past over the course of many years.

In overruling *DuPont*, the Board returned to its prior standard, which required an employer to provide notice and an opportunity to bargain before making a "change" in employment matters, but not requiring bargaining when no "change" has occurred. Actions constitute a "change" only if they materially differ from what has occurred in the past. Where an employer takes actions that are not materially different from its past actions, no change has occurred and the employer's unilateral actions are lawful. In other words, regardless of the circumstances under which the past practice developed (i.e., whether or not the past practice developed under a CBA's management rights clause), an employer's past practice constitutes a term and condition of employment that permits it to take actions unilaterally that are not materially different (in kind or degree) from what the employer has customarily done in the past.

For more information these recently overturned NLRB cases, please read our prior GT Alert, "NLRB Overturns 4 Decisions that Adversely Impacted Employers."

New Jersey and New York Federal and State Court Developments

Analyzed below are significant decisions by federal and state courts affecting New Jersey employers and federal courts affecting New York employers.

Federal Court Decisions Impacting New Jersey Employers

Third Circuit Issues Important Decision for Employers in Holding that an Employer's "Honest Belief" that the Employee was Misusing FMLA Leave is Sufficient to Defeat FMLA Retaliation Claim

In *Capps v. Mondelez Global, LLC*, 847 F.3d 144 (3d Cir. 2017), the Third Circuit held, for the first time, that an employer's mere "honest belief" that an employee misused Family and Medical Leave Act (FMLA) leave is sufficient to defeat a retaliation claim. Plaintiff, a long-time employee who suffered from arthritic pain in his legs and hips, requested and received intermittent FMLA leave over a period of many years for that same condition, which was recertified approximately every six months. Plaintiff was arrested (and briefly incarcerated) for drunk driving during his employment. Months later, defendant learned of plaintiff's arrest. According to defendant's records, plaintiff had requested and taken FMLA leave on days when he had been arrested, incarcerated, or appearing in court for the offense. As a result, defendant terminated plaintiff's employment for misusing FMLA leave.

The Third Circuit affirmed summary judgment for the employer, holding that plaintiff could not show that defendant's legitimate, nondiscriminatory reason for terminating his employment—its reasonable belief that he misused and was dishonest about his use of FMLA leave—was pretextual, and that retaliation was the real cause for termination. As the Court stated:

> FMLA retaliation claims require proof of the employer's retaliatory intent. Where an employer provides evidence that the reason for the adverse employment action taken by the employer was an honest belief that the employee was misusing FMLA leave, that is a legitimate, nondiscriminatory reason for the discharge.

Although retaliation claims are typically fact-intensive, the Third Circuit's decision offers employers a lighter standard when defending against such claims. Employers now need only show they have a good faith, "honest," basis for their adverse employment decision. Employers do not have to prove they were actually correct in their determination. The heavy burden employers commonly face in obtaining summary judgment on FMLA retaliation claims (and similar claims under other anti-discrimination statutes) may now have been lightened by *Capps*.

For more information please read our prior GT Alert, "Employer's Honest Belief Sufficient to Defeat FMLA Retaliation Claim."

In Another Important Case, the Third Circuit "Clarifies" that Even a Single Racial Slur May be Sufficiently "Severe" to Create a Hostile Work Environment

In *Castleberry v. STI Group*, 863 F.3d 259 (3d Cir. 2017), the Third Circuit clarified the standard for establishing a hostile work environment under federal antidiscrimination law. Plaintiffs, two African-American males hired as laborers, brought suit under Section 1981 alleging harassment, discrimination, and retaliation. Plaintiffs claimed that they observed racially insensitive comments on sign-in sheets "on several occasions," they were prohibited from working on certain projects because of their race, and that a supervisor once threatened plaintiffs and others stating that they would be fired if they "[n-----] rigged" a fence. Plaintiffs complained about their supervisor's use of this offensive racial epithet and were fired two weeks later. They were brought back to work shortly afterwards, but soon let go again due to "lack of work."

On appeal of the District Court's dismissal of plaintiffs' claims, the Third Circuit focused on and rejected the more limiting standard that the District Court applied in evaluating plaintiffs' hostile work environment claims. Noting that its precedent was "inconsistent" and "confusing, the court conceded that it had in the past misstated the standard—calling it pervasive *and* regular—or articulated the applicable standard inconsistently. The Court held: "Thus, we clarify. The correct standard is 'severe *or* pervasive.'" As the Court explained, "[S]ome harassment may be severe enough to contaminate an environment even if not pervasive; other, less objectionable, conduct will contaminate the workplace only if it is pervasive."

After addressing the applicable legal standard, the court evaluated whether the one-time use of the highly offensive term about which plaintiffs complained could be considered sufficiently "severe" by itself to state a hostile work environment claim. The court concluded that while the answer to that question would be context specific, "it is clear that one such instance can suffice to state a claim." The Court also held plaintiffs' allegations of their supervisor's use of a racially charged slur in front of them and their non-African-American coworkers, accompanied by threats of termination, "constitutes severe conduct that could create a hostile work environment."

For more information, please read our prior GT Alert, "Third Circuit 'Clarifies' that a Single Racial Slur May be Sufficiently 'Severe' to Create a Hostile Work Environment."

Third Circuit Clarifies Meaning of "Willfulness" Under the FLSA in Employers' Favor, Heightening Plaintiff's Burden

In *Souryavong v. Lackawanna County*, the Third Circuit clarified the meaning of "willfulness" under the FLSA to require an employer, at the time of the violation, to have knowledge that the FLSA prohibited its conduct, or show a "reckless disregard for the matter." Acting only "unreasonably" is insufficient, as some degree of "actual awareness" that the conduct was prohibited by the FLSA is necessary. The Court also noted that a willfulness finding requires the FLSA violation to have "a degree of egregiousness."

Plaintiffs in *Souryavong* alleged FLSA violations for defendant's failure to pay overtime. Plaintiffs were among a class of defendant's employees who worked in two separate part-time positions. Defendant allegedly failed to aggregate the hours in both jobs, which resulted in its failure to pay overtime for hours over 40 per week. The Third Circuit considered the nature of the evidence sufficient to create a jury question on the purported "willfulness" of an employer's nonpayment of overtime. The Third Circuit held that plaintiffs did not present any evidence of defendant's pre-violation awareness of the two-job-FLSA problem. While plaintiffs argued that their evidence of willfulness was sufficient, pointing to (1) a series of overtime violations that continued into January 2012 with respect to one of the plaintiffs, (2) a March 28, 2011, email from defendant's HR Director raising the overtime issue with other employees of defendant, and (3) defendant's general awareness of the FLSA's requirements at all relevant times, as indicated by the defendant's CFO's testimony, the Third Circuit held that these three bits of evidence do not show defendant was (i) specifically aware of the two-job FLSA overtime problem, (ii) as it related to plaintiffs, (iii) prior to the dates of the violations. The Court noted that willful violations require "a more specific awareness of the legal issue." The Court also held that the required "degree of egregiousness" was lacking in defendant's case, as there was nothing indicating defendant's violations could be attributed to the level of recklessness or ill will found in other cases that went to the jury on willfulness.

Third Circuit Lightens Burden for Plaintiffs Asserting Title VII Retaliation Claim to Satisfy Prima Facie Case

In *Carvalho-Grevious v. Delaware State University*, 851 F.3d 249 (3d Cir. 2017), the Third Circuit considered "whether a plaintiff asserting a Title VII retaliation claim must establish but-for causation as part of her prima facie case" pursuant to a prior Supreme Court case. In that case, the Court held that, at the prima facie stage, a plaintiff only has to provide evidence "sufficient to raise the inference that her engagement in a protected activity was the *likely reason* for the adverse employment action, not the but-for reason."

The Third Circuit stated that the question before it was what evidence a plaintiff must advance as part of her prima facie retaliation case to survive summary judgment given the Supreme Court's holding in the case referenced above that: "Title VII retaliation claims must be proven according to traditional principles of but-for causation." The Court noted that it previously held that a plaintiff must prove that retaliatory animus had a "determinative effect" on the employer's decision to subject the employee to the adverse employment action. *Woodson v. Scott Paper Co.*, 109 F.3d 913, 932 (3d Cir. 1997). The Court also previously held that a plaintiff proceeding under a pretext theory must convince the factfinder that the employer's proffered nonretaliatory explanation was false, and that retaliatory animus was the "*real reason* for the adverse employment action." *Moore v. City of Philadelphia*, 461 F.3d 331, 342 (3d Cir. 2006) (emphasis added by Court).

In *Carvalho-Grevious*, the Third Circuit held that although the "determinative effect" or "real reason" causation standards and the Supreme Court's "but-for" causation standard differ in terminology, they are functionally the same. However, the Court instructed that plaintiff's burden at the prima facie stage of the case differs from its ultimate burden of persuasion. The Court thus held that the prior case "does not alter the plaintiff's burden at the prima facie stage; proving but-for causation as part of her ultimate burden of persuasion comes later, and not at the motion-to-dismiss stage."

Third Circuit Holds that Disparate-Impact Age Discrimination Claims Brought by a "Subgroup" of Employees Protected Under the ADEA are Cognizable

In *Karlo v. Pittsburgh Glass Works, LLC*, 849 F.3d 61 (3d Cir. 2017), the question before the Third Circuit was whether a disparate-impact claim under the Age Discrimination in Employment Act (ADEA), which protects only those individuals who are at least 40 years old, is cognizable where a "subgroup" of employees at the upper end of that range (*e.g.*, individuals over age 50 in this case), were alleged to have been disfavored relative to employees between the ages of 40 and 50. The Court held that plaintiffs' "subgroup" claim is cognizable under the ADEA, as an ADEA disparate-impact claim may proceed when a plaintiff offers evidence that a specific, facially neutral employment practice caused a significantly disproportionate adverse impact based on age. Evidence that plaintiffs can use to demonstrate impact includes: 40-and-older comparisons, subgroup comparisons, or more sophisticated statistical modeling, as long as it is admissible.

Plaintiffs were over age 50 at the time defendant terminated their employment pursuant to a RIF. Plaintiffs brought a putative ADEA collective action asserting disparate treatment and disparate impact claims. While the ADEA covers all employees at least 40 years old, plaintiffs claimed to have identified an employer policy that disproportionally impacted a subgroup of employees covered by the ADEA: employees older than 50 years of age. Plaintiffs further claimed that the policy favored younger members of the protected class (*i.e.*, individuals between 40 and 50 years old).

In reviewing the District Court's decision to grant summary judgment to the employer, the Third Circuit noted that the "central question in this case is whether so-called "subgroup" disparate-impact claims are cognizable under the ADEA." The Court answered that question affirmatively and reversed the District Court's summary judgment award. The Court held that "[e]vidence that a policy disfavors employees older than 50 is probative of the relevant statutory question of whether the policy creates a disparate impact because of the individual's age." In support of its holding, the Court cited *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996), which "clarified that the ADEA proscribed age discrimination, not forty-and-over discrimination," and *Connecticut v. Teal*, 457 U.S. 440 (1982), which confirms that "even under a disparate-impact theory, the plain text of the statute is designed to protect the rights of individual employees, not the rights of a class."

The Third Circuit has now made clear that plaintiffs can bring "subgroup" ADEA claims, where an older group of employees (*e.g.*, over 50 years of age) allege to have been disfavored relative to a younger group of employees protected by the ADEA (*e.g.*, between 40 and 50 years old).

Third Circuit Holds that the WARN Act's Notice Requirement is Triggered When a Mass Layoff Becomes "Probable," Not Just Possible

In *In re AE Liquidation, Inc.*, 866 F.3d 515 (3d Cir. 2017), the Third Circuit held that a "probability standard" applies when determining whether an employer has to give notice to employees of a mass layoff under the Worker Adjustment and Retraining Notification Act of 1988 (WARN Act). The WARN Act requires certain employers to provide "sixty days' notice to all affected employees . . . prior to a mass layoff

or plant closing." One of the numerous exceptions to this rule is the "unforeseeable business circumstances exception," which applies when an employer can objectively demonstrate that "(i) the business circumstances causing the layoff were not reasonably foreseeable; and (ii) those circumstances caused the layoff."

In *In re AE Liquidation, Inc.*, the Third Circuit held that "reasonably foreseeable" means "probable." In other words, the "WARN Act is triggered when a mass layoff becomes probable — that is, when the objective facts reflect that the layoff was more likely than not." The Court emphasized, however, that the probability test is objective, "and WARN Act liability may not be avoided by an employer clinging to a glimmer of hope that it will remain open against improbable odds." An employer's well-intentioned subjective beliefs will not excuse its failure to comply with the WARN Act's notice requirement if they are not "commercially reasonable." The Court further cautioned that the WARN Act still requires that employers give as much notice as practical, including, where appropriate, notice after the fact.

New Jersey Supreme and Appellate Court Decisions Impacting Employers

NJ Supreme Court Holds Unenforceable an Employment Contract Limiting a Worker's Right to Sue a Third Party for Injuries Covered by the Workers' Compensation Act

In *Vitale v. Schering-Plough Corp.* (Dec. 11, 2017), the plaintiff-employee had signed a "Workers' Comp Disclaimer" (Disclaimer) as a condition of his employment, whereby he agreed to "waive . . . all rights" asserting claims "against any customer . . . of [his employer] to which [he] may be assigned, arising from or related to injuries which are covered under the Workers' Compensation statutes." After plaintiff suffered injuries while performing his job duties on a customer's premises, he filed a negligence lawsuit against the customer. The Supreme Court rejected the customer's argument that the Disclaimer barred plaintiff's claim, holding that the Disclaimer was unenforceable because it contravened the public policy expressed in New Jersey's Workers' Compensation Act.

NJ Supreme Court Provides Important Reminders for Employers Evaluating Employees' Accommodation Requests under LAD

In *Grande v. Saint Clare's Health Sys.*, (July 12, 2017), plaintiff worked as a Registered Nurse. One essential duty listed on the employer's R.N. position description was to "frequently" lift 50 pounds. Beginning in 2007, plaintiff suffered a series of work-related injuries, and was out for several months of recovery. Plaintiff's employer required her to undergo a "functional capacity evaluation" (FCE) before she could return to work. The FCE "Report recommended . . . that [plaintiff] frequently lift no more than 16 pounds." The employer, relying on the findings contained in its FCE Report, terminated plaintiff because she could no longer perform essential functions of the job, *i.e.*, "frequently" lifting 50 pounds. The employer additionally asserted that plaintiff's "history of injuring herself on the job sufficiently proved her inability to perform her job without posing a risk of harm to herself or others."

The Court reversed the trial court's decision granting summary judgment in the employer's favor. The Court held that there were genuine issues of material fact as to whether "frequently" lifting 50 pounds was actually one of plaintiff's essential job duties. The Court further held there were genuine issues of material fact as to whether the FCE report conclusively determined that plaintiff could not perform her duties, as the report did not state whether plaintiff's lifting restrictions were permanent or temporary. Lastly, the Court held that the employer's decision that plaintiff's injury history suggested a safety risk to herself and others was not supported by "factual or scientifically validated evidence."

Federal Court Decisions Impacting New York Employers

Second Circuit Permits Discrimination and FMLA Interference Claim to Proceed, Even Though Employer Rescinded the Termination Before it Became Effective

In *Shultz v. Congregation Shearith Israel*, (Aug. 10, 2017), the Second Circuit held that, even though the employer rescinded the termination notice before it became effective, plaintiff nevertheless suffered an adverse employment action upon notice of the termination. Plaintiff was program director at a synagogue. When she returned from her one month honeymoon, visibly pregnant, her supervisor had an extensive discussion with her regarding her pregnancy, and the fact that she was pregnant prior to marriage. Later that date, the congregation advised plaintiff that her employment would be terminated effective a month later due to a restructuring.

Plaintiff immediately retained an attorney, who sent a demand letter to the congregation. A few days later, the congregation presented plaintiff with a reinstatement letter, advising that it had reversed its decision, and that she would not be terminated as previously planned. Plaintiff nevertheless decided not to return to work, and commenced a lawsuit, claiming sexual discrimination and FMLA violations.

The Second Circuit concluded: "the Congregation did not attempt to rescind the termination for two weeks. [Plaintiff] thus had ample time to experience the dislocation of losing her employment at a particularly vulnerable time, undertake the effort of retaining counsel, and inform the Congregation that she was going to file suit." The Court observed that an immediate revocation might present different circumstances. The Court further noted that Plaintiff sufficiently alleged that her employer interfered with her FMLA rights when it notified her of her termination shortly after she gave notice that she was pregnant, even though it rescinded the termination notice.

Second Circuit Distinguishes Title VII Claims Based on Sexual Stereotyping, Which are Recognized, and Sexual Orientation Claims, Which are Not Viable

During 2017, the Second Circuit has denied attempts by plaintiffs to expand Title VII to sexual orientation claims, while also recognizing that plaintiffs may have cognizable claims based on sexual stereotyping. In *Christiansen v. Omnicom Group*, (March 27, 2017), plaintiff alleged that his supervisor repeatedly harassed him based on his effeminacy and sexual orientation. The District Court dismissed plaintiff's Title VII complaint based on the pleadings, reasoning that the Second Circuit had previously held that Title VII does not protect sexual orientation, and that allegations about plaintiff's effeminacy cannot "transform a claim for discrimination . . . as stemming from sexual orientation animus into one for sexual stereotyping."

On appeal, the Second Circuit reaffirmed its prior decisions, holding that sexual orientation is not protected under Title VII. The Court did, however, in a strained opinion, reverse the District Court's summary judgment award, holding that Title VII prohibits harassment and adverse employment decisions based on lack of conformity to traditional senses of masculinity or femininity. The Court concluded that, while it might be difficult for plaintiff to ultimately prove he was harassed because of his perceived effeminacy, rather than his sexual orientation, the Court could not make that determination based on the Complaint. In a concurring opinion, Chief Judge Katzmann suggested that the Court should reverse its prior precedent, and recognize sexual orientation claims under Title VII.

A month after *Christiansen*, the Second Circuit affirmed dismissal of Title VII sexual orientation and sexual stereotyping claims. In *Zarda v. Altitude Express*, (April 18, 2017), plaintiff, a skydiving instructor, alleged that his employer terminated him because of his sexual orientation and for failing to conform to

gender stereotypes, claiming that, in addition to his sexual orientation, his supervisor criticized him for wearing pink to work and painting his toenails pink. The Second Circuit reaffirmed that Title VII did not cover sexual orientation, and rejected plaintiff's assertion that his employer discriminated against him based on a gender stereotype that men should date only women. The Court further held that plaintiff failed to demonstrate that his employer took any adverse action based on plaintiff's pink attire or toenails, which was plaintiff's only remaining evidence.

Authors

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