

## A Year of Significant Changes in NJ Employment Law

By Wendy Johnson Lario, Michael J. Slocum, and Courtney Caine | August 22, 2019 | New Jersey Law Journal

There have been many significant developments impacting private employers in New Jersey in the past year. The state legislature and our courts have been actively enacting new laws and revisiting a wide range of employment principles. Here is the recap.

### Federal and State Court Opinions

Below are three appellate decisions that will be of interest to New Jersey employers.

#### **Third Circuit Affirms Summary Judgment for Employer, Highlighting Importance of Well-Documented Progressive Discipline Process**

In *Simons v. Bos. Sci.*, 765 F. App'x 773 (3d Cir. 2019), the employee received two detailed written warnings for alcohol-induced impairment on the job. The employee then requested, and was granted, a 30-day leave to "address his alcoholism." After his return to work, the employer discovered the employee was arrested during work hours for a DUI which he did not disclose, and terminated the employee. The employee's claims of disability discrimination under the New Jersey Law Against Discrimination (LAD), retaliation under the New Jersey Conscientious Employee Protection Act (CEPA), and retaliation for asserting his rights under the Family and Medical Leave Act (FMLA) were dismissed on summary judgment, which the Third Circuit affirmed. When analyzing whether the employer's reasons for termination were a pretext for discrimination or retaliation, the Third Circuit repeatedly cited to the prior warnings and the employer's well-documented progressive disciplinary procedures, and held that no fact-finder could find a causal relationship between the employee's request for leave and the employer's decision to terminate.

#### **Appellate Division Opens the Door for Medical Marijuana LAD Claims**

On March 27, 2019, the Appellate Division in *Wild v. Carriage Funeral Holdings*, 458 N.J. Super. 416 (App. Div. 2019), held that, despite an apparent conflict between the New Jersey Compassionate Use Medical Marijuana Act (CUMMA) and the LAD, employees may advance LAD claims for failing to accommodate their off-duty use of medical marijuana. The employee, who legally treated a disability with marijuana under CUMMA, alleged his employer terminated him for his off-duty medical marijuana use. The trial court dismissed the case, finding that CUMMA “does not contain employment-related protections for licensed users of medical marijuana.” The Appellate Division disagreed, finding that just because CUMMA does not obligate employers to accommodate medical marijuana use “does not mean that the LAD may not impose such an obligation.” New Jersey is now one of the several states in which courts have recognized a legal obligation to accommodate an employee’s off-duty medical marijuana use.

### **Appellate Division Holds Adverse Employment Action Not Required to Advance LAD Failure to Accommodate Claim Where Employer Forces Employee to “Soldier On”**

In *Richter v. Oakland Board of Education*, 2019 WL 245807 (App. Div. 2019), the employee, a Type I diabetic, sustained injuries when she fainted at work due to low blood-sugar levels. The employee alleged that she fainted because her employer refused to provide her the reasonable accommodation of eating lunch earlier in the day. The trial court dismissed the LAD claim, holding that, as a matter of law, the employee “did not establish an adverse employment action.” The Appellate Division, however, reversed and concluded that the employee need not demonstrate an adverse employment action under this “unusual situation ... where the employee could demonstrate that the failure to accommodate forced the employee to soldier on without a reasonable accommodation and there need not be proof of adverse employment action because the circumstances ‘cry out for a remedy.’”

### **New Laws**

The legislature has been busy in the employment arena. Employers must be aware of the following new laws.

### **NJ Bans Confidentiality Provisions in LAD Settlement Agreements, and May Have Banned Arbitration Agreements as Well**

In March 2019, New Jersey passed legislation declaring unenforceable confidentiality provisions in settlement agreements for LAD claims. Specifically, New Jersey will no longer enforce any provision that “has the purpose or effect of concealing the details relating to a claim of discrimination, retaliation or harassment.” The legislation additionally invalidates provisions in “*any* employment contract” that waive substantive or procedural rights or remedies relating to a claim of discrimination, retaliation, or harassment under the LAD—and notably, under “any other statute or case law.” Only collective bargaining agreements are explicitly excluded from the legislation’s “any employment contract” language, and thus it remains to be seen how the new law will impact, for example, jury-waiver provisions in employment applications and agreements to arbitrate LAD claims.

### **NJ Adopts State-Wide Mandatory Paid Sick Leave**

The state-wide paid sick leave law that took effect Oct. 29, 2018, requires all New Jersey employers—regardless of size—to provide paid sick leave to their employees, whether full- or part-time. Employees accrue one hour of earned sick leave for every 30 hours worked up to a required minimum of 40 hours. Employers are not required to allow employees to accrue more than 40 hours of leave per year, or carry unused leave that exceeds 40 hours forward to the next year, or pay for unused leave upon termination of employment, provided their policies make those limitations clear to employees.

## **NJ Adopts Unequal Pay Law; Federal Court Declares It Does Not Apply Retroactively**

In April 2018, New Jersey enacted the Diane B. Allen Equal Pay Act (NJEPA), which became effective July 1, 2018. Similar to, but much broader than, the federal Equal Pay Act (EPA), New Jersey's law declares it unlawful for employers to pay employees within a protected class less than those outside that class for "substantially similar work, when viewed as a composite of skill, effort and responsibility." Employers may escape liability if they demonstrate "that the [pay] differential is made pursuant to a seniority system [or] a merit system," or that the pay differential is based on a "bona fide factor[] other than the characteristics of members of the protected class, such as training, education or experience, or the quantity of production ...." A federal court has held the NJEPA "is not retroactively applicable to conduct occurring prior to its effective date." *Perrotto v. Morgan Advanced Materials*, No. CV 2:18-13825, 2019 WL 192903, at \*2 (D.N.J. Jan. 15, 2019).

## **NJ Expands Family Leave Act**

In February 2019, Governor Murphy approved expansions to New Jersey's Family Leave Act (NJFLA). The NJFLA enables employees to take leave to care for family members, and the recent amendment expanded the definition of "family member," shortened advance notice requirements, and now (as of June 30, 2019) applies to employers with 30 or more employees (reduced from 50 or more employees).

This law also expanded New Jersey's Family Leave Insurance Law (FLI), which provides pay to employees for qualifying family leaves. As of July 1, 2020, the amendments to FLI will increase paid leave to 12 weeks of consecutive leave or 56 days of intermittent leave (increased from six weeks and 42 intermittent days). The amendments also increase the maximum pay during FLI leave from 66.6% to 85% of an employee's weekly salary, up to a maximum of 70% of the statewide weekly wage average.

## **NJ Joins Trend Raising Minimum Wage**

In February 2019, Governor Murphy signed legislation that incrementally raises New Jersey's minimum wage. Under the new law, the state minimum wage increased from \$8.85 to \$10 per hour on July 1, 2019, and will increase by \$1 per hour every January 1st until it reaches \$15 per hour in January 2024.

## **NJ Bans Salary History Inquiries**

In July 2019, New Jersey law expanded to prohibit employers from "screen[ing] a job applicant based on the applicant's salary history, including, but not limited to, the applicant's prior wages, salaries or benefits." It is now unlawful for an employer to require an applicant's salary history to satisfy any minimum or maximum criteria, and refusal to volunteer compensation information may not be considered in any employment decisions. Violations incur civil penalties from \$1,000 to \$10,000.

## **NJ Expands Sanctions and Imposes Criminal Liability for Wage Payment Violations**

In August 2019, New Jersey expanded the fines, penalties and damages imposed for violations of the state's wage payment law. Violators are now required to pay the employee's owed wages plus liquidated damages equal to 200% of the owed wages. There are also increased fines for repeated offenses. Additional administrative penalties up to \$250 for a first violation and \$500 for each subsequent violation can also be assessed by the Department of Labor and Workforce Development. On top of the employer fines, penalties and damages, the law also provides for criminal penalties against any corporate officer or employee responsible for the wage payment violation, including both fines and jail time. Employers are also subject to a wage payment audit as an alternative to, or in addition to, any of these other sanctions.

Retaliation against an employee who files a wage payment complaint also subjects corporate employees to a disorderly persons offense and employer fines in the range of \$100 to \$1,000 plus payment of wages lost as a result of the retaliation, and liquidated damages of 200% of the lost wages. In addition, if the employee was discharged in retaliation for filing a wage payment complaint, the employer is “required” to offer reinstatement unless prohibited by law. The law presumes that retaliation has occurred if an adverse action is taken within 90 days of the filing of a wage complaint.

Also noteworthy, there is an extended six-year statute of limitations, and violations and names of violating employers will be made public on a website.

**Takeaways**

New Jersey has reshaped and expanded the myriad rules and requirements employers face. Employers are encouraged to keep abreast of these changes and proactively adapt to the ever-evolving legal landscape to reduce their exposure to enforcement actions and lawsuits.

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