Baydin & Brandt NJ Employment Newsletter

Whistleblowers

Employees Protected if Just Doing Your Job

New Jersey's broad sweeping whistleblower statute, the Conscientious Employee Protections Act (CEPA), was clarified by the NJ Supreme Court to provide whistleblowers with more protection in Lippman v Ethicon (decided July 15, 2015). Previous lower court decisions had been split on whether or not so-called "watchdog" employees -- whose job is to oversee, report or ensure employer/company compliance with legal or safety issues – are entitled to sue under the CEPA statute. The watchdog defense had been upheld by some courts on the theory that an employee could not be a whistleblower if his or her actions were within the scope of that employee's job duties or responsibilities. Rejecting this theory, the New Jersey Supreme Court held that Dr. Lippman, who was VP of medical affairs and responsible for safe medical practices in trials of Ethicon's medical devices, could still sue for retaliation under the CEPA statute after he was terminated for reporting dangerous health risks he observed as part of his job duties.

Deficient Medical Certification

Opportunity to Correct

Employees who request medical leave for their illnesses or disabilities are required by law to provide medical certification under employer policies and the various governing laws (family leave statutes, New Jersey Law Against Discrimination, ADA). In Hansler v Lehigh Valley Hospital (3rd Circuit decided August 19, 2015) the federal appeals court upheld Ms. Hansler's claim that her employer violated the FMLA by denying her medical leave. The ground for denial of Family Leave was that her doctor's medical certification failed to establish that she had a "serious medical condition". Relying on Department of Labor regulations, the court held that employers must inquire in writing about the reason for an employee's leave request if sufficient information is not presented. This interactive process importantly permits the employee to supplement his or her health record. In addition, the court also found that Ms. Hansler could sue on her claim that she was fired in retaliation for requesting FMLA leave.

Taking Employer Documents for Lawsuit

Risk of Prosecution

The NJ Supreme Court issued a cautionary opinion to employees in NJ v Saavedra (decided June 23, 2015), holding that an employee who takes certain employer documents for an employment discrimination or whistleblower case may be criminally prosecuted notwithstanding the lawful purpose of the taking. In Saavedra, a clerk was charged with theft and official misconduct after she sued the Bergen Board of Education and used original and confidential documents to try to prove her case. The defense attorney for the Board alerted the prosecutor who in turn issued a criminal indictment.

In refusing to dismiss the indictment, the high court held that taking certain kinds of documents can be indictable offenses, including: employer's originals or only copies; documents containing legally mandated confidential information; and documents that an employee was not entitled to see as part of his or her job duties. The Court stated that the clerk would have the opportunity to defend herself in the criminal trial (i.e. affirmative defense based on NJ public policy against employment discrimination). However, it held that her conduct was still indictable under the criminal statutes, and the trial court could then evaluate the full record in determining her guilt or innocence of the crimes charged.

New Unemployment Regulations

Disqualification Made Easier

One of the most frequent grounds for disqualification of unemployment benefits occurs when the NJ Department of Labor (DOL) finds that the employee committed misconduct. A finding of Simple Misconduct disqualifies receipt of benefits for 8 weeks while Severe Misconduct is complete disqualification. In May 2015, the DOL adopted new regulations, 47 NJR 1009(a), which amended the definition of "simple misconduct" under the NJ unemployment statute to include "**negligence** to such a degree or recurrence to manifest culpability…" (emphasis added). This low threshold may make it harder for employees to qualify for full benefits when they make mistakes at work as opposed to the more stringent requirement of engaging in deliberate and intentional misbehavior. This regulation is currently under appeal in the New Jersey Appellate Division, but unless and until it is overturned, employers will have additional ammunition to fight unemployment claims.

Independent Contractor Status

Employers Beware

A significant issue which courts all over the country are addressing is the question of who is an independent contractor and who is an employee. There are far-reaching economic consequences for both employees and employers in this determination. Independent contractors generally receive little or no benefits, are responsible for payment of their own taxes and enjoy a large amount of independence in the performance of their work. Employees on the other hand may be eligible for significant benefits such as health insurance, over-time, and unemployment, with employers bearing the additional cost of larger taxes and payment for these benefits. Recently, a group of independent drivers of the mattress company Sleepy's brought a class action claiming employee status. In a seminal decision, the NJ Supreme Court ruled in Hargrove v Sleepy's (220 NJ 289, 2015) that for purposes of the NJ Wage and Hour laws, the employee-friendly "ABC" test applies which carries a heavy presumption against independent contractor status with the employer bearing the burden of proof to demonstrate otherwise. While the majority of cases, at least in New Jersey, are based on the traditional model of employee versus independent contractor, most legal analysts agree that in the smartphone world where work places can be virtual as well, the old models no longer apply. A good example is the current class action by UBER drivers in California, and we expect more similar lawsuits in NJ.

Employer's "Policy" Defense to Harassment Claims

In one of the most important NJ employment law decisions Aguas v State (decided Feb. 11, 2015), our state Supreme Court provided employers with a strong defense against claims that an employer is vicariously liable for the sexual harassment committed by a supervisor. The court ruled that if the employer has an effective anti-discrimination, anti-harassment and anti-retaliation policy readily available to an employee and the employee fails to take advantage of such a policy and file a formal complaint, the employer may assert this failure as a defense. The policy must be widely disseminated and reasonably available. The employer cannot assert this defense if the policy is ineffective or not enforced, or where the employee reasonably fails to file a complaint due to the employer's history of retaliation. Moreover, the employer is precluded from this defense if the employee was subjected to adverse tangible employment actions. Tangible employment actions include discharge, demotion, undesirable reassignments, and other targeted behavior. There are many factors and defenses which must be considered before Aguas can be strictly applied.

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