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Trends in New Jersey Employment Law – 2013 Year in Review

2013 was a busy year for employment law in New Jersey. This newsletter summarizes noteworthy developments in ten key areas—social media, the Law Against Discrimination ("LAD"), whistleblowing, background checks, drug and alcohol policies, employee leave, arbitration, non-competes, wage & hour, and Title VII of the Civil Rights Act of 1964 ("Title VII").

Social Media

Statutory Developments

New Jersey has a new law that forbids employers from requiring or requesting that prospective or current employees disclose user names and passwords to their personal social media accounts. The law also provides employees with expansive protections against retaliation. An employer may not require employees to waive their rights under the statute.

Despite these prohibitions, an employer may:

- implement and enforce a policy pertaining to the use of employer-issued communications devices, accounts or services used for work-related purposes;
- conduct an investigation based on the receipt of specific information about activity on an employee's personal social media account (1) to ensure compliance with laws, regulations or prohibitions on work-related misconduct, or (2) to prevent the employee's unauthorized transfer of the employer's proprietary/confidential or financial information; or
- access, view or utilize information about a current or prospective employee in the public domain, as well as otherwise comply with existing statutes, regulations, rules, or case law.

The new law does not provide a private right of action; rather, for non-compliance, an employer is subject to a modest fine of no more than $2,500. Nevertheless, there is concern that employers which engage in the type of conduct the new law prohibits may violate common law privacy rights or the Conscientious Employee Protection Act ("CEPA") and incur damages in court.

Employers doing business across the country should note that 11 other states have granted similar social media protections by statute. For more information on the New Jersey law and this emerging national trend, please see our client alert.

Judicial Developments

A RECENT FEDERAL CASE HIGHLIGHTS OTHER POSSIBLE FORMS OF LIABILITY FOR NEW JERSEY EMPLOYERS WHO ACCESS OR MONITOR THE PERSONAL SOCIAL MEDIA ACCOUNTS OF THEIR APPLICANTS OR EMPLOYEES.

A recent federal case highlights other possible forms of liability for New Jersey employers who access or monitor the personal social media accounts of their applicants or employees. In *Ehling v. Monmouth-Ocean Hospital Service Corp.*, No. 2:11-cv-03305 (WMJ), 2013 WL 4436539 (D.N.J. Aug. 20, 2013), an employer (defendant) suspended an employee (plaintiff) for posting offensive comments on her Facebook page. The defendant learned of the post from another employee who was one of the plaintiff's Facebook friends. The plaintiff filed suit, alleging violations of her common law privacy rights and the Stored Communications Act ("SCA"), a federal law that protects against the unauthorized disclosure of electronic communications.

The court granted summary judgment on the common law privacy claim, reasoning that, because the co-worker "voluntarily" disclosed the post, the defendant did not *intentionally* intrude upon the plaintiff's personal affairs. Moreover, although the court held that the SCA protects non-public Facebook posts, it dismissed the SCA claim, invoking the "authorized user" exception given that the plaintiff granted access to her co-worker who, in turn, freely divulged the post.

LAD

Pay Equity Amendment

New Jersey amended the LAD to include a non-retaliation pay equity provision to protect employees who discuss compensation with one another. Under the amendment, an employer may not retaliate against an employee for requesting from another employee, or former employee, information regarding job title, occupational category, and rate of compensation, or the gender, race, ethnicity, military status, or national origin, of any current or former employee, if the purpose of that inquiry is to assist in an investigation into discriminatory treatment regarding pay, compensation, bonuses, other compensation, or benefits. The amendment makes it clear that an employer is not required to release protected information in response to an employee's request, but only prohibits reprisals against any employee who makes such a request.

An aggrieved employee may seek a range of monetary damages and equitable relief under the LAD, and also may try to assert a claim under CEPA for retaliation as a result of objecting to or disclosing violations of the new amendment. For more on the amendment, please see our client alert.

Pay Equity Notice and Poster of Rights

The New Jersey Department of Labor and Workforce Development recently issued a notice in English and Spanish detailing "the right to be free of gender inequality or bias in pay, compensation, benefits, or other terms and conditions or employment" under the LAD, Title VII and Equal Pay Act. No later than January 6, 2014, employers must conspicuously display the notice. Moreover, employers must provide the notice to employees hired after January 6, 2014 immediately upon hire, and to all current employees no later than February 5, 2014. Employers also must provide each employee with the notice upon the employee's first request.

After satisfying the initial distribution requirements, employers must provide the notice to employees annually on or before December 31 of each year (like with CEPA). Employers may distribute the notice via email, print or the internet. When notice is distributed, employees must sign a form to acknowledge receipt, which also is available on the Department's website. For more on the new posting and distribution requirements, please refer to our client alert.

Judicial Developments

The New Jersey Supreme Court recently rendered a significant decision with regard to the LAD. In *Battaglia v. United Parcel Service*, *Inc.*, 214 N.J. 518 (2013), the court concluded that a plaintiff engaged in protected activity sufficient to support a retaliation claim under the LAD when he allegedly complained about discriminatory comments made about women in the presence of male employees only. Significantly, there was no evidence that the defendant committed "demonstrable acts of [gender] discrimination" against "any particular woman." Thus, according to the Court, even where a plaintiff did not directly witness or experience discrimination or report discrimination against identifiable persons, he or she may qualify for protection under the anti-retaliation provisions of the LAD.

Whistleblowing

Within the past year, New Jersey federal and state courts have issued important rulings in several whistleblower cases.

New Jersey Supreme Court

In *Longo v. Pleasure Productions*, *Inc.*, 215 N.J. 48 (2013), the trial judge instructed the jury that it could award punitive damages under CEPA against the employer "to punish defendants who have acted in an especially egregious or outrageous manner." The Supreme Court reversed the lower court's award of punitive damages for failure to include an *upper management* charge in the jury instructions. Specifically, the Court emphasized that to assess punitive damages under CEPA a jury must conclude that *upper management* actually participated in, or acted with willful indifference to, the wrongful conduct (which must be especially egregious).

New Jersey Appellate Division

Over the years, several Appellate Division opinions had suggested there was a "job-duties" exception to qualifying as a whistleblower under CEPA, *i.e.*, an employee may not

THIS DECISION CONCERNING THE PROTECTIONS AFFORDED TO "WATCHDOG" EMPLOYEES COULD HAVE SIGNIFICANT IMPLICATIONS.

qualify as a whistleblower where the complaint arose from the employee's performance of his or her job duties. In 2013, the Appellate Division issued a decision that went in a different direction. In *Lippman v. Ethicon*, *Inc.*, 432 N.J. Super. 378 (App. Div. 2013), the Appellate Division concluded that CEPA protection is not necessarily based on an employee's title or the "core functions" of the employee's position. Rather, according to the court, a so-called "watchdog" employee may assert a CEPA claim so long as "he or she either pursued and exhausted all internal means of securing compliance; or refused to participate in the objectionable conduct." This decision concerning the protections afforded to "watchdog" employees could have significant implications.

Third Circuit Court of Appeals

In *Wiest v. Lynch*, 710 F.3d 121 (3d Cir. 2013), the Third Circuit held that a whistleblower does not have to "definitively and specifically" relate his or her complaint to shareholder fraud to make out a claim under Section 806 of the Sarbanes-Oxley Act ("SOX"). In rejecting the "definitively and specifically" standard, the Third Circuit split from the First, Fifth, Sixth and Ninth Circuits. The Third Circuit also diverged from the Fourth Circuit in holding that communications about a *potential* violation of Section 806 are protected so long as the employee reasonably believes the violation will occur. Applying these standards, the Third Circuit held that plaintiff's communications about improper business expenditures constituted protected activity. For more on *Wiest*, please refer to our post on the Proskauer Whistleblower Defense blog.

Background Checks

Criminal

The New Jersey legislature has introduced the Opportunity to Compete Act (A-3837 and S-2586), which, among other things, would prohibit an employer from inquiring into an applicant's criminal history until after a conditional offer of employment is made. Under the proposed law, an employer who conducts an impermissible criminal inquiry is subject to a several thousand dollar fine. An Assembly committee recently advanced the bill.

Employers operating in other jurisdictions should note that several other states as well as New Jersey municipalities (including Newark) have enacted similar laws as part of a trend known as "ban the box." For more on recent "ban the box" laws, please read our past client alerts.

Credit

In 2012, the New Jersey Senate passed a bill (S-455) that would generally prohibit employers from obtaining credit reports on their applicants and employees. An Assembly committee approved the bill (A-2840) in December of 2013 and a vote before the full Assembly can be expected in the near future. Although the proposed law contains several exceptions, it affords generous remedies, *i.e.*, a private right of action and significant fines.

Multi-state employers should remember that ten other states have codified similar statutes, and the U.S. Senate recently introduced comparable legislation. For more on recent credit check bans, please see our past client alerts.

Drug and Alcohol Policies

The Third Circuit issued two notable decisions this past year regarding workplace drug and alcohol policies. In *Ostrowski v. Con-way Freight, Inc.*, No. 12-3800, 2013 WL 5814131 (3d Cir. Oct. 30, 2013), the Court held that an employer did not discriminate against the plaintiff on the basis of his disability (alcoholism) when it terminated him for violating a return-to-work agreement (RWA) that prohibited the consumption of alcohol. The Third Circuit held that the plaintiff could not state a claim of discrimination because the RWA did not preclude disabled employees (*i.e.,* alcoholics) from working for Con-way, but merely regulated their conduct (*i.e*., drinking alcohol). For more on the *Ostrowski* decision, please see our client alert.

And, in *Reilly v. Lehigh Valley Hospital*, 519 F. App'x 759 (3d Cir. 2013), the Third Circuit affirmed that an employer did not discriminate on the basis of the plaintiff's disability (drug addiction) when it fired him for lying about his history of narcotics addiction on a pre-employment questionnaire.

Employee Leave

Domestic Violence Leave

JOINING A NUMBER OF OTHER STATES, NEW JERSEY NOW PROVIDES EMPLOYEES AFFECTED BY DOMESTIC OR SEXUAL VIOLENCE WITH UP TO 20 DAYS OF UNPAID LEAVE.

Joining a number of other states, New Jersey now provides employees affected by domestic or sexual violence with up to 20 days of unpaid leave. Should an employer discriminate or retaliate against an employee or otherwise deny an employee his or her rights under the law, the employer may be subject to a suit in court, as well as a fine ranging from $1,000 to $5,000. Employers must post a notice of employee rights, which is available on the New Jersey Department of Labor and Workforce Development's website, and use other "appropriate means" to keep employees informed. For more information on the law, please refer to our client alerts on the substantive provisions and posting requirements.

Sick Leave (Jersey City only)

As of January 24, 2014, Jersey City employers with 10 or more employees must provide *paid* sick leave, while employers with fewer than 10 employees must provide *unpaid* sick leave. Leave accrues at a rate of one hour of paid time for every thirty hours worked, up to a maximum of forty hours of leave in a calendar year. The law contains expansive anti-retaliation protections and a private right of action; employers also face fines of up to $1,250. Furthermore, Jersey City employers must remember to abide by the posting and distribution requirements set forth under the new ordinance.

By enacting this law, Jersey City followed the lead of several other municipalities around the country with sick leave laws. Newark also is considering a similar ordinance, which is likely to become law. For more on the Jersey City ordinance, please see our client alert.

Arbitration

In *Cole v. Jersey City Medical Center*, 215 N.J. 265 (2013), the New Jersey Supreme Court adopted a seven-factor inquiry into whether an employer waived its right to compel arbitration. This test considers (1) any delay in making the arbitration request; (2) the filing of any motions, particularly dispositive ones; (3) whether the delay is part of a litigation strategy; (4) the extent of discovery conducted; (5) whether the party raised arbitration in the pleadings or gave other notice of intent to seek arbitration; (6) the proximity of the date on which the arbitration was sought to the trial date; and (7) any resulting prejudice suffered by the other party. Employers should take note of these factors if they seek to compel arbitration.

Covenants not to Compete

The New Jersey Assembly proposed a bill (A-3970) that would invalidate any agreement not to compete, not to disclose, and not to solicit between an individual eligible to receive unemployment benefits and his or her most recent employer. Notably, the bill only would invalidate restrictive covenants entered into after its enactment. Given the current political landscape, it appears unlikely that the legislation will become law.

Wage and Hour

Minimum Wage

New Jersey voters overwhelmingly approved a constitutional amendment to increase the minimum wage from $7.25 to $8.25 per hour as of January 1, 2014. The amendment further provides that the minimum wage will be adjusted automatically based on the Consumer Price Index on an annual basis, beginning on September 30, 2014 and taking effect every January 1 thereafter. Please refer to our client alert for more on the amendment.

Unpaid Interns

The New Jersey Senate introduced a bill (S-3064) to protect unpaid interns from employment discrimination by amending LAD, CEPA and the Worker Freedom from Employer Intimidation Act ("WFEIA"). Should the proposal become law, unpaid interns could seek a range of legal or equitable remedies, including compensatory and punitive damages, reinstatement and attorney's fees. Although Oregon is the only state to have enacted such a law, the New York Senate introduced similar legislation and there are rumblings that California may do the same. For more on the New Jersey bill and this emerging trend, please see our client alert.

Title VII

In *Mariotti v. Mariotti Building Products Inc.*, 714 F.3d 761 (3d Cir. 2013), the Third Circuit held that an individual who was a shareholder, officer and director of a closely held corporation was not an employee under Title VII. Following the lead of the United States Supreme Court and the First Circuit, the Third Circuit concluded that the plaintiff did not qualify for protection under the statute because, given his authority and right to control the enterprise, he was not the "kind of person that common law would consider an employee."

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

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