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Labor & Employment News



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Amendments to Conscientious Employee Protection Act Impose Additional Posting and Notification Requirements Upon Employers

Susan M. Leming, Esquire

N.J.S.A. 34:19-1, et seq., the Conscientious Employee Protection Act ("CEPA") or more commonly known as the "Whistleblower Act" provides employees with a cause of action against employers for retaliation because of an employees' objection or report of certain activities by the employer. Recent amendments to CEPA now require employers to inform employees of their rights under the Act.

As amended N.J.S.A. 34:19-7 now provides,

*An employer shall **conspicuously display, and annually distribute** to all employees, **written or electronic notices** of its employees' protections, obligations, rights and procedures under this act, and use other appropriate means to keep its employees so informed. Each notice posted or distributed pursuant to this section shall be in English, Spanish and at the employer's discretion, any other language spoken by the majority of the employer's employees. The notice shall include the name of the person or persons the employer has designated to receive written notifications pursuant to section 4 of this act. The Commissioner of Labor shall make available to employers a text of a notice fulfilling the requirements of this section and provide copies of the notice suitable for display and distribution to any employers who request the copies, charging them as much as is needed to pay the costs of the department. The commissioner shall also provide notices printed in a language other than English and Spanish, at the request of the employer.*

(emphasis added).

Therefore, employers are now required to conspicuously display and annually distribute to all employees written or electronic notices of employees' protections, obligations, rights and procedures under CEPA. The New Jersey Department of Labor is in the process of preparing an approved CEPA notice which conforms to the amended provisions. A form notice approved by the New Jersey Department of Labor is included in this newsletter. The new amendment applies to all employers—both private and public. The only exception is that the amendments do not apply to employers with less than 10 employees.

Since the CEPA amendments became effective September 14, 2004, employers should review their current postings and policies to ensure compliance with the new statutory requirements. CEPA notices should be placed in the same general areas whether employers post other legally required employee notices (such as cafeterias, break rooms or bulletin boards). Employers must also promptly determine how to comply with the distribution requirement and maintain documentation to prove that the notices were posted and distributed as required.

Inside this Issue:

CEPA Overview	2
Third Circuit Rules Employer Has Duty to Provide Rest Period After	3
Court Holds Municipal Police Departments are Places of Public Accommodation	4
Congress Alleviates Double Taxation in Employment Cases	5

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Conscientious Employee Protection Act

“Whistleblower Act”

Employer retaliatory action; protected employee actions

The law prohibits an employer from taking any retaliatory action against an employee because the employee does any of the following:

- a. Discloses, or threatens to disclose, to a supervisor or to a public body an activity, policy or practice of the employer or another employer, with whom there is a business relationship, that the employee reasonably believes is in violation of a law, or a rule or regulation issued under the law, or, in the case of an employee who is a licensed or certified health care professional, reasonably believes constitutes improper quality of patient care;
- b. Provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any violation of law, or a rule or regulation issued under the law by the employer or another employer, with whom there is a business relationship, or, in the case of an employee who is a licensed or certified health care professional, provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into quality of patient care; or
- c. Objects to, or refuses to participate in, any activity, policy or practice which the employee reasonably believes:
 - (1) is in violation of a law, or a rule or regulation issued under the law or, if the employee is a licensed or certified health care professional, constitutes improper quality of patient care;
 - (2) is fraudulent or criminal; or
 - (3) is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment. N.J.S.A. 34:19-3.

Your employer has designated the following contact person to answer your questions or provide additional information regarding your rights and responsibilities under this act:

Name: _____

Address: _____

Telephone Number: _____

This notice must be conspicuously displayed.

If you need this document in a language other than English

NEW JERSEY DEPARTMENT OF

LWD

LABOR AND WORKFORCE DEVELOPMENT

Kevin P. McCabe
Commissioner

Janet Share Zatz
Deputy Commissioner

Third Circuit Rules Employer Has No Duty To Provide Rest Period After Military Service Prior To Requiring Employee Return To Work

Christine P. O'Hearn, Esquire

As a result of the increasing number of individuals being called to active duty, employers are faced with yet another statute with which to comply, the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. §§ 4301-4333 ("USERRA"). The USERRA provides certain rights to reinstatement and protection against retaliation to employees called and returning from military service. The United States Court of Appeals for the Third Circuit recently clarified the scope of the USERRA and an employer's duty to an employee returning from military service in Gordon v. Wawa, Inc., 388 F.3d 78 (3d Cir. 2004).

In Gordon, the employee was an active member of the U.S. Army Reserve and was employed by Wawa. After returning from weekend reserve duties, Gordon stopped by the Wawa store to retrieve his check and work schedule for the upcoming week. Gordon alleged that his shift manager ordered him to return to work for that night's late shift and threatened to fire him if he refused to do so. Gordon did so, however, tragically he lost consciousness and/or fell asleep while driving home after his shift and was killed in an automobile accident. Gordon's estate filed suit against Wawa alleging ordering Gordon to return to work for the late shift without providing him with an eight hour rest period after return from his military service violated the USERRA and further alleging that Wawa's threats to fire him if he refused to work was a violation of USERRA's anti-retaliation provisions.

The district court granted Wawa's motion to dismiss plaintiff's complaint on grounds that there is no affirmative duty for an employer to provide an eight hour rest period for military reservists after conclusion of their service prior to requiring their return to work. Gordon appealed. The Third Circuit affirmed the district court's dismissal of the complaint.

Section 4312(e) provides that a person whose military service caused an absence from work shall, upon completion of a period of service in the uniformed services, notify the employer of the person's intent to return to a position of employment with such employer as follows:

(A) In the case of a person whose period of service in the uniformed services was less than 31 days, by reporting to the employer -

(i) not later than the beginning of the first full regularly scheduled work period on the first full calendar day following the completion of the period of service and the expiration of eight hours after a period allowing for the safe transportation of the person from the place of that service to the person's residence; or

(ii) as soon as possible after the expiration of the eight-hour period referred to in clause (i), if reporting within the period referred to in such clause is impossible or unreasonable through no fault of the person. 38 U.S.C. § 4312(e)(1)(A)(i)-(ii).

These provisions do not, however, require an employer provide an employee returning from duty with any rest period prior to returning to work. Although some legislative history of the USERRA discussed concern regarding adequate rest for military reservists returning from duty prior to returning to work, the Third Circuit held the plain language of 38 U.S.C. § 4312(e) merely requires an employee returning from uniformed duty to notify his or her employer of an intent to return to work within a specified time period and imposes no affirmative duty on an employer to prevent an employee from reporting to work prior to the expiration of an eight hour period following the employee's return from uniformed services.

The Third Circuit similarly affirmed dismissal of Gordon's retaliation claim. Although USERRA prohibits any employer from taking any adverse action against an employee who exercises any rights under the USERRA, the Court held Gordon had no such claim since he had not exercised or attempted to exercise any USERRA rights because USERRA does not confer any right to a rest period prior to returning to work.

In summary, employers need not provide an employee returning from military service with any particular rest period prior to requiring the employee to return to work.

Court Holds Municipal Police Departments Are “Places Of Public Accommodation” Even Though Law Does Not Say So

Ila Bhatnagar, Esquire

In a recently published decision, the New Jersey Appellate Division ruled not only that a municipal police department qualifies as a “place of public accommodation,” but also that its individual police officers do too. In Ptaszynski v. Uwaneme, 371 N.J. Super. 333 (App. Div. 2004), the court held that township police departments, as well as their individual officers, are subject to the provisions of New Jersey’s Law Against Discrimination (“LAD”) which protect against discrimination in places of public accommodation. What is especially striking about the Ptaszynski decision is that the Appellate Division made the ruling despite that (1) the LAD does not list police departments on the Legislature’s extensive list of places of public accommodation, and (2) previous cases did not define “place of public accommodation” in a manner consistent with the court’s decision. Nonetheless, the Appellate Division stated, “irrespective of how our courts have analyzed the meaning of a place of public accommodation for purposes of application of the LAD, we conclude that the Township police department – both the building and the individual officers – is a place of public accommodation.” Id. at 347.

Ptaszynski arose from a civil suit for damages resulting from injuries out of an altercation, filed by a police officer and his wife against a Nigerian couple who had made a domestic violence call to which the officer responded. The couple were arrested and charged with resisting arrest, aggravated assault on a police officer, disarming a law enforcement officer, and obstructing the administration of law. What followed the police response to the domestic violence call was a series of alleged brutality, resulting in injury to the Nigerian couple and eventually culminating in their filing a third-party complaint against the responding officers, the Township, and its police department. The couple alleged assault and battery, wrongful arrest, malicious prosecution, and violations of federal civil rights statutes and the LAD. The trial judge granted a summary judgment motion on the LAD claims and dismissed them. A jury trial was held on the remaining claims, most of which were dismissed.

However, on appeal, the Appellate Division held that the trial judge erred in dismissing the LAD claims. Relying on the language of the LAD which provides that, “All persons shall have the opportunity...to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation. . . without discrimination because of race. . . .,” the court emphasized that the LAD should be construed liberally. The court then quoted the LAD’s lengthy definition section on “place of public accommodation,” which includes taverns, hotels, retail shops, restaurants, public libraries, bowling alleys, and the like. While acknowledging the LAD did not list the type of establishment involved in the Ptaszynski case, the court reasoned that “the more broadly this statute is applied[,] the greater its anti-discriminatory impact[;] places of public accommodation are not limited to those listed in the statute.” The court noted that a key factor was the extent to which the facility has interaction with the public. The court then reversed the trial judge and held that, “not just a municipal police force, but any State governmental agency is a place of public accommodation for purposes of inclusion under the umbrella of the LAD.” Thus, public entities should be aware that they may be exposed to claims of violations under the LAD if individuals are denied or disparately treated with respect to any accommodations, advantages, facilities and privileges of their business, particularly if they regularly interact with members of the public.

Congress Alleviates Double Taxation in Employment Cases

Christine P. O'Hearn, Esquire

Plaintiffs in employment discrimination lawsuits have long been faced with substantial tax liability as a result of Internal Revenue Rulings which taxed plaintiffs who won or settled employment claims on the total amount of the award or settlement, including attorneys' fees, even when the attorneys fees were paid directly to the plaintiff's attorney by the defendant. Therefore, assuming a recovery of \$100,000, a plaintiff was required to pay taxes on the entire \$100,000 recovery even though a contingency fee of \$33,000 was paid to plaintiff's attorney and even though the attorney would also be required to pay taxes on the same \$33,000. This created a circumstance of "double taxation." Assuming a modest recovery at trial but substantial attorney fee award, a plaintiff could be subject to tax liability which exceeded their own net recovery. The "double taxation" was challenged throughout the country with mixed success. Proposed legislation to remedy the tax burden had been stalled in Congress for years.

As a practical matter, the double taxation often impeded settlement of employment litigation claims once a plaintiff realized the tax liability to which they would be subject. This caused plaintiff's attorneys to increase settlement demands in an attempt to recoup the double taxation and achieve a more equitable outcome.

After intense lobbying efforts by various legal and civil rights organizations, Congress enacted and President Bush signed legislation alleviating double taxation effective October 23, 2004 which was innocuously included in the The American Jobs Creation Act of 2004. Under the new law, plaintiffs may take a deduction for the full amount of amount of attorneys' fees and court costs as an "above the line" deduction. The new law applies to a broad array of employment claims including those asserted under the Civil Rights Act of 1964 and 1991, Congressional Accountability Act of 1995, National Labor Relations Act, Fair Labor Standards Act, Age Discrimination in Employment Act, Employee Retirement Income Security Act, Employee Polygraph Protection Act, Worker Adjustment and Retraining Notification Act, Family and Medical Leave Act, Employment and Reemployment Rights of Members of the Uniformed Services, Fair Housing

Act, the Americans with Disabilities Act and other federal laws protecting whistleblowers. The new law further applies to any federal, state or local law which protects civil rights or regulates any aspect of the employment relationship including claims for wages, compensation or benefits. Thus, in New Jersey it would similarly apply to cases filed pursuant to the New Jersey Law Against Discrimination, New Jersey Family Leave Act, New Jersey Wage and Hour laws, etc.

The statute is only effective prospectively and, as a result, only applies to claims which are settled after the date of enactment.

Therefore, employers involved in litigation matters should no longer be subject to the "double taxation" argument of plaintiffs as a basis for increasing settlement demands or payments and, hopefully, will enable defendants to achieve settlement of claims in a more expeditious fashion.



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