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Discrimination Against Smokers is Prohibited and May Result in Significant Damages

Ila Bhatnagar, Esquire

In New Jersey it is illegal for an employer to discriminate against an employee or a prospective employee who smokes or uses other tobacco products. This means an employer cannot take adverse employment action based on the fact the employee is a smoker. "Discrimination" under the Workers' Protections Act may come in the form of refusing to hire, discharging, or taking any adverse action against an employee with respect to compensation, terms, conditions or other privileges of employment, because that person does or does not smoke or use other tobacco products. If an employer does not want to hire a smoker or fire a current employee who is a smoker, the employer must articulate a rational basis and, under the Workers' Protections Act, N.J.S.A. 34:6B-1, *et seq*., that basis must be reasonably related to the prospective/current employee's job responsibilities.

The Workers' Protections Act is *in addition to* New Jersey's Smoking Act, N.J.S.A. 26:3D-23, *et seq*., which requires employers designate smoking and non-smoking areas in the workplace. Unlike New Jersey's Smoking Act, application of the Workers' Protections Act is broad, and is not limited to employers of any particular size or nature. The New Jersey Smoking Act only covers corporations and individual employers who employ more than fifty (50) employees. The Workers' Protections Act contains no such limits. Therefore, all employers are subject to the provisions of the Workers' Protections Act.

Potential penalties for violations of the Workers' Protections Act are steep and include fines of $2,000.00 for the first violation and $5,000.00 for each subsequent violation. In addition, the Workers' Protection Act creates a private cause of action permitting employees to file a lawsuit in the New Jersey Superior Court. Unlike the New Jersey Smoking Act which does not authorize a private cause of action, the Workers' Protections Act specifically provides an employer may be liable for compensatory and consequential damages, attorneys' fees and court costs. Even injunctive relief, including reinstatement of an employee, is an available remedy. Notably, the potential for the fee-shifting of attorneys' fees, normally borne by each party, may cause a case which is otherwise low in compensatory or consequential damages, to substantially increase in value.

Fortunately, in enacting the Workers' Protections Act, the Legislature has specifically excluded employer-sponsored health or life insurance plans from its reach, including the right of such plans to differentiate between smokers and non-smokers with respect to the amount of employee contributions or copayments under those plans. While no published New Jersey case law has yet applied the provisions Workers' Protections Act, employers must be mindful of its provisions, to avoid yet another potential employment claim.

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Department of Labor Issues Regulations Clarifying Employers' Obligations for Employees Returning From Military Leave

Diane S. Kane, Esquire

In the four and one-half years since the September 11th attacks, more than 500,000 reservists have been called to military service. Employers' obligations to these employees are governed by the Uniformed Services Employment and Reemployment Rights Act (USERRA). All private and public employers, regardless of the number of employees or nature of their business, must comply with USERRA.

The Department of Labor recently issued new final regulations interpreting and clarifying USERRA. The new regulations provide specific guidance on areas of the law which were uncertain or which have posed problems for employers. The regulations, effective on January 18, 2006, should prompt all employers to review their responsibilities under the USERRA, particularly as lawsuits for failure to comply with USERRA are increasing and have resulted in substantial verdicts against employers.

Some of the significant areas addressed by the new regulations include:

Eligibility

An employee is eligible for protection under USERRA where: (1) the employee's absence is due to the performance of duty on a voluntary or involuntary basis in the Armed Forces, the Army National Guard, or the Air National Guard; (2) the employee gives oral or written notice to his or her employer prior to leaving for military service; (3) the period of the employee's military service has not exceeded five years; (4) the employee is honorably discharged from service; and (5) the employee returns to his or her civilian job in a timely manner or submits a timely application for reemployment. All employees, even those holding temporary, part-time or seasonal positions, have rights under USERRA. Job applicants may also be covered by USERRA.

Leave of Absence

Under USERRA, all public and private sector employers are required to provide leaves of absences to employees who must be absent from work in order to satisfy a military obligation. USERRA does not require employers to pay employees who are on military leave. (However, state law may require employers to provide paid leaves of absence for a portion of an employee's military leave). The new regulations detail the obligations of employers and employees prior to a military leave of absence. First, employees must give advance notice that they intend to go on military leave unless notice is "impossible" or "impractical." Second, employees are entitled to start their military leave in advance of their actual military report date in order to put their affairs in order – and may take intermittent leave from work to do so. Third, employees are not required to inform their employers whether they intend to seek reemployment after completing their service. Finally, an employer cannot require employees to delay or reschedule military training or service, although an employer may speak with an employee's commanding officer regarding any concerns as to the timing, frequency or duration of the employee's uniformed service.

Status While on Leave of Absence

Under USERRA, employers must afford employees on military leave the non-seniority rights and benefits generally provided to other employees with similar seniority and status. This may mean an employer must provide continued life insurance, disability insurance and other benefits to employees on military leave. Employees who participate in group health plans must be afforded the right to continue coverage under such plans while on leave. If the leave is for 31 days or more, the employee can be required to pay the full cost of coverage plus a two percent administration fee.

"Prompt" Reemployment

Upon returning from military leave, an eligible employee is entitled to "prompt reemployment." The new regulations provide that absent unusual circumstances, an employee who was on leave for 31 days or more must be reemployed by his or her employer within two weeks of the employee's application for reemployment. Employees on leave for 30 days or less must be reemployed at the time of their next regularly occurring work shift.

Reemployment Under the "Escalator Principle"

The new regulations clarify a returning employee must be reinstated to an "escalator position" -- a position with the same seniority, status and pay the employee would have held if employment had not been interrupted by military service. In

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NJ DOL Recovers $4 Million in Overtime Wages Owed to Employees

Jacqueline R. Barrett, Esquire

The New Jersey Department of Labor and Workforce Development ("NJ DOL") recently announced a settlement with Nestle Waters N.A. in which $4 million will be distributed to 650 workers. In addition, Nestle Waters, N.A. will pay $400,000 in penalties and fees for overtime violations. According to the NJ DOL, this settlement is the second highest amount recovered from a single employer by the Department's Division of Wage and Hour Compliance.

Under New Jersey law, employers must pay wages of one and a half times the regular rate of pay for time those employees who are non-exempt and work beyond forty (40) hours in a week. This particular dispute arose after Nestle Waters, N.A. classified drivers as sales staff who would not normally be entitled to overtime pay. In New Jersey, however, drivers are routinely entitled to overtime pay.

According to the NJ DOL, the Division of Wage and Hour Compliance recovers approximately $6 million in back wages during a normal year. The largest settlement reached by the NJ DOL was in 2004, when the Department settled with Pepsi-Cola for $28.5 million in back pay, penalties and fees following a dispute over enforcement of wage and hour laws.

In order to assure compliance with wage and hour laws, employers should periodically re-assess the classification of employees for purposes of payment of overtime wages and ensure compliance with wage and hour laws.

New Jersey Court Holds Employer Must Deduct State and Federal Withholding Taxes From Arbitration Awards Where the Employee Remains Employed or is Reinstated

Christine P. O'Hearn, Esquire

In Amalgamated Transit Union Local 880 v. N.J. Transit Bus Operations, Inc., 2006 WL 1211187 (N.J. Super. Ct. App. Div.) (May 8, 2006), the Appellate Division held that an employer is required to deduct state and federal withholding taxes from arbitration awards where the employee remains employed and/or is reinstated as a result of the arbitration award.

Plaintiffs were employed by N.J. Transit and subject to a collective bargaining agreement which required binding and final arbitration of all grievances. Id. at 2. The three individual employees were terminated for improper conduct and thereafter filed grievances asserting termination was too harsh a penalty. Id. Pursuant to the collective bargaining agreement, the grievances proceeded to arbitration. Id. The arbitrator held termination was inappropriate, reduced each termination to a suspension, reinstated each grievant to their position of employment and ordered back pay from the end of the suspension period to the date of the employee's return to work. Id. The employer intended to pay the arbitration awards but withhold applicable state and federal taxes. Id. at 2-3. The Amalgamated Transit Union Local 880 ("the Union") filed suit seeking to confirm the arbitration awards and compel the employer to pay the arbitration awards in full without any withholdings. Id.

The trial court confirmed the arbitration awards and ordered the employer to pay the awards without any withholdings unless authorized to do so by the employee. Id. at 5. The employer appealed and the Appellate Division reversed.

The Union argued no taxes should be withheld since the payments represented a period of time where the employee did not actually work and, therefore, could not technically be considered income or wages. Id. at 8-12. The Appellate Division rejected that argument and held back pay clearly constituted wages as that term has been broadly defined by statute and case law. Id. at 7, 9. The Court held the critical consideration in determining whether taxes were required to be withhold was the status of the employment relationship between the parties. Id. The Court articulated a test of "whether the employees are being paid as a consequence of the existing employee-employer relationship, not whether they actually performed services for the employer for the back pay period." Id. at 12. Thus, in this case, the arbitrator's award which ordered the employees be reinstated continued the employee-employer relationship and was a "direct consequence their employment." As a result, the employer was required to withhold state and federal taxes. Id.

Employers should be aware of this issue and that the failure to properly withhold state and federal taxes may subject the employer to significant administrative penalties and interest.

Department of Labor Issues Regulations . . .

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cases where these variables are difficult to determine, the regulations provides guidance, citing a number of factors which employers should evaluate, and a specified method upon which the returning employee's rate of pay should be calculated. There are several limited exceptions to the "escalator principle," such as where there has been a reduction in force or where a returning employee is not qualified to perform the escalator position (although the employer is required to make reasonable efforts to assist the returning employee to become qualified for the position). Employers should be cautious when considering denying reemployment to a returning employee.

Reinstatement of Pension Benefits

The new regulations confirm USERRA's directive that upon reemployment, employees must be treated as not having had a break in service for pension plan purposes. Under the new regulations, employers must make all contributions to a returning employee's retirement account that are not contingent on the employee making contributions within 90 days after the employee's reemployment, or when contributions would normally be made for the plan year in which military service is performed.

New USERRA Posters

The Department of Labor has issued two new posters regarding USERRA rights – one for federal employers and one for use by all other employers. Employers are required to provide employees with a "notice of the rights, benefits, and obligations" under USERRA. Employers should either utilize the new poster – which is available at www.dol.gov/vets/welcome.html -- or notify their employees of the rights, benefits and obligations under USERRA by alternative means such as an employee handbook.

The new USERRA regulations are quite extensive and can be challenging to interpret and apply. Employers must review existing human resource policies and procedures, employment manuals and collective bargaining agreements to ensure compliance with the new regulations.

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Around the Firm . . . .

Louis R. Lessig, an associate attorney, spoke at the 20th Annual Tri-State Human Resource Management Association on May 4, 2006 regarding legislative issues. Mr. Lessig is a member of the Board of Directors for the Tri-State HRMA.

On June 15, 2006, the firm will launch its newly redesigned website, www.brownconnery.com.

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