

**MESSAGE FROM THE CHAIR**

**TO THE FRIENDS OF COZEN O'CONNOR:**

Our Winter 2008 Labor and Employment Law Observer covers a multitude of topics of interest to in-house counsel, human resources professionals and corporate management.

Recently, President Bush signed the National Defense Authorization Act into law, which expands the FMLA to provide enhanced leave for families of military personnel. Additionally, in mid-February 2008, the Department of Labor propounded new proposed regulations regarding the FMLA. Moreover, in late February, the Supreme Court weighed in on the use of “me too” evidence during trials.

Several new state laws have recently taken effect, including several changes to New York and New Jersey laws. Most notably, New Jersey recently amended the NJLAD to include new provisions requiring broader accommodation of employees’ religious practices and observances and has just enacted its own state WARN Act. New York has several new laws regarding wage and hour issues, breastfeeding in the workplace, blood donation, and commissioned salespeople.

The NLRB has recently addressed the issue of a union’s use of email communications in the workplace.

You can read about these and other recent labor and employment developments in this issue of the Observer.

We welcome your inquiries on the articles in this Observer, other matters of interest to you and suggestions for future topics.

Sincerely,  
Mark Foley



Chair, Labor & Employment

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### FMLA UPDATE: DOL CLARIFIES NEW MILITARY LEAVE PROVISIONS AND PROPOSES CHANGES TO EXISTING REGULATIONS

*Debra S. Friedman, Esquire*

#### Overview of What's Been Happening and What's to Come

It has been a long time coming, but changes finally are being made to the federal Family and Medical Leave Act ("FMLA").

In December 2006, the U.S. Department of Labor ("DOL") published a Request for Information, asking for public comment on the effectiveness of the FMLA and employer and employee experiences with the law. After receiving more than 15,000 comments, the DOL published a report summarizing the comments in June 2007. They then spent months working on new, proposed regulations under the FMLA, finally submitting them to the White House's Office of Management and Budget ("OMB") on January 24, 2008.

On another front, President Bush signed the National Defense Authorization Act ("NDAA") into law on January 28, 2008. Included in this voluminous law were provisions expanding the FMLA to provide enhanced leave provisions for families of U.S. military personnel. This marked the first expansion of the FMLA since its enactment 15 years ago.

The NDAA provides eligible employees with up to 26 weeks of FMLA leave in a single 12-month period to care for a parent, child, spouse or next of kin who has suffered a serious illness or injury while on active duty in the Armed Forces. This provision of the NDAA became effective on January 28, 2008.

The NDAA also provides eligible employees up to 12 weeks of unpaid leave in a 12-month period for a qualifying exigency arising out of the fact that the

employee's spouse, child or parent is on active duty or has been notified of an impending call or order to active duty. Since we issued our *Labor and Employment Alert!* on January 29, 2008, the DOL clarified that this provision of the NDAA will not take effect until the agency issues regulations defining "qualifying exigencies," although the agency is encouraging employers to grant such leave.

Then, on February 11, 2008, the DOL issued long-awaited proposed regulations. The agency stated that the regulations provide "needed clarity for both workers and employers about the law's coverage" and that they "will reduce uncertainty in the workplace for everyone." The proposed regulations are open for comment through April 11, 2008, and the DOL hopes to issue final regulations before year-end.

While there are no proposed regulations for the new military leave provisions, the regulations do address a variety of topics, such as further defining "serious health condition," waiver of FMLA rights, employer notice obligations, employee notification obligations, fitness-for-duty certifications, light duty and the medical certification process. See <http://www.dol.gov/esa/whd/FMLANPRM.htm>, and then click on "Fact Sheet" for a summary of the proposed regulations and see <http://www.dol.gov/esa/minwage/printpage.asp?REF=/esa/whd/fmla/NPRMfaq.htm> for FAQs on the proposed regulations.

The DOL stated that it will issue final regulations regarding military leave—without first issuing proposed regulations--given the need to act quickly. However, the DOL's February 11, 2008 proposal seeks comments on subjects and issues that the agency may consider in the final military leave regulations.

The proposed regulations are not without controversy. Already, at a February 13, 2008 Senate hearing, Democratic Senators Kennedy, Dodd and Murray

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criticized the proposals, stating that they make it more difficult for employees to take FMLA leave. Furthermore, there likely will be voluminous comments from both the employee and employer communities, given the significant response to the DOL's December 2006 Request for Information.

So keep tuned . . . .

### **A Closer Look at the NDAA Expansion: The New Military Leave Provisions**

While the proposed regulations provide employers with insight into specific changes that may be implemented in the future, the new military leave provisions require more immediate attention.

#### *(1) The Seriously Ill or Injured Family Member Provision:*

Effective January 28, 2008

This provision provides eligible employees up to a total of 26 workweeks of unpaid leave during a single 12-month period to care for a parent, son, daughter, spouse or next of kin who has suffered a serious illness or injury while on active duty in the Armed Forces.

The leave to care for seriously ill or injured military personnel is broad in scope. It covers members of the Armed Forces, including members of the National Guard or Reserves, who are undergoing medical treatment, recuperation, or therapy, are otherwise in outpatient status, or are otherwise on the temporary disability retired list, for a serious injury or illness.

“Serious injury or illness”--in the case of a member of the Armed Forces--is defined as an “injury or illness incurred by the member in line of duty on active duty in the Armed Forces that may render the member medically unfit to perform the duties of the member’s office, grade, rank, or rating.” “Outpatient status” includes military personnel assigned either to a military medical treatment facility as an outpatient or to a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients.

#### *(2) The Qualified Exigency Provision: Effective upon Issuance of DOL Regulations*

This provision provides eligible employees up to 12 weeks of unpaid leave in a 12-month period for a qualifying exigency arising out of the fact that the employee’s spouse, son, daughter, or parent is on active duty or has been notified of an impending call or order to active duty in the Armed Forces in support of a contingency operation.

Leave arising from an immediate family member’s call to active duty is not clearly defined. Indeed, Congress did not define “qualified exigency,” leaving it up to the DOL to do so.

#### *(3) Implementing the Military Leave Provisions*

There are many unanswered questions about how the new military leave provisions will work. Right now, however, we can make several general comments on its application.

FMLA leave for an eligible employee whose parent, child or spouse is called to active duty is counted toward the employee’s annual 12-week entitlement under the law. Only eligible employees caring for a family member who has suffered a serious injury or illness while on active duty in the Armed Forces are entitled to more than 12 weeks of unpaid leave in a 12-month period. In that situation, eligible employees may use up to 26 weeks of unpaid leave in a single 12-month period. Here too, however, the 26 weeks of leave is a combined total and includes any and all types of FMLA taken in a 12-month period.

In several ways, administration of the new leave provisions mirrors existing FMLA provisions. For instance, employees may take these new types of FMLA leave on an intermittent basis or reduced schedule. Moreover, if a family member’s call to active duty is foreseeable, the employee must provide the employer with reasonable notice of the need for such leave.

Employers also may require a healthcare certification when an employee is taking leave to care for a family member who has suffered an injury or illness while on active duty. Finally, employers may require certification that an employee’s parent, spouse or child has been

called to active duty when leave for that reason is requested if and when the Secretary of Labor issues a regulation requiring the certification.

### *Actions for Employers to Take Now*

While employers may prefer to wait and see what other FMLA changes are on the way before taking action, they do so at their peril. Employers must immediately notify their employees of the new military leave provisions. They should not wait for regulations to be issued by the U.S. Department of Labor.

The DOL recently issued a new FMLA poster insert, which can be accessed by going to <http://www.dol.gov/esa/whd/fmla/#poster>, scrolling down to “Workplace Posters,” and clicking the link for “FMLA Poster Insert for Military Family Leave Amendments.” Employers should post this insert with their existing FMLA poster.

Employers also should review and revise, as necessary, their FMLA policies (stand-alone and employee handbook versions) and procedures to ensure that they reflect the military leave provisions. While employers may need to revisit these documents when new regulations come out, revising documents now helps ensure proper implementation of the military leave provisions that currently are in effect.

Although not required to do so until final regulations are issued, employers should consider granting FMLA leave for employees whose family members are called to active duty. If an employer chooses to provide such leave, we recommend interpreting the term “qualifying exigency” broadly until the DOL issues regulations defining it. If the regulations define the term more narrowly than the employer has been interpreting it, the employer may follow the more narrow definition once it becomes effective.

Finally, employers should ensure that their Human Resource personnel and front line managers are aware of the new leave provisions. These employees should be trained to identify requests for all types of FMLA protected leave as employees are not required to reference the FMLA specifically, but only to put their employers on notice of the need for a protected leave under the law.

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### **SUPREME COURT: NO PER SE RULE ON “ME TOO” EVIDENCE**

*Jeffrey I. Pasek, Esquire*

Very few things are more frustrating for an employer facing a discrimination lawsuit than having to fight two different claims in the same lawsuit.

This frequently happens when the plaintiff tries to prove discrimination by parading out some other employee witnesses to say “the same thing happened to me.” Known as “me too” evidence, this kind of testimony is very difficult to confront. The big legal question is whether it should ever be admitted in the first place.

The Supreme Court has now weighed in on this issue with a definitive maybe, creating yet one more area of uncertainty for the parties just before they are ready to begin trial.

The Court’s ruling came in an age discrimination case that grew out of a reduction in force: *Sprint/United Management Co. v. Mendelsohn*. Plaintiff sought to introduce testimony by five other Sprint employees who claimed that their supervisors had discriminated against them because of their age. Three of these witnesses alleged that they heard managers make denigrating remarks about older workers. One claimed that Sprint’s intern program was a mechanism for age discrimination and that she had seen a spreadsheet suggesting that a supervisor considered age in making layoff decisions. Another witness claimed that he had been given an unwarranted negative evaluation because of his age and that he had seen another employee being harassed because of her age. The final witness claimed that Sprint had required him to get permission to hire anyone over age 40, that the company had replaced him with a younger person and rejected his subsequent employment applications.

Sprint filed a motion before the trial to exclude all of this evidence. According to the company, none of the

five witnesses worked in the same department as the plaintiff or worked under supervisors in the same chain of command. None of the witnesses claimed to have heard any discriminatory comments by the management chain responsible for plaintiff's termination.

The company's legal argument was based on a lack of relevance because it claimed that none of the proposed witnesses was similarly situated to the plaintiff. Sprint also argued that whatever probative value the evidence might have would be substantially outweighed by the danger of dealing with unfair prejudice, confusion of the issues, misleading the jury and undue delay.

Although Sprint was successful at the trial court level, the plaintiff appealed its ruling that she could offer evidence of discrimination against Sprint employees who were similarly situated to her. The Court of Appeals for the Tenth Circuit reversed. It characterized the trial court's ruling as the application of a per se rule that evidence from employees with other supervisors is irrelevant to proving an age discrimination claim. Deciding that the evidence was relevant and admissible, the Court of Appeals remanded the case for a new trial.

A unanimous Supreme Court reversed in an opinion that chided the Court of Appeals for stepping on the turf of the trial court. Whether evidence of discrimination by other supervisors is relevant in an individual case is fact based and depends on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case. This requires a fact intensive, context-specific inquiry. Eschewing application of any per se rules, the Supreme Court ordered that the case be sent back to the trial court judge to make that determination in the first instance. The court also noted that evidentiary rulings by the trial court should not ordinarily be overturned except when the trial judge has abused his discretion.

The end result is that litigants will have to focus more clearly on pretrial motions to exclude particular forms of evidence. Rather than argue about general categories of evidence, such as "me too" testimony, the parties will have to present the trial court with a contextualized showing as to why particular testimony should or should not be admitted.

Major rulings on evidentiary issues are usually made just before trial, but these are only tentative judgments by the judge and can be reversed based on what occurs at trial. The lack of any per se rules on issues such as "me too" testimony means that the outcome of cases will be less predictable for a longer period of time thus putting both sides at greater risk.

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### NLRB ADDRESSES E-MAIL COMMUNICATIONS AND SUBSTANTIALLY REVISES DISCRIMINATORY ENFORCEMENT RULE

*Jeffrey L. Braff, Esquire*

It is well-established that the key to successful union organizing is communications: communications between the union and the targeted workforce, as well as communications among the members of the targeted workforce. A number of "rules" have been developed over the years by the National Labor Relations Board which address employer efforts to curtail the "traditional" forms of communications used in organizing: oral solicitation, distribution of written materials, and posting of notices. These can be whittled down to the following:

- An employer may prohibit employees from engaging in oral solicitation or discussion of terms and conditions of employment on working time.
- An employer may prohibit the distribution of written or printed materials during working time or in work areas.
- An employer may not enforce a facially lawful no-solicitation/no-distribution rule in a discriminatory manner, i.e., against union organizing activity, but not against solicitations for Tupperware parties or sports pools.
- An employer may not institute a new no-solicitation/no-distribution rule in the midst of an organizing campaign.
- An employer may not discriminatorily prohibit union postings on an employer's bulletin board, but permit other non-business notices such as babysitting services or items for sale.

- An employer may prohibit access to its private property by non-employee union organizers if there is another reasonable means by which the organizers can communicate with the employer's employees.

In prior issues of the OBSERVER we have noted that a number of unions are now using the Internet and e-mail to assist them in their organizing efforts, and that websites providing information and misinformation, as well as "chat rooms," have become increasingly popular. In addition, the speed of e-mail makes it an organizer's dream.

There would appear to be nothing that an employer can do to prevent a union from using the "new technology" to communicate with employees outside of the workplace. In that regard, perhaps the best that an employer can do is to monitor the union's website to enhance its knowledge of what the union is doing, and to use the new technology itself. But what about use of the new technology *within* the workplace, *i.e.*, through the use of the company's own computers and e-mail system: (1) can an employer prevent its employees from sending e-mail messages to one another, or to the union, using the company's hardware and software?; and (2) will the same rules be applied to e-mail as have been used with respect to "traditional" forms of organizing activities?

In *Guard Publishing Co. d/b/a Register Guard*, 351 NLRB No.70, a 3-2 decision issued just before Christmas, and some nine months after taking the rather unusual step of holding oral argument, the Board provided its answers to these two questions: (1) "yes;" and (2) "yes, but." The rules with respect to discriminatory enforcement have changed substantially.

Register - Guard had a Communications System Policy ("CSP") addressing its communications systems, including e-mail, which included the following provision:

Company communication systems and the equipment used to operate the communications systems are owned and provided by the Company to assist in conducting the business of The Register Guard. Communications sys-

tems are not to be used to solicit or proselytize for commercial ventures, religious or political causes, outside organizations, or other non-job related solicitations.

The case arose out of the discipline of an employee, who was also the union's president, for violating the CSP by sending three union-related e-mails to Company employees at their Register Guard e-mail addresses. Two of the e-mails were sent from the union's office; the third was sent from the president's work station.

### Ownership Of Communications System Is Controlling

The Board majority commenced its analysis by concluding that, since the Company's communications system, including its e-mail system, was the Company's property and was purchased and maintained by the Company for use in operating its business, the employees had no statutory right to use Register Guard's e-mail system in the absence of evidence that there was no means of communication among employees at work other than e-mail. The majority placed substantial emphasis on the fact that the Company's policy did not prohibit traditional face-to-face solicitation, and noted that the National Labor Relations Act protects organizational rights, rather than the particular means by which employees may seek to communicate.

Rejected was the position urged by the dissenters that e-mail has revolutionized communication; that an e-mail system is not "a piece of communications equipment to be treated the same as bulletin boards, telephones, and pieces of scrap paper;" and that, accordingly, a balancing test should be applied, weighing the employees' Section 7 rights (*i.e.*, to organize, bargain collectively, and engage in concerted activities for the purpose of bargaining or other mutual aid or protection) against the employer's property interests. Thus, according to the dissent, a broad ban on employee non-work-related e-mail communications should be presumptively unlawful absent the showing of special circumstances.

## Discriminatory Enforcement Analysis

Because it is not limited to communications by e-mail, the Board's modification of the law regarding discriminatory enforcement of employer communications policies may be of even greater significance than the decision that e-mail use can be restricted. The undisputed evidence in the case revealed that Register Guard was well aware that employees used the Company's e-mail system to send and receive numerous non-job related messages, including: to circulate jokes, baby announcements, and party invitations; to offer sports tickets; to seek a dog walker; to organize a poker group; to make lunch plans; and to solicit support for the United Way. Accordingly, and not surprisingly, the union argued that, even if the CSP was lawful on its face, it was unlawful as applied because it discriminated between union related e-mail and other non-job-related messages.

The Board concluded that existing Board precedent on this issue was not sufficiently precise, and that the guiding principal in discriminatory enforcement cases must be the "unequal treatment of equals. Thus, in order to be unlawful, discrimination must be along Section 7 lines. In other words, unlawful discrimination consists of disparate treatment of activities or communications of a similar character because of their union or other Section 7 - protective status."

The Board then provided the following examples of unlawful discrimination and lawful discrimination.

### Unlawful Discrimination

- Permitting employees to use e-mail to solicit for one union but not another.
- Permitting solicitation by antiunion employees but not prounion employees.

### Lawful Discrimination

- Distinguishing between charitable solicitations and non-charitable solicitations.
- Distinguishing between solicitations of a personal nature (e.g., a car for sale) and solicitations for the commercial sale of a product (e.g., Avon products).

- Distinguishing between invitations for an organization and invitations of a personal nature.
- Distinguishing between solicitations and mere talk.
- Distinguishing between business-related use and non-business related use.
- A rule barring all non-work-related solicitations by membership organizations.

And the Board reaffirmed its prior holdings that an employer does not violate the Act by permitting limited charitable solicitations, i.e., isolated "beneficent acts," as a narrow exception to a no-solicitation rule, while prohibiting union solicitation.

## Warning

This decision is extremely employer-friendly. However, though buried in a footnote, and confined to a single sentence, after providing the foregoing examples of lawful discrimination, the Board adds:

Of course, if the evidence showed that the employer's motive for the line-drawing was antiunion, then the action would be unlawful.

Accordingly, those employers seeking to remain union-free would be well-advised to implement a no-solicitation and no-distribution rule, a rule restricting the use of the company bulletin board, and a rule restricting the use of the company's communication system, including its e-mail system, and to do so well prior to being the target of an organizing drive.

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### NEW AMENDMENTS TO THE NEW JERSEY LAW AGAINST DISCRIMINATION

*Sarah A. Kelly, Esquire*

#### Require Accommodation of Religious Practice

The New Jersey Law Against Discrimination (“NJLAD”) was amended, effective January 13, 2008, to include new provisions requiring broader accommodation of employees’ religious practices and observances. Prior to the amendment, New Jersey’s statute, like most state anti-discrimination laws, conformed to Title VII of the federal Civil Rights Act with respect to prohibited discrimination on the basis of religion. Under federal law, discrimination on the basis of religion has been prohibited since 1964. However, federal courts have held that if workplace accommodation of an employee’s religious practice or observance imposes more than a *de minimis* burden on an employer, an employer need not make the accommodation.

The intent of the amendments to the NJLAD is to raise the threshold of the employer’s duty to provide accommodation. Thus, with the amendment, which is effective immediately, employers are prohibited from imposing any term or condition of employment, with respect to hiring, retention, promotion, or transfer, that would require an employee to violate or forego a sincerely-held religious practice or religious observance.

In order to deny a reasonable religious accommodation, an employer must show that it would be an undue hardship to provide the accommodation. An undue hardship is defined as:

- one requiring unreasonable expense or difficulty;
- one which interferes with the safe or efficient operation of the workplace;
- one which requires violation of a seniority system or a collective bargaining agreement;
- one which results in the inability of an employee to perform the essential functions of the position in which he or she is employed; or
- one in which a uniform application of terms

and conditions of attendance to all employees is essential to prevent undue hardship to the employer. (The employer will have the burden of proof on this issue).

In determining whether an undue hardship exists, the statute mandates that the following factors be considered:

- the identifiable cost of the accommodation, including the costs of lost productivity and of retaining or hiring employees, or transferring employees from one facility to another, in relationship to the size and operating costs of the employer;
- the number of individuals who will need the particular accommodation for a sincerely-held religious observance or practice; and
- for an employer with multiple facilities, the degree to which the geographic separateness or administrative or physical relationship of the facilities will make the accommodation more difficult or expensive.

The amendment specifically notes that religious observance includes the observance of any particular day or days, or portion thereof, as a Sabbath or other holy day, in accordance with the requirements of the religion or religious belief. Specifically with respect to observance of the Sabbath or a holy day, the law states that unless an undue hardship would arise, an employee may not be required to remain at his or her place of employment during any day or portion of a day which is observed as a Sabbath or other holy day, including a reasonable time prior to and subsequent to work, for travel between employment and home. An employee must be permitted to utilize leave time, if available, in accommodation of a religious observance or practice. If such time is not available, the amendment provides that an employee may be required, when practicable, in the reasonable judgment of the employer, to make up time off by working an equivalent amount of time and work at some other “mutually convenient time.” The absence may also be charged against any leave time available to the employee, other than sick leave, even if the employee does not wish it to be. If the time is neither made up for nor charged against leave time,



the employer may treat that time as leave taken without pay. The amendment specifically provides that, notwithstanding any other provision to the contrary, an employee is not entitled to premium wages or premium benefits for work performed during hours to which such premium wages or benefits would otherwise be applicable, if the employee is working during those hours only as an accommodation to his or her religious requirements.

Obviously, these new amendments to the NJLAD create some additional concerns and obligations for employers. Thus, when an employee asks for a religious accommodation, employers will need to review the request carefully, considering these new amendments. Employers should seek legal counsel if they have any questions

about the applicability of these new amendments to an employee's request for religious accommodation.

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### ATTORNEY-CLIENT PRIVILEGE DOES NOT PROTECT EMPLOYEE'S E-MAILS TO HIS ATTORNEY SENT USING EMPLOYER'S E-MAIL SYSTEM

*George A. Voegele, Esquire*

A New York trial court recently concluded that an individual's e-mails to and from his attorney were not protected by the attorney-client privilege when the individual used his employer's e-mail system to send and receive the messages. The decision also confirms that attorneys should not place much reliance on boilerplate claims of privilege attached to the end of e-mails to protect their client communications.

In *Scott v. Beth Israel Medical Center*, \_\_\_ N.Y.S.2d \_\_\_, 2007 WL 3053351 (N.Y. Sup. Oct. 17, 2007), an employee (Dr. Scott) used his office e-mail account to send e-mails to his attorney regarding planned legal action against his employer. The attorney also sent e-mails to Scott's workplace e-mail address. During ensuing litigation, the employer learned of these e-mails. It took the position they were not protected by any privilege. Scott asserted that the e-mails were protected by the attorney-client privilege and/or the work

product doctrine. In concluding that the attorney-client privilege did not insulate the e-mails from discovery, the court noted that the employer had a policy in place which provided that: (1) all company computer and e-mail systems are the property of the company and are to be used for business purposes only; and (2) employees have no privacy right in any e-mails created, sent, or received using the company's e-mail system.

Scott claimed he was unaware of these policies. However, the court concluded that he had sufficient notice because he had personally required newly-hired doctors to sign forms acknowledging they had read and were aware of the e-mail policy.

The court also rejected Scott's argument that the e-mails were protected by the work product doctrine. Scott's attorney attached to each e-mail it sent him a notice stating that the e-mail *may* be confidential and that the attorney should be notified if anyone other than the intended recipient gains access to the e-mail. The court found that this notice did not override the employer's e-mail policy whereby it was made clear that employees had no expectation of privacy in their e-mails: "When client confidences are at risk, [a law firm's] *pro forma* notice at the end of the e-mail is insufficient and not a reasonable precaution to protect its clients."

The impact of this decision is specific to New York, and the result may have been different in another jurisdiction applying different confidentiality or privilege law. Nevertheless, the case offers two important lessons: (1) employees must keep in mind that their employer's computer and e-mail systems are not their own. As a result, documents and e-mails created or received by employees on a company's computer or e-mail system may not be considered confidential or protected by legal privileges; and (2) boilerplate claims of privilege attached to e-mails from law firms to their clients may not be sufficient to preserve the attorney-client privilege. The Scott decision demonstrates that in certain jurisdictions firms should take additional, active steps to preserve an e-mail's confidentiality, such as ensuring the e-mails are sent only to a client's personal e-mail account.

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### THE FORGOTTEN NEW YORK STATE LABOR LAW

*By Michael C. Schmidt, Esquire*

Most companies focus on federal laws that impose requirements on the employer-employee relationship. Whether the issue is compliance with employee leave requirements, anti-discrimination and harassment protocol, or wage and hour obligations, much ink has been spilled in law journal articles and written judicial decisions interpreting the Family and Medical Leave Act, the Fair Labor Standards Act, Title VII of the Civil Rights Act, and other federal laws governing the employment arena.

However, companies often pay a price for failing to consider, even unintentionally, the various obligations imposed on the state level. Thus, companies with offices located in New York, or that have employees who are based in and work in New York, should take notice of the statutory requirements that do exist in the “forgotten” New York State Labor Law. This article summarizes a few of the recently-enacted provisions of the New York State Labor Law, and then reviews the primary sections of the Labor Law that govern an employer’s wage payment obligations.

#### Recent New York Legislative Enactments

The New York State Legislature recently enacted several new statutory provisions. For example, Section 206-c of the New York Labor Law created a “Right of Nursing Mothers to Express Breast Milk” as of August 15, 2007. The primary provisions of this new law include the requirement that employers provide reasonable, unpaid break time, or permit an employee to use paid break time or meal time, to allow an employee to express breast milk for up to 3 years following child- birth. Section 206-c also requires an employer to make reasonable efforts to provide a private room in close proximity to the employee’s work area, and expressly prohibits discrimination against any employee who chooses to express breast milk in the workplace.

Another new leave obligation was enacted in New York as Labor Law Section 202-j to provide a “Leave of Absence for Blood Donation Granted to

Employees.” Effective December 13, 2007, this law requires employers of 20 or more employees to grant to any employee who works an average of 20 or more hours per week, three hours of leave in any 12-month period for the purpose of donating blood. Section 202-j prohibits retaliation against an employee for requesting or taking such leave.

Next, Section 191[1][c] of the New York Labor Law was amended as of October 16, 2007 to require that the terms of employment for all commissioned salespersons be put in writing. While many employment relationships are not reduced to a written agreement between the parties, the potential confusion and difficulty that has arisen in the context of commissioned salespersons in determining when commissions are owed and how they are calculated, has resulted in the New York Legislature’s attempt to provide some minimum requirements. Thus, while this new provision does not impose any particular terms or conditions on the employment relationship, Section 191[1][c] does require that the terms of employment, whatever they may be, must be set forth in writing as follows:

- The writing between the employer and commissioned salesperson must contain, at a minimum: (i) a description of how wages, salary, drawing account, commissions, and all other monies earned and payable to the salesperson are to be calculated; (ii) if the parties’ agreement provides for a recoverable draw on commissions, the frequency of reconciliation between the draw and any commissions earned; and (iii) details concerning the manner in which wages, salary, drawing account, commissions and all other monies earned will be paid in the event of termination of the employment relationship by either party.
- The writing must be signed by both the employer and the commissioned salesperson, and must be retained by the employer for a minimum period of three years.
- If the employer fails to provide the required writing, or fails to update any existing writing to conform to the new requirements, a presumption will arise in any subsequent dispute

that the terms of employment are as presented by the commissioned salesperson – not the employer.

Finally, the New York State Legislature enacted a new Section 399-h of the New York General Business Law, effective December 4, 2006 and entitled “Disposal of Records Containing Personal Identifying Information.” While not contained in the New York Labor Law, employers should take note of this provision, which prohibits a company from disposing of any record that contains “personal identifying information” unless that company either shreds the record before disposing of it, destroys the “personal identifying information” contained in the record, modifies the record in such manner as will render the “personal identifying information” unreadable, or otherwise takes appropriate action consistent with industry practices to ensure that no unauthorized person will have access to such information. Violations of this new provision can result in a court issuing an injunction, as well as imposing a civil penalty up to a maximum of five thousand dollars for each violation.

### **The New York Wage and Hour Law**

As noted above, when it comes to compliance with wage payment obligations, most companies look for guidance to the provisions of the federal Fair Labor Standards Act (“FLSA”). Viewed broadly, the FLSA covers issues pertaining to minimum wages, maximum hours/overtime compensation, equal pay for equal work, and child labor standards. In 1967, prohibitions against age discrimination were added to the FLSA.

However, the FLSA does not regulate the specifics of wage payments. Instead, state law generally regulates the details of wage and hour obligations, such as when and how wages must be paid, what deductions can be taken from wages, and general requirements for meal and rest periods. In New York, those requirements are embodied primarily in Article 6 of the New York Labor Law and four wage orders issued by the Department of Labor. It is critical that employers understand the New York State obligations, particularly as federal law does not preempt state law in this area.

To begin a summary of the “forgotten” New York State requirements, Section 190 of the New York Labor Law

contains relevant definitions. For example, an “employer” is defined broadly to include “any person, corporation or association employing any individual in any occupation, industry, trade, business or service.” “Employee” is defined, in a similarly helpful way, as “any person employed for hire by an employer in any employment.” These terms are intentionally defined broadly to effectuate the wide reach intended by these regulations.

The term “wages” is defined by Section 190 as “the earnings of an employee for labor or services rendered, regardless of whether the amount of earnings is determined on a time, piece, commission or other basis.” Effective October 18, 2007, the definition of “clerical and other workers” (when defining the particular class of employee) was amended to include all employees, other than manual workers, railroad workers, and commissioned salespersons, but to specifically exempt any person employed in a bona fide executive, administrative, or professional capacity whose earnings are in excess of \$900 per week. Prior to the October 2007 amendment, the monetary threshold was \$600 per week.

In terms of substantive obligations, Section 191 of the New York Labor Law addresses the timing of wage payments. For the majority of employees, wages must be paid in accordance with the agreed terms of employment, but not less frequently than semi-monthly. Commissioned salespersons must be paid wages, salary, drawing accounts, commissions and other monies earned or payable in accordance with the agreed terms of employment (as provided in writing under the new law described above). Sections 191-b and 191-c impose other obligations on the payment of commissions to sales representatives employed by certain persons or companies engaged in the business of manufacturing. In light of these provisions, it is critical for all employers who compensate employees at least in part based on commissions to create a policy identifying when a commission is deemed to be “earned” or “payable,” and to apply that policy consistently. Employers are required by law to pay the wages of terminated employees no later than the regular payday for the pay period during which the termination occurred.

Next, Section 192 of the Labor Law provides that an employer can only utilize a direct deposit method of

wage payment if it obtains the advance written consent of the particular employee. This provision does not apply to a person engaged in a bona fide executive, administrative, or professional capacity who earns more than \$900 per week.

Section 193 imposes strict prohibitions against making deductions from an employee's wages. Specifically, an employer can only deduct money from an employee's wages if the deduction is made in accordance with the provisions of a particular law or regulation, or if the deduction is expressly authorized in writing by the employee and the deduction is for the benefit of the employee, such as insurance premium payments, union dues, or pension or welfare benefits.

Additionally, an employer is prohibited from making any charge against an employee's wages, or from otherwise requiring an employee to make any payment to the employer by separate deduction as a way of circumventing the rule prohibiting unauthorized deductions. By way of example, Section 193 would prohibit an employer from deducting an amount from wages due to a shortage found in an employee's cash register, due to an employee's failure to return a company uniform, or due to any lost, damaged, or unsold inventory, or any other violations of company policy. An employer may, however, discipline an employee up to and including termination for violations of company policy, but may not make any unauthorized deductions from an employee's wages.

Section 194 of the Labor Law prohibits an employer from paying unequal wages to employees on account of their gender when the employees work in the same establishment, perform equal work requiring equal skill, effort and responsibility, and perform under equal working conditions. However, pay rate differentials can be made if such differential is based on a seniority system, a merit system, a system that measures earnings by quantity or quality of production, or any factor other than an employee's gender.

Section 195 of the Labor Law imposes certain miscellaneous obligations that should be noted as well. Specifically, it requires an employer (1) to notify its employees at the time of hiring, of the rate of pay and the regular pay day designated by the employer, (2) to

notify its employees of any changes in the designated pay day prior to the change, (3) to notify a terminated employee in writing of the exact date of termination and the exact date of cancellation of employee benefits connected with the termination, and (4) to notify its employees in writing or by publicly posting the employer's policy on sick leave, vacation, personal leave, holidays and hours. An employer is not required by state law to actually provide sick leave, vacation, or personal leave, but must at least notify its employees of the employer's policy on these matters. Section 195 further requires employers to preserve and maintain employees' payroll records for a period of at least 3 years.

Finally, the New York Labor Law provides significant criminal and civil penalties for violations. Section 197 authorizes the Department of Labor to impose a civil penalty for each failure of an employer to pay wages to an employee, and for each violation of the equal pay provisions. Section 198 authorizes an employee to commence a lawsuit alleging a violation of the Labor Law and to recover compensatory damages, liquidated damages in the amount of 25% of the total amount of wages owed, and attorneys' fees. In addition, Section 198-a provides that an employer (and any officers and agents of a corporation who knowingly permit the corporation to violate the Labor Law) can be found guilty of a misdemeanor for the first offense, and a felony for the second offense, with a fine of no more than \$20,000 and/or imprisonment for no more than one year.

Therefore, it is critical that employers in New York understand and comply with the New York State Labor Law, in addition to the more familiar requirements contained in the applicable federal law.

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## EEOC ISSUES FINAL RULE EXEMPTING COORDINATION OF SOME RETIREE HEALTH BENEFITS FROM THE AGE DISCRIMINATION IN EMPLOYMENT ACT

*Anita B. Weinstein, Esquire*

### Final Rule allows coordination of benefits with Medicare for retirees

On December 26, 2007, the Equal Employment Opportunity Commission (EEOC) issued its Final Rule amending the Age Discrimination in Employment Act (ADEA) to permit an exemption for employers to coordinate retiree health benefits with Medicare or a comparable health benefit plan. The Final Rule recognizes that “some employee benefit plans provide health benefits for retired participants that are altered, reduced or eliminated when the participant is eligible for Medicare health benefits or for health benefits under a comparable State health benefit plan, whether or not the participant actually enrolls in the other benefit program.” Sec. 1625.32 (b). The Final Rule provides that “it is hereby found necessary and proper in the public interest to exempt from all prohibitions of the Act such coordination of retiree health benefits with Medicare or a comparable State health benefit plan.” *Id.* A comparable State health benefit plan is defined as a state sponsored health benefit plan that provides retired participants who have attained a minimum age with health benefits whether or not the type, amount or value of the benefits is equivalent to benefits provided under Medicare. Sec. 1625.32 (a)(3).

The exemption is to be construed narrowly and does not affect any other aspects of the ADEA. The Final Rule provides that the exemption does not apply to the use of eligibility for Medicare or a comparable State health benefit plan in connection with any act, practice or benefit not specified in the Final Rule. Sec. 1625.32(c).

In all other respects, the ADEA applies to retirees to the same extent it did prior to the issuance of the Final Rule.

### ADEA enacted to prohibit age discrimination

The ADEA was enacted in 1967 to prohibit age discrimination against persons over 40 with respect to compensation, terms, conditions or privileges of employment. It applies to employers with 20 or more employees, employment agencies, and labor organizations. The ADEA applies to both employees and applicants. The EEOC reports that in 2006, 16,548 charges under the ADEA were received. Approximately 10% of the charges which were resolved resulted in a settlement. 61.8% of the charges resulted in a finding of no reasonable cause.

### Older Works Benefit Protection Act amends ADEA

The Older Workers Benefit Protection Act (OWBPA), enacted in 1990, amended the ADEA with respect to providing benefits and waiving rights under the OWBPA. Under the OWBPA, compensation, terms, conditions or privileges of employment encompass all employee benefits, including benefits provided under a bona fide employee benefit plan. The OWBPA provides that the actual amount of payment made or cost incurred on behalf of an older worker for benefits must be no less than that made or incurred on behalf of a younger worker.

When resolving claims or waiving rights, the OWBPA provides specific requirements for a waiver to be considered “knowing and voluntary.” The waiver must be part of an agreement which specifically refers to rights or claims arising under the OWBPA; no rights or claims may be waived after the date that the waiver is executed; valuable consideration is required; the employee is advised in writing to consult with an attorney and given a period of at least twenty-one (21) days within which to consider the agreement (forty-five (45) days if the waiver relates to an exit incentive or termination program) and a period of seven (7) days after execution to revoke the agreement.

### “Equal benefits or equal cost”

In *Erie County Retirees Ass’n v. County of Erie*, 220 F.3d 193 (3d Cir. 2000), the court affirmed the “equal benefits or equal cost” mandate of the ADEA. The

United States Court of Appeals for the Third Circuit held that a reduction or elimination of retiree health benefits when retirees became eligible for Medicare violated the ADEA unless the employer could show either that the benefits available to Medicare-eligible retirees were equivalent to the benefits provided to retirees not yet eligible for Medicare or that it spent the same money for both groups of retirees. The EEOC followed this “equal benefits or equal cost” ruling in its national enforcement policy.

### **AARP sues EEOC to prevent exemption**

In response to many organizations including, inter alia, labor organizations, the EEOC issued a notice of proposed rule making in 2003 to address concerns regarding the relationship between the ADEA and employer sponsored retiree health benefits and to exempt the prohibition of coordinating health benefits for Medicare eligible retirees. In response to the proposed exemption, AARP filed suit against the EEOC to keep the rule from going into effect. In 2007, the Third Circuit Court of Appeals upheld the exemption finding:

“We recognize with some dismay that the proposed exemption may allow employers to reduce health benefits to retirees over the age of sixty-five while maintaining greater benefits for younger retirees. Under the circumstances, however, the EEOC has shown that [its] narrow exemption from the ADEA is a reasonable, necessary, and proper exercise of its Section 9 authority, as over time it will likely benefit all retirees.”

*AARP v. EEOC*, 489 F.3d 558, 564-565 (3d Cir. 2007). AARP subsequently filed a petition for certiorari to the United States Supreme Court which is pending as of this writing. This decision paved the way for the Final Rule in its present form.

The exemption does not apply to health benefits for Medicare eligible employees who are not yet retired. Further, the exemption applies to health benefits of dependents or a spouse which may be included as part of the health benefits provided to the retiree.

In all other respects, the ADEA must be followed with respect to all terms and conditions of employment.

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### **INTERVIEW QUESTIONS IN COMPLIANCE WITH THE IMMIGRATION AND NATIONALITY ACT: WHAT NOT TO ASK**

*Elena Park, Esquire*

With employer investigations and enforcement by Immigration and Customs Enforcement a hot topic these days, recruiters may be tempted to weed out unlawful workers and, by extension, foreign nationals, early in the hiring process. But asking questions about nationality could lead to discrimination claims and lawsuits. The Immigration and Nationality Act (INA) prohibits discrimination with respect to the hiring, or recruitment or referral for a fee for reasons such as the person’s national origin or citizenship status. Moreover, verification tools such as the I-9 Employment Verification form and *E-Verify* may not be used to check out job candidates prior to hire.

How can employers make sure the people they hire are legal? First, be aware of who can work legally in this country. Not only U.S. citizens are permitted to work: permanent residents and asylees/refugees are also granted permanent employment authorization. The INA specifically protects these groups from discrimination. So asking questions such as “are you a U.S. citizen?” or “what is your nationality?” should be avoided. Similarly, employers should steer away from job questionnaires requesting nationality information or advertising for “U.S. citizens only” positions. For employers who do not wish to sponsor foreign workers for temporary visas, the better way to limit the position is to “U.S. residents.” Employers may also ask whether the candidate is legally allowed to work in the U.S. and/or requires visa sponsorship. Another way of asking the question is “[a]re you one of the following: (1) U.S. citizen; (2) permanent resident; (3) asylee/refugee? Do not specify which one.” Remember that if you choose to ask these types of questions, *every* candidate should be asked the same or

similar question. Employers can avoid both discrimination claims and hiring unlawful workers by recruiting and hiring the best candidate, irrespective of nationality or citizenship status, and then verifying work authorization after hire.

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## NEW JERSEY'S NEW WARN ACT

*Carrie B. Rosen, Esquire*

In December 2007, New Jersey enacted its own version of the federal WARN Act. The Millville Dallas Airmotive Plant Job Loss Notification Act (“the New Jersey Act”), signed into law by Governor Corzine on December 20, 2007 and effective immediately, requires New Jersey employers to consider yet another statute when conducting a mass layoff or plant shutdown. While the New Jersey Act is similar in many regards to the federal WARN Act, there are several key differences in the two laws.

### New Jersey WARN Act

The New Jersey Act is applicable in situations where an establishment is subject to a “transfer of operations” or a “termination of operations” which results, during any period of not more than 30 days, in the termination of employment of 50 or more full-time employees, or where an employer conducts a mass layoff.

Similar to WARN, the New Jersey Act requires employers who employ 100 or more full-time employees to provide at least 60 days notice before the first termination of employment in connection with “the termination or transfer of operations,” or mass layoff to (i) the New Jersey Commissioner of Labor and Workforce Development, (ii) the chief elected official of the municipality where the establishment is located, (iii) each employee whose employment is to be terminated, and (iv) any collective bargaining units of employees at the establishment.

Interestingly, the New Jersey Act excludes from its definition of “establishment” those places of employment that have been operating by the employer for less than three years.

### Notice Requirements

The notice required by the New Jersey Act is broader and more detailed than the notice required under WARN. Among other requirements, the New Jersey notice must contain the number of employees whose employment will be terminated, the date on which the mass layoff or transfer or termination of operations and each termination of employment will occur, a statement as to the reasons for the mass layoff/transfer/termination of operations, a statement as to other employment available with the employer, a statement of any employee rights as to wages, severance pay, benefits or pension, and a disclosure as to severance pay payable pursuant to the New Jersey Act for failure to provide the required 60-days notice. The notice is to be provided on a form to be developed by the Commissioner of Labor and Workforce Development by March 19, 2008. In contrast, WARN notices need not be on a particular form and the notices sent to employees do not require an employer to provide the reasons for the layoff or plant closing, the numbers of employees who will be affected, a statement as to other employment available, or a statement of employee rights as to wages, severance pay, benefits or pension (although WARN notices to unions and local government require some additional information).

### Limited Defenses for Failure to Provide Notice

Unlike WARN, the New Jersey Act does not provide the same economic defenses for failure to provide 60-days notice. Specifically, the New Jersey Act does not contain a faltering business or unforeseen business circumstances exception.

### Severance Pay Penalties for Failure to Provide 60-days Notice

Unlike WARN, the New Jersey Act requires employers to pay severance pay to the affected employees where the employer provides less than 60-days notice. In such situations, employers are required to pay severance pay equal to one week of pay for each full year of employment. The New Jersey Act does not reduce this penalty for partial compliance; hence, employers must pay severance pay even if they provide 59 days of notice to the affected employees. Moreover, this severance pay is in addition to any severance pay provided by the employer pursuant to a



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collective bargaining agreement or a severance pay plan. However, any back pay paid pursuant to the WARN Act, due to a WARN violation, may be credited against the New Jersey Act severance pay entitlement.

The New Jersey Act also provides aggrieved employees with a right to sue in New Jersey Superior Court. If an aggrieved employee(s) prevails, the employee(s) may be entitled to recover the costs of the action, attorney's fees, and compensatory damages, including lost wages and benefits. However, an award of compensatory damages for lost wages shall be limited to the amount of severance pay required under the New Jersey Act.

The New Jersey Act is much less detailed than the WARN Act and leaves many questions unanswered. In time, many of these open issues should be resolved by the courts. In the meantime, New Jersey employers are advised to consult the New Jersey Act before any planned reduction-in-force and carefully consider its requirements.

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