



THE PRACTICAL EMPLOYER®

**Recent court decisions, legislation,
developments, and practical tips on
labor and employment law issues**

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NJ MINIMUM WAGE RISES AGAIN

On October 1, 2006, NJ minimum wage will increase from \$6.15 per hour to \$7.15 per hour. For tipped employees, the suggested minimum wage is \$2.13 per hour, but the tips plus with the hourly rate paid must bring the employee's hourly pay to at least the minimum wage in effect at the time. Federal minimum wage remains at \$5.15 per hour, but most private employers in NJ must pay the NJ rate.

US SUPREME COURT EXPANDS ANTI-RETALIATION PROVISIONS

The US Supreme Court recently made it significantly easier for employees to prove they suffered retaliation after filing a complaint of discrimination, when it ruled that employers may be liable for retaliatory discrimination under the anti-retaliation provisions of Title VII if the actions, "could well dissuade a reasonable worker from making or supporting a charge of discrimination." Before this ruling, many federal appeals courts held that employers were liable for retaliatory discrimination only if the action (e.g., demotion, discharge reduction in pay) was an "ultimate employment decision," which resulted in an adverse effect on the "terms, conditions, or benefits of employment." In this case, the Court unanimously ruled that the employer improperly punished a female forklift operator by suspending her without pay for 37 days including a Christmas holiday and reassigning her to more physically demanding duties, after she accused her supervisor of sexual harassment. Although the employee ultimately was cleared of all

charges and received back pay, the Court found that "many reasonable employees would find a month without a paycheck to be a serious hardship," and that "an indefinite suspension without pay could well act as a deterrent, even if the suspended employee eventually received back pay." *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S. Ct. 2405 (2006).

Practice Tip: Employers should carefully review any job change affecting any employee who recently complained of discrimination or harassment, and should ensure the objective business reasons for the change are well documented.

NJ RAISES AGE FOR DEPENDENT INSURANCE COVERAGE TO 30

On May 12, 2006, New Jersey raised the age for dependent coverage under health benefits plans delivered in New Jersey, including the State Health Benefits Program, but excluding all other self-funded plans. Traditionally, the definition of "eligible dependent" included children of covered participants up to age 23 if currently enrolled in school full-time. The law expands the definition of dependent to include adult children who are: 1) less than 30 years old; 2) unmarried; 3) without a dependent of their own; 4) a New Jersey resident or enrolled as a full-time student at an accredited institution of higher education (in or outside NJ); and 5) not actually covered (not merely eligible to enroll or obtain coverage) as a named subscriber, insured, enrollee, or covered person under *any other* group or individual health benefits plan, group health plan, church plan, or health benefits plan, or

entitled to benefits under Medicare. Employees or their dependants, not employers, pay the cost of this coverage, which insurers set at up to 102% of the "applicable portion" of the regular premium for dependent coverage.

Eligible dependents, who currently are covered, can request continuation of their coverage within 30 days prior to the end of the calendar year in which they turn 23, within 30 days after they become eligible due to changed circumstances (e.g., a return to NJ after living out-of-state), or during any open enrollment period. If a dependent has already reached age 23, he/she also may request to re-enroll at any time between now and May 11, 2007.

Practice Tip: Although the burden for implementing this change rests with insurers, employers must be mindful to ensure their health benefits plan(s) offer this extended coverage, and that employees are aware of the change.

OFCCP ISSUES FINAL RULE ON SYSTEMIC DISCRIMINATION

The Office of Federal Contract Compliance Programs (OFCCP) recently issued formal standards for interpreting the non-discrimination requirements of Executive Order 11246 with respect to systemic compensation discrimination. OFCCP will conduct compliance reviews of covered contractors, including examination of pay practices, in an effort to uncover systemic workplace discrimination. OFCCP's new systemic compensation discrimination analysis involves comparing the pay of "similarly situated" employees by focusing on the similarity of the work performed, the levels of responsibility, and the skills and qualifications involved in the positions, and the rates of pay; and then using a statistical technique (multiple regression) to determine if statistically significant compensation disparities exist. The analysis accounts for legitimate factors that influence

compensation, including education, work experience, performance, productivity and time in the job. OFCCP also will find a discrimination violation if a contractor establishes pay rates for positions occupied predominantly by women or minorities that are significantly lower than rates established for jobs occupied predominantly by men or non-minorities, where the evidence establishes that the contractor made the wage rate decisions based on the sex, race or ethnicity of the incumbent employees that predominate each position. OFCCP published general guidelines contractors can use to evaluate their compensation systems (available at www.dol.gov/esa/regs).

Practice Tip: The Standard confirms that OFCCP is increasingly concerned about compensation disparities. Contractors are not obligated to use OFCCP's general guidelines but if they don't use them, they must be vigilant in continuing their current self-evaluation practices.

SHAREHOLDERS AND DIRECTORS MAY BE EMPLOYEES UNDER CEPA

The NJ Supreme Court recently held that a physician/shareholder-director can be an "employee" under the Conscientious Employee Protection Act, which previously was found to apply only to employees. The Court held that the shareholder-director's title or ownership interest does not determine employee status; rather, the inquiry is fact-intensive, focusing on the professional association's direction and control over the shareholder-director and the true power and vulnerability of the shareholder-director within the professional association. *Feldman, M.D. v. Hunterdon Radiological Assocs., et al.*, 187 N.J. 228 (2006).

PARTNERS MAY BE EMPLOYEES UNDER ADEA

The 7th Circuit recently ruled that EEOC can obtain monetary damages on behalf of demoted equity partners at Sidley Austin

LLP, one of the world's largest law firms. Although the partners themselves did not file any charges, the Court held that EEOC could exercise its own enforcement authority and sue the law firm on behalf of several former partners who contend that they were discharged due to their age in violation of the Age Discrimination in Employment Act. Despite their title, EEOC contends that the former "partners" had no significant decision-making authority, served on no decision-making committees, had no role in determining their share of profits and, therefore, should be considered employees. *EEOC v. Sidley Austin LLP*, 437 F.3d 695 (7th Cir. 2006).

Practice Tip: Professional associations, PCs and partnerships should assess the duties of all shareholders and partners, determine whether each partner merits the title, implement adjustments necessary to preserve ownership/partnership status and assess whether their present business form of the legal entity is most appropriate for their business.

MANDATORY ARBITRATION POLICY VIOLATES NATIONAL LABOR RELATIONS ACT

The NLRB recently held that a non-union employer's mandatory arbitration policy violates the NLRA because it reasonably tended to inhibit employees from filing unfair labor practice charges with the Board. The policy expressly covered all disputes relating to or arising out of an employee's employment or the termination of employment, including but not limited to "claims for wrongful termination or employment, breach of contract, fraud, employment discrimination . . . or other claims under the Labor Code or any other legal or equitable claims and causes of action recognized by local, state or *federal law or regulations*." The Board found employees reasonably would read the policy language, particularly the highlighted language, as prohibiting them from filing

unfair labor practice charges with the Board. *U-Haul Company of California*, 347 NLRB No. 34 (6/8/2006).

Practice Tip: Employers with arbitration policies or agreements should review or draft them carefully to identify the types of claims that are subject to mandatory arbitration, and should consider an express exclusion of claims arising under the NLRA, Fair Labor Standards Act, and comparable state statutes and regulations.

NEW JERSEY EXPANDS EMPLOYEE RIGHTS AND EMPLOYER OBLIGATIONS

On July 26, 2006, the Worker Freedom From Employer Intimidation Act became law. The Act prohibits NJ employers from requiring their employees to attend or participate, on or off the job, in political or religious gatherings or other activities or communications reflecting the employer's political or religious opinion(s). The new law also protects employees who make a "good faith report, verbally or in writing, of a violation or suspected violation" of the Act. Employees have the right to sue within 90 days after any alleged violation, and may recover compensatory and punitive damages and attorneys' fees, if successful. Religious and political organizations are exempt from the Act.

Practice Tip: Because this is a potential gold mine for plaintiff attorneys, employers should modify their policies, review their practices, and inform their supervisors, to ensure ongoing compliance with the Act.

COURTS INTOLERANT OF OFF-DUTY MISCONDUCT BY PUBLIC EMPLOYEES

In 2 recent cases, NJ appellate courts upheld discipline against employees for off-duty conduct. In one case, the court overturned an arbitration award, which required the Turnpike Authority to reinstate a GSP toll collector, who lost his job because, while driving home after his shift, he fired a paintball gun at the window and windshield

of a van he felt was traveling too slowly in the fast lane on the Parkway. The court held that the arbitrator failed to give due consideration to the clear public policy against shooting or hurling objects at a moving vehicle. In a second case, the court upheld the suspension of a police officer following an off-duty confrontation with a citizen on the street outside of her home, in which the officer publicly humiliated the citizen. The court also upheld an order directing the officer to undergo anger management counseling and pass a fitness-for-duty psychiatric examination. *N.J. Turnpike Authority v. Local 196, I.F.P.T.E.*, (App. Div. 2006) (per curiam); *I/M/O Butler, etc.*, (App. Div. 2006) (per curiam).

Practice Tip: Although these cases arose in the public sector, all employers should be mindful that off-duty conduct by their employees, which reflects poorly on the employer or demonstrates illegal/improper conduct, may be grounds for discipline at work, provided that the employer does not infringe on employees' privacy rights.

3rd CIRCUIT OPENS DEFENSE TO EEOC CHARGES FOR EMPLOYEES

In a case of first impression, the 3rd Circuit Court of Appeals recently held that a plaintiff's employment discrimination claims may be dismissed if the plaintiff fails to verify the charge with the EEOC before the employer receives notice of, or is required to

respond to, the charge. Where, as here, the employer responds to the merits of the charge without raising the plaintiff's failure to verify her charge before the EEOC, the employer waives its right to assert that defense in later federal court proceedings. *Buck v. Hampton Twp. School Dist., et al.*, 452 F.3d 256 (3rd Cir. 2006)

RELEASES MUST BE PROCEDURALLY CORRECT TO BE ENFORCED

A plaintiff sued his former employer alleging discrimination and FMLA and CEPA violations, asserting that a release he signed was void because he was incapable of voluntary and knowing consent due to the effect of his medications; the release lacked prior notification that he would be required to release his claims; he was unaware of the rights he was releasing; and he did not have an opportunity to consult an attorney. The Court refused to enforce the release pending further consideration of whether he knowingly and voluntarily signed the release. *O'Brien v. Star Gas Propane, L.P.*, (App. Div. 2006)(per curiam)

Practice Tip: Employers must ensure that all releases with employees contain language that states that the employee understands and accepts the release, has the right to consult counsel, and the employee has sufficient time to consider the document.

The information contained in this newsletter should not be construed as legal advice. If you have any questions about anything you read in this publication or any other labor or employment law related questions, please contact:

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