

LEGAL ALERT

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Recent Legislative Enactments Expand Benefits & Liability for New Jersey Employers

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In the past week Governor Murphy has signed two pieces of legislation that significantly impact all New Jersey employers. On April 24, 2018, the Governor signed the Diane B. Allen Equal Pay Act (“Equal Pay Act”), and on May 2, 2018 the Governor signed the Earned Sick Leave Act (“Sick Leave Act”). These laws are historical for New Jersey and they add to the legal benefits and protections afforded New Jersey’s workers, while increasing liability for employers.

The Equal Pay Act

The Equal Pay Act is being touted as the strongest equal pay law in the Country. The law amends the New Jersey Law Against Discrimination (“NJLAD”), which is already one of the nation’s toughest ant-discrimination laws. While the Equal Pay Act had its genesis in protecting equal pay between the sexes, the final version of the law expanded its protections to all protected classes including race, creed, color, national origin, nationality, ancestry, age, marital status, civil union status, domestic partnership status, affectional or sexual orientation, genetic information, pregnancy, sex, gender identity or expression, disability or atypical hereditary cellular or blood trait of any individual, or liability for service in the armed forces.

The law prohibits an employer from paying any member of a protected class at a rate of compensation, including benefits, which is less than the rate paid by the employer to employees who are not members of the protected class, and who perform substantially similar work, when viewed as a composite of skill, effort and responsibility. An employer can pay protected employees differently if the employer demonstrates that the difference in pay is made pursuant to a seniority system or a merit system. In the absence of a neutral-based system, pay differentials are not permitted unless the employer can show that:

1. The differential is based on one or more legitimate, bona fide factors other than the protected characteristics, such as training, experience, or the quality and quantity of production;

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2. The factors are not based on and do not perpetuate a differential in compensation grounded in the protected characteristics:
3. Each factor is applied reasonably;
4. One or more factors cannot account for the entire wage differential; and
5. The factors are job-related with respect to the position in question and based on a legitimate business necessity. Any factor based on business necessity will not apply if it is demonstrated that there are alternative business practices that would serve the same business purpose without producing the wage differential.

The Equal Pay Act also contains strong enforcement mechanisms. Employers are prohibited from retaliating against any employee who discusses, discloses or requests information regarding any current or former employee's inclusion in a protected class, or regarding compensation rates, benefits, job category, job title, gender, race or ethnicity. Employers are also prohibited from retaliating against any such person who seeks legal advice from a lawyer or who contacts any governmental agency regarding any matter related to equal pay. It is also a violation of the law to require prospective employees to waive or otherwise agree not to make any such inquiry or request.

Furthermore, in addition to the relief afforded an aggrieved employee under the NJLAD, the Equal Pay Act awards a prevailing party his or her legal fees and provides for treble damages if a jury determines that an employer is guilty of paying a prohibited wage differential. The law also allows an aggrieved employee to collect back pay for six (6) years equal to the applicable and non-waivable statute of limitations, while it also codifies the common law doctrines "continuing violation" and the "discovery rule" as specifically applicable to wage disparity claims.

The Equal Pay Act goes into effect on July 1, 2018. There is no grandfathering clause, so all employers must evaluate their compensation plans for compliance with the law on or before July 1, 2018. The task of achieving compensation parity in New Jersey will be made more challenging considering New Jersey's recently enacted salary ban legislation, which prohibits employers from asking prospective employees about their earnings history. Notwithstanding, employers who fail to achieve compliance with the Equal Pay Act face significant liability.

The Sick Leave Act

Nearly all of New Jersey's private-sector workers will be allowed to receive paid sick time off under the Sick Leave Act, which Governor Murphy signed into law on May 2, 2018, ending a debate that has raged in the State legislature for several years. Under the law, employees may

accrue one hour of paid sick time for every 30 hours worked up to a maximum of 40 hours of paid sick leave in any benefit year. A benefit year is a 12-consecutive month period designated by the employer, during which the employee may accrue and use earned sick leave.

The law applies to all employers regardless of size. There is no small employer carve-out as many employers hoped there would be. All employees are eligible for paid leave under the law except for per diem healthcare workers, construction workers employed pursuant to a collective bargaining agreement, and public employees who already have sick leave benefits. Employees of temporary service firms are also included within the definition of employee. They accrue paid sick leave benefits based on total time worked with the temporary service firm and not for each separate client for whom the employee performs services.

Existing employees can accrue and begin to use paid sick leave benefits when the law becomes effective. Those employees who commence employment after the effective date of the law will begin to accrue earned sick leave benefits when their employment commences; however, these employees may not use the earned sick leave until after the 120th day of their employment unless the employer agrees to an earlier date. These employees may subsequently use earned sick leave as soon as it is accrued.

Employees may carry over accrued but unused paid sick leave benefits; however, the law does not require the employer to provide more than 40 hours of paid sick leave in a single benefit year including any amount of paid leave that an employee carries over from the previous year. Employers have the option under the Sick Leave Act to cash-out any accrued and unused sick leave in the last month of the benefit year. Employers are not required to pay out an employee's accrued and unused sick leave upon separation from service unless the employer has a policy in place that states otherwise.

An eligible employee may use paid sick leave benefits for any one of the following reasons:

- Diagnosis, care, treatment, or recovery for the employee's own mental or physical condition (inclusive of preventive care);
- Diagnosis, care, treatment, or recovery for a family member's mental or physical condition (including preventive care);
- Time needed because of an employee's or family member's status as a victim of domestic or sexual violence (including counseling, legal services, or participation in any civil or criminal proceedings related to same);
- Time when the workplace, school, or childcare is closed by order of a public official due to a public health concern; and

- Time to attend a school-related conference or meeting.

The definition of “family member” is broad and comprehensive, and includes any individual “whose close association with the employee is the equivalent of a family relationship.” This definition is broad enough to capture friends and extended family members who may or may not reside with the employee.

The Sick Leave Act permits employers to require advanced notice of not more than seven (7) days for foreseeable absences, and requires employees to make a reasonable effort to schedule paid leave in a manner that does not unduly interrupt the employer’s operations. For unforeseeable absences, the employer can require the employee to provide notice as soon as practicable. The employer can also prohibit the use of “foreseeable” paid sick leave benefits on certain dates, and require documentation if an employee uses unforeseeable sick leave on those dates. If an employee is absent for three or more consecutive days, the employer may require the employee to provide documentation to confirm whether the employee used the sick leave benefits for a purpose permitted under the law.

The Sick Leave Act contains stringent recordkeeping and notice requirements. Employers must maintain records documenting the hours worked and earned sick leave accrued and used by each employee. Employers must maintain these records for a period of five years and the records must be made available for inspection upon request by the Department of Labor and Workforce Development. Failure to maintain the records and/or to produce them upon request will result in a presumption that the employer did not provide the required benefits, which can only be rebutted by clear and convincing evidence. Employers must also post a notice in the workplace and provide each employee with an individual notice explaining their paid sick leave benefits within 30 days after the Department of Labor issues the notice and, thereafter, at the time of each employee’s hiring.

Employers that have an existing Paid Time Off policy may already be in compliance with the Sick Leave Act’s requirements. That is, the law provides that an employer shall be deemed in compliance if the employer offers paid time off, which is fully paid, which includes, but is not limited to, personal days, vacation days, and sick days, and which may be used for the purposes Sick Leave Act and in the manner provided by the law. Paid time off must also be earned and accrued under the employer’s policy at a rate equal to or greater than the rate described in the Sick Leave Act.

The Sick Leave Act is enforced by the Department of Labor and Workforce Development. The law provides for a private right of action that includes, among other remedies, liquidated

damages in an amount equal to the actual damages sustained by an aggrieved employee (i.e., wages multiplied by two), plus reasonable attorney's fees. Moreover, the Sick Leave Act contains a strong anti-retaliation provision, which includes a "rebuttable presumption" of retaliation if an employer takes adverse action against an employee within 90 days of the employee engaging in protected activity such as filing a complaint, cooperating in an investigation or informing others of their rights. Employers, however, are permitted to take disciplinary action against an employee who uses earned sick leave for improper purposes.

An employer that violates the Sick Leave Law is also subject to administrative penalties issued by the Department of Labor and Workforce Development in the amount of \$250 for the first violation and \$500 for each subsequent violation, as well as to administrative fees up to 25% of the amount of any penalties. The law also provides that any employer who knowingly and willfully violates any provision of the Sick Leave Act shall be guilty of a disorderly persons offense and shall, upon conviction for a first violation, be punished by a fine of not less than \$100.00 nor more than \$1,000, or by imprisonment for not less than 10 nor more than 90 days, or by both the fine and imprisonment, and upon conviction for a second or subsequent violation, be punished by a fine of not less than \$500.00 nor more than \$1,000 or by imprisonment for not less than 10 nor more than 100 days or by both the fine and imprisonment.

The Sick Leave Act takes effect 180 days from May 2, 2018, or on October 29, 2018. During the interim period employer's that operate in New Jersey should review their existing Paid Time Off and Sick Leave policies to determine whether these policies comply with the law's provisions. Non-compliant policies should be modified and revised accordingly. Employers that do not have an existing Paid Time Off or Sick Leave policy should use the interim period to familiarize themselves with the details and complexities of the Sick Leave Act and prepare to implement the law on October 29, 2018.

If you are concerned that your company's compensation plan or paid time off policy are not in compliance with these recent legislative enactments, our labor and employment law attorneys can ease your mind with a thorough analysis and assessment of policies and plans. Please contact Joseph Maddaloni, Jr., or Cynthia L. Flanagan for assistance or if you have any questions.

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