BRESSLER, AMERY & ROSS

A PROFESSIONAL CORPORATION

EMERGING TRENDS IN LABOR AND EMPLOYMENT LAW - 2008

Presented by: **The Labor and Employment Law Practice Group**
Bressler, Amery & Ross, P.C.
February 20, 2008

NEW DEVELOPMENTS IN THE LAW

SSA NO-MATCH LETTERS

NEW JERSEY WARN ACT

RELIGIOUS ACCOMODATION LAW

NEW JERSEY FAMILY LEAVE

Jed Marcus

IMMIGRATION ISSUES FOR EMPLOYERS

SAFE HARBOR PROCEDURES

AND

SSA NO-MATCH LETTERS.

BASIC I-9 REQUIREMENTS

- Must complete for every new hire after November 6, 1986.
- May not *knowingly* hire or continue to employ a person who is not authorized to work in the U.S.
- *Knowingly* = "Actual Knowledge" or "Constructive Knowledge" (should have known).

I-9 COMPLETION – WHO?

- Required for everyone hired after Nov. 6, 1986.
- No exception for temporary or part-time employment.
- Not required for independent contractors.
- Who is exempt?
  - “Grandfathered” employees
  - Contractors/Subcontractors
  - Domestic workers in a private home – employment must be sporadic, irregular or intermittent

I-9 COMPLETION – WHEN?

- Employee must complete Section 1 on or before the first day of employment (first day of paid work).
- Employer must complete Section 2 within three business days of the first day of employment. Employee must be physically present and must present original documents.
- Special rules for employees hired for less than three business days.

DOCUMENT TIPS

- U.S. passports can be expired or unexpired.
- Foreign passports must be unexpired.
- ID card must be issued by a federal/state/local government agency.
- Voter's registration card need not have photo to confirm identity.
- Social Security card not acceptable if it says "Not Valid for Employment."
- Birth certificate can be certified copy. Must be issued by state or local government authority.

IRCA: I-9 Unacceptable Document

- The following List A documents are ***no longer***
- ***acceptable*** to establish identity and
- employment eligibility:
- – Certificate of U.S. Citizenship
- – Certificate of Naturalization
- – Unexpired Reentry Permit
- – Unexpired Refugee Travel Document
- – Old Form I-151 Green Card

Note: Unexpired Foreign Passport with I-551 stamp or Form I-94 ***only acceptable*** when individual authorized to work for specific employer

FORM I-9 COMPLETION, SECTION 3 -- REVERIFICATION

Employer must complete Section 3 of I-9 to reverify work authorization before expiration of date in Section 1.

Don’t need to reverify for U.S. citizens or nationals (Section 1, Box 1).

Don’t need to reverify Lawful Permanent Residents (Section 1, Box 2) unless employee shows I-551 stamp and passport or reentry permit.

Don’t need to reverify Lawful Permanent Residents when green cards expire.

What About "No Match" Letters?

- What they are:
  - - Notice from SSA of discrepancy between wage reporting and SSA information
- What they are not
  - – A notice that an employee is not authorized to work
  - – A statement about an employee's immigration status
  - – An implication that you or your employee intentionally provided incorrect information

No Match Letters

- A no match letter, ***without more***, is not constructive knowledge
- A no match letter ***in addition to*** other information may support a finding of constructive knowledge

No Match Letters

- What should you do?
  - – Check company records
  - – Ask employee to verify that your information is correct
  - – Ask employee to resolve issue with SSA
  - – Do you learn additional information during investigation?
  - – Document all efforts!
  - – Report back to SSA

No Match Letters

- What should you ***NOT*** do?
  - – Do not panic
  - – Do not assume employee is not authorized
  - – Do not use no match letter ***by itself*** for taking adverse employment action against employee
  - – Do not reverify or require employee to produce additional or different documents without additional information

FINAL RULE AND FEDERAL COURT LITIGATION

- Final Rule
  - • Proposed rule published June 14, 2006 (71 FR 34,281).
  - • 5,000+ comments received.
  - • Final rule published August 15, 2007
  - (72 FR 45,611).
  - • Effective date: September 14, 2007.

Court's Temporary Injunction

- Temporary restraining order (TRO) issued on August 31, 2007 with preliminary injunction issued on October 1, 2007.

Stops ICE and SSA from implementing the regulation on pending further hearings.

- Restrains SSA from mailing or sending the no-match "letter packets" which include the DHS guidance letter, until a final decision after the hearing.

ESTABLISHING A NO-MATCH COMPLIANCE PROGRAM

- Safe-Harbor Requirements
  - Within 30 days of receiving a no-match letter, check employer's records for typos or transposition;
  - If the first step does not resolve the problem, ask the employee to review and confirm the accuracy of the employer's records;
  - If the employee confirms the records are accurate, the employee must resolve this issue directly with SSA (no later than 90 days from the date the no-match letter was received by the employer).

Safe-Harbor Requirements, Cont.

- If resolved with SSA, the employer must verify that the correction has been made by SSA through the on line Social Security Number Verification System (SSNVS) or by telephone.
- If none of the foregoing measures If resolves the matter within 90 days, the employer should complete the "special I-9 process" within three days:
  - The employee must present an I-9 document which contains a photograph.
  - The employer may not accept a document listing the SS# in question.

Issues to Consider

- If after going through the steps the employee or employer is unable to comply the employer must choose between:
  - Taking action to terminate the employee;
  - Continuing to employ the individual and
  - balance the risk DHS could determine the employer had "knowledge" the employee was unauthorized to work.
- Remember, this rule does not provide safe harbor to employers who have actual knowledge the employee is not authorized to work

Establishing a No-Match Compliance Program

- Determine who will be responsible for monitoring this program at your organization.
- Identify who currently receives or will receive the no-match letters.
- Establish a tracking system to monitor the 30, 90 and 3 day time periods.

PLANT/BUSINESS CLOSING, MASS LAYOFFS

NEW JERSEY WARN ACT

Worker Adjustment and Retraining Notification Act ("WARN")

- Requires employers of 100 or more employees to give at least 60 days advance written notice of a plant closing or mass layoff to the affected employees or their bargaining representatives.
- Depending on the timing of the sale, WARN notice obligations may fall on Seller or Buyer.

Worker Adjustment and Retraining Notification Act ("WARN")

- A PLANT CLOSING
  - when a permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, occurs; and
  - the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more employees excluding any new and part-time employees.

Worker Adjustment and Retraining Notification Act ("WARN")

- A MASS LAYOFF
  - when, during any 30-day period at the single site of employment, there is an employment loss for at least 33% of the employees (excluding new and part-timers) and at least 50 employees (excluding new and part-timers); or
  - an employment loss during any 30-day period for at least 500 employees (excluding new and part-timers)

NEW JERSEY WARN ACT

- Requires New Jersey employers with 100 or more full-time employees to provide sixty days' notice to employees impacted by a mass layoff, transfer of operations or termination of operations.
- NJ Warn also sets penalties for violations at a greater level than those found in its federal counterpart.

NEW JERSEY WARN ACT
Who is Impacted?

- Employers who have an "establishment" in New Jersey. An "employer" is "an individual or private business entity" which employs a workforce at an establishment and has at least 100 employees
- An "establishment" is "a single place of employment which has been operated by an employer for a period longer than three years . . . ." It may be "a single location or a group of contiguous locations," such an industrial park or separate facilities (i.e., a building) across the street from each other." (A temporary construction site is excluded from the definition.)

NEW JERSEY WARN ACT

When is Notice Required?

- “Termination of employment,"
- “Termination of operations,"
- “Transfer of operations," or
- “Mass layoff."

NEW JERSEY WARN ACT

When is Notice Required?

- “Termination of employment;"
  - “Layoff of an employee without a commitment to reinstate the employee to his previous employment within six months of the layoff[.]"
  - The layoff of seasonal employees is not a covered event.
  - Employees offered the same job with equivalent status, benefits, pay and other terms and conditions of employment at another location within fifty miles from the prior workplace are not considered to have been "terminated."

NEW JERSEY WARN ACT
When is Notice Required?

- Does not include "a layoff of more than six months which, at its outset, was announced to be a layoff of six months or less if business circumstances not reasonably foreseeable at the time of the initial layoff and notice are responsible for the extension beyond the six-month period, and the employer gives notice when it becomes reasonably foreseeable that the extension beyond six months will be required." However, notice is still required, even if not a full 60-day notice.

NEW JERSEY WARN ACT

When is Notice Required?

- “Termination of operations,"
  - "the permanent or temporary shutdown of a single establishment, or of one or more facilities or operating units within a single establishment."
  - Does not occur if the result of a fire, flood, natural disaster, national emergency, act of war, civil disorder or industrial sabotage, decertification from participation in the Medicare and Medicaid programs. Notice is not required as the event is excepted from the definition of a "termination of operations"

NEW JERSEY WARN ACT

When is Notice Required?

- “Transfer of operations,"
  - "the permanent or temporary transfer of a single establishment, or of one or more facilities or operating units within a single establishment, to another location inside or outside of this State."

NEW JERSEY WARN ACT

When is Notice Required?

- A "mass layoff"
  - the termination of (a) 500 or more full-time employees during any thirty-day period or (b) 50 or more full-time employees which represent one-third or more of the employer's full-time employees during any thirty-day period.

NEW JERSEY WARN ACT
When is Notice Required?

- Employers must include any terminations of employment for two or more groups at a single establishment occurring within any ninety-day period where each group has less than the number of terminations which would trigger the notification requirements (i.e., a non-covered event).
- Where the aggregate for all of the groups exceeds that number, there is a covered event under NJ Warn subject to the notification requirements; unless, the employer demonstrates that the cause of the terminations for each group is separate and distinct from the causes of the terminations for the other group or groups.

NEW JERSEY WARN ACT

How Much Notice is Required?

- Both the federal WARN and NJ Warn require sixty days' advance notice.

NEW JERSEY WARN ACT

Damages

- The employer must pay each employee "severance pay equal to one week of pay for each full year" the employee worked for the employer.
- The rate of severance is calculated as the higher of: (1) the average rate of compensation that the employee received during his "last three years of employment with the employer . . .;"or (2) the final rate of compensation the employee received. This severance penalty is "in addition to" any other severance benefit provided by the employer; however, the severance penalty under NJ Warn can be offset by any back pay damages paid as a result of a violation of the federal WARN Act.

NEW JERSEY WARN ACT
Damages

- If an employer violates the federal law, an employer is liable for back pay and benefits of the employees only for each day the employer failed to provide notice.
- NJ Warn makes no distinction based upon the amount of notice provided and does not expressly provide for any reduction of damages based upon the amount of notice provided. Thus, an employer who provides notice that is even one day less than that which is required would have to pay the same damages as an employer who simply fails to provide any notice.

New Jersey Enacts Broad Religious Accommodation Law

Amending the NJLAD

- Effective January 13, 2008.
- Employers must reasonably accommodate applicants' and employees' sincerely held religious beliefs - such as allowing time off to observe the Sabbath or other holy days - unless to do so would impose an undue burden.
- Now establishes an affirmative duty of reasonable accommodation not previously recognized under state law.
- The newly-enacted reasonable accommodation obligations appear to greatly exceed employers' existing obligations under federal law.

Amending the NJLAD

- An employer may not "impose upon a person as a condition of obtaining or retaining employment, including opportunities for promotion, advancement or transfers, any terms or conditions that would require a person to violate or forego a sincerely held religious practice or religious observance" unless "after engaging in a bona fide effort the employer demonstrates that it is unable to reasonably accommodate the religious observance or practice without undue hardship on the conduct of the employer's business."

Amending the NJLAD

- If an employer grants time off from work for religious reasons as a reasonable accommodation, the employer may require that the employee make up the work "at some other mutually convenient time," or may charge the time off against any accrued leave with pay (other than sick leave), or may charge the time off as leave without pay.

Undue Hardship Considerations

- Does not define what constitutes a "bona fide effort" to reach a reasonable accommodation.
- Defines an "undue hardship" as an "accommodation requiring (1) unreasonable expense or difficulty, (2) unreasonable interference with the safe or efficient operation of the workplace, (3) a violation of a bona fide seniority system or (4) a violation of any provision of a bona fide collective bargaining agreement."

Undue Hardship Considerations

- Factors:
  - the cost of loss of productivity;
  - retaining or hiring employees or transferring employees from one facility to another, in relation to the size and operating cost of the employer
  - "the number of individuals who will need the particular accommodation."

Undue Hardship Considerations

- Two "safe harbor" provisions:
  - "an accommodation shall be considered to constitute an undue hardship if it will result in the inability of an employee to perform the essential functions of the position in which he or she is employed," and
  - no accommodation is required "where the uniform application of terms and conditions of attendance to employees is essential to prevent undue hardship to the employer."

Federal/State Difference

- Under federal law, if an accommodation imposes more than a "de minimis" burden on an employer, the accommodation need not be granted.
- The LAD amendments appear to require more than simply a de minimis burden to justify denial of an accommodation.
- First Amendment challenge ?

Impact on Pay and Benefits

- If an employer grants a schedule change as an accommodation, the employee is not entitled to any "premium wages" (such as premium pay for night, weekend or holiday work) or "premium benefits" (including seniority, sick leave or annual leave) that would ordinarily be applicable to the hours worked by the employee as an accommodation.

Impact on Pay and Benefits

- However, this provision does not relieve the employer of any obligation to pay overtime wages, nor does it supersede any entitlement to premium wages or benefits due under a collective bargaining agreement. Moreover, the employer must count any hours worked by an employee as an accommodation "towards the accruing of seniority, pension and other benefits."

PROPOSALS FOR CHANGE TO THE NEW JERSEY FAMILY LEAVE ACT

PAID LEAVE

FMLA Provides:

- 12 workweeks of unpaid leave
- Continued health benefit coverage
- Reinstatement to same or equivalent position
- No retaliation

Eligible Employees

- Work at site where 50 or more employees are employed by employer within 75 miles
- Employed by employer for at least 12 months
  - Need not be consecutive
- Worked 1,250 hours during 12-month period immediately prior to leave

How Much FMLA Leave?

- 12 weeks within a 12-month period
  - If only work 3 days/week, entitlement of 12
    3-day workweeks
  - Concurrent with any state leave entitlement
  - May need to extend to reasonably accommodate disabled employees

Employee Notice

- Advance Notice Required
  - 15/30 days for foreseeable leaves
    - Employer may delay not deny leave for lack of notice
  - "As soon as practicable" for unforeseeable leaves
    - 1 or 2 business days
- Notice may be verbal
- Notice may be by spokesperson for employee
- Notice does not specifically have to refer to "FMLA" or "NJFLA"

Pay/Benefit Issues

- Employee may request or Company may require use of accrued paid time off (vacation, sick, etc.) ***during*** leave
- Cannot require employee to take paid time off while on WC or STD and count as FMLA
- Pre-existing health benefits must be maintained during FMLA leave as if employee had continued to work
- Other benefits (e.g., life insurance and LTD) do not have to continue during leave

How is the NJFLA different?

- Does not apply to one's own serious health condition.
- Only applies to those situations in which one needs to care for another.

Proposed Changes to NJFLA – Paid Leave

- Provides six weeks of replacement wages, equal to two-thirds of the workers weekly pay, up to a maximum of $524 per week to care for a newborn or adopted child or an ill family member.
- Financing for this program would come from a new employee payroll tax. The tax would be used to establish a fund that is similar to New Jersey's existing Temporary Disability Insurance (TDI) fund.

Proposed Changes to NJFLA – Paid Leave

- Unlike existing unpaid-leave laws (state and federal) which apply only to employers with 50 or more employees, this bill would apply to all businesses.
- Employers may require employees to exhaust paid time off (such as vacation and sick time) only for the first two weeks of the leave. The existing unpaid leave laws expressly permit employers to require the use of paid time off for leaves.

Proposed Changes to NJFLA – Paid Leave

- Employers with fewer than 50 workers are not required to take the worker back after the leave ends

- BUT -

- Businesses do not have the right to terminate employees who take the leave for childbirth. The New Jersey State Law against Discrimination, the Federal Pregnancy Anti-Discrimination Act, and the Americans with Disabilities Act stand against this.