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A Cautionary Tale for Employers: Mandatory EAP Attendance May Violate the Americans with Disabilities Act

An Employee Assistance Program ("EAP") is a program offered by an employer that may provide confidential psychological assessment, counseling, referrals and other services to employees who have personal and/or work based problems. A recent case, EEOC v. Weis Supermarkets, reinforces for employers that employees cannot be required to attend an EAP without the employer running afoul of the rules regarding medical testing under the Americans with Disabilities Act ("ADA").

EEOC v. Weis Supermarkets

In EEOC v. Weis Supermarkets ("Weis"), Elizabeth Book, a supermarket worker, alleged that she had been sexually harassed by her supervisor, who made vulgar, sexually related comments in the workplace, and touched her in a sexual manner without her consent. Book made a complaint against her supervisor, and he admitted to the inappropriate behavior. Weis issued the supervisor a warning and required him to attend sexual harassment training, but he was not disciplined in any other manner. Subsequent to her complaint, Book's colleagues complained that she was creating a "hostile work environment" because they were afraid she was going to report them for engaging in unspecified workplace misconduct.

Weis required Ms. Book to complete an EAP referral as her condition of continued employment with the Company. Ms. Book was given 24 hours to initiate the EAP process and could not return to work until she had done so. Weis' EAP program consisted of mental health counseling services by licensed therapists. In order to participate in the program, she had to complete an authorization form allowing the release of her medical records to the EAP. Ms. Book refused to comply with Weis' order for her to attend the EAP program. She was then suspended and terminated.

EAP Attendance Cannot Be Mandatory

The EEOC brought sexual harassment and disability discrimination claims against Weis. The EEOC and Weis eventually settled the case by a mutually agreed upon consent decree. The decree awarded $75,000 to Ms. Book, and Weis agreed to remediate its sexually hostile work place. Further, Weis agreed not to require employees to participate in an EAP that would involve unlawful medical exams or disability-related inquiries. In a statement, the EEOC reiterated its position that medical examinations and disability-related inquiries must be job-related and consistent with business necessity. If they are not, as in the case of Ms. Book, they may violate the rights of workers under the ADA.

TAKEAWAY: EAPs are valuable resources but an employee's attendance cannot be required unless the employer has a job-related reason for the requirement that is consistent with business necessity. If you have questions on your EAP program or any federal or New Jersey employment law, contact Stephanie Gironda or any member of the Wilentz Employment Law Team

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Increased Protections for Immigrant Workers Across New Jersey

On August 8, 2024, New Jersey lawmakers passed legislation to provide immigrant employees with greater protections under the law. The new law, effective immediately, subjects employers to fines and penalties for using an employee's immigration status as a means to retaliate against them for raising concerns or complaints about their employment.

Pursuant to the new law, employers are prohibited from: (1) threatening to reveal, disclose or report an employee's immigration status to authorities as a means of coercing the employee, (2) subduing employee complaints or (3) covering up reported labor violations. The law is intended to provide additional legal support and remedies to immigrant employees who want to complain about or report what they believe are employer violations of the law.

The law and associated penalties will be imposed and enforced by the Commissioner of Labor and Workforce Development. Depending on the circumstances, civil penalties imposed may be in addition to any related penalties for any underlying employment violations. Employers that are deemed to have violated the law shall be subject to civil penalties as follows: up to $1,000 for the first violation, up to $5,000 for a second violation and up to $10,000 for any subsequent violations. Each instance of a violation relative to each affected employee shall constitute a separate violation.

Employers should be aware of the increased protections for immigrant employees and the penalties associated with violating the law. If you have questions concerning this new law or related employment laws, please reach out to the Employment Team at Wilentz.

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Employment Law Update: Employer Reasonableness Is Key To Defeat Employee Failure To Accommodate Claims

According to the Americans with Disabilities Act ("ADA"), an employee who has a disability that makes it difficult to perform an essential function of the job may request an accommodation from an employer to enable the employee to do so. If there is no way to accommodate the employee's disability or it is an "undue hardship" to the employer, the employer does not have to grant the accommodation request. Employers have a duty to engage in an "interactive process" to determine whether an accommodation can be made and the form of the accommodation. A recent Fourth Circuit Court of Appeals decision, Tartaro-McGowan v. Inova Home Health, illustrates that employers who are reasonable in negotiating with an employee over an accommodation request will be able to defeat "failure to accommodate" claims.

Tartaro-McGowan v. Inova Home Health

Laura Tartaro-McGowan was a registered nurse with Inova Home Health ("IHH"), an agency that provides healthcare services to patients in their homes. She had a bi-lateral knee replacement and developed chronic arthritis in her knees, making it difficult for her to squat, kneel, and bend. Because she could no longer safely perform some direct patient care, Tartaro-McGowan became a clinical manager and supervisor. She was assured by IHH's management that, in her new role, she would not be required to perform direct patient care.

In 2020, when the Covid-19 pandemic struck, IHH required all nurses, including clinical managers, to perform direct patient field visits because the number of patients drastically increased and there was a nurse shortage. Ms. Tartaro-McGowan requested that IHH accommodate her by not requiring her to engage in direct patient care. IHH responded to the request by stating she could screen patients to determine which she wanted to visit and space the visits apart as much as possible to minimize potential stress on her knees. Ms. Tartaro-McGowan refused to accept the accommodation and insisted that she be exempted from direct patient care. She did not return to work after her request was rejected and sued IHH.

The Fourth Circuit Court of Appeals dismissed Ms. Tartaro-McGowan's claims and ruled that no reasonable jury could conclude that IHH denied Ms. Tartaro-McGowan a reasonable accommodation. The Court explained that an employer's chosen accommodation does not have to be perfect, only reasonable. It also noted Ms. Tartaro-McGowan's failure to propose an alternative accommodation and insistence on her own solution without giving IHH's proposed accommodation a chance.

Lessons For Employers

It is important for an employer to know that its proposed accommodation does not have to be perfect, it just needs to be reasonable. Employers should make sure they document the "interactive process" so they can provide proof of their actions, if necessary.

TAKEAWAY: Employers should document their reasonable, if not perfect, attempts to accommodate employees. If you have questions on the employer's duty to accommodate, or any federal or New Jersey employment law, contact Stephanie Gironda or any member of the Wilentz Employment Law Team.

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Violating the New Jersey Earned Sick Leave Law Can Be Very Costly

Did you know that, pursuant to the 2018 New Jersey Earned Sick Leave Law, all New Jersey employers are obligated to provide each employee working in the state with paid earned sick leave ("ESL") for qualifying reasons? Employers have obligations and employees have rights under the law, and when the law is not followed, it can have very serious ramifications for employers.

EARNED SICK LEAVE VIOLATION RESULTS IN HEFTY JUDGMENT AND ATTORNEYS' FEES

In June 2019, one of the first challenges to the ESL Law was filed. Plaintiffs who worked for a concrete company formed a class and sued their employer for violations of the ESL Law. Following a 2022 trial, the Court found the employer liable for violations of the ESL Law concerning notice and recordkeeping requirements, maintenance of unlawful policies in violation of the ESL Law and denial of ESL benefits to the class.

The Court found in favor of the class and awarded damages in the amount of $776,898.38. Shortly thereafter, an application for an award of attorneys' fees was filed. The Court entered an Order awarding attorneys' fees and costs in the amount of $591,423.91, increasing the total amount owed by the employer, to more than $1,350,000.

KNOW THE EMPLOYEES' RIGHTS

Employees are entitled to paid leave for qualifying reasons during the 12 consecutive month benefit year established by their employer. On the first day of employment, an employee shall immediately begin to accrue ESL, or receive a pro rata bank of ESL. Following an employee's 120th calendar day of employment (or sooner), employers must allow employees to begin using ESL. ESL can be provided in one of two ways:

1. accrued at a rate of one hour for every 30 hours worked, up to 40 hours per benefit year; or
2. a bank of 40 hours provided at the commencement of each benefit year.

While employers may have a single policy that offers general paid time off, which includes time off for the reasons outlined in the ESL Law, and is accrued at a rate equal to or better than the rate required by the ESL Law, employers should be cautious to ensure they are compliant with the law.

An employee may use ESL in increments designated by the employer, with the maximum increment of the length of the shift during which the employee requests to use ESL. ESL can be used for a multitude of reasons, including:

1. diagnosis, care, treatment or recovery from an employee's mental or physical illness
2. diagnosis, care, treatment or recovery from an employee's family member's mental or physical illness
3. absence for employee or to assist a family member who is a victim of domestic or sexual violence
4. time during which an employee is unable to work because of epidemic or other public health emergency resulting in closure of the workplace or school or place of care of a child of the employee
5. to attend a school-related conference, meeting function or other event requested or required by an employee's child's school

An employer does not have to allow an employee to utilize more than 40 hours of ESL in any benefit year. If an employee has remaining ESL at the close of a benefit year, depending on whether the employer uses the

"accrual method" or the "advance method", an employer may offer to pay out the accrued but unused ESL in the final month of the benefit year at 50% or 100% of the accrued but unused time – which the employee may reject; or the employer may carry over a maximum of 40 hours of ESL to the following year. Notwithstanding any carry over, an employer may limit the use of ESL to 40 hours each benefit year.

KNOW THE EMPLOYER'S OBLIGATIONS

In addition to providing and administrating ESL to each employee working in New Jersey, employers have a host of other obligations under the law. It is critical employers establish and maintain ESL records for a minimum of five (5) years and are able to demonstrate compliance with the law. The records must document employee hours worked and any ESL taken so they can establish to the Department of Labor, if necessary, that ESL was properly accounted and accrued, as well as used, carried over and/or paid out. The law presumes an employer is in violation of the ESL Law if it has failed to maintain and cannot produce records.

Employers are prohibited from retaliating or discriminating against employees because they request or use ESL, or file a complaint concerning ESL. If an employee suffers an adverse employment action within 90 days of filing a complaint, alleging a violation, informing another of their rights to earned sick leave, opposing a practice inconsistent with ESL and/or cooperating with any investigation of a violation, there will be a (rebuttable) presumption that the employer's actions are unlawful retaliation.

Among other responsibilities under the law, employers are also responsible for posting the ESL Poster, among numerous other posters.

TAKEAWAY: Unquestionably, it is critical that employers not only comply with the ESL Law in providing employees with ESL, but that they also post required notices and maintain appropriate records. If you would like to know more about the ESL Law and how it affects your workplace or to ensure you are compliant, reach out to Wilentz's Employment Law Team.

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Federal Judge Overturns FTC's Non-Compete Ban

As we advised in our prior blog post, the Federal Trade Commission (FTC) promulgated regulations banning enforcement of most post-employment non-compete restrictions. In the blog post we noted there was pending litigation and many commentators believed the regulations would be stricken, or, at the very least, delayed. With the regulations set to go into effect on September 4, 2024, on August 20, 2024, Judge Ada Brown of the United States District Court for the Northern District of Texas ruled against the FTC, striking down the regulations. In short, Judge Brown determined that the FTC lacked authority to adopt such rules.

Specifically, Judge Brown found that the FTC "exceeded its statutory authority in promulgating the Non-Compete Rule." The FTC had promulgated the regulations relying on the power granted to it by the FTC Act, originally enacted in 1914.The FTC claimed that Section 6(g) of the FTC Act granted the agency authority to promulgate rules regarding unfair methods of competition. The Court rejected this argument, holding that Section 6(g) is a "housekeeping statute," and does not authorize the FTC to promulgate "substantive rules" regarding competition.

The Court further deemed the non-compete ban "arbitrary and capricious because it is unreasonably overbroad without a reasonable explanation" and imposed a "one-size-fits-all approach with no end date, which fails to establish a rational connection between the facts found and the choice made." The Court held that there was insufficient evidence of the FTC attempting alternates to the "sweeping prohibition," and further stated that the FTC should have at the very least "target[ed] specific, harmful non-competes."

The FTC has stated that it intends to challenge the ruling. This matter is still developing and we will supplement in a future blog post.

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Can An Employer Terminate The Health Insurance of An Employee Who Turns 65 and Becomes Medicare Eligible?

The answer is “it depends”. The Medicare Secondary Payer (“MSP”) rules determine which coverage is the primary payer when an employee is a beneficiary of both an employer’s group health plan and Medicare. The primary payer is the insurer that is the first to pay coverage of a healthcare bill. The secondary payer covers remaining costs if any, up to its limits, that the primary payer insurance does not cover.

Individuals become eligible to apply for Medicare benefits at the age of 65. Just because an employee is eligible, does not mean they will enroll. An individual will only be automatically enrolled if they file a claim for Social Security retirement benefits. Unless they file such a claim or enroll in Medicare, an employer should not terminate an employee’s group health coverage.

In a company with 20 or more employees Medicare is considered secondary to the group health plan of the employer. When Medicare is secondary (i.e., >20 employees), the MSP rules prohibit the employer from involuntarily terminating an employee’s health coverage because he or she is enrolled in and has become a Medicare beneficiary.

In a company with fewer than 20 employees (for the past year), Medicare is considered primary, instead of the group health plan of the employer. The MSP rules do not prohibit an employer from terminating the employee’s coverage if they enroll in Medicare. Do not, however, assume that an employee is enrolling in Medicare when they turn 65.

Additionally, an employer has to consider whether terminating the employee’s coverage would violate the Age Discrimination in Employment Act (ADEA). Generally, the ADEA prohibits group health plans from excluding active employees (or their spouses) from coverage solely because they are Medicare beneficiaries. There is an exception called the “equal benefit or equal cost” standard. This principle requires that employer-sponsored benefit plans provide equal benefits to all participants or require equal contributions from all participants. It is narrowly construed and difficult to meet.

Takeaway: This is not a simple issue and every employer’s circumstances are unique. We strongly recommend you consult your employment attorney before deciding how to proceed.

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Urgent News on The New Jersey Secure Choice Savings Program

More than three years after the enactment date of the New Jersey Secure Choice Savings Program ("Program"), new deadlines to comply have been announced. The Program requires certain New Jersey employers to provide their employees with a payroll-funded Roth IRA if the employer has not already established a qualified retirement plan. This month, July 2024, the apparatus to implement the Program, RetireReady NJ ("RR") was launched.

Fall Deadlines for Employers

When the law was signed on March 28, 2019, the deadline for employer compliance was set for two years after enactment but was later extended without a new deadline until now. The five members that manage the Program have set new deadlines:

- September 15, 2024 is the deadline for employers with 40 or more employees
- November 15, 2024 is the deadline for employers with 25 to 39 employees

Employers, unless they are exempt, must automatically enroll their eligible employees. Employees may opt-out within 30 days. Employees who are hired more than six months after RR is open for enrollment must be enrolled within three months of their hire date.

An employer is penalized if the employer does not register for RR or provide a qualified retirement plan within one year. The fines escalate depending on how long an employer has failed to comply and how many times the employer has violated the Program.

A Refresher: Program Basics

Employers must participate in the Secure Choice Savings Program if they do not already offer their employees a qualified retirement plan. Employers must participate in the Program whether they are for profit or non-profit employers, as long as they have employed 25 or more workers during the past calendar year and have been in business for at least two years. Employees who are 18 or older, who live or are employed in New Jersey, and whose wages are subject to New Jersey income tax withholding count toward the 25 employee threshold. Employers must offer the Program to both part-time and full-time workers. They do not have to offer the Program to independent contractors.

Employees will contribute to RR through automatic payroll deductions into a Roth IRA. Employees may opt out of the program. Employers are not required to contribute or match their employees' RR accounts, but they must set up the infrastructure so that their employees can participate, establish payroll deductions, and ensure compliance with the Program.

For more information about the Program, including penalties for non-compliance, please see this author's blogs entitled Understanding the New Jersey Secure Choice Savings Program and Update on the New Jersey Secure Choice Savings Program and the RR website, at https://www.nj.gov/treasury/securechoiceprogram/.

TAKEAWAY: The deadlines for compliance with The New Jersey Secure Choice Savings Program are here! Employers should prepare to enroll employees in RetireReady NJ or offer qualified retirement programs for their employees if they have not already done so.

If you are an employer and need help navigating the New Jersey Small Business Retirement Marketplace Act/New Jersey Secure Choice Savings Program or any other employment laws, contact Stephanie Gironda or any member of the Wilentz Employment Law Team.

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Construction-Industry Employers: Take a Look at the EEOC's New Guidance on Preventing Harassment on Your Worksites

On June 18, 2024, the Equal Employment Opportunity Commission ("EEOC") issued "Promising Practices for Preventing Harassment in the Construction Industry" (the "Guidance"), an overview of the core principles for construction-industry employers to effectively prevent harassment on their worksites. In support of these principles, the Guidance contains several recommendations for such employers to prevent harassment while remaining in compliance with federal laws.

Leadership and Accountability

The EEOC believes a successful harassment prevention strategy starts at the top, recommending:

- worksite leaders – from the project owner to crew leads to union stewards – should clearly, frequently, and unequivocally message and demonstrate that harassment is prohibited;
- project leaders and general contractors should focus on preventing harassment against all site workers regardless of whether those workers are covered by anti-discrimination laws;
- general contractors should assist subcontractors and staffing agencies with their legal obligations under federal anti-discrimination laws by referring them to the EEOC's Small Business Resource Center; and
- project owners should provide or coordinate anti-harassment training, monitor the workforce for anti-harassment compliance, require that contract bids include a plan to prevent and address workplace harassment, and seek feedback from workers about anti-harassment efforts and whether harassment may be occurring.

Comprehensive and Clear Harassment Policies

The EEOC expects construction-industry employers to maintain and provide a clear and comprehensive anti-harassment policy to workers. According to the EEOC, the policy should:

- provide a description of who is covered under the policy, what conduct is prohibited, and complaint and reporting procedures;
- indicate the employer's commitment to conduct a prompt and thorough investigation of any reported harassment; and
- be regularly updated, understandable to all employees, and posted in easy-to-find places (ex. breakroom or near the timeclock).

Effective and Accessible Harassment Complaint System

The EEOC highlights the importance of an effective harassment complaint system for construction-industry employers, recommending that:

- onsite employers and leaders should work together to provide a "no wrong door" environment to workers;
- the system should include both formal and informal methods of reporting harassment; and
- the system should be explained in languages commonly used by workers.

Effective Harassment Training

The EEOC emphasizes the importance of regular interactive, and comprehensive training of all workers on a construction site. According to the EEOC, the anti-harassment training should be:

- clear, easy to understand, and offered in languages commonly used by onsite workers;
- tailored to the specific workforce and work environment; and
- interactive if feasible, but if not, then alternative options include providing training through an interactive module accessible via mobile phone, or watching a series of short video clips, followed by a guided discussion about the clips.

TAKEAWAY: Construction-industry employers should review their policies and practices to prevent harassment on their worksites in light of the Guidance. If you are a construction-industry employer seeking additional guidance on implementing these recommendations, contact any member of the Wilentz Employment Law Team.

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Update on the FTC's Non-Compete Ban: Recent Court Rulings and Implications for Employers

As we previously reported, in April 2024, the Federal Trade Commission (FTC) issued a rule banning almost all employment-based non-compete restrictions. While the rule has garnered significant opposition, it is still currently scheduled to go into effect September 4, 2024. This alert will provide an overview of the current legal challenges facing the rule, and further give practical guidance to help prepare for (possible) implementation of the rule on September 4th.

Pending Law Suits Against the FTC

At least three lawsuits are currently pending in the federal courts, each of which challenges the enforceability of the pending rule. Most recently, in *ATS Tree Services, Inc. v. Federal Trade Commission*, filed in the U.S. District Court for the Eastern District of Pennsylvania, the court issued a July 23, 2024 decision denying plaintiff's request for a preliminary injunction, which would have halted implementation of the rule. Previously on July 3, 2024, in *Ryan, LLC v. Federal Trade Commission*, filed in the U.S. District Court for the Northern District of Texas, a court did issue a preliminary injunction against implementation of the rule, but importantly limited the injunction only to the specific plaintiffs in the case, meaning that the injunction does not otherwise impact the FTC's ability to enforce the rule against other US businesses. The plaintiffs have requested that the court reconsider expanding the scope of its injunction to apply to businesses nationwide, and the court has said it will issue a decision on or about August 30, 2024. Thus, as of now, the rule has yet to be struck down or enjoined by the courts (except in a very limited manner).

The Chevron Doctrine and Its Overturn

The recent US Supreme Court case overturning the long standing Chevron doctrine further adds to the already complex web of legal challenges. Historically, under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*., decided in 1984, courts deferred to federal agencies in interpreting ambiguous laws, allowing the agencies discretion in rule implementation. However, on June 28, 2024, the Supreme Court overturned Chevron by way of *Loper Bright Enterprises v. Raimondo*, deciding that while agency interpretations may still inform courts, courts may no longer defer to such interpretations. This change makes it easier for opponents to challenge agency rules, and in particular potentially impacting the ongoing lawsuits against the FTC's non-compete ban. It is still very early to tell the practice impact of the overturn of Chevron, and we will update you on any developments.

Practical Steps for Employers

As of now, despite much movement in the legal landscape, the non-compete ban is set to become effective on September 4, 2024. Employers need to prepare for compliance. Below are certain practical steps to take:

1. Identify "Senior Executives"
The rule does not restrict employment-based non-compete restrictions imposed on "senior executives" (as defined in the rule), provided those restrictions were entered into before September 4, 2024. Determining who is a "senior executive" is a fact-specific inquiry, and you should contact legal counsel for guidance in analysis.

2. Prepare a Form of Notice
On or before September 4th, businesses must notify current and former employees (excluding “senior executives”) that their non-compete restrictions are no longer enforceable. A template for the notice is available from the FTC.[1] Notifications must be in writing and can be hand delivered, sent via email, text message, or mail/courier. If you don't have contact information for a former employee, you are not required to send the notice. You should identify all current and former employees currently bound by a non-compete, so that by September 4th you are able to send out such notices (provided the rule is not otherwise enjoined or struck down before then).

3. Review Your Current Form Documents
Ensure that all future employment contracts, paperwork, employee handbooks, workplace policies, and websites do not include non-compete clauses for all workers, including “senior executives.”[2]

4. Consult and Stay Informed
Despite implementation of the rule, there will still be various other ways to protect your business, including by use of non-solicitation provisions and non-competition restrictions not tied to employment. You should consult legal counsel to help protect your business while ensuring compliance and stay updated on any further developments that could affect the rule's implementation.

If you have more questions about the FTC's new rule, please contact Jason Krisza and John Barry.

[1] Federal Trade Commission, Non-Compete Rule - Model Notices, https://www.ftc.gov/legal-library/browse/rules/noncompete-rule

[2] Federal Trade Commission, Non-Compete Clause Rule: A Compliance Guide for Businesses and Small Entities, After September 4, 2024, when the Rule is set to go into effect, you can’t enter into a new non-compete with any worker covered by the Rule—that includes senior executives. However, an existing non-compete with a senior executive is still valid. In contrast, for workers other than senior executives, you cannot enforce existing non-competes after the effective date, set to be on September 4, 2024, and you must give these workers notice that their non-competes will not be enforced.

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Household Employers Must Take Steps to Comply with New Jersey's Domestic Workers Bill of Rights

On July 1, 2024, the New Jersey Domestic Workers Bill of Rights went into effect, extending employee protections to more than 50,000 domestic workers throughout the state. Here is what household employers need to know.

Who is Considered a "Domestic Worker"?

A "domestic worker" is an employee who works in a residence providing services such as childcare; companionship or caretaker for a sick, convalescing, elderly or disabled individual; housekeeping or house cleaning; cooking; providing food or butler service; parking cars; cleaning laundry; gardening; personal organizing; or any other domestic service purpose. Expressly excluded from the definition of domestic workers include those who care for their own family members, pet or house sitters, home day-care businesses, and household maintenance contractors. The Bill of Rights covers all domestic workers, regardless of immigration status.

What Do Household Employers Need to Know?

Whether a worker is an independent contractor or an employee requires a fact-sensitive analysis under New Jersey's "ABC" test. Household employers should know that most domestic workers **do not meet the test to be an Independent Contractor** and therefore, are employees. For the first time, domestic workers are now protected under the New Jersey Law Against Discrimination (NJLAD) and the New Jersey Wage and Hour Law. As a result, domestic workers are now protected from discrimination and are entitled to receive minimum wage and overtime.

Additionally, under the new (and preexisting) law, employers must:

- register as an employer and make tax contributions
- notify domestic workers of their rights and protections under the law
- provide appropriate paid rest and meal breaks
- provide up to 40 hours of Earned Sick Leave
- maintain records concerning employee's worked hours, pay rates, break schedule and earned/used leave time
- prepare a written contract for employees who work five (5) or more hours per month on a regular basis, in the employee's language
- maintain Workers' Compensation insurance
- provide notice of termination for reasons other than misconduct - two (2) weeks' notice to live-out domestic workers and four (4) weeks' notice to live-in domestic workers

These requirements are not an exhaustive list.

Moreover, household employers must provide domestic workers with 10 minute rest-periods for every four (4) hours worked, 30 minute paid lunch breaks after five (5) consecutive hours of work, and requiring that live-in domestic workers receive an unpaid 24 hour rest period after six (6) consecutive days of work.

Employees who work fewer than five (5) hours per month or whose work for the household employer is casual, irregular and different from paid work in which they normally undertake, are exempt from the new law.

Domestic workers can pursue claims through the Department of Labor, Division of Civil Rights, Equal Employment Opportunity Commission or through a lawsuit filed in a court of law.

What if a Domestic Worker Files A Report?

Employers cannot punish employees for filing a complaint, reporting a violation or talking about their rights under the law. This means an employer of a domestic worker cannot cut their hours, make threats, fire them or take any action that would impact their employment because of the report or complaint. If an employee suffers any adverse action within 90 days of reporting a violation, filing a complaint or talking about their rights, it is presumed under the law to be retaliatory.

Are There Penalties for Violations?

Fines can range from $975 to $13,653, half of which would be returned to the worker. Further, any domestic worker or person who believes the law has been violated may also bring a lawsuit. If the employee prevails, they may be entitled to: reinstatement of employment, back pay (including 200% in liquidated damages for non-payment of wages, including overtime), front pay (lost wages going forward) and injunctive relief, as well as an award of reasonable attorneys' fees and cost.

Takeaway: Domestic workers are now entitled to significant protections under the Domestic Workers Bill of Rights and employers must adhere to several new regulations. NJ Department of Labor has provided a "model contract" that can be used as a starting point for a household employer who would like to hire a Domestic Worker. If you have questions about whether your worker(s) are employees or independent contractors under New Jersey Law or about how the New Jersey Domestic Bill of Rights affects you contact a member of the Wilentz Employment Law Team.

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What is the Pregnant Workers Fairness Act?

The Pregnant Workers Fairness Act ("PWFA") is a federal law that requires private and public employers, with 15 or more employees, to make reasonable accommodations for a qualified employee's or applicant's known limitations (physical or mental) related to, affected by or arising out of pregnancy, childbirth or related medical conditions irrespective of whether those conditions qualify as a disability. This includes but is not limited to current or past pregnancy, childbirth, miscarriage, stillbirth, postpartum depression, edema, high blood pressure, gestational diabetes, infertility and fertility treatment, placental conditions, lactation, use of contraception, menstruation, abortion, among other conditions. The accommodations cannot cause an undue hardship on the covered entities business operations.

For an applicant or employee's accommodation to be considered by an employer, the employee must make their limitation known to the employer by communicating to the employer or the employer's representative. The physical or mental condition that is limiting the employee can fall within any of the following categories:

- an impediment or problem that may be modest, minor and/or episodic;
- a need or problem related to maintaining the employee's health or the health of the pregnancy; or
- seeking health care related to pregnancy, childbirth or a related medical condition itself.

Limitations can include avoiding certain exposures or chemicals, avoiding working in certain temperatures, avoiding certain physical tasks such as lifting or standing, or needing to attend medical appointments for pregnancy, childbirth or related conditions.

An employee or applicant for employment qualifies for a reasonable accommodation under the PWFA in two ways:

1) they can currently perform the essential functions (fundamental duties and responsibilities) of the job with or without a reasonable accommodation; or

2) they cannot currently perform the essential functions of the job with or without a reasonable accommodation so long as: the period of inability is temporary, the employee could perform the essential functions in the near future and the inability to perform the essential functions can be reasonably accommodated.

If an employee is pregnant, it is to be assumed that the employee could perform the essential functions of their job "in the near future" because they could perform the essential functions generally within 40 weeks of the temporary suspension of an essential function.

For the temporary suspension of the essential function for conditions other than a current pregnancy, the determination of whether the employee will be able to perform the essential functions "in the near future" will be determined on a case-by-case determination.

What is a reasonable accommodation?

A reasonable accommodation is a change or adjustment in the work environment or the way things are usually done at work to allow employees to continue working. Reasonable accommodations sought by pregnant employees may change throughout the course of the employee's pregnancy or after childbirth.

Some examples of reasonable accommodations under the PWFA include, but are not limited to:

- frequent breaks
- temporary reassignment
- work-from-home
- schedule adjustments
- different uniform or safety equipment
- permitting food or drink
- light duty
- job restructuring
- temporary suspension of one or more essential functions
- leave to attend medical appointments
- leave to give birth and recover
- leave to recover from other medical conditions related to pregnancy or childbirth

The final rule expressly states that four (4) accommodations are presumptively reasonable and should be granted without any documentation:

- additional restroom breaks
- food and drink breaks
- permission for water and other drinks to be kept nearby and accessible
- for the employee to sit or stand as needed

What constitutes an undue hardship?

An employer is only required to provide accommodations that do not cause the employer an undue hardship. An employer suffers an undue hardship from an employee's accommodation if the accommodation will result in significant operational difficulty or expense.

Factors for an employer to consider to determine whether the temporary suspension of an essential function will cause an undue hardship:

- consideration of the length of time that the employee will be unable to perform the essential function(s)
- whether there is work for the employee to accomplish
- the nature of the essential function(s), including frequency
- whether the employer has provided other employees in similar positions who are unable to perform the essential function(s) of their positions with temporary suspensions of those functions
- whether there are other employees, temporary employees or third parties who can perform or be temporarily hired to perform the essential function(s) in question
- whether the essential function(s) can be postponed or remain unperformed for any length of time, and if so, for how long

What does a request for an accommodation look like?

There are no specific words an applicant or employee must use to request an accommodation. Casual conversations can trigger accommodation obligations. For example, an employee sharing the news that they are pregnant can be sufficient for an employer to be put on notice that the employee will need reasonable accommodations and to trigger the interactive process. If an accommodation is not obvious or evident, an employee must identify the limitation requested and the adjustment or change at work requested due to the limitation. An employee failing to complete specific paperwork or speak to a designated company representative is not grounds to delay or deny an employee an accommodation under the PWFA, unless very specific criteria are met.

What does an employer need to do in response to a request for an accommodation?

Employers who are aware of an applicant or employee's need for an accommodation associated with pregnancy, childbirth or related medical conditions must engage in the interactive process and must do so with expediency. The interactive process is a communication back and forth between the employer and the employee to identify the employee's known limitation, the adjustment or change needed at work for the limitation and potential reasonable accommodations. The PWFA recognizes that most accommodations can be provided quickly and the interactive process often will consist of only a brief conversation or email exchange. Regardless, the employer is obligated to promptly respond to a request for an accommodation.

In evaluating the accommodation requested, generally the employer must provide the accommodation, or an effective alternative accommodation, unless providing the accommodation would cause an undue hardship to the employer's business. To the extent an employer requires additional time to respond to a needed accommodation, the PWFA recommends as a best practice that the employer grant an interim accommodation to avoid unnecessary delay or further impact the employee.

Can an employer require a doctor's note?

Employers are generally prohibited from requesting documentation concerning an employee's request or need for a reasonable accommodation under the PWFA, unless the request that an employee obtain a provider's note is reasonable under the circumstances. More specifically, an employee's need for accommodation ought not to require a provider's note when:

- the requested accommodation is obvious
- the employer already has sufficient information to support a known limitation related to pregnancy
- when the request for one of the four expressed reasonable accommodations outlined above
- when the request is related to lactation accommodations
- when the accommodation is available to other employees seeking the same accommodation for non-PWFA related reasons and documentation is not required

If the requested accommodation is not obvious or the employer needs additional information to ensure it is providing the proper accommodation, the employer is limited to requesting the following information:

- confirming the existence of the physical or mental condition
- confirming the condition is related to, affected by or arising out of pregnancy, childbirth or related medical conditions
- a description of the needed adjustment or change at work due to the limitation

The PWFA does not allow an employer to require an employee seeking an accommodation to be examined by a health care provider selected by the employer.

Unpaid Leave is a Last Resort

Employers are expressly prohibited from requiring pregnant employees to take a paid or unpaid leave if another reasonable accommodation can be provided. Essentially, requiring an employee to take leave is a last resort available only if there are no other reasonable accommodations that can be provided absent undue hardship.

The PWFA prohibits:

Coercion, intimidation, threats, harassment or interference with any individual in the exercise or enjoyment of rights under the PWFA or with any individual aiding or encouraging any other individual in the exercise or enjoyment of rights under the PWFA. Employers are also prohibited from retaliating against any employee, applicant or former employee because they opposed acts or practices made unlawful by the PWFA or has made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing related to the PWFA.

The PWFA permits:

Employees to bring a private right of action against their employer for alleged violations of the PWFA. An the employer that can show it made good faith efforts to identify and make a reasonable accommodation that would provide an "equally effective opportunity" to the qualifying employee and not cause an undue hardship for the employer will be able to assert a defense.

Takeaways for Employers:

- train recruiting and hiring professionals on how applicants can request accommodations during the application process
- train human resources professionals and all supervisors in how to evaluate accommodation requests and to ensure compliance with the PWFA
- ensure workplace technology and tools are accounting for and adjusted to the integration of accommodations for qualified employees needing an accommodation under the PWFA
- consider other federal, state and local laws in conjunction with determining reasonable accommodations under the PWFA
- identify the essential functions of each position in job descriptions
- employers must maintain confidentiality of an employee's medical information, including the fact that an employee is pregnant, has recently been pregnant or has a medical condition related to pregnancy or childbirth

If you are concerned about your rights or obligations under the PWFA, please contact a member of our Employment Law Team to assist you.

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Out-of-State Remote Workers are Protected by the New Jersey Law Against Discrimination

In May, the New Jersey Division of Civil Rights issued guidance regarding the applicability of the Law Against Discrimination ("LAD") to Out-of-State Remote Workers.

The LAD provides that "all persons shall have the opportunity to obtain employment . . . without discrimination". The LAD prohibits employers from discriminating on the basis of actual or perceived sexual orientation, gender, gender identity, gender expression, age, race, color, national origin, ancestry, religion, disability, and other protected characteristics.

The LAD definition of "person" is expansive, it includes "one or more individuals, partnerships, associations, organizations, labor organizations, corporations, legal representatives, trustees, trustees in bankruptcy, receivers, and fiduciaries," and it contains no geographic restriction on its scope.

The LAD's employment provisions, meanwhile, also prohibit employers, because of a protected characteristic "of any individual," "to refuse to hire or employ or to bar or to discharge or require to retire . . . from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment." That provision applies broadly to discrimination against "any individual," no matter where the employee is located.

Whether an employee working for a New Jersey employer lives in New Jersey, commutes to work from another state, or works remotely from outside New Jersey, the LAD protects the right to a workplace free from discrimination and bias-based harassment. Thus, **any aggrieved employee, regardless of their residency or where they physically work, including those who work remotely full-time or part-time on a hybrid schedule, may seek redress for violations of the LAD by New Jersey employers.**

Employers based in New Jersey should ensure they understand and comply with the expansive reach of the Law Against Discrimination (LAD). This includes maintaining a discrimination-free workplace environment for all employees, regardless of their location or remote work arrangement. Understanding these legal obligations helps create a workplace culture aligned with the principles of the LAD.

If you have any questions regarding the LAD's employment provisions, please reach out to Tracy Armstrong or any member of the Wilentz Employment Law Team.

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The New Jersey Supreme Court Ruled that the Written Agreement Between a Real Estate Broker and a Real Estate Salesperson Outlining Whether the Relationship is One of Employer-employee or as an Independent Contractor is Enforceable

Plaintiff James Kennedy, II, was a real estate salesperson who entered into written agreements with defendant Weichert Co. pursuant to which they agreed Kennedy was an independent contractor of Weichert. In his lawsuit, Kennedy claimed Weichert had violated the Wage Payment Law by misclassifying him (and other real estate salespersons) as independent contractors and unlawfully deducting marketing fees and other expenses from commissions.

In denying Defendant Weichert's Motion to Dismiss, the trial court found that the Plaintiff's status was not determined by his agreement with Weichert, but by the legal standard that generally governs employee classification issues under Wage Payment Law, also known as the "ABC Test".

Weichert appealed, and the Appellate Division found that the written contract between a real estate salesperson and the salesperson's broker is just one of several factors to be considered in determining whether a real estate salesperson is an independent contractor or employee, and that the ABC Test shall also be considered.

Thereafter the Legislature amended the Brokers Act.

The Supreme Court relied upon the clear express language of the New Jersey Brokers Act and found that a written agreement entered into between a real estate salesperson and the salesperson's broker identifying the relationship as an independent contractor relationships is enforceable.

The Supreme Court's decision in this matter is a significant one. Its rejection of the ABC Test and reliance on and enforcement of the written contract between the real estate salesperson and the salesperson's broker, when one exists, gives the real estate professionals the autonomy to determine the nature of their relationship by way of contract. The result is that real estate salespeople who contract as independent contractors may be able to write-off costs incurred in the performance of their work, such as support staff, vehicle costs for business purposes, equipment depreciation, advertising costs, meals, business related travel, continuing education expenses, insurance costs, dues, and licensing fees, among other expenses. Additionally, they are able to set their own hours and schedules and determine how much or how little they work.

Takeaway: Written agreements between real estate salespersons and brokers concerning their employment relationship are enforceable. This is only one exception to the ABC test for independent contractors. The misclassification of an individual is a risk for employers that contains a significant monetary consequence. If you have any questions regarding misclassification of individuals, please reach out to any attorney on our Employment Law team.