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The Times They Are a-Changin' for NJ Employers

Gather round employers, there's a battle outside and it's ragin'. The new employment laws will soon shake your windows and rattle your walls, for the times in New Jersey they are a-changin'.

By **Steven I. Adler** | August 08, 2018

Nobel laureate Bob Dylan was writing about different times, but his song "The Times They Are a-Changin'" surely applies to the state of employment law since New Jersey Governor Phil Murphy took office in January.

No New Jersey employment lawyer would argue with the general proposition that, for decades, our state has been far more liberal than most when it comes to protecting employees' rights. While Governor Christie did his best to put a halt to that trend, since his first day in office our new governor has made it clear the direction he wants to travel. The train is now barreling down the tracks toward more employee rights.



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On day one, Governor Murphy signed an executive order to combat gender pay disparity by precluding the state government from asking job applicants about their pay history. Subsequently, Governor Murphy signed the New Jersey Equal Pay Act (NJEPA) to further close the pay gap not only for women, but all minorities covered by New Jersey's discrimination law. NJEPA replaced various provisions of the New Jersey Law Against Discrimination (NJLAD). Governor Christie previously vetoed these measures, arguing they were unfriendly to businesses and a threat to our economy. This new law enables workers to assert claims that go back six years, and sometimes even longer, rather than being bound by the two-year statute of limitations for all other types of discrimination claims. The NJEPA also prohibits employers from taking reprisals against employees for discussing their pay with fellow employees, provides for treble damages and other provisions that are extremely unfriendly to New Jersey employers.

For example, not only does the NJEPA increase employer exposure to liability and damages by raising the statute of limitations period to six years, the NJEPA provides that "[n]othing in this subsection shall prohibit the application of the doctrine of 'continuing violation' or the 'discovery rule' to any appropriate claim as those doctrines currently exist in New Jersey common law." A continuing violation claim allows a series of discriminatory acts to be combined to form a single cause of action for discrimination. In 2002, the New Jersey Supreme Court held that a continuing violation claim begins to run when the wrongful conduct ends, which extended the NJLAD two-year statute of limitations period. Now, a continuing violation claim under NJEPA further increases employer's liability, allowing potential liability far beyond six years. The NJEPA also makes it an unlawful employment practice "to require employees or prospective employees to consent to a shortened statute of limitations or to waive any of the protections provided by the NJLAD."

On top of these employee-friendly provisions, the NJEPA also inverts the traditional burden of proof, creating a presumption of illegal discrimination wherever an employee in a protected class is paid less in either wages or benefits than another

similarly situated employee. To defend against such a presumption, employers may rely upon a system of “seniority” or must demonstrate that: (1) the differential is based on legitimate factors such as education level, experience, training, or the quality or quantity of production; (2) these bona fide factors do not perpetuate the differential in compensation based on any characteristic of the protected class; (3) each factor is reasonably applied; (4) one or more of these factors accounts for the differential in pay or benefits; *and* these factors are job-related with respect to the employee’s position and business necessity. Employers who seek to employ this affirmative defense are compelled to compare not only the employee in question’s place of work, but compensation across all offices or facilities.

Starting in October, Governor Murphy’s new employment law, the New Jersey Paid Sick Leave Act (the Act), will require employers, regardless of size, to provide workers with paid sick and domestic violence leave. Once in effect, New Jersey will be the 10th state to require such paid leave. Specifically, the accrual rate will be 1 hour of paid leave per 30 hours worked, up to a maximum of 40 hours of paid leave per year. An employee may take paid leave for their own health needs or health needs of a family member, which is broadly defined as any individual related by blood or whose close association is equal to that of a family type relationship. Also, among other things, an employee may take paid leave for issues resulting from him or herself or a family member being a victim of domestic or sexual violence. The Act also will have a negative impact on most employers since many do not have as generous a paid sick leave policy currently. The Act may result in employers raising prices or decreasing employee pay or other benefits. Employers will also have the added burden of documenting exempt employee hours worked, earned paid leave and used paid leave per employee, for a period of five years.

The governor also recently signed another executive order to create a task force to investigate misclassification of workers as independent contractors rather than employees. The task force will be charged with a number of responsibilities to combat employee misclassification, including: (1) examining misclassification enforcement by

agencies; (2) developing best practices to increase efficient enforcement; (3) developing recommendations to foster compliance with the law; and (4) conducting a review of existing law and applicable procedures. This crack down could result in significant awards against employers. Governor Murphy stated that any company that violates this law will either be brought into compliance or put out of business.

In the 2015 case, *Hargrove v. Sleepy's*, the New Jersey Supreme Court adopted an extremely stringent test for determining whether a worker is an employee or an independent contractor. The test is known as the "ABC Test," which starts with the presumption that a worker is an employee, placing the burden on the employer to prove otherwise. To prove that a worker is an independent contractor, employers must satisfy three prongs: (1) the worker has been and will continue to be free from control over the performance of his or her work; (2) such work is either outside the usual course of the business or is performed outside of all of the places of business of the enterprise; and (3) the worker is customarily engaged in an independently established trade, profession or occupation. Of these three prongs, the issue of control bears the most weight in determining whether an employee is an independent contractor.

Based on the implementation of this new task force, the New Jersey Department of Labor will likely increase auditing procedures to monitor employee classification, examining payroll records, 1099 and W-2 forms, and independent contractor agreements. These new measures will significantly increase costs for companies operating in New Jersey, as many will be forced to reclassify workers as employees, compelling companies to pay employment taxes (FICA, FUTA) and provide benefits to employees such as paid leave and health insurance. Additionally, employers are potentially liable for past contributions that should have been made to the state. Under New Jersey's Workers' Compensation laws, employers can face fines of up to \$1,000 per day if an employee is misclassified as an independent contractor. Each day a worker is misclassified constitutes a separate offense. On top of potentially devastating fines, the push to reclassify workers will force employers to pay newly classified employees minimum wage under the New Jersey Wage and Hour Laws. This executive order also

opens the door for more litigation against employers. With more workers classified as employees, there is greater opportunity for suits to be brought against employers under the NJEPA, the NJLAD and under other laws such as the New Jersey Conscientious Employee Protection Act (CEPA).

Finally, the New Jersey legislature is considering a bill which would cut back the use of non-compete agreements. The bill would enable workers to obtain employment in New York City and compete with their former employers in New Jersey, limit any non-compete agreements to one year, and allow employees to continue to provide services to customers of their former employer as long as they do not solicit the customers for that business. Further, an employee terminated without good cause could only be restrained from competing if his or her former employer continues to pay the terminated employee during the non-compete period. While non-compete agreements are overused by employers, requiring employers to pay former employees during their non-compete periods would impose a large financial burden on many employers. It could also cause employers to choose not to operate in the Garden State. A better approach would be to limit non-compete clauses to salespeople or others with access to confidential information that could harm their former employers.

Was Governor Christie correct that these types of measures would be a tremendous threat to our economy? That may be overstating it a bit, but not by much. Most people are not against women and minorities earning equal pay for equal or substantially similar work. Likewise, one cannot argue with employees staying home when ill and even paying them for at least some of that time off. However, it seems that the pendulum has swung too far the other way such as when allowing for a six-year or longer statute of limitations and gutting legitimate defenses employers previously had when fighting disparate pay cases. The new measures that have been implemented will likely result in increased costs, a surge in lawsuits and additional penalties for employers.

So gather round employers, there's a battle outside and it's ragin'. The new employment laws will soon shake your windows and rattle your walls, for the times in New Jersey they are a-changin'.

Steven I. Adler is the co-chair of the Labor and Employment Law Practice Group at Mandelbaum Salsburg, with offices in New Jersey, New York, Florida and Colorado. Erin Barrett and Mallory Ullrich were summer associates at the firm.

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