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The New Jersey Law Against Discrimination: A License To Steal

What can a New Jersey employer do about a Human Resources Manager who steals confidential personnel information in order to bolster her failure-to-promote discrimination lawsuit and then discloses that confidential information in a deposition? Nothing, says the New Jersey Supreme Court, and if the employer decides to fire her for violating uniformly applied rules against stealing confidential information, it will be liable for unlawful retaliation under the New Jersey Law Against Discrimination ("NJLAD"). *Quinlan v. Curtiss-Wright Corporation*, Docket No. A-51-09 (Dec. 2, 2010). Thanks to this ruling, employers cannot fire employees who steal confidential documents just because they are able to use it in their lawsuits before getting caught.

In *Quinlan*, the person stealing the confidential personnel documents was the Executive Human Resources Director, the same employee who was entrusted with the information's safe-keeping. Quinlan brought a failure-to-promote case against her employer. While still employed, she copied more than 1,800 pages of confidential information without authorization. Most of the information copied was from other employees' personnel files. She then removed the files from the employer's premises and gave them to her lawyer.

Quinlan's employer learned of the theft when the employer's lawyer received copies of the documents in response to a notice to produce served on Quinlan. Later, Quinlan, as part of her normal job duties, came into possession of the performance evaluation of the person who beat her out of the job she wanted. Because the evaluation noted that he needed improvement in several areas, Quinlan decided the evaluation was important to her discrimination claim. She copied it without authorization and turned it over to her attorneys who, however, chose not to turn it over to the employer's attorneys. Thereafter, Quinlan's attorneys deposed the employee who beat Quinlan out of the promotion she wanted and during his deposition, confronted him with this document. Once the employer learned from its attorneys of the unauthorized taking by Quinlan, the employer fired Quinlan for the theft of company property, *i.e.*, the unauthorized taking of confidential and privileged information. Quinlan then added a retaliation claim to her pending lawsuit. A trial resulted in a multimillion dollar verdict for Quinlan.

Although the Appellate Division reversed the trial court, the New Jersey Supreme Court affirmed the jury verdict, holding that because Quinlan used the purloined documents in her lawsuit, she was engaged in protected activity. The employer could fire Quinlan for the wrongful taking of the documents, but then be held liable for the firing if she used the stolen documents in a deposition. In other words, the theft of documents is forgiven if they are used in litigation.

Quinlan should deeply trouble New Jersey employers, employees and lawyers. Now, when employees entrusted with confidential information file NJLAD claims, their employer will be forced to keep them in their jobs for fear of a retaliation claim even though they admitted stealing this information for their own gain. Trust among employees will be replaced by suspicion and fear. The same employee who stole confidential personnel documents will still be sitting in the human resources office handling fellow employees' private data like Social Security numbers, bank account numbers, birth dates, immigration status and medical information. Thanks to *Quinlan*, New Jersey employees have no right to feel that the private information they give to their employers is secure and free from theft and exploitation. ■

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SEC Proposes New Rules For Implementing The Whistleblower Provisions Of The Dodd-Frank Act

In July 2010, Congress passed, and President Obama signed into law, the Dodd-Frank Wall Street Reform and Consumer Protection Act. Section 922 of the Act establishes a whistleblower program requiring the SEC to pay an award to whistleblowers who voluntarily provide the SEC with **original information** about a violation of the federal securities laws that leads to the successful enforcement of a covered judicial or administrative action, or a related action.

Specifically, Section 922 (new Section 21F of the Securities Exchange Act of 1934), as added by Dodd-Frank, provides that whistleblowers who voluntarily provide the SEC with original information about a violation of the securities laws that leads to a successful enforcement action resulting in monetary sanctions exceeding $1,000,000 will be entitled to awards between 10% and 30% of the total

monetary sanctions collected, including monetary sanctions collected in related actions by other agencies. The Act does not require the whistleblower to first makes complaints through internal compliance or ethics programs instituted by the employer. Therefore, employers can expect that their employees will go directly to the SEC, thereby depriving employers of a good faith opportunity to correct any problems.

Who can be a whistleblower?

A whistleblower is an individual who, alone or jointly with others, provides information to the SEC relating to a potential violation of the securities laws. A company or other entity is not eligible to be a whistleblower. However, certain persons will not qualify to receive awards under the new rules, such as attorneys and auditors representing the company, persons who participated in the wrongdoing, persons that make false or fraudulent statements to the SEC, foreign officials, and certain relatives of SEC employees.

Must a whistleblower comply with the company's internal compliance programs before reporting to the SEC?

No. A potential whistleblower is not required to follow internal company complaint and reporting procedures.

What type of information qualifies as "original information"?

For information to be "original information," it must be: (1) derived from the individual's independent knowledge or analysis; (2) not already known to the SEC or other regulatory entity from another source; (3) not exclusively derived from an allegation made in another forum unless the whistleblower was the source of the information; and (4) provided to the SEC after July 21, 2010. It is not necessary that the whistleblower have independent knowledge of a violation; it can include knowledge derived from facts or other information learned from third parties. If the SEC already knows the information disclosed by a whistleblower, then the information will not be "original information" unless the SEC learned of the information from another source, and that source learned of the information from the whistleblower. In such case, the burden of proof is on the whistleblower to prove that he/she was the original source, and the claim by the whistleblower must be made within 90 days of the conveyance of the information to the other source.

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... to receive an award, whistleblowers must make a claim for an award within 60 days of notice that monetary sanctions were levied against the company.

May a company prevent a potential whistleblower from reporting if the potential whistleblower has signed a confidentiality agreement?

No.

What are the specific procedures that a whistleblower must follow?

The whistleblower must submit the information either through the SEC's standard form or online database for receiving tips, complaints and referrals. In addition, the whistleblower must complete a form, signed under penalty of perjury, representing that the information provided is truthful and that the whistleblower is eligible to receive a potential award. When information is submitted anonymously, the whistleblower's attorney must submit the information, certify that the attorney has verified the whistleblower's identity and retain the whistleblower's signed form in the attorney's files. In addition, to receive an award, whistleblowers must make a claim for an award within 60 days of notice that monetary sanctions were levied against the company.

What constitutes original information that leads to the successful enforcement of an SEC action or a related action?

If the information led the SEC to open an investigation and the information "significantly contributed" to the success of the enforcement action, it would qualify. In addition, in the case of ongoing investigations, if the information was essential to the success (a higher standard) of an investigation already ongoing, it would qualify.

What type of proceeding qualifies as a proceeding from which an award may be paid?

To qualify, the proceeding must be a single federal court or administrative action.

How big can the award be?

The award will be between 10% and 30% of the monetary sanctions recovered, the exact amount to be determined by the SEC. If there are multiple whistleblowers, the total will not exceed 30%, so one whistleblower may receive 25% and another 5%. The criteria the SEC must use to make the determination of the exact amount between these two percentages are: the significance of the information to the success of the action; the degree of assistance provided by the whistleblower and any legal representative of the whistleblower; the programmatic interest in deterring violations of the securities laws; and whether an award otherwise enhances the SEC's ability to enforce the federal securities laws, protect investors, and encourage the submission of high quality information from whistleblowers. ■

Bereavement Leave In New York Must Be Provided To Same-Sex Couples

Recently, Governor David Paterson signed into law bill number S6177A, an amendment to the New York Civil Rights Law, providing that same-sex couples are entitled to bereavement leave. The law does not require that employers provide bereavement leave; rather, it simply requires that those who do must provide the same benefits to same-sex committed couples as for opposite-sex married couples with regard to leave for a spouse or spouse's family members.

Specifically, the law will amend New York Civil Rights Law by adding Section 79-n, which will "prohibit[] employers from discriminating in the granting of funeral or bereavement to its employees who are in a committed, same-sex relationship." It also provides that "such leave must be extended on the same basis as if offered to those employees who are married." A committed relationship is defined as a long-term relationship characterized by emotional and financial commitment and interdependence.

The purpose behind this law is to ensure that individuals in same-sex relationships who are prohibited from civil marriage are granted bereavement leave to attend the funeral of their partner or partner's relatives. However, there has yet to be published any guidance or additional instruction from the New York State Division of Human Rights as to implementation of this new law and how employers can ensure legitimate requests.

The Bottom Line

The new law takes effect sixty (60) days from the date of enactment. New York employers should examine and revise their employment handbooks and personnel policies to reflect the new legal requirements and benefits offered to employees in same-sex relationships. Should employers have any specific questions, they should feel free to contact us. ■

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New York Adopts The Construction Industry Fair Play Act

On August 27, 2010, Governor David Paterson signed into law the Construction Industry Fair Play Act that was enacted by the New York State legislature during the 2010 legislative term. This Act reflects the State's concern over misclassification of workers in the construction industry and took effect on October 26, 2010.

This new law sets forth a presumption that workers in construction are employees unless the following three criteria are met: (1) the worker is "free from control and direction in performing the job, both under his or her contract and in fact"; (2) the worker's services "must be performed outside the usual course of business in which the service is performed"; and (3) the worker is "customarily engaged in an independently established trade, occupation, profession or business that is similar to the services at issue."

Construction industry employers are also mandated to provide workers with a notification of their classification status and display a NYSDOL notice about the Act which explains to workers their rights and protections. Employers are prohibited from retaliating against those who exercise their rights under this Act.

Penalties for violations of this Act range from civil fines of $2,500 to $5,000 per employee. In addition to the civil penalties, an employer may be subject to a criminal penalty of up to 60 days in jail, a $50,000 fine and debarment from public work for up to five years.

The Bottom Line

The issue of misclassification of employees is one that both the federal and state wage and hour agencies take very seriously. The U.S. Department of Labor, Wage and Hour officials have announced a regulatory agenda that includes vigorous enforcement of wage and hour laws, with an express focus on the misclassification of employees as independent contractors and as exempt employees. Therefore, it is particularly vital that employers should immediately do a wage and hour audit to make sure that they are in compliance. The cost of doing an audit will be swamped by the potential liability of various violations. ■

For more information about any of the topics covered in this issue of the Labor and Employment Law Alert, please contact:

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