

EMPLOYMENT & *Immigration Law*

LAD Amendment Prohibits Retaliation for Sharing Compensation Information

“How much do you make?” is no longer a forbidden question

By **M. Trevor Lyons and Michael A. Shadiack**

New Jersey’s Law Against Discrimination (LAD), N.J.S.A. 10:5-12(d), makes it an unlawful practice:

[f]or any person to take reprisals against any person because that person has opposed any practices or acts forbidden under this act or because that person has filed a complaint, testified or assisted in any proceeding under this act or to coerce, intimidate, threaten or interfere with any person in the exercise or enjoyment of, or on account of that person having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by this act.

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This antiretaliation prohibition has been interpreted by New Jersey courts to apply not only to those employees who actually bring an antidiscrimination claim against their employer, but also to any employees who aid or assist such individuals in bringing such claims. Generally, an employee who provides information, including compensation information, to an employee complaining of discrimination is assisting that complaining employee and would, therefore, arguably be protected against reprisal under the LAD’s antiretaliation provisions.

New Jersey’s legislators expressed a concern that gender-based pay disparities persist in the workplace, and they often go undiscovered because employees do not discuss compensation information in the workplace out of fear of reprisal by their employer. Therefore, the LAD was recently amended to add a new antiretaliation provision that expressly addresses the situation in which an employee shares compensation and benefit information with another current or former employee for purposes of investigating, considering or asserting a discrimination claim under the LAD, including a claim for gender discrimination.

Originally, proponents of this legislation had sought to extend the protections of New Jersey’s Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1

et seq., to protect employees discussing or providing salary and benefits information to other employees as whistleblowers. Because workplace discrimination claims are brought under the LAD, however, the governor conditionally vetoed that original legislation, and proposed modifying the bill to remove the proposed language from CEPA and incorporate it into the LAD.

Specifically, a new section “r” was added to the LAD to prohibit reprisal against an employee:

for requesting from any other employee or former employee of the employer information regarding the job title, occupational category, and rate of compensation, including benefits, of any employee or former employee of the employer, or the gender, race, ethnicity, military status, or national origin of any employee or former employee of the employer, regardless of whether the request was responded to, if the purpose of the request for the information was to assist in investigating the possibility of the occurrence of, or in taking of legal action regarding, potential discriminatory treatment concerning pay,

compensation, bonuses, other compensation, or benefits.

The LAD makes clear, however, that this new provision cannot be used by an employee, former employee or employee organization to require disclosure of compensation information by an employer.

Practical Examples

New Jersey employers and the attorneys that represent them must ensure that the organization's practices, personnel policies and work rules comply with the amendment. For example, an organization may have a policy or work rule that provides that:

Employees are prohibited from discussing their salary or wage levels and company benefits with other employees. Such information is confidential and may not be discussed in the workplace. Any employee violating this policy will be considered to have committed a breach of confidentiality and will be subject to disciplinary action, up to and including termination of employment.

Enforcement of such a policy or rule against an employee investigating the possibility of discriminatory pay practices will now expose the employer to possible liability under the LAD.

Even prior to the recent amendment to the LAD, however, having or enforcing such a policy or rule potentially violated federal labor law. Specifically, the National Labor Relations Act (NLRA) contains a provision, Section 7 (29 U.S.C. § 157), that gives all employees the right to "engage in concerted activities," including the right to discuss the terms and conditions of their employment with each other. Section 8(a) (1) of the NLRA (29 U.S.C. § 158(a)(1)) makes it an unfair labor practice for an

employer to deny or limit the Section 7 rights of employees. Based upon these two provisions, for decades, the National Labor Relations Board has taken the position that employers may not prohibit employees from discussing their pay and benefits, and that any attempts to do so violate the NLRA.

Employers should also be wary about disciplining employees for sharing compensation information outside of work or through social media. When employees discuss compensation in a virtual forum such as online message boards or personal blogs, Section 7 rights and the new provision of the LAD still apply. Just as employers cannot prohibit or limit employees' ability to discuss salaries and benefit information away from the workplace, they must also allow employees to discuss compensation information online. Neither Section 7 nor the recent amendment to the LAD, however, permits employees to publicly disparage a company's products or services. Therefore, in certain circumstances, employees who combine compensation discussions with comments not legally protected may still face disciplinary action by their employer.

A Reminder

New Jersey employers with 50 or more employees should also be mindful of last year's amendment to the New Jersey Equal Pay Act (EPA), which requires such employers to provide written notification of employees' right to be free from gender discrimination in salary, benefits and other terms and conditions of employment. While the EPA amendment was passed in 2012, the gender equity posting and notification requirement does not become effective until the New Jersey Department of Labor and Workforce Development issues the required form of notice. A proposed form of notice was published in January 2013 but has not yet been adopted. Once the gender equity posting requirements become effective, employers will be required to post such notification in conspicuous locations avail-

able to all workers in each of the employer's facilities and also provide each employee with written notice.

Things To Do Now

New Jersey employers, and the attorneys that represent them, should consider taking the following proactive steps to address the LAD's new reprisal provisions.

- Review company policies and work rules regarding confidentiality to ensure that they do not prohibit employees from discussing their compensation, benefits or other job information with current or former co-workers or from otherwise engaging in potentially protected concerted activity.

- Update policies, handbooks, employment manuals and other policy statements, including disciplinary and social media policies, to reflect the new requirements.

- Train and educate managers, human resources personnel and others to ensure their awareness that employees should not be prohibited from discussing salary, benefits or other terms and conditions of employment, or be disciplined for doing so. That training should include a discussion of the employer's confidentiality and social media policies. Periodic reminders or refreshers as to these new requirements as part of the employer's annual training requirements is also a necessity to prevent unnecessary litigation.

- Monitor the New Jersey Department of Labor and Workforce Development's website for further updates regarding the gender equity posting and the distribution requirements.

It is not uncommon for employers to have maintained a formal policy or a practice prohibiting or discouraging employees from discussing their wages with each other. Therefore, employers are encouraged to act as soon as possible to bring their practices, policies and rules in line with the NJLAD amendment and to ensure that managers and human resources personnel are trained accordingly. ■