

New Laws Bolster NJ's Worker-Friendly Bona Fides, Attys Say

By **Vin Gurrieri**

Law360 (January 22, 2020, 11:03 PM EST) -- New Jersey Gov. Phil Murphy signed a spate of employee-friendly bills into law Tuesday, including one statute that stiffens penalties on employers for misclassifying workers and another that requires businesses to pay severance to workers impacted by mass layoffs.

The series of new employment laws includes several statutes geared toward the hot-button issue of workers being misclassified as independent contractors. While contractors are afforded fewer workplace protections than individuals categorized as employees, business advocates often argue that contractor status affords workers greater flexibility and certain other benefits.

Ryan T. Warden, a shareholder in Ogletree Deakins Nash Smoak & Stewart PC's offices in Morristown, New Jersey, and Philadelphia, told Law360 that a major focus for businesses in the Garden State should be staying apprised of the constant changes in workplace mandates and communicating with internal staff and outside counsel regarding compliance "since the landscape is constantly changing."

"One of the big things is staying on top of [the new laws] — they're coming at a pace that I don't think we've ever seen before," Warden said.

Adam Gersh of Flaster Greenberg PC said the laws are indicative of New Jersey's continued movement to join states like California and New York that have traditionally been seen as havens for workers when it comes to employment laws.

"New Jersey continues to push forward as being one of the most employee-friendly states," Gersh said. "New York has taken some big steps to change employment law to be friendlier to employees, and I think that New Jersey is doing the same — I suppose in part with confidence that New Jersey is appealing enough for certain kinds of employers that they won't move out of state. I guess only time will tell what will happen."

Here, employment attorneys take stock of the Garden State's new mandates.

Fines for Misclassification

One new law, A.B. 5839, authorizes the state's Department of Labor and Workforce Development to assess fines against businesses for intentionally misclassifying workers.

The penalty can be up to \$250 for every misclassified employee for a first offense, and up to \$1,000 per misclassified employee for subsequent violations.

Employers caught having misclassified workers will also have to pay those individuals up to 5% of their gross earnings over the previous yearlong period under the new law, which requires regulators to first notify employers of a forthcoming penalty and give them a chance to request an agency hearing.

Steven Suflas of Ballard Spahr LLP, who practices out of the firm's office in Denver and its office in Cherry Hill, New Jersey, said that while "there is no doubt that misclassification is a problem," the state's new laws "are really heavy-handed, overbearing approaches" to addressing it.

"The problem here is that the steps that are being taken really are directed towards eliminating independent contractors [altogether] in New Jersey," Suflas said.

He said he believes part of the reason the state is adopting that approach has to do with increasing the unemployment tax revenue the state takes in when workers are classified as employees.

New Jersey governors in the past "have balanced their budgets by raiding the unemployment fund, and they say, 'I have not raised taxes,'" Suflas said. "And then unemployment taxes go up because they raided the unemployment fund to balance the budget. So, the cynic in me says part of this is a tax grab."

Midlevel Managers Potentially On The Hook

Another newly enacted law, A.B. 5840, says that businesses that enter into an arrangement with a labor contractor to provide it with workers will share legal responsibility for any civil violations of state wage or tax laws, including laws regarding the misclassification of workers.

The statute includes a provision that says any person acting on an employer's behalf, including owners, officers or managers, who flouts state wage or tax laws "may be held liable as the employer for the violation."

Warden noted that the bill amends the state's Wage Theft Act, which was enacted over the summer. That law's mandate that employers and staffing agencies be jointly and severally liable for wage law violations is expanded by A.B. 5840 to also cover tax law violations, he said.

Suflas, for one, said expanding the scope of individual liability to managers could land employers "potentially in a situation where ... the department of labor in New Jersey takes the position that low-level supervisors should be personally liable for alleged violations."

"I think that's problematic," Suflas said.

New Posting Notices

A third misclassification-related law signed Tuesday by Murphy, A.B. 5843, requires employers to conspicuously post notices at their worksites describing misclassification, including posters that make clear to workers how they can report purported

misclassification. The law allows for fines against employers that violate any of the statute's components.

While the posting notice "in and of itself isn't a huge deal," Warden said the most noteworthy part of the law pertains to retaliation against workers who complain about being potentially misclassified.

"While it stated that it's a provision requiring the posting of notice, it also has built in an anti-retaliation provision with substantial damages available to employees who are retaliated against for engaging in protected activity regarding worker misclassification," Warden said.

But given the wording of the law, which bars retaliation "against an employee" for complaining about misclassification, it remains to be seen whether the law covers individuals who are correctly classified as contractors, Warden said.

Business Shutdowns for Violations

Beyond the issue of worker misclassification, Murphy signed a bill dubbed A.B. 5838 that enables state regulators to issue stop-work orders for sites at which employers are found to have violated state wage, benefit or tax laws. Businesses that flout such orders may be subject to \$5,000-per-day fines.

The law, however, requires state regulators to issue stop-work orders only after violations are found and only after a notification of an impending stop-work order has been issued to the employer.

Sufilas noted that although the law mandates that stop-work orders can be issued only after the state labor commissioner issues a final decision, the "problem is [that] a party's got a right of appeal to the Appellate Division in New Jersey Superior Court."

"So, the way the statute is written, you'll have to go into court to get an injunction against the stop-work order while you execute your legal rights of appeal. That's pretty heavy-handed," Sufilas said.

Severance for Mass Layoffs

One final notable bill that is now law in New Jersey following Tuesday's signing spree by Murphy is S.B. 3170, which mandates that employers give severance pay to employees in situations where certain plants close or at least 50 full-time workers are laid off in a 30-day period. That severance must equal one week's pay for each full year the worker has been employed, the law says.

The law in part also requires businesses to give affected workers a 90-day heads-up that layoffs are coming.

Under the federal Worker Adjustment and Retraining Notification Act, businesses have to give affected workers or unions 60 days' notice of certain mass layoffs or plant closings and must afford similar notices to state and local officials.

If businesses don't meet the 90-day mandate, the Garden State's new law requires businesses to give them an additional four weeks of severance pay. S.B. 3170 updates

portions of New Jersey's version of the WARN Act.

"I have some concerns that it will influence employers over the cost of operating in New Jersey," Gersh said. "I recognize that the state [WARN Act] is helpful to employees in the event of a mass layoff. However, I believe that this particular [law] ... is really more expansive than what we've seen in the past."

--Editing by Aaron Pelc and Michael Watanabe.