Recent Federal And New Jersey Laws Expand Employee Rights

By David W. Garland[1]

Gaming companies should be aware of three recent legislative developments in the area of employment and labor law. At the federal level, the Family and Medical Leave Act ("FMLA") has been amended to provide special rights to family members of military personnel. Separately, New Jersey has expanded the state's Law Against Discrimination ("LAD") to require employers to accommodate the religious practices of their workers. New Jersey has also enacted legislation imposing new obligations on employers closing a facility or initiating mass layoffs.

The FMLA

The FMLA, 29 U.S.C. § 2601, *et seq*., generally requires covered employers to provide eligible employees with up to twelve weeks of unpaid leave during a twelve month period for a serious health problem of the employee or a member of the employee's immediate family or for the birth or adoption of a child. On January 28, 2008, President Bush signed legislation expanding the FMLA. It now permits an employee who is the "spouse, son, daughter, parent, or next of kin" of a "covered servicemember" to take up to twenty-six weeks of leave to "care for" the servicemember. A "covered servicemember" means a member of the Armed Forces "who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness."

As amended, the FMLA also provides that an employee may take up to twelve weeks of leave "[b]ecause of any qualifying exigency … arising out of the fact that the

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spouse, or a son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of" a military operation. This provision will not take effect until the Secretary of Labor issues regulations defining the term "qualifying exigency."

The FMLA imposes notice requirements on employees when their need for leave under the new provisions is foreseeable. Gaming operators should amend their leave policies consistent with these changes to the FMLA.

The LAD

The LAD, *N.J.S.A.* 10:5-1, *et seq*., prohibits discrimination in employment on the basis of such protected characteristics as race, religion, disability, age, and gender. On January 13, 2008, Governor Jon Corzine signed legislation amending the law to require employers to accommodate the religious practices of their employees.

The amendment, which took effect immediately, bars an employer from requiring an individual to violate or forego a "sincerely held religious practice or religious observance" as a term or condition of hire, retention, promotion, advancement, or transfer. Among the religious practices or observances that the law covers is "the observance of any particular day or days or any portion thereof as a Sabbath or other holy day in accordance with the requirements of the religion or religious belief."

The law includes an exception where, "after engaging in a bona fide effort, the employer demonstrates that it is unable to reasonably accommodate the employee's religious observance or practice without undue hardship on the conduct of the employer's business." In this context, "undue hardship" means "an accommodation requiring unreasonable expense or difficulty, unreasonable interference with the safe or efficient

operation of the workplace or a violation of a bona fide seniority system or a violation of any provision of a bona fide collective bargaining agreement." The factors an employer should consider is determining whether an accommodation would constitute an undue hardship include: (1) the monetary cost of lost productivity and of transferring or hiring other workers; and (2) the number of employees needing the accommodation. In addition, "an accommodation shall be considered to constitute an undue hardship if it will result in the inability of an employee to perform the essential functions of the position in which he or she is employed." The law excuses an employer from any obligation to provide a worker with extra wages or benefits for working particular hours if the employee was assigned those hours as a religious accommodation.

An employee must make up for work time missed pursuant to the new legislation "by an equivalent amount of time and work at some other mutually convenient time." In the alternative, the time may be charged against other paid leave, other than sick leave. If the time is not made up or charged against other paid leave, the employer may treat it as unpaid leave.

Gaming companies with properties in New Jersey should revise their policies in light of these changes to the LAD.

NJ WARN

On December 20, 2007, Governor Corzine signed the Millville Dallas Airmotive Plant Job Loss Notification ("NJ WARN") Act. The NJ WARN Act, N.J.S.A. § 34:21-1, *et seq*., is similar to the federal Worker Adjustment Retraining and Notification ("WARN") Act, 29 U.S.C. § 2101, *et seq*., but includes significant differences.

The NJ WARN Act applies to private employers of 100 or more full-time employees. It requires such employers to provide at least 60 days' notice of: (1) a "transfer of operations" or "termination of operations" that results in a loss of employment for 50 or more employees within a 30-day period; or (2) a "mass layoff." The employer must provide notice to the employees facing termination and to certain government and union officials.

NJ WARN, like the federal law, defines "mass layoff" to mean a reduction in force that is not the result of a transfer or termination of operations, and that results in the termination of employment during a thirty day period for: (1) 500 or more full-time employees; or (2) 50 or more full-time employees representing one-third or more of all full-time employees at a location.

The NJ WARN Act also requires notice in advance of a "termination of operations," which is similar to the federal WARN Act term, "plant closing," and means "the permanent or temporary shutdown of a single establishment, or of one or more facilities or operating units within a single establishment." The NJ WARN Act includes an exception to the "termination of operations" notice requirement where a company ceases operations "because of a fire, flood, natural disaster, national emergency, act of war, civil disorder or industrial sabotage, decertification from participation in the Medicare and Medicaid programs as provided under Titles XVIII and XIX of the federal 'Social Security Act,' … or license revocation [for health care facilities]."

In addition, unlike the federal WARN Act, NJ WARN requires notice of a "transfer of operations," which means "the permanent or temporary transfer of a single establishment, or one or more facilities or operating units within a single establishment,

to another location, inside or outside of this State." Under the NJ WARN Act, "establishment" means "a single place of employment which has been operated by an employer for a period longer than three years, but shall not include a temporary construction site." It may include "a single location or a group of contiguous locations."

NJ WARN imposes harsher penalties for non-compliance than does the federal WARN Act. In particular, while an aggrieved employee may recover up to 60 days' pay under the federal law, employers that fail to provide the mandatory notice under NJ WARN are obligated to pay terminated employees severance equal to one week of pay for each full year of employment.

Conclusion

Recent legislative developments in Washington, D.C. and Trenton have changed rights and obligations in the workplace on issues of leave for military family members, religious accommodation, and plant closings. Gaming businesses should consult with counsel regarding the application of these new laws to specific situations.