As businesses continue to traverse the unchartered waters created by the COVID-19 outbreak across the country, the law constantly is evolving, and employers must grapple with new limitations created by both Congress and state and local governments on what seems like a daily basis. Employers must take care to learn, understand, and comply with the emergency legislation being passed at all levels of government. In so doing, employers must remain mindful of the penalties and enforcement of violations of the substantive benefits provided by these coronavirus-inspired laws, and must exercise care to avoid violating the anti-retaliation provisions included in these new laws.

For example, at the Federal level, employers should take care not to violate the anti-retaliation provisions of the recently enacted Families First Coronavirus Response Act (“FFCRA”). As described in greater detail here, the FFCRA provides certain benefits to eligible employees of covered employers, including requiring paid sick leave under certain scenarios for employees impacted by COVID-19, as well as expanded/enhanced FMLA benefits related to COVID-19 that apply to employers and employees not previously covered by FMLA.

In addition, employers are prohibited from discharging, disciplining, or otherwise discriminating or retaliating in any manner against an employee who takes paid sick
leave or expanded FMLA leave under the FFCRA, files a complaint or institutes a proceeding under or related to the FFCRA, or testifies – or will testify – in such a proceeding. An employer that violates the FFCRA, including the proscriptions against discrimination and retaliation, will be subject to the penalties, enforcement provisions, and remedies thereunder.

Likewise, employers need to steer clear of potential violations of anti-retaliation laws at the state level. On March 20, 2020, New Jersey Governor Phil Murphy signed into law new anti-retaliation legislation with respect to the novel coronavirus, Assembly Bill No. 3848, which prohibits employers in the state from discharging, demoting, or otherwise penalizing an employee for requesting or taking time off, based on the recommendation of a licensed medical professional, because he or she has, or is likely to have, COVID-19.

The law also includes a job restoration requirement, prohibiting employers from refusing to reinstate an employee to the position he or she held when the leave commenced, with no reduction in seniority, status, benefits, pay, or other terms or conditions of employment. In addition to providing a private right of action to any employee aggrieved by a violation of this new anti-retaliation act, an employer may be subject to a fine of $2,500 for each violation thereof.

Beyond those specific anti-retaliation proscriptions written into law as a result of the coronavirus pandemic, employers need to remain mindful of other pre-COVID-19 laws of general application that may be implicated by this crisis, including but not limited to state “whistleblower” protection statutes such as New Jersey’s Conscientious Employee Protection Act (“CEPA”), N.J.S.A. 34:19-1, et seq. Under CEPA, New Jersey employees enjoy great whistleblower protection that is among the broadest, most robust and comprehensive in the country. The act prohibits all public and private employers in New Jersey from retaliating against any employee because that employee has engaged in certain protected activities set forth in the statute, which includes, in relevant part and among other things, an employee who:

- Discloses, or threatens to disclose, to a supervisor or a public body an activity, policy, or practice of the employer that the employee reasonably believes violates the law;
- Provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any violation of law by the employer; or
- Objects to, or refuses to participate in any activity, policy, or practice which the employee reasonably believes violates the law or is incompatible with a clear mandate of public policy concerning the public health, safety, or welfare.

One significant way in which CEPA may be triggered is if an employer discharges or takes other adverse employment action against an employee who has complained about, objected to, or disclosed (or threatened to disclose) an employer’s practices or activities that the employee reasonably and in good faith believes violate the stringent limitations and restrictions imposed by way of Governor Philip Murphy’s executive order(s), including Executive Order 107, issued on March 21, 2020 (summarized here). Indeed, Governor Murphy has expressly encouraged and invited employees (and others) to report potential violations of Executive Order 107 to the
State’s attention by filling out this form to file a complaint through the State’s website.

There are any number of different scenarios in which CEPA could come into play in the context of an employer who takes adverse action in retaliation for, or in response to, an employee’s objection to, complaint about, or actual or threatened disclosure of an employer practice the employee reasonably believes violate Executive Order 107—even if, in actuality, the employer has complied in full therewith (CEPA requires only that the employee’s belief that a violation has occurred be objectively reasonable under the circumstances). By way of example, an employee may object to continuing to work at his or her employer’s brick-and-mortar premises on the basis that the employee reasonably believes it is not an essential retail business as set forth in Executive Order 107 and, therefore, should not be remaining open to the public. Or, perhaps more likely, in the case of an essential retail business whose brick-and-mortar premises remain open to the public, an employee may take issue with his or her employer’s failure to take reasonable and necessary efforts to ensure its workforce and/or customers abide by appropriate social distancing practices to the extent practicable. Another possibility is that an employee may not see eye-to-eye with his or her employer in terms of whether it is necessary for that employee (or some or all of his or her co-workers) to be physically present in the office as opposed to working remotely.

Executive Order 107 requires that all businesses that remain open and operating must “accommodate their workforce, wherever practicable, for telework or work-from-home arrangements,” and further provides that “[t]o the extent a business . . . has employees that cannot perform their functions via telework or work-from-home arrangements, the business . . . should make best efforts to reduce staff on site to the minimal number necessary to ensure that essential operations can continue.” Whether a particular employee needs to be physically present at his or her work site in order to perform his or her duties may be a fact-sensitive determination—one with respect to which reasonable minds could differ—but an employer who discharges or disciplines an employee for objecting or complaining about the employer’s determination in that regard may be subjecting itself to litigation and exposure to liability under CEPA if the employee as an objectively reasonable belief that the employer’s practices violate Governor Murphy’s order.

Employers should not take the possibility of enforcement and liability under CEPA lightly; the statute has sharp teeth. The rights and protections afforded to whistleblowers under CEPA are accompanied by an arsenal of remedies. Under CEPA, an employee may file suit against an employer for taking retaliatory action against the employee in reprisal for exercising his or her rights, and where a violation is established, the employee may obtain, among other remedies, compensatory damages (such as lost wages, benefits and other remuneration), damages for emotional distress, punitive damages, attorneys’ fees and costs, as well as appropriate equitable or injunctive relief to redress violations, including but not limited to reinstatement of position, seniority and fringe benefits. Courts have discretion to assess a civil fine for violations under CEPA, as well.

Under the present circumstances, employers should tread cautiously before taking disciplinary action against an employee for any reason relating to the coronavirus
that is not required due to business, financial or economic necessity, or some other legitimate business reason. This is especially true with respect to employees who have exercised their rights or engaged in protected activity under state or federal law in connection with ongoing coronavirus pandemic.

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