

message from partner in charge

In this issue of *Princeton Update*, Pepper provides clients and friends with vital information to protect their business in these challenging times.

First, Mr. Spada and Mr. Canavan's article helps prepare New Jersey employers for the state's new family leave law. The changes take effect on January 1, and employees can take advantage of the new leave provisions by July 2009. So the article, which compares the new law's provisions with existing state and federal mandates for paid employee leave, is a must-read.

Next, Pepper partners Gallagher, Paw and Schwartz outline the U.S. Department of Justice's new antitrust leniency letter for companies seeking amnesty for antitrust violations. To companies facing the need to apply for leniency, they offer several valuable points to consider.

We also point readers to a Pepper webinar that outlines the new amendments to the Americans with Disabilities Act, which change the standards for employees to be considered disabled and thereby eligible for accommodations.

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New Jersey's Paid Family Leave Law to Take Effect in 2009

New Jersey has become the third state to mandate that employers provide paid leave to employees who request time off to care for a newborn or newly adopted child or a sick family member. Payroll deductions to fund the plan begin on January 1, 2009, and eligible employees may apply for family leave benefits beginning July 1, 2009.

The law, officially entitled the new Jersey Family Temporary Disability Benefits Law but commonly referred to as Paid Family Leave, does not provide an independent basis for employee leave. Rather, it is a partial wage replacement benefit that expands New Jersey's temporary disability insurance (TDI) system, which presently provides wage insurance for employees' own disabilities, to workers who require leave in two additional circumstances.

First, parents may receive benefits during a period of up to six weeks' leave to "be with a child during the first 12 months after the child's birth ... or the first 12 months after the placement of the child for adoption with the [parent]." Second, workers may receive benefits during a period of up to six weeks' leave to "participate in the providing of care ... for a family member of the individual made necessary by a serious health condition of the family member." A "serious health condition" is defined as "an illness, injury, impairment or physical or mental condition which requires: inpatient care in a hospital, hospice, or residential medical care facility; or continuing medical treatment or continuing supervision by a health care provider," which is consistent with that term's definition in New Jersey's existing Family Leave Act.

While the Family Leave Act already permits employees to take up to 12 weeks of *unpaid* leave to care for a new baby or a seriously ill family member, the new law enables workers to be paid a portion of their wages (two-thirds of their regular weekly wage, up to \$524 each week) for up to six weeks of that leave. Unlike the Family Leave Act and

the federal Family and Medical Leave Act (FLMA), which apply only to employers with 50 or more employees, *all* New Jersey employers must participate in the state's paid family leave program. The new law does not, however, extend the job restoration requirement found in the Family Leave Act and the FMLA to employers of fewer than 50 employees. The law states explicitly that an employee shall have no action for wrongful discharge or other violation of law or public policy if he or she is not restored to employment after a leave.

The new program is funded solely through worker payroll deductions that lawmakers estimate will cost employees an average of \$33 annually. Other than administering the payroll deductions, there is no cost to employers. Employers must begin withholding from employees beginning January 1, 2009.

An important practical effect of the law on employers is the anticipated increased need to find replacement workers for a period of up to six weeks. Although larger employers currently deal with this issue under the Family Leave Act, the paid leave is likely to encourage employees who might not otherwise take advantage of — or who are ineligible for — unpaid family leave to opt out of the workforce for a time to care for a family member. Given the likely increase in extended leave situations, employers should examine their current practices for managing employee absences. Potential strategies for mitigating the disruption include increasing cross-training so other employees can more easily perform an absent colleague's job duties and implementing policies that encourage employees to provide ample advance notice of an intent to take family leave. Although workers cannot take paid family leave until July 2009, it is never too early to adopt these beneficial workplace measures.

Information concerning employers' notification requirements (including copies of required notification posters), payroll withholding procedures, and other details of the Paid Family Leave insurance benefit can be found on the Web site of the Department of Labor and Workforce Development (www.nj.gov/labor), by e-mailing Constituent.Relations@dol.state.nj.us, or by calling 609.777.3200. Please also feel free to contact the authors.

News from the Bench and The Trenches: Navigating The ADA Amendments Act

Employers will face significant challenges in the ways in which they deal with disabled employees after January 1, 2009. New amendments to the ADA will permit millions of people to qualify as disabled under the broader definitions of major life activities and will put new emphasis on the interactive process as employers determine their employees' potential disabilities. Employers will soon discover that their managers may create new liabilities through their actions towards individuals who are not disabled but who can claim that they are "regarded as" disabled.

In order to prepare for the sweeping changes of these new amendments, employers must understand their profound impact and prepare their supervisors to deal with them. This unique Pepper Hamilton webinar provides perspectives from the bench, in-house counsel and trial counsel on these critical developments. Speakers include **James T. Giles**, Of Counsel, Pepper Hamilton; **Mark Suprenant**, General Counsel and Secretary, Wawa Inc.; and **Robert C. Ludolph**, Partner, Pepper Hamilton.

Visit Pepper's webinar section at www.pepperlaw.com to view the webinar recording and download the PowerPoint slides from this online event.

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Department of Justice Issues New Antitrust Leniency Letter

Recently, the U.S. Department of Justice issued a new model leniency letter for companies seeking amnesty for antitrust violations, viewable at <http://www.usdoj.gov/atr/public/criminal/239524.htm>. The Department of Justice also released a document of “Frequently Asked Questions” (FAQs) regarding the Antitrust Division’s leniency program, viewable at <http://www.usdoj.gov/atr/public/criminal/239583.htm>. The model letter revisions and the FAQs document clarify the Antitrust Division’s policies and practices.

The changes came in the wake of the controversial Stolt-Nielsen criminal antitrust case, *Stolt-Nielsen, S.A. v. United States*, 442 F.3d 177, 183-187 (3d Cir. 2006), where the Antitrust Division reneged on its amnesty agreement with a shipping company and indicted the company and two of its executives. In the U.S. District Court for the Eastern District of Pennsylvania and the Court of Appeals for the Third Circuit, Stolt-Nielsen won its case against the Antitrust Division and the company’s immunity agreement was reinstated. In response, the Antitrust Division promised to increase the transparency and predictability of its amnesty program.

One of the changes involves the effective date of amnesty, a contested issue in the *Stolt-Nielsen* case. Amnesty is effective upon the date of the letter except when there is a significant lapse of time between the date the applicant terminated its illegal conduct and the date the applicant reported the conduct to the Antitrust Division. The amnesty applicant has the burden to show that it terminated its participation in the illegal activity.

Another change under the new model letter requires the leniency applicants to waive judicial review of pre-indictment leniency revocations.

The Antitrust Division grants corporate leniency to only one company per conspiracy, and in applying for leniency, the company is in a race with its co-conspirators and possibly its own employees who also may be preparing to apply for leniency. To benefit from the Antitrust Division’s leniency program, a corporation must be the first to confess participation in a criminal antitrust violation, must fully cooperate with the Antitrust Division and must meet

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other requisite conditions. Compliance with the leniency program can help corporations and individuals avoid criminal convictions, prison terms and fines.

To effectively respond to the discovery of antitrust criminal violations and prepare a successful leniency application, companies should consider:

- **Implementing a Compliance Program.** Corporations must implement comprehensive compliance programs designed to detect wrongdoing inside and outside the company and must effectively implement reporting measures.
- **Securing a Marker.** Since the Antitrust Division grants only one corporate leniency per conspiracy, a corporation that discovers it may have committed an antitrust violation must be the first to apply for leniency. Time is of the essence. Once potential antitrust violation activity is uncovered, a corporation should secure a marker that will hold its place in line for leniency while it gathers more information to support its leniency application.
- **Involving Counsel Immediately.** As soon as a company becomes aware of potential antitrust violation activity, it should immediately notify corporate counsel and retain experienced outside counsel. Counsel will conduct a privileged and confidential internal investigation to uncover all of the pertinent facts and determine whether preparing a leniency application is in the company’s best interest. Counsel can then contact the Antitrust Division’s

Deputy Assistant Attorney General for Criminal Enforcement (Criminal DAAG), who reviews all requests for leniency.

- **Formulating an Overarching Strategy.** Based on a properly conducted and privileged internal investigation, experienced outside counsel also will be able to assess the risks and potential exposure of related state and foreign investigations, as well as U.S. and foreign civil litigation, and can work with the company to formulate a strategy for dealing with any such risks, including customer relations and a communications plan.

Following these recommendations and implementing other proactive measures can help companies avoid criminal prosecution for antitrust violations.

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Upcoming Events

- **Steven D. Bortnick** will be a speaker at a live 90-minute teleconference on “Tax Law Strategies Following the Emergency Economic Stabilization Act and New IRS Guidance.” The teleconference, sponsored by the Legal Publishing Group of Strafford Publications, will be held on Wednesday, January 7, 2009, beginning at 1:00 p.m. Eastern Time.
- **Steven D. Bortnick** will be speaking on “Tax Due Diligence in Acquisitions” at a live national teleconference with interactive Q&A on January 29, 2009, from 1:00 p.m. to 2:30 p.m. EST. This teleconference is sponsored by Lorman Education Services. For more information, visit www.lorman.com.

Pepper Hamilton LLP

Attorneys at Law

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