

OP-ED: GUILTY UNTIL PROVEN INNOCENT -- UNPRECEDENTED CHALLENGE FOR NJ BUSINESSES

MARCUS RAYNER | MARCH 28, 2016

Sick-leave and equal-pay proposals aren't inherently bad, but they can make it difficult if not expensive for fair-minded businesses to operate



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One of the core tenets of the U.S. legal system is that criminal defendants are presumed innocent until proven guilty. Defendants are not required to lift a finger or open their mouths in their own defense. On the civil side of things, both the plaintiff and the defendant have the responsibility to show up in court and present evidence, but typically the plaintiff has the burden of proving that the wrongs they allege are more likely to have occurred than not.

Right now two important bills, one working its way through the Legislature, and one already on the governor's desk, would flip this age-old system on its head in the employment context so that when an employee sues an employer, the employer would have the burden of proving its innocence.

Under the paid-sick leave bill, employers will have to prove in a court of law that they had a legitimate business need to change the schedule of an employee who calls in "sick" every Monday after the Giants have a home football game. Even if a jury agrees that such a schedule change is warranted, the employer will have spent thousands of dollars proving its innocence, costs that will undoubtedly be passed on to consumers in the form of higher prices.

If the equal-pay bill, which has already passed both Houses, becomes law, and employers can be sued for even slightly disparate statistical differences in pay, employers will have the burden to prove that the pay gap was legal. How will a business ever justify giving a high-performing employee a raise if it knows that it must be able to defend that decision in a court of law an unknown number of years from now? How many positive evaluations and profit-and-loss statements will a jury need to see to find that the employer made a reasonable business decision?

Answering these unpredictable questions will be expensive and time-consuming even when the business did nothing wrong.

Forcing businesses in cases like these to prove their innocence is a very radical idea. However, nobody seems to be talking about it. Instead, these bills are being debated as if we were dealing with a simple question of should we help workers or shouldn't we. We're not. Many of us who oppose this legislation are not arguing that workers who handle food should have to come to work when they are sick, or that paying women less than men is good. What we are arguing, is that when you try to solve complex problems, you have to take a look at the fine print of the proposed solutions rather than blindly trusting the good intentions of the policy proponents. Whether they intend to or not, the sponsors of these bills are proposing a sea change in the law that will force employers to their knees.

Laws that would assume businesses are guilty unless they can prove their innocence would be an unprecedented change in the law. We in the business community must engage on these issues in

order to make sure the Legislature knows how significant and unusual of a burden they are preparing to place on our state's already beleaguered businesses.

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