INTRO TO LABOR AND EMPLOYMENT

2025 Seminar Material

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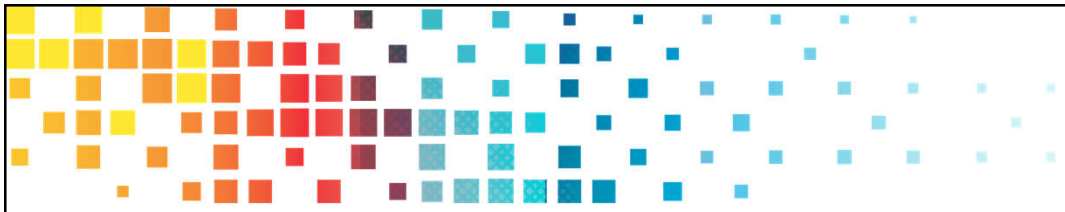

Introduction to Labor and Employment

Compliance Issues

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Hiring

Compliance Challenges

- Documentation that complies with law
- Lawsuit by an unsuccessful applicant
- Negligent Hiring Claims
- Claims by a competitor
  - Raiding employees
  - Confidential Information
- Future claim for breach of contract
  - Wrongful termination

Application

- Ban-the Box/ Fair Chance Restrictions
- Remove inquiries that reveal membership in protected class
- Authority to work in United States
  - www.eeoc.gov/pre-employment-inquiries-and-citizenship#:~:text=The%20INA%20requires%20employers%20to,employee's%20identity%20and%20employment%20authorization
- Agreements with prior employer
- At-will employment statement
- Certification that true and complete
- FCRA authorization as stand-alone Document

Negligent Hiring

- *Di Cosala v. Kay,* 91 N.J. 159 (1982)
- Plaintiff was visiting his uncle who worked for the Boy Scouts and was shot by another employee with the uncle's loaded gun.
- Court recognized a negligence claim holding an employer responsible for hiring and retention for acts outside the scope of employment because the employer exposed the public to a dangerous and unfit employee.

Background Checks and Testing

- New Jersey Opportunity to Compete Act, N.J. S.A. §34:6B-11
  - https://www.nj.gov/corrections/pdf/OTS/FRARA/OtherResources/Opportunity%20to%20Compete%20Law.PDF
- EEOC Guidance
  - https://www.eeoc.gov/laws/guidance/enforcement-guidance-consideration-arrest-and-conviction-records-employment-decisions
- Fair Credit Reporting Act, 15 U.S.C. §1681
  - https://www.ftc.gov/system/files/ftc_gov/pdf/fcra-may2023-508.pdf
- New Jersey Fair Credit Reporting Act, N.J. S.A. §56:11-29
- Pre-employment testing
  - N.J.A.C. § 13:13-2.3
  - https://www.eeoc.gov/laws/guidance/employment-tests-and-selection-procedures
  - https://www.dol.gov/agencies/ofccp/faqs/employee-selection-procedures

Medical Examinations and Drug Testing

- Medical Examinations
  - https://www.eeoc.gov/laws/guidance/enforcement-guidance-preemployment-disability-related-questions-and-medical
  - Allowed if all the examination is part of the standard hiring process used for all newly hired employees.
  - Allowed post-offer, and job offer must be "real"
  - Medical conditions learned through medical exams must be treated confidentially
  - Duty to accommodate N.J.A.C. 13:13-2.5, *et seq.* https://www.njoag.gov/wp-content/uploads/2021/02/Final-Title-13-12.30.pdf
- Drug testing
  - Allowed post-offer
  - Impact of legalization of recreational marijuana N.J.S.A. 24:6I-31

Alawi v. Sprint Nextel Corp.

- National origin and religious discrimination claims required a jury trial because it appeared that Sprint's reasons for not hiring Alawi were a pretext.
- Sprint claimed Alawi lacked B2B sales experience required for the Account Executive position. However, job description did not require B2B sales experience.
- Sprint claimed Alawi lacked qualifications. She had a B.S. and seven years of experience in the wireless industry, and the job description only required a B.S. and one to three years of related experience.

EEOC v. Wal-Mart Stores, Inc.

- Court held that a jury trial was required to determine whether Wal-Mart failed to hire an applicant with mobility limitations caused by cerebral palsy.
- The EEOC established that Bradley was "qualified" for the positions of greeter and cashier because job description stated: "no experience or qualifications is required."

Handbooks

Woolley v. Hoffmann-LaRoche

- *Woolley v. Hoffmann-LaRoche*, 99 N.J. 284, 285-86 *modified*, 101 N.J. 10 (1985)
- Representations made in employee handbooks may create a contractual obligation to employees
- Resulted in wrongful termination claims
- Does handbook create promise relating to discharge and discipline?
- Clear and prominent disclaimer requirement
- Code of Conduct issues

Review of Handbooks

- Clear and prominent disclaimer
- Preserve at-will employment status
- Policies relating to harassment and discrimination
  - *Aquas v. State,* 220 N. J. 494 (2015)
  - https://www.eeoc.gov/proposed-enforcement-guidance-harassment-workplace
- Sick and leave law requirements
  - New Jersey Earned Sick Leave Law, N.J.S.A. 34:11D-1
  - New Jersey Family Leave Law, N.J.S.A. 34:11B-1
- Description of benefits (e.g. vacation) and potential contact claim
- Wage and hour
- National Labor Relations Act
  - *Stericycle, Inc., 372 NLRB No. 131* (2023)

Downsizing

Notice Laws (Employers of More than 100)

- Worker Adjustment and Retraining Act, 29 U.S.C. 2101
  - https://www.dol.gov/agencies/eta/layoffs/warn
- Millville Dallas Airmotive Plant Job Loss Notification Act, N.J.S.A. 34:21-1, et seq.
  - https://www.nj.gov/labor/employer-services/warn/

Severance Agreements

Older Worker Benefits Protection Act

- Releases - 40 and over
  - 21-day consideration period
  - 7-day revocation period
  - Attorney review notice
- Special requirements for waiver of claims under the ADEA in the context of an "employment termination program."
  - 45-day consideration period
  - Information about employees in the "Decisional Unit" - § 1625.22(f)
- https://www.eeoc.gov/laws/guidance/qa-understanding-waivers-discrimination-claims-employee-severance-agreements

Waiver of State Claims

- Cases in New Jersey requires specific reference to and waiver of Conscientious Employee Protection Act and New Jersey Family Leave Act claims.
- Certain rights cannot be waived including future claims, worker's compensation claims, certain wage claims, and NJ WARN severance

Confidentiality and Non-Disparagement

- New Jersey Law Against Discrimination, N.J.S.A. 10:5-12.8
- Prohibits nondisclosure clauses that would conceal any details relating to claims of discrimination, retaliation, or harassment
- A specific statement is required when a claim is resolved
    - "bold, prominently placed notice that although the parties may have agreed to keep the settlement and underlying facts confidential, such a provision in an agreement is unenforceable against the employer if the employee publicly reveals sufficient details of the claim so that the employer is reasonably identifiable"
- Unlawful to enforce or attempting to enforce

Savage v. Township of Neptune, 257 N.J. 204 (2024)

- Parties to settlement agreed not to make "statements, written or verbal regarding the past behavior of the parties, which statements would tend to disparage or impugn the reputation of any party."
- Savage was interviewed by a television reporter and made general statements about her treatment and the treatment of other women, and statements that mirrored allegations of sex discrimination and retaliation in her complaint.
- The Supreme Court held
  - "To accuse someone of misconduct is to disparage them."
  - "To provide details about allegations of discrimination, retaliation, or sexual harassment by an employer, then, would naturally 'tend to disparage or impugn' the employer's 'reputation.'"
- The Supreme Could held that the non-disparagement provision was unenforceable as against public policy under NJLAD as it had the purpose or effect of concealing the details relating to a claim of discrimination, retaliation, or harassment.

Confidentiality & Non-Disparagement and the NLRB

- *McLaren Macomb,* 372 NLRB No. 58 (2023)
  - Certain confidentiality and non-disparagement provisions in severance agreements violate employees' rights under the National Labor Relations Act, 29 U.S.C. § 151(NLRA)
- Section 7 of the NLRA 29 U.S.C. § 151
  - Protects concerted action by employees for their mutual aid and protection, regardless of whether they are unionized
- Unlawful non-disparagement provision prevents the employee from assisting others in raising complaints or making statements that could disparage or harm the image of the employer.
- Unlawful confidentiality provision prohibits the employee from disclosing the terms of the severance agreement to a third party

NLRB Guidance

- The NLRB's General Counsel released guidance in the wake of *McLaren Macomb* and clarified unanswered questions. *Memorandum GC 23-05*
- Retroactive application
  - Inform current and former employees
- Severability of the unlawful provision
- Limitations:
  - Only affects non-supervisory employees (exceptions apply)
  - Does not protect speech that is "disloyal, reckless, or maliciously untrue"

Thank You!

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Wage and Hour Laws

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Federal and State Wage and Hour Laws

Federal

- Fair Labor Standards Act (FLSA)
  - Requires non-exempt employees be paid at least federal minimum wage of **$7.25** per hour
  - Requires non-exempt employees be paid time and a half for all hours worked over 40 hours in a workweek

New Jersey

- New Jersey Wage and Hour Law
  - Requires most non-exempt employees be paid at least **$15.49** per hour (Jan. 1, 2025)
    - Note some higher rate (e.g., direct care staff long-term care facilities) and some lower (seasonable and small employers; agricultural)
  - Requires non-exempt employees be paid time and a half for all hours worked over 40 hours in a workweek
- New Jersey Wage Payment Law
  - Time, manner, and mode of payment
  - Prohibits unlawful deductions

New Jersey Wage Theft Act

- Failure to properly pay wages may result in significant exposure to damages, penalties and fines
  - 200% liquidated damages in addition to the payment of wages owed **(treble damages)**
  - Attorney's fees and costs
  - Certain criminal violations
- Six-year statute of limitations
- Presumption Of Retaliation: The WTA creates a rebuttable presumption of retaliation if the employer takes an adverse action against an employee within 90 days of any conduct protected under the State Wage and Hour Laws. The presumption may be overcome only by "clear and convincing evidence" that the employer took the alleged retaliatory action for permissible reasons.

Overtime

- Employers must pay nonexempt employees at a rate of at least **1.5 times the "regular rate"** for time worked over 40 hours in a workweek

- Employers must establish and document a seven-day workweek

Unpaid Overtime – Misclassification Issues

Must satisfy both the salary basis and the duties test

Salary Basis

Employee regularly receives a predetermined amount of compensation each pay period. Employee must receive the full salary for any week in which the employee performs any work, regardless of the number of days or hours worked. Exempt employees do not need to be paid for any workweek in which they perform no work. No improper deductions

Salary Threshold

Currently $844 a week, $43,888 per year

USDOL proposed rule to increase salary threshold (Jan. 1, 2025)

$1,128 per week, about $58,656 per year. (On hold per - Texas v. US Dep't of Labor, 756 F.Supp.3rd 361 (E.D., Texas 2024)

$151,164 for a Highly Compensated Employee (Jan. 1, 2025)

Unpaid Overtime – Misclassification Issues

- Many FLSA exemptions
  - New Jersey largely follows the FLSA with respect to exemptions
  - Best known: the "white collar" provisions requires examination of primary duties
- Exemptions relate to individuals – not to job descriptions, pay classifications, positions, job groups, conventional wisdom, etc.

Unpaid Overtime – Misclassification Issues

- **Executive exemption**: primary duty is managing the enterprise or a customarily-recognized department or unit; authority to hire or fire or make suggestions; customarily and regularly directs the work of two or more employees
- **Administrative exemption**: primary duty is office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; exercise discretion and independent judgment
- **Professional exemption:**
  - **Learned professional**: primary duty is the performance of work requiring advanced knowledge, which is predominantly intellectual in character and requires consistent use of discretion and judgment, in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instructions
  - **Creative professional**: primary duty is the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor

Independent Contractor Misclassification

- **Employee or Independent Contractor?**

Independent Contractor Misclassification New Jersey's ABC Test

Under this test, there is a **presumption** of employee status, unless the following factors are established:

A. The worker has been and will continue to be **free from control** or direction over the performance of the service;

B. The work is either **outside the usual course of the business** for the company requesting the work, or the **work is performed outside of the company's place of business**; **and**

C. The worker is **customarily engaged in an independently** established trade, occupation, profession or business.

Hargrove v. Sleepy's, LLC, 220 N.J. 289 (2015)

Child Labor Laws

- Federal law restrictions
  - Regulation of minors under the FLSA:
    - Minors under the age of 14
    - Minors aged 14-15
    - Minors aged 16-17
- New Jersey law restrictions
- Overlap between the FLSA and New Jersey law
  - New Jersey law has nuances
- **Significant Penalties for non-compliance**
  - Major Mexican food chain $7.75 million settlment with New Jersey AG

Pay Equity

Diane B. Allen Equal Pay Act

- New Jersey's pay equity law covers all categories protected under the LAD
- Employers **may not** pay any employee who is a member of a protected class at a rate of compensation, including benefits, less than that paid to employees who are not members of a protected class for **"substantially similar work"**
- Substantially similar work must:
  - Include an employee's skill, effort, and responsibility; and
  - Compare wage rates based on the wage rates in all of the employer's operations or facilities
- Unlawful to reduce wages in order to comply with the law

Lawful Justifications for Pay Disparities

Once an employee shows that she is being paid less for substantially similar work, it becomes the employer's burden to show:

- The pay differential is due to seniority or a merit system; or
- That all five of the following are true:
  1. The differential is based on one or more legitimate factors such as training, education, or experience, or the quantity or quality of production
  2. The factors are not based on and do not perpetuate a differential based on protected characteristics
  3. The factors are applied reasonably
  4. That one or more factors account for the entire wage differential
  5. The factors are job related and based on business necessity. Business necessity shall not apply if there are alternative practices that would serve the same purpose without producing a wage differential

Expanded Prohibitions on Retaliation

- New Jersey law prohibits retaliation against employees for:

"requesting from, discussing with, or disclosing to, any other employee or former employee of the employer, a lawyer from whom the employee seeks legal advice, or any government agency" equity pay information

- Such equity pay information includes job title, occupational category, rate of compensation, including benefits, and the gender, race, ethnicity, military status, or national origin of the employee or any other employee or former employee, regardless of whether the employee receives a response

New Jersey Pay and Benefits Transparency Law

N.J.S.A. 34:6B-23. Opportunities for promotion; notification; disclosure of compensation; requirements; violation; penalty; definitions

a. An employer shall make reasonable efforts to announce, post, or otherwise make known opportunities for promotion that are advertised internally within the employer or externally on internet-based advertisements, postings, printed flyers, or other similar advertisements to all current employees in the affected department or departments of the employer's business prior to making a promotion decision. Any promotion for a current employee that is awarded on the basis of years of experience or performance shall not be subject to the notification requirements established in this subsection. Nothing in this subsection shall be construed to prohibit an employer from making a promotion on an emergent basis due to an unforeseen event.

b. An employer shall disclose in each posting for new jobs and transfer opportunities that are advertised by the employer either externally or internally the hourly wage or salary, or a range of the hourly wage or salary, and a general description of benefits and other compensation programs for which the employee would be eligible. Nothing in this subsection shall be construed to prohibit an employer from increasing the wages, benefits, and compensation identified in the job opening posting at the time of making an offer for employment to an applicant.

New Jersey Pay and Benefits Transparency Law

c. (1) Any employer who violates this act shall be subject to a civil penalty in an amount not to exceed $300 for the first violation, and $600 for each subsequent violation, collectible by the Commissioner of Labor and Workforce Development in a summary proceeding pursuant to the "Penalty Enforcement Law of 1999," P.L.1999, c. 274 (C.2A:58-10 et seq.).

- (2) An employer's failure to comply with subsection a. of this section for one promotional opportunity shall be considered one violation for all listings of a particular promotion, even if that promotion is listed on multiple forums.
- (3) An employer's failure to comply with subsection b. of this section for all postings for a particular job opening or transfer opportunity shall be considered one violation regardless of the number of postings that list, or forums that advertise, that job opening or transfer opportunity, as appropriate.

d. (1) Temporary help service firms and consulting firms registered with the Division of Consumer Affairs in the Department of Law and Public Safety shall not be required to provide on job postings that are posted for the purpose of identifying qualified applicants for potential future job openings and not for existing job openings:

New Jersey Pay and Benefits Transparency Law

- (a) the hourly wage or salary, or range of hourly wage or salary; or
- (b) a general description of benefits and other compensation programs for which the employee would be eligible.
- (2) Temporary help service firms or consulting firms shall be required to provide the pay and benefit information listed in paragraph (1) of this subsection to an applicant for temporary employment at the time of interview or hire for a specific job opening.

e. As used in this act:

"Employer" means any person, company, corporation, firm, labor organization, or association which has 10 or more employees over 20 calendar weeks and does business, employs persons, or takes applications for employment within this State, including the State, any county or municipality, or any instrumentality thereof. The term shall include job placement and referral agencies and other employment agencies.

"Promotion" means a change in job title and an increase in compensation.

Effective June 1, 2025.

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New Jersey Discrimination and Retaliation Overview

PATTI PREZIOSO
JON GREEN

The New Jersey Law Against Discrimination ("NJ LAD")

- Applies to all employers (except federal employers) regardless of size (N.J.S.A 10:5-5(e))

NJ LAD Prohibits Employers From…:

- refusing to hire or employ, discharge, require to retire, or otherwise discriminate against an individual in compensation or other terms, conditions, or privileges of employment based on the individual's protected status (N.J.S.A. 10:5-12(a)).
- issuing employment advertising reflecting a preference for or discrimination against individuals based on a protected status (N.J.A.C. 13:11-1.1(a)).
- treating an employee the employer knows or should know is affected by pregnancy differently or less favorably than a non-pregnant person whose inability to work is similar to that of the pregnant or breastfeeding employee (N.J.S.A. 10:5-12(s)).

Protected Classes (N.J.S.A. 10:5-12(a))

- Age.
- Ancestry.
- Atypical hereditary cellular or blood trait (AHCBT). Color.
- Creed.
- Disability or handicap.
- Gender identity or expression.
- Genetic information, including refusal to:
  - participate in genetic testing; or
  - provide genetic information.
- Marital status, civil union status, and domestic partnership status.
- National origin.
- Nationality.

Protected Classes Continued…

- Pregnant or breastfeeding.
- Race, including race of the:
  - employee; and
  - individuals affiliated with the employee for personal or business reasons, such as friends, family, or colleagues.
- Service in the US armed forces.
- Sex.
- Sexual orientation or affectional orientation.
  - (N.J.S.A. 10:5-5 and 10:5-12.)

Exceptions N.J.S.A. 10:5-12 (a)

- …nothing herein contained shall be construed to bar an employer from refusing to accept for employment any person on the basis of sex in those certain circumstances where sex is a bona fide occupational qualification, reasonably necessary to the normal operation of the particular business or enterprise;
- …it shall not be an unlawful employment practice for a club exclusively social or fraternal to use club membership as a uniform qualification for employment, or for a religious association or organization to utilize religious affiliation as a uniform qualification in the employment of clergy, religious teachers or other employees engaged in the religious activities of the association or organization, or in following the tenets of its religion in establishing and utilizing criteria for employment of an employee;
- … it shall not be an unlawful employment practice to require the retirement of any employee who, for the two-year period immediately before retirement, is employed in a bona fide executive or a high policy-making position, if that employee is entitled to an immediate non-forfeitable annual retirement benefit from a pension, profit sharing, savings or deferred retirement plan, or any combination of those plans of the employer of that employee which equals in the aggregate at least $27,000.00;
- … an employer may restrict employment to citizens of the United States where such restriction is required by federal law or is otherwise necessary to protect the national interest.

Additional Prohibitions For Employers

- The NJLAD prohibits employers from including a provision in any employment contract that waives any substantive or procedural right or remedy relating to a claim of:
- Discrimination.
- Retaliation.
- Harassment.
  - (N.J.S.A. 10:5-12.7).
- Clarification: In Antonucci v. Curvature Newco, Inc., the court held that a mandatory arbitration provision in an employment agreement was enforceable in a suit under the NJLAD because the Federal Arbitration Act preempted the procedural protection in N.J.S.A. 10:5-12.7 (470 N.J. Super 553, 566 (App. Div. 2022)).
- The prohibition does not apply to the terms of any collective bargaining agreement between an employer and the collective bargaining representative of the employees (N.J.S.A. 10:12.7(c)).

Further Requirements of NJ LAD:

- Any settlement agreement resolving a claim for discrimination, retaliation, or harassment must include a bold, prominently placed notice that states that while the parties may have agreed to keep the settlement and underlying facts confidential, the provision will be unenforceable against the employer if the employee publicly reveals sufficient details of the claim that reasonably identify the employer (N.J.S.A. 10:5-12.8(a), (b)).
- When a job applicant is a member of a protected class, it is unlawful for an employer to:
  - Screen the applicant based on salary history
- Require that the applicant's salary history satisfy any minimum or maximum criteria.
  - (N.J.S.A. 10:5-12.12(2), 34:6B-20.) The prohibition does not apply:
  - If the applicant voluntarily offers salary history information without prompting or coercion.
  - After the employer has made a job offer to the applicant that includes an explanation of the overall compensation package.
  - (N.J.S.A. 34:6B-20(b).)

Individual Supervisor Liability

- Individual supervisors can be held personally liable for aiding and abetting discrimination by an employer (N.J.S.A. 10:5-12(e)).

Enforcement:

- The New Jersey Division on Civil (NJDCR) administers and enforces this law.
- Individuals may enforce their rights under the NJLAD by either:
  - Bringing an administrative complaint with the NJDCR.
  - Filing a complaint in state superior court (or federal court, if there is federal jurisdiction).

Potential Damages:

- Injunctive relief.
- Reinstatement.
- Back pay.
- Front pay.
- Compensatory damages for:
  - Emotional distress damages;
  - Punitive damages;
  - Interest;
  - Reasonable attorneys' fees and costs.
  - (N.J.S.A. 10:5-3, 10:5-12.11, and 10:5-13.)

DIRECT EVIDENCE

- Actual statements or witnessed actions that demonstrate discrimination
  - Employee shows direct evidence that employer placed substantial negative reliance on an illegitimate criterion in making the adverse employment decision—proven by an admission by the decision-makers that directly bears upon the adverse employment decision. This form of proof is rare.
  - Burden then shifts to the employer to show it would have made the same decision without the impermissible consideration

CIRCUMSTANTIAL EVIDENCE

- Circumstantial evidence– Similarly situated employees treated more favorably; verbal or written documentation indicating discriminatory intent; statistics
- **McDonnell Douglass v. Green - burden shifting paradigm for proving the case – elements vary slightly depending on type of claim**
- Applicable to discrimination and retaliation claims; but see concurring opinion in Ames v. Ohio Dept. of YouthServicehttps://www.supremecourt.gov/opinions/24pdf/23-1039_c0n2.pdf

Burden Shifting

- **Employee bears the initial burden of proof**
- Employee must show a "*Prima Facie* Case"
  - **In a protected class**
  - **Suffered an adverse employment action**
  - **Objectively qualified for position**
  - **Circumstances may lead to an inference of discrimination**

- **Burden then shifts to Employer**
  - Employer must articulate a non-discriminatory reason for the adverse action
- **Burden then shifts back to Employee**
  - Employee must show that the articulated reason is a pretext
- **If employee proves pretext then jury may find that the true reason or at least one reason was discrimination**

Key Cases

Peper v. Princeton University Board of Trustees, 77 N.J. 55 (1978)(seminal case interpreting LAD)

Grigoletti v. Ortho Pharmaceutical Corp., 118 N.J. 89 (1990)(where appropriate, when interpreting LAD, look to federal caselaw interpreting Title VII)

Grasso v. West New York, B.O.E., 364 N.J. Super. 109 (App. Div. 2003), certif. den. 179 N.J. 312 (2004)(If any part of the decision-making process is tainted or influenced by an illegal motive, then jury can find the employer liable).

DeWees v. RCN Corp., 380 N.J. Super. 511 (App. Div. 2005)(roadmap for proving discrimination through circumstantial evidence)

Statute of Limitations

- Individuals must file either:
- A claim with the NJDCR within 180 days of the alleged unlawful employment discrimination (N.J.S.A. 10:5-18).
- A court action within two years from the date of the alleged unlawful employment discrimination (Montells v. Haynes, 133 N.J. 282, 292-93 (N.J. 1993)).
- Employment contract provisions that shorten the limitations period for filing claims under the NJLAD are unenforceable (N.J.S.A. 10:5-12(a)).

Disabilities: Employers Must Reasonably Accommodate N.J.A.C. 13:13-2.5

- (a) All employers shall conduct their employment procedures in such a manner as to assure that all people with disabilities are given equal consideration with people who do not have disabilities for all aspects of employment including, but not limited to, hiring, promotion, tenure, training, assignment, transfers, and leaves on the basis of their qualifications and abilities. Each individual's ability to perform a particular job must be assessed on an individual basis.

Disabilities: Employers Must Reasonably Accommodate

- (b) An employer must make a reasonable accommodation to the limitations of an employee or applicant who is a person with a disability, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its business. The determination as to whether an employer has failed to make reasonable accommodation will be made on a case-by-case basis.

Where such accommodation will not impose and undue hardship, examples of accommodations include:

- i. Making facilities used by employees readily accessible and usable by people with disabilities;
- ii. Job restructuring, part-time or modified work schedules or leaves of absence;
- iii. Acquisition or modification of equipment or devices; and
- iv. Job reassignment and other similar actions.
  - N.J.A.C. 13:13-2.5 (b)(1)

Factors to consider in analyzing whether the accommodation will impose an undue hardship on employer's business:

- i. The overall size of the employer's business with respect to the number of employees, number and type of facilities, and size of budget;
- ii. The type of the employer's operations, including the composition and structure of the employer's workforce;
- iii. The nature and cost of the accommodation needed, taking into consideration the availability of tax credits and deductions and/or outside funding; and
- iv. The extent to which accommodation would involve waiver of an essential requirement of a job as opposed to a tangential or non-business necessity requirement.
- N.J.A.C. 13:13-2.5 (b)(3)

Federal Law: Title VII, the ADA, and the ADEA

Title VII- Who does it cover?

- Covers employers with 15 or more employees
- Labor organizations
- Employment agencies
- US companies operating overseas (in regard to US employees), unless complying with Title VII violates foreign law.
- Some religious entities (for religious discrimination) and private membership clubs are excluded.

Title VII- Protected Classes

- Race
- Color
- Religion
- Sex (including gender, pregnancy, sexual orientation, and gender identity).
- National Origin
  - 42 U.S.C. ç 2000e-2(a)(1)

Title VII Discrimination: SOL and Administrative Remedies

- In general, you need to file a charge [with the EEOC] within 180 calendar days from the day the discrimination took place. The 180 calendar day filing deadline is extended to 300 calendar days if a state or local agency enforces a law that prohibits employment discrimination on the same basis. The rules are slightly different for age discrimination charges. For age discrimination, the filing deadline is only extended to 300 days if there is a state law prohibiting age discrimination in employment and a state agency or authority enforcing that law. The deadline is not extended if only a local law prohibits age discrimination.
  - See Equal Employment Opportunity Commission ("EEOC") website
  - https://www.eeoc.gov/time-limits-filing-charge

Timing- Title VII Continued:

- Once the EEOC issues a "right to sue" letter, the Claimant has 90 days to file a lawsuit in federal court.

ADA and ADEA

- The Americans with Disabilities Act ("ADA") prohibits discrimination against those with disabilities.
- The Age Discrimination in Employment Act ("ADEA") prohibits age discrimination.
  - It shall be unlawful for an employer--
  - (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
  - (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
  - (3) to reduce the wage rate of any employee in order to comply with this chapter.

ADA and ADEA

- The ADA covers any employer with 15 or more employees.
- The ADEA covers any employer with 20 or more employees.

Conscientious Employee Protection Act ("CEPA")

- New Jersey Statute covering all Employers.
- "Employee" means any individual who performs services for and under the control and direction of employer or wages or other remuneration.
- "Retaliatory action" means the discharge, suspension or demotion of an employee, or other adverse employment action taken against an employee in the terms and conditions of employment.
  - N.J.S.A. 34:19-2

CEPA Prohibits Retaliation - Elements

- Plaintiff must show that she reasonably believed that conduct occurring in the workplace was either violating a law, rule, or regulation under the law, or was about to do so; OR
- The conduct was incompatible with a clear mandate of public policy concerning public health, safety, or welfare or the protection of the environment; AND
- She blew the whistle (reported to a supervisor, or to a government or regulating body); AND
- Defendant Retaliated (she suffered adverse employment action); AND
- There was a causal connection between her protected activity and the retaliation by Defendant.

Proving Whistleblower Retaliation

- Direct Evidence---"you're fired because you keep raising legal issues"
- Circumstantial evidence---variant of McDonnell Douglass paradigm, *prima facie* case and then proving employer's non-retaliatory reason is a pretext for retaliation. First, the *prima facie* case or first phase:

  a) Employee engaged in protected conduct;

  b) Employee had a reasonable belief that employer was violating public policy, i.e., a constitutional provision, statute, rule, regulation or judicial decision;

  c) Adverse employment action---firing, demotion, transfer, etc.

  d) Causal connection between adverse employment action and protected conduct

Second phase: if employer articulates non-retaliatory reason for adverse employment action, employee proves that the employer's reason is false and/or the real reason is employer retaliation.

Key CEPA Cases

- Abbamont v. Piscataway Twp. Bd. of Educ. 138 N.J. 405 (1995)(seminal case interpreting CEPA);
- Mehlman v. Mobil Oil Corp., 153 N.J. 163 (1998)(describing source of public policy).
- Lippman v. Ethicon, Inc., 222 N.J. 362 (2015)(rejected argument that compliance officer not covered under CEPA);
- Kolb v. Burns, 320 N.J. Super. 467 (App. Div. 1999)(circumstantial evidence paradigm);
- Dwoznar v. McDevitt, 177 N.J. 451 (2003)(up to court to define public policy);
- Maimone v. City of Atlantic City, 188 N.J 221 (2006)(jury can draw inference that decision-maker aware of whistleblower's protected activity).

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EMPLOYEE LEAVE REQUESTS AND EMPLOYER ACCOMMODATIONS

Presenter: Ruby Kumar-Thompson, Esq.

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Accommodations Under the LAD and ADA

Both prohibit discrimination against those with disabilities and requires accommodations based on both physical and mental disabilities, including temporary disabilities

Difference: ADA covers any employer with 15 or more employees

LAD applies to all employers regardless of size

Accommodations Under the LAD and ADA (cont'd)

- There are no magic words an employee must use to request an accommodation for a disability
- But it must be obvious that an employee desires assistance with work for a disability known to the employer before an employer has a duty to accommodate
- Additionally, the employer can require an employee to provide a doctor's note to substantiate the need for leave

Disabilities: Employers Must Reasonably Accommodate

N.J.A.C. 13:13-2.5

- (a) All employers shall conduct their employment procedures in such a manner as to assure that all people with disabilities are given equal consideration with people who do not have disabilities for all aspects of employment including, but not limited to, hiring promotion tenure training assignment, transfers and leaves on the basis of their qualifications and abilities. Each Individual's ability to perform a particular job must be assessed on an individual basis.
- (b) An employer must make reasonable accommodations to the limitations of an employee or applicant who is a person with a disability, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its business. The determination as to whether an employer has failed to make reasonable accommodation will be made on a case-by-case basis.

Where Such an Accommodation Will Not Impose an Undue Hardship, Examples of Accommodations Include:

N.J.A.C. 13:13-2.5(b)(1)

i. Making facilities used by employees readily accessible and usable by people with disabilities;

ii. Job restructuring, part-time or modified work schedules or leaves of absence;

iii. Acquisition or modification of equipment or devices; and

iv. Job reassignment and other similar actions.

- The above list is non-exhaustive. Other examples include:
- An extension of unpaid leave for more than the 12 weeks permitted under the FMLA, even if not provided to other employees.

Factors to Consider in Analyzing Whether an Accommodation Will Impose an Undue Hardship on Employer's Business:

N.J.A.C. 13:13-2.5(b)(3)

Factors to consider in analyzing whether an accommodation will impose an undue hardship on employer's business:

i. The overall size of the employer's business with respect to the number of employees, number and type of facilities, and size of budget

ii. The type of the employer's operations, including the composition and structure of the employer's workforce

iii. The nature and cost of the accommodation needed, taking into consideration the availability of tax credits and deductions and/or outside funding;

iv. The extent to which accommodation would involve waiver of an essential requirement of a job as opposed to a tangential or non-business necessity requirement.

Interactive Process:

- Is a mutually collaborative effort by which an employer and employee engage in a dialogue to identify a reasonable accommodation that will not impose an Undue Hardship
- May include:
  - Analysis of particular job to determine its purpose and essential functions
  - Consultation with individual to ascertain precise job limitations imposed by the disability and how to overcome
  - Identification of potential accommodation and assessment of its effectiveness to overcome disability (Where disability is not obvious may be requested of a licensed medical professional who is treating the employee).
  - No requirement to engage in the interactive process where the limitations imposed by the disability is deemed to pose a direct threat of safely performing the essential functions of a hazardous position.

RELIGIOUS ACCOMMODATIONS Under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a)(1) and the LAD

All three prohibit discrimination by an employer on account of an employee's sincerely held religious belief.

RELIGIOUS ACCOMMODATIONS Under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a)(1) and the LAD (cont'd)

- Differences: Title VII must file a complaint with EEOC first and receive a right to sue letter. Only have 180 days
- LAD – not necessary to file with Division of Civil Rights before filing in court.

RELIGIOUS ACCOMMODATIONS Under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a)(1) and the LAD (cont'd)

N.J.S.A. 10:5-12(q)(1)

- Under the LAD, employers cannot impose any condition upon employees that "would violate… sincerely held religious practice of religious observance."
- Sincerely held religious belief is one which an employer cannot inquire about its validity but must nonetheless be religious in nature to be protected.

RELIGIOUS ACCOMMODATIONS Under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a)(1) and the LAD (cont'd)

- A form of religious discrimination is where an employer fails to accommodate an employee's sincerely held religious beliefs reasonably and after engaging in a bona fide effort.
- "An accommodation is reasonable if it 'eliminates the conflict between employment requirements and religious practices by allowing the individual to observe fully.' " *EEOC v. Geo Grp., Inc.*, 616 F.3d 265, 291 (3d Cir. 2010) (*quoting Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 70 (1986)).

RELIGIOUS ACCOMMODATIONS Under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a)(1) and the LAD (cont'd)

Examples of reasonable accommodations:

1) Changing the work schedule of an employee so that the employee does not work due to observance of their Sabbath –*Groff v. DeJoy*, 600 U.S. 447 (2023)

2) Permitting an employee to wear religious garb. – *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.C. 768 (2015)

3) Permitting an employee to grow a beard. – *Smith v. City of Atlantic City*, --- 4th---, 2025 WL 1537927 (3d Cir. May 30, 2025)

4) Making exceptions to a policy that applies to other employees or where exceptions are made for secular reasons. *See Smith*, *supra*

RELIGIOUS ACCOMMODATIONS Under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a)(1) and the LAD (cont'd)

EXCEPTION:

An exception exists only if an employer cannot [reasonably] accommodate "the employee's religious observance or practice without undue hardship on the conduct of the employer's business' after putting forth a "bona fide effort" to accommodate. 42 U.S.C. 2000e(j) and *N.J.S.A.* 10:5-12(q)(3)(a))

RELIGIOUS ACCOMMODATIONS Under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a)(1) and the LAD (cont'd)

- Undue hardship is also defined as '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 [CNA].' " *N.J.S.A.* 10:5-12(q)(3)(a))
- The analysis of undue hardship may not be based on mere speculation or conjecture. *See Miller v. Port Auth. of N.Y. & N.J.*, 351 F. Supp. 3d 762, 789 (D.N.J. 2018)
- However, "[A]n employer is not required 'to wait until it [feels] the effects' of [a] proposed accommodation before determining its reasonableness." Miller, supra (second alteration in original) (*quoting EEOC v. Firestone Fibers & Textiles Co.*, 515 F.3d 307, 317 (4th Cir. 2008)). Rather, "[e]mployers must be given leeway to plan their business operations and possible accommodative options in advance, relying on an accommodation's predictable consequences along the way." *Ibid.* (*quoting Firestone Fibers*, 515 F.3d at 317).

RELIGIOUS ACCOMMODATIONS Under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a)(1) and the LAD (cont'd)

Examples of undue hardship:

1) An accommodation which results in the violation of a CNA provision for vacation, absenteeism, or seniority constitutes an undue hardship. See *N.J.S.A.* 10:5-12(q)(3)(a) and *Trans World Airlines*, 432 U.S. at 79

2) Safety and efficiency concerns that are sufficiently predictable to negatively impact the operations of the employer. See *Webb v. City of Philadelphia*, 562 F.3d 256 (3d Cir. 2009)

3) Substantial costs that are more than *de minimis*. *See E.E.O.C. v. Geo Group, Inc.*, 616 F.3d 265 (3d Cir. 2010).

Welcome to the Profession: A CLE event for recently admitted attorneys

Thank you!

Ruby Kumar-Thompson, Esq.

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About the Panelists…

Raymond M. Baldino is a Partner in Zazzali, P.C. in the firm's Newark, New Jersey, office, where he concentrates his practice in labor and employment law and represents public and private sector unions in state and federal court, and in administrative proceedings. Prior to joining the firm he was a member and organizer for the Rutgers AUUP-AFT chapter.

Mr. Baldino is admitted to practice in New Jersey and New York, and before the United States District Court for the District of New Jersey and the Southern and Eastern Districts of New York, and the Third Circuit Court of Appeals. A member of the New Jersey State Bar Association, he has served as a commercial litigator for major national companies and banks, and has handled OPRA cases in the Appellate Division and Supreme Court of New Jersey. Mr. Baldino is also a former journalist knowledgeable in First Amendment and media law, and worked as an attorney in the legal department of *The Record* and *Herald News*. He is the author of articles which have appeared in the *New Jersey Labor and Employment Quarterly* and other publications.

Mr. Baldino received his B.A., with honors, from Rutgers University, where he was elected to *Phi Beta Kappa*; his M.A. from Rutgers University; and his J.D. from Rutgers University School of Law-Newark, where he interned at ACLU-NJ, the Reporter's Committee for Freedom of the Press and other First Amendment and media advocacy organizations.

Christopher L. Jackson practices with Buchanan, Ingersoll & Rooney, P.C. in Princeton, New Jersey. He has counseled and defended clients in civil litigation matters with a focus on businesses in the transportation industry. He has also represented manufacturers and distributors in product liability matters including personal care products, household appliances, consumer goods and medical devices.

Mr. Jackson is admitted to practice in New Jersey and before the United States District Court for the District of New Jersey. Chair of the Young Lawyers Division of the New Jersey State Bar Association, he has been a Trustee of the Mercer County Bar Association and Co-Chair of its Young Lawyers Division, and a member of the American Bar Association's Young Lawyers Division. Mr. Jackson has been a member of the New Jersey Supreme Court Committee on Diversity, Inclusion and Community Engagement as well as the Garden State Bar Association. Named Young Lawyer of the Year in 2022 by the Mercer County Bar Association, he is also the recipient of the Service to the Bar Award bestowed by the NJSBA Young Lawyers Division.

Mr. Jackson received his B.A. from Western Michigan University and his J.D. from Rutgers Law School, where he was the recipient of the Law Dean's Scholarship.

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Cheyne R. Scott is a civil litigation attorney and a Partner in Chasan Lamparello Mallon & Cappuzzo, P.C. in Secaucus, New Jersey. She concentrates her practice in labor and employment law, and has represented individuals, municipalities, counties, authorities and school boards in litigation and compliance matters arising under New Jersey's *Tort Claims Act* (Title 59).

Admitted to practice in New Jersey and Michigan, and before the United States District Court for the District of New Jersey, Ms. Scott is Past President of the Hudson County Bar Association's Young Lawyers Division and a Trustee of the Association. She is a Trustee of the New Jersey State Bar Association, a member of the Association's Diversity Committee and the Labor and Employment Law Section's Executive Committee, and was selected by the Association as a 2016-2017 Leadership Academy Fellow.

A member of the Hudson American Inn of Court and the Sidney Reitman Employment Law American Inn of Court, Ms. Scott has lectured for ICLE on labor and employment matters and has also lectured and written on mindfulness and self-care for attorneys. Her article "Mindfulness: A Simpler Way to Alleviate Attorney Stress" was published in the American Bar Association's *GPSOLO Magazine* (July/August 2017). Ms. Scott is also the author of "The ABCs of Emotional Health" which appeared in the July 2019 issue of *New Jersey Lawyer*. She was the recipient of the Garden State Bar Association's Professional Lawyer of the Year Award in 2021 and the Association's Raymond A. Brown Award in 2022.

Ms. Scott received her B.A. from Michigan State University and her J.D., *cum laude*, from Thomas M. Cooley Law School. She served as a Judicial Intern to the Honorable Patrick J. Duggan, United States District Court for the Eastern District of Michigan. She was also Law Clerk to the Honorable Sheila A. Venable, Presiding Judge, Criminal Division, Hudson County, Superior Court of New Jersey.