

## NEW JERSEY

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### I. AT-WILL EMPLOYMENT

#### A. Statutes

There is no statutory authority in New Jersey on this subject matter.

#### B. Case Law

Employers have the unbridled authority to discharge an employee, with or without cause, in the absence of contractual or statutory restrictions. *English v. College of Med. & Dentistry*, 372 A.2d 295, 73 N.J. 20 (1977). Today, public and private employers may discharge at-will employees for “good reason, bad reason, or no reason at all.” *Witkowski v. Thomas J. Lipton, Inc.*, 643 A.2d 546, 552, 136 N.J. 385, 397 (1994). Similarly, an employee may terminate the employment relationship at will. If an employer does have a reason for discharging an employee, however, that reason must not be unlawful.

### II. EXCEPTIONS TO AT-WILL EMPLOYMENT

#### A. Implied Contracts

##### 1. Employee Handbooks/Personnel Materials

In 1985, the New Jersey Supreme Court held that in certain circumstances, representations in employee handbooks or manuals may be enforceable as implied contracts. *Woolley v. Hoffmann-LaRoche, Inc.*, 491 A.2d 1257, 99 N.J. 284 (1985). The basic test for determining whether a contract of employment can be implied turns on the reasonable expectations of employees. In *Woolley*, the Plaintiff worked for Hoffmann-La Roche from 1969 to 1978, at which time he was terminated without cause. Approximately one month after he began his employment, he was given a copy of Hoffmann-La Roche’s personnel manual which included a statement of the company’s “Policy” regarding job security: “It is the policy of Hoffmann-La Roche to retain to the extent consistent with company requirements, the services of all employees who perform their duties efficiently and effectively.” The manual also included specific provisions defining termination for cause as “discharge due to performance” and “discharge, disciplinary.” There was no category in the manual for a discharge without cause.

Following his discharge, Woolley commenced an action contending that the job security provisions of the personnel manual were contractually binding, and that his discharge without cause was

contrary to those provisions. The trial court granted Hoffmann-La Roche's motion for summary judgment and the Appellate Division affirmed.

The New Jersey Supreme Court reversed and remanded the case for trial. In reaching its conclusion regarding the enforceability of job security provisions in employment manuals, the court stated:

A policy manual that provides for job security grants an important, fundamental protection for workers. [citation omitted] If such a commitment is indeed made, obviously an employer should be required to honor it. When such a document, purporting to give job security, is distributed by the employer to a workforce, substantial injustice may result if that promise is broken.

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Given the facts before us and the common law of contracts interpreted in the light of sound policy applicable to this modern setting, we conclude that the termination clauses of this company's Personnel Policy Manual, including the procedure required before termination occurs, could be found to be contractually enforceable. Furthermore, we conclude that when an employer of a substantial number of employees circulates a manual that, when fairly read, provides that certain benefits are an incident of the employment (including, especially, job security provisions), the judiciary, instead of "grudgingly" conceding the enforceability of those provisions, should construe them in accordance with the reasonable expectations of the employees.

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[U]nless the language contained in the manual were such that no one could reasonably have thought it was intended to create legally binding obligations, the termination provisions of the policy manual would have to be regarded as an obligation undertaken by the employer. It will not do now for the company to say it did not mean the things it said in its manual to be binding. Our courts will not allow an employer to offer attractive inducements and benefits to the workforce and then withdraw them when it chooses, no matter how sincere its belief that they are not enforceable.

*Woolley*, 491 A.2d at 1264-66.

In addition to the reasonable expectations of employees, New Jersey courts consider a variety of other factors when analyzing whether a job security representation in a handbook or manual creates a binding contract, including the circumstances in which the manual was prepared, the scope of its distribution to employees, and the degree to which the manual addresses the subject of termination for cause. In *Witkowski v. Thomas J. Lipton, Inc.*, 643 A.2d 546, 136 N.J. 385 (1994), the Plaintiff was fired by defendant Lipton when he was accused of stealing a can of oil that had been discovered in his locker. Witkowski denied that he had stolen the can of oil and maintained that his discharge was wrongful because the company's employment manual which was given to him when he was hired provided specific grounds and procedures

for employee termination. Witkowski maintained that the manual constituted a binding contract of employment under which he could only be fired for cause. Lipton, on the other hand, maintained that Witkowski was hired as an “at-will” employee who could be fired without cause. In rejecting Witkowski’s claim on summary judgment, the trial court found “as a matter of law that the [Lipton] manual . . . was not intended to be a comprehensive treatment of the subject of employment termination and therefore, there was no contract between plaintiff and defendant.” *Id.* at 548. The Appellate Division reversed, finding that the Manual “created a factual question of an employment contract.” The New Jersey Supreme Court affirmed, stating:

The key consideration in determining whether an employment manual gives rise to contractual obligations is the reasonable expectations of the employees. “When an employer of a substantial number of employees circulates a manual that, when fairly read, provides that certain benefits are an incident of the employment (including, especially, job security provisions),” courts should continue and enforce that manual “in accordance with the reasonable expectations of the employees.”

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Certain factors, however, will generally be relevant in determining whether such a manual creates a contract. Those ordinarily relate to both the manual’s specific provisions and the context of its preparation and distribution. An established employment manual that expresses “company-wide employer policy” may give rise to an implied contract of employment if its provisions “contain an express or implied promise concerning the terms and conditions of employment.” . . . In sum, under *Woolley*, the basic test for determining whether a contract of employment can be implied turns on the reasonable expectations of employees. A number of factors bear on whether an employee may reasonably understand that an employment manual is intended to provide enforceable employment obligations, including the definiteness and comprehensiveness of the termination policy and the context of the manual’s preparation and distribution.

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Comprehensiveness of job-security provisions is just one of several factors for a court to consider in determining whether that policy gives rise to an implied contract under *Woolley*. . . . In this case, Lipton distributed its manual to all employees. The wide distribution of the manual indicates that Lipton understood that it would be read and considered by all its employees. . . . We can infer that Lipton sought to gain the cooperation and loyalty of its employees by creating the employment manual and through its wide dissemination reasonably demonstrated its intent that the manual applied to the entire workforce. . . . In addition, the specific provisions of the manual relating to job security are sufficiently definite and comprehensive, thereby reinforcing the conclusion that Lipton intended those provisions to be regarded by its workforce as enforceable. . . . In conclusion, the Lipton manual’s wide distribution and the definiteness and comprehensiveness of its termination policy could reasonably lead an employee to expect that the manual created enforceable employment obligations.

*Witkowski*, 643 A.2d at 550-51.

Where handbooks or manuals are enforceable as binding contracts, there is also an enforceable implied covenant of good faith and fair dealing. *Wade v. Kessler Inst.*, 798 A.2d 1251, 1259, 172 N.J. 327, 339 (2002).

a. Limitations on *Woolley*: Agreement to At-Will Status.

In *Radwan v. Beecham Laboratory*, 850 F.2d 147 (3d Cir. 1988), the Third Circuit Court of Appeals held that a *Woolley* claim cannot be maintained where the employee has agreed to an at-will status in an application for employment:

Here, unlike in *Woolley*, the question of the employee's tenure was specifically dealt with in writing when he was hired, for Radwan in his employment application agreed that he could be discharged at any time without previous notice. While this application was not part of the employees' manual, we do not understand *Woolley* to require that disclaimers of an intent to bind an employer not to discharge an employee must be in the employees' manual and not an individual agreement.

Id. at 150.

The court further explained its rationale on the basis that if an employee has expressly accepted at-will employment by signing an agreement in his application, he does not have "any reasonable expectation that [an employer's] manual granted him [contrary] . . . right[s]." Id.

b. Limitations on *Woolley*: At-will status not affected by other changes in terms of employment

Changing terms of employment in a manual that are unrelated to provisions requiring discharge for cause will not affect the at-will status created by an employment manual. In *Mita v. Chubb Computer Services, Inc.*, 767 A.2d 989, 337 N.J. Super. 517 (App. Div. 2001), plaintiff Cynthia Mita was employed by Chubb as a technical manager. When Mita was hired, she signed an Employee Acknowledgment which indicated that her employment was at-will. She also received a handbook that re-emphasized her at-will status. The company thereafter asked Mita to sign a non-compete clause. When she refused, Mita was informed that if she did not sign the agreement, her commissions would be reduced by 15 percent. Chubb issued a memorandum confirming that failure to sign the non-compete would lead to a reduction in commissions. The company instructed Mita to sign the non-compete or be fired immediately. Mita refused and was terminated. She commenced a suit against Chubb alleging that the defendant violated their agreement not to terminate her employment for her refusal to sign the non-compete clause. The trial court granted summary judgment in favor of the company and Mita appealed.

The Appellate Division affirmed. It held that "an employee manual can narrow and define the procedure or method by which an employment-at-will contract can be changed by the parties." *Mita*, 767 A.2d at 994. The court concluded, however, that because the memorandum did not conform with the employment manual's requirements for changing at-will employment status (it failed to state plaintiff's employment was not at-will, and did not set forth the duration or terms of her employment), the plaintiff's

at-will status was not altered. Moreover, the court held that Mita's failure to sign a non-compete evidenced her desire to maintain her at-will status. *Id.* at 994-95.

## 2. Other Contracts

Even where an employer has a published policy setting forth that employment is at-will, communications with employees may create an enforceable contract of employment. In *Lapidoth v. Telcordia Technologies, Inc.*, 22 A.3d 11, 420 N.J. Super. 411 (App. Div. 2011), the New Jersey Appellate Division concluded that an employee who had just completed a one year maternity leave could have reasonably interpreted her employer's letters authorizing her tenth maternity leave as a promise of reinstatement precluding termination, notwithstanding the company's annually distributed employment-at-will disclaimer and despite the fact that the employee was not covered by the federal Family and Medical Leave Act or the New Jersey Family Leave Act. But *See Baader v. AT&T et al.*, No. A-3215-09T3, 2011 N.J. Super. Unpub. LEXIS 2147 (App. Div. 2011)(language in manager's letter and subsequent telephone call during employee's medical leave did not establish the existence of an implied contract of plaintiff's continued employment with AT&T because the statements and letter created no reasonable expectation that the plaintiff's job was secure).

## 3. Provisions Regarding Fair Treatment

New Jersey law does not specifically address fair treatment in its analysis of implied employment contracts.

## 4. Disclaimers

An employer may prevent an employment manual from creating an implied contract by including a conspicuous and clear disclaimer in the manual. The leading case on this issue is *Nicosia v. Wakefern Food Corp.*, 643 A.2d 554, 136 N.J. 401 (1994). In *Nicosia*, the New Jersey Supreme Court set the standard for an effective disclaimer in an employee manual. Nicosia was hired by defendant Wakefern Food Corporation in 1971 and worked there for the next 18 and one-half years. At the time Nicosia's employment with defendant was terminated, he held the position of Warehouse Shift Supervisor. Merchandise was stolen from Wakefern's warehouse on two separate occasions during Nicosia's employment, and Nicosia was discharged for "failing to maintain safe storage of the merchandise and for not following appropriate procedures on discovering the thefts." *Id.* at 556. Nicosia maintained that he was terminated without having received the benefit of the disciplinary procedures outlined in an 11-page document entitled, "Wakefern Disciplinary Procedure," which was part of a larger manual entitled, "Human Resources Policies and Procedures Manual" ("Manual"). Nicosia maintained that either the 11-page section of the Manual, or the entire Manual itself, created an implied employment contract which Wakefern breached by terminating him without following the Manual's termination procedures. Wakefern, in turn, argued that because the Manual was not "widely distributed," it did not give rise to an employment contract. Wakefern further maintained that even if the Manual was widely distributed, the disclaimer, which appeared in the first paragraph on the first page of the Manual, negated any employment contract. Wakefern, therefore, argued that the Manual was not binding and as a result, Nicosia could be fired without cause.

The New Jersey Supreme Court stated:

This Court in [*Woolley v. Hoffmann-La Roche, Inc.*], stated that “absent a clear and prominent disclaimer, an implied promise contained in an employment manual that an employee will be fired only for cause may be enforced against an employer even when the employment is for an indefinite term and would otherwise be terminable at-will.”

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The context of the preparation and distribution of the manual in this case supports the finding that the manual was intended to constitute an enforceable employment contract. The entire manual was distributed to a substantial number of Wakefern’s workforce, although Nicosia may not have received it. As was the manual in *Woolley*, Wakefern’s manual coincidentally, was distributed to 300 of the 3,000 person workforce. . . . Moreover, Nicosia did actually receive the eleven page section of the manual covering terminations.

\* \* \*

Wakefern’s manual also includes a definite, comprehensive termination policy. Its termination provision provides a three-step disciplinary procedure, which includes “employee counseling” (a first written warning), “caution” (a second written warning), and a “final warning.” The manual further provides that “[a]ll steps must be completed in order to discharge for cause.” “Cause” includes: “poor job performance; excessive absenteeism/tardiness/early departures; insubordination; violation of rules and regulations; gross negligence.” The evidence was clearly sufficient to support the determination that Wakefern’s employees reasonably expected that the manual, particularly its discipline and termination policy, was intended to govern the rights and duties of Wakefern’s workforce based on both the manual’s content and distribution. Therefore, sufficient evidence showed that the manual, which included the eleven-page section, constituted an enforceable employment contract.

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An effective disclaimer by the employer may overcome the implication that its employment manual constitutes an enforceable contract of employment. The purpose of such a disclaimer is to provide adequate notice to an employee that she or he is employed only at-will and is subject to termination without cause . . . . An employer can make such a disclaimer by the inclusion in a very prominent position of an appropriate statement that there is no promise of any kind by the employer contained in the manual; that regardless of what the manual says or provides, the employer promises nothing and remains free to change wages and all other working conditions without having to consult anyone and without anyone’s agreement; and that the employer continues to have the absolute power to fire anyone with or without good cause.

In other words, [t]he provisions of the manual concerning job security shall be considered binding unless the manual elsewhere prominently and unmistakably indicates that those provisions shall not be binding or unless there is some other similar proof of the employer’s intent not to be bound.

Therefore, to determine whether a disclaimer constitutes an “appropriate statement” in a “very prominent” place, a court should construe the disclaimer “in accordance with the

reasonable expectations of the employees.” An effective disclaimer must be expressed in language “such that no one could reasonably have thought [the Manual] was intended to create legally binding obligations.”

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Disclaimers in employee manuals fail for lack of prominence when the text is not set off in such a way as to bring the disclaimer to the attention of the reader. . . . The “prominence” requirement can be met in many ways. Basically, a disclaimer must be separated from or set off in a way to attract attention. For example, “a term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it.” A reader’s attention may be called by setting off the disclaimer with different type, including bold. A disclaimer may be underlined or set off by a different color or border.

*Nicosia*, 643 A.2d at 557-58, 559-60, 561 (citations omitted).

## 5. Implied Covenants of Good Faith and Fair Dealing

The implied covenant of good faith and fair dealing applies to employment contracts as it does to other express or implied contracts in New Jersey. See *Wade v. Kessler Inst.*, 798 A.2d 1251, 1262, 172 N.J. 327, 344 (2002) (noting that there can be no implied covenant of good faith and fair dealing if there is no enforceable contract, either express or implied); *Nolan v. Control Data Corp.*, 579 A.2d 1252, 1257, 243 N.J. Super. 420, 429 (App. Div. 1990).

If an at-will employee is bound by a contract with respect to certain aspects of his employment, then the covenant of good faith and fair dealing applies to that contract. See *Nolan*, 243 N.J. Super. at 429; *Peck v. Imedia, Inc.*, 679 A.2d 745, 753, 293 N.J. Super. 151, 168 (App. Div. 1996). Where handbooks or manuals are enforceable as binding contracts, there is also an enforceable implied covenant of good faith and fair dealing. *Wade*, 798 A.2d at 1259; *Noye v. Hoffman-La Roche Inc.*, 570 A.2d 12, 13, 238 N.J. Super. 430, 432 (App. Div. 1990) (“a *Woolley* contract, like any other contract, contains an implied covenant of good faith and fair dealing”).

The term “good faith and fair dealing” is defined in New Jersey in accordance with the Uniform Commercial Code as “honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.” N.J. Stat. Ann. § 12A:2- 103(1)(b). It has been defined by New Jersey courts as an implied promise not to destroy or injure the rights of the other party(ies) under the contract. See *McGarry v. St. Anthony of Padua*, 704 A.2d 1353, 1357, 307 N.J. Super. 525, 533 (App. Div. 1998).

The covenant does not provide a separate and independent ground for imposing liability where the defendant has breached an express term of the contract. See *Wade*, 172 N.J. at 344-45. Also, there is no cause of action for breach of an implied covenant of good faith and fair dealing in the absence of an enforceable express or implied contract. Id. See also *Marrin v. Capital Health Sys.*, No. 14-2558, 2015 U.S. Dist. LEXIS 10243, 2015 WL 404783 (D.N.J. Jan. 29, 2015).

Tort damages are not available for breach of the covenant of good faith and fair dealing in an employment contract. See *Noye*, 238 N.J. Super. at 436.

**B.** Public Policy Exceptions

## 1. General

Prior to 1980, in the absence of a contract, employment in New Jersey was considered to be at-will, subject to termination at any time, with or without cause, for a good reason, a bad reason or no reason at all, so long as the termination was not for a reason prohibited by statute. In 1980, the New Jersey Supreme Court created an exception to that rule by establishing “a cause of action for wrongful discharge when the discharge is contrary a clear mandate of public policy.” *Pierce v. Ortho Pharm. Corp.*, 417 A.2d 505, 84 N.J. 58 (1980).

Pierce worked as a physician at Ortho Pharmaceutical Corporation. She was an employee-at-will. Pierce was asked to develop a drug which contained an unsuitably high level of saccharin. An alternative method to develop the drug could have been developed in approximately three months, but the company refused to wait. Pierce refused to continue to work on the project and resigned after she was removed from the project and placed in a position that she felt constituted a demotion. Pierce then sued Ortho asserting several causes of action, including a claim for wrongful discharge. In accepting that cause of action, the Court held:

[A]n employee has a cause of action for wrongful discharge when the discharge is contrary to a clear mandate of public policy. The sources of public policy include legislation; administrative rules, regulations or decisions; and judicial decisions . . . . Absent legislation, the judiciary must define the cause of action on a case-by-case determination. An employer’s right to discharge an employee at-will carries a correlative duty not to discharge an employee who declines to perform an act that would require a violation of a clear mandate of public policy. However, unless an employee at-will identifies a specific expression of public policy, he may be discharged with or without cause.

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An employee who is wrongfully discharged may maintain a cause of action in contract or tort or both. An action in contract may be predicated on the breach of an implied provision that an employer will not discharge an employee for refusing to perform an act that violates a clear mandate of public policy. [citation omitted]

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An action in tort may be based on the duty of an employer not to discharge an employee who refused to perform an act that is a violation of a clear mandate of public policy . . . .

\* \* \*

Employees will be secure in knowing that their jobs are safe if they exercise their rights in accordance with a clear mandate of public policy. On the other hand, employers will know



that unless they act contrary to public policy, they may discharge employees at-will for any reason.

*Pierce*, 417 A.2d at 512.

The Court subsequently restricted the scope of a *Pierce* claim in *Hennessey v. Coastal Eagle Point Oil Co.*, 609 A.2d 11, 129 N.J. 81 (1992), holding that the public policy in question had to affect the public, rather than a purely personal right or privilege. *Id.* at 20. Hennessey was an at-will employee who worked at Coastal Eagle, a private oil company, as a lead pumper. As part of his job, Hennessey was required to make precise calculations, interpret orders and convey them to gaugers, and keep accurate records for the next shift's lead pumper. Having found evidence of marijuana use on the premises, Coastal Eagle conducted random urine tests. Hennessey was randomly selected for the urine test. Diazepam, an active ingredient in Valium, was found in his urine. Coastal Eagle subsequently dismissed Hennessey who brought an action for wrongful discharge based on public policy. Citing *Pierce*, the New Jersey Supreme Court held that it is possible that firing an employee for failing or refusing to take a drug test could violate a clear mandate of public policy depending on the nature of the employee's job. Here, however, the court determined that the safety-sensitive nature of Hennessey's job outweighed any public policy supporting individual privacy.

The public's interest in ensuring that workers in safety-sensitive positions are drug-free outweighs any individual right to privacy, and one way to vindicate that interest is to permit employers to test those workers and to discharge them for failing those tests.

*Hennessey*, 609 A.2d at 21.

Sources of public policy include legislation, administrative rules, regulations or decisions; judicial decisions, and in certain instances, professional codes of ethics. *Pierce*, 84 N.J. at 72. The mandate of public policy must be clearly identified and firmly grounded. *MacDougall v. Weichert*, 677 A.2d 162, 144 N.J. 380, 391-92 (1996). A "vague, controversial, unsettled, and otherwise problematic public policy does not constitute a clear mandate. Its alleged violation will not sustain a wrongful discharge cause of action." *Id.* at 392.

A difference of professional opinion between an employee and those with the corporate decision making power is not a sufficient basis for a wrongful discharge cause of action. *Pierce*, 417 A.2d 505, 84 N.J. at 75. See also *Fineman v. New Jersey Dep't of Human Servs.*, 640 A.2d 1161, 272 N.J. Super. 606, 610 n.2 (App. Div. 1994) (discharged doctor's refusal to treat patients in opposition to his professional and ethical beliefs that defendant's staffing decisions were violative of regulatory patient and caseload ratios did not support *Pierce* claim), certif. denied, 649 A.2d 1087, 138 N.J. 267 (1994). "This is so even though the dispute arises from the employee's well-intended and conscientious concern for potential harm to those who might be affected by the corporate conduct of which the employee objects." *Chelly v. Knoll Pharmaceuticals*, 685 A.2d 498, 295 N.J. Super. 478, 488-89 (App. Div. 1996).

Once a clear mandate of public policy has been identified, an employee must prove that he or she was either discharged in violation of the public policy; or for exercising rights protected by the public policy; or for declining to perform an act or acts which require a violation of the asserted policy. *Martinez*

*v. Cardinal Health Partners, LLC*, Civ. No. 08-0680, 2008 U.S. Dist. LEXIS 32861 at \*8-9 (D.N.J. Apr. 21, 2008), reconsideration denied, 2008 U.S. Dist. LEXIS 50118 (D.N.J. June 25, 2008).

In *Tartaglia v. UBS PaineWebber, Inc.*, 961 A.2d 1167, 197 N.J. 81 (2008), the New Jersey Supreme Court considered whether a complaint to an outside agency was a prerequisite to support a *Pierce* claim for wrongful discharge in violation of public policy. The Court answered that question in the negative:

To be sure, a *Pierce* claim will often include an employee's complaint about an employer's action to an external authority because a discharge in those circumstances will more likely support the claim that his or her termination violates a clear mandate of public policy. Nothing in *Pierce*, however, mandates an actual or even a threatened external complaint as an element of the cause of action.

\* \* \*

Even though we do not require that an external complaint be made to support a *Pierce* claim, the remedy is not unbounded. Like the CEPA remedy to which it gave rise, it requires in this context an expression by the employee of a disagreement with a corporate policy, directive, or decision based on a clear mandate of public policy derived from one of the sources we identified in *Pierce*. It requires, as well, a sufficient expression of that disagreement to support the conclusion that the resulting discharge violates the mandate of public policy and is wrongful. That is to say, a complaint to an outside agency will ordinarily be a sufficient means of expression, but a passing remark to co-workers will not. A direct complaint to senior corporate management would likely suffice, but a complaint to an immediate supervisor generally would not.

*Tartaglia*, 197 N.J. at 108, 109 (citation omitted).

Two additional limitations on *Pierce* claims are noteworthy. First, such causes of actions have not been extended to failure to hire or promote claims. *Ebner v. STS Tire & Auto Ctr.*, Civil Action No. 10-2241, 2011 U.S. Dist. LEXIS 102006 at \*22 (D.N.J. Sept. 9, 2011) ("What [plaintiff] actually alleges is a common law action for failure to hire, a cause of action not recognized by New Jersey courts."); *Sabatino v. Saint Aloysius Parish*, 672 A.2d 217, 288 N.J. Super. 233, 240 (App. Div. 1996) ("Pierce has not been applied to failure to hire or promote situations."). Second, a *Pierce* claim based on discriminatory discharge is preempted by the state anti-discrimination statute – the New Jersey Law Against Discrimination. *Catalane v. Gilian Instrument Corp.*, 638 A.2d 1341, 271 N.J. Super. 476, 492, (App. Div. 1994), certif. denied, 642 A.2d 1006, 136 N.J. 298 (1994); *Erthal v. Hapag-Lloyd (Am.) Inc.*, Civil Action No. 09-5580, 2011 U.S. Dist. LEXIS 61280 at \*26-28 (D.N.J. June 8, 2011).

## 2. Exercising a Legal Right

In *Lally v. Copygraphics*, 428 A.2d 1317, 85 N.J. 668 (1981), the New Jersey Supreme Court affirmed the Appellate Division's determination that a common law right of action exists for wrongful discharge where an employee is fired in retaliation for filing a workers' compensation claim:

[W]e endorse the conclusion of the Appellate Division that there exists a common law cause of action for civil redress for a retaliatory firing that is specifically declared unlawful under [the workers' compensation statute] . . . Such a cause of action is strongly founded in public policy which, in this case, is reflected in the statutory prohibitions themselves [citation omitted] . . . A common law action for wrongful discharge in this context will effectuate statutory objectives and complement the legislative and administrative policies which undergird the workers' compensation laws.

Id. at 1318.

The court also concurred in the Appellate Division's observation that retaliatory discrimination by an employer constitutes both a public and a private wrong. *Lally*, 428 A.2d at 1318. To establish a prima facie case that a Pierce claim exists based upon this violation of public policy, an employee is not required to actually file a claim for workers' compensation benefits; however, he (or she) must prove: "(1) that he made or attempted to make a claim for workers' compensation; and (2) that he was discharged in retaliation for making that claim." *Cerracchio v. Alden Leeds, Inc.*, 538 A.2d 1292, 223 N.J. Super. 435, 442-43 (App. Div. 1988).

### 3. Refusing to Violate the Law

New Jersey recognizes a cause of action for wrongful discharge in violation of public policy for retaliation taken against an employee for refusing the employer's directive to engage in conduct that is prohibited by law. See *Kalman v. Grand Union Co.*, 443 A.2d 728, 183 N.J. Super. 153 (App. Div. 1982).

### 4. Exposing Illegal Activity (Whistleblowers)

#### a. Common Law: Public Policy

The issue of retaliation for exposing illegal activity arose in *Potter v. Village Bank*, 543 A.2d 80, 225 N.J. Super. 547 (App. Div. 1988). Potter became president and chief executive officer of the Village Bank of New Jersey on November 15, 1982. Em Kay Holding Corporation (Em Kay) owned 93 percent of the stock of Village Bank and was owned by Kraselnick and Kroitoro. Beginning in January of 1983, many cash deposits were made into the accounts of Kraselnick and others affiliated with Em Kay. Potter became suspicious that money was being laundered so he called the New Jersey Commissioner of Banking and requested advice. When Potter was fired, he claimed that it was in retaliation for reporting the suspected violations to the authorities.

The Appellate Division held that an employee who blows the whistle on illegal activities of an employer has a cause of action if he is terminated as a result of this conduct.

It is now clear that *Pierce* [417 A.2d at 505] does not require an at-will employee's claim of retaliatory discharge to be based on a specific statute which proscribes a particular type of discharge. Rather, an employer's obligation to refrain from discharging an employee who reports suspected criminal activities to law enforcement officials reflects a duty imposed upon all employers including banks-in order to implement the fundamental public policies embodied in the State and federal penal statutes.

\* \* \*

We hold that the public policy of the State of New Jersey should protect at-will employees--including bank presidents--who in good faith blow the whistle on one or more bank directors suspected of laundering money from illegal activities.

*Potter*, 543 A.2d at 85, 87.

**b.** The Conscientious Employee Protection Act (“CEPA”)

The Conscientious Employee Protection Act (“CEPA”), N.J. Stat. Ann. § 34:19-1 et. seq., prohibits an employer from retaliating against an employee if the employee exposes the employer’s illegal activity or activity that contravenes public policy intended to protect the health, safety, or welfare of the environment. It was enacted “to protect and encourage employees to report illegal or unethical workplace activities and to discourage public and private sector employees from engaging” in that activity. *Abbamont v. Piscataway Township Bd. of Educ.*, 650 A.2d 958, 138 N.J. 405 (1994).

The statute of limitations under CEPA is one year. N.J. Stat. Ann. § 34:19-5. The action runs from the date of the adverse employment action. *Ivan v. County of Middlesex*, 595 F. Supp. 2d 425, 467 (D.N.J. 2009). In termination cases, a CEPA claim generally accrues on the date of the actual termination, and not when the employee receives notice of the termination. *Keelan v. Bell Communications Research*, 674 A.2d 603, 289 N.J. Super. 531, 539 (App. Div. 1996). In constructive discharge cases, a CEPA claim accrues on the date the employee tenders his or her resignation. *Daniels v. Mutual Life Ins. Co.*, 773 A.2d 718, 340 N.J. Super. 11, 19 (App. Div. 2001).

The limitations period does not “begin to run until the wrongful action ceases.” *Green v. Jersey City Bd. of Educ.*, 828 A.2d 883, 890, 177 N.J. 434 (2003) (citation omitted). This means that retaliation under CEPA may not be a single, discrete action, but rather, may include “many separate but relatively minor instances of behavior directed against an employee that may not be actionable individually but that combine to make up a pattern of retaliatory conduct.” *Id.*, 828 A.2d at 891. Thus, courts, in determining when a wrongful act ceases, apply the continuing violation theory, which means that the cause of action accrues on the date on which the last act occurred. See *Shepherd v. Hunterdon Developmental Center*, 803 A.2d 611, 174 N.J. 1 (2002).

**i.** Who Qualifies as an Employee under CEPA?

A person qualifies as an employee under CEPA if that individual is either a traditional employee or an independent contractor whom an employer can control and direct or whose work has been functionally integrated into the employer’s business.

CEPA defines an “employee” as “any individual who performs services for and under the control and direction of an employer for wages or other remuneration.” N.J. Stat. Ann. § 34:192(b). This definition is broad and includes many individuals who have traditionally been considered independent contractors. See *D’Annunzio v. Prudential Insurance Company of America*, 927 A.2d 113, 119, 192 N.J. 110 (2007); *Stomel v. City of Camden*, 927 A.2d 129, 192 N.J. 137 (2007). However, the definition of “employee” does not extend to volunteers who perform services without the expectation or receipt of payment, regardless

of benefits the volunteer may receive, such as retirement benefits, insurance coverage, or discounts. See *Sauter v. Colts Neck Volunteer Fire Co. No. 2*, 170 A.3d 351, 358-59 (App. Div. 2017).

The test for assessing whether an individual is an “employee” under CEPA is set forth in *Pukowsky v. Caruso*, 711 A.2d 398, 312 N.J. Super. 171, 182-83 (App. Div. 1998), which identifies twelve factors the Court should consider: (1) the employer’s right to control the means and manner of the worker’s performance; (2) whether the occupation is supervised or unsupervised; (3) skill; (4) who furnishes the equipment and workplace; (5) the length of time the individual has worked; (6) the method of payment; (7) the manner of termination of the work relationship; (8) whether there is annual leave; (9) whether the work is an integral part of the employer’s business; (10) whether the individual accrues retirement benefits; (11) whether the “employer” pays social security taxes; and (12) the intention of the parties. As the Court explained in *D’Annunzio*:

[courts] must look beyond the label attached to the relationship. The considerations that must come into play are three: (1) the employer’s control; (2) the worker’s economic dependence on the work relationship; and (3) the degree to which there has been a functional integration of the employer’s business with that of the individual doing the work.

*Id.*, 192 N.J. at 122.

The *Pukowsky* test was affirmed in the Supreme Court’s recent decisions in *D’Annunzio* and *Stomel*. Those decisions have established that an individual will more likely be considered to be an employee under the Act if that individual is a “cog” in the employer’s business, has work that is continuously required by the employer’s business, and is regularly at the employer’s disposal or performs routine or administrative activities. *D’Annunzio*, 927 A.2d at 12324. The Court will not simply accept the parties’ label for the relationship, but requires instead a fact-sensitive inquiry into the true nature of the employment relationship. In *Stomel*, for example, the Court found that the plaintiff, a public defender who provided service to the City on regular and continuous basis while working for a private law firm, was an employee of the City of Camden because his services were integrated into the City’s delivery of services to its residents.

- ii. CEPA requires complaints about employer activities that contravene public policy.

To state a claim under CEPA, the employee must show that “he or she reasonably believed that his or her employer’s conduct was violating either a law, rule, or regulation promulgated pursuant to law, or a clear mandate of public policy[.]” *Dzwonar v. McDevitt*, 828 A.2d 893, 900, 177 N.J. 451 (2003). CEPA requires that an employee show that he or she disclosed, threatened to disclose, objected to or refused to participate in an activity that he or she reasonably believed was illegal or contrary to public policy.” *Matthews v. New Jersey Institute of Technology*, 772 F. Supp. 2d 647 (D.N.J. 2011).

In *Battaglia v. United Parcel Service, Inc.*, No. A-86/87-11, 2013 N.J. LEXIS 734 (N.J. July 17, 2013) the New Jersey Supreme Court held on July 17, 2013 that in order to succeed on a fraud-based CEPA claim, a plaintiff must reasonably believe that the complained-of activity was occurring and was fraudulent. The court further held that the statute does not protect employees whose complaints involve

minor or trivial matters. Under this reasoning, the court found that the plaintiff's anonymous letter to human resources and his alleged comment to his supervisor were vague, that the plaintiff did not believe the complained-of conduct was fraudulent and that his complaints did not rise to the level of activity protected by CEPA.

A plaintiff's regular job duties can be considered whistle-blowing conduct. *Lippman v. Ethicon, Inc.*, 119 A.3d 215, 222 N.J. 362 (2015). In that case, the plaintiff, a physician employed as a Vice President of Medical Affairs, advocated for a recall of a company product which was ultimately recalled by the Federal Drug Administration. Approximately six months after the plaintiff advocated for the recall, the employer terminated his employment, based on an inappropriate relationship with someone who worked directly for him. The plaintiff filed a lawsuit under CEPA alleging that his termination was in retaliation for his whistleblowing activity. The trial court dismissed the case on summary judgment finding that because the plaintiff's job was to raise issues regarding the safety of the employer's product, he was not a whistleblower. The Appellate Division reversed summary judgment and remanded, holding that CEPA does protect employees who are hired to be in house whistleblowers and set forth a modified test applicable to "watchdog" employees. The New Jersey Supreme Court agreed with the Appellate Division that CEPA's protections extend to the performance of regular job duties by watchdog employees and held that CEPA did not impose any additional requirements on watchdog employees bringing a CEPA claim.

In *Dzwonar*, the plaintiff was employed as an arbitration officer of Local 54 of The Hotel and Restaurant Employees International Union, and also served as an elected member of its Executive Board. Dzwonar claimed that she was unlawfully discharged by the Union under CEPA in retaliation for repeatedly complaining about the failure of the Executive Board to read the minutes from its Board meetings at the meetings of the general membership. A jury found in her favor, but the Appellate Division set aside the verdict based on its determination that the CEPA claim was preempted by federal labor law.

The New Jersey Supreme Court affirmed the dismissal of the CEPA claim on the grounds that Dzwonar did not have an objectively reasonable belief that the conduct of the Executive Board in failing to read its minutes to the general membership violated any law or clear mandate of public policy:

A plaintiff who brings a claim [under CEPA] need not show that his or her employer or another employee actually violated the law or a clear mandate of public policy. Instead, the plaintiff simply must show that he or she "reasonably believes" that to be the case.

\* \* \*

We agree with the lower courts that when a plaintiff brings an action pursuant to N.J. Stat. Ann. 34:19-3c, the trial court must identify a statute, regulation, rule, or public policy that closely relates to the complained of conduct. The trial court can and should enter a judgment for a defendant when no such law or policy is forthcoming. We do not agree, however, that a plaintiff must allege facts that, if true, actually would violate that statute, rule, or public policy.

\* \* \*

Instead, a plaintiff must set forth facts that would support an objectively reasonable belief that a violation has occurred. In other words, when a defendant requests that the trial court determine as a matter of law that a plaintiff's belief was not objectively reasonable, the trial court must make a threshold determination that there is a substantial nexus between the complained-of conduct and a law or public policy identified by the court or the plaintiff. If the trial court so finds, the jury then must determine whether the plaintiff actually held such a belief and, if so, whether that belief was objectively reasonable.

*Dzwonar*, 828 A.2d at 901-02.

The court found that *Dzwonar's* claim had no merit because the complained-of conduct – the failure to read the Executive Board minutes to the general membership – was not related to any identified law or public policy such that *Dzwonar* could not have held an objectively reasonable belief that the failure to read the minutes was unlawful. *Dzwonar*, 828 A.2d at 902-04. See also *Mehlman v. Mobil Oil Corp.*, 707 A.2d 1000, 1013, 153 N.J. 163, 168 (1998) (“A salutary limiting principle is that the offensive activity must pose a threat of public harm, not merely private harm or harm only to the aggrieved employee.”).

In *Hitesman v. Bridgeway, Inc.* 93 A.3d 306, 218 N.J. 8 (2014), the New Jersey Supreme Court held that to assert a claim for retaliation under CEPA based on complaints concerning improper quality of patient care or conduct incompatible with a clear mandate of public policy concerning the public health, a plaintiff must, at a minimum, identify a source of law or other authority that sets forth a standard from which to determine whether there was a reasonable belief that the employer engaged in the alleged misconduct.

In this case, a registered nurse of a nursing home complained to the facility's management and anonymously to government agencies and the press about the infectious diseases among patients and released partially redacted patient records in violation of the employer's confidentiality policy and the Health Insurance Portability and Accountability Act. He was subsequently terminated and filed suit under CEPA. The plaintiff identified the following as the legal standard governing the alleged misconduct: the American Nursing Association Code of Ethics and the Company's Statement of Resident Rights. The New Jersey Supreme Court concluded that the authorities identified by the plaintiff did not set forth a law or other source of public policy that governed the employer's alleged misconduct.

iii. CEPA does not apply to private disputes

In *Klein v. Univ. of Med. & Dentistry of N.J.*, the Appellate Division expanded on the requirement that a plaintiff have a reasonable belief that a law, regulation, or public policy is being violated. 871 A.2d 681, 377 N.J. Super. 28 (App. Div. 2005). The Appellate Division in *Klein* rejected the whistleblower claim of a healthcare professional who asserted that he was subjected to retaliation for raising concerns about the internal operations of his medical department where his complaints centered on his concern that the staffing of the department was inadequate and his belief that the physical layout needed improvement in order to provide better patient care. After refusing to accept assignments until his concerns were addressed, Dr. Klein was temporarily relieved of his clinical duties, and then placed under the supervision of another faculty member. He then filed a claim for retaliation under CEPA. In rejecting his claim, the Appellate Division held that Dr. Klein failed to establish a prima facie case under CEPA because he did not

have a reasonable basis to believe that the practices complained of violated a law, rule, or regulation, and because the discipline imposed by the hospital was not an adverse employment action because there was no reduction in his salary or rank. *Id.*

In *Maw v. Advanced Clinical Communications, Inc.*, 846 A.2d 604, 179 N.J. 439 (2004), the Court held that the plaintiff could not maintain a CEPA claim where she was discharged because she refused to sign a non-compete agreement which her employer had asked its employees to execute. Maw claimed that the agreement violated public policy, but her dispute was only with the reasonableness of the terms of the proposed restrictions based on her belief that the employer had no legitimate reason to require her to agree not to compete. In that circumstance, the Court found that her claim was properly dismissed because it was a private dispute that did not implicate the public interest, and because the public policy of New Jersey does not prohibit or preclude reasonable non-compete agreements. *Id.* at 608-09.

On the other hand, complaining about a co-worker's violation of public policy is protected activity under CEPA. In *Estate of Roach v. TRW, Inc.*, plaintiff Roach was an army intelligence officer who became aware of rumors that his co-workers were engaged in improper conduct in violation of company policy and reported his beliefs to his supervisors. 754 A.2d 544, 164 N.J. 598 (2000). There was no action taken against the co-workers, and Roach subsequently filed suit following his lay-off, claiming that he was laid off in violation of CEPA in retaliation for his complaints about his co-workers conduct, which he believed were contrary to public policy. The jury found in favor of Roach.

The Appellate Division set aside the jury verdict on the ground that § 3(c) of CEPA did not protect employee complaints about co-worker violations of company policies. The New Jersey Supreme Court ultimately reversed and remanded to reinstate the jury verdict, holding that CEPA protects employees who complain about co-worker conduct so long as the employee has a "reasonable belief" that the co-worker conduct violates a law, regulation or clear mandate of public policy. *Estate of Roach*, 754 A.2d at 550. The Court explained:

For instance, if an employee were to complain about a co-employee who takes an extended lunch break or makes a personal telephone call to a spouse or friend, we would be hard pressed to conclude that the complaining employee could have "reasonably believed" that such minor infractions represented unlawful conduct as contemplated by CEPA. CEPA is intended to protect those employees whose disclosures fall sensibly within the statute; it is not intended to spawn litigation concerning the most trivial or benign employee complaints.

*Estate of Roach*, 754 A.2d at 552.

In *Fleming v. Correctional Healthcare Solutions, Inc.*, 751 A.2d 1035, 164 N.J. 90 (2000), the plaintiff was employed as a nurse at the Edna Mahan Correctional Facility. During her employment, she complained that prisoners were receiving medication without making statutory co-payments. Fleming did not complain to her immediate supervisor, who she believed was involved in the wrongful conduct, but instead complained to her supervisor's supervisor. Thereafter, the defendant terminated Fleming for insubordination for failing to follow the company's chain-of-command policy. Fleming brought an action



against the employer and individual supervisors alleging that her termination violated CEPA. The trial court dismissed the complaint, and the Appellate Division affirmed based on its determination that the whistleblowing was not protected activity because it was not made to the appropriate person in the employer's chain of command.

The New Jersey Supreme Court reversed, holding that Fleming's violation of the proper chain of command for reporting complaints did not justify her termination:

Holdings below that allow firing for insubordination when a whistle-blowing employee sidesteps an involved supervisor contradict the express language of CEPA and its broad remedial purpose. Fleming's act of communicating her complaints to Meirs involved protected conduct as a matter of law.

*Fleming*, 751 A.2d at 1040.

Participation by the plaintiff in illegal activity does not bar a CEPA claim. In *Donofry v. Autotote Sys., Inc.*, plaintiff Donald Donofry, a general manager for the Atlantic City Race Track, allowed technicians who were not licensed by Casino Control Commission to work in the facility in violation of the Casino Simulcasting Act. 795 A.2d. 260, 350 N.J. Super. 276 (App. Div. 2001). Donofry informed the Casino Control Commission of these activities and his participation in them. He was subsequently discharged by Autotote. Donofry sued under CEPA and, after a bench trial in which he was awarded compensatory damages, attorneys' fees and costs, but not punitive damages, both sides appealed.

The Appellate Division rejected Autotote's argument that Donofry's participation in the unlawful conduct about which he "blew the whistle" barred his CEPA claim, explaining that no New Jersey case has held that a whistleblower's participation in the unlawful conduct he reports is a per se bar to a whistleblower claim. *Donofry*, 795 A.2d at 268-69.

Autotote also claimed that Donofry was terminated because of his illegal conduct and not because of his whistleblowing. However, the Appellate Division concluded that, by demonstrating that Autotote retained supervisors who were just as culpable as he, Donofry satisfied his burden proof under CEPA and showed that retaliatory discrimination was more likely than not a determinative factor in Autotote's decision to fire him. *Donofry*, 795 A.2d at 270-74.

Where an employee's CEPA claim has nothing to do with a collective bargaining agreement covering his position, the New Jersey Supreme Court has held that the CEPA claim is not preempted by either the Labor Management Relations Act or the National Labor Relations Act ("NLRA"). *Puglia v. Elk Pipeline, Inc.*, 141 A.3d 1187, 226 N.J. 258 (2016). In that case, the former employee claimed that his CEPA claim was centered on whether he engaged in whistleblowing activity and whether he was terminated for engaging in that activity, and therefore do not require an analysis of the collective bargaining agreement. The New Jersey Appellate Division held that Puglia's CEPA claim was preempted. The New Jersey Supreme Court reversed holding that the NLRA does not preempt Puglia's CEPA claim and that the State's interest in enforcing CEPA runs deep and exists regardless of an employee's union membership.

iv. What constitutes retaliation under CEPA?

In order to establish a prima facie case under CEPA, an employee must demonstrate that he/she was the victim of retaliation, which is defined as “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. Stat. Ann. § 34.19-2e. New Jersey courts have interpreted the statute “as requiring an employer’s action to have either impacted on the employee’s compensation or rank or be virtually equivalent to discharge in order to give rise to the level of retaliatory action required for a CEPA claim.” *Caver v. City of Trenton*, 420 F.3d 243, 255 (3d Cir. 2005) (internal quotation marks and citation omitted). The definition of retaliatory action also “speaks in terms of completed action.” *Keelan v. Bell Communications Research*, 674 A.2d 603, 289 N.J. Super. 531, 539 (App. Div. 1996).

In *Donelson v. Dupont Chambers Works*, 20 A.3d 384, 206 N.J. 243 (2011), the New Jersey Supreme Court considered what acts are retaliatory under CEPA. Discharges, the Court found, encompassed not only actual termination of employment but also constructive discharges, which occur when an employer’s conduct “is so intolerable that a reasonable person would be forced to resign rather than continue to endure it.” *Donelson*, 20 A.3d at 392, 206 N.J. at 257 (citation omitted). The Court went on to hold:

What constitutes an “adverse employment action” must be viewed in light of the broad remedial purpose of CEPA, and our charge to liberally construe the statute to deter workplace reprisals against an employee speaking out against a company’s illicit or unethical activities. Cast in that light, “adverse employment action” is taken against an employee engaged in protected activity when an employer targets him for reprisals – making false accusations of misconduct, giving negative performance reviews, issuing an unwarranted suspension, and requiring pretextual mental-health evaluations – causing the employee to suffer a mental breakdown and rendering him unfit for continued employment.

*Id.*, 206 N.J. at 257-58.

In *Hancock v. Borough of Oaklyn*, 790 A.2d 186, 347 N.J. Super. 350 (App. Div. 2002), the Appellate Division observed that retaliation under CEPA requires action that results in an adverse impact on an employee’s “compensation or rank,” or “that impacts in a substantial way on . . . work or conditions at work or constitutes a de facto termination.” *Hancock*, 790 A.2d at 193. The Appellate Division concluded that the plaintiffs, who were police officers, had failed to establish a prima facie case by claiming only that they had been given directives with respect to their job functions, such as being told to wear a protective vest, or that they had been subjected to disciplinary charges which were heard and resolved under normal disciplinary procedures, because such actions were not “adverse” under the statute. *Id.*; see also *Borawski v. Henderson*, 265 F. Supp. 2d 475, 486-87 (D.N.J. 2003) (denying access to telephone to conduct union business was not retaliatory action because there was no impact on compensation, rank or terms and conditions of employment). However, when an employee is disciplined for conduct related to a protected class or protected conduct, such discipline may be considered actionable retaliation under CEPA. See *Rivera v. State Dep’t of Human Servs.*, No. A-0086-17T4, 2019 N.J. Super. Unpub. LEXIS 706, at \*36 (App. Div. Mar. 28, 2019). The Appellate Division in *Rivera v. State Dep’t of Human Servs.*, distinguished *Hancock* finding that the plaintiff in that case alleged that the absences for which he was disciplined resulted from a protected disability and that defendants terminated him in relation for his objections to discriminatory practices rather than providing a reasonable accommodation for his disability. The Appellate Division

found that such conduct may be actionable because it was directly caused by his disability and was exacerbated by defendants' discriminatory and retaliatory actions.

v. Geographical limits of CEPA

CEPA protection applies even when the unlawful activity occurs outside the state of New Jersey. In *Mehlman v. Mobil Oil Corp.*, plaintiff Mehlman worked for Mobil Oil Corporation from 1976 to 1989. 707 A.2d 1000, 153 N.J. 163 (1998). At the time of his termination, Mehlman was the manager of Mobil's Environmental Health and Science Laboratory. In September 1989, Mehlman traveled to Japan to represent Mobil at an environmental symposium. While addressing a group of managers at MSKK, Mobil's Japanese subsidiary, Mehlman learned that MSKK's gasoline contained benzene concentrations above five percent, which can be hazardous to human beings. Mehlman expressed his concern to Mobil officials. After this discovery and upon his return to the United States, Mehlman was informed by his supervisor that he was being placed on special assignment pending an investigation regarding potential conflicts of interest between Mehlman's job at Mobil and his activities on behalf of his wife's company. Mehlman was officially terminated on November 20, 1989. The New Jersey Supreme Court was asked to decide whether CEPA protects an employee from retaliatory action taken against him in New Jersey by a New Jersey employer based on his objection to a practice that was incompatible with public policy designed to protect the health and safety of citizens of another country. In reaching its decision that CEPA would protect the employee in this situation, the court held:

The specific applications of the CEPA cause of action continue to evolve but the core value that infuses CEPA is the legislative determination to protect from retaliatory discharge those employees who, "believing that the public interest overrides the interest of the organization [they] serve[ ], publicly 'blow[s] the whistle' [because] the organization is involved in corrupt, illegal, fraudulent or harmful activity." We look generally to the federal and state constitutions, statutes, administrative rules and decisions, judicial decisions, and professional codes of ethics to inform our determination whether specific corrupt, illegal, fraudulent or harmful activity violates a clear mandate of public policy, but those sources are not necessarily exclusive. A salutary limiting principle is that the offensive activity must pose a threat of public harm, not merely private harm or harm only to the aggrieved employee.

\* \* \*

The core value embodied in CEPA is that employees courageous enough to object to illegal, fraudulent or harmful activity by their employers in order to protect the public welfare deserve to be shielded from retaliation by their employers. We would not impute to the Legislature so parochial an objective as to protect New Jersey employees retaliated against for taking risks to protect only New Jersey citizens. In our view, the purposes of CEPA are no less served by recognizing a cause of action for a New Jersey employee whose employer retaliated against him or her for objecting to the violation of a clear mandate of public policy that threatened to harm citizens of other states or countries. Under CEPA, the wrongful conduct is the employer's retaliatory action, and we decline to

impose artificial geographical limits on the harm of illegality that the objecting employee sought to avoid.

*Mehlman*, 707 A.2d at 1012-13, 1016-17 (citations omitted).

vi. Preemption of CEPA Claims

CEPA claims are not preempted by the LMRA or the NLRA solely because the employer's alleged retaliation may constitute an unfair labor practice or implicate the employee's rights under a collective bargaining agreement. See *Puglia v. Elk Pipeline, Inc.*, 226 N.J. 258 (Aug. 16, 2016). In *Puglia*, unionized construction workers were terminated after complaining to their employer of wage underpayments pursuant to the New Jersey Prevailing Wage Law. The employees filed CEPA claims in state court. The employer moved to dismiss the claims as preempted by federal labor law because (1) they arguably stated a claim of retaliation for engaging in concerted activity under the NLRA and (2) they arguably stated a claim for violation of the employees' collective bargaining agreement under Section 301 of the LMRA. The New Jersey Supreme Court held that the employees' CEPA claims were not preempted by the NLRA because they did not require a finding as to whether the employees were engaged in concerted activity. Id. at 296. Absent such a finding, the CEPA claims did not sufficiently intrude on the jurisdiction of the NLRB. In addition, the CEPA claims were not preempted by the LMRA because they did not require a finding that the employer violated the CBA or ask the court to interpret the CBA. Id. at 285. The court found that the employee had not asserted a claim under the CBA, and the employer was not entitled to read such a claim into the employee's complaint in order to argue that the employee's CEPA claim was preempted. Id.

vii. Election of Remedies Under CEPA

An employee who desires to bring a CEPA claim must elect his or her remedy and waives other rights and remedies by asserting and maintaining a CEPA claim. Under CEPA, "the institution of an action in accordance with [CEPA] shall be deemed a waiver of the rights and remedies available under any other contract, collective bargaining agreement, State law, rule or regulation under the common law." N.J. Stat. § 34:19-8. Although the New Jersey Supreme Court has yet to establish when a CEPA claim is "instituted" – and thus when an employee must make this election – New Jersey state and federal courts have determined that the election must be made after discovery is complete. *Rivera v. State Dep't of Human Servs.*, No. A-008-17T4, 2019 N.J. Super. Unpub. LEXIS 706, at \*44 n. 7 (App. Div. Feb. 11, 2019); *Hrinuk v. Pub. Serv. Elec. & Gas Co.*, No 14-988, 2018 U.S. Dist. LEXIS 14544, at \*5 (N.J.D. Jan. 30, 2018).

viii. CEPA Claims and COVID-19

New Jersey employers have begun to face complaints about allegedly unsafe working conditions, safety measures and practices related to COVID-19, as well as requests for continued remote work. Some individuals who believe they have been retaliated against for making such complaints/requests have begun to file retaliation claims under CEPA. New Jersey has issued several Executive Orders specific to COVID-19 as well as legislation regarding public health and safety. The litigations have cited to the foregoing as the underlying policies or laws required for a CEPA claim. While this is a developing area, employers should be aware of the potential for whistleblower retaliation claims under CEPA filed by

employees who raise internal health or safety concerns and allege that as a result of raising such a concern, they suffered an adverse action.

### III. CONSTRUCTIVE DISCHARGE

A constructive discharge claim arises when an employee leaves the workplace because the “‘employer knowingly permit[s] conditions of discrimination in employment so intolerable that a reasonable person subject to them would resign.’” *Toto v. Princeton Tp.*, 962 A.2d 1150, 1156, 404 N.J. Super. 604-615 (App. Div. 2009) (citing *Shepherd v. Hunterdon Developmental Ctr.*, 803 A.2d 611, 627 (2002)). “The phrase ‘intolerable conditions’ conveys a sense of outrageous, coercive and unconscionable requirements.” *Jones v. Aluminum Shapes, Inc.*, 772 A.2d 34, 44, 339 N.J. Super. 412, 428 (App. Div. 2001).

Factors that New Jersey courts consider in performing this analysis are: the nature of the harassment; the closeness of the working relationship between the harasser and the victim; whether the employee fulfilled its obligation to do what is necessary and reasonable in order to remain employed; whether the employee used internal grievance procedures; and, the employer’s responsiveness to employee complaints. See *Shepherd*, 803 A.2d at 627.

A plaintiff asserting a cause of action for constructive discharge has a higher burden of proof than a plaintiff claiming to be the victim of hostile environment discrimination, as the constructive discharge plaintiff must show more than the “severe and pervasive” conduct necessary for a hostile work environment claim; he/she must establish the existence of “conduct so intolerable that a reasonable person would be forced to resign rather than continue to endure it.” See *Shepherd*, 803 A.2d at 628, (citation omitted). To establish a constructive discharge, there must be a “sense of outrageous, coercive, and unconscionable” conduct on the part of the employer. *Shepherd*, 803 A.2d at 628.

See also discussion below under Section IV.A.

### IV. WRITTEN AGREEMENTS

#### A. Standard “For Cause” Termination

An enforceable contract which provides for a set term of employment, termination provision and/or notice requirements would constitute an exception to at-will employment.

A perfect example of the enforceability of written employment contracts is *Kass v. Brown Boveri Corp.*, 488 A.2d 242, 199 N.J. Super. 42 (App. Div. 1985). Kass entered into a written employment contract with Brown Boveri Corp. pursuant to which Brown Boveri was to employ Kass as a manager of Control and Automation at the rate of \$40,000 per year plus bonuses. The contract was to run for two years, but either party had the right to terminate the contract without cause on 90 days written notice. Brown Boveri was allowed to terminate with cause with 30 days’ notice provided Kass was given written notice of any deficiencies and an opportunity to improve his performance. The parties also entered into a side agreement whereby Kass agreed not to exercise his managerial powers over a certain project until six months had passed. At the end of the six-month period Brown Boveri refused to allow Kass to exercise his managerial authority and, rather, attempted to relegate him to a lesser position. Kass eventually resigned

and sued, claiming that he had been constructively discharged in breach of his written employment contract. The court held that Kass's demotion was a breach of contract saying:

The facts presented lead us unequivocally to the conclusion that defendant Brown Boveri breached the employment contract. There is an emerging pattern of persuasive out-of-state case law supporting the proposition that Brown Boveri's attempt to reclassify plaintiff to a lesser job status constructively discharged him in violation of his employment contract.

\* \* \*

It would be unjust to permit Brown Boveri to discharge its liability for its clear breach of the employment contract by claiming that plaintiff voluntarily resigned. Plaintiff was improperly discharged from his position as manager in violation of the terms of the employment contract. His rights were fixed as of that time and there is no evidence that he intended to discharge his employer from liability for that breach. There is neither a written release of the employer's liability nor a demonstration that an accord and satisfaction was intended.

*Kass*, 488 A.2d at 245-47 (citations omitted).

B. Status of Arbitration Clauses

On March 18, 2019, New Jersey passed an amendment to the New Jersey Law Against Discrimination that bars employers from including in employment contracts any provision that prospectively waives an employee's substantive or procedural rights to assert a claim for discrimination, retaliation, or harassment. N.J. Stat. § 10:5-12.7. In addition, the law renders non-disclosure agreements relating to the details of such claims unenforceable, whether such NDA is included in an employment agreement or settlement agreement. *Id.* § 10:5-12.8. An employer that attempts to enforce such provisions in an employment contract or settlement agreement shall be liable for the employee's attorney's fees and costs. *Id.* § 10:5-12.9.

However, on March 25, 2021, a federal judge permanently enjoined enforcement of N.J. Stat. § 10:5-12.7 with respect to arbitration agreements, finding that the New Jersey law is preempted by the Federal Arbitration Act. See *N.J. Civil Justice Inst. v. Grewal*, 2021 U.S. Dist. LEXIS 57437 (D.N.J. Mar. 25, 2021).

New Jersey public policy favors arbitration. See *Martindale v. Sandvik, Inc.*, 800 A.2d 872, 173 N.J. 76 (2002). Arbitration clauses in employee manuals, employment contracts, and employment applications are valid, despite the fact that there may be inequality in bargaining power between employer and employee. *Id.* In order to be enforceable, however, employees must sign, or otherwise clearly and affirmatively indicate agreement to, the arbitration clause. See *Leodori v. Cigna Corp.*, 814 A.2d 1098, 1107, 175 N.J. 293, 306 (2003).

The scope of arbitration agreements is determined according to the precise language used in the agreements. See *Quigley v. KPMG Peat Marwick*, 749 A.2d 405, 416, 330 N.J. Super. 252, 271 (App. Div.

2000) (reversing the lower court's order of arbitration because the scope of the arbitration clauses did not include discrimination claims); see also *Lederman v. Prudential Life Ins. Co. of America*, 897 A. 2d 373, 385 N.J. Super. 324 (App. Div. 2006). Although the Federal Arbitration Act requires New Jersey courts to resolve statutory questions of arbitrability in favor of arbitration, see *Quigley*, 749 A.2d at 415, citing *Moses H. Cone Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983), the right to try statutory claims in court can only be waived in an arbitration clause if done so clearly, unambiguously, and explicitly. See *Martindale*, 800 A.2d at 882; see also *Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A.*, 773 A.2d 665, 168 N.J. 124 (2001) (holding that an employee did not waive his statutory remedies under the New Jersey Law Against Discrimination in favor of arbitration because the purported waiver was not "clearly and unmistakably established"). Accordingly, a waiver in which an employee relinquishes the right to sue and instead submits claims to arbitration must be prominent and in language that is both easy to read and could be understood by a person of average intelligence. See, e.g., *Grasser v. United Healthcare Corp.*, 778 A.2d 521, 528, 343 N.J. Super. 241, 252 (App. Div. 2001).

An arbitration agreement between an employer and its employee must expressly indicate that the employee has waived his or her right to a trial in court. *Milloul v. Knight Capital Group, Inc.*, No. A-1953-13T22015, 2015 N.J. Super. Unpub. LEXIS 2115 (App. Div. Sept. 1, 2015). The court adopted the holding of the New Jersey Supreme Court in *Atalese v. U.S. Legal Services Group, L.P.*, 99 A.3d 306, 219 N.J. 430 (2014), which, in the context of a Consumer Fraud Act claim, held that an arbitration provision had to clearly and unambiguously notify the consumer that he or she was waiving the right to seek relief in a court of law. See also *Anthony v. Eleison Pharmaceuticals LLC*, No. A-932-15T4, (App. Div. July 18, 2016).

In September 2020, in *Flanzman v. Jenny Craig, Inc.*, 244 N.J. 119 (2020), a unanimous New Jersey Supreme Court reversed the Appellate Division's decision which had voided an arbitration agreement which did not contemplate or provide any guidance on the forum the parties intended to use to arbitrate claims that were covered by the provisions of the agreement. The New Jersey Supreme Court held that an arbitration agreement may bind the parties even if the agreement does not designate a specific arbitrator, organization or process. The Supreme Court cited to the policies favoring the enforceability of arbitration agreements. If there is no such designation, the default rules of the Federal Arbitration Act and the New Jersey Arbitration Act will apply to fill any gaps in the agreement.

A waiver of rights provision need not refer to statutes specifically by name, but it must "at least provide that an employee agrees to arbitrate all statutory claims arising out of the employment relationship or its termination." *Garfinkel* 773 A.2d at 672. See also *Noren v. Heartland Payment Sys.*, 154 A.3d 178, 448 N.J. Super. 486 (App. Div. Feb. 6, 2017), recons. denied, 2017 N.J. Super. LEXIS 31 (App. Div. March 8, 2017)(arbitration provision held to be unenforceable as to CEPA claim where the arbitration agreement made no reference to statutory claims and did not define the scope of covered claims as including all claims relating to plaintiff's employment).

An arbitration clause within an employment contract will not be presumed to survive the expiration of the contract unless the contract is renewed or contains specific language that the arbitration clause will survive the contract's expiration. *O'Keefe v. Edmund Optics, Inc.*, No. L3339-18, 2018 N.J. Super. Unpub. LEXIS 2517, at \*7-\*9 (Ch. Div. Nov. 15, 2018) (arbitration agreement in expired employment contract was unenforceable, although the employee continued to work beyond the term of the agreement).

An employee's agreement to arbitrate within an employee handbook that contained a disclaimer against any assumption that the handbook was contractual in nature did not support the employer's motion to compel arbitration. *Morgan v. Raymours Furniture Co., Inc.*, 443 N.J. Super. 338, 128 A.3d 1127 (App. Div. 2016), cert. denied, 225 N.J. 220, 137 A.3d 533 (2016), cert. denied, *Raymours Furniture Co. v. Morgan*, 137 S. Ct. 204, 196 L. Ed. 2d 132 (2016). The court held that the employer could not equitably have it both ways and that the presence of the employer's disclaimer precluded a determination that the employee had contracted away his right to sue.

### C. Electronic Signature Acknowledgments

In February 2017, the Third Circuit upheld non-compete agreements electronically entered into by two former ADP employees and affirmed a partial preliminary injunction order barring the employees from soliciting ADP customers for one year. Notably, the decision rejected the former employees' challenge to ADP's electronic signature system. *ADP, LLC v. Lynch*, 2-16 Civ. 1053 and 2-16 Civ. 01111, 2017 U.S. App. LEXIS 2159 (3<sup>rd</sup> Cir. February 7, 2017). While employed at ADP, the two employees accepted incentive stock awards that were offered to select employees based on performance. In order to accept the awards, the employees accessed the ADP webpage, confirmed via click-through screens that they had read all of the documents (including a non-compete agreement), and clicked that they "accept grant." Although the employees challenged the validity of the agreements on the basis that the click-through screens only stated that they "read" the documents and not that they "agreed", "accepted" or "acknowledged" the documents, the court held that the non-compete agreements were a condition of accepting the stock award which was plainly set forth in the documents, and that the employees therefore agreed to the non-compete agreement.

In August 2020, in *Skuse v. Pfizer, Inc.*, 244 N.J. 30 (2020), the New Jersey Supreme Court enforced an arbitration agreement which the employee had simply "acknowledged" by clicking on a link. In reaching this holding, the New Jersey Supreme Court reversed the Appellate Division, which had held that the company was unable to show an "explicit and unmistakable voluntary" agreement by the employee to submit to binding arbitration. Though noting that the company could have better labeled its communication explaining the arbitration agreement, the Supreme Court held it was still enforceable because the agreement clearly explained what rights the employee was waiving by agreeing to arbitrate.

### D. Damages

#### 1. Punitive Damages for Breach of Contract

Tort damages, including punitive damages, are rarely available for breach of contract. *Noye v. Hoffmann-LaRoche, Inc.*, 570 A.2d 12, 238 N.J. Super 430 (App. Div. 1990). In extreme and egregious circumstances, however, a successful plaintiff may be entitled to recover punitive damages based on an employer's breach of an employment contract.

In one case, for example, plaintiff Sandler, a distributor and dealer of Lawn-A-Mat Chemical & Equipment Corp. sued Lawn-A-Mat for breach of contract based on their distributorship agreement and the rights and obligations of the parties pursuant to the agreement. *Sandler v. Lawn-A-Mat Chem. & Equip. Co.*, 358 A.2d 805, 141 N.J. Super. 437 (App. Div. 1976). The trial court awarded punitive damages based on the franchiser's breach of contract. The Appellate Division reversed, holding that punitive



damages were improper under the circumstances of the particular case. The court indicated, however, that punitive damages are not necessarily limited to tort actions and could conceivably be awarded in a breach of contract action if the case involved “such an aggravated set of facts that punitive damages might be appropriate regardless of the contract form of the cause of action and even though it may be beyond the scope of the recognized exceptions in the adjudicated cases.” *Id.* at 813. Presumably this analysis would apply to contract actions alleging a breach of an employment agreement. Thus, punitive damages may be available to a successful plaintiff in a breach of employment contract action if the employer’s actions are extreme and egregious. *Id.* at 808-13.

## 2. Emotional Damages Resulting from Breach of Contract

Emotional distress damages are rarely an available remedy in a breach of contract action. *Coyle v. Englander’s*, 488 A.2d 1083, 1086, 199 N.J. Super. 212, 218 (App. Div. 1985). To recover for emotional distress damages in the breach of contract setting, the plaintiff must demonstrate that the harm was foreseeable at the time that the contract was made and that the defendant’s breach was willful and wanton. *Buckley v. Trenton Sav. Fund Soc’y*, 544 A.2d 857, 863, 111 N.J. 355, 365 (1988); see also *Menorah Chapels v. Needle*, 899 A.2d 316, 324-27, 386 N.J. Super. 100, 114-18 (App. Div. 2006). Arguably, emotional distress damages would be available to an employee in an action for breach of an employment contract. One New Jersey court, however, refused to award damages for emotional distress based on an employer’s breach of the implied covenant of good faith and fair dealing in an employment contract.

In *Noye v. Hoffmann-LaRoche, Inc.*, 570 A.2d 12, 238 N.J. Super 430 (App. Div. 1990), Hoffmann-LaRoche terminated Noye after one of Noye’s subordinates alleged that he had sexually harassed her. Noye did not have a written employment agreement; rather, he claimed he had an implied contract, based on the company’s employment manual. The employment manual required the company to give an employee the opportunity to meet any charges prior to termination. Noye was not given this opportunity. Noye filed suit for breach of contract alleging that he was terminated without good cause and that the company failed to follow its own termination procedures. The trial court found for Noye, but it did not award tort damages, including damages for emotional distress. The Appellate Division affirmed, holding that tort damages are not an appropriate remedy for a breach of the implied covenant of good faith and fair dealing inherent in employment contracts. *Id.* at 15-16.

### E. LAD Statute of Limitations Cannot Be Shortened by Contract

In *Rodriguez v. Raymours Furniture Co., Inc.*, 138 A.3d 528, 225 N.J. 343 (2016), the New Jersey Supreme Court held that a private agreement that frustrated the public purpose of the New Jersey Law Against Discrimination (NJLAD) by shortening the two-year statute of limitations period for private NJLAD claims could not be enforced.

The employment application contained a provision requiring the applicant, if hired, to agree to bring any employment-related cause of action against the employer within six (6) months of the challenged employment action and waive any longer statute of limitations permitted by statute or the courts. After being hired and employed for a period of time, the plaintiff filed a complaint in Superior Court against his former employer, claiming, among other things, a NJLAD violation for disability discrimination. The trial

court dismissed the action, enforcing the six (6) month limitations period set forth in the application, and the Appellate Division affirmed.

The New Jersey Supreme Court reversed, holding that the challenged private contractual agreement, which shortened the generally applicable statute of limitations, could not be enforced. The court held that a shortened time frame for instituting legal action or losing that ability hampers enforcement of the public interest of eradicating discrimination.

## V. ORAL AGREEMENTS

### A. Promissory Estoppel

In an oral contract dispute, Shebar was hired by defendant Sanyo Business Systems Corp. as National Sales Manager for its Computer Division in 1981. *Shebar v. Sanyo Bus. Sys. Corp.*, 544 A.2d 377, 111 N.J. 276 (1988). The parties did not execute an employment contract. Shebar continued to work for Sanyo for several years. In 1984, believing his future with Sanyo was questionable, Sheba accepted a position with Sony Corporation. When Shebar notified Sanyo's president, Yamazaki, that he was resigning from his position at Sanyo to work for Sony, plaintiff maintained that Yamazaki stated, "I will not accept your resignation. We will solve your problems." Thereupon, Shebar claimed that Yamazaki told him that he had a job with Sanyo for the rest of his life, and that Sanyo had never fired a corporate employee whose rank was manager or above. Shebar maintained that he was assured that he would receive a substantial raise in March 1985. As a result of this meeting, and in reliance on the assurances made to him by Yamazaki, plaintiff revoked his acceptance of Sony's offer. Four months later, Shebar was called into the office of Sanyo's new president and fired. Plaintiff subsequently commenced a lawsuit against Sanyo for breach of oral contract of employment. Specifically, Shebar maintained that Sanyo's oral promises to him, on which he relied, contractually allowed Sanyo to terminate Shebar's employment only for cause. He alleged breach of contract, fraud, tortious interference, outrage and defamation. The trial court granted summary judgment for Sanyo on all five counts. The Appellate Division affirmed the dismissal of the defamation and outrage counts, but reversed the dismissal of the breach of contract, fraud and tortious interference counts. The New Jersey Supreme Court affirmed, stating:

In considering plaintiff's breach of contract claim, it is important that we understand the nature of his claim. Prior to October 1984, plaintiff had been employed by defendant for approximately three years. Plaintiff essentially acknowledges that during those years he was an at-will employee whose employment could be terminated without cause. Furthermore, plaintiff does not assert that Sanyo communicated a company-wide termination policy at any time during the years preceding his termination. Finally, the record does not reveal that defendant had established and disseminated a definitive company-wide termination policy, or that plaintiff or any other employee had ever relied on such a policy.

\* \* \*

Plaintiff's claim instead turns on the unique, oral promise defendant made specifically to him, in a private conference on October 1, 1984 and his reliance thereon. The alleged promise was that if plaintiff revoked his acceptance of the Sony job offer and stayed with

Sanyo, he would have a job for life or at least he could not be fired without cause. It is this individualized contract that plaintiff claims constitutes an enforceable obligation on the part of defendant to terminate plaintiff's employment only for reasonable cause.

\* \* \*

To determine the type of contract the parties intended, a court must closely examine the terms of the contract and the surrounding circumstances. In *Shiddell v. Electro Rust-Proofing Corp.*, 112 A.2d 290 (N.J. Super. Ct. App. Div. 1954), the court recognized the enforceability of an oral contract of employment. There, the plaintiff alleged that when he was given a franchise from defendant in 1939, defendant did not have sufficient funds to pay him a salary or to finance the promotion of the product. Plaintiff alleges that in return for his forgoing a salary and for financing the promotional expenses, defendant told him he would have the franchise for life. He operated the franchise from 1939 to 1954 when defendant attempted to revoke his franchise. The court held that plaintiff had raised sufficient facts regarding the existence of an oral agreement that granted plaintiff the franchise for life so as to defeat defendant's motion for summary judgment.

\* \* \*

To the extent that plaintiff alleges a promise of discharge for cause only, plaintiff's breach of contract claim should be analyzed by those contractual principles that apply when the claim is one that an oral employment contract exists . . . We find that plaintiff has presented a material issue of fact concerning whether his employer orally promised to discharge him only for cause. Plaintiff's superiors specifically represented to him that he would have continued employment at the company. Those representations were obviously intended to induce plaintiff to remain with Sanyo as Sanyo's computer sales manager and revoke his acceptance of Sony's employment offer. Plaintiff acted in reliance on the alleged promise by forgoing the job opportunity he had secured at Sony. Having made such representations, on which plaintiff relied, Sanyo may not escape the possibility that its representations transformed plaintiff's at-will employment into employment with termination for cause only.

\* \* \*

Furthermore, we hold that a fact finder could conclude that plaintiff gave valuable consideration for Sanyo's promise of continued employment with termination only for cause . . . Taking plaintiff's allegations as true, he agreed to relinquish his new position at Sony in exchange for job security at Sanyo. Sanyo, in turn, agreed to relinquish its right to terminate plaintiff's employment at-will in exchange for the retention of a valued employee. Such bargained-for and exchanged promises furnish ample consideration for an enforceable contract.

*Shebar*, 544 A.2d at 381, 382-83 (citations omitted).

In *Smith v. Squibb Corp.*, 603 A.2d 75, 254 N.J. Super. 69 (App. Div. 1992), Smith brought a cause of action against Squibb Corporation alleging wrongful termination of an oral employment contract supported by an act of forbearance. In deciding whether a cause of action under *Shebar* should be applied retroactively, the court held:

Shebar instructs that an alleged breach of an oral contract of employment made to an individual, rather than through a manual or company policies, “should be analyzed by those contractual principles that apply when a claim is that an oral employment contract exists. Under general contract law, New Jersey has acknowledged for over three-quarters of a century that an act or promise of forbearance may be sufficient consideration to support an alleged oral contract of employment . . . . We conclude that an oral contract of employment supported by additional consideration such as an act or promise of forbearance, if not recognized in this State as valid [since *Bird v. J.L. Prescott Co.*, 99 A. 380 (N.J. 1916)] no matter how difficult to prove, ‘had been foreshadowed, at least in part, for years’” before Shebar was decided . . . . For that reason alone, *Shebar* should be applied retroactively.

*Smith*, 603 A.2d at 77 (citations omitted).

In a similar case, plaintiff Rogozinski was an employee of the manufacturer of Airstream Trailer Associated Companies. *Rogozinski v. Airstream By Angell*, 377 A.2d 807, 152 N.J. Super. 133 (App. Div. 1977), modified, 397 A.2d 334, 164 N.J. Super. 465 (App. Div. 1979). He originally worked for May Trailer Sales, but then went to work for Angell when Angell bought the franchise. The original employment contract was for \$2,000 a month for Rogozinski and his wife. In May or June 1975, Angell’s brother, John, came into Airstream by Angell, Inc. as a service manager. On July 28, a written agreement was produced whereby Rogozinski would work in the body shop only. On September 2, 1975, Rogozinski and his wife were terminated. He claimed that his July 28 contract provided for employment “in perpetuity” and, therefore, sought damages for breach of this “perpetual” contract. The Superior Court of New Jersey held that the parties intended to enter into a contract for permanent employment and that Angell breached the contract by discharging Rogozinski without cause. In finding that the employment contract was enforceable, the court stated:

In the instant case the contract, by its terms, indicates that the clearly expressed intention of the parties contemplated permanent employment. More importantly, the surrounding circumstances indicate that, at least as to the second contract, there was an equality of bargaining power and a considerable sacrifice of important economic advantage in the substitution of body shop duties for those of the service manager . . . . The sacrifices and risks entailed and the equality of bargaining power which accompanied the contract and perpetuity were within the contemplation of the parties and fully enforceable.

Id. at 812.

**B. Fraud**

There are no published New Jersey opinions addressing the issue of fraud in oral employment contracts.

C. Statute of Frauds

The New Jersey Statute of Frauds, N.J. Stat. Ann. § 25:1-5, was amended, effective January 5, 1996 (see P.L. 1995, c.320, § 8), to allow oral employment contracts for fixed-terms greater than one year to be enforceable, as long as the alleged breach occurred after the date of the amendment. Prior to the amendment, oral employment contracts that were incapable of performance within one year were barred by the Statute of Frauds. See *Kreuzburg v. Computer Servs. Corp.*, 661 F. Supp. 877, 879 (D.N.J. 1987).

VI. DEFAMATION

A. General Rule

Defamatory statements are those statements that are false and injurious to reputation. To support a cause of action for defamation, a plaintiff must show that the defendant made a defamatory remark, the remark was heard by at least one other person, the defendant acted with fault at least equal to negligence, and the plaintiff suffered damages as a result. See *DeAngelis v. Hill*, 847 A.2d 1261, 1267-68, 180 N.J. 1, 12-13 (2004). The third person must also understand that the communication relates to the plaintiff. *Allia v. Target Corp.*, 2008 U.S. Dist. LEXIS 29591 \*16 (D.N.J. Apr. 10, 2008).

A statement can be considered “reasonably susceptible of a defamatory meaning” if reasonable persons of ordinary intelligence would find it defamatory when giving the words their ordinary meaning. See *Singer v. Beach Trading Co.*, 876 A.2d 885, 895, 379 N.J. Super. 63, 80 (App. Div. 2005) (finding that an employer’s incorrect response to a question regarding plaintiff’s work title did not meet this threshold because there was no evidence that employer’s response was intended to cast plaintiff as a liar or as one who would falsify information on her resume).

B. Libel

Oral or written statements by an employer to other persons within the company or outside of the company are protected by qualified privilege if the other party has an interest in the employee’s performance and conduct. *Murphy v. Johns-Manville Prod. Corp.*, 133 A.2d 34, 45 N.J. Super. 478 (App. Div. 1957). Thus, supervisors can discuss an employee or evaluate his performance without defaming that employee. In *Murphy*, the plaintiff-employee, was accused of taking company property without permission and was terminated. Prior to the termination, a hearing was held with five management and three union representatives. The notes from the hearing were transcribed into a report which was distributed to the president of the company and other management personnel. The report stated that Murphy committed larceny. The company also sent a letter to the union advising it that it was terminating Murphy because he had committed larceny. Murphy denied this allegation and sued for libel. The court held that the communications were privileged insofar as all 18 people who received a copy of the report “[h]ad a sufficient interest in the matter . . . as to make the communication not only qualifiedly privileged, but its distribution well within reason, as a matter of law.” *Id.* at 41.

C. Slander

There are two types of slander recognized under New Jersey law - slander and slander “per se.” A plaintiff claiming slander per se need not offer proof of special damages. Slander per se is defined in New

Jersey as false statements that (1) charge the commission of a crime; (2) impute certain loathsome diseases; (3) affect a person in his business, trade, profession or office; or (4) impute unchastity to a woman. *Arturi v. Tiebie*, 179 A.2d 539, 541, 73 N.J. Super. 217, 222 (App. Div. 1962) (citing *Gnapinsky v. Goldyn*, 128 A.2d 697, 701, 23 N.J. 243, 250 (1957)). If the slander is not per se, a plaintiff must allege that the utterance thereof caused special damages, i.e. material or pecuniary harm due to the conduct of one other than the defamer. *Arturi*, 179 A.2d at 541-42. Evidence of mental suffering or physical illness alone is insufficient to prove special damages. *Id.* at 542.

In a case where a company is being sued for the slanderous statements of an agent, the company may be held liable if the agent was “acting in the scope of his employment and in the actual performance of the duties thereof touching the matter in question though the corporation had no knowledge and did not ratify the act of the agent.” *Davis v. Trust Co. of N.J.*, 57 A.2d 380, 26 N.J. Misc. 111 (1948). Additionally, if the employer did ratify the slander, it is well settled that the employer may be held liable for the slander spoken by its agent. *Id.* 57 A.2d at 382.

#### D. References

Employers in New Jersey may be held liable for the tort of negligent misrepresentation in providing employment references. See *Singer v. Beach Trading Co., Inc.*, 876 A.2d 885, 379 N.J. Super. 63 (App. Div. 2005). The Singer court explained that an employer who provides an employment reference for a former employee can be liable for negligently misrepresenting his/her work history if: (1) the party making the inquiry clearly identifies the nature of the inquiry; (2) the employer voluntarily responds to the inquiry and provides unreasonably inaccurate or false information; (3) the person providing the false information is acting within the scope of his/her employment; (4) the party receiving the information relies upon its accuracy in taking an adverse employment action against the plaintiff; and, (5) the plaintiff suffers quantifiable harm. *Id.* at 888.

Employers may also be liable for negligent misrepresentation if they have an affirmative duty to disclose certain information and fail to do so. For example, in *Berry v. Playboy Enterprises, Inc.*, the plaintiff claimed that her employer failed to provide her with a proper summary of her health benefits plan, which resulted in the lapse of her health coverage. *Berry v. Playboy Enterprises, Inc.*, 480 A.2d 491, 195 N.J. Super. 520 (App. Div. 1984), cert. denied 491 A.2d 720, 99 N.J. 231 (1985). The Berry court held that if an employer chooses to explain its benefit plan to its employees, the employer assumes a duty to provide such an explanation with reasonable care. *Id.* at 947. Thus, when an employer negligently explains those benefits to an employee and the employee is harmed as a proximate result of such negligence, the employee may recover damages. *Id.*

#### E. Privileges

There are special defenses - qualified privileges - that may apply to employers who are charged with defamation. See *Erickson v. Marsh & McLennan Co., Inc.*, 569 A.2d 793, 117 N.J. 539 (1990). A qualified privilege extends to an employer who responds in good faith to the specific inquiries of a third party regarding the qualifications of an employee. Although defamatory, a statement will not be actionable if it is subject to a qualified privilege. Chief Justice Weintraub addressed the nature and scope of that privilege:

A communication made bona fide upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty, although it contains criminy matter which, without this privilege, would be slanderous and actionable . . . .

Id. at 805 (citation omitted).

The privilege of an employer to respond to an inquiry about an employee’s qualifications is limited. A publisher abuses the privilege “if (1) the publisher knows the statement is false or the publisher acts in reckless disregard of its truth or falsity; (2) the publication serves a purpose contrary to the interests of the qualified privilege; or (3) the statement is excessively published.” *Williams v. Bell Tel. Lab. Inc.*, 623 A.2d 234, 240, 132 N.J. 109, 121 (1993). As articulated in *Erickson v. Marsh & McLennan Co., Inc.*, 569 A.2d 793, 806, 117 N.J. 539, 565 (1990), an abuse of a qualified privilege must be proven by clear and convincing evidence. See also *Kass v. Great Coastal Express*, 704 A.2d 1293, 1294, 152 N.J. 353, 355 (1998).

The determination of whether a defamatory statement is privileged is a threshold decision for the court, not the jury. See *Govito v. W. Jersey Health Sys.*, 753 A.2d 716, 724, 332 N.J. Super. 293, 310 (App. Div. 2000), citing *Lawrence v. Bauer Publ’g & Printing Ltd.*, 446 A.2d 469, 89 N.J. 451 (1982).

#### F. Other Defenses

##### 1. Truth

Truth, under the common law and as applied by New Jersey courts, is a defense to defamation. *Lawrence v. Bauer Publ’g & Printing Ltd.*, 446 A.2d 469, 473, 89 N.J. 451, 460 (1982). However, in order to exonerate the publisher of liability, the truth must be “as broad as the defamatory imputation or ‘sting’ of the statement.” See *Rogozinski v. Airstream by Angell, Inc.*, 377 A.2d 807, 814, 152 N.J. Super. 133, 146 (App. Div. 1977), modified, 397 A.2d 334, 164 N.J. Super. 465 (App. Div. 1979) (modifying the computation of damages); W. Prosser, *Law of Torts* § 116 (4th ed. 1971); see also *Medico v. Time, Inc.*, 643 F.2d 134, 137 (3d Cir. 1981); *Rogers v. Courier Post Co.*, 66 A.2d 869, 2 N.J. 393 (1949).

##### 2. No Publication

The plaintiff must establish publication of the defamatory statement to one other than himself. “Without this essential element, neither libel nor slander is shown.” In New Jersey, “publication” is a “word of art and refers to the distribution of written material or the transmittal of the spoken word to a third person.” *Lawrence v. Bauer Publishing and Printing Ltd.*, 154 N.J. Super. 271, 277 (App. Div. 1977), *aff’d*, 78 N.J. 371 (1979). The third person to whom the defamatory comment was communicated must have understood the statement to relate to the plaintiff. *Gnapnisky*, *supra*, 23 N.J. at 252-53.

##### 3. Self-Publication

Whether self-publication satisfies the publication element has not been resolved in New Jersey. Self-publication refers to a predicament a defamatorily discharged employee faces in his job search: an honest report by the employee of the employer’s defamatory grounds for discharge “re-publishes” that defamatory statement.

#### 4. Invited Libel

New Jersey courts recognize the theory of invited libel. A plaintiff cannot complain about an injury suffered from the publication of a defamatory statement where that publication was invited by, instigated by, or procured by the defamed or an agent of the defamed. See *Mick v. Am. Dental Ass'n*, 139 A.2d 570, 577, 49 N.J. Super. 262, 275-76 (N.J. Super. Ct. 1958); accord *Beck v. Tribert*, 711 A.2d 951, 312 N.J. Super. 335 (App. Div.), certif. denied, 719 A.2d 1022, 156 N.J. 424 (1998).

#### 5. Opinion

Opinion is a complete defense to libel if the statement is “pure” opinion, but if it is a statement of undisclosed defamatory facts cloaked in the form of an opinion, it is actionable. See *Kotlikoff v. Cmty. News*, 444 A.2d 1086, 1089, 89 N.J. 62, 68 (1982) (holding that a ‘letter to the editor’ was a protected statement of opinion because the language was hyperbolic and the facts upon which the statements were based were fully disclosed). Determining whether a publication is a statement of fact or an opinion is a question of law. Id. The more a statement is based upon fact, the more likely it will be actionable. See *DeAngelis v. Hill*, 847 A.2d 1261,1269, 180 N.J. 1, 14-15 (2004).

If a statement is considered to be an opinion, it is constitutionally protected “no matter how extreme, vituperous [sic], or vigorously expressed [it] may be.” *Kotlikoff v. Cmty. News*, 444 A.2d 1086, 1091, 89 N.J. 62, 71 (1982). In cases involving statements of opinion, a reader or listener can decide for him/herself whether an opinion that discloses the facts upon which it is based is justified. Id. at 1091.

#### G. Blacklisting Statutes

There are no blacklisting statutes in New Jersey.

#### H. Non-Disparagement Clauses

There are no New Jersey published opinions specifically addressing non-disparagement clauses.

## VII. EMOTIONAL DISTRESS CLAIMS

### A. Intentional Infliction of Emotional Distress

Employees can recover for intentional infliction of emotional distress in the workplace based on the conduct of supervisors and co-employees. However, the plaintiff’s prima facie showing is substantial. See *Wigginton v. Servidio*, 734 A.2d 798, 324 N.J. Super. 114 (App. Div. 1999). To recover for intentional infliction of emotional distress, plaintiff must demonstrate: (1) that the defendant acted intentionally or recklessly, both in doing the act and in producing emotional distress; (2) that the defendant’s conduct was so outrageous in character and extreme in degree as to go beyond all bounds of decency; (3) that the defendant’s actions were the proximate cause of the emotional distress; and (4) that the emotional distress suffered was so severe that no reasonable person could be expected to endure it. Id. at 806.



With respect to the requirement that the employee demonstrate extreme and outrageous conduct, the Wiggenton court recognized that an employer's position of authority and power over the plaintiff and the abuse of the employer-employee relationship can both contribute to a finding of extreme and outrageous conduct. 734 A.2d at 807. The court further instructed that standards of decency and civility are different in the workplace where employers, supervisors, or mere co-employees are not strangers to one another. "A comment that might otherwise be regarded as a part of everyday living, no matter how vulgar or rude, can take on entirely different connotations when uttered by a supervisor or co-employee in the workplace." *Id.*

Courts in this State have held that "it is extremely rare to find conduct in the employment context which will rise to the level of outrageousness necessary to provide a basis for recovery." *Ferraro v. Bell Atl. Co., Inc.*, 2 F. Supp. 2d 577, 588 (D.N.J. 1998); accord *Griffin v. Tops Appliance City, Inc.*, 766 A.2d 292, 337 N.J. Super. 15, 23-24 (App. Div. 2001); see *Acevedo v. Monsignor Donovan High School*, 420 F. Supp. 2d 337, 348 (D.N.J. 2006) (stating that "allegations of sexual harassment, discrimination, or improperly motivated discharge, cannot alone provide the basis for an intentional infliction of emotional distress claim.") (citations omitted). For instance, in *Harris v. Middlesex County College*, 801 A.2d 397, 353 N.J. Super. 31 (App. Div. 2002), the court found that a plaintiff had failed to establish that she suffered severe emotional distress where she claimed only that she was "emotionally devastated" and had suffered a loss of self-esteem, but had not shown that her day-to-day activities had been interfered with, had not sought counseling, and did not proffer an expert opinion.

#### B. Negligent Infliction of Emotional Distress

A plaintiff claiming negligent infliction of emotional distress must show that the defendant owed plaintiff a legal duty of care, that the duty was breached, that the plaintiff suffered genuine and substantial emotional distress, and that defendant's acts proximately caused that distress. See *Decker v. The Princeton Packet*, 561 A.2d 1122, 1128, 116 N.J. 418, 427 (1989). See also *Young v. Hobart West Group*, 897 A.2d 1063, 1074-75, 385 N.J. Super. 448, 468-69 (App. Div. 2005). The injury must also be foreseeable. *Byrd v. Fed. Express Corp.*, No. 05-2648, 2008 U.S. Dist. LEXIS 16891 \*22 (D.N.J. Mar. 4, 2008). This requirement ensures "that the tortious conduct will cause genuine and substantial emotional distress or mental harm to average persons." *Decker*, 561 A.2d at 1128. Under New Jersey law, a negligence claim against an employer, such as a claim of negligent infliction of emotional distress, is barred by the exclusivity provisions of the New Jersey Workers Compensation Act, N.J.S.A. § 34:15-8.5. See *Gaines v. United Parcel Service, Inc.*, No. 2:13-3709 (KM)(MCA) (D.N.J. April 14, 2014), citing *Silvestre v. Bell Atl. Corp.*, 973 F. Supp. 475, 486 (D.N.J. 1997).

If the claim is based upon a claim of false publication, plaintiff must also prove defamation. See *Salek v. Passaic Collegiate Sch.*, 605 A.2d 276, 279, 255 N.J. Super. 355, 360 (App. Div. 1992); see also *Dello Russo v. Nagel*, 817 A.2d 426, 435, 358 N.J. Super. 254, 270 (App. Div. 2003) (holding that in order to state a claim for negligent infliction of emotional distress based on allegedly defamatory statements in a newspaper advertisement a plaintiff of emotional difference must prove physical injury or sickness resulting from "fright or apprehension of danger" therefrom).

### VIII. PRIVACY RIGHTS

A. **Generally**

In determining whether an employee has a right to privacy in the workplace, New Jersey courts balance the employee's legitimate expectation of privacy against the interests of the private employer. See Vargo v. Nat'l Exch. Carriers Ass'n, 870 A.2d 679, 687, 376 N.J. Super. 364, 377 (App. Div. 2005).

B. **New Hiring Processing**

1. References and Reference Checks

Employers should refrain from contacting references other than those identified and consented to by the applicant to avoid claims of invasion of privacy due to a lack of notice or consent. See Hennessy v. Coastal Eagle Point Oil Co., 129 N.J. 81 (1992).

2. Background Checks

The New Jersey Opportunity to Compete Act (OTCA), N.J. Stat. § 34:6B-11, et. seq., also known as New Jersey's "Ban the Box" law, limits an employer's ability to inquire into a job applicant's criminal history. The law prohibits employers from requiring job applicants to complete a job application that makes any inquiries about an applicant's criminal record during the initial employment application process. N.J. Stat. § 34:6B-14(a)(1). A "criminal record" is defined as information collected about an individual's arrests, detentions, indictments, or other formal criminal charges and any disposition arising from those charges. N.J.A.C. § 12:68-1.2. A DWI, DUI, or any other motor vehicle violation constitutes a criminal record, and therefore such a violation is shielded from inquiry during the initial employment application process. 47 N.J.R. § 3034(a).

In addition, the law prohibits an employer from making any oral or written inquiries regarding an applicant's criminal record during the initial employment application process. N.J. Stat. § 34:6B-14(a)(2). The NJDOL has interpreted "oral or written inquiries" to include Internet or other public record searches, but has declined to establish a rule on the subject. 47 N.J.R. § 3034(a). However, an employer may make inquiries regarding the applicant's criminal record during the initial application process if an applicant *voluntarily* discloses any information relating to his or her criminal record during that time. N.J. Stat. § 34:6B-14(b). After such a voluntary disclosure by the applicant, an employer can make inquiries to anyone, not just to the applicant. N.J.A.C. § 12:68-1.3(e).

Notably, employers operating in multiple states may use the same employment application in all states, so long as the application contains instructions for New Jersey applicants not to answer certain questions that the OTCA prohibits. N.J.A.C. § 12:68-1.3(h). Employers also may include a disclaimer in the employment application that informs applicants that they may be subject to a criminal background check as a condition of their employment. Id.

The law also prohibits employers from posting job advertisements stating that they will not consider anyone who has been arrested or convicted of a crime. N.J. Stat. § 34:6B-15.

Under the law, an employer can require an applicant to complete an application that makes inquiries regarding an applicant's criminal record during the initial application process or make oral or written inquiries regarding an applicant's criminal record during the initial application process if

- the applicant seeks a position in law enforcement, corrections, the judiciary, homeland security, or emergency management;
- the applicant seeks a position where a criminal history record background check is required by law, rule or regulation, or where an arrest or conviction by the person for one or more crimes or offenses would or may preclude that person from holding such employment as required by any law, rule or regulation, or where any law, rule, or regulation restricts an employer's ability to engage in specified business activities based on the criminal records of its employees; or
- the applicant seeks a position designated by the employer to be part of a program or systematic effort designed predominantly or exclusively to encourage the employment of persons who have been arrested or convicted of one or more crimes or offenses.

N.J. Stat. § 34:6B-16.

Employers that violate the law may incur a penalty of \$1,000.00 for the first violation, \$5,000.00 for the second violation, and \$10,000.00 for subsequent violations, to be collected by the Commissioner of Labor and Workforce Development. There is no private right of action for aggrieved applicants. N.J. Stat. § 34:6B-19.

### C. Other Privacy Issues

#### 1. Workplace Searches

Public employers are constrained in the performance of workplace searches by the Fourth Amendment. See, e.g., State v. Ferrari, 344 A.2d 332, 136 N.J. Super. 61 (Law Div. 1975). While the New Jersey Supreme Court has not directly considered a private employer's right to search the offices and belongings of employees, lower courts have indicated that private employers are not constrained by constitutional search and seizure requirements. See State v. Pohle, 400 A.2d 109, 166 N.J. Super. 504 (App. Div. 1979) (search of air freight by airline employee was not state action and thus not covered by the Fourth Amendment); State v. Robinson, 206 A.2d 779, 86 N.J. Super. 308 (Law Div. 1965) (finding that a search of an employee's locker by a private employer did not implicate the Fourth Amendment).

Public policy considerations may, however, constrain private employers' ability to search employees and employee belongings. See Hennessey v. Coastal Eagle Point Oil Co., 609 A.2d 11, 12, 129 N.J. 81, 84 (1992) (stating that a search by a private actor could be found unlawful if it violates a "clear mandate of public policy"); see also Pierce v. Ortho Pharm. Corp., 417 A.2d 505, 84 N.J. 58 (1980).

### D. Drug Testing Laws

#### 1. Public Employers

A public employee in a safety-sensitive position may be tested for illegal drug use, either randomly or with probable cause, if the government's interest in safety outweighs the employee's right to privacy. See *Rawlings v. Police Dep't of Jersey City*, 627 A.2d 602, 133 N.J. 182 (1993); see also *N.J. Transit PBA 304 v. N.J. Transit Corp.*, 701 A.2d 1243, 151 N.J. 531 (1997) (upholding the random drug testing of transit police officers because the officers had a diminished expectation of privacy and the state had a compelling interest in public safety).

## 2. Private Employers

New Jersey law permits private employers to perform random drug testing on employees in safety-sensitive positions. See *Hennessey v. Coastal Eagle Point Oil Co.*, 609 A.2d 11, 129 N.J. 81 (1992) (permitting an employer to perform a random urine test on employees engaged in lead pumping at a refinery because the potential harm that could occur if an employee was under the influence of drugs outweighed the employee's privacy interests and thus did not violate a "clear mandate of public policy"). However, the *Hennessey* court expressly stated that private employees maintain privacy rights that can be violated by random drug testing if their right to privacy outweighs the societal right or need for safety. See Id.

In *Hennessey*, a private employer in the business of lead pumping conducted a random urine test on its employees who engaged in lead pumping at its refinery. The court upheld the search after finding that the potential harm that could occur if an employee was under the influence of drugs outweighed the employee's privacy interests. Thus, the court concluded that there was no violation of any "clear mandate of public policy" in the execution of this search. 609 A.2d at 11.

New Jersey has passed a medical marijuana statute, entitled the New Jersey Compassionate Use Medical Marijuana Act, N.J. Stat. Ann. §§ 24:61-1, et. seq. Although the law states that there is no requirement for an employer to accommodate the medical use of marijuana in the workplace, a New Jersey appellate court held that an employer may not discriminate against an employee who seeks an accommodation for the use of medical marijuana off-site or during non-work hours. In *Wild v. Carriage Funeral Holdings, Inc.*, No. A-3072-17T3, 2019 N.J. Super. LEXIS 37, at \*19-\*20 (App. Div. March 27, 2019), a funeral director used medical marijuana to treat his disability (cancer). Although the employee did not use medical marijuana at work, the employer fired the employee for failing a drug test. The court held that the employee could maintain a claim for disability discrimination under the New Jersey Law Against Discrimination because the NJCUMMA did not immunize an employer against discrimination claims concerning the employee's use of medical marijuana outside of work.

On February 22, 2021, Governor Phil Murphy signed a series of bills legalizing the recreational use of cannabis in New Jersey. Under this new law, employers may not refuse to hire or employ anyone, and may not discharge or take any adverse action against any employee, because he or she does or does not use cannabis items. The new law also prohibits employers from making an employment decision "solely" based on an arrest, charge, conviction, or adjudication of delinquency for violation of certain state laws related to manufacturing, distributing, dispensing, or possessing certain amounts of cannabis. Basing employment decisions solely on cannabis-related criminal history subjects employers to potential fines as high as \$10,000 per violation for repeat offenders.

Employers may continue to maintain drug-free workplaces, including prohibiting the possession and consumption of cannabis as well as intoxication during work hours. But an employer may only require an employee to undergo a “drug test” if:

- (i) the employer reasonably suspects the employee’s usage of a cannabis item while engaged in the performance of the employee’s work responsibilities;
- (ii) there are observable signs of intoxication related to usage of a cannabis item;
- (iii) the drug test follows a work-related accident subject to investigation by the employer; or
- (iv) the employer conducts random drug testing, or requires drug testing as part of regular screening of employees to determine use during work hours.

Critically, a “drug test” is no longer a simple mechanical collection and lab test. The law now prohibits employers from taking any adverse action against an employee based solely on the presence of “cannabinoid metabolites” in the employee’s bodily fluids. In other words, a failed blood, urine, or saliva test is no longer sufficient grounds for discipline. Rather, employers must utilize a two-part “drug test” involving both (i) “scientifically reliable objective testing methods and procedures,” such as a blood, urine, or saliva test; and (ii) a physical evaluation conducted by an individual with necessary certification to opine on the employee’s state of impairment or lack thereof.

The employment-related provisions of this new law will not become effective until a newly-created Cannabis Regulatory Commission adopts initial rules and regulations, which may not be for several more months.

#### **E. Electronic Monitoring and Social Media**

E-mails sent by public carriers may be protected by the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Electronic Communications Privacy Act of 1986, 18 U.S.C. § 2510 et. seq. (2007), and the New Jersey Wire Tapping and Electronic Control Act, N.J. Stat. Ann. § 2A:156A-1 et. seq. (2007). These statutes allow employers to monitor employee e-mail in some circumstances, which include monitoring done in the normal course of business when necessary for business purposes or when necessary to protect employer’s rights or property.

The New Jersey Appellate Division has held that stored emails are protected by the New Jersey Wire Tapping and Electronic Control Act. See State v. Gaikwad, 793 A.2d 39, 349 N.J. Super. 62 (App. Div. 2002); N.J. Stat. Ann. § 2A:156A-1 et. seq. The Supreme Court has not yet ruled on this issue.

In a landmark case, *Doe v. XYZ Corp.*, 887 A.2d 1156, 382 N.J. Super. 122 (App. Div. 2005), the Appellate Division held that an employer has a duty to report an employee’s illegal use of his work computer. In *Doe*, an employee of defendant corporation (the “Employee”) was married to a woman with a 10 year-old daughter. Employee’s supervisors noticed that Employee often visited pornographic internet sites, including child pornography websites, on his office computer. Employee visited these sites despite defendant’s e-mail and internet policy which stated that e-mails were the property of defendant and were not confidential. The policy also stated that employees were permitted to access internet websites of a “business nature only.” An employee who became aware of a violation of the policy was required to

report it to the Personnel Department. Eventually, Employee's supervisor admonished Employee for the improper use of his work computer, and the Employee promised to stop visiting the pornographic websites on his work computer. A few months later, Employee's supervisor discovered that Employee had resumed his illegal use of his work computer, but the Employee's supervisor took no action. Soon thereafter, Employee was arrested for posting nude pictures of his stepdaughter on the internet.

Employee's wife and stepdaughter brought a civil suit against XYZ Corporation, alleging that defendant employer had a duty to monitor its employees' internet use and to report the crimes Employee was committing on his computer. The trial court granted summary judgment to defendant, but the Appellate Division reversed. In its decision, the court considered several issues. First, the court considered whether defendant had the ability to monitor Employee's use of the Internet on his office computer. The court concluded that Employer had the software and technical ability to do so. *Doe*, 382 N.J. Super. at 135-136.

Second, the court considered whether XYZ had the right to monitor Employee's Internet activities. In light of XYZ's e-mail and Internet policy, and the fact that Employee's computer screen was visible from the hallway, the court concluded that Employee "had no legitimate expectation of privacy that would prevent his employer from accessing his computer to determine if he was using it to view adult or child pornography." *Doe*, 382 N.J. Super. at 136-39. Therefore, the court concluded, XYZ had the right to monitor Employee's Internet activities.

Third, the court considered whether XYZ knew or should have known that Employee was using his computer to access child pornography. The court explained that, pursuant to XYZ's policy, Employee's improper use of the Internet was reported and should have triggered an investigation, which would have revealed "the full scope of Employee's activities." Accordingly, the court imputed to XYZ knowledge that "Employee was viewing pornography on his computer and, indeed, that this included child pornography." *Doe*, 382 N.J. Super. at 139-40.

Fourth, the court considered whether XYZ had a duty to act, either by terminating his employment or notifying law enforcement, to prevent Employee from continuing his activities. The court found that Employee was using XYZ's property to engage in criminal conduct, XYZ knew that it had the ability to control Employee, and knew or should have known of the necessity of doing so. Therefore, the court concluded, XYZ had "a duty to exercise reasonable care to stop Employee's activities, specifically his viewing of child pornography." *Doe*, 382 N.J. Super. at 140-42.

Fifth, the court considered whether XYZ's failure to act proximately caused harm to the employee's stepdaughter. According to the court, a jury could reasonably find that, had XYZ conducted a prompt investigation, it would have discovered and stopped Employee before his June 15, 2001 transmission of the illegal photos. The court further explained, however, that there was insufficient evidence in the record to establish that plaintiffs suffered damages as a result of the transmission. Therefore, the court remanded the case to the trial court to address this issue. *Doe*, 382 N.J. Super. at 143-145.

The law concerning electronic communications and social media in the workplace has developed at a frenetic pace over the past several years. Two significant decisions, and a law enacted in late 2013,

highlight the changes taking place in this area of the law. The first significant decision is *Pietrylo v. Hillstone Rest. Group*, No. 06 Civ. 5754, 2009 U.S. Dist. LEXIS 88702 (D.N.J. Sept. 25, 2009).

In *Pietrylo*, two of defendant-restaurant's waiters began an invitation-only [MySpace.com](http://MySpace.com) group for employees to "vent" about work issues. The MySpace forum included sexual remarks and used profanity toward company managers. One employee member of the forum showed the chat group page to a manager. When another manager asked the employee for her password to the forum, she gave it to him. When defendant fired the servers who founded the forum due to the sexually inappropriate and derogatory content on the site, the servers sued, in part, for alleged violation of federal and state Stored Communications Acts.

The case was tried to a jury, who found that defendant's conduct in accessing the employees' password-protected MySpace forum violated the federal and state Stored Communications Act because the managers accessed the chat group without authorization from a forum user. The District Court denied the defendant's motions for judgment as a matter of law and for a new trial, concluding that it could reasonably infer that the employee's purported "authorization" (the provision of her password to a manager) was coerced or provided under pressure and that the manager's review of the site was intentional.

The court's holding in *Pietrylo* first established that employers face significant liability when using information obtained from password-protected social networking sites to discipline or terminate employees, where that information is obtained without the requisite permission. The decision left open the question of what constitutes sufficient "authorization" to access such a site. However, since *Pietrylo*, the New Jersey Legislature has severely limited whatever remaining rights New Jersey employers may have had to access employees' personal social networking websites.

In December 2013, the New Jersey Legislature passed a statute with respect to social networking websites that provides even greater protections to employees than *Pietrylo*. N.J. Stat. Ann. § 34:6B-5 et. seq. The statute provides that employers cannot "require or request a current or prospective employee to provide or disclose any user name or password, or in any way provide the employer access to, a personal account through an electronic communications device." N.J. Stat. § 34:6B-6. The law also protects current and prospective employees from retaliation and discrimination for asserting their rights provided by the law, such as refusing to provide access to a personal social networking website account and reporting violations. N.J. Stat. Ann. § 34:6B-8. Further, current and prospective employees cannot – either voluntarily or involuntarily – waive the rights provided to them by the statute. N.J. Stat. Ann. § 34:6B-7.

The statute broadly defines "social networking website" as "an internet-based service that allows individuals to construct a public or semi-public profile within a bounded system created by the service, create a list of other users with whom they share a connection within the system, and view and navigate their list of connections and those made by others within the system." N.J. Stat. Ann. § 34:6B-5. However, the law is limited to *personal* social networking website accounts, which includes "an account, service or profile on a social networking website that is used . . . exclusively for personal communications unrelated to any business purposes of the employer," but does not include "any account, service or profile created,

maintained, used or accessed . . . for business purposes of the employer or to engage in business related communications.” N.J. Stat. Ann. § 34:6B-5. Currently, no New Jersey court has analyzed this statute.

The second of the aforementioned significant decisions is *Stengart v. Loving Care Agency, Inc.*, 990 A.2d 650, 201 N.J. 300 (2010). In *Stengart*, the Supreme Court of New Jersey addressed whether a company’s electronic communications policy gave the employer ownership of emails sent by an employee to her attorney, on a company-owned computer, via a private password-protected Internet-based email account. Although the Court found that plaintiff had a “reasonable expectation of privacy in the emails she exchanged with her attorney on [defendant’s] laptop,” it based the holding on (1) the steps taken by plaintiff to protect the privacy of those emails, (2) the ambiguity in defendant’s policy as to whether emails exchanged through a private password-protected web-based account via a company-owned computer were subject to monitoring or constituted company property, (3) the failure of the policy to provide adequate notice to employees that such emails were stored on the computer hard drive and could be retrieved, and (4) the importance of the attorney-client privilege.

### 1. Taping of Employees

An employer’s right to tape its employees is governed by the New Jersey Wire Tapping and Electronic Control Act, N.J. Stat. Ann. § 2A:156A-1 *et. seq.* (2007). *See Pascale v. Carolina Freight Carriers Corp.*, 10 I.E.R. Cas. (CBNA) 1804, 898 F. Supp. 276 (1995) (noting that the New Jersey electronic surveillance law is modeled after the federal law).

### 2. One or Two-Party Consent

New Jersey law currently allows for the recording of communications so long as one party consents to the recording. As a result, the other party may never know that the communication was recorded.

### 3. New Jersey Identity Theft Prevention Act

The New Jersey Identity Theft Prevention Act (the Act) provides that public and private entities may not:

- Publicly post or display an individual’s Social Security Number (SSN), or four or more consecutive numbers of it;
- Print an individual’s SSN on any materials that are mailed to the individual, unless otherwise required by law;
- Print an individual’s SSN on any card required for access to the entity’s products or services;
- Intentionally communicate or make available an individual’s SSN to the general public;
- Require an individual to transmit his SSN over the Internet, unless the connection is secure or the SSN encrypted; or
- Require an individual to use his SSN to access an Internet web site, unless a password or unique personal identification number or other authentication device is also required to access the Internet web site.



N.J. Stat. § 56:8-164(a).

Employers may use SSNs for internal verification and administrative purposes as long as the use does not require the release to unauthorized individuals. N.J. Stat. § 56:8-164(b).

Employers may use SSNs on applications and forms that are sent by mail “including documents sent as part of an application or enrollment process, or to establish, amend or terminate an account, contract or policy, or to confirm the accuracy of the Social Security number.” N.J. Stat. § 56:8-164(d).

The Act requires the destruction of records that are no longer to be retained by the business or entity that contain the *personal* information of its employees, which is defined as employee’s name plus one of the following: his/her SSN, driver’s license number, state identification card number or account number or credit or debit card number, in combination with any code or password required for access. N.J. Stat. § 56:8-161; N.J. Stat. § 56:8-162.

Employers that compile or maintain computerized records containing personal information must disclose a breach of security to *customers*, which includes employees, when information was, or is reasonably believed to have been, accessed by an unauthorized person. N.J. Stat. § 56:8-163(a).

## IX. WORKPLACE SAFETY

### A. Negligent Hiring

The New Jersey Supreme Court expressly recognized the tort of negligent hiring in *Di Cosala v. Kay*, 91 N.J. 159, 174 (1982). The tort stems from the premise that employers must exercise reasonable care in selecting employees who will come in contact with the public in the course of their employment. *Di Cosala v. Kay*, 91 N.J. 159, 171-172 (1982). An employer that hires an employee who is dangerous, incompetent, or unfit for the particular job may be held directly liable to a third party for injuries proximately caused by the employer’s negligence in choosing that employee.

Notably, in contrast to the situation in which there may be potential tort liability based on the doctrine of *respondeat superior* for conduct within the scope of an employee’s duties, an employer may be liable under the tort of negligent hiring even if an intentional act by the employee outside of the scope of his or her employment caused the plaintiff’s injury. *Di Cosala v. Kay*, 91 N.J. 159, 171-172 (1982). As such, “[n]egligent hiring covers acts committed outside the scope of employment.” *Hoag v. Brown*, 935 A.2d 1218, 1230, 397 N.J. Super. 34, 52 (App. Div. 2007).

For a court to find an employer liable for negligent hiring, a plaintiff must establish two fundamental elements:

- The employer knew, or had reason to know, of the employee’s particular unfitness, incompetence, or dangerousness and could reasonably have foreseen that such attribute created a risk of harm to third parties.

- The employer's negligence in hiring the employee resulted in the dangerous attribute proximately causing the plaintiff's injury.

*Smith v. Harrah's Casino Resort of Atl. City*, 2013 N.J. Super. Unpub. LEXIS 2928, at \*6-7 (App. Div. Dec. 13, 2013), citing *Di Cosala v. Kay*, 91 N.J. 159, 173-74, 450 A.2d 508 (1982). See also *Johnson v. Usdin Louis Co.*, 248 N.J. Super. 525, 529 (App. Div. 1991).

New Jersey courts generally do not extend the tort of negligent hiring to employers who employ independent contractors. *Mavrikidis v. Petullo*, 707 A.2d 977, 153 N.J. 117 (1998). An exception to this rule is made "(a) where the [employer] retains control of the manner and means of the doing of the work which is the subject of the contract; (b) where he engages an incompetent contractor; or (c) where . . . the activity contracted for constitutes a nuisance per se." *Id.* at 984; *Puckrein v. ATI Transport, Inc.*, 897 A.2d 1034, 1041-42, 186 N.J. 563, 574 (2006).

#### B. Negligent Supervision/Retention

In New Jersey, the tort of negligent retaining an employee requires proof that the employer "knew or had reason to know of the particular unfitness, incompetence or dangerous attributes of the employee and could reasonably have foreseen that such qualities created a risk of harm to other persons." *Di Cosala v. Kay*, 91 N.J. 159, 174, 450 A.2d 508, 516 (1982). In addition, there must be proof that through the negligence of the employer in hiring or retaining the employee, the employee's unfitness or dangerous characteristics proximately caused the injury. *Id.*

For example, in *Johnson v. Usdin Louis Co.*, 248 N.J. Super. 525, 591 A.2d 959 (App. Div. 1991), an employee used nitric acid taken from his place of employment to assault family members at home. Among other things, the plaintiff alleged the employer negligently retained the employee "when it knew or should have known of his dangerousness." The Court dismissed the claim finding there was no basis to impose a legal duty upon the employer because "it was not aware that [the employee] possessed dangerous characteristics."

By contrast, in *Dixon v. CEC Entm't, Inc.*, No. A-2010-06T1, 2008 N.J. Super. Unpub. LEXIS 2875 (App. Div. Aug. 6, 2008), the Court found that the employee's act of getting a tattoo with the words "FEAR ME" was sufficient to establish that the employer knew or had reason to know of the employee's "unfitness, incompetence or dangerous attributes" or make it foreseeable that he would get involved in an altercation with a customer.

#### C. Firearms In the Workplace

There are no applicable firearm statutes in New Jersey.

### X. OTHER TORTS

#### A. Respondeat Superior Liability

As a general principle of tort law, liability must be based on personal fault; however, "the doctrine of respondeat superior recognizes a vicarious liability principle pursuant to which a master will be held liable

in certain cases for the wrongful acts of his servants or employees.” *Carter v. Reynolds*, 175 N.J. 402, 408 (2003). The employer, “having set the whole thing in motion,” is held responsible for what has occurred. *Galvao v. G.R. Robert Constr. Co.*, 179 N.J. 462, 467 (2004) (quoting W. Page Keeton, et al., *Prosser and Keeton on Torts* § 69, at 500 (5th ed. 1984)).

Under respondeat superior, an employer can be found liable for the negligence of an employee causing injuries to third parties “if, at the time of the occurrence, the employee was acting within the scope of his or her employment.” *Lehmann v. Toys ‘R’ Us, Inc.*, 132 N.J. 587, 619, 626 A.2d 445 (1993) (quoting Restatement (Second) of Agency § 219 (1958)). To establish an employer’s liability for the acts of his employee, the employee must prove (1) that a master-servant relationship existed and (2) that the tortious act of the servant occurred within the scope of that employment. *Carter*, 175 N.J. at 409. The former element focuses on the nature of the relationship. *Id.* If no master-servant relationship exists, no further inquiry need take place because the master-servant relationship is sine qua non to the invocation of respondeat superior. *Id.* If such a relationship exists, its margins are the subject of the scope of employment inquiry. Restatement (Second) of Agency § 228 comment a (1958).

New Jersey has adopted the following Restatement (Second) of Agency standard in determining whether an agency exists:

- (1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other’s control or right to control.
- (2) In determining whether one acting for another is a servant or an independent contractor, the following matters of facts, among others, are considered:
  - (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
  - (b) whether or not the one employed is engaged in a distinct occupation or business;
  - (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
  - (d) the skill required in the particular occupation;
  - (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
  - (f) the length of time for which the person is employed;
  - (g) the method of payment, whether by the time or by the job;
  - (h) whether or not the work is a part of the regular business of the employer;
  - (i) whether or not the parties believe they are creating the relation of master and servant;  
and
  - (j) whether the principal is or is not in business.

*Carter*, 175 N.J. at 409 (citing Restatement (Second) of Agency § 220 (1958)). Although each factor should be considered based on the totality of the circumstances, courts often have considered the determinative factor to be whether the employer exercised control over the individual in question. *Galvao v. G.R. Robert Constr. Co.*, 179 N.J. 462, 467 (2004).

B. Tortious Interference with Business/Contractual Relations

A plaintiff must prove the following four elements to state a claim for interference with contract or prospective economic advantage: (1) a contract or protectable right; (2) interference done intentionally and with malice; (3) causation of a loss by the interference; and (4) damage. See *Printing Mart-Morristown v. Sharp Elecs.*, 563 A.2d 31, 37, 116 N.J. 739, 750 (1989). The plaintiff need not prove that the contract is enforceable in order to state a claim. See *Harris v. Perl*, 197 A.2d 359, 41 N.J. 455 (1964). But the plaintiff must establish malice, which is defined as the intentional infliction of harm without justification or excuse. *Printing Mart-Morristown*, 116 N.J. at 751. “The ultimate inquiry is whether the conduct was both injurious and transgressive of generally accepted standards of common morality or of the law.” *Id.*, 563 A.2d 31, 40, 116 N.J. 739, 757 (1989).

C. False Imprisonment

In order to succeed on a claim of false imprisonment, a plaintiff must prove that: (1) he or she was arrested or detained against his or her will; and (2) the arrest or detention had no proper legal authority or justification. See *Fleming v. United Parcel Serv., Inc.*, 604 A.2d 657, 680, 255 N.J. Super. 108, 155 (Law Div. 1992), *aff’d*, 642 A.2d 1029, 273 N.J. Super. 526 (App. Div. 1994). False imprisonment claims have been recognized in the employment context. For example, in *DeAngelis v. Jamesway Department Store*, the Appellate Division upheld a jury award of compensatory and punitive damages to the plaintiff, a 17-year old cashier who was detained in an office by her employer and subjected to a four-hour interrogation for allegedly stealing cash from her register. 501 A.2d 561, 562-63, 205 N.J. Super. 519, 521-22 (App. Div. 1985). Specifically, the Appellate Division held: “an employer has a right to question an employee, but not to imprison her. Such a detention without color of legal authority is false imprisonment.” *Id.* at 566 (internal citations and quotations omitted).

D. Fraud

A common law fraud claim has five elements: Under New Jersey law, a common-law fraud action has five elements: “(1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages.” *McConkey v. Aon Corp.*, 804 A.2d 572, 584, 354 N.J. Super. 25, 45 (App. Div. 2002). In addition to establishing these elements, a plaintiff must also show that his or her reliance on the misrepresentation was reasonable under the existing circumstances. *Capano v. Borough of Stone Harbor*, 530 F. Supp. 1254, 1268 (D.N.J. 1982). Plaintiff must also plead fraud with specificity. See R. 4:5-8(a); see also *State, Dep’t of Treasury, Div. of Inv. ex rel. McCormac v. Qwest Communications Intern., Inc.*, 904 A.2d 775, 784, 387 N.J. Super. 469, 484 (App. Div. 2006).

E. Sex Abuse Claims

Under legislation enacted in December 2019, victims of childhood sexual abuse have until they are age 55 or seven years after they discover the abuse, whichever is later, to commence a civil action. Victims of adult sexual abuse have seven years after they discover the abuse to commence a civil action. NJSA § 2A:14-2a. The legislation also amended the Charitable Immunity Act so that not-for-profit organizations may face liability for negligent hiring, supervision, or retention where the negligence resulted in the sexual abuse of a minor. See NJSA 2A:53A-7. Finally, the legislation amended the New Jersey Tort Claims Act to remove immunity for public institutions from actions alleging sexual abuse. NJSA § 59:2-1.3.

## XI. RESTRICTIVE COVENANTS/NON-COMPETE AGREEMENTS

### A. General Rule

While restrictive covenants are disfavored in New Jersey insofar as they interfere with an individual's right to earn a living, they are enforceable. Restrictive covenants will be upheld if they are reasonable, i.e., the covenant must "simply protect [ ] the legitimate interest of the employer, impose [ ] no undue hardship on the employee, and [not be] injurious to the public." *Whitmyer Bros., Inc. v. Doyle*, 274 A.2d 577, 581, 58 N.J. 25, 32-33 (1971) (citation omitted); see also *Maw v. Advanced Clinical Communications, Inc.*, 846 A.2d 604, 608-09, 79 N.J. 439, 445 (2004).

New Jersey courts recognize and enforce non-compete agreements; they are no longer "flatly outlawed" as they once were in New Jersey. See *Solari Indus., Inc. v. Malady*, 264 A.2d 53, 56, 55 N.J. 571, 576 (1970). However, the degree to which a restrictive covenant will be enforced depends upon the nature of the activity the restrictive covenant intends to restrict:

[A] seller's incidental noncompetitive covenant, which is designed to protect the good will of the business for the buyer, is freely enforceable in the courts. And while a covenant by an employee not to compete after the termination of his employment is not, because of the countervailing policy considerations, as freely enforceable, it will nonetheless be given effect if it is reasonable in view of all the circumstances of the particular case.

Id. at 56 (citations omitted).

The *Solari/Whitmyer* test of reasonableness is used by New Jersey courts to determine the enforceability of restrictive covenants in all cases except those involving attorneys, see *Jacob v. Norris, McLaughlin & Marcus*, 607 A.2d 142, 128 N.J. 10 (1992) and psychologists, see *Comprehensive Psychology Sys., P.C. v. Prince*, 867 A.2d 1187, 375 N.J. Super. 273 (App. Div. 2005). The court in *Prince* reasoned that psychologists should be subjected to the same limitations as are attorneys, because the State Board of Psychological Examiners adopted a regulation restricting psychologists from entering into restrictive covenants to the same extent that attorneys are restricted from doing so in New Jersey; the Board of Psychological Examiners modeled its language on the Rules of the New Jersey Supreme Court; and the nature of the practice of psychology in conjunction with the highly personal patient-psychologist relationship preclude use of restrictions that may interfere with an ongoing course of treatment. See *Prince*, 867 A.2d at 1190.

The exception for attorneys and psychologists has not been extended to doctors despite the fact that the American Medical Association strongly disfavors post-employment restrictive covenants. See *Cnty. Hosp. Group, Inc. v. More*, 869 A.2d 884, 183 N.J. 36 (2005).

Under New Jersey Law, employees owe a duty of loyalty to their employers. See *Auxton Computer Enters., Inc. v. Parker*, 416 A.2d 952, 956, 174 N.J. Super. 418, 425 (App. Div. 1980) (defining the duty of loyalty as a fiduciary duty that prevents employees from acting contrary to their employer's interest). The duty of loyalty is implied in all employment relationships and exists regardless of whether or not it is stated in an employment contract. See *Chernow v. Reyes*, 570 A.2d 1282, 1283, 239 N.J. Super. 201, 202 (App. Div. 1990). Activities prohibited by this duty include: soliciting employer's customers for a competing entity while still employed, see *Brown v. Brown*, 731 A.2d 1212, 1217, 323 N.J. Super. 30, 39 (App. Div. 1999); purloining confidential information from employer's file in order to compile a target client solicitation list to compete with the employer immediately upon resignation, see *Lamorte Burns & Co. v. Walters*, 770 A.2d 1158, 1170, 167 N.J. 285, 305 (2001); and, probably, posting confidential employer information on a message board of an Internet service provider's website. See *generally Immunomedics, Inc. v. Doe*, 775 A.2d 773, 342 N.J. Super. 160 (App. Div. 2001).

New Jersey courts also recognize a cause of action for aiding and abetting an employee in the breach of his fiduciary duty of loyalty to his employer. See *Franklin Med. Assocs. v. Newark Pub. Sch.*, 828 A.2d 966, 975-76, 362 N.J. Super. 494, 510 (2003).

#### B. Blue Penciling

Partial enforcement of restrictive covenants is allowed in New Jersey. Specifically, if a restrictive covenant is unduly burdensome, courts are allowed to "blue line" the covenant so that it is reasonable under the circumstances. *Solari Indus., Inc. v. Malady*, 264 A.2d 53, 58-61, 55 N.J. 571, 579-86 (1970).

Under the "blue pencil" rule, New Jersey courts may modify geographic areas and time restrictions that are more excessive than is necessary to protect an employer's legitimate business interests. See *Karlin v. Weinberg*, 390 A.2d 1161, 77 N.J. 408 (1978); *Malady*, 264 A.2d at 56.

#### C. Confidentiality Agreements

Confidentiality agreements are enforceable in New Jersey. See *Whitmyer Bros., Inc. v. Doyle*, 274 A.2d 577, 581, 58 N.J. 25, 33 (1971) (indicating that such agreements are helpful in avoiding difficulties in proving and defining what constitutes confidential information). An employer's confidential business information, however, is legally protected even in the absence of an agreement. See *Lamorte Burns & Co., Inc. v. Walters*, 770 A.2d 1158, 1165, 167 N.J. 285, 298 (2000) (stating that the court will consider the expectations of the parties and the intended use of the information in determining whether information is "confidential").

Information that is publicly available may still be considered confidential and receive legal protection. See *Platinum Mgmt., Inc. v. Dahms*, 666 A.2d 1028, 1038, 285 N.J. Super. 274, 295 (Law. Div. 1995) (finding that customer identities revealed by a former employee were confidential even though the

names themselves were listed in public trade directories because the fact that they were customers was not published and that fact was divulged in confidence to the employee and the employee signed a covenant not to compete). Courts look to the relationship of the parties at the time of the disclosure and the intended use of the information in determining whether disclosed information is confidential. See Id.

On March 18, 2019, New Jersey passed an amendment to the New Jersey Law Against Discrimination that prohibits employers from using confidentiality, non-disclosure, or any other provisions in employment agreements or settlement agreements to bar an employee from disclosing or publishing the details of a discrimination, retaliation, or harassment claim. Id. § 10:512.8. The law also prohibits employers from requiring employees to prospectively waive substantive or procedural rights to assert a claim for discrimination, retaliation, or harassment. N.J. Stat. § 10:5-12.7. An employer that attempts to enforce such a provision in an employment contract or settlement agreement shall be liable for the employee's attorney's fees and costs. Id. § 10:5-12.9. The law also requires that "[e]very settlement agreement resolving a discrimination, retaliation, or harassment claim by an employee against an employer shall include a 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." N.J.S.A. § 10:5-12.8(b).

#### D. Trade Secrets Statute

Under the New Jersey Trade Secrets Act, which became effective January 9, 2012, the holder of a trade secret may recover damages for its misappropriation. See N.J.S.A. 56:15-1, et. seq. The statute is based on the Uniform Trade Secrets Act prepared by the National Conference of Commissioners on Uniform State Laws; prior to the new law's enactment, New Jersey was one of only four states that had not adopted some form of the uniform law.

"Misappropriation" is defined under the statute as the acquisition of a trade secret by a person who knows or has reason to know that the trade secret was acquired by "improper means;" or the disclosure or use of a trade secret without the express or implied consent of the trade secret owner by a person who (i) used "improper means" to acquire knowledge of the trade secret, (ii) at the time of its disclosure or use, knew or had reason to know that knowledge of the trade secret was derived or acquired through "improper means," or (iii) before a material change of position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired through "improper means." "Trade secret" is broadly defined to mean "information including a formula, pattern, business data compilation, program, device, method, technique, design, diagram, drawing, invention, plan, procedure, prototype or process, that (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

An action for misappropriation must be commenced within three years after the misappropriation was discovered or by the exercise of reasonable diligence should have been discovered. Damages for violations of this statute may include both the actual loss caused by the misappropriation and the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss. Damages

may also be measured by imposition of liability for a reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret. A court is authorized to award punitive damages in an amount not exceeding twice any damage award if willful and malicious misappropriation exists and, if certain conditions are satisfied, reasonable attorney's fees and costs to the prevailing party. Actual or threatened misappropriation may be enjoined and, in exceptional circumstances, an injunction may condition future use upon payment of a reasonable royalty for no longer than the time period for which use could have been prohibited.

The statute does not apply to misappropriations occurring prior the law's effective date; not does it apply to a continuing misappropriation that began prior to its effective date. In those circumstances, misappropriation of trade secrets is governed by a body of New Jersey case law. Whether New Jersey will protect employers against misappropriation under such case law depends on whether the information in question fits a somewhat narrower, and vaguer, definition of "trade secret." Under New Jersey case law, a trade secret is generally a "formula, process, device or compilation that a person uses to obtain advantage over competitors who do not know or use it." *Sun Dial Corp. v. Rideout*, 108 A.2d 442, 445, 16 N.J. 252, 257 (1954). The subject matter cannot be a matter of public knowledge or of general knowledge within the industry. *Id.* It must be substantially secret, but can generally be disclosed to employees involved in its use without losing its protection. *Id.*

This definition was expanded in *Rycoline Products, Inc. v. Walsh*, 756 A.2d 1047, 334 N.J. Super. 62 (App. Div. 2000). In *Rycoline*, the New Jersey Appellate Division held that a trade secret includes products created from reverse engineering. It argued that, although the commencement of a reverse engineering process does not implicate a protected trade secret, it is possible that the process may ultimately result in a product that is worthy of protection.

Notably, in an unpublished case in the Superior Court of New Jersey, Chancery Division, Bergen County, the chancery court held that the New Jersey Trade Secrets Act does not preempt a common law claim for misappropriation of confidential information or other tort claims arising out of the same core facts that form the basis for a plaintiff's trade secret claims. *See SCS Healthcare Mktg., LLC v. Allergan USA, Inc.*, Docket No. C-268-12, 2012 N.J. Super. Unpub. LEXIS 2704, at \*1 (Ch. Div. Dec. 7, 2012). *SCS Healthcare* is a case of first impression and the only New Jersey state court case interpreting the New Jersey Trade Secrets Act to date.

Employers can also prevent employees from using the employer's ideas on a competing product by entering into contracts with employees preventing such misappropriation of trade secrets. *See Ingersoll-Rand Co. v. Ciavatta*, 542 A.2d 879, 893, 110 N.J. 609, 636 (1988).

Information that is not a "trade secret" may still be protectable under New Jersey law if it is confidential information misappropriated to compete with or harm the employer. In *Lamorte Burns & Co., Inc. v. Walters*, 770 A.2d 1158, 167 N.J. 285 (2001), the plaintiff, an insurance firm, filed a lawsuit against its former employees for breach of restrictive covenant clauses in an employment agreement, claiming that while they were employed by Lamorte Burns, they attempted to steal customers by collecting confidential client information. The company's motion for summary judgment was granted. The Appellate Division affirmed, finding that the employees breached the employment contract, but



reversed as to the company's tort claims, reasoning that a dispute existed as to whether the documents defendants stole were in fact confidential and proprietary information.

On appeal, the New Jersey Supreme Court considered whether or not the company's client claim files, which included client's names, addresses, and file numbers were legally protectable. The court held that although the information did not amount to a trade secret, it was legally protected as confidential information. After a close examination of the files, the court determined they were "confidential" because:

[T]he information surreptitiously gathered by defendants from plaintiff was not generally available to the public, but was shared between plaintiff and its clients. Defendants would not have been aware of that information but for their employment. The information went beyond the mere names of plaintiff's clients. It included specific information concerning the clients' claims, such as the name of the injured party, and the type and date of injury. Defendants admitted that the information gave them an advantage in soliciting plaintiff's clients once they resigned. But, the information was available to defendants for their use in servicing clients on behalf of Lamorte only.

*Lamorte*, 770 A.2d at 1167.

The court went on to hold that while employees can prepare to compete with their employer while they are still employed, they breach their duty of loyalty by gathering confidential information from their employer to seek a competitive advantage upon their resignation. Based on the foregoing, the Court concluded that the defendants breached their duty of loyalty by using confidential information to create a business in competition with Lamorte Burns while they were still employed by the company. *Lamorte*, 770 A.2d at 1169-70.

## **XII. DRUG TESTING LAWS**

In November 2020, New Jersey voters approved a referendum legalizing the recreational use of cannabis by adults. In February 2021, Governor Murphy signed legislation which will become operative by August 2021 and will restrict how employers can test employees for cannabis. An employer may only require an employee to undergo a "drug test" for cannabis if: (i) the employer reasonably suspects the employee's usage of a cannabis item while engaged in the performance of the employee's work responsibilities; (ii) there are observable signs of intoxication related to usage of a cannabis item; (iii) the drug test follows a work-related accident subject to investigation by the employer; or (iv) the employer conducts random drug testing, requires drug testing as part of pre-employment screening, or requires drug testing as part of regular screening of employees to determine use during work hours. The "drug test" permitted by the law not a simple mechanical collection and lab test. The law now prohibits employers from taking any adverse action against an employee based solely on the presence of "cannabinoid metabolites" in the employee's bodily fluids. In other words, a failed blood, urine, or saliva test is no longer sufficient grounds for discipline. Rather, employers must utilize a two-part "drug test" involving both (i) "scientifically reliable objective testing methods and procedures," such as a blood, urine, or saliva test; and (ii) a physical evaluation conducted by an individual with necessary certification to

opine on the employee's state of impairment or lack thereof. A new commission created under the law will issue standards for training and certification of workplace impairment recognition experts.

### XIII. STATE ANTI-DISCRIMINATION STATUTE(S)

The New Jersey Law Against Discrimination, N.J. Stat. Ann. § 10:5-1 et. seq. ("NJLAD"), prohibits discrimination in employment against a person by reason of age, ancestry, atypical hereditary cellular or blood trait, liability for service in the Armed Forces of the United States, color, creed, disability, marital status, civil union status, national origin, nationality, sex, domestic partnership status, affectional or sexual orientation, gender identity or expression, pregnancy, genetic information, refusal to submit to genetic testing, refusal to provide genetic information, or race of that person, or of their spouse, partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers, or customers, and for a sincerely held religious practice or religious observance. N.J. Stat. Ann. § 10:5-12.

Section 10:5-12 also prohibits retaliation against an employee who opposes unlawful practices or participates in proceedings under the Act. N.J. Stat. Ann. § 19:34-27 (2012) makes it a misdemeanor to use force or threat of force in order to influence an employee's vote.

#### A. Employers/Employees Covered

The NJLAD is a broad statute that defines covered employers as "one or more individuals, partnerships, associations, organizations, labor organizations, corporations, legal representatives, trustees, trustees in bankruptcy, receivers, and fiduciaries." § 10:5-5(a), (e). The NJLAD's definition of "employer" also "includes the State, any political or civil subdivision thereof, and all public officers, agencies, boards or bodies." Id. All New Jersey employers are covered by the NJLAD, regardless of the number of individuals they employ.

The NJLAD's prohibitions on discrimination apply to both job applicants and current employees. N.J. Stat. Ann. § 10:5-12. The definition of "employee" "does not include any individual employed in the domestic service of any person." Id. § 10:5-5(f). Independent contractors are also not covered by the NJLAD. *Pukowsky v. Caruso*, 312 N.J. Super. 171, 180 (App. Div. 1998).

#### B. Separate and Individual Liability

Supervisors may only be held personally liable for aiding and abetting discrimination under the NJLAD. In *Cicchetti v. Morris County*, 947 A.2d 626, 194 N.J. 563 (2008), the Court clarified that the significance of a supervisor's acts as a basis for an employer's liability should not be confused with the significance of those same acts for the purposes of the supervisor's individual liability. Supervisors can only be personally liable for "aiding and abetting" in the discriminatory conduct. Id. at 645 (discussing *Herman v. Coastal Corp.*, 791 A.2d 238, 348 N.J. Super. 1 (App. Div.) certif. denied, 807 A.2d 195, 174 N.J. 363. Such aiding and abetting "require[s] active and purposeful conduct." Id.

#### C. Examples of Types of Conduct Prohibited

##### 1. Sex Discrimination

As discussed above, the NJLAD prohibits discrimination based on an individual's sex. N.J. Stat. Ann. § 10:5-12(a). Employers are prohibited from making any distinction based upon the gender of an employee/applicant in employment opportunities, wages, hours, or other terms and conditions of employment. *Muench v. Township of Haddon*, 605 A.2d 242, 247-48, 255 N.J. Super. 288, 297-98 (App. Div. 1992). This applies equally to males and females. *Enriquez v. West Jersey Health Sys.*, 777 A.2d 365, 342 N.J. Super. 501, 515 (App. Div.), cert. denied, 785 A.2d 439, 170 N.J. 211 (2001).

## 2. Sexual Harassment and Hostile Work Environment

An employee may claim to be subjected to quid pro quo sexual harassment when an employer attempts to make an employee's submission to sexual demands a condition of employment, advancement, an increase in salary, a benefit or any other term or condition of employment. *Lehmann v. Toys 'R' Us, Inc.*, 626 A.2d 445, 452-53, 132 N.J. 587 (1993). The plaintiff does not need to show that an adverse action was threatened when the advance was made, but must show that his/her response to the unwelcomed advances was subsequently used as a basis for the decision to take adverse action. *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 282-83 (3d Cir. 2000).

There is strict liability for an employer for quid pro quo harassment by a supervisor. *Lehmann*, 626 A.2d at 460.

The landmark NJLAD case for hostile work environment sexual harassment is *Lehmann v. Toys 'R' Us, Inc.*, 626 A.2d 445, 132 N.J. 587 (1993). Theresa Lehmann commenced a lawsuit against her employer, Toys 'R' Us, for hostile work environment discrimination based upon gender. The plaintiff claimed that her supervisor, Don Baylous, sexually harassed her and that Toys 'R' Us condoned the harassment. Lehmann alleged that Baylous made comments of a sexual nature, commented on her physique, and pulled Lehmann's shirt over her shoulders. When Lehmann complained about this behavior, Supervisor Frankfort told her to handle the situation herself. Lehmann then complained to Supervisor Jonas, who told her that he would talk to Baylous. Baylous' behavior worsened.

After filing more complaints with the company, management offered to transfer Lehmann. She rejected this offer, and soon after resigned. Lehmann sued for lost wages and pension benefits, anxiety, medical expenses, humiliation, pain and suffering, and attorneys' fees. Toys 'R' Us responded by claiming that it conducted an investigation and could not substantiate Lehmann's allegations. The New Jersey Supreme Court remanded the case for further factual finding, but defined the standards in NJLAD actions.

The court first addressed the purpose of the NJLAD and found that "[i]ts purpose is 'nothing less than the eradication of the cancer of discrimination,'" because the "opportunity to obtain employment 'is recognized as and declared to be a civil right.'" *Lehmann*, 626 A.2d at 45152 (citations omitted).

The court next adopted the following test for hostile work environment sexual harassment:

To state a claim for hostile work environment sexual harassment, a female plaintiff must allege conduct that occurred because of her sex and that a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an intimidating, hostile, or offensive working environment. For

the purposes of establishing and examining a cause of action, the test can be broken down into four prongs: the complained-of conduct (1) would not have occurred but for the employee's gender; and it was (2) severe or pervasive enough to make a (3) reasonable woman believe that (4) the conditions of employment are altered and the working environment is hostile or abusive.

\* \* \*

We further hold that in the determination of an employer's liability for damages where an employee raises a hostile work environment discrimination claim against a supervisor: (1) an employer will be strictly liable for equitable damages and relief; (2) an employer may be vicariously liable under agency principles for compensatory damages that exceed equitable relief; and (3) an employer will not be liable for punitive damages unless the harassment was authorized, participated in, or ratified by the employer.

*Lehmann*, 626 A.2d at 453-54.

- a. Availability of affirmative defense based on existence of anti-harassment policies

A properly implemented anti-harassment policy may shield an employer from vicarious liability under the NJLAD. *Gaines v. Bellino*, 801 A.2d 322, 173 N.J. 301 (2002). However, a policy creates a "safe haven" for an employer only if the employer properly monitors whether its policy is effective at preventing harassment. This rule was implemented in *Gaines*. Plaintiff, Maria Gaines, worked as a corrections officer at the county jail in Hudson County, New Jersey. Gaines alleged that she was subjected to sexual harassment by her supervisor, defendant Joseph Bellino, but admitted that she never complained about Bellino's alleged harassment or took any action under the county's published anti-harassment policy. When the county became aware from other sources of Bellino's conduct, it initiated disciplinary action against him. The trial court granted summary judgment to the defendants, and the appellate court affirmed, finding that the county had established an affirmative defense by having in place an effective anti-harassment policy which the employee failed to utilize.

The New Jersey Supreme Court reversed, finding that a factual dispute existed with respect to whether the policy had been properly monitored to check its effectiveness in preventing harassment where Gaines claimed that she reasonably feared that her complaints would be ignored, and that she would be subjected to retaliation by Bellino, because her informal reports to superior officers had been ignored, and because other employees also believed that a formal complaint would have been useless. The court also observed that there were factual disputes on the issue of training, and concluded that the affirmative defense would be available only where there were no issues regarding a policy's implementation and effectiveness in preventing harassment:

As expressed in *Lehmann*, an employer's sexual harassment policy must be more than the mere words encapsulated in the policy; rather, the NJLAD requires an unequivocal commitment from the top that the employer's opposition to sexual harassment is not just words, but backed up by consistent practice.

*Gaines*, 801 A.2d at 332.

A similar result was reached in *Velez v. City of Jersey City*, 817 A.2d 409, 358 N.J. Super. 224 (App. Div. 2003), where the evidence showed that employees and management officials had not been trained, and that the plaintiff's "unofficial" complaints to management had been ignored. See also *Dunkley v. S. Coraluzzo Petroleum Transporters*, 437 N.J. Super. 366, 379, 98 A.3d 1202 (App. Div. 2014) (an employer may be vicariously liable for the conduct of a supervisor "if the employer negligently or recklessly failed to have an explicit policy that bans . . . harassment and that provides an effective procedure for the prompt investigation and remediation for such claims") (internal citations and quotation marks omitted).

The shield provided by an effective anti-harassment policy is not available as an affirmative defense to harassment where the harassment results in a tangible action such as a discharge or demotion. *Smith v. Exxon Mobil Corp.*, 374 F. Supp. 2d 406, 422 (D.N.J. 2005) (citing *Entrot v. The BASF Corp.*, 819 A.2d 447, 463-66, 359 N.J. Super. 162 (App. Div. 2003)). In *Entrot*, the court held that a constructive discharge is a "tangible employment action" that precludes the application of the affirmative defense.

On February 11, 2015, the Supreme Court of New Jersey expressly adopted the test created by the United States Supreme Court in *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) and *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998). *Aguas v. State*, 107 A.3d 1250, 220 N.J. 494 (2015). The United States Supreme Court has held that an employer has an affirmative defense to sexual harassment if it demonstrates that it (a) "exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Faragher*, 524 U.S. at 807.

In *Aguas*, the New Jersey Supreme Court ruled, for the first time, that the Faragher/Ellerth affirmative defense was viable under New Jersey law. In reaching this decision, the New Jersey Supreme Court reaffirmed the impact of an employer's anti-harassment policy for purposes of negligence, recklessness, or vicarious liability claims. The New Jersey Supreme Court's decision in *Aguas* is also significant because the Court addressed which factors trial courts should apply in determining if an employee will be considered a supervisor for a hostile work environment sexual harassment claim.

In *Aguas*, the plaintiff, a corrections officer employed by the Department of Corrections, claimed that her supervisor sexually harassed her and that, as a consequence, the Department was both directly and vicariously liable for the alleged misconduct. *Id.* at 1254-56. The Department moved for summary judgment on the grounds that the plaintiff did not avail herself of the grievance procedure provided in the Department's written policy prohibiting discrimination and harassment in the workplace. The trial court granted the motion on these grounds, and the Appellate Division affirmed. *Id.* at 1257.

On appeal, the Supreme Court "expressly adopted" the Faragher-Ellerth standard as a defense to vicarious liability in supervisory sexual harassment cases. *Id.* at 1268-69. The Court further held that the implementation and enforcement of an effective anti-harassment policy, or the failure to maintain such a policy, is a "critical factor" in assessing sexual harassment claims for direct liability (i.e., negligence or recklessness) under LAD. *Id.* at 1253.

In addition, the Court addressed the factors that trial courts should apply when determining whether an employee, accused of sexually harassing another employee, is that individual's supervisor -- a term undefined in the LAD and our prior case law -- for purposes of a hostile work environment sexual harassment claim. *Id.* at 1270. The New Jersey Supreme Court held that an allegedly harassing employee is the complainant's supervisor if that employee had the authority to take or recommend tangible employment actions affecting the complaining employee, or to direct the complainant's day-to-day activities in the workplace. *Id.* at 1271. The Court expressly rejected the more restrictive standard applied by the Supreme Court in *Vance v. Ball State University*, 133 S. Ct. 2434, 2443 (2013) to determine whether which an employee is a "supervisor" for purposes of vicarious liability under Title VII. Instead, the Court agreed with the Equal Employment Opportunity Commission's more expansive definition of the term "supervisor" to "include not only employees granted the authority to make tangible employment decisions, but also those placed in charge of the complainant's daily work activities." *Id.* at 497.

### Number of incidents necessary to create hostile work environment

While generally, multiple incidents of offensive conduct are required to constitute a hostile environment action, one or two highly offensive remarks may suffice if they are sufficiently egregious. Plaintiffs have greater probability of success if the statement is specifically directed at the plaintiff by his/her immediate supervisor and concerns his/her protected characteristic. *Taylor v. Metzger*, 706 A.2d 685, 152 N.J. 490 (1998) (summary judgment denied to defendant county sheriff who called plaintiff, African-American subordinate, a "jungle bunny" in the presence of another employee); *Leonard v. Metro. Life*, 723 A.2d 1007, 318 N.J. Super. 337 (App. Div. 1999) (diabetic plaintiff states actionable claim against supervisor who makes two derogatory comments including, "move your diabetic ass out of here before you die in my office").

### 3. Pay Discrimination

The Diane B. Allen Equal Pay Act prohibits an employer from paying "any of its employees who is a member of a protected class at a rate of compensation, including benefits, which is less than the rate paid by the employer to employees who are not members of the protected class for substantially similar work, when viewed as a composite of skill, effort and responsibility." N.J.S.A. 10:5-12(t). This goes beyond the federal Equal Pay Act, which only bars salary differentials between employees of different sexes. An employer may pay employees of different protected characteristics differently only if "the differential is made pursuant to a seniority system, a merit system, or the employer demonstrates: (1) that the differential is based on one or more legitimate, bona fide factors other than the characteristics of members of the protected class, such as training, education or experience, or the quantity or quality of production; (2) that the factor or factors are not based on, and do not perpetuate, a differential in compensation based on sex or any other characteristic of members of a protected class; (3) that each of the factors is applied reasonably; (4) that one or more of the factors account for the entire wage differential; and (5) that the factors are job-related with respect to the position in question and based on a legitimate business necessity. A factor based on business necessity shall not apply if it is demonstrated that there are alternative business practices that would serve the same business purpose without producing the wage differential." *Id.* An employer may not lower an employee's salary in order to comply with the law and may not retaliate against anyone who engages in related protected activity. *Id.*

#### 4. Pregnancy Discrimination.

On January 21, 2014, the Pregnant Workers Fairness Act modified the NJLAD to add pregnancy as a protected classification. For purposes of the amendment, “pregnancy” means “childbirth, or medical conditions related to pregnancy or childbirth, including recovery from childbirth.” N.J. Stat. Ann. § 10:5-3.1. An employee affected by pregnancy may request accommodations, which include, but are not limited to, the following: bathroom breaks; breaks for increased water intake; periodic rest; assistance with manual labor; job restructuring or modified work schedules; and temporary transfers to less strenuous or hazardous work. N.J. Stat. § 10:5-3.1

Employers may not penalize an employee for requesting or utilizing a pregnancy-related accommodation and must ensure that the employee seeking an accommodation is not treated less favorably than employees who seek accommodations for reasons unrelated to pregnancy, but who are similarly able or unable to work. The NJLAD permits employers to decline requests for accommodations when providing such accommodations would constitute an “undue hardship.”

An employee asserting disparate treatment pregnancy discrimination under the PWFA must prove that (1) she was part of a protected class of pregnant workers and her employers knew of her pregnancy; (2) she was performing her work at a level that met her employer’s legitimate expectations; (3) she suffered adverse employment action, such as demotion or termination; and (4) the circumstances give rise to an inference of unlawful discrimination. *Roopchand v. CompleteCare*, No. A-3223-15T4, 2017 N.J. Super. Unpub LEXIS 1974, at \*13-\*14 (App. Div. Aug. 3, 2017) (medical technician stated a prima facie case of pregnancy discrimination by alleging that her employer knew she was pregnant, she was performing her duties, she was demoted, asked to wash windows, and then fired for refusing to wash windows); *Ologundudu v. Manorcare Health Servs.*, No. 15-cv-04021, 2017 U.S. Dist. LEXIS 207235, at \*11 (N.J.D. Dec. 18, 2017)(nurse stated claim for pregnancy discrimination by alleging that she was terminated for falling asleep in her chair due to her pregnancy and that employer knew of her pregnancy prior to her termination).

In March 2021, the New Jersey Supreme Court identified three potential violations of the PWFA (and, by extension the LAD): (i) unequal or unfavorable treatment of a pregnant or breastfeeding employee; (ii) failure to provide a reasonable accommodation; and (iii) illegal penalization of an employee who requests or uses an accommodation. *Delanoy v. Twp. of Ocean*, No. a-68, 2021 N.J. LEXIS 176 (Mar. 9, 2021). A pregnant or breastfeeding employee may sue under the LAD and PWFA for any one, or any combination, of these three causes of action, and may recover damages as well as attorneys’ fees.

The PWFA requires employers to provide reasonable accommodations for pregnant and breastfeeding employees. However, an employer need not grant any accommodation that would be an undue hardship on its business operations. Critically, the PWFA makes clear, and the Supreme Court reiterated in *Delanoy*, that the burden is on the employer to prove that an accommodation would be an undue hardship. The PWFA provides a non-exhaustive list of factors to be considered in determining what constitutes an undue hardship: (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, tax deductions, and

outside funding; and (iv) the extent to which the accommodation would involve waiver of an essential requirement of a job as opposed to a tangential or non-business necessity requirement. NJSA § 10:5-12(s). In *Delanoy*, The Supreme Court explained that the last factor—whether an accommodation waives an essential job requirement—is not a disqualifier even if true. An employee’s temporary inability to perform an essential job function does not automatically constitute an undue hardship. Rather, it is just one factor to consider among all of the employer’s circumstances in determining whether or not an accommodation is an undue hardship.

5. Age Discrimination

a. Reverse Discrimination

The NJLAD protects young and old employees alike, setting no limit on the age of the protected plaintiff. However, a plaintiff who alleges age discrimination based on youth must satisfy a heightened reverse discrimination standard. In *Bergen Commercial Bank v. Sisler*, 723 A.2d 944, 157 N.J. 188 (1999), plaintiff Michael Sisler was an employee in the merchant credit-card department of New Era Bank when Bergen Commercial Bank began recruiting him. After several meetings with two high-ranking Bergen Bank officers, Sisler was offered a position as vice-president of credit-card operations, which he accepted. Shortly before beginning his new job, Sisler had lunch with one of the two Bergen Bank officers. The Bergen Bank official asked Sisler his age. According to Sisler, when he responded that he was twenty-five, the officer “appeared shocked” and asked him not to tell anyone else his age, because it would be embarrassing if the bank’s other officers found out, in light of Sisler’s salary and his responsibilities.

Only eight days into Sisler’s employment at Bergen Bank, the same two officers who recruited Sisler told him that “they didn’t think this was going to work,” that “they wanted to make some changes,” and that Sisler might be terminated. They suggested as an alternative to termination that Sisler resign from his position and work for the bank as a consultant. Sisler did not understand how in such a short period they could have reached such a conclusion about his potential to succeed, and he rejected their suggestion. Fewer than five months later, Bergen Bank terminated Sisler for what it indicated was subpar performance. Sisler was simply informed that it “wasn’t working out,” and he was replaced with an individual six years older. Sisler claimed that his discharge violated the NJLAD’s prohibition against age discrimination.

Unlike the federal Age Discrimination in Employment Act (“ADEA”), the NJLAD does not expressly state that it only protects individuals over forty (40) years of age. Given the absence of any age cut-off, as well as the NJLAD’s remedial purpose, New Jersey’s Supreme Court decided that there was no age threshold that precluded an employee from asserting an age discrimination claim under the statute.

Accordingly, the court held that the trial court acted hastily in dismissing Sisler’s claim. The court stated that Sisler might be able to make out a prima facie case of age discrimination because Bergen Bank attempted to discharge him soon after learning that he was twenty-five years old and after advising him not to reveal his age to other bank officials. Specifically, the Court instructed:

We hold that the LAD’s prohibition against age discrimination is broad enough to accommodate Sisler’s claim of age discrimination based on youth.



\* \* \*

Our examination of [the New Jersey Law Against Discrimination] reveals no evidence of a legislative intent to exclude younger workers from the LAD's anti-age-discrimination protection. Together, N.J. Stat. Ann. 10:5-4 and - 12(a) protect 'all persons' from employment discrimination on the basis of age. Neither section, on its face, specifies a qualifying age at which the act's protections vest.

*Sisler*, 723 A.2d at 957.

The court also designed a heightened scrutiny test for reverse discrimination cases where the employee is not a member of a historically disadvantaged class. In order to establish a prima facie case, plaintiff must establish:

(1) background circumstances supporting the suspicion that the defendant is the unusual employer who discriminates against the majority; (2) that he was performing at a level that met his employer's legitimate expectations; (3) that he was nevertheless fired; and (4) that he was replaced with a candidate sufficiently older to permit an inference of age discrimination. *Sisler*, 723 A.2d at 959.

6. Heightened scrutiny only applies to reverse discrimination cases

The heightened standard for stating a prima facie case set forth in *Sisler* is not applicable to traditional age discrimination claims. See *Reynolds v. Palnut Co.*, 748 A.2d 1216, 330 N.J. Super. 162 (App. Div. 2000). Albert Reynolds, a 49-year-old who was terminated and replaced by a 42-year-old and, thereafter, a 49-year-old, sued his former employer claiming age discrimination. The defendant moved for summary judgment and the court granted the motion on the ground that Reynolds failed to state a claim because he did not show that he was replaced by an employee who was sufficiently younger than him. Relying on *Sisler*, the trial court ruled that Reynolds had to show that he was replaced by a candidate who was sufficiently younger than him to permit an inference of discrimination.

The Appellate Division affirmed, but rejected the trial court's reasoning. It held that *Sisler* was distinguishable, because it involved reverse discrimination, while Reynolds was a traditional age discrimination case. In traditional age discrimination cases, as long as the plaintiff has made a sufficient prima facie showing to create an inference of discrimination: "[h]e need not show that he was replaced by someone sufficiently younger." *Reynolds*, 748 A.2d at 1219. The appellate court ruled that in a traditional age discrimination case, the plaintiff must simply show that the employer sought others to perform the work after the plaintiff was removed.

The Appellate Division further clarified that the rationales in *Sisler* and *Reynolds* are not inconsistent. See *Petrusky v. Maxfli Dunlop Sports Corp.*, 775 A.2d 723, 342 N.J. Super. 77 (App. Div. 2001). The two cases simply demonstrate that the fourth element of the prima facie discrimination case can be satisfied by proof of either replacement by someone outside the protected class or by someone younger or by other proof that the discharge was because of age. In *Petrusky*, a former employee sued Maxfli Dunlop Sports Corporation on a variety of grounds, including age discrimination under the NJLAD. Maxfli moved for summary judgment and, as to the NJLAD claim, the trial court dismissed. Specifically,

the trial court found that because the *Sisler* decision was inconsistent with *Reynolds*, it was bound by the requirement for proving the fourth element of the prima facie case in *Sisler*. The trial court thus concluded that in order for Petrusky to state a prima facie case for age discrimination, he had to show that he was replaced by a person sufficiently younger.

On appeal, the Appellate Division considered whether or not the trial court erred when it concluded that the rationales in *Sisler* and *Reynolds* were inconsistent. In reversing the dismissal of the plaintiff's NJLAD claims, the court emphasized the following:

It is erroneous, in an ordinary case of age discrimination in employment, to use reference to a particular replacement employee as the only means for satisfying the customary fourth element of a prima facie showing. The focal question is not necessarily how old or young the claimant or his replacement was, but rather whether the claimant's age, in any sufficient way, "made a difference" in the treatment he was accorded by his employer . . . . Thus, we conclude the trial court, in ruling on this aspect of defendants' motion for summary judgment, mistakenly conceived the fourth element test as rising or falling on whether plaintiff had made a showing that he had been replaced by a younger person.

*Petrusky*, 775 A.2d at 726.

#### 7. Disability Discrimination

The NJLAD specifically prohibits an employer from discriminating against a qualified individual with a disability in hiring, advancement, or through a discharge based on that individual's physical or mental impairments. N.J. Stat. Ann. § 10:5-4.1, et. seq.

The NJLAD has been interpreted as significantly broader than the analogous provisions of the Americans with Disabilities Act (ADA). *Viscik v. Fowler Equipment Co.*, 800 A.2d 826, 173 N.J. 1 (2002). Particularly, the definition of disability under the NJLAD is contrasted with the ADA's definition of disability, because the ADA adds an additional requirement that the individual's condition result in a substantial limitation on a major life activity. Therefore, because the NJLAD's definition imposes a lesser standard of proof than the ADA's prerequisites, the NJLAD permits coverage of a wider array of conditions. See e.g., *Viscik v. Fowler Equip. Co.*, 173 N.J. 1, 17-18 (2002) (holding that genetic "morbid obesity" constitutes a "handicap" under the NJLAD's broader scope); *Soules v. Mount Holiness Mem'l Park*, 808 A.2d 863, 866-67, 354 N.J. Super. 569, 574-75 (App. Div. 2002) (cancer is a disability); *Harris v. Middlesex County Coll.*, 353 N.J. Super. 31, 43-44, 801 A.2d 397 (App. Div. 2002) (mastectomy is an amputation; breast cancer is a disability); *Tynan v. Vicinage 13 of the Superior Court of N.J.*, 351 N.J. Super. 385, 397-99, 798 A.2d 648 (App. Div. 2002) (post-traumatic stress disorder, depression and panic attacks can be handicaps).

##### a. Use of illegal drugs

Prior drug users, such as individuals who have successfully completed a supervised drug rehabilitation, are protected as disabled under the NJLAD. However, as under the ADA, current drug users are not a protected disability under the NJLAD. This distinction was established in *Bosshard v. Hackensack*

*Univ. Med. Ctr.*, 783 A.2d. 731, 345 N.J. Super. 78 (App. Div. 2001). Diane Bosshard, a vascular technician at Hackensack University Medical Center, called the coordinator of the Employee Assistance Program (“EAP”), and told her that she was depressed and had used marijuana and heroin over the prior weekend. The coordinator arranged for Bosshard, whose drug usage had been ongoing, to be admitted to a hospital for an in-house 28 day drug treatment program. Under the EAP policy, this information was to be kept confidential absent express authorization from the employee.

Bosshard completed the drug treatment program and returned to work to learn that she was being terminated for having altered certain medical records. Bosshard filed suit claiming she was handicapped under the NJLAD because of her drug addiction. The trial court dismissed her action for failure to state a claim and the New Jersey Appellate Division affirmed.

Because the New Jersey courts had not addressed the issue and the Director of the Division of Civil Rights had not expressed an opinion, the Appellate Division looked to the federal Americans with Disabilities Act (“ADA”) for guidance as to whether addiction to controlled substances could be considered a handicap under the NJLAD. Following the ADA, the Appellate Division determined that while current drug users are not protected under the NJLAD, individuals who have successfully completed a supervised drug rehabilitation program and are no longer engaging in the illegal use of drugs are protected. *Bosshard*, 783 A.2d at 737.

In this case, the court found that there was no evidence that Bosshard was dismissed for drug addiction because the decision to terminate her employment was made before she sought help from the EAP. *Bosshard*, 783 A.2d at 738.

The New Jersey Jake Honig Compassionate Use Medical Cannabis Act (formerly known as the Compassionate Use Medical Marijuana Act), N.J. Stat. Ann. §§ 24:61-1, et. seq., permits the legal use of medical marijuana in New Jersey. Employers may not discriminate against an employee who is treating a disability by consuming medical marijuana off-site or during non-work hours. *Wild v. Carriage Funeral Holdings, Inc.*, No. A-3072-17T3, 2019 N.J. Super. LEXIS 37, at \*19-\*20 (App. Div. March 27, 2019). An amendment effective in July 2019 prohibits employers from taking adverse employment actions against employees based solely on the employee’s status as a legal medical marijuana user, and employers cannot refuse to hire, discharge or otherwise discriminate against a medical marijuana-using employee in any terms or conditions of employment. As originally enacted, the act expressly stated that employers were not required by to accommodate the medical use of marijuana in the workplace. This language was stricken by the amendment.

“”””As mentioned elsewhere in November 2020, New Jersey voters approved a referendum legalizing the recreational use of cannabis by adults. In February 2021, Governor Murphy signed legislation which will become operative by August 2021 and will impose additional burdens on employers related to employees and applicants who use cannabis.

Employers may continue to maintain drug-free workplaces, including prohibiting the possession and consumption of cannabis as well as intoxication during work hours.

b. The Need to Accommodate and The Interactive Process

Employers are required to make reasonable accommodations for disabled individuals to enable them to perform the duties of a job for which they are otherwise qualified. Employers must engage in an “interactive process” in order to accommodate an employee’s disability. In *Jones v. Aluminum Shapes Inc.*, 772 A.2d 34, 339 N.J. Super. 412 (App. Div. 2001), the New Jersey Appellate Division held, for the first time, that the “interactive process” requirement applies to a handicap discrimination under the NJLAD. In *Tynan v. Vicinage 13*, 798 A.2d 648, 351 N.J. Super. 385 (App. Div. 2002), the court held that the “interactive process” arises once the employer is on notice that the employee is seeking assistance, even in the absence of a formal request for accommodation, and requires a good faith effort on the part of the employer.

This process must identify the potential reasonable accommodations that could be adopted to overcome the employee’s precise limitations resulting from the disability. Once a handicapped employee has requested assistance, it is the employer who must make the reasonable effort to determine the appropriate accommodation.

To show that an employer failed to participate in the interactive process, a disabled employee must demonstrate: (1) the employer knew about the employee’s disability; (2) the employee requested accommodations or assistance for her disability; (3) the employer did not make a good faith effort to assist the employee in seeking accommodations; and (4) the employee could have been reasonably accommodated but for the employer’s lack of good faith. *Tynan*, 798 A.2d 648 (citations omitted).

Clarifying the scope of the duty to accommodate, the New Jersey Supreme Court held that an employee had to possess the bona fide occupational qualifications for the job he sought to occupy in order to trigger an employer’s obligation to reasonably accommodate the employee to the extent required by the LAD. *Raspa v. Office of Sheriff of County of Gloucester*, 924 A.2d 435, 191 N.J. 323 (2007). The Court also held that an employer could reasonably limit light duty assignments to those employees whose disabilities were temporary, and the availability of light duty assignments for temporary disabled employees did not give rise to any additional duty on the part of the employer to assign a permanently disabled employee indefinitely to an otherwise restricted light duty assignment. *Id.*

Employers are also not required to hire or retain an individual who is not qualified to perform a job. N.J. Stat. Ann. § 10:5-4.1. Therefore, if the nature and extent of the disability reasonably precludes or impedes the adequate and safe performance of the essential functions of the job, an employer does not violate the NJLAD by taking an adverse action with respect to his or her employment. *Leshner v. McCollister’s Transp. Sys., Inc.*, 113 F. Supp. 2d 689, 691-92 (D.N.J. 2002) (if an employee cannot perform a job unless essential job functions are eliminated, he is not “otherwise qualified”); *Sturm v. UAL Corp.*, Civil Action No. 98-264, 2000 U.S. Dist. LEXIS 13331, \*\*50-51 (D.N.J. Sept. 5, 2000).

### c. Prima Facie Case

As part of the prima facie case to prove disability discrimination, the employee must show that he or she suffered an adverse employment action because of the disability. *Bosshard*, 783 A.2d at 739. However, the New Jersey Appellate Division held that an employee cannot rely on the employer’s alleged failure to accommodate the disability as an adverse employment action to meet the prima facie burden, but must allege an additional failure to accommodate. *Victor v. State*, 952 A.2d 493, 401 N.J. Super. 596

(App. Div. 2008), cert. granted, 973 A.2d 946, 199 N.J. 542 (2009). The New Jersey Supreme Court declined to address this issue. 203 N.J. 383 (2010).

#### 8. “English-Only” Rule in the Workplace

Discrimination on the basis of national origin may be based on an “English-only” rule in the workplace. In *Rosario v. Cacace*, 767 A.2d 1023, 337 N.J. Super. 578 (App. Div. 2001), plaintiff Gilsela Rosario, a bilingual office manager in a urologist’s office, brought a complaint against her employer, Cacace. Rosario had been hired, in part, because she spoke fluent Spanish and most of Cacace’s patients were Spanish-speaking. Rosario was repeatedly told not to speak Spanish to her co-workers, however, and, on occasion, not to speak Spanish to patients. She was told, “[t]his is America, you got to speak English, you don’t have to be talking in Spanish,” and was threatened with losing her job if she did not stop speaking Spanish. *Rosario*, 767 A.2d at 1026.

The Appellate Division affirmed summary judgment for the defendants, stating:

A plaintiff who could prove that an English-only or English-mainly rule was used as a surrogate for discrimination on the basis of national origin, ancestry, or any other prohibited grounds, would qualify for relief under the NJLAD. But, evaluating the facts as a whole, this plaintiff has made no such showing.

\* \* \*

We view the matter as simply involving a two-part employer’s rule regarding the use of languages in the workplace, one element addressing the use of Spanish with patients who required such assistance and the other mandating the use of English in all other circumstances including communication among co-workers.

Rosario, 767 A.2d at 585-86.

#### 9. Other Types of Discrimination

As discussed above, the NJLAD prohibits a variety of other forms of discrimination, including:

- Religion - The NJLAD, which specifically refers to discrimination on the basis of creed, prohibits religious discrimination. *Shuchter v. Division On Civil Rights*, 285 A.2d 42, 4243, 117 N.J. Super. 405, 406-07 (App. Div. 1971) (NJLAD definition of creed includes an individual’s religious, as opposed to political, beliefs or principles).

An employer may rebut an employee’s inference of religious discrimination with evidence of risks to safety and security. *Tisby v. Camden County Corr. Facility*, \_\_\_ N.J. Super. \_\_\_, 2017 WL 192887 (App. Div. Jan. 18, 2017). In *Tisby*, the plaintiff was a former corrections officer for Defendant Camden County in 2002. In 2015, she reported to work wearing, for the first time, a traditional Muslim khimar. The plaintiff’s supervisor informed her that she needed to comply with the prison’s uniform policy and remove the garment. The plaintiff refused numerous times, and each time was sent home with disciplinary charges. She requested an accommodation under Title VII and the NJLAD, but was refused. The defendant

permitted her to return to work without the khimar, but she refused and, as a result, was terminated. The Appellate Division affirmed the dismissal of the plaintiff's complaint alleging violations of the NJLAD on the basis of religious discrimination. The court found that the defendant rebutted the plaintiff's inference of discrimination with evidence of risks to safety, security, and maintaining orderly operations of the prison.

An employee's claim of religious discrimination based on lack of non-religious exemption to a vaccination policy was held not to be cognizable under the NJLAD. *Brown v. Our Lady of Lourdes Med. Ctr., Inc.*, No. A-4594-14T2, 2016 WL 5759654 (App. Div. Oct. 3, 2016). The Appellate Division reasoned that in such a case, the plaintiff failed to allege that she was a member of a protected class or that adverse employment action was taken against her. *Id.* Without these two elements, the plaintiff could not state a prima facie case under the NJLAD.

- Race and National Origin - The NJLAD makes it unlawful for an employer to discriminate on the basis of race or national origin. New Jersey courts have adopted the Title VII burden of proof standard for race and national origin cases filed under the NJLAD. *See Silvestre v. Bell Atl. Corp.*, 973 F. Supp. 475, 481 (D.N.J. 1997), aff'd without opinion, 156 F.3d 1225 (3d Cir. 1998); *O'Lone v. New Jersey Dep't of Corr.*, 712 A.2d 1177, 1179, 313 N.J. Super. 249, 254 (App. Div. 1998). Significantly, although the NJLAD prohibits "reverse" race discrimination, a plaintiff bringing a claim of reverse race discrimination must establish that the defendant is the "unusual employer who discriminates against the majority." *Oakley v. Wiannecki*, 784 A.2d 727, 731, 345 N.J. Super. 194, 201 (App. Div. 2001).

For purposes of the NJLAD's prohibition on race discrimination, the statute now defines race to include "traits historically associated with race, including, but not limited to, hair texture, hair type, and protective hairstyles." N.J.S.A. 10:5-5(vv). The statute further defines protective hairstyles to include "hairstyles as braids, locks, and twists." N.J.S.A. 10:5-5(ww). The examples given in both definitions are illustrative and non-exhaustive.

- Ancestry - Employers are also from prohibited discriminating against employees on the basis of ancestry. *Whateley v. Leonia Bd. of Educ.*, 358 A.2d 826, 827-28, 141 N.J. Super. 476, 478-80 (Ch. Div. 1976). New Jersey courts have found that ancestry under the NJLAD cannot be defined as a mere genealogical relationship, but rather is more broadly defined as a "racial, religious, ethnic or national ancestry shared by numerically significant segments of the population." *Id.* at 480.

Marital Status - The NJLAD prohibits discrimination on the basis of marital status. *See Slohoda v. United Parcel Service, Inc.*, 504 A.2d 53, 207 N.J. Super. 145 (App. Div.), cert. denied, 104 N.J. 400, 517 A.2d 403, (1986). The New Jersey Supreme Court has held that marital status discrimination covers employees separated, divorcing, or divorced. *See Smith v. Millville Rescue Squad*, 225 N.J. 373 (2016). In *Smith*, the plaintiff engaged in an extra-marital affair with a coworker prior to leaving his wife. The plaintiff's wife was also an employee at the time, and informed the defendant of the affair. *Id.* The plaintiff alleged that the defendant said he "would be terminated because he and his wife were going to go through an ugly divorce." *Id.* The defendant gave him the option to resign, after the governing board voted to terminate him. When he refused, he was officially discharged. *Id.* The plaintiff filed suit under the NJLAD, claiming he was discriminated against on the basis of marital status and sex. The Supreme Court held that the defendant's alleged statements, if true, would give rise to an inference of discrimination. *Id.*

- Atypical Hereditary Cellular or Blood Trait - Employers cannot discriminate against individuals on the basis of atypical hereditary cellular or blood trait with respect to any terms or conditions of employment. N.J. Stat. Ann. § 10:5-12(a).
- Service in Armed forces - The NJLAD prohibits discrimination on the basis of an employee's liability for service in the U.S. Armed Forces. N.J. Stat. Ann. § 10:5-5(g).
- Sexual Orientation - In 1992 the NJLAD was amended to prohibit discrimination on the basis of sexual orientation discrimination.
- Domestic Partnership Status - The New Jersey Domestic Partnership Act, effective July 2004, amended the NJLAD to include "domestic partner" as a protected status. N.J. Stat. Ann. § 10:5-12(a). Additionally, the NJLAD recognized civil unions as of February 2007, in compliance with the New Jersey Supreme Court's constitutional mandate set forth in the landmark decision *Lewis v. Harris*, 908 A.2d 196, 188 N.J. 415 (2006).
- Gender Identity or Expression - As of June 2007, the NJLAD was amended to prohibit discrimination on the basis of gender identity or expression. See, *Enriquez v. West Jersey Health Systems*, 777 A.2d 365, 342 N.J. Super. 501 (App. Div. 2001), cert. denied, 170 N.J. 211 (2001).
- Genetic Information - The NJLAD was amended by the Genetic Privacy Act, which makes it unlawful for an employer to discriminate on the basis of genetic information, and/or to base employment decisions on an applicant or employee's refusal to submit to genetic testing or make such genetic test results available to the employer. N.J. Stat. Ann. §§ 10:5-43 et. seq.
- Salary History- Effective January 1, 2020, employers in New Jersey may not inquire into an applicant's salary history, including prior wages, salary, or benefits and may not screen applicants based on salary history. Violation of the prohibition may result in civil liability, including per-violation penalties of up to \$10,000. There are several exceptions that apply, including that an employer may: (i) verify and consider salary history that is voluntarily disclosed, without prompting or coercion; (ii) verify salary history after making an offer that includes compensation details; (iii) consider salary history for internal promotions and transfers; (iv) consider salary history of an applicant known to the employer due to the applicant's prior employment with the employer. NJSA 10:5-12.12; NJSA 34:6B-20.

D. Retaliation Under the NJLAD

The NJLAD prohibits employers from unlawfully taking reprisals against any individual that (1) opposed any practices or acts proscribed by the NJLAD; or (2) filed or intended to file a complaint, testify, or assist in any proceeding under the NJLAD. N.J. Stat. Ann. § 10:5-12(d). However, the NJLAD is intended as a shield to protect employees from the wrongful acts of their employers, and not as a sword to be wielded by a savvy employee against his employer. *Carmona v. Resorts Int'l Hotel, Inc.*, 189 N.J. 354, 373, 915 A.2d 518, 530 (2007). Although the NJLAD protects employee that in good faith complaint about an activity that ultimately is not prohibited by the NJLAD, an unreasonable, frivolous, bad-faith, or unfounded complaint cannot satisfy the statutory prerequisite necessary to establish liability for retaliation under the LAD. Id.

A prima facie case of retaliation requires the plaintiff to prove that: (1) the individual was engaged in protected activity that was known by the alleged retaliator; (2) the individual was subjected to an adverse employment decision as a result; and (3) a causal connection existed between the protected activity and the retaliation. *Abramson v. William Paterson Coll. of N.J.*, 260 F.3d 265, 286 (3d Cir. 2001). The burden then shifts to the employer to provide a legitimate reason for the decision and then back to the plaintiff to show that the reason articulated by the employer was a pretext for a retaliatory motive.

The New Jersey Supreme Court issued a decision in *Battaglia v. United Parcel Service, Inc.*, 214 N.J. 518; 70 A.3d 602 (2013) providing guidance regarding the standard for a retaliation claim under NJLAD. The Court held that for purposes of an NJLAD retaliation claim, a plaintiff need only demonstrate a good faith belief that the complained-of conduct violates the LAD, and need not identify any actual victim of discrimination. Accordingly, the court effectively lowered the standard, finding that discrimination against an identifiable victim is not necessary to establish a retaliation claim.

On August 28, 2013, an amendment to the NJLAD was passed adding a new non-retaliation pay equity provision, which prohibits retaliation against any employee who requests from a current or former co-worker information regarding compensation, benefits or occupational category or the gender, race, ethnicity, military status or national origin of any employee or former employee, if the purpose of the request is to assist in investigating or taking legal action regarding a potential discriminatory pay practice occurring in the workplace. N.J. Stat. Ann. § 10:5-12(r). The amendment clarifies that an employer is not required to release protected information in response to an employee's request, but only prohibits reprisals against any employee who makes such a request.

#### E. Administrative Requirements/Statute of Limitations

In the seminal case *Montells v. Haynes*, 627 A.2d 654, 133 N.J. 282 (1993), the New Jersey Supreme Court held that claims arising under the NJLAD are subject to the two-year statute of limitations for personal injury claims, rather than the general six-year statute of limitations. The court also held that the new statute of limitations would only apply to cases whose operative facts arose after the *Montells* decision. Id.

A few years after the *Montells* decision, the New Jersey Supreme Court decided which statute of limitations would apply to NJLAD claims based on claims whose operative facts occur both before and after the *Montells* determination. In *Ali v. Rutgers*, 765 A.2d 714, 166 N.J. 280 (2000), the employee filed a breach of contract and race discrimination suit against Rutgers University. Rutgers moved for summary judgment. The court granted the defendant's motion on the ground that both claims were barred by the two-year statute of limitations. The plaintiff appealed. The court held that because plaintiff, along with other litigants, relied on the holding of *Montells*, the two-year statute of limitations should not apply because some of the operative facts occurred prior to the decision. The court also held that for NJLAD claims accruing after the date of *Montells*, the limitations period is two years from the accrual date. The court reasoned that its holding would avoid any unfairness associated with litigants having to guess what the proper statute of limitations period is. *Ali*, 765 A.2d at 717-18.



The New Jersey Supreme Court held that each new payment of discriminatory wages constitutes a discrete action that is remediable under the NJLAD and may be challenged within the applicable two-year statute of limitations. *Alexander v. Seton Hall Univ.*, 8 A.3d 198, 204 N.J. 2d. (2010). The two-year statute of limitations, according to the Court, applies to such violations and serves to limit the back period for which a plaintiff may seek recovery.

On June 19, 2014, the Appellate Division of the Superior Court of New Jersey on June 19, 2014, in *Rodriguez v. Raymours Furniture Company, Inc.* upheld the trial court's granting of summary judgment for the defendant based on a provision in an employment application that shortened the statute of limitations for any employment related claims from two years to six months. 93 A.3d 760, 436 N.J. Super. 305 (App. Div. 2014). In *Rodriguez*, the plaintiff, who was a furniture customer delivery assistant, was barred from pursuing NJ LAD and worker's compensation claims, despite the fact that he filed his lawsuit approximately nine months after his termination. In reaching its decision, the Appellate Division rejected a variety of arguments by the plaintiff that the agreement was unenforceable, including that the application was a contract of adhesion and was unconscionable.

#### F. Remedies Available

A successful claimant may receive various remedies, including "economic loss; time loss; [and] physical and emotional stress." N.J. Stat. Ann. § 10:5-3. For instance, a successful plaintiff is entitled to an award of equitable remedies, such as reinstatement to his or her former position where feasible. N.J. Stat. Ann. § 10:5-17; *Granzel v. City of Plainfield*, 652 A.2d 227, 279 N.J. Super. 104, 108 (App. Div.), cert. granted and remanded, 664 A.2d 110, 142 N.J. 513, 142 N.J. 513 (1995). A prevailing plaintiff is also entitled to an award of reasonable attorneys' fees under the NJLAD. N.J. Stat. Ann. § 10:5-27.1; see *Michael v. Robert Wood Johnson Univ. Hosp.*, 940 A.2d 310, 313-314, 398 N.J. Super. 159, 165-66 (articulating standards to determine whether a prevailing defendant is entitled to attorneys' fees), cert. denied, 195 N.J. 420 (2008).

In addition, punitive damages are available in discrimination cases, but only in certain circumstances. In *Cavuoti v. N.J. Transit Corp.*, 735 A.2d 548, 161 N.J. 107 (1999), the plaintiff, Joseph Cavuoti, worked for the New Jersey Transit Corporation (NJT). Cavuoti commenced a suit against NJT, alleging that he was denied several promotions, which were awarded to younger candidates, in violation of the NJLAD. After trial, a jury found in favor of Cavuoti and awarded him over \$1,000,000.00 in punitive damages. The Appellate Division affirmed the verdict, but remanded the punitive damages issue for a new trial.

On appeal, the New Jersey Supreme Court vacated the punitive damages award and ordered a further determination of whether the individual defendants were "upper management" for purposes of assessing employer liability for punitive damages. Citing *Lehmann*, 626 A.2d 445, the court first addressed employer liability for punitive damages in NJLAD cases:

[A]n employer should be liable for punitive damages under the NJLAD only in the event of actual participation by upper management or willful indifference . . . . *Lehmann* did not set forth the precise definition of upper management for the purposes of assessing punitive damages against the defendant employer. *Lehmann* held, however, that

“[c]oncerning punitive damages . . . a greater threshold than mere negligence should be applied to measure employer liability.”

*Id.* at 554.

The New Jersey Supreme Court next held that in determining whether or not an employee is a member of “upper management” for purposes of imputing punitive damages to the employer, the individuals’ authority and role are dispositive, not their title. The court held that “upper management” consists of those employees who:

[are] responsible to formulate the organization’s anti-discrimination policies, provide compliance programs and insist on performance (its governing body, its executive officers), and those to whom the organization has delegated the responsibility to execute the employer’s policies in the workplace, who set the atmosphere or control the day-to-day operations of the unit (such as heads of departments, regional managers, or compliance officers).

*Cavuoti*, 735 A.2d at 561.

In *Tarr v. Bob Ciasulli’s Mack Auto Mall, Inc.*, 943 A.2d 866, 194 N.J. 212 (2008), the New Jersey Supreme Court held that an award of punitive damages against an employer under the NJLAD should not be increased to enhance the general deterrence effect on other employers. The Court also held that in determining the amount of punitive damages, a jury may consider both the employer’s financial condition at the time of the wrongdoing as well as its financial worth at the time of judgment. *Id.* at 872.

An award of punitive damages can be limited by after-acquired evidence. *Cicchetti*, 194 N.J. at 587-591. *Cicchetti* held that a sheriff’s officer who failed to disclose an expunged conviction on his job application was not barred from pursuing claims for hostile work environment and disability based discharge under the Act. However, after-acquired evidence of his resume fraud could be used to limit or potentially eliminate economic damages, including claims for back pay and front pay, if the employer could demonstrate that it would have terminated the employee upon discovery of the concealed information. *Id.* at 589-90 (discussing *McKennon v. Nashville Banner Publ’g Co.*, 513 U.S. 352 (1995)).

The New Jersey Supreme Court held in *Carmona v. Resorts International Hotel*, 915 A.2d 518 (2007), that a retaliation claim under the NJLAD must, as part of the prima facie case, prove that a complaint was filed reasonably and in good faith. In addition, the Court held that, within the limits of New Jersey’s evidentiary rules, an employer’s investigative report concerning a terminated employee’s statutory claim(s) can be admitted into evidence if the report is relevant and is offered to show the decision-maker’s motive in taking adverse action the plaintiff. *Id.*

#### G. Pre-Dispute Arbitration of Discrimination, Retaliation, or Harassment Claims

On March 18, 2019, New Jersey enacted a law making any provision in any employment contract other than a collective bargaining agreement which “waives any substantive or procedural right or remedy” relating to a claim of discrimination, retaliation or harassment against public policy and

unenforceable. N.J. Stat. § 10:5-12.7. The law would thus prohibit the pre-dispute arbitration agreements contained in many employment agreements. However, the Federal Arbitration Act preempts any state law “discriminating on its face against arbitration” or that covertly accomplishes the same objective by disfavoring contracts that...have the defining features of arbitration agreements.” *Kindred Nursing Centers Ltd. P’Ship v. Clark*, 137 S. Ct. 1421 (2017); see also 9 U.S.C. § 2. At least two trial courts in New Jersey—one federal and one state—have held New Jersey’s law banning pre-dispute employment agreements to be preempted by the Federal Arbitration Act. See *N.J. Civ. Justice Inst. v. Grewal*, No. 19-cv-17518, 2021 U.S. Dist. LEXIS 547437 (D.N.J. Mar. 25, 2021); *Janco v. Bay Ridge Auto. Mgmt. Corp.*, No. MON-L-1967-20 (N.J. Super. Ct. Law. Div. Jan. 22, 2021).

### XIII. STATE LEAVE LAWS

#### A. Sick Leave

##### 1. Accrual of Sick Leave

Pursuant to New Jersey’s Earned Sick Leave Law (“ESLL”), beginning October 29, 2018, all private employers in New Jersey, regardless of size, must allow employees to accrue paid sick leave. N.J. Stat. Ann. § 34:11D-1 et. seq. Employees accrue one hour of sick leave for every 30 hours worked, up to 40 hours of sick leave per year. *Id.* § 34:11D-2(a). Employers may also elect to grant employees 40 hours of sick leave on the first day of each benefit year. *Id.* Employees may begin to use accrued sick leave beginning 120 days after beginning employment, unless the employer agrees to allow the employee to use accrued sick leave earlier. *Id.* Employees must be allowed to carry over any unused sick leave, up to 40 hours, to the next benefit year. However, employers are required only to let an employee use up to 40 hours of earned sick leave per benefit year. An employer may choose, but is not required, to pay an employee for unused earned sick leave at the end of the benefit year.

Employers with PTO policies that allow employees paid time off for vacation, sick, and personal days may satisfy the ESLL’s requirements, so long as the PTO policy meets or exceeds the requirements of the ESLL, including with respect to accrual, use, payment, number of days, and carry-over of paid time off. Notably, pursuant to the final regulations issued in January 2020, an employee must be able to use all of the time included in a PTO bank for sick leave purposes and that the PTO program must meet or exceed the sick leave law’s requirements including but not limited to, accrual rate, use, payment, and payout and carry-over. N.J.A.C. § 12:69-1.1.

The ESLL does not apply to construction-industry employees who are subject to a collective bargaining agreement, certain per diem health care employees, or public employees granted sick leave through other laws, rules, or regulations. N.J. Stat. Ann. § 34:11D-1(1).

##### 2. Use of Sick Leave

Employees must be allowed to use accrued sick leave for any of the following purposes:

- a. the diagnosis, care, or treatment of, or recovery from, the employee's own mental or physical illness, injury, or other adverse health condition, or to obtain preventative medical care;
- b. to aid or care for a family member requiring such diagnosis, care, treatment, recovery, or preventative medical care;
- c. to address circumstances arising from the employee or the employee's family member being the victim of sexual or domestic violence, including seeking medical attention, victim's services, counseling, or relocation, or to participate in legal proceedings;
- d. to attend school related conferences by request of the school of the employee's child;
- e. for closures of the employee's workplace or child's school by public health order, or if the employee or member of the employee's family has been quarantined by order of a public health official;
- f. the declaration of a state of emergency by the Governor or the issuance by a health care provider or the Commissioner of Health or other public health authority of a determination that the presence in the community of the employee, or a member of the employee's family in need of care by the employee, would jeopardize the health of others; or
- g. during a state of emergency declared by the Governor, or upon the recommendation, direction, or order of a healthcare provider or the Commissioner of Health or other authorized public official, the employee undergoes isolation or quarantine, or cares for a family member in quarantine, as a result of suspected exposure to a communicable disease and a finder by the provider or authority that the presence in the community of the employee or family member would jeopardize the health of others.

N.J. Stat. Ann. § 34:11D-3(a).

### 3. Notice and Documentation

The employer may require the employee to provide up to seven days' advance notice of any foreseeable use of sick leave. If leave is not foreseeable, the employee must notify their employer as soon as is practicable. N.J. Stat. Ann. § 34:11D-3(b).

The employer may require documentation for sick leave taken by an employee under two circumstances: First, the employer may require documentation where the employee uses sick leave for three or more consecutive days. Second, the employer may designate in advance certain days of anticipated increased productivity on which employees may not use foreseeable sick leave, and the employer may require documentation if an employee takes non-foreseeable sick leave on those days. Id.

### B. Jury/Witness Duty

New Jersey employers may not take adverse action against employees for attending court for jury service. N.J. Stat. Ann. § 2B:20-17. If the employer either threatens, coerces, or penalizes an employee for so doing, the employee may bring a civil action for economic damages suffered and for an order requiring reinstatement. *Id.* The statute of limitations begins on the date of the violation or the completion of jury service, whichever is later, and runs for 90 days thereafter. *Id.* Any person employed full-time by any agency, independent authority, instrumentality or entity of the State or of any political subdivision of the State must be excused from employment at all times the person is required to be present for jury service, and is entitled to receive from the employer the person's usual compensation for each day the person is present for jury service in lieu of any payment for juror service. N.J. Stat. Ann. § 2B:20-16. A court will not hear a case brought under this statute if it is untimely. See *Ashton v. AT&T Corp.*, No. 03-CV-3158 (DMC), 2005 U.S. Dist. LEXIS 21419 (D.N.J. Sept. 22, 2005). Public employers are required to provide paid leave to employees attending jury duty. N.J. Stat. Ann. § 2B: 20-16.

C. Voting

There are no New Jersey statutes or published opinions addressing voting leave in the employment context. However, employers are prohibited from threatening or causing injury to any employee to induce the employee to vote or refrain from voting for any particular candidate or because the employee voted for or refrained from voting for any particular candidate at any election. N.J. Stat. Ann. § 19:34-27 et. seq.

D. Family/Medical Leave

Family leave is governed by the New Jersey Family Leave Act ("FLA"), N.J. Stat. Ann. § 34:11B-1 et. seq., but provisions regarding medical benefits during leave are preempted by ERISA. The FLA requires both public and private employers with 30 or more U.S. employees to provide covered employees with leave. By amendment effective June 30, 2019, the previous threshold of 50 employees was reduced to 30 employees.

A covered employee is defined as an employee who has worked for at least 1,000 hours during a twelve month period. The FLA allows an employee to take to 12 weeks of leave in any 24 month period for:

- \* the birth (including a child born by a valid written agreement for gestational carrier), adoption of a child or placement into foster care;
- \* caring for a family member with a serious health condition; or
- \* in the event of a state of emergency declared by the Governor, or when indicated to be needed by the Commissioner of Health or other public health authority, an epidemic of a communicable disease, a known or suspected exposure to the communicable disease, or efforts to prevent spread of a communicable disease, which:
  - requires in-home care or treatment of a child due to the closure of the school or place of care of the child of the employee, by order of a public official due to the epidemic or other public health emergency;

- prompts the issuance by a public health authority of a determination, including by mandatory quarantine, requiring or imposing responsive or prophylactic measures as a result of illness caused by an epidemic of a communicable disease or known or suspected exposure to the communicable disease because the presence in the community of a family member in need of care by the employee, would jeopardize the health of others; or

- results in the recommendation of a health care provider or public health authority that a family member in need of care by the employee voluntarily undergo a self-quarantine as a result of a suspected exposure to a communicable disease because the presence in the community of that family member in need of care by the employee would jeopardize the health of others.

The 24 month period is calculated using one of the four approved methods under the FMLA. A “family member” is broadly defined to include the employee’s parent (including stepparent or parent-in-law), child, spouse, domestic partner or partner in a civil union, sibling, grandparent, grandchild, any other individual related by blood to the employee, or any other individual that the employee has a relationship with that is equivalent to a family relationship.

Unlike federal law, the FLA does not provide for leave for the employee’s own serious health condition. N.J. Stat. Ann. § 34:11B-3(1). It also prohibits retaliation in connection with exercising rights under the FLA or opposing unlawful practices under the FLA.

The employee is required to give at least 30 days’ notice for leave to care for a family member with a serious health condition, unless an emergency exists. N.J.A.C. § 13:14-1.4 (a); N.J. Stat. Ann. § 34:11B-4(f). If the employee requires intermittent leave to care for a family member with a serious health condition, at least 15 days’ notice must be provided. If the employee requires intermittent leave, the employee may be temporarily transferred to a different position that better accommodates intermittent leave, if the position provides equivalent pay and benefits. N.J. Stat. Ann. § 34:11B-4(a); N.J.A.C. §13:14-1.5 (d)(4). However, if the employer wants to run FMLA and FLA concurrently, it must follow the FMLA rules regarding reassignment, so often employers do not take advantage of the NJ regulations in this regard. Leave can be denied if the employee is among the highest paid 5% of the workforce or one of the seven highest paid employees, and if the denial is necessary to prevent “substantial and grievous economic injury to the employer’s operations.” N.J. Stat. Ann. § 34:11B-4(h).

The FLA generally guarantees reinstatement to the same or similar position, in salary, seniority and other terms and conditions of employment. A true RIF or other layoff program is a legitimate reason to deny reinstatement. Employers are required to display a poster and provide employees with information regarding the FLA in a handout or within a handbook. There is a \$10,000 punitive damages limit for claims under the FLA. N.J. Stat. Ann. § 34:11B-7, 11.

While the FLA only provides for unpaid leave, the New Jersey Paid Family Leave Insurance (“FLI”) provides all workers with up to 12 weeks of paid leave insurance benefits under the State’s Temporary Disability Benefits Law. N.J. Stat. Ann. § 43:21-25 et. seq. The FLI is therefore totally funded by employee payroll deductions. The benefit applies to all workers taking time off to take care of a newborn, a newly adopted child (both within the first 12 months), or a family member, defined as under the FLA, with a serious health condition. The FLI does not contain a 30 employee threshold. Employees who have worked for at least 20 weeks in covered NJ employment, and have earned approximately 1,000 times the

minimum wage in the past year are entitled to collect these benefits. Employees are also required to provide notice to employers of their need for the leave. The FLI benefit runs concurrently with the FLA, but does not reduce rights under the FLA, and in fact, employees can collect the insurance payments on an intermittent basis, consistent with the leave periods under the FLA. There is no job protection associated with use of FLI. Id.

E. Day of Rest Statutes

All state statutory provisions that prohibited conducting business on Sunday in New Jersey have been repealed as of May 3, 1999. Bergen County, New Jersey is the only county in New Jersey that still has county laws prohibiting work on Sunday.

F. Military Leave

Protections for public employees taking military leave in New Jersey are contained in N.J. Stat. Ann. § 38:23-1 et. seq. and protections for private employees are contained in N.J. Stat. Ann. § 38:23C-20(a). Thus, employers must restore to their employment veterans who have left their jobs to perform military service if they make application for reinstatement within 90 days of release and valid certificate, and are still qualified to perform their job. If the employer cannot restore the position or an equivalent position because circumstances have changed making it impossible or unreasonable to do so, they must restore the individual to any available position for which they are qualified and to which the individual requests to be assigned. No person who takes leave in excess of three months in a four year period is protected. This protection applies to members of the National Guard, naval militia, or reserve component of the Armed Forces, or to employees required to join such armed forces through a system of national selective service. Id.

G. Leave for Victims of Domestic or Sexual Violence

On July 18, 2013, New Jersey enacted the Security and Financial Empowerment Act (“SAFE”), which is expected to take effect on October 1, 2013. N.J. Stat. Ann. § 2C:25-17 et. seq. SAFE applies to employers who employed 25 or more employees for at least 20 work weeks during the current or immediately preceding year. SAFE requires covered employers to grant 20 days of unpaid leave to employees who are either victims of a domestic or sexually violent incident themselves, or whose child, parent, spouse or domestic or civil union partner is so victimized to benefit from SAFE, an employee must have worked for his or her employer for a minimum of 12 months and for a minimum of 1,000 hours during that 12-month period.

#### XIV. STATE WAGE AND HOUR LAWS

The New Jersey State Wage and Hour Law, N.J. Stat. Ann. § 34:11-56a et. seq. governs minimum wage rates, overtime, wages for minors, and sets forth employer recordkeeping and posting requirements.

A. Current Minimum Wage in State

The current minimum wage for most employees is \$12.00 per hour, with exceptions for outside salespeople, car salesmen, part time child care employees engaged in the care and tending of children in

the home of the employer, minors not possessing a special vocational school graduate permit, and employees at summer camps, conferences, and retreats operated by any nonprofit or religious organization or association, or persons employed in a volunteer capacity and receiving only incidental benefits at a county or other agricultural fair by a nonprofit or religious corporation or a nonprofit or religious association which conducts or participates in that fair. N.J. Stat. § 34:11-56a4, 34:11-56a4.1.

Subsequent increases to the minimum wage rate are set according to the following schedule: effective January 1, 2022, \$13.00 per hour; effective January 1, 2023, \$14.00 per hour; and effective January 1, 2024, \$15.00 per hour.

For employers with fewer than six employees and employers of non-tipped seasonal employees, the minimum wage rate is \$11.10 per hour. The minimum wage rate is set to increase according to the following schedule: effective January 1, 2022, \$11.90 per hour; effective January 1, 2023, \$12.70 per hour; effective January 1, 2024, \$13.50 per hour; effective January 1, 2025, \$14.30 per hour; and effective January 1, 2026, \$15.00 per hour.

**B. Deductions from Pay**

Wage deductions are prohibited, unless certain defined exceptions exist. N.J. Stat. Ann. § 34:11-4.4.

**C. Overtime Rules**

Hours worked beyond 40 in a workweek are considered overtime, which is compensated at one and one-half times the employee's regular hourly wage. *Id.* at § 34:11-56a4. In 2011, New Jersey amended its wage and hour regulations to adopt the federal regulations with respect to exemptions from overtime requirements for executive, administrative, professional, computer and outside sales employees. The amendment inadvertently resulted in the omission of the exemption commonly referred to as the "inside sales exemption." New Jersey corrected this omission in February 2012, and restored the inside sales exemption, though there are still differences between the New Jersey and federal versions of this exemption.

New Jersey has similar record keeping requirements to those required by FLSA; records must be kept for six years at the place of central employment. Wages for non-exempt employees must be paid at least twice per month and payment must be made for hours worked no later than ten days following the conclusion of a pay period. N.J. Stat. Ann. § 34:11-4.2. An employer may establish less frequent paydays for bona fide executive, supervisory and other special classifications of employees, provided that the employee is paid at least once each calendar month on a regularly established schedule. N.J. Stat. Ann. § 34:11-4.2. Employers are not required to provide paid vacation or holidays. If these benefits are provided, they must be administered uniformly in accordance with the established policy or employment agreement. Paid sick leave must be provided in accordance with the New Jersey Earned Sick Leave Law. N.J. Stat. Ann. § 34:11D-1 *et. seq.*

**D. Time for Payment Upon Termination**



Upon termination or suspension of employment, the employer must pay the employee all wages due not later than the regular payday for the pay period during which the employee's termination, suspension or cessation of employment (whether temporary or permanent) took place. N.J. Stat. Ann. § 34:11-4.3. In the case of employees compensated in part or in full by an incentive system, employers must pay a reasonable approximation of all wages due, until the exact amounts due can be computed; provided, however, that when any employee is suspended as a result of a labor dispute and such labor dispute involves those employees who make up payrolls, the employer may have an additional 10 days in which to pay such wages. Id. Such payment may be made either through the regular pay channels or by mail if requested by the employee. Id.

#### E. Wage Theft Law

In August 2019, the Governor of New Jersey signed an expansive wage theft law which amended various state wage payment laws in several key respects, effective November 1, 2019. In sum, the act:

- \* expanded the statute of limitations from 2 to 6 years;
- \* provided liquidated damages of up to 200% of the wages owed for violations of the wage payment law, in addition to having to pay earned, unpaid wages;
- \* expanded the anti-retaliation provisions by making it a disorderly persons offense to take retaliatory action by discharging or otherwise discriminating against an employee for making a complaint, instituting an action or informing other employees about their rights concerning wages and hours of work;
- \* imposed fines and punishments, including a range of criminal penalties and fines depending on whether it is a first, second, third or subsequent violation and provided a broad definition of "employer" to include officers of a corporation and "any agents having the management of that corporation";
- \* created a new crime of "pattern of wage nonpayment" for a person convicted of violating certain provisions of the Criminal Justice Code and/or wage and hour laws on two or more occasions;
- \* expanded the circumstances under which organizations may be held liable as joint or successor employers; and
- \* imposed a new written notice obligation on employers.

#### F. Worker Misclassification

On January 14, 2015, in a case involving a certified question from a federal court, the New Jersey Supreme Court held "that the 'ABC' test derived from the New Jersey Unemployment Compensation Act, N.J.S.A. § 43:21-19(i)(6), governs whether [an individual] is an employee or independent contractor for purposes of resolving a wage-payment or wage-and-hour claim." *Hargrove v. Sleepy's, LLC*, 106 A.3d 449, 220 N.J. 289 (2015). Under the ABC test, a worker is considered an employee unless an employer can satisfy all three of these criteria: "(A) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact; (B) Such

service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and (C) Such individual is customarily engaged in an independently established trade, occupation, profession or business.” N.J. Stat. Ann. § 43:21-19(i)(6). “[T]he failure to satisfy any one of the three criteria results in an employment classification.” *Hargrove*, 106 A.3d at 459 (citing *Carpet Remnant Warehouse, Inc. v. N.J. Dep t of Labor*, 125 N.J. 567, 581 (1991)).

In January 2020, Governor Murphy signed a package of legislation to strengthen the rules against worker misclassification.

- Under A.B. 5839, the New Jersey Department of Labor and Workforce Development is authorized to assess fines against employers for misclassifying workers. Any employer or staffing agency that misclassifies workers may be liable for an administrative penalty of up to \$250 per employee for the first violation and up to \$1,000 per employee for subsequent violations. The amount of the penalty to be assessed will depend on such factors as the history of the prior violations, the severity of the violation, the size of the employer’s business and the good faith of the employer. In addition, an employer found to have misclassified a worker may have to pay a fine to the misclassified worker of up to 5% of their gross earnings over the previous year.
- Under A.B. 5843, employers are required to post a conspicuous notice regarding employee misclassification. The statute also prohibits employer retaliation against workers who make complaints and potential unlawful employee misclassifications.
- Under A.B. 5840, any person acting on behalf of an employer, including an owner, director, officer, or manager of the employer may be held liable as the employer.
- Under A.B. 5838, the State’s Commissioner of Labor and Workforce Development has the authority to issue a stop-work order against an employer, requiring cessation of all business operations at the specific place of business.

Other laws in New Jersey that regulate wages and hours are the Prevailing Wage Act, N.J. Stat. Ann. § 34:11-56.25 et. seq. (regulating wages for workers engaged in public works), the Equal Pay Act (EPA), N.J. Stat. Ann. § 34:11-56.1 et. seq. (discussed supra), and the Child Labor law, N.J. Stat. Ann. § 34:2-21.1 et. seq. (regulating wages of minors).

## **XV. MISCELLANEOUS STATE STATUTES REGULATING EMPLOYMENT PRACTICES**

### **A. Worker’s Compensation Act**

#### **1. General Provisions**

The New Jersey Worker’s Compensation Act (“WCA”) provides a comprehensive scheme for managing personal injury claims against employers and co-employees for workplace tortious injuries. By virtue of its breadth and scope, it “evinces a clear legislative intent to provide an expeditious and

relatively certain recovery to employees injured on the job regardless of the employee's contributory negligence or the absence of employer's negligence." *Cameron v. G & H Steel Serv., Inc.*, 494 F. Supp. 171, 174 (E.D.N.Y. 1980), citing *Schweizer v. Elox Div.*, 359 A.2d 857, 70 N.J. 280 (1976); *Thornton v. Chamberlain Mfg. Corp.*, 300 A.2d 146, 62 N.J. 235 (1973); *Danek v. Hommer*, 87 A.2d 5, 9 N.J. 56 (1952). However, to be entitled to worker's compensation an employee must be in the direct performance of work duties.

The nine articles in the WCA cover virtually every aspect of the management of workplace personal injury claims. For example, the WCA defines covered illnesses and injuries, establishes and computes payment schedules, establishes an adjudicative body for hearing claims and procedures therefore, provides for the discharge and assumption of an employer's obligation, and even requires employers to carry liability insurance against its obligations. See N.J. Stat. Ann. §§ 34:15-7 through 34:15-102. In exchange for the relative certainty and simplicity the WCA provides to employees, it relieves the employer from the uncertainties of exposure to common law liability in tort by making an employee's compensation recovery his sole and exclusive remedy. To effect this purpose, § 34:15-8 of the New Jersey Statutes Annotated provides that the availability of workers' compensation coverage results in:

a surrender by the parties thereto of their rights to any other method, form or amount of compensation or determination thereof than as provided in this article and an acceptance of all provisions of this article, and shall bind the employee . . . as well as the employer, and those conducting the employer's business . . . .

\* \* \*

If any injury or death is compensable under this article, a person shall not be liable to anyone at common law or otherwise on account of such injury or death for any act or omission occurring while such person was in the same employ as the person injured or killed, except for intentional wrong.

Id.

In short, the legislature intended to eliminate an employee's right to bring a common law action against either the employer, or a co-employee, in exchange for an employer's absolute liability for compensation in the event of injury arising out of and in the course of employment. *Wilson v. Faull*, 141 A.2d 768, 27 N.J. 105 (1958). The only exception to the WCA exclusive bar is when an employee can prove that her workplace injury resulted from "intentional wrong." For example, in *Laidlow v. Hariton Machinery Co., Inc.*, 790 A.2d 884, 170 N.J. 602 (2002), the New Jersey Supreme Court ruled that an employee could pursue a common law claim where the employee could show that his employer removed a safety device from a dangerous machine, knowing that the removal was substantially certain to cause injury to its workers and only replaced the device during inspections. See also *Crippen v. Cent. Jersey Concrete Pipe Co.*, 823 A.2d 789, 176 N.J. 397 (2003); *Mull v. Zeta Consumer Prods.*, 823 A.2d 782, 176 N.J. 385 (2003); *Kibler v. Roxbury Bd. of Educ.*, 919 A.2d 878, 392 N.J. Super. 45, 52-53 (App. Div. 2007) (finding this "exception applicable in only rare and extreme factual circumstances").

## 2. Emotional Distress Damages Under WCA

Claims for intentional infliction of emotional distress may be permitted under the WCA. To be successful, an employee must show that the actions were taken with the actual intent to harm or that the person taking the actions should have known that the harm would almost certainly result. See *Millson v. E.I. du Pont de Nemours & Co.*, 501 A.2d 505, 101 N.J. 161(1985).

In contrast, claims of negligent infliction of emotional distress are barred by the WCA. In *Ditzel v. Univ. of Med. & Dentistry*, 962 F. Supp. 595 (D.N.J. 1997), plaintiff Ditzel sued his former employer alleging that he was unlawfully harassed and discharged based on his race and medical condition and in retaliation for criticizing his former employer. Ditzel specifically asserted violations of the NJLAD and the ADA. Ditzel's complaint also contained causes of action for negligent infliction of emotional distress and intentional infliction of emotional distress. With respect to the negligent infliction of emotional distress claim, the court held that this claim was barred by the WCA and its protections. The court did not find that the WCA barred the intentional infliction of emotional distress claim; it did note that the burden of proving intentional infliction of emotional distress is onerous, especially in the employment context. Finding that Ditzel did not demonstrate that his employer's behavior was "so severe that no reasonable man could expect to endure it," his intentional infliction of emotional distress claim was dismissed. *Ditzel*, 962 F.Supp. at 608.

### 3. Retaliation

N.J. Stat. Ann. § 34:15-39.1 provides that no employee may be discharged or otherwise retaliated against for filing a workers' compensation claim. The remedies for violation of this provision are reinstatement and lost wages, and a defense is that the employee has ceased to be qualified for his position.

### 4. Enhanced Workers Compensation Coverage for Essential Workers Who Contract COVID-19

On September 16, 2020, New Jersey enacted a statute which expanded the number of employees eligible to collect workers' compensation benefits if they contract COVID-19. The law, retroactive to March 9, 2020, created a "rebuttable presumption" that a covered essential employee contracted COVID-19 at work. The burden of rebutting that presumption lies with the employer to prove that the essential worker was not exposed to the virus while at the workplace.

### B. Plant Closings – NJ WARN

In December, 2007, New Jersey became the 16<sup>th</sup> state to enact a plant closing law modeled after the Federal Work Adjustment and Retraining Notification Act ("WARN Act"), when it enacted the Millville Dallas Airmotive Plant Job Loss Notification Act ("NJ WARN"). See N.J. Stat. Ann. §§ 34:21-1 et. seq. NJ WARN requires an entity that employs 100 or more full-time employees to give notice 60 days in advance of a transfer of operations, plant closing or a mass layoff, as each of those terms are defined in the statute. Id. at § 34:21-2.

The notice requirements of NJ WARN are triggered if: (1) 50 or more full-time employees are terminated during any continuous period of not more than 30 days; (2) during any 90-day period, two or more groups of employees are terminated at a single establishment, when each group has less than 50

employees, but the combined groups exceed 50 employees. Id. Note, however, that an employer does not have to provide the notice required by the statute in the latter scenario if it can show that the cause for termination for each group is separate and distinct from the causes for termination of the other group or groups. Id.

If the notice requirements of NJ WARN are triggered, the employer must notify: each employee whose employment is being terminated; the Commissioner of Labor and Workforce Development; the chief elected official of the municipality where the business is located; and any collective bargaining units of employees at the business. Id. A sample notification can be found on the Department of Labor and Workforce Development's website:

<http://lwd.dol.state.nj.us/labor/wnjpin/employer/layoffs/RapidResponseTeam.html>.

Unlike the WARN Act, NJ WARN does not provide exceptions for any of the following circumstances: (1) a "faltering business;" (2) "unforeseen business circumstances;" or (3) the "sale of a business." Compare N.J. Stat. Ann. § 34:21-1 et. seq. with 29 U.S.C. § 2102 (b)(2)(A) and 20 C.F.R. § 639.9(a). Moreover, NJ WARN requires employers to provide notice concerning short term layoffs and transfer offers, even though such notice may not be required under the WARN Act. These and other differences in the statutes mean that compliance with WARN does not guarantee compliance with NJ WARN, a fact which employers must be aware of.

Failure by the employer to provide the required notice may subject the employer to financial penalties that include having to pay the employees one week's worth of severance pay for each full year of service accrued. See N.J. Stat. Ann. § 34:21-2.

In January 2020, New Jersey amended the state WARN law in several significant respects. However, due to the COVID-19 pandemic, the effective date was changed from July 19, 2020 to a date to be determined, which will be 90 days after the termination of Executive Order 103, which declares the public health emergency. Once in effect, the amendments will increase the advance notice required to affected employees from 60 to 90 days. In addition, the amendment requires covered employers to provide severance pay to employees when there is a mass layoff of termination/transfer of operations impacting at least 50 full-time employees laid off in a 30-day period. Under the amendment, severance is calculated at one week's pay for each full year the employee has been employed and is required even when the requisite notice has been provided.

### C. Smoking in Workplace

N.J. Stat Ann. § 26:3D-55 provides that a person controlling an indoor work place shall prohibit smoking indoors in compliance with the act.

Under the "New Jersey Smoke Free Air Act," smoking is prohibited at the workplace. N.J. Stat. § 26:3D-55 et. seq. The person having control of a workplace shall place in every public entrance to the indoor public place or workplace a sign, which shall be located so as to be clearly visible to the public and shall contain letters or a symbol which contrast in color with the sign, indicating that smoking is prohibited therein, except in designated areas. N.J. Stat. § 26:3D-61. The sign shall also indicate that violators are subject to a fine. The person having control of the indoor public place or workplace shall

post a sign stating “Smoking Permitted” in letters at least one inch in height or marked by the international symbol for “Smoking Permitted” in those areas where smoking is permitted. Id.

**D. Immigration Laws**

Under New Jersey law, driver’s license applicants must prove that they are in the United States with lawful immigration status. Undocumented immigrants may not obtain driver’s licenses.

**E. Health Benefit Mandates for Employers**

The Mandated Health Benefits Advisory Commission Act established the Mandated Health Benefits Advisory Commission (“MHBAC”) in 2004. N.J. Stat. Ann. 17B:27D-1. The MHBAC responds to requests from the State Legislature, providing an objective, independent analysis of the medical, financial and social impacts of proposed health insurance benefit mandates. Mandated health benefits are defined as a benefit or coverage that is required by New Jersey law to be provided by any company authorized to transact health insurance in New Jersey in health policies and contracts issued in New Jersey, regardless of the state of domicile of the company. Mandated Health Benefits include coverage for specific health care services, treatments or practices, or direct reimbursement to specific health care providers. Mandated benefits do not apply to self-funded plans where the employer is responsible for the claims but uses an insurer or third party administrator to process claims. Very large employers typically have self-funded plans. Any benefits plan which pays or provides hospital and medical expense benefits for covered services, and is delivered or issued for delivery in New Jersey by or through a carrier must provide a mandated health benefit. Health benefits plans do not include the following plans, policies or contracts: accident only, credit, disability, long-term care, coverage arising out of workers’ compensation or similar law, automobile medical payment insurance, personal injury protection insurance issued pursuant to P. L. 1972, c.70 (C.39:6A-1 et. seq.) or hospital confinement indemnity coverage

**F. Right to Work Law**

Although New Jersey protects workers’ ability to organize for the purpose of collective bargaining with employers, it has no “right to work” law.

**G. Lawful Off-duty Conduct**

With certain exceptions, employers may discipline or fire employees for lawful off-duty activities under the at-will nature of employment in the state. However, employers may not refuse to hire or employ any individual and may not discharge from employment or take any adverse action against any employee with respect to compensation, terms, conditions or other privileges of employment because that individual does or does not smoke or use other tobacco products, unless the employer has a rational basis for doing so which is reasonably related to the employment, including the responsibilities of the employee or prospective employee. N.J.S.A. § 34:6B-1; see N.J.S.A. §§ 34:6B-2 – 34:6B-4.

**H. Gender/Transgender Expression**

As of June 2007, the NJLAD was amended to prohibit discrimination on the basis of gender identity or expression. See, *Enriquez v. West Jersey Health Systems*, 777 A.2d 365, 342 N.J. Super. 501 (App. Div. 2001), cert. denied, 170 N.J. 211 (2001).

Pursuant to the 2012 amendments to the NJEPA, employers with 50 or more employees must provide notice to employees of their right to be free from gender discrimination in the workplace, including inequity or bias in pay, compensation, benefits or other terms and conditions of employment under existing federal and state laws. N.J. Stat. Ann. § 34:11-56.12. This notice must be posted by employers in English, Spanish, and any other language for which the commissioner has made available and which the employer reasonably believes is the first language of a significant number of the employer's workforce. *Id.* The notice must be posted in a place accessible to all employees. *Id.* Employers must also distribute a copy of the notice to employees annually, on or before December 31 of each year, as well as at the time of hire, and any time an employee requests a copy. *Id.*

#### I. Other Key Statutes

1. N.J. Stat. Ann. O.C.G.A. § 34:5A-17 provides that no employee may be discharged for exercising rights under the act governing hazardous substances in the workplace and community.
2. N. J. Stat. Ann. § 34:6A-45 provides that no employee may be discharged for exercising rights under the act governing occupational safety and health.
3. N.J. Stat. Ann. § 2A:65A-1 provides that no employee may be forced to participate in an abortion.
4. N.J. Stat. Ann. § 2A:17-56.23(b) provides for a lien on the net proceeds of settlements reached in employment civil actions and severance and release agreements to satisfy child support judgments. The attorney representing the prevailing party or beneficiary is required to initiate the search through a private judgment search company, unless the person receiving the benefit is not represented by counsel, in which case the burden falls on counsel for the company.
5. N.J. Stat. Ann. § 2C:40A-1 prohibits employers from requiring their employees or applicants to submit to lie detector-tests.
6. N.J. Stat Ann. § 26:3D-55 provides that a person controlling an indoor work place shall prohibit smoking indoors in compliance with the act.
7. There is no New Jersey state law requiring private sector employers to provide employees with paid or unpaid sick leave, although a number of cities and towns within the state have passed local ordinances requiring that employers provide employees with paid sick leave. Paid sick time laws have passed in the following New Jersey cities: Jersey City, Newark, Passaic, East Orange, Paterson, Irvington, Trenton, Montclair and Bloomfield Township.
8. New Jersey employers with 15 or more employees are prohibited from inquiring into a job applicant's criminal history until after they have conducted an initial interview of the applicant. Employers will also be banned from stating in any employment advertisement that they will not consider applicants who have been arrested or convicted of a crime pursuant to the New Jersey Opportunity to Compete Act.

9. N.J. Stat. Ann. O.C.G.A. § 34:5A-17 provides that no employee may be discharged for exercising rights under the act governing hazardous substances in the workplace and community.
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13. N.J. Stat. Ann. § 2C:40A-1 prohibits employers from requiring their employees or applicants to submit to lie detector-tests.
14. N.J. Stat. Ann. § 34:6B-1 provides that no employer shall refuse to hire or employ any person or shall discharge from employment or take any adverse action against any employee with respect to compensation, terms, conditions or other privileges of employment because that person does or does not smoke or use other tobacco products, unless the employer has a rational basis for doing so which is reasonably related to the employment, including the responsibilities of the employee or prospective employee. Id.
16. There is no New Jersey state law requiring private sector employers to provide employees with paid or unpaid sick leave, although a number of cities and towns within the state have passed local ordinances requiring that employers provide employees with paid sick leave. Paid sick time laws have passed in the following New Jersey cities: Jersey City, Newark, Passaic, East Orange, Paterson, Irvington, Trenton, Montclair and Bloomfield Township.
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J. COVID-19

Since the beginning of the pandemic in March 2020, Governor Murphy has issued dozens of Executive Orders based on the evolving situation, which included such measures as declaring a state of emergency, directing the closure of certain non-essential businesses, setting forth various limits on capacity, as well as setting standards for workplaces.

For example, on March 21, 2020, Governor Murphy issued E.O. 107, which provided that all businesses (whether closed or open to the public) must accommodate their workforce “wherever practicable” for telework or work-from-home arrangements; and to the extent a business or non-profit has employees that cannot perform their functions via telework or work-from-home, the business or



non-profit should make “best efforts” to reduce staff on site to the minimal numbers necessary ensure that essential operations can continue.

Thereafter, on October 28, 2020, Governor Murphy issued E.O. 192, which became effective November 5, 2020 and mandated all employers at a minimum to:

- Require individuals at a worksite to maintain at least 6 feet distance from others to the maximum extent possible;
- Required employees and visitors to wear masks when entering the worksite, subject to certain limited exceptions and at the employer’s expense;
- Provide sanitization materials to employees and visitors at no cost;
- Ensure that employees practice hand hygiene and provide sufficient break time for that purpose;
- Routinely clean and disinfect high-touch surfaces in accordance with Department of Health and CDC guidelines;
- Conduct daily health checks, such as temperature screenings, visual symptom checking, self-assessment checklists and/or health questionnaires, prior to each shift;
- Exclude sick employees from the workplace and follow requirements of sick leave laws; and
- Promptly notify employees of any known exposure to COVID-19 at the worksite, subject to confidentiality rules.

As the situation continues to evolve, the New Jersey state COVID-19 website (<http://covid19.nj.gov>) should be consulted for all applicable guidance. See also Section XIII on State Leave Laws for additional COVID-19 related provisions.