



Introduction to Labor and Employment Compliance Issues

Rosemary S. Gousman
Partner, Fisher & Phillips, LLP
rgousman@fisherphillips.com

fisherphillips.com



Hiring

fisherphillips.com



Compliance Challenges

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



Application

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



Negligent Hiring

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



Background Checks and Testing

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



Medical Examinations and Drug Testing

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



Alawi v. Sprint Nextel Corp.

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



EEOC v. Wal-Mart Stores, Inc.

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



Handbooks

fisherphillips.com



Woolley v. Hoffmann-LaRoche

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



Review of Handbooks

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



Downsizing

fisherphillips.com

Notice Laws (Employers of More than 100)

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



Severance Agreements

fisherphillips.com



Older Worker Benefits Protection Act

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



Waiver of State Claims

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



Confidentiality and Non-Disparagement

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


Confidentiality & Non-Disparagement and the NLRB

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



NLRB Guidance

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



Thank You!

Rosemary S. Gousman
Partner, Fisher & Phillips, LLP
rgousman@fisherphillips.com

fisherphillips.com

This page intentionally left blank

Managing Leave Requests Under the FMLA, NJFLA, and FLI, ADA, LAD, AND MATERNITY LEAVE

Presented by:

Ruby Kumar-Thompson, Esq.

Cleary Giacobbe Alfieri Jacobs, LLC
Matawan - Oakland



Topics for Discussion:

- Federal Family and Medical Leave Act ("FMLA")
- New Jersey Family Leave Act ("NJFLA")
- Designating Maternity Leave
- Family Leave Insurance ("FLI")
- Pregnancy Discrimination and Breastfeeding
- Title VII, ADA, and LAD accommodations for disability and religion

FMLA & NJFLA: Leave Entitlements



FMLA and NJFLA provide eligible employees with up to twelve (12) work weeks of unpaid, job protected leave for specified family and medical reasons (also military caregiver leave)

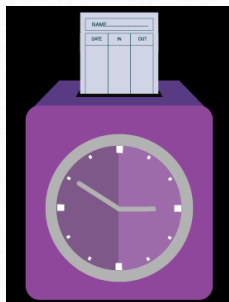
- FMLA → twelve (12) month entitlement period
- NJFLA → twenty-four (24) month entitlement period
- Continuation of group health benefits
- Restoration to same or “equivalent” job
- “Work week” = any week the employee would otherwise be required to work at least one day

*** RECOMMENDATION:**
**Employer Policy should clearly define
method for calculating FMLA/NJFLA
entitlement periods**

FMLA & NJFLA: Employee Eligibility

FMLA

- ✓ Employed for at least one year
- ✓ Must have *actually worked* **1,250 hours** in previous 12 months
- ✓ Applies to private employers with 50 or more employees and government agencies and schools regardless of #



NJFLA

- ✓ Employed for at least one year
- ✓ Must have *actually worked* **1,000 hours** in previous 12 months
- ✓ Applies to employers (public and private with 30 or more employees)

SELECTING A 12 MONTH LEAVE YEAR

- Employer may select any of the following methods to establish the 12-month period under FMLA so long as it is applied consistently and uniformly:
 - (1) The calendar year- runs from January 1 through December 31
 - (2) Any fixed 12 months-such as a fiscal year, a year starting on an employee's anniversary date or a 12-month period required by state law
 - (3) The 12-month period measured forward- from first date an employee takes an FMLA leave after completion of a 12 month period (e.g. leave request made on June 3, 2024) Next time the employee requests leave (after June 2, 2025 a new 12-month leave year would begin
 - (4) A "rolling" 12 month period measured backward from date an employee uses any FMLA leave (e.g. employee has taken 3 weeks FMLA leave so 9 more weeks available.

NOTE: The 24-month period under the NJFLA begins on the first day of the employee's NJFLA leave.



FMLA: Qualifying Reasons for Leave

- Employee's own serious health condition
- "Family member" suffering from a serious health condition
- Birth/Adoption of a child (***must be completed*** within 1-year of birth or placement)
- "Qualifying exigency" due to active military status

NJFLA: Qualifying Reasons for Leave



1. “Family member” suffering from a serious health condition (including a diagnosis of Covid-19)
 2. Birth/Adoption of a child (must commence within 1-year of birth or placement)
 3. If a school or place of care is closed by order of a public official due to an epidemic of a communicable disease (including Covid-19) or other public health emergency
 4. “Qualifying exigency” due to active military status
- **NOTE: NJFLA does not entitle an employee to leave for his/her own serious health condition**

Leave taken for the same “qualifying reason” shall be concurrently designated as FMLA & NJFLA

N.J.A.C. 13:14-1.6(a):

“Where an employee requests leave for a reason covered by both the [NJFLA] and another law, the leave simultaneously counts against the employee's entitlement under both laws.”

29 C.F.R. § 825.701(a):

“If leave qualifies for FMLA leave and leave under State law, the leave used counts against the employee's entitlement under both laws”.

Bond with newly-born child
Care for family member
Qualifying exigency

➔ **FMLA & NJFLA leave**

But... N.J.A.C. 13:14-1.6(b)(2):

“If an employee takes FMLA leave because of his or her own disability, including a disability related to pregnancy or childbirth, and a family member becomes seriously ill or a child is born or adopted while he or she is still on FMLA disability leave, the intervening birth, adoption or serious family illness does not convert the FMLA leave to a leave under the Act. for as long as the employee continues to be eligible for FMLA leave based on his or her own disability...”

Pregnancy- and/or
childbirth-related
disabilities

➔ **FMLA leave only**

FMLA: Serious Health Condition (employee or family member)

An **illness, injury, impairment, or physical or mental condition**
that involves:

1. incapacity or treatment connected with inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility; or a period of incapacity requiring absence of more than **three (3) calendar days** from work, school, or other regular daily activities that also involves continuing treatment by (or under the supervision of) a health care provider; or
2. incapacity due to **pregnancy**, or for prenatal care; or any period of incapacity (or treatment therefore) due to a **chronic serious health condition** (e.g., asthma, diabetes, epilepsy, etc.); or
3. incapacity that is **permanent** or long-term due to a condition for which treatment may not be effective (e.g., Alzheimer's, stroke, terminal diseases, etc.); or,
4. absences to receive **multiple treatments** (including any period of recovery therefrom) by, or on referral by, a health care provider for a condition that likely would result in incapacity of more than three consecutive days if left untreated (e.g., chemotherapy, physical therapy, dialysis, etc.).



FMLA for “On-The-Job” Injury

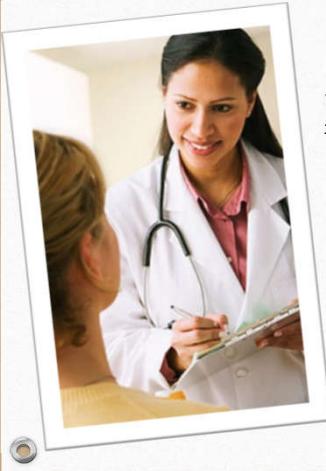
FMLA and workers’ compensation may run together



The reason for the absence must be due to a qualifying serious illness or injury (“serious health condition”)

The employer must properly notify the employee in writing that the leave will be counted as FMLA leave within five business days

NJFLA: Serious Health Condition (family member only)



An **illness, injury, impairment, or physical or mental condition** which requires:

1. Inpatient care in a hospital, hospice, or residential medical care facility; or
2. Continuing medical treatment or continuing supervision by a health care provider:
 - i. incapacity of more than **three (3) consecutive days**, and any subsequent treatment or period of incapacity that also involves, (i) Treatment two or more times by a health care provider; or (ii) Treatment by a health care provider on one occasion which results in a regimen of continuing treatment under the supervision of a health care provider;
 - ii. incapacity due to **pregnancy**, or for prenatal care;
 - iii. incapacity or treatment for such incapacity due to a **chronic serious health condition**;
 - iv. incapacity, which is **permanent** or long-term, due to a condition for which treatment may not be effective (such as Alzheimer's disease, a severe stroke or the terminal stages of a disease); or
 - v. absence to receive **multiple treatments** (including any period of recovery therefrom) by a health care provider, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy) or kidney disease (dialysis).

NOTE: NJFLA's definition of a "parent" includes parent-in-law or step parent.

Certification of Health Care Provider

29 C.F.R. §825.305

Employer may require a request for leave due to employee's own/family member's serious health condition be supported by a
Certification of Health Care Provider

**** Legal recommendation – always request a certification***

- Should be requested within five (5) business days of leave request
- Employee has fifteen (15) days to return completed certification



Employee Rights during FMLA/FLA leave

- The taking of FMLA leave cannot result in the loss of any employment benefit accrued before the leave began--- even if the employee has been replaced or position has been restructured to accommodate the employee's absence
- At end of leave employee must be restored to the same position held when leave commenced or equivalent employment with equivalent benefits, pay and other terms and conditions of employment unless:
 - The employment relationship would have terminated if the employee had not taken FMLA leave;
 - The employee informs the employer of his or her intent not to return to work
 - The employee fails to return from leave; or
 - The employee continues on leave after exhausting his or her FMLA leave entitlement in the 12-month period

NOTE: FMLA makes an exception to permit denial of job restoration to certain "key employees" if necessary to prevent substantial and grievous economic injury to the operations of the employer. A "key employee" is among the highest 10% of all salaried employees employed by the employer within 75 miles of the employees work site.

Likewise, NJFLA permits employers to deny leave to some of its highly compensated employees, specifically the highest paid 5% or the seven highest paid employees but only if necessary to prevent "substantial and grievous economic injury" to the employer

INTERMITTENT LEAVE OR REDUCED LEAVE SCHEDULE

- FMLA and FLA leave may be taken intermittently or on a reduced leave schedule due to a single qualifying reason.
 - A “reduced leave schedule” is a leave schedule is a change in the employee’s schedule for a period of time that reduces an employee’s usual number of working hours per workweek or hours per workday, normally from full-time to part-time
 - “Intermittent leave” is leave taken in separate blocks of time and may include leave of periods from one hour or more to several weeks. (E.g. leave taken for medical appointments or leave taken several days at a time for chemotherapy)
 - When leave is taken after birth of a healthy child or placement of a healthy child for adoption or foster care, then intermittent or reduced leave can only be taken if the employer agrees.

CONTINUED DISABILITY

If the employee is unable to perform an essential function of the position because of a physical or mental condition, or one who fails to provide a properly requested fitness for duty certificate to return to work, there is no right to restoration to another position under FMLA or FLA



However, the Americans with Disabilities Act and the Law Against Discrimination may entitle an employee to further accommodation if they continue to be under a disability that prevents them from working

ADA AND THE NEW JERSEY LAD

both prohibit discrimination on the basis of a disability in Employment and requires accommodations based on both physical and mental disabilities in employment including temporary disabilities

- **ADA Title I:**

- Applies to 15 or more employees
- Title I complaints must be filed with the U.S. Equal Employment Opportunity Commission (EEOC) within 180 days of the date of discrimination or 300 days if the charge is filed with the New Jersey Division on Civil rights

- **LAD**

- Applies to all employers regardless of size
- LAD complaints may be filed with the New Jersey Division on Civil Rights within 180 days of discrimination or with the Superior Court within 2 years of the date that the accommodation request was denied.

OBLIGATION TO PROVIDE REASONABLE ACCOMMODATION

- Employers must reasonably accommodate individuals with disabilities so that they can perform the essential functions of their position, as needed;
- Once the employer becomes aware of the disability and the employee requests assistance for the disability, the employer must participate in the interactive process to determine if a reasonable accommodation can be made without undue hardship on the business operations
- A reasonable accommodation is, generally, "any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities;"
- Includes, but is not limited to, providing an extension of unpaid leave, even if not provided to other employees;
 - May include an extension of unpaid leave for more than 12 weeks under the FMLA
 - No requirement to provide paid leave that extends beyond what is typically provided to other employees or if it would violate an employer's absenteeism policy;
 - The employer can require an employee to provide a doctor's note to substantiate the need for leave;
 - Reassigning an employee and job restructuring including modified or part-time work schedules can be a reasonable accommodation.

Interactive Process

- Mutually collaborative effort by which employer and employee engage in dialogue to identify reasonable accommodation. May include:
 - Analysis of particular job to determine its purpose and essential functions
 - Consultation with individual to ascertain precise job limitations imposed by disability and how to overcome
 - Identification of potential accommodations and assessment of effectiveness to overcome disability (may be requested of a licensed medical professional where disability is not obvious)
 - Consideration of preference of individual and selection that is appropriate for both employer and individual
 - Whether accommodation poses an undue hardship

Other considerations

There are no magic words an employee must use to request an accommodation for a disability

But it must be obvious that employee desires an accommodation for a known disability so as to trigger employer's duty to engage in interactive process

Can be denied due to inability to perform essential function of position but only after employer engages in the interactive process-otherwise exposes employer to liability

Can be denied without engaging in interactive process where direct threat in safely performing essential functions of a hazardous position exist

Designating Maternity Leave

STEP 1: Determine employee's eligibility for FMLA & NJFLA

- Has employee been employed for at least one year?
- Has employee worked 1,250 and/or 1,000 hours in previous 12 months?
- Has employee used any FMLA in designated 12-month period? Has employee used any NJFLA in designated 24-month period?
- Issue FMLA Notice of Eligibility



Designating Maternity Leave

STEP 2: Request written leave request and Certification of Health Care Provider

- Legal presumption of disability → 4 weeks prior to due date, and 4 weeks after delivery
- Actual disability based upon opinion of health care provider



Designating Maternity Leave

STEP 3: Determine whether sick leave is used *prior to*,
or *concurrently with*, FMLA leave

Use of paid sick leave during FMLA leave is **mandatorily negotiable** –
that means the use of sick leave is governed by “past practice” and/or the applicable Union contract

- Lumberton Tp. Bd. Of Ed., P.E.R.C. No. 2002-13, 27 NJPER 372, aff'd 28 NJPER 427
(App.Div. 2002)

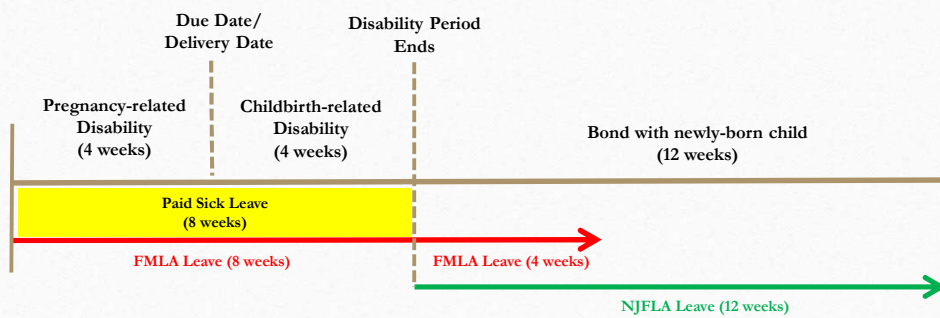
“**Prior to**” → Employee may utilize sick leave for pregnancy- and childbirth-related disabilities
before using FMLA leave

“**Concurrently**” → Pregnancy- and childbirth-related disabilities will count against
both accrued sick leave and FMLA

Designating Maternity Leave

STEP 4: Designate employee's leave

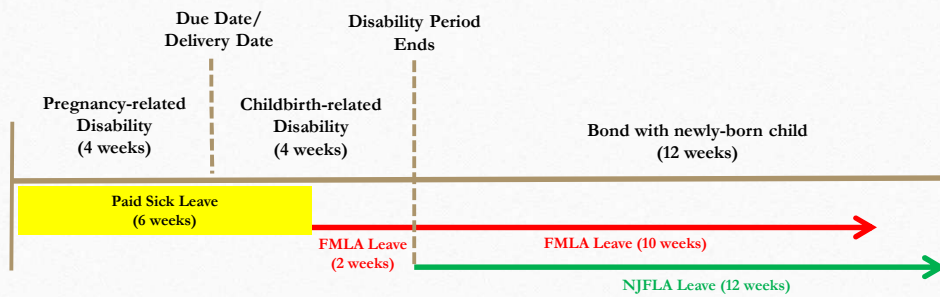
If the employer runs sick leave & FMLA *concurrently*-



Designating Maternity Leave

STEP 4: Designate employee's leave

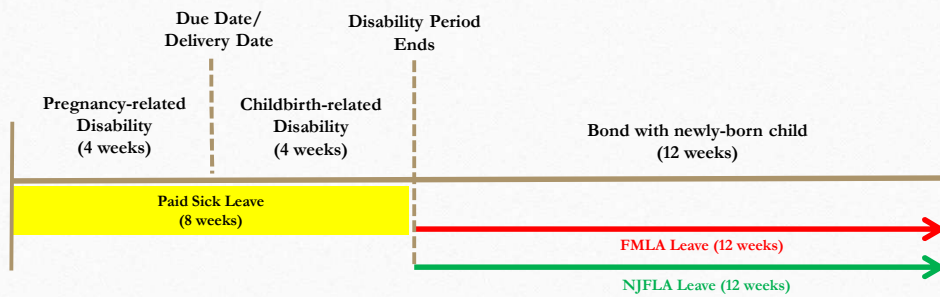
If your district runs sick leave & FMLA *consecutively* and employee has *insufficient* sick leave for entire disability period



Designating Maternity Leave

STEP 4: Designate employee's leave

If your district runs sick leave & FMLA *consecutively* and employee has *sufficient* sick leave for entire disability period



New Jersey Family Leave Insurance (“FLI”) The Basics

New Jersey FLI provides salary continuation during an approved unpaid family leave

- Does ***not*** entitle employees to additional leave time
- Employee may apply for benefits when on approved unpaid leave of absence to care for family member with a “serious health condition” and/or to bond with newborn (up to six weeks)
- Paid by the state as disability compensation
- No “double dipping”



Federal Pregnancy Discrimination Act and the New Jersey Pregnancy Act/LAD

- Makes it unlawful for employers to treat a pregnant employee less favorably than other employees
- Requires reasonable accommodations to facilitate pregnant employee's ability to work while pregnant
- Prohibits retaliation against an employee for becoming pregnant or for requesting reasonable accommodations for her pregnancy
- **Note:** The Federal Pregnancy Discrimination Act also provides that employer health plans with 50 or more employees must cover pregnancy

Statutory Amendments to NJFLA/FLI Effective July 1, 2020

	<u>OLD:</u>	<u>NEW:</u>
NJFLA Employee Requirements	<ul style="list-style-type: none">• Fifty (50) employees	<ul style="list-style-type: none">• Thirty (30) employees
Maximum Weekly Benefit	<ul style="list-style-type: none">• 66% average weekly wage	<ul style="list-style-type: none">• 85% average weekly wage
Cap Amount	<ul style="list-style-type: none">• 53% of state average weekly wage (~ \$650)	<ul style="list-style-type: none">• 70% of the state average weekly wage (~ \$860)
Maximum FLI Entitlement Period	<ul style="list-style-type: none">• Six (6) weeks or forty-two (42) intermittent days	<ul style="list-style-type: none">• Twelve (12) weeks or fifty-six (56) intermittent days

Also – NJFLA definition of “family member” expanded to include siblings, grandparents, grandchildren, parents-in-law, domestic partners, any blood relatives, and any individual with whom the employee has a relationship that is “the equivalent” of a family member

Pregnancy Discrimination and Breastfeeding

- **Federal Pregnant Workers Fairness Act** (Eff. June 27, 2023)-applies to employers with 15 or more workers:

Pregnant Workers do not need to be able to perform an essential function of job to qualify for accommodations temporarily due to their pregnancy

Examples of reasonable accommodations:

- Bathroom and water breaks
- Rest breaks
- Assistance with manual labor
- Job restructuring or modified work schedules
- Temporary transfer to less strenuous or hazardous work

FLSA'S PUMP ACT- Breast feeding or lactating employees are a protected class under both federal law and the LAD (eff. January 8, 2018, as amended January 7, 2022)

- An employer must grant a reasonable (paid) break time each day and a suitable private place other than a toilet stall in which to express breast milk

RELIGIOUS ACCOMMODATION

(Title VII of the Civil Rights Act of 1964 and LAD)

- Applies not only to schedule changes, providing time and place to pray or leaves for religious observances but to things as dress or grooming practices
- *Groff v. DeJoy*, 142 S.Ct. 2279 (2023)- Postal worker did not want to work on Sundays in observance of his faith
 - The Supreme Court clarified that showing “more than a de minimis cost” does not suffice to establish undue hardship under Title VII.
 - What must be shown is substantial burden in overall context taking into consideration practical impact in light of nature size and operating cost of an employer.
 - No longer a lower standard than ADA’s undue hardship defense to disability accommodation---may require employer to engage in interactive process to determine limits imposed by a religious practice of belief and how best to accommodate

RELIGIOUS GARB AND GROOMING

- Religion is defined very broadly- may be beliefs that are new uncommon, nor part of a formal church or sect or held by a small number of people
- Social political or economic philosophies or personal preferences are not “religious” beliefs
- Usually arises once employer makes employee aware of workplace requirement that conflicts with religious practice
- Example: wearing religious clothing or articles (Muslim Hijab, A Sikh turban, or Christian Cross or observing prohibition against wearing pants or short skirts or adhering to hair length observances (e.g. Sikh uncut hair and beard, Rastafarian Dreadlocks, or Jewish peyes (side locks)
- **Note:** Customer preference is not a defense to a claim of discrimination



Cleary Giacobbe Alferi Jacobs, LLC
Oakland Office:
169 Ramapo Valley Road, UL 105,
Oakland, NJ 07436
Tel 973 845-6700 Fax 201 644-7601

Wage-and-Hour Issues: Every Minute Counts

January 20, 2024

James M. Lemonedes
Sills Cummis & Gross P.C.
Member, Employment & Labor Department
(973) 643-5888 | jlemonedes@sillscummis.com

What Is “Wage-and-Hour”?

“Wage-and-hour” refers to the laws, regulations, and practices concerning how employees are paid (“wages”) for the work they perform (“hours”), as well as related issues like recordkeeping, breaks, etc.

Why It Matters?

- Extremely Complex
- Class actions
- Liquidated damages
- Attorneys' fees (only for Employee side)
- Individual liability
- Joint employer/single enterprise liability
- Criminal penalties
- Raids & stop-work orders

What Laws Apply?

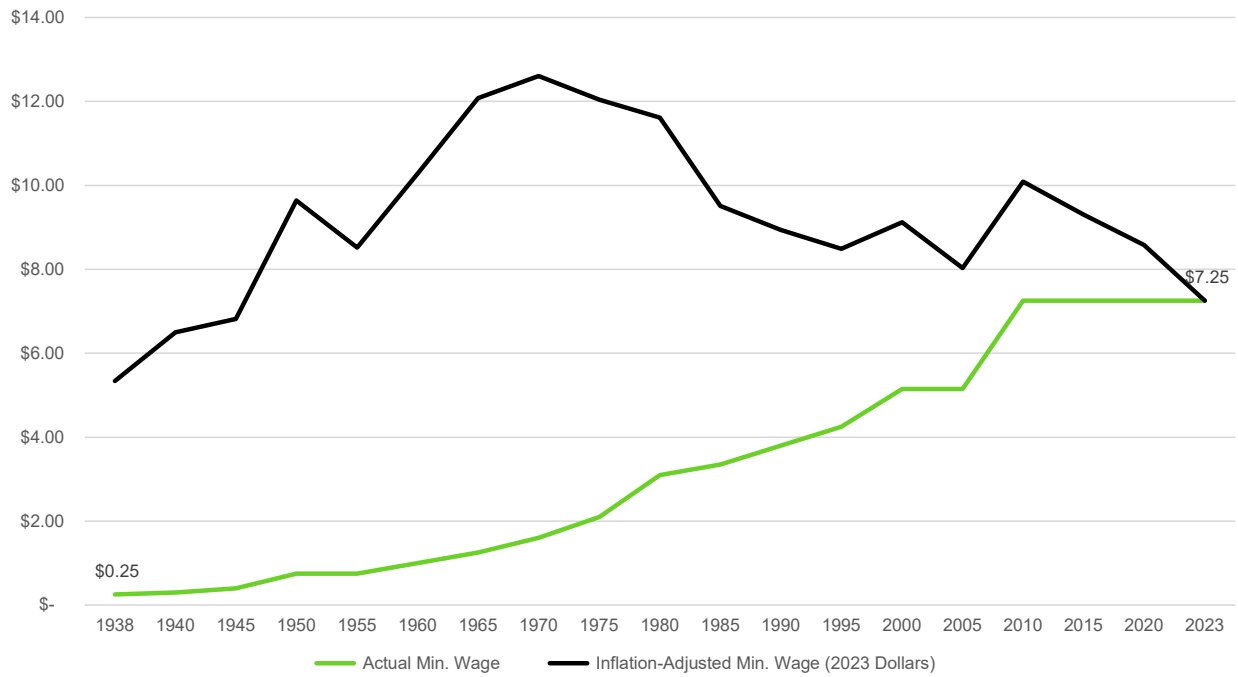
- Overlapping federal, state, and sometimes local laws
- Federal law sets a floor; must comply with all that apply
- Federal – Fair Labor Standards Act of 1938 (“FLSA”)
- New Jersey – Wage & Hour Law (“WHL”) and Wage Payment Law (“WPL”)

Federal vs. NY vs. NJ

	Current Min. Wage	Statute of Limitations	Liquidated Damages	Private Settlements Enforceable
Federal	\$7.25/hour	2 or 3 years	100%	No
New Jersey	\$15.13/hour	6 years	200%	Yes

On January 1, 2024, New Jersey minimum wage increased to \$15.13/hour

Federal Min. Wage 1938-2023



Non-Exempt Employees

- “Exempt/non-exempt” refers to overtime laws
- Non-exempt employees must be paid overtime
- Default classification = non-exempt
- Usually paid on an hourly basis but *may* be paid on a piece rate, fluctuating workweek, or other basis (very complex)
- Must be paid at least the applicable minimum wage per hour
- Timekeeping requirements

Overtime

- Required after 40 hours in a workweek (required after 8 hours in a day in some states such as California)
- A workweek is 168 consecutive hours; employer designates start/end
- Overtime must be at least 1.5x regular rate
- Regular rate
 - What counts?
 - Blended rates?
- Unauthorized overtime

Exempt Employees

- Fixed weekly salary intended to cover all hours worked
- Must satisfy a specific exemption (usually the same requirements under federal and NJ law)
 - Big 3/EAP – executive, administrative, professional
 - Highly compensated employee (currently \$107,432/year*)
 - Others (outside sales, computer, etc.)
- Duties test
- Salary basis test (not for all exemptions) – beware deductions
- Salary level test (not for all exemptions)

Exemption Example – Admin.

- Duties test – primary duty...
 - “performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers”
 - “exercise of discretion and independent judgment with respect to matters of significance”
- Salary basis test
- Salary level test (per week)
 - Federal & New Jersey – \$684/week* (\$35,658/year)
 - New York – \$1,200/week (\$62,400/year) NYC/LI/Westchester

Misclassification

- Perfect storm – no time records & failure to pay overtime
- Misclassified employees inevitably claim to have worked an absurd number of hours per workweek
- Oil workers example
 - Paid a day rate (up to \$1,341/day) for on/off cycles working 12 hours/day, 7 days straight (84 hours)
 - Regular rate is? ... \$112/hour*, so overtime rate is \$168/hour
 - “But everyone in the industry does it this way!”
 - *Helix Energy Solutions Group, Inc. v. Hewitt* (2023)
 - Damages = \$8,800/week plus interest & attorneys’ fees

Recordkeeping

- Timekeeping
 - Methods
 - Presumption
 - Rounding
 - Time shaving (a/k/a “gap time”)
- Wage statements
- Notice of rate of pay
- Retention requirements vary, but should retain all records for at least 6 years

Independent Contractors

- Workers are presumed to be employees
- Various/changing tests – economic realities, ABC
- No withholding, no overtime, no timekeeping, no benefits
- Gig workers?
- Please remember:
 - An independent contractor agreement does *not* guarantee that classification as an independent contractor is proper
 - A part-time employee is *not* an independent contractor
 - The nanny is *not* an independent contractor

Misclassification

- Failure to pay overtime
- No time records
- Unemployment liability
 - Uber – \$100 million for 297,866 drivers (down from \$642 million)
 - DOL audits
- Tax liability for failure to withhold

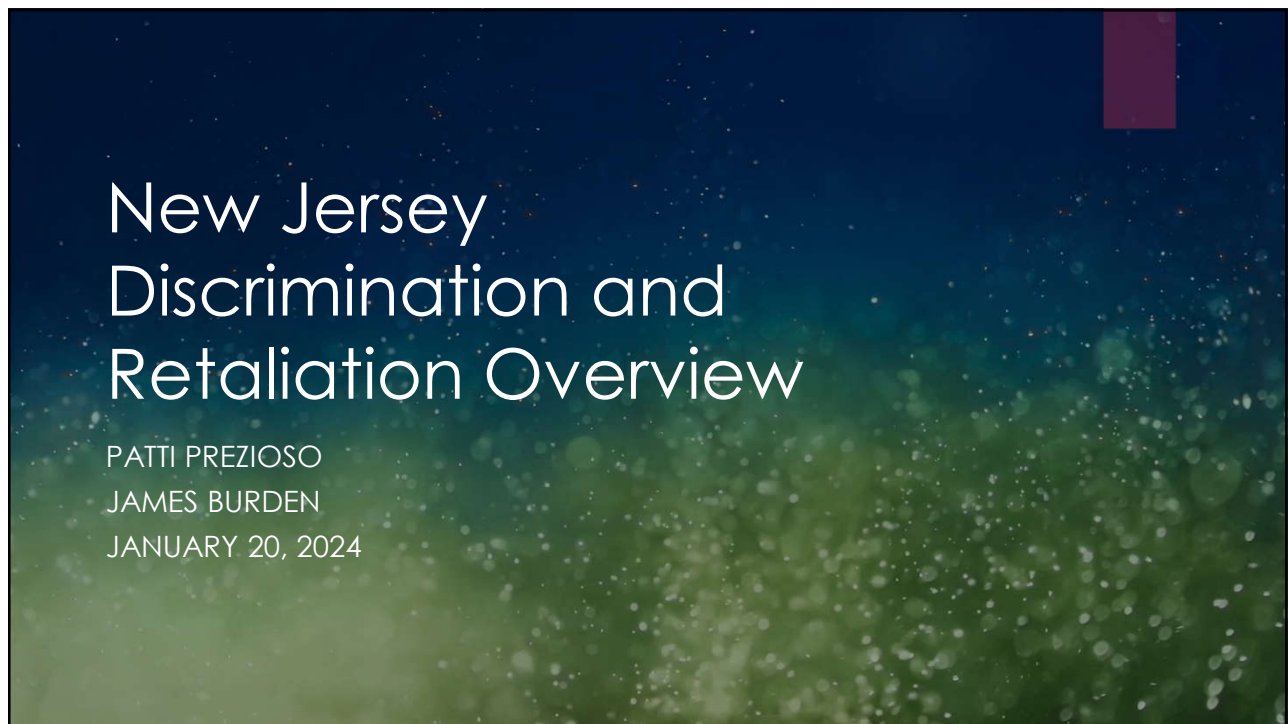
Other Wage-and-Hour Issues

- Expenses
- Uniforms
- Tools of the trade
- Spread of hours
- Call-in pay
- Meal/lodging credits
- Tips/tip credits
- Service fees
- Commissions & bonuses
- Meal/rest breaks
- Frequency of pay
- Methods of pay
- Cash/off-the-books
- Overpayments
- Paid/unpaid interns
- Retaliation
- Pre-/postliminary work
- Required postings
- Equal Pay Act(s) and anti-discrimination laws



Questions

James M. Lemonedes
Sills Cummis & Gross P.C.
Member, Employment & Labor Department
(973) 643-5888 | jlemonedes@sillscummis.com



New Jersey Discrimination and Retaliation Overview

PATTI PREZIOSO
JAMES BURDEN
JANUARY 20, 2024

The New Jersey Law Against Discrimination (“NJ LAD”)

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

NJ LAD Prohibits Employers From...:

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

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

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

Protected Classes Continued...

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

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

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

Additional Prohibitions For Employers

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

Further Requirements of NJ LAD:

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

Individual Supervisor Liability

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

Enforcement:

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

Potential Damages:

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

Statute of Limitations

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

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

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

Disabilities: Employers Must Reasonably Accommodate

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

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

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

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

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



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

Title VII- Who does it cover?

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

Title VII- Protected Classes

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

Title VII Discrimination: SOL and Administrative Remedies

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

Timing- Title VII Continued:

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

ADA and ADEA

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

ADA and ADEA

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

Conscientious Employee Protection Act ("CEPA")

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

CEPA Prohibits Retaliation - Elements

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

Contact Us:

Patricia Prezioso
Sills Cummis & Gross P.C.
(973) 643-5041
pprezioso@sillscummis.com

James E. Burden
McClure Burden LLC
(862) 323-0422
james@mcclureburden.com

NJICLE
New Attorney Day

INTRO TO
WORKERS' COMPENSATION

Presented by:

Dennis M. Baptista, Esq.

Certified Workers' Compensation Attorney

(c) 2024 Dennis M. Baptista, Esq.

Personal Injury vs. Workers' Compensation

- | Constitutional Court
- | Administrative Court

(c) 2024 Dennis M. Baptista, Esq.

Workers Comp and the Industrial Revolution



- | When employee accepts employment, the right to sue for negligence is taken away
- | In exchange for having that right taken away, an employee is entitled to receive workers compensation benefits regardless of who is at fault for the occurrence of the accident.

(c) 2024 Dennis M. Baptista, Esq.

Preface

- | Workers Comp is often counter-intuitive
- | Your job is to educate your client while you guide them through the system
- | All resources available online



(c) 2024 Dennis M. Baptista, Esq.

Workers Compensation Benefits



- | Medical Benefits
- | Temporary Disability Benefits
- | Permanent Disability Benefits

- | Dependency Benefits

(c) 2024 Dennis M. Baptista, Esq.

Medical Benefits



- | What is covered by Workers Compensation Medical Benefits?
- | Curative vs. Palliative Treatment
- | MMI – Maximum Medical Improvement
- | Employer has exclusive right to chose medical provider
- | Independent Medical Evaluations – When, Where, Why
- | What to do if Employer refuses to authorize?

(c) 2024 Dennis M. Baptista, Esq.

Temporary Disability Benefits



- | Qualifying for Workers Comp Temp
- | Rate of Temporary Disability Benefits
- | 7 Day Waiting Period
- | Delay or Refusal to Pay Benefits
- | State TDB Liens
- | Terminating Temporary Disability Benefits
- | Cunningham v Atlantic States Pipe

(c) 2024 Dennis M. Baptista, Esq.

Partial Permanent Disability Benefits

- | What is Permanent Disability?
- | What is not included in an award for Permanent Disability?
- | Perez vs. Pantasote
- | Stacking
- | Abdullah Credits
- | Reconstruction of Wages



(c) 2024 Dennis M. Baptista, Esq.

Total Permanent Disability Benefits



- | Second Injury Fund
- | Odd Lot Doctrine
- | 80% ACE
- | Social Security Offset - Respondent
- | Date of Totality
- | 450 Weeks / Lifetime Benefits
- | Zabita vs Chatham Shop Rite

(c) 2024 Dennis M. Baptista, Esq.

Dependency Benefits

- | Who is a Dependant?
- | How are benefits calculated?
- | For how long are they paid?
- | Funeral Allowance



(c) 2024 Dennis M. Baptista, Esq.

Occupational Diseases



- | Types of occupational diseases:
 - Pulmonary Disability;
 - Hearing Loss;
 - Carpal Tunnel Syndrome;
 - Degenerative Orthopedic Disease.
- | Which insurance carrier is liable?
- | Impleading current employer

(c) 2024 Dennis M. Baptista, Esq.

Wage Reconstruction

- | Applies only to Permanent Disability Rates, not Temporary Disability
- | Not subject to “Minimum” Perm Rate on chart
- | Katsoris v. South Jersey Publishing



(c) 2024 Dennis M. Baptista, Esq.

Determining Compensability



- | Arising out of and in the course of employment
- | Going and Coming Rule
- | Activities directed by the Employer
- | Minor Deviation
- | Special Mission



(c) 2024 Dennis M. Baptista, Esq.

Statutory Defenses



- | Intentionally Self Inflicted
- | Intoxication – CDS
- | Willful failure to use personal safety devices
- | Statute of Limitations
- | Notice



(c) 2024 Dennis M. Baptista, Esq.

Questions & Answers



(c) 2024 Dennis M. Baptista, Esq.

Med/Temp Motions



- | Petitioner Attorney's most powerful tool
- | When to file?
- | Rule 3.2
- | Benson vs. Coca Cola
- | Emergent Motions.

(c) 2024 Dennis M. Baptista, Esq.

Third Party Claims



- | Two Claims – One Accident
- | No “Double Recovery”
- | \$750 Costs and Actual Attorney fees
- | No lien when 3rd Party is a Public Entity
- | Applies in “Millison Cases”
- | Owens v. C&R Waste Material
- | Liens in Total Disability and Dependency Claims

(c) 2024 Dennis M. Baptista, Esq.

Perm Exams

- | 26 week rule
- | Voluntary Tenders (VT) (R.I.P.)
- | Bona Fide Tender (BFT)(R.I.P.)
- | Perm Estimates During Treatment



(c) 2024 Dennis M. Baptista, Esq.

Other Offsets & Liens



- | Social Security Offset – Total & Partial Total
- | State TDB Liens
- | Child Support Liens
- | Medicare Liens
- | PERS Liens – Ordinary & Accidental Disability

(c) 2024 Dennis M. Baptista, Esq.



Handling a Workers Comp Case:

The Judge's Perspective

(c) 2024 Dennis M. Baptista, Esq.

How to Succeed In Comp Court

- | Be Prepared
- | Be Courteous
- | Be On Time
- | Don't Be Afraid To Ask
- | Pay Attention To Details
- | Be Familiar With Division of Workers' Compensation Web Site

(c) 2024 Dennis M. Baptista, Esq.

How a Case is Scheduled

- | Cases are scheduled by cycles of 21 days
- | There are 3 calendar weeks in each Cycle
- | Respondents are assigned fixed days in Cycle
- | The Cycle repeats itself
- | Trials and Motion Hearings take place on the same day each cycle and aren't continuous
- | The Cases are listed as Pre-Trials, Motions and Trials

(c) 2024 Dennis M. Baptista, Esq.

Call of the List

- | Occurs daily at 9 a.m.
- | Arrive promptly
- | Clients usually sit in the waiting area
- | Call if you are going to be late
- | Check in early if you have multiple lists in same Comp Court
- | Be brief and to the point when you answer at the Call of the List

(c) 2024 Dennis M. Baptista, Esq.

Adjournments

- | Requests should be made as far in advance as possible
- | Adjournments and Ready-Holds should be made with knowledge by and consent of counsel
- | Adjournments requests because exams are needed should contain the date of the exam and the name of examining doctor

(c) 2024 Dennis M. Baptista, Esq.

Pre-Trials

- | Most cases appear on the list as pre-trials
- | A case may be listed even if discovery is not complete and exams have not taken place
- | There is a distinction between a case being listed as a Pre-Trial and when the case is actually pre-tried
- | If a case can't be resolved it will be pre-tried and the next listing will be as a trial

(c) 2024 Dennis M. Baptista, Esq.

What Happens at a Pre-Trial Conference



- | Usually takes place in the Judge's Chambers
- | Issues relating to discovery, treatment or independent medical exams (IME) may be discussed
- | If there are no outstanding issues, the IME's are exchanged and the parties discuss resolving the case
- | The Judge may be asked to participate

(c) 2024 Dennis M. Baptista, Esq.

What you need to do to Resolve a Case

- | **BE PREPARED**-Often the parties settle on the value of a case and then the case lingers
- | Know the petitioner's date of birth
- | Know if the petitioner is working, retired or receiving Social Security Disability Benefits or Medicare or Medicaid
- | Know the Petitioner's wage and rate and last date of temp

(c) 2024 Dennis M. Baptista, Esq.

Obtain the Following Information if Available

- | Have Temporary Disability Benefits Lien information-Know dates of payment
- | •Have other Lien info (PIP/Health Insurance)
- | •Know Status of 3rdParty Case/Lien
- | •Have ACE info along with auxiliary benefits
- | •Have Medicare Conditional Payment Info
- | •Have copies of unpaid medical bills if any
- | •Have info on amount and type of Pension

(c) 2024 Dennis M. Baptista, Esq.

Second Injury Fund Cases

- | Have Total Perm Report that addresses the alleged pre existing disabilities
- | Have documentation of pre-existing disabilities-orders, doctor/hospital records
- | Remember to look at the value of the last accident first; Respondent pays full value of the last accident
- | Review Order and have SIF DAG look at order

(c) 2024 Dennis M. Baptista, Esq.

Order Approving Settlement ~ NJSA 34:15-22

- | Parties go before the Judge to put the settlement through on the record
- | Respondent does stipulations
- | Petitioner is questioned about his/her understanding of the settlement; voluntariness; and current complaints
- | Can be Reopened or Medical Treatment can be requested for 2 years after last benefit

(c) 2024 Dennis M. Baptista, Esq.

Settlement pursuant to NJSA 34:15-20

- | Case can be resolved under NJSA 34:15-20 if there is an issue regarding jurisdiction, liability, causal relationship or dependency
- | Case is closed forever-no right to reopener or to medical treatment
- | Dependent's claim may or may not resolve
- | Petitioner can't give away dependent's claim
- | Dependent must sign if that issue is resolved

(c) 2024 Dennis M. Baptista, Esq.

Form of Order

- | Use the forms of Orders on the Division of Workers' Compensation web site
- | Download and use OSCAR for calculations
- | Leave fees blank
- | **Take time to review the completed Order and make corrections**
- | Provide Order to Respondent to review
- | Have Exhibit List and exhibits with Order

(c) 2024 Dennis M. Baptista, Esq.

The Pre-Trial Order (The Green Sheet)

- | Parties list witnesses
- | Exams with dates (can't be stale)
- | Estimated length of trial
- | Judge's Recommendation
- | A date for trial will be set
- | Usually the court will hear the testimony of one witness at each listing-case will take several cycles to conclude

(c) 2024 Dennis M. Baptista, Esq.

Trial - Proof by a Preponderance



- | The Petitioner and the Petitioner's non expert or lay witnesses testify first
- | •Then the Respondent and the Respondent's non expert or lay witnesses testify next
- | •Then expert witnesses-first for Petitioner and then for the Respondent
- | •Rules of Evidence are relaxed; decision must be based on credible evidence

(c) 2024 Dennis M. Baptista, Esq.

Conclusion of Trial



- | Judge may ask for closing arguments
- | Judge more likely will ask parties to submit briefs
- | Judge will render either an oral decision in the presence of the parties or a written decision
- | While the Judge is writing opinion, the case will be carried on the court list as a Reserved Decision

(c) 2024 Dennis M. Baptista, Esq.

Powers of the Judge



- | Under NJSA 34:15-28(a)-(f) failure to comply with an Order or provision of the Statute can result in the following:
 - | Assessment not to exceed 25% of the moneys due
 - | A fine not to exceed \$5,000 paid to the SIF
 - | Closure of proofs, dismissal of claim and suppression of defenses

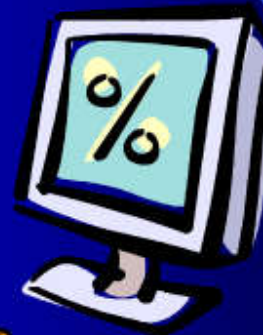
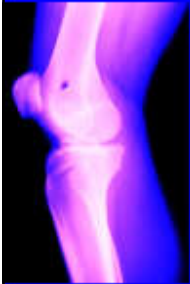
(c) 2024 Dennis M. Baptista, Esq.

Powers of the Judge

- | Exclusion of evidence or witnesses
- | Contempt hearing
- | Award of Attorney Fees not Limited to 20%
- | Any other action the Judge sees fit
- | In addition to any other remedies provided by law

(c) 2024 Dennis M. Baptista, Esq.

Questions & Answers



(c) 2024 Dennis M. Baptista, Esq.