2024 LABOR AND EMPLOYMENT SUMMER INSTITUTE – DAY ONE

2024 Seminar Material

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2024 LABOR AND EMPLOYMENT SUMMER INSTITUTE – DAY ONE

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CONFIDENTIALITY & DATA PROTECTION

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Confidential Information, Confidentiality Agreements & Data Protection Policies

What is Confidential Information?

- Information shared by the employer with the employee during the course of the employment relationship.
- Not widely known in the public.

Examples of Confidential Information

- Customer Lists and Information
- Pricing Information
- Research Data
- Business Initiatives and Plans
- Financial Account Information
- Business and Marketing Plans
- Payroll Information
- Information Received from Third Parties

Protecting Confidential Information

- Restricting Access
- Restricting Distribution
- Employee Training
- Implementing Security Measures
- Policies and Contractual Restrictions

Confidentiality Agreements

- Legal agreements aimed to safeguard proprietary information.
- Applies to information that does not constitute a "trade secret".
- Must be reasonable in scope and necessary to protect proprietary information.

  See Lamorte Burns & Co. v. Walters, 167 N.J. 285 (2001).

Electronic Communication Policies

- Identify the scope and purpose
- Cover all forms of electronic communication
- Appropriate Use
- Retention Policies
- Internet Usage
- Statement Regarding Expectations of Privacy - *See Stengart v. Loving Care Agency, Inc.*, 201 N.J. 300 (2010).

Security Measures

- Monitor employee use of computer systems.
- Investigate suspicious activity.
- Keep confidential information in secure locations.
- Engage in data security measures for systems.

Federal & NJ Trade Secret Laws

What is a Trade Secret

- "a formula, process, device or compilation which one uses in his business and which gives him an opportunity to obtain an advantage over competitors who do not know or use it."

Sun Dial Corp. v. Rideout, 16 N.J. 252 (1954).

NJ Trade Secrets Act

- The New Jersey Trade Secrets Act, N.J.S.A. §§ 56:15-1 to 9 ("NJ Act").
- Became law on January 9, 2012.
- Based on the Uniform Trade Secrets Act.

Defend Trade Secrets Act

- The Defend Trade Secrets Act became law on May 11, 2016. 18 U.S.C. § 1836, *et seq.* ("DTSA").
- Creates a private cause of action for civil trade secret misappropriation under Federal Law.
- Did not preempt the NJ Act.

NJ Act v. DTSA

NJ ACT – A trade Secret is information that:

(1) is subject to efforts that are reasonable to maintain its secrecy; and

(2) derives independent economic value from not being generally known or readily ascertainable.

DTSA - A trade Secret is information that:

(1) the owner has taken "reasonable measures to keep [ ] secret;" and

(2) derives independent value from not being generally known or readily ascertainable.

NJ Act v. DTSA

NJ ACT – "Misappropriation" includes:

(1) Acquisition by person who knows/should know the trade secret was acquired by improper means; or

(2) Disclosure/use without consent by a person that derived knowledge of trade secret through improper means.

DTSA – "Misappropriation" includes:

(1) Acquisition of a trade secret by someone who "knows or has reason to know" that it was acquired by improper means; or

(2) Disclosure/use without consent by a person that derived knowledge of trade secret through improper means; or

(3) Disclosure/use without consent by a person that knew, before material change, that trade secret was acquired by mistake/accident.

Application of Trade Secret Statutes

DTSA claim:

(1) "the existence of a trade secret, defined generally as information with independent economic value that the owner has taken reasonable measures to keep secret;

(2) that "is related to a product or service used in, or intended for use in, interstate or foreign commerce[,]"; and

(3) the misappropriation of that trade secret, defined broadly as the knowing improper acquisition, or use or disclosure of the secret."

Oakwood Labs. LLC v. Thanoo, 999 F.3d 892, 905 (3d Cir. 2021).

Application of Trade Secret Statutes

Misappropriation under the NJTSA:

- (1) the existence of a trade secret;
- (2) communicated in confidence by the plaintiff to [third party];
- (3) disclosed by the [third party] in breach of that confidence;
- (4) acquired by the competitor with knowledge of the breach of confidence, and
- (5) used by the competitor to the detriment of the plaintiff.

OWAL, Inc. v. Caregility Corp., 3:21-CV-13407, (D.N.J. Mar. 25, 2022)

NJ Act v. DTSA

NJ ACT Remedies

(1) Injunctions
(2) Damages
(3) Exemplary Damages
(4) Attorney Fees

DTSA Remedies

(1) Injunctions
(2) Damages
(3) Exemplary Damages
(4) Attorney Fees
(5) Ex Parte Seizure Order

Defend Trade Secrets Act

- ***Ex parte* Seizure Order**
  - A unique remedy under DTSA
  - Allows Court to enter an *ex parte* order to seize property to prevent propagation of a trade secret
  - Seizure is carried out by Law Enforcement Officials, not trade secret owner

Trade Secret Litigation

- *Oakwood Labs. LLC v. Thanoo*, 999 F.3d 892 (3d Cir. 2021).
- *Scs Healthcare Marketing, LLC v. Allergan Usa, Inc.*, No. C-268-12, (N.J. Ch. Div. Dec. 7, 2012).
- *Baxter Healthcare Corp. v. HQ Specialty Pharma Corp.*, 157 F. Supp. 3d 407 (D.N.J. 2016).

Other Contractual Protections

Types

- Non-competition
- Non-solicitation

Restrictive Covenants

- NJ courts generally disfavor restraints on trade
  - Narrowly construed
  - Reasonable in scope and duration

Reasonableness Analysis

- Three-pronged reasonableness test:
  - protects a legitimate interest of the employer;
  - imposes no undue hardship upon the employee; and
  - not injurious to the public interest.

See Solari Industries. v. Malady, 55 N.J. 571 (1970) & *Whitmyer Bros., Inc. v. Doyle*, 58 N.J. 25 (1971).

Legitimate Interests

- customer relationships;
- trade secrets; and
- confidential business information.
  - *Coskey's Television & Radio Sales v. Foti*, 253 N.J. Super. 626 (App. Div. 1992).

Undue Hardship

- Factors:
  - scope of the restraint
    - Temporal duration
    - Geographic limits
    - Activities restrictions
  - can the employee find other work?
  - burden on the employee
- What if the employee was fired? *See Karlin v. Weinberg*, 77 N.J. 408 (1978).

Other Considerations

- Public Interest
- Consideration
- Modifications – blue penciling

Other Considerations (cont'd)

- Equitable Tolling
- Choice of law/choice of forum
- Changes in technology/job market
- Type of agreement

Remedies

- Injunction
- Damages
- Forfeiture

FTC Rule

- Broad prohibition on non-compete clauses.
- Effective September 4, 2024.
- Applies to “all workers”.
- Various legal challenges pending.

Common Law Protections

Duty of Loyalty

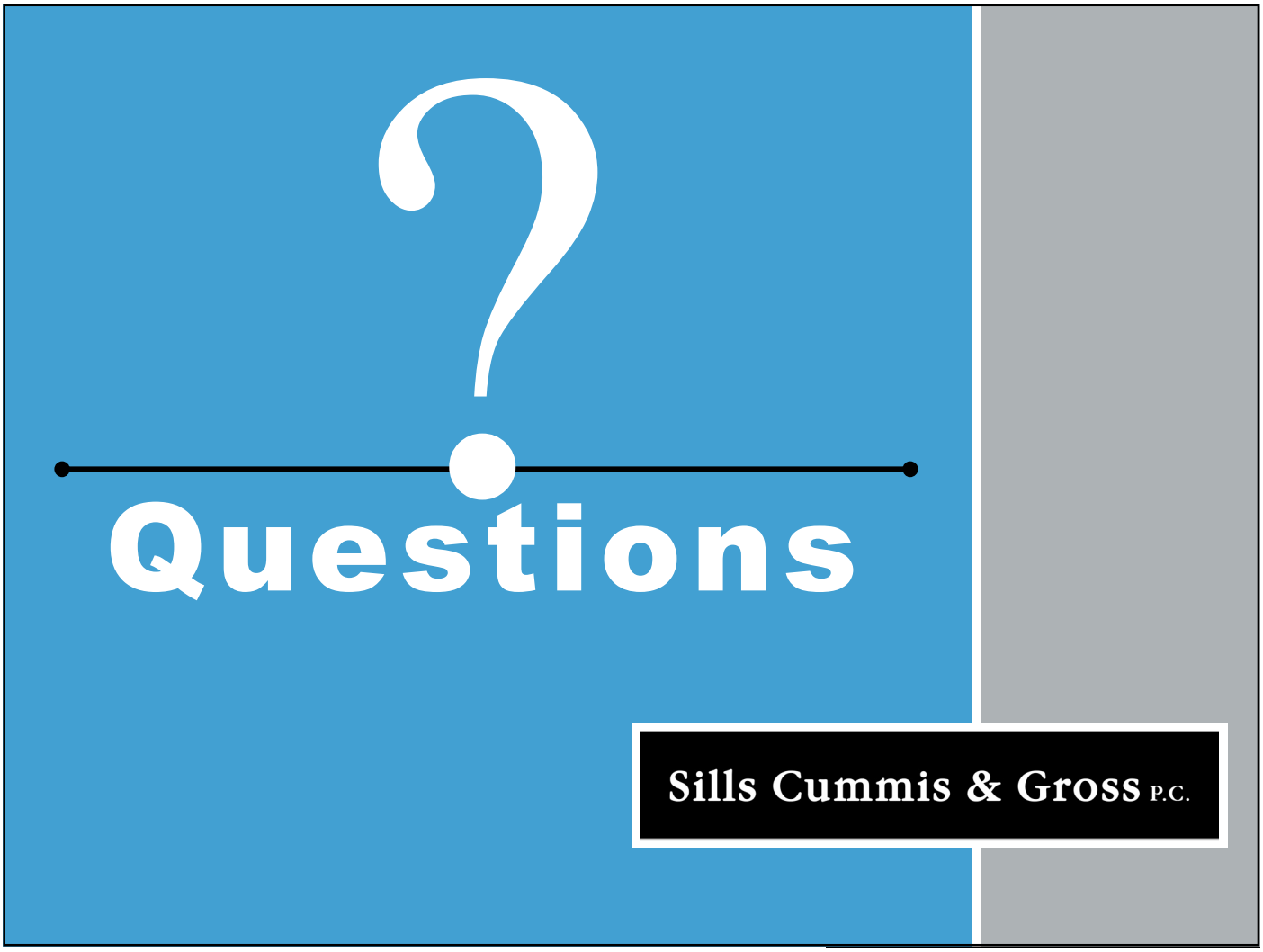
- Common law duty
- Protects confidential information and trade secrets
- To determine whether there is a breach:
  - The employee's level of trust and confidence
  - The presence of a contractual obligation
  - Egregiousness of the conduct

Other Common Law Torts

- Unfair Competition
- Conversion
- Misappropriation
- Unjust Enrichment
- Tortious Interference

Inevitable Disclosure Doctrine

Permits an employer to enjoin a former employee from undertaking certain types of employment if the employee would inevitably use or disclose the former employer's confidential information or trade secrets.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Questions
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NJ Law Against Discrimination Update

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I. PROPOSED AMENDMENTS TO THE NJLAD

Assembly Bill No. 2924

Amendment to codify case law defining unlawful discrimination to include the disparate impact of a facially neutral policy on members of the affected class.

Assembly Bill No. 3544

Amends employer's duty to accommodate a "lactating" employee "for such time as the employee desires" and provides that the accommodation shall include reasonable paid break time each day, "paid at the employee's regular rate of compensation, job restructuring, and a modified work schedule." It also amends the obligation to provide a private room or other location to require that it be "free from intrusion of other employees or customers of the employer's business, if applicable."

Assembly Bill No. 1613

Makes it unlawful for an employer to discriminate on the basis of an individual's familial status.

Assembly Bill No. 981

Excludes awards for unlawful gender-based compensation discrimination from New Jersey gross income.

Assembly Bill No. 1623

Adds an express provision to the NJLAD to protect paid and unpaid interns.

Senate Bill No. 1602

Amends the NJLAD to add height and weight as a protected class. There are exceptions for BFOQs and safety reasons.

II. PUBLISHED DECISIONS

A. New Jersey Supreme Court

Players Place II Condominium Association, Inc. v. K.P., 256 N.J. 472 (2024)

The wife of a condominium owner was diagnosed with bipolar II disorder, panic disorder, acute PTSD, and ADD or ADHD. When the condominium association denied the owner's request to adopt an emotional support dog that exceeded the thirty pound limit on pets, the owner asserted a claim under the NJLAD. The Supreme Court held that emotional support animals are different from pets, are not subject to general pet policies, and that parties should engage in a good-faith, interactive dialogue to reach a reasonable accommodation. It further ruled that in order to state a claim under the NLAD, individuals denied an accommodation must show that they have a disability under the NJLAD and that the requested accommodation is necessary to afford them an "equal opportunity to use and enjoy a dwelling." Once this showing is made, housing providers have the burden to prove the requested accommodation is unreasonable. Courts must "balance the need for, and benefits of, the requested accommodation against the cost and administrative burdens it presents ... to determine whether the accommodation is reasonable under the LAD."

C.V. by and through C.V. v. Waterford Township Board of Education, 255 N.J. 289 (2023)

The Supreme Court reversed an Appellate Division holding that the parents of a five-year-old girl sexually abused by a pedophile on a school bus could not bring a sex discrimination claim because there was no evidence that she was abused because of her gender. The abuser was a child sex predator who abused male and female children and the Appellate Division ruled that his actions were the result of his "pedophilia directed to all children," not discrimination. In reversing, the Supreme Court reaffirmed its holdings that "sexual touching of areas of the body linked to sexuality happens, by definition, because of sex," and that a plaintiff need only show by a preponderance of the evidence that the plaintiff's protected characteristic made a difference in the decision. In the opinion, the Supreme Court held that the NJLAD's protections against sex discrimination in employment and places of public accommodation are the same, but the NJLAD does not prohibit age discrimination in places of public accommodation.

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

The Supreme Could held that a non-disparagement provision in a settlement agreement was unenforceable as against public policy under Section 12.8 of the NJLAD, N.J.S.A. 10:5-12.8, which bars provisions in a settlement agreement that have the purpose or effect of concealing the details relating to a claim of discrimination, retaliation, or harassment. The settlement agreement stated:

> The parties agree not to make any statements written or verbal, or cause or encourage others to make any statements, written or verbal regarding the past

> behavior of the parties, which statements would tend to disparage or impugn the reputation of any party. The parties agree that this non disparagement provision extends to statements, written or verbal, including but not limited to, the news media, radio, television, ... government offices or police departments or members of the public.

Following the settlement, Savage was interviewed by a television reporter and made comments the Supreme Court found were related to her claims of discrimination, retaliation, and harassment, including general statements about her treatment and the treatment of other women, and statements that mirrored allegations of sex discrimination and retaliation in her complaint. The Supreme Court held that "[t]o accuse someone of misconduct is to disparage them. To provide details about allegations of discrimination, retaliation, or sexual harassment by an employer, then, would naturally 'tend to disparage or impugn' the employer's 'reputation.' The agreement, therefore, encompasses and would prevent employees from revealing information that lies at the core of what section 12.8 protects – details about claims of discrimination. In that way, the agreement directly conflicts with the LAD."

Crisitello v. St. Theresa School, 255 N.J. 200 (2023)

A teacher at St. Theresa School, a Roman Catholic institution, was terminated because she was unmarried and pregnant. Summary judgment was granted to the School on plaintiff's LAD pregnancy discrimination claim. In 2018, the Appellate Division reversed and remanded the case to allow for discovery concerning the School's treatment of similarly situated employees that it knew were in violation of its ethics code. Following discovery, the trial court again granted summary judgment, and another appeal followed. The Appellate Division reversed again, finding that plaintiff produced evidence the reason for her termination was a pretext for pregnancy discrimination. The evidence of pretext was the School's lack of action to detect whether employees violated Catholic tenets or breached its handbook, which did not expressly prohibit premarital sex. Instead, the School relied only upon its knowledge of employees' pregnancy and marital status. The Appellate Division also held that the ministerial exception, grounded in the First Amendment, did not bar the claim. The Supreme Court reversed and reinstated the grant of summary judgment. It held that the "religious tenets" exception to the NJLAD is an affirmative defense to employment discrimination claims available to religious entities and that the uncontroverted facts were that St. Theresa's followed the religious tenets of the Catholic Church in terminating Crisitello. The Court specifically rejected the Appellate Division's suggestion that because St. Theresa's did not survey employees to discover other transgressions of the tenets of the Catholic faith, her termination was a pretext.

B. Appellate Division

Beneduci v. Graham Curtin, P.A., 476 N.J. Super. 73 (App. Div. 2023)

The law firm Graham Curtin merged with the McElroy law firm while Beneduci was on disability leave. She did not apply for a position with McElroy, but asserted that Graham Curtin and McElroy

violated the NJLAD by not offering her employment with the merged firm. Summary Judgment was granted to defendants dismissing Beneduci's claims of discrimination on the basis of age, disability, and the use of disability leave. The Appellate Division reversed, finding that "the fact that Graham Curtin ceased to operate after the merger does not give them immunity from Beneduci's allegations." It further found that no other Graham Curtin employees were required to apply for a position at McElroy, and that there were sufficient facts to create a jury issue as to McElroy's liability, including whether the Managing Partner at Graham Curtin was empowered by and acted on behalf of McElroy when making decisions as to who to hire.

Pritchett v. State, 477 N.J. Super. 597 (App. Div. 2024)

Pritchett, a corrections officer at the Juvenile Justice Center, was diagnosed with multiple sclerosis. She retired when she was advised that if she did not return from leave by a specified date, she would be subject to disciplinary proceedings resulting in her termination without a pension. She sued, claiming the State violated the LAD by failing to accommodate her disability and discriminating against her based upon the perception of disability. A jury awarded plaintiff $10 million in punitive damages. The trial court approved the jury's punitive damages award. In an earlier unpublished opinion, the Appellate Division remanded the matter for further proceedings on the amount of punitive damages. That ruling was appealed to the New Jersey Supreme Court, which reaffirmed earlier holdings that punitive damages may be awarded against a public entity that violates the NJLAD, but such awards must be reviewed under a heightened scrutiny standard.

On remand from the Supreme Court, the trial court found the award of punitive damages was appropriate and the Appellate Division affirmed, holding it could not "conclude that the award" of punitive damages seven times greater than the compensatory damages award (less emotional distress damages) "is unreasonable or disproportionate to the inflicted injury" and that the award was "appropriate to deter further unlawful conduct."

Guzman v. M. Teixeira International, Inc., 476 N.J. Super. 64 (App. Div. 2023)

Guzman alleged that his employer wrongfully terminated him based on a perceived disability of "suffering from COVID-19" in violation of the NJLAD. The trial court granted defendant's' motion to dismiss the complaint with prejudice pursuant to Rule 4:6-2(e), finding that plaintiff failed to state a claim under the NJLAD for discrimination based on a perceived disability. The Appellate Division affirmed, holding that not every illness will constitute a disability under the NJLAD and not every person with COVID-19 will meet the definition of disability. Guzman did not plead facts sufficient to establish a prima facie case that he was terminated because defendant perceived he had a disability. He alleged that on his last day worked, he felt "cold, clammy, and weak," but worked the entire day and had a COVID-19 test the next day. He did not allege he sought medical attention or treatment. He alleged that he was terminated after he had reported to defendant that his condition had improved and he was feeling well enough to work. The Appellate Division ruled: "Those facts as pleaded by plaintiff are not sufficient to show he 'qualifies as an

individual with a disability, or who is perceived as having a disability, that has been defined by statute.'"

C. District of New Jersey

Smart v. County of Gloucester, 681 F.Supp.3d 306 (D.N.J. 2023)

An African American correctional officer alleged that Gloucester County, county officials, his state and local union, and union officials engaged in discriminatory and retaliatory action against him in violation of the NJLAD. In a detailed memorandum opinion, Magistrate Judge Lloret granted summary judgment dismissing Smart's NJLAD claims. The claim of retaliation against two individual union officials based upon information they shared with a Detective in the Prosecutor's Office about irregularities in the Union's recordkeeping and account of expenditures while Smart was Treasurer was dismissed based upon the litigation privilege.

Schulman v. Zoetis, Inc., 684 F.Supp.3d 275 (D.N.J. 2023)

An employee living and working remotely in New Hampshire for a company headquartered in New Jersey alleged that she was paid less than male employees in violation of the NJLAD. Defendant moved to dismiss the NJLAD claim, asserting the statute did not apply to a New Hampshire resident working remotely. The Court denied the motion without prejudice, predicting that the New Jersey Supreme Court will hold the NJLAD can apply to an out-of-state remote worker for a New Jersey-based company.

III. New Jersey Division on Civil Rights Guidance

Guidance on Discrimination and Out-of-State Remote Workers (May 2024)

The New Jersey Division on Civil Rights issued enforcement guidance to clarify that the NJLAD does not only protect New Jersey residents but extends more broadly to workers who are employed by a New Jersey company, even if they work remotely in another state. However, the NJLAD does not necessarily extend to individuals who work for an employer that is based in another state, unless there is some nexus between their employer and New Jersey for the NJLAD to apply.

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Protected Characteristics Under the LAD

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DISCLAIMER

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- The opinions expressed in this seminar are mine alone and not those of Selikoff & Cohen, P.A., the NJSBA, or NJICLE.
- The information presented in this seminar is not legal advice.
- Other laws and circumstances may be relevant to a particular case.

New Jersey Law Against Discrimination

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- N.J.S.A. 10:5-1 to -50
- Prohibits discrimination and harassment based on protected classes in employment (and also housing & places of public accommodation)
- No intent requirement

"***The LAD is not a fault- or intent-based statute***. A plaintiff need not show that the employer intentionally discriminated or harassed [them] or intended to create a hostile work environment. ***The purpose of the LAD is to eradicate discrimination, whether intentional or unintentional***. Although unintentional discrimination is perhaps less morally blameworthy than intentional discrimination, it is not necessarily less harmful in its effects, and ***it is at the effects of discrimination that the LAD is aimed***." Lehmann v. Toys R Us, Inc., 132 N.J. 587, 604–05 (1993). (Emphases added.)

Protected classes under the LAD

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"[It shall be an unlawful employment practice, or, as the case may be, an unlawful discrimination] [f]or an employer, ***because of the race, creed, color, national origin, ancestry, age, marital status, civil union status, domestic partnership status, affectional or sexual orientation, genetic information, pregnancy or breastfeeding, sex, gender identity or expression, disability or atypical hereditary cellular or blood trait of any individual***, or ***because of the liability for service in the Armed Forces of the United States or the nationality of any individual***, or ***because of the refusal to submit to a genetic test or make available the results of a genetic test to an employer, to refuse to hire or employ or to bar or to discharge or require to retire***, unless justified by lawful considerations other than age, from employment such individual ***or to discriminate against such individual in compensation or in terms, conditions or privileges of employment***." N.J.S.A. 10:5-12(a). (Emphases added.)

Protected classes under the LAD

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"***All persons shall have the opportunity to obtain employment***, and to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation, publicly assisted housing accommodation, and other real property without discrimination ***because of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, disability, liability for service in the Armed Forces of the United States, nationality, sex, gender identity or expression or source of lawful income used for rental or mortgage payments***, subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right." N.J.S.A. 10:5-4. (Emphases added.)

Protected characteristics under the LAD

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- Age
- Ancestry
- Breastfeeding
- Civil union status
- Disability
- Domestic partnership status
- Familial status
- Gender
- Gender identity
- Genetic traits
- Hair styles
- Marital status
- Military service
- Nationality
- National origin
- Pregnancy
- Race/color
- Religion/creed
- Sexual orientation

The LAD vs. Title VII

7

- The LAD is broader than Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e to 2000e-17.
  - No minimum number of employees
    - Title VII only covers employers with 15 or more employees.
    - The LAD covers all employers in New Jersey regardless of size (other than federal employers).
  - No administrative exhaustion requirement
    - Under Title VII, employees must first file a complaint with the EEOC.
    - Under the LAD, employees can file EITHER a complaint with the Division on Civil Rights (Attorney General's Office) OR a lawsuit in Superior Court.

The LAD vs. Title VII

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- Additional protections
  - Title VII does not cover marital status, civil union status, or domestic partnership status.
  - The LAD explicitly covers LGBTQ+ discrimination. (Bostock v. Clayton Cty., Ga., 590 U.S. 644 (2020): Title VII implicitly covers LGBTQ+ discrimination, which is per se sex discrimination, or discrimination "because of" sex.)
- Plaintiffs in employment discrimination cases rarely win in federal court.
  - Fewer than 5% of federal employment discrimination plaintiffs achieve any form of litigated relief.
  - Dismissals (motions to dismiss or summary judgment) account for 86% of all litigated outcomes of federal employment discrimination claims—higher than for any other federal plaintiffs except prisoners.

Disparate treatment & disparate impact

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- Disparate treatment
  - "The elements comprising the traditional formulation of the prima facie case for discrimination are that: (1) plaintiff belongs to a protected class; (2) she was performing her job at a level that met her employer's legitimate expectations; (3) she suffered an adverse employment action; and (4) others not within the protected class did not suffer similar adverse employment actions." El-Sioufi v. St. Peter's Univ. Hosp., 382 N.J. Super. 145, 167 (App. Div. 2005).
- Disparate impact
  - "[C]laims that stress disparate impact...involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity…[A] plaintiff must show that a facially neutral policy resulted in a significantly disproportionate or adverse impact on members of the affected class." Schiavo v. Marina Dist. Dev. Co., LLC, 442 N.J. Super. 346, 369 (App. Div. 2015). (Quotations and citations omitted.)

Reverse discrimination

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- Plaintiff "must substantiate...that the background circumstances support the suspicion that the defendant is the unusual employer who discriminates against the majority." Erickson v. Marsh & McLennan Co., 117 N.J. 539, 551 (1990). See also Zack v. Integra LifeSciences Corp., No. A-1745-22, 2024 WL 1208530 (N.J. Super. Ct. App. Div. Mar. 21, 2024), certif. den., No. 089285, 2024 WL 3298541 (N.J. July 1, 2024).
- Third Circuit has rejected "background circumstances" test as "both problematic and unnecessary" for Title VII claims. Iadimarco v. Runyon, 190 F.3d 151, 161 (3d Cir. 1999).

Sex discrimination

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- Sexual harassment
  - Quid pro quo
  - Hostile work environment
    - Plaintiff must allege that "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." Lehmann v. Toys 'R' Us, 132 N.J. 587, 603-04 (1993).
  - Includes same-sex harassment and reverse discrimination claims
- "Sexual touching of areas of the body linked to sexuality happens, by definition, because of sex." C.V. by & through C.V. v. Waterford Twp. Bd. of Educ., 255 N.J. 289, 297 (2023).

Pregnant Workers Fairness Act

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- L. 2013, c. 220
- Covers "pregnancy, childbirth, and breast feeding or expressing milk for breastfeeding, or medical conditions related to pregnancy, childbirth, or breastfeeding, including recovery from childbirth"
- "[A]n employer of an employee who is a woman affected by pregnancy shall make available to the employee reasonable accommodation in the workplace…for needs related to the pregnancy when the employee, based on the advice of her physician, requests the accommodation…unless the employer can demonstrate that providing the accommodation would be an undue hardship on the business operations of the employer." Id.
- Delanoy v. Twp. of Ocean, 245 N.J. 384 (2021)
  - Township violated PWFA by treating pregnant police officer differently than other officers similarly situated in their ability or inability to work
  - Three distinct statutory causes of action
    - "Unequal" or "unfavorable" treatment
    - Failure to accommodate
    - Unlawful penalization of employee for requesting accommodation

Race discrimination

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- "Race" is not defined under the LAD.
- United States Supreme Court has defined "race" within the meaning of federal civil rights law (§ 1981) to include "identifiable classes of persons who are subjected to intentional discrimination ***solely because of their ancestry or ethnic characteristics***. . . whether or not it would be classified as racial in terms of modern scientific theory." Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 606 (1987). (Emphasis added.)
- Includes perceived race
- Includes race-based hostile work environment claims
  - Taylor v. Metzger, 152 N.J. 490 (1998): a single derogatory comment can be severe or pervasive enough to create a hostile work environment. See also Rios v. Meda Pharm., Inc., 247 N.J. 1 (2021).
- Includes "reverse discrimination" claims
  - DeCapua v. Bell Atl.-New Jersey, Inc., 313 N.J. Super. 110 (Law Div. 1998).

CROWN Act

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- Create a Respectful and Open Workspace for Natural Hair (CROWN) Act (P.L. 2019, C. 272) amendment to the LAD
- "'Race' is inclusive of traits historically associated with race, including, but not limited to, hair texture, hair type, and protective hairstyles."
- "'Protective hair styles' includes, but is not limited to, such hairstyles as braids, locks, and twists."

Affectional or sexual orientation discrimination

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- "'Affectional or sexual orientation' means male or female heterosexuality, homosexuality, or bisexuality by inclination, practice, identity, or expression, having a history thereof or being perceived, presumed, or identified by others as having such an orientation." N.J.S.A. 10:5-5(hh).
- Zalewski v. Overlook Hosp., 300 N.J. Super. 202 (Law. Div. 1996): LAD's ban on affectional or sexual orientation discrimination covers sexual harassment of heterosexuals by other heterosexuals when based on gender stereotyping
  - cf. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)

Gender identity or expression discrimination

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- "'Gender identity or expression' means having or being perceived as having a gender related identity or expression whether or not stereotypically associated with a person's assigned sex at birth." N.J.S.A: 10:5-5(rr).
- "Nothing in the [LAD] shall affect the ability of an employer to require employees to adhere to reasonable workplace appearance…except that an employer shall allow an employee to appear, groom and dress consistent with the employee's gender identity or expression." N.J.S.A. 10:5-12(p).
- Babs Siperstein Act (P.L. 2018, C. 58)
  - Allows New Jersey residents to change the gender identification on their birth certificates without showing proof of surgery
  - Includes an undesignated/non-binary category

Marital and civil union status

17

- "'Civil Union' means a legally recognized union of two eligible individuals established pursuant to R.S.37:1-1 et seq. and P.L.2006, c. 103 (C.37:1-28 et al.)." N.J.S.A. 10:5-5(ss).
- "[M]arital status is not limited to the state of being single or married. Rather, the LAD also protects all employees who have declared that they will marry, have separated from a spouse, have initiated divorce proceedings, or have obtained a divorce from discrimination in the workplace. " Smith v. Millville Rescue Squad, 225 N.J. 373, 379 (2016).
- LAD does not prohibit anti-nepotism policies
  - Thomson v. Sanborn's Motor Express, Inc., 154 N.J. Super. 555 (App. Div. 1977)

Religious discrimination

18

- Religious accommodation claims
  - N.J.S.A. 10:5-12(q)(1): employers cannot "impose upon a person as a condition of obtaining or retaining employment…any terms or conditions that would require a person to violate or forego a sincerely held religious practice or religious observance…unless, after engaging in a bona fide effort, the employer demonstrates that it is unable to reasonably accommodate the employee's religious observance or practice without undue hardship on the conduct of the employer's business"
  - N.J.S.A. 10:5-12(q)(2): employers cannot "refuse to permit an employee to utilize leave…solely…to accommodate the employee's sincerely held religious observance or practice…[e]xcept where it would cause an employer to incur an undue hardship"

Religious discrimination

19

- Religious accommodation claims
  - N.J.S.A. 10:5-12(q)(3)(b): factors that determine "undue hardship" shall include:
    - Cost (including lost productivity) – based on size/operating cost of employer
    - Total number of employees who need the particular accommodation
    - Difficulty in administering the accommodation for employers with multiple facilities
  - Tisby v. Camden Cty. Corr. Facility, 448 N.J. Super. 241 (App. Div. 2017): allowing Muslim corrections officer to wear khimar would create undue hardship
- Hostile work environment claims
  - Cutler v. Dorn, 196 N.J. 419 (2008)
- Perceived membership
  - Cowher v. Carson & Roberts, 425 N.J. Super. 285 (App. Div. 2012)

Religious discrimination

20

- Religious exemptions to the LAD
  - "[I]t shall not be an unlawful employment practice…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" N.J.S.A. 10:5-12(a)
  - Gallo v. Salesian Soc., Inc., 290 N.J. Super. 616 (App. Div. 1996): ministerial exception did not apply to bar age and sex discrimination lawsuit brought by lay teacher at Catholic all-boys high school
  - Crisitello v. St. Theresa Sch., 255 N.J. 200 (2023): religious tenets exception to LAD barred pregnancy and marital status discrimination lawsuit brought by unmarried lay teacher at Catholic elementary school who was terminated for engaging in premarital sex
  - cf. Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 565 U.S. 171 (2012); Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020)

Disability discrimination

21

- "'Disability' means physical or sensory disability, infirmity, malformation, or disfigurement which is caused by bodily injury, birth defect, or illness including epilepsy and other seizure disorders, and which shall include, but not be limited to, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impairment, deafness or hearing impairment, muteness or speech impairment, or physical reliance on a service or guide dog, wheelchair, or other remedial appliance or device, or any mental, psychological, or developmental disability, including autism spectrum disorders, resulting from anatomical, psychological, physiological, or neurological conditions which prevents the typical exercise of any bodily or mental functions or is demonstrable, medically or psychologically, by accepted clinical or laboratory diagnostic techniques. Disability shall also mean AIDS or HIV infection." N.J.S.A. 10:5-5(q).
- Includes alcoholism and past substance use
  - Clowes v. Terminix Int'l, Inc., 109 N.J. 575 (1988); Bosshard v. Hackensack Univ. Med. Ctr., 345 N.J. Super. 78 (App. Div. 2001)
- Can include obesity
  - Compare Gimello v. Agency Rent-A-Car Sys., Inc., 250 N.J. Super. 338 (App. Div. 1991) with Dickson v. Cmty. Bus Lines, Inc., 458 N.J. Super. 522 (App. Div. 2019)
  - S1602 would overturn Dickson

Disability discrimination

22

- Perception of disability claims
  - Rogers v. Campbell Foundry Co., 185 N.J. Super. 109 (App. Div. 1982)
- Reasonable accommodation
  - "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." N.J.A.C. 13:13-2.5(b)
  - Employee must request accommodation to trigger the employer's obligation.
  - Employer may request reasonable medical documentation from the employee to support the request.
  - A reasonable accommodation does not need to be the exact accommodation requested by the employee. It only needs to be an effective accommodation.
- Failure-to-accommodate claims

Disability discrimination

23

- Jansen v. Food Circus Supermarkets, Inc.,110 N.J. 363, 374 (1988): An employer's decision that an employee cannot perform their job cannot be based on "unfounded fears or prejudice" about the employee's disability but must be "reasonably arrived at."
- Interactive process
  - "To determine what appropriate accommodation is necessary, ***the employer must initiate an informal interactive process with the employee***…This process must ***identify the potential reasonable accommodations that could be adopted to overcome the employee's precise limitations*** resulting from the disability." Tynan v. Vicinage 13 of Superior Court, 351 N.J. Super. 385, 400 (App. Div. 2002) (citing 29 C.F.R. § 1630.2(0)(3)). (Emphases added.)
  - "The appropriate reasonable accommodation is best determined through ***a flexible, interactive process that involves both the employer and the [employee]*** with a disability." Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 311 (3d Cir. 1999) (quoting 29 C.F.R. § 1630.9).

Age discrimination

24

- Covers all ages
  - Broader than ADEA (40 and older)
- Includes reverse discrimination claims (age discrimination based on youth)
  - Bergen Com. Bank v. Sisler, 157 N.J. 188 (1999)
- Includes age-based hostile work environment claims
  - Kelly v. Bally's Grand, Inc., 285 N.J. Super. 422 (App. Div. 1995)
- Exceptions
  - Refusal to hire someone under 18
  - Age is a bona fide occupational qualification (BFOQ)
  - No longer an exception: refusal to hire or promote someone over 70. Repealed by A681 (October 2021).

Affirmative defenses

25

- No adverse employment action
  - Adverse employment action is not required for failure-to-accommodate claims (Richter v. Oakland Bd. of Educ., 246 N.J. 507 (2021))
- Employer had effective anti-harassment policy
  - Gaines v. Bellino, 173 N.J. 301 (2002); Payton v. New Jersey Tpk. Auth., 148 N.J. 524 (1997)
- Plaintiff unreasonably failed to take advantage of corrective/preventative measures
- No affirmative defense available when a supervisor's harassment results in a tangible employment action
  - Aguas v. State, 220 N.J. 494 (2015)
  - cf. Burlington Industries v. Ellerth, 524 U.S. 742 (1998); Faragher v. City of Boca Raton, 524 U.S. 775 (1998)

Affirmative defenses

26

- Bona fide occupational qualification (BFOQ)
- Statute of limitations
  - Shepherd v. Hunterdon Developmental Ctr., 174 N.J. 1 (2002)
- Failure to mitigate economic damages
  - Goodman v. London Metals Exch., Inc., 86 N.J. 19 (1981)
    - "Lower sights doctrine"
    - Timing is critical ("[A]n employee who lowers his sights too soon by accepting lower paying work may be subject to a reduction in an amount equivalent to that which he should have accepted")
  - Quinlan v. Curtiss-Wright Corp., 425 N.J. Super. 335 (App. Div. 2012)

Remedies

27

- Compensatory damages
  - Economic damages
    - Back pay
    - Front pay
  - Emotional damages
- Consequential damages
- Punitive damages
- Attorneys' fees and costs
- Pre-judgment interest
- Post-judgment interest
- Injunctive relief

Proposed rules & amendments

28

- S1602: Adds height and weight to protected classes (subject to BFOQ and safety exceptions)
  - Passed by Senate February 2024
- A1613: Adds familial status to employment discrimination provision
  - Referred to Assembly Children, Families and Food Security Committee January 2024
- Proposed DCR rules clarifying disparate impact standard (N.J.A.C. 13:16-1 to 16:6-2)
  - Employer must demonstrate challenged practice/policy is necessary to achieve a "substantial, legitimate, nondiscriminatory interest" rather than a "legitimate business necessity"
  - Challenged practice/policy may still be unlawful if complainant can demonstrate there is a less discriminatory, equally effective alternative practice/policy that would achieve the same interest
  - Complainant must use empirical evidence (not hypothetical or speculative)
  - Comment period closes August 2, 2024

COMMENTARY

When Bad Precedent Remains Good Law

by Hop T. Wechsler

When is good law bad precedent? The answer should be "never," but it isn't. Federal and state courts' jurisdiction to correct past mistakes is circumscribed by Article III;[1] analogous state constitutional provisions; related doctrines such as standing, mootness, and ripeness; and the limitation of justiciable legal questions to "cases" and "controversies" that arise from a live dispute between parties. Other doctrines such as stare decisis, res judicata, collateral estoppel, and the "law of the case" also discourage or prevent courts from overturning both decades-old and recent decisions. In extreme cases, however, bad precedent remains good law not because courts lack jurisdiction or opportunity to reverse a particular decision. Sometimes, bad precedent remains good law because courts deliberately choose to cite or to perpetuate the decision, whether expressly or sub silentio. The morally untenable remains legally tenable, not by default but by design.

On Feb. 13, 2022, 13 civil rights organizations, including the American Civil Liberties Union, the NAACP Legal Defense and Education Fund, the Brennan Center for Justice, the Hispanic Federation, and Lambda Legal, sent an open letter to Attorney General Merrick Garland and Solicitor General Elizabeth Prelogar.[2] The letter encouraged the U.S. Department of Justice to reject the Insular Cases,[3] a series of 1901 U.S. Supreme Court cases that denied full constitutional rights and protections to residents of Guam, Puerto Rico, and other U.S. territories acquired as a result of the Spanish-American War on the basis that such residents were "alien races"[4] and "savage tribes"[5] undeserving of and unfit for citizenship. The letter compared the Insular Cases to other "infamous" and "shameful" cases from our nation's history such as *Plessy v. Ferguson*[6] and *Korematsu v. United States*,[7] noting that, while *Plessy* and *Korematsu* were both reversed, DOJ has continued to defend the Insular Cases. Specifically, DOJ relied extensively on the Insular Cases in its briefing before the Tenth Circuit in *Fitisemanu v. United States*, a case that the Supreme Court could eventually hear. [8]

In *Fitisemanu*, a divided panel ruled that American Samoa, a U.S. territory since 1900, is not "in the United States" for purposes of the Fourteenth Amendment's Citizenship Clause, thus denying U.S. citizenship to multiple American Samoan plaintiffs.[9] In briefing the case, DOJ cited the same opinions from the Insular Cases that elsewhere included racist dicta,[10] such as one opinion's objection to "the immediate bestowal of citizenship" on members of "uncivilized race[s]," who were "absolutely unfit to receive it."[11] Indeed, although DOJ admitted during a recent oral argument before the Supreme Court in a different case, *United States v. Vaello Madero*, that "some of the reasoning and rhetoric" represented by the Insular Cases is "obviously anathema," DOJ urged the Court to avoid addressing the Insular Cases' abhorrent, foundational racism as "[not] relevant to this case." [12]On April 21, 2022, a majority of the Court did exactly that, ruling in *Vaello Madero*[13] that the Constitution does not require Congress to extend Supplemental Security Income benefits to residents of Puerto Rico without mentioning the Insular Cases once. As Justice Neil Gorsuch cautioned in a concurring opinion, "leav[ing] the Insular Cases on the books" means that "[l]ower courts [will] continue to feel constrained to apply their terms" and "only defers a long overdue reckoning."[14]

Acknowledged bad precedent nonetheless remains good law, whether cited, relied upon, or tacitly followed by the Judiciary. The Insular Cases are extreme in this respect but not anomalous. More often, bad precedents are avoided or even repudiated by decisions that repeat or compound the errors of these prior decisions. Although *Korematsu* is now both bad law and bad precedent, *Trump v. Hawaii*, the case that reversed *Korematsu*, simultaneously reinforced *Korematsu*'s conclusion—namely, that deference to purported national security concerns, however flimsy or pretextual, allows the government to violate civil liberties on the basis of protected class.[15] In the employment context, the U.S. Supreme Court has repeatedly denounced "Lochnerism,"[16] a judicially activist conservatism that overrode multiple economic regulations for violating the purport-

ed constitutional right to contract but ignored the often vastly unequal bargaining power between the contracting employer and employee. Notwithstanding these denunciations, the Court perpetuates "neo-Lochnerism" by interpreting the Federal Arbitration Act[17] to override federal and state laws protecting the right to a jury trial[18] and a class action lawsuit,[19] among other procedural safeguards, while ignoring the often vastly unequal bargaining power between the parties to employment contracts that contain mandatory arbitration provisions.

Nor is New Jersey exempt from bad but cited precedent. TEACHNJ[20] tenure arbitration briefs and awards regularly reference *In re Grossman*[21] for its anodyne definition of "incapacity,"[22] one of the statutory grounds for removing a tenured school employee from their employment,[23] but typically avoid the egregiously transphobic underlying facts of the case. In *Grossman*, the Appellate Division affirmed the Commissioner of Education's decision that "a male tenured teacher who underwent sex-reassignment surgery to change his [sic] external anatomy to that of a female can be dismissed from a public school system on the sole ground that his [sic] retention would result in potential emotional harm to the students."[24] If the legal meaning of "incapacity" has not changed since 1974, must we continue to define it by citation to *Grossman*, a case expressly endorsing what now constitutes unlawful discrimination per se under the New Jersey Law Against Discrimination?[25]

Lawyers, who are trained to think critically, should take the opportunity to think critically when it comes to citing bad precedent that remains good law. Either refuse to cite the case at issue or else cite the case for being what it is: bad precedent, period.[26] In multiple recent unreported decisions, Appellate Division panels have "declined" to use the term "grandfathered" "because of its prejudiced origins," referencing the "grandfather clause" enacted by seven Southern states to disenfranchise Black voters during the post-Reconstruction era.[27] Today "grandfathered," tomorrow *Grossman*? The arc of bad precedent is long, but it bends toward reversal.

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Endnotes

1. U.S. Constitution, Art. III, § 2.
2. *See* Civil Rights Group Letter to DOJ on Insular Cases, *available at* aclu.org/letter/civil-rights-group-letter-doj-insular-cases. *See also* Paul Blumenthal, Civil Rights Groups To Biden DOJ: Stop Using 100-Year-Old Racist Precedents In Court, *HuffPost* (Feb. 15, 2022), *available at* huffpost.com/entry/biden-doj-insular-cases-racism_n_620bc80ae4b032302470eae8.
3. *See, e.g.*, Joseph W. Dellapenna, Constitutional Citizenship Under Attack, 61 *Vill. L. Rev.* 477, 507 (2016) ("Collectively, these decisions are called The Insular Cases because the lands involved were all islands acquired by the United States in 1898 or 1899").
4. *Downes v. Bidwell*, 182 U.S. 244, 287 (1901).
5. *DeLima v. Bidwell*, 182 U.S. 1, 219 (McKenna, J., dissenting).
6. 163 U.S. 537 (1896), *overruled by Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).
7. 323 U.S. 214 (1944), *abrogated by Trump v. Hawaii*, 138 S. Ct. 2392 (2018).
8. Brief for Defendants-Appellants, *Fitisemanu v. United States*, et al. (Apr. 14, 2020) (No. 20-4017, No. 20-4019).
9. *Fitisemanu v. United States*, 1 F.4th 862, 875 (10th Cir. 2021).
10. *Id.*
11. *Downes*, *supra* n.4, at 306 (White, J., concurring).
12. Tr. of Oral Argument at 10-11, *United States v. Vaello Madero*, No. 20-303 (S. Ct. argued Nov. 9, 2021).
13. *United States v. Vaello Madero*, No. 20-303, 2022 WL 1177499, at *4 (Apr. 21, 2022).
14. *Id.* at *14 (Gorsuch, J., concurring).
15. *See, e.g.*, Hop T. Wechsler, *Trump v. Hawaii*: When Overwhelming Direct Evidence of Discrimination and Pretext Cannot Survive Rational Basis Review, 40 *N.J. Lab. & Emp. L.Q.*, No. 1, 2019, at 22-25.

16. *Lochner v. New York*, 198 U.S. 45 (1905). *See, e.g.*, *Planned Parenthood v. Casey*, 505 U.S. 833, 961 (1992) (Rehnquist, C.J., concurring in part) ("[T]he *Lochner* Court…believed, erroneously, that 'liberty' under the Due Process Clause protected the 'right to make a contract'") (citing *Lochner* at 53); *Dobbs v. Jackson Women's Health Org.*, No. 19-1392, 2022 WL 2276808, at *11 (June 24, 2022) (referring to "the freewheeling judicial policymaking that characterized discredited decisions such as *Lochner v. New York*").
17. 9 U.S.C. § 1 *et seq.*
18. *See, e.g.*, *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421 (2017).
19. *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018).
20. The Teacher Effectiveness and Accountability for the Children of New Jersey Act, L. 2012, c. 26, codified as N.J.S.A. 18A:6-117 to -129 (TEACHNJ Act).
21. 127 N.J. Super. 13 (App. Div.), *certif. den.* 65 N.J. 292 (1974).
22. *Id.* at 29-30 ("[I]ncapacity'…is directly related to fitness to teach" and "is not based exclusively on a teacher's classroom proficiency or the absence of misconduct" but instead "depends upon a broad range of factors[,]" including "the teacher's impact and effect upon [their] students").
23. *See* N.J.S.A. 18A:6-10 ("No person shall be dismissed or reduced in compensation…except for inefficiency, incapacity, unbecoming conduct, or other just cause….").
24. *Grossman*, *supra* n. 21, at 19.
25. *See* N.J.S.A. 10:5-12 ("It shall be an unlawful employment practice, or, as the case may be, an unlawful discrimination [f]or an employer, because of the…sex, gender identity or expression…of any individual…to discharge or require to retire…from employment such individual….").
26. *See, e.g., Vaello Madero*, *supra* n.13, at *15 (Gorsuch, J., concurring) ("Because no party asks us to overrule the Insular Cases to resolve today's dispute, I join the Court's opinion. But the time has come to recognize that the Insular Cases rest on a rotten foundation").
27. *See Danetz-Gold v. Bd. of Educ. of Englewood Cliffs*, No. A-3021-18T2, 2020 WL 4919688, at *2 n.1 (N.J. Super. Ct. App. Div. Aug. 21, 2020) (declining to use the term "grandfathered" due to "its prejudiced origins" and citing Webster's Third New International Dictionary 987 (2002) (definition of "grandfather clause") and Benno C. Schmidt, Jr., Principle and Prejudice: The Supreme Court and Race in the Progressive Era, 82 *Colum. L. Rev.* 835 (1982)); *Squicciarini v. Bor. of Closter*, No. A-0822-19, 2021 WL 2774870, at *1 n.2 (N.J. Super. Ct. App. Div. July 2, 2021) (same); *Laffey v. Aufiero*, No. A-3349-19, 2021 WL 5778434, at *2 n.3 (N.J. Super. Ct. App. Div. Dec. 7, 2021) (same).

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Tenure Under the Education Laws

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Disclaimer

- The opinions expressed in this seminar are mine alone and not those of Selikoff & Cohen, P.A., the NJSBA, or NJICLE.
- The information presented in this seminar is not legal advice.
- Other laws and circumstances may be relevant to a particular case.

What is tenure

- "[T]eacher tenure is a statutory right imposed upon a teacher's contractual employment status." Zimmerman v. Bd. of Educ. of City of Newark, 38 N.J. 65, 72, (1962).
- "Tenure is a status, a protection, not a contract…As a status, tenure protects all teachers who have it, the merely adequate as much as the excellent." Kopera v. Bd. of Educ. of Town of W. Orange, Essex Cnty., 60 N.J. Super. 288, 298 (App. Div. 1960).

3

"Tenure is a statutory status and not a contractual one." Marbut v. Bd. of Educ. of Tp. of S. Brunswick, N.J.A.R. 2d (EDU) 99, 102. The Tenure Act "makes tenure a mandatory term and condition of employment. It therefore supersedes contractual terms." Spiewak v. Bd. of Educ. of Rutherford, 90 N.J. 63, 72 (1982).

4

Why tenure matters

- "The tenure statute prevents school boards from abusing their superior bargaining power over teachers in contract negotiations…It protects teachers from dismissal for unfounded, flimsy or political reasons." Spiewak v. Bd. of Educ. of Rutherford, 90 N.J. 63, 73 (1982). (Citations and quotations omitted.)

- "The objectives [of tenure] are to protect competent and qualified teachers in the security of their positions during good behavior, and to protect them, after they have undergone an adequate probationary period, against removal for unfounded, flimsy, or political reasons." Zimmerman v. Bd. of Ed. of City of Newark, 38 N.J. 65, 71 (1962).

5

Who is eligible

- Teaching staff members (N.J.S.A. 18A:28-5)
- Secretaries & clerks (N.J.S.A. 18A:17-2)
- Custodians employed indefinitely (not for a fixed term) (N.J.S.A. 18A:17-3)
- School board officers
- Attendance officers in city districts (N.J.S.A. 18A:38-33)
- Faculty members at county colleges (N.J.S.A. 18A:60-8)
- Faculty members at state colleges (N.J.S.A. 18A:60-16)

Who is not eligible

- Substitutes/replacement teachers (N.J.S.A. 18A:16-1.1)
  - Includes home instructors/bedside instructors/tutors (Donvito v. Bd. of Educ. of N. Valley Reg'l High Sch. Dist., 387 N.J. Super. 216 (App. Div.), certif. den. 188 N.J. 577 (2006))
- Chief School Administrators/Superintendents (N.J.S.A. 18A:17-15)
- Non-U.S. citizens (N.J.S.A. 18A:28-3)

Teaching staff members

- "Teaching staff member" means a member of the professional staff of any district or regional board of education, or any board of education of a county vocational school, holding office, position or employment of such character that the qualifications, for such office, position or employment, require him to hold a valid and effective standard, provisional or emergency certificate, appropriate to his office, position or employment, issued by the State Board of Examiners and includes a school nurse and a school athletic trainer. N.J.S.A. 18A:1-1.

Teaching staff member tenure

- N.J.S.A. 18A:28-5(a) (pre-TEACHNJ hires)
  - "[A]n employee of a board of education is entitled to tenure if (1) [they] work[] in a position for which a teaching certificate is required; (2) [they] hold[] the appropriate certificate; and (3) [they] ha[ve] served the requisite period of time." Spiewak v. Bd. of Educ. of Rutherford, 90 N.J. 63, 74 (1982).
- N.J.S.A. 18A:28-5(b) (post-TEACHNJ hires)
  - Longer probationary period (four years and a day, not three years and a day)
  - Mentorship program requirement (initial year)
  - Evaluation requirement (must be Effective or Highly Effective in 2/3 years following the mentorship)
- "[T]enure is acquired in one of the specifically enumerated positions only if the individual has served for the requisite statutorily required period of time in that position." L.1996, c. 58, § 1.
- Position must require a ***specific*** (subject-appropriate) teaching certificate.
- A teaching staff member can have tenure in more than one position simultaneously. Melnyk v. Bd. of Educ. of Delsea Reg'l High Sch. Dist., 241 N.J. 31 (2020).

Tenure positions under N.J.S.A. 18A:28-5

- Teacher
- Educational services
- School nurse
- School athletic trainer
- Principal (other than administrative principal)
- Assistant principal
- Vice principal
- Assistant superintendent
- School business administrator

Secretarial & clerical tenure

- Three consecutive calendar years OR three consecutive academic years plus the beginning of the next succeeding year (N.J.S.A. 18A:17-2)
- Whether or not a position is "clerical" within the meaning of the statute "require[s] a fact-specific evaluation of the duties of a tenure claimant irrespective of the job assignment, job titles, or negotiated placement in a collectively negotiated agreement." Effenberger v. Bd. of Educ. of Toms River Reg'l Schls., Ocean Cnty., 95 N.J.A.R. 2d (EDU) 66, 69.
  - Were the employee's duties predominantly clerical in nature?
  - Were any non-clerical duties minimal and incidental to the predominantly and primarly clerical duties the employee performed?
- Civil service jurisdictions: school employees in classified Civil Service secretarial positions also accrue tenure under N.J.S.A. 18A:17-2. Miller v. State-Operated Sch. Dist. of the City of Newark, 240 N.J. 118 (2019).

Custodial tenure

- "Every public school janitor of a school district shall, unless he is appointed for a fixed term, hold his office, position or employment under tenure during good behavior and efficiency…" N.J.S.A. 18A:17-3
- A public school custodian employed for an indefinite term is tenured from the beginning of employment.
- A custodian who accepts employment for a fixed term (e.g. annual contract or board resolution that includes beginning and end dates) has no employment rights beyond the expiration of that term.

Contractual (non-statutory) tenure

- "[J]ob security and protection from unfair or unwarranted dismissal must rank high among an employee's rights. And we agree with [PERC's] conclusion that ***board of education employees whose tenure is not provided for by the Legislature may negotiate job security***." Plumbers & Steamfitters Loc. No. 270, Carpenters Loc. No. 65 & Painters Loc. No. 144 v. Woodbridge Bd. of Educ., 159 N.J. Super. 83, 87-88 (App. Div. 1978). (Emphasis added.) See also Wright v. Bd. of Educ. of City of E. Orange, Essex Cnty., 99 N.J. 112 (1985).
- Contractual tenure is not available for statutorily tenure-eligible certificated positions.

Seniority

- Statutorily tenured certificated employees have seniority by regulation. Other employees can negotiate contractual seniority.
- Seniority rights are triggered when a tenured staff member is RIFd or transferred to another position with a loss of tangible employment benefits (e.g. reduction in hours, loss of salary). Carpenito v. Bd. of Educ. of Borough of Rumson, Monmouth Cnty., 322 N.J. Super. 522, 533 (App. Div. 1999).
- Tenured teaching staff members dismissed as the result of a RIF "shall be and remain upon a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which [they] shall be qualified." N.J.S.A. 18A:28-12.

Seniority categories (N.J.A.C. 6A:32-5.1(l))

- Superintendent of schools
- Assistant superintendent
- Director
- High school principal
- Adult high school principal
- Alternative school principal
- Vocational school principal
- Junior high or middle school principal
- Elementary school principal
- Supervisor
- High school vice principal or assistant principal
- Adult high school vice principal or assistant principal
- Alternative school vice principal or assistant principal
- Junior high or middle school vice principal or assistant principal
- Elementary school vice principal or assistant principal
- Vocational school vice principal or assistant principal
- Secondary
- Elementary
- Additional categories of specific educational service endorsements issued by the State Board of Examiners and listed in N.J.A.C. 6A:9B

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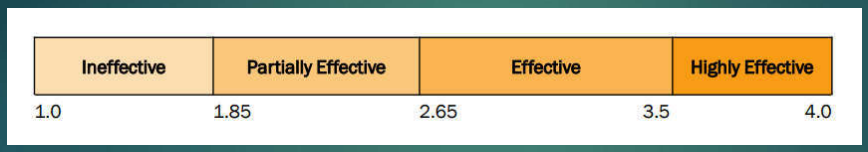
Removing a tenured employee

- RIF/abolishment of position (N.J.S.A. 18A:28-9)
- Tenure charges
- Abandonment
- Failure to maintain certification (N.J.A.C. 6A:9B-5.1(c))
- Disqualification based on criminal conviction (N.J.S.A. 2C:51-2, N.J.S.A. 18A:6-7.1)
- Forfeiture based on criminal conviction (N.J.S.A. 43:1-3.1)

Tenure charges

- "No person shall be dismissed or reduced in compensation…except for inefficiency, incapacity, unbecoming conduct, or other just cause" (N.J.S.A. 18A:6-10)
- TEACHNJ Act, N.J.S.A. 18A:6-117 to -129 (effective Aug. 6, 2012)
- Replaced the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 to -18.1
- Inefficiency (N.J.S.A. 18A:6-17.3)
  - Ineffective or Partially Effective rating followed by Ineffective rating (must file charges) or Partially Effective (may file charges)
  - Arbitrators may only consider (1) district's failure to adhere to the evaluation process including Corrective Action Plan; (2) mistake of fact in the evaluation; (3) if the charges would not have been brought but for considerations of political affiliation, nepotism, union activity, discrimination, or other conduct; (4) whether the charge is arbitrary or capricious
- Incapacity
  - "[T]he touchstone is fitness to discharge the duties and functions of one's office or position" (Matter of Grossman, 127 N.J. Super. 13, 29 (App. Div. 1974))
- Conduct unbecoming
  - "A charge of unbecoming conduct requires only evidence of inappropriate conduct by teaching professionals. It focuses on the morale, efficiency, and public perception of an entity, and how those concerns are harmed by allowing teachers to behave inappropriately while holding public employment." Bound Brook Bd. of Educ. v. Ciripompa, 228 N.J. 4, 14 (2017).
- Other just cause

AchieveNJ teacher summative ratings



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Job protection other than tenure

- Chapter 66
  - P.L. 2020, C. 66 (N.J.S.A. 34:13A-29): requires binding arbitration for discipline up to and including termination or non-renewal of a non-certificated staff member's employment contract
- Anti-discrimination claims
- Conscientious Employee Protection Act claims (N.J.S.A. 34:19-1 to -14)
- Common law retaliation claims (Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58 (1980))

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PAY EQUITY AND WAGE THEFT ACTS

Stephanie D. Gironda, Esq.
Tracy A. Armstrong, Esq.

When You Wish Upon a Star . . .

Prima Facie Case Under the Federal Equal Pay Act ("EPA")

A plaintiff must show that he or she receives less pay than an employee of the opposite sex who

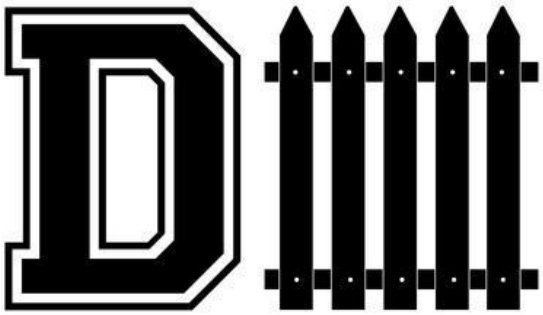
- Works at the same establishment (it is not enough to show that the employees work for the same company at different locations)
- Performs substantially equal work (regardless of job title)
- Under substantially equal working conditions (such as physical/environmental surroundings and hazards).

EPA

Employer Defenses

An Employer can avoid liability by proving that the pay differential between employees of the opposite sex is due to one of the following factors:

- a seniority system;
- a merit pay system;
- a system which measures earnings by quantity or quality of production; or
- a differential based on any factor other than sex.



EPA
Damages

Damages under the EPA include:

- back pay (including compensation for all forms of pay, such as lower benefits);
- an order that the plaintiff's pay be raised to the level of the opposite-sex counterpart (note than the EPA prohibits an employer from reducing the other employee's pay to match the plaintiff's pay);
- attorneys' fees; and
- liquidated damages equal to the amount of the back pay awarded.

The Diane B. Allen New Jersey Equal Pay Act ("NJEPA")

The NJEPA prohibits employers from paying different compensation to employees in any protected class who perform substantially similar work when viewed "as a composite of skill, effort and responsibility."

NJEPA
Employer Defenses

An Employer can avoid liability under the NJEPA by proving that the pay differential is due to one of the following factors:

- a seniority system;
- a merit pay system;
- a system which measures earnings by quantity or quality of production; or
- a differential based on any factor other than sex.

NJEPA

Damages

Treble damages

if employee proves employer

- Discriminated against employee on the basis of pay or
- Retaliated against employee for requesting, discussing or disclosing to any other employee any information regarding employee compensation or
- Required the employee to waive his or her right to complain about pay disparities.

New Jersey Wage Theft Act ("NJWTA")

The New Jersey Wage Theft Act amends three New Jersey wage and hour laws:

1. The New Jersey Wage Payment Law;
2. New Jersey Wage and Hour Law; and
3. New Jersey Wage Collection Law.

NJWTA

- Unpaid/lost wages
- Liquidated damages equal to 200% of the unpaid wages
- Reasonable costs of the action and attorneys' fees.

NJWTA

There is a defense to liquidated damages for first time violators if the employer:

- can demonstrate that the violation was an inadvertent error made in good faith
- can show that the employer had reasonable grounds for believing that the act or omission was not a violation
- acknowledges the violation
- pays the amount owed within 30 days.

Thank You!

WILENTZ
—ATTORNEYS AT LAW—

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About the Panelists…

Tracy Armstrong is a Shareholder in and a member of the Employment Law Team and Management Committee of Wilentz, Goldman & Spitzer, P.A. in Woodbridge and Eatontown, New Jersey; New York City; and Philadelphia, PA. She represents management in employer/employee disputes and the laws governing the employer/employee relationship, and offers representation in claims and matters involving employment laws including, but not limited to, the *New Jersey Law Against Discrimination* (LAD), the *Conscientious Employee Protection Act* (CEPA), the *Fair Labor Standards Act* (FLSA), the *Family Medical Leave Act* (FMLA), the *New Jersey Family Leave Act* (NJFLA), the *Americans with Disabilities Act* (ADA) and the *Age Discrimination in Employment Act* (ADEA). She also provides advice and guidance in proactive employment counseling, and assists her clients in drafting and reviewing all types of policies and contracts.

Admitted to practice in New Jersey and before the United States District Court for the Southern District of New York, Ms. Armstrong is a member of the New Jersey State Bar Association Cannabis Law Committee and the Executive Committee of the Labor and Employment Law Section, and has been a member of the Monmouth Bar Association's Labor and Employment Committee. She serves on the District VIII Ethics Committee, has been a member of the New Jersey Women Lawyers Association and the American and New Jersey Associations of Legal Administrators, and has lectured for ICLE and other professional groups and associations.

Ms. Armstrong received her B.A. from Monmouth University and her J.D. from Seton Hall University School of Law, where she was a director of the Seton Hall University Juvenile Justice Clinic.

Dean Burrell is Principal of Burrell Dispute Resolution in Morristown, New Jersey, and a nationally-known labor and employment attorney and neutral with expertise gained as a litigator for the National Labor Relations Board, major law firms, and major domestic and international corporations. He has been a neutral, a union local president and a management-side practitioner, and a leader in the minority labor and employment bar. Mr. Burrell began his career in government service as the staff attorney for the District of Columbia Public Employee Relations Board, and as a Field Attorney and litigator with the NLRB and its Special Litigation Branch. He was president of Local 5 of the NLRB Union and Shop Steward with the NLRB Professional Association.

Admitted to practice in New Jersey and Pennsylvania, Mr. Burrell is Past President of the Arizona chapter of the Labor Employment Relations Association (LERA), Past President of the Garden State Bar Association and a member of the New Jersey State Bar Association Labor and Employment Law Executive Committee, where he has been Co-Coordinator of the ADR Subcommittee. He has been a member of the Labor and Employment and ADR Sections of the American, National and New York State Bar Associations, Chair of the NJSBA Dispute Resolution Section, Chair of the NJSBA Minorities in the Profession Section and Chair of the National Bar Association ADR Section. Inducted as a Fellow of the College of Labor and Employment Lawyers, Mr. Burrell is a mediator for the New Jersey Courts, a qualified mediator for the Equal Employment Opportunity Commission (EEOC) and has mediated employment discrimination claims for the Arizona State Attorney General's Office. His arbitration and fact-finding panels include those of the American Arbitration Association, the New Jersey State Board of Mediation,

the Financial Industry Regulatory Authority (FINRA) and the Nuclear Regulatory Commission Whistleblower Panel.

Mr. Burrell has taught labor law at the Arizona Summit Law School and legal writing at the American University Washington College of Law. A Master of the Bench, Reitman Labor and Employment Law American Inn of Court, he has lectured for professional organizations.

Mr. Burrell received his B.S from the Cornell University School of Industrial & Labor Relations, his J.D. from Washington College of Law and his LL.M. in Labor and Employment Law from Georgetown University Law Center. He completed the Labor Arbitrator Development Program at Cornell University ILR School's Scheinman Institute for Conflict Resolution.

Grace A. Byrd is Of Counsel to the Sills Cummis & Gross P.C. Employment and Labor Practice Group in Newark, New Jersey, and has worked with business owners, executives and other professionals to develop and execute legal strategies to achieve their litigation and business goals. She frequently counsels management regarding the implementation of employment policies and personnel issues that arise in the workplace, including family and medical leave eligibility, disability accommodations, wage and hour matters, reductions-in-force, and hiring and discharge of personnel, and provides training to employees and management on topics including anti-harassment, diversity, ethics and whistleblowing. Co-Chair of the firm's Diversity Committee, she also serves on the Professional Relations Committee.

Admitted to practice in New Jersey and New York, and before the United States District Court for the District of New Jersey and the Southern and Eastern Districts of New York, Ms. Byrd is a member of the Labor and Employment Law Sections of the American and New Jersey State Bar Associations, serves on the Executive Committee of the latter, and is Co-Chair of the Gala Committee of the New Jersey Women Lawyers Association. She is also a mentor to students in the New Jersey Law and Education Empowerment Project's (NJ LEEP's) four-year college-bound program, which prepares students in the greater Newark area to attend a four-year school after graduation.

Ms. Byrd's articles have appeared in the *New Jersey Labor & Employment Law Quarterly*, *New Jersey Lawyer*, *The Metropolitan Corporate Counsel* and other publications. A Senior Research Fellow at Seton Hall's Center for Policy and Research, she has lectured for ICLE, the Commerce and Industry Association of New Jersey and other organizations, and is the recipient of several honors.

Ms. Byrd received her B.A., *magna cum laude*, from Clark University, her M.P.A. from Clark University and her J.D., *magna cum laude*, from Seton Hall University School of Law, where she was a member of the Order of the Coif and participated in Seton Hall's Civil Litigation Clinic.

Arnold Shep Cohen is a Partner in Oxfeld Cohen, P.C. in Newark, New Jersey, where he concentrates his practice in private and public-sector labor, employment and employee benefits law. He has negotiated numerous labor agreements and has handled thousands of labor arbitrations and administrative hearings in several industries and levels of government.

A member of the New Jersey State Bar Association, Mr. Cohen is Past Chair of the Association's Labor and Employment Law Section and has served on the Board of Trustees of the American Labor Museum. He has had twelve reported decisions before the New Jersey

Supreme Court in addition to many reported decisions in federal and state trial and appellate courts, and is a former member of the Editorial Board of *New Jersey Lawyer*, the weekly newspaper. He is also a Fellow of the College of Labor and Employment Lawyers.

Mr. Cohen was a founding Master of the Sidney Reitman Employment Law American Inn of Court and former Editor-in-Chief of *New Jersey Labor and Employment Law Quarterly*. Listed in *Who's Who in American Law*, he is an editor and co-author of ICLE's *New Jersey Labor and Employment Law*, has written numerous articles on labor and employment law and has lectured for ICLE and other organizations. Mr. Cohen is the host of "World of Work" on WDVR-FM and an Adjunct Professor at Rutgers School of Law-Newark, where he teaches labor arbitration, labor negotiations and alternative dispute resolution. He was the recipient of ICLE's Distinguished Service Award for Excellence in Continuing Legal Education in 2015, the 2019 Sidney H. Lehmann Award bestowed by the NJSBA Labor & Employment Law Section and several other honors.

Mr. Cohen received his undergraduate degree, *summa cum laude*, from Rutgers College, his J.D. from Rutgers School of Law-Newark and his LL.M. in Labor Law from New York University.

Yvette Gibbons is the owner and President of Employment Compliance Strategies®, LLC in South Orange, New Jersey, where she has counseled clients in all aspects of employment law and related litigation. She has represented numerous clients in federal, state and administrative courts and counseled clients in wrongful discharge with Title VII, the *American with Disabilities Act*, the *Family and Medical Leave Act*, the *Equal Pay Act*, the WARN Act, civil rights violations and other federal and state employment legislation. She has also served as a federal arbitrator for the District of New Jersey and the New Jersey State Board of Mediation, and has served on the District of New Jersey's Mediation Panel.

Admitted to practice in New Jersey and New York, and before the United States District Court for the District of New Jersey and the Southern District of New York, and the Third Circuit Court of Appeals, Ms. Gibbons is Past President of the Essex County Bar Association and has been a member of the American Bar Association's Labor and Employment Law Section and the New Jersey Association of Professional Mediators (NJAPM). She has been a Director and member of the Board of Trustees of the Essex County Legal Aid Association as well as a member of the Federal Historic Society of the United States District Court for the District of New Jersey. She frequently conducts in-house employment training for management, supervisory and non-supervisory employees, on topics including litigation avoidance, employment compliance, discrimination, harassment, gender-based issues, workplace violence and bias training.

Ms. Gibbons received her B.S from Montclair State University, attended Rutgers Business School and received her J.D. from the University of Virginia School of Law, where she served on the Editorial Board of the *Virginia Law Review.* She was Law Clerk to the Honorable Joseph A. Greenway, Jr., U.S.D.J., District of New Jersey, the Honorable Ronald J. Hedges, U.S.M.J., District of New Jersey, and the Honorable Leander J. Shaw, Jr., Justice, Supreme Court of Florida.

Stephanie D. Gironda is an associate with the Employment Law Team of Wilentz, Goldman & Spitzer, P.A. with offices in Woodbridge and Eatontown, New Jersey; New York City; and Philadelphia, Pennsylvania. She concentrates her practice in employment matters, representing employees to help resolve some of the most difficult circumstances at work, including claims of

harassment, discrimination and retaliation based on membership in a protected category such as gender, age, race, sexual orientation, religion, national origin and disability as well as whistleblower, wage and hour, and leave time claims. She advises employees on employment and severance agreements, accommodation requests, performance warnings and performance improvement plans, and in unemployment hearings.

Admitted to practice in New Jersey and before the United States District Court for the District of New Jersey, Ms. Gironda has been the Employee Co-Chair for the Insurance Subcommittee of the Employment Rights and Responsibilities Committee, Labor and Employment Law Section, American Bar Association. She has served as Co-Chair of the *Ad Hoc* Subcommittee of the Employment Law Section of the New Jersey State Bar Association and has been a member of the Middlesex and Hudson County Bar Associations, and the New Jersey Employment Lawyers' Association.

Ms. Gironda has been a Bencher in the Sidney Reitman Employment Law American Inn of Court. She is co-author and editor of "Recurring Insurance Defense Issues: A State-by-State Survey," ABA Section of Labor and Employment Law, 2016 Midwinter meeting of the Employment Rights & Responsibilities Committee.

Ms. Gironda received her B.A. from the College of the Holy Cross, her M.A. from New York University and her J.D. from Rutgers Law School-Newark.

Jon W. Green, Certified as a Civil Trial Attorney by the Supreme Court of New Jersey, is a Partner in Green Savits, LLC in Florham Park, New Jersey. He concentrates his practice in employment law and civil rights litigation on behalf of employees, and has obtained favorable trial verdicts in cases of sexual harassment, color and age discrimination, and retaliatory discharge from several companies as well as the State of New Jersey's Division of Mental Health. He has been involved in a number of reported opinions as counsel of record or as *amicus curiae*.

Admitted to practice in New Jersey and New York, and before the United States Court of Appeals for the Second and Third Circuits, and the United States Supreme Court, Mr. Green is a member of the New Jersey State Bar Association, where he serves on the Executive Committee of the Labor and Employment Law Section. A Fellow of the College of Labor and Employment Lawyers, he is also a member of the American Bar Association, where he serves on the Program Committee of the EEO Committee of the Labor and Employment Section, and formerly served on the *Amicus* Committee of the New Jersey Chapter of the National Employment Lawyers Association (NELA). He is a former Plaintiff's Co-Chair of the Labor and Employment Relations Committee of the ABA Section of Litigation.

Mr. Green was Co-Chief Editor of the ABA *Employment Litigation Deskbook*, for which he co-wrote chapters on summary judgment and trial preparation, and was also Co-Chief Editor of the ABA's *Model Jury Instructions on Employment Law*, published in 2005. He has written and lectured in New Jersey and nationally on employment law topics, and for nearly 30 years has been a Master of the Sidney Reitman Employment Law American Inn of Court. He is the recipient of several honors.

Mr. Green received his B.A., *cum laude*, from Claremont McKenna College and his J.D. from Yeshiva University's Benjamin N. Cardozo School of Law, where he was a Finalist in the Jacob Burns Moot Court Competition.

James T. Prusinowski is a founding Member of Trimboli & Prusinowski, LLC with offices in Morristown, New Jersey, Philadelphia, PA, and New York City. He primarily represents New Jersey individuals, public entities and private employers in labor and employment law issues. Mr. Prusinowski has defended unfair labor claims, grievances and collective bargaining negotiations, and has worked with businesses to negotiate employment agreements that contain restrictive covenants and separation agreements. He has also advised clients regarding employment issues concerning the *Family Medical Leave Act*, the *Americans With Disabilities Act*, the *Health Insurance Portability and Accountability Act* (HIPAA), the *New Jersey Law Against Discrimination*, the *Conscientious Employee Protection Act* (CEPA) and other state and federal employment laws.

Mr. Prusinowski is admitted to practice in New Jersey and New York, and before the United States District Court for the District of New Jersey, the Eastern District of Pennsylvania and the Southern and Eastern Districts of New York, the Second and Third Circuit Courts of Appeals and the United States Supreme Court. He is\\has been a member of the New Jersey State, Morris County and Essex County Bar Associations and the Labor and Employment Section of the Morris County Bar Association.

Mr. Prusinowski has lectured on the requirements for service of process in collection matters and the exhaustion of administrative processes for filing ADA and Title VII claims, and has published on topics including considerations concerning arbitration in employment cases. He is the recipient of several honors.

Mr. Prusinowski received his B.A. from the University of Northern Colorado and his J.D. from Seton Hall University School of Law. He served as the judicial clerk for the Honorable Roger F. Mahon, PJ.Ch.

Robert T. Szyba is a Partner in the Labor & Employment Department of Seyfarth Shaw LLP in New York City, where he defends and counsels employers in a wide range of employment-related issues, including background check and *Fair Credit Reporting Act* violations, “ban the box” issues, prevailing wage requirements, wage and hour compliance, whistleblower retaliation, family and medical leave compliance and interference/retaliation claims, paid sick leave, and discrimination/harassment. He also advises clients on preventive employment counseling, pre-litigation strategy and litigation avoidance, alternate dispute resolution and mandatory arbitration programs, and employment policies and procedures.

Admitted to practice in the state and federal courts of New Jersey and New York, Mr. Szyba serves on the Executive Committee of the Labor & Employment Law Section of the New Jersey State Bar Association. He has been Co-Chair of the Ethics & Professional Responsibility Subcommittee of the American Bar Association Labor & Employment Law Section’s Employment Rights & Responsibilities Committee.

Mr. Szyba has served on the Alumni Advisory Board of the *Hofstra Labor & Employment Law Journal* and as a member of the Sidney Reitman Employment Law American Inn of Court. He is a former Editor-in-Chief of the New Jersey State Bar Association’s *New Jersey Labor & Employment Law Quarterly* and has lectured for ICLE, NELA-NJ, the American and New York State Bar Associations, and other organizations.

Mr. Szyba received his undergraduate degree, *cum laude*, from Berklee College of Music and his J.D., *cum laude*, from Hofstra University School of Law, where he was Editor-in-Chief of the *Hofstra Labor & Employment Law Journal* and a member of Hofstra's Moot Court Associati

Peter Tsai is Counsel to Seyfarth Shaw LLP in New York City, and has extensive experience in government and knowledge of e-discovery and information governance. As a technologist, he is at the forefront of leveraging AI and technology-assisted review (TAR) to enhance efficiency and accuracy in his legal work.

Mr. Tsai is admitted to practice in New Jersey and New York, and before the United States District Court for the Southern and Eastern Districts of New York. In addition to e-discovery matters he has defended clients in actions involving negligence, wrongful death, fraud, retaliatory discharge and harassment.

Mr. Tsai received his B.S. from Drexel University and his J.D. from New York Law School.

Hop T. Wechsler is a Shareholder in Selikoff & Cohen, P.A. in Mt. Laurel, New Jersey, and concentrates his practice in labor and employment law and Workers' Compensation. He represents unions and union members in tenure rights claims, unfair labor practice charges, tenure charges and other disciplinary matters, workplace accommodation and discrimination claims, and RIFs and non-renewals. He formerly worked in scientific, technical and medical (STM) publishing for 18 years, and has also worked as a paralegal for an immigration law firm and as a research assistant for a law professor at Rutgers, focusing on public policy options for ensuring economic human rights, specifically the right to employment.

Admitted to practice in New Jersey and Pennsylvania, Mr. Wechsler is a member of the Executive Committee of the New Jersey State Bar Association Labor and Employment Law Section and the Labor and Employment Committee of the National Lawyers Guild. Executive Director of the South Branch of the Sidney Reitman Employment Law American Inn of Court, he is Managing Editor of the NJSBA's *New Jersey Labor & Employment Law Quarterly* and is the author of articles which have appeared in the publication.

Mr. Wechsler received his B.A. from the University of Pennsylvania and his A.A.S. in Paralegal Studies from the Community College of Pennsylvania, where he was the recipient of the 2011 Paralegal Achievement Award. He received his J.D. from Rutgers School of Law-Camden, where he was the recipient of the ABA-Bloomberg BNA Award for Excellence in the Study of Labor and Employment Law as well as several other honors.

Sarah Wieselthier is a Partner in Fisher & Phillips LLP in the firm's Murray Hill, New Jersey, office. An experienced employment litigation attorney, she has counseled some of the most high-profile employers on litigation and compliance issues involving discrimination, harassment, wrongful termination, retaliation, equal pay, wage and hour claims, and class and collective actions matters.

Ms. Wiesenthier is admitted to practice in New Jersey and New York, and before the United States District Court for the District of New Jersey and the Southern, Eastern and Western Districts of New York. Prior to joining Fisher Phillips she represented public school districts in education and labor and employment matters with another law firm.

Ms. Wiesenthier received her B.A., with high honors, from the University of Maryland and her J.D., *magna cum laude*, from Hofstra University's Maurice A. Deane School of Law, where she was an Articles Editor of the *Hofstra Law Review* and was awarded the Citation of Excellence in Labor and Employment Law.

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