Morgan Lewis

DEVELOPMENTS IN NEW JERSEY EMPLOYMENT LAW

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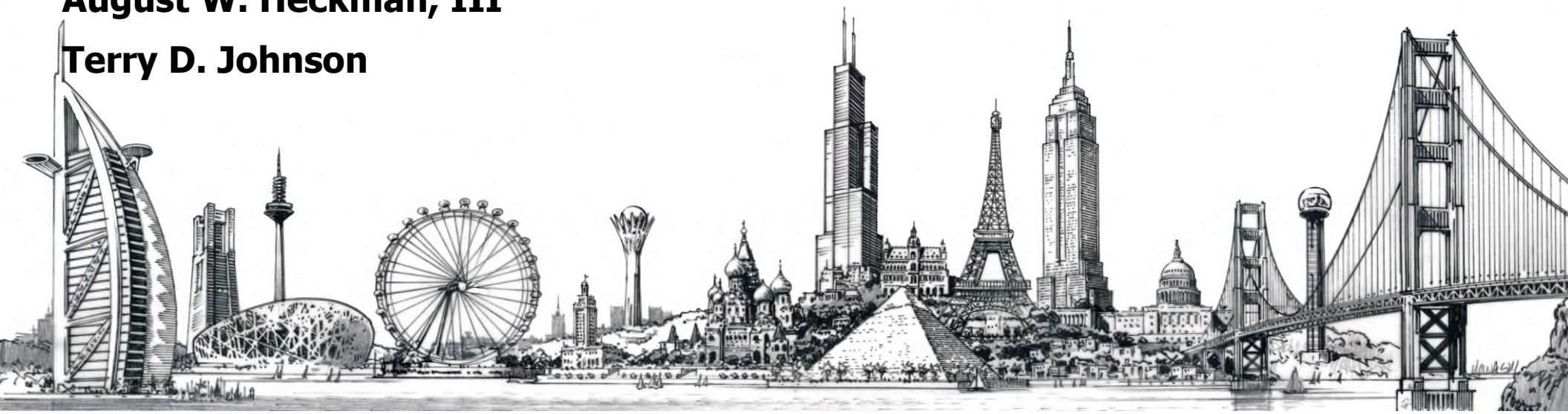


Sweeping Changes with New Governor – Progressive and Employee-Friendly Laws

- Governor Murphy has since made good on his campaign promises to change laws impacting the workplace since taking office.
- New Jersey has already enacted five important pieces of legislation that meaningfully alter the legal landscape for employers.
  - The New Jersey Equal Pay Act.
  - The New Jersey Earned Sick Leave Law.
  - The New Jersey Family Leave Law.
  - Increased minimum wage.
  - Prohibition of arbitration clauses and nondisclosure provisions related to NJLAD claims.
- Employers will need to be prepared for additional changes, which may include:
  - Expansion of legalized marijuana.
  - Prohibiting the use of credit checks in the employment process.
  - The New Jersey legislature is considering a bill that would require all New Jersey employers to utilize the federal E-Verify system to check the employment eligibility of each new hire.

NEW JERSEY EQUAL PAY ACT

Existing Federal Law

- The federal Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964 prohibit wage differences based upon gender and protected categories, respectively.
- The EEOC has clarified that "all forms of pay are covered . . . including salary, overtime pay, bonuses, stock options, profit sharing and bonus plans, life insurance, vacation and holiday pay, cleaning or gasoline allowance, hotel accommodations, reimbursement for travel expenses and benefits."

New Jersey Equal Pay Act

- On April 24, 2018, Governor Murphy signed into law the Diane B. Allen Equal Pay Act (the New Jersey Equal Pay Act) (effective July 1, 2018).
- This is one of the most aggressive pay equity laws in the country, on par with the employee-friendly equal pay laws in California and New York.
- The Act prohibits discrimination in compensation or in the financial terms or conditions of employment based on any characteristic protected under the NJLAD.
  - Broader than most other existing state laws because protections extend to ALL classes of employees protected under the NJLAD, not just gender.
  - NJLAD covers **all employers** regardless of the number of employees employed.

New Jersey Equal Pay Act

Characteristics protected by the NJLAD include:

- Sex
- Race
- Creed
- Color
- National origin or nationality
- Ancestry
- Age
- Marital, civil union, or domestic partnership status
- Affectional or sexual orientation
- Genetic information, including the refusal to:
  - submit to a genetic test; or
  - make genetic test results available to the employer
- Pregnancy or breastfeeding
- Gender identity or expression
- Disability
- Atypical hereditary cellular or blood trait
- Service in the US Armed Forces

N.J.S.A. 10:5-12

New Jersey Equal Pay Act

- **Pay Equity Components**
  - Under the Equal Pay Act, employers **may not**:
    - Pay any employee who is a member of a protected class at a rate of compensation, including benefits, less than that paid to employees who are not members of a protected class for "substantially similar work." The evaluation of substantially similar work must:
      - include an employee's skill, effort, and responsibility; and
      - compare wage rates based on the wage rates in all of the employer's operations or facilities.
  - It is unlawful to reduce wages in order to comply with the law.
  - Must pay more to level the field

New Jersey Equal Pay Act

- **Pay Equity Components**
  - Seniority or merit-based system = viable basis for different pay
  - Otherwise, only if the employer can show differential is based on one or more legitimate, "bona fide factors"
  - Employers relying on bona fide factors to justify pay discrepancies must also show that:
    - The bona fide factors are not based on, and do not perpetuate a differential in compensation based on, a protected characteristic;
    - Each bona fide factor relied upon is applied reasonably;
    - At least one bona fide factor accounts for the entire wage differential; and
    - The bona fide factors are job-related and based on legitimate business necessities. A factor is not a business necessity if an alternative practice would serve the same purpose without producing the wage differential.
  - Employers are required to engage in this exercise to justify **each** purported discriminatory pay decision.

New Jersey Equal Pay Act

- **Expanded Prohibitions on Retaliation**
  - The Act prohibits retaliation against employees for:

    "requesting from, discussing with, or disclosing to, any other employee or former employee of the employer, a lawyer from whom the employee seeks legal advice, or any government agency" equity pay information.
  - Such equity pay information includes job title, occupational category, rate of compensation, including benefits, and the gender, race, ethnicity, military status, or national origin of the employee or any other employee or former employee, regardless of whether the employee receives a response.

New Jersey Equal Pay Act

- **Public Contractor Reporting Requirements**
  - Employers that contract with the state or other public bodies to provide "qualifying services" are required to report "compensation and hours worked by employees categorized by gender, race, ethnicity, and job category."
    - "Qualifying services" is defined as "the provision of any service to the State or to any other public body," except for "public work," which is defined in a separate statute and generally encompasses construction-related work paid for by public funds.
  - Employers with "public work" contracts are required to provide information, through certified payroll records, regarding the "gender, race, job title, occupational category, and rate of total compensation" of every NJ employee employed in connection with the subject contract, and update this information during the contract period.
  - Employees who are or were employed by a state contractor "during the period of any of the contracts between the employer and any public body" are entitled to request and receive the above information, which the state will retain for at least five years following the contract.

New Jersey Equal Pay Act

- **Public Contractor Reporting Requirements**

NJ Department of Labor & Workforce Development

Annual Equal Pay Report

for Qualifying Services
***Other than* Public Works Projects**

MW-563 (6/18)

Name of Employer	Business Address	Establishment Address or ❑ Same as business address
Year	Contract No.	

***KEY A* – Race**

- **A** = Asian
- **B** = Black or African American
- **I** = Native Hawaiian or Pacific Islander
- **N** = American Indian or Native Alaskan
- **W** = White
- **M** = 2 or More

***KEY B* – Pay Bands**

- **1** = $19,239 and under
- **2** = $19,240–$24,439
- **3** = $24,440–$30,679
- **4** = $30,680–$38,999
- **5** = $39,000–$49,919

1.	2. Job		3. Demographics			4. Hours		5. Compensation
Employee Name	Job Title	Job Category	Sex *M = Male* *F = Female* *X = Non-Binary*	Race *See Key A*	Ethnicity *H = Hispanic* *N=Non-Hispanic*	Non-Exempt Employees Total Hrs. Worked Annually	Exempt Employees Est. Annual Hours – *See Instructions*	Pay Band No. *See Key B* – based on IRS form W-2, Box #1

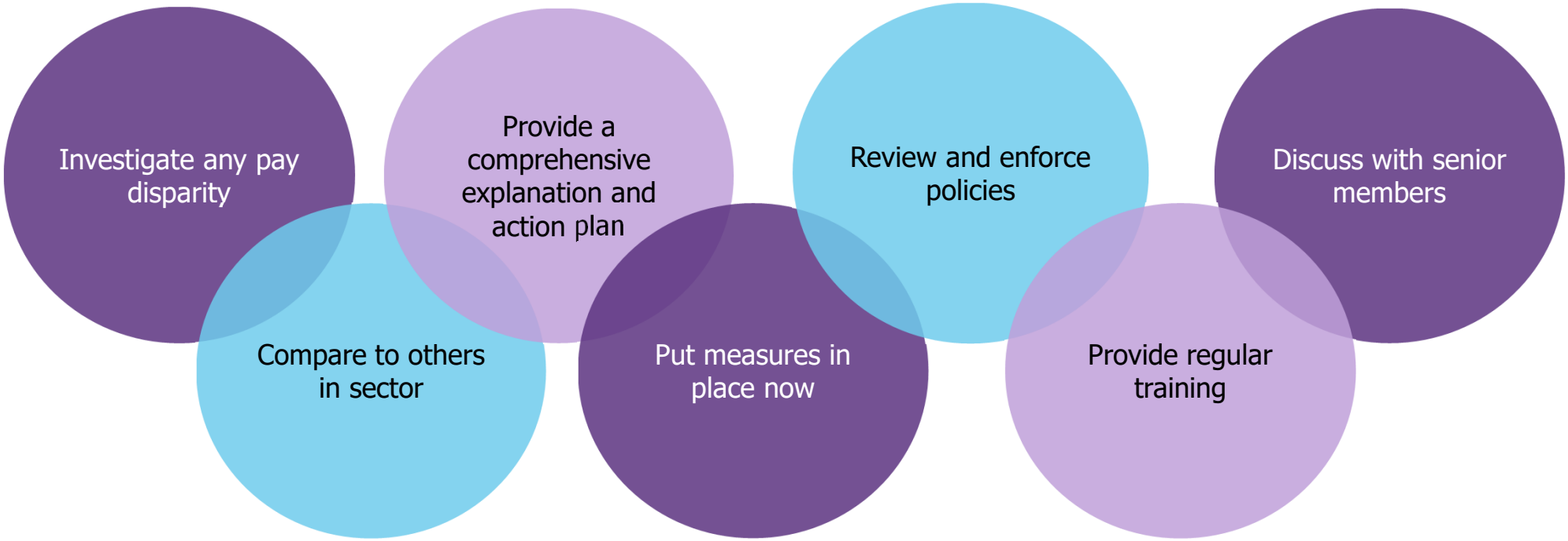
New Jersey Equal Pay Act

- **Damages and Statute of Limitations**
  - Six-year statute of limitations – three times longer than the two-year period provided under existing federal law.
  - An employer may be held liable each time an employee has been impacted by a "discriminatory compensation decision or other practice" (*e.g.*, a discriminatory paycheck) up to, but not longer than, six years if the violation has been continuous and persists within the limitations period.
    - This means employers may be held liable for up to six years of back pay.
  - Employees are also now able to recover ***treble*** damages, or three times the amount of any pay differential, in the event of a violation.
    - I.e., if damages are established at $100,000, the employer must pay $300,000 in damages.

What Does This Mean For Employers?

- Consider proactively identifying and eliminating pay inequity before legal challenges are made.
  - Evaluate job descriptions and job titles to identify any "substantially similar" jobs with pay differences between genders or other protected characteristics.
  - Document the bona fide business purpose driving any identified pay-related differences.
  - Conduct an audit of the salaries and benefits of all current employees.
  - Employers should think beyond base pay and initial hire. Consider total remuneration, including performance and signing bonuses, equity, overtime pay opportunities, and other benefits.
  - Consider and implement proactive adjustments to any salaries found to be unequal (or without sufficient documented justification for any disparity).
  - Be prepared for greater transparency.
- **Note**: intent and knowledge are irrelevant.

Moving Forward



Some Good News?

- The Act has been held not to apply retroactively.
- In *Perrotto v. Morgan Advanced Materials*, United States District Judge William J. Martini held that the Act "is not retroactively applicable to conduct occurring prior to its effective date."
  - The employee in *Perrotto* was terminated from her employment on April 5, 2018 (before the enactment of the Act), but filed her lawsuit on July 27, 2018 (after the effective date of the Act).
  - The court found that the legislature intended the Act to apply only prospectively to claims arising after the Act's effective date.
- The impact of this decision is that employers' immediate liability is limited to conduct occurring after July 1, 2018.
- However, while it is persuasive authority, this federal court decision is not binding on state courts. It also is noteworthy that because the employee was terminated before the Act went into effect, she never received a "discriminatory" paycheck—thereby triggering the six-year statute of limitations. While the court's reasoning suggests this fact is irrelevant, a state court might find that any paycheck received after the effective date of the Act is sufficient to trigger the statutory protections and allow a claim to proceed in spite of the otherwise prospective intent of the legislature.

NEW JERSEY EARNED SICK LEAVE LAW

New Jersey Earned Sick Leave Law

- On May 2, 2018, Governor Murphy signed into law the New Jersey Earned Sick Leave Law, joining the growing number of states requiring employers to provide paid sick leave.
- The Act, which took effect on October 29, 2018, applies to all employers regardless of size.
- The Act prohibits municipalities from enacting earned sick leave ordinances and preempts all existing ordinances.

New Jersey Earned Sick Leave Law

- **Eligibility**
  - An employer is "any firm, business, educational institution, non-profit agency, corporation, LLC or other entity that employs employees in the State, including temporary help services firms." Public employers that are obligated to provide paid sick leave are excluded.
  - Most employees working in the state of New Jersey are covered by the Act.
    - Per diem healthcare employees, construction workers employed pursuant to a collective bargaining agreement, and public employees who already have sick leave benefits are expressly excluded from the definition of "employee" under the Act
  - All full-time, part-time and temporary employees in NJ are eligible

New Jersey Earned Sick Leave Law

- **Leave Amount and Accrual**
  - Employees accrue 1 hour of paid leave for every 30 hours worked, with accrual, use, and carryover capped at 40 hours per benefit year.
  - Alternatively, employers can frontload the full amount of annual leave at the beginning of each benefit year.
  - Leave accrues on later of the effective date of the Act or the first day of employment, unless the employee has accrued earned sick leave before the effective date.
  - Employers that already provide sick leave are permitted to maintain their own policies, provided their policies provide benefits that are equal to or greater than the Act's benefits.
  - Further, employees represented by a union may waive their rights and benefits under the law during negotiations of a collective bargaining agreement.

New Jersey Earned Sick Leave Law

- **Entitlement**
  - Unless employees have accrued paid sick leave before the effective date of the Act, employees can use leave beginning on the 120th day after the later of the effective date or commencement of employment, and as accrued thereafter.
  - If rehired within 6 months, previously accrued unused leave is reinstated and can be used immediately.
  - Successor employers must allow immediate use of all previously accrued but unused leave. Employers can cap usage at 40 hours per year.

New Jersey Earned Sick Leave Law

- **Carryover**
  - Employers must carryover accrued unused leave, subject to the 40 hour cap, and the following:
    - Employers **may** give employees the option of being paid for accrued unused leave during final month of benefit year. Employees must opt within 10 days of offer to receive full payment or 50% payment (with remainder carried over), or to decline payment (with unused accrual carried over subject to cap).
    - If employers frontload leave, they must either:
      - opt to pay out for unused leave in final month of benefit year and forego the right to use the accrual method for affected employees during the next benefit year; or
      - carry over accrued but unused leave (subject to annual cap).

New Jersey Earned Sick Leave Law

- **Covered Reasons**
  - Earned sick time under the Act may be used:
    - (1) for diagnosis, care, or treatment of an existing health condition of, or preventative care for, an employee or family member;
    - (2) for employee's need for time off when employee is a victim of domestic violence, sexual assault or stalking;
    - (3) where an employee's place of business or child's daycare or school is closed due to a public health emergency; or
    - (4) to attend a school-related event as requested or required by school staff, or to attend a meeting related to the care of a child's health condition or disability.

New Jersey Earned Sick Leave Law

- **Prohibition on Retaliation**
  - The Act prohibits retaliation because of an employee's request for or use of earned sick leave.
  - The Act provides for a rebuttable presumption of unlawful retaliation if an employer takes an adverse employment action against an employee within 90 days of the employee's: (1) filing a complaint with the Department of Labor and Workforce Development; (2) informing other employees of an employer's violation of the Act or the employee's rights under the Act; (3) cooperating with the Department's or other person's investigation of a possible violation of the Act; or (4) opposing any policy, practice, or act that is prohibited by the Act.

New Jersey Earned Sick Leave Law

- **Notice**
  - **Requirements for Employee –** When the need for sick time is "foreseeable," employers are permitted to require employees to provide up to seven days' advance notice of the intended use and the expected duration. Employees can be required to make a "reasonable effort" to schedule the time off so it does not "unduly disrupt" the employer's operations. Employers may prohibit employees from using foreseeable sick time "on certain dates" and require specified documentation if sick time that is not foreseeable is used during those dates.
  - **Requirements for Employer –** Employers are required to provide employees and new hires with notice of their rights under the law through a form to be issued by the commissioner. The notice must also be posted at each of the employer's workplaces.

New Jersey Paid Sick Leave Law

- **Documentation Requirements**
  - The law does permit employers to require documentation (*e.g.*, doctor's note, police report, court order, etc.) to show that the time was taken for a permissible purpose in cases where employees use 3 or more paid sick days consecutively.
- **Recordkeeping Requirements**
  - Employers must keep, for at least five years, records documenting the hours worked and paid sick days accrued and used by an employee.
  - Failure to maintain adequate records results in a presumption of noncompliance with the law, unless the employer can show otherwise by clear and convincing evidence.

What Does This Mean For Employers?

- Employers should revisit their employee handbooks and review their employee PTO, attendance, leave, and disciplinary policies.
- Employers should decide whether to implement an accrual or annual method of earning sick leave, the applicable benefit year, and the increments in which employee leave may be taken.
- Employers also should reevaluate their recordkeeping requirements and make sure they have an accurate, user-friendly PTO tracking system in place.
- Employers should ensure all management and supervisory personnel are aware of what is prohibited when it comes to the new law, including denying compliant requests and taking retaliatory actions as a result of leave.

EXPANDED FAMILY LEAVE

Expanded Family Leave

- New Jersey is one of only a handful of states to offer family leave insurance to employees (for six weeks per year to care for a new child or sick relative), which is funded through small employee-only payroll deductions.
- On February 19, 2019, Governor Murphy signed legislation that amends Family Leave and SAFE Acts, as well as available benefits under New Jersey Family Leave Insurance. Some of the changes are effective immediately, while others will take effect at a later date.
- The New Jersey Family Leave Act (NJFLA) currently requires employers with 50 or more employees (counting those employed both in and outside New Jersey) to provide their New Jersey employees with up to 12 weeks of employment-protected leave in a 24-month period to care for a family member (which includes a parent, parent-in-law, minor or disabled child, spouse, or civil union partner) with a serious health condition, or to bond with a newly born or adopted child.

Expanded Family Leave

- There are other new provisions to the NJFLA, which went into effect *immediately*:
- In addition to the previously identified family members (parent, parent-in-law, minor or disabled child, spouse, or civil union partner), employees may now take leave to care for: a child regardless of age; a sibling; a grandparent; a grandchild; a parent-in-law; a foster parent; any individual related by blood; or any other individual with a close association equivalent to a family relationship.
- Employees are permitted to take leave for bonding with a newborn child conceived through a gestational carrier agreement, or with a newly placed foster child.
- Employees are permitted to take leave for bonding on an intermittent basis without employer consent.
- Leave may be taken intermittently over a period of 12 consecutive months (up from 24 consecutive weeks).
- Except for continuous bonding leave (which still requires 30 days advance notice), leave may be taken on only 15 days of advance notice.
- **Note**: the changes to the NJFLA did not broaden the law to provide for leave for an employee's own serious health condition. Employees who are eligible for federal Family and Medical leave may take leave for their own serious health condition. In the case of pregnancy, the interplay of the two laws often results in up to 12 weeks of leave for the employee's own serious health condition due to pregnancy and childbirth, followed by an additional leave up to 12 weeks under the NJFLA for bonding with the newborn baby.

Family Leave Insurance Benefits

- New **Jersey** Family Leave Insurance ("NJFLI") provides partial wage replacement benefits to employees on family leave through New Jersey's temporary disability leave benefits program.
- NJFLI now includes an expansive anti-retaliation provision that prohibits an employer from discharging or otherwise discriminating or retaliating against an employee because the employee requested or took temporary disability benefits or family temporary disability leave benefits, including "retaliation by refusing to restore the employee following a period of leave." The amendment provides a private right of action to the employee, which includes various remedies, such as monetary damages, attorneys' fees and costs, and injunctive relief and reinstatement to his or her former position.
  - Essentially, the NJFLI in effect works as a job-protection statute by requiring employers to restore the employee to his or her job at the end of temporary disability leave.
- Beginning on July 1, 2020, a number of additional changes will become effective:
  - The amendment raises the amount of the weekly benefit total from two-thirds (currently capped at $650 per week) to 85% percent of an employee's weekly salary (to a maximum of $860).
  - The benefit period will be increased from 6 weeks to 12 weeks during a 12-month period.
  - The amount of intermittent paid leave benefits will also increase from 42 to 56 days during a 12-month period.

NJ SAFE Act

- The New Jersey Security and Financial Empowerment ("SAFE") Act provides leave for employees who are victims of domestic violence or sexual assault, or have a family member who is a victim.
- Effective July 1, 2020, employees taking leave under the SAFE Act will be eligible for wage replacement benefits from the state, just like employees who take NJFLA leave. Employees can elect to use accrued paid leave, including paid sick leave, or NJFLI benefits while on SAFE Act leave, and such leave would run concurrently with SAFE Act leave. In addition, employers can no longer require employees to use existing paid time off, vacation, or other similar employer-paid benefits for SAFE Act purposes.
- The amendment also expands the definition of "family member" under the SAFE Act to mirror the definition under the NJFLA. Eligible "family members" now includes a "parent-in-law," "sibling," "grandparent," and "any other individual related by blood to the employee, and any other individual that the employee shows to have a close association with the employee which is the equivalent of a family relationship."

Responding to Expanded Family Leave

- Many of the amendment provisions are effective immediately or within the next few months. To that end, employers should take the following steps:
  - Employers will need to update their handbooks, post the legally required notices in the workplace, coordinate with their insurance and payroll administrators to obtain and pay for family leave insurance, and train their human resources administrators in processing requests for leave and coordinating benefits under the Family and Medical Leave Act (FMLA) and any state laws and regulations.
  - Take an inventory of leave policies.
    - Large employers might have numerous policies that address different kinds of leave, and they should pull them all together to ensure that any additional benefits offered under a new leave law will affect their policies, or change what they want to offer in terms of voluntary paid leave benefits.
    - In addition, it is important to train your human resources staff and inform and update the appropriate management employees about the new legal provisions.

PROHIBITION OF ARBITRATION CLAUSES AND NONDISCLOSURE PROVISIONS

Banning Nondisclosure Agreements & Arbitration Clauses

- Gov. Murphy signed Senate Bill 121 (S 121) into law on March 18, 2019.
- The new law—which took effect immediately upon enactment—amends the NJLAD and contains a number of provisions that will have serious implications for New Jersey employers.
- Although initially introduced as part of the #MeToo movement, the law encompasses not only sexual harassment claims but all other types of discrimination, retaliation, or harassment claims available.
  - In that regard, this law is significantly more expansive than most of the legislative efforts taking place in other states and at the federal level, which tend to be limited to claims involving sexual harassment or sex discrimination

Prohibiting Waiver of Rights or Remedies

- Section 1 of the new law renders unenforceable any "provision in any employment contract that waives any substantive or procedural right or remedy relating to a claim of discrimination, retaliation, or harassment."
- Section 1 further prohibits any prospective waiver of any "right or remedy under the 'Law Against Discrimination' or any other statute or case law."
  - The only exception appears to be for provisions in collective bargaining agreements.
- Vague and undefined terms create significant uncertainty.
  - The law does not define "employment contract" or "case law"
  - The attempt to prohibit prospective waivers of "any other statute or case law" also likely implicates contractual limitations on the territorial reach of a New Jersey law.
  - The law does not explain or define what constitutes "a claim."

Prohibiting Waiver of Rights or Remedies

- Parties inevitably will litigate the application of Section 1 to arbitration agreements – the outlawing of which in discrimination, retaliation, and harassment cases appears to be the primary purpose of Section 1.
  - It is widely anticipated that Section 1 will be challenged as preempted by the FAA in any dispute to which the FAA would apply.
- The law raises significant questions regarding the extent to which a state law can impact how litigation of federal law claims proceed – whether in arbitration or with or without a jury.

Restriction on Enforcement of NDAs

- Section 2 renders unenforceable against the employee any nondisclosure provision in an employment contract or settlement agreement that has the "purpose or effect of concealing the details relating to a claim of discrimination, retaliation, or harassment."
  - In other words, agreements to maintain confidentiality regarding the underlying issues involved in a claim now cannot be enforced by an employer.
- Conversely, however, if the parties were to agree to confidentiality, the employee can enforce the provision against an employer so long as the employee had not, up to that point, "publicly reveal[ed] sufficient details of the claim so that the employer is reasonably identifiable."
  - In other words, if parties to an agreement decide to include a mutual nondisclosure provision, the ability to enforce that provision is one-sided and left to the employee.

Restriction on Enforcement of NDAs

- Section 2 also requires that "[e]very settlement agreement resolving a discrimination, retaliation, or harassment claim by an employee against an employer . . . include a bold, prominently placed notice that although the parties may have agreed to keep the settlement and underlying facts confidential, such a provision in an agreement is unenforceable against the employer if the employee publicly reveals sufficient details of the claim so that the employer is reasonably identifiable."

What is Not Covered

- First, the law applies to claims of harassment, discrimination, and retaliation and amends the NJLAD. Seemingly then, the law does not apply to wage and hour claims or to other statutes or common law causes of action.
- Second, the prohibition on employment contracts or settlement agreements that have a purpose or effect of concealing the details relating to a claim of discrimination, retaliation, or harassment would not seem to extend to a provision keeping confidential the amount or terms of a settlement of such a claim, although plaintiffs may contend otherwise.
- Third, Section 2—in somewhat of a *non sequitur*—states that it is not intended to limit enforceability of nondisclosure agreements that pertain to "proprietary information."
- Finally, in another *non sequitur*, the law makes clear that it is not intended to limit noncompete agreements.

Anti-Retaliation

- The new law prohibits "retaliatory action" against anyone who refuses to enter into an agreement or contract that contains a provision prohibited by the new legislation.
- "Retaliatory action" includes "failure to hire, discharge, suspension, demotion, discrimination in the terms, conditions or privileges of employment, or other adverse action."

Private Right of Action

- As to enforcement, the new law creates a private right of action for "[a]ny person claiming to be aggrieved by a violation" of the law, and provides for a two-year statute of limitations period.
- A prevailing plaintiff is entitled to "all remedies available in common law tort actions," as well as reasonable attorney fees and costs.
- The law also provides for an award of reasonable attorney fees and costs against an employer "who enforces or attempts to enforce" a prohibited provision.

Next Steps for NJ Employers

- The law creates significant new challenges for employers across New Jersey.
- At minimum, employers should closely review their arbitration, settlement, and nondisclosure agreements, as well as any related policies, and consider whether there is an appropriate choice of law other than New Jersey and, assuming not, the application of this law to such agreements – both as a practical matter and for inclusion of the required notice language.
- The new law will have to be considered when employers are considering settlement of claims governed by New Jersey law.

EXPANSION OF LEGALIZED MARIJUANA

Existing Federal Law: Controlled Substances Act ("CSA")

- Schedule I includes marijuana
- Illegal to grow, distribute, use, or possess
- Doctors cannot prescribe
- US Supreme Court: CSA trumps state law for federal criminal prosecutions:
  - *United States v. Oakland Cannabis Buyers Co-Op* (2001): the medical necessity defense does not apply to marijuana
  - *Gonzales v. Raich* (2005): Congress may criminalize the private growing of medical marijuana
  - *Gonzales v. Oregon* (2006): legal drugs may be prescribed to assist the suicide of the terminally ill

Americans with Disabilities Act ("ADA")

- Under the ADA, "current" drug users, who use drugs that are unlawful under the CSA (e.g., medical marijuana), are not protected.
  - *See, e.g.*, *James v. City of Costa Mesa*, 700 F.3d 394, 408 (9th Cir. 2012) ("[T]he ADA does not protect medical marijuana users who claim to face discrimination on the basis of their marijuana use.").
- The ADA excludes current marijuana users from being "qualified individual[s] with a disability."

Lack of Employment Law Protection Under Federal Law?

- ADA **also** says that an employer may require employees to behave in a manner that meets federal Drug-Free Workplace Act requirements.
  - The unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited in a person's workplace; and
  - The employee must abide by the terms of that statement. ADA **also** permits employers to hold employees to standards imposed by NRC, DOD, or DOT

New Jersey's Current Medical Marijuana Law

- Since 2010, marijuana has been legal for medicinal purposes under the New Jersey Compassionate Use Medical Marijuana Act ("CUMMA").
- CUMMA states that employers are not required "to accommodate the use of medical marijuana in any workplace." N.J.S.A. 24:6I-14.
- However, any underlying condition for which medical marijuana would be prescribed would likely qualify as disability under both the ADA and the New Jersey Law Against Discrimination ("NJLAD"), both of which require employers to offer reasonable accommodations.

New Jersey's Current Medical Marijuana Law

- One federal district court in New Jersey held that employers are not required to waive drug testing requirements for medical marijuana users as an accommodation under the ADA or the NJLAD. *Cotto v. Ardagh Glass Packing*, 2018 WL 3814278 (D.N.J. Aug. 10, 2018).
- In a more recent decision, the New Jersey Appellate Division held that an employer who refused to accommodate the out-of-office use of medical marijuana for cancer treatment violated NJLAD. In *Wild v. Carriage Funeral Holdings, Inc.,* Docket No. A-3072-17T3 (App. Div. Mar. 27, 2019),
  - The court held that while CUMMA does not require employers to accommodate medical marijuana users in the workplace, it does not foreclose an action under the NJLAD when the employee was suffering from a disability and was not seeking to use marijuana at work.
  - The trial court dismissed plaintiff's NJLAD and defamation claims, observing that nothing in the MMCUA "require[s] . . . an employer to accommodate the medical use of marijuana in any workplace." N.J.S.A. 24:6I-14.
  - The Appellate Division reversed, noting that the plaintiff alleged a NJLAD claim: (1) he was disabled because he had cancer; (2) he was able to continue to work as a funeral director; and (3) and his employment was terminated. As for the CUMMA, the Court found that while the New Jersey legislature did not intend to expand employee's rights, it also did not intend to destroy any rights already available under the NJLAD.
  - The Court held that plaintiff pleaded that he sought a reasonable accommodation not to use medical marijuana in the workplace, but to accommodate his legal use of medical marijuana outside of his job. Plaintiff did not seek to circumvent the CUMMA because he was not asking for an accommodation to use medical marijuana "in any workplace." Instead, he was seeking a reasonable accommodation for his legal use "off-work hours."

Potential Expansion of New Jersey's Marijuana Law

- Murphy has stated that he supports expanding the legalization of marijuana in New Jersey.
- Legislation has been introduced in New Jersey that would create, among other things, a right to sue employers for taking "any adverse employment action" against an individual because that person does or does not smoke or otherwise use marijuana.

Potential Expansion of New Jersey's Marijuana Law

- As of June 2018, two New Jersey Senate bills – S2702 and S2703 – have been introduced, which, if passed, would significantly expand the legalization of marijuana.
- This legislation – dubbed the "New Jersey Marijuana Legalization Act" – would legalize the possession and personal use of marijuana for persons age 21 and over and create the Division of Marijuana Enforcement and a licensing structure.
- It would also expand access to medical marijuana. Under the proposed legislation, medical marijuana would be available to individuals diagnosed with a "qualifying medical condition" as a treatment of first resort (as opposed to those diagnosed with a "debilitating medical condition" under the current law).
  - The list of qualifying medical conditions includes, among other illnesses, epilepsy, post-traumatic stress disorder, glaucoma, human immunodeficiency virus, acquired immune deficiency syndrome, cancer, multiple sclerosis and muscular dystrophy.
- As it relates to employers, the legislation states: "No employer shall refuse to hire or employ any person or shall discharge from employment or take any adverse action against any employee with respect to compensation, terms, conditions, or other privileges of employment because that person does or does not smoke or use marijuana items, unless the employer has a rational basis for doing so which is reasonably related to the employment, including the responsibilities of the employee or prospective employee."

Potential Expansion of New Jersey's Marijuana Law

- **A1838**, an Assembly bill introduced on January 9, 2018, would amend the provisions of CUMMA addressing employment.
- It would prohibit employers from taking any adverse action against an employee who uses medical marijuana in accordance with New Jersey law, unless the employer can demonstrate by a preponderance of evidence that the employee's lawful medical marijuana use impairs their ability to do their job.
- Employers that require drug testing from employees would be required to give an employee who tests positive for marijuana an opportunity "to present a legitimate medical explanation for the positive test result."

The Potential Tension Between New Jersey and Federal Law

- Legalization of recreational and medical marijuana under various state laws, including New Jersey, is arguably at odds with federal CSA, under which marijuana remains a Schedule I controlled substance.
- Employers are left to navigate conflicting rules.
- Proposed "Fairness in Federal Drug Testing Under State Laws Act," H.R. 1687
  - would remove limitations on certain federal employment for individuals using marijuana legally under state law.
- The *Wild* court explicitly held that there was no conflict between the NJLAD and the CUMMA.

How Have Employers Fared Under Liberal Medical And Recreational Marijuana Laws?

- All challenges/decisions to date involve medical marijuana (not recreational).
- Certain state statutes – including Connecticut, Delaware, Illinois, Maine, Massachusetts, Minnesota, New York, and Nevada – contain explicit protection against employment discrimination on the basis of medical use of marijuana in compliance with state law.
- Recent decisions out of three of these states – Massachusetts, Rhode Island, and Connecticut – have held that medical patients terminated for positive test results have valid causes of action against their employers for disability discrimination.
- In so holding, courts have taken the position that, despite marijuana's remaining illegality under federal law, employers should not enforce zero-tolerance policies against employees who engage in off-duty medical marijuana use in accordance with state law.

What Does This Mean for NJ Employers?

- The *Wild* decision makes things more difficult for employers, especially when it comes to determining whether medical marijuana users are under the influence in the workplace. It is no longer enough that such an employee test positive. The employer will now need "reasonable cause" to send that employee for testing and determining that the employee is under the influence.
  - By "reasonable cause," we mean that the employee looked like he was under the influence based on objective observation, such as slurred speech or blood shot eyes or other indicators.
- Of course, New Jersey employers remain free to:
  - ban the use or possession of marijuana on the job;
  - send employees for drug tests;
  - Discharge employees if they use marijuana in the workplace or are under the influence during the work day, even if he/she smoked medical marijuana before work.
- As New Jersey laws continue to evolve and as courts begin to interpret these laws, it has become even more important for employers to stay up to date on developments.
- Particularly if New Jersey adopts an explicit protection against employment discrimination on the basis of use of marijuana, consider treating employees using marijuana as any other user of lawful prescriptions:
  - Tell employees to disclose all medications they are taking that could affect the safe performance of their jobs and the safety of co-workers
  - Be alert to indications that an employee is impaired
  - If you become aware that an employee is using an impairing, legally prescribed medication, engage in the interactive process to determine if a reasonable accommodation is needed
  - If no reasonable accommodation is possible, consider transferring the employee to another position or placing the employee on medical leave
  - Carefully consider termination as a last resort

WAGE & HOUR ISSUES

Increased Minimum Wage

In February 2019, Governor Murphy passed a law which will raise New Jersey's minimum wage to $15 by 2024

Lead-up to the Minimum Wage Raise:

- 2016: Former Governor Chris Christie vetoed A15, a bill which would have raised the then-minimum hourly wage of $8.38 per hour to $10.10 at the start of 2017, with incremental, annual boosts from 2018 to 2021 until the minimum hourly wage reached $15. After 2021, the wage would have increased by any upward change in the consumer price index.

- 2018: Phil Murphy is elected Governor
  - During his campaign, Murphy expressed support for gradually increasing the minimum wage to $15 an hour.
  - Upon being elected, Governor Murphy met with leaders of both the state Senate and Assembly to discuss increases to the minimum wage.

➢ February 2019: Governor Murphy signed into law Bill A-15, which will raise the minimum wage to $15 per hour by the year 2024 (*for most workers).
  - "A minimum wage should be a living wage." -- Senate President Stephen Sweeney

Increased Minimum Wage

The minimum wage will not increase to $15 until **January 2024**. Specifically, increases in the minimum wage will roll-out on an annualized, gradual basis:

- Current NJ minimum wage → $8.85 per hour
  - [Federal minimum wage: $7.25 per hour]
- July 1, 2019 → $10 per hour
- January 1, 2020 → $11 per hour
- January 1, 2021 → $12 per hour
- January 1, 2022 → $13 per hour
- January 1, 2023 → $14 per hour
- January 1, 2024 → $15 per hour

Once the minimum wage reaches $15 per hour in 2024, it will continue to increase based on the consumer price index for all urban wage earners and clerical workers (CPI-W), as calculated by the federal government.

By enacting this law, New Jersey joins California, Massachusetts, New York, and the District of Columbia each of which have adopted a $15 per hour minimum wage.

Increased Minimum Wage

Not all New Jersey workers will receive the $15 minimum wage in 2024:

- Seasonal workers & employees at small businesses (i.e., less than six employees)
  - minimum wage will reach $15 per hour by January 1, 2026

- Agricultural workers
  - minimum wage will increase to $12.50 per hour by January 1, 2024
  - thereafter, the New Jersey Labor Commissioner and Secretary of Agriculture will jointly decide whether to recommend a minimum wage increase for agricultural workers to $15 per hour by 2027

- Tipped employees
  - scheduled to see an increase (from $2.13 per hour, currently) to $5.13 per hour by 2024
  - employers who employ tipped workers may still credit tips earned by the tipped workers against the hourly minimum wage rate, as follows:
    - January 1, 2019 to June 30, 2019: $6.72
    - June 30, 2019 to January 1, 2020: $7.37
    - 2020 through 2022: $7.87
    - 2023: $8.87
    - 2024: $9.87

Increased Minimum Wage

Additional Provisions of the New Minimum Wage Law:

"Training Wage"

- beginning January 1, 2020, a Training Wage of not less than 90% of the minimum wage may be paid to employees enrolled in a qualified training program
- the Training Wage may be paid during the first 120 hours of employment in an occupation in which the employee has no previous similar or related experience
- employers are required to make good faith efforts to continue employing the training employee after the Training Wage expires

Tax Credits for hiring "Employees with Impairments"

- A-15 establishes within the Department of Labor and Workforce Development a program for providing tax credits to employers who employ "employees with impairments"
- "Employee with an impairment" is defined as an employee earning at least minimum wage "whose work capacity is significantly impaired by age or physical or mental deficiency or injury and who, based on a determination by the State, is found eligible for personal assistance services or prescribed drugs because without such services or drugs the individual would be unable to perform the essential functions of the employment position that the individual holds"

Federal Changes: Update of Salary Level

- On March 7, 2019, the DOL proposed several important updates to the regulations governing overtime under the FLSA. The proposed regulations are now in a public comment period. We're targeting the late fall of 2019 as the earliest realistic effective date for a new rule. Here's the deal:
- **The salary minimum for exemption as an executive, administrative, or professional employee would jump from $455 per week ($23,660 per year) to $679 per week ($35,308 per year).**
  - That's not quite the boost the Obama Administration tried to roll out in 2016 (to $913 per week, or $47,476 per year), but it's on the higher end of the low-to-mid 30s that many businesses expected.
- **Up to 10% of the salary minimum can be satisfied through nondiscretionary bonuses, incentives, and/or commissions that are paid annually or more frequently.**
  - And employers can make a "catch up" payment at the end of the year to bring an employee up to the $35,308 minimum. This effectively brings the weekly salary minimum down to $611.10 (provided there's a later true-up payment), but it's unclear what happens if an employee is terminated mid-year without having received the full $679 per week. Ostensibly, the employer could make a supplementary payment in a amount such that, when the total compensation paid to the employee for the year is divided by the total number of weeks worked in the year, the outcome is at least $679, and thereby preserve the exemption.
- **The threshold for exemption as a "highly compensated employee" would jump from $100,000 to $147,414 in total annual compensation.**
  - That's higher than the $134,004 level in the dead-on-arrival 2016 rule (a federal judge declared it invalid prior to its effective date), but it might not matter to employers in states that don't recognize this particular exemption for state law wage claims.

Rules Regarding Misclassification - Independent Contractors

- The New Jersey Supreme Court has adopted the "ABC test" to determine whether a worker is an independent contractor under the Wage Payment Law and the Wage and Hour Law. *Hargrove v. Sleepy's LLC*, 220 N.J. 289, 316 (2015). Under the ABC test, an employer is required to show that an individual providing services:
- (A) is free from the company's control in performing the services;
- (B) performs work outside the usual course of the company's business or outside the company's place of business; and
- (C) is engaged in an independently established business.

PROHIBITING THE USE OF CREDIT CHECKS IN THE EMPLOYMENT PROCESS

Prohibiting the Use of Credit Checks

Under the Fair Credit Reporting Act (FCRA), as long as an employer follows certain notice and authorization procedures, the employer is free to decide not to hire an applicant, or to discipline or even fire an employee, based on the contents of his or her credit report.

- In addition to the FCRA, New Jersey employers are subject to the New Jersey Fair Credit Reporting Act. The NJ FCRA, however, is substantially similar to its federal equivalent and does not impose any additional burdens on employers. *See* N.J.S.A. § 56:11-30 et seq.

In March 2018, the New Jersey Senate approved Bill S-545, which, if enacted into law, will expand the protections regarding credit checks afforded under the federal law. Specifically, S-545 would:

1) Preclude inquiry into employees' credit reports
2) Prohibit discrimination on the basis of credit reports

Prohibiting the Use of Credit Checks

1.) A-545 prohibits employers from obtaining a credit report that contains information regarding an employee's credit history or other financial status.

Exceptions: an employer may perform a credit inquiry IF:

- the employer is required by law to obtain a credit report;
- the employer reasonably believes that the employee has engaged in a specific activity that is financial in nature and constitutes a violation of law; OR
- good credit history or financial status is a "bona fide occupational qualification," which includes the following occupations:
  - managerial positions that involve setting the financial direction or control of the business
  - positions that involve access to customers', employers' or employees' personal belongings, financial assets or financial information other than that which is customarily provided in a retail transaction
  - positions that involve a fiduciary responsibility to the employer, including, but not limited to, the authority to issue payments, transfer money or enter into contracts positions that provide for an expense account for travel
  - law enforcement or non-governmental security personnel

The Bill's ban on credit reports would apply to current as well as prospective employees

Prohibiting the Use of Credit Checks

2.) In addition, S-545 would prohibit employers from discriminating or retaliating against an employee based on information in a credit report

- "No employer shall…[d]ischarge, demote, suspend, retaliate, refuse to hire, or otherwise discriminate against a current or prospective employee with regard to promotion, compensation, or the terms, conditions or privileges of employment, based on information in a credit report on the employee."

Importantly, the "bona fide occupational qualification"-exception likewise applies to the non-discrimination mandate -- i.e., employers may take an employment action on the basis of a credit report if credit history is a bona fide occupational qualification of a particular position or employment classification

Prohibiting the Use of Credit Checks

Employee protections under the S-545 are non-waivable

The bill provides a civil cause of action to remedy a violation of any provision thereof

- one-year statute of limitations period
- judicial relief can include: compensatory damages, attorneys' fees, injunctive relief, and reinstatement

Additionally, employers in violation of the act would be subject to fines in the amount of $2,000 for the first violation and $5,000 for each subsequent violation

Current status of legislation: in February 2019, the Assembly Labor Committee "reported favorably" on Bill S-545

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