

# Trevejo v. Legal Cost Control: Telecommuting in the Gig Economy—When Does the New Jersey Law Against Discrimination Protect Out-of-State Employees?

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Do the protections of New Jersey’s Law Against Discrimination (LAD) apply to employees who work outside the state? More often than not, the answer is no, but a recent decision from the Appellate Division, *Trevejo v. Legal Cost Control*,<sup>1</sup> provides new insight into this analysis in the context of a telecommuting employee.

In prior cases, New Jersey state and federal courts have applied the “governmental interest” test to determine the extraterritorial application of the LAD.<sup>2</sup> In this choice-of-law analysis, for New Jersey law to apply, the state “must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.”<sup>3</sup>

In the employment context, New Jersey courts have considered the state in which the employee worked as the most important factor in determining the LAD’s applicability.<sup>4</sup> There are several decisions holding that the LAD did not apply to out-of-state employees,<sup>5</sup> though the ultimate analysis is fact specific. That an employee’s work may bring him or her to New Jersey, even frequently, may not be enough to bring that employee within the protections of the LAD.<sup>6</sup> As noted by the Appellate Division, mere “occasional contact with New Jersey as part of [a plaintiff’s] employment [i]s insufficient to turn those visits into plaintiff being ‘based’ in New Jersey for employment purposes.”<sup>7</sup> Courts have also recognized the location of the allegedly discriminatory conduct as a factor, albeit not a determinative one.<sup>8</sup>

In *Trevejo*, the court was tasked with the question of whether a telecommuting employee working from home in Massachusetts could assert an LAD age discrimination claim against her New Jersey-based employer.

The employee’s connections with New Jersey were her employer’s location (New Jersey), her employer-provided computer (which she used to connect remotely from her home to a company server in New Jersey), her employer-provided phone (which she used for daily phone calls with coworkers), and her company health insurance. The employee visited New Jersey on company business “a few times” between 2003 and 2008, but did not visit after that time, through her employment termination in 2015. The plaintiff never lived in New Jersey or sought or received benefits from the state of New Jersey.

The trial court granted summary judgment after it permitted limited discovery on whether the employee was an “inhabitant” of New Jersey. The *Trevejo* court took issue with this analysis, noting that ‘inhabitant’ was only mentioned in the statute’s preamble, and that the LAD applies to “persons,” which the statute does not limit to inhabitants.

Summary judgment was, therefore, premature, and the court held that “discovery is required to determine where the discriminatory conduct took place—in New Jersey or Massachusetts—and to explore whether plaintiff was employed in New Jersey or Massachusetts.”<sup>9</sup> As noted above, while courts have found the location of employment and allegedly discriminatory conduct to be relevant, the *Trevejo* court did not cite any of the case law in this area.

Specifically, the court held that the plaintiff was entitled to discovery on the following:

- where the plaintiff’s co-employees worked;
- whether those co-employees worked from home;
- the nature of the software used by the plaintiff and other employees to conduct business on behalf of the employer;
- the location of the server used to connect the plaintiff and other employees to the office in New Jersey;

- the location of the internet service provider allowing the plaintiff and other employees to connect to the employer's office in New Jersey;
- the individual or individuals who made the decision to terminate the plaintiff and the basis for the decision; and
- any other issues relevant to the plaintiff's contacts with New Jersey and her work for the employer that may demonstrate her entitlement to protection under the LAD.

The court further commented that, “[b]ased upon current computer technology and the forward thinking concept of ‘telecommuting,’ we are satisfied that determining who may be entitled to protection under the NJLAD is a novel question of law that involves highly significant policy considerations. Discovery yet to be completed may shed light on the matter.”<sup>10</sup>

So while the *Trevejo* court did not decide the applicability of the LAD, the scope of the discovery delineated by the court appears to be focused on the contact analysis in the governmental interest test described above, though the court did not cite that test in the opinion.

It is expected that this extraterritoriality issue will be more prominent in the New Jersey courts moving forward, not least because of out-of-state employees seeking the additional protections in New Jersey's new pay equity law, the Diane B. Allen Equal Pay Act, which will be effective July 1. ■

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## Endnotes

1. No. A-1377-16T4, 2018 WL 1569640 (App. Div. April 2, 2018).
2. See *Seibert v. Quest Diagnostics Inc.*, No. 11-304 (KSH), 2012 WL 1044308, at \*4 (D.N.J. March 28, 2012).
3. *Blakey v. Continental Airlines, Inc.*, 164 N.J. 38, 65 (2000).
4. See *Seibert*, 2012 WL 1044308, at \*4 (“Judges in the state and federal courts of New Jersey have continuously found that ‘the most critical factor is the location where the employee works.’”) (citation omitted).
5. See, e.g., *Buccilli v. Timby, Brown & Timby*, 283 N.J. Super. 6, 10 (App. Div. 1995) (Pennsylvania, not New Jersey, law applied to employee who resided in New Jersey but worked exclusively in Pennsylvania and the alleged wrongdoing occurred in Pennsylvania); *Santi v. Nat’l Bus. Records Mgmt., LLC*, 722 F. Sup. 2d 602, 608 (D.N.J. 2010) (LAD did not cover the New Jersey-based plaintiff who worked for Pennsylvania company, as “New Jersey courts apply the law of the state where the employee works to claims of employment discrimination”).
6. See *Peikin v. Kimmel & Silverman, P.C.*, 576 F. Supp. 2d 654, 658 (D.N.J. 2008) (LAD did not protect Pennsylvania resident who was an associate based in a Pennsylvania office of a law firm even though the associate worked on cases for New Jersey clients and frequently traveled to New Jersey).
7. *Buccilli*, 283 N.J. Super. at 10-11.
8. *Seibert*, 2012 WL 1044308, at \*5.
9. *Trevejo*, 2018 WL 1569640 at \*3.
10. *Id.*