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DEPARTMENTS

TIMOTHY F. MCGOUGHRAN

Back to Basics: Focusing on the NJSBA Mission

Editor's note: Timothy F. McGoughran was installed as the 125th president of the New Jersey State Bar Association at the Annual Meeting and Convention on May 18 in Atlantic City. This is an excerpt of his installation speech. It has been edited for brevity and clarity.

It is an honor and privilege to serve as the 125th President of the New Jersey State Bar Association. As I stand here tonight, I reflect on where we began, as an organization of 74 attorneys; the historic events we have lived through, including two World Wars and two pandemics, two state constitutions and that we are today an organization 16,000-members strong, I am humbled to serve as your president.

I love being a New Jersey lawyer—I have raised three of them who have attended all three law school locations in New Jersey. I love paralegals—I married one! My journey with the NJSBA began when I was a newly admitted lawyer and joined the Young Lawyers Division. The Association has truly been my professional home.

I have one short year and a lot to do.

After the last few chaotic years, I plan to spend my tenure driven by the central underpinnings of our mission and getting back to basics for our members and our organization.

At its core, the NJSBA stands, "To serve, protect, foster and promote the personal and professional interests of our members." Looking after our members is first and foremost. It informs our advocacy, our policies and everything we do. We strive to improve the lives of our members, and everyone in the legal community. That, in turn, will help us serve our clients, the legal profession and society.

I promise you all that the NJSBA will spend the year ahead doubling down on fundamental issues facing our members and our profession.

Chief among those is to continue to stand up and speak out about the urgent need for the governor and Legislature to address the judicial vacancy crisis. Indeed, our mission says the NJSBA will "promote access to the judicial system, fairness in its administration and the independence and integrity of the judicial branch." The fair administration of justice and the independence and integrity of the justice system certainly require a full complement of judges in the Judiciary. The healthy and thriving judicial branch is an essential component of our democracy and right now—while doing an admirable job—too few judges are left carrying the load. This cannot continue. Real people are suffering, and we will continue to tell their story until this crisis has abated.

Our mission also tells us to "foster professionalism and pride in the profession." As the Putting Lawyers First Task Force revealed, ours is a profession that is suffering a mental health and wellness crisis. That is why in the year ahead, the Association will work to advance not just the policy recommendations of the Task Force, but also work to provide our members and colleagues with real, practical solutions to improve their lives, and, in turn, their practices. We are soon rolling out a Member Assistance Program in the coming weeks that will help every member, and their family members, with access to counseling and resources to deal with the stress of their daily lives, as people and professionals.

Another key tenet of our mission is that the Association will "serve as the voice of New Jersey attorneys to other organizations, governmental entities, and the public with regard to the law, legal profession and legal system." Advocacy in the halls of the Legislature is one of the most powerful roles we play, and we will continue to seek a level playing field for attorneys. In the year ahead, we will renew our calls that the statute of limitations on malpractice claims be changed to two years, just as it is for nearly every other professional licensed in our great state.

Our advocacy will also call on the Legislature to once and for all provide necessary funding so that litigants facing matters of magnitude can receive the legal assistance they need. The NJSBA has long said the *Madden* system of the random assignment of *pro bono* cases is broken. The system was meant to be a stop gap. Three decades later the time has come to end

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FROM THE SPECIAL EDITORS

Legal Issues in the Workplace Span Many Practice Areas

By Brian R. Lehrer and Asaad K. Siddiqi

For lawyers, employment is always topical. The vast spectrum of issues which arise out of employment pollinates large firms, small firms and boutique practices. This issue of *New Jersey Lawyer* addresses a wide variety of issues created by the employer-employee relationship.

It is now a cliché that the COVID-19 pandemic changed the world, including the rise of remote employment. However, employees who work remotely are still employees and Laura A. Siclari and Cara A. Fialkoff discuss the tapestry of issues which arise with remote workers. And, Daniel R. Dowdy addresses the topic of religious accommodations in the workplace in the context of COVID-19 vaccine mandates.

Pandemic or no pandemic, some issues are forever. Some people get injured off the job with obvious impacts on their employability. Ann F. Kiernan discusses the shoals and reefs of reasonable accommodations for injured employees who need to be reassigned due to an off-the-job injury.

In one of the more profound moments in the movie *Cocktail*, Tom Cruise points out to a jilted lover that "Everything ends badly or it wouldn't end." While we all hope to leave prior employment on good terms and not unwillingly, the reality of a messy breakup provides the foundation for a survey of non-disclosure and non-disparagement provisions in New Jersey case law and legislation by Susan L. Nardone and Zachary B. Posess.

Meanwhile, Cindy Flanagan and Matthew Parker discuss the New Jersey Law

BRIAN R. LEHRER *is a trial attorney with the Law Offices of Brandon J. Broderick. He has been a member of the Editorial Board of* New Jersey Lawyer *for 20 years.*

ASAAD K. SIDDIQI, *the chair of the editorial board of* New Jersey Lawyer *and a member since 2011, is a director at Trenk Isabel Siddiqi & Shahdanian, P.C., and advises clients on myriad issues, including employment, commercial and complex litigation and non-profit law. He serves on the Civil Practice and Model Civil Jury Charges Committees of the New Jersey Supreme Court, and is a member of the Board of Trustees for the New Jersey State Bar Association, the Association of the Federal Bar of New Jersey and the Bergen County Bar Association.*

Against Discrimination and recent case law which—for better or for worse depending upon your perspective—continues to expand the scope of relief for employees. Acknowledging an anti-competitive trend in the New Jersey business climate, Michael Coco and Gigio K. Ninan discuss and analyze a proposed bill to restrict the rights of businesses to negotiate non-compete and non-poaching agreements with prospective employees.

The area of workers' compensation is addressed next. In an overview examining recent statutory changes, Lisa A. Lehrer and Sherwin Tsai discuss the developments expanding coverage to employees in the process of arriving at or leaving from the workplace.

Unfortunately, injuries on the job are not uncommon. Normally, an injured worker trades the right to file a lawsuit against their employer for compensation under New Jersey's Workers' Compensation Act. However, some employers are uninsured and Christopher J. Keating and Mark R. Natale argue that uninsured employers should not receive protection from suit under the Workers' Compensation Act.

Finally, continuing the theme of articles addressing emerging areas, John L. Shahdanian II, Asaad K. Siddiqi and Valentina M. Scirica review the growing importance of implicit bias and artificial intelligence in employment matters.

The employer-employee relationship gives rise to legal issues which are sprinkled over numerous practice areas. The articles in this issue provide a valuable template for attorneys involved in multiple practice areas whose clients are affected by the ever-evolving legal parameters of the employer-employee relationship. ■

President's Message

Continued from page 5

it and urge the Legislature to properly fund a system that will help people facing issues of magnitude who cannot afford representation. It is not fair to litigants and not fair to the attorneys assigned to represent them. We will amplify the findings of the Supreme Court's Working Group on Attorney Pro Bono Assignments that the current system is not effective in matching willing and skilled attorneys with economically disadvantaged clients facing consequences of magnitude. And we will advocate for proper funding with the full force of our voice.

Our Association is also "committed to insuring that the individual differences of its members are understood, respected and appreciated." In this coming year, and in all future years, we will continue to work to mentor young lawyers and ensure that lawyers of all races, religion, gender identity, sexual orientation, disability, age or ethnicity are given the same opportunities to succeed. Our commitment to diversity requires listening, learning, and respect for all viewpoints. We have made great progress through our diversity and inclusion initiatives, but there is still much work ahead to ensure our Association and legal system is wholly representative of the people it serves. It is work we want to do and work we will do.

And as a final issue that will serve the profession, the public, and the legal system, as well as extend our efforts to address mental health issues, I have established a multidisciplinary committee to make recommendations about ways we can help individuals whose involvement with the courts and legal system can be traced to mental health issues.

As a municipal court judge, I have seen firsthand how substance abuse and mental health issues are among the underlying contributors when people are charged with many offenses. Many of these offenders aren't bad people, but rather they are in a difficult position in part due to their mental health diagnosis and the justice system faces challenges in helping them.

Too often is the case that the legal system becomes a revolving door, and charge after charge piles up. This doesn't have to be the way.

This is an issue that we intend to address in earnest this year. Our committee will research and make recommendations about instituting mental health diversionary programs in every courthouse. To achieve this goal, it will study pending legislation, examine similar programs such as the Military Diversion Program and mental health diversion programs in the counties that have them, the Prisoner Reentry programs in the state and federal courts, New Jersey's Recovery Court program and other resources and programs that may be relevant and take the best of all of those to create a path forward.

Using our collective expertise, compassion, and knowledge, the NJSBA can provide clarity, guidance and inspiration to a segment of our society that needs it. There is a lot to do and so little time, but our team is up to the task, and we promise to work hard and try to make you proud.

Please know one important thing about me: My door is always open. I ask that if you have any concerns I am here to listen and try to help, so please email me at tmcgoughran@mcgoughranlaw.com or call me at my office at 732-660-7115. ■

PRACTICE TIPS

WORKING WELL

The Nature Experience for Lawyers

By Lori A. Buza
NJSBA Lawyer Well-Being Committee Chair
KSBranigan Law

Science tells us that seeing, hearing, and experiencing what is around you affects your mood and overall health. Studies show strong associations linking well-being to the "nature experience." Empirical evidence reveals that people who spend time outdoors have:

- boosted their immune system
- improved memory, concentration, creativity
- lowered stress and physical manifestations of stress
- decreased anxiety and depression symptoms
- restored mental strength and better quality of sleep

Research suggests that just 120 minutes per week of time in nature may improve one's overall health and psychological well-being. This could include exposure to the green grass and trees/flowers, bodies of water, starry nights, birdwatching/bird listening, hikes, walks and other outdoor activities. The studies indicate that you may split that time over the course of days, or in a "recharge" day once per week. So maybe it's time to find a way to visit the great outdoors!

Even just looking at nature scenes is linked to positive well-being effects. Studies conducted in hospitals show that photos of nature help patients cope with pain; and in rooms with pictures of nature, patients spent less time in the hospital. Indeed, other studies show that nature deprivation—lack of time in the natural world (e.g. too much time in front of the computer)—had the converse effect such that it increased rates of depression. Having just one plant in a school room has also been linked to lowered stress and anxiety in students.

Meetings, court appearances, client consults...oh my. It seems daunting—the thought of having to find a way to also get outside. But frankly, if it can bring you better health, mood, and concentration, wouldn't it be worth it to find the time? Personally, I like to experience nature once a day with a walk or visit to the park; but as noted, you can choose to bundle your exposure to the outdoors in one day per week. Schedule outdoors time into your

legal experience by adding it to your calendar and sticking with it as an appointment you cannot miss. Bring plants into your office, include nature scenes on your computer and phone wallpaper, and open the window whenever you can. If you have a good view from your office, position your desk to face the window and periodically look out the window for reprieves from your lawyering. In all these experiences be mindful, taking in the rich colors, sounds and beauty of nature around you. Prioritize the "nature experience" for yourself, and you will both *see* and *feel* a difference in your life.

Deposition Tips for Young Lawyers

By Barry S. Sobel
Greenbaum Rowe, Smith & Davis, LLP

Taking depositions is arguably the single most important part of the discovery process because it is the only time lawyers can explore in real time information gathering from a witness under oath before trial. It provides lawyers (and clients) the opportunity to pursue areas of inquiry virtually unchallenged (as objections are limited) and obtain information that can then be used to better formulate strategy and arguments and pursue claims on behalf of clients at trial.

Here are some tips for young lawyers in conducting and defending depositions.

Be prepared

There is neither a substitute nor a time limit for proper preparation. Make sure to review all important documents so that you are not only familiar with the intricate details of those documents/assertions, but so that you are also aware of potential follow-up inquiries. Listen to the answers given. Often, lawyers stick to their outline and, after a deponent answers a question, either asks another question or switches topic and does not follow up on the initial answer.

Decide on the order of depositions. Is it more advantageous to take the deposition of the other party first, or their expert? Has the expert submitted a report? How fact-sensitive is the inquiry? For fact witnesses, focus on the source of their knowledge. Be aware of—and do not feel uncomfortable exploring—potential bias. For expert witnesses, ask about prior work with the law firm/client hiring them in your case. When you get a good answer, move onto another topic and do not provide an opportunity for subsequent clarification or modification.

Prepare your client

Often, clients send information or documentation they are sure will help them win their deposition. Depositions, however, are not won—only lost. It only takes one answer to destroy credibility. Proper preparation not only includes reviewing documents (i.e., certifications and other court submissions), but counseling clients on *how* to answer questions. A deposition is not a conversation—it is a response-based inquiry.

A properly prepared witness only answers the question posed and does not volunteer anything additional. For example, when asked whether the witness knows the time, the correct response is "yes"—not "yes, it is noon." Remind clients that not remembering is an acceptable answer (so long as it is truthful) and questions should only be answered based on that client's personal knowledge. A properly prepared witness also controls the timing—both with regard to answering specific questions and overall.

Be conversational

In contravention to a properly coached witness, an attorney taking a deposition should be conversational, not argumentative—that time is for trial—and try to facilitate opportunities to enable the witness to talk. A successful deposition casts a wide net. One of the best ways to accomplish this is to ask open-ended questions, such as, "What happened next?" Lawyers should get a full chronology of events and ask about others who may have been present (and their respective involvement/knowledge).

Close the loop

The purpose of a deposition is to obtain information—all information. Too often, lawyers forget to close the loop—which then allows an opportunity for a witness to modify/add to their prior deposition testimony at trial. Lawyers must close the loop, so they are not surprised at trial with additional information.

Ask the witness whether they can recall anything else. Keep asking/repeating until the witness confirms that they cannot recall anything else. Is there anything that would help the witness recall? If so, what? If the witness modifies their testimony at trial, attack their credibility on cross-examination. Ask why they failed to provide the information at the time of deposition. If the witness recalls something they were previously unable to recall, what changed?

Check out the next issue for more deposition tips!

A version of this article first appeared in the April 2023 edition of the NJSBA Family Law Section's New Jersey Family Lawyer *and has been adapted for* New Jersey Lawyer *and reprinted here with permission.*

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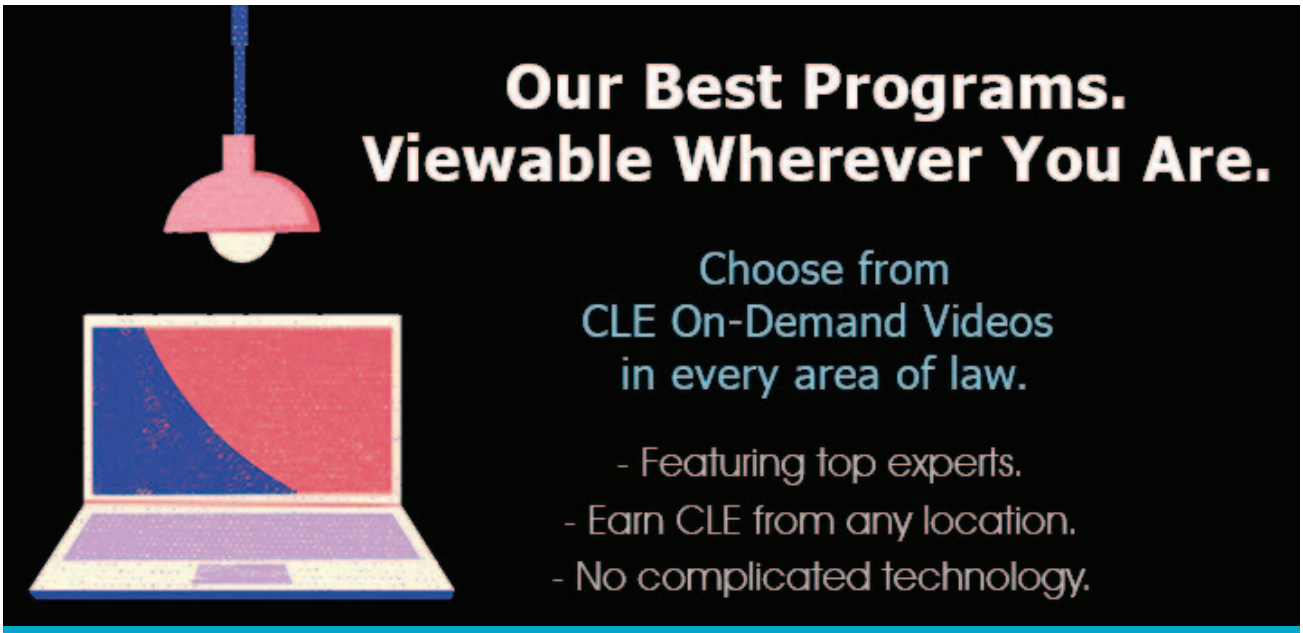

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The Rise of the Digital Nomads

Employer Considerations for the Next Breed of Remote Workers

By Laura A. Siclari and Cara A. Fialkoff

As remote work policies implemented during the COVID-19 pandemic demonstrated that employees can effectively work from anywhere, the digital nomad lifestyle began gaining momentum. The Merriam-Webster Dictionary defines "digital nomad" as "someone who performs their occupation entirely over the internet while traveling." These types of remote workers can travel and work domestically or internationally and may include self-employed individuals, freelancers, and employees. The internet keeps them connected to jobs, coworkers, and clients.

Statistics show that the number of digital nomads from the U.S. has nearly quadrupled over the past four years and was up to 16.9 million as of September 2022. The total number of digital nomads worldwide has ballooned to over 35 million, with 52% coming from the United States. As of 2022, the percentage of digital nomads who are traditional remote employees has overtaken the independent workers by 66% to 34%, respectively—a shift caused by the pandemic-driven remote work boom. Additionally, digital nomads by-and-large are well-educated and technologically savvy, with 47% of digital nomads being in their 30s. Digital nomads work in a wide variety of fields, with the primary professions including information technology (21%), creative services (12%); education and training (11%); sales, marketing, and PR (9%); finance and accounting (9%); and consulting, coaching and research (8%). The unifying theme of these professions is that they can be performed remotely using digital tools and the internet.

As these statistics reflect, the digital nomadism trend has reached the size and scale across industries such that many employers can no longer ignore it. Accordingly, it is crucial to understand the rules and regulations that come with employing this unique type of professional. These considerations include: (1) digital nomad travel laws; (2) payroll and tax obligations; (3) worker classifications; and (4) other employment law considerations.

Digital Nomad Travel Laws

Digital nomads may travel and work in a variety of countries through tourist visas or digital nomad visas. Tourist visas typically last from 30 to 90 days, sometimes up to six months, and can suffice for a short-staying digital nomad unless a particular

country's tourist visa prohibits work in that country. In the alternative, a growing list of countries have instituted digital nomad-friendly travel policies with incentives and special visa programs for applicants to both travel and work. For example, countries like Bermuda, Dubai, Greece, Iceland, Croatia, Mexico, Portugal, as well as others, offer digital nomad remote working visa programs that permit remote workers to stay in their country for an extended period (often up to one year), as long as they meet the visa requirements. These requirements may include proof of employment, their own insurance, and demonstration of a minimum monthly income. In most cases, employment with a local company in the country where the remote worker is traveling is not permitted by either a tourist visa or a digital nomad visa. These programs only work when the employer is outside of the country.

Businesses managing or supporting the visas of their remote working international employees must be mindful of each country's specific laws and regulations and may want to consider using third-party agencies specializing in remote and international workers.

Payroll and Tax Considerations

Both digital nomads and their employers are subject to the tax and payroll laws of the state or country where they work. Compliance is a key challenge for all businesses employing out-of-state or international workers. Taxes are one of the biggest compliance issues, as employers must ensure that the correct local deadlines and payroll regulations are met and what documents the company and employee are required to have based on the country or state where the employee is working. Indeed, in certain countries, such as Italy, payroll tax rates are determined at a local level and can vary from town to town or region to region. It is the responsibility of the employer and its payroll specialist to determine whether payroll is being calculated correctly and whether the overtime rules applicable to each international or out-of-state remote worker are being followed.

For domestic remote workers within the United States, the business will likely be required to withhold income taxes for the state in which the employee lives and works. While some states suspended temporary presence rules for employees due to the COVID-19 pandemic, these provisions have largely expired as of 2023. Several states, such as Connecticut, Delaware, Nebraska, New York, and Pennsylvania, have a "convenience of employer rule" which asserts that a state has the right to impose an income tax on wages an employee earned while working for a business based in that state. To address this, some states have entered into "reciprocal agreements" which may limit an employee's tax obligations. For instance, the Reciprocal Personal Income Tax Agreement between Pennsylvania and New Jersey provides that compensation and wages paid to New Jersey residents employed in Pennsylvania are not subject to Pennsylvania income tax. Likewise, compensation and wages paid to Pennsylvania residents employed in New Jersey are not subject to New Jersey income tax. It should be noted that while New Jersey has a reciprocal tax agreement with Pennsylvania, there is no agreement with New York. However, New Jersey residents may receive a tax credit for taxes paid to New York, or another state, on income earned in and taxed to both states.

There may also be different tax implications if an employee's presence in a state is temporary. Temporary presence rules vary among states and often involve a determination as to the number of days an employee resides in a state. States with a 183-day residency rule, such as California, Massachusetts, New Jersey, New York, Maryland, Vermont, Washington D.C. and Delaware, will consider an employee a full-year resident for tax purposes if the employee spent more than half the year in that state. It should be noted that the burden of proving residency varies from state to state and some may require documentary evidence. As such, it is important for employees who frequently travel and work between states to keep track of the number of days spent in each state.

In general, businesses that permit employees to work remotely out of state or internationally should consult with their tax counsel to ensure they follow all applicable tax and payroll rules and regulations for all of their workers.

Worker Classifications

Accurate classification of employees and independent contractors is critical to ensuring compliance with local labor and tax laws. Digital nomads may be either direct employees or contractors/freelancers depending on a number of factors, the most important of which is the worker classification law in the country where the worker resides. As the digital nomad lifestyle grows in popularity,

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several countries have introduced or passed worker classification legislation or rules aimed at capturing tax revenue of the freelance remote worker. For example, the United Kingdom implemented IR35, known as the "off-payroll working rules," which may apply to digital nomads. Spain also launched new legislation on external worker classification. The European Union (EU)'s new proposed rules on "platform work" will regulate digital labor platforms and may result in more uniform worker classification rules across the EU if passed.

Employers may want to consider partnering with local resources in the countries where they employ their remote workers or recruit talent to ensure legally compliant employment.

Other Employment Law Considerations

Employers are responsible for knowing and applying all other relevant and applicable employment laws for the states or countries where their workers reside, which can vary significantly between countries and states. Such laws may include: transportation taxes (withheld from wages); different tax treatment of employee benefits; wage garnishment restrictions/limits; family/sick leave requirements; disability insurance; discrimination and whistleblowing laws; pay equity laws and reporting; background screening restrictions; and privacy & employee data protection.

For example, within the United States, federal law requires the posting of notifications of specific worker rights under the Fair Labor Standards Act (FLSA), the Family and Medical Leave Act (FMLA), and other acts. With the growth of remote working, traditional physical postings required by the U.S. Department of Labor (DOL) may not suffice. In December 2020, the DOL's Wage and Hour Division (WHD) issued Bulletin No. 2020-7 which detailed guidance on meeting poster requirements for remote workers. In most cases, electronic notices supplement but do not replace the statutory and regulatory requirements. Whether notices are provided electronically or in hard-copy format, the bulletin reiterated that it is an employer's obligation to provide the required notices to all affected individuals.

Rules and regulations such as these are just one of many potentially applicable federal, local, and international employment laws that employers must become educated on and apply to their applicable workers. Having specialized human resource employees or outside third-party agencies knowledgeable of the employment laws of the states and/or countries of an employer's digital nomad workforce is critical to ensuring compliance and employment protections for each employee.

Last Thoughts

Employers considering opening their talent pool to digital nomads both domestically and internationally have potentially significant benefits to gain, which include using a category of professional reported as being among the most satisfied in the world with their work and lifestyle. Job satisfaction significantly impacts employee retention, which directly benefits the employer's bottom line. Another significant benefit can be talent acquisition, as companies are better able to attract the best talent by expanding their acquisition efforts across borders. However, with these benefits come the challenges that employing digital nomads and other remote workers bring. Employers must be prepared to educate themselves on the various laws and regulations applicable to all of their workers and to use the resources necessary to compliantly and successfully retain these unique professionals. ■

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Are You Serious?

What Employers Get Wrong About the 'Sincerely Held Belief' Standard as Applied to COVID-19 Religious Accommodations

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By Daniel R. Dowdy

Employers have many things to consider when presented with a request for a religious accommodation. It is rare that such an employer will embark on an examination of the sincerity of the beliefs of its employees. When they do, however, they very often get it wrong.

COVID-19, the 'Sincerely Held Belief' Standard, and the Pope

The COVID-19 pandemic caused a surge of employees seeking exemptions to COVID-19 vaccine mandates.[1] This influx has led some to question the sincerity with which some employees have asserted the religious basis for their accommodation requests.[2] In fact, two out of three Americans surveyed by Pew Research said they doubt the sincerity of religious objections to COVID-19 vaccine mandates altogether.[3] However, this article will not deeply examine that issue. For the purposes of this article it does not matter how many claims for religious exemptions to vaccine requirements are sincere or insincere. That subject has been extensively covered else-

where.[4] The skepticism surrounding religious objections to COVID-19 vaccines is useful, however, as a launching point for examining why the rarely-applied "sincerely held belief" standard for religious accommodations under Title VII and the New Jersey Law Against Discrimination (NJLAD) has come back into the limelight over the past three years, and to test its workability.

Most employers steer clear of evaluating the sincerity of their employees' religious beliefs altogether. In fact, the Equal Employment Opportunity Commission (EEOC) even seems to recommend that employers avoid an analysis of an employee's sincerity. In guidance issued in direct response to the uptick in requests for religious accommodation to COVID-19 vaccination requirements, the EEOC stated that "[g]enerally, under Title VII, an employer should proceed on the assumption that a request for religious accommodation is based on sincerely held religious beliefs, practices, or observances."[5]

When an employer does wade into the murky waters of testing sincerity, an all-too-common misconception in the application of this test is that a particular religion's leadership or clergy are good determinators of whether a person's belief is sincerely held. However, this consideration is mostly irrelevant because the sincerely held belief standard is—under relevant case law—entirely subjective and based only on the individual's personal beliefs, not the beliefs of other members of their religion.[6] Looking to the leaders of a particular religion creates an *objective* test of sincerity, basing the truth of the belief itself on the underlying religion, as opposed to a *subjective* test, which examines the sincerity of the *individual's* actual conviction.

The sincerely held belief standard has long been held to be a subjective test, including in the Third Circuit.[7] In *DeHart v. Horn*, 227 F.3d 47 (3rd Cir. 2000), an inmate sought a vegetarian diet claiming it was part of his Buddhist practice.[8] After the District Court held that no sect of Buddhism required vegetarianism, the Third Circuit admonished the District Court not to interject in doctrinal disputes, stating that "[w]e agree with [DeHart] that the district court could properly determine only whether he sincerely held his religious beliefs, not whether his beliefs are doctrinally correct or central to a particular school of Buddhist teaching."[9] This makes the subjective nature of the test abundantly clear. Yet, employers still sometimes look to doctrine.

For example, Pope Francis has called receiving COVID-19 vaccinations an "act of love"[10] and a "moral obligation."[11] This has led some employers to incorrectly determine that there cannot be a Catholic objection to COVID-19 vaccines. Under the subjective sincerely held belief standard, however, the Pope's stance on the issue has very little to do with whether an individual Catholic holds a belief that prohibits them from receiving the COVID-19 vaccine. It is, at best, one small factor in that analysis.

These employers are not alone. Indeed, even some lower courts have misapplied the sincerely held belief standard, applying an objective test where a subjective test is explicitly required.[12] Some courts also opt to determine whether a belief is "religious" at all, rather than doing the dirty work of determining subjective sincerity.[13] Even an author writing for the American Bar Association' Human Rights Magazine incorrectly applies an objective test in part. In his article, "Sincerely Held or Suddenly Held Religious Exemptions to Vaccination," Mark E. Wojcik details a 10-step test an employer should use when receiving requests for COVID-19 vaccine accommodations.[14] Some of these steps seem prudent, such as asking whether the person has received other vaccinations.[15] Some of these steps, however, look to the objective tenets of the religion, rather than the subjective beliefs of the individual, such as asking "whether the religious belief or practice against vaccination is held universally and uniformly within that person's religion."[16] This inquiry seems unwise and irrelevant given the case law on this issue.

New Jersey Vaccination and Testing Requirements and Sincerely Held Beliefs

The sincerely held belief test is arguably less applicable to vaccine mandates in the State of New Jersey than in more restrictive states. After all, vaccine mandates in New Jersey included testing alternatives to providing proof of COVID-19 vaccination.[17] It would be a seemingly rare occurrence that an individual would have a sincerely held religious objection to both vaccination *and* testing, but that argument has nevertheless been made with regard to New Jersey vaccination and testing mandates.[18] Some of this litigation is still pending.[19]

In an unpublished opinion, New Jersey's Appellate Division had an opportunity to review such a case.[20] In *Matter of Whitehead*, Docket No. A-0730-21 (N.J. Super. Ct. App. Div. Dec. 22, 2022), a *pro se* appellant from the New Jersey Civil Service Commission argued that she should not have been terminated for refusing to take a COVID-19 test before returning to work on site.[21] Whitehead claimed that she held a religious belief that "God has not given us the spirit of fear," that COVID-19 testing is required because of fear, and that she should not therefore be subject to COVID-19 testing.[22]

While this claim begs the sincerity question, the Appellate Division took a pass, stating that the employer had not challenged the issue of sincerity before the court.[23] Instead, the Appellate Division in *Whitehead* reversed the Civil Service Commission's decision which had granted the employer's motion for sum-

mary decision, and held that the employer had altogether failed to provide evidence that allowing Whitehead to work from home would have caused an undue hardship to the employer.[24] While this matter has been remanded to the Civil Service Commission and is still pending as of the drafting of this article, the Appellate Division's decision, and the employer's failure to address the sincerity issue altogether, are reflective of what a third rail the sincerity test can be.

The Supreme Court

Where there is not a testing alternative to a vaccine mandate and religious exemptions are requested, the United States Supreme Court seems to have acted by omission.[25] In denying certiorari from the Second Circuit in *Dr. A v. Hochul*, 142 S. Ct. 2569 (2022), the Supreme Court let stand a ruling which allowed for a vaccination requirement for New York health care workers without religious exemption.[26] In Justice Clarence Thomas' dissent, in which Justices Samuel Alito and Neil Gorsuch joined, the three conservative justices decried the denial of certiorari, asserting that the mandate is "not neutral and generally applicable" because "the New York mandate includes a medical exemption but no religious exemption."[27] This denial dealt with injunctive relief, however, and the Court could hypothetically come down differently in the future, but with most vaccine mandates now lifted, it is unclear what impact this would have.

As to sincerely held belief, the Court has often avoided the issue, in part because employers are themselves so reluctant to address it.[28] However, when it has addressed the issue, it has made clear that the test is a subjective one.[29] The subjective nature of this test may well be why employers and courts alike tend to avoid the issue altogether. After all, applying a subjective test to individual sincerity is all but unworkable.

The Difficulty of Applying of the Sincerely Held Belief Standard

What if an employee comes into an employer's office requesting a religious exemption to a COVID-19 vaccination policy because they claim to believe in a Flying Spaghetti Monster that controls the universe?[30] Does it matter that the founder of the Church of the Flying Spaghetti Monster has taken a strong stance in favor of COVID-19 vaccination?[31] Does it matter that the religion itself is arguably made up?[32] Under a subjective standard the answer to these questions must be "no." An employer is left with only the employee's words and their credibility to determine whether they really believe that a Flying Spaghetti Monster does not want them to be vaccinated.

The only real tool for determining the sincerity of a particular belief, outside of some unlikely written admission or some obvious outside indicia, is for an employer to metaphorically or literally stand over its employee asking "sure, but do you *really* believe it?" over and over again. There is simply no amount of judicial imagination that can take an employer or a court inside someone's mind. As a result, the subjective sincerely held belief standard comes almost immediately undone when pressed, and leaves only crude credibility determinations in its wake.

There may, however, be a better tool with regard to vaccinations. The COVID-19 pandemic may have been unprecedented, but a person's religious aversions to vaccination more generally are presumably not. The better test of the sincerity of such a religious objection may lie in past practice. For example, Bloomberg Law has produced a form to distribute to employees who seek a religious accommodation to COVID-19 vaccine policies which asks, among other things, "whether the religious objection is to all vaccines, the COVID-19 vaccine, or a specific Covid-19 vaccine," and "whether you have received vaccines as an adult against other diseases like influenza."[33] This test—the individual's past actions with regard to vaccines—is probably the better test of sincerity. It is a more accurate barometer of individual sincerity than looking to the Pope, and it is certainly more logical than looking to the Flying Spaghetti Monster. ■

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Who Gets the Job?

Reassignment as Reasonable Accommodation

By Ann F. Kiernan

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Here's the scenario: You get a call from your client, the general manager at Acme Products. Friz tells you that Cecil was in a car crash two months ago and has been released from doctors' care but will never be able to go back to his old job on the anvil production line. As accommodation for his back disability, Cecil has asked to transfer to an open position that meets his medical restrictions: quality control inspector in the earthquake pills division. But, Friz explains, Acme has a policy that it always hires the most-qualified applicant, and, while Cecil does meet the minimum job requirements, his co-worker Marvin, who has also applied for the inspector position, has advanced training and more experience in quality control than Cecil. Who gets the job?

You tell Friz that you'll do some research and get back to him.

Under both the Americans with Disabilities Act and the New Jersey Law Against Discrimination, reassigning an employee with a disability to a vacant position can be

a reasonable accommodation, unless that creates an undue hardship for the employer.[1] More than 20 years ago, in *Barnett v. U.S. Airways,*[2] the U.S. Supreme Court set up a two-part test for reasonable accommodations:

> 1. The employee must show that the accommodation is a type that is reasonable in the run of cases.
> 2. If so, the burden shifts to the employer to show that granting the accommodation would impose an undue hardship under the circumstances of the case.
>
> or
>
> If not, the employee can only prevail by showing that special circumstances warrant a finding that the accommodation is reasonable under the circumstances of the case.[3]

In *Barnett,* the Court held that reassignment in violation of the rules of a seniority system made the accommodation unreasonable in the run of cases, largely based on the disruption to concrete employee expectations created by the seniority system. The Court noted that a typical seniority system creates certain employee expectations such as "job security and an opportunity for steady and predictable advancement based on objective standards," and creates "employees' expectations of consistent, uniform treatment—expectations upon which the seniority system's benefits depend."[4] So, to prevail on a reasonable accommodation claim involving reassignment contrary to a seniority system, a plaintiff must show "special circumstances," such as the employer frequently changing the seniority system or the system already containing exceptions so that one more is unlikely to matter.[5]

The United States Equal Employment Opportunity Commission has long said, "The employee does not need to be the best qualified individual for the position in order to obtain it as a reassignment," and that, "Does reassignment mean that the employee is permitted to compete for a vacant position? No. Reassignment means that the employee gets the vacant position if s/he is qualified for it."[6] But the agency does not have the last word on the subject, and at least four federal appeals courts have ruled against EEOC's position.

Since *Barnett,* courts have struggled with whether violating a policy of filling vacant positions through a competitive application process and selecting the best qualified applicant is unreasonable "in the run of cases." Circuit courts are split on the issue, and neither the New Jersey Supreme Court nor the Third Circuit has ruled on it.

The Circuit Split

In March 2023, the Fifth Circuit[7] joined the Fourth,[8] Eighth,[9] and Eleventh[10] circuits in concluding that violating a "most qualified applicant available" policy—like a seniority system—is unreasonable in the run of cases. Echoing *Barnett,* the court specifically invoked the rights of coworkers in rejecting the EEOC's position:

> The EEOC's proposed course of action turns the shield of the ADA into a sword, casting the equally reasonable expectations of other workers to the side…[A] disability-neutral policy stabilizes employee expectations. It invites, rewards, and protects the formation of settled expectations regarding hiring decisions. It recognizes that basic fairness in such a context rests atop an often-rickety three-legged stool, whose legs are the employer, the disabled employee, and—easiest to neglect—the other employees. Further, such discretion is fundamental to the employer's freedom to run its business in an economically viable way. (citations omitted)[11]

Since *Barnett,* courts have struggled with whether violating a policy of filling vacant positions through a competitive application process and selecting the best qualified applicant is unreasonable "in the run of cases." Circuit courts are split on the issue, and neither the New Jersey Supreme Court nor the Third Circuit has ruled on it.

But the Tenth Circuit has taken the opposite view, rejecting the argument that a most-qualified-applicant policy is comparable in importance to a seniority system.[12] Rather, that court has adopted the EEOC stance and held that "in most situations, an employer must award the position to the disabled, but qualified, employee."[13]

In a pre-*Barnett* case whose continuing validity has been questioned,[14] the D.C. Circuit said that "the word 'reassign' must mean more than allowing an employee to apply for a job on the same basis as anyone else" while at the same time noting that "[a]n employer is not required to reassign a disabled employee in circumstances when such a transfer would violate a legitimate, nondiscriminatory policy of the employer."[15] And the

Seventh Circuit has ducked the issue, rejecting the idea that deviation from a best-qualified selection policy is always unreasonable but remanding to the district court to "determine (under *Barnett* step two) if there are fact-specific considerations particular to United's employment system that would create an undue hardship and render mandatory reassignment unreasonable."[16]

What About the Third Circuit?

While no Third Circuit case has addressed best-qualified-applicant policies, the court did look at a different disability-neutral policy in *Shapiro v. Twp. of Lakewood.*[17] As a reasonable accommodation for his disability plaintiff Shapiro asked to be reassigned to vacant positions for which he was qualified, but because he did not follow Lakewood's policy of going to the municipal building and filling out an application for intradepartmental transfer, his requests were denied. Relying on the precedent of *Donohue v. Consolidated Rail Corp.,*[18] the trial court had granted summary judgment to Lakewood, based on Shapiro's failure to apply for any transfers, but the appellate court revered and remanded for reconsideration in light of *Barnett*, which was decided after the appeal had been argued.[19]

Looking to the proceedings on remand, the *Shapiro* court instructed that the trial judge had improperly interpreted *Donohue* to require the employee with a disability to identify a vacant position for which he requested a transfer: "*Donahue* did not hold or state that an employee in a failure-to-transfer case must always show that he or she formally applied for the position in question."[20] Rather, as Judge Rendell Alito explained for the court:

> There, we held that in a failure-to-transfer case, "the plaintiff bears the burden of demonstrating: (1) that there was a vacant, funded position; (2) that the position was at or below the level of the plaintiff's former job; and (3) that the plaintiff was qualified to perform the essential duties of this job with reasonable accommodation."[21]

Five years before *Barnett,* the Third Circuit had held it unreasonable to require an employer to violate a seniority system in a collective bargaining agreement in order to accommodate a disabled worker.[22] While the court did note the conflict "between the rights of the disabled individual and those of his coworkers," its ruling rested largely on the special status of collectively-bargained rights. In particular, the Third Circuit noted the inherent unfairness of requiring an employer to breach its seniority obligations under a CBA and incur the expense and inconvenience of grievances and the danger of potentially costly remedies, since neither the union nor the arbitrator was obliged to ignore or forgive contract violations.[23]

State Court Cases

Following federal precedents, the New Jersey courts also recognize that the obligation to accommodate under NJLAD does not require "interference with existing collective bargaining agreements."[24] But our state courts have not addressed either the *Barnett* test or best-qualified-applicant policies and reassignment under NJLAD.[25]

The only New Jersey authority to have analyzed and applied *Barnett* appears to be the Division on Civil Rights in *Weiss v. Cooper Hospital.*[26] After plaintiff Weiss was diagnosed with fibromyalgia, she asked to transfer to a quality assurance or an ambulatory care nursing job, stating in her applications that she was bidding for those positions based on her doctor's recommendation that she no longer work as a floor nurse. But there were no quality assurance jobs available and the hospital picked a coworker who had seniority for the ambulatory care job.[27]

Initially, the administrative law judge had held that the hospital had met its burden of providing reasonable accommodations by giving Weiss medical leaves of absence, providing an extended benefits leave, and granting a temporary reduced shift/reduced work week assignment. But the director reversed, finding that the hospital had failed to show that transferring Weiss instead of firing her would have been an undue hardship. He awarded lost wages and compensation for pain and humiliation, and assessed $7,500 in statutory penalties.[28]

The director found that because the hospital did not consistently use seniority as the decisive factor in transfer decisions, but instead used a combination of qualifications, seniority, and past performance, its seniority system was not entitled to deference under *Barnett*.[29] He determined that the hospital never interviewed Weiss for the position, and found "no evidence in the record to support the conclusion that Respondent otherwise considered Complainant's transfer request in such a manner as to determine whether placing her in the position would impose an undue hardship on its operations."[30]

So, Who Gets the Job?

Your research finished, you call Friz to discuss the options. In response to your questions, Friz assures you that Acme has never deviated from its best-qualified-applicant policy, at least in the 10 years that he has been general manager.

You give Friz the bad news: The law is unclear. You think, based on what Friz has told you, that Acme has a decent shot at showing, under *Barnett* and following the majority of the federal appeals courts that have considered the question, that requiring Acme to promote a less-qualified applicant is unreasonable and that, given Acme's strict adherence to its best-qualified policy, Cecil will not be able to show any "special circumstances."

But, you caution, given (1) that the

author of the opinion in *Shapiro,* where the Third Circuit implied that, absent undue hardship, a minimally-qualified employee with a disability (like Cecil) gets the job, is now on the Supreme Court; and (2) the use of *Barnett* by the DCR in *Weiss*, let's focus on undue hardship under *Barnett*'s second step.

Friz says that if he has to start promoting and transferring less-qualified people, accidents will go up, as will workers' comp premiums. After all, Acme employees routinely deal with detonators, jet fuel for rocket-powered roller skates, and other hazardous items. He expects quality to suffer as well, and that means that customer complaints will increase. Friz also believes that if Acme upsets the reasonable expectations of Marvin and other skilled, experienced workers in the current labor-competitive environment, they will quit for better opportunities. That sounds like a plausible case for undue hardship, you tell Friz.

You then remind Friz that he is going to have to make the final decision, balancing business needs and legal risks. And, if he does decide to promote Marvin, he should be sure to continue to engage in the interactive process with Cecil. How long must Acme continue to look for accommodations before terminating Cecil? That's the subject of another circuit split with no Third Circuit or New Jersey Supreme Court authority on point. Best guess: six months.[31]

And that's not all, folks. There may be other return-to-work issues to consider. If Acme is covered by the Family and Medical Leave Act and if Cecil is an eligible employee, he is entitled to 12 weeks of job-protected leave. But Cecil is not entitled to reinstatement under the FMLA if he cannot perform the essential functions of his job.[32] Finally, under recent amendments to New Jersey workers' comp law, if Cecil had been injured at Acme, he would have the right to preferential rehiring into "any existing, unfilled position offered by the employer for which the employee can perform the essential duties of the position."[33] ■

Endnotes

1. 42 U.S.C. §12111(9)(B); 29 C.F.R. §1630.2(o)(2)(ii); NJAC §13:13-2.5(b). Even though the ADA and NJLAD use differing verbiage, the New Jersey courts routinely look to federal anti-discrimination cases for guidance. *Richter v. Oakland Bd. of Educ.*, 246 N.J. 507, 527 (2021).
2. 535 U.S. 391 (2002).
3. *Shapiro v. Twp. of Lakewood*, 292 F.3d 356, 361 (3d Cir. 2002).
4. *Barnett, supra,* 535 U.S. at 404-05.
5. *Id.* at 405.
6. EEOC, Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA, eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#reassignment (2002).
7. *EEOC v. Methodist Hospitals of Dallas*, 62 F.4th 938, 2023 U.S. App. LEXIS 6598 (5th Cir. 2023).
8. Elledge v. Lowe's Home Centers, LLC, 979 F.3d 1004 (4th Cir. 2020).
9. *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480 (8th Cir. 2007).
10. *EEOC v. St. Joseph's Hospital, Inc.*, 842 F.3d 1333 (11th Cir. 2016).
11. 62 F.4th 938, 2023 U.S. App. LEXIS 6598 at *13-14.
12. *Lincoln v. BNSF Ry. Co.,* 900 F.3d 1166, 1205 (10th Cir. 2018).
13. Ibid.
14. *Perry-Anderson v. Howard Univ. Hosp.,* 192 F. Supp. 3d 136, 147-8 (D.D.C. 2016).
15. *Aka v. Wash. Hosp. Ctr.,* 156 F.3d 1284,1304-5 (D.C. Cir. 1998) (en banc).
16. *EEOC v. United Airlines, Inc.,* 693 F.3d 760,764 (7th Cir. 2012).
17. 292 F.3d 356 (3d Cir. 2002).
18. 224 F.3d 226 (3d Cir. 2000).
19. For those keeping score at home: *Shapiro* argued April 4, *Barnett* decided April 29, *Shapiro* decided May 29, 2002.
20. *Shapiro, supra*, 292 F.3d at 360.
21. *Ibid.* Defendant then bears the burden of showing undue hardship.
22. *Kralik v. Durbin*, 130 F.3d 76 (3d. Cir.1997).
23. *Id.* at 83.
24. *Jones v. Aluminum Shapes,* 339 N.J. Super. 412, 427 (App. Div. 2001). The *Jones* court cited *Kralik v. Durbin, supra*, with approval. *Ibid.*, n.3
25. An unpublished trial court opinion mentions a plaintiff's contention that she was entitled to "special consideration, given that her disability required reassignment", but does no analysis. *Murtha v. Hunterdon Healthcare Sys.*, 2013 N.J. Super. Unpub. LEXIS 958 (Law. Div. 2013) at **15, 17.
26. OAL Dkt. No. CRT 8661-00, final decision (Oct. 22, 2002), njlaw.rutgers.edu/collections/oal/final/crt8661-00.pdf.
27. *Id.* at 3-4. Discussion of a second ambulatory care position is omitted in the interests of focus and brevity.
28. *Id.* at 30-31.
29. *Id.* at 11-14.
30. *Id.* at 14-15.
31. *See: Hwang v. Kansas State University,* 753 F.3d 1159, 1161-62 (10th Cir. 2014)(Gorsuch, J.) ("[A]n employee who isn't capable of working for [six months] isn't an employee capable of performing a job's essential functions—and…requiring an employer to keep a job open for so long doesn't qualify as a reasonable accommodation.") *cited with approval in Tolliver v. Trinity Par. Found.*, 723 F. App'x 166, *10 (3d Cir. 2018).
32. 29 C.F.R. §825.216(e).
33. N.J.S.A. §34:15-147.

Non-Disclosure and Non-Disparagement Provisions Under Scrutiny

Recent Case Law, Legislation Affecting Employment Agreements

By Susan L. Nardone and Zachary B. Posess

The inclusion and scope of non-disparagement and non-disclosure provisions in employment agreements has come under increased scrutiny in the last few years. On both the federal and state level, such provisions have been questioned for their potential effect on an employee's ability to discuss the terms and conditions of employment or to participate freely in a governmental investigation. Non-disparagement and non-disclosure provisions are most commonly used in separation agreements presented upon an employee's departure from the employer (*e.g.*, severance agreements) or in settlement agreements involving the resolution of a disputed claim. Here, we address recent developments at the National Labor Relations Board (NLRB) and in New Jersey's courts and Legislature.

The NLRB's Latest Missive

Historically, the NLRB has expressed skepticism over whether non-disparagement and non-disclosure provisions can peacefully coexist with an employee's right to engage in protected concerted activities, such as the right to unionize or come together to advance their interests as employees, under Section 7 of the National Labor Relations Act (NLRA). The Board's position has fluctuated significantly in the past decade. For many years, it maintained that including these clauses in employment contracts violated Section 8(a)(1) of the NLRA if

they interfere with, restrain, or coerce an employee's exercise of Section 7 rights. However, in 2020 decisions in *Baylor University Medical Center* and *IGT d/b/a International Game Technology*, a Republican-led Board held that severance agreements containing non-disclosure and non-disparagement clauses were not unlawful.[1] Instead of evaluating the language of the agreement, the Board focused its inquiry on the circumstances surrounding the offer of severance, including whether the severance agreement was mandatory, restricted post-employment activities, or was offered to employees who had accused the employer of wrongdoing. Absent one of these external conditions, the Board concluded that the inclusion of non-disparagement and non-disclosure provisions did not, on its own, constitute a violation of Section 8(a)(1).

However, in the NRLB's Feb. 21 decision in *McLaren Macomb*, a Democrat-led Board expressly overturned the decisions in *Baylor* and *IGT* and held that the mere proffer of an unlawful severance agreement runs afoul of Section 8(a)(1).[2] The respondent was a Michigan-based hospital employing approximately 2,300 employees, 350 of whom had recently unionized. In accordance with federal regulations prompted by the coronavirus pandemic, the hospital temporarily furloughed 11 bargaining unit employees it deemed nonessential. Several months later, the hospital permanently furloughed those 11 employees and offered each employee a "Severance Agreement, Waiver and Release." All 11 employees signed the severance agreement.

In pertinent part, the severance agreement in *McLaren*: (1) required the employees to release any claims against the hospital arising out of the termination of their employment ("release provision"); (2) broadly prohibited the employees from making "statements to the [hospital's] employees or to the general public which could disparage or harm the image of the [hospital], its parent and affiliated entities and their officers, directors, employees, agents and representatives" ("non-disparagement provision"); and (3) forbade employees from disclosing the terms of the severance agreement "to any third person, other than a spouse, or as necessary to professional advisors for the purposes of obtaining legal counsel or tax advice, or unless legally compelled to do so by a court or administrative agency of competent jurisdiction" ("non-disclosure provision"). The severance agreement also included an "Injunctive Relief" provision imposing substantial monetary and injunctive sanctions on any employee who breached the non-disparagement or non-disclosure provisions.

The primary issue before the Board was whether the hospital had violated Section 8(a)(1) by offering the severance agreement to permanently furloughed employees. The Board ultimately ruled that it had. Departing from its findings in *Baylor* and *IGT*, the Board preliminarily concluded that it need not look beyond the language of the Severance Agreement itself to determine the legality of the contested provisions.

The Board began its analysis with the non-disparagement provision, which it characterized as a "comprehensive ban [that] would encompass employee conduct regarding any labor issue, dispute, or term and condition of employment." It noted that the provision did not define disparagement; was not limited to matters arising during employment; had no temporal limitations; extended to statements made against the employer's parents and affiliated entities and their officers, directors, employees, agents and representatives; and imposed onerous sanctions on a breaching employee. The Board took umbrage with the fact that the non-disparagement provision would preclude an employee from cooperating with the NLRB in its investigation or litigation of an unfair labor practice. It concluded that the non-disparagement provision created a "sweepingly broad bar" against post-employment conduct and was therefore unenforceable.

The Board found that the Non-Disclosure Provision was impermissible for similar reasons. It held that the restrictions set forth in the Non-Disclosure Provision "would reasonably tend to coerce the employee from filing an unfair labor practice charge or assisting a Board investigation into the [hospital's] use of the severance agreement." It emphasized that the furloughed employees were pre-

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cluded from "disclosing even the existence of an unlawful provision." The Board further determined that the nondisclosure provision could stifle communications between employees intended to improve the conditions of employment. According to the Board, a signor would not be permitted to discuss "the terms of the severance agreement with former coworkers who could find themselves in a similar predicament facing the decision whether to accept a severance agreement." As such, the Board found both provisions to be unnecessarily broad and unduly restrictive on the former employees' conduct.

Most significantly, the Board expressly overruled its prior rulings in *Baylor* and *IGT* that the employer must have committed an additional unfair labor practice to find a Section 8(a)(1) violation. Instead, the *McLaren* decision proclaims that the mere offering of a coercive agreement could have a "potential chilling effect" on other employees' exercise of Section 7 rights, even if those employees had not actually signed the agreement. The Board emphasized that, were it to consider external circumstances (such as whether the employee actually raised an unfair labor charge or signed the agreement), it may incentivize employers to offer overly restrictive severance agreements. If that were the case, the Board reasoned, it could only intervene "belatedly" to strike down the agreement after an employee had already signed it and then lodged a complaint. Instead, according to the decision in *McLaren*, the Board must place significant value on "the high potential that coercive terms in separation agreements may chill the exercise of Section 7 rights."

The Board also disagreed with the finding in *Baylor* and *IGT* that the employer's animus toward an employee's exercise of Section 7 rights has any bearing on whether a provision violates Section 8(a)(1). However, it did highlight that the hospital shirked its duties to provide adequate notice to Local 40, RN Staff Council, Office & Professional Employees International Union (OPEIU), AFL-CIO. According to the Board, the hospital erred by failing to disclose to the union that the employees' furloughs had become permanent, thereby precluding the union from engaging in negotiations regarding that decision and its effects. Additionally, the hospital did not notify the union that it was presenting the employees with the severance agreement. The Board found that, by not apprising the union of these actions, the hospital had "entirely bypassed and excluded the union from the significant workplace events here: employee's permanent job loss and eligibility for severance benefits."

In effect, the decision in *McLaren* represents a return to the Board's longstanding rule that an employer violates Section 8(a)(1) of the NLRA by including broad non-disparagement and non-disclosure provisions in a severance agreement if they have "a reasonable tendency to restrain, coerce, or interfere with the exercise of Section 7 rights by employees, regardless of the surrounding circumstances." Although *McLaren* involved a unionized workforce, the rights set forth in Section 7 apply to union and nonunion employees alike. Accordingly, employers with nonunionized workforces must heed the Board's decision.

In the immediate aftermath of *McLaren*, NLRB General Counsel Jennifer Abruzzo issued a memo to all NLRB field offices providing guidance and answering inquiries about the import of the decision. She initially noted that the Board's ruling in *McLaren* does not represent an outright ban on severance agreements, so long as "they do not have overly broad provisions that affect the rights of employees to engage with one another to improve their lot." Accordingly, Abruzzo confirmed that severance agreements with a general release waiving the employee's right to pursue employment claims arising prior to the date of the agreement are still permissible. She also noted that confidentiality provisions may still be enforceable if they are "narrowly-tailored to restrict the dissemination of proprietary information or trade secret information for a period of time based on legitimate business justifications." Abruzzo, however, placed stricter

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confines on a permissible non-disparagement provision, noting it must be "narrowly-tailored, justified" and "limited to employee statements about the employer that meet the definition of defamation," *i.e.*, statements made with knowledge of their falsity or with reckless disregard for their truth or falsity.

Abruzzo's memo also reinforces several of the substantive portions of *McLaren*. First, she confirmed that outside circumstances, such as whether the employee actually signed the agreement, would remain immaterial to the Board's analysis of a non-disparagement or non-disclosure provision. Additionally, she highlighted that *McLaren* applies to both current and former employees, since Section 7 rights "do not depend on the existence of an employment relationship between the employee and the employer," but not to supervisors, who are not covered by the NLRA. She acknowledged that a savings clause or disclaimer might be useful "to resolve ambiguity over vague terms" but would not rehabilitate overly broad provisions. Abruzzo offered a very detailed "model prophylactic statement of rights" that could be included instead. She further clarified that the decision can be applied retroactively to prior agreements that continue to be maintained and enforced by the employer. Finally, in what could be viewed as predictive of the Board's future decisions, Abruzzo noted that several other common provisions in severance agreements could be viewed as impinging an employee's exercise of their Section 7 rights, including non-compete clauses, no solicitation clauses, and no poaching clauses.

Notably, the NLRB's decision in *McLaren* aligns with the Security and Exchange Commission's (SEC) rules governing confidentiality agreements proffered by public companies and SEC registrants. In 2011, the SEC adopted Rule 21F-17 prohibiting companies from using confidentiality agreements that "impede an individual from communicating directly with the Commission staff about a possible securities law violation."[3] The reasoning behind Rule 21F-17 is similar to the Board's in *McLaren* – that employees must be able to freely report violations to enforcement agencies. The SEC's implementation of this rule, however, has been inconsistent and largely driven by the political affiliations of the executive branch. But that pendulum may be swaying toward increased enforcement actions. In June 2022, the SEC issued an order concluding that onboarding documents signed by thousands of employees violated Rule 21F-17 because they included a confidentiality provision that required employees to obtain written consent from the company before disclosing financial or business information to any third party—including the Commission itself. As a remedy, the SEC required the employer to carve out an exemption in future contracts that expressly permits employees to make whistleblower reports to the SEC, which many employers have been doing for years.[4]

What's the Latest in New Jersey?

At the state level, several years ago New Jersey's Legislature targeted non-disclosure provisions as an improper restriction on employees' rights. Senate Bill No. 121 (S121), signed by Gov. Phil Murphy on March 19, 2019, amended the New Jersey Law Against Discrimination (NJLAD) to prohibit non-disclosure provisions in employment contracts or settlement agreements that are intended to conceal the details of discrimination, retaliation, or harassment claims. S121 expressly states that such provisions are unenforceable and against public policy in New Jersey.[5]

The limitations of S121 were tested in a 2022 Appellate Division case, *Savage v. Township of Neptune*.[6] The plaintiff, a sergeant in the Neptune Police Department, sued the Department alleging sexual harassment, discrimination, hostile work environment, and retaliation for filing an EEOC charge. The parties settled in 2014, and the resulting settlement agreement included a non-disparagement provision. In 2016, Christine Savage filed a new complaint alleging continued sex discrimination, harassment, retaliation, and aiding and abetting discrimination in violation of the NJLAD. She specifically alleged the defendants failed to honor the letter and spirit of the 2014 settlement agreement because the department promoted three men and thereby "sen[t] a message to the rank and file that male dominance of the police department would remain the status quo."

In July 2020, the parties entered into a second settlement agreement and general release that included a negotiated, mutual non-disparagement provision. Several months later, the department filed a motion to enforce the 2020 settlement agreement, alleging that an interview Savage gave to NBC New York violated the non-disparagement provision. In the interview, Savage stated that the department had "abused [her] for about eight years" and she felt "vindicated" by the settlement. She also indicated the department did not "want women there," "oppressed" its female employees, and maintained a "good ol' boy system" when making promotion decisions. Savage opposed the motion, arguing the non-disparagement provision violated the amended NJLAD, was against public policy, and effectively "gagged" her from discussing her claims publicly.

The Appellate Division concluded that the non-disparagement provision was enforceable because the Legislature did not specifically forbid such provisions when drafting and enacting S121. The court also emphasized that the non-disparagement provision in the 2020 settlement agreement was negotiated, agreed upon as a material term, and created a "mutual and reciprocal obligation" that protected both parties, as

opposed to a non-disclosure provision that affords the employer a one-sided benefit. Nevertheless, the court held that Savage's interview with NBC New York did not violate the non-disparagement provision. It reasoned that her comments were "statements about present or future behavior," and the provision only prohibited her from making disparaging statements related to "the past behavior of the parties."

Since the *Savage* decision, the New Jersey Legislature has already proposed new laws to strengthen S121. In June 2022, lawmakers introduced Senate Bill 2930 (S2930), which would further amend NJLAD to treat non-disparagement clauses identically to non-disclosure clauses. New Jersey's Assembly proposed a companion bill (A4521) in September 2022 that has already passed and been referred to the Senate for approval. If enacted, these laws would expand the language of S121 to ban non-disclosure and non-disparagement provisions, as well as "other similar agreements," in employment contracts and settlement agreements if they have "the purpose or effect of concealing the details relating to a claim of discrimination, retaliation, or harassment." Given the bi-partisan support for S2930 and A4521, New Jersey employers should prepare for the likelihood that these laws will take effect in the future.

Conclusion

As with any employment law-related changes, these developments require employers to take a careful look at their non-disparagement and non-disclosure provisions and evaluate whether and how to use them. The *McLaren* decision offers something of a roadmap for permissible provisions. New Jersey employment law practitioners have lived with S121 and its effect for four years. If S2930 or A4521 further amend the NJLAD, we will all be ready for it. ■

Endnotes

1. *Baylor University Medical Center*, 369 NLRB No. 43 (2020); *IGT d/b/a International Game Technology*, 370 NLRB No. 50 (2020).
2. *McLaren Macomb*, 372 NLRB No. 58 (2023).
3. 17 C.F.R. § 240.21F-17.
4. *In the Matter of The Brink's Co.*, Release No. 95138 (June 22, 2022).
5. S121 also bans employment contracts that contain a waiver of any substantive or procedural right or remedy relating to a claim of discrimination, retaliation, or harassment. Last year, the Appellate Division in *Antonucci v. Curvature Newco, Inc.,* No. A-1983-20 (App. Div. Feb. 15, 2022), concluded that the Federal Arbitration Act preempts this provision in S121.
6. *Savage v. Twp. of Neptune*, 472 N.J. Super. 291 (App. Div. 2022).

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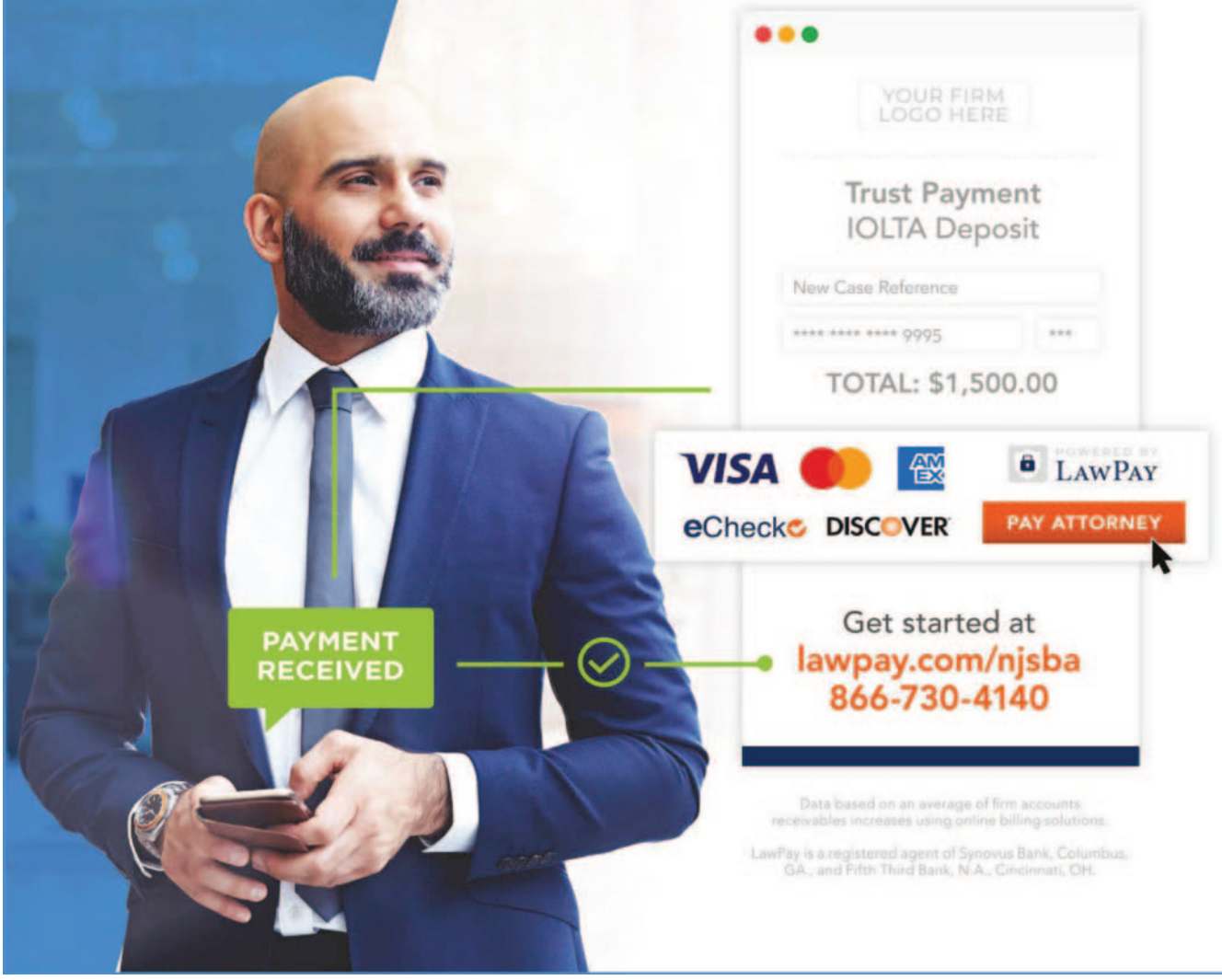

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PUSHED TO THE LIMIT

Are There Any Theories of Liability that LAD Will Not Permit?

By Cindy Flanagan and Matthew Parker

The 1958 classic movie *The Blob* features an amorphous entity that continues to expand until it envelops everything in sight. The New Jersey Law Against Discrimination appears be the blob's statutory equivalent: malleable, amorphous, and continuing to expand to include novel theories of liability pertaining to alleged workplace discrimination. Whether the LAD's continued expansion serves to eradicate discrimination in the workplace, or simply shoulders New Jersey employers with undue costs and burdens in having to defend against such claims, remains unanswered. However, the aggressive expansion of the LAD by New Jersey courts establishes that employers in New Jersey must make appropriate changes to their workplace policies to appropriately mitigate the risks arising from these novel theories of liability.

Enacted in 1945, the NJLAD is remedial legislation which prohibits discrimination and harassment based on actual or perceived race, religion, national origin, gender, sexual orientation, gender identity or expression, disability, and other protected characteristics, including age.[1] The NJLAD's goal is "nothing less than the eradication of the cancer of discrimination."[2] To assist in the accomplishment of this goal, the statute permits successful plaintiffs to recover compensatory damages (including back pay, front pay, and emotional distress damages), punitive dam-

ages, and reasonable attorneys' fees.[3] Based on the damages available to an LAD plaintiff, defending against an LAD claim is a risky and costly endeavor for employers. Accordingly, many employers seek to mitigate such risks by settling those claims that survive, or could survive, a motion for summary judgment. Two cases recently decided by New Jersey courts will make defeating claims at the summary judgment stage even harder for employers.

Meade v. Township of Livingston featured an expansion of the LAD to permit claims based on discriminatory conduct toward an employee by that employee's subordinate.[4] *Meade* concerned a claim by a township manager against the town's board for her termination. The plaintiff's termination had resulted from her continued conflict with the town's chief of police, who was her subordinate. While the plaintiff had exclusive authority to fire the police chief, she could only do so for cause. In 2016, the town's board ultimately terminated the plaintiff because of her performance issues; namely her inability to supervise the chief. Prior to the plaintiff's termination, one member of the town had remarked that the chief's conduct may have been partially driven by his displeasure about reporting to a woman. The plaintiff asserted she was terminated based on her gender to "appease the sexist male Police Chief." Based on such claims, the trial court granted summary judgment in favor of the township, and the Appellate Division affirmed.

On review, the state Supreme Court considered whether discriminatory conduct toward an employee by that employee's subordinate could result in liability on the part of the employer under the LAD. Previously this had not been considered a viable theory of liability for recovery under the LAD as it was "upside down" to contend that the allegedly sexist refusal of the subordinate to yield to their supervisor makes the decision to terminate the supervisor's employment discriminatory.[5] However, the Supreme Court did not agree with this position. Instead, the Court held that the plaintiff asserted a viable theory of liability and that a reasonable jury could conclude that the performance issues which the plaintiff's supervisors cited as the reason for her termination were merely pretextual and that the plaintiff's gender played a role in the termination of her employment.

While *Meade* has not yet been subjected to much further analysis by New Jersey's lower courts, the conclusion after *Meade* is liability under the LAD can now arise if a plaintiff employee's subordinate holds discriminatory animus, the subordinate's actions or conduct contributes to the decision to terminate the plaintiff employee, and the plaintiff employee's supervisor is aware of the subordinate's animus when the decision to terminate the plaintiff is made. While there may not be a significant number of cases that immediately fits within this factual paradigm, allowing liability in these instances considerably expands the scope of the LAD. Indeed, after *Meade*, an employer need not only remain vigilant for potentially hostile words or actions by an individual's supervisor but must also remain vigilant about potentially hostile words or actions by subordinate employees. This shift will require additional time, training and resources to be expended by employers to ensure that adequate processes and procedures are in place to deal with this novel liability. Accordingly, the compliance costs for employers in the wake of *Meade* could be significant.

Further expansion of the LAD may be likely after the recent Appellate Division decision in *Morris v. Rutgers-Newark University*.[6] While *Morris* concerned a hostile educational environment claim under the LAD, a hostile educational environment claim is similar to a hostile work environment claim and uses the same burden shifting framework. In *Morris*, the Appellate Division affirmatively found that a hostile environment can be formed in the mind of one member of a protected class even if the event or events that gave rise to that belief were directly experienced by another. In other words, the *Morris* court held that inappropriate or hostile comment to one individual could be taken as hostility toward all similarly situated individuals. Thus, hostile words or actions against one member of a protected class can serve as the basis of a claim for liability by other members of the class, even if the litigant member did not directly hear or experience the

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allegedly hostile words or actions.

As the Appellate Division decided *Morris* in relation to a hostile education claim and placed significant focus on the small, closely knit nature of a basketball team, courts should not be inclined to extend this holding into the workplace. While words like "team" and "teammate" may be thrown around in relation to the workplace, an athletic team and a workplace are different environments. Teammates win and lose in tandem; they spend hours in close proximity training together, learning to rely on one another, and helping one another hone their respective athletic prowess. Workplaces are not an athletic field, and employees do not have the same uniquely shared bond as teammates. Accordingly, while the Appellate Division may have been willing to find that inappropriate or hostile comment to one individual could be taken as hostility toward all similarly situated individuals regarding a hostile education environment claim raised by athletic teammates, courts must pause before doing so in relation to coworkers.

If the holding in *Morris* were extended to employers in New Jersey, the effects could prove financially devastating. Under the reasoning in *Morris*, employers could be subjected to lawsuits from multiple plaintiffs for allegedly hostile words or actions that were not even directed at, or experienced by, all litigants.

If the holding in *Morris* were extended to employers in New Jersey, the effects could prove financially devastating. Under the reasoning in *Morris*, employers could be subjected to lawsuits from multiple plaintiffs for allegedly hostile words or actions that were not even directed at, or experienced by, all litigants. Accordingly, even if settlement is reached with the individual to whom the hostile words and/or actions were directed, further litigation could follow by similarly protected employees who did not directly hear or experience the subject hostility.

Like the blob, the LAD cannot continue to expand in an unconstrained and unlimited fashion. At a certain point, New Jersey courts must be prepared to find that not every theory of liability can support a claim for recovery under the LAD. In the contemporary economy where stability is an invaluable commodity, New Jersey employers are being subjected to an increasingly uncertain legal environment caused by the continued expansion of the LAD. While the expansion of the LAD is a worthy undertaking insofar as it seeks to stamp out the cancer of discrimination, these efforts must be balanced against the economics of increased compliance costs, increased insurance premiums, increased trainings, and increased litigation costs. In medicine, the aggressiveness of treatment must be balanced against the effects such treatment will have on patients. Likewise, in rooting out discrimination in the workplace, courts must recognize that permitting any theory of liability to potentially support an LAD claim will, at a certain point, prove to be unduly burdensome to employers without providing any commensurate benefit to employees. Accordingly, while the theory of liability underlying *Meade* has been adopted by the Supreme Court and is now considered good law in relation to hostile workplace claims, courts must proceed carefully in permitting the theory of liability espoused in *Morris* to be extended to hostile workplace claims. ■

Endnotes

1. *See N.J.S.A.* 10:5-1 et seq.
2. *Fuchilla v. Layman,* 109 N.J. 319, 334 (1988)
3. *See N.J.S.A.* 10:5-1 et seq.
4. *Meade v. Twp. of Livingston*, 249 N.J. 310, 316 (2021)
5. *Meade v. Twp. of Livingston*, No. A-4108-18T1, 2020 N.J. Super. Unpub. LEXIS 2167, at *1 (App. Div. Nov. 12, 2020).
6. *Morris v. Rutgers-Newark Univ.,* 472 N.J. Super. 335, 352 (App. Div. 2022)

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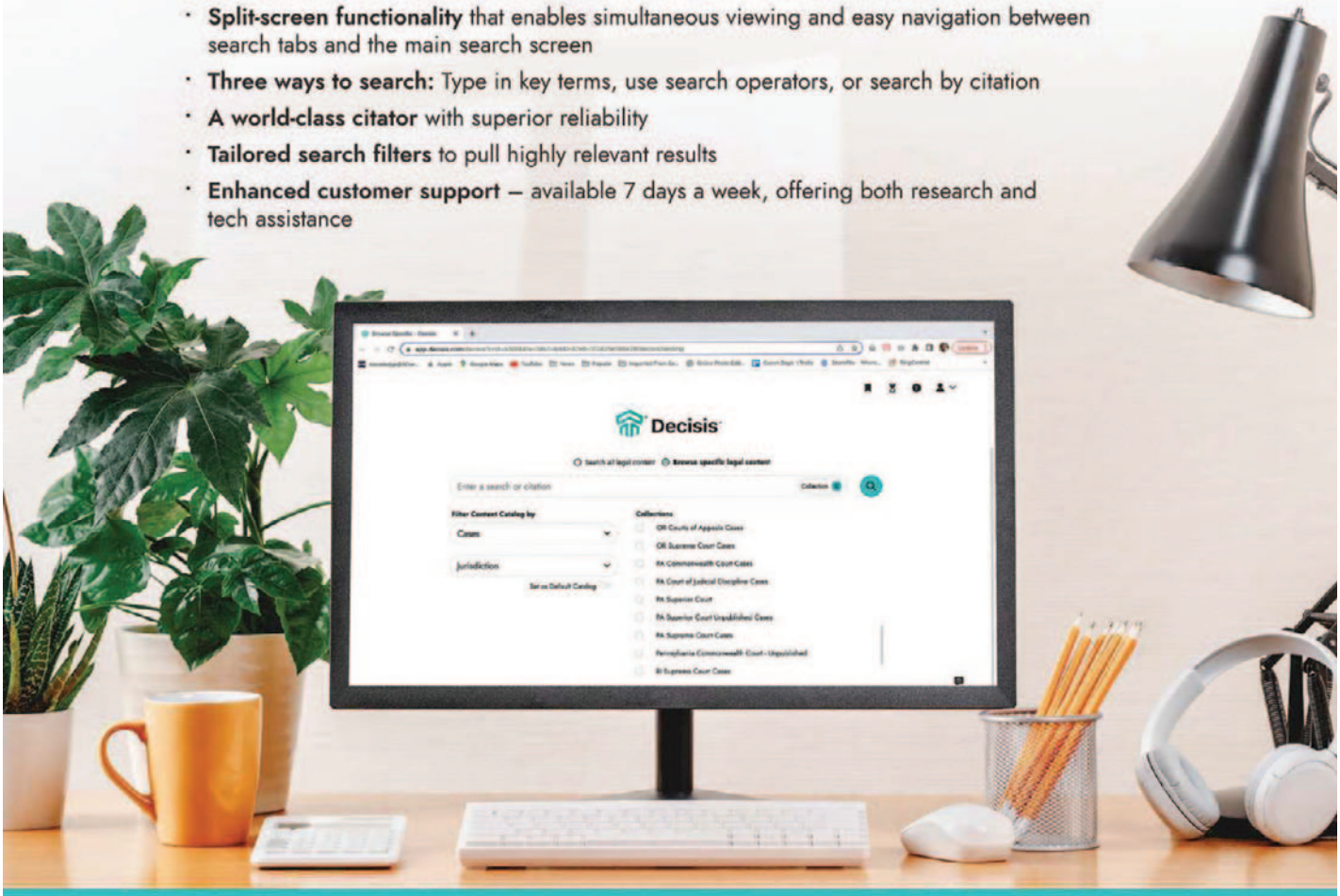

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THE Blue Eraser

New Jersey's Proposed Move Against Restrictive Covenants

By Michael Coco and Gigio K. Ninan

According to a New Jersey Business and Industry Association October 2022 update, the state ranks dead-last in business climate.[1] One group of lawmakers are trying to fix that by loosening trade restraints. Last May, new legislation was introduced that would restrict the rights of businesses to negotiate non-compete and non-poaching agreements with prospective employees. The bill, A3715,[2] seeks to make such agreements unenforceable unless the employer adheres to a set of strict provisions that, among other things, require all newly-signed non-competes to include in them a "garden-leave" provision of up to one year. These agreements are governed by a mix of common law, statutory provisions, and statutes, making their enforceability different in each state.

The bill proposal is part of a growing national trend to restrict the use of non-compete agreements under the auspices of employee protection. In January, the Federal Trade Commission proposed a new rule that would ban the use of non-competes on a federal level.[3] The FTC estimates that 30 million people are subject to non-compete agreements and restricting their use would increase earnings by $250 billion to $298 billion per year.[4] The proposed rule would ban most future non-competes and require employers to rescind any current non-compete agreements, but non-compete clauses would still be enforceable if related to the purchase of a business.[5] The time for comment on this rule closed on April 19 after receiving nearly 30,000 submissions.[6] Currently, New Jersey's restrictive covenant proposal is one of the most viewed bills on at least one major legislation-monitoring website.[7]

Restrictive covenants and non-competes are used frequently in industries that offer apprenticeships, such as residency and training opportunities for new physicians. They are also common in professions where a former employee could take a significant number of clients or patients with them and leave to start their own practice or join a nearby competitor. Currently, New Jersey courts will enforce a restrictive covenant if it is reasonable, protects a legitimate business interest, does not impose an undue burden on the employee and is not harmful to the public.[8] When assessing reasonableness, the courts examine the time, scope, and geographic confines of the restrictions.[9] If the court finds the covenant overly broad, it can use a "blue pencil" to limit the scope without invalidating the entire agreement.[10] This current practice protects the rights of the employer while ensuring fairness to the employee.[11] However, if passed in its current form, the bill will replace the court's blue pencil with an eraser—removing all boundaries in favor of near prohibition.

Bill A3715 purports to stop anti-competitive behavior that

impedes business development and innovation. It places severe restrictions on restrictive covenants. In its present form, the law would limit the duration of any post-employee agreement to 12 months but is not enforceable against an employee who is laid off or terminated without a determination of misconduct. Like the current court test, the law proposes to limit these agreements to a "reasonable" geographic area in which the employee provided services or "had a material presence or influence during the two years preceding the date of termination." The agreements would not be enforceable in other states.

Employers would not be permitted to "penalize" an employee for "defending against or challenging" the covenant. Presumably, this means no fee-shifting provisions in favor of the employer. There is, however, a fee-shifting provision in favor of the employee contained in the bill. Liquidated damages are available to a plaintiff up to $10,000. The law would prohibit "choice of law" clauses that might void the agreement so long as the employee is "a resident of or employed in the State" at the time of termination and 30 days prior to such termination. The agreements cannot limit an employee's "substantive, procedural and remedial rights." In other words—no arbitration clauses. The law allows for permissive restrictive covenants, meaning that any covenant not covered by the law is null and void. The law specifically exempts certain interns, "low wage" employees, employees participating in a Department of Labor apprenticeship program, and other special cases.

A3715 requires an employer to notify the employee within 10 days of termination if it intends to enforce the restrictive covenant. If the employer does seek to enforce the agreement, it must pay the employee for the length of the agreement. For example, if the employee is prohibited from working within a certain geographic area for eight months after resignation, the employee must pay the employee the equivalent to eight months of wages at the time of separation. This "garden leave" provision is not applicable if the employee is terminated for misconduct. The proposed bill also includes a blanket prohibition on "poaching" of "low-wage" employees. No-poach agreements are contracts between employers that prohibit the other from hiring or "poaching" the other's employees.

Analysis

Although all bills are a work-in-progress, this particular piece of legislation will have a long journey before achieving its sponsors' goal. Courts already limit the scope of these agreements based on the facts. This bill assigns a more arbitrary process of limiting the length and geography of an agreement. For example, a one-year restriction might work well to protect the business interests of a general practitioner physician, but a longer provision would be more equitable for a specialized surgeon. The state carve-out also presents a potential problem with employers who have businesses in towns that border Pennsylvania, New York, or Delaware. An employee could leave and set up shop only a few miles away, as long as it is across the state line. Instead of achieving its goal of stopping anti-competitive behavior, the law in its current form could give larger employers the advantage over small businesses. A large employer could, for example, place newer employees in offices in neighboring states that allow non-competes.

The "garden leave" provision and notice constraints will place difficult restrictions on large and small employers alike. However, larger employers with more resources might have the advantage of being able to pay off departing employees and could, in general, have a more efficient human resources process that ensures employees are provided with notice of enforcement. This creates a "structural bias" against smaller employers and practitioners, while raising the cost of hiring employees throughout the state. Finally, the bill might encourage termination of marginal employees for cause to avoid paying garden leave.

As for the non-poaching of low-wage employees provision, there is nothing presented in the bill statement that cites any evidence that such practice is occurring on any significant scale. If non-poaching agreements are being used to

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reduce employee pay and the ability to move from one employer to another, then this practice can harm employees of all wage levels in the same way as price-fixing agreements. However, employers who engage in price fixing and anti-competitive forms of employee poaching are already being pursued by the Department of Justice.[12] Thus, there is no compelling reason for state-based legislative action on this issue.

Overall, this bill needs work if it is to achieve its stated goal of increasing competition and business development in the state. Up until now, the courts have done a fine job of enforcing these covenants when reasonable and protecting employees from overly-burdensome provisions. Passing a law to address non-compete and non-solicitation agreements is a more democratic way to regulate anti-competitive behavior than leaving it up to the courts, but laws can be inflexible, resulting in harmful, unintended consequences rather than enhancing public policy. The bill has a long way to go in the legislative process. At the very least, the bill should be updated to better address enforceability of these agreements in neighboring states. Practitioners who draft and review restrictive covenants should keep their eye on this bill's progression and, hopefully, the final version will strike the proper balance between supporting businesses and preventing anti-competitive behavior. ■

Endnotes

1. *NJ Ranks Dead Last in Nationwide Comparison of Business Climates*, NJBIA, available at njbia.org/nj-ranks-dead-last-in-nationwide-comparison-of-state-tax-systems/
2. legiscan.com/NJ/text/A3715/2022
3. *Non-Complete Clause Rulemaking*, Federal Trade Commission, available at ftc.gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking
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5. *Id.*
6. *Non-Complete Clause Rulemaking*, Federal Trade Commission, available at regulations.gov/docket/FTC-2023-0007/comments
7. New Jersey Legislature, LegiScan, available at legiscan.com/NJ
8. *Community Hosp. Group v. More*, 183 N.J. 36, 869 A.2d 884, 890 (N.J. 2005).
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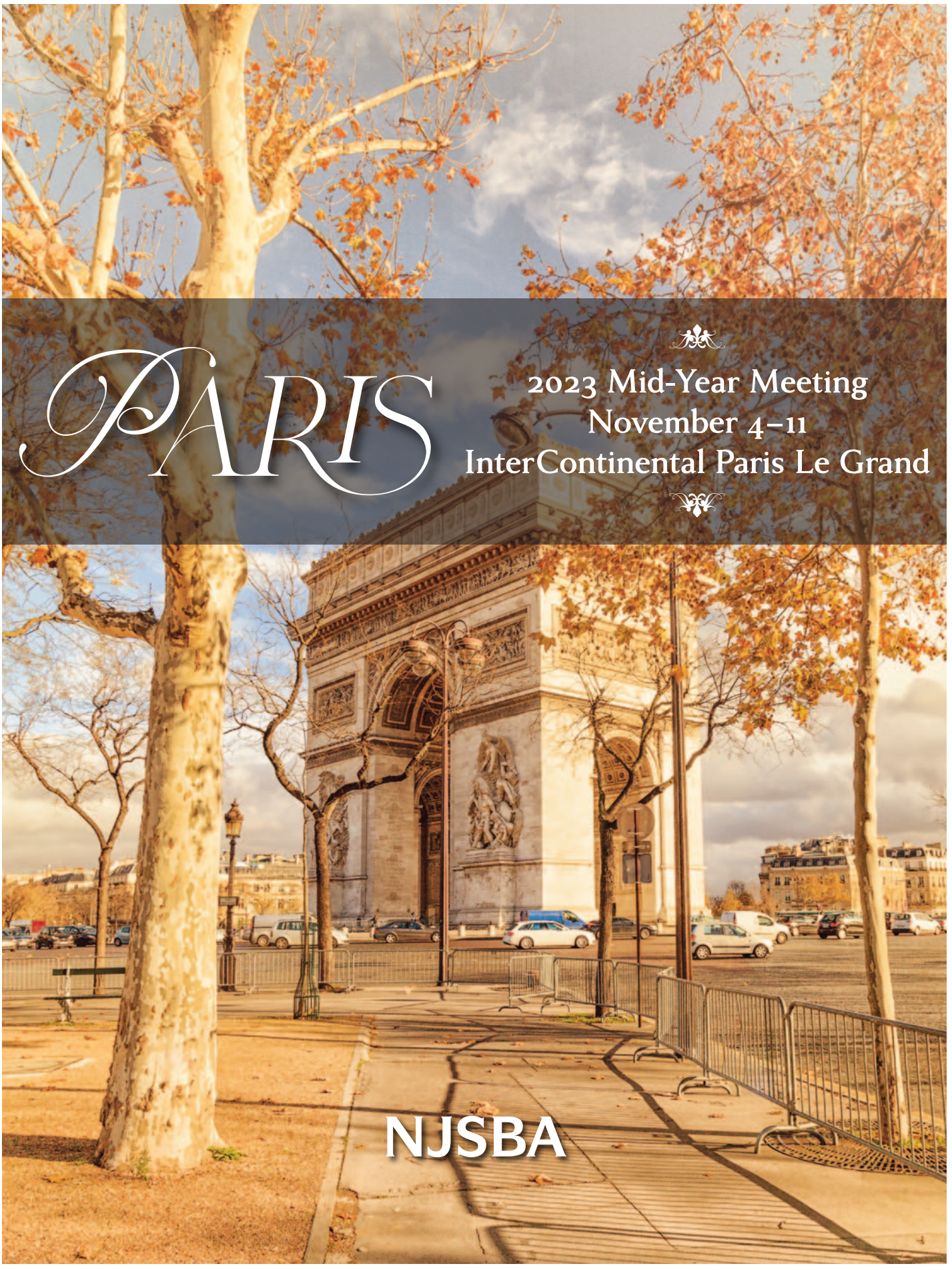
11. *Coat v. Krzywulak*, 56 A.2d 584, 141 N.J.Eq. 212 (N.J. Ch. 1948).
12. Alex Malyshev and Jeffrey S. Boxer, *With DOJ's focus on wage fixing and no poach agreements, non-compete and antitrust laws collide*, Reuters, available at reuters.com/legal/legal industry/with-dojs-focus-wage-fixing-no-poach-agreements-non-compete-antitrust-laws-2021-08-23/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Coming and Going and the Premises Rule

What Laws Apply When an Employee is Hurt While Commuting?

By Lisa A. Lehrer and Sherwin Tsai

As a general rule, commuting is not considered to be a job-related activity. As a result, injuries suffered on the way to work or on the way home are not covered by workers' compensation. This was commonly referred to as "Coming and Going" rule. In January 2022, two notable things happened which appears to have expanded New Jersey's law on injuries sustained by an employee while arriving at and leaving from their place of employment: the New Jersey Supreme Court published a decision in *Lapsley v. Twp. of Sparta* and Gov. Phil Murphy signed an amendment to the Workers' Compensation Act, S771.

The Premises Rule is based on the notion that an injury to an employee that happens going to or coming from work arises out of and in the course of employment if the injury takes place on the employer's premises. The Premises Rule "limits recovery to injuries which occur on the employer's premises…by confining the term 'course of employment' to the physical limits of the employer's premises."

In New Jersey an employee is entitled to recover workers' compensation benefits (i.e. medical treatment, lost wages and indemnity) from their employer for injuries arising out of and in the course of their employment.[1] The Workers' Compensation Act governs and further provides that "employment starts when an employee arrives at the employer's place of employment to report for work and [ends] when the employee leaves the employer's place of employment." The long-established concept of the "Coming and Going" rule dictated that employees were not covered under the WCA when injured if going to or coming from their place of employment. As a slew of exceptions to the rule developed over the years, the need for uniformity prompted the New Jersey Legislature to adopt an amendment to the act in 1979, dubbed the more comprehensive "Premises Rule."

The "Coming and Going" rule that existed since the inception of the act was abrogated by the 1979 amendments to the act.[2] In its place, the Legislature established the Premise Rule. The rule defined, for the first time, when employment begins and ends. Pertinent to this case, the amendments provide: "Employment shall be deemed to commence when an employee arrives at the employer's place of employment to report for work and shall terminate when the employee leaves the employer's place of employment, excluding areas not under the control of the employer."[3]

The Premises Rule is based on the notion that an injury to an employee that happens going to or coming from work arises out of and in the course of employment if the injury takes place on the employer's premises.[4] The Premises Rule "limits recovery to injuries which occur on the employer's premises…by confining the term 'course of employment' to the physical limits of the employer's premises."[5] It provides that "[e]mployment shall be deemed to commence when an employee arrives at the employer's place of employment to report for work and shall terminate when the employee leaves the employer's place of employment, excluding areas not under the control of the employer."[6] Therefore, in applying the Premises Rule to any potential claim, the key is to determine "where was the situs of the accident and did the employer have control of the property on which the accident occurred."[7] "[C]ontrol exists when the employer owns, maintains, or has exclusive use of the property."[8] The Premises Rule has opened the door to compensation claims which may or would not have been covered prior to its 1979 enactment. Rather than focusing on the *timing* of the injury, the rule shifts the focus to *where* the injury occurred and whether the employer had *control* over same.

After the amendment, the New Jersey Supreme Court first addressed the issue of employer's control via *Livingstone v. Abraham Straus, Inc*.[9] In this matter, Marlene Livingstone, an employee of Abraham Straus at the Monmouth Mall, was

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struck and injured by a motor vehicle while she was walking in the mall parking lot. Prior to the crash her employer directed all of its employees to park at the far corner of the mall parking lot, to allow more convenient parking spaces for retail customers. Abraham Straus, as a tenant of the Monmouth Mall, neither owned nor rented a specific portion of the mall parking lot for exclusive use by its customers or employees, but rather paid for general access to the parking lot. Livingstone's claim for workers' compensation benefits filed against Abraham Strauss was denied because Abraham Straus did not have "actual" or "exclusive" control of the parking lot, and further, that Livingstone was in the "common area to the public from any area leased or controlled by [the employer]."[10] On appeal, the Appellate Court reversed, opining there is a need to analyze compensability under the WCA on a case-by-case basis based upon the legislative intent of the amendment. The New Jersey Court was then tasked with determining if the area where Livingstone was directed to park could be construed as the employer's control as per the Premises Rule.

The Supreme Court agreed that Livingstone's workday commenced when she parked in the lot as directed by her employer, irrespective of whether Abraham Straus owned, maintained or had exclusive rights to the area of the parking lot. The Court equated Abraham Straus' designation of the far corner of the lot for its employees to park to an employer-owned lot.[11] Therefore, the requirement of control had been satisfied, considering Abraham Straus' ability to direct its employees to park in the designated area, as well as reserving this area for its employees.[12] Furthermore, by directing its employees to park in the far area of the lot, Abraham Straus caused its employees to be "exposed to added hazard, on a daily basis, in order to enhance its business interests."[13]

The expansion of compensability in *Livingstone* suffered a setback six years later in *Novis v. Rosenbluth Travel*,[14] when the New Jersey Supreme Court determined that Heidi Novis' injuries were not compensable under the act, given the lack of control over parking practices. In *Novis,* Heidi Novis was a traveling employee who was injured at a branch office while walking to her motor vehicle on a sidewalk leading from the parking lot to the building's entrance. Workers' Compensation benefits were denied, finding that the employer did not exercise any control over Novis in the parking process and further, that she was not entitled to compensation while traveling out of town from her hotel to the branch office. The Appellate Court reversed this denial under the act, stating that Novis' course of employment had commenced when she parked at the lot "used" by the employer in the conduct of its business, relying on the *Livingstone* decision in stating that the employer's lack of ownership, maintenance and control was irrelevant. Overturning that finding, the New Jersey Supreme Court opined that the Appellate Court's reliance on *Livingstone* was misplaced, citing that the distinguishing factor to be that the employer in *Livingstone* exercised control over where its employees would park, exposing its employees to added hazard, on a daily basis, in order to enhance its business interests.[15] Contrarily, the employer in *Novis* exercised no control over the subject parking lot, only sharing the lot with other tenants, which the Court determined to be vastly different from the facts in *Livingstone.*[16]

Another important case along these lines is *Brower v. ICT Group Case*.[17] After punching out on a time clock, Sandra Brower was injured on stairs. The Workers' Compensation Court and the Appellate Court held the accident as non-compensable. The Supreme Court determined that the subject staircase—one of three ways in which the she could reach the employer's premises—located within a two-story multi-tenant building; the staircase, although maintained by the landlord, was exclusively used by the employer and its employees—facts that generated the Court's holding that the injuries resulting from the plaintiff's fall on the staircase were covered by the act.

A further setback on compensability took place in 2014 when the New Jersey Supreme Court found a county employee's injury not compensable. In *Hersh v. County of Morris*,[18] Cheryl Hersh was employed by the County Board of Elections. The County assigned her free parking at a private garage located about two blocks from the building in which she worked. The garage contained several hundred parking spaces of which the county rented about 65 for its employees. Hersh was permitted to park at the Cattano Garage but she was not given an assigned space. On Jan. 29, 2010, she parked her car in the Cattano Garage and began walking one-half block to work when she was struck by a motor vehicle. Hersh brought a workers' compensation claim and prevailed in the Division of Workers' Compensation. The Appellate Division affirmed her award. The county appealed, arguing that there was no benefit attained by employees parking in the Cattano Garage.

The Supreme Court agreed with the county, holding that the distinguishing factors from the *Livingstone* case were missing from the *Hersh* case: Of chief concern in *Livingstone*, *supra*, was the employer-derived benefit that was created by dictating that employees park at the far end of the lot.[19] The employer's business benefit, along with the added hazard employees were forced to endure

by the employer while they walked through the parking lot, made the injury compensable.[20] The case is significant because on the surface, the facts appeared to be on all fours with *Livingstone*. Yet, the Supreme Court seemed to suggest that there must be a special benefit to the employer or additional hazard for an accident of this nature to be found compensable. The tenor of the case is that parking privileges were a perquisite, much like having a company-paid car, but these facts do not make the injury compensable.

More recently, in *Lapsley v. Township of Sparta*,[21] the New Jersey Supreme Court further clarified the Premises Rule, specifically addressing whether the employer exercises adequate control over the premises to warrant an employee's injuries as compensable under the act. Specifically, Diane Lapsley, a librarian for the Sparta Public Library, was struck by a snow plow in a parking lot adjacent to the library. The parking lot was owned and maintained by her employer, the Township of Sparta. The township did not mandate how employees entered or exited the building where Lapsley worked, allowing employees, as well as the general public to use the subject parking lot. While the Division of Workers' Compensation awarded benefits to Lapsley, the Appellate Division reversed, stating that her employment did not arise "out of and in the course of" her employment, in light of the township's lack of control of over her use of the parking lot. In support of its decision, the Court further rationalized that "because the Township owns and maintains multiple properties and roadways including the municipal complex...to find that Lapsley's injuries were compensable would be 'an unwarranted and overbroad expansion' of liability for public employers.[22]

The Township argued that the Appellate Court erred in requiring a finding that it exercised control over the use of the parking lot to determine applicable benefits under the act. Rather, the Premises Rule says it should be the employer's right to control the parking lot, not the degree of control exercises that serves as the determining factor. The township emphasized, to the contrary, that the parking lot is not part of the township's premises because the township did not exercise any control over her route to or from the library and the subject lot was shared with the public. Further expanding on her position, she argued that the township owns and maintains many properties and roadways within its boundaries. Thus to determine that any injuries occurring on a lot is compensable simply because it is owned and maintained by the township would open the floodgates to extensive, frivolous claims based on a relaxed interpretation of the act.

The Supreme Court reiterated that the Workers' Compensation Act provides compensation for injuries to employees in accidents arising out of and in the course of their employment, and that the act is the "exclusive remedy for an employee who suffers a work-related injury" in the vast majority of circumstances. The Court then applied the Premises Rule. "The Premises Rule is based on the notion that an injury to an employee that happens going to or coming from work arises out of and in the course of employment if the injury takes place on the employer's premises." The Court relied on its former decision in *Kristiansen*, stating, "[T]his Court has stated that control exists when the employer owns, maintains, or has exclusive use of the property."[23] The Court further noted that "when compensability of an accident depends on control of the employer, that test is satisfied if the employer has the right of control; it is not necessary to establish that the employer actually exercised that right."[24] The Court decided that Lapsley was entitled to compensation under the act, reasoning that the township owned, maintained and had exclusive use of the property.[25] The fact that the township was plowing snow at the time of Lapsley's injuries demonstrates control over

On Jan. 10, 2022, Gov. Phil Murphy signed S771 which amends the Workers' Compensation Act to expand the confines of compensability for injuries occurring in employer-owned or controlled parking lots set forth under N.J.S.A. 34:15-36. This new amendment affords compensation coverage to injuries occurring on any parking areas "provided for and/or designated by an employer for use by an employee."

the lot. Further, the township would have been aware that Lapsley, as an employee of the library, would park in the lot directly abutting the library.[26]

The Legistature recently enacted law in effort to resolve some of the inconsistency. On Jan. 10, 2022, Gov. Phil Murphy signed S771 which amends the Workers' Compensation Act to expand the confines of compensability for injuries occurring in employer-owned or controlled parking lots set forth under *N.J.S.A.* 34:15-36. This new amendment affords compensation coverage to injuries occurring on any parking areas "provided for and/or designated by an employer for use by an employee." Employment commences and ends when an employee arrives at the parking area and ends when the employee leaves said parking area. This new amendment effectively overturned the decision in *Hersh*, which would have been deemed the employer-paid garage as employer-provided parking, thus determining Hersh's injuries to be compensable under the WCA. The amendment makes clear that if an employee parks at an offsite parking area provided by the employer and is injured while traveling directly from that area to the place of employment, that injury will be compensable. This amendment essentially overturns *Hersh*.

Specifically, it provides:

> Employment shall also be deemed to commence, if an employer provides or designates a parking area for use by an employee, when an employee arrives at the parking area prior to reporting for work and shall terminate when an employee leaves the parking area at the end of a work period; provided that, if the site of the parking area is separate from the place of employment, an employee shall be deemed to be in the course of employment while the employee travels directly from the parking area to the place of employment prior to reporting for work and while the employee travels directly from the place of employment to the parking area at the end of a work period.

Of note, and for sake of completeness, New Jersey's Premises Rule does have exceptions that allow benefits to an employee where the injury did not occur on the employer's premises: (1) the special mission exception, and (2) the authorized operation of a business vehicle exception. The statute specifically provides "...when the employee is required by the employer to be away from the employer's place of employment, the employee shall be deemed to be in the course of employment when the employee is engaged in the direct performance of duties assigned or directed by the employer."[27] Simply, an employee is covered when they are required by the employer to be away from the employer's place of employment when performing duties authorized by the employer.

The amendment to the statute has brought much-needed clarification to a confusing line of precedent. Workers' rights to the protection of the statute have been expanded, and all practitioners should be aware that the road to Workers' Compensation has widened. ■

Endnotes

1. *N.J.S.A.* 34:15-1 to 142.
2. *L.* 1979, *c.* 283, § 12.
3. *N.J.S.A.* 34:15-36.
4. *Cressey v. Campus Chefs, Div. of CVI Serv., Inc.*, 204 N.J.Super. 337, 342-43, 498 (App.Div.1985).
5. *Id.* at 342.
6. *N.J.S.A.* 34:15-36.
7. *Kristiansen v. Morgan*, 153 N.J. 298, 316-17 (1988).
8. *Id.* at 317.
9. 111 N.J. 89 (1988).
10. *Id.* at 92-3.
11. *Id.* at 105.
12. *Ibid.*
13. *Id.* at 105-6.
14. 138 N.J. 92 (1994).
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16. *Ibid.*
17. 164 N.J. 367 (2000).
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21. 249 N.J. 427 (2022).
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24. *Brower v. ICT Grp.,* 164 N.J. 367, 372-73 (2000).
25. *Id.* at 419.
26. *Id.* at 419-420.
27. *N.J.S.A.* 34:15-36.

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COMMENTARY

Uninsured Employers Should No Longer Receive the Benefits of the Exclusive Remedy Provision of the Workers' Compensation Act

By Christopher J. Keating and Mark R. Natale

Views and opinions expressed herein are not to be taken as official expressions of the New Jersey State Bar Association unless so stated.

A hard-working laborer is struck in the eye with a nail, causing permanent physical injuries, vision loss, and pain and suffering, and requiring immediate medical attention. The nail was shot from a nail gun operated by a coworker at their industrial worksite. The coworker was clearly negligent and operating within the scope of his employment. As of the date of the injury, the laborer's employer failed to carry any workers' compensation insurance coverage, leaving the laborer with no option but to seek immediate and follow-up medical treatment through charity care at a local hospital. The laborer remained out of work without income for several months and eventually attained only a partial recovery of his vision.

Without available workers' compensation insurance coverage, the laborer could only receive delayed medical expense reimbursements and temporary disability benefits by filing a workers' compensation claim against the employer and the Uninsured Employers Fund. The Exclusive Remedy Provision of the Workers' Compensation Act prohibits the laborer from bringing any negligence claim against the employer in state or federal court—preventing any recovery for pain and suffering and other non-economic damages and certain forms of economic damages—even though the employer broke the law by failing to provide workers compensation coverage.

The question presented: why does an uninsured employer receive the protections of the Exclusive Remedy Provision if it does not hold up its end of the bargain? For over a century, the questionable underlying public policy has impacted these cases that exist at the intersection of employment law, personal injury, and workers' compensation law, often serving as a shield for uninsured employers and as a barrier to justice for injured workers.

This article examines the New Jersey Workers' Compensation Act (WCA) and its Exclusive Remedy Provision, and it calls into question the Exclusive Remedy Provision's application in favor of uninsured employers. This article, however, does not implicitly or explicitly advocate for any reforms to the laws as they presently exist concerning law-abiding employers that carry workers' compensation insurance. To the contrary, the reforms advanced in this article seek to level the playing field for insured employers, increase pressure on uninsured employers to opt into the New Jersey's workers' compensation scheme, and create more just causes of action to be brought against uninsured employers by their injured employees.

The New Jersey Constitution "guarantees that the 'right of trial by jury shall remain inviolate.'"[1] Plaintiffs bringing claims for the negligent acts of others are entitled to the benefits of New Jersey's trial courts and juries under the New Jersey Constitution, except for the limited circumstances under which the Legislature has decided to abrogate that right by statute, such as the Exclusive Remedy Provision of the WCA.[2]

In 1911, New Jersey joined a gradual nationwide movement to establish a workers' compensation system to replace the common law negligence system for injured employees.[3] In New Jersey, under the WCA, employees gained access to immediate medical treatment, timely payment of wages, and a permanency award for certain qualifying injuries, all without needing to prove their employer was negligent—instead just requiring proof that the injury occurred on the job. Meanwhile employers gained the benefit of avoiding costly litigation and unpredictable jury verdicts. Our Supreme Court has stated, "The ultimate purpose of the [WCA] is to provide a dependable minimum of compensation to insure security from want during a period of disability."[4]

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The WCA created an "elective system" that presented two options from which employers must choose to implement in their workplaces—one that opts out of the workers compensation framework (Article I) and one that opts into it (Article II).[5] Article II coverage is the no-fault scheme of compensation that is synonymous with the phrase "Workers' Comp" and is "built upon the principle that it provides the exclusive remedy against the employer for a work-related injury sustained by an employee."[6] Fundamental to the Exclusive Remedy Provision "is

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the premise that by accepting the benefits provided by its schedule of payments, the employee agrees to foresake a tort action against the employer."[7] Meanwhile, Article I coverage is the lesser known and far less employer-friendly option, and it allows employees to maintain the right to sue an employer for common law negligence, with the exception of willful negligence, and bars an employer from raising the defenses of contributory negligence, assumption of risk, or negligence of a fellow-employee.[8]

Article II is the default selection by operation of law.[9] It is implied into every employment contract unless there is an express, clear, and unambiguous written agreement between the employer and employee to select Article I coverage, which appears to require a knowing and voluntary waiver of Article II coverage by the employer and employee.[10] The public policy in favor of Article II coverage was so strong that the Legislature retroactively incorporated Article II coverage into every employment agreement existing as of July 4, 1911.[11]

The Uninsured Employers Fund (UEF)

As was foreseeable, some employers chose to accept the benefits of Article II protections without actually paying for and maintaining a workers' compensation insurance policy. In 1988, the Legislature amended the WCA to create the Uninsured Employers Fund as a safety net to "provide for the payment of awards against uninsured defaulting employers who fail to provide compensation to employees or their beneficiaries in accordance with the provisions of the [WCA]."[12] The fund is funded by an annual surcharge on law-abiding employers' workers' compensation insurance policies and penalties and assessments against uninsured employers.[13] An employee who is injured during the course of employment under an uninsured employer may seek compensation from the fund limited to reasonable medical expenses and temporary disability benefits,[14] subject to strict regulations governing procedures and relief.[15] After receiving a limited payment from the fund, an injured employee "may bring an action against the employer to recover all or part of any damages and costs sustained by the employee for any injury or death which has been deemed compensable under the WCA, and for which the employee or his estate has not received compensation from [the fund]."[16]

The delayed and limited right to a civil suit presumes that an injured employee can find a private attorney to bring a claim against the fund and then convince an attorney to bring a civil action against an uninsured employer for the balance of owed medical expenses and temporary disability benefits and, possibly, a permanency award governed by the values established under the WCA.

As a safety net, the fund plays a crucial role in providing much needed benefits to injured workers who would otherwise have nowhere to turn other than available health insurance coverage, Medicare or Medicaid, or charity care. This is especially true when an uninsured employer is assetless or otherwise judgement proof. However, in practice, the limited resources and statutory restrictions of the fund inherently disincentivize private attorneys from taking workers' compensation cases against uninsured employers. In the past five years, the fund issued payments in 2,105 cases.[17] During that period, the fund paid an average medical expense reimbursement of $341.00 per claim, temporary benefits of $112.07 per claim, and counsel fees of $110.25 per claim.[18] To be fair to the hard-working civil servants that administer the fund and pursue uninsured employers, this is not a critique of their work, and those numbers do not take into account the nuances of every case in which the fund is joined as a party to a workers' compensation claim.

	2018	2019	2020	2021	2022	TOTALS
Temporary Benefits Paid	$48,185	$52,967	$33,330	$65,071	$36,366	$235,918
Medical Paid	$275,163	$162,420	$179,264	$86,877	$14,082	$717,806
Counsel Fees Paid	$50,537	$77,614	$60,734	$23,501	$19,700	$232,085
Number of UEF claims filed	609	292	398	423	383	2,105

Legal Claims Beyond the Exclusive Remedy Provision

In the case of the laborer and the uninsured employer at the beginning of this article, a claim against the Uninsured Employers Fund is seemingly pointless where medical bills have already been absorbed by charity care, Medicare, or Medicaid. Under New Jersey law, the laborer's case would require additional facts and circumstances for there to be a cause of action that evades the Exclusive Remedy Provision. In prac-

tice, there are four potential common claims a plaintiff's attorney may investigate. First, a plaintiff's attorney will search for a third party that bears responsibility for the injuries, as third parties are not subject to the Exclusive Remedy Provision.[19] Second, in very limited circumstances, an ambitious plaintiff's attorney may plead a *Laidlow* claim and seek to prove that an "intentional wrong" was committed by the employer, forcing the personal injury claims outside the purview of the Exclusive Remedy Provision.[20] Third, if the employee was terminated in retaliation for requesting workers' compensation coverage, the employee could bring a common law claim for wrongful termination and workers' compensation retaliation.[21] Fourth, if the termination was based on a discrimination related to the employee's disability, or in retaliation for the employee requesting a reasonable accommodation, remedies under the New Jersey Law Against Discrimination may apply.[22] But short of those additional facts, an injured employee working for an uninsured employer is limited to pursuing a claim against the fund.

On paper, the WCA threatens a disorderly-persons offense for employers that failed to maintain Worker's Compensation coverage and a fourth-degree indictable offense for employers that knowingly failed to do so....However, criminal penalties were rarely, if ever, pursued by the state of New Jersey and any of its prosecutorial agencies.

Government Agencies Lack Resources, Enlist the Private Bar

New Jersey must enlist the ranks of the private bar to incentivize compliance with the WCA. Just as the threat of civil penalties and fines have made limited impact, the threat of criminal prosecution has failed to deter or change the unlawful conduct of uninsured employers in New Jersey. On paper, the WCA threatens a disorderly-persons offense for employers that failed to maintain Workers' Compensation coverage and a fourth-degree indictable offense for employers that knowingly failed to do so.[23] That same provision established liability for corporate officers of companies that failed to maintain Workers' Compensation coverage, and it placed liability on contractors for subcontractors that failed to maintain coverage.[24] However, criminal penalties were rarely, if ever, pursued by the state of New Jersey and any of its prosecutorial agencies.

Over-burdened county prosecutors' offices and the New Jersey Office of the Attorney General have historically lacked the resources to prioritize these offenses, and law enforcement agencies of all levels have been trained to view these offenses as a "civil issue." For the five-year period of Jan. 1, 2017, through Dec. 31, 2021, the New Jersey Office of the Attorney General charge did not charge any person or entity with a disorderly persons or indictable offence under N.J. STAT. ANN. 34:15-79.[25] However, in late 2022, the Division of Criminal Justice obtained an indictment against an owner of an uninsured company after an employee suffered a severe and permanent workplace injury that cost the Uninsured Employers Fund $194,582.85 in temporary disability benefits, medical benefits, counsel fees, and stenographic fees.[26] It is not yet clear whether that prosecution was a one-time event due to the egregious circumstances and associated costs to the Uninsured Employers Fund, or whether that prosecution indicates a policy shift involving the Division of Criminal Justice's newly created Worker Protection and Fair Labor Enforcement Unit.[27]

Proposed Reforms to the WCA

For an injured worker, limited benefits from the fund are better than nothing. But it is time to rethink the public policy underlying the WCA that allows uninsured employers to pass the costs onto everyone else while benefiting from a shield against liability that they simply do not deserve. Considering that uninsured employers have refused the proverbial carrot of the efficiencies of Article II, the Legislature should introduce a long overdue proverbial stick.

To level the playing field and expand access to justice, the New Jersey Legislature should revisit the application of the Exclusive Remedy Provision to uninsured employers. Simple revisions to Article I and Article II of the WCA could achieve a more just system: (1) remove the application of Article II's Exclusive Remedy Provision to an uninsured employer, (2) mandate that an uninsured employer is subject to the causes of

Several states across the country, including neighboring Pennsylvania, revoke the protection offered by their respective exclusive-remedy limitations for a company that does not carry insurance. By keeping its current statutory framework, New Jersey is providing fewer remedies for its injured employees and less deterrence for employers looking to avoid paying for workers' compensation insurance.

action articulated in Article I without exception, and (3) modify the WCA to create personal liability for the owners, officers, and managing agents of an uninsured employer for damages an injured worker may seek to recover from an uninsured employer under Articles I and II. Without exception, an employee of an uninsured employer must retain the ability to file a Workers' Compensation petition and pursue safety net relief from the fund.

The WCA already includes individual criminal and civil liability against corporate officers who were "actively engaged" in the business of uninsured employers, limited to those damages compensable under the WCA.[28] The New Jersey Legislature has also adopted analogous individual liability models in other employee-protection statutes, including the New Jersey Wage Payment Law, which serves the primary purpose of ensuring employees received their owed wages on time and in full.[29]

New Jersey would not be alone or unprecedented in allowing for greater protections. Several states across the country, including neighboring Pennsylvania, revoke the protection offered by their respective exclusive-remedy limitations for a company that does not carry insurance.[30] By keeping its current statutory framework, New Jersey is providing fewer remedies for its injured employees and less deterrence for employers looking to avoid paying for workers' compensation insurance.

Reforming the WCA will enlist the support of more members of the private bar not only to directly combat uninsured employers, but also to aid in New Jersey's fight against employee misclassification and tax and insurance fraud. By implementing the proposed reforms, a misclassifying employer without insurance will have to reassess whether it is willing to assume the risk of Article I liability in the event a misclassified employee is injured on the job. These reforms could also relieve some burdens on the Uninsured Employers Fund and expand the pool of employers buying workers' compensation insurance.

Most importantly, the proposed reforms offer injured employees of uninsured employers access to justice that has long been denied. Absent some sensible and articulable public policy for maintaining the *status quo*, the New Jersey Legislature should adopt the proposed reforms after receiving input from all involved stakeholders. ■

Endnotes

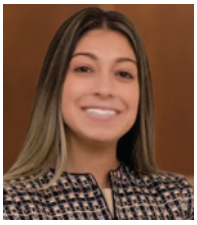
1. *Jersey Cent. Power & Light Co. v. Melcar Util. Co.*, 212 N.J. 576, 589 (2013) (citing N.J. Const. art. I, ¶ 9.).
2. *See* N.J. Stat. Ann. 34:15-8; *see also Naseef v. Cord, Inc.*, 48 N.J. 317, 322 (1966).
3. Hon. Peter J. Calderone, J.W.C., *Honoring NJ's 100 years of workers compensation*, NJ.com, September 2, 2011, nj.gov/labor/forms_pdfs/wc/pdf/Honoring%20NJ's%20100%20years%20of%20workers%20compensation%20_%20NJ%20com.pdf.
4. *Naseef*, 48 N.J. at 325.
5. *Naseef*, 48 N.J. at 322-23 (1966).
6. *Ramos v. Browning Ferris Industries, Inc.*, 103 N.J. 177, 183 (1986) (*citing* N.J. Stat. Ann. 34:15-8; *Estelle v. Board of Educ. of Red Bank*, 14 N.J. 256 (1954)).
7. *Ramos*, 103 N.J. at 183 (citing *Morris v. Hermann Forwarding Co.*, 18 N.J. 195, 197-98 (1955)).
8. N.J. Stat. Ann. 34:15-1, 2; *Peck v. Newark Morning Ledger Co.*, 344 N.J. Super. 169, 177 (App. Div. 2001).
9. N.J. Stat. Ann. 34:15-9.
10. *Peck*, 344 N.J. Super. at 177 (citing N.J. Stat. Ann. 34:15-9; *Naseef supra* note 4).
11. *Id.*
12. *See* N.J. Stat. Ann. 34:15-120.1(a); *see also* 1988 N.J. ALS 25, 1988 N.J. Laws 25, 1988 N.J. A.N. 1784.
13. N.J. Stat. Ann. 34:15-120.1(b) and (c).
14. N.J. Stat. Ann. 34:15-120.2(b).
15. N.J. Admin Code § 12:235-7, *et seq.*

16. N.J. Stat. Ann. 34:15-120.9.
17. N.J. Labor and Workforce Development, email response to Open Public Records Act request W195573 (February 1, 2023).
18. *Id.*
19. *See Ramos v. Browning Ferris Industries, Inc.*, 103 N.J. 177 (1986) (holding that the WCA prohibits an employer from being a party to a negligence action and thereby from contribution to a third-party as a joint tortfeasor under the Comparative Negligence Act, N.J. Stat. Ann. § 2A:15-5.3).
20. *See Laidlow v. Hariton Machinery Co., Inc.*, 170 N.J. 602 (2002).
21. *Lally v. Copygraphics*, 173 N.J. Super. 162, 181-182 (App. Div. 1980) (applying the holding of *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 64 (1980) to workers' compensation retaliation cases); N.J. Stat. Ann. 34:15-39.1 ("It shall be unlawful for any employer or his duly authorized agent to discharge or in any other manner discriminate against an employee as to his employment because such employee has claimed or attempted to claim workmen's compensation benefits from such employer[.]"
22. *See Richter v. Oakland Bd. of Educ.*, 246 N.J. 507, 524 (2021).
23. N.J. Stat. Ann. 34:15-79.
24. *Id.*
25. N.J. Div. Crim. Justice, email response to Open Public Records Act request W195771 (February 24, 2023); *see* State Grand Jury Indictment No. SGJ-768-22-24, Docket No. 22-14-51-S; see also Complaint-Summons S-2022-000077-1604.
26. *Id.*
27. N.J. Div. Crim. Justice Highlights, njoag.gov/about/divisions-and-offices/division-of-criminal-justice-home/division-of-criminal-justice-highlights/ (last accessed February 26, 2023).
28. N.J. Stat. Ann. 34:15-79; *Macysyn v. Hensler*, 329 N.J. Super. 476, 482 (App. Div. 2000).
29. *See* N.J. Wage Payment Law, N.J. Stat. Ann. 34:11-4.1 (Expanding the definition of a liable "employer" to include "the officers of a corporation and any agents having the management of such corporation").
30. 77 Pa. Cons. Stat. § 501(d); *Liberty by Liberty v. Adventure Shops, Inc.*, 433 Pa. Super. 586 (Pa. Super. 1994); *see also* Wyo. Stat. Ann. § 27-14-104(c); Ark Code Ann. § 11-9-105(b); D.C. Code § 32-1504(b).

IMPLICIT BIAS

Considerations for Employers to Avoid Liability Stemming From its Impact

By John L. Shahdanian II, Asaad K. Siddiqi and Valentina Scirica



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On Jan. 31, the New Jersey Appellate Division addressed issues of first impression when it rendered its decision in *State of New Jersey v. William L. Scott*. The Appellate Division held for the first time that "implicit bias" can be a basis for establishing a *prima facie* case of police discrimination under the burden-shifting standard adopted in the 2002 New Jersey Supreme Court case of *State v. Segars*.[1] While the concept of "implicit bias" is long-standing in New Jersey, the Appellate Division's most recent determination in *Scott* should be regarded by all employers to ensure that the workplace is free from discrimination, including biases, especially in the context of hiring, promoting, evaluating and terminating employment and in conjunction with the fairly new use of artificial intelligence in making such employment decisions.

What is Implicit Bias?

Implicit bias is an automatic association people make between groups of people and stereotypes about those groups.[2] Implicit bias operates at a subconscious level and is oftentimes contrary to a person's stated beliefs and attitudes. Implicit bias is different than explicit bias, in that it is not expressed directly and does not operate on a conscious level.[3]

The Court in *State v. Andujar* defined implicit bias as referring to "Attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner."[4] Implicit biases "encompass both favorable and unfavorable assessment, [and] are activated involuntarily and without an individual's awareness or intentional control."[5] The Court further stated that "implicit bias is no less real and problematic than intentional bias."[6] "It makes little sense to condemn one form of racial discrimination yet permit another."[7]

State v. Scott

In the matter of *State v. Scott*, defendant Scott contended that he was subjected to discriminatory policing when he was stopped and frisked based on the be-on-the-lookout (BOLO) description of a person who committed an armed robbery in the vicinity just minutes earlier. The BOLO described the robber as a Black male wearing a dark raincoat. However, the victim of the armed robbery did not provide the race of the perpetrator when she reported the crime. The state acknowledged that it did not know why the dispatcher assumed the perpetrator was Black while announcing the BOLO.[8]

The New Jersey Appellate Division was tasked with addressing three issues of first impression, one of which being whether implicit bias can be the basis for establishing a *prima facie* case of police discrimination under the *Segars* burden-shifting standard.[9] In *Segars*, defendant Segars, a Black motorist, pleaded guilty in the municipal court to a charge of driving with a suspended license. Throughout the proceedings, Segars maintained that Officer Williams checked his license plate on the Mobile Data Terminal because of his race. The question before the Court was whether the trial court's conclusion that Segars failed to sustain the burden of

In applying the concept of implicit bias to the *Lehmann* Court's determination, it can be concluded that even though an implicit bias is "unintentional" or "involuntary," such bias can still be considered discriminatory under the New Jersey Law Against Discrimination because the LAD is not an intent-based statute. Additionally, as further demonstrated in *Lehmann*, an employee's discriminatory implicit bias toward another can cause an employer to become vicariously liable under the LAD.

proving discriminatory targeting be sustained. The Supreme Court of New Jersey held that: (1) the evidence established racial targeting by a police officer; (2) the defendant had the burden of establishing a *prima facie* case of racial targeting; (3) a *prima facie* case shifted the burden to the state to produce evidence of a race-neutral reason; and (4) the defendant bore the burden of proving discriminatory treatment by a preponderance or greater weight of the credible evidence.[10] Under *Segars*, the Appellate Division in *State v. Scott* determined that implicit bias can be a basis for establishing a *prima facie* case of police discrimination.[11] In reaching such conclusion, the court was persuaded by the Attorney General Directive 2005-1, which states in part that under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and the New Jersey Constitution, a person's race may not be considered as a basis for making law enforcement decisions other than when determining whether an individual matches the description in a BOLO alert.[12]

In addition, the Appellate Division considered the harm that can be caused by implicit bias as set forth in *Andujar supra*, and determined:

> We likewise hold that implicit bias may be considered as part of a *Segars* analysis notwithstanding that *Segars* provides that a defendant bears the 'ultimate burden of proving by a preponderance of the evidence that the police acted with discriminatory purpose.' Accordingly, evidence of implicit bias can support an inference of discrimination that would establish a prima facie case under *Segars*, shifting the burden of production to the prosecutor.[13]

The court further stated:

> But even if we were to hold that evidence of implicit bias is not sufficient to establish a prima facie case of purposeful discrimination under *Segars*, the evidence in this case, when viewed in a light favorable to defendant's claim, supports the inference that the dispatcher made a conscious decision to infer the robber's race based on a prejudiced assumption about the correlation of race and criminality. While any such inference of intentional discrimination might be rebutted under the *Segars*, burden-shifting paradigm, the State was obliged—and failed—to do so.[14]

In sum, the court determined that the defendant presented evidence establishing a *prima facie* case of discrimination, shifting the burden to the state to provide a race-neutral reason as for the dispatchers assumption that the perpetrator was Black. Because the state failed to meet its burden of production and even admitted that it does not know why the dispatcher added the racial description to the BOLO, the defendant established a *prima facie* case.[15]

Implicit Bias's Impact on Employers

While the case of *State v. Scott* was determined in a criminal context, implicit bias is apparent in all realms of society, including the employment context. Given the new ruling in *State v. Scott,* employers should be cognizant, now more than ever, to eradicate and prevent implicit bias in the workplace.

The concept of implicit bias in an employment law context was demonstrated in the seminal New Jersey employment law case of *Lehmann v. Toys 'R' Us, Inc.,* where the New Jersey Supreme Court ultimately held that an employer may be vicariously liable, based on principles of agency law, for sexual harassment committed by a supervisor resulting in a hostile work environment.[16] In determining whether the plaintiff in *Lehmann* was harassed based on her sex, the Court stated:

> The LAD is not a fault-or intent-based statute. A plaintiff need not show that the employer intentionally discriminated or harassed her, 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 his effects, and it is at the *effects* of discrimination that the LAD is aimed.[17]

In applying the concept of implicit bias to the *Lehmann* Court's determination, it can be concluded that even though an implicit bias is "unintentional" or "involuntary," such bias can still be considered discriminatory under the New Jersey Law Against Discrimination because the LAD is not an intent-based statute. Additionally, as further demonstrated in *Lehmann*, an employee's discriminatory implicit bias toward another can cause an employer to become vicariously liable under the LAD.

In *Cutler v. Dorn*, the New Jersey Supreme Court was tasked with determining whether comments that stereotyped persons of Jewish ancestry occurred because of Cutler's particular ancestry and religion, thus constituted harassment. The Court concluded that such stereotypic comments were not accidents and were aimed to have an effect on their listener, and their listener was known as a person of Jewish faith and ancestry.[18] Although the Court did not use the term "implicit bias," it was concluded that stereotyping (discussed *supra* as a form of implicit bias) was considered harassment/hostile work environment under the NJLAD.

Not only should an employer be aware of implicit bias in connection with vicarious liability and actions of employees, but an employer should also be aware of its presence when hiring, promoting, evaluating and terminating an employee. Such notion is demonstrated in the United States Supreme Court case of *Phillips v. Martin Marietta Corp.,* where the plaintiff, a female job applicant, instituted an action against an employer under Title VII of the Civil Rights Act of 1964 alleging that she had been denied employment because of her sex. In *Phillips*, the United States Supreme Court held that stereotypes about the child-care obligations of women are a form of gender discrimination.[19] The Court stated:

> By adding the prohibition against job discrimination based on sex to the 1964 Civil Rights Act Congress intended to prevent employers from refusing to 'hire an individual based on *stereotyped* characterizations of the sexes.' Even characterizations of proper domestic roles of the sexes were not to serve as predicates for restricting employment opportunity. (Emphasis added).[20]

As demonstrated above, implicit bias has permeated judicial decision-making and will continue to be a focus of courts after *State v. Scott*.

AI, Bias and Employers

On Jan. 10, the Equal Employment Opportunity Commission published its draft Strategic Enforcement Plan, which includes updates that take into account employers increasing use of automated systems, including artificial intelligence or machine learning, to target job advertisements, recruit applicants, and make or assist in hiring decisions.[21] The SEP builds upon the previous SEP adopted in 2018, which added "emerging and developing issues," such as AI bias.[22] In October 2021, the EEOC launched its initiative to ensure that AI and other emerging tools used in hiring and other employment decisions comply with federal civil

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rights laws. EEOC Chair Charlotte A. Burrows stated:

> Bias in employment arising from the use of algorithms and AI falls squarely within the Commission's priority to address systemic discrimination. While the technology may be evolving, anti-discrimination laws still apply. The EEOC will address workplace bias that violates federal civil rights laws regardless of the form it takes, and the agency is committed to helping employers understand how to benefit from these new technologies while also complying with employment laws.[23]

While the EEOC's focus on employment bias, including implicit bias, is based on the federal level, individual states, such as New York, have also issued guidance on automatic employment decision tools. On April 6, the New York City Department of Consumer and Workers Protection issued a final rule to provide guidance regarding the city's Automatic Employment Decision Tool. The final rule came after the New York City Council enacted an ordinance which took effect on Jan. 1 banning AI in employment decisions unless the technology has been subject to an independent bias audit within a year of use.[24] The final rule defines an AEDT as any tool that applies artificial intelligence to "substantially assist or replace discretionary decision making" of an employer, such that it does any of the following: scores, classifies or ranks job applicants or employees based on only one factor; gives more weight to simplified output as one set of criteria; or uses a simplified output to overrule conclusions derived from human decision-making or other factors.[25]

Accordingly, an employer cannot use an AEDT unless the tool was subject to a bias audit within the last year to ensure that the AEDT does not disparately impact a particular group.[26] The final rule also has a notice requirement which requires employers to inform applicants and employees of the use of the AEDT and the process of requesting an alternative selection process or reasonable accommodation.[27] The DCWP announced that it will begin enforcement of the AEDT law and final rule on July 5.[28]

In addition to New York, a bill has been introduced in the New Jersey Assembly that would impose new obligations on employers with the use of AI in the hiring process. At present, the bill remains in committee. It was approved by the Assembly Labor Committee and referred to the Innovation and Technology Committee.[29]

As a takeaway, it is important for employers who use software to assist in the hiring process and other employment related decisions to consult with their venders to determine whether their AI tools are subject to the AEDT law and final rule. If so, it is important for employers to ensure that such venders complete the bias audit by the applicable enforcement date(s) to eliminate the potential bias in such tools.

What Can Employers Do?

In light of the *State v. Scott* decision and its impact, employers should take additional steps to ensure that the workplace is free of bias, including implicit bias, and discrimination. On Aug. 4, 2021, the EEOC launched Diversity, Equity and Inclusion workshops through the EEO Training Institute to help employers understand, prevent and correct discrimination in the workplace.[30]

In addition to attending EEOC training sessions, it is important for employers and employees to attend state-specific anti-harassment/anti-discrimination training conducted by seasoned employment counsel of the employer's home state as a best practice. It is important for both employers and employees to understand and acknowledge the types of discrimination and how they can be prevalent in the workplace. With regard to implicit bias, it is essential for employers and employees to define and acknowledge implicit bias; recognize different types of implicit bias; and understand the impact of implicit bias in order to protect employees in the workplace. Employers should further familiarize themselves with how bias can play a role in hiring, terminating, promoting, evaluating and demoting. Employers should consult with counsel for further assistance and guidance on appropriate training(s). ■

Endnotes

1. *State of New Jersey v. William L. Scott*, 474 N.J. Super. 388 (2023).
2. *Implicit Bias*, National Initiative for Building Community Trust & Justice, trustandjustice.org/resources/intervention/implicit-bias#:~:text=Implicit%20bias%20describes%20the%20automatic,and%20stereotypes%20about%20those%20groups.
3. *Equity Council Corner: What Is Implicit Bias?,* New Jersey School Boards Association (January 22, 2020), njsba.org/news-publications/school-board-notes/january-22-2020-vol-xliii-no-24/equity-council-corner-what-is-implicit-bias/.
4. *State v. Andujar*, 247 N.J. Super. 275, 302 (2012) (citing Cheryl Staats et al., Kirwan Inst. for the Study of Race and Ethnicity, Implicit Bias app. at 62 (2015), kirwaninstitute.osu.edu/wp-content/uploads/2015/05/2015-kirwan-implict-bias.pdf).
5. *Id*. at 302-03.
6. *Id*. at 303.
7. *Id.*
8. *State v. Scott*, 474 N.J. Super. at 398.
9. *Id*. at 399.
10. *State v. Segars*, 172 N.J. 481 (2002).

11. *Id*.
12. *Id*. at 403-04.
13. *Id*. at 410.
14. *Id*. at 410-11.
15. *Id*. at 411.
16. *Lehmann v. Toys 'R' Us, Inc.,* 132 N.J. 587 (1993).
17. *Id*. at 605.
18. *Cutler v. Dorn,* 196 N.J. 419, 433 (2008).
19. *Phillips v. Martin Marietta Corp.,* 400 U.S. 542 (1971).
20. *Id*. at 545.
21. *Draft Strategic Enforcement Plan*, A Notice by the Equal Employment Opportunity Commission (January 10, 2023), federalregister.gov/documents/2023/01/10/2023-00283/draft-strategic-enforcement-plan.
22. *J. Edward Moreno, EEOC Targets AI-Based Hiring Bias in Draft Enforcement Plan*, Bloomberg Law (January 12, 2023), news.bloomberglaw.com/daily-labor-report/eeoc-targets-ai-based-hiring-bias-in-draft-enforcement-strategy.
23. *EEOC Launches Initiative on Artificial Intelligence and Algorithmic Fairness*, U.S. Equal Employment Opportunity Commission (October 28, 2021), eeoc.gov/newsroom/eeoc-launches-initiative-artificial-intelligence-and-algorithmic-fairness.
24. New York City Council, Int. No. 1894-A, Section 1. Chapter 5 title 20, Subchapter 25 (January 1, 2023).
25. Section 1. Chapter 5 of Title 6 of the Rules of the City of New York, Subchapter T, §5-300.
26. New York City Council, Int. No. 1894-A, Section 1. Chapter 5 title 20, Subchapter 25 (January 1, 2023).
27. Section 1. Chapter 5 of Title 6 of the Rules of the City of New York, Subchapter T, §5-304.
28. *NYC Publishes Final Rule for AEDT Law and Identifies New Enforcement Date*, The National Law Review, Volume XIII, Number 121 (April 6, 2023), natlawreview.com/article/nyc-publishes-final-rule-aedt-law-and-identifies-new-enforcement-date.
29. *Bill A4909,* New Jersey Legislature, njleg.state.nj.us/bill-search/2022/A4909.
30. *EEOC Launches Diversity, Equity & Inclusion (DE&I) Workshop Series*, U.S. Equal Employment Opportunity Commission (August 4, 2021), eeoc.gov/newsroom/eeoc-launches-diversity-equity-inclusion-dei-workshop-series.

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