



NEW JERSEY STATE BAR ASSOCIATION

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Via Electronic Mail (regulations@njcivilrights.gov)

Kaley Lentini, Interim Deputy Associate Director for Policy
Department of Law and Public Safety

Division on Civil Rights

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Dear Ms. Lentini:

On behalf of the New Jersey State Bar Association, please accept these comments on the Division of Civil Rights' (DCR) Proposed New Rules pertaining to disparate impact discrimination. We represent a wide swath of attorneys on both sides of the issue and these comments were debated at length. While there were several comments on these proposed rules, there was consensus on four main points of the rules. That said, the NJSBA does not take a position on the overall proposed rules. Instead, the Association provides the following comments to highlight potential ambiguities and requests for clarification for your consideration.

The NJSBA Urges Clarification of the “Equally Effective” Standard

The term “equally effective” is used throughout the proposed rules¹ without any guidance on what this means in order to meet the burden that a practice or policy is necessary. In fact, it has been considered superfluous by the United States Department of Housing & Urban Development (HUD) in its review of comments on the proposed rules of the Fair Housing Act's Discriminatory Effects Standard.

The use of “equally effective” was proposed by commenters in the Fair Housing Act proposed rules “for the proposition that liability should attach unless the less discriminatory alternative would impose an undue hardship on the respondent or defendant under the circumstances of a particular case.” U.S. Dep't of Hous. & Urban Dev., Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,474 (2013). In rejecting this proposal HUD pointed out that the rule language proposed was superfluous to already proposed language stating “that the less discriminatory alternative must serve the respondent's or defendant's

¹¹ Proposed new N.J.A.C. 13:16-2.1; N.J.A.C. 13:16-2.2; N.J.A.C. 13:16-3.1; N.J.A.C. 13:16-3.4; N.J.A.C. 13:16-4.1; N.J.A.C. 13:16-4.3; N.J.A.C. 13:16-4.4; N.J.A.C. 13:16-4.5; N.J.A.C. 13:16-4.6; N.J.A.C. 13:16-5.1; N.J.A.C. 13:16-5.3; N.J.A.C. 13:16-5.4; N.J.A.C. 13:16-5.5; N.J.A.C. 13:16-6.1; N.J.A.C. 13:16-6.2.

interests.” HUD pointed out that the proposed language, similar to the proposed language in the DCR Proposed Rules, is consistent with Congress’s codification of the disparate impact standard in the employment context as well as with judicial interpretations of the Fair Housing Act. *Id.* “The additional modifier ‘equally effective,’ borrowed from the superseded Wards Cove case, is even less appropriate in the housing context than in the employment area in light of the wider range and variety of practices covered by the Act that are not readily quantifiable.”

For this reason, the NJSBA urges clarification on the use of this phrase or removing the phrase to ensure consistency in this standard of proof with what occurs in other contexts, including employment and housing at the federal level.

NJSBA Urges Clarification on the Application of the U.S. Equal Employment Opportunity Commission’s Uniform Guidelines and Employee Selection Procedures in Disparate Impact Law Against Discrimination (LAD) Cases

The proposed rules incorporate by reference the EEOC’s Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. 1607. DCR should clarify the extent to which these guidelines and procedures are mandatory in disparate impact LAD cases; the extent to which the guidelines apply to each state of litigation under the proposed rules; and whether all of the guidelines are incorporated, and if not, which are incorporated and which are not.

Automated Employment Decision Tools and Online Application Technology


The proposed rules defines automated employment decision tools, but utilizes the phrase “online application technology” in N.J.A.C. 13:16-3.2. DCR should clarify whether “automated employment decision tools” (defined) is synonymous with “online application technology” (not defined).

Clarify “Reasonable” Steps Relative to an Outside Vendor’s Artificial Intelligence-Related Product

Under the proposed rules, if a respondent’s practice or policy that results in a disparate impact based on a protected characteristic relies on conduct, standards, products, procedures, or systems of an outside person or vendor, “the respondent must take reasonable steps to ensure that the outside person or vendor’s conduct, standards, products, procedures, or systems are consistent with the Act and this chapter.” N.J.A.C. 13:16-2.2(l). It is unclear what employer conduct constitutes “reasonable” steps to ensure that an outside vendor’s AI-related product does not result in an unlawful disparate impact; and whether employer liability would still attach if it took “reasonable” steps with an outside vendor to ensure that disparate impact did not occur, but it nevertheless occurred.

The Association is grateful for the opportunity to submit these comments and appreciates DCR's consideration of them.

Very truly yours,



William H. Mergner

cc: Christine Amalfe, Esq., NJSBA Incoming President
Angela Scheck, Esq., NJSBA Executive Director