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Mid-Summer NJ Employment Law Update

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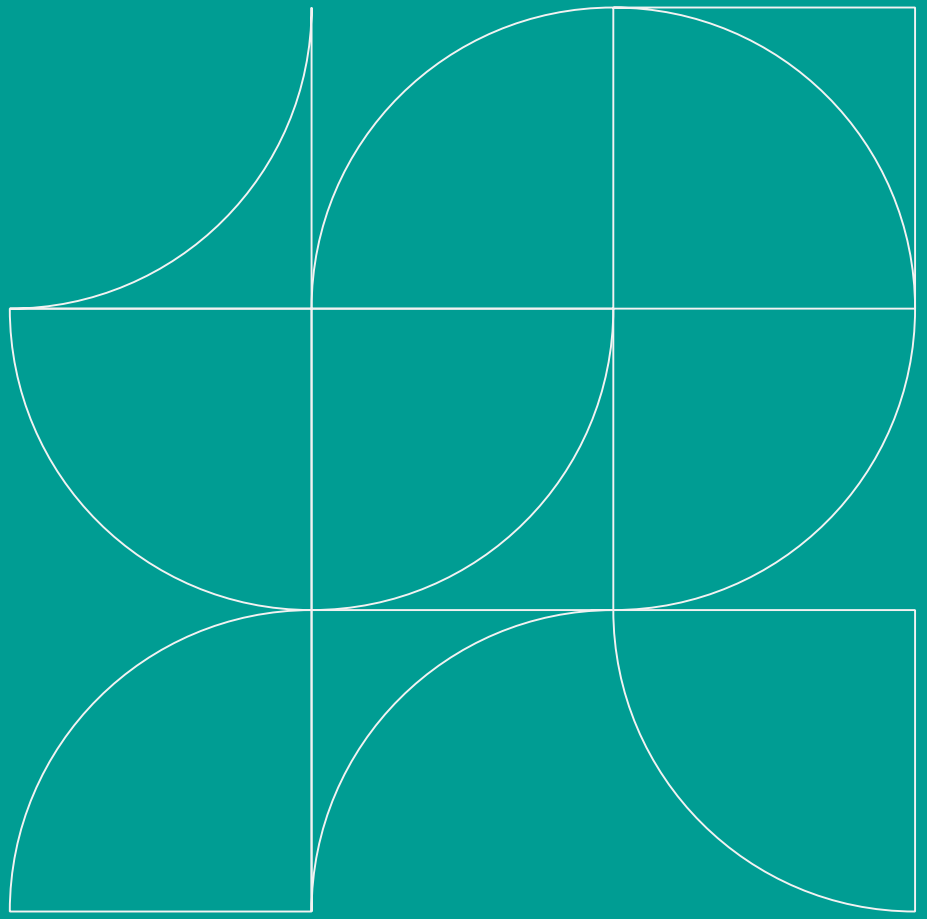
Disability Accommodations Under New Jersey's Law Against Discrimination



Disability Discrimination Under the LAD

- The LAD prohibits discrimination against a qualified individual because of a known or perceived disability.
- Employers are required to provide reasonable accommodations for disabled individuals unless the accommodation would impose an undue hardship.
- Whether an employer has made a reasonable accommodations is determined on a case-by-case basis.

NJ Supreme Court Lowers Threshold for Accommodation Claims – *Richter v. Oakland Bd. of Ed.*

On June 8, 2021, the NJ Supreme Court held that, among other things, an adverse employment action is unnecessary to sustain a failure to accommodate claim.

Key Facts

- Plaintiff was a science teacher who suffers from Type-1 Diabetes
- Plaintiff requested an accommodation – an earlier lunch period to prevent a drop in her blood sugar
- Principal claimed he would "look into it." No schedule change is made in the first or third marking periods.
- Plaintiff later passed out at work and sustained serious injuries

Holding Reasoning – *Richter v. Oakland Bd. of Ed.*

- Resolved the issue in favor of the LAD's broad legislative intent to eradicate workplace discrimination
- The failure to provide Plaintiff with an accommodation was sufficient to sustain her failure to accommodate claim
- The wrongful act = employer's failure to perform its duty to provide a reasonable accommodation
- An employer's "*inaction, silence, or inadequate response to a reasonable accommodation request"* is enough to sustain a failure to accommodate claim

Richter v. Oakland Bd. of Ed – Employer Takeaways

The Court held that an employer's "inaction, silence, or inadequate response to a reasonable accommodation request is an omission that can give rise to a cause of action" under the LAD.

Key Impressions From *Richter*'s Holding

- Resolved ambiguity surrounding adverse employment actions and failure to accommodate claims under the LAD
- Eliminates a potential defense to a failure to accommodate claim where a plaintiff fails to pled an adverse employment action
- Did not precisely define what would constitute an ***"inadequate response"*** to an accommodation request
- Continues the NJ Supreme Court's trend of broadening LAD protections available and pursuing the full range of the LAD's legislative intent to eradicate workplace discrimination

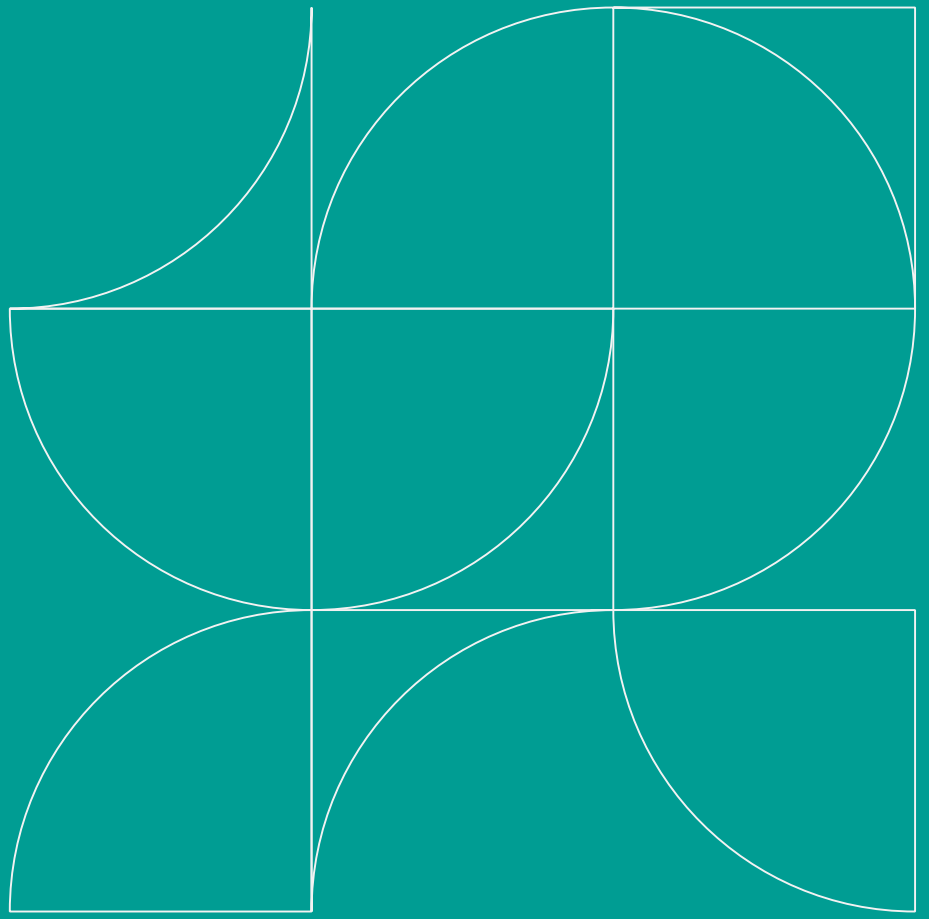
Broadening Disability Accommodation Landscape

- More nuanced conditions/situations to consider as part of the accommodation landscape
  - Growth in remote work and telecommute capabilities removes potential undue hardship arguments
  - July 26, 2021 - President Biden commented that those experiencing long-term effects of COVID may qualify for disability protections
  - Disability under the LAD includes mental health conditions such as depression, anxiety, adjustment disorders, PTSD, etc.
  - Use of legalized marijuana under New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act and the Jake Honig Compassionate Use Medical Cannabis Act

Accommodation Best Practices

- Engage in the interactive dialogue in a ***transparent*** and ***timely*** manner
  - Maintain a clear accommodation policy
  - Train managers on how to identify accommodation requests and where to direct requests
  - Respond timely to requests
- Interactive dialogue with employees should include discussion of:
  - The individual's accommodation needs
  - Potential accommodations or alternatives
  - Undue burden of a proposed accommodation
- End process by granting a reasonable accommodation or reasonably concluding that:
  - No accommodation can be made without undue hardship;
  - A sufficient accommodation was offered but rejected; or
  - No accommodation exists that will allow the individual to perform the essential job tasks

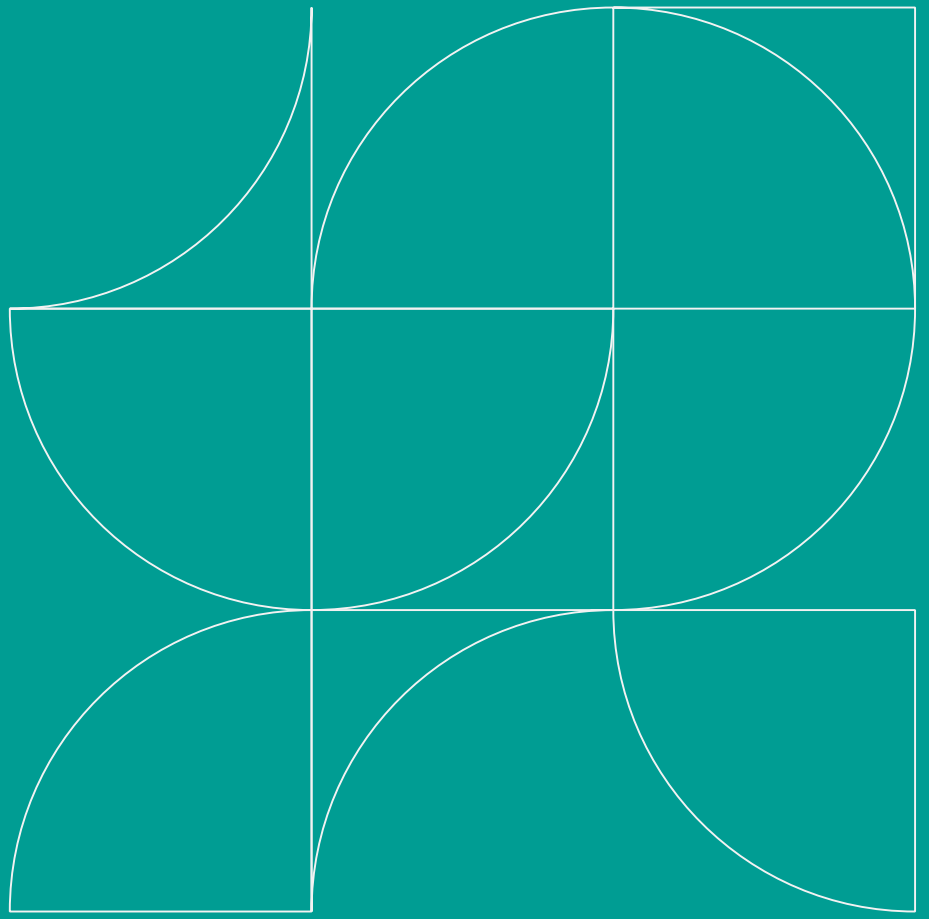
Noteworthy Caselaw: Workplace Harassment



Rios v. Meda Pharm., Inc.

- Decided June 16, 2021
- Hostile Work Environment claim: two comments by supervisor, which supervisor denied making
- Claims must be evaluated in light of **all the circumstances**, including the **frequency** of the discriminatory conduct; its **severity**; whether it is **physically threatening** or **humiliating**, or a **mere offensive utterance**; and whether it **unreasonably interferes with an employee's work performance**
- Severity can be "exacerbated" when it is uttered by a supervisor -- supervisors have an important role in shaping the workplace
- The perspective of a reasonable person in the plaintiff's position -- this takes into account the sensibilities of our ***present day society***

Arbitration Agreements in the Employment Context



Janco v. Bay Ridge Automotive Grp.

- Decided Jan. 22, 2021 – Law Div., Monmouth County (Judge Hutehorn)
- 2019, LAD was amended by Senate Bill 121
  – A provision of any employment contract that waives any substantive or procedural right or remedy relating to a claim of discrimination, retaliation, or harassment shall be deemed against public policy and unenforceable.
- Citing *Kindred Nursing Centers v. Clark*, Court pointed out:
  – FAA preempts state laws that discriminate on their face against arbitration or covertly accomplish the same objective by disfavoring contracts that have the same defining features as arbitration
  – State law was irreconcilable with the national policy (and NJ policy) favoring arbitration as a forum for dispute resolution

NJ Civil Justice Institute v. Grewal

- Decided Mar. 25, 2021 – District of N.J. (Judge Thompson)
- Filed on 8/30/2019 by the NJ Civil Justice Institute and US Chamber of Commerce to enjoin enforcement of S. 121's bar on arbitration
  - Had standing – did not need to wait for enforcement action by NJ Attorney General
- Citing Kindred Nursing Centers v. Clark, Court pointed out:
  - A state law that discriminates on its face against arbitration or covertly accomplishes the same objective by disfavoring contracts that have the defining features of arbitration are preempted by the FAA
- S. 121's ban on arbitration = preempted

Arbitration Agreements in New Jersey

- *Examples:*
  - *Martindale v. Sandvik, Inc.*, 173 N.J. 76 (2002)
    - Employee agreed "to waive [her] right to a jury trial" and that "all disputes relating to [her] employment ... shall be decided by an arbitrator"
    - "arbitration agreement not only was clear and unambiguous, it was also sufficiently broad to encompass reasonably plaintiff's statutory causes of action"
  - *Griffin v. Burlington Volkswagen, Inc.*, 411 N.J. Super. 515 (App. Div. 2010)
    - "By agreeing to arbitration, the parties understand and agree that they are waiving their rights to maintain other available resolution processes, such as a court action or administrative proceeding, to settle their disputes."
    - Upheld

Arbitration Agreements in New Jersey (Cont.)

- *Examples:*
  - *Curtis v. Cellco Partnership*, 413 N.J. Super. 26 (App. Div. 2010)
    - "Instead of suing in court, we each agree to settle disputes (except certain small claims) only by arbitration. The rules in arbitration are different. There's no judge or jury, and review is limited, but an arbitrator can award the same damages and relief, and must honor the same limitations stated in the agreement as a court would."
      - This was "sufficiently clear, unambiguously worded, satisfactorily distinguished from the other [a]greement terms, and drawn in suitably broad language to provide a consumer with reasonable notice of the requirement to arbitrate."

Arbitration Agreements in New Jersey (Cont.)

- Back to *Atalese*
  - Contract stated that either party may submit any dispute to "binding arbitration"; that "[t]he parties shall agree on a single arbitrator to resolve the dispute"; and that the arbitrator's decision "shall be final and may be entered into judgment in any court of competent jurisdiction."
    - *But* no explanation that employee was waiving her right to seek relief in court
  - No explanation of what arbitration is, or how arbitration is different from court
  - Not written in plain language: not clear and understandable to the average employee
  - Arbitration clause need not "list every imaginable statute by name to effectuate a knowing and voluntary waiver of rights," employees should at least know that they have "agree[d] to arbitrate all statutory **claims arising out of the employment relationship or its termination**"

Arbitration Agreements in New Jersey (Cont.)

- Further Lessons After *Atalese*
  - *Kernahan v. Home Warranty Admin. of FL, Inc.*, 236 N.J. 301 (Jan. 10, 2019)
    - "Any and all disputes, claims and causes of action arising out of or connected with this Agreement (including but not limited to whether a particular dispute is arbitrable hereunder) shall be resolved exclusively by the American Arbitration Association in the state of New Jersey under its Commercial Mediation Rules. Controversies or claims shall be submitted to arbitration regardless of the theory under which they arise, including without limitation contract, tort, common law, statutory, or regulatory duties or liability."
  - Not sufficiently clear -- 3 flaws:

    1) In section labeled "Mediation"

    2) small font & confusing order of sentences

    3) reference to Commercial Mediation Rules

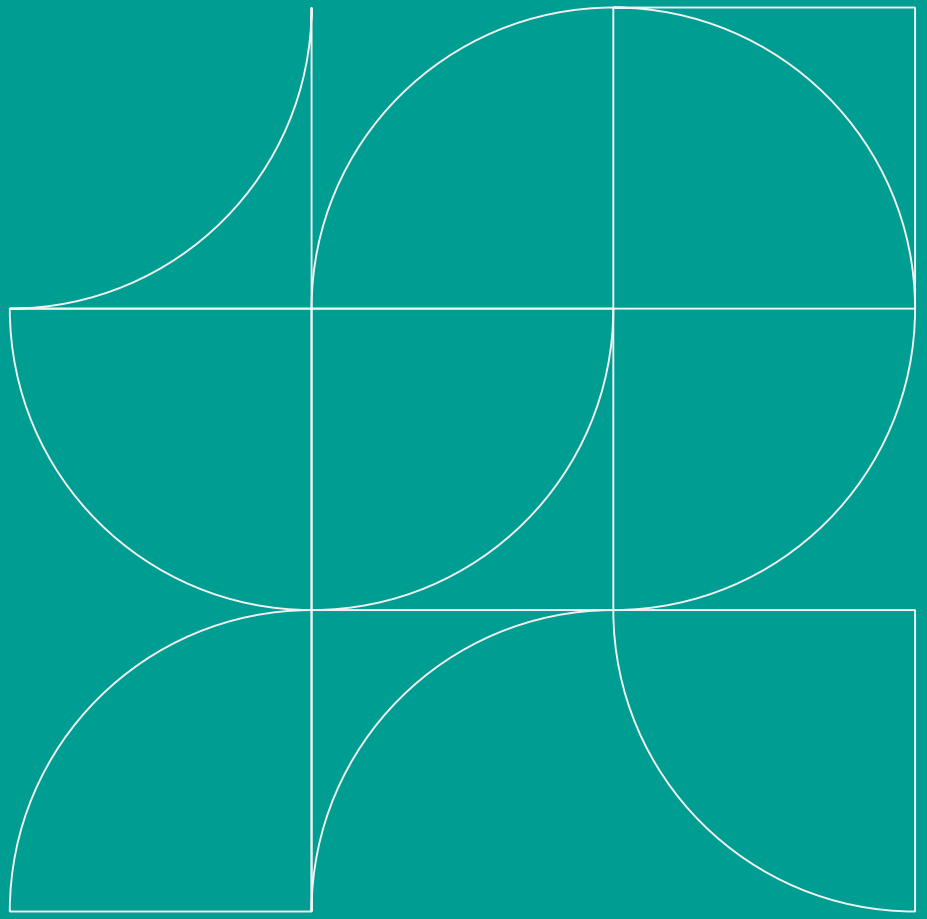
Arbitration Agreements in New Jersey (Cont.)

- Further Lessons After *Atalese*
  - *Skuse v. Pfizer, Inc.*, 244 N.J. 30 (Aug. 18, 2020)
    - Four years into her employment, employee was notified of new arbitration policy.
    - Continued employment can be expression of agreement
      - If that is the designated way to express assent
      - Do not need signature or click through
    - Employee opened e-mails that linked to the Agreement, completed a "training module" regarding the arbitration policy, and clicked a box on her computer screen that asked her to "acknowledge" her obligation to assent to the Agreement as a condition of her continued employment after 60 days
      - Sufficiently clear, and sufficiently communicated

Arbitration Agreements in New Jersey (Cont.)

- Further Lessons After *Atalese*
  - *Flanzman v. Jenny Craig, Inc.*, 244 N.J. 119 (Sept. 11, 2020)
    - Challenge: No forum selection clause; no choice of law provision (NJ v. CA)
    - Court referenced State's policy in favor of arbitration
    - NJ Arbitration Act – contains default rules:
      - A court, on application of a party to the arbitration proceeding, shall appoint the arbitrator
      - NJAA addresses the arbitrator's conduct of conferences, evidential determinations, summary disposition of a claim or issue, and hearings; it also authorizes a court to replace a designated arbitrator who "ceases or is unable to act

NJ Crackdown on Independent Contractor Misclassification



Murphy's Top Employment Law Priority

- 2018 Misclassification Task Force
- 2020 Legislation
- 2021 Legislation

2018 Misclassification Task Force

Legislative Recommendations:

1) Require public posting of misclassification notices
2) Give DOL ability to issue stop-work orders
3) Grant DOL additional access to tax information
4) Impose liability on employers who rely on companies that misclassify workers
5) Impose liability on business owners and successor entities that misclassify
6) Require non-compliant companies to fund investigatory costs and attorney's fees
7) Increase fines and penalties

2020 Legislation

1) Permit LWD to issue stop-work orders to employers who misclassify workers
2) Permit LWD to issue penalties for worker misclassification
3) Require employers to post notices for employees regarding worker misclassification (available here)
4) Impose joint tax liability on contractors who supply employers with workers deemed to be misclassified as IC's
5) Permit LWD to post information about a person/business that misclassifies
6) Permit NJ Treasury Dep't to share tax data with LWD to better enforce proper classification

2020 Legislation (Cont.)

1) Permit LWD to issue stop-work order ("SWO")

- LWD may issue SWO to non-compliant employers
  - LWD must first conduct audit or investigation and determine that employer violated wage and classification obligations. LWD must provide employer 7 days' notice of intent to issue SWO.
  - Employer may seek injunctive relief if it "can demonstrate that the stop-work order would be issued or has been issued in error"
- LWD may also issue subpoenas for relevant witnesses and documents to enforce law

2020 Legislation (Cont.)

2) Penalties

- Permits LWD to issue two types of penalties for employers that violate misclassification laws:

  *1. An "administrative misclassification penalty" up to a maximum of **$250** per misclassified employee for a first violation and up to a maximum of **$1,000** per misclassified employee for each subsequent violation*

  2. A penalty paid to each misclassified worker of not more than 5% of each worker's respective gross earnings during the prior 12 months

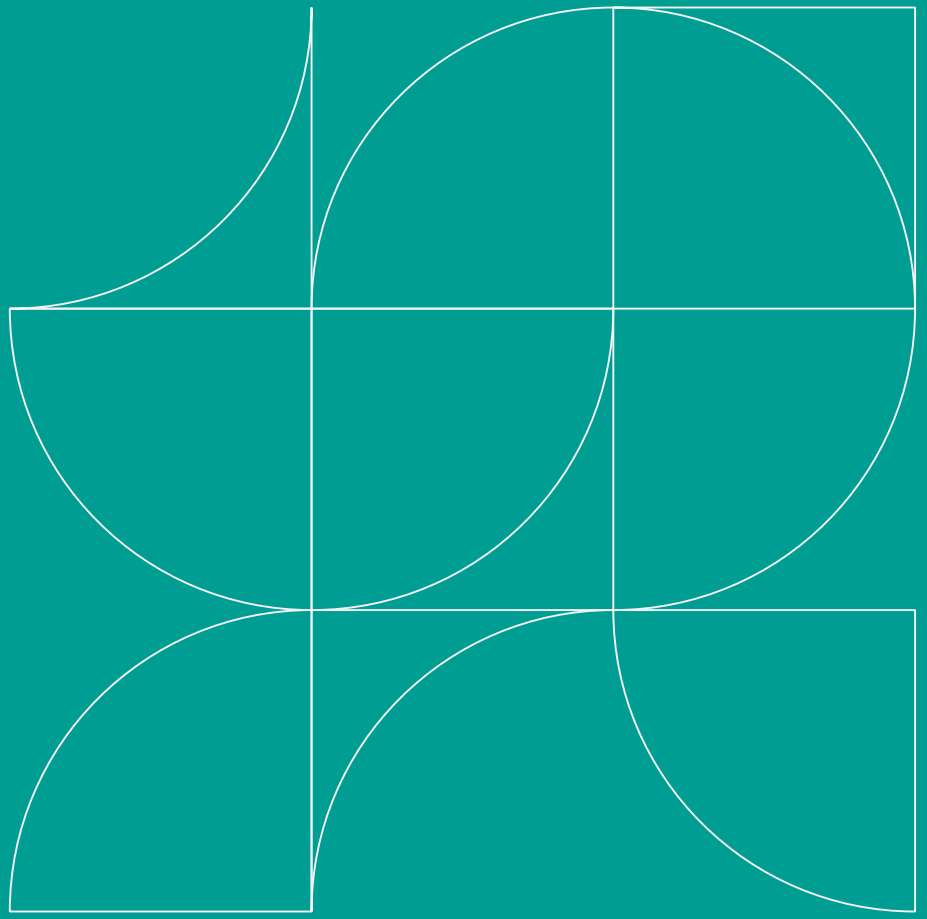
- **Factors**: (a) history of employer's prior violations; (b) seriousness of violation; (c) employer's good faith; and (d) size of employer's business

- LWD can't impose penalties until it provides (1) notice of violation to employer, and (2) an opportunity for employer to request a hearing before LWD (must request within 15 days).

2021 Legislation

1) Permits LWD to seek court injunction
   - Law does not provide factors → Commissioner's "sole discretion"
2) Enhances LWD Stop Work Orders
   - Wide-sweeping SWO for single violation
   - Final after 72 hours with no objection
   - SWO remains in effect even after request for hearing
   - Affected workers receive up to 10 days of unpaid wages – LWD can sue to collect
   - Penalty of $5,000 per day for violating SWO
3) Creates the Office of Strategic Enforcement and Compliance

Two-Minute Warning: Legislative Updates for NJ WARN Amendments and NJ Earned Sick Leave



Proposed Legislation to Revise New Jersey's Anti-Workplace Harassment Laws for Employers

- Standard for hostile work environment: Codifies the standard for hostile work environment, including the fact that a single incident can create a hostile work environment and that harassment need not involve physical contact.
- Mandatory anti-discrimination and harassment policy: Requires all employers adopt a written nondiscrimination policy that establishes policies and procedures concerning unlawful discrimination and harassment, including sexual harassment, in the workplace.
- Mandatory training: Requires employers provide employees with interactive workplace training on unlawful discrimination and harassment, including sexual harassment.
- Mandatory reporting: Employers with 50 or more employees will be required to collect and annually report to the DCR data on complaints received regarding unlawful workplace discrimination or harassment, including sexual harassment.
- Extends statute of limitations: the law extends the statute of limitation to three years.
- Broadens the definition of employee: the law adds domestic workers and unpaid interns to employees protected by LAD.

Proposed Predictive Scheduling Law

- If passed, the Bill would have an expansive reach, applying to non-exempt employees working in mercantile, hospitality, restaurant, and warehouse establishments with 250 or more employees worldwide.
- Employers and employees would be required to exchange information regarding availability and expectations concerning hours and shifts to be worked, including the employee's desired number of weekly work hours and the days and times the employee is available to work.
- Employers would also be required to provide employees with a written good-faith estimate of their work schedule upon hire. Such estimate would have to be revised in case of a "significant change" to the employee's work schedule or to the employer's business needs.
- The Bill would require that employers post work schedules at least 14 days before the first day of the new schedule. All schedules would need to (1) be posted in a conspicuous and accessible location, (2) be transmitted to each employee, and (3) list every employee at the worksite, whether or not they are scheduled to work on the posted schedule.

Minimum Wage Reminder

Statutory Minimum Wage Rate

Employees are to be paid not less than the New Jersey minimum wage in accordance with the schedule below.

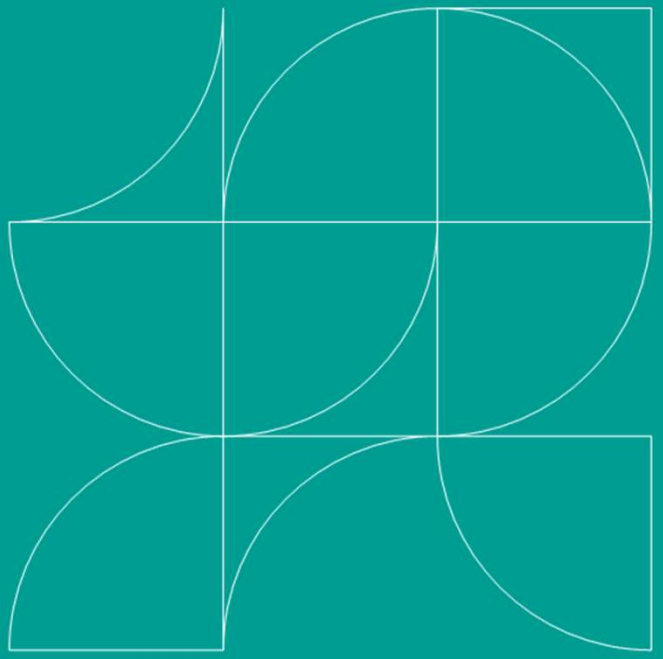
Date	Most Employers	Seasonal & Small Employers (fewer than 6)	Agricultural Employers	*Cash Wage for Tipped Workers
January 1, 2019	$8.85	$8.85	$8.85	$2.13
July 1, 2019	$10.00	NO CHANGE	NO CHANGE	$2.63
January 1, 2020	$11.00	$10.30	$10.30	$3.13
January 1, 2021	$12.00	$11.10	$10.44	$4.13
January 1, 2022	$13.00	$11.90	$10.90	$5.13
January 1, 2023	$14.00	$12.70	$11.70	NO CHANGE
January 1, 2024	$15.00	$13.50	$12.50	NO CHANGE
January 1, 2025	TBD	$14.30	$13.40	TBD
January 1, 2026	TBD	$15.00	$14.20	TBD
January 1, 2027	TBD	TBD	$15.00	TBD

* Cash wage plus tips must equal the minimum wage

NJ WARN Act

- Includes mandatory severance for layoffs of 50 or more within a 30-day period as well as changed definitions of employer, establishments, and covered employees and a 90 days' notice requirement
- The law was scheduled to go into effect on July 19, 2020.
- Stay tuned!

Thank You



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