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STATE

Littler on

New Jersey Employment Law

Coverage

Scope of Discussion. This publication is designed to help employers operating in a state to identify and apply various state employment law requirements. It follows the chronology of employment—tracking requirements from pre-hire, time of hire, during employment, and the end of employment. Because employers are subject to both federal and state employment laws, each section provides a brief overview of federal law and then summarizes applicable state law.

Although the major developments in New Jersey employment law are generally covered, this publication is not all-inclusive and the current status of any decision or principle of law should be verified by counsel. In addition:

- This publication focuses on requirements for private-sector employers; requirements applicable solely to public employers are not covered. Similarly, while some provisions applicable to government contractors may be covered, this publication is not designed to address requirements applicable only to government contractors.
- Local ordinances are generally excluded from this publication. Notwithstanding, local rules may be included to the extent they deal with ban-the-box or criminal history restrictions, local minimum wage, paid sick leave, or antidiscrimination provisions. A detailed discussion of these requirements, however, is outside the scope of this publication. Further, the focus of local ordinances is primarily on jurisdictions with populations of 100,000 or more residents, but laws in locations with populations below that threshold may also be included.
- State law may create special rules or provide exceptions to existing rules for certain industries—for example, the health care industry. This publication does not offer an exhaustive look at these industry-specific exceptions and should not be interpreted to cover all industry-specific requirements.
- Civil and criminal penalties for failure to follow any particular state employment law requirement may be covered to the extent the penalty is specifically included and discussed in the statute. Any penalty discussion that is included, however, is nonexhaustive and may only highlight some of the possible penalties under the statute. In many instances, an individual statute will not include its own penalty provision; rather, a general or catchall penalty provision will apply, and these are not covered here.

To adhere to publication deadlines, developments, and decisions subsequent to **October 11, 2024** are not covered.

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1. PRE-HIRE

1.1 Classifying Workers: Employees v. Independent Contractors

1.1(a) *Federal Guidelines on Classifying Workers*

A person providing services to another for payment generally can be classified either as an employee or an independent contractor. An independent contractor is considered self-employed, whereas an employee, as the term suggests, works for an employer. The choice between classifying a worker as an independent contractor or an employee is more than a question of terminology and can have many and far-reaching consequences for a company. A company's legal obligation to its workers under various employment and labor laws depends primarily on whether workers are employees. For example, a company using an independent contractor is not required to:

- withhold income taxes from payments for service;
- pay minimum wages mandated by state or federal law;
- provide workers' compensation coverage or unemployment insurance;
- provide protections for various leaves of absences required by law; or
- provide a wide range of employee benefits, such as paid time off or a 401(k) retirement plan, that are offered voluntarily to the employer's employees as part of the terms or conditions of their employment.

As independent contractor use increased, government officials began to scrutinize asserted independent contractor relationships with increasing skepticism. Courts have also proven willing to overturn alleged independent contractor relationships that fail to satisfy the increasingly rigorous standards applied by federal and state agencies for classifying workers as independent contractors.

For companies, misclassification of a worker as an independent contractor can carry significant tax, wage, and benefit liabilities, as well as unanticipated and perhaps under-insured tort liability to third parties for injuries caused by the worker.

There are four principal tests used to determine whether a worker is an employee or an independent contractor:

1. the common-law rules or common-law control test;[1]
2. the economic realities test (with several variations);[2]

[1] The common-law rules or common-law control test, informed in part by the Internal Revenue Service's 20 factors, focus on whether the engaging entity has the right to control the means by which the worker performs their services as well as the end results. *See generally* Treas. Reg. § 31.3121(d)-(1)(c); I.R.S., Internal Revenue Manual, *Technical Guidelines for Employment Tax Issues*, 4.23.5.4, *et seq*. (Nov. 22, 2017), *available at* https://www.irs.gov/irm/part4/irm_04-023-005r.html#d0e183.

[2] In addition to an evaluation of the right to control how the work is to be performed, the economic realities test also requires an examination of the underlying "economic realities" of the work relationship—namely, do the workers "depend upon someone else's business for the opportunity to render service or are [they] in business for themselves." *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir. 1988); *see also Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947).

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3. the hybrid test, combining the common law and economic realities test;[3] and
4. the ABC test (or variations of this test).[4]

For a detailed evaluation of the tests and how they apply to the various federal laws, see LITTLER ON CLASSIFYING WORKERS.

1.1(b) *State Guidelines on Classifying Workers*

In New Jersey, as elsewhere, an individual who provides services to another for payment generally is considered either an independent contractor or an employee. For the most part, the distinction between an independent contractor and an employee is dependent on the applicable state law (see Table 1).

New Jersey requires that employers post a notice regarding employee misclassification. This requirement applies to any employer required to keep and report on wages, benefits, and taxes pursuant to state law.[5] This law also prohibits employers from discharging or discriminating against an employee because they have inquired or complained about possible misclassification, or because they have brought a proceeding or testified in a proceeding regarding worker misclassification under New Jersey's wage, benefit, and tax laws. Finally, the law requires that the Department of Labor and Workforce Development maintain a webpage that contains information regarding employee misclassification.[6]

The state's Insurance Fraud Prevention Act provides that misclassifying employees to evade payment of insurance premiums is a violation of the Act. Under the law, a person, organization, or business violates the Act if they:

- make a false or misleading statement, representation, or submission, including failing to properly classify employees in violation of state wage, benefit and tax laws for the purpose of evading the full payment of insurance benefits or premiums; or
- coerce or employ any individual to make a false or misleading statement, representation or submission concerning any fact that is material to a claim for insurance benefits for the purpose of wrongfully obtaining the benefits or of evading the full payment of the insurance benefits or insurance premiums.

In a civil action brought by the Commissioner of Banking and Insurance, the penalty for violating this provision is $5,000 for the first violation, $10,000 for the second violation, and $15,000 for each subsequent violation. In addition, the Commissioner will assess a civil and administrative penalty of $5,000 for the first violation, $10,000 for the second violation and $15,000 for each subsequent violation and will

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[3] Under the hybrid test, a court evaluates the entity's right to control the individual's work process, but also looks at additional factors related to the worker's economic situation—such as how the work relationship may be terminated, whether the worker receives yearly leave or accrues retirement benefits, and whether the entity pays social security taxes on the worker's behalf. *Wilde v. County of Kandiyohi*, 15 F.3d 103, 105 (8th Cir. 1994). Because the hybrid test focuses on traditional agency notions of control, as a general rule, it results in a narrower definition of employee than under a pure economic realities test. *Hopkins v. Cornerstone Am.*, 545 F.3d 338, 337 (5th Cir. 2008).

[4] Under a typical formulation of the ABC test, a worker is an independent contractor if: (A) there is an ABSENCE of control; (B) the BUSINESS is performed outside the usual course of business or performed away from the place of business; and (C) the work is CUSTOMARILY performed by independent contractors.

[5] N.J. STAT. ANN. § 34:1a-1.19(a).

[6] N.J. STAT. ANN. § 34:1a-1.19(b).

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order restitution to any insurance company or other person who has suffered a loss as a result of a violation.[7]

The Construction Industry Independent Contractor Act. While there is no statewide statute on independent contractor status applicable to all industries, New Jersey has a statute concerning employee classification in the construction industry.[8] Under the New Jersey Construction Industry Independent Contractor Act (CIICA), an individual hired to perform construction services is deemed an employee, unless and until three factors are satisfied. First, it must be shown that: "the individual has been and will continue to be free from control or direction over the performance of that service, both under his contract of service and in fact."[9] Second, "the service is either outside the usual course of the business for which the service is performed, or the service is performed outside of all the places of business of the employer for which the service is performed."[10] And third, "the individual is customarily engaged in an independently established trade, occupation, profession or business."[11] If the Commission of Labor and Workforce Development determines that a covered employer failed to properly classify individuals under the CIICA, significant civil and criminal penalties and fines may be imposed.[12]

Task Force on Employee Misclassification. New Jersey Governor Philip D. Murphy established the Task Force on Employee Misclassification (Task Force) in 2018.[13] The Task Force aims to "combat employee misclassification" through the following methods:

1. examining and evaluating existing misclassification enforcement by executive departments and agencies;
2. developing best practices by departments and agencies to increase coordination of information and efficient enforcement;
3. developing recommendations to foster compliance with the law, including by educating employers, workers, and the public about misclassification; and
4. conducting a review of existing law and applicable procedures related to misclassification.[14]

Employers should remain vigilant about worker classification in the state.

Table 1. State Tests for Classifying Workers		
Purpose of Determining Employee Status	**State Agency**	**Test to Apply**
Fair Employment Practices Laws	New Jersey Department of Law & Public Safety, Office of	Common-law test. The law utilizes a multifactor hybrid test that considers:

7 N.J. STAT. ANN. §§ 17:33A-4, 33A-5.

8 N.J. STAT. ANN. §§ 34:20-1 *et seq.*; N.J. ADMIN. CODE §§ 12:65-1.1 *et seq*.

9 N.J. STAT. ANN. § 34:20-4.

10 N.J. STAT. ANN. § 34:20-4.

11 N.J. STAT. ANN. § 34:20-4.

12 N.J. STAT. ANN. § 34:20-5.

13 N.J. EXEC. ORDER 25 (May 3, 2018).

14 N.J. EXEC. ORDER 25 (May 3, 2018).

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Table 1. State Tests for Classifying Workers		
	the Attorney General, Division on Civil Rights ("Division")[15]	1. the employer's right to control the means and manner of the worker's performance; 2. the kind of occupation, supervised or unsupervised; 3. skill needed to perform the work; 4. who furnishes the equipment and workplace; 5. the length of time in which the individual has worked; 6. the method of payment; 7. the manner of termination of the work relationship; 8. whether there is annual leave; 9. whether the work is an integral part of the employer's business; 10. whether the worker accrues retirement benefits; 11. whether the employer pays Social Security taxes; and 12. the parties' intentions.[16] These factors are weighed qualitatively, rather than quantitatively.[17]
Income Taxes	New Jersey Department of the Treasury, Division of Taxation	Statutory test. The pertinent statute provides a multifactor balancing test considering the following factors: 1. "[t]he relationship which the parties believe they have created; 2. [t]he extent of control exercisable by the person receiving the benefit of the services over the manner and method of performance; . . .

[15] The Division enforces the New Jersey Law Against Discrimination (LAD) and the New Jersey Family Leave Act (NJFLA).

[16] *Hoag v. Brown*, 935 A.2d 1218, 1225-26 (N.J. Super. Ct. App. Div. 2007) (quotations omitted). To determine the relationship, courts "must look beyond the label attached to the employer/employee relationship to determine whether an employer/employee relationship exists." 935 A.2d at 1226 (quotations omitted). Moreover, of the twelve factors, the three "primary considerations" are: "(1) employer control; (2) the worker's economic dependence on the work relationship; and (3) the degree to which there has been a functional integration of the employer's business with that of the person doing the work at issue." 935 A.2d at 1226 (quotations omitted).

[17] 935 A.2d at 1226.

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Table 1. State Tests for Classifying Workers		
		3. [w]hether the person rendering the service undertook substantial costs to perform; 4. [w]hether the service required special training or skill, and whether the person receiving the benefit of the services provided such special training; 5. [t]he duration of the relationship between the parties; 6. [w]hether the person rendering the service had a risk of loss; 7. [w]hether the person who received the benefit of the services could discharge without cause the person who performed the services; 8. [t]he method of payment, such as by time or by job; 9. [w]hether the person rendering services regularly performs the same services for other persons and is not protected to any degree from competition; 10. [w]hether the person for whom services are performed furnishes tools, equipment, support staff and a place to work to the individual rendering the services; 11. [w]hether the individual rendering the services is eligible for employer provided benefits such as pension, bonuses, paid vacation days and sick pay; 12. [w]hether the person receiving the benefits of the services rendered carries workmen's compensation insurance on the individual performing the services; and 13. [w]hether the IRS determines that an individual performing services is an employee."[18] No one factor is conclusive evidence of an individual being an employee or an independent contractor, and the final determination is based on reviewing "the

[18] N.J. ADMIN. CODE § 18:35-7.1.

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Table 1. State Tests for Classifying Workers		
		circumstances of the entire relationship" and evaluating "any special facts in a particular case."[19]
Unemployment Insurance	New Jersey Department of Labor and Workforce Development, Unemployment Insurance	Statutory test. The pertinent statute adopts the ABC test. For an individual to be considered an independent contractor, all of the following requirements must be met: A. the individual "has been and will continue to be free from control or direction over the performance of the services being rendered, both under his or her contract of service and in fact;" B. the "service is either outside the usual course of the business for which such service is performed, or . . . is performed outside of all the places of business of the enterprise for which such service is performed;" and C. the individual providing the service "is customarily engaged in an independently established trade, occupation, profession or business."[20]
Wage & Hours Laws	New Jersey Department of Labor and Workforce	Statutory test. The pertinent statute adopts the ABC test (language matches that under the unemployment insurance test).[21]

[19] N.J. ADMIN. CODE § 18:35-7.1.

[20] N.J. STAT. ANN. § 43:21-19 (i)(6)(A)(B)(C). Information about the test and a link to the worker classification questionnaire used by the Department of Labor and Workforce Development to evaluate employment relationships under the unemployment compensation law is on the Department's website, available at https://www.nj.gov/labor/ea/employer-services/who-qualifies/index.shtml. There, the Department provides the following guidance: "In New Jersey, because the statute is remedial and its provisions construed liberally, a statutory employee-employer relationship can be found even though that relationship may not satisfy common-law principles." Regarding the "C" prong of the test, the Supreme Court of New Jersey held in 2022 that an independent contractor's establishment as a separate corporate structure in the form of a single-member limited liability company or corporation accompanied by a certificate of insurance and publicly available business registration information was not alone sufficient to establish independent contractor status under the New Jersey Unemployment Compensation Act. *East Bay Drywall, L.L.C.. v. Dept of Lab. and Workforce Dev.*, 251 N.J. 477, 278 A.3d 783 (2022).

[21] As noted in the wage and hour administrative regulations, "[t]he criteria identified in the Unemployment Compensation Law at N.J. STAT. ANN. 43:21-19(i)(6)(A)(B)(C) and interpreting case law will be used to determine whether an individual is an employee or independent contractor for purposes of the Wage and Hour Law." N.J. ADMIN. CODE § 12:56-16.1. In *Hargrove v. Sleepy's, L.L.C.*, the New Jersey Supreme Court held that the ABC test adopted by the Department of Labor in the wage and hour regulation as applicable to employment status under the wage and hour law should also apply to the issue of status under the wage payment law. 106 A.3d 449, 462-65 (N.J. 2015) (considering, but ultimately not adopting the right to control test, hybrid test, and economic realities

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Table 1. State Tests for Classifying Workers		
	Development, Division of Wage and Hour Compliance	
Workers' Compensation	New Jersey Department of Labor and Workforce Development, Workers' Compensation[22]	Common-law test. The law utilizes a multifactor hybrid test (language matches that under the fair employment practices laws).[23]
Workplace Safety	Not applicable	There is no relevant statutory definition or case law identifying a test for independent contractor status. New Jersey does not have an approved state plan covering private employers and employees under the federal Occupational Safety and Health Act.

1.2 Employment Eligibility & Verification Requirements

1.2(a) *Federal Guidelines on Employment Eligibility & Verification Requirements*

The federal Immigration Reform and Control Act of 1986 (IRCA) prohibits knowingly employing workers who are not authorized to work in the United States. Under IRCA, an employer must verify each new hire's identity and employment eligibility. Employers and employees must complete the U.S. Citizenship and Immigration Service's Employment Eligibility Verification form (Form I-9) to fulfill this requirement. The employer must ensure that: (1) the I-9 is complete; (2) the employee provides required documentation; and (3) the documentation appears on its face to be genuine and to relate to the employee. If an employee

test). In *Hargrove*, the New Jersey Supreme Court clarified application of the test, stating that: "[i]n order to satisfy part A of the 'ABC' test, the employer must show that it neither exercised control over the worker, nor had the ability to exercise control in terms of the completion of the work." 106 A.3d at 459. To meet part B of the test, the employer must prove "that the services provided were 'either outside the usual course of the business . . . or that such service is performed outside of all the places of business of the enterprise.'" 106 A.3d at 459. Finally, the court explained that "[part C] of the test 'calls for an enterprise that exists and can continue to exist independently of and apart from the particular service relationship." 106 A.3d at 459. Accordingly, "part C . . . is satisfied when an individual has a profession that will plainly persist despite the termination of the challenged relationship." 106 A.3d at 459.

[22] The Department of Labor and Workforce Development, Workers' Compensation Division provides a summary of relevant cases regarding the employee-employer relationship for workers' compensation purposes. This summary is available at https://www.nj.gov/labor/wc/legal/cases/emp_emp_rel.html.

[23] In *Estate of Kotsovska ex rel. Kotsovska v. Liebman*, 221 N.J. 568, 595 (N.J. 2015), the Supreme Court of New Jersey held that a 12-factor hybrid test used for purposes of New Jersey Law Against Discrimination should be used to determine whether an individual was an employee or independent contractor under the state workers' compensation law. Before *Kotsovska*, New Jersey courts used two tests to determine employment status: the "right to control" and the "relative nature of the work." *Estate of Kotsovska*, 211 N.J. at 592-93.

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cannot present the required documents within three business days of hire, the employee cannot continue employment.

Although IRCA requires employers to review specified documents establishing an individual's eligibility to work, it provides no way for employers to verify the documentation's legitimacy. Accordingly, the federal government established the "E-Verify" program to allow employers to verify work authorization using a computerized registry. Employers that choose to participate in the program must enter into a Memorandum of Understanding with the Department of Homeland Security (DHS) which, among other things, specifically prohibits employers from using the program as a screening device. Participation in E-Verify is generally voluntary, except for federal contractors with prime federal contracts valued above the simplified acquisition threshold for work in the United States, and for subcontractors under those prime contracts where the subcontract value exceeds $3,500.[24]

Federal legislative attempts to address illegal immigration have been largely unsuccessful, leading some states to enact their own immigration initiatives. Whether states have the constitutional power to enact immigration-related laws or burden interstate commerce with requirements in addition to those imposed by IRCA largely depends on how a state law intends to use an individual's immigration status. Accordingly, state and local immigration laws have faced legal challenges.[25] An increasing number of states have enacted immigration-related laws, many of which mandate E-Verify usage. These state law E-Verify provisions, most of which include enforcement provisions that penalize employers through license suspension or revocation for knowingly or intentionally employing undocumented workers, have survived constitutional challenges.[26]

For more information on these topics, see LITTLER ON I-9 COMPLIANCE & WORK AUTHORIZATION VISAS.

1.2(b) *State Guidelines on Employment Eligibility & Verification Requirements*

New Jersey does not have a generally applicable employment eligibility or verification statute. Therefore, private-sector employers in New Jersey should follow federal law requirements regarding employment eligibility and verification.

1.3 Restrictions on Background Screening & Privacy Rights in Hiring

1.3(a) *Restrictions on Employer Inquiries About & Use of Criminal History*

1.3(a)(i) *Federal Guidelines on Employer Inquiries About & Use of Criminal History*

There is no applicable federal law restricting employer inquiries into an applicant's criminal history. However, the federal Equal Employment Opportunity Commission (EEOC) has issued enforcement

[24] 48 C.F.R. §§ 22.1803, 52.212-5, and 52.222-54 (contracts for commercially available off-the-shelf items and contracts with a period of performance of less than 120 days are excluded from the E-Verify requirement). For additional information, see LITTLER ON GOVERNMENT CONTRACTORS & EQUAL EMPLOYMENT OPPORTUNITY OBLIGATIONS.

[25] *See, e.g.*, *Lozano v. Hazelton*, 496 F. Supp. 2d 477 (E.D. Pa. 2007), *aff'd*, 724 F.3d 297 (3d Cir. 2013) (striking down a municipal ordinance requiring proof of immigration status for lease and employment relationship purposes).

[26] *See Chamber of Commerce of the U.S. v. Whiting*, 563 U.S. 582 (2011).

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guidance pursuant to its authority under Title VII of the Civil Rights Act of 1964 ("Title VII").[27] While there is uncertainty about the level of deference courts will afford the EEOC's guidance, employers should consider the EEOC's guidance related to arrest and conviction records when designing screening policies and practices. The EEOC provides employers with its view of "best practices" for implementing arrest or conviction screening policies in its guidance. In general, the EEOC's positions are:

1. **Arrest Records.** An exclusion from employment based on an arrest itself is not job related and consistent with business necessity as required under Title VII. While, from the EEOC's perspective, an employer cannot rely on arrest records alone to deny employment, an employer can consider the underlying conduct related to the arrest if that conduct makes the person unfit for the particular position.

5. **Conviction Records.** An employer with a policy that excludes persons from employment based on criminal convictions must show that the policy effectively links specific criminal conduct with risks related to the particular job's duties. The EEOC typically will consider three factors when analyzing an employer's policy: (1) the nature and gravity of the offense or conduct; (2) the time that has passed since the offense, conduct, and/or completion of the sentence; and (3) the nature of the job held or sought.

Employers should also familiarize themselves with the federal Fair Credit Reporting Act (FCRA), discussed in 1.3(b)(i). The FCRA does not restrict conviction-reporting *per se*, but impacts the reporting and consideration of criminal history information in other important ways.

For additional information on these topics, see LITTLER ON BACKGROUND SCREENING & PRIVACY RIGHTS IN HIRING.

1.3(a)(ii) *State Guidelines on Employer's Use of Arrest Records*

Generally. Employers can request and use conviction and nonconviction information, including records of pending arrests or criminal charges, but must provide applicants and employees with adequate notice to complete and challenge the accuracy of the records obtained.[28] New Jersey law does not preclude an employer from refusing to hire an applicant for employment based upon the applicant's criminal record, unless the criminal record or relevant portion thereof has been expunged or erased through executive pardon.[29]

New Jersey's Opportunity to Compete Act (Ban the Box)

New Jersey's ban-the-box law places additional restrictions on preemployment background screening practices, however. Under the Opportunity to Compete Act,[30] New Jersey employers with 15 or more employees for over 20 calendar weeks in the current or preceding year,[31] cannot make any oral, written,

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[27] EEOC, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. § 2000e et seq.* (Apr. 25, 2012), *available at* https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

[28] N.J. ADMIN. CODE §§ 13:59-1.2, 13:59-1.6.

[29] N.J. ADMIN. CODE §§ 13:59-1.2(a), 34:6B-14; N.J. ADMIN. CODE § 12:68-1.3(f).

[30] N.J. STAT. ANN. §§ 34:6B-11 to 34:6B-19; N.J. ADMIN. CODE §§ 12:68-1.2 to 12:68-1.5.

[31] Covered employers include those that do business, employ persons, or take applications for employment within New Jersey. The term *employer* also covers job placement and referral agencies as well as other employment agencies. For purposes of calculating the number of employees, the 15 employees may be located anywhere, not solely in New Jersey. N.J. STAT. ANN. § 34:6B-13; N.J. ADMIN. CODE § 12:68-1.2. *Employee* is defined as any "person

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or online inquiry regarding an applicant's criminal record during the initial employment application process. The *initial employment application process* refers to the:

> period beginning when an applicant for employment first makes an inquiry to an employer about a prospective employment position or job vacancy or when an employer first makes any inquiry to an applicant for employment about a prospective employment position or job vacancy, and ending when an employer has conducted a first interview.[32]

Interview means any live, direct contact by the employer with the applicant, whether in person, by telephone, or video conferencing, but does not include an exchange of emails or the completion of a written or electronic questionnaire. *Employment* is "any occupation, vocation, job, or work with pay, including temporary or seasonal work, contingent work, and work through the services or a temporary or other employment agency," along with any form of vocational apprenticeship or internship.[33] The physical location of the prospective employment must be in whole, or substantial part (equals or exceeds 50%), within New Jersey.[34]

Requirements for Application Forms & Job Advertisements. In addition, covered employers may not require an applicant to complete any employment application that makes any inquiries regarding an applicant's criminal record, including expunged records, during the initial employment application process.[35] Employers with operations in more than one state are not prohibited from including an inquiry regarding criminal record on an employment application, so long as the employer's multistate application includes a disclaimer for New Jersey applicants. Immediately preceding the criminal record inquiry on the employment application, the application must state that an applicant for a position where the physical location will be wholly or substantially in New Jersey is instructed not to answer the question.[36]

Employers may not "knowingly or purposefully publish, or cause to be published, any advertisement that solicits applicants for employment where that advertisement explicitly provides that the employer will not consider any applicant who has been arrested or convicted of one or more crimes or offenses."[37] This restriction does not apply to any advertisement that solicits applicants for positions in "law enforcement, corrections, the judiciary, homeland security, or emergency management," or any other position where a criminal history check is required by law.[38] It also does not apply where an arrest or conviction may preclude the person from holding such employment, by law, or where any law restricts an "employer's ability to engage in specified business activities based on the criminal records of its employees."[39]

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who is hired for a wage, salary, fee, or payment to perform work for an employer," and includes interns and apprentices. N.J. STAT. ANN. § 34:6B-13; N.J. ADMIN. CODE § 12:68-1.2.

[32] N.J. STAT. ANN. §§ 34:6B-13, 34:6B-14.

[33] N.J. STAT. ANN. § 34:6B-13.

[34] N.J. STAT. ANN. § 34:6B-13; N.J. ADMIN. CODE § 12:68-1.2.

[35] N.J. STAT. ANN. § 34:6B-14(2).

[36] N.J. ADMIN. CODE § 12:68-1.3(h).

[37] N.J. STAT. ANN. § 34:6B-15.

[38] N.J. STAT. ANN. § 34:6B-15.

[39] N.J. STAT. ANN. § 34:6B-15.

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Exemptions. Similar exemptions also apply under the Act with respect to employment applications and to oral or written inquiries during the initial employment application process. Such restrictions do not apply if the employment sought or being considered is for a position:

- "in law enforcement, corrections, the judiciary, homeland security or emergency management;"
- "where a criminal history background check is required by law, rule or regulation;"
- if an arrest or conviction may disqualify the applicant pursuant to a law, rule or regulation;
- "where any law, rule or regulation restricts an employer's ability to engage in specific business activities based on the criminal records of its employees;" or
- identified by the employer "to be part of a program or systematic effort designed predominantly or exclusively to encourage the employment of persons who have been arrested or convicted of one or more crimes or offenses."[40]

Voluntary Disclosure. If an applicant voluntarily discloses any information regarding their criminal record, either orally or in writing, during the initial employment application process, the law permits an employer to make inquiries regarding the applicant's criminal record.[41]

1.3(a)(iii) *State Guidelines on Employer's Use of Conviction Records*

Employers can request and use conviction and nonconviction information, including records of pending arrests or criminal charges.[42] However, as discussed in **1.3(a)(ii)**, the Opportunity to Compete Act places additional restrictions on preemployment criminal background screening practices.

1.3(a)(iv) *State Guidelines on Employer's Use of Sealed or Expunged Criminal Records*

Unless otherwise provided by law, a person whose criminal records have been expunged may respond to inquiries as though the arrest, conviction, or proceedings did not occur.[43] As discussed in **1.3(a)(ii)**, the Opportunity to Compete Act places additional restrictions on preemployment criminal background screening practices.

1.3(a)(v) *State Enforcement, Remedies & Penalties*

The Opportunity to Compete Act does not provide aggrieved individuals with a private right of action against an employer that has violated or is alleged to have violated the law. Instead, the New Jersey Commissioner of Labor and Workforce Development can impose civil penalties. In evaluating an appropriate administrative penalty for a particular violation, the following factors will be considered, where applicable: (1) the seriousness of the violation; (2) any past history of previous violations; (3) the employer's good faith; (4) the size of the employer; and (5) additional factors "deemed to be appropriate under the circumstances."[44]

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[40] N.J. STAT. ANN. § 34:6B-16; N.J. ADMIN. CODE § 12:68-1.4.

[41] N.J. STAT. ANN. § 34:6B-14(b); N.J. ADMIN. CODE § 12:68-1.3(c).

[42] N.J. ADMIN. CODE §§ 13:59-1.2, 13:59-1.6.

[43] N.J. STAT. ANN. § 2C:52-27.

[44] N.J. STAT. ANN. §§ 34:6B-18, 34:6B-19; N.J. ADMIN. CODE § 12:68-1.5.

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1.3(b) *Restrictions on Credit Checks*

1.3(b)(i) *Federal Guidelines on Employer's Use of Credit Information & History*

The Fair Credit Reporting Act (FCRA). The FCRA[45] governs an employer's acquisition and use of virtually any type of information gathered by a "consumer reporting agency"[46] regarding job applicants for use in hiring decisions or regarding employees for use in decisions concerning retention, promotion, or termination. Preemployment reports created by a consumer reporting agency (such as credit reports, criminal record reports, and department of motor vehicle reports) are subject to the FCRA, along with any other consumer report used for employment purposes.

The FCRA establishes procedures that an employer must strictly follow when using a consumer report for employment purposes. For example, before requesting a consumer report from a consumer reporting agency, the employer must notify the applicant or employee in writing that a consumer report will be requested and obtain the applicant's or employee's written authorization before obtaining the report. An employer that intends to take an adverse employment action, such as refusing to hire the applicant, based wholly or partly on information contained in a consumer report must also follow certain notification requirements. For additional information on the FCRA, see LITTLER ON BACKGROUND SCREENING & PRIVACY RIGHTS IN HIRING.

Many states have enacted their own version of the FCRA, referred to as "mini-FCRAs." While these laws often mirror the FCRA's requirements, there may be important distinctions between federal and state requirements.

Discrimination Concerns. While federal law does not prevent employers from asking about financial information provided they follow the FCRA, as noted above, federal antidiscrimination law prohibits employers from applying a financial requirement differently based on an individual's protected status—*e.g.*, race, national origin, religion, sex, disability, age, or genetic information. The EEOC also cautions that an employer must not have a financial requirement "if it *does not help the employer to accurately identify* responsible and reliable employees, and if, at the same time, the requirement significantly disadvantages people of a particular [protected category]."[47]

1.3(b)(ii) *State Guidelines on Employer's Use of Credit Information & History*

New Jersey has enacted a mini-FCRA law, the New Jersey Fair Credit Reporting Act ("Credit Act"). Under the Credit Act, an employer may use a consumer report for employment purposes.[48] *Consumer report* refers to:

> any written, oral or other communication of any information by a consumer reporting agency bearing on an [individual's] credit worthiness, credit standing, credit capacity,

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[45] 15 U.S.C. §§ 1681 *et seq*.

[46] A *consumer reporting agency* is any person or entity that regularly collects credit or other information about consumers to provide "consumer reports" for third persons. 15 U.S.C. § 1681a(f). A *consumer report* is any communication by a consumer reporting agency bearing on an individual's "creditworthiness, credit standing, character, general reputation, personal characteristics or mode of living" that is used for employment purposes. 15 U.S.C. § 1681a(d).

[47] EEOC, *Pre-Employment Inquiries and Financial Information*, *available at* https://www.eeoc.gov/laws/practices/financial_information.cfm (emphasis in original).

[48] N.J. STAT. ANN. § 56:11-31.

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> character, general reputation, personal characteristics or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the [individual's] eligibility for . . . employment purposes.[49]

Employment purposes refers to "a report used for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee."[50]

Before requesting a report, the employer must provide a clear and conspicuous disclosure, in writing and in a separate document, informing the applicant or employee that a report may be obtained for employment purposes. The applicant or employee must provide written authorization in order for a report to be obtained.[51] If an employer will take an adverse employment action against an applicant based wholly or partly on a consumer report, the employer must also provide the individual with a copy of the report as well as a written description of the rights of the individual under both the Credit Act and the federal FCRA.[52]

Similarly, an employer cannot procure, or cause to be prepared, an investigative consumer report unless the employer has provided a clear and conspicuous disclosure, in writing and prior to requesting the report, that an investigative consumer report commonly includes information regarding the character, general reputation, personal characteristics, and mode of living. The disclosure must include the precise nature and scope of the investigation requested, and the right of the individual to have a copy of the report upon request. The applicant or employee must also provide written authorization for a report to be obtained, before the employer can request the report from the consumer reporting agency.[53]

Investigative consumer report means a consumer report or a portion thereof in which information on an individual's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the individual who is the subject of the report, or with other acquaintances or with people who may have knowledge concerning any of those items of information. However, this information does not include specific factual information on an individual's credit record obtained directly from a creditor of the individual or from a consumer reporting agency when the information was obtained directly from a creditor of the individual or from the individual.[54]

1.3(b)(iii) *State Enforcement, Remedies & Penalties*

Employers that negligently violate the Credit Act may be held liable for actual damages, along with costs and attorneys' fees. Employers that commit willful violations may be liable for actual or statutory damages, as well as punitive damages, costs, and attorneys' fees.[55]

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[49] N.J. STAT. ANN. § 56:11-30.

[50] N.J. STAT. ANN. § 56:11-30.

[51] N.J. STAT. ANN. § 56:11-31.

[52] N.J. STAT. ANN. § 56:11-31.

[53] N.J. STAT. ANN. § 56:11-33.

[54] N.J. STAT. ANN. § 56:11-30.

[55] N.J. STAT. ANN. §§ 56:11-38, 56:11-39.

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1.3(c) *Restrictions on Access to Applicants' Social Media Accounts*

1.3(c)(i) *Federal Guidelines on Access to Applicants' Social Media Accounts*

There is no federal law governing an employer's ability to request access to applicants' or employees' social media accounts. However, various federal laws, or federal agencies' interpretations and enforcement of these laws, may impact employer actions. For example:

- Preemployment action taken against an applicant, or post-employment action taken against an employee, based on information discovered via social media may run afoul of federal civil rights law (*e.g.*, Title VII, the Americans with Disabilities Act, and the Age Discrimination in Employment Act).
- The National Labor Relations Board, which is charged with enforcing federal labor laws, has taken an active interest in employers' social media policies and practices, and has concluded in many instances that, regardless of whether the workplace is unionized, the existence of such a policy or an adverse employment action taken against an employee based on the employee's violation of the policy can violate the National Labor Relations Act.
- Accessing an individual's social media account without permission may potentially violate the federal Computer Fraud and Abuse Act or the Stored Communications Act.

For additional information on federal law related to background screening, see LITTLER ON BACKGROUND SCREENING & PRIVACY RIGHTS IN HIRING.

1.3(c)(ii) *State Guidelines on Access to Applicants' Social Media Accounts*

With respect to both applicants and employees, an employer cannot:

- require or request an individual to provide or disclose any username or password, or otherwise grant the employer access to, a personal account through an electronic communications device;
- require an individual to waive or limit any protection granted under the law as a condition of applying for or receiving an offer of employment. An agreement to waive any right or protection is against state public policy and is void and unenforceable; or
- retaliate or discriminate against an individual because the individual:
  - refuses to disclose any username or password, or to otherwise provide access to a personal account;
  - reports an alleged violation of the social media provisions to the New Jersey Department of Labor and Workforce Development;
  - testifies, assists, or participates in any investigation, proceeding, or action concerning a violation of this law; or
  - otherwise opposes a violation of the law.[56]

Under the law, *electronic communications device* is "any device that uses electronic signals to create, transmit, and receive information, including a computer, telephone, personal digital assistant, or other

[56] N.J. STAT. ANN. §§ 34:6B-6, 34:6B-7, and 34:6B-8.

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similar device."[57] *Personal account* is "an account, service or profile on a social networking website that is used by a current or prospective employee exclusively for personal communications unrelated to any business purposes of the employer."[58] This definition, however, does not include accounts "created, maintained, used or accessed by a current or prospective employee for business purposes of the employer or to engage in business related communications."[59]

Exceptions. Notwithstanding the above prohibitions, an employer can view, access, or use information about a current or prospective employee that can be obtained in the public domain.[60] In addition, the law does not prohibit an employer from complying with state or federal statutes, rules, regulations, or case law, or rules of self-regulatory organizations.[61]

An employer is also permitted to conduct certain investigations with respect to an employee's social media accounts. An employer can request that an employee provide otherwise restricted information if the information is believed to be relevant to an investigation of an employee's actions "based on the receipt of specific information about the unauthorized transfer of employer's proprietary information, confidential information or financial data to a personal account by an employee."[62] Investigations are also permitted as necessary to comply with applicable laws or regulatory requirements, or to enforce prohibitions against work-related employee misconduct, if the employer has received "specific information about activity on a personal account by an employee."[63]

Finally, an employer can implement and enforce a policy pertaining to the use of an employer-issued electronic communications device or any accounts or services provided by the employer or that the employee uses for business purposes.[64]

1.3(c)(iii) *State Enforcement, Remedies & Penalties*

An employer that violates the law is subject to civil penalties, collected by the Department of Labor and Workforce Development.[65]

1.3(d) *Polygraph / Lie Detector Testing Restrictions*

1.3(d)(i) *Federal Guidelines on Polygraph Examinations*

The federal Employee Polygraph Protection Act (EPPA) imposes severe restrictions on using lie detector tests.[66] The law bars most private-sector employers from requiring, requesting, or suggesting that an

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[57] N.J. STAT. ANN. § 34:6B-5.

[58] N.J. STAT. ANN. § 34:6B-5.

[59] N.J. STAT. ANN. § 34:6B-5.

[60] N.J. STAT. ANN. § 34:6B-10.

[61] N.J. STAT. ANN. § 34:6B-10.

[62] N.J. STAT. ANN. § 34:6B-10.

[63] N.J. STAT. ANN. § 34:6B-10.

[64] N.J. STAT. ANN. § 34:6B-10.

[65] N.J. STAT. ANN. § 34:6B-9.

[66] 29 U.S.C. §§ 2001 to 2009; *see also* U.S. Dept of Labor, *Other Workplace Standards: Lie Detector Tests*, *available at* https://webapps.dol.gov/elaws/elg/eppa.htm.

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employee or job applicant submit to a polygraph test, and from using or accepting the results of such a test.

The EPPA further prohibits employers from disciplining, discharging, or discriminating against any employee or applicant:

- for refusing to take a lie detector test;
- based on the results of such a test; and
- for taking any actions to preserve employee rights under the law.

There are some limited exceptions to the general ban. The exception applicable to most private employers allows a covered employer to test current employees reasonably suspected of involvement in a workplace incident that resulted in economic loss or injury to the employer's business. There is also a narrow exemption for prospective employees of security guard firms and companies that manufacture, distribute, or dispense controlled substances.

Notably, the EPPA prohibits only mechanical or electrical devices, not paper-and-pencil tests, chemical tests, or other nonmechanical or nonelectrical means that purport to measure an individual's honesty. For more information on federal restrictions on polygraph tests, including specific procedural and notice requirements and disclosure prohibitions, see LITTLER ON EMPLOYMENT TESTING.

Most states have laws that mirror the federal law. Some of these state laws place greater restrictions on testing by prohibiting lie detector "or similar" tests, such as pencil-and-paper honesty tests.

1.3(d)(ii) *State Guidelines on Polygraph Examinations*

The New Jersey Code of Criminal Justice severely restricts and generally prohibits the use of polygraph examinations as a condition of employment or continued employment. Employers cannot influence, request, or require an applicant or employee to take or submit to a lie detector test as a condition of either employment or continued employment.

These restrictions do not apply if:

- the employer is authorized to manufacture, distribute, or dispense controlled dangerous substances pursuant to the New Jersey Controlled Dangerous Substances, or the applicant or employee is or will be directly involved in the manufacture, distribution, or dispensing of, or has or will have access to, legally distributed controlled dangerous substances;
- the test covers a period of time no greater than five years preceding the test; and
- the test is limited to the applicant or employee's work and the individual's improper handling, use, or illegal sale of legally distributed controlled dangerous substances.

The employer must inform the applicant or employee of their right to present the results of a second, independently administered lie detector test prior to the employer making any personnel decision based on results.

An applicant or employee who is required to take a lie detector test as a precondition of employment or continued employment has a right to be represented by counsel. Moreover, upon request, an employer

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must provide a copy of the lie detector test results in writing, to the individual who has taken the test. Information obtained from the test cannot be released to any other employer or person.[67]

1.3(d)(iii) *State Enforcement, Remedies & Penalties*

An employer that violates the polygraph provisions commits a "disorderly persons offense," which is a criminal offense.[68]

1.3(e) *Drug & Alcohol Testing of Applicants*

1.3(e)(i) *Federal Guidelines on Drug & Alcohol Testing of Applicants*

Whether an employer must implement a drug testing program for its employees under federal law is often determined by the industry in which it operates. For example, the Omnibus Transportation Employee Testing Act requires testing certain applicants and employees in the transportation industries.[69] The Drug-Free Workplace Act of 1988 also requires some federal contractors and all federal grantees (but not subcontractors or subgrantees) to certify to the appropriate federal agency that they are providing a drug-free workplace.[70] Employers not legally mandated to implement workplace substance abuse and drug and alcohol testing policies may still do so to promote workplace safety, deter illegal drug use, and diminish absenteeism and turnover. For more information on drug testing requirements under federal law, see LITTLER ON EMPLOYMENT TESTING.

For the most part, workplace drug and alcohol testing is governed by state law, and state laws differ dramatically in this area and continue to evolve.

1.3(e)(ii) *State Guidelines on Drug & Alcohol Testing of Applicants*

If an employer in the state has a drug testing policy and a job applicant tests positive for cannabis, the employer must offer the applicant an opportunity to present a legitimate medical explanation for the positive test result, and must provide written notice of the right to explain to the applicant. The applicant must, within three working days after receiving the employer's written notice, submit information to the employer to explain the positive test result, or request a retest of the original sample. The retest will be at the applicant's expense. The applicant may present an authorization for medical cannabis issued by a health care practitioner, or proof of registration with the state, or both, as part of the individual's explanation for the positive test result.[71]

1.3(f) *Additional State Guidelines on Preemployment Conduct*

1.3(f)(i) *State Restrictions on Job Application Fees, Deductions, or Other Charges*

Employers may not deduct or require repayment for medical examinations made at the request or direction of an employer; performed by a physician designated by the employer; or, performed as a

[67] N.J. STAT. ANN. § 2C:40A-1.

[68] N.J. STAT. ANN. § 2C:40A-1.

[69] These industries are covered by the Federal Aviation Administration (FAA); the Federal Motor Carrier Safety Administration (FMSCA); the Federal Railroad Administration (FRA); the Federal Transit Administration (FTA); and the Pipeline and Hazardous Materials Safety Administration (PHMSA). In addition, the U.S. Department of Defense, the Coast Guard, and the Nuclear Regulatory Commission, as well as other government agencies, have adopted regulations requiring mariners, employers, and contractors to maintain a drug-free workplace.

[70] 41 U.S.C. §§ 8101 *et seq.*; *see also* 48 C.F.R. §§ 23.500 *et seq*.

[71] N.J. STAT. ANN. § 24:6I-6.1.

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condition of entering or maintaining employment. If a prospective employee or employee pays for any such medical examination, the employer must reimburse the employee or applicant for the amount of any such payment.[72]

1.3(f)(ii) *State Restrictions on Salary History Inquiries*

It is an unlawful employment practice for an employer to:

- screen a job applicant based on the applicant's salary history, including, but not limited to, the applicant's prior wages, salaries, or benefits; or
- require that the applicant's salary history satisfy any minimum or maximum criteria.[73]

These prohibitions notwithstanding, an employer is permitted to:

- consider salary history in determining salary, benefits, and other compensation for the applicant, and may verify the applicant's salary history, if an applicant voluntarily, without employer prompting or coercion, provides the employer with salary history. An applicant's refusal to volunteer compensation information cannot be considered in any employment decisions; and
- request that an applicant provide the employer with a written authorization to confirm salary history, including, but not limited to, the applicant's compensation and benefits, after an offer of employment that includes an explanation of the overall compensation package has been made to the applicant.[74]

Though an employer cannot request or inquire into an applicant's salary history, not all compensation-related discussions are prohibited. An employer may provide an applicant information regarding wage or salary rates set for the job position by collective bargaining agreements or by civil service or other laws, or from paying those rates if the applicant is hired. An employer may also make inquiries regarding an applicant's previous experience with incentive and commission plans and the terms and conditions of those plans, except that the employer cannot:

- seek or require the applicant to report information about the amount of the applicant's earnings in connection with such plans; and
- make any inquiry regarding the applicant's previous experience with incentive and commission plans unless the job position includes an incentive or commission component as part of the total compensation program.[75]

The statute builds in several other exceptions to the general prohibitions, and does not apply in the following circumstances:

- applications for internal transfer or promotion with an employee's current employer, or the employer's use of previous knowledge obtained as a consequence of the employee's prior employment with the employer;

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[72] N.J. STAT. ANN. § 34:11-24.1.

[73] N.J. STAT. ANN. § 34:6B-20(1)(a).

[74] N.J. STAT. ANN. § 34:6B-20(1)(b).

[75] N.J. STAT. ANN. § 34:6B-20(c)(4).

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- actions taken by an employer pursuant to any federal law or regulation that expressly requires the disclosure or verification of salary history for employment purposes, or requires knowledge of salary history to determine an employee's compensation; or
- any attempt by an employer to obtain, or verify a job applicant's disclosure of non-salary related information when conducting a background check on the job applicant, provided that, when requesting information for the background check, the employer must specify that salary history information is not to be disclosed. If, notwithstanding that specification, salary history information is disclosed, the employer cannot retain that information or consider it when determining the salary, benefits, or other compensation for the applicant.[76]

An employer is not prohibited from acquiring salary history information that is publicly available, but the employer cannot retain or consider that information when determining the applicant's salary, benefits, or other compensation unless the applicant voluntarily, without employer prompting or coercion, provides the employer with salary history. An applicant's refusal to volunteer compensation information cannot be considered in any employment decisions.[77]

Certain restrictions also apply to employment agencies. An applicant may provide salary history information, including information regarding the applicant's experience with incentive or commission plans, to an employment agency contacted by the applicant for assistance in searching for and identifying employment opportunities, but the employment agency cannot share the information with potential employers without the applicant's express written consent.[78]

An employer that does business, employs employees, or takes applications for employment in at least one state other than New Jersey is not prohibited from including an inquiry regarding salary history on an employment application, so long as immediately preceding the salary history inquiry on the employment application, there is a statement that an applicant for a position the physical location of which will be in whole, or substantial part, in New Jersey is instructed not to answer the salary history inquiry.[79]

1.3(f)(iii) *Local Restrictions on Salary History Inquiries*

The city of Jersey City requires an employer with five or more employees with their principal place of business within Jersey City to include a minimum and maximum salary or hourly wage for the job, including benefits, in any print or digital media within the city to advertise job openings, promotions, or transfer opportunities.

Additionally, employers that advertise by any means must provide notice of employment opportunities, transfers, or promotions, whether they are temporary or permanent, and must provide the required salary or hourly wage information. An employer must disclose the minimum and maximum annual salary or hourly wage for the job, but is not required to include information on the benefits that will come with the position.[80]

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[76] N.J. STAT. ANN. § 34:6B-20(c)(3).

[77] N.J. STAT. ANN. § 34:6B-20(h).

[78] N.J. STAT. ANN. § 34:6B-20(d).

[79] N.J. STAT. ANN. § 34:6B-20(g).

[80] JERSEY CITY, N.J., CODE OF ORDS. § 148-4.1.

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2. TIME OF HIRE

2.1 Documentation to Provide at Hire

2.1(a) *Federal Guidelines on Hire Documentation*

Table 2 lists the documents that must be provided at the time of hire under federal law.

Table 2. Federal Documents to Provide at Hire	
Category	**Notes**
Benefits & Leave Documents: Affordable Care Act (ACA)	Currently, employers covered under the Fair Labor Standards Act (FLSA) must provide to each employee, at the time of hire, written notice: • informing the employee of the existence of an insurance exchange, including a description of the services provided by such exchange, and the manner in which the employee may contact the exchange to request assistance; • that if the employer-plan's share of the total allowed costs of benefits provided under the plan is less than 60% of such costs, the employee may be eligible for a premium tax credit under section 36B of the Internal Revenue Code of 1986[81] and a cost-sharing reduction under section 1402 of the Patient Protection and Affordable Care Act[82] if the employee purchases a qualified health plan through the exchange; and • that if the employee purchases a qualified health plan through the exchange, the employee may lose the employer contribution (if any) to any health benefits plan offered by the employer and that all or a portion of such contribution may be excludable from income for federal income tax purposes.[83] The U.S. Department of Labor's Employee Benefits Security Administration provides a model notice for employers that offer a health plan to some or all employees and a separate notice for employers that do not offer a health plan.[84]
Benefits & Leave Documents: Consolidated Omnibus Budget Reconciliation Act (COBRA)	Employers or group health plan administrators must provide written notice to employees and their spouses outlining their COBRA rights no later than 90 days after employees and spouses become covered under group health plans. Employers or plan administrators can develop their own COBRA rights notice or use the COBRA Model General Notice.[85]

[81] 26 U.S.C. § 36B.

[82] 42 U.S.C. § 18071.

[83] 29 U.S.C. § 218b.

[84] Model notices are available in English and Spanish at https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/affordable-care-act/for-employers-and-advisers/coverage-options-notice.

[85] The model notice is available in English and Spanish at https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/cobra.

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Table 2. Federal Documents to Provide at Hire	
Category	**Notes**
	Employers or plan administrators can send COBRA rights notices through first-class mail, electronic distribution, or other means that ensure receipt. If employees and their spouses live at the same address, employers or plan administrators can mail one COBRA rights notice addressed to both individuals; alternatively, if employees and their spouses do not live at the same address, employers or plan administrators must send separate COBRA rights notices to each address.[86]
Benefits & Leave Documents: Family and Medical Leave Act (FMLA)	In addition to posting requirements, if an FMLA-covered employer has any eligible employees, it must provide a general notice to each employee by including the notice in employee handbooks or other written guidance to employees concerning employee benefits or leave rights, if such written materials exist, or by distributing a copy of the general notice to each new employee upon hiring.[87] In either case, distribution may be accomplished electronically. Employers may use a format other than the FMLA poster as a model notice, if the information provided includes, at a minimum, all of the information contained in that poster.[88] Where an employer's workforce is comprised of a significant portion of workers who are not literate in English, the employer must provide the general notice in a language in which the employees are literate. Employers furnishing FMLA notices to sensory-impaired individuals must also comply with all applicable requirements under federal or state law.[89]
Immigration Documents: Form I-9	Employers must ensure that individuals properly complete Form I-9 section 1 ("Employee Information and Verification") at the time of hire and sign the attestation with a handwritten or electronic signature. Also, individuals must present employers documentation establishing their identity and employment authorization. Within three business days of the first day of employment, employers must physically examine the documentation presented in the employee's presence, ensure that it appears to be genuine and relates to the individual, and complete Form I-9, section 2 ("Employer Review and Verification"). Employers must also, within three business days of hiring, sign the

[86] 29 C.F.R. § 2590.606-1.

[87] 29 C.F.R. § 825.300(a).

[88] The U.S. Department of Labor's Wage & Hour Division's model FMLA poster, which satisfies the notice requirement, is available at https://www.dol.gov/WHD/fmla/index.htm.

[89] 29 C.F.R. § 825.300(a).

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Table 2. Federal Documents to Provide at Hire	
Category	**Notes**
	attestation with a handwritten or electronic signature. Employers that hire individuals for a period of less than three business days must comply with these requirements at the time of hire.[90] For additional information on these requirements, see LITTLER ON I-9 COMPLIANCE & WORK AUTHORIZATION VISAS.
Tax Documents	On or before the date employment begins, employees must furnish employers with a signed withholding exemption certificate (Form W-4) relating to their marital status and the number of withholding exemptions they claim.[91]
Uniformed Services Employment and Reemployment Rights Act (USERRA) Documents	Employers must provide to persons covered under USERRA a notice of employee and employer rights, benefits, and obligations. Employers may meet the notice requirement by posting notice where employers customarily place notices for employees.[92]
Wage & Hour Documents	To qualify for the federal tip credit, employers must notify tipped employees: (1) of the minimum cash wage that will be paid; (2) of the tip credit amount, which cannot exceed the value of the tips actually received by the employee; (3) that all tips received by the tipped employee must be retained by the employee except for a valid tip pooling arrangement limited to employees who customarily and regularly receive tips; and (4) that the tip credit will not apply to any employee who has not been informed of these requirements.[93]

2.1(b) *State Guidelines on Hire Documentation*

Table 3 lists the documents that must be provided at the time of hire under state law.

Table 3. State Documents to Provide at Hire	
Category	**Notes**
Benefits & Leave Documents: New Jersey Family Leave Act (NJFLA) Benefits	If a covered employer maintains written guidance to employees concerning employee benefits or leave rights, such as in an employee handbook, information concerning leave under the NJFLA and employee obligations under the NJFLA must be included in the handbook or other document.

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[90] *See generally* 8 C.F.R. § 274a.2. The form is available at https://www.uscis.gov/i-9.

[91] 26 C.F.R. § 31.3402(f)(2)-1. The IRS provides this form at https://www.irs.gov/pub/irs-pdf/fw4.pdf.

[92] 38 U.S.C. § 4334. This notice is available at https://www.dol.gov/sites/dolgov/files/VETS/legacy/files/USERRA_Private.pdf.

[93] 29 C.F.R. § 531.59.

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Table 3. State Documents to Provide at Hire	
Category	**Notes**
	If an employer does not have written policies, manuals, or handbooks describing employee benefits and leave provisions, it must provide written guidance to each of its employees concerning all the employee's rights and obligations under the NJFLA. To satisfy the notice requirement, employers can provide the state-created NJFLA Fact Sheet.[94]
Benefits & Leave Documents: New Jersey Family Leave Insurance	At the time of hiring, employers must provide employees a written copy of the notification of covered individuals' rights relative to the receipt of family leave insurance benefits. The written notification may be transmitted in electronic form.[95]
Benefits & Leave Documents: New Jersey Paid Sick and Safe Leave	Employers must provide written individual notices of rights under the paid sick and safe leave law, including the amount of earned sick leave to which employees are entitled; the terms of its use; and remedies provided by the law to employees if an employer fails to provide the required benefits or retaliates against employees exercising their rights. New employees must receive this written notice from their employer when they begin employment. Employees who request the notice must also be given the notice.[96]
Benefits & Leave Documents: Notice of Private Plan - Family Leave Insurance Benefits	An employer must provide notice of the benefits provided by a private insurance plan at the time of hire. The notice must reflect current rates, eligibility requirements, benefit entitlements, and rights of the employees under a private family leave insurance plan pursuant to the Temporary Disability Benefits Law, including appeal rights, and must include contact information for the private plan and instructions as to how to file for benefits with the private plan. Employers may provide this notice via email.[97]
Benefits & Leave Documents: Temporary	This law covers private plans only. Employers with private plans must provide notice to covered employees individually to the employee (either physically or by email). The employer must provide notice at the

[94] N.J. ADMIN. CODE § 13:14-1.14. This notice is available at https://www.njoag.gov/wp-content/uploads/2021/09/fact-FLA.pdf.

[95] N.J. ADMIN. CODE § 12:21-1.8. This notice is available at https://www.nj.gov/labor/wageandhour/assets/PDFs/Employer Poster Packet/fli_poster.pdf.

[96] N.J. STAT. § 34:11D-7(A). The Notice of Employee Rights is available online from the New Jersey Department of Labor and Workforce Development at https://www.state.nj.us/labor/forms_pdfs/mw565sickleaveposter.pdf. The notice will be available in English, Spanish, and any other language that the commissioner determines is the first language of a significant number of workers in New Jersey, and the employer must use the notification in English, Spanish or any other language for which the commissioner has provided notifications and which is the first language of a majority of the employer's workforce.

[97] N.J. ADMIN. CODE §12:21-1.8.

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Table 3. State Documents to Provide at Hire	
Category	**Notes**
Disability Benefits Under Private Plans	time of hire. The notice must include the following information and be in a form approved by the Director (not yet available): • current rates; • eligibility requirements; • benefit entitlements; • rights of the employee, including appeal rights; and • contact information for the private plan and instructions as to how to file for benefits.[98]
Fair Employment Practices: Gender Equity	At the time of hiring, employers with 50 or more employees must provide employees a written copy of a notification detailing the right to be free of gender inequity or bias in pay, compensation, benefits, or other terms or conditions of employment under state and federal law. Employers can make the notification available to each worker: • by email; • by printed material, including, but not limited to, a pay check insert, brochure, or similar informational packet provided to new hires, an attachment to an employee manual or policy book, or flyer distributed at an employee meeting; or • through an Internet or Intranet website, if the site is for the exclusive use of all workers, can be accessed by all workers, and the employer provides notice to the workers of its posting. The notification must contain an acknowledgement that the worker has received it and has read and understood its terms. The acknowledgement must be signed by the worker, in writing or by means of electronic verification, and returned to the employer within 30 days of its receipt. Employers may use a notice prepared by the New Jersey Department of Labor and Workforce Development.[99]
Tax Documents	Employers are obligated to provide new employees with the Form NJ-W4 and to withhold New Jersey income tax. Employees are not required to complete Form NJ-W4; if they do not, the marital status reported on Line 3 of the federal Form W4 must be used for state withholding purposes.[100]

[98] N.J. ADMIN. CODE §12:18-2.38.

[99] N.J. STAT. ANN. § 34:11-56.12; N.J. ADMIN. CODE § 12:2-2.3. The notice is available in English at https://www.nj.gov/labor/wageandhour/assets/PDFs/Employer%20Poster%20Packet/genderequityposterenglish.pdf and in Spanish at https://www.nj.gov/labor/wageandhour/assets/PDFs/Employer%20Poster%20Packet/genderequityposterspanish.pdf.

[100] N.J. ADMIN. CODE § 18:35-7.2. Form NJ-W4 is available at http://www.nj.gov/treasury/taxation/pdf/current/njw4.pdf. Instructions on withholding are available at http://www.nj.gov/treasury/taxation/pdf/current/njwt.pdf.

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Table 3. State Documents to Provide at Hire	
Category	**Notes**
Wage & Hour Documents: Wages, Benefits & Taxes	At the time of hiring, each employer that is required to maintain and report records regarding wages, benefits, taxes, and other contributions and assessments pursuant to state wage, benefit, and tax laws must provide each employee a written copy of the notification concerning the employer's obligations to maintain and report those records. The notification must also provide information on how an employee or their authorized representative may contact, by telephone, mail, and email, a representative of the state labor department to provide information to, or file a complaint with, the representative regarding possible violations of the requirements of this law or any state wage, benefit, and tax law, or may obtain information about any actual violation, including any audit. Employers may provide notice to employees via email. Employers may use a notice prepared by the New Jersey Department of Labor and Development.[101]
Wage & Hour Documents: Pay Rate & Payday	At the time of hiring, employers must notify employees of their rate of pay and the regular payday designated by the employer.[102]

Wage & Hour Documents: Staffing Firms	Whenever a staffing firm agrees to send an individual to work as a temporary laborer, the staffing firm must provide the temporary laborer a statement that includes the following information:
	• the name of the temporary laborer;
	• the name, address, and telephone number of:
	  ▪ the temporary help service firm, or the contact information of the firm's agent facilitating the placement;
	  ▪ its workers' compensation carrier;
	  ▪ the worksite employer or third-party client; and
	  ▪ the Department of Labor and Workforce Development;
	• the name and nature of the work to be performed;
	• the wages offered;
	• the name and address of the assigned worksite of each temporary laborer;
	• the terms of transportation offered to the temporary laborer, if applicable;
	• a description of the position and whether it shall require any special clothing, protective equipment, and training, and what training and

[101] N.J. STAT. ANN. § 34:1a-1.14; N.J. ADMIN. CODE § 12:2-1.3. The notice is available at https://www.nj.gov/labor/wageandhour/assets/PDFs/Employer%20Poster%20Packet/MW-400_11x17.pdf.

[102] N.J. STAT. ANN. § 34:11-4.6. Employers must create their own forms to satisfy this requirement.

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Table 3. State Documents to Provide at Hire	
Category	**Notes**
	clothing will be provided by the temporary help service firm or the third-party client; and any licenses and any costs charged to the employee for supplies or training; • whether a meal or equipment, or both, are provided, either by the temporary help service firm or the third-party client, and the cost of the meal and equipment, if any; • for multi-day assignments, the schedule; • the length of the assignment, if known; and • the amount of sick leave to which temporary workers are entitled, and the terms of its use. The Department of Labor and Workforce Development has published a form a staffing firm may use. The notice must be provided in English and the language identified by the employee as their primary language.[103]
Wage & Hour Documents: Tip Credit	An employer cannot take a tip credit unless it has informed employees in advance of the following: • the amount of the cash wage that is to be paid to the tipped employee by the employer; • the amount of the tip credit, which will be claimed by the employer, which amount may not exceed the value of the tips actually received by the employee; • that all tips received by the tipped employee must be retained by the employee, except for a valid tip pooling arrangement limited to employees who customarily and regularly receive tips; and • that the tip credit shall not apply to any employee who has not been informed of the requirements of the tip credit rule.[104]
Wage & Hour Documents: Wage Theft Notice	Employers must distribute to current employees a statement concerning their rights under New Jersey's wage and hour laws and how to file claims under those laws. This statement must also be provided to all new hires.[105]

[103] N.J. STAT. ANN. § 34:8D-3(3)(a). The form is available in English and Spanish at https://www.nj.gov/labor/wageandhour/assets/PDFs/Forms%20and%20Publications/MW-23%20(5-17-23).pdf. The form is available in English and Portuguese at https://www.nj.gov/labor/wageandhour/assets/PDFs/Forms%20and%20Publications/MW-23.16.1%20(5-23)%20Portuguese.pdf.

[104] N.J. ADMIN. CODE § 12:56-3.5(q).

[105] N.J. STAT. ANN. § 34:11-58. This notice is available at https://www.nj.gov/labor/wageandhour/assets/PDFs/Employer%20Poster%20Packet/MW-17_17S%20(4-22).pdf.

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2.2 New Hire Reporting Requirements

2.2(a) *Federal Guidelines on New Hire Reporting*

The federal New Hire Reporting Program requires all states to establish new hire reporting laws that comply with federal requirements.[106] State new hire reporting laws must include these minimum requirements:

1. employers must report to the appropriate state agency the employee's name, address, and Social Security number, as well as the employer's name, address, and federal tax identification number provided by the Internal Revenue Service;
2. employers may file the report by first-class mail, electronically, or magnetically;
3. if the report is transmitted by first-class mail, the report must be made not later than 20 days after the date of hire;
4. if the report is transmitted electronically or magnetically, the employer may report no later than 20 days following the date of hire or through two monthly transmissions not less than 12 days nor more than 16 days apart;
5. the format of the report must be a Form W-4 or, at the option of the employer, an equivalent form; and
6. the maximum penalty a state may set for failure to comply with the state new hire law is $25 (which increases to $500 if the failure to comply is the result of a conspiracy between the employer and the employee to not supply the required report or to supply a false or incomplete report).[107]

These are only the minimum requirements that state new hire reporting laws must satisfy. States may enact new hire reporting laws that, for example, require additional information to be submitted or require a shorter reporting timeframe. Many states have also developed their own reporting form; however, its use is optional.

Multistate Employers. The New Hire Reporting Program includes a simplified reporting method for multistate employers. The statute defines *multistate employers* as employers with employees in two or more states and that file new hire reports either electronically or magnetically. The federal statute permits multistate employers to designate one state to which they will transmit all of their reports twice per month, rather than filing new hire reports in each state. An employer that designates one state must notify the Secretary of the U.S. Department of Health and Human Services (HHS) in writing. When notifying the HHS, the multistate employer must include the following information:

- Federal Employer Identification Number (FEIN);
- employer's name, address, and telephone number related to the FEIN;
- state selected for reporting purposes;
- other states in which the company has employees;

[106] The New Hire Reporting Program is part of the Personal Responsibility and Work Opportunity Act of 1996. 42 U.S.C. §§ 651 to 669.

[107] 42 U.S.C. § 653a.

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- the corporate contact information (name, title, phone, email, and fax number); and
- the signature of person providing the information.

If the company is reporting new hires on behalf of subsidiaries operating under different names and FEINs, it must list the names and FEINs, and the states where those subsidiaries have employees working.

Multistate employers can notify the HHS by mail, fax, or online as follows:

Table 4. Multistate Employer New Hire Information	
Contact By Mail or Fax	**Contact Online**
Department of Health and Human Services Administration for Children and Families Office of Child Support Enforcement Multi-State Employer Registration Box 509 Randallstown, MD 21133 Fax: (410) 277-9325	Register online by submitting a multistate employer notification form over the Internet.[108] Multistate employers can receive assistance with registration as a multistate employer from the Multistate Help Desk by calling (410) 277-9470, 9:00 A.M. to 5:00 P.M., Eastern Time.

2.2(b) *State Guidelines on New Hire Reporting*

The following is a summary of the key elements of New Jersey's new hire reporting law.[109]

Who Must Be Reported. New Jersey employers must report individuals who are contracted with, hired, rehired, or returning to work from lay off, furlough, separation, unpaid leave or termination, if the individuals work in the state and the employer anticipates paying them earnings. Employers must also report any other employee who was not previously employed and is hired to work in New Jersey, or an individual who was previously employed but was separated from employment for at least 60 consecutive days.

Report Timeframe. Reporting must occur within 20 days of the hiring or rehiring date. If submitted magnetically or electronically, reporting must be every 15 days in accordance with the rules adopted by the New Jersey Commissioner of Labor and Workforce Development.

Information Required. Employers must report the employee's name, address, date of birth, and Social Security number.

Form & Submission of Report. The information should be submitted via Form W-4, the New Hire Reporting Form, or printed lists. Reports may be mailed, faxed, or submitted magnetically or electronically.

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[108] HHS offers the form online at http://www.acf.hhs.gov/programs/css/resource/multistate-employer-registration-form-instructions.

[109] N.J. STAT. ANN. § 2A:17-56.61.

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Location to Send Information.

New Jersey New Hire Directory
P.O. Box 4654
Trenton, NJ 08650-4654
(877) 654-4737
(800) 304-4901 (fax)
https://www.njcsesp.com/

2.3 Restrictive Covenants, Trade Secrets & Protection of Business Information

2.3(a) *Federal Guidelines on Restrictive Covenants & Trade Secrets*

Restrictive covenants are limitations placed on an employee's conduct that remain in force after the individual's employment has ended. Post-employment restrictions are designed to protect the employer and typically prevent an individual from disclosing the employer's confidential information or soliciting the employer's employees or customers. These restrictions may also prohibit individuals from engaging in competitive employment, including competitive self-employment, for a specific time period after the employment relationship ends. There is no federal law governing these types of restrictive covenants. Therefore, a restrictive covenant's ability to protect an employer's interests is dependent upon applicable state law and the type of relationship or covenant involved.

As a general rule, a covenant restraining competition (referred to as a "noncompete") is more likely to be viewed critically because restraints of trade are generally disfavored. The typical exception to this general rule is a reasonable restraint that has a legitimate business purpose, such as the protection of trade secrets, confidential information, customer relationships, business goodwill, training, or the sale of a business. Notwithstanding, state laws vary widely regarding which of these interests can be protected through a restrictive covenant. Even where states agree on the interest that can be protected, they may vary on what is seen as a reasonable and enforceable provision for such protection.

Protections against trade secret misappropriation are also available to employers. Until 2016, trade secrets were the only form of intellectual property (*i.e.*, copyrights, patents, trademarks) not predominately governed by federal law. However, the Defend Trade Secrets Act of 2016 (DTSA) now provides a federal court civil remedy and original (but not exclusive) jurisdiction in federal court for claims of trade secret misappropriation.[110] As such, the DTSA provides trade secret owners a uniform federal law under which to pursue such claims. The DTSA operates alongside more limited existing protections under the federal Economic Espionage Act of 1996 and the Computer Fraud and Abuse Act, as well as through state laws adopting the Uniform Trade Secrets Act (UTSA).

For more information on these topics, see LITTLER ON PROTECTION OF BUSINESS INFORMATION & RESTRICTIVE COVENANTS.

2.3(b) *State Guidelines on Restrictive Covenants & Trade Secrets*

2.3(b)(i) *State Restrictive Covenant Law*

In New Jersey, there is no statute of general applicability governing restrictive covenants. As New Jersey courts have held, a covenant is enforceable when it protects legitimate interests of the employer, imposes

[110] 18 U.S.C. §§ 1832 *et seq.*

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no undue hardship on the employee, and is not injurious to the public.[111] Notably, customer limits are permissible substitutes for geographic limits in New Jersey.[112] A nonsolicitation provision is enforceable without geographic limitation as long as it identifies specific customers that are subject to the restrictions for a reasonable time period.[113]

Noncompete agreements are generally enforceable against a former employee posttermination, but courts have found some noncompetes unenforceable depending on timing of and basis for termination.[114]

2.3(b)(ii) *Consideration for a Noncompete*

Restrictive covenants require an employee to promise not to do something the employee would otherwise have been able to do. For example, by signing a noncompete agreement, an employee is giving up the right to open a competing business or work for an employer in a competing business. Therefore, employers need to provide an employee with "consideration" in return for the agreement to be binding. Providing *consideration* means giving something of value—*i.e.*, a promise to do something that the employer was not otherwise obligated to do—such as extending an offer of employment to a new employee or providing a bonus for an existing employee.

In New Jersey, it is considered sufficient consideration if the noncompete is signed at inception of employment.[115] In addition, continued employment is considered sufficient consideration for a noncompete.[116] New Jersey courts have not directly addressed whether a noncompete signed during employment is supported by sufficient consideration if there are accompanying changes in the employee's terms and conditions of employment, but such agreements have been enforced.[117]

2.3(b)(iii) *Ability to Modify or Blue Pencil a Noncompete*

When a restrictive covenant is found to be unreasonable in scope, some states refuse to enforce its terms entirely (sometimes referred to as the "all-or-nothing" rule), while others may permit the court to "blue pencil" or modify an agreement that is unenforceable as written. *Blue penciling* refers to the practice whereby a court strikes portions of a restrictive covenant it deems unenforceable. *Reformation*, on the other hand, refers to a court modifying a restrictive covenant to make it enforceable, which may include introducing new terms into the agreement (sometimes referred to as the "reasonableness" rule). By rewriting an overly broad restrictive covenant rather than simply deeming it unenforceable, courts attempt to effectuate the parties' intentions as demonstrated by their agreement to enter into a restrictive covenant in the first place.

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[111] *Community Hosp. Grp., Inc. v. Moore*, 869 A.2d 884 (N.J. 2005).

[112] *Solari Indus. v. Malady*, 264 A.2d 53 (N.J. 1970).

[113] *Platinum Mgmt., Inc. v. Dahms*, 666 A.2d 1028 (N.J. Super. Ct. Law Div. 1995).

[114] *See Grinspec, Inc. v. Lance*, 2002 WL 32442790, at *8-9 (N.J. Super. Ct. App. Div. Aug. 13, 2002).

[115] *A.T. Hudson & Co. v. Donovan*, 524 A.2d 412 (N.J. Super. Ct. App. Div. 1987).

[116] *Hogan v. Bergen Brunswig Corp.*, 378 A.2d 1164 (N.J. Super. Ct. App. Div. 1977) (vacating trial court's order that voided and refused to enforce nonsolicit agreement because consideration may be found, in part, through employee's continued employment).

[117] *See Campbell Soup Co. v. Desatnick*, 58 F. Supp. 2d 477 (D.N.J. 1999) (receipt of stock options conditioned on signing noncompete agreement).

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In New Jersey, courts will rewrite covenants to the extent reasonable under the circumstances or will otherwise strike overbroad restrictions.[118]

2.3(b)(iv) *State Trade Secret Law*

The New Jersey Trade Secret Act (NJTSA), effective January 9, 2012, expanded potential remedies and established a statutory framework for the protection of trade secrets, essentially codifying much of the then-existing case law.[119] Note, however, that it does not apply to misappropriations that occurred prior to the effective date or to a continuing misappropriation that occurs after the effective date.[120]

Definition of a Trade Secret. New Jersey courts largely rely upon the common-law definition of trade secret contained in the Restatement of Torts. The Restatement (Second) of Torts section 757(b) defines a *trade secret* as:

> [A]ny formula, pattern, device, or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers.

New Jersey courts have cautioned that a straightforward application of the Restatement definition is not always sufficient to determine whether something constitutes a trade secret. They have suggested that the following additional factors should be considered:

- extent to which the information is publicly known;
- extent to which it is known to employees and others involved in the business;
- extent of the measures used to guard its secrecy;
- value of the information;
- amount of effort or money expended in developing the information; and
- ease or difficulty with which the information could be acquired or duplicated.[121]

The NJTSA's definition of a "trade secret" does not differ significantly from the above. It defines a *trade secret* as:

> [I]nformation, held by one or more people, without regard to form, including a formula, pattern, business data compilation, program, device, method, technique, design, diagram, drawing, invention, plan, procedure, prototype or process, that:

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[118] *Coskey's Television & Radio Sales and Serv., Inc. v. Foti*, 602 A.2d 789 (N.J. Super. Ct. App. Div. 1992).

[119] *SCS Healthcare Mktg., L.L.C. v. Allergan USA, Inc.*, 2012 WL 6565713 (N.J. Super. Ct. Ch. Div. Dec. 7, 2012) (noting that the rights and protections afforded under the NJTSA are cumulative and, therefore, the new law does not preempt common-law claims).

[120] N.J. STAT. ANN. §§ 56:15-1 to 56:15-9.

[121] *Suncoast Tours, Inc. v. Lambert Grp., Inc.*, 1999 WL 1034683, at *7 (D.N.J. Nov. 10, 1999) (citing *Trump Castle Assoc. v. Tallone*, 645 A.2d 1207, 1208 n.1 (N.J. Super. Ct. App. Div. 1994)).

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> (1) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
>
> (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[122]

Importantly, information need not rise to the level of a trade secret to be protected.[123] New Jersey courts have afforded trade secret protection to business-related compilations of information. In defining the term to include this form of business information, the New Jersey Supreme Court has stated:

> A trade secret may consist of a . . . compilation which one uses in his business and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. Its subject matter must not be a matter of public knowledge or of general knowledge within the industry. Although a substantial measure of secrecy must exist, the secrecy need not be absolute and disclosure to employees involved in its use will not ordinarily result in loss of the employer's protection. . . . Novelty and invention are not essential.[124]

Misappropriation of a Trade Secret. In New Jersey, to prove a claim for *misappropriation of a trade secret*, the plaintiff must prove:

- the existence of a trade secret;
- communication of that trade secret in confidence by the plaintiff-employer to its employees;
- disclosure of the trade secret by the defendant-employee (or former employee) in breach of that confidence;
- acquisition of that trade secret by a competitor with knowledge that it was obtained in breach of a confidence; and
- use of the trade secret "by the competitor to the detriment of the plaintiff."[125]

Remedies for Misappropriation of a Trade Secret. Often an employer that is harmed by the misappropriation of a trade secret requires more than monetary damages to remedy the continuing injury to its business. In those circumstances, the employer may seek immediate judicial intervention to return things to the *status quo* before the wrongful disclosure and/or use of its trade secrets occurred. This remedy may include an order directing the return of the trade secret, precluding the further use of it, and similar forms of noneconomic relief. Under New Jersey law, a plaintiff seeking a preliminary injunction must show that:

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[122] N.J. STAT. ANN. § 56:15-2.

[123] *See Platinum Mgmt., Inc. v. Dahms*, 666 A.2d 1028, 1038 (N.J. Super. Ct. Law Div. 1995) (holding that to be legally protected, the information need not constitute a trade secret, and indeed, may otherwise be publicly available).

[124] *Sun Dial Corp. v. Rideout*, 108 A.2d 442, 445 (N.J. 1954) (citations omitted); *see also Rycoline Prods*., *Inc. v. Walsh*, 756 A.2d 1047, 1055 (N.J. Super. Ct. App. Div. 2000).

[125] *Rohm & Haas Co. v. Adco Chem. Co.*, 689 F.2d 424, 429-30 (3d Cir. 1982); *Rycoline Prods., Inc*., 756 A.2d at 1052.

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1. there is no adequate remedy at law;
2. injunctive relief is necessary to prevent substantial, immediate and irreparable harm to the employer due to the misappropriation of its trade secrets;
3. it has a clear legal right to the relief sought; and
4. the employer has a reasonable probability of success on the merits.[126]

In addition, courts will consider the relative hardship that would be suffered by each of the parties in granting or denying a preliminary injunction[127] and how the public would be impacted by granting or denying the proposed injunctive relief.[128]

In addition to injunctive relief, an employer is entitled to monetary damages to compensate it, to the extent possible, for losses due to the misappropriation. Damages for misappropriation of trade secrets may include lost profits and/or incidental damages that the employer can prove it suffered.[129] The NJTSA has a three-year statute of limitations beginning with the discovery of the misappropriation or when the misappropriation should have been discovered by the exercise of reasonable diligence.[130]

Under the statutory scheme in the NJTSA, damages for misappropriation include:

- actual damages and unjust enrichment;
- the payment of a reasonable royalty from the wrongdoer to the trade secret owner (where there is no award for actual lost or unjust enrichment);
- punitive damages, capped at double the awarded damages (but excluding reasonable royalty amounts) where the misappropriation was "willful and malicious;" and
- reasonable costs and attorneys' fees to a prevailing party where:
  - a willful and malicious misappropriation exists;
  - a misappropriation claim is made in bad faith; or
  - a motion to terminate an injunction is made in bad faith.[131]

In addition to the typical civil remedies, New Jersey law allows for the imposition of criminal sanctions for misappropriation of a trade secret.[132]

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[126] *Subcarrier Commc'ns, Inc. v. Day*, 691 A.2d 876, 878 (N.J. Super. Ct. App. Div. 1997).

[127] *Subcarrier Commc'ns, Inc.*, 691 A.2d at 878.

[128] *J.H. Renarde, Inc. v. Sims*, 711 A.2d 410, 416 (N.J. Super. Ct. Ch. Div. 1998); *see also Campbell Soup Co. v. Desatnick*, 58 F. Supp. 2d 477, 489 (D.N.J. 1999); *Coskey's Television & Radio Sales and Serv., Inc. v. Foti*, 602 A.2d 789, 793 (N.J. Super. Ct. App. Div. 1992).

[129] *Platinum Mgmt., Inc. v. Dahms*, 666 A.2d 1028, 1038 (N.J. Super. Ct. Law Div. 1995).

[130] N.J. STAT. ANN. § 56:15-8.

[131] N.J. STAT. ANN. § 56:15-6.

[132] N.J. STAT. ANN. § 2C:20-1 (i).

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2.3(b)(v) *State Guidelines on Employee Inventions & Ideas*

New Jersey does not have a statute of general applicability regarding ownership of employee inventions and ideas.

3. DURING EMPLOYMENT

3.1 Posting, Notice & Record-Keeping Requirements

3.1(a) *Posting & Notification Requirements*

3.1(a)(i) *Federal Guidelines on Posting & Notification Requirements*

Several federal employment laws require that specific information be posted in the workplace. Posting requirements vary depending upon the law at issue. For example, employers with fewer than 50 employees are not covered by the Family and Medical Leave Act and, therefore, would not be subject to the law's posting requirements. Table 5 details the federal workplace posting and notice requirements.

Table 5. Federal Posting & Notice Requirements

Poster or Notice	Notes
Employee Polygraph Protection Act (EPPA)	Employers must post and keep posted on their premises a notice explaining the EPPA.[133]
Equal Employment Opportunity (EEO) Act ("EEO is the Law" Poster)	Employers must post and keep posted in conspicuous places upon their premises, in an accessible format, a notice that describes the federal laws prohibiting discrimination in employment.[134]
Fair Labor Standards Act (FLSA)	Employers must post and keep posted a notice, summarizing employee rights under the FLSA, in conspicuous places in every establishment where employees subject to the FLSA are employed.[135]
Family & Medical Leave Act (FMLA)	Employers must conspicuously post, where employees are employed, a notice explaining the FMLA's provisions and providing information on filing complaints of violations.[136]
Migrant and Seasonal Agricultural Worker Protection Act (MSPA)	Farm labor contractors, agricultural employers, and agricultural associations that employ or house any migrant or seasonal agricultural worker must conspicuously post at the place of employment a poster setting forth the MSPA's rights and protections, including the right to

[133] 29 C.F.R. § 801.6. This poster is available in English and Spanish at http://www.dol.gov/whd/regs/compliance/posters/eppa.htm.

[134] 29 C.F.R. §§ 1601.30 (Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act), 1627.10 (Age Discrimination in Employment Act). This poster is available in English, Spanish, Arabic, and Chinese at https://www1.eeoc.gov/employers/poster.cfm.

[135] 29 C.F.R. § 516.4. This poster is available in English, Spanish, Chinese, Russian, Thai, Hmong, Vietnamese, Korean, Polish, and Haitian Creole at http://www.dol.gov/whd/regs/compliance/posters/flsa.htm.

[136] 29 C.F.R. § 825.300. This poster is available in English and Spanish at http://www.dol.gov/whd/regs/compliance/posters/fmla.htm.

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Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
	request a written statement of the information described in 29 U.S.C. § 1821(a). The poster must be provided in Spanish or other language common to migrant or seasonal agricultural workers who are not fluent or literate in English.[137]
Notice to Workers with Disabilities/Special Minimum Wage Poster	Employers of workers with disabilities under special minimum wage certificates must at all times display and make available to employees a poster explaining the conditions under which the special wage rate applies. Where an employer finds it inappropriate to post notice, directly providing the poster to its employees is sufficient.[138]
Occupational Safety and Health Act ("the Fed-OSH Act")	Employers must post a notice or notices informing employees of the Fed-OSH Act's protections and obligations, and that for assistance and information employees should contact the employer or nearest U.S. Department of Labor office.[139]
Uniformed Service Employment and Reemployment Rights Act (USERRA)	Employers must provide notice about USERRA's rights, benefits, and obligations to all individuals entitled to such rights and benefits. Employers may provide notice by posting or by other means, such as by distributing or mailing the notice.[140]
In addition to the federal posters required for all employers, government contractors may be required to post the following posters.	
"EEO is the Law" Poster with the EEO is the Law Supplement	Employers subject to Executive Order No. 11246 must prominently post notice, where it can be readily seen by employees and applicants, explaining that discrimination in employment is prohibited on numerous grounds.[141] The second page includes reference to government contractors.
Annual EEO, Affirmative Action Statement	Government contractors covered by the Affirmative Action Program (AAP) requirements are required to post a separate EEO/AA Policy Statement (in addition to the required "EEO is the Law" Poster), which

[137] 29 C.F.R. §§ 500.75, 500.76. This poster is available in English, Spanish, Haitian Creole, Vietnamese, and Hmong at http://www.dol.gov/whd/regs/compliance/posters/mspaensp.htm.

[138] 29 C.F.R. § 525.14. This poster is available in English and Spanish at http://www.dol.gov/whd/regs/compliance/posters/disab.htm.

[139] 29 C.F.R § 1903.2. This poster is available in English, Spanish, Arabic, Chinese, Russian, Nepali, Thai, Hmong, Vietnamese, Korean, Polish, Portuguese, and Haitian Creole at https://www.osha.gov/Publications/poster.html.

[140] 20 C.F.R. app. § 1002. This poster is available at http://www.dol.gov/vets/programs/userra/poster.htm.

[141] 41 C.F.R. § 60-1.42; *see also* 41 C.F.R. § 60-741.5(a) (requiring all agencies and contractors to include an equal opportunity clause in contracts, in which the contractor agrees to post this notice). This poster is available at https://www.dol.gov/ofccp/regs/compliance/posters/ofccpost.htm.

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Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
	indicates the support of the employer's top U.S. official. This statement should be reaffirmed annually with the employer's AAP.[142]
Employee Rights Under the Davis-Bacon Act Poster	Employers performing work covered by the labor standards of the Davis-Bacon and Related Acts must prominently post notice, where accessible to employees, summarizing the protections of the law.[143]
Employee Rights Under the Service Contract or Walsh-Healey Public Contracts Acts Poster	Employers performing work covered by the McNamara-O'Hara Service Contract Act ("Service Contract Act") or the Walsh-Healey Public Contracts Act ("Walsh-Healey Act") must prominently post notice, where accessible to employees, summarizing all required compensation and other entitlements. To comply, employers may notify employees by attaching a notice to the contract, or may post the notice at the worksite.[144]
E-Verify Participation & Right to Work Posters	The Department of Homeland Security requires certain government contractors, under Executive Order Nos. 12989, 13286, and 13465, to post notice informing current and prospective employees of their rights and protections. Notices must be posted in a prominent place that is visible to prospective employees and all employees who are verified through the system.[145]
Notice to Workers with Disabilities/Special Minimum Wage Poster	Employers of workers with disabilities under special minimum wage certificates authorized by the Service Contract Act or the Walsh-Healey Public Contracts Act must post notice, explaining the conditions under which the special minimum wages may be paid. Where an employer finds it inappropriate to post this notice, directly providing the poster to its employees is sufficient.[146]
Notification of Employee Rights Under Federal Labor Laws	Government contractors are required under Executive Order No. 13496 to post this notice in conspicuous locations and, if the employer posts notices to employees electronically, it must also make this poster available where it customarily places other electronic notices to employees about their jobs. Electronic posting cannot be used as a substitute for physical posting. Where a significant portion of the

[142] 41 C.F.R. §§ 60-300.44, 60-741.44.

[143] 29 C.F.R. § 5.5(a)(l)(i). This poster is available at https://www.dol.gov/whd/regs/compliance/posters/davis.htm.

[144] 29 C.F.R. § 4.6(e); 29 C.F.R. § 4.184. This poster is available at https://www.dol.gov/whd/regs/compliance/posters/sca.htm.

[145] U.S. Citizenship and Immigration Servs., Dept of Homeland Sec., *E-Verify Memorandum of Understanding for Employers*, *available at* https://www.e-verify.gov/sites/default/files/everify/memos/MOUforEVerifyEmployer.pdf. The poster is available at https://preview.e-verify.gov/sites/default/files/everify/posters/IER_RightToWorkPoster%20Eng_Es.pdf. According to the U.S. Citizenship and Immigration Services, this poster must be displayed in English and Spanish.

[146] 29 C.F.R. § 525.14. This poster is available at https://www.dol.gov/whd/regs/compliance/posters/disab.htm.

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Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
	workforce is not proficient in English, the notice must be provided in the languages spoken by employees.[147]
Office of the Inspector General's Fraud Hotline Poster	Certain government contractors must prominently post notice, where accessible to employees, addressing fraud and how to report such misconduct.[148]
Paid Sick Leave Under Executive Order No. 13706	Certain government contractors must prominently post notice, where accessible to employees at the worksite, informing employees of their right to earn and use paid sick leave. Notice may be provided electronically if customary to the employer.[149] **Pay Period or Monthly Notice.** A contractor must inform an employee in writing of the amount of accrued paid sick leave no less than once each pay period or each month, whichever is shorter. Additionally, this information must be provided when employment ends and when an employee's accrued but unused paid sick leave is reinstated. Providing these notifications via a pay stub meets the compliance requirements of the executive order. **Pay Stub / Electronic.** A contractor's existing procedure for informing employees of available leave, such as notification accompanying each paycheck or an online system an employee can check at any time, may be used to satisfy or partially satisfy these requirements if it is written (including electronically, if the contractor customarily corresponds with or makes information available to its employees by electronic means).[150]
Pay Transparency Nondiscrimination Provision	Employers covered by Executive Order No. 11246 must either post a copy of this nondiscrimination provision in conspicuous places available to employees and applicants for employment, or post the provision electronically. Additionally, employers must distribute the nondiscrimination provision to their employees by incorporating it into their existing handbooks or manuals.[151]

[147] 29 C.F.R. § 471.2. This poster is available at https://www.dol.gov/olms/regs/compliance/EO13496.htm.

[148] 48 C.F.R. §§ 3.1000 *et seq*. This poster is available at https://oig.hhs.gov/documents/root/243/OIG_Hotline_Ops_Poster_-_Grant__Contract_Fraud.pdf.

[149] 29 C.F.R. § 13.26. This poster is available at https://www.dol.gov/whd/govcontracts/eo13706/index.htm. Additional resources on the sick leave requirement are available at https://www.dol.gov/whd/govcontracts/eo13706/index.htm.

[150] 29 C.F.R. § 13.5.

[151] 41 C.F.R. § 60-1.35(c). This poster is available at https://www.dol.gov/agencies/ofccp/posters.

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Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
Worker Rights Under Executive Order Nos. 13658 (contracts entered into on or after January 1, 2015), 14026 (contracts entered into on or after January 30, 2022)	Employers that contract with the federal government under Executive Order Nos. 13658 or 14026 must prominently post notice, where accessible to employees, summarizing the applicable minimum wage rate and other required information.[152]

3.1(a)(ii) *State Guidelines on Posting & Notification Requirements*

Table 6 details the state workplace posting and notice requirements. While local ordinances are generally excluded from this publication, some local ordinances may have posting requirements, especially in the minimum wage or paid leave areas. Local posting requirements may be discussed in the table below or in later sections, but the local ordinance coverage is not comprehensive.

Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
Benefits & Leave: Family Leave Insurance Poster	All employers covered by the family leave insurance provisions must conspicuously post notice (Poster PR-2) to inform employees of their rights.[153]
Benefits & Leave: Earned Sick Leave	Covered employers must conspicuously post the notification of rights under the law in places accessible to all employees in each of the employer's workplaces. The employer must use the notification in English, Spanish, and any other language that has been provided by the state and which is the first language of a majority of the employer's workforce.[154]
Benefits & Leave: New Jersey Family Leave Act (NJFLA)	Covered employers (employers with 30 or more employees) must conspicuously post notice informing employees of their rights and obligations under the NJFLA. In addition, employers must distribute a written copy of the official NJFLA poster: (1) annually, on or before

[152] 29 C.F.R. §§ 10.29, 23.290. The poster, referencing both Executive Orders, is available at https://www.dol.gov/whd/regs/compliance/posters/mw-contractors.htm.

[153] N.J. STAT. ANN. § 43:21-39.1(g). This poster is available at https://www.nj.gov/labor/forms_pdfs/tdi/fli_poster.pdf.

[154] N.J. STAT. ANN. § 34:11D-7. These notices are available in a variety of languages at https://www.nj.gov/labor/wageandhour/tools-resources/forms-publications/employer-poster-packet/.

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Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
	December 31 of each year; and (2) upon the first request of an employee.[155]
Benefits & Leave: New Jersey Security and Financial Empowerment Act ("NJ SAFE Act")	Covered employers (employers with 25 or more employees) must display conspicuous notice informing employees of their rights and obligations under the NJ SAFE Act, which provides unpaid leave for employees who are victims of domestic or sexual violence or who are immediate family members of such victims.[156]
Benefits & Leave Documents: Temporary Disability Benefits Under Private Plans	This law covers private plans only. Employers with private plans must provide notice to covered employees in a conspicuous posting (either physically at the place of employment or on the employer's internet or intranet site) and individually (either physically or by email) (1) at the time of hire; (2) when the private plan is established; and (3) within three business days of when the employer knows or should know that the employee may need disability benefits. The notice must include the following information and be in a form approved by the Director (not yet available): • current rates; • eligibility requirements; • benefit entitlements; • rights of the employee, including appeal rights; and • contact information for the private plan and instructions as to how to file for benefits.[157]
Child Labor: Abstract	Employers must conspicuously post an abstract of the child labor law where any minor under the age of 18 is employed. This requirement is not applicable to minors working in agricultural pursuits, domestic service in private homes, or as newspaper deliverers.[158]
Child Labor: Schedule of Minors' Hours	Employers of minors under age of 18 must conspicuously post and maintain a schedule of all hours of work for minors, including: (1) the name of each minor; (2) the maximum number of hours the minor will work each per week; (3) the total hours per week; (4) the beginning and ending times for each work day; and (5) the beginning and ending time for the daily meal period. This requirement is not applicable to minors working in agricultural pursuits, domestic service in private homes, or

[155] N.J. STAT. ANN. § 34:11B-6; N.J ADMIN. CODE § 13:8-2.2. This poster is available at https://www.njoag.gov/wp-content/uploads/2022/07/Family-Leave-Act.pdf.

[156] N.J. STAT. ANN. §§ 34:11C-2, 34:11C-3(d). This poster is available at https://www.nj.gov/labor/wageandhour/assets/PDFs/Employer%20Poster%20Packet/AD-289_9-13.pdf.

[157] N.J. ADMIN. CODE §12:18-2.38.

[158] N.J. STAT. ANN. § 34:2-21.5. This poster is available at https://www.nj.gov/labor/wageandhour/assets/PDFs/Employer%20Poster%20Packet/mw-129-1.pdf.

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Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
	as newspaper deliverers. Employers must use a template provided by the state labor department.[159]
Conscientious Employee Protection Act (CEPA)	All employers must conspicuously display notice describing employee protections under the CEPA, which protects whistleblowers. Notice must be posted in English and Spanish and may be posted, at the employer's discretion, in other languages spoken by a majority of employees.[160]
Employee Misclassification	Employers are required to conspicuously post the notification in a place accessible to all employees in each of the employer's workplaces.[161]
Fair Employment Practices: Discrimination in Employment	All employers must visibly display posters provided by the state concerning the prohibition against discrimination in employment. Notice must be printed on no smaller than letter size paper (8 ½ by 11 inches) and contain text that is fully legible and large enough to be easily read. In addition, employers must distribute a written copy of the official NJLAD poster: (1) annually, on or before December 31 of each year; and (2) upon the first request of an employee. [162]
Fair Employment Practices: Discrimination in Housing	Real estate employers (agencies or brokers, property management offices, and landlords) must visibly display posters provided by the state concerning the prohibition against discrimination in housing. Notice must be printed on no smaller than letter size paper (8 ½ by 11 inches) and contain text that is fully legible and large enough to be easily read.[163]

[159] N.J. STAT. ANN. § 34:2-21.5. This poster is available at https://www.nj.gov/labor/wageandhour/assets/PDFs/Employer%20Poster%20Packet/MW-191-1.pdf.

[160] N.J. STAT. ANN. § 34:19-7. This poster is available at https://www.nj.gov/labor/wageandhour/assets/PDFs/Employer%20Poster%20Packet/CEPA270.1.pdf.

[161] N.J. STAT. ANN. § 34:1a-1.19.This poster is available at https://www.nj.gov/labor/forms_pdfs/lsse/mw-899_520_missclassification11x17.pdf.

[162] N.J. ADMIN. CODE § 13:8-1.2. This poster is available in English at https://www.njoag.gov/wp-content/uploads/2022/07/Employment.pdf and in Spanish at https://www.njoag.gov/wp-content/uploads/2022/09/ESP_Family-Leave-Act.pdf.

[163] N.J. ADMIN. CODE § 13:8-1.3(a). The posters are available in English and in Spanish at https://www.njoag.gov/about/divisions-and-offices/division-on-civil-rights-home/division-on-civil-rights-resources/required-posters/.

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Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
Fair Employment Practices: Discrimination in Public Accommodation	All employers operating a place of public accommodation must post, where easily visible to customers, a notice provided by the state concerning the prohibition against discrimination in public accommodations. *Public accommodations* include, but are not limited to, schools, government buildings, courts, restaurants, taverns, libraries, hotels, gymnasiums, theaters, and hospitals.[164]
Fair Employment Practices: Gender Pay Equity	Employers with 50 or more employees must conspicuously post notice advising workers of applicable state and federal law provisions regarding gender pay equity or detailing the right to be free of gender inequity or bias in pay, benefits, or other employment terms and conditions. The poster must be posted in English, Spanish, and any other language determined by the Commissioner of Labor and Workforce Development.[165]
Unemployment Compensation	All employers must post in a conspicuous place at each worksite a notice (Poster PR-1) informing employees of their rights under the state unemployment compensation and temporary disability benefits laws.[166]
Wages, Hours & Payroll: Current Wage Order	Employers subject to various wage orders, based on their industries, must conspicuously display a summary of the applicable wage orders and regulations. Wage orders apply, for example, to employers engaged in the farm products, seasonal amusement, hotel and motel, mercantile, beauty, and laundry industries.[167]
Wages, Hours & Payroll: Payment of Wages	All employers must conspicuously post, where accessible to employees, a poster describing the laws concerning the payment of wages (*i.e.*, paydays, deductions, employer obligations, etc.).[168]
Wages, Hours & Payroll: Records Concerning	All employers must post notice concerning the employer's obligations to maintain and report records about employee wages, benefits, taxes,

[164] N.J. ADMIN. CODE § 13:8-1.4. This poster is available in English at https://www.njoag.gov/wp-content/uploads/2022/07/Public-Accommodation.pdf and in Spanish at https://www.njoag.gov/wp-content/uploads/2022/09/ESP_Public-Accommodation.pdf.

[165] N.J. STAT. ANN. § 34:11-56.12(a). This poster is available at https://www.nj.gov/labor/wageandhour/assets/PDFs/Employer%20Poster%20Packet/CEPA270.1.pdf. The poster is also available in English and Spanish at https://www.nj.gov/labor/wageandhour/tools-resources/forms-publications/employer-poster-packet/.

[166] N.J. STAT. ANN. § 43:21-49(a)(1); N.J. ADMIN. CODE § 12:16-16.1(a). This poster is available at https://www.nj.gov/labor/wageandhour/assets/PDFs/Employer%20Poster%20Packet/pr-1_6-19_uitdiemployerposter.pdf.

[167] N.J. STAT. ANN. §§ 34:11-4.6, 34:11-56a21. Posters and regulation booklets are available at https://www.nj.gov/labor/wageandhour/tools-resources/forms-publications/.

[168] N.J. STAT. ANN. § 34:11-4.6(d). This poster is available at https://www.nj.gov/labor/wageandhour/assets/PDFs/Employer%20Poster%20Packet/mw-17.pdf.

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Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
Wages, Benefits & Taxes	and other contributions and assessments. The notification must also provide information on how an employee or their authorized representative may contact the state labor department to provide information to, or file a complaint with, the representative regarding possible violations of the requirements of this law or any state wage, benefit and tax law, or may obtain information about any actual violation, including any audit. Employers may provide notice to employees via email or on an Intranet if all employees have access. Employers may use a notice prepared by the New Jersey Department of Labor and Development.[169]
Wages, Hours & Payroll: Wage and Hour Abstract	All employers must post, where easily accessible to employees, an abstract of the wage and hour law.[170]
Workers' Compensation	All employers that have secured workers' compensation insurance must post and maintain, in a conspicuous place or places, notice of such compliance. Notice must inform employees of the name of the insurance company providing coverage or state that the employer has qualified for carrying its own liability.[171]
Workplace Safety: Hazardous Materials, etc.	All employers in certain specified industries (*i.e.*, agriculture, manufacturing, transportation services, utilities, etc.) must post notice, readily accessible to employees, of the availability of information about hazardous materials in the workplace and other related information to be retained by the employer. The poster must be posted in Spanish for employers with employees whose native language is Spanish. General retail stores and restaurants are not included as employers covered by this requirement. Employers with questions about coverage should consult the statute.[172]
Workplace Safety: No Smoking Signs	Generally speaking, smoking is prohibited in New Jersey workplaces. Employers must post "No Smoking" signs at every public entrance. "No

[169] N.J. Stat. Ann. § 34:1a-1.14; N.J. Admin. Code §§ 12:2-1.3(a), 12:2-2.3. This poster is available at https://www.nj.gov/labor/wageandhour/assets/PDFs/Employer%20Poster%20Packet/MW-400_11x17.pdf.

[170] N.J. Stat. Ann. § 34:11-4.6(d). This poster is available at https://www.nj.gov/labor/wageandhour/assets/PDFs/Employer%20Poster%20Packet/MW-220_1-21.pdf.

[171] N.J. Stat. Ann. § 34:15-80. Notice typically is provided by the insurance carrier.

[172] N.J. Stat. Ann. §§ 34:5A-3(h), 34:5A-12. This poster is available at http://www.nj.gov/health/workplacehealthandsafety/right-to-know/.

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Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
	Smoking" signs must include an indication that violators are subject to a fine.[173]
Workplace Safety: Seizure First Aid (Recommended)	The state recommends that employers post information about rendering seizure first aid to an individual who has suffered a seizure in the workplace.[174]

3.1(b) *Record-Keeping Requirements*

3.1(b)(i) *Federal Guidelines on Record Keeping*

Table 7 summarizes the federal record-keeping requirements.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Age Discrimination in Employment Act (ADEA): Payroll Records	*Covered employers must maintain the following payroll or other records for each employee:* • employee's name, address, and date of birth; • occupation; • rate of pay; and • compensation earned each week.[175]	At least 3 years from the date of entry.
Age Discrimination in Employment Act (ADEA): Personnel Records	*Employers that maintain the following personnel records in the course of business are required by the ADEA to keep them for the specified period of time:* • job applications, resumes, or other forms of employment inquiry, including records pertaining to the refusal to hire any individual; • promotion, demotion, transfer, selection for training, recall, or discharge of any employee; • job orders submitted by the employer to an employment agency or labor organization for recruitment of personnel for job openings; • test papers completed by applicants which disclose the results of any employment test considered by the employer; • results of any physical examination considered by the employer in connection with a personnel action; and	At least 1 year from the date of the personnel action to which any records relate.

[173] N.J. STAT. ANN. § 26:3D-61(a).

[174] A.B. 2583 (N.J. 2023).

[175] 29 U.S.C. § 626; 29 C.F.R. § 1627.3(a).

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Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• any advertisements or notices relating to job openings, promotions, training programs, or opportunities to work overtime.[176]	
Age Discrimination in Employment (ADEA): Benefit Plan Documents	*Employer must keep on file any:* • employee benefit plans, such as pension and insurance plans; and • copies of any seniority systems and merit systems in writing.[177]	For the full period the plan or system is in effect, and for at least 1 year after its termination.
Title VII & the Americans with Disabilities Act (ADA): Personnel Records	*Employers must preserve any personnel or employment record made, including:* • requests for reasonable accommodation; • application forms submitted by applicants; • other records having to do with hiring, promotion, demotion, transfer, lay-off, or termination; • rates of pay or other terms of compensation; and • selection for training or apprenticeship.[178]	At least 1 year from the date the records were made, or from the date of the personnel action involved, whichever is later.
Title VII & the Americans with Disabilities Act (ADA): Complaints of Discrimination	*When a charge of discrimination has been filed or an action brought against the employer, it must:* • make and keep such records relevant to the determination of whether unlawful employment practices have been or are being committed, including personnel or employment records relating to the aggrieved person and to all other employees holding positions similar to that held or sought by the aggrieved person; and • retain application forms or test papers completed by unsuccessful applicants or candidates for the position.[179]	Until final disposition of the charge or action (*i.e.*, until the statutory period for bringing an action has expired or, if an action has been brought, the date the litigation is terminated).

[176] 29 C.F.R. § 1627.3(b).

[177] 29 C.F.R. § 1627.3(b).

[178] 42 U.S.C. § 2000e-8c; 29 C.F.R. § 1602.14.

[179] 42 U.S.C. § 2000e-8c; 29 C.F.R. § 1602.14.

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Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Title VII & the Americans with Disabilities Act (ADA): Other	An employer must keep and maintain its Employer Information Report (EEO-1).[180]	Most recent form must be retained for 1 year.
Employee Polygraph Protection Act (EPPA)	*Records pertaining to a polygraph test must be maintained for the specified time period including, but not limited to, the following:* • a copy of the statement given to the examinee regarding the time and place of the examination and the examinee's right to consult with an attorney; • the notice to the examiner identifying the person to be examined; • copies of opinions, reports, or other records given to the employer by the examiner; • where the test is conducted in connection with an ongoing investigation involving economic loss or injury, a statement setting forth the specific incident or activity under investigation and the basis for testing the particular employee; and • where the test is conducted in connection with an ongoing investigation of criminal or other misconduct involving loss or injury to the manufacture, distribution, or dispensing of a controlled substance, records specifically identifying the loss or injury in question and the nature of the employee's access to the person or property that is the subject of the investigation.[181]	At least 3 years following the date on which the polygraph examination was conducted.
Employee Retirement Income Security Act (ERISA)	Employers that sponsor an ERISA-qualified plan must maintain records that provide in sufficient detail the information from which any plan description, report, or certified information filed under ERISA can be verified, explained, or checked for accuracy and completeness. This includes vouchers, worksheets, receipts, and applicable resolutions.[182]	At least 6 years after documents are filed or would have been filed but for an exemption.
Equal Pay Act	Covered employers must maintain the records required to be kept by employers under the Fair Labor Standards Act (29 C.F.R. part 516).[183]	3 years.

[180] 29 C.F.R. § 1602.7.

[181] 29 U.S.C. §§ 2001 *et seq.*; 29 C.F.R. § 801.30.

[182] 29 U.S.C. § 1027.

[183] 29 C.F.R. § 1620.32(a).

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Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Equal Pay Act: Other	*Covered employers must maintain any additional records made in the regular course of business relating to:* • payment of wages; • wage rates; • job evaluations; • job descriptions; • merit and seniority systems; • collective bargaining agreements; and • other matters which describe any pay differentials between the sexes.[184]	At least 2 years.
Fair Labor Standards Act (FLSA): Payroll Records	*Employers must maintain the following records with respect to each employee subject to the minimum wage and/or overtime provisions of the FLSA:* • full name and any identifying symbol used in place of name on time or payroll records; • home address with zip code; • date of birth, if under 19; • sex and occupation in which employed; • time of day and day of week on which the employee's workweek begins; • regular hourly rate of pay for any workweek in which overtime compensation is due; • basis on which wages are paid (pay interval); • amount and nature of each payment excluded from the employee's regular rate; • hours worked each workday and total hours worked each workweek; • total daily or weekly straight-time earnings or wages due for hours worked during the workday or workweek, exclusive of premium overtime compensation; • total premium pay for overtime hours; • total additions to or deductions from wages paid each pay period, including employee purchase orders or wage assignments; • total wages paid each pay period; • date of payment and the pay period covered by the payment; • records of retroactive payment of wages, including the amount of such payment to each employee, the period	3 years from the last day of entry.

[184] 29 C.F.R. § 1620.32(b).

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Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	covered by the payment, and the date of the payment; and • for employees working on a fixed schedule, the schedule of daily and weekly hours the employee normally works (instead of hours worked each day and each workweek).[185] The record should also indicate for each week whether the employee adhered to the schedule and, if not, show the exact number of hours worked each day each week.	
Fair Labor Standards Act (FLSA): Tipped Employees	*Employers must maintain and preserve all Payroll Records noted above as well as:* • a symbol, letter, or other notation on the pay records identifying each employee whose wage is determined in part by tips; • weekly or monthly amounts reported by the employee to the employer of tips received (*e.g.*, information reported on Internal Revenue Service Form 4070); • amount by which the wages of each tipped employee have been deemed to be increased by tips as determined by the employer (not in excess of the difference between $2.13 and the applicable federal minimum wage); • hours worked each workday in which an employee does not receive tips, and total daily or weekly straight-time payment made by the employer for such hours; and • hours worked each workday in occupations in which the employee receives tips, and total daily or weekly straight-time earnings for such hours.[186]	
Fair Labor Standards Act (FLSA): White Collar Exemptions	*For bona fide executive, administrative, and professional employees and outside sales employees (e.g., white collar employees) the following information must be maintained:* • full name and any identifying symbol used in place of name on time or payroll records; • home address with zip code; • date of birth if under19; • sex and occupation in which employed; • time of day and day of week on which the employee's workweek begins;	3 years from the last day of entry.

[185] 29 C.F.R. §§ 516.2, 516.5.

[186] 29 C.F.R. § 516.28.

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Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• total wages paid each pay period; • date of payment and the pay period covered by the payment; and • basis on which wages are paid in sufficient detail to permit calculation for each pay period of the employee's total remuneration for employment including fringe benefits and prerequisites.[187]	
Fair Labor Standards Act (FLSA): Agreements & Other Records	*In addition to payroll information, employers must preserve agreements and other records, including:* • collective bargaining agreements and any amendments or additions; • individual employment contracts or, if not in writing, written memorandum summarizing the terms; • written agreements or memoranda summarizing special compensation arrangements under FLSA sections 7(f) or 7(j); • certain plans and trusts under FLSA section 7(e); • certificates and notices listed or named in the FLSA; and • sales and purchase records.[188]	At least 3 years from the last effective date.
Fair Labor Standards Act (FLSA): Other Records	*In addition to other FLSA requirements, employers must preserve supplemental records, including:* • basic time and earning cards or sheets; • wage rate tables; • order, shipping, and billing records; and • records of additions to or deductions from wages.[189]	At least 2 years from the date of last entry.
Family and Medical Leave Act (FMLA)	*Covered employers must make, keep, and maintain records pertaining to their compliance with the FMLA, including:* • basic payroll and identifying employee data, including name, address, and occupation; • rate or basis of pay and terms of compensation; • daily and weekly hours per pay period; • additions to or deductions from wages and total compensation paid; • dates FMLA leave is taken by FMLA-eligible employees (leave must be designated in records as FMLA leave,	At least 3 years.

[187] 29 C.F.R. §§ 516.2, 516.3. Presumably the regulation's reference to "prerequisites" is an error and should refer to "perquisites."

[188] 29 C.F.R. § 516.5.

[189] 29 C.F.R. § 516.6.

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Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	and leave so designated may not include leave required under state law or an employer plan not covered by FMLA); • if FMLA leave is taken in increments of less than one full day, the hours of the leave; • copies of employee notices of leave furnished to the employer under the FMLA, if in writing; • copies of all general and specific notices given to employees in accordance with the FMLA; • any documents that describe employee benefits or employer policies and practices regarding the taking of paid and unpaid leave; • premium payments of employee benefits; and • records of any dispute between the employer and an employee regarding designation of leave as FMLA leave, including any written statement from the employer or employee of the reasons for the designation and the disagreement. *Covered employers with no eligible employees must only maintain the following records:* • basic payroll and identifying employee data, including name, address, and occupation; • rate or basis of pay and terms of compensation; • daily and weekly hours worked per pay period; • additions to or deductions from wages; and • total compensation paid. *Covered employers in a joint employment situation must keep all the records required in the first series with respect to any primary employees, and must keep the records required by the second series with respect to any secondary employees.* *Also, if an FMLA-eligible employee is not subject to the FLSA record-keeping requirements for minimum wage and overtime purposes (i.e., not covered by, or exempt from FLSA) an employer does not need to keep a record of actual hours worked, provided that:* • FMLA eligibility is presumed for any employee employed at least 12 months; and	

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Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• with respect to employees who take FMLA leave intermittently or on a reduced leave schedule, the employer and employee agree on the employee's normal schedule or average hours worked each week and reduce their agreement to a written, maintained record. *Medical records also must be retained.* Specifically, records and documents relating to certifications, re-certifications, or medical histories of employees or employees' family members, created for purposes of FMLA, must be maintained as confidential medical records in separate files/records from the usual personnel files. If the ADA is also applicable, such records must be maintained in conformance with ADA-confidentially requirements (subject to exceptions). If the Genetic Information Nondiscrimination Act of 2008 (GINA) is applicable, records and documents created for purposes of FMLA containing family medical history or genetic information as defined in GINA must be maintained in accordance with the confidentiality requirements of Title II of GINA.[190]	
Federal Insurance Contributions Act (FICA)	*Employers must keep FICA records, including:* • copies of any return, schedule, or other document relating to the tax; • records of all remuneration (cash or otherwise) paid to employees for employment services. The records must show with respect to each employee receiving such remuneration: ▪ name, address, and account number of the employee and additional information when the employee does not provide a Social Security card; ▪ total amount and date of each payment of remuneration (including any sum withheld as tax or for any other reason) and the period of services covered by such payment; ▪ amount of each such remuneration payment that constitutes wages subject to tax; ▪ amount of employee tax, or any amount equivalent to employee tax, collected with respect to such payment, and, if collected at a time other than the	At least 4 years after the date the tax is due or paid, whichever is later.

[190] 29 U.S.C. § 2616; 29 C.F.R. § 825.500.

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Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	time such payment was made, the date collected; and ▪ if the total remuneration payment and the amount thereof which is taxable are not equal, the reason for this; • the details of each adjustment or settlement of taxes under FICA; and • records of all remuneration in the form of tips received by employees, employee statements of tips under section 6053(a) (unless otherwise maintained), and copies of employer statements furnished to employees under section 6053(b).[191]	
Immigration	Employers must retain all completed Form I-9s.[192]	3 years after the date of hire or 1 year following the termination of employment, whichever is later.
Income Tax: Accounting Records	*Any taxpayer required to file an income tax return must maintain accounting records that will enable the filing of tax returns correctly stating taxable income each year, including:* • regular books of account or records, including inventories, sufficient to establish the amount of gross income, deductions, credits, or other matters required to be shown by such person in any return of such tax or information.[193]	Required to be maintained for "so long as the contents [of the records] may become material in the administration of any internal revenue law;" this could be as long as 15 years in some cases.
Income Tax: Employee Payment Records	*Employers are required to maintain records reflecting all remuneration paid to each employee, including:* • employee's name, address, and account number; • total amount and date of each payment; • the period of services covered by the payment;	4 years after the return is due or the tax is paid, whichever is later.

[191] 26 C.F.R. §§ 31.6001-1, 31.6001-2.

[192] 8 C.F.R. § 274a.2.

[193] 26 U.S.C. § 3402; 26 C.F.R. § 1.6001-1.

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Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• the amount of remuneration that constitutes wages subject to withholding; • the amount of tax collected and, if collected at a time other than the time the payment was made, the date collected; • an explanation for any discrepancy between total remuneration and taxable income; • the fair market value and date of each payment of noncash remuneration for services performed as a retail commissioned salesperson; and • other supporting documents relating to each employee's individual tax status.[194]	
Income Tax: W-4 Forms	Employers must retain all completed Form W-4s.[195]	As long as it is in effect and at least 4 years thereafter.
Unemployment Insurance	*Employers are required to maintain all relevant records under the Federal Unemployment Tax Act, including:* • total amount of remuneration paid to employees during the calendar year for services performed; • amount of such remuneration which constitutes wages subject to taxation; • amount of contributions paid into state unemployment funds, showing separately the payments made and not deducted from the remuneration of its employees, and payments made and deducted or to be deducted from employee remuneration; • information required to be shown on the tax return and the extent to which the employer is liable for the tax; • an explanation for any discrepancy between total remuneration paid and the amount subject to tax; and • the dates in each calendar quarter on which each employee performed services not in the course of the employer's trade or business, and the amount of the cash remuneration paid for those services.[196]	At least 4 years after the later of the date the tax is due or paid for the period covered by the return.

[194] 26 C.F.R. §§ 31.6001-1, 31.6001-5.

[195] 26 C.F.R. §§ 31.6001-1, 31.6001-5.

[196] 26 C.F.R. § 31.6001-4.

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Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Workplace Safety / the Fed-OSH Act: Exposure Records	*Employers must preserve and retain employee exposure records, including:* • environmental monitoring or measuring of a toxic substance or harmful physical agent, including personal, area, grab, wipe, or other form of sampling, as well as related collection and analytical methodologies, calculations, and other background data relevant to an interpretation of the results obtained; • biological monitoring results which directly assess the absorption of a toxic substances or harmful physical agent by body specimens; and • Material Safety Data Sheets (MSDSs), or in the absence of these documents, a chemical inventory or other record reveling the identity of a toxic substances or harmful physical agent and where and when the substance or agent was used. *Exceptions to this requirement include:* • background data to workplace monitoring need only be retained for 1 year provided that the sampling results, collection methodology, analytic methods used, and a summary of other background data is maintained for 30 years; • MSDSs need not be retained for any specified time so long as some record of the identity of the substance, where it was used and when it was used is retained for at least 30 years; and • biological monitoring results designated as exposure records by a specific Fed-OSH Act standard should be retained as required by the specific standard.[197]	At least 30 years.
Workplace Safety / the Fed-OSH Act: Medical Records	*Employers must preserve and retain "employee medical records," including:* • medical and employment questionnaires or histories; • results of medical examinations and laboratory tests; • medical opinions, diagnoses, progress notes, and recommendations; • first aid records; • descriptions of treatments and prescriptions; and • employee medical complaints.	Duration of employment plus 30 years.

[197] 29 C.F.R. § 1910.1020(d).

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Table 7. Federal Record-Keeping Requirements

Records	Notes	Retention Requirement
	"Employee medical record" does not include: • physical specimens; • records of health insurance claims maintained separately from employer's medical program; • records created solely in preparation for litigation that are privileged from discovery; • records concerning voluntary employee assistance programs, if maintained separately from the employer's medical program and its records; and • first aid records of one-time treatment which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job, if made on-site by a nonphysician and maintained separately from the employer's medical program and its records.[198]	
Workplace Safety: Analyses Using Medical and Exposure Records	*Employers must preserve and retain analyses using medical and exposure records*, including any compilation of data, or other study based on information collected from individual employee exposure or medical records, or information collected from health insurance claim records, provided that the analysis has been provided to the employer or no further work is being done on the analysis.[199]	At least 30 years.
Workplace Safety: Injuries and Illnesses	*Employers must preserve and retain records of employee injuries and illnesses, including:* • OSHA 300 Log; • the privacy case list (if one exists); • the Annual Summary; • OSHA 301 Incident Report; and • old 200 and 101 Forms.[200]	5 years following the end of the calendar year that the record covers.
Additional record-keeping requirements apply to government contractors. The list below, while nonexhaustive, highlights some of these obligations.		
Affirmative Action Programs (AAP)	*Contractors required to develop written affirmative action programs must maintain:* • current AAP and documentation of good faith effort; and	Immediately preceding AAP year.

[198] 29 C.F.R. § 1910.1020(d).

[199] 29 C.F.R. § 1910.1020(d).

[200] 29 C.F.R. §§ 1904.33, 1904.44.

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Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• AAP for the immediately preceding AAP year and documentation of good faith effort.[201]	
Equal Employment Opportunity: Personnel & Employment Records	*Government contractors covered by Executive Order No. 11246 and those required to provide affirmative action to persons with disabilities and/or disabled veterans and veterans of the Vietnam Era must retain the following records:* • records pertaining to hiring, assignment, promotion, demotion, transfer, lay off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship; • other records having to do with requests for reasonable accommodation, the results of any physical examination, job advertisements and postings, applications, resumes; and • any and all expressions of interest through the internet or related electronic data technologies as to which the contractor considered the individual for a particular position, such as on-line resumes or internal resume databases, records identifying job seekers contacted regarding their interest in a particular position, regardless of whether the individual qualifies as an internet applicant under 41 C.F.R. § 60–1.3, tests and test results, and interview notes; ▪ for purposes of record keeping with respect to internal resume databases, the contractor must maintain a record of each resume added to the database, a record of the date each resume was added, the position for which each search of the database was made, and corresponding to each search, the substantive search criteria used and the date of the search; ▪ for purposes of record keeping with respect to external resume databases, the contractor must maintain a record of the position for which each search of the database was made, and corresponding to each search, the substantive search criteria used, the date of the search, and the resumes of job seekers who met the basic	3 years recommended; regulations state "not less than two years from the date of the making of the record or the personnel action involved, whichever occurs later." If the contractor has fewer than 150 employees or does not have a contract of at least $150,000, the minimum retention period is one year from the date of making the record or the personnel action, whichever occurs later.

[201] 41 C.F.R. § 60-1.12(b).

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Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	qualifications for the particular position who are considered by the contractor). *Additionally, for any record the contractor maintains pursuant to 41 C.F.R. § 60-1.12, it must be able to identify:* • gender, race, and ethnicity of each employee; and • where possible, the gender, race, and ethnicity of each applicant or internet applicant.[202]	
Equal Employment Opportunity: Complaints of Discrimination	*Where a complaint of discrimination has been filed, an enforcement action commenced, or a compliance review initiated, employers must maintain:* • personnel or employment records relating to the aggrieved person and to all other employees holding positions similar to that held or sought by the aggrieved person; and • application forms or test papers completed by unsuccessful applicants and candidates for the same position as the aggrieved person applied and was rejected.[203]	Until final disposition of the complaint, compliance review or action.
Minimum Wage Under Executive Orders Nos. 13658 (contracts entered into on or after January 1, 2015), 14026 (contracts entered into on or after January 30, 2022)	*Covered contractors and subcontractors performing work must maintain for each worker:* • name, address, and Social Security number; • occupation(s) or classification(s); • rate or rates of wages paid; • number of daily and weekly hours worked; • any deductions made; and • total wages paid. These records must be available for inspection and transcription by authorized representatives of the Wage and Hour Division (WHD) of the U.S. Department of Labor. The contractor must also permit authorized representatives of the WHD to conduct interviews with workers at the worksite during normal working hours.[204]	3 years.

[202] 41 C.F.R. §§ 60-1.12, 60-300.80, and 60-741.80.

[203] 41 C.F.R. §§ 60-1.12, 60-741.80.

[204] 29 C.F.R. § 23.260.

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<table>
<tr><th colspan="3">Table 7. Federal Record-Keeping Requirements</th></tr>
<tr><th>Records</th><th>Notes</th><th>Retention Requirement</th></tr>
<tr><td>Paid Sick Leave Under Executive Order No. 13706</td><td>Contractors and subcontractors performing work subject to Executive Order No. 13706 must keep the following records:
• employee’s name, address, and Social Security number;
• employee’s occupation(s) or classification(s);
• rate(s) of wages paid (including all pay and benefits provided);
• number of daily and weekly hours worked;
• any deductions made;
• total wages paid (including all pay and benefits provided) each pay period;
• a copy of notifications to employees of the amount of accrued paid sick leave;
• a copy of employees’ requests to use paid sick leave (if in writing) or (if not in writing) any other records reflecting such employee requests;
• dates and amounts of paid sick leave used by employees (unless a contractor’s paid time off policy satisfies the EO’s requirements, leave must be designated in records as paid sick leave pursuant to the EO);
• a copy of any written responses to employees’ requests to use paid sick leave, including explanations for any denials of such requests;
• any records relating to the certification and documentation a contractor may require an employee to provide, including copies of any certification or documentation provided by an employee;
• any other records showing any tracking of or calculations related to an employee’s accrual and/or use of paid sick leave;
• the relevant covered contract;
• the regular pay and benefits provided to an employee for each use of paid sick leave; and
• any financial payment made for unused paid sick leave upon a separation from employment intended to relieve a contractor from its reinstatement obligation.[205]</td><td>During the course of the covered contract as well as after the end of the contract.</td></tr>
<tr><td>Davis-Bacon Act</td><td>Davis-Bacon Act contractors or subcontractors must maintain the following records with respect to each employee:</td><td>At least 3 years after the work.</td></tr>
</table>

[205] 29 C.F.R. § 13.25.

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Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• name, address, and Social Security number; • work classification; • hourly rates of wages paid (including rates of contributions or costs anticipated for *bona fide* fringe benefits or cash equivalents); • daily and weekly number of hours worked; and • deductions made and actual wages paid. *Contractors employing apprentices or trainees under approved programs must maintain written evidence of:* • registration of the apprenticeship programs; • certification of trainee programs; • the registration of the apprentices and trainees; • the ratios and wage rates prescribed in the program; and • worker or employee employed in conjunction with the project.[206]	
Service Contract Act	*Service Contract Act contractors or subcontractors must maintain the following records with respect to each employee:* • name, address, and Social Security number; • work classification; • rates of wage; • fringe benefits; • total daily and weekly compensation; • the number of daily and weekly hours worked; • any deductions, rebates, or refunds from daily or weekly compensation; • list of wages and benefits for employees not included in the wage determination for the contract; • any list of the predecessor contractor's employees which was furnished to the contractor by regulation; and • a copy of the contract.[207]	At least 3 years from the completion of the work records containing the information.
Walsh-Healey Act	*Walsh-Healey Act supply contractors must keep the following records:*	At least 3 years from the last date of entry.

[206] 29 C.F.R. § 5.5.

[207] 29 C.F.R. § 4.6.

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Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• wage and hour records for covered employees showing wage rate, amount paid in each pay period, hours worked each day and week; • the period in which each employee was engaged on a government contract and the contract number; • name, address, sex, and occupation; • date of birth of each employee under 19 years of age; and • a certificate of age for employees under 19 years of age.[208]	

3.1(b)(ii) *State Guidelines on Record Keeping*

Table 8 summarizes the state record-keeping requirements.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Benefits & Leave: FMLA Records	*Public service employers must keep records concerning federal FMLA leave, including all of the following:* • basic payroll and identifying employee data; • dates FMLA is taken (FMLA leave should be designated as such in records); • hours of FMLA leave, if taken in increments of less than a full day; • copies of employee notices of leave which fall under the FMLA; • copies of all general and specific notices given to employees as required by the FMLA or the NJFLA; • any written or electronic documents describing employee benefits or employer leave policies; • premium payments of employee benefits; and • records of any dispute regarding designation of leave as FMLA leave.[209]	Not less than 3 years.
Benefits & Leave: Earned Sick Leave	*Covered employers must keep records documenting:* • hours worked by employees; • earned sick leave taken;	Five years.

[208] 41 C.F.R. § 50-201.501.

[209] N.J. ADMIN. CODE § 4A:6-1.21B.

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Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• leave: • accrued; • advanced; • earned; • paid out; • carried over.[210]	
Child Labor	*Employers are required to keep a record of the following, in a form approved by the Department of Labor for those employees under 19 years of age:* • name, date of birth, and address; • number of hours worked each day; • hours of beginning and ending such work; • hours of beginning and ending meal period; • amount of wages paid; and • any other such information the department requires.[211]	At least 1 year after entry of the record.
Income Tax	All taxpayers must maintain all records necessary to determine the correct tax liability, including but not limited to "books of account, invoices, sales receipts, or other documents required to be maintained by any specific tax statute or regulation."[212] The retention period is determined by the specific state tax statute or regulations for the obligation.[213]	None specified.
Public Works Contracts	*Every contractor and subcontractor must keep records, in connection with a public work, showing each employee's:* • name, craft or trade; and • actual hourly rate of wages paid.[214]	2 years from date of payment.
Temporary Disability Benefits: Private Plans	Any employer that elects to discontinue a private plan for temporary disability benefits must retain the records pertaining to that election.[215]	1 year from the date of termination.

[210] N.J. STAT. ANN. § 34:11D-6.

[211] N.J. STAT. ANN. § 34:2-21.6.

[212] N.J. ADMIN. CODE § 18:2-7.3.

[213] N.J. ADMIN. CODE § 18:2-7.10.

[214] N.J. STAT. ANN. § 34:11-56.29.

[215] N.J. ADMIN. CODE § 12:18-2.18.

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Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Temporary Workers' Bill of Rights	Whenever a temporary help service firm sends one or more persons to work as temporary laborers in certain designated classification placements, the temporary help service firm must keep the following records relating to that transaction: • the name, address, and telephone number of the third-party client, including each worksite, to which temporary laborers were sent , and the date of the transaction; • for each temporary laborer, the name and address, the specific location sent to work, the type of work performed, the number of hours worked, the hourly rate of pay, and the date sent. The third-party client is required to remit all information required to the temporary help service firm no later than seven days following the last day of the work week worked by the temporary laborer; • the name and title of the individual(s) at each third-party client's place of business responsible for the transaction; • specific qualifications or attributes of a temporary laborer, requested by each third-party client; • copies of all contracts if any, with the third-party client and copies of all invoices for the third-party client; • copies of all employment notices provided; • amounts of any deductions from each temporary laborer's compensation by either the third-party client or by the temporary help services firm for the temporary laborer's food, equipment, withheld income tax, withheld contributions to the state unemployment compensation trust fund and the state disability benefits trust fund, withheld Social Security deductions and every other deduction; • verification of the actual cost of any equipment or meals charged to a temporary laborer; • any additional information required by the commissioner; and • staffing firms must also make records related to the number of hours billed to a third-party client available for review or copying within five days following a	6 years from the date of their creation.

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Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	written request by the temporary worker or their authorized representative.[216]	
Unemployment Compensation	*Employers must keep true and accurate records as needed to verify compliance with the unemployment law. Records must include, for each pay period:* • beginning and ending dates; • full name of each employee, and the days in each calendar week on which services for remuneration are performed; • total amount of remuneration paid to each employee, showing separately cash (including commissions and bonuses); cash value of other remuneration; gratuities reported by the employee (if not reported, minimum wage or amount of remuneration actually received by the employee, whichever is higher); and service charges collected by the employer and distributed to workers in lieu of gratuities; • total amount of all remuneration paid to all employees; and • number of weeks worked.[217] *Records must include, for each worker:* • full name, address, and Social Security number; • amount of any special payments, such as bonuses and gifts, which have been paid during the pay period but which relate to employment in a prior period, showing separately cash payments, cash value of other remuneration, nature of such payments, period during which the services were performed for which the special payments were payable; • date hired, rehired, and/or returned to work after temporary layoff; • date and reason for separation; • information necessary to determine remuneration on a calendar week basis; and • number of base weeks and wages.[218]	Current year and 4 subsequent calendar years.

[216] A.B. 1474 (N.J. 2023) (not yet codified).

[217] N.J. STAT. ANN. §§ 43:21-1 *et seq.*; N.J. ADMIN. CODE §§ 12:16-2.1, 12:16-2.4.

[218] N.J. ADMIN. CODE §§ 12:16-2.2, 12:16-2.4.

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Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	Records must be maintained in such a way that an inspection would reveal whether a regular employee may be eligible for partial benefits, including: • remuneration for each calendar week ending at midnight Saturday; • whether any such period was a week of less than full-time work, as determined according to the norm or custom associated with the individual's occupation, profession, trade, or industry; and • time lost, if any, during such week when work was available.[219]	
Wages, Hours & Payroll	*Every employer must keep and maintain wage and hour records for each employee, which must include:* • name and address of each employee; • date of birth if under 18 years; • total hours worked each day and workweek (this data need not be kept for *bona fide* executive, administrative, or professional employees, or for outside salespeople 18 years or older); • earnings, including the regular hourly wage, gross to net amounts with itemized deductions; and • basis on which wages are paid.[220] *If employees work on a fixed working schedule, employers may keep records that show:* • the exact schedule of daily and weekly work hours and an indication; if the schedule was followed each week; and • hours actually worked, if the employee works longer or shorter hours than schedule indicates.[221] *In addition to the above requirements, if employees receive gratuities, employers must keep records as follows:* • records containing total gratuities received by each employee during the payroll week; and • daily or weekly reports completed by the employee with the following information:	6 years.

[219] N.J. ADMIN. CODE §§ 12:17-6.1, 12:16-2.4.

[220] N.J. STAT. ANN. §§ 34:11-4.6, 34:11-56a20; N.J. ADMIN. CODE §§ 12:56-4.1, 12:56-4.4, and 12:2-1.3.

[221] N.J. ADMIN. CODE §§ 12:56-4.3, 12:56-4.4.

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Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	▪ employee's name, address, and Social Security number; ▪ name and address of employer; ▪ calendar day or week covered by the report; and ▪ total amount of gratuities received.[222] In addition to the above requirements, if the employer claims credit for food or lodging as a cash substitute, it must keep and maintain records substantiating the cost of furnishing food or lodging. Details can be found in the regulations.[223] If an employee receives additions to cash wages that results in the employee being paid less in cash than the minimum hourly wage, or if the employee works in excess of 40 hours per week, the employer must maintain records showing such additions by reason of gratuities, food, or lodgings paid on a workweek basis.[224]	
Workers' Compensation	*All employers must make, keep, preserve, and make the following records available to the Commissioner:* • records regarding compliance with the workers' compensation statute; • records relating to work-related deaths, injuries, and illnesses, other than minor injuries requiring only first aid treatment; and • records regarding employee exposure to potential toxic material or other harmful agents.[225]	Not specified.

3.1(c) *Personnel Files*

3.1(c)(i) *Federal Guidelines on Personnel Files*

Federal law does not address access to personnel files for private-sector employees.

3.1(c)(ii) *State Guidelines on Personnel Files*

New Jersey law does not address access to personnel files for private-sector employees.

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[222] N.J. ADMIN. CODE §§ 12:56-4.4, 12:56-4.6, and 12:56-4.7.

[223] N.J. ADMIN. CODE §§ 12:56-4.9, 12:56-4.4.

[224] N.J. ADMIN. CODE §§ 12:56-4.10, 12:56-4.4.

[225] N.J. STAT. ANN. § 34:6A-40.

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3.2 Privacy Issues for Employees

3.2(a) *Background Screening of Current Employees*

3.2(a)(i) *Federal Guidelines on Background Screening of Current Employees*

For information on federal law related to background screening of current employees, see **1.3**.

3.2(a)(ii) *State Guidelines on Background Screening of Current Employees*

New Jersey law limits what credit and criminal information can be used for background screening.[226] The state additionally restricts an employer from requesting or requiring an employee to allow the employer access to their personal social media accounts.[227] For more information on state law related to background screening of current employees, see **1.3**.

3.2(b) *Drug & Alcohol Testing of Current Employees*

3.2(b)(i) *Federal Guidelines on Drug & Alcohol Testing of Current Employees*

For information on federal laws requiring drug testing of current employees, see **1.3(e)(i)**.

3.2(b)(ii) *State Guidelines on Drug & Alcohol Testing of Current Employees*

If an employer in the state has a drug testing policy and an employee tests positive for cannabis, the employer must offer the employee an opportunity to present a legitimate medical explanation for the positive test result, and must provide written notice of the right to explain to the employee. The employee must, within three working days after receiving the employer's written notice, submit information to the employer to explain the positive test result, or request a retest of the original sample. The retest will be at the employee's expense. The employee may present an authorization for medical cannabis issued by a health care practitioner, or proof of registration with the state, or both, as part of the individual's explanation for the positive test result.[228] Additionally, the New Jersey Supreme has ruled that a private employer's mandatory random urine testing could violate an employee's right to privacy, but any privacy interest claimed by workers must be balanced against the competing interest of the employer and general public in health and safety.[229]

3.2(c) *Marijuana Laws*

3.2(c)(i) *Federal Guidelines on Marijuana*

Under federal law, it is illegal to possess or use marijuana.[230]

3.2(c)(ii) *State Guidelines on Marijuana*

New Jersey allows both medical and recreational marijuana use.[231]

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[226] N.J. STAT. ANN. §§ 56:11-30, 56:11-31; N.J. STAT. ANN. §§ 34:6B-11 to 34:6B-19; N.J. ADMIN. CODE §§ 12:68-1.2 to 12:68-1.5.

[227] N.J. STAT. ANN. §§ 34:6B-7 to 34:6B-8.

[228] N.J. STAT. ANN. § 24:6I-6.1.

[229] *Hennessy v. Coastal Eagle Point Oil Co.*, 609 A.2d 11 (N.J. 1992).

[230] 21 U.S.C. §§ 811-12, 841 *et seq*.

[231] N.J. STAT. ANN. §§ 24-6I-1 *et seq*.; N.J. STAT. ANN. §§ 24:6I-51, 24:6I-52.

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Under the recreational marijuana law, employers cannot refuse to hire or employ any person, discharge, or take any adverse action against any employee with respect to compensation, terms, conditions, or other privileges of employment because the person does or does not smoke, vape, aerosolize or otherwise use cannabis.

The presence of cannabinoid metabolites in an employee's bodily fluids cannot form the basis for refusing to employ or otherwise penalizing that person unless in failing to do so the employer would violate a federal contract or cause it to lose federal funding. Employers cannot subject employees to adverse action solely due to the presence of cannabinoid metabolites in their bodily fluid from using recreational marijuana. However, employers can require employees to undergo a drug test:

- upon reasonable suspicion of their use of a cannabis item while performing work responsibilities;
- if there are observable signs of intoxication related to marijuana use; or
- following a work-related accident subject to employer investigation.

Employers can drug test randomly, as part of pre-employment screening or regular screening of employees, to determine use during an employee's prescribed work hours. The drug test must include scientifically reliable objective testing methods and procedures, such as testing of blood, urine, or saliva, and a physical evaluation to determine an employee's state of impairment. An individual with the necessary certification to opine on the employee's state of impairment, or lack thereof, related to marijuana use must conduct the physical evaluation. The employer can use the drug test result when determining the appropriate employment action, including but not limited to, dismissal, suspension, demotion, or other disciplinary action. On September 9, 2022, the New Jersey Cannabis Regulatory Commission issued workplace impairment guidance, along with a workplace impairment observation sample form.[232] Corresponding rules issued before the guidance provide that, notwithstanding the statutory requirements, until the New Jersey Cannabis Regulatory Commission, in consultation with the Police Training Commission, develops standards for a Workplace Impairment Recognition Expert certification, no physical evaluation of an employee being drug tested in accordance with the statute shall be required.[233] Note, however, that, if any of the law's provisions cause a probable adverse impact on an employer subject to the requirements of a federal contract, employers may revise their employee prohibitions consistent with federal law, rules, and regulations.

The recreational marijuana law does not require employers to amend or repeal, or affect, restrict or preempt employers' rights and obligations to maintain a drug- and alcohol-free workplace or require them to permit or accommodate the use, consumption, being under the influence, possession, transfer, display, transportation, sale, or growth of marijuana in the workplace, or affect employers' ability to have policies prohibiting marijuana use or intoxication during work hours.

Additionally, other provisions in the recreational marijuana bills restrict where people can smoke marijuana, driving under the influence of marijuana, and pre- and/or during-employment decisions based on an individual's arrest, charge, or conviction for various marijuana criminal offenses.

Under the medical marijuana law, an employer cannot, solely based on the employee's status as a registered qualifying patient, take adverse employment action, which means refusing to hire or employ

[232] *Available at* https://www.nj.gov/cannabis/businesses/resources/.

[233] N.J. ADMIN. CODE § 17:30-2.1(e).

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an individual, barring or discharging an individual from employment, requiring an individual to retire from employment, or discriminating against an individual in compensation or in any terms, conditions, or privileges of employment.[234] However, an employer can prohibit, or take adverse employment action for, possession or use of intoxicating substances during work hours or on workplace premises outside of work hours.[235]

If an employer has a drug testing policy and an employee or job applicant tests positive for cannabis, the employer must:

- offer the individual an opportunity to present a legitimate medical explanation for the positive test result; and
- provide written notice of the individual's right to explain.

Within three working days after receiving notice, the employee or job applicant may submit information to the employer to explain the positive test result, or may request a confirmatory retest of the original sample at the individual's own expense. As part of the explanation, the individual may present an authorization for medical cannabis issued by a health care practitioner, proof of registration with the Cannabis Regulatory Commission, or both.[236]

Under the law, an employer is not required to commit any act that would cause it to violate federal law, result in a loss of a licensing-related benefit pursuant to federal law, or result in the loss of a federal contract or federal funding.[237] The medical marijuana law does not permit: (1) operating, navigating, or being in actual physical control of any vehicle, aircraft, railroad train, stationary heavy equipment, or vessel while under the influence of cannabis; or (2) smoking cannabis in a private vehicle unless the vehicle is not in operation.[238] Finally, although a private health insurer is not required to reimburse a person for costs associated with the medical use of cannabis,[239] the New Jersey Supreme Court has ruled employers can be required to reimburse employees for medical marijuana expenses.[240]

Note that, before medical marijuana amendments took effect on July 1, 2019, state and federal court decisions were mixed concerning whether individuals could proceed with disability-related claims under

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[234] N.J. STAT. ANN. § 24:6I-6.1(a). The Cannabis Regulatory Commission has enforcement authority for the New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (CREAMMA). The law does not explicitly authorize a private right of action. *See* N.J. STAT. § 24:6I-33. *See also Zanetich v. Wal-Mart Stores East, Inc*., 2023 WL 3644813 (D.N.J. May 25, 2023) (CREAMMA does not confer an employed private right of action for individuals who believe their rights under CREAMMA have been violated).

[235] N.J. STAT. ANN. § 24:6I-6.1(c)(1).

[236] N.J. STAT. ANN. § 24:6I-6.1(b).

[237] N.J. STAT. ANN. § 24:6I-6.1(c)(2). *But see Hager v. M&K Constr.*, 247 A.3d 864 (N.J. 2021) (Federal Controlled Substances Act did not preempt New Jersey Compassionate Use Act).

[238] N.J. STAT. ANN. § 24:6I-8.

[239] N.J. STAT. ANN. § 24:6I-14; *McNeary v. Freehold Township*, Claim Petition No. 2008-8094 (N.J. Div. of Workers' Comp. June 28, 2018); *Watson v. 84 Lumber*, Claim Petition No. 2009-15740 (N.J. Div. of Workers' Comp. Dec. 15, 2016).

[240] *Hager v. M&K Constr.*, 247 A.3d 864 (N.J. 2021). *See also, e.g.*, *McNeary v. Freehold Township*, Claim Petition No. 2008-8094 (N.J. Div. of Workers' Comp. June 28, 2018); *Watson v. 84 Lumber*, Claim Petition No. 2009-15740 (N.J. Div. of Workers' Comp. Dec. 15, 2016).

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the New Jersey Law Against Discrimination.[241] However, the state supreme court has opined that such claims can proceed:

> "1. The Court concurs with the Appellate Division that plaintiff has stated a claim sufficient to survive defendants' motion to dismiss and that there is no conflict between the Compassionate Use Act and the LAD.
>
> 2. The Court notes, however, that as plaintiff acknowledged at oral argument, had the Legislature not enacted the Compassionate Use Act, he would have no LAD claim for disability discrimination or failure to accommodate following the termination of his employment. The Compassionate Use Act does have an impact on plaintiff's existing employment rights. In a case such as this, in which plaintiff alleges that the Compassionate Use Act authorized his use of medical marijuana outside the workplace, that Act's provisions may be harmonized with the law governing LAD disability discrimination claims. Two particular provisions of the Compassionate Use Act may affect a LAD discrimination or failure to accommodate claim in certain settings. In N.J.S.A. 24:6I-14 (2018), the Legislature provided that '[n]othing in [the Compassionate Use Act] shall be construed to require . . . an employer to accommodate the medical use of marijuana in any workplace.' In N.J.S.A. 24:6I-8 (2018), the Legislature further stated in part that the Act 'shall not be construed to permit a person to: a. operate, navigate or be in actual physical control of any vehicle, aircraft, railroad train, stationary heavy equipment or vessel while under the influence of marijuana.' To the extent that the circumstances surrounding a LAD disability discrimination claim were to implicate one or both of those provisions of the Compassionate Use Act, the Act would have an impact on that claim.
>
> 3. At this early stage of this case, in which the facts have yet to be developed and plaintiff's allegations are entitled to every reasonable inference of fact, those provisions do not bar his cause of action. Plaintiff has properly stated a claim under the LAD."[242]

3.2(d) *Data Security Breach*

3.2(d)(i) *Federal Data Security Breach Guidelines*

Federal law does not contain a data security breach notification statute. However, of interest to employers that provide identity theft protection services to individuals affected by a data security breach, whether voluntarily or as required by state law:

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[241] Compare *Wild v. Carriage Funeral Holdings, Inc.*, 205 A.3d 1144 (N.J. Super. Ct. App. Div. 2019) (Reversing granting of defendant's motion to dismiss, concluding plaintiff sufficiently pleaded disability discrimination and failure to accommodate causes of action) with *Cotto v. Ardagh Glass Packing, Inc.*, 2018 WL 3814278 (D.N.J. Aug. 10, 2018) (granting motion to dismiss, holding Law Against Discrimination did not require employers to waive drug tests for medical marijuana users, and the employee failed to show he could perform the job's essential functions, *i.e.*, pass a drug test). *See also, e.g.*, *Cobb v. Ardagh Glass, Inc.*, 2018 WL 585540 (D.N.J. Jan. 26, 2018) (whether there was a failure to accommodate medical marijuana use was a merits-based decision not to be determined at the dismissal stage) and *Barrett v. Robert Half Corp.*, 2017 WL 4475980 (D.N.J. Feb. 21, 2017) (failure to accommodate claim was insufficiently pleaded because it merely alleged notifying employer of medical marijuana license without alleging whether, and what, requested accommodation for the disability was made).

[242] *Wild v. Carriage Funeral Holdings, Inc.*, 224 A.3d 1206 (N.J. 2020).

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- An employer providing identity protection services to an employee whose personal information may have been compromised due to a data security breach is not required to include the value of the identity protection services in the employee's gross income and wages.
- An individual whose personal information may have been compromised in a data breach is not required to include in their gross income the value of the identity protection services.
- The value of the provided identity theft protection services is not required to be reported on an information return (such as Form W-2 or Form 1099-MISC) filed with respect to affected employees.[243]

The tax relief provisions above do not apply to:

- cash provided in lieu of identity protection services;
- identity protection services provided for reasons other than as a result of a data breach, such as identity protection services received in connection with an employee's compensation benefit package; or
- proceeds received under an identity theft insurance policy.[244]

3.2(d)(ii) *State Data Security Breach Guidelines*

Under New Jersey law, any business that suffers a security breach—the unauthorized access to electronic files that compromises personal information—must notify those affected by the breach.[245]

Covered Entities & Information. Any business that conducts business in New Jersey that compiles or maintains computerized records that include personal information is covered by the data security breach statute.[246] Under the statute, *personal information* is defined as an individual's first name or first initial and last name in combination with any one or more of the following:

- Social Security number;
- driver's license number or state identification card number;
- any account number or credit or debit card number, in combination with any required security code, access code, or password that would permit access to a resident's financial account; or
- username, email address, or any other account holder identifying information, in combination with any password or security question and answer that would permit access to an online account.[247]

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[243] I.R.S. Announcement 2015-22, *Federal Tax Treatment of Identity Protection Services Provided to Data Breach Victims* (Aug. 14, 2015), *available at* https://www.irs.gov/pub/irs-drop/a-15-22.pdf.

[244] I.R.S. Announcement 2015-22, *Federal Tax Treatment of Identity Protection Services Provided to Data Breach Victims* (Aug. 14, 2015).

[245] N.J. STAT. ANN. § 56:8-163.

[246] N.J. STAT. ANN. § 56:8-163.

[247] N.J. STAT. ANN. § 56:8-161.

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New Jersey law allows exceptions for data that is encrypted, unreadable, or unusable and for information that is lawfully available publicly through federal, local, or state government records or widely distributed media.[248]

A covered entity is compliant with the New Jersey law if it maintains and complies with a notification procedure as part of its own information security policy for the treatment of personal information. The policy must afford the same or greater protection to the affected individuals as the statute.[249]

Content & Form of Notice. Notice may be in one of the following formats:

- written notice;
- electronic notice, if it is consistent with the federal e-sign act; or
- substitute notice, if
  - the covered entity demonstrates that—
    - the cost of providing notice would exceed $250,000;
    - the affected class of persons to be notified exceeds 500,000; or
    - the covered entity does not have sufficient contact information.[250]

Substitute notice must consist of all of the following:

- electronic mail notice, when the covered entity has an electronic mail address for members of the individuals;
- conspicuous posting of the notice on the website of the covered entity, if the covered entity maintains a website; and
- notification by statewide media.[251]

In the case of a breach of security involving a username or password, in combination with any password or security question and answer that would permit access to an online account, and no other personal information, the business may provide the notification in electronic or other form that directs the customer whose personal information has been breached to promptly change any password and security question or answer, as applicable, or to take other appropriate steps to protect the online account with the business or public entity and all other online accounts for which the customer uses the same username or email address and password or security question or answer. Any business or public entity that furnishes an email account shall not provide notification to the email account that is subject to a security breach. The business must provide notice by another method described in this section or by clear and conspicuous notice delivered to the customer online when the customer is connected to the online account from an Internet Protocol address or online location from which the business or public entity knows the customer customarily accesses the account.[252]

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[248] N.J. STAT. ANN. §§ 56:8-161, 56:8-163.

[249] N.J. STAT. ANN. § 56:8-163(e).

[250] N.J. STAT. ANN. § 56:8-163(d).

[251] N.J. STAT. ANN. § 56:8-163(d).

[252] N.J. STAT. ANN. § 56:8-163(g).

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Timing of Notice. Notice must be made in the most expedient time possible and without unreasonable delay. However, notification may be delayed if:

- a law enforcement agency determines that the notification will impede a criminal investigation;
- a covered entity needs time to determine the scope of the breach; or
- a covered entity needs time to restore the reasonable integrity of the data system.

Prior to notification, a covered entity must report the breach of security and any information pertaining to the breach to the Division of State Police in the Department of Law and Public Safety for investigation or handling, which may include dissemination or referral to other appropriate law enforcement entities.[253]

Additional Provisions. If more than 1,000 consumers will be notified of a security breach, then the covered entity must also notify all nationwide consumer reporting agencies of the timing distribution and content of the notices.[254]

3.3 Minimum Wage & Overtime

3.3(a) *Federal Guidelines on Minimum Wage & Overtime*

The primary source of federal wage and hour regulation is the Fair Labor Standards Act (FLSA). The FLSA establishes minimum wage, overtime, and child labor standards for covered employers. The FLSA applies to businesses that have: (1) annual gross revenue exceeding $500,000; and (2) employees engaged in commerce or in the production of goods for commerce, or employees that handle, sell, or otherwise work on goods or material that have been moved in or produced for commerce. For more information on this topic, see LITTLER ON FEDERAL WAGE & HOUR OBLIGATIONS.

As a general rule, federal wage and hour laws do not preempt state laws.[255] Thus, an employer must determine whether the FLSA or state law imposes a more stringent minimum wage, overtime, or child labor obligation and, if so, apply the more stringent of the two standards. If an employee is exempt from either federal or state law, but not both, then the employee must be paid for work in accordance with whichever law applies.

3.3(a)(i) *Federal Minimum Wage Obligations*

The current federal minimum wage is $7.25 per hour for most nonexempt employees.[256]

Tipped employees are paid differently. If an employee earns sufficient tips, an employer may take a maximum tip credit of up to $5.12 per hour. Therefore, the minimum cash wage that a tipped employee must be paid is $2.13 per hour. Note that if an employee does not make $5.12 in tips per hour, an employer must make up the difference between the wage actually made and the federal minimum wage

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[253] N.J. STAT. ANN. § 56:8-163(c).

[254] N.J. STAT. ANN. § 56:8-163(f).

[255] 29 U.S.C. § 218(a).

[256] 29 U.S.C. § 206.

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of $7.25 per hour. An employer bears the burden of proving that it is not taking a tip credit larger than the amount of tips actually received by the employee.[257]

An employer cannot keep tips received by employees for any purpose, including allowing managers or supervisors to keep a portion of employees' tips, regardless of whether the employer takes a tip credit.[258]

3.3(a)(ii) *Federal Overtime Obligations*

Nonexempt employees must be paid one-and-a-half times their regular rate of pay for all hours worked over 40 in a workweek.[259] For more information on exemptions to the federal minimum wage and/or overtime obligations, see **LITTLER ON FEDERAL WAGE & HOUR OBLIGATIONS**.

3.3(b) *State Guidelines on Minimum Wage Obligations*

3.3(b)(i) *State Minimum Wage*

State law requires payment of the federal or state minimum wage rate, whichever is greater.[260] There are different minimum wage rates. One rate is generally applicable. A separate rate applies to employees of a small employer[261] or seasonal employer.[262] There is a specific rate for employees paid on a piece-rate or hourly basis to labor on a farm.[263] Additionally,[264] the state created a separate rate for long-term care

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[257] 29 U.S.C. §§ 203, 206.

[258] 29 U.S.C. § 3(m)(2)(B).

[259] 29 U.S.C. § 207.

[260] N.J. STAT. ANN. § 34:11-56a4(5)(a), (c)-(d).

[261] An employer who employed less than six employees for every working day during each of a majority of the calendar workweeks in the current calendar year and less than six employees for every working day during not less than 48 calendar workweeks in the preceding calendar year. N.J. STAT. § 34:11-56a1(p).

[262] Seasonal employment is: (1) Employment during a year by an employer that is a seasonal employer; or (2) employment by a nonprofit of an individual who is not employed by that employer outside of the period of that year commencing on May 1 and ending September 30. It does not include employment of employees engaged to labor on a farm on either a piece-rate or regular hourly rate basis. Moreover, a seasonal employer is one: (1) who exclusively provides its services in a continuous period of not more than 10 weeks during the months of June, July, August, and September; or (2) for which, during the immediately previous calendar year, not less than 2/3 of the its gross receipts were received in a continuous period of not more than 16 weeks or for which not less than 75% of the wages paid by it during the immediately preceding year were paid for work performed during a single calendar quarter. N.J. STAT. § 34:11-56a1(n), (o).

[263] Not later than March 31, 2024, the Labor Commissioner and Secretary of Agriculture must review a report about the changes' impact and recommend: (1) approval of established increases; (2) disapproval of established increases; or (3) an alternative manner of changing the minimum wage after 2024. If the Commissioner and Secretary cannot agree on a recommendation, a Governor-appointed / Senate-consented-to individual will break the tie. The established increases take effect unless there is a recommendation to disapprove the increases or for an alternative manner of changing the minimum wage and the Legislature, not later than June 30, 2024, enacts a concurrent resolution approving the implementation of that recommendation. Beginning in 2024, the Commissioner, Secretary, and Public Member must meet biennially to make either a one- or two-year recommendation to the Legislature for implementation by way of concurrent resolution. N.J. STAT. § 34:11-56a4(5)(d).

[264] *See* N.J. STAT. § 34:11-56a4(4)(i). Long-term care facility direct care staff member means any health care professional licensed or certified (N.J. STAT. TIT. 26or45) who is employed by a long-term care facility and who provides personal care, assistance, or treatment services directly to residents of the facility in the course of the professional's regular duties. N.J. STAT. § 34:11-56a1(q).

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facility direct care staff, *i.e.*, these employees must receive a minimum wage rate that is $3.00 per hour more than the general minimum wage.

On each subsequent January 1, the minimum wage must be increased based on increases in the consumer price index (CPI). If the federal minimum wage exceeds the state minimum wage rate, the latter must be increased to the federal minimum wage rate and subsequent CPI-based increases must be applied to the higher minimum wage rate. However, the law also sets rates that will apply if they exceed the CPI-adjusted rate for the indicated year, including a rate that is generally applicable (see Table 9). Note, however, that the rates for 2024 are CPI-based rates because they exceed the statute's set rates. Additionally, separate annual rate adjustments will occur to the rate for employees of a small employer or seasonal employer in 2027 and the rate for employees paid on a piece-rate or hourly basis to labor on a farm in 2028 and 2029.[265]

Table 9. Scheduled Minimum Wage Increases

Date	Generally	Small Employer or Seasonal Employer	Piece Rate or Hourly on Farm	Long-Term Care Facility Direct Care Staff
January 1, 2024[266]	$15.13	$13.73	$12.81	$18.13
January 1, 2025	$15.49	$14.53 (Alternative Rate Higher than CPI-Adjusted Rate)	$13.40 (Alternative Rate Higher than CPI-Adjusted Rate)	$18.49
January 1, 2026	TBD	TBD or *2025 rate plus 70¢	TBD or 2025 rate plus 80¢	TBD
January 1, 2027	TBD	TBD plus one half of the difference between $15.00 and the 2026 general minimum wage	TBD or 2026 rate plus 80¢	TBD
January 1, 2028	TBD	TBD plus one half of the difference between $15.00 and the 2026 general minimum wage	TBD or 2027 rate plus 80¢	TBD

265 The increase will be based on the CPI increase, plus either half the difference (small or seasonal employers) or one-third the difference (farm labor) between $15.00 per hour and the general minimum wage in effect in 2026 or 2027, respectively. N.J. STAT. § 34:11-56a4(5)(c), (d)(2).

266 Although the "alternative" rate in the statute appeared to be $15, 13.50, and $12.50, respectively, the state labor department is interpreting the law so that, whenever the CPI-adjusted minimum wage overtakes the "alternative" rate in the statute, as it did in 2023, that higher rate becomes the baseline to use for "alternative" rate increases in future years.

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Table 9. Scheduled Minimum Wage Increases				
Date	Generally	Small Employer or Seasonal Employer	Piece Rate or Hourly on Farm	Long-Term Care Facility Direct Care Staff
January 1, 2029	TBD	TBD	TBD plus one-third of the difference between $15.00 and the 2027 general minimum wage	TBD
January 1, 2030	TBD	TBD	TBD plus one-third of the difference between $15.00 and the 2027 general minimum wage	TBD
January 1, 2031	TBD	TBD	TBD	TBD

3.3(b)(ii) *Tipped Employees*

Tipped employees are paid differently. If an employee engages in an occupation in which the individual customarily and regularly receives more than $30 a month in tips, an employer may apply a maximum tip credit toward payment of the minimum wage. State law establishes a $9.87 per hour maximum tip credit.[267] Ultimately, an employee's tips plus minimum cash wage paid by the employer must make up at least the minimum wage. If the hourly cash wage plus tips do not add up to the minimum wage, the employer must make up the difference.[268] Importantly, an employer cannot take a tip credit unless it has informed employees in advance of the following:

- the amount of the cash wage that is to be paid to the tipped employee by the employer;
- the amount of the tip credit, which will be claimed by the employer, which amount may not exceed the value of the tips actually received by the employee;
- that all tips received by the tipped employee must be retained by the employee, except for a valid tip pooling arrangement limited to employees who customarily and regularly receive tips; and

[267] As noted above, a separate minimum wage rates applies to employees who are engaged in seasonal employment. However, that rate is inapplicable to employees who customarily and regularly receive gratuities or tips; instead, the general rate applies. N.J. STAT. § 34:11-56a4(5)(c); *see also* New Jersey Assembly Appropriations Committee Statement to Assembly Committee Substitute for Assembly, No. 15 (Jan. 28, 2019) (Noting a separate rate applies to "employees of any employer with less than six employees, and for seasonal employees other than tipped employees . . . ."), *available at* https://www.njleg.state.nj.us/2018/Bills/A0500/15_S2.HTM.

[268] N.J. STAT. ANN. § 34:11-56a4; N.J. ADMIN. CODE §§ 12:56-2.1, -3.5, -8.4.

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- that the tip credit shall not apply to any employee who has not been informed of the requirements of the tip credit rule.[269]

Importantly, although a lower minimum wage rate applies for employees of small or seasonal employers, the state labor department contends that the general minimum wage rate applies to a covered tipped employee thereof. Note, however, that the legislative history suggests the general minimum wage rate only applies to tipped employees of seasonal employers.[270] Accordingly, small employers with tipped employees should consult knowledgeable employment counsel when determining the rate to pay tipped employees.

3.3(b)(iii) *Minimum Wage Exceptions & Rates Applicable to Specific Groups*

All of the following employees are exempt from the New Jersey minimum wage requirements:

- full-time students employed by the college or university at which they are enrolled at not less than 85% of the effective minimum wage rate;
- outside salespeople;
- individuals engaged in the sale of motor vehicles;
- part-time employees primarily engaged in the care and tending of children in the home of the employer;
- minors under 18 years of age except as provided otherwise by law or as permitted by the terms of the Wage Orders for Minors; and
- employees at summer camps, conferences, and retreats operated by nonprofit or religious corporations or associations during June, July, August, or September.[271]

In addition, individuals whose earning capacities are impaired by age, physical, or mental deficiency or injury may obtain a special license authorizing their employment, for a limited period of time, at a rate less than the minimum wage set by statute or by order.[272]

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[269] N.J. ADMIN. CODE § 12:56-3.5(q).

[270] *Compare* email response, David M. Bander, Executive Director, Policy Office, New Jersey Department of Labor and Workforce Development (July 3, 2019) ("if a small or seasonal employer takes a tip credit, then he must pay employees the 'full' MW, but if he doesn't then he can pay the lower rate.") *with* New Jersey Assembly Labor Committee, Statement to Assembly Committee Substitute for Assembly, No. 15 (Jan. 24, 2019), *available at* https://www.njleg.state.nj.us/Bills/2018/A0500/15_S1.HTM (lower minimum wage rate applies to "any employer with less than six employees, and for seasonal employees other than tipped employees"), New Jersey Assembly Appropriations Committee, Statement to Assembly Committee Substitute for Assembly, No. 15 (Jan. 28, 2019), *available at* https://www.njleg.state.nj.us/Bills/2018/A0500/15_S2.HTM (lower minimum wage rate applies to "any employer with less than six employees, and for seasonal employees other than tipped employees"), *and* Office of Legislative Services, Legislative Fiscal Estimate for Assembly Committee Substitute Assembly, No. 15 (Feb. 21, 2019), *available at* https://www.njleg.state.nj.us/Bills/2018/A0500/15_E1.HTM ("The bill provides different minimum wage schedules for employees of businesses with fewer than six employees, . . . seasonal employees other than tipped workers").

[271] N.J. ADMIN. CODE § 12:56-3.2.

[272] N.J. STAT. ANN. § 34:11-56A17; N.J. ADMIN. CODE §§ 12:56-9.1 to 12:56-9.5.

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3.3(c) *State Guidelines on Overtime Obligations*

Like the FLSA, New Jersey law requires payment of overtime to nonexempt employees for all hours worked in excess of 40 hours per workweek.[273] Overtime must be paid at a rate of not less than one and one-half times the employee's regular hourly wage.[274] The workweek need not coincide with the calendar week; it may begin on any day of the week, and at any hour of the day.[275] The workweek must be designated to employees in advance, and it remains fixed regardless of the employee's scheduled hours.[276] The beginning of the workweek may be changed, however, if the change is intended to be permanent and is not intended to evade the overtime requirements of the New Jersey Wage and Hour Law.[277]

The regular hourly wage is an employee's total remuneration for employment, excluding overtime pay, divided by the total number of hours in any workweek for which such compensation was paid.[278] Among other forms of compensation, an employee's regular rate does not include vacation or other paid time off, business expense reimbursements, and overtime premiums.[279]

3.3(d) *State Guidelines on Overtime Exemptions*

New Jersey's overtime regulations adopt by reference the FLSA regulations, which define the exemptions from overtime for executive, administrative, professional and outside sales employees.[280] Accordingly, employers should consult and rely on the pertinent federal regulations.

It is worth reiterating, however, that federal wage and hour laws do not preempt state laws[281] and that the law most beneficial to the employee will apply. Therefore, even if an employee meets one of the exemptions discussed below under state law, if the employee does not meet the requirements of the federal exemption, or vice versa, then the employee will not qualify as exempt.

3.3(d)(i) *Executive, Administrative, Professional, Computer Employee & Outside Sales Exemptions*

New Jersey incorporates federal regulations concerning the executive and professional exemption. It also generally incorporates federal regulations concerning the administrative exemption, although this exemption as applied to commissioned sales employees differs slightly, as discussed briefly below. Additionally, New Jersey incorporates federal regulations concerning the outside sales exemption.[282]

3.3(d)(ii) *Commissioned Sales Exemption*

New Jersey exempts individuals employed in a "*bona fide* administrative capacity" from its overtime provisions. Generally, the definition of "administrative employee" is determined according to federal law,

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[273] N.J. ADMIN. CODE § 12:56-6.4.

[274] N.J. ADMIN. CODE § 12:56-6.1.

[275] N.J. ADMIN. CODE § 12:56-5.4.

[276] N.J. ADMIN. CODE § 12:56-5.4.

[277] N.J. ADMIN. CODE § 12:56-5.4.

[278] N.J. ADMIN. CODE § 12:56-6.5.

[279] N.J. ADMIN. CODE § 12:56-6.6.

[280] N.J. ADMIN. CODE § 12:56-7.2.

[281] 29 U.S.C. § 218(a).

[282] N.J. STAT. ANN. § 34:11-56a4; N.J. ADMIN. CODE §§ 12:56-7.1, 12:56-7.2.

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however, the term *administrative* in New Jersey also includes "an employee whose primary duty consists of sales activity and who receives at least 50 percent of his or her total compensation from commissions and a total compensation of not less than $400 per week."[283]

3.4 Meal & Rest Period Requirements

3.4(a) *Federal Meal & Rest Period Guidelines*

3.4(a)(i) *Federal Meal & Rest Periods for Adults*

Federal law contains no generally applicable meal period requirements for adults. Under the FLSA, *bona fide* meal periods (which do not include coffee breaks or time for snacks and which ordinarily last 30 minutes or more) are not considered "hours worked" and can be unpaid.[284] Employees must be completely relieved from duty for the purpose of eating regular meals. Employees are *not* relieved if they are required to perform any duties—active or inactive—while eating. It is not necessary that employees be permitted to leave the premises if they are otherwise completely freed from duties during meal periods.

Federal law contains no generally applicable rest period requirements for adults. Under the FLSA, rest periods of short duration, running from five to 20 minutes, must be counted as "hours worked" and must be paid.[285]

3.4(a)(ii) *Federal Meal & Rest Periods for Minors*

The FLSA does not include any generally applicable meal and rest period requirements for minors. The principles described above as to what constitutes "hours worked" for meal and rest periods applies to minors as well as to adults.

3.4(a)(iii) *Lactation Accommodation Under Federal Law*

The Providing Urgent Maternal Protections for Nursing Mothers Act ("PUMP Act"), which expands the FLSA's lactation accommodation provisions, applies to most employers.[286] Under the FLSA, an employer must provide a reasonable break time for an employee to express breast milk for the employee's nursing child for one year after the child's birth, each time the employee needs to express milk. The employer is not required to compensate an employee receiving reasonable break time for any time spent during the workday for the purpose of expressing milk unless otherwise required by federal, state, or local law. Under the PUMP Act, break time for expressing milk is considered hours worked if the employee is not completely relieved from duty during the entirety of the break.[287] An employer must also provide a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.[288] Exemptions apply for smaller employers and air carriers.[289]

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[283] N.J. ADMIN. CODE § 12:56-7.1.

[284] 29 C.F.R. § 785.19.

[285] 29 C.F.R. § 785.18.

[286] 29 U.S.C. § 218d.

[287] 29 U.S.C. § 218d(b)(2).

[288] 29 U.S.C. § 218d(a).

[289] 29 U.S.C. § 218d(c), (d).

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The Pregnant Workers Fairness Act (PWFA), enacted in 2022, also impacts an employer's lactation accommodation obligations. The PWFA requires employers of 15 or more employees to make reasonable accommodations for a qualified employee's known limitations related to pregnancy, childbirth, or related medical conditions.[290] Lactation is considered a related medical condition.[291] Reasonable accommodation related to lactation includes, but is not limited to breaks, space for lactation, and accommodations related to pumping and nursing during work hours.[292] For more information on these topics, see **LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES**.

3.4(b) *State Meal & Rest Period Guidelines*

3.4(b)(i) *State Meal & Rest Periods for Adults*

There are no generally applicable meal and rest period requirements for adults in New Jersey. In the absence of state law, the labor department has acknowledged that "[employer] policy dictates . . . lunch periods for anyone over the age of 18."[293]

Relatedly, wage and hour regulations concerning "hours worked" do not require an employer to pay employees for time that employees are not required to be at their place of work because of lunch hours.[294]

3.4(b)(ii) *State Meal & Rest Periods for Minors*

Minors under age 18 are not permitted to work for more than six hours continuously without an interval of at least 30 minutes for a meal period. A meal period must be at least 30 minutes long to be a *bona fide* meal period.[295]

3.4(b)(iii) *State Enforcement, Remedies & Penalties*

A knowing violation of the meal and rest break requirements for minors is a crime of the fourth degree. Otherwise, a violation is a "disorderly persons offense," which is punishable by a fine between $100 and $2,000 for the first offense, or $200 and $4,000 for subsequent offenses. Each day a violation continues is a separate and distinct offense, and the employment of each minor in violation of the law is a separate and distinct offense.[296] As an alternative to, or in addition to, any other sanctions provided by law, the state labor department can assess an administrative penalty of up to $500 for the first offense, $1,000 for the second offense, and $2,500 for each subsequent offense.[297]

3.4(b)(iv) *Lactation Accommodation Under State Law*

An individual has a right to breast feed their child in public or any place where the individual is permitted to be.[298] In addition, the New Jersey Law Against Discrimination requires employers of one or more

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[290] 42 U.S.C. § 2000gg–1.

[291] 29 C.F.R. § 1636.3.

[292] 29 C.F.R. § 1636.3.

[293] New Jersey Dept of Labor & Workforce Dev., *Wage and Hour Compliance FAQs*, *available at* https://www.nj.gov/labor/wageandhour/support/faqs/wageandhourworkerfaqs.shtml.

[294] N.J. ADMIN. CODE § 12:56-5.2.

[295] N.J. STAT. ANN. §§ 34:2-21.4, 34:2-21.5.

[296] N.J. STAT. ANN. § 34:2-21.19.

[297] N.J. STAT. ANN. § 34:2-21.19.

[298] N.J. STAT. ANN. § 26:4B-4.

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employees to provide reasonable accommodation for an employee who is breastfeeding their infant child. *Reasonable accommodation* includes reasonable break time each day and a suitable room or other location with privacy, other than a toilet stall, in close proximity to the work area for the employee to express breast milk for the child, unless the employer can demonstrate that providing the accommodation would be an undue hardship on the employer's business operations.[299]

3.5 Working Hours & Compensable Activities

3.5(a) *Federal Guidelines on Working Hours & Compensable Activities*

In contrast to some state laws that provide for mandatory days of rest, the FLSA does not limit the hours or days an employee can work and requires only that an employee be compensated for "all hours" worked in a workweek. Ironically, the FLSA does not define what constitutes hours of work.[300] Therefore, courts and agency regulations have developed a body of law looking at whether an activity—such as on-call, training, or travel time—is or is not "work." In addition, the Portal-to-Portal Act of 1947 excluded certain preliminary and postliminary activities from "work time."[301]

As a general rule, employee work time is compensable if expended for the employer's benefit, if controlled by the employer, or if allowed by the employer. All time spent in an employee's principal duties and all time spent in essential ancillary activities must be counted as work time. An employee's *principal duties* include an employee's productive tasks. However, the phrase is expansive enough to encompass not only those tasks an employee is employed to perform, but also tasks that are an "integral and indispensable" part of the principal activities. For more information on this topic, including information on whether time spent traveling, changing clothes, undergoing security screenings, training, waiting or on-call time, and sleep time will constitute hours worked under the FLSA, see **LITTLER ON FEDERAL WAGE & HOUR OBLIGATIONS**.

3.5(b) *State Guidelines on Working Hours & Compensable Activities*

In New Jersey, all of the time an employee is required to be on duty or at their place of work must count as hours worked.[302] Employees are entitled to payment for all hours worked.[303] *Hours worked* is defined as "all the time the employee is required to be at their place of work or on duty."[304] In addition to these general principles, there are a number of issues considered when determining whether activities constitute work. This publication looks more closely at pay requirements for reporting time, on-call time, and travel time. New Jersey has specific guidance on the compensability of all three.

Reporting Time. Under New Jersey law, an employee who reports for duty on any day at the employer's request must be paid for at least one hour at the employee's regular rate. This requirement does not apply

[299] N.J. STAT. ANN. § 10:5-12(s).

[300] The FLSA states only that to employ someone is to "suffer or permit" the individual to work. 29U.S.C. § 203(g).

[301] *See, e.g.*, *Integrity Staffing Solutions, Inc. v. Busk*, 135 S. Ct. 513, 519 (2014) (in determining whether certain preliminary and postliminary activities are compensable work hours, the question is not whether an employer requires an activity (or whether the activity benefits the employer), but rather whether the activity "is tied to the productive work that the employee is employed to perform").

[302] N.J. ADMIN. CODE § 12:56-5.2.

[303] N.J. ADMIN. CODE § 12:56-5.1.

[304] N.J. ADMIN. CODE § 12:56-5.2.

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to an employer that made available the minimum number of hours agreed upon between the employer and employee before the work began on the day involved.[305]

On-Call Time. In the health care industry, on-call time typically refers to "time spent by an employee who is not currently working on the premises of the place of employment, but . . . as a condition of employment has agreed to be available, to return to the [employer's premises] on short notice if the need arises."[306] More broadly, hours worked by any employee include the time in which the employee is engaged to wait, for example, where "calls are so frequent or the on-call conditions so restrictive that employees are not really free to use the intervening periods effectively for their own benefit."[307]

However, employees are not entitled to payment for time away from the employer's premises that is spent engaged in their own pursuits, subject only to the understanding that they leave word at their homes or with their employer where they may be reached.[308] If employees who are on call are not required to remain on the employer's premises, are free to engage in their own activities, and only need to leave word at their home or with the employer where they may be reached, such on-call time is not compensable.

When an employer requires employees to remain on-call at their homes to receive telephone calls from customers when the company office is closed, and the employees have long periods of uninterrupted free time during which they can engage in the normal activities of living, the employer and employees may enter into a reasonable agreement for determining the number of compensable hours worked during the on-call time. This agreement must "take into account not only the actual time spent in answering the calls but also some allowance must be made for the restriction on the employee[s'] freedom to engage in personal activities resulting from the duty of answering the telephone."[309]

Travel Time. New Jersey does not have a general provision addressing travel time. However, by statute, travel time spent in a ridesharing arrangement between home and work is not compensable unless the employer requires the employee to participate in the ridesharing arrangement as a condition of employment. Special rules apply to minors.[310]

3.5(b)(i) *Predictive Scheduling in the New Jersey Temporary Workers' Bill of Rights*

The Temporary Workers' Bill of Rights establishes numerous labor and employment protections for New Jersey's temporary workers. The provisions related to predictive scheduling are discussed here. Under the law, temporary help service firms, (commonly referred to as staffing firms or temp agencies), must provide certain information to their workers. A temporary help service firm is defined as an entity that employs individuals directly or indirectly for the purpose of assigning them to assist the firm's customers in handling the customers' temporary, excess, or special workloads. Such a firm also pays wages or salaries to workers, carries workers' compensation insurance, and pays federal social security and state and

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[305] N.J. ADMIN. CODE § 12:56-5.5.

[306] N.J. STAT. ANN. § 34:11-56a32 (defining *on-call time* for health care employees); *see* N.J. ADMIN. CODE §§ 12:56-5.6, 12:56-5.7.

[307] N.J. ADMIN. CODE § 12:56-5.6 (comparing time spent "engaged to wait" as opposed to time spent "waiting to be engaged").

[308] N.J. ADMIN. CODE § 12:56-5.6.

[309] N.J. ADMIN. CODE § 12:56-5.7.

[310] N.J. STAT. ANN. § 27:26-5; N.J. ADMIN. CODE §§ 12:56-5.1 to 12:56-5.8.

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federal unemployment insurance taxes. The temporary laborers covered under the law are defined as individuals that contract for employment with a temporary help service firm in a designated classification placement.

The designated classification placements covered under the law are the following occupational categories as defined by the U.S. Department of Labor, Bureau of Labor Statistics (BLS):

- Other Protective Service Workers (Miscellaneous Manufacturers) (33-90000);
- Food Preparation and Serving Related Occupations (35-0000);
- Building and Grounds Cleaning and Maintenance Occupations (37-0000);
- Personal Care and Service Occupations (39-0000);
- Construction Laborers (47-2060);
- Helpers, Construction Trades (47-30000);
- Installation, Maintenance, and Repair Occupations (49-0000);
- Production Occupations (51-0000);
- Transportation and Material Moving Occupations (53-0000); or
- Any successor categories as the BLS may designate.

When a temporary help service firm places a person as a temporary laborer in a designated classification placement, the firm must provide the worker at the time of dispatch, a written statement of the schedule, if it is a multi-day assignment, and the length of the assignment, if known, among other things. Notice must be provided in English and in the language the employee identified as their primary language. It can be provided via telephone, text, email, or other electronic means.

If there is a change in the schedule, shift, or location of an assignment for a multi-day assignment of a temporary laborer in a designated classification placement, the temporary help service firm must provide notice of the change not less than 48 hours in advance to the temporary laborer, when possible, in a manner appropriate to whether the assignment is accepted at the temporary help service firm's office, or remotely by telephone, text, email, or other electronic exchange. The temporary help service firm bears the burden of showing that it was not possible to provide the required notice.

If a temporary laborer in a designated classification placement is assigned to the same assignment for more than one day, the temporary help service firm must provide the employment notice only on the first day of the assignment and on any day that any of the terms listed on the employment notice are changed.[311]

3.6 Child Labor

3.6(a) *Federal Guidelines on Child Labor*

The FLSA limits the tasks minors, defined as persons under 18 years of age, can perform and the hours they can work. Occupational limits placed on minors vary depending on the age of the minor and whether the work is in an agricultural or nonagricultural occupation. There are exceptions to the list of prohibited

[311] N.J. STAT. ANN. § 34:8D-3.

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activities for apprentices and student-learners, or if an individual is enrolled in and employed pursuant to approved school-supervised and school-administered work experience and career exploration programs.[312] Additional latitude is also granted where minors are employed by their parents.

Considerable penalties can be imposed for violation of the child labor requirements, and goods made in violation of the child labor provisions may be seized without compensation to the employer. Employers may protect themselves from unintentional violations of child labor provisions by maintaining an employment or age certificate indicating an acceptable age for the occupation and hours worked.[313] For more information on the FLSA's child labor restrictions, see LITTLER ON FEDERAL WAGE & HOUR OBLIGATIONS.

3.6(b) *State Guidelines on Child Labor*

The New Jersey Child Labor Act limits and regulates the performance of work by minors in New Jersey.[314] It delineates, in great detail, at what ages and under what conditions individuals under 18 years of age may be employed, and proscribes the performance of certain work by minors.[315]

3.6(b)(i) *State Restrictions on Type of Employment for Minors*

General Restrictions. The prohibitions on certain types of employment for minors, broken down by age limitations, are described in Table 10.

Table 10. State Restrictions on Type of Employment by Age

Age Range	Restrictions
Under Age 18	*In New Jersey, minors under age 18 cannot perform the following work or occupations:* • manufacturing and packing of paints, colors, white or red lead; • handling dangerous or poisonous acids or dyes; • work involving injurious quantities of dust, gases, vapors, or fumes; • work involving exposure to benzol or benzol compound, which is volatile or could penetrate the skin; • manufacturing and transportation of explosives and highly flammable substances; • oiling, wiping, or cleaning machinery in motion or assisting thereon; • power-driven machinery; • using grinding, abrasive, polishing, or buffing machines, cutting machines, corrugating, crimping, or embossing machines, certain baking machines, or paper lace machines; • calendar or mixing rolls; • centrifugal extractors, or mangles in laundries or dry cleaning establishments; • ore reduction, smelters, hot rolling mills, furnaces, foundries, forging shops, or other places where heating, melting, or heat treatment of metals occurs; • mines or quarries;

[312] 29 C.F.R. §§ 570.36, 570.50.

[313] 29 C.F.R. § 570.6.

[314] N.J. STAT. ANN. §§ 34:2-21.1 *et seq*.

[315] N.J. STAT. ANN. § 34:2-21.3.

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Table 10. State Restrictions on Type of Employment by Age	
Age Range	**Restrictions**
	• steam boilers; • construction; • fabrication or assembly of ships; • operation or repair of elevators or hoisting apparatus; • transportation of payrolls (other than within employer's premises); • establishments where alcoholics beverages are distilled, rectified, compounded, brewed, manufactured, bottled, or are sold for consumption on premises; • pool or billiard rooms (though this restriction does *not* apply to certain minors age 16 or older); or • work that is hazardous to their life, health, safety, or welfare. *Additionally, minors under age 18 cannot:* • perform construction work; • operate certain agricultural machinery; • work at junk or scrap yards; • work at establishments where they will be exposed to carcinogenic substances; • operate certain compactors or scrap paper balers; • use circular and band saws, or guillotine shears; • be employed as applicators of pesticides; • be employed where pesticides are being applied; • service single or multi-piece rim wheels; • work at houses of prostitution, brothels, or gambling places; • work in slaughtering and meat packing establishments, rendering plants, or wholesale, retail, or service establishments in occupations involved in the operation or feeding of certain power-driven meat-processing machines; • work in any boning operations; • work in indecent or immoral theatrical exhibitions or establishments where the acts of indecent or immoral theatrical exhibitions are performed or shown on screens; • perform in the nude or as a go-go dancer; • pose in the nude or without generally accepted attire; • work in adult book stores or massage parlors; or • serve beverages out of any bar service area, which includes outside bars at pools or other recreational facilities.[316] *However, the above restrictions do not apply to:* • minors who are pupils in public or private schools under the supervision and instruction of officers or teachers; • minors age 17 who are enrolled in special vocational programs;

[316] N.J. STAT. ANN. § 34:2-21.17; N.J. ADMIN. CODE §§ 12:58-4.2 to 12:58-4.17.

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Table 10. State Restrictions on Type of Employment by Age	
Age Range	**Restrictions**
	• minors age 14 years who are involved in Junior Firefighters' Auxiliary; • minors age 15 years employed in supermarkets or retail establishments as cashiers or baggers working register conveyor belts;[317] or • minors who participate or work in any junior achievement program (that is, a program where minors under age 18 engage in business enterprises or activities pursuant to an economics education program conducted under the guidance of adult sponsors from private business and industry).[318]
Under Age 16	*In New Jersey, in addition to the above restrictions, specific restrictions apply to minors under age16. Such minors cannot:* • operate, service, or work in, about, or in connection with power-driven machinery (including power tools, but not including standard office or domestic type machines or appliances when used in domestic or business establishments); or • work on or about conveyors and related equipment.[319]
Age 15 & Older	In New Jersey, minors age 15 or older *may* work as cashiers or baggers on or near a supermarket or retail establishment cash register conveyor belt.[320]
Under Age 14	Minors under 14 cannot work in any *street trade*, which includes selling, offering for sale, soliciting for, collecting for, displaying, or distributing any articles, goods, merchandise, commercial service, posters, circulars, newspapers or magazines or in blacking shoes on any street or other public place or from house to house.[321]
Under Age 12	Minors under age 12 cannot work in any agricultural pursuit.[322]

Restrictions on Selling or Serving Alcohol. In New Jersey, minors under age 18 cannot work at establishments where alcoholic liquors are distilled, rectified, compounded, brewed, manufactured, bottled, or are sold for on-premises consumption, or in a pool or billiard room.[323] However, the restriction does not apply to minors age 16 or older employed as pinsetters, lane attendants, or busboys in public bowling alleys, or to minors employed in theatrical productions where alcohol is sold. Additionally, the restriction does not prevent minors age 16 or older being employed in restaurants (including dining establishments, catering establishments, industrial caterers, and drive-in restaurants), in public bowling alleys, or in the pool or beach areas of a hotel, motel, or guest-house, if they do not prepare, sell, or serve alcohol. A minor must be closely supervised when clearing alcoholic beverages.

[317] N.J. STAT. ANN. § 34:2-21.3.

[318] N.J. STAT. ANN. § 34:2-21.17a.

[319] N.J. STAT. ANN. §§ 34:2-21.2, 34:2-21.7; N.J. ADMIN. CODE §§ 12:58-3.2, 12:58-3.3.

[320] N.J. STAT. ANN. § 34:2-21.17.

[321] N.J. STAT. ANN. § 34:2-21.15.

[322] N.J. STAT. ANN. § 34:2-21.15.

[323] N.J. STAT. ANN. §§ 34:2-21.17, 34:2-21.17a.

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3.6(b)(ii) *State Limits on Hours of Work for Minors*

In New Jersey, minors age 16 to 18 cannot work:

- more than eight hours per day;
- more than 40 hours per week when school is in session;
- more than 50 hours a week and up to 10 hours in one day during their school's summer break through Labor Day;
- six consecutive days in a week;
- between 11:00 P.M. and 6:00 A.M.;
  - *Exception*: Minors can be employed after 11:00 P.M. during school vacations or on days not preceding a school day;
- between 3:00 A.M. and 6:00 A.M. on a day preceding a school day; or
- after 10:00 P.M. at a factory during school vacation.

Special rules also apply to minors age 16 and 17 employed in seasonal amusement, restaurant occupations, concert or theatrical performances, and summer camps. Special rules also apply to minors 16-18 working in industrial home work. [324]

In New Jersey, minors under age 16 cannot work:

- more than three hours per day during nonschool hours when school is in session;
- more than eight hours per day on a nonschool day during a school week;
- more than six consecutive days in one week;
- more than 40 hours in a week during their school's summer break through Labor Day;
- more than 18 hours a week when school is in session;
- between 7:00 P.M. and 7:00 A.M., except during summer; or
  - *Exception*: Minors can work until 9:00 P.M. during summer (last day of school through Labor Day);
- more than the maximum number of hours permitted per week under the FLSA.[325]

Special rules apply to minors age 14 and 15 employed as little league umpires or working at a bowling alleys.[326]

3.6(b)(iii) *State Child Labor Exceptions*

New Jersey's child labor laws do not apply to minors engaged in domestic service or agricultural pursuits performed outside of school hours or during school vacations in connection with the minor's own home and directly for their parents or legal guardians. Minors may also engage in employment in domestic

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[324] N.J. STAT. ANN. § 34:2-21.3, as amended by A.B. 4222 (N.J. 2022).

[325] N.J. STAT. ANN. § 34:2-21.3, as amended by A.B. 4222 (N.J. 2022).

[326] N.J. STAT. ANN. § 34:2-21.3, as amended by A.B. 4222 (N.J. 2022).

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service performed outside of school hours or during school vacations in a residence other than the minor's own home.[327]

Minors under 16 years of age are also permitted to:

- engage in professional employment in stage, motion picture, and television productions upon obtaining a permit; and
- work outside of school hours and during school vacations in agricultural pursuits, in street trades, and in newspaper delivery.[328]

As noted in **3.6(b)(i)**, Table 9 summarizes additional exceptions to the specific restrictions on types of employment for minors.

3.6(b)(iv) *State Work Permit or Waiver Requirements*

Employment certificates are no longer needed for minors under the age of 18 in New Jersey. The state Department of Labor and Workforce Development will create a database that serves as an employer and employee registry. Employers that hire minors under age 18 must register and provide certain information to the Department about their business and the minors they employ. Employers must keep their information up to date, including the positions that any minor holds. Minors must also register and submit documents and information about their eligibility to work. The Department will then send confirmation to the minor's employer that the minor is authorized to work. This process requires approval by the minor's caregiver.[329]

3.6(b)(v) *State Enforcement, Penalties & Remedies*

An employer that violates the New Jersey Child Labor Act is guilty of an offense. If an employer acts knowingly, an offense is a crime of the fourth degree. Otherwise, a violation is considered a "disorderly persons offense;" the employer will be punished by a fine of not less than $100 or more than $2,000 for an initial violation and not less than $200 or more than $4,000 for each subsequent violation. Each day during which the employer is in violation constitutes a separate and distinct offense. Moreover, the employment of any minor in violation of the statute, with respect to each minor so employed, constitutes a separate and distinct offense.[330]

3.7 Wage Payment Issues

3.7(a) *Federal Guidelines on Wage Payment*

There is no federal wage payment law. The FLSA covers minimum wage and overtime requirements, but would not generally be considered a "wage payment" law as the term is used in state law to define when and how wages must be paid.

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327 N.J. STAT. ANN. § 34:2-21.2, as amended by A.B. 4222 (N.J. 2022).

328 N.J. STAT. ANN. § 34:2-21.2.

329 N.J. STAT. ANN. § 34:2-21.1a(f).

330 N.J. STAT. ANN. § 34:2-21.19.

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3.7(a)(i) *Form of Payment Under Federal Law*

Authorized Instruments. Wages may be paid by cash, check, or facilities (*e.g.*, board or lodging).[331]

Direct Deposit. Neither the FLSA, nor its implementing regulations, address direct deposit of employee wages. The U.S. Department of Labor (DOL) has briefly considered the permissibility of direct deposit by stating:

> The payment of wages through direct deposit into an employee's bank account is an acceptable method of payment, provided employees have the option of receiving payment by cash or check directly from the employer. As an alternative, the employer may make arrangements for employees to cash a check drawn against the employer's payroll deposit account, if it is at a place convenient to their employment and without charge to them.[332]

According to the Consumer Financial Protection Bureau (CFPB), an employer may require direct deposit of wages by electronic means if the employee is allowed to choose the institution that will receive the direct deposit. Alternatively, an employer may give employees the choice of having their wages deposited at a particular institution (designated by the employer) or receiving their wages by another means, such as by check or cash.[333]

Payroll Debit Card. Employers may pay employees using payroll card accounts, so long as employees have the choice of receiving their wages by at least one other means.[334] The "prepaid rule" regulation defines a *payroll card account* as an account that is directly or indirectly established through an employer and to which electronic fund transfers of the consumer's wages, salary, or other employee compensation such as commissions are made on a recurring basis, whether the account is operated or managed by the employer, a third-party payroll processor, a depository institution, or any other person.[335]

Employers that use payroll card accounts must comply with several requirements set forth in the prepaid rule. Employers must give employees certain disclosures before the employees choose to be paid via a payroll card account, including a short-form disclosure, a long-form disclosure, and other information that must be disclosed in close proximity to the short-form disclosure. Employees must receive the short-form disclosure and either receive or have access to the long-form disclosure before the account is activated. All disclosures must be provided in writing. Importantly, within the short-form disclosure, employers must inform employees in writing and before the card is activated that they need not receive wages by payroll card. This disclosure must be very specific. It must provide a clear fee disclosure and include the following statement or an equivalent: "You do not have to accept this payroll card. Ask your employer about other ways to receive your wages." Alternatively, a financial institution or employer may provide a statement

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[331] U.S. Dept of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c, *available at* https://www.dol.gov/whd/FOH/FOH_Ch30.pdf; *see also* 29 C.F.R. § 531.32 (description of "other facilities").

[332] U.S. Dept of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c00.

[333] Consumer Fin. Prot. Bureau, *CFPB Bulletin 2013-10: Payroll Card Accounts (Regulation E)* (Sept. 12, 2013), *available at* http://files.consumerfinance.gov/f/201309_cfpb_payroll-card-bulletin.pdf.

[334] 12 C.F.R. § 1005.18; *see also* Consumer Fin. Prot. Bureau, *CFPB Bulletin 2013-10: Payroll Card Accounts (Regulation E)* (Sept. 12, 2013) *and* Consumer Fin. Prot. Bureau, *Ask CFPB: Prepaid Cards, If my employer offers me a payroll card, do I have to accept it?* (Sept. 4, 2020), *available at* https://www.consumerfinance.gov/ask-cfpb/if-my-employer-offers-me-a-payroll-card-do-i-have-to-accept-it-en-407/.

[335] 12 C.F.R. § 1005.2(b)(3)(i)(A).

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that the consumer has several options to receive wages or salary, followed by a list of the options available to the consumer, and directing the consumer to tell the employer which option the customer chooses using the following language or similar: "You have several options to receive your wages: [list of options]; or this payroll card. Tell your employer which option you choose." This statement must be located above the information about fees. A short-form disclosure covering a payroll card account also must contain a statement regarding state-required information or other fee discounts or waivers.[336] As part of the disclosures, employees must: (1) receive a statement of pay card fees; (2) have ready access to a statement of all fees and related information; and (3) receive periodic statements of recent account activity or free and easy access to this information online. Under the prepaid rule, employees have limited responsibility for unauthorized charges or other unauthorized access, provided they have registered their payroll card accounts.[337]

The CFPB provides numerous online resources regarding prepaid cards, including Frequently Asked Questions. Employers that use or plan to use payroll card accounts should consult these resources, in addition to the prepaid card regulation, and seek knowledgeable counsel.[338]

3.7(a)(ii) *Frequency of Payment Under Federal Law*

Federal law does not specify the timing of wage payment and does not prohibit payment on a semi-monthly or monthly basis. However, all wages that are required by the FLSA are generally considered to be due on the payday for the pay period in which the wages were earned. FLSA regulations state that if an employer cannot calculate how much it owes an employee in overtime by payday, it must pay that employee overtime as soon as possible and no later than the next payday.[339]

3.7(a)(iii) *Final Payment Under Federal Law*

Federal law does not address when final wages must be paid to discharged employees or to employees who voluntarily quit. However, as noted in 3.7(a)(ii), wages that are required by the FLSA are generally considered to be due on the payday for the pay period in which the wages were earned.

3.7(a)(iv) *Notification of Wage Payments & Wage Records Under Federal Law*

Federal law does not generally require employers to provide employees wage statements when wages are paid. However, federal law does require employers to furnish pay stubs to certain unique classifications of employees, including migrant farm workers.

Federal law does not address whether electronic delivery of earnings statements is permissible.

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[336] 12 C.F.R. § 1005.18; *see also* Consumer Fin. Prot. Bureau, *Guide to the Short Form Disclosure* (Mar. 2018), *available at* https://files.consumerfinance.gov/f/documents/cfpb_prepaid_guide-to-short-form-disclosure.pdf; *Prepaid Disclosures* (Apr. 1, 2019), *available at* https://files.consumerfinance.gov/f/documents/102016_cfpb_PrepaidDisclosures.pdf.

[337] 12 C.F.R. § 1005.18.

[338] *See* Consumer Fin. Prot. Bureau, *Prepaid Cards*, *available at* https://www.consumerfinance.gov/ask-cfpb/category-prepaid-cards/ *and Prepaid Rule Small Entity Compliance Guide* (Apr.. 2019), *available at* https://files.consumerfinance.gov/f/documents/cfpb_prepaid_small-entity-compliance-guide.pdf.

[339] 29 C.F.R. § 778.106; *see also* U.S. Dept of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30b04, *available at* https://www.dol.gov/whd/FOH/FOH_Ch30.pdf.

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3.7(a)(v) *Changing Regular Paydays or Pay Rate Under Federal Law*

There are no general notice requirements under federal law should an employer wish to change an employee's payday or wage rate. However, it is recommended that employees receive advance written notice before a change in regular paydays or pay rate occurs.

3.7(a)(vi) *Paying for Expenses Under Federal Law*

The FLSA does not have a general expense reimbursement obligation. Nonetheless, it prohibits employers from circumventing minimum wage and overtime laws by passing onto employees the cost of items that are primarily for the benefit or convenience of the employer, if doing so reduces an employee's wages below the highest applicable minimum wage rate or cuts into overtime premium pay.[340] Because the FLSA requires an employer to pay minimum wage and overtime premiums "free and clear," the employer must reimburse employees for expenses that are primarily for the benefit of the employer if those expenses would reduce the applicable required minimum wage or overtime compensation.[341] Accordingly, among other items, an employer may be required to reimburse an employee for expenses related to work uniforms,[342] tools and equipment,[343] and business transportation and travel.[344] Additionally, if an employee is reimbursed for expenses normally incurred by an employee that primarily benefit the employer, the reimbursement cannot be included in the employee's regular rate.[345]

3.7(a)(vii) *Wage Deductions Under Federal Law*

Permissible Deductions. Under the FLSA, an employer can deduct:

- state and federal taxes, levies, and assessments (*e.g.*, income, Social Security, unemployment) from wages;[346]
- amounts ordered by a court to pay an employee's creditor, trustee, or other third party, under garnishment, wage attachment, trustee process, or bankruptcy proceedings (the employer or anyone acting on its behalf cannot profit from the transaction);[347]
- amounts as directed by an employee's voluntary assignment or order to pay an employee's creditor, done, or other third party (the employer or agent cannot directly or indirectly profit or benefit from the transaction);[348]

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[340] *See* 29 U.S.C. §§ 203(m), 206; 29 C.F.R. §§ 531.2, 531.32(a), and 531.36(a); U.S. Dept of Labor, Wage & Hour Div., *Fact Sheet #16: Deductions From Wages for Uniforms and Other Facilities Under the Fair Labor Standards Act (FLSA)* (rev. July 2009).

[341] 29 C.F.R. §§ 531.35, 531.36, and 531.37.

[342] 29 U.S.C. § 203(m); 29 C.F.R. §§ 531.3, 531.32; U.S. Dept of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c12.

[343] 29 U.S.C. § 203(m); 29 C.F.R. §§ 531.3, 531.35; U.S. Dept of Labor, Wage & Hour Div., Op. Ltr. FLSA 2001-7 (Feb. 16, 2001).

[344] 29 C.F.R. § 531.32; U.S. Dept of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c04.

[345] 29 C.F.R. § 778.217.

[346] 29 C.F.R. § 531.38.

[347] 29 C.F.R. § 531.39. The amount subject to withholding is governed by the federal Consumer Credit Protection Act. 15 U.S.C. §§ 1671 *et seq*.

[348] 29 C.F.R. § 531.40.

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- with an employee's authorization for:
  - the purchase of U.S. savings stamps or U.S. savings bonds;
  - union dues paid pursuant to a valid and lawful collective bargaining agreement;
  - payments to the employee's store accounts with merchants wholly independent of the employer;
  - insurance premiums, if paid to independent insurance companies where the employer is under no obligation to supply the insurance and derives, directly or indirectly, no benefit or profit from it; or
  - voluntary contributions to churches and charitable, fraternal, athletic, and social organizations, or societies from which the employer receives no profit or benefit, directly or indirectly;[349]
- the reasonable cost of providing employees board, lodging, or other facilities by including this cost as wages, if the employer customarily furnishes these facilities to employees;[350] or
- amounts for premiums the employer paid while maintaining benefits coverage for an employee during a leave of absence under the Family and Medical Leave Act if the employee fails to return from leave after leave is exhausted or expires, if the deductions do not otherwise violate applicable federal or state wage payment or other laws.[351]

Additionally, while the FLSA contains no express provisions concerning deductions relating to overpayments made to an employee, loans and advances, or negative vacation balance, informal guidance from the DOL suggests such deductions may nonetheless be permissible. While this informal guidance may be interpreted to permit a deduction for loans to employees, employers should consult with counsel before deducting from an employee's wages. An employer can deduct the principal of a loan or wage advance, even if the deduction cuts into the minimum wage or overtime owed. However, deductions for interest or administrative costs on the loan or advance are illegal to the extent that they cut into the minimum wage or overtime pay. Loans or advances must be verified.[352]

An employer may also be able to deduct for wage overpayments even if the deduction cuts into the employee's FLSA minimum wage or overtime pay. The deduction can be made in the next pay period or several pay periods later. An employer cannot, however, charge an administrative fee or charge interest that brings the payment below the minimum wage.[353] Finally, if an employee is granted vacation pay before it accrues, with the understanding it constitutes an advance of pay, and the employee quits or is

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[349] 29 C.F.R. § 531.40.

[350] 29 U.S.C. § 203. However, the cost cannot be treated as wages if prohibited under a collective bargaining agreement.

[351] 29 C.F.R. § 825.213.

[352] U.S. Dept of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c10, *available at* https://www.dol.gov/whd/FOH/FOH_Ch30.pdf.

[353] U.S. Dept of Labor, Wage & Hour Div., Op. Ltr. FLSA2004-19NA (Oct. 8, 2004); *see also* U.S. Dept of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c10.

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fired before the vacation is accrued, an employer can recoup the advanced vacation pay, even if this cuts into the minimum wage or overtime owed an employee.[354]

Deductions During Non-Overtime v. Overtime Workweeks. Whether an employee receives overtime during a given workweek affects an employer's ability to take deductions from the employee's wages. During non-overtime workweeks, an employer may make qualifying deductions (*i.e.*, the cost is reasonable and there is no employer profit) for "board, lodging, or other facilities" even if the deductions would reduce an employee's pay below the federal minimum wage. Deductions for articles that do not qualify as "board, lodging, or other facilities" (*e.g.*, tools, equipment, cash register shortages) can be made in non-overtime workweeks if, after the deduction, the employee is paid at least the federal minimum wage.[355]

During overtime workweeks, deductions can be made on the same basis in overtime weeks as in non-overtime weeks if the amount deducted does not exceed the amount which could be deducted if the employee had not worked overtime during the workweek. Deductions that exceed this amount for articles that are not "facilities" are prohibited. There is no limit on the amount that can be deducted for qualifying deductions for "board, lodging, or other facilities." However, deductions made only in overtime weeks, or increases in prices charged for articles or services during overtime workweeks will be scrutinized to determine whether they are manipulations to evade FLSA overtime requirements.[356]

Prohibited Deductions. The FLSA prohibits an employer from making deductions for administrative or bookkeeping expenses incurred by an employer to the extent they cut into the minimum wage and overtime owed an employee.[357]

3.7(b) *State Guidelines on Wage Payment*

3.7(b)(i) *Form of Payment Under State Law*

Authorized Instruments. Wages must be paid in U.S. currency or with checks on banks where suitable arrangements are made for employees to cash checks without difficulty and for the full amount for which they are drawn. With an employee's consent, employees may also be paid by direct deposit or payroll debit card within the parameters discussed below. An employer is also responsible for paying any fee associated with the cashing of a payroll check by the employee.[358]

Wages means "the direct monetary compensation for labor or services rendered by an employee, where the amount is determined on a time, task, piece, or commission basis."[359] The term does not include "any form of supplementary incentives and bonuses which are calculated independently of regular wages and paid in addition thereto."[360]

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[354] U.S. Dept of Labor, Wage & Hour Div., Op. Ltr. FLSA2004-17NA (Oct. 6, 2004); *see also* U.S. Dept of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c10.

[355] 29 C.F.R. § 531.36.

[356] 29 C.F.R. § 531.37.

[357] U.S. Dept of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c10.

[358] N.J. STAT. ANN. § 34:11-4.2; N.J. ADMIN. CODE § 12:55-2.4.

[359] N.J. ADMIN. CODE § 12:55-1.2.

[360] N.J. ADMIN. CODE § 12:55-1.2; *see also* N.J. STAT. ANN. § 34:11-4.1.

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Direct Deposit. Mandatory direct deposit is not permitted in New Jersey. An employer can pay wages by direct deposit into an employee's account at a state or federally chartered financial institution authorized to accept deposits in New Jersey only if all the following conditions are met:

- the employee must first consent in writing to the direct deposit of wages;
  - such consent must be obtained without intimidation, coercion, or fear of discharge or reprisal for refusing direct deposit; and
  - consent cannot not be a condition of hire or continued employment;
- the employee's wages must be subject to withdrawal and other disposition by the employee to the same extent and in the same manner as if such deposit had been made by cash or check;
- the employee must be furnished a wage statement for each pay period; and
- the employee must, on timely notice to the employer, be permitted to elect not to have wages direct deposited and to be paid wages by cash, check, or pay card.

An employer is responsible for payment of check-deposit-return fees. If paid by direct deposit and a check-deposit-return fee is issued, an employer must reimburse the employee as soon as possible, but no later than the next regularly scheduled payday. Reimbursement must be for the full amount of the check-deposit-return fee and must not be paid to the employee as wages.

Additionally, the state labor department has informally advised that it is not required that revocation requests be in writing, but an employee must make the request in advance of the next payroll period.[361]

Payroll Debit Card. An employer may pay wages by deposit to a payroll debit card account only if all the following conditions are met:

- the employee must first consent in writing to deposit to a payroll debit card account;
  - consent must be obtained by the employer without intimidation, coercion, or fear of discharge or reprisal for refusing a payroll debit card account deposit arrangement;
  - consent cannot be a condition of hire or continued employment;
- the employee's wages must be subject to withdrawal and other disposition by the employee to the same extent and in the same manner as if such deposit had been made directly by the employee via cash or check into a personal account at a financial institution;
- on at least one occasion per pay period, the employee must be permitted, using the payroll debit card, to withdraw wages in full, in lawful money of the United States, without any fee to the employee and without difficulty;
- the employee must be furnished with a wage statement each pay period;
- prior to obtaining consent from the employee, an employer must disclose in writing to the employee each of the features of the payroll debit card (for example, withdrawal at any ATM or point-of-sale use), including any fee(s), which may be charged to the card holder for the

[361] N.J. STAT. ANN. § 34:11-4.2a; N.J. ADMIN. CODE § 12:55-2.4; Email correspondence from John Callahan, Section Chief, Div. of Wage & Hour Compliance, New Jersey Dept of Labor & Workforce Dev. (June 17, 2014).

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use of each of those features. The written disclosure must also include an explanation of the specific means by which the employee may, on at least one occasion per pay period, use the payroll debit card to withdraw wages in full without any fee or difficulty; and

- the employee must, on timely notice to the employer, be permitted to elect not to have wages deposited by pay card and to be paid via cash, check, or direct deposit.

Additionally, the state labor department has informally advised that it is not required that revocation requests be in writing, but an employee must make the request in advance of the next payroll period.[362]

3.7(b)(ii) *Frequency of Payment Under State Law*

An employer must pay its employees at least twice during each calendar month (that is, semi-monthly), on regular paydays designated in advance by the employer. Payment must be made for hours worked by an employee no later than 10 days following the conclusion of a pay period. If the regular payday falls on a nonworkday, payment must be made on the preceding workday.[363]

An employer may establish regular paydays less frequently than semi-monthly for *bona fide* executive, supervisory, and other special classifications of employees, provided that the employees are paid in full at least once each calendar month on a regularly established schedule. Thus, employers may pay executive employees on a monthly basis. The state has a very strict policy regarding monthly payment of wages, however. Only employees that are directly involved in the corporate decision-making process for an employer may be paid once a month. As a result, administrative and professional employees, and outside salespersons, must be paid in full at least twice a month.[364]

Special rules apply to railroad, express, car-loading, and car-forwarding companies authorized to do business in the state.[365]

3.7(b)(iii) *Final Payment Under State Law*

Discharge. Whenever an employee is discharged or laid off, or when work is suspended as the result of a labor dispute, an employer must pay the employee no later than the regular payday for the pay period during which the termination, suspension, etc. took place.

When an employee is suspended as a result of a labor dispute, and such dispute involves employees who make up the payroll, an employer may have an additional 10 days in which to pay final wages.

Where employees are compensated in part or in full by an incentive system, a reasonable approximation of all wages due must be paid at the next regular payday, until the exact amounts due can be computed.[366]

Resignation. Whenever an employee quits, an employer must pay all wages not later than the payday for the pay period in which the separation took place.

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[362] N.J. ADMIN. CODE § 12:55-2.4; Email correspondence from John Callahan, Section Chief, Div. of Wage & Hour Compliance, New Jersey Dept of Labor & Workforce Dev. (June 17, 2014).

[363] N.J. STAT. ANN. § 34:11-4.2.

[364] N.J. STAT. ANN. § 34:11-4.2.

[365] N.J. STAT. ANN. § 34:11-4.2.

[366] N.J. STAT. ANN. § 34:11-4.3.

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Where employees are compensated in part or in full by an incentive system, a reasonable approximation of all wages due must be paid at the next regular payday, until the exact amounts due can be computed.[367]

3.7(b)(iv) *Notification of Wage Payments & Wage Records Under State Law*

Employers must provide each employee with a statement of deductions made from wages for each pay period where such deductions are made.[368]

Notably, New Jersey law requires that an employer must furnish each employee a wage statement each pay period but does not specify what form it must take. According to the state labor department, an employer may provide wage statements electronically or in hard copy.[369]

In addition to the above requirement, employers with 10 or more employees (including public employees) must provide the following information on wage statements:

- gross wages;
- net wages;
- rate of pay; and
- number of hours worked during each pay period (if relevant to wage calculation).

The wage payment law expressly allows employers to provide wage statements electronically, unless an employee specifically requests to receive statements via paper copy.[370]

Temporary help service firms in New Jersey must provide a detailed itemized statement at the time of payment of wages on a temporary laborer's paycheck stub or on a form approved by the commissioner, listing the following:

1. the name, address, and telephone number of each third-party client at which the temporary laborer worked. If this information is provided on the temporary laborer's paycheck stub, a code for each third-party client may be used so long as the required information for each coded third-party client is made available to the temporary laborer;
2. the number of hours worked by the temporary laborer at each third-party client each day during the pay period. If the temporary laborer is assigned to work at the same work site of the same third-party client for multiple days in the same work week, the temporary help service firm may record a summary of hours worked at that third party client's worksite so long as the first and last day of that work week are identified as well;
3. the rate of payment for each hour worked, including any premium rate or bonus. Overtime pay shall be paid in accordance with the provisions of subsection b. of section 5 of P.L.1966, c.113 (C.34:11-56a4);

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[367] N.J. STAT. ANN. § 34:11-4.3.

[368] N.J. STAT. ANN. § 34:11-4.6.

[369] N.J. STAT. ANN. § 34:11-4.6; New Jersey Dept of Labor & Workforce Dev., *Wage and Hour Compliance FAQs*, *available at* https://www.nj.gov/labor/wageandhour/support/faqs/wageandhourworkerfaqs.shtml; email correspondence from John Callahan, Section Chief, Div. of Wage & Hour Compliance, New Jersey Dept of Labor & Workforce Dev. (June 17, 2014).

[370] N.J. STAT. ANN. §34:11-4.6(C)

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4. the total pay period earnings;
5. the amount of each deduction made from the temporary laborer's compensation made [either by the third-party client or] by the temporary help service firm, and the purpose for which each deduction was made, including for the temporary laborer's food, equipment, withheld income tax, withheld Social Security deductions, withheld contributions to the state unemployment compensation trust fund and the state disability benefits trust fund, and every other deduction; the current maximum amount of a placement fee which the temporary help service firm may charge to a third party client to directly hire the temporary laborer; and
6. any additional information required by the commissioner.

For each temporary laborer who is contracted to work a single day, the third-party client must, at the end of the work day, provide the laborer with a work verification form, approved by the commissioner, which contains the date, the temporary laborer's name, the work location, and the hours worked on that day.[371]

3.7(b)(v) *Wage Transparency*

It is an unlawful employment practice for any employer to take reprisals against an employee for discussing with, disclosing to, or requesting from another employee or former employee information regarding the job title, occupational category, or rate of compensation, including benefits, of any employee or former employee.

The above protection extends to an employee's communications with a lawyer from whom the employee seeks legal advice, or any government agency. Further, an employer is prohibited from requiring, as a condition of employment, any employee or prospective employee to sign a waiver, or otherwise requiring an employee or prospective employee to agree not to make those requests or disclosures.[372]

An employee alleging a violation of the Law Against Discrimination may file an administrative complaint with the New Jersey Division of Civil Rights within 180 days of the alleged violation, or may elect to file a civil action within two years of the alleged violation.[373]

3.7(b)(vi) *Changing Regular Paydays or Pay Rate Under State Law*

Employers must notify employees about payday changes before the change occurs.[374] In addition, employers must notify employees about pay rate changes before the change occurs. Per the state labor department, decreases cannot be retroactive.[375]

3.7(b)(vii) *Paying for Expenses Under State Law*

In New Jersey, there is no general obligation to indemnify an employee for business expenses, but there are requirements specific to certain types of expenses.

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[371] N.J. STAT. ANN. § 34:8D-3(3)(a).

[372] N.J. STAT. ANN. § 10:5-12(r).

[373] N.J. STAT. ANN. §§ 2A:14-2, 10:5-13.

[374] N.J. STAT. ANN. § 34:11-4.6.

[375] N.J. STAT. ANN. § 34:11-4.6; New Jersey Dept of Labor & Workforce Dev., *Wage and Hour Compliance FAQs*, *available at* https://www.nj.gov/labor/wageandhour/support/faqs/wageandhourworkerfaqs.shtml.

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Travel. Reasonable payments for traveling, or other expenses incurred by an employee furthering an employer's interests, which are reimbursed by the employer, are not included when determining an employee's regular rate for overtime purposes.[376]

Uniforms. An employer must pay for uniforms that are required, which are not appropriate for street wear or use in other establishments. An employer is presumed to have required an employee to wear uniforms if the garments are of a similar design, color, or material, or form part of the establishment's decorative pattern. An employer cannot take deductions for uniforms.[377]

If a particular type of clothing is required, which is appropriate for street wear, and an employer requires employees to furnish more than one style, type, or color of clothing during any one year of employment, the employer must pay, in addition to regular wages, the amount the employee is required to pay for newly-required uniform or uniforms. This additional payment must be made to the employee in the week in which the change is required. If an employee pays for a uniform in cash, and the payment brings his or pay below the minimum wage, an employer must make up the difference so the employee is paid the minimum wage that week.[378]

However, an employer can deduct from wages for payments that employees or their collective bargaining agents authorize for renting, laundering, or dry cleaning work clothing or uniforms, as long as: (1) the employer approves deductions for such payments; and (2) the clothing or uniforms are provided to the employee at their discretion by an outside vendor or the employer.[379]

The term *uniform* is defined, in the food service industry, as "any garment such as dress, apron, collar, cuffs or headdress which is worn by the employee either at the direction of the employer or as a condition of employment." Maintenance and upkeep of uniforms worn by kitchen staff, cooks, and dishwashers must be provided and maintained by an employer.[380]

3.7(b)(viii) *Wage Deductions Under State Law*

Permissible Deductions. An employer cannot make deductions from an employee's wages unless the employer is required or empowered to do so by federal or state law, or if the deductions are made for the following purposes:

- contributions authorized either in writing by employees, or under a collective bargaining agreement, to employee welfare, insurance, hospitalization, medical or surgical or both, pension, retirement, and profit-sharing plans, and to plans establishing individual retirement annuities on a group or individual basis, or individual retirement accounts at any state or federally chartered bank, savings bank, or savings and loan association, for the employee, employee's spouse, or both;[381]
- contributions authorized either in writing by employees, or under a collective bargaining agreement, for payment into company-operated thrift plans, or security option or security

376 N.J. ADMIN. CODE § 12:56-6.6.

377 N.J. ADMIN. CODE § 12:56-17.1.

378 N.J. ADMIN. CODE § 12:56-17.1(d)-(e); *see* N.J. STAT. ANN. § 34:11-4.4.

379 N.J. ADMIN. CODE § 12:55-2.1.

380 N.J. ADMIN. CODE §§ 12:56-14.1, 12:56-17.1.

381 *See* 26 U.S.C. § 408(a)-(b).

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purchase plans to buy securities of the employing corporation, an affiliated corporation, or other corporations at market price or less, if such securities are listed on a stock exchange or are marketable over the counter;

- payments authorized by employees for payment into employee personal savings accounts, such as payments to a credit union, savings fund society, savings and loan or building and loan association, and payments to banks for Christmas, vacation, or other savings funds, if deductions are approved by the employer;
- payments for company products purchased (in accordance with a periodic payment schedule contained in the original purchase agreement), for employer loans to employees (in accordance with a periodic payment schedule contained in the original loan agreement), for safety equipment, for the purchase of U.S. Government bonds, to correct payroll errors, and for costs and related fees for the replacement of employee identification which is used to allow employees access to sterile or secured areas of airports (in accordance with a fee schedule described in any airline media plan approved by the federal Transportation Security Administration (TSA)), if deductions are approved by the employer;
- contributions authorized by employees for organized and generally recognized charities, if contributions are approved by the employer;
- payments authorized by employees or their collective bargaining agents for the rental of work clothing or uniforms or for the laundering or dry cleaning of work clothing or uniforms, if deductions are approved by the employer;
- labor organization dues and initiation fees, and such other labor organization charges permitted by law;
- contributions authorized in writing by employees, pursuant to a collective bargaining agreement, to a political committee, continuing political committee, or both, established by the employees' labor union to make contributions to aid or promote the nomination, election, or defeat of any candidate for a public office of the state or of a county, municipality, or school district or the passage or defeat of any public question, subject to conditions;[382]
- contributions authorized in writing by employees to any political committee or continuing political committee, other than the aforementioned committee, to make contributions to aid or promote the nomination, election, or defeat of any candidate for a public office of the state or of a county, municipality, or school district or the passage or defeat of any public question, subject to conditions;[383] in making a payroll deduction, the administrative expenses incurred by the employer must be borne by such committee, at the option of the employer;
- payments authorized by employees for employer-sponsored programs for the purchase of insurance or annuities on a group or individual basis, if otherwise permitted by law;
- other contributions, deductions, and payments as the state labor department may authorize by regulation as proper and in conformity with the intent and purpose of the general deductions statute, if deductions are approved by the employer. Examples of permissible deductions include:

[382] N.J. STAT. ANN. § 34:11-4.4a.

[383] N.J. STAT. ANN. § 34:11-4.4a.

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- payments authorized in writing by employees, or under a collective bargaining agreement, for health club membership fees or for child care services;
- for providing mass transportation commuter tickets, but only if the deduction is authorized in writing or by collective bargaining agreement and if the commuter ticket option is available to all employees;
- if the employer provides transportation to a work site, it may deduct the actual cost (excluding profit) for transportation, if the employee authorizes the deduction in writing, or via a collective bargaining agreement;
- for an employee's financial obligation to the state, via an installment payment (the employer can only withhold amount employee expressly authorized in writing);
- payments for employer loans to employees (in accordance with a periodic payment schedule contained in the original loan agreement);[384]
- to correct payroll errors; and[385]

- for pretax election transportation fringe benefits, consistent with the provisions of the Internal Revenue Code.[386]

Prohibited Deductions. An employer is prohibited from taking deductions from wages for:[387]

- cash or inventory shortages or breakage;
- damage to company property;
- failing to return company property (*e.g.*, identification badge, cellphone, tools);
- uniform cost or maintenance (unless permitted under the general deductions statute);
- drug or preemployment testing (except in the case of security guards); and
- licenses or certification required for performance of the job (unless the property of the employee, nonexclusive, and required to perform job).[388]

Meals & Lodging. Under the minimum wage and overtime provisions, the term *wages* includes "the fair value of any food or lodging supplied by an employer to an employee."[389] Employers must generally keep records to substantiate the costs of food or lodging provided to employees if food or lodging is used as a deduction or addition to employee wages. Employers should consult the regulations for specific record-

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[384] N.J. STAT. ANN. § 34:11-4.4.

[385] N.J. STAT. ANN. § 34:11-4.4(4).

[386] N.J. STAT. ANN. § 34:11-4.4; *see* N.J. ADMIN. CODE §§ 12:55-2.1 to 12:55-2.3; *see also* N.J. STAT. ANN. § 34:11-33.6 (special rules apply when employing non-New Jersey residents); N.J. ADMIN. CODE § 12:55-2.5 (same); N.J. STAT. ANN. § 27:26A-3.

[387] New Jersey Dept of Labor & Workforce Dev., *Wage and Hour Compliance FAQs*, *available at* https://www.nj.gov/labor/wageandhour/support/faqs/wageandhourworkerfaqs.shtml.

[388] New Jersey Dept of Labor & Workforce Dev., *Wage and Hour Compliance FAQs*, *available at* https://www.nj.gov/labor/wageandhour/support/faqs/wageandhourworkerfaqs.shtml.

[389] N.J. STAT. ANN. § 34:11-56a1(d).

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keeping requirements, which include, for example, data used to compute the fair value of the food or lodging and the rate of depreciation.[390]

3.7(b)(ix) *Wage Assignments & Wage Garnishments*

New Jersey Support Enforcement Act. Under the New Jersey Support Enforcement Act (NJSEA),[391] an employer is required to withhold child-support payments from the income of an employee against whom a child-support order has been issued or modified.[392] Income withholding under this section is made subject to the terms of the federal Consumer Credit Protection Act,[393] which establishes the maximum amounts that may be withheld by an employer.[394]

In addition, an employer must permit an employee who is required to provide medical support benefits for their child to enroll the child under the health benefits plan as a dependent, in accordance with the terms of the NJSEA.[395]

An employer may not discriminate against or discharge an employee on the basis of a garnishment or other income withholding or potential withholding made pursuant to the provisions of the NJSEA.[396] Discrimination against, refusal to hire, or discipline or discharge of an employee in contravention of the NJSEA is a "disorderly persons offense." An employee who is discriminated against or unlawfully discharged in violation of this provision may bring suit in New Jersey Superior Court for damages (including two-fold compensatory damages), reinstatement, and reasonable attorneys' fees.[397]

Child Support Investigations Act & Effect on Settlement Agreements. New Jersey law addresses settlement agreements reached in employment law civil actions and severance and release agreements commonly negotiated by New Jersey-based employers. The statute's policy objective is to require child support judgment debtors to honor their obligations.[398]

The statute establishes a lien on the net proceeds of settlements (either prior or subsequent to litigation), judgments, inheritances, or awards to satisfy child support judgments. The provision further requires that a search be conducted to determine if the "prevailing party or beneficiary" is subject to any outstanding child support judgments in New Jersey. Upon learning that the prevailing party or beneficiary is a child support judgment debtor, the initiating party must contact the Probation Division of the Superior Court to arrange for satisfaction of the judgment. The law precludes the distribution of the net proceeds until the child support judgment is satisfied.

The attorney representing the prevailing party or beneficiary is responsible for initiating the search through a private judgment search company. If the person receiving the net proceeds is not represented by counsel, the burden falls on the opposing counsel. If the net proceeds are distributed via a structured

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[390] *See* N.J. ADMIN. CODE §§ 12:56-4.9, 12:56-4.10, and 12:56-8.1 to 12:56-8.9.

[391] N.J. STAT. ANN. §§ 2A:17-56.7a *et seq*.

[392] N.J. STAT. ANN. § 2A:17-56.9.

[393] 15 U.S.C. § 1673(b).

[394] N.J. STAT. ANN. § 2A:17-56.9.

[395] N.J. STAT. ANN. § 2A:17-56.11a.

[396] N.J. STAT. ANN. § 2A:17-56.12.

[397] N.J. STAT. ANN. § 2A:17-56.12.

[398] N.J. STAT. ANN. § 2A:17-56.23b.

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settlement, the law only requires the responsible attorney to conduct a one-time search before the payments are made.[399]

Finally, although the statute does not contain any mechanism for enforcement, a party who willfully fails to perform the search could be subject to a contempt citation by a court or a monetary penalty. This monetary penalty could equal the full amount of the settlement proceeds, capped at the amount of the outstanding New Jersey child support judgment.

3.7(b)(x) *State Enforcement, Remedies & Penalties*

The Division of Wage and Hour Compliance ("Division") investigates employee complaints about underpaid or unpaid wages, including regular and overtime wages.[400] Only individual employees can file claims; groups of employees cannot file claims together as a class.[401]

Once a claim is filed, depending on the nature of the complaint, the claim will be assigned to a field investigator, handled by mail, or scheduled for a wage collection proceeding. If it is assigned to a field investigator, the field investigator will contact the employer to make arrangements for an inspection. If the claim is handled by mail, the employer will be sent a copy of the claim and given the opportunity to either pay the wages due or explain why the wages are not due. If the claim is scheduled for a wage collection proceeding, the employer will be notified of the date and time of the proceeding. The wage collection section will determine whether to schedule an in-person or telephone proceeding.[402]

Employers are notified of the results of the investigation after it is completed. If it is determined that wages are due, the employer will be notified in writing and will be sent an Assessment Letter explaining the wages, fees, and penalties. The employer can then issue the payment (wages due) directly to the employee or send payment to the Division for forwarding to the complainant. Any fees or penalties that are assessed must be sent directly to the Division.

If the employer disagrees with the results of the investigation, the employer may request a conference via the Assessment Letter. The case is reviewed by a supervisor who will contact the employer to explain the violations, the laws or regulations, and the wages, fees, and penalties that are due. If the employer still disagrees after the discussion, then the employer can schedule a conference with a Section Chief. If the employer disagrees with the results after the conference, then the employer will have a hearing before a Hearing and Review Officer.[403]

If an employer fails to comply with a final determination of the Commissioner or a judgment of a court to pay an employee any wages owed or damages awarded within 10 days of the time that the determination or judgment requires the payment, the Commissioner may do either or both of the following: issue a

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[399] N.J. STAT. ANN. § 2A:17-56.23b(b)(2).

[400] *See* New Jersey Dept of Labor & Workforce Dev., Div. of Wage & Hour Compliance, *Wage and Hour Compliance, Investigation Process*, *available at* https://www.nj.gov/labor/wageandhour/claims-appeals-investigations/investigation/index.shtml.

[401] New Jersey Dept of Labor & Workforce Dev., Div. of Wage & Hour Compliance, *Wage and Hour Compliance FAQs (for Workers),* Complaints and Investigations, *available at* https://www.nj.gov/labor/wageandhour/support/faqs/wageandhourworkerfaqs.shtml.

[402] *See* New Jersey Dept of Labor & Workforce Dev., *Wage and Hour Compliance FAQs (for Employers)*, *available at* https://www.nj.gov/labor/wageandhour/support/faqs/wageandhouremployerfaqs.shtml.

[403] *See* New Jersey Dept of Labor & Workforce Dev., *Wage and Hour Compliance FAQs (for Employers).*

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written determination directing any appropriate agency to suspend one or more licenses held by the employer or any successor firm of the employer until the employer complies with the determination or judgment; or issue a stop-work order against the employer requiring the cessation of all business operations.[404]

The order is effective from service upon the employer. The stop-work order remains in effect until the Commissioner issues an order releasing the stop-work order. The Commissioner can release the stop-work order upon finding that the employer has come into compliance and has paid any penalty deemed to be satisfactory; or after the Commissioner determines in a hearing that the employer did not commit the act on which the order was based. Once a stop-work order becomes final, any employee affected by a stop-work order issued is entitled to pay from the employer for the first 10 days of work lost because of the stop-work. Upon request of any employee not paid wages, the Commissioner can take assignment of the claim and bring any legal action necessary to collect all that is due. The Commissioner may also assess a civil penalty of $5,000 per day against an employer for each day that it conducts business operations that are in violation of the stop-work order. An employer who is subject to a stop-work order has the right to appeal within 72 hours of receiving the stop-work order notification. An employer is not precluded from seeking injunctive relief from a court if the employer can demonstrate that the stop-work order would be issued or has been issued in error.[405]

An employee may also bring a civil action against their employer for failure to pay the minimum wage. The employee can recover the full amount of such minimum wage, less any amount actually paid to them by the employer, together with costs and reasonable attorneys' fees as allowed by the court.[406] A judgment procured from the Division is also appealable to any Superior Court.[407]

Antiretaliation Provisions. The New Jersey Wage and Hour Law prohibits an employer from discharging or otherwise discriminating against an employee because: (1) the employee has made any complaint to their employer, to the Commissioner of Labor, the Director, or to their authorized representatives that they have not been paid wages in accordance with the minimum wage standards; (2) the employee has caused to be instituted or is about to cause to be instituted any proceeding under or related to the law; (3) the employee has testified or is about to testify in any such proceeding; or (4) the employee has served or is about to serve on the wage board.[408] The penalties for retaliating against an employee for exercising their rights under the New Jersey Wage and Hour Law include for the first violation, a fine of no less than $500 nor more than $1,000 or by imprisonment for not less than 10 nor more than 90 days, or by both the fine and imprisonment, and for the second violation, a fine of no less than $1,000 nor more than $2,000 or by imprisonment for not less than 10 nor more than 100 days, or by both the fine and imprisonment.[409] Moreover, the employer will be required to offer reinstatement to any such discharged employee and to correct any such discriminatory action, and also to pay the employee in full all wages lost as a result of the discharge or discriminatory action. As an alternative to or in addition to these

[404] N.J. STAT. ANN. § 34:11-58.1.

[405] N.J. STAT. ANN. § 34:11-56.35.

[406] N.J. STAT. ANN. § 34:11-56a25.

[407] N.J. STAT. ANN. § 34:11-63.

[408] N.J. STAT. ANN. § 34:11-56a24.

[409] N.J. STAT. ANN. § 34:11-56a24.

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sanctions, the Commissioner of Labor can assess and collect administrative penalties, up to a maximum of $250 for the first violation, and up to $500 for each subsequent violation.[410]

3.8 Other Benefits

3.8(a) *Vacation Pay & Similar Paid Time Off*

3.8(a)(i) *Federal Guidelines on Vacation Pay & Similar Paid Time Off*

To the extent an "employee welfare benefit plan" is established or maintained for the purpose of providing vacation benefits for participants or their beneficiaries, it may be governed under the federal Employee Retirement Income Security Act (ERISA).[411] However, an employer program of compensating employees for vacation benefits out of the employer's general assets is not considered a covered welfare benefit plan.[412] Further, the U.S. Supreme Court, in *Massachusetts v. Morash*, noted that extensive state regulation of vesting, funding, and participation rights of vacation benefits may provide greater protections for employees than ERISA and, as a result, the court was reluctant to have ERISA preempt state law in situations where it was not clearly indicated.[413]

3.8(a)(ii) *State Guidelines on Vacation Pay & Similar Paid Time Off*

An employer is not required to pay its employees for holidays or vacations.[414] However, once an employer does establish a policy and promises vacation pay and other types of additional compensation, the employer may not arbitrarily withhold or withdraw these fringe benefits retroactively. Therefore, it is important to draft clear, precise, and complete policies and procedures regarding these benefits, as they can become contractual obligations and subject the employer to liability if withheld or reduced without notice. Such benefits must be administered uniformly in accordance with the established policy or employment agreement.[415] Because vacation and similar paid time off is a matter of contract or employer policy in New Jersey, an employer may impose a "use-it-or-lose-it provision"[416] or require employees to forfeit unused accrued vacation time upon termination of employment.[417]

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[410] N.J. STAT. ANN. § 34:11-56a24.

[411] 29 U.S.C. § 1002.

[412] 29 C.F.R. § 2510.3-1; *see also* U.S. Dept of Labor, *Advisory Opinion 2004-10A* (Dec. 30, 2004), *available at* https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/2004-10a; U.S. Dept of Labor, *Advisory Opinion 2004-08A* (July 2, 2004), *available at* https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/2004-08a; U.S. Dept of Labor, *Advisory Opinion 2004-03A* (Apr. 30, 2004), *available at* https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/advisory-opinions/2004-03a.

[413] 490 U.S. 107, 119(1989).

[414] N.J. ADMIN. CODE § 12:56-5.2.

[415] New Jersey Dept of Labor & Workforce Dev., *Wage and Hour Compliance FAQs*, *available at* https://www.nj.gov/labor/wageandhour/support/faqs/wageandhourworkerfaqs.shtml.

[416] *See, e.g.*, *Chrin v. Cambridge Hydrodynamics, Inc*., 2003 WL 25754809 (N.J. Super. Ct. App. Div. Dec. 30, 2003); *Caponegro v. State Operated Sch. Dist. of City of Newark, Essex Cnty.*, 748 A.2d 1208 (N.J. Super. Ct. App. Div. 2000).

[417] *See, e.g.*, *Chrin*, 2003 WL 25754809; *HMH Hospitals Corp. v. Warren*, 2023 WL 2146405 (N.J. App. Div. Feb. 22, 2023).

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3.8(b) *Holidays & Days of Rest*

3.8(b)(i) *Federal Guidelines on Holidays & Days of Rest*

There is no federal law requiring that employees be provided a day of rest each week, or be compensated at a premium rate for work performed on the seventh consecutive day of work or on holidays.

3.8(b)(ii) *State Guidelines on Holidays & Days of Rest*

New Jersey has no law requiring that employees be provided a day of rest each week. Moreover, New Jersey law expressly states that there is no requirement that an employee be paid a premium for work on Sundays, holidays, or regular days of rest.[418]

3.8(c) *Recognition of Domestic Partnerships & Civil Unions*

3.8(c)(i) *Federal Guidelines on Domestic Partnerships & Civil Unions*

Federal law does not regulate or define domestic partnerships and civil unions. States and municipalities are free to provide for domestic partnership and civil unions within their jurisdictions. Thus, whether a couple may register as domestic partners or enter into a civil union depends on their place of residence. States may also pass laws to regulate whether employee benefit plans must provide coverage for an employee's domestic partner or civil union partner.

Whether such state laws apply to an employer's benefit plans depends on whether the benefits are subject to ERISA. Most state and local laws that relate to an employer's provision of health benefit plans for employees are preempted by ERISA. Self-insured plans, for example, are preempted by ERISA. If the plan is preempted by ERISA, employers may not be required to comply with the states' directives on requiring coverage for domestic partners or parties to a civil union.[419] ERISA does not preempt state laws that regulate insurance, so employer health benefit plans that provide benefits pursuant to an insurance contract are subject to state laws requiring coverage for domestic partners or civil union partners.

The federal Comprehensive Omnibus Budget Reconciliation Act (COBRA) requires group health plans to provide continuation coverage under the plan for a specified period of time to each qualified beneficiary who would lose coverage under the plan as a result of a qualifying event (*e.g.*, the employee's death or termination from employment).[420] However, under COBRA, only an employee and the employee's spouse and dependent children are considered "qualified beneficiaries."[421] Here again, states may choose to extend continuation coverage requirements to domestic partners and civil union partners under state mini-COBRA statutes.

3.8(c)(ii) *State Guidelines on Domestic Partnerships & Civil Unions*

In New Jersey, civil union couples have all of the same benefits, protections, and responsibilities under law as are granted to spouses in a marriage.[422] The New Jersey Civil Union Act provides that under any law, rule, regulation, judicial, or administrative proceeding or otherwise, the terms *marriage*, *husband*, *wife*, *spouse*, *family*, *immediate family*, *dependent*, *next of kin*, *widow*, *widower*, *widowed*, or another

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[418] N.J. ADMIN. CODE § 12:56-6.4.

[419] 29 U.S.C. § 1144.

[420] 29 U.S.C. § 1161.

[421] 29 U.S.C. § 1167(3).

[422] N.J. STAT. ANN. § 37:1-31.

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word that in a specific context denotes a marital or spousal relationship, will include a civil union.[423] Likewise, all persons in domestic partnerships are entitled to certain rights and benefits that are afforded to married couples under the laws of New Jersey.[424]

With respect to employee benefits, if an employer's group plan provides coverage to a spouse, coverage must be likewise provided to a domestic partner, a civil union partner, or to parties in valid civil unions or same-sex marriages from other jurisdictions.[425] Employers subject to the state's mini-COBRA statute may therefore also be required to provide continuation coverage to domestic partners and civil union partners.[426]

3.9 Leaves of Absence

3.9(a) *Family & Medical Leave*

3.9(a)(i) *Federal Guidelines on Family & Medical Leave*

The federal Family and Medical Leave Act (FMLA) requires covered employers to provide eligible employees up to 12 weeks of unpaid leave in any 12-month period:

- for the birth or placement of a child for adoption or foster care;[427]
- to care for an immediate family member (spouse, child, or parent) with a serious health condition;[428]
- to take medical leave when the employee is unable to work because of a serious health condition;[429]
- for a qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is on covered active duty or called to covered active duty status as a member of the National Guard, armed forces, or armed forces reserves (see **3.9(k)(i)** for information on "qualifying exigency leave" under the FMLA); and
- to care for a next of kin service member with a serious injury or illness (see **3.9(k)(i)** for information on the 26 weeks available for "military caregiver leave" under the FMLA).

A *covered employer* is engaged in commerce or in any industry or activity affecting commerce and has at least 50 employees in 20 or more workweeks in the current or preceding calendar year.[430] A *covered employee* has completed at least 12 months of employment and has worked at least 1,250 hours in the

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[423] N.J. STAT. ANN. § 37:1-33.

[424] N.J. STAT. ANN. § 26:8A-2.

[425] N.J. STAT. ANN. § 17B:27-46.1bb.

[426] N.J. STAT. ANN. §§ 17B:27A-17, 17B:27A-27.

[427] 29 C.F.R. §§ 825.102, 825.112, 825.113, 825.120, and 826.121.

[428] 29 C.F.R. §§ 825.102, 825.112, and 825.113; *see also* U.S. Dept of Labor, Wage & Hour Div., *Administrator's Interpretation No. 2010-3* (June 22, 2010), *available at* https://www.dol.gov/whd/opinion/adminIntrprtn/FMLA/2010/FMLAAI2010_3.pdf (guidance on who may take time off to care for a sick, newly-born, or adopted child when the employee has no legal or biological attachment to the child).

[429] 29 C.F.R. §§ 825.112, 825.113.

[430] 29 U.S.C. § 2611(4); 29 C.F.R. §§ 825.104 to 825.109.

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last 12 months at a location where 50 or more employees work within 75 miles of each other.[431] For information on the FMLA, see LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES.

3.9(a)(ii) *State Guidelines on Family & Medical Leave*

New Jersey has enacted a state family and medical leave law, the New Jersey Family Leave Act (NJFLA).

Coverage & Eligibility. The NJFLA applies to employers that employ 30 or more employees for each working day during each of 20 or more workweeks in the current or preceding calendar year.[432] All employees should be counted whether or not they are eligible for leave and whether or not they work in New Jersey. In some situations, employees of a subsidiary or related entity must also be considered.[433]

Employees are eligible for leave under the NJFLA if they have performed 12 months of service and have worked at least 1,000 base hours during the immediately preceding 12-month period. *Base hours* means hours for which an employee receives compensation including regular hours, overtime hours, hours for which the employee receives workers' compensation benefits, and hours an employee would have worked except for military service.[434]

The determination of the number of hours an employee worked for purposes of eligibility under the NJFLA must include time during which an employee was laid off or furloughed due to a state of emergency. Any time, up to a maximum of 90 calendar days, during which a person is laid off or furloughed by an employer due to that employer curtailing operations because of a state of emergency declared after October 22, 2012, must be regarded as time in which the person is employed for the purpose of determining eligibility for leave time under the NJFLA. In making the determination, the base hours per week during the layoff or furlough shall be deemed to be the same as the average number of hours worked per week during the rest of the 12-month period.[435] A state of emergency means a natural or man-made disaster or emergency for which a state of emergency has been declared by the President of the United States or the Governor, or for which a state of emergency has been declared by a municipal emergency management coordinator.[436]

The NJFLA includes a key employee exception, however. An employer may deny family leave to an otherwise eligible employee if: (1) the employee is a salaried employee who is among the highest paid 5% of the employer's employees or the seven highest paid employees, whichever is greater; (2) the denial is necessary to prevent substantial and grievous economic injury to the employer's operations; and (3) the employer notifies the employee of its intent to deny leave at the time the employer determines denial is necessary. If the leave has already begun, the employee must return to work within 10 working days of the notification.[437]

Purpose & Length of Leave. Leave may be taken for the birth or adoption of a child, for the serious health condition of a child, parent, parent-in-law, spouse, or partner in a civil union, or in certain circumstances

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[431] 29 U.S.C. § 2611(2); 29 C.F.R. §§ 825.110 to 825.111.

[432] N.J. STAT. ANN. § 34:11B-3(f); N.J. ADMIN. CODE § 13:14-1.2.

[433] N.J. ADMIN. CODE § 13:14-1.3.

[434] N.J. ADMIN. CODE § 13:14-1.2.

[435] N.J. STAT. ANN. § 34:11B-3.

[436] N.J. STAT. ANN. § 34:11B-3.

[437] N.J. STAT. ANN. § 34:11B-4(h); N.J. ADMIN. CODE § 13:14-1.9.

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to care for a child or family member during a state of emergency or an epidemic of a communicable disease.[438]

A person may take up to 12 weeks in any 24-month period, upon advance notice to the employer.[439] Leave for birth or placement of a child must commence within a year after the date of the birth or placement.[440] An employer must grant a family leave to more than one employee from the same family at the same time provided that each employee is eligible for the leave.[441]

Leave may be taken intermittently for a family member with a serious health condition when medically necessary if: (1) the total time within which the leave is taken does not exceed a 12-month period for each serious health condition episode; (2) the employee provides reasonable advance notice; and (3) the employee makes a reasonable effort to schedule leave so as not to unduly disrupt the employer's operations.[442]

An employee is entitled to take a leave on a reduced schedule not to exceed 24 consecutive weeks. An employer may require an employee on an intermittent or reduced leave schedule to temporarily transfer to an available alternative position that better accommodates recurring periods of leave, so long as the position has equivalent pay and benefits as the employee's regular position.[443]

Employees must make reasonable efforts to schedule a reduced leave so as not to unduly disrupt the employer's operations, and must provide advance notice in a reasonable and practicable manner.[444]

Employer Obligations. An employee is entitled to be reinstated to the same position or an equivalent position with like seniority, status, benefits, pay, and other terms and conditions of employment, unless the employee would have lost their position pursuant to a *bona fide* layoff if the employee was not on leave. In that event, the employee retains all rights under any applicable layoff and recall system.[445]

An employee's entitlement to return to work prior to the prearranged date is governed by the employer's policy with respect to other leaves.[446] During the leave, the employer must maintain coverage under any group health insurance policy, group subscriber contract, or health care plan under the same conditions as if the employee had been employed continuously.[447] The employer must also provide other benefits that are provided pursuant to the employer's policy for employees on temporary leave.[448]

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[438] N.J. STAT. ANN. §§ 34:11B-3(i), (j), 37:1-32; N.J. ADMIN. CODE § 13:14-1.5.

[439] N.J. STAT. ANN. § 34:11B-4(a); N.J. ADMIN. CODE § 13:14-1.4.

[440] N.J. STAT. ANN. § 34:11B-4(c); N.J. ADMIN. CODE § 13:14-1.5.

[441] N.J. ADMIN. CODE § 13:14-1.12.

[442] N.J. STAT. ANN. § 34:11B-4(a); N.J. ADMIN. CODE § 13:14-1.5.

[443] N.J. ADMIN. CODE § 13:14-1.5.

[444] N.J. STAT. ANN. § 34:11B-5.

[445] N.J. STAT. ANN. § 34:11B-7; N.J. ADMIN. CODE § 13:14-1.11.

[446] N.J. ADMIN. CODE § 13:14-1.5.

[447] N.J. STAT. ANN. § 34:11B-8(a). Nonetheless, this provision is preempted (and, therefore, void) to the extent that it relates to an employee welfare benefit plan regulated by ERISA. *N.J. Business & Indus. Ass'n v. State*, 592A.2d 660 (N.J. Super. Ct. Law Div. 1991).

[448] N.J. STAT. ANN. § 34:11B-8(b).

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It is unlawful to interfere with employee rights or to discriminate or retaliate against employees for exercising the right to take leave.[449] Further, these rights under the NJFLA are in addition to any rights available under the state's temporary disability benefits law.[450]

All employers covered by the Family Leave Act must display the poster, whether they have any eligible employees or not. The poster must be printed on paper that is at least 8.5" x 11" and contain text that is legible and large enough to be easily read. Employers must provide employees with a written copy of the poster annually (on or before December 31 of each year) and upon the first request of the employee. Posting the notice on the employer's internet or intranet site will satisfy the posting requirement if this site is accessible to all employees. The poster should be made available via email, through printed material such as a paycheck insert, or through its internet or intranet website. Additionally, if the employer maintains an employee handbook, information about the law must be included. If not, employers must provide written guidance to each employee.[451]

Employee Rights & Obligations. Employees must provide notice of the need for leave as follows:

- at least 15 days' notice for intermittent or reduced schedule leave related to a newborn, child placement, or for a family member's serious health condition;
- as soon as practicable for intermittent or reduced schedule leave to care for a family member in connection with a communicable disease;
- at least 30 days' notice for consecutive leave related to a newborn or child placement;
- in a reasonable and practicable manner for consecutive leave to care for a family member with a serious health condition or to care for a family member related to a communicable disease; and
- as much notice as possible in emergent circumstances.[452]

An employer may establish a policy requiring written notice so long as the policy allows for oral notice in emergent circumstances when written notice is impracticable. The employer may require the employee to follow up with written notice. The policy applies only if the employee has been informed of its terms.[453]

An employer may require that a leave be supported by a certification issued by a duly licensed health care provider or other acceptable health care provider. Where leave is for a serious health condition of a family member, certification is sufficient if it states the date on which the serious health condition commenced, the probable duration of the conditions, and medical facts within the provider's knowledge regarding the condition. Where certification is for the birth or placement of a child, the certification need only state the date of birth or placement. Additional requirements apply if the certification is for communicable disease purposes. If an employer doubts the validity of the certification provided it may require a second (and in some instances third) opinion at its own cost.[454]

[449] N.J. STAT. ANN. § 34:11B-9; N.J. ADMIN. CODE § 13:14-1.15.

[450] N.J. STAT. ANN. § 34:11B-13.

[451] N.J. ADMIN. CODE §§ 13:8-2.2, 13:14-1.14.

[452] N.J. STAT. ANN. § 34:11B-4(e); N.J. ADMIN. CODE §§ 13:14-1.4, -1.5.

[453] N.J. ADMIN. CODE § 13:14-1.4.

[454] N.J. STAT. ANN. § 34:11B-4(e); N.J. ADMIN. CODE § 13:14-1.10.

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An employer may also require an employee to sign a form certifying the purpose for which the employee is requesting leave, but may not require the employee to attest to additional facts. An employee who refuses to sign a certification may be denied leave. The form must contain a statement warning employees of the consequences of refusing to sign or falsely certifying.[455]

If an employer has a past practice or policy of requiring employees to exhaust all accrued paid leave during a leave of absence, the employer may require employees to do so during a family leave. If an employer allows employees to take unpaid leaves without first exhausting accrued paid leave, it may not require employees to exhaust accrued paid leave while on a family leave. If the employer does not have a policy, the employee is entitled to use accrued paid leave, but may not be required to do so, during a family leave.[456]

Paid Family Leave (Temporary Disability and Family Leave Insurance). Employees that qualify as employed under state unemployment compensation law are eligible for paid benefits under the paid family leave law if they have been employed during at least 20 weeks in the last four of five quarters, and earned a certain amount weekly.[457]

Leave may be taken for the reasons that qualify under the NJFLA, as well as for purposes under the state's Security and Financial Empowerment Act (SAFE Act). See **3.9(j)(ii)**. Additionally, an employee may receive benefits for their own temporary disability that did not arise out of the course of employment, including a disability that is a result of an organ or bone marrow donation.[458] See **3.9(f)(ii)**.

Eligible employees may receive 26 weeks of benefits for their own temporary disability, or 12 weeks (56 days if taken intermittently) for family leave. The benefit rate is 85% of the employee's average weekly wage, subject to a maximum of 70% of the state's average weekly wage.[459]

Employers must post notification of each covered employee's rights under the law, as well as provide a written copy of the notice at the time of hire, upon an employee's request, or any time an employee notifies the employer that they will be taking time off for circumstances under which they may be eligible for benefits. There are additional posting and notification requirements for an employer's temporary disability benefits program. Employees must provide notice to their employer prior to receiving benefits, the amount of which differs based on the underlying reason for taking leave. Employees may also be required to provide medical or other certification to the employer regarding leave.[460]

3.9(b) *Paid Sick Leave*

3.9(b)(i) *Federal Guidelines on Paid Sick Leave*

Federal law does not require private employers (that are not government contractors) to provide employees paid sick leave. Executive Order No. 13706 requires certain federal contractors and subcontractors to provide employees with a minimum of 56 hours of paid sick leave annually, to be

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[455] N.J. ADMIN. CODE § 13:14-1.10.

[456] N.J. ADMIN. CODE § 13:14-1.7.

[457] N.J. STAT. ANN. § 43:21-27.

[458] N.J. STAT. ANN. §§ 43:21-27; 43:21-29.

[459] N.J. STAT. ANN. § 43:21-40; For more information about how benefits are calculated, see https://www.myleavebenefits.nj.gov/worker/fli/.

[460] N.J. STAT. ANN. §§ 43:21-39.1 – 39.3; 43:21-49.

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accrued at a rate of at least one hour of paid sick leave for every 30 hours worked.[461] The paid sick leave requirement applies to certain contracts solicited—or renewed, extended, or amended—on or after January 1, 2017, including all contracts and subcontracts of any tier thereunder. For more information on this topic, see **LITTLER ON GOVERNMENT CONTRACTORS & EQUAL EMPLOYMENT OPPORTUNITY OBLIGATIONS**.

3.9(b)(ii) *State Guidelines on Paid Sick Leave*

New Jersey's statewide paid sick and safe time law went into effect in 2018.[462]

Covered Employers & Employees. All private employers are covered. Covered employees include individuals engaged in service to an employer in the employer's business for compensation who perform that service in New Jersey, but exclude independent contractors, certain per diem health care employees, employees that have waived their paid sick and safe time rights during the negotiation of a collective bargaining agreement (CBA), and employees performing service in the construction industry pursuant to a CBA. For employees covered by a CBA in effect when the law took effect, they law will apply to them when the CBA expires.

Covered Relations. Employees can use leave for personal reasons, or to care for or assist a family member, which includes a child (regardless of age, per the state labor department), grandchild (employee's), sibling, spouse (includes domestic or civil union partner), parent, and grandparent (employees), as well as any other individual related by blood to the employee or whose close association with the employee is the equivalent of a family relationship.

Designation of Benefit Year. A *benefit year* is defined as a period of 12 consecutive months established by an employer. Once a year is established it cannot be changed without notifying the state labor department at least 30 days before the proposed change. The notice must:

- be in writing;
- specify the existing benefit year;
- specify the proposed new benefit year;
- indicate the effective date of the new benefit year;
- indicate the reason for the change in benefit year; and
- include a current list of employees with corresponding contact information, including phone number and home address, and a corresponding history of accrual, use, payment, payout, and carry-over of earned sick leave for each employee for the preceding 2 benefit years.

The department can deny a proposal and impose a benefit year on the employer it determines is changing the year at times or in ways that prevent accrual or use of leave by an employee.

Accrual & Carry-Over. Employers can comply with the law by offering fully paid time off paid (includes, but is not limited to personal days, vacation days, and sick days) to each employee that meets or exceeds

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[461] 80 Fed. Reg. 54,697-54,700 (Sept. 10, 2015).

[462] N.J. STAT. §§ 34:11D-1 *et seq.*, § 12; N.J. ADMIN. CODE §§ 12:69-1.1 *et seq*. When the state law took effect, it preempted then-existing local ordinances in the following 13 cities: (1) Bloomfield; (2) East Orange; (3) Elizabeth; (4) Irvington; (5) Jersey City; (6) Montclair; (7) Morristown; (8) Newark; (9) New Brunswick; (10) Passaic; (11) Paterson; (12) Plainfield; and (13) Trenton.

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all the law's requirements. Otherwise, accrual begins when employment begins. Employees must accrue one leave hour for every 30 hours worked. For exempt employees for whom an employer does not track hours worked, for accrual purposes employers can either track their hours or assume the employee works 40 hours per week. Alternatively, employers may provide employees 40 hours of leave on the first day of each year. Employers are not required to permit employees to accrue more than 40 leave hours in any benefit year.

Regardless of whether an accrual-based or frontloading system is used, unused leave carries over to the following benefit year. However, employers are not required to permit employees to carry forward more than 40 leave hours from one benefit year to the next. Alternatively, employers may be able to cash-out unused leave hours at year-end, though providing the option is entirely at an employer's discretion. Standards differ based on whether an accrual-based on frontloading system is used. If an accrual-based system is used, in the last month of a benefit year employers can offer a cash-out to employees, who must choose, within 10 calendar days of the offer, to cash-out 50% or 100% of unused leave hours. If the employee opts for a 50% cash-out, the other 50% of leave hours must be carried forward to the next benefit year. If a frontloading system is used, cash-out can only occur at 100% of unused leave hours.

Covered Purposes. Unless an employer agrees to an earlier date, employees are eligible to use leave beginning on the 120th calendar day after employment commences. Employers determine the minimum amount of leave an employee must use for an absence, which cannot exceed the number of hours the employee was scheduled to work during that shift. Employers are not required to permit employees to use more than 40 leave hours in any benefit year.

Leave can be used for the following sick time purposes:

- diagnosis, care, or treatment of, or recovery from, a mental or physical illness, injury or other adverse health condition of an employee or covered relation; or
- preventive medical care for an employee or covered relation.

Also, is an absence is necessary due to circumstances resulting from an employee or covered relation being a victim of domestic or sexual violence, leave can be used for the following safe time purposes:

- medical attention needed to recover from physical or psychological injury or disability caused by domestic or sexual violence;
- services from a designated domestic violence agency or other victim services organization;
- psychological or other counseling;
- relocation; or
- legal services, including obtaining a restraining order or preparing for, or participating in, any civil or criminal legal proceeding related to the domestic or sexual violence.

Additionally, leave may be used for other purposes:

- closure of an employee's workplace, or child's school or place of care, by order of a public official or because the governor declares a state of emergency due to an epidemic or other public health emergency;

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- governor declares a state of emergency, or health care provider or Health Commissioner or other public health authority issued a determination that the presence in the community of the employee or covered relation would jeopardize others' health;
- during a state of emergency the governor declares, or upon the recommendation, direction, or order of a healthcare provider or the Commissioner of Health or other authorized public official, an employee undergoes isolation or quarantine, or cares for a family member in quarantine, as a result of suspected exposure to a communicable disease and a finding by the provider or authority that the individual's presence in the community would jeopardize others' health
- attend a child's school-related conference, meeting, function or other event requested or required by a school administrator, teacher, or other professional staff member responsible for the child's education; or
- attend a meeting regarding care provided to the child in connection with the child's health conditions or disability (which, possibly, could include sporting events, play, or similar activities).

Requesting, Verifying & Documenting Leave Use. If the need to use leave is foreseeable, an employer may require advance notice of the intention to use leave, not to exceed 7 calendar days prior to the date the leave is to begin, and employees must make a reasonable effort to schedule leave use in a manner that does not unduly disrupt the employer's operations. If the reason for leave is not foreseeable, an employer may require an employee to give notice of the intention as soon as practicable if the employer has notified the employee of this requirement. In either case, employers can require notice of the absence's expected duration.

An employer may require reasonable documentation that leave is being taken for a covered purpose if either leave is used for three or more consecutive days or when leave that is not foreseeable is used during dates on which an employer has prohibited employees from using foreseeable leave. If leave is taken for a sick time purpose, documentation signed by a health care professional who is treating the employee or covered relation indicating the need for leave and, if possible, number of days of leave, is considered reasonable documentation. If leave is taken for a safe time purpose, any of the following is considered reasonable documentation of the domestic or sexual violence:

- medical documentation;
- a law enforcement agency record or report;
- a court order;
- documentation that the perpetrator of the domestic or sexual violence has been convicted of a domestic or sexual violence offense; Certification from a certified Domestic Violence Specialist or a representative of a designated domestic violence agency or other victim services organization; or
- other documentation or certification provided by a social worker, counselor, member of the clergy, shelter worker, health care professional, attorney, or other professional who has assisted the employee or covered relation in dealing with the domestic or sexual violence.

If leave is taken for a public health purpose, a copy of the order of the public official or the determination by the health authority is considered reasonable documentation. When leave is used for a covered school-

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related event, reasonable documentation means tangible proof of the school-related conference, meeting or function, or other event, or tangible proof of the meeting regarding care.

Payment When Leave Is Used. Leave must be paid at the same rate of pay with the same benefits – *i.e.*, it must be as if employee worked those hours – as an employee normally earns, which cannot be less than the state minimum wage.

- If paid solely by commission or piecework, or paid a base wage plus commission or piecework, the hourly rate of pay is the base wage or the state minimum wage, whichever is greater.
- If an employee has two or different jobs, or the employee's pay rate fluctuates for the same job, the hourly rate of pay is calculated by dividing total earnings (excluding overtime premium) for the seven most recent workdays without leave taken by total hours worked during that period.
- If an employee's pay includes the value of gratuities, food, or lodging, the hourly rate of pay is calculated by dividing total earnings (excluding overtime premium) for the seven most recent workdays without leave taken by the number of hours worked during that period. If it is not feasible to determine an employee's exact hourly rate using this calculation, leave should be paid at the agreed hourly wage, which cannot be less than the state minimum wage.
  - **CAUTION**: The state labor department suggests all earnings, including tips, must be included in pay rate calculations.[463]
- Discretionary bonuses are excluded when calculating an employee's hourly rate of pay.

When employment ends, employees are not entitled to payment of unused leave unless an employer policy or collective bargaining agreement provides for payment.

Notice, Posting & Record Keeping Requirements. Employers must provide each employee with a written copy of the state-created notice at the time of the employee's hiring, if the employee is hired after it was issued. Also, employers must provide notification to employees of their rights under the law, including the amount of earned sick leave to which they are entitled and the terms of its use, and remedies provided by the law to employees if an employer fails to provide the required benefits or retaliates against employees exercising their rights under the law. This notice must be provided to each employee in a form issued by the state labor department not later than 30 days after the state issued the notice, and at any time when first requested by an employee. Employers must conspicuously post the required notification in a place or places accessible to all employees in each workplace. For a period of five years, employers must retain records documenting hours worked, and leave taken by employees. Moreover, per the state labor department, employers must keep records documenting leave accrued/advanced, earned, paid out, and carried over.

Separately, the New Jersey's Temporary Workers' Bill of Rights Law requires that when a temporary help service firm agrees to send a person to work as a temporary laborer in a designated classification placement, at the time of dispatch the firm must provide the laborer a written statement on a state-labor-

[463] New Jersey Department of Labor and Workforce Development, Response to Comment 64, 52 N.J.R. 20(a) (Jan. 6, 2020).

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department-approved form containing various pieces of information, including but not limited to the amount of sick leave to which the laborer is entitled under New Jersey's Earned Sick Leave Law.[464]

Prohibitions. Generally, a violation occurs when an employer:

- willfully hinders or delays the state labor department from enforcing the law;
- fails to make, keep, and preserve any required record;
- falsifies any record;
- refuses to make any such record accessible to the state labor department upon demand;
- refuses to furnish to the state labor department, on demand, a sworn statement of such record or any other information required for the proper enforcement of the law;
- fails to provide earned sick leave to each employee in the amount and in the manner the law prescribes;
- takes a retaliatory personnel action or discriminates against an employee in violation of the law; or
- otherwise violates any provision of the law.

An employer cannot require, as a condition of an employee's using leave, that the employee search for or find a replacement worker to cover the hours during which the employee is using leave. Additionally, employees cannot be required to use accrued leave. Employers cannot count legitimate use of leave as an absence that may result in an employee being subject to discipline, discharge, demotion, suspension, a loss or reduction of pay, or any other adverse action, which includes "no fault" attendance policies whereby employees receive a point or a demerit for any absence, no matter the reason, and are subjected to discipline or are foreclosed from a promotional opportunity after the accumulation of a certain number of points or demerits. Also, employers cannot take retaliatory personnel action or discriminate against an employee because the employee: Requests or uses leave either in accordance with the law or the employer's sick leave policy; Files a complaint with the state labor department alleging the employer violated the law; Informs any other person of their rights under the law. There is a rebuttable presumption of an unlawful retaliatory personnel action whenever an employer takes adverse action against an employee within 90 days of an employee engaging in protected activities.

End of Employment. When employment ends, employees are not entitled to payment of unused leave unless an employer policy or collective bargaining agreement provides for payment.

Enforcement. The law is enforced by the New Jersey Department of Labor and Workforce Development, with whom employees can file a complaint. Alternatively, employees can individually, or as a class action, file a lawsuit against an employer. The statute of limitations is six years.

3.9(c) *Pregnancy Leave*

3.9(c)(i) *Federal Guidelines on Pregnancy Leave*

Three federal statutes are generally implicated when handling leave related to pregnancy: the Pregnancy Discrimination Act, which amended Title VII of the Civil Rights Act of 1964 ("Title VII") in 1978; the Family

[464] To be codified. New Jersey A. 1474. § 3.

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and Medical Leave Act; and the Americans with Disabilities Act. For additional information, see **LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES**.

Pregnancy Discrimination Act (PDA). Under the PDA, which as part of Title VII applies to employers with 15 or more employees, disabilities caused or contributed to by pregnancy, childbirth, or related medical conditions must be treated the same as disabilities caused or contributed to by other medical conditions under an employer's health or disability insurance or sick leave plan.[465] Policies and practices involving such matters as the commencement and duration of leave, the availability of extensions, reinstatement, and payment under any health or disability insurance or sick leave plan must be applied to disability due to pregnancy, childbirth, or related medical conditions on the same terms as they are applied to other disabilities.

An employer must allow individuals with physical limitations resulting from pregnancy to take leave on the same terms and conditions as others who are similar in their ability or inability to work. However, an employer may not compel an employee to take leave because the employee is pregnant, as long as the employee is able to perform their job. Moreover, an employer may not prohibit employees from returning to work for a set length of time after childbirth. Thus, employers must hold open a job for a pregnancy-related absence for the same length of time as jobs are held open for employees on sick or disability leave.

Family and Medical Leave Act (FMLA). A pregnant employee may take FMLA leave intermittently for prenatal examinations or for their own serious health condition, such as severe morning sickness.[466] FMLA leave may also be used for the birth or placement of a child; however, the use of intermittent leave (as opposed to leave taken on an intermittent or reduced schedule) is subject to the employer's approval.

Americans with Disabilities Act (ADA). Pregnancy-related impairments may constitute disabilities for purposes of the ADA. The federal Equal Employment Opportunity Commission (EEOC) takes the position that leave is a reasonable accommodation for pregnancy-related impairments, and may be granted in addition to what an employer would normally provide under a sick leave policy for reasons related to the impairment.[467] An employee may also be allowed to take leave beyond the maximum FMLA leave if the additional leave would be considered a reasonable accommodation.

Several states provide greater protections for employees with respect to pregnancy. For example, states may have specific laws prohibiting discrimination based on pregnancy or providing separate protections for pregnant individuals, including the requirement that employers provide reasonable accommodations to pregnant employees to enable them to continue working during their pregnancies, provided that no undue hardship on the employer's business operations would result. These protections are discussed in **3.11(c)**. To the extent that a state law focuses primarily on providing job-protected leave for employees with disabling pregnancy-related health conditions, that state law is discussed below.

3.9(c)(ii) *State Guidelines on Pregnancy Leave*

There is no New Jersey statute that provides entitlement for pregnancy leave to private employees unless the pregnancy results in a disability. The New Jersey Family Leave Act does not provide leave for an

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[465] 42 U.S.C. § 2000e(k); *see also* 29 C.F.R. § 1604.10.

[466] 29 C.F.R. § 825.202.

[467] EEOC, Notice 915.003, *EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues* (June 25, 2015), *available at* https://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm; *see also* EEOC, *Facts About Pregnancy Discrimination* (Sept. 8, 2008), *available at* https://www.eeoc.gov//facts/fs-preg.html.

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employee's own disability, but the state's paid family leave law does. A pregnant employee that qualifies as disabled under the state's paid family leave law may take up to 26 weeks of leave for their own temporary disability, as described in 3.9(a)(ii).[468] Thus, an employee who first takes leave under the federal FMLA because of their own disability, including a disability relating to pregnancy or childbirth, may be entitled to an additional 12 weeks within 24 months to care for a seriously ill family member or newly-born or adopted child under the state law.[469]

As described in 3.11(c)(ii), New Jersey requires employers of one or more employees to make reasonable accommodations for a pregnant individuals. Under this law, workplace accommodation and paid or unpaid leave provided to an employee affected by pregnancy must not be provided in a manner less favorable than accommodations or leave provided to other employees not affected by pregnancy but similar in their ability or inability to work.[470]

3.9(d) *Adoptive Parents Leave*

3.9(d)(i) *Federal Guidelines on Adoptive Parents Leave*

An eligible employee may take time off to care for a newly-adopted child as part of the employee's leave entitlement under the FMLA. For information on the FMLA, see LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES.

3.9(d)(ii) *State Guidelines on Adoptive Parents Leave*

An eligible employee may take time off to care for a newly-adopted child as part of the employee's leave entitlement under the New Jersey Family Leave Act (NJFLA).[471] For more information on the NJFLA, see 3.9(a)(ii).

3.9(e) *School Activities Leave*

3.9(e)(i) *Federal Guidelines on School Activities Leave*

Federal law does not address school activities leave for private-sector employees.

3.9(e)(ii) *State Guidelines on School Activities Leave*

New Jersey law does not address school activities leave for private-sector employees.

3.9(f) *Blood, Organ, or Bone Marrow Donation Leave*

3.9(f)(i) *Federal Guidelines on Blood, Organ, or Bone Marrow Donation*

Federal law does not address blood, organ, or bone marrow donation leave for private-sector employees.

3.9(f)(ii) *State Guidelines on Blood, Organ, or Bone Marrow Donation*

The New Jersey Temporary Disability Benefits Law[472] provides that an employee is eligible to use temporary disability benefits during a period when the employee is unable to work due to a temporary

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[468] N.J. STAT. ANN. § 43:21-39.

[469] N.J. ADMIN. CODE § 13:14-1.6.

[470] N.J. STAT. ANN. § 10:5-12(s).

[471] N.J. STAT. ANN. §§ 34:11B-1 *et seq.*; N.J. ADMIN. CODE §§ 13:14-1.2 *et seq.*

[472] N.J. STAT. ANN. §§ 43:21-25 *et seq.*

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disability, including during a period in which the employee is unable to work because s/he is an organ or bone marrow donor.[473]

The statute provides an eligible employee with the right to reinstatement. After the period of disability due to organ or bone marrow donation ends, the employee is entitled to be restored to the position of employment the employee held when the period of disability began, or to an equivalent position of like seniority, status, employment benefits, pay, and other terms and conditions of employment. If during the employee's period of disability the employer experiences a reduction in force or layoff, and the employee would have lost the position of employment had s/he not experienced the period of disability, as a result of the reduction in force or pursuant to the good faith operation of a bona fide layoff and recall system, the employee would not entitled to reinstatement. The employee retains all rights under any applicable layoff and recall system, including a system under a collective bargaining agreement, as if the employee had not experienced the period of disability.[474]

3.9(g) *Voting Time*

3.9(g)(i) *Federal Voting Time Guidelines*

There is no federal law concerning time off to vote.

3.9(g)(ii) *State Voting Time Guidelines*

New Jersey law does not address time off to vote for private-sector employees.

3.9(h) *Leave to Participate in Political Activities*

3.9(h)(i) *Federal Guidelines on Leave to Participate in Political Activities*

Federal law does not address leave for private-sector employees to participate in political activities.

3.9(h)(ii) *State Guidelines on Leave to Participate in Political Activities*

New Jersey law does not address leave for private-sector employees to participate in political activities.

3.9(i) *Leave to Participate in Judicial Proceedings*

3.9(i)(i) *Federal Guidelines on Leave to Participate in Judicial Proceedings*

The Jury System Improvements Act prohibits employers from terminating or disciplining "permanent" employees due to their jury service in federal court.[475] Employers are under no federal statutory obligation to pay employees while serving on a jury.

Employers may verify that an employee's request for civic duty is legally obligated by requiring the employee to produce a copy of the summons, subpoena, or other documentation. Also, an employer can set reasonable advance notice requirements for jury duty leave. Upon completion of jury duty, an employee is entitled to reinstatement.

An employer also may be required to grant leave to employees who are summoned to testify, to assist, or to participate in hearings conducted by federal administrative agencies, as required by a variety of

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[473] N.J. STAT. ANN. § 43:21-29.

[474] N.J. STAT. ANN. § 43:21-29.2.

[475] 28 U.S.C. § 1875.

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additional federal statutes.[476] For more information, see **LITTLER ON LEAVES OF ABSENCE: MILITARY & CIVIC DUTY LEAVES**.

3.9(i)(ii) *State Guidelines on Leave to Participate in Judicial Proceedings*

Leave to Serve on a Jury. In New Jersey, employers are prohibited from taking an adverse employment action against an employee, or otherwise threatening or coercing that employee, on the basis of the employee's required attendance at court for jury duty.[477] Penalties for violating this prohibition include the possibility of a criminal charge and a possible civil action for monetary damages, attorneys' fees, and reinstatement of employment.[478] However, there is no statutory requirement for private employers to compensate employees for jury service.

3.9(j) *Leave for Victims of Domestic Violence, Sexual Assault, Stalking, or Victims of Crime*

3.9(j)(i) *Federal Guidelines on Leaves for Victims of Domestic Violence, Sexual Assault, Stalking, or Victims of Crime*

Federal law does not address leave for private-sector employees who are victims of crime or domestic violence.

3.9(j)(ii) *State Guidelines on Leaves for Victims of Domestic Violence, Sexual Assault, Stalking, or Victims of Crime*

The New Jersey Security and Financial Empowerment Act ("NJ SAFE Act") provides eligible employees with unpaid time off to attend to a variety of matters related to an act of domestic violence or sexual assault committed against the employee or a family or household member.[479] The NJ SAFE Act applies to employers with 25 or more employees. Additionally, it applies to all public offices, agencies, boards, and government bodies in the state.[480]

To be eligible for protection under the NJ SAFE Act, an individual must be employed for at least 12 months and for at least 1,000 hours during the immediately preceding 12-month period.[481] A covered employee who is a victim of domestic violence or a sexually violent offense, or whose family member is a victim, is entitled to unpaid leave of no more than 20 days in one 12-month period, to be used in the 12-month period following any qualifying incident. *Family member* is defined as an employee's child, parent, spouse, domestic partner, or civil union partner, parent-in-law, sibling, grandparent, grandchild, or any other individual related by blood to the employee, and any other individual that the employee shows to have a close association with the employee that is the equivalent of a family relationship. The unpaid leave may be taken intermittently in intervals of at least one day, within the 12-month period following the qualifying incident. Each qualifying incident is a separate offense for which an employee is entitled to unpaid leave, provided the employee has not exhausted the allotted 20 days for the 12-month period.[482]

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[476] *See, e.g.*, 29 U.S.C. § 660(c) (Occupational Safety and Health Act); 29 U.S.C. § 215(a)(3) (Fair Labor Standards Act); 42 U.S.C. § 2000e 3(a) (Title VII); 29 U.S.C. § 623(d) (Age Discrimination in Employment Act).

[477] N.J. STAT. ANN. § 2B:20-17(a).

[478] N.J. STAT. ANN. § 2B:20-17(b)-(c).

[479] N.J. STAT. ANN. § 34:11C-3.

[480] N.J. STAT. ANN. § 34:11C-2.

[481] N.J. STAT. ANN. § 34:11C-2.

[482] N.J. STAT. ANN. § 34:11C-3.

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Employees may take leave to engage in any of the following activities (as it applies to them personally, or to a family member as defined above):

- seeking medical attention for, or recovering from, physical or psychological injuries caused by the incident;
- obtaining services from a victim services organization;
- obtaining psychological or other counseling;
- participating in safety planning, temporarily or permanently relocating, or taking other actions to increase the victim's safety or to ensure their economic security;
- seeking legal assistance, including preparing for, or participating in, any civil or criminal legal proceeding related to or derived from domestic or sexual violence; or
- attending, participating in, or preparing for a criminal or civil court proceeding relating to an incident of domestic or sexual violence.[483]

If the need for leave is foreseeable, employees must provide employers with written notice as far in advance as is reasonable and practical under the circumstances.[484] An employer may require employees to provide documentation of the qualifying incident when requesting leave. Acceptable supporting documents include the following:

- a domestic violence restraining order or other documentation issued by a court;
- written documentation from a county or municipal prosecutor;
- documentation of the conviction of the person who committed the qualifying incident;
- medical documentation of the qualifying incident;
- certification from a certified Domestic Violence Specialist or the director of a designated domestic violence agency or Rape Crisis Center; or
- other documentation or certification provided by a social worker, member of the clergy, shelter worker, or other professional who has assisted the employee or family member in dealing with the qualifying incident.[485]

An employee may elect, but an employer may not require, that employees use any accrued paid vacation leave, personal leave, or medical or sick leave during any part of the 20-day period of unpaid leave.[486] If an employee requests leave for a reason that is also covered by the FMLA or the NJFLA, employers may count the leave against an FMLA or NJFLA entitlement and run it concurrently with the employee's entitlement under each respective law.

An employer must conspicuously post a notice advising employees of their rights and obligations under the NJ SAFE Act.[487]

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[483] N.J. STAT. ANN. § 34:11C-3(a).

[484] N.J. STAT. ANN. § 34:11C-3(b).

[485] N.J. STAT. ANN. § 34:11C-3(b).

[486] N.J. STAT. ANN. § 34:11C-3(a).

[487] N.J. STAT. ANN. § 34:11C-3(d).

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Antiretaliation Provisions. An employer cannot threaten to or actually discharge, harass, or otherwise discriminate or retaliate against an employee concerning compensation, terms, conditions, or privileges of employment because the employee took or requested NJ SAFE Act leave or because the employee refused to authorize the release of confidential information.[488]

3.9(k) *Military-Related Leave*

3.9(k)(i) *Federal Guidelines on Military-Related Leave*

Two federal statutes primarily govern military-related leave: the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Family and Medical Leave Act (FMLA). For more detailed information on these statutes, including notice and other requirements, see LITTLER ON LEAVES OF ABSENCE: MILITARY & CIVIC DUTY LEAVES.

USERRA. USERRA imposes obligations on all public and private employers to provide employees with leave to "serve" in the "uniformed services." USERRA also requires employers to reinstate employees returning from military leave who meet certain defined qualifications. An employer also may have an obligation to train or otherwise qualify those employees returning from military leave. USERRA guarantees employees a continuation of health benefits for the 24 months of military leave (at the employee's expense) and protects an employee's pension benefits upon return from leave. Finally, USERRA requires that employers not discriminate against an employee because of past, present, or future military obligations, among other things.

Some states provide greater protections for employees with respect to military leave. USERRA, however, establishes a "floor" with respect to the rights and benefits an employer is required to provide to an employee to take leave, return from leave, and be free from discrimination. Any state law that seeks to supersede, nullify, or diminish these rights is void under USERRA.[489]

FMLA. Under the FMLA, eligible employees may take leave for: (1) any "qualifying exigency" arising from the foreign deployment of the employee's spouse, son, daughter, or parent with the armed forces; or (2) to care for a next of kin servicemember with a serious injury or illness (referred to as "military caregiver leave").

1. **Qualifying Exigency Leave.** An eligible employee may take up to 12 weeks of unpaid leave in a single 12-month period if the employee's spouse, child, or parent is an active duty member of one of the U.S. armed forces' reserve components or National Guard, or is a reservist or member of the National Guard who faces recall to active duty if a qualifying exigency exists.[490] An eligible employee may also take leave for a qualifying exigency if a covered family member is a member of the regular armed forces and is on duty, or called to active duty, in a foreign

[488] N.J. STAT. ANN. § 34:11C-4.

[489] USERRA provides that: (1) nothing within USERRA is intended to supersede, nullify, or diminish a right or benefit provided to an employee that is greater than the rights USERRA provides (38 U.S.C. § 4302(a)); and (2) USERRA supersedes any state law that would reduce, limit, or eliminate any right or benefit USERRA provides (38 U.S.C. § 4302(b)).

[490] 29 C.F.R. § 825.126(a).

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country.491 Notably, leave is only available for covered relatives of military members called to active federal service by the president and is not available for those in the armed forces recalled to state service by the governor of the member's respective state.

2. **Military Caregiver Leave.** An eligible employee may take up to 26 weeks of unpaid leave in a single 12-month period to care for a "covered servicemember" with a serious injury or illness if the employee is the servicemember's spouse, child, parent, or next of kin.

3.9(k)(ii) *State Guidelines on Military-Related Leave*

Military Leave. New Jersey employers are required to restore the employment of individuals who have left their full- or part-time employment with an employer to perform military service, under certain circumstances. Reinstatement is required if the individual:

- receives a certificate of completion of military service duly executed by the appropriate military officer;
- is still qualified to perform the duties of their position; and
- applies for reemployment within 90 days of relief from service.[492]

The employer is required to restore such individuals to the positions they occupied immediately prior to their performance of military service, or to positions of like seniority status and pay, unless the employer's circumstances have so changed that it becomes impossible or unreasonable to do so. If the employer's circumstances have changed because of reasons of economy, efficiency, or other related reasons as to make it impossible or unreasonable to reinstate employees who left to enter active military service in time of war or emergency, the employer is required to restore such individuals to any available position, upon request, that they are able or qualified to perform. Military service includes active duty ordered by a state governor.[493]

The rights provided by this section apply with equal force to any person who temporarily leaves their employment to participate in assemblies or attend annual training or service schools conducted by one of the U.S. armed forces for a period or periods up to and including three months, provided that the individual remains qualified for the position and applies for reemployment within 10 days after completion of the temporary service.[494] However, an individual who takes leave in excess of three months in any four-year period is not entitled to the protections of this provision.

These protections also extend to members of the military reserves, the U.S. armed forces, and the National Guard of New Jersey or of any other state who have been discharged by their employers as a result of their membership therein. If these individuals remain qualified to perform the duties of their employment, and apply for reemployment within 10 days of discharge, employers must offer them the same rights and privileges as other individuals protected by this law.[495]

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[491] Deployment of the member with the armed forces to a foreign country means deployment to areas outside of the United States, the District of Columbia, or any Territory or possession of the United States, including international waters. 29 C.F.R. § 825.126(a)(3).

[492] N.J. STAT. ANN. § 38:23C-20(a).

[493] N.J. STAT. ANN. § 38:23C-20(a)(3).

[494] N.J. STAT. ANN. § 38:23C-20(b).

[495] N.J. STAT. ANN. § 38:23C-20(c).

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Employees covered by this section are treated as if they had been on a leave of absence during the period of military service (or during the period during which they were unlawfully suspended or discharged by the employer on the basis of such service). As such, the employer must: (1) restore their seniority; (2) offer them the same insurance or other benefits to which other employees are entitled, under the same conditions as such benefits are provided to other employees considered to be on a leave of absence; and (3) provide continuous employment for a period of one year after such restoration.[496]

Employers that violate this law may be subject to specific enforcement (that is, employers can be ordered to comply with the law's provisions by offering reinstatement, etc.) and payment of the individual's lost wages or benefits attributable to the employer's violation. Individuals seeking enforcement may be represented by counsel of their own choosing or may request the state attorney general to represent them.[497]

Other Military-Related Protections: Spousal Unemployment. Although not a leave entitlement, New Jersey law states that no otherwise eligible individual may be denied unemployment benefits for voluntarily leaving work if the individual left work to accompany their spouse who is an active member of the armed forces. This protection applies if: (1) the employee moves to a new place of residence, outside New Jersey, due to the armed forces member's transfer to a new assignment in a different geographical location; (2) the move takes place not more than nine months after the spouse is transferred; and (3) upon arrival at the new place of residence, the individual must be available for suitable work. Additionally, no employer's account will be charged for the payment of benefits to an individual who left work under these circumstances.[498]

3.9(l) *Other Leaves*

3.9(l)(i) *Federal Guidelines on Other Leaves*

There are no federal statutory requirements for other categories of leave for private-sector employees.

3.9(l)(ii) *State Guidelines on Other Leaves*

Volunteer Emergency Responders. New Jersey law offers certain leave protections for employees who are volunteer emergency responders. Under the Emergency Responders Employment Protection Act, a *volunteer emergency responder* is an active member in good standing of a volunteer fire company, a volunteer member of a duly incorporated first aid, rescue, or ambulance squad, or a member of any county or municipal volunteer Office of Emergency Management. Employers may not dismiss or suspend an employee who fails to report for work because the employee is serving as a volunteer emergency responder.

Employees are required to provide notice, at least one hour before they are scheduled to report to their place of employment, and upon returning to work must provide a copy of the incident report and a certification by the incident commander. Leave may be unpaid; however, a volunteer emergency responder may use a vacation day or a sick day, if they have such days available. The law provides an exception for essential employees.[499]

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[496] N.J. STAT. ANN. § 38:23C-20(d).

[497] N.J. STAT. ANN. § 38:23C-20(e).

[498] N.J. STAT. ANN. § 43:21-5(k).

[499] N.J. STAT. ANN. § 40A:14-214.

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3.10 Workplace Safety

3.10(a) *Occupational Safety and Health*

3.10(a)(i) *Fed-OSH Act Guidelines*

The federal Occupational Safety and Health Act ("Fed-OSH Act") requires every employer to keep their places of employment safe and free from recognized hazards likely to cause death or serious harm to employees.[500] Employers are also required to comply with all applicable occupational safety and health standards.[501] To enforce these standards, the federal Occupational Safety and Health Administration ("Fed-OSHA") is authorized to carry out workplace inspections and investigations and to issue citations and assess penalties. The Fed-OSH Act also requires employers to adopt reporting and record-keeping requirements related to workplace accidents. For more information on this topic, see LITTLER ON WORKPLACE SAFETY.

Note that the Fed-OSH Act encourages states to enact their own state safety and health plans. Among the criteria for state plan approval is the requirement that the state plan provide for the development and enforcement of state standards that are at least as effective in providing workplace protection as are comparable standards under the federal law.[502] Some state plans, however, are more comprehensive than the federal program or otherwise differ from the Fed-OSH Act.

3.10(a)(ii) *State-OSH Act Guidelines*

New Jersey, under agreement with Fed-OSHA, operates its own state occupational safety and health program in accordance with section 18 of the Fed-OSH Act.[503] Thus, New Jersey is a so-called "state plan" jurisdiction, with its own detailed rules for occupational safety and health that parallel, but are separate from, Fed-OSHA standards. However, New Jersey's plan applies only to public-sector employees. New Jersey does not have an approved state plan directed to private-sector employees. Accordingly, employers must abide by the Fed-OSH Act.

3.10(b) *Cell Phone & Texting While Driving Prohibitions*

3.10(b)(i) *Federal Guidelines on Cell Phone & Texting While Driving*

Federal law does not address cell phone use or texting while driving.

3.10(b)(ii) *State Guidelines on Cell Phone & Texting While Driving*

New Jersey law prohibits drivers from texting or using a cell phone while driving, without a hands free headset or device. This prohibition applies to employees driving for work purposes and could expose an employer to liability. Employers therefore should be cognizant of, and encourage compliance with, the restriction.

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[500] 29 U.S.C. § 654(a)(1). An *employer* is defined as "a person engaged in a business affecting commerce that has employees." 29 U.S.C. § 652(5). The definition of employer does not include federal or state agencies (except for the U.S. House of Representatives and Senate). Under some state plans, however, state agencies may be subject to the state safety and health plan.

[501] 29 U.S.C. § 654(a)(2).

[502] 29 U.S.C. § 667(c)(2).

[503] 29 U.S.C. § 667.

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A person who is guilty of violating this law will be fined between $200 and $400 for a first offense, between $400 and $600 for a second offense, and between $600 and $800 for a third offense. Additionally, for a third or subsequent violation, the court in its discretion may order the person to forfeit the right to operate a motor vehicle over the highways of the state for a period of 90 days.[504]

3.10(c) *Firearms in the Workplace*

3.10(c)(i) *Federal Guidelines on Firearms on Employer Property*

Federal law does not address firearms in the workplace.

3.10(c)(ii) *State Guidelines on Firearms on Employer Property*

New Jersey law restricts where a person may carry a firearm in public places. In addition to a list of public locations where firearms are prohibited, a person is prohibited from carrying a firearm onto private property, including but not limited to residential, commercial, industrial, agricultural, institutional, or undeveloped property, unless the property owner has provided express consent or has posted a sign indicating that it is permissible to carry a concealed handgun with a valid and lawfully issued carry permit onto the premises.[505]

Also, a person may transport a firearm into a parking lot of an area or premises where carrying a firearm is otherwise prohibited. A person with a valid concealed carry permit may:

- transport a concealed handgun or ammunition within a vehicle into or out of the parking area, provided that the handgun is unloaded and contained in a closed and securely fastened case, gunbox, or locked unloaded in the trunk or storage area of the vehicle;
- store a handgun or ammunition within a locked lock box and out of plain view within the vehicle in the parking area;
- transport a concealed handgun in the immediate area surrounding their vehicle within a prohibited parking lot area only for the limited purpose of storing or retrieving the handgun within a locked lock box in the vehicle's trunk or other place inside the vehicle that is out of plain view; and
- transport a concealed handgun between a vehicle parked within a prohibited parking lot area and a place other than a prohibited location, provided that the person immediately leaves the parking lot area and does not enter into or on the grounds of the prohibited location with the handgun.[506]

3.10(d) *Smoking in the Workplace*

3.10(d)(i) *Federal Guidelines on Smoking in the Workplace*

Federal law does not address smoking in the workplace.

[504] N.J. STAT. ANN. § 39:4-97.3.

[505] A.B. 4769 (N.J. 2022).

[506] A.B. 4769 (N.J. 2022).

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3.10(d)(ii) *State Guidelines on Smoking in the Workplace*

The New Jersey Smoke-Free Air Act prohibits smoking in essentially all workplaces and places open to the public.[507] "No smoking" signs with contrasting lettering must be posted at entrances to workplaces. The sign must also indicate that violators are subject to a fine.[508]

3.10(e) *Suitable Seating for Employees*

3.10(e)(i) *Federal Guidelines on Suitable Seating for Employees*

Federal law does not address suitable seating requirements for employees.

3.10(e)(ii) *State Guidelines on Suitable Seating for Employees*

Employers of one or more employees in any manufacturing, mechanical, or mercantile establishment, or in the services and operations incident to any commercial employment, are subject to a suitable seating requirement. Such employers must "provide and maintain suitable seats conveniently situated" and must "permit the use of seats by employees at all times except when necessarily engaged in the discharge of duties that cannot properly be performed in a sitting position."[509]

3.10(f) *Workplace Violence Protection Orders*

3.10(f)(i) *Federal Guidelines on Workplace Violence Protection Orders*

Federal law does not address employer workplace violence protection orders. That is, there is no federal statute addressing whether or how employers might obtain a legal order (such as a temporary restraining order) on their own behalf, or on behalf of their employees or visitors, to protect against workplace violence, threats, or harassment.

3.10(f)(ii) *State Guidelines on Workplace Violence Protection Orders*

New Jersey law does not address employer workplace violence protection orders.

3.11 Discrimination, Retaliation & Harassment

3.11(a) *Protected Classes & Other Fair Employment Practices Protections*

3.11(a)(i) *Federal FEP Protections*

The federal equal employment opportunity laws that apply to most employers include: (1) Title VII of the Civil Rights Act of 1964 ("Title VII");[510] (2) the Americans with Disabilities Act (ADA);[511] (3) the Age Discrimination in Employment Act (ADEA);[512] (4) the Equal Pay Act;[513] (5) the Genetic Information

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[507] N.J. STAT. ANN. § 26:3D-58.

[508] N.J. STAT. ANN. § 26:3D-61.

[509] N.J. STAT. ANN. § 34:2-29.

[510] 42 U.S.C. §§ 2000e *et seq.* Title VII applies to employers with 15 or more employees. 42 U.S.C. § 2000e(b).

[511] 42 U.S.C. §§ 12101 *et seq.* The ADA applies to employers with 15 or more employees. 42 U.S.C. § 12111(5).

[512] 29 U.S.C. §§ 621 *et seq*. The ADEA applies to employers with 20 or more employees. 29 U.S.C. § 630.

[513] 29 U.S.C. § 206(d). Since the Equal Pay Act is part of the FLSA, the Equal Pay Act applies to employers covered by the FLSA. *See* 29 U.S.C. § 203.

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Nondiscrimination Act of 2009 (GINA);[514] (6) the Civil Rights Acts of 1866 and 1871;[515] and (7) the Civil Rights Act of 1991. As a result of these laws, federal law prohibits discrimination in employment on the basis of:

- race;
- color;
- national origin (includes ancestry);
- religion;
- sex (includes pregnancy, childbirth, or related medical conditions, and pursuant to the U.S. Supreme Court's decision in *Bostock v. Clayton County, Georgia*, includes sexual orientation and gender identity);[516]
- disability (includes having a "record of" an impairment or being "regarded as" having an impairment);
- age (40); or
- genetic information.

The Equal Employment Opportunity Commission (EEOC) is the agency charged with handling claims under the antidiscrimination statutes.[517] Employees must first exhaust their administrative remedies by filing a complaint within 180 days—unless a charge is covered by state or local antidiscrimination law, in which case the time is extended to 300 days.[518]

3.11(a)(ii) *State FEP Protections*

New Jersey's comprehensive state antidiscrimination statute is known as the New Jersey Law Against Discrimination (LAD).[519] New Jersey employers should be aware that a wider array of protected categories exists under state law, and unlike federal law, all New Jersey employers, regardless of size, are bound by its provisions. Moreover, a broader set of remedies is available under state law to compensate employees and punish offending employers.

The LAD prohibits employment discrimination against any person on the basis of the following:

- race (encompasses discrimination based on hairstyles closely associated with race, including but not limited to, twists, braids, cornrows, Afros, locs, Bantu knots, and fades);[520]

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[514] 42 U.S.C. §§ 2000ff *et seq*. GINA applies to employers with 15 or more employees. 42 U.S.C. § 2000ff (refers to 42 U.S.C. § 2000e(f)).

[515] 42 U.S.C. §§ 1981, 1983.

[516] 140 S. Ct. 1731 (2020). For a discussion of this case, see LITTLER ON DISCRIMINATION IN THE WORKPLACE: RACE, NATIONAL ORIGIN, SEX, AGE & GENETIC INFORMATION.

[517] The EEOC's website is available at http://www.eeoc.gov/.

[518] 29 C.F.R. § 1601.13. Note that for ADEA charges, only state laws extend the filing limit to 300 days. 29 C.F.R. § 1626.7.

[519] N.J. STAT. ANN. §§ 10:5-1 *et seq*.

[520] New Jersey Div. on Civil Rights, *Guidance on Race Discrimination Based on Hairstyle* (Sept. 2019), *available at* https://www.nj.gov/oag/dcr/downloads/dcr-guide_Hair-Discrimination.pdf.

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- creed;
- color;
- national origin and ancestry;
- nationality;
- age;
- sex;
- pregnancy (includes childbirth or related medical conditions);
- marital, civil union, or domestic partnership status;
- affectional or sexual orientation;
- gender identity or expression;
- atypical hereditary cellular or blood trait;
- genetic information;
- refusal to submit to a genetic test or make available the results of a genetic test to an employer;
- liability for service in the Armed Forces of the United States; and
- disability (including AIDS and HIV-related illnesses).[521]

All New Jersey employers are covered by the LAD, regardless of the number of individuals they employ.[522]

3.11(a)(iii) *State Enforcement Agency & Civil Enforcement Procedures*

Agency Enforcement. The LAD contains a comprehensive administrative procedure to implement and enforce its provisions. The LAD authorizes the Division on Civil Rights (DCR) to investigate charges of discrimination and issue orders to eliminate discriminatory practices.[523] The DCR consists of the state attorney general and the Commission on Civil Rights and is responsible for adopting rules and regulations and investigating charges alleging unfair and discriminatory practices.[524] The DCR is empowered to conduct investigations, receive complaints, subpoena witnesses, compel attendance at hearings and production of documents, administer oaths, and take testimony.[525] The DCR is provided with broad discretion to achieve the goal of eliminating workplace discrimination in New Jersey.[526]

Exhaustion Requirement. Unlike federal antidiscrimination laws and the antidiscrimination laws of many states, the LAD does not require employees to exhaust their administrative remedies by first filing a claim with the DCR. Instead, a victim of an alleged unlawful employment practice has the option of bringing a civil action immediately in state superior court or commencing an administrative proceeding with the

[521] N.J. STAT. ANN. § 10:5-12; N.J. ADMIN. CODE § 12:67-1.3. Until October 5, 2021, New Jersey employers were permitted to refuse to hire or promote individuals over 70 years..

[522] N.J. STAT. ANN. § 10:5-5(e).

[523] N.J. STAT. ANN. § 10:5-6.

[524] N.J. STAT. ANN. § 10:5-7.

[525] N.J. STAT. ANN. § 10:5-8(h)-(i).

[526] N.J. STAT. ANN. § 10:5-6.

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DCR.[527] Once an aggrieved individual has elected a forum, the individual may not pursue a secondary remedial route while the initial action is pending.[528]

Charges. With regard to claims before the DCR, a person who believes that they were the subject of discriminatory practices may file a charge of discrimination naming the respondent employer that is alleged to have committed a discriminatory practice and describing the claimed discriminatory conduct.[529] Charges must be filed within 180 days of the alleged act of discrimination.[530] After the charge of discrimination is filed, the director of the DCR has the power to conduct an investigation and may subpoena witnesses, compel testimony, and request books and records pertaining to the charge.[531]

Investigation. An investigation by the DCR usually includes the utilization of a fact-finding conference.[532] This is not a hearing on the merits of the dispute, but instead is an initial evaluation of the facts to determine if it is likely that unlawful discrimination has occurred. The DCR's investigation may also include one or more of the following:

- collecting and analyzing statistical data;
- reviewing documentary evidence and records;
- interviewing witnesses, which may include current and former employees; and
- issuing questionnaires to the respondent regarding the alleged discriminatory conduct.

Probable Cause Determination & Hearing. Following the investigation, the DCR must determine whether probable cause exists for crediting the charge of discrimination.[533] If the director determines probable cause does not exist, the charge is dismissed. Such dismissal is an appealable order, and the appeal may be taken directly to the New Jersey Superior Court, Appellate Division. The complainant is precluded from pursuing all other avenues of relief based on the same factual allegations.[534]

If the DCR determines that probable cause does exist, the charging party and the respondent are required to participate in a conciliation conference.[535] If settlement cannot be reached during the conciliation stage, the director of the DCR has the authority to schedule a hearing.[536] The case may be heard before the director, or it instead may be transferred to the Office of Administrative Law for a hearing and initial

[527] *Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A.*, 773 A.2d 665 (N.J. 2001).

[528] *Shaner v. Horizon Bancorp.*, 561 § A.2d 1130 (N.J. 1989), *superseded by statute on other grounds*, N.J. STAT. ANN. § 10:5-13.

[529] N.J. ADMIN. CODE §§ 13:4-1.1 *et seq*.

[530] N.J. ADMIN. CODE § 13:4-2.5.

[531] N.J. STAT. ANN. § 10:5-8(i).

[532] N.J. ADMIN. CODE § 13:4-4.7(a)(1).

[533] N.J. STAT. ANN. § 10:5-14; N.J. ADMIN. CODE § 13:4-10.2.

[534] N.J. STAT. ANN. §§ 10:5-13 to 10:5-14; N.J. ADMIN. CODE § 13:4-10.2.

[535] N.J. STAT. ANN. § 10:5-14; N.J. ADMIN. CODE § 13:4-9.4.

[536] N.J. STAT. ANN. § 10:5-15.

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finding by an administrative law judge.[537] If a case has been transferred to the Office of Administrative Law, a notice of filing will issue.[538]

Regardless of whether the hearing is conducted by the director or is transferred to the Office of Administrative Law, the proceeding is governed by nearly the same procedural guidelines. Prior to the hearing, the parties have the right to engage in full-scale documentary discovery, including review of certain materials in the DCR's investigation file. Good cause must be shown prior to the taking of depositions or for physical and mental examinations.[539] If a party has established the requisite good cause for the taking of a deposition and/or testimony at a hearing, the administrative law judge or the clerk of the Office of Administrative Law may issue subpoenas to compel a party's attendance.[540] At any time during the pendency of a hearing, a party may move for summary decision by filing a motion supported by a brief and affidavits.[541]

The hearing itself need not comply with the formal rules of evidence; rather, all relevant evidence is generally admissible.[542] The fact finder has the discretion to exclude evidence if its probative value is substantially outweighed by its prejudicial effect or if it will unduly consume time.[543] The complainant's case is conducted by the DCR's attorney and the respondent may either be represented by counsel or appear pro se.[544] During the proceeding, parties may present oral and documentary evidence, argue the legal issues, cross-examine witnesses, and submit rebuttal evidence.[545] Testimony is taken under oath, and a record transcript is created, which parties have the right to obtain at their expense.[546]

Following the hearing, the administrative law judge presents recommended findings of fact and conclusions of law, based on the evidence supplied at the hearing.[547] The initial decision of the administrative law judge is filed with the director of the DCR within 45 days after the close of the hearing.[548] The parties may file exceptions, objections, and replies to the administrative law judge's initial decision and may also present arguments to the director of the DCR.[549]

Following receipt of the initial decision, the director of the DCR has the discretion to adopt, reject, or modify it.[550] In addition, they may remand the case to the administrative law judge for further action on

[537] N.J. ADMIN. CODE §§ 13:4-1.1 *et seq*.

[538] N.J. ADMIN. CODE § 1:1-9.5(a).

[539] N.J. ADMIN. CODE §§ 1:1-10.1 *et seq*.

[540] N.J. STAT. ANN. § 10:5-8(i).

[541] N.J. ADMIN. CODE § 1:1-12.5(a)-(b).

[542] N.J. STAT. ANN. § 10:5-16.

[543] N.J. ADMIN. CODE § 1:1-15.1(c).

[544] N.J. STAT. ANN. § 10:5-16.

[545] N.J. ADMIN. CODE § 1:1-14.7.

[546] N.J. STAT. ANN. §§ 10:5-16, 10:5-24.

[547] N.J. STAT. ANN. § 10:5-17.

[548] N.J. ADMIN. CODE § 1:1-18.1(b), (d).

[549] N.J. ADMIN. CODE § 1:1-18.4.

[550] N.J. ADMIN. CODE § 1:1-18.6(a).

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particular issues.[551] Appeals from the final decision by the director may be taken directly to the New Jersey Superior Court, Appellate Division.[552]

3.11(a)(iv) *Additional Discrimination Protections*

Tobacco Products. An employer may not refuse to hire a person, and may not discharge or take other adverse action against an employee with respect to compensation, terms, conditions, or other privileges of employment, because the person does or does not smoke or use other tobacco products. This protection does not apply if the employer has a rational basis for taking such adverse action that is reasonably related to the employment, including the responsibilities of the employee or prospective employee.[553]

This law does not affect "any applicable laws, rules or workplace policies concerning smoking or the use of other tobacco products during the course of employment."[554]

Unemployment Status. New Jersey employers are prohibited from discriminating against the unemployed in print and Internet job advertisements. Specifically, employers may not knowingly or purposefully publish a job posting that states any of the following:

- current employment is a job qualification;
- currently unemployed candidates will not be considered; or
- only currently employed job applicants will be considered.[555]

However, employers are not prohibited from publishing a job posting that seeks only applicants who are currently employed by *that* employer. Employers that violate this law are subject to a civil penalty of up to $1,000 for the first violation, $5,000 for the second violation, and $10,000 for third and subsequent violations.[556]

Mandatory Employer-Sponsored Meetings. An employer cannot require its employees to attend an employer-sponsored meeting or participate in any communications with the employer or its agents or representatives, the purpose of which is to communicate the employer's opinion about religious or political matters. An employer is further prohibited from retaliating against an employee for refusing to attend such a meeting or reporting a violation of this law. *Political matters* include political party affiliation and decisions to join or not join or participate in any lawful political, social, or community organization or activity. Exceptions to the prohibition exist for religious organizations, educational institutions, and political organizations and parties.[557]

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[551] N.J. ADMIN. CODE § 1:1-18.7(a).

[552] N.J. STAT. ANN. § 10:5-21.

[553] N.J. STAT. ANN. § 34:6B-1.

[554] N.J. STAT. ANN. § 34:6B-2.

[555] N.J. STAT. ANN. § 34:8B-1.

[556] N.J. STAT. ANN. § 34:8B-2.

[557] N.J. STAT. ANN. §§ 34:19-9 - 34:19-14.

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3.11(b) *Equal Pay Protections*

3.11(b)(i) *Federal Guidelines on Equal Pay Protections*

The Equal Pay Act requires employers to pay male and female employees equal wages for substantially equal jobs. Specifically, the law prohibits employers covered under the federal Fair Labor Standards Act (FLSA) from discriminating between employees within the "same establishment on the basis of sex by paying wages to employees at a rate less than the rate at which the employer pays wages to employees of the opposite sex for equal work on jobs—"the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."[558] The prohibition does not apply to payments made under: (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quantity or quality of production; or (4) a differential based on a factor other than sex.

An employee alleging a violation of the Equal Pay Act must first exhaust administrative remedies by filing a complaint with the EEOC within 180 days of the alleged unlawful employment practice. Under the federal Lilly Ledbetter Fair Pay Act of 2009, for purposes of the statute of limitations for a claim arising under the Equal Pay Act, an unlawful employment practice occurs with respect to discrimination in compensation when: (1) a discriminatory compensation decision or other practice is adopted; (2) an individual becomes subject to such a decision or practice; or (3) an individual is affected by application of such decision or practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.[559]

3.11(b)(ii) *State Guidelines on Equal Pay Protections*

New Jersey's equal pay statute prohibits employers from discriminating in any way in the rate or method of payment of wages to any employee because of their sex.[560] A differential in pay between employees based on a reasonable factor or factors other than sex does not constitute wage discrimination. An employee alleging a violation of the equal pay law may file a civil action within six years of the alleged violation.[561]

New Jersey's Law Against Discrimination prohibits an employer from paying any employee who is a member of a protected class at a rate of compensation, including benefits, that is less than the rate paid by the employer to employees who are not members of the protected class for substantially similar work, when viewed as a composite of skill, effort and responsibility. An employer paying a rate of compensation in violation of the statute cannot reduce the rate of compensation of any employee in order to comply with the statute.[562]

An employer may pay a different rate of compensation only if the employer demonstrates that the differential is made pursuant to a seniority system, a merit system, or the employer demonstrates:

- that the differential is based on one or more legitimate, bona fide factors other than the characteristics of members of the protected class, such as training, education or experience, or the quantity or quality of production;

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[558] 29 U.S.C. § 206(d)(1).

[559] 42 U.S.C. § 2000e-5.

[560] N.J. STAT. ANN. § 34:11-56.2.

[561] N.J. STAT. ANN. §§ 2A:14-1, 34:11-56.8.

[562] N.J. STAT. ANN. § 10:5-12(t).

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- that the factor or factors are not based on, and do not perpetuate, a differential in compensation based on sex or any other characteristic of members of a protected class;
- that each of the factors is applied reasonably;
- that one or more of the factors account for the entire wage differential; and
- that the factors are job-related with respect to the position in question and based on a legitimate business necessity.[563]

A factor based on business necessity does not apply if it is demonstrated that there are alternative business practices that would serve the same business purpose without producing the wage differential. Comparisons of wage rates will be based on wage rates in all of an employer's operations or facilities.[564]

An employee alleging a violation of the Law Against Discrimination may file an administrative complaint with the New Jersey Division of Civil Rights within 180 days of the alleged violation, or may elect to file a civil action within two years of the alleged violation.[565] For purposes of the statute of limitations, an unlawful employment practice occurs, with respect to discrimination in compensation or in the financial terms or conditions of employment, for each occasion that an individual is affected by application of a discriminatory compensation decision or other practice, including, but not limited to, each occasion that wages, benefits, or other compensation are paid, resulting in whole or in part from the decision or other practice. It is an unlawful employment practice to require employees or prospective employees to consent to a shortened statute of limitations or to waive any of the protections provided by the Law Against Discrimination.[566] An employee may recover up to six years of backpay. If a jury determines that an employer is guilty of an unlawful employment practice prohibited by section 10:5-12(r) or (t), the court must award three times any monetary damages to the person or persons aggrieved by the violation.[567]

Further, as discussed in 3.7(b)(v), the New Jersey Law Against Discrimination prohibits employers from barring employees from inquiring about other employees' wages.

3.11(c) *Pregnancy Accommodation*

3.11(c)(i) *Federal Guidelines on Pregnancy Accommodation*

As discussed in 3.9(c)(i), the federal Pregnancy Discrimination Act (PDA), which amended Title VII, the Family and Medical Leave Act (FMLA), and the Americans with Disabilities Act (ADA) may be implicated in determining the extent to which an employer is required to accommodate an employee's pregnancy, childbirth, or related medical conditions.

Additionally, the Pregnant Workers Fairness Act (PWFA) makes it an unlawful employment practice for an employer of 15 or more employees to:

- fail or refuse to make reasonable accommodations for the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee, unless the

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563 N.J. STAT. ANN. § 10:5-12(t).

564 N.J. STAT. ANN. § 10:5-12(t).

565 N.J. STAT. ANN. §§ 2A:14-2, 10:5-13.

566 N.J. STAT. ANN. § 10:5-12(a).

567 N.J. STAT. ANN. § 10:5-13.

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employer can demonstrate that the accommodation would impose an undue hardship on its business operations;

- require a qualified employee affected by pregnancy, childbirth, or related medical conditions to accept an accommodation other than any reasonable accommodation arrived at through the interactive process;
- deny employment opportunities to a qualified employee, if the denial is based on the employer's need to make reasonable accommodations for the qualified employee;
- require a qualified employee to take leave, whether paid or unpaid, if another reasonable accommodation can be provided; or
- take adverse action related to the terms, conditions, or privileges of employment against a qualified employee because the employee requested or used a reasonable accommodation.[568]

A *reasonable accommodation* is any change or adjustment to a job, work environment, or the way things are usually done that would allow an individual with a disability to apply for a job, perform job functions, or enjoy equal access to benefits available to other employees. Reasonable accommodation includes:

- modifications to the job application process that allow a qualified applicant with a known limitation under the PWFA to be considered for the position;
- modifications to the work environment, or to the circumstances under which the position is customarily performed;
- modifications that enable an employee to enjoy equal benefits and privileges of employment as are enjoyed by other similarly situated employees without known limitations; or
- temporary suspension of an employee's essential job function(s).[569]

The PWFA also provides for reasonable accommodations related to lactation, as described in **3.4(a)(iii)**.

An employee seeking a reasonable accommodation must request an accommodation.[570] To request a reasonable accommodation, the employee or the employee's representative need only communicate to the employer that the employee needs an adjustment or change at work due to their limitation resulting from a physical or mental condition related to pregnancy, childbirth, or related medical conditions. The employee must also participate in a timely, good faith interactive process with the employer to determine an effective reasonable accommodation.[571] An employee is not required to accept an accommodation. However, if the employee rejects a reasonable accommodation, and, as a result of that rejection, cannot perform (or apply to perform) an essential function of the position, the employee will not be considered "qualified."[572]

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[568] 42 U.S.C. § 2000gg-1. The regulations provide definitions of *pregnancy*, *childbirth*, and *related medical conditions*. 29 C.F.R. § 1636.3.

[569] 29 C.F.R. § 1636.3.

[570] 42 U.S.C. § 2000gg-1; 29 C.F.R. § 1636.3.

[571] 29 C.F.R. § 1636.3.

[572] 29 C.F.R. § 1636.4.

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An employer is not required to seek documentation from an employee to support the employee's request for accommodation but may do so when it is reasonable under the circumstances for the employer to determine whether the employee has a limitation within the meaning of the PWFA and needs an adjustment or change at work due to the limitation.

Reasonable accommodation is not required if providing the accommodation would impose an undue hardship on the employer's business operations. An *undue hardship* is an action that fundamentally alters the nature or operation of the business or is unduly costly, extensive, substantial, or disruptive. When determining whether an accommodation would impose an undue hardship, the following factors are considered:

- the nature and net cost of the accommodation;
- the overall financial resources of the employer;
- the number of employees employed by the employer;
- the number, type, and location of the employer's facilities; and
- the employer's operations, including:
  - the composition, structure, and functions of the workforce; and
  - the geographic separateness and administrative or fiscal relationship of the facility where the accommodation will be provided.[573]

The following modifications do not impose an undue hardship under the PWFA when they are requested as workplace accommodations by a pregnant employee:

- allowing an employee to carry or keep water near and drink, as needed;
- allowing an employee to take additional restroom breaks, as needed;
- allowing an employee whose work requires standing to sit and whose work requires sitting to stand, as needed; and
- allowing an employee to take breaks to eat and drink, as needed.[574]

The PWFA expressly states that it does not limit or preempt the effectiveness of state-level pregnancy accommodation laws. State pregnancy accommodation laws are often specific in terms of outlining an employer's obligations and listing reasonable accommodations that an employer should consider if they do not cause an undue hardship on the employer's business.

Where a state law focuses primarily on providing job-protected leave for pregnancy or childbirth—as opposed to a pregnancy accommodation—it is discussed in 3.9(c)(ii). For more information on these topics, see LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES.

3.11(c)(ii) *State Guidelines on Pregnancy Accommodation*

The New Jersey Law Against Discrimination requires an employer of one or more employees to make reasonable accommodations in the workplace available to a woman affected by pregnancy, as long as the

[573] 42 U.S.C. § 2000gg-1; 29 C.F.R. § 1630.2(p).

[574] 29 C.F.R. § 1636.3.

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employer cannot demonstrate that providing the accommodation would impose an undue hardship on its business operations.[575]

Reasonable accommodation means, for needs related to pregnancy:

- bathroom breaks;
- breaks for increased water intake;
- periodic rest;
- assistance with manual labor;
- job restructuring or modified work schedules; and
- temporary transfers to less strenuous or hazardous work.[576]

The employee must base the request for accommodation on the advice of her physician.[577] The Law Against Discrimination also requires covered employers to provide lactation accommodation to employees who are breastfeeding an infant child. These requirements are discussed in 3.4(b)(iv).

The employer is prohibited from penalizing the employee in any way with respect to the terms, conditions, or privileges of employment for requesting or using the accommodation.[578]

3.11(d) *Harassment Prevention Training & Education Requirements*

3.11(d)(i) *Federal Guidelines on Antiharassment Training*

While not expressly mandated by federal statute or regulation, training on equal employment opportunity topics—*i.e.*, discrimination, harassment, and retaliation—has become *de facto* mandatory for employers.[579] Multiple decisions of the U.S. Supreme Court[580] and subsequent lower court decisions have made clear that an employer that does not conduct effective training: (1) will be unable to assert the affirmative defense that it exercised reasonable care to prevent and correct harassment; and (2) will subject itself to the risk of punitive damages. EEOC guidance on employer liability reinforces the important role that training plays in establishing a legal defense to harassment and discrimination claims.[581] Training for all employees, not just managerial and supervisory employees, also demonstrates an employer's "good faith efforts" to prevent harassment. For more information on harassment claims and employee training, see LITTLER ON HARASSMENT IN THE WORKPLACE and LITTLER ON EMPLOYEE TRAINING.

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[575] N.J. STAT. ANN. §§ 10:5-5(e), 10:5-12(s).

[576] N.J. STAT. ANN. § 10:5-12(s).

[577] N.J. STAT. ANN. § 10:5-12(s).

[578] N.J. STAT. ANN. § 10:5-12(s).

[579] Note that the Notification and Federal Employee Anti-Discrimination and Retaliation ("No FEAR") Act mandates training of federal agency employees.

[580] *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *see also Kolstad v. American Dental Assoc.*, 527 U.S. 526(1999).

[581] EEOC, *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*, June 18, 1999, *available at* http://www.eeoc.gov/policy/docs/harassment.html; *see also* EEOC, *Select Task Force on the Study of Harassment in the Workplace: Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic* (June 2016), *available at* https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm.

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3.11(d)(ii) *State Guidelines on Antiharassment Training*

There are no antiharassment training and education requirements mandated by statute for private employers in New Jersey. However, the New Jersey Supreme Court held in 2002 that, absent managerial and supervisory training on harassment, there were questions of fact as to whether an employer's policy was effective and whether the policy could shield the organization from vicarious liability for supervisor misconduct. In its decision, the court also noted the importance of making such training available to *all* employees. This ruling in essence made employee training mandatory for employers covered by the New Jersey LAD.[582]

3.12 Miscellaneous Provisions

3.12(a) *Whistleblower Claims*

3.12(a)(i) *Federal Guidelines on Whistleblowing*

Protections for whistleblowers can be found in dozens of federal statutes. The federal Occupational Safety and Health Administration ("Fed-OSHA") administers over 20 whistleblower laws, many of which have little or nothing to do with safety or health. Although the framework for many of the Fed-OSHA-administered statutes is similar (*e.g.*, several of them follow the regulations promulgated under the Wendell H. Ford Aviation Investment and Reform Act (AIR21)), each statute has its own idiosyncrasies, including who is covered, timeliness of the complaint, standard of proof regarding nexus of protected activity, appeal or objection rights, and remedies available. For more information on whistleblowing protections, see LITTLER ON WHISTLEBLOWING & RETALIATION.

3.12(a)(ii) *State Guidelines on Whistleblowing*

New Jersey's whistleblower statute, the Conscientious Employee Protection Act (CEPA), prohibits an employer from retaliating against an employee who discloses or objects to certain forms of misconduct on the job.[583]

Covered Employers. The CEPA defines an *employee* as "any individual who performs services for and under the control and direction of an employer for wages or other remuneration."[584] The New Jersey Supreme Court has ruled that, in certain circumstances, an independent contractor may be an employee under the CEPA and thus be entitled to pursue a statutory wrongful termination claim. Specifically, the court found that independent contractors who perform regular or recurrent tasks that further the business interests of the employer's enterprise may constitute an employee under the CEPA.[585]

Prohibitions. Generally speaking, under the CEPA, it is unlawful for an employer to take retaliatory action against an employee because the employee: (1) discloses, or threatens to disclose, conduct that is unlawful, fraudulent, or criminal; (2) provides information related to or testifies in a hearing or investigation concerning allegedly unlawful conduct; or (3) objects to, or refuses to participate in, any

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582 *See Gaines v. Bellino*, 801 A.2d 322 (N.J. 2002).

583 N.J. STAT. ANN. §§ 34:19-1 *et seq.*

584 N.J. STAT. ANN. § 34:19-2 (b).

585 *D'Annunzio v. Prudential Ins. Co*, 927 A.2d 113 (N.J. 2007).

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activity or practice that the employee believes is unlawful, fraudulent, criminal, or violative of public policy.[586]

The statute is detailed and, more specifically, prohibits retaliation against any employee who:

1. Discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer, or another employer, with whom there is a business relationship, that the employee reasonably believes:
   a. is in violation of a law, or a rule or regulation promulgated pursuant to law, including any violation involving deception of, or misrepresentation to, any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity, or, in the case of an employee who is a licensed or certified health care professional, reasonably believes constitutes improper quality of patient care; or
   b. is fraudulent or criminal, including any activity, policy or practice of deception or misrepresentation which the employee reasonably believes may defraud any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity;
2. Provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any violation of law, or a rule or regulation promulgated pursuant to law by the employer, or another employer, with whom there is a business relationship, including any violation involving deception of, or misrepresentation to, any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity, or, in the case of an employee who is a licensed or certified health care professional, provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into the quality of patient care; or
3. Objects to, or refuses to participate in any activity, policy or practice which the employee reasonably believes:
   a. is in violation of a law, or a rule or regulation promulgated pursuant to law, including any violation involving deception of, or misrepresentation to, any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity, or, if the employee is a licensed or certified health care professional, constitutes improper quality of patient care;
   b. is fraudulent or criminal, including any activity, policy or practice of deception or misrepresentation which the employee reasonably believes may defraud any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity; or
   c. is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment.[587]

Employee's Obligation to Give Notice to Employer. Not all of the CEPA's protections apply, however, unless the employee has first notified their employer of the allegedly unlawful conduct. Indeed, the

586 N.J. STAT. ANN. § 34:19-3.

587 N.J. STAT. ANN. § 34:19-3.

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statute expressly provides that the protections "pertaining to disclosure to a public body" do not apply unless the employee making such disclosure "has brought the activity, policy, or practice . . . to the attention of a supervisor by written notice and has afforded the employer a reasonable opportunity to correct the activity, policy or practice."[588]

That being said, if the employee is reasonably certain that the activity, policy, or practice is already known to one or more supervisors, written notice and opportunity to cure are not required. Moreover, these steps also are not required (and the CEPA's protections therefore apply) if "the employee reasonably fears physical harm as a result of the disclosure," so long as "the situation is emergency in nature."[589]

Statute of Limitations. An aggrieved employee has one year from the date of an alleged CEPA violation to bring a civil action in a court of competent jurisdiction.[590] The limitations period begins to run when an employee is discharged or otherwise retaliated against for complaining about illegal activity, not when the employee complains about such activity.[591]

Forms of Retaliation Covered. For employer conduct to be actionable under the CEPA, it must constitute "a discharge, suspension or demotion . . . or other adverse employment action taken against an employee in the terms and conditions of employment."[592] The New Jersey Supreme Court has expanded the concept of *adverse employment action* under the CEPA by holding that retaliation is not limited to discharge, constructive or otherwise, but includes any adverse employment action, such as false accusations, negative performance reviews, suspension, and pretextual mental-health examinations.[593]

3.12(a)(iii) *State Enforcement, Remedies & Penalties*

In addition to all remedies available to a party in a common-law tort action, the following remedies are available to an employee who prevails in a CEPA lawsuit:

- injunctive relief, to restrain continued violation of the CEPA;
- reinstatement to the same or equivalent position;
- reinstatement of full fringe benefits and seniority rights;
- compensation for lost wages, benefits, and other remuneration; and
- reasonable costs and attorneys' fees.

In addition, the court or jury may order the assessment of a civil fine (of not more than $10,000 for the first violation and not more than $20,000 for each subsequent violation), punitive damages, or both.[594]

Notably, reasonable attorneys' fees and court costs may be awarded to an employer if an employee brings a claim that has no basis in law or fact. However, an employee who voluntarily dismisses a CEPA claim

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588 N.J. STAT. ANN. § 34:19-4.

589 N.J. STAT. ANN. § 34:19-4.

590 N.J. STAT. ANN. § 34:19-5.

591 *Alderiso v. Medical Ctr. of Ocean Cnty., Inc.*, 770 A.2d 275 (N.J. 2001).

592 N.J. STAT. ANN. § 34:19-2(e).

593 *Donelson v. DuPont Chambers Works*, 20 A.3d 384 (N.J. 2011).

594 N.J. STAT. ANN. § 34:19-5.

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upon receipt of evidence demonstrating that the employer would not be found liable for damages if the claim were to go to trial will not be assessed attorneys' fees.[595]

CEPA Waiver Provision. A provision in the CEPA operates as a waiver of an employee's rights under other laws, under certain circumstances. The statute clarifies that the CEPA does not diminish any "rights, privileges, or remedies of any employee" under state or federal law or regulations, or under any collective bargaining agreement or employment contract.[596] Nonetheless, once a CEPA action is instituted, the employee's rights and remedies under those laws, regulations, or agreements are deemed to be waived to the extent that those other claims are based on the same rights or evidence as the employee's CEPA claim.

3.12(b) *Labor Laws*

3.12(b)(i) *Federal Labor Laws*

Labor law refers to the body of law governing employer relations with unions. The National Labor Relations Act (NLRA)[597] and the Railway Labor Act (RLA)[598] are the two main federal laws governing employer relations with unions in the private sector. The NLRA regulates labor relations for virtually all private-sector employers and employees, other than rail and air carriers and certain enterprises owned or controlled by such carriers, which are covered by the RLA. The NLRA's main purpose is to: (1) protect employees' right to engage in or refrain from *concerted activity* (*i.e.*, group activities attempting to improve working conditions) through representation by labor unions; and (2) regulate the collective bargaining process by which employers and unions negotiate the terms and conditions of union members' employment. The National Labor Relations Board (NLRB or "Board") enforces the NLRA and is responsible for conducting union elections and enforcing the NLRA's prohibitions against "unfair" conduct by employers and unions (referred to as *unfair labor practices*). For more information on union organizing and collective bargaining rights under the NLRA, see LITTLER ON UNION ORGANIZING and LITTLER ON COLLECTIVE BARGAINING.

Labor policy in the United States is determined, to a large degree, at the federal level because the NLRA preempts many state laws. Yet, significant state-level initiatives remain. For example, *right-to-work laws* are state laws that grant workers the freedom to join or refrain from joining labor unions and prohibit mandatory union dues and fees as a condition of employment.

3.12(b)(ii) *Notable State Labor Laws*

New Jersey Constitution. The New Jersey Constitution extends to private employees the right to organize and to bargain collectively.[599]

Yellow-Dog Contracts. Public policy in New Jersey prohibits a corporation doing business in this state from requiring, as a term or condition of employment, that applicants for employment (individually or collectively) "sign any paper, document, or writing of any description," by which they are bound to

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595 N.J. STAT. ANN. § 34:19-6.

596 N.J. STAT. ANN. § 34:19-8; *see also Flaherty v. Enclave*, 605 A.2d 301 (N.J. Super. Ct. Law Div.1992) (holding that the institution of a CEPA lawsuit does not constitute a waiver of all claims arising out of the employment relationship, but that it does act as a waiver of all claims that are based on the same facts or rights).

597 29 U.S.C. §§ 151 to 169.

598 45 U.S.C. §§ 151 *et seq*.

599 N.J. CONST. art. I, ¶19.

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renounce "existing membership in an organization, society or brotherhood," or by which they agree not to join any such an organization in the future.[600]

This restriction also extends to current employees. Indeed, the pertinent statute provides that no corporation may "require, directly or indirectly, that any individuals . . . in any manner promise to renounce membership in a lodge, brotherhood, or labor organization, of any kind, or promise to refrain from joining any such" organization in the future.[601]

All agreements of a prohibited nature are considered to be void as against public policy.[602] Violators are subject to a fine not to exceed $500 or three months' imprisonment, or both.[603]

Anti-Injunction Act. The Anti-Injunction Act prohibits the New Jersey state courts from issuing restraining orders or temporary or permanent injunctions that prohibit any of the following acts:

- cessation or refusal to perform any work, or to remain in any employment relationship;
- becoming or remaining a member of any labor organization or in any organization of employers, regardless of any prior promise or undertaking made in that regard;
- payment of or provision to, or the withholding from any person, any strike or unemployment benefits or insurance, or other money or things of value;
- provision of lawful aid to any person involved in any labor dispute who is being proceeded against or is prosecuting any action in any court in New Jersey;
- publicizing the existence or circumstances of any labor dispute, whether by advertising, speaking, patrolling, picketing (without fraud or violence), or any other method not in violation of state law;
- peaceful assembly to act or to organize to act in promotion of interests in a labor dispute;
- advising or notifying persons of an intention to do any of the aforementioned acts;
- agreeing to do or not to do any of the above;
- advising, urging or otherwise causing or inducing (without fraud or violence) any of the above; or
- requiring as a condition of employment that all employees of a particular employer or group of employers be members of a particular labor organization.[604]

However, the statute also specifies a procedure to obtain injunctive relief in the event of a labor dispute.[605]

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[600] N.J. STAT. ANN. § 34:12-2.

[601] N.J. STAT. ANN. § 34:12-3.

[602] N.J. STAT. ANN. § 34:12-5.

[603] N.J. STAT. ANN. § 34:12-4.

[604] N.J. STAT. ANN. § 2A:15-51(a)-(j).

[605] N.J. STAT. ANN. § 2A:15-53.

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Importation of Strike Breakers. Under New Jersey law, it is unlawful for any person, firm, partnership, or corporation to import from outside New Jersey, or to transport within the state, any person for the purposes of being or becoming employed, where the object of that employment is:

- to interfere with by force or violence or threats thereof, to coerce, or to intimidate persons who are lawfully picketing the premises of an employer or who are otherwise lawfully engaged during the existence of a labor dispute;
- to interfere with by force or violence or threats thereof, to coerce or intimidate persons in their right to form, join, or assist labor organizations, or to engage in collective bargaining with their employers; or
- to replace employees of an employer who are lawfully on strike or who have been locked out.[606]

Additionally, it is unlawful for any person or entity not directly involved in a strike or lockout to recruit individuals for employment, or to secure or offer to secure such employment, where the purpose for doing so is to replace employees in an industry where a strike or lockout exists.[607] This law also applies to the importation of union pickets from outside New Jersey.[608] Violators are guilty of a misdemeanor.[609]

Although the law excludes employment agencies licensed under the laws of the State of New Jersey, as well as the New Jersey Employment Service, it nevertheless prohibits those entities from knowingly referring an applicant for employment to an employer whose employees are then engaged in a strike or have been locked out.[610] These provisions, however, do not apply to common carriers.[611]

4. END OF EMPLOYMENT

4.1 Plant Closings & Mass Layoffs

4.1(a) *Federal WARN Act*

The federal Worker Adjustment and Retraining Notification (WARN) Act requires a covered employer to give 60 days' notice prior to: (1) a *plant closing* involving the termination of 50 or more employees at a single site of employment due to the closure of the site or one or more operating units within the site; or (2) a *mass layoff* involving either 50 or more employees, provided those affected constitute 33% of those working at the single site of employment, or at least 500 employees (regardless of the percentage of the workforce they constitute).[612] The notice must be provided to affected nonunion employees, the representatives of affected unionized employees, the state's dislocated worker unit, and the local

606 N.J. STAT. ANN. § 34:13C-1.

607 N.J. STAT. ANN. § 34:13C-2.

608 N.J. STAT. ANN. § 34:13C-4.

609 N.J. STAT. ANN. § 34:13C-5.

610 N.J. STAT. ANN. § 34:13C-3.

611 N.J. STAT. ANN. § 34:13C-6.

612 29 U.S.C. § 2101(1)-(3). Business enterprises employing: (1) 100 or more full-time employees; or (2) 100 or more employees, including part-time employees, who in aggregate work at least 4,000 hours per week (exclusive of overtime) are covered by the WARN Act. 20 C.F.R. § 639.3.

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government where the closing or layoff is to occur.[613] There are exceptions that either reduce or eliminate notice requirements. For more information on the WARN Act, see LITTLER ON REDUCTIONS IN FORCE.

4.1(b) *State Mini-WARN Act*

The New Jersey Mini-WARN Act (NJWARN) requires businesses in operation for longer than three years that employ 100 or more full-time employees to give notice 60 days in advance of a transfer of operations, a plant closing, or a mass layoff, as those terms are defined in the statute. The NJWARN requires businesses in operation for longer than three years that employ 100 employees, regardless of tenure or hours of work, to give notice 90 days in advance of a transfer of operations, a plant closing, or a mass layoff, as those terms are defined in the statute. [614]

Triggering Events. NJWARN is triggered if:

- during any continuous period of not more than 30 days, there is a termination of employment of 50 or more employees regardless of tenure or hours of work;
- a reduction in force (that is not the result of a transfer or termination of operations) results in the termination of employment at an establishment, during any 30-day period of 50 or more employees, regardless of tenure or hours of work, in aggregate, working at or reporting to, all facilities in the state; or
- during any 90-day period, there is a termination of employment for two or more groups at a single establishment, when each group has less than 50 employees, but the aggregate for all of the groups exceeds 50 employees.[615]

An employer does not have to provide notice in the third situation if the employer can demonstrate that the cause of the termination for each group is separate and distinct from the causes of the termination for the other group(s).[616]

Unlike its federal counterpart, NJWARN does not provide exceptions for a faltering business, unforeseen business circumstances, or the sale of a business.[617] Notice is required pursuant to New Jersey law in situations involving short term layoffs and transfer offers, even though such notice may not be required under the federal statute.[618]

In addition to requiring earlier notice in serial layoff situations, NJWARN provides employers with less flexibility than federal law in adjusting termination dates after notice has been issued. Therefore, an employer may be in compliance or exempt from the federal WARN Act but may be subject to and/or in violation of NJWARN.

Notice Requirements. When NJWARN is triggered, notice must be provided, at least 90 days prior to the first termination, to the following:

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[613] 20 C.F.R. §§ 639.4, 639.6.

[614] N.J. STAT. ANN. §§ 34:21-1, 34:21-2.

[615] N.J. STAT. ANN. §§ 34:21-1, 34:21-2.

[616] N.J. STAT. ANN. § 34:21-2.

[617] N.J. STAT. ANN. §§ 34:21-1 *et seq.*; *see* 29 U.S.C. § 2102(b)(2)(A); 20 C.F.R. § 639.9(a).

[618] N.J. STAT. ANN. § 34:21-2.

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- each employee whose employment is to be terminated;
- the Commissioner of Labor and Workforce Development;
- the chief elected official of the municipality where the establishment is located; and
- any collective bargaining units of employees at the establishment.[619]

The content of the notice required by NJWARN is different from, and more extensive than, notice required under the federal WARN Act. Notice pursuant to NJWARN must include:

- the number of employees whose employment will be terminated;
- the date(s) on which the layoff and each termination of operations will occur;
- the reasons for the termination of operations, transfer of operations, or mass layoff;
- a statement of jobs available at the employer's other establishments, along with pay, benefits, and other information regarding those positions;
- a statement of any employee rights with respect to wages, severance pay, benefits, pension, or other terms of employment as they relate to the termination, including any rights under a collective bargaining agreement or existing employer policy;
- a disclosure of the amount of the NJWARN severance pay (if applicable); and
- a statement of employees' rights to receive certain information from the New Jersey Response Team information, including but not limited to, referral and counseling regarding public programs and benefits available to the employee and a summary of the employee's rights afforded by law.[620]

Severance. If the NJWARN notice requirement is triggered, employers must pay all terminated employees severance pay of one week for each year of employment, in addition to providing 90 days' advance notice of layoff, transfer, or closure of operations. Severance pay is the greater of the statutory amount or any severance pay provided by the employer pursuant to a collective bargaining agreement or for any other reason. If the employer does not comply with the 90-day notice requirement, the severance obligation is increased by four weeks of pay.

State Enforcement, Remedies & Penalties. An employer that fails to provide its employees with notice required pursuant to NJWARN may be subject to financial repercussions in the form of paying each employee one week's severance pay for each full year of service accrued.[621] Severance pay is required when the NJWARN notice requirement is triggered and if the employer does not comply with the 90-day notice requirement, the severance obligation is increased by four weeks of pay.[622] The employer may set off this severance pay from back-pay liability pursuant to the federal WARN Act, but may not set off severance paid in accordance with a collective bargaining agreement. In the alternative, the state law

[619] N.J. STAT. ANN. § 34:21-2.

[620] N.J. STAT. ANN. § 34:21-3.

[621] N.J. STAT. ANN. § 34:21-2.

[622] N.J. STAT. ANN. § 34:21-2.

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allows an employee to initiate suit against the employer for recovery of the severance pay afforded by NJWARN as well as attorneys' fees.[623]

4.1(c) *State Mass Layoff Notification Requirements*

New Jersey requires that notice be given by all employers to the Director of the Division of Unemployment Insurance when there is a mass separation, as defined by regulation.

Triggering Events. *Mass separation* means the separation of 25 or more employees in a single establishment (either permanently or for an indefinite period) at or about the same time and for the same reason, except where the separation or unemployment is due to a labor dispute.[624]

Notice Requirements. Employers must file the notice of mass separation with the Director of Unemployment Insurance no later than 48 hours prior to any mass separation. Where the employer has no advance notice of the mass separation, notice must be filed within 24 hours after the mass separation occurs. The mass separation notice must include:

- the name and address of the employer;
- a statement of the cause of separation;
- the number and job titles of the affected employees;
- the expected duration of the period of unemployment; and
- whether or not the employer will have sufficient employees to handle the division's requests for wage information.[625]

Employers that have completed the notification requirements under Federal WARN will be considered to have provided the above information. However, all employers with mass separations must also provide information relating to payments made to the effected employees for vacation, sick leave, pension, remuneration in lieu of notice, and severance.[626]

State Enforcement, Remedies & Penalties. The mass separation notice regulation does not provide for a penalty. However, employers in violation of unemployment regulations where no penalty is prescribed are liable for a fine of $50.00 per day.[627]

4.2 Documentation to Provide When Employment Ends

4.2(a) *Federal Guidelines on Documentation at End of Employment*

Table 11 lists the documents that must be provided when employment ends under federal law.

[623] N.J. STAT. ANN. § 34:21-6.

[624] N.J. ADMIN. CODE § 12:17-3.5.

[625] N.J. ADMIN. CODE § 12:17-3.5(b).

[626] N.J. ADMIN. CODE § 12:17-3.5(c), (f).

[627] N.J. STAT. ANN. § 43:21-16(c).

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Table 11. Federal Documents to Provide at End of Employment	
Category	**Notes**
Health Benefits: Consolidated Omnibus Budget Reconciliation Act (COBRA)	Under COBRA, the administrator of a covered group health plan must provide written notice to each covered employee and spouse of the covered employee (if any) of the right to continuation coverage provided under the plan.[628] The notice must be provided not later than the earlier of: • the date that is 90 days after the date on which the individual's coverage under the plan commences or, if later, the date that is 90 days after the date on which the plan first becomes subject to the continuation coverage requirements; or • the first date on which the administrator is required to furnish the covered employee, spouse, or dependent child of such employee notice of a qualified beneficiary's right to elect continuation coverage.
Retirement Benefits	The Internal Revenue Service requires the administrator of a retirement plan to provide notice to terminating employees within certain time frames that describe their retirement benefits and the procedures necessary to obtain them.[629]

4.2(b) *State Guidelines on Documentation at End of Employment*

Table 12 lists the documents that must be provided when employment ends under state law.

Table 12. State Documents to Provide at End of Employment	
Category	**Notes**
Health Benefits: Mini-COBRA, etc.	Small employers must provide employees, at the time of the qualifying event (*i.e.*, upon termination or a reduction in an employee's hours), notice of their continuation rights under a group health plan. For these purposes, the term *small employers* includes those that meet three conditions; they: (1) averaged at least two but not more than 50 eligible employees in the preceding year; (2) have at least two employees on the first day of the plan year; and (3) employ a majority of their employees in New Jersey. *Qualified beneficiaries* (that is, any person who was covered who has a qualifying event) may elect continuation coverage no later than 30 days after the qualifying event.[630]

[628] 29 C.F.R. § 2590.606-1. Model notices and general information about COBRA is available from the U.S. Department of Labor's Employee Benefits Security Administration at https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/cobra.

[629] See the section "Notice given to participants when they leave a company" at https://www.irs.gov/retirement-plans/plan-participant-employee/retirement-topics-notices.

[630] N.J. STAT. ANN. §§ 17B:27A-17, 17B:27A-27(e).

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Table 12. State Documents to Provide at End of Employment

Category	Notes
Unemployment Notice	**Generally.** All employers must provide notice to employees, at the time of separation, instructing them how to seek unemployment benefits. Notice must be given regardless of the reason for separation or its anticipated duration. The benefit instructions must include, at a minimum, the following: • the date upon which the individual becomes unemployed, and, in the case that the unemployment is temporary, to the extent possible, the date upon which the individual is expected to be recalled to work; and • notice that the individual may lose some or all of the benefits to which the individual is entitled if the individual fails to file a claim in a timely manner.[631] Employers should use the template (Form BC-10) provided by the Department of Labor and Workforce Development. **Multistate Workers.** New Jersey does not require that employees be again notified as to the jurisdiction under whose unemployment compensation law services have been covered.[632] It is recommended, however, that employers consider providing notice of the jurisdiction where services will be covered for unemployment purposes. Employers should also follow that state's general notice requirement, if applicable.

4.3 Providing References for Former Employees

4.3(a) *Federal Guidelines on References*

Federal law does not specifically address providing former employees with references.

4.3(b) *State Guidelines on References*

In New Jersey, there are no statutory guidelines on providing employer references or prohibiting blacklisting of employees.

Employers may subject themselves to civil liability for defamation by releasing inaccurate or misleading information about an employee or a former employee if that information proves false. Under New Jersey law, however, employers enjoy the protection of a *qualified privilege* in responding to certain specific requests for information about the qualifications of a present or former employee, even if that

[631] N.J. STAT. ANN. § 43:21-6; N.J. ADMIN. CODE § 12:17-3.1. The template notice (Form BC-10) provided by the Department of Labor and Workforce Development is available at https://nj.gov/labor/handbook/formdocs/FormIntroBC10.html. Additional forms and publications are available at https://nj.gov/labor/handbook/formdocs/formsindex.html.

[632] *See* N.J. STAT. ANN. § 43:21-21; *see also* N.J. ADMIN. CODE §§ 12:17-16.1 to 12:17-16.7.

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information proves false.[633] Nevertheless, abuse of the qualified privilege by making false and defamatory statements maliciously or with reckless disregard removes its protective shield and may result in employer liability for defamation.[634]

[633] *Erickson v. Marsh & McLennan Co.*, 569A.2d 793 (N.J. 1990); *see also Senisch v. Carlino*, 32A.3d217, 223(N.J. Super. Ct. App. Div. 2011) (noting that qualified privilege applies to a "truthful reference letter in response to inquiry from a prospective employer"), *cert. denied*, 211N.J. 608(2012).

[634] *Williams v. Bell Tel. Labs., Inc.*, 623A.2d 234 (N.J. 1993).

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