NEW JERSEY

The 'Law & Practice' sections provide easily accessible information on navigating the legal system when conducting business in the jurisdiction. Leading lawyers explain local law and practice at key transactional stages and for crucial aspects of doing business.

Law and Practice

Contributed by Lindabury, McCormick, Estabrook & Cooper, PC

Contents

Lindabury, McCormick, Estabrook & Cooper, PC is a 60-attorney law firm with offices in Westfield, Summit, Red Bank New Jersey, New York City and Philadelphia. Lindabury provides management with labor and employment advice and counsel in areas including hiring and termination, health and benefits, family and medical leave, discrimination and equal opportunity, compensation, work environment and safety, unionization, and insurance defense. Key employment practice areas include: discrimination and equal opportunity; employment and termination issues; work environment and safety; health and benefits; the FMLA – federal and state compensation issues; and whistleblower. Lindabury is retained by clients as general outside counsel, local counsel, litigation counsel or special counsel in such diverse areas as public and private construction, energy, finance, commercial real estate, environmental, and taxation. Clients include global private and public corporations, national commercial insurance firms, healthcare institutions, trade associations, employee benefit funds, banks and financial institutions, nonprofit organizations, privately held businesses and individuals.

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1. Current Socio-Economic, Political and Legal Climate; Context Matters

1.1 "Gig" Economy and Other Technological Advances

The 'gig economy' offers employers access to larger, cheaper and more targeted pools of workers with specialized skills. Technological advances make it easier for employers and short-term workers to connect in alternative arrangements outside the full-time employment model; see also **2.1 Defining and Understanding the Relationship**. It is estimated that freelance, independent contractor and other gig workers will make up more than half of the workforce in the next decade.

As the gig economy grows, so do concerns about worker exploitation by corporations seeking to suppress wages and benefits, leaving large segments of the economy without access to healthcare, paid leave and retirement benefits. Gig workers cannot form unions and bargain collectively for increased wages and benefits. Many gig workers are displaced employees who secure multiple assignments while seeking full-time opportunities that may never materialize, creating a ghost economy of underemployed workers not counted in the unemployment rates. Artificial intelligence presents another challenge, causing more entry level unskilled jobs to be threatened with eradication.

These concerns have seen a rise in the number of lawsuits against popular gig platforms, such as Uber, claiming that workers were misclassified as independent contractors and denied the benefits of the employer-employee relationship. There is increasing pressure to redefine these working relationships to reflect the modern economy and assure that vulnerable workers are sufficiently protected. Going forward, employers must carefully weigh the risks and benefits before entering into these alternative work arrangements.

1.2 "Me Too" and Other Movements

The '#MeToo' movement, spawned by allegations of rampant sexual harassment in Hollywood, prompted several legislative initiatives. The EMPOWER Act aims to ban confidentiality, non-disparagement and mandatory arbitration provisions in employment contracts and sexual harassment settlement agreements, require disclosure of sexual harassment settlements in US Securities and Exchange Commission filings, and restrict employer tax deductions for payments and expenses incurred in sexual harassment litigation. This is on the heels of new federal legislation barring employers from deducting costs of sexual harassment settlements when the agreement contains a confidentiality clause. The Equal Employment Opportunity Commission (EEOC) is expected to issue new enforcement guidance on the content and frequency of harassment training for all employees, even if not mandated by state law.

The New Jersey State Legislature has passed two legislatives initiatives in response to #MeToo. The Diane B. Allen Equal Pay Act (effective July 1, 2018) amended the New Jersey Law Against Discrimination (NJLAD) to prohibit agreements shortening the limitations period for filing discrimination claims or waiving other protections of the NJLAD, such as jury trials and attorney fees. In March 2019, the Legislature further amended the NJLAD to ban waivers of substantive and procedural rights (eg, arbitration) and impose significant restrictions on the ability to include non-disclosure provisions in settlement agreements designed to prevent victims from disclosing the details of a sexual harassment or other NJLAD claim (see **5.1 Addressing Issues of Possible Termination of the Relationship**).

The '#MeToo' movement has influenced the judiciary. For example, in Minarsky v Susquehanna County (2018), the Third Circuit pointed to the '#MeToo' climate and statistical evidence of widespread failure of reporting by women as underpinnings for a precedential ruling announcing a heightened standard for employers invoking the Faragher-Ellerth affirmative defense to avoid liability for harassment claims. As a result, employers in the Third Circuit face an uphill battle defending sexual harassment claims.

Finally, the inclusion of 'Weinstein clauses' in executive employment contracts – which call for compensation clawbacks in the event of subsequent disclosures of sexual misconduct – are increasingly common.

1.3 Decline in Union Membership

According to a January 2018 report, only 6.4% of workers in the private sector are unionized, a significant decline from 25% in the 1960s and 1970s. Until recently, that decline appeared to go hand-in-hand the National Labor Relations Board (NLRB) transition from a neutral arbiter of labor disputes to a more union-friendly agency, openly advocating for the labor movement.

However, labor was recently dealt a major blow in Janus v AFSCME, Council 31 (2018). The US Supreme Court struck down mandatory 'agency' union fees as impermissible violations of nonmembers' First Amendment rights. While limited to union fee practices in the public sector, it portends to have significant consequences for the private sector labor movement as well. The 'right to work' movement has gained strength in recent years, with 27 states enacting legislation prohibiting the collection of agency fees in the private sector. Whether or not the Janus decision will further fuel such initiatives remains to be seen. At a minimum, the drastically-reduced funding stream available to public sector unions to support labor-friendly legislation and candidates will negatively impact the private sector that was a beneficiary of these initiatives.

See **1.4 National Labor Relations Board**.

1.4 National Labor Relations Board

Since President Trump's election, the NLRB has returned to its more traditional role of neutral arbiter between management and labor. The NLRB has begun to reverse Obama-era policies that favored employee rights over management rights. For example, the NLRB has made it clear that it will dispense with its 2015 Browning-Ferris decision that made it easier to prove joint employer status in favor of a more employer-friendly test. (See **2 Nature and Import of the Relationship**).

In 2014 the NLRB adopted new 'ambush' or 'quickie election' rules that significantly shortened the time for representation elections to as little as 13 days after a union petition for election was filed. In 2017, the newly-constituted NLRB issued a Request for Information, seeking comments as to whether the current 2014 Election Rule should be retained, modified or rescinded.

In June 2019 the NLRB in UPMC overturned 38-year old precedent, ruling that employers may prohibit non-employee union solicitation in public spaces on their property absent evidence of discriminatory enforcement.

During the Obama administration, the NLRB took an expansive approach when determining whether facially neutral workplace rules violated employee Section 7 rights under the National Labor Relations Act (NLRA). Finding that many policies could be construed by employees as having a chilling effect on Section 7 rights, the Board increasingly deemed common workplace policies unlawful, with little consideration to an employer's reasons for implementing these rules. The NLRB changed course in December 2017, articulating a new test for review of neutral workplace rules that takes into consideration the nature and extent of any potential impact on NLRA rights and the employer's legitimate justifications for the rule – a test that will differentiate between rules that impact activities that are 'central' to the NLRA, as opposed to those that are merely 'peripheral'.

None of this alters the fact that Section 7 rights are enforceable in both union and non-union workplaces and, going forward, employers must keep in mind that the NLRB can enforce these rights in all work environments. Although the employer-friendly trend in the NLRB is expected to continue under the Trump administration, the momentum may come to a halt as vacancies occur under future administrations.

See also **1.3 Decline in Union Membership**.

2. Nature and Import of the Relationship

2.1 Defining and Understanding the Relationship

Employee Versus Independent Contractor

Classification of a worker as an 'employer' as opposed to 'independent contractor' has significant legal implications. Regarding employees, the employer bears responsibility for payroll taxes and withholdings. Employees are generally eligible for:

- employer's benefit programs (eg, vacation);
- state-mandated benefit programs (workers' compensation, temporary disability, paid sick leave, family leave insurance and unemployment benefits);
- overtime and minimum wage payments;
- leave entitlements under the Family and Medical Leave Act (FMLA) and New Jersey Family Leave Act (NJFLA); and
- the protections of various employee rights statutes, eg,NJLAD, and other discrimination and whistleblower protection laws.

Employment status also implicates collective bargaining rights under the National Labor Relations Act (NLRA). Furthermore, an employer-employee relationship exposes employers to liability for the tortious acts of employees under the doctrine of respondeat superior.

When employer obligations are statutory in nature, the statute may not define 'employee'. In such cases, various tests are used to determine employee or independent contractor classification. For example, the Third Circuit uses the employer-friendly 'economic realities' test to determine employee status under the Fair Labor Standards Act (FLSA), which considers the following questions:

- is the work an integral part of the company's business;
- does the worker have an opportunity for profit/loss;
- is the worker retained indefinitely;
- is the worker's investment minor, compared to the company's;
- does the worker exercise business skills, judgement and initiative; and
- what degree of control is exercised by the employer, with no emphasis on any one factor.

When determining employee status under Title VII, the Third Circuit employs the narrower 12-factor Darden test, placing emphasis on the degree of control exercised by the employer. The NLRB has returned to a more employer-friendly common-law agency test. For purposes of state wage and hour laws, New Jersey adopted the ABC test, which presumes a worker is an employee unless the employer can show:

- the individual is free from control over performance of the work;
- the service is outside the usual course of the employer's business; and
- the individual is customarily engaged in an independent established trade or occupation.

Although no single factor is decisive in any test, if the 'totality of the circumstances' suggests an employer-employee relationship, the worker will be deemed an employee. The parties' written agreement that the worker is an independent contractor is given little weight.

Joint Employer Status

Employers turn to 'shared employee' arrangements with staffing agencies or a franchise model to escape the burdens of the employer-employee relationship. Courts and administrative agencies often look past efforts to alienate the employer-employee relationship to find both businesses are 'joint employers' with shared responsibility under employment laws. There is no uniform test to determine joint employer status. The Third Circuit uses the narrower Darden test for determining joint liability for violations of federal anti-discrimination laws. For purposes of joint employer status under the NJLAD, New Jersey courts apply the 12-factor 'Pukowsky test', also focsing on the degree to which each employer controls the means and manner of the employee's performance.

The National Labor Relations Board's (NLRB) test for joint liability under the NLRA is unsettled. In Browning-Ferris Industries (2015), the NLRB abandoned precedent to create a new test, expanding the potential for joint employer findings. Under Browning-Ferris, entities could be deemed joint employers if they reserved potential joint control over the other employer's workers, even if never exercised. Subsequently, in Hy-Brand Industrial Contractors (2017), the NLRB reverted to the pre-Browning-Ferris standard, requiring proof that the putative joint employer exercised actual joint control. However, in February 2018 the NLRB vacated Hy-Brand because of a potential conflict of interest that may have affected the decision, resulting in a return to the broader Browning-Ferris test. In September 2018, the NLRB proposed a new rule that effectively reinstitutes the Hy-Brand test. A final rule is expected later in 2019.

For purposes of the Fair Labor Standards Act, the US Department of Labor (USDOL) has proposed a narrower four-part test, a sharp departure from Obama-era proposals that eased the burden to establish joint employer status. Like the pending NLRB proposal, this change would require proof that the employer exercised actual control to meet joint-employer status.

Unpaid Interns

In January 2017, the USDOL announced a more flexible 'primary beneficiary test' to determine whether an unpaid intern is actually an employee entitled to wages and overtime under the FLSA. Among the test's factors are the extent to which the internship provides training similar to that provided in an educational environment and is tied a formal education program, and the extent to which the intern's work complements rather than displaces the work of paid employees. No single factor is determinative, but on balance the intern must be the 'primary beneficiary' of the relationship. However, New Jersey's Wage and Hour Law uses a more stringent eight-part test that requires co-ordination between the employer and the intern's school.

See **2.2 Alternative Approaches to Defining, Structuring and Implementing the Basic Nature of the Entity**.

2.2 Alternative Approaches to Defining, Structuring and Implementing the Basic Nature of the Entity

Consequences of Misclassification

Liability for employee misclassification includes unpaid payroll taxes, unpaid employer-sponsored or state-mandated benefits, overtime and minimum wage payments and significant civil and criminal penalties. Moreover, misclassified employees are free to bring claims alleging violations of employee rights under federal and state employment laws that arose during the period they were misclassified as independent contractors.

At-Will Employment

Absent a contract providing for job security, New Jersey presumes that employment is 'at-will' and may be terminated at any time, for any reason. However, as discussed in **4 Terms of the Relationship**, at-will employees have certain protections under federal and state statutes as well as common law.

Employment Contracts

Binding contracts of employment can be oral or written but must be sufficiently definite so that the performance to be rendered by each party can be reasonably ascertained. In New Jersey, oral contracts of employment for longer than one year are enforceable under New Jersey's Statue of Frauds.

The New Jersey Supreme Court has recognized that representations in employee handbooks, policies or offer letters can give rise to implied contractual obligations if they can reasonably be construed as promising benefits or job security. However, in Woolley v Hoffmann-LaRoche, Inc, (1985), the Court provided the following solution to avoid an implied contract:

'All that need be done is the inclusion in a very prominent position of an appropriate statement that there is no promise of any kind by the employer contained in the manual; that

regardless of what the manual says or provides, the employer promises nothing and remains free to change wages and all other working conditions without having to consult anyone and without anyone's agreement; and that the employer continues to have absolute power to fire anyone with or without cause'.

New Jersey employers must ensure that conforming Woolley disclaimers are incorporated into materials provided to employees discussing terms and conditions of employment.

Employee Wage and Hour Requirements

New Jersey's current minimum wage is USD10.00 and is subject to automatic adjustments tied to inflation. New Jersey's Wage Payment Law requires payment of wages at least twice monthly on regular pay days. Upon hire, employees must be told their rate of pay and thereafter provided with notice of pay changes and statement of payroll deductions each pay period.

Consistent with the FLSA, New Jersey's Wage and Hour Law requires 'non-exempt' employees be paid overtime (over 40 hours a week) at one and a half times the regular rate. The principal exemptions from overtime requirements are individuals employed in executive, administrative, or professional capacities. The New Jersey Department of Labor (NJDOL) uses the same definitions for these exemptions as those under the FLSA. To qualify as 'exempt', employees must be paid on a salary no less than USD455 per week and meet the 'primary duties' requirements specified under the FLSA regulations for the executive, professional, or administrative employee. In March 2019 the USDOL issued a proposed rule raising the salary exemption level to USD679 per weekIf adopted, are expected to take effect in January 2020.

Additional exemptions include 'highly compensated' employees making over USD100,000 (raised to USD147,414 under the proposed regulations), employees engaged in outside sales, and other employee classes. If exemption requirements under both state and federal law are not met, overtime pay is required.

Eligibility for Employee Benefit Programmes

There are no statutory definitions for the informal classifications used by employers to differentiate employees. 'Probationary employees' are typically those in a 'try-out' period who may not be eligible for employer benefit programs. 'Full-time' employees are typically scheduled to work 37.5 or 40 hours per week and eligible for benefits. 'Part-time' employees are scheduled to work less hours and may not be eligible for benefits, or only on pro-rated bases. 'Seasonal' or 'temporary' employees are not regularly scheduled, hired for short durations and generally not eligible for benefits.

Federal and state-mandated benefit programs have varying eligibility requirements. New Jersey employers are required to carry Workers' Compensation Insurance for all employees, regardless of classification. To qualify for New Jersey temporary disability, paid family leave and unemployment benefits, employees must meet 'base weeks' worked or minimum earnings requirements. Under New Jersey's Earned Sick Leave Act, all employees begin accruing one hour of paid sick leave for every 30 hours worked upon hire, but may be required to serve at least 120 days before using leave benefits. The FMLA and the NJFLA both provide 12 weeks of unpaid, job-protected leave for a qualifying event. The FMLA applies to employers with 50 or more employees; in February 2019 employer coverage under the NJFLA was reduced from 50 to 30 employees. Employees qualify under the FMLA after one year of service and 1,250 hours worked in the preceding year; employees qualify for the NJFLA after one year and 1,000 hours worked.

See **2.1 Defining and Understanding the Relationship**.

2.3 Immigration and Related Foreign Workers

The Immigration Reform and Control Act mandates employers to complete an Employment Eligibility Verification Form (I-9) for all employees within three days of hire. Completion requires verification the employee has presented sufficient documentation to establish both identity and authorization to work in the USA. Employers are required to maintain original I-9s for all current employees, and three years from the date of hire or one year after employment ceases for former employees, whichever is longer. There are significant civil and criminal sanctions for employers who fail to comply with I-9 requirements.

Employers may seek the services of a foreign national on a temporary or permanent basis. Generally, for a foreign national to enter the USA for temporary work, the employer must first file a Petition for a Nonimmigrant Worker (Form I-129) with the US Citizenship and Immigration Services demonstrating that a position for the worker exists, that the worker will be entering the USA for a temporary period of time, and for that specific employment purpose. Only after the petition is approved can the worker apply for an employment-based non-immigrant visa.

Employers wanting to sponsor an immigrant visa (or 'Green Card') for a foreign national intending to live and work permanently in the USA must go through the Program Electronic Review Management (PERM) labour certification process to demonstrate to the USDOL that there are no suitable US citizens available for the position in question. The first step is filing an application with the New Jersey State Workforce Agency, outlining how the prospective immigrant fits the job description. While the application is pending, the employer must publicise and recruit for the job among US applicants. Those meeting the qualifications must be interviewed and the employer must demonstrate why those applicants are not suitable. If the application is

approved, the employer can file an immigrant visa petition on the worker's behalf. The process is costly and can take several years to complete.

The USDOL has exempted certain immigrant employees from the PERM process, including (in descending order):

- those of extraordinary ability in business, sciences, arts, education or athletics;
- outstanding professors/researchers;
- international executives/managers;
- professionals holding advanced degrees, or persons of exceptional ability in the arts, sciences or business;
- skilled workers;
- 'special' immigrants, such a religious workers; and
- wealth immigrants who will invest USD500,000 to USD1 million that will create ten full-time jobs in the USA.

If a preference is met, the employer can directly file the immigrant visa petition on behalf of the immigrant worker without the labour certification.

2.4 Collective Bargaining Relationship or Union Organizational Campaign

Employers contemplating the purchase of a unionized business must consider the consequences of successorship liability and the impact it may have on the ongoing business. The question of whether a successor employer has a duty to recognize and bargain with the predecessor's union arises whenever there is a change in the employing entity through a purchase, merger or other development.

Generally, in the event of a bona fide purchase or sale that results in an arm's length relinquishment of control between two independent entities, the successor employer is not bound by the collective bargaining agreement negotiated by its predecessor. However, pursuant to well-settled precedent from the US Supreme Court and the NLRB, if the successor employer decides to retain a majority of the predecessor's employees and generally engages in the same business, it is obligated to recognize and bargain with the union.

Alter Ego Doctrine

In contrast, the 'alter ego doctrine' was developed to prevent employers from avoiding their collective bargaining obligations by altering their corporate form. The alter ego doctrine focuses on whether the two enterprises have substantially identical management, business purpose, operation, equipment, customers, and supervision, as well as ownership. If the new employer is 'merely a disguised continuance of the old employer' then the predecessor's labor contract binds the new employer, regardless of whether a majority of the workforce is retained.

3. Interviewing Process

3.1 Legal and Practical Constraints

Federal anti-discrimination laws and the NJLAD preclude employers from using employment advertisements, making pre-employment inquiries, or imposing pre-employment testing that directly or indirectly discriminates against applicants based upon their legally protected status (see **4 Terms of the Relationship**). Pre-employment inquiries or testing are discriminatory if they tend to affect members of a protected class differently than other applicants and are not justified by a bona fide occupational qualification or business-related job necessity.

Disability-Related Inquiries and Medical Exams

Both the Americans With Disabilities Act (ADA) (covering employers with 15 or more employees) and the NJLAD (covering all employers regardless of the company's size) prohibit disability-related inquiries and medical examinations at the pre-offer stage. After a conditional offer of employment has been made, inquiries and examinations are permitted so long as all employees in the same job category are subject to the same requirements. Under the ADA, 'disability-related inquiries' are those likely to elicit information about a disability, but do not include simple inquiries into whether applicants can perform essential job duties of the desired position, with or without reasonable accommodation.

The ADA and NJLAD prohibit utilizing the results of post-offer inquiries or examinations to disqualify applicants unless the condition would prevent safe or efficient job performance, even with reasonable accommodations by the employer. At this stage, the employer is obligated to engage in the 'interactive process', whereby the employer identifies the job's essential functions, analyses the candidate's job-related restrictions, and collaborates with the employee to identify possible accommodations. An accommodation is reasonable if it does not create undue hardship (significant difficulty or expense) for the employer. Reasonable accommodations do not require the employer to eliminate essential job functions, create new positions, or move an existing employee from a position.

Pre-Employment Drug and Alcohol Testing

Under the ADA, alcohol testing is a 'medical examination' but testing for illegal drugs is not and is expressly permitted. New Jersey does not regulate private sector drug and alcohol testing. While prior drug or alcohol addictions are recognised disabilities under the ADA and NJLAD, both laws do not require employers to accommodate current illegal drug or alcohol abuse. Applicants who test positive for current use, including recreational marijuana, may be disqualified.

In July 2019, New Jersey amended its Compassionate Use Medical Marijuana Act to provide job protections to medical marijuana users. Although employers may bar the posses-

sion or use of medical marijuana during work hours or on workplace premises, the amendments prohibit employers from taking adverse employment action based solely on an employee's/applicant's status as a medical marijuana user. The amendments also create new procedures to be followed when an employee/applicant tests positive for marijuana. The employee/applicant must receive written notice of a positive test and an opportunity to provide a 'legitimate medical explanation for the positive test result' within three working days. A retest can be requested at the candidates expense.

Age-Related Inquiries

Unlike the federal Age Discrimination in Employment Act (ADEA), which protects individuals over the age of 40, the NJLAD protects individuals over the age of 18. Thus, during the application and interview process employers should omit any questions that directly (eg, date of birth) or indirectly (eg, date of graduation) elicit age information, as rejected candidates may allege impermissible age information was used in the hiring decision.

Credit Checks

New Jersey does not preclude the use of consumer credit reports during the application process. However, under the federal and New Jersey Fair Credit Reporting Acts (FCRA), employers utilizing consumer reporting agencies must provide applicants with notice that it will request the report and secure written consent. If information from a consumer report is a basis for denying employment, the applicant must be advised and provided with a description of his or her rights under the FCRA. Applicants must be accorded the opportunity to dispute information upon which the employer relied with the credit reporting agency.

Criminal History

New Jersey's Opportunity to Compete Act prohibits employers with 15 or more employees from maintaining policies or including statements in advertisements that individuals with arrest or conviction records will not be considered. Employers are prohibited from using employment applications, or making oral or written inquiries about the applicant's criminal record during the 'initial employment application process'. This process begins when the applicant first enquires about a position and concludes when the employer has completed a first interview in person or by other means. Thereafter, the employer is not prohibited from making criminal history inquiries or refusing to hire based upon an applicant's criminal record.

Criminal inquiries may also violate Title VII and the NJLAD because the practice tends to disproportionately impact minorities with statistically higher arrest and conviction records. The EEOC Guidance on the Consideration of Arrest and Conviction Records deems blanket prohibitions against hiring applicants with criminal records invalid unless the employer can show that exclusion is 'job related' and 'consistent with business necessity'. According to the EEOC, arrest records cannot meet this standard and should never be considered. When considering convictions, the EEOC recommends employers conduct a 'targeted individualized assessment' that takes into account the nature of the crime, the time elapsed and the nature of the job to determine if exclusion is consistent with business necessity. Finally, before rejecting the applicant, he or she should be afforded an opportunity to explain why the conviction should not result in exclusion. While employers are not bound by the EEOC guidance, takeing them on board may forestall adverse impact discrimination claims.

Wage and Salary Inquiries

New Jersey recently joined other states in enacting legislation prohibiting employers from requiring or asking applicants to provide salary history. Employers may inquire about an applicant's experience with incentive and commission programs, so long as it does not seek the disclosure of earnings. The new law takes effect January 1, 2020.

In addition, when establishing compensation packages for employees, New Jersey employers must comply with the recently enacted New Jersey Equal Pay Act which strengthens existing pay equity protections. The Act makes it an unlawful to pay any protected class member a rate of compensation, including benefits, less than the rate paid to employees outside the protected class for 'substantially similar work'. These amendments apply to all protected classes, paving the way for disparate wage claims on the basis of race, age, disability, and any other status protected by the NJLAD.

Social Media

An employer's use of social media to research prospective employees is not without risk, as it can reveal the individual's age, race, or other protected status' that can become the basis for a discrimination claim if the applicant is rejected. Employers should use individuals with no role in the hiring decision or third-party vendors to screen candidates' social media activities. Advertising open positions through targeted social media outlets which do not have diverse participants may create the appearance of discrimination against non-targeted groups. Hiring decisions based upon an applicant's lack of social media presence may invite age discrimination claims.

New Jersey law prohibits employers from requesting applicants and employees to provide password and user name information to access password-protected portions of personal social media accounts. Employers searching social media for information about prospective employees must therefore confine their search to publicly available information.

4. Terms of the Relationship

4.1 Restrictive Covenants

Restrictive Covenants

The New Jersey Supreme Court has repeatedly observed that restrictive covenants are generally disfavored as restraints of trade and will be narrowly construed by the courts. Nevertheless, a restrictive covenant will be enforced if reasonable under the circumstances. It will be deemed reasonable if it:

- protects the employer's legitimate interests and is reasonable in scope and duration;
- imposes no undue hardship upon the employee; and
- is not injurious to the public.

These factors must be balanced on a case-by-case basis. However, greater deference is given to restrictive covenants executed in connection with the sale of a business.

Employer's Legitimate Interests

While an employer has no legitimate interest in preventing competition, the New Jersey Supreme Court has identified the protection of trade secrets, confidential information and customer relationships as legitimate protectable interests. Thus, employees can be restrained from using trade secrets and confidential information to the competitive disadvantage of the former employer. However, general knowledge of the industry, trivial differences in methods of operation or customer lists that are readily accessible through publicly available sources do not qualify as trade secrets or confidential information worthy of protection. Similarly, skills an employee develops during the course of employment will not qualify for protection. As for customer relationships developed at the employer's expense, under proper circumstances employees can be restrained from doing business with or soliciting those customers.

Undue Hardship on the Employee

Employers are prevented from including the broadest possible restrictions to achieve the greatest protection for themselves, while imposing unreasonable restrictions on the employee's right to use their skills to their best advantage. Three factors are generally considered when determining whether a restriction is unreasonably overbroad – duration, geographic limits and scope of activities prohibited. These factors must be narrowly tailored to ensure the covenant is not broader than necessary to protect the employer's legitimate interests.

Although each situation is fact-sensitive, covenants no longer than two years are generally considered reasonable by New Jersey courts. Covenants limiting an employee's ability to compete in the same capacity and in the same geographic area the employee serviced for a former employer are also generally considered reasonable. Likewise, customer non-solicitation provisions limited to those customers the employee had exposure to through the former employer are typically enforceable.

Injury to the Public

When assessing the interest of the public, New Jersey courts consider the effect of enforcement of the restriction on the availability of goods or services, the effect of non-enforcement on corporate investments in long-term research and development, and the effect of enforcement on individual initiative.

Consideration

Under New Jersey law, the employer's initial offer of employment or continued employment after hire is sufficient consideration for a restrictive covenant. Thus, throughout the course of the employment relationship, the employer's agreement not to exercise its right to terminate an at-will employment relationship is deemed sufficient and will not void an otherwise reasonable restriction for lack of consideration.

Blue Pencil Doctrine

New Jersey has adopted the 'blue pencil' doctrine, permitting the court to modify overbroad restrictive covenants. However, a court may decline to employ the doctrine if it finds that the restrictions are not aimed at protecting the employer's legitimate interests but aimed at stifling competition from a former employee and thus unenforceable restraints of trade. Employers who draft overbroad restrictions with the expectation a court will blue-pencil the agreement run the risk of having the entire agreement struck down if they cannot show that the protection of legitimate interests was the motivating factor.

Legislation is presently pending before the New Jersey Senate and Assembly that would effectively eliminate the use of covenants not to compete unless the former employer is willing to continue to pay the employee for effectively sitting on the sidelines during the terms of the restrictions.

4.2 Privacy Issues

There is no information relevant to this section.

4.3 Discrimination, Harassment and Retaliation Issues

Protected Classes Under Anti-Discrimination Laws

NJLAD is one of the most inclusive anti-discrimination statutes in the country. In addition to protected characteristics under federal law – age, race, national origin, religion, gender, disability, pregnancy, genetic information and veteran's status – it extends protection on the basis of atypical hereditary cellular or blood trait, marital/civil union/domestic partnership status, affectional or sexual orientation, gender identity or expression, and lactating mother status.

Several factors explain why most discrimination claims in New Jersey are filed under the NJLAD. While federal laws

have threshold employee head counts for coverage, the NJLAD applies to all employers, regardless of size. Where federal laws require employees file a charge with the Equal Employment Opportunity Commission before initiating suit in the courts, NJLAD permits employees the option of filing a charge with the New Jersey Division on Civil Rights or initiating suit in the Superior Court. While federal laws differ on remedies available and may cap damages, the NJLAD provides a full panoply of remedies with no damage caps. While federal laws limit liability to the employer, NJLAD provides for individual liability of those who 'aid and abet' employer's discriminatory acts.

The protections of the federal ADA only extend to individuals with impairments that 'substantially limit a major life activity'. The NJLAD defines disability more broadly as impairments that preclude the normal exercise of any physical or mental function or that can be demonstrated medically or psychologically through accepted diagnostic techniques. Additionally, the NJLAD's protections extend to employees who are 'perceived' as disabled. The ADA's duty to provide reasonable accommodation applies to employers with 15 or more employees, whereas NJLAD's reasonable accommodation requirement applies to all employers.

In contrast to the federal Age Discrimination in Employment Act that protects individuals over the age of 40, the NJLAD's age protections begin at 18. The Diane B. Allen Equal Pay Act amended NJLAD to impose higher burdens of proof than under federal pay equity laws for employers defending wage disparity claims and increased the availability of back wages from two to six years.

Although New Jersey courts look to federal law for guidance in construing claims under the NJLAD, the New Jersey Supreme Court has cautioned that NJLAD must be construed with a 'high degree of liberality'. Federal standards are only a starting point in actions under NJLAD, and courts are free to deviate from these standards to effectuate the broader remedial purposes of the statute.

Retaliation Protections

New Jersey employees have significant protections against workplace retaliation that trump the at-will doctrine. The NJLAD and federal anti-discrimination laws prohibit retaliation against employees who complain of discrimination or otherwise invoke the protections of these statutes.

The New Jersey Conscientious Employee Protection Act prohibits retaliatory action against employees who disclose, object to, or refuse to participate in actions that the employee reasonably believes are illegal or incompatible with public policy concerning health, safety, welfare or the protection of the environment. Numerous laws on the federal side (eg, the Sarbanes Oxley and Dodd-Frank Acts) provide a wide array of protections for various whistleblowing activities.

New Jersey's Workers' Compensation provides a private right of action for individuals who are victims of retaliation for filing a claim for benefits.

Even in the absence of statutory protection, New Jersey has recognized a common-law wrongful discharge action for a termination that is contrary to a clear mandate of public policy reflected in legislation, rules, regulations, judicial or administrative decisions and, in some cases, a professional code of ethics.

Training Considerations

The need to develop anti-harassment policies, coupled with employee training, cannot be understated. New Jersey has adopted the federal Faragher-Ellerth affirmative defense employers can invoke, in certain cases, to escape liability for sexual harassment under the NJLAD. This defense has two elements; the employer exercised reasonable care to prevent and correct sexually-harassing behavior and the employee unreasonably failed to take advantage of preventative or corrective opportunities provided by the employer. Factors considered when assessing the employer's exercise of reasonable care include the existence of formal policies prohibiting workplace harassment, formal and informal complaint procedures for employees' use, and mandatory training for supervisors that is open to all employees. Training should include instruction on how to eradicate 'implicit bias' as well as bullying in the workplace, and these behaviors often lead to claims of unlawful harassment.

4.4 Workplace Safety

Both federal and state laws mandate employers to provide employees with a reasonably safe work environment. The federal Occupational Safety and Health Act (OSHA) requires most employers to comply with all workplace safety, training, hazard communication and other standards, rules and regulations issued under OSHA. As permitted under OSHA, New Jersey has opted to operate is own occupational safety and health plan for public sector workers that includes most of the federal OSHA safety standards and some state-specific standards. For private sector workers, New Jersey has adopted the federal OSHA standards and regulations.

The New Jersey Worker and Community Right to Know Act requires public employers to disclose relevant information concerning the use/storage of hazardous materials by responding to environmental surveys developed by the New Jersey Department of Environmental protection, and both public and private sector employers to ensure that containers containing such substances are properly labelled.

New Jersey's Smoke-Free Air Act prohibits 'smoking', defined to include the use of vapor or electronic smoking devices, in the workplace. However, New Jersey employers are prohibited from refusing to hire or take adverse action against an

employee who uses tobacco products unless the exclusion is reasonably related to the employment.

The New Jersey Workers' Compensation Law requires all New Jersey employers not covered by a federal program to secure workers' compensation coverage, or establish a self-funded insurance program approved by the state. Failure to insure is a disorderly persons offense and, if wilful, a crime of the fourth degree. Penalties can be assessed up to USD5,000 for the first ten days and up to USD5,000 for each additional ten-day period. Employers are prohibited from retaliating against any employee who seeks benefits or testifies in a workers compensation proceeding.

4.5 Compensation and Benefits

The Employee Retirement Income Security Act (ERISA) covers most benefit plans offered by private employers, regardless of whether they are insured or funded by employer contributions. ERISA-covered benefit plans must be in writing. Upon written request, ERISA requires that plans furnish copies of the plan document, summary plan description, most recent annual report, collective bargaining agreement (CBA) (if applicable), and other 'instruments' under which a plan is established or maintained. Personnel handbooks, manuals and other policy statements, as well as certificates of insurance, group benefit contracts, benefit booklets and other documents may all be part of the 'plan documents' considered by courts when reviewing a claim for benefits or other actions by the plan.

If the language in the plan documents is clear and unambiguous, extrinsic evidence will not be sought. If the plan language is vague then other extrinsic evidence, including past practice, may be considered. As a result, utmost care must be taken to ensure that all benefit plan documents are written in plain language that is clear, consistent, and easy to understand.

COBRA requires most health plans to offer 'qualified beneficiaries' an option to choose to continue their health plan coverage for a limited time period after they have experienced certain 'qualifying events'. Some of the most common employment events subject to COBRA include termination of employment, divorce, separation, loss of dependent status or death of a covered employee. COBRA rights must be disclosed to benefit plan participants in the plan document and summary plan description (SPD) and other manuals and policies that summarize health plan benefits. Plan administrators must comply with the time frames, information and manner in which they provide employees notice of COBRA rights following a qualifying event to avoid significant daily penalties and taxes for noncompliance.

5. Termination of the Relationship

5.1 Addressing Issues of Possible Termination of the Relationship

Termination of At-Will Employees

Although New Jersey is an 'at-will' jurisdiction, employers must evaluate the reasons for discharge and the employee's work history to minimize the risk of a legal challenge. Documentation that objectively supports the business justification for termination is critical if the employee can point to legal protections that can support a wrongful termination claim.

Termination on the basis of a status protected under the NJLAD or federal anti-discrimination laws may prompt a wrongful termination claim. Termination for 'blowing the whistle' on illegal activity or health and safety issues in the workplace gives rise to a claim under the New Jersey Conscientious Employee Protection Act.

Terminated employees who exercise their right to protected family or medical leave may pursue retaliation claims under the FMLA or the NJFLA. Termination for filing claims for workers' compensation or other state benefit plans may increase claims of unlawful retaliation. Termination of an employee who cannot conform to regular work hours because of a medical condition may breach the employer's duty to provide reasonable accommodation for a disability under the ADA and NJLAD. New Jersey has recognized a common-law wrongful termination claim for terminations that are contrary to a clear mandate of state public policy, as embodied in statues, regulations, judicial decisions or professional codes of ethics.

WARN Act Requirements

Generally, termination of at-will employment does not require notice, with exception in the event of a mass layoff or plant closing. The federal Worker Adjustment and Retraining Notification Act (WARN Act) requires employers with 100 or more full-time employees to provide 60 days' notice in the event of a mass layoff or a plant closing affecting 50 or more employees. Employers who fail to comply are liable for back pay and benefits to each employee for each day of a violation. Employees are entitled to attorneys' fees and costs if forced to file suit to enforce rights under the Act.

New Jersey has its own version of the WARN Act, the Millville Dallas Airmotive Plan Job Loss Notification Act (NJ WARN), applicable to employers with 100 or more full-time employees. Employers are obligated to provide 60 days' notice of any shut-down of operations involving the termination of 50 or more full-time employees to New Jersey's Commissioner of Labor and Workforce Development, the chief elected official in the affected municipality, and to any collective bargaining units of affected employees. Employers who fail to comply are obligated to pay affected employees one week of severance pay for each year of employment.

Attorney's fees and costs are available to employees who bring suit to enforce rights under the Act.

Termination Under an Employment Contract

If the employment relationship is governed by an individual employment agreement, the terms of the contract will govern whether the employment is for a definite duration or indefinite term, whether the employment is at-will or if 'good cause' is required for termination, if severance benefits are due upon termination and any post-employment restrictions.

Where the agreement requires 'good cause' for termination, what constitutes good cause generally includes: conviction of a felony or acts of moral turpitude; gross negligence, recklessness or wilful misconduct in the performance duties; or material violations of the company's policies or the agreement. For cause provisions may include procedural protections for the employee, including written notice of the inappropriate conduct and a possible cure period. Employees terminated for cause are generally not entitled to any additional compensation, whereas those terminated without cause may be entitled to financial consideration and the continuation of benefits, as outlined in the contract.

Executive employment agreements frequently contain 'change in control' or 'golden parachute' provisions providing additional protection, usually deferred compensation and retirement benefits, in the event of a separation of employment resulting from a merger, acquisition or other change in the company's control (or within a specified timeframe after the change of control).

If an employment agreement calls for severance or other payments upon a termination of employment, they may be conditioned upon the employee's execution of a release and waiver of all legal claims of any kind against the employer. The agreement may contain class action waivers (recently sanctioned by the US Supreme Court in Epic Systems Corp. v Lewis) and require mandatory arbitration of any claims arising under the employment agreement or the employment relationship, with a carve out for injunctive relief for violations of any post-employment restrictions. The agreement may spell out certain obligations that survive termination, including restrictive covenants, confidentiality, nondisclosure and non-disparagement clauses.

Termination of employees covered by a CBA typically requires a showing of just cause. However, the CBA will outline specific grievance procedures employees must follow to challenge a termination, beginning with the union filing a written grievance on behalf of the employee. Employer and union representatives then discuss the grievance and attempt to negotiate a resolution. If a resolution is not reached, the matter is generally referred to binding arbitration before an arbitrator selected by the parties. Most CBAs provide that the arbitrator's decision is binding.

Payment Upon Termination

Upon termination of employment, New Jersey's Wage Payment Law requires the payment of all 'wages' due by the next regular pay day, which must be within ten working days of the end of the pay period. Although New Jersey does not require the payment of unused paid time-off benefits, if payment is called for under the employer's policy or contract, the payments are considered 'wages' and must be paid. Employees who have met all the eligibility requirements for commissions or incentive compensation must be paid a reasonable approximation of the commissions due until the exact amount can be determined.

Severance and Releases

Employers can reduce the risk of lawsuits through the use of a severance agreement and general release which offers severance payments and other benefits in exchange for a waiver and release of all legal claims that arose up to the date of the agreement. Special drafting considerations apply, and a comprehensive list of federal, state and local employee rights laws is recommended to ensure that the courts will uphold the release as a 'knowing and voluntary' release of claims.

As set forth in **1.2 "Me Too" and Other Movements**, the '#MeToo" movement has prompted federal legislation impeding the ability of employers to take advantage of tax deductions for settlement of harassment claims if it contains a non-disclosure clause, and there are ongoing efforts at the state and federal level to pass legislation banning any nondisclosure provisions in sexual harassment settlement agreements. New Jersey recently amended the NJLAD to prohibit employers from including mandatory arbitration clauses and nondisclosure provisions in any settlement agreement or employment contract involving any claims of discrimination, retaliation or harassment, not just those concerning sexual harassment. As written, however, the amendment arguably runs afoul of the Federal Arbitration Act ('FAA') which preempts state laws that prohibit the 'outright arbitration of a particular type of claim.'

In addition, to release an age claim under federal law, the Older Workers Benefit Protection Act requires that agreement provide that the employee had 21 days (expanded to 45 days for group terminations) to consider the agreement and consult with a legal representative, and was accorded a period of seven days after signing to revoke the agreement. These requirements now typically appear in all employment waivers to prevent the employee from seeking to avoid the waiver by claiming it was not knowing and voluntary.

When the severance agreement provides for any non-qualified deferred compensation that is earned in a previous year, but is payable in a future year, the agreement should include

a statement that payments will only be made upon an event and in a manner that complies with Section 409A of the Internal Revenue Code of 1986 ('Section 409A').

Employers that are signatory to a CBA and who make contributions to a Taft Hartley, multiemployer defined benefit pension plan are applicable to withdrawal liability. If an employer ceases to have an obligation to contribute to the defined benefit pension plan or ceases doing work that requires contribution to the plan, they may have an obligation to pay their percentage of the unfunded liability of the pension plan. The employer's percentage is determined by the history of contribution to the pension plan compared to the other contributing employers. The more the employer contributes to the pension plan compared to other employers, the larger is their percentage of the unfunded liability.

6. Employment Disputes: Claims; Dispute Resolution Forums; Relief

6.1 Contractual Claims

When termination is contrary to the terms of an employment agreement, the employee is entitled to normal contract damages flowing from the breach, namely wages and benefits lost. Except in special circumstances, tort remedies (emotional distress and punitive damages) and attorney fees are not available. Where the contract permits termination without cause upon notice. but adequate notice is not provided, damages are limited to wages and benefits for the balance of the notice period. Where the term of the contract was for a definite duration, the employer is liable for the contracted salary and benefits through the balance of the term. If the contract was for an indefinite duration, back pay and future wages and benefits for a reasonable period may be awarded to afford the employee time to secure comparable employment. While dependent upon the circumstances, New Jersey courts typically limit the period to one or two years.

Employees claiming wrongful termination in violation of implied contractual obligations set forth in an employee manual or policy are generally limited to contract damages and are not entitled to tort damages.

Although rare, emotional distress damages for breach of contract may be available where the breach was willful and wanton, and the harm to the employee resulting from the breach was foreseeable at the time of the contract. Punitive damages are not available, even if the breach is malicious, unless there is a special relationship between the parties (eg, a fiduciary relationship) that generally is not implicated in an employer-employee relationship.

An award of lost wages will be reduced by the amount of wages the employee earned from another employer. Moreover, employees have a duty to mitigate damages by undertaking reasonable efforts to secure comparable employment, and damages will be reduced by the amount the employee could have earned upon a showing that the employee did not take reasonable efforts to secure comparable employment following the discharge, and comparable positions were available in the relevant market.

The limitations period for filing contract claims is six years.

6.2 Discrimination, Harassment and Retaliation Claims

Federal Discrimination Claims

Employees alleging discrimination in violation of Title VII, the ADEA, the ADA, the Equal Pay Act (EPA) and other federal anti-discrimination laws are required to file charges of discrimination with the EEOC before initiating an action in courts. Failure to exhaust this administrative remedy will result in a dismissal of a court action. Charges generally must be filed with the EEOC within 180 days from the date of the discriminatory act. However, if the employee alleges discrimination in violation of federal discrimination laws and the NJLAD, the filing deadline is extended to 300 days pursuant to a Worksharing Agreement between the EEOC and the New Jersey Division on Civil Rights (NJDCR).

If the EEOC determines there is reasonable cause to believe that discrimination occurred, it engages in conciliation efforts with the parties to resolve the discriminatory issues. If unsuccessful, the EEOC may elect to file suit in the federal courts on the employee's behalf. If the EEOC issues a no reasonable cause determination, the charging party is issued a Notice of Right to Sue informing the employee that they have 90 days to initiate litigation in the courts. However, if the EEOC fails to take action on a charge for 180 days (60 days for ADA claims), the employee may request a Right To Sue letter from the EEOC. Suits initiated without the Right to Sue letter will be subject to dismissal.

Back pay, front pay, compensatory damages, punitive damages and attorney fees are available under Title VII and the ADA, but there are caps on compensatory and punitive damages based upon the employer's size. In ADEA cases, back pay, front pay and attorney fees are available; compensatory and punitive damages are not available, but back pay awards are doubled as liquidated damages and there are no caps on these damages.

In EPA cases, only back pay, liquidated damages and mandatory attorney fees are available but, again, there is no cap on damages. In addition, under the Lilly Ledbetter Act, a new violation of the EPA occurs each time the employee receives a paycheck that is affected by a discriminatory compensation decision or practice, no matter how long ago that decision was made.

Discrimination Claims Under the New Jersey Law Against Discrimination

The NJLAD is a 'one stop' statue that generally provides uniform administration, rights and remedies. The NJLAD does not have an exhaustion of administrative remedies requirements, and employees can file charges with the NJDCR or directly filing a complaint in the courts. NJDCR charges must be filed within 180 days of the discriminatory act, whereas the limitation period for filing litigation is two years.

In actions before the NJDCR, the agency initially attempts to mediate the claim. If unsuccessful and an investigation ensues, the NJDCR Director determines if there is probable cause to support the claim; if so, the matter proceeds to the Office of Administrative Law for hearings. After a decision is issued by the Administrative Law Judge, the NJDCR Director decides whether or not to adopt that decision, and issues a final order. The only recourse after a final order is an appeal to the Appellate Division of the New Jersey Superior Court.

The NJDCR has the authority to order appropriate equitable relief (eg, reinstatement, promotion), back and front pay, compensatory damages attorney fees and heavy monetary penalties. Punitive damages are outside the Division's authority. In actions initiated in the Superior Court, the complainant is likewise entitled to back pay, front pay, compensatory damages and attorney fees, as well as punitive damages. Unlike federal actions, there are no caps on damages under the NJLAD.

Equal Pay Act Claims under the New Jersey Law Against Discrimination

The recent EPA amendments to the NJLAD provide special rules for wage disparity claims under the NJLAD. Under the Act, employers cannot reduce the pay of higher-paid employees in an effort to even out salaries and avoid a violation, but instead must raise any salaries for members of protected classes who are being paid less for substantially similar work. In addition, any comparison of wages to determine if a disparity exists must be based upon the wage rates in all of an employer's facilities.

Consistent with the federal Lilly Ledbetter Act, the law provides that a new violation NJLAD occurs each time the employee receives a pay cheque that is affected by a discriminatory compensation decision. In addition, the employee can recover back pay going back as far as six years, as opposed to two years under the federal EPA. Finally, when a violation is proved, the NJDCR or a court is required to award treble damages.

6.3 Wages and Hours Claims

New Jersey's Commissioner of Labor enforces New Jersey's Wage Payment Act, and employers may be subject to both fines and criminal penalties for wilful violations. The courts have also recognized the right of employees to pursue a private right of action for violations of the law. In August 2019 New Jersey enacted its Wage Theft Law, making the state's wage and hour protections among the strongest in the country. Among the enhanced protections for employees are an increase of the statute of limitations for minimum wage and overtime claims from two to six years, liquidated damages of up to 200% of unpaid wages, increased anti-retaliation requirements, enhanced civil and criminal penalties, individual liability for officers and upper management, and expanded joint and successor employer liability.

Violations of the minimum wage and overtime requirements of the federal FLSA and New Jersey Wage Law may be prosecuted by the respective Departments of Labor, and may result in significant civil penalties and criminal prosecution for wilful violations. Alternatively, employees may pursue private rights of action in the federal and state courts for back pay and attorney fees. The FLSA expressly provides for liquidated damages, unless the employer can demonstrate that its actions were taken in good faith and it had a reasonable basis for believing that it was in compliance with the FLSA. The limitations period under both laws is two years, extended to three years under the FLSA for wilful violations.

6.4 Whistle-blower/Retaliation Claims

Whistleblower retaliation claims under the New Jersey Conscientious Employee Protection Act (NJCEPA) must be filed in the New Jersey Superior Court (or other court of competent jurisdiction) within one year of the retaliatory act. A full array of tort remedies are available, including equitable relief, back and front pay, compensatory damages, punitive damages and attorney fees. Significant civil fines may also be imposed for each violation of the law.

Congress has enacted at least 18 statutes that extend whistleblower protection to employees, including the Sarbanes-Oxley Act, the FDA Food Safety Modernization Act, and the Dodd-Frank Wall Street Reform and Consumer Protection Act. The forum for resolution of claims and the remedies available to aggrieved employees varies under these statutes.

6.5 Dispute Resolution Forums

The US Supreme Court has repeatedly held that the Federal Arbitration Act (FAA) reflects the national public policy favoring the enforcement of arbitration agreements, despite the fact that the arbitral forum deprives employees of the right to jury and other protections that may be available under statutes. New Jersey courts have likewise enforced agreements to arbitrate claims under the NJLAD, NJCEPA and other statutory and common-law claims.

However, New Jersey courts will not enforce an arbitration agreement unless it can be shown that the employee's waiver of a judicial forum or other statutory rights was 'knowing and voluntary' and deemed this standard not met in numerous circumstances.

According to the New Jersey Supreme Court, at a minimum the agreement must clearly state that the employee agrees to arbitrate all statutory claims arising out of the employment relationship or its termination. Although not yet mandated by the courts, the inclusion of an exhaustive list of the statutory claims that are subject to arbitration will enhance the agreement's enforceability.

Pointing to the typical imbalance of economic power between the employer and the employee, the high court has cautioned that the knowing and voluntary standard may not be met unless the agreement clearly states that:

- the employee is waving a right to a jury trial;
- that any statutory remedies, such as punitive damages and attorney fees, are available in arbitration; and
- the employer agrees to absorb the costs of arbitration, including the arbitrator's fee.

Citing the unique importance of the NJLAD and New Jersey's public policy against abrogating such substantive rights by contract, the high court struck down an agreement shortening the statute of limitations for filing NJLAD claims. Whether this ruling would apply to agreements shortening the limitations period for NJCEPA or other statutory claims is unclear.

New Jersey's appellate court struck down an arbitration agreement contained in an employee handbook, reasoning that the Woolley disclaimer of any contractual obligation arising from the handbook applied to the arbitration provision. Therefore, arbitration agreements should be a standalone document signed by or electronically accepted by the employee.

In March 2019, New Jersey enacted Senate Bill No. 121 into law, amending the Law Against Discrimination to prohibit employers from including non-disclosure provisions, jury waivers or mandatory arbitration clauses in employment agreements. It is unclear whether this new law would survive a challenge that it is preempted by the FAA.

6.6 Class or Collective Actions

Class and Collective Action Waivers

In recent years employers increasingly included class and collective action waivers in arbitration agreements, thus requiring employees to individually pursue employment claims. In its recent decision in Lewis v Epic Systems (2018), the US Supreme Court resolved a split among the circuit courts, holding that class action waivers in arbitration agreements must be enforced as written. Pointing once again to the public policy favoring arbitration reflected in the FAA, the court rejected the NLRB's position that these waivers violate an employee's right to engage in concerted activity under the NLRA. An open question remains as to whether state initiatives precluding class action waivers of state claims are preempted by the FAA.

National Labor Relations Act Claims

The NLRA guarantees private sector employees at union and non-union workplaces the right to unionise and engage in collective bargaining or other concerted activity to improve the terms and conditions of employment. The NLRB is charged with enforcement of the NLRA, and its primary functions are:

- to decide if an appropriate bargaining unit of employees exists for collective bargaining;
- to oversee union representation from elections; and
- to prevent or correct unfair labour practices by employers and unions.

To start a union election process, a petition must be filed with the nearest NLRB Regional Office showing interest in the union (or in decertifying the union) from at least 30% of employees. NLRB agents will investigate to ensure the NLRB has jurisdiction and there are no existing labour contracts that would bar an election. An unfair labour practice charge alleging that the employer or union has violated the NLRA must be filed with the Regional Office within six months of the occurrence.

The NLRB has no independent power to enforce its orders but may seek enforcement through a US court of appeals.

6.7 Possible Relief

See **6.1 Contractual Claims** and **6.2 Discrimination, Harassment and Retaliation Claims**.

7. Extraterritorial Application of Law

As employers increasingly manage a mobile workforce in a global economy, they must grapple with the issue of what jurisdiction's laws will apply to the employment relationship. Generally, federal statues do not apply to foreign workers overseas unless the statute provides otherwise. US citizens working for a US employer overseas will generally be covered by Title VII, the ADA, and the ADEA if the employer meets the threshold for coverage. The FLSA, EPA, FMLA, OSHA, the NLRA and other federal employment statues are not given extraterritorial application.

As for state employment laws, New Jersey courts generally employ a governmental-interest analysis to determine the extraterritorial application of New Jersey employment laws, which is met if the underlying policy of the law was intended to have effect across state lines or abroad.

Although extraterritorial application is not the norm, the New Jersey Supreme Court extended the protections of

the Contentious Employee Protection Act to a New Jersey employee discharged after he raised health concerns to his employer's Japanese subsidiary about the levels of benzene in its gasoline while on a business trip abroad. The court declined to 'impose artificial geographical limits' on the harm the objecting employee sought to avoid.

New Jersey Courts historically rejected similar efforts to extend the NJLAD protections beyond the state's boundaries. However, with the need for physical presence in the workplace increasingly diminishing, a recent decision from the New Jersey Appellate Division reverses that trend, illustrating the broad reach of protection that may be accorded to far-flung employees under New Jersey laws. In Trevejo v Legal Cost Control, Inc (2018), the court concluded that the protections of the NJLAD might be extended to a telecommuting resident of Massachusetts employed by a New Jersey corporation. Observing that the text of the NJLAD consistently extends to 'any person', restricting the protections to 'inhabitants' of the state would frustrate the NJLAD's goal of 'the eradication of the cancer of discrimination in the workplace'. If Trevejo could show that she had a sufficient 'virtual' presence in New Jersey, the protections of the NJLAD could be extraterritorially applied.

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