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Legislature Considers Further Expansion of LAD

New legislative proposals create definitions of what and how we define employment discrimination

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The New Jersey Law Against Discrimination (LAD) was enacted in 1945 to protect the civil rights of all persons, to prevent and eliminate practices of discrimination against certain persons, and to create a state Division of Civil Rights. See *N.J.S.A. 10:5-1 et. seq.* Since 1945, the LAD has been revised to expand the class of persons protected from discrimination and to further explain the types of behaviors that constitute discrimination, including those based on sex, affectional or sexual orientation, and domestic partnership. *N.J.S.A. 10:5-12.* Currently proposed before the New Jersey Legislature are two bills that would further amend and clarify the LAD: Senate Bill No. 234 and Assembly Bill No. 4209.

Senate Bill No. 234 was originally introduced to the 212th legislature as Senate Bill No. 1075 and identical Assembly Bill No. 2255. However, it failed to progress before close of the Senate session in December 2007. It was reintroduced as Senate Bill No. 234 on

Jan. 8, and has been referred to the Senate Judiciary Committee. As mentioned above, the new proposals to the bill include changes to its protected classes, prohibited actions and methods of procedure.

To begin with, *S-234* proposes to add “familial status” as a protected class against discrimination in employment. The current language of the LAD specifically prohibits discrimination by employers against employees because of race, creed, color, national origin, ancestry, age, marital status, domestic partnership status, affectional or sexual orientation, genetic information, sex, disability or atypical hereditary cellular or blood trait of any individual, or because of the liability for service in the Armed Forces of the United States or the nationality of any individual. *N.J.S.A. 10:5-12.* Employers would have to also safeguard against discrimination (direct or indirect) based upon one’s “familial status” in their advertisements, statements, circulations, publications, and any form of application for employment. *S-234, 213th Sess. (N.J. 2008)* (amending *N.J.S.A. 10:5-12(c)*). Labor organiza-

tions would also now be held accountable for discrimination specifically based upon “familial status” in its membership or other programs. *S-234, 213th Sess. (N.J. 2008)* (proposed change to *N.J.S.A. 10:5-12(b)*).

The proposals to *Senate Bill 234* also include expanding discrimination not only as to employees, but also to independent contractors. *S-234, 213th Sess. (N.J. 2008)* (amending *N.J.S.A. 10:5-12(a)*). The new language defines an “independent contractor” as an individual who provides services pursuant to a *direct contract* between the individual and the entity for whom the individual is performing work.

In addition to expanding the definition of protected classes and those covered, *Senate Bill 234* specifies that an employer shall provide reasonable accommodations for a disability unless to do so would impose an undue hardship upon the employer. *S-234, 213th Sess. (N.J. 2008)* (amending *N.J.S.A. 10:5-12(a)*).

The new language also provides clarification to prohibited actions regarding pregnancy. Accordingly, a prohibited action would include a failure “to provide reasonable accommodations for pregnancy or pregnancy-related conditions unless to do so would impose an undue hardship upon the employer.” *S-*

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234, 213th Sess. (N.J. 2008) (amending N.J.S.A. 10:5-12(a)). The bill would provide that the Attorney General, acting in consultation with the Division on Civil Rights, shall promulgate guidelines to assist employers in adopting written employment policies prohibiting discrimination on the basis of pregnancy pursuant to the Law Against Discrimination. (Section 9 of S-234).

Further, this bill would remove the exception to unlawful discriminatory employment practice for hiring or promoting individuals who are over 70 years of age. Removing this language would bring consistency with federal law. In 1986, the federal Age Discrimination in Employment Act removed the limit on claims pursuant to that act based upon age to those who are age 70 or under. *See 29 U.S.C.A. 623 et. seq.* The bill would specifically repeal the language of forcing the retirement of higher education employees once they reach the age of 70. (Section 8 of S-234).

The proposals to Senate Bill 234 also provide guidelines to certain procedural methods. The revised N.J.S.A. 10:5-13 would specify that if a complaint based upon alleged LAD violations in Superior Court is filed, the complainant must withdraw any complaint that he or she has filed with the Division of Civil Rights (DCR); and the Complaint (or Answer to a Complaint) filed with the DCR would no longer need to be verified. S-234, 213th Sess. (N.J. 2008) (amending N.J.S.A. 10:5-13(a) & (b)). Also, the new language of 10:5-13(e) would permit the Attorney General or Director to initiate suit in Superior Court under the LAD without first filing a Complaint with the Division of Civil Rights. S-234, 213th Sess. (N.J. 2008) (amending N.J.S.A. 10:5-13(e)). The new law would make it clear that any communications between the Attorney General's office and victims of discrimination are considered attorney-client privileged communications. (Section 5 of S-234).

Also, if unlawful discrimination is found in Superior Court, the Attorney

General may seek and obtain penalties or punitive damages payable to the state. S-234, 213th Sess. (N.J. 2008) (amending N.J.S.A. 10:5-13(e)).

Additionally, if adopted, it would be an unlawful employment practice for an employer to require that an employee waive his or her rights under the LAD as a condition of employment or a condition of continued employment. (Section 6 of S-234).

The bill would prohibit "English-only" rules or policies by employers, prohibiting the use of a language unless: 1) the language is justified by business necessity; and 2) the employer has notified its employees of the circumstances and the time when the language restriction is required to be observed and of the consequences for violating the restriction. A business necessity is defined as "an overriding legitimate business purpose such that the language restriction is necessary to the safe and efficient operation of the business, that the language restriction effectively fulfills the business purpose it is supposed to serve, and there is no alternative practice to the language restrictions that would accomplish the business purpose equally well with a lesser discriminatory impact." (Section 7 of S-234).

The New Jersey Legislature also seeks to codify that it shall be an unlawful employment practice for an employer to subject an employee to a hostile work environment or to retaliation for having opposed a hostile work environment. A-4209, 212th Sess. (N.J. 2007) (amending N.J.S.A. 10:5-12). The bill was prompted by the Appellate Division decision of *Cutler v. Dorn*, 390 N.J. Super. 238 (App. Div. 2007) in which the court found that certain sporadic pranks and comments, while offensive, was not enough to demonstrate a hostile work environment. The bill seeks to define a "hostile work environment" as a workplace where an employee is subjected to *abusive conduct* based upon a LAD-protected category. Abusive conduct is defined as *repeated verbal or physical conduct* of an employee in a workplace that a *reasonable person* would find hos-

tile, offensive, and unrelated to an employer's legitimate business interests. It specifies that:

Abusive conduct may include, but is not limited, to repeated infliction of: (a) derogatory remarks, insults, and epithets; (b) verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating; or (c) the gratuitous sabotage or undermining of a person's work performance.

The amendments delete any reference to requirements of a showing of physical or psychological harm that had been initially contemplated by the legislature.

Of related importance to the legislative proposals to New Jersey Law against Discrimination, is that of Family Leave Insurance: *Senate Bill No. 786/Identical Assembly Bill 873* (previously *Assembly Bill 2080* but disregarded in favor of a bill identical to *Senate Bill No. 786*). The bills seek to provide up to six weeks of paid Temporary Disability Insurance benefits to an employee who opts to take leave from employment in order to provide care which is certified to be necessary for a family member of the employee who suffers from a serious health condition, including providing psychological comfort, and arranging third-party care for the family member; or (after 30 days notice to employer) to take leave in order to bond with a child born from the employee during the child's first 12 months or placement of adoption with the employee's family. S-786, 213th Sess. (N.J. 2008); A-873, 213th Sess. (N.J. 2008) (amending N.J.S.A. 43:21-1 et. seq.; N.J.S.A. 43:21-25 et. seq.)

Senate Bill 786 would apply to all private and governmental employers subject to the "unemployment compensation law," and benefits would come from the State's existing Temporary Disability Insurance (TDI) system. S-786, 213th Sess. (N.J. 2008); A.873, 213th Sess. (N.J. 2008) (amending

N.J.S.A. 43:21-1 et. seq.; *N.J.S.A.* 43:21-25 et. seq.; N.J.S.A. 43:21-7 et. seq.). According to the proposed language, the employer may require that the employee take up to two weeks of available sick or vacation pay or other fully paid leave provided by the employer before receiving benefits under the bill, and may require that the period of benefits under the bill be reduced by the amount of time in which fully paid leave is provided. *S-786*, 213th Sess. (N.J. 2008); *A-873*, 213th Sess. (N.J. 2008). The leave benefits under the bill and protected leave under the federal Family and Medical Leave Act (FMLA) and the NJ Family Leave Act (FLA) must be taken concurrently.

Arguments on how the legislation will impact businesses have been made

on both sides of the issue. Some businesses argue that it will cause hardship, while others assert that the impact of the law will be beneficial. Particularly, some smaller employers (which are not covered by the FMLA NJ FLA) fear requirements surrounding job restoration; however, it should be noted that there is no job restoration provision in the law. On the other side, employers who argue in favor of the law highlight that the provision of a stream of income for a limited period of time of hardship is beneficial in several ways.

Such as: 1) employers do not have to fund the benefit as it is funded through employee wages; 2) employers will reduce or minimize expensive retraining/rehiring costs that are typically incurred in connection with

employees' separation for family care reasons; 3) employers that cannot afford to pay loyal and well-trained employees will know that their employees have a financial alternative during a difficult time, without having to absorb the costs; and 4) employers can benefit from a heightened level of productivity upon the return of employees who were not placed in the often difficult position of choosing between keeping their jobs and caring for a family member.

On March 3, *Senate Bill 786* passed the NJ Senate with a vote of 22-16. It was then sent to the General Assembly. The identical *Assembly Bill A-873* was voted out of the Assembly Labor Committee and thereafter referred to the Appropriations Committee. ■