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Message from the Chair

by Lisa Manshel

Welcome to the fourth issue of the 2017-2018 *Labor and Employment Law Quarterly*. This term, in a series of landmark decisions, the U.S. Supreme Court upended traditional analysis of a variety of First Amendment protections. The battles are political but are being played out in the doctrine, and the arguments are creating deep uncertainty about whether longstanding labor and employment law protections will survive in recognizable form.

In *Janus*, the Supreme Court held that agency or fair share fees charged by state and public sector unions to nonmembers in the bargaining unit violate the First Amendment.[1] Fair share laws require nonmembers of a union to contribute dues to the union in exchange for the union's legal obligation to fairly represent all members of the bargaining unit. The Court held that fair share fees constitute compelled speech in violation of the First Amendment. The decision overturns precedent that for 40 years had controlled public sector bargaining in New Jersey, and in a total of 22 states, the District of Columbia, Puerto Rico, and another two states for police and firefighter unions.[2] As a result, organized labor "will now need to come up with new ways—elaborated in new statutes—to structure relations between government employers and their workers."[3]

The *Janus* decision also pitches into uncertainty longstanding doctrine that had limited the constitutionally protected free speech rights of public employees to speech on matters of public concern.[4] Traditionally, issues of wages, benefits, and the terms and conditions of employment were held to be matters of purely private concern and, therefore, outside the protection of the First Amendment.[5] Employers could discipline or fire employees for speech about such subjects without giving rise to a Section 1983 claim. However, the *Janus* majority has held that the issues discussed in collective bargaining—the terms and conditions of employment such as wages and benefits—are matters of public concern, therefore concluding that fair share requirements to support collective bargaining violate nonmembers' rights

against compelled speech.[6] By expanding the scope of constitutionally protected speech, *Janus* arguably clears the way for a dramatic increase in free speech retaliation claims by public employees. The dissent predicts that "when actual cases of this kind come around, we will discover that today's majority has crafted a 'unions only' carve-out to our employee-speech law."[7] Indeed, the majority curiously refers to "the more rigorous form of *Pickering* analysis that would apply in this context,"[8] suggesting the dissent is right. Nevertheless, litigation will be required to test the new reach of the First Amendment in protecting public employee speech on matters relating to wages, benefits, and other previously private terms and conditions of employment.

In *Trump v. Hawaii*,[9] the Court decided another First Amendment case with potentially important implications for labor and employment lawyers. In that case, the State of Hawaii brought an Establishment Clause challenge to Proclamation No. 9645, the president's third attempt at a *de facto* Muslim travel ban.[10] This time, the proclamation cited national security as a justification to place entry restrictions on the nationals of seven foreign countries, five predominantly Muslim.[11] The challengers presented a mountain of evidence of the president's religious animosity, described by the dissent as a "harrowing picture" of "animus toward the Muslim faith."[12] Despite the motive evidence, the majority applied rational basis scrutiny and "completely set[] aside the President's charged statements about Muslims as irrelevant."[13] The majority's failure to assign any legal significance to the available evidence of discriminatory intent introduces uncertainty into legal practice involving unlawful motives. Moreover, the shrug over anti-Muslim animosity in *Trump v. Hawaii* contradicts the outrage over anti-Christian animosity in *Masterpiece Cakeshop*.[14] The Court's inconsistent treatment of motive proofs creates new room for legal maneuvering on the types of and relevance of proofs of discriminatory motive. In addition, the tension between the two decisions introduces confusion about the correct legal standard for evaluating claims under the Establishment Clause.[15]

Yet another First Amendment decision this term raises questions that could impact our practice of law. In *Becerra*, the Supreme Court struck a state law requiring pregnancy crisis centers to provide state-scripted notices to clients about available pregnancy and abortion resources.[16] The Court held that the law was a content-based regulation of speech and petitioners were likely to succeed on the merits of their claim that the law violates the First Amendment.[17] This result was surprising as a matter of law, if not politics, because in 1992, in *Planned Parenthood of Southeastern Pa. v. Casey*, the Court upheld a state law that, *inter alia*, required doctors to provide information about adoption to clients seeking an abortion.[18] The *Becerra* decision opens fresh lines of constitutional attack against state notice and notification requirements, including notices relating to employee and customer rights. Furthermore, in a concurring opinion, Justice Anthony Kennedy warned that "[g]overnments must not be allowed to force persons to express a message contrary to their deepest convictions."[19] Justice Kennedy's statement suggests that the Court may be receptive to claims not just from business owners[20] but also from individual employees for exemptions from notice and other federal and state laws.

Not to be overlooked, the executive branch also continues to challenge our foundational understanding of the civil rights landscape. The president's recent comments about deportation without due process[21] threaten a radical revision of our understanding that the Fifth and 14th Amendments protect every "person" in the United States.[22] The president's view of due process has been condemned as "straight out of slavery."[23] In addition, the president's July 10, 2018, "Executive Order Excepting Administrative Law Judges from the Competitive Service"[24] would eliminate merit-based standards for administrative law judges and convert administrative law judges (ALJs) into political appointees. The Executive Order has caused grave concern as a threat to the political independence and impartiality of ALJs and as an attack on the administrative state itself. The Executive Order is currently the subject of a proposed legislative amendment that would block its implementation.[25]

The 2017-2018 developments make clear that our state's strong protections of employee and bargaining rights are vulnerable to challenge with new constitutional arguments. Justice Elena Kagan has warned that the conservative majority of the Supreme Court is "weaponizing the First Amendment."[26] In the next term, the Labor and Employment Law Section will continue to develop seminar programming and articles for the *Quarterly* that identify and analyze developments in the larger legal landscape that appear to be heading this way.

Endnotes

1. *Janus v. AFSCME*, 138 S. Ct. 2448, 2486 (2018) (Alito, J., opinion of the court).
2. *Janus v. AFSCME*, 138 S. Ct. 2448, 2498-99 (2018) (Kagan, J., dissenting).
3. *Id.* at 2499.
4. *Garcetti v. Ceballos*, 547 U.S. 410 (2006); *Pickering v. Board of Ed. of Twp. High Sch. Dist. 205, Will Cty.*, 391 U.S. 563 (1968).
5. *Janus v. AFSCME*, 138 S. Ct. 2448, 2495-97 (2018) (Kagan, J., dissenting) ("[S]peech about the terms and conditions of employment—the essential stuff of collective bargaining—has never survived *Pickering*'s first step. This Court has rejected all attempts by employees to make a 'federal constitutional issue' out of basic 'employment matters, including working conditions, pay, discipline, promotions, leave, vacations, and terminations.'") (citations omitted).
6. *Janus v. AFSCME*, 138 S. Ct. 2448, 2474-77 (2018) (Alito, J., opinion of the court).
7. *Janus v. AFSCME*, 138 S. Ct. 2448, 2496 (2018) (Kagan, J., dissenting).
8. *Janus v. AFSCME*, 138 S. Ct. 2448, 2477 (2018) (Alito, J., opinion of the court).
9. *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).
10. *Id.* at 2403-04.
11. *Id.* at 2420-23.
12. *Trump v. Hawaii*, 138 S. Ct. 2392, 2435 (2018) (Sotomayor, J., dissenting).
13. *Id.* at 2447.
14. *Cf.*, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1729 (2018).
15. *Id.* at 2441 (criticizing the majority for applying rational basis scrutiny when "in other Establishment Clause cases, including those involving claims of religious animus or discrimination, this Court has applied a more stringent standard of review") (Sotomayor, J., dissenting). *See also Masterpiece Cakeshop*, 138 S. Ct. at 1731 (holding that "even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices" may offend the Constitution).
16. *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2378 (2018).
17. *Id.*
18. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 874 (1992).
19. *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2369-70, 2379 (2018) (Kennedy, J., concurring).
20. *See, e.g.*, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).
21. The president tweeted, "When somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came." Katie Rogers and Sheryl Gay Stolberg, Trump Calls for Depriving Immigrants Who Illegally Cross Border of Due Process Rights, *N.Y. Times* (June 24, 2018).
22. U.S. Const. amend. V; U.S. Const. amend XIV.
23. Steven Lubet and Robert Baker, Trump's Views on Due Process are Straight Out of Slavery, *Daily Beast* (July 27, 2018) (*citing Prigg v. Pennsylvania*, 41 U.S. 539 (1842)), https://www.thedailybeast.com/trumpsviewsondueprocessarestraightoutofslavery?ref=home.
24. *Executive Order Excepting Administrative Law Judges from the Competitive Service* (July 10, 2018).
25. *Warren, Colleagues Move to Block Politicization of Administrative Law Judges* (July 27, 2018), https://www.warren.senate.gov/newsroom/pressreleases/warrencolleaguesmovetoblockpoliticizationofadministrativelawjudges.
26. *Janus v. AFSCME*, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting).

Inside this issue

Message from the Editor

by Robert T. Szyba

We are pleased to present this issue of the *New Jersey Labor and Employment Law Quarterly*, filled with insights and discussion of some of the most cutting-edge issues faced by today's labor and employment practitioners. We hope you enjoy this issue!

In our Director's Corner, we welcome Chair Joel M. Weisblatt of the New Jersey Public Employment Relations Commission (PERC). Chair Weisblatt shares his reflections and insight looking forward to the future of PERC.

Lisa Manshel follows with an analysis of the U.S. Supreme Court's decision in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, and discusses the potential implications on civil rights protections and the First Amendment.

Meanwhile, Samuel Wenocur reviews the events of the first 100 days that Governor Phil Murphy spent in office, focusing on the developments and initiatives that stand to impact labor and employment law practitioners, as well as the workforce and employers of New Jersey. Maria Papasevastos then takes a close look at the Diane B. Allen Equal Pay Act, effective July 1 of this year, that amended the Law Against Discrimination (LAD) to create protections against pay disparities between any protected categories, not limited to gender. August W. Heckman III and Rudolph J. Burshnic II analyze the potential extraterritorial application of the LAD, reviewing the Appellate Division's decision in *Trevejo v. Legal Cost Control* and looking beyond to issues created under the new Diane B. Allen Equal Pay Act.

The #MeToo Movement has been a key issue of today's time. With permission of the *New Jersey Law Journal*, we are delighted to reprint Kristen Scheurer Branigan's and Jessica Stein Allen's article reviewing the proposed guidance from the U.S. Equal Employment Opportunity Commission and the impact of the #MeToo Movement.

We are pleased to introduce a new feature: Traps for the Unwary. We feature a discussion of the pitfalls surrounding the taxation of litigation costs, as carefully explained by Luke P. Breslin and Ashley D. Chilton.

Additionally, it is our pleasure to include articles by two student authors. Michael V. Caracappa discusses the requirements and inner-workings of the proposed legislation that would ban pre-employment inquiries into applicants' salary histories. We then turn to Joshua Garland, writing with Timothy D. Cedrone, who looks at the emerging gig economy through the lens of the U.S. Court of Appeals for the Third Circuit decision in *Razak v. Uber Techs., Inc.* to analyze the wage and hour implications under the Fair Labor Standards Act. We have been thrilled with the interest in labor and employment practice by these student authors and look forward to seeing them in practice.

Finally, I would like to thank the New Jersey State Bar Association; the Labor and Employment Law Section; the respective chairs during my tenure: Paul L. Kleinbaum, Paulette Brown, and Lisa Manshel; the managing editors: Claudia A. Reis and Lisa Barré-Quick; the editorial board; and our readers. It has been my honor and pleasure to serve as editor-in-chief of this esteemed publication, and I am very grateful for the opportunity. I welcome our new editor-in-chief, Lisa Barré-Quick, and look forward to the continued success and thought leadership of the *Quarterly*!

The Nature of Conflict and Resolution

by Joel M. Weisblatt

More than 40 years ago I was hired by the New Jersey Public Employment Relations Commission (PERC), straight out of law school. I had the benefit of an undergraduate degree in industrial and labor relations and I was motivated to embark on a career as a neutral in the labor-management field. I came to PERC because my mentor told me it was the best agency of its kind in the country. As I gained experience, learning the skills of the trade, I found that to be true.

I left PERC more than 35 years ago to establish a private practice as a mediator and arbitrator; that proved to be a particularly rewarding experience. Now I intend to prove that "You can go home again." (My apologies to Thomas Wolfe.)

PERC operates in a realm where it is vulnerable to criticism because a certain segment of its work relates to highly visible and deeply contested disputes. We are often measured on a case-by-case basis according to the hot issue of the moment. This is unavoidable and a fact of life for those responsible for insuring the integrity of dispute resolution processes.

I intend to discuss in some depth the *nature* of disputes and the *conflict* that makes them difficult to resolve. However, I first would like to reflect on some of the numerous important tasks for which PERC is responsible. These functions are critical to public sector collective negotiations in New Jersey.

Initially, I note that the agency is particularly skilled at ensuring that public employees have a secure and fair process for the selection or rejection of an exclusive employee representative for collective negotiations. Additionally, it has established an excellent track record for deciding issues with respect to supervisory, confidential or managerial status, under the representation elements of the statute. This segment of PERC's responsibilities requires the application of great care to properly protect the rights of public employees, their representatives and their employers. The representation functions of the agency are so fundamental to the collective negotiations process that we often take for granted how effectively that division of PERC has administered its responsibilities.

PERC is also responsible for making scope of negotiations determinations, deciding what matters are mandatory subjects for bargaining and arbitrable under contractual grievance procedures. Consistency in this area is of paramount importance. Bargaining teams make decisions, often mid-negotiations, as to whether consideration of a particular proposal is important, perhaps even whether it warrants modification to another proposal as a trade-off. The parties must be able to reasonably rely on an established foundation constituting the value of enforceability of specific proposals. The scope of negotiations rulings must be consistent and predictable.

PERC does a superlative job of applying the rights and obligations set forth in the unfair practice provisions of the statute. The New Jersey Employer-Employee Relations Act protects individual rights, organizational rights and management rights; PERC is committed to implementing the intent of the statute and is dedicated to applying these rights and obligations on an impartial and objective basis. The establishment of a clear and meaningful factual record is often critical to properly fulfilling this function and the agency understands the importance of this task.

The vast majority of claims involving our unfair practice jurisdiction are resolved at an informal or exploratory stage of processing, avoiding more extensive litigation. The resolution of cases at an early stage is a critical aspect of the agency's dispute resolution responsibilities.

The Division of Conciliation and Arbitration has long provided New Jersey parties with professional and effective mediation services. Our staff mediators are dedicated to assisting those at impasse to reach resolu-

tion of their disputes on a voluntary level. The skills they use include: persistence, patience, confidentiality and substantive understanding.

The conciliation and arbitration section also provides expert fact-finding panels for impasses that persist beyond mediation and it oversees the appointment of super conciliators in those few disputes that require even further third-party neutral involvement. This division also administers the police and fire compulsory interest arbitration provisions as established by the Legislature. Interest arbitration is the ultimate dispute resolution mechanism for qualifying bargaining units. Historically, these disputes have had a very high percentage of voluntary settlements, even after the interest arbitration process has been invoked. PERC actively encourages the voluntary resolution of impasses in police and fire (and all other) cases.

PERC also maintains an extensive panel of grievance arbitrators. When the agency has been designated as an appointing authority under a negotiated grievance procedure, it provides lists of arbitrators in accordance with our rules. This has proven to be an efficient means for parties to get contractual disputes to an impartial decision maker.

Most of the activities accomplished by PERC fly under the radar; they are accomplished without notice, recognition or consternation. Much of the impact of agency actions is local in nature. Even within broad and extensive bargaining units, the effects are often limited and localized. That does not, however, diminish the importance of the agency's functions. These local-impact decisions provide the foundation for our system of public sector negotiations. The importance of the basic determinations at the core of the process must not and will not be under-appreciated. We, as an agency, must be committed to 'getting it right.' We must focus on the details. We must maintain consistency and promote stability. That is our mission and our guiding principle.

Harold Newman was a stalwart chairman of the New York State Public Employment Relations Board. Decades ago, Harold delivered a speech in which he recited a few stanzas composed by the renowned arbitrator Peter Seitz. These lines adapt the poem, "You are old Father William," from *Alice in Wonderland*: Please bear with me as I present this observation about conflict.

> "You are young, Father Harold, and perhaps
> you're naïve
> To expect that the parties will reason
> When their purpose is just to mislead
> and deceive,
> And avoid claims of 'sell-out' and 'treason.'
>
> Experience teaches that most labor disputes
> Are products of rampant emotion;
> Compulsive desire to stir up emeutes;
> And a thirst for chaotic commotion.
>
> The parties agree when this instinct recedes,
> And self-interest dominates passion,
> Until this occurs, none listens or heeds
> In a logical common-sense fashion.
>
> Disputes like a fever must run out a course
> And crisis of charges and hating!
> It's not every marriage that ends in divorce;
> There's service in patiently waiting."

It appears that many of our labor-management disputes, especially those that attract widespread attention, reflect a level of conflict that is extreme. The parties' positions are hardened and resistant to compromise. This might be a function of a more polarized society or might simply be just a temporary feature of the swing of the pendulum of competing interests in the labor-management communities that we serve.

All too often, the hardened disputes involve two parties who attribute negative characteristics to the views of their adversaries. As a mediator, I have heard, on many occasions, the belief that the other side is narrow-minded, uninformed or simply wrong about the substance of the dispute. Sometimes these beliefs translate into interpersonal conflicts that may have nothing to do with the substance of the issues at impasse. Those involved in bargaining may justify the severity of their mutual disagreement by blaming adversaries in any manner of negative descriptive terms. This interpersonal discord only makes resolution of differences more difficult. There is an unfortunate tendency to personalize disagreement, exacerbating conflict; this is not a new phenomenon but one that has become much more common in recent years. Note that neither labor nor management has a monopoly on this characteristic.

It's been my observation that often the *true nature* of the conflict is not quite as deeply ingrained as the parties perceive. One example might, at times, be found

in issues arising over health benefits. These present some of the most difficult and polarizing problems in bargaining today. The most recent round of collective negotiations suggests the promise that health benefits will continue to be a particularly challenging issue.

I have often worked with parties who describe their bargaining counterparts in the most negative of terms with respect to proposals and counter-proposals as to health insurance plans. The gap is regularly subject to personalizing conflict, even demonizing the other side.

As I ponder my early experiences as a staff mediator at PERC, I am reminded that the process of negotiations is certainly not a science. Indeed, negotiations and dispute resolution may well be an 'art form' where instinct, timing and persistence may be the most important skills. I often recall a series of disputes in my formative years as a mediator that illustrate this concept. I appeared at an impasse where the union was demanding a five percent raise and the municipality was offering three percent. After spending some time listening to the parties explain the rationale behind their positions, I suggested to each that four percent might be the basis for a deal. They both reacted as if I were a genius and they settled the case on that basis. I thought: "This is easy work."

In my next case the parties were similarly situated, one at four and a half percent and the other at three and a half percent. When I eventually suggested four percent, they surely did not look at me as a genius. They shook their heads and said, "Jerk, if that were the answer we wouldn't have needed your help." Some hours later, I helped the parties maneuver into a settlement at three and a half percent in the first year and four and a half percent in the second, and once again they expressed great appreciation at the insight I brought to their table.

The truth is, mediation is not magical, nor is it subject to formula. Effective dispute resolution rewards effort, diligence and positive reinforcement. Sometimes the parties, and the neutral, must simply grind it out to find the road to labor peace.

It is surprising to step back and recognize that the ultimate goal of both parties is often quite similar. In healthcare, both parties usually (although not always) want to achieve high levels of benefits at the most reasonable cost possible. The real nature of these disputes is centered on the ability and willingness to spend the funds necessary to provide healthcare at acceptable levels.

This is truly a competitive dispute over how to spend available resources. That does not diminish the substantive nature of the conflict. Competing interests as to funding compensation and benefits have been with us since the earliest phases of collective bargaining in both the public and private sectors. However, these interests are not always a product of diametrically opposed goals; they are not necessarily attributable to the 'evil ways' of the other side. They are fairly typical of negotiations in a competitive environment where numerous pressures present meaningful considerations for both management and unions.

These disputes may lend themselves to more cooperative resolution approaches where parties are willing to work as partners in solving a problem rather than as opponents. I have seen a number of instances where parties have found perfectly acceptable coverage, sometimes even with improved benefits at lower premium costs. The case law establishes that the selection of carriers is a managerial prerogative, leaving issues over benefit coverage as negotiable. However, on numerous occasions, employers have found it effective to choose to include unions in the search and selection process of carriers to find more reasonable costs in a plan acceptable to the employees.

This cooperative approach seems risky to many who have engaged in a polarized environment at the negotiations table. One of the greatest difficulties in rethinking the bargaining structure over tough issues is the matter of trust. The highly conflicted environment has eroded trust, especially when considering the issue of health care benefits. Further, the insurance providers often have not helped the parties maintain trust levels with respect to changes in plans.

A different example of common goals, acting as a catalyst to allow the parties to reach an unexpected, mutually beneficial outcome, can be found in the history of bargaining work schedules for firefighters. The perspective of time has allowed us to view this experience a bit more objectively. I can recall a time when only about 20 percent of professional fire departments in New Jersey had a 24 on/72 off work schedule. Proposals to switch from the more common 10s and 14s were routinely rejected by management, fearing certain negative attributes from such a change. The firefighter

organizations promised reduced sick leave use and greater efficiency and productivity with their preferred schedule. Interest arbitrators, generally conservatively disposed to resist such major work schedule changes, rarely imposed the proposal to go to the 24/72 schedule at that time.

As an interest arbitrator, in mediation mode, I had numerous opportunities to work with parties willing to try an experimental change. In quite a number of municipalities, the parties were willing to assent to a temporary change in schedule from 10s and 14s to the 24/72, agreeing that the employer would retain the *unilateral right* to revert to the old schedule at the end of the contract term. I later was told that the unilateral right to revert was not used by any of those employers.

The 24/72 schedule has become a norm, and I have heard no complaints that managements' fears, some of which were grounded in logic, materialized after implementation. These changes were accomplished not through imposition in interest arbitration but through negotiated agreement by the parties, who exercised a measure of trust.

It is incumbent on both labor and management to reconsider when and where it might make sense to work in a mutually beneficial direction, getting away from the harsh and personal conflict that has made negotiations more difficult than the substance of the disputes would dictate. It's hard enough to resolve the truly substantive disputes. Let's see if we can reverse the structural conflict centered on inter-personal problems or perceived roadblocks by focusing more on substantive matters, no matter how tough, to achieve resolution. Like my son always says, "If you're skiing in the woods, don't look at the trees, look at the space between the trees."

Will Weinberg, my long-time colleague at the Port Authority Employment Relations Panel, and a mediator of extraordinary accomplishment, used to refer to the mediator's prayer: "Dear Lord, let there be strife; lest thy servant starve." Those of us lucky enough to be involved in dispute resolution know that no such prayers are really needed; there is plenty of strife. Strife is a critical component of the system. It is the fruits of overcoming endemic strife that provides the very special sense of accomplishment when the parties find resolution of their differences.

In conclusion, I am thrilled to be back at PERC. I am pleased to find that we have a dedicated, skilled and hard-working staff that will continue to evolve in order to provide the best possible service to the labor-management community. I can promise you that PERC will live up to its tradition of professionalism, independence and impartiality.

Joel M. Weisblatt is the chair of the New Jersey Public Employment Relations Commission. A career neutral, Weisblatt returned to PERC following a career of over 35 years as an arbitrator and mediator, serving on many panels in both the public and private sectors. He has a degree in industrial and labor relations from Cornell University, a law degree from Brooklyn Law School and is a member of the National Academy of Arbitrators.

Masterpiece Cakeshop Indecision

by Lisa Manshel

By now, everyone knows that the United States Supreme Court decided *Masterpiece Cakeshop* in favor of the baker, Jack Phillips, who refused to sell a wedding cake to a same-sex couple. On June 4, 2018, in an opinion written by Justice Anthony Kennedy, the Court held that the respondent, the Colorado Civil Rights Commission (Commission), violated Phillips' First Amendment rights because it "was neither tolerant, nor respectful of Phillips' religious beliefs."[1] The Court held that, whether or not the U.S. Constitution permitted Colorado to require Phillips to sell a wedding cake to a same-sex couple over his religious and speech objections, he was entitled to a finding in his favor due to evidence of "religious hostility" among the state commissioners.[2] Through this analysis, the Court avoided deciding the key questions presented—whether the Free Exercise or Free Speech Clauses of the First Amendment entitled Phillips to an exemption from the state's prohibition against discrimination in serving same-sex couples.

The majority relied on two sets of facts to conclude that the Commission's proceedings were tainted with religious hostility. First, one of the commissioners commented that "'[f]reedom of religion and religion has [sic] been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.'"[3] The Court condemned these statements as questioning Phillips' sincerity of belief and criticized the Commission itself for not having "disavowed" the commissioner's statements in its briefs.[4]

Second, the Court noted that the Commission had found that another complainant, William Jack, had not suffered religious discrimination when three other bakers refused Jack's requests for Bible-shaped cakes decorated with derogatory words about LGBTQ individuals.[5] The majority pointed out that "[t]he Commission ruled against Phillips in part on the theory that any message the requested wedding cake would carry would be attributed to the customer, not to the baker. Yet, the Division did not address this point in any of the other cases with respect to the cakes depicting anti-gay marriage symbolism."[6] Colorado had justified the different outcomes in the *Jack* cases by explaining that those three bakers had refused service, not due to Jack's religion but "'because of the offensive nature of the requested message.'"[7] The majority held that the Commission's own explanation for the different outcomes revealed an improper reliance on "the government's own assessment of offensiveness."[8]

The Court reversed the judgment against Masterpiece Cakeshop and Phillips because "'even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices'" may offend the Constitution.[9] Justice Kennedy pointed toward the future, writing that "[t]he outcome of cases like this in other circumstances must await further elaboration in the courts, all in the context of recognizing that *these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market.*"[10]

In *Masterpiece Cakeshop*, Phillips won a *de facto* exemption from anti-discrimination law. In a number of ways, his roundabout success can now be used as a results-oriented blueprint to avoid the law. Within days of the decision, the petitioners in *Arlene's Flowers v. Washington*, a case in which a shop owner refused to serve a same-sex couple seeking floral arrangements for their wedding, filed a supplemental brief before the Supreme Court to allege, for the first time, that Washington State officials had demonstrated religious hostility in their matter.[11] Over respondents' protests,[12] the Court granted *certiorari* and remanded for further consideration in light of *Masterpiece Cakeshop*.[13] The success of the *Jack* strategy—to dare other bakers to

refuse to write discriminatory words on cakes and then argue viewpoint discrimination—is also expected to lead other litigants to request discriminatory products in the hope of demonstrating a religiously motivated disparity in outcomes.[14]

Critically, however, although the Court held that Phillips himself could avoid penalty, the majority impliedly rejected the premise that the Constitution permits individuals, even those motivated by sincerely held religious convictions, to discriminate against LGBTQ individuals:

> Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights. The exercise of their freedom on terms equal to others must be given great weight and respect by the courts. At the same time, the religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression.... Nevertheless, while those religious and philosophical objections are protected, *it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.*[15]

The majority indicated only an extremely limited receptivity to future exemption requests:

> When it comes to weddings, it can be assumed that a member of the clergy who objects to gay marriage on moral and religious grounds could not be compelled to perform the ceremony without denial of his or her right to the free exercise of religion. This refusal would be well understood in our constitutional order as an exercise of religion, an exercise that gay persons could recognize and accept without serious diminishment to their own dignity and worth. *Yet if that exception were not confined, then a long list of persons who provide goods and services for marriages and weddings might refuse to do so for gay persons, thus resulting in a communitywide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations.*[16]

Also critically, the majority declined Phillips' invitation to pronounce race to be the only protected class sufficiently deserving of protection without First Amendment exemption. Petitioners, and the United States as *amicus curiae*, had urged the Court to recognize a compelling interest only in the prevention of race discrimination and not in the prevention of discrimination against LGBTQ individuals or any other protected class.[17] In this way, constitutional exemptions could be required in all cases other than those involving race discrimination. The Court did not adopt this analysis. Instead, the majority appears to have assumed the equal importance of non-discrimination across all protected classes for compelling interest analysis, noting that "[i]t is unexceptional that Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public."[18] The majority also did not distinguish but instead invoked *Newman v. Piggie Park Enterprises*, a case in which the Court held that religious exemptions are not available to justify racial discrimination.[19]

Thus, while Masterpiece Cakeshop and Phillips won a victory on their own behalf, courts have now begun to cite *Masterpiece Cakeshop* for the proposition that discrimination laws can be constitutionally enforced without exemption.

On June 7, 2018, three days after the decision, an Arizona appellate court rejected a litigant's request for constitutional exemption from local anti-discrimination law.[20] In *Brush & Nibs Studio, LC v. City of Phoenix*, the owners of a wedding design business had filed a pre-enforcement action challenging the constitutionality of the Phoenix anti-discrimination ordinance and seeking "to be able to legally refuse to create custom-made merchandise for all same-sex weddings" based on their religious beliefs.[21] The lower court had already denied the request for injunctive relief and granted summary judgment to the City of Phoenix. In the immediate aftermath of *Masterpiece Cakeshop*, the state appellate court then issued its decision affirming the denial of the claim for exemption, relying in relevant part on *Masterpiece Cakeshop* itself:

> [W]e recognize that a law allowing Appellants to refuse service to customers based on sexual orientation would constitute a "grave and continuing harm"... As most recently expressed by the Supreme Court: "Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights...."[22]

On July 13, 2018, Chief Judge Petrese B. Tucker of the United States District Court, Eastern District of Pennsylvania, cited *Masterpiece Cakeshop* as consistent with her decision denying a motion for preliminary relief based on First Amendment objections to the City of Philadelphia's anti-discrimination ordinance. In *Fulton v. City of Philadelphia*, Catholic Social Services (CSS) was seeking free exercise and free speech exemptions from the city's Fair Practices Ordinance (FPO) in providing foster placement and home study services to the city.[23] The contract between CSS and Philadelphia requires CSS to comply with the non-discrimination provisions of the FPO. Earlier this year, the city learned that CSS maintains policies of refusing to certify same-sex couples as prospective foster parents and refusing to provide same-sex couples with home study services as part of the couples' applications for adoption.[24] The city contacted CSS about the violation, and CSS admitted the policies but explained that it refuses to serve same-sex couples for religious reasons.[25] As a result, the city ceased making new referrals to CSS.[26] CSS filed suit, contending that the First Amendment requires the city to exempt CSS from the non-discrimination requirement.

Judge Tucker denied CSS's motion for a temporary restraining order and preliminary injunction, rejecting each and every constitutional argument. The court acknowledged the parties' citations to *Masterpiece Cakeshop* and concluded that *Masterpiece Cakeshop* is consistent with denial of plaintiffs' motion, writing:

> *Masterpiece Cakeshop*...has little bearing on this case in view of *Masterpiece Cakeshop*'s narrow holding. Among other narrow propositions, *Masterpiece Cakeshop* stands for the unfortunately nowremarkable proposition that disputes such as the one before this Court "'must be resolved with tolerance.'"[27]

The district court further demonstrated understanding of *Masterpiece Cakeshop*'s precedential value by including a tolerant and respectful introduction that begins: "The gratitude we owe to all those working to better the lives of Philadelphia's most vulnerable children is too great to convey in words."[28]

These early indications suggest that courts will read *Masterpiece Cakeshop* as a decision that stands *against* First Amendment exemptions to discrimination law.

Yet, the Supreme Court's failure to reach the merits has deepened an already deep moral divide. Just days after the decision, state representative Michael Clark, a South Dakota Republican, called the decision "a win for freedom of speech and freedom of religion" and wrote in a Facebook post that "it is his business. He should have the opportunity to run his business the way he wants. If he wants to turn away people of color, then that [is] his choice."[29] An Indiana school teacher resigned, claiming that his religious beliefs prevented him from complying with a district policy that required teachers to address transgender students by their preferred names.[30] The governor of Maine vetoed a bill that would have banned conversion therapy, claiming in his veto message, "I have grave concerns that LD 912 can be interpreted as a threat to an individual's religious liberty."[31]

From the outset, *Masterpiece Cakeshop* threatened to unravel generations of civil rights protections if exemptions were allowed to make each individual "'a law unto himself.'"[32] Justice Kennedy's majority opinion pushed back against that expectation with its lengthy passages of reassuring *dicta* about the continuing viability of civil rights law. However, the *Masterpiece Cakeshop* Court no longer exists. With Justice Kennedy's retirement, a newly constituted Court will decide whether discrimination law must give way to individual religious or creative and expressive rights. ■

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Endnotes

1. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018).
2. *Id.* at 1724.
3. *Id.* at 1729.
4. *Id.* at 1729-30.
5. *Id.* at 1730-31.
6. *Id.* 1730.
7. *Id.* at 1731.
8. *Id.*
9. *Id.* (citation omitted).
10. *Id.* at 1732 (emphasis added).
11. Supplemental Brief of Petitioners (June 6, 2018) (No. 17-108).
12. Supplemental Brief of Respondent (June 6, 2018) (No. 17-108); Supplemental Brief of Respondents Robert Ingersoll and Curt Freed (June 7, 2018) (No. 17-108).
13. *Arlene's Flowers, Inc. v. Washington*, No. 17-108, 2018 WL 3096308 (U.S. Supr. Ct. June 25, 2018).
14. Ian Millhiser, The Christian Right's bizarre plan to destroy civil rights laws by trolling, *ThinkProgress*, (June 6, 2018), available at https://thinkprogress.org/thechristianrightsbizarreplantodestroycivilrightslawsbytrolling3ac9d939cd1b/.
15. *Masterpiece Cakeshop*, 138 S. Ct. at 1727 (emphasis added) (citations omitted).
16. *Id.* (emphasis added).
17. Transcript of Oral Argument at 22-23, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* (Dec. 5, 2017) (No. 16-111); Brief for the United States as *Amicus Curiae* Supporting Petitioners at 32 (Sept. 2017) (No. 16-111).
18. *Masterpiece Cakeshop*, 138 S. Ct. at 1728.
19. *Id.* at 1727 (*citing Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 n.5 (1968) (holding that a barbeque vendor must serve black customers even if he perceives such service as vindicating racial equality, in violation of his religious beliefs); *id.* at 1733 n.* (Kagan, J., concurring) (*citing Newman*, 390 U.S. at 402 n.5 (noting that "[a]s this Court has long held, and reaffirms today, a vendor cannot escape a public accommodations law because his religion disapproves selling a product to a group of customers, whether defined by sexual orientation, race, sex, or other protected trait....A vendor can choose the products he sells, but not the customers he serves – no matter the reason.")).
20. *Brush & Nib Studio, LC v. City of Phoenix*, 418 P.3d 426, 244 Ariz. 59 (Ariz. Ct. App. 2018).
21. *Id.* at 432.
22. *Id.* at 434 (*quoting Masterpiece Cakeshop*, 138 S. Ct. at 1727).
23. *Fulton v. City of Philadelphia*, No. 18-2075, 2018 WL 3416393 (E.D. Pa. July 13, 2018).
24. *Id.* at *5.
25. *Id.*
26. *Id.* at *5, 11.
27. *Id.* at *17 (*quoting Masterpiece Cakeshop*, 138 S. Ct. at 1732).
28. *Id.* at *1.
29. Dana Ferguson, South Dakota lawmaker: Let Businesses 'turn away people of color,' later apologizes, *Argus Leader*, (June 5, 2018), available at https://www.argusleader.com/story/news/politics/2018/06/05/sdlawmakersaysbusinessesshouldableturnawaycustomersbasedrace/673317002/.
30. Curtis M. Wong, Teacher Says He Was Forced to Quit Over School's Transgender Student Policy, *HuffPost*, (Jun. 6, 2018), available at https://www.huffingtonpost.com/entry/indianateachertransgenderschoolpolicy_us_5b17f162e4b0599bc6df3caf.
31. Governor Paul R. LePage, Veto Statement, LD 912 (July 6, 2018), available at https://www.maine.gov/tools/whatsnew/attach.php?id=802362&an=1.
32. *Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872, 885 (1990) (citation omitted).

Recap: Changes to New Jersey's Labor and Employment Laws from Governor Murphy's First 100+ Days in Office

by Samuel Wenocur

Phil Murphy's platform for governor included numerous progressive proposals aimed at New Jersey's working class, including raising the minimum wage, guaranteeing earned sick leave and ensuring equal pay for equal work.[1] With full control of the governorship and New Jersey Legislature for the first time since 2009, Governor Murphy and the New Jersey Democratic-led Legislature have moved quickly to enact many of his promises. This article will address the most significant of these actions from Governor Murphy's first 100+ days in office.[2]

The Diane B. Allen Equal Pay Act

On April 24, Murphy signed into law the Diane B. Allen Equal Pay Act (EPA).[3] The EPA, which took effect on July 1, amends the New Jersey Law Against Discrimination (LAD)[4] so that it is now illegal for an employer to discriminate in compensation and other financial terms of employment based upon a person's inclusion in any protected category.[5] A violation of the EPA occurs each time an employer pays an employee a discriminatorily differential wage, and the employee "may obtain relief" for the entire period of the discriminatory pay up to six years.[6] The EPA also amends the LAD to protect employees from retaliation by an employer for sharing information with legal counsel or a government agency, and prohibits employers from preventing employees from sharing with each other their terms of employment.[7]

The EPA's amendments to the LAD include a provision specifically enunciating the circumstances under which an employer may pay a different rate of compensation to an employee and still comply with the act. For example, a pay differential will not violate the law if the employer can demonstrate that the difference results from a seniority or merit system or if the employer can show:

1) 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 quantify or quality of production;

2) 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;

3) That each of the factors is applied reasonably;

4) That one or more of the factors account for the entire wage differential; and

5) That the factors are job-related with respect to the position in question and based on a legitimate business necessity. A factor based on business necessity shall not apply if it is demonstrated that there are alternative business practices that would serve the same business purpose without producing the wage differential.[8]

If successful at trial, the judge *shall* award the aggrieved plaintiff(s) treble damages.[9] If such claims are pursued administratively rather than judicially, the director of the Division of Civil Rights (DCR) also has the authority to award treble damages.[10]

Under the EPA, employers who contract with a public body to provide certain services must identify, in writing, to the state the compensation and hours of its employees broken down by gender, race, ethnicity and job category. This information will be made available to the DCR and, upon request, to any employee of the employer during the relevant timeframe of the contracts or any employee's authorized representative.[11]

Going forward, New Jersey employers should presume their employees' compensation information will be readily available. This is a particular concern for employers who contract with the state, as compensation records will soon become accessible to their employees. Also, employers can no longer prevent their employees

from disclosing the terms of their employment with each other, legal counsel or the state. If an employee can demonstrate a difference in pay between members and nonmembers of protected categories performing substantially similar work, the employer now has the burden to meet the five-factor test or else it will face the potential for liability for violating the EPA and, if found so liable, be responsible for paying treble damages consisting of the difference between the two differential salaries for up to six years. Because of these changes, the EPA has been hailed as the gold standard for wage discrimination laws and the strongest protections in the nation.[12]

Sick Leave Statute

On May 2, New Jersey became the 10th state to enact a paid sick leave law.[13] The Sick Leave Law,[14] which will become effective on Oct. 29, will provide sick leave to an estimated 1.1 million workers who previously were unable to earn it.[15] Under the new law, New Jersey employers[16] must provide employees with one hour of earned sick leave for every 30 hours worked, and permit employees to accrue up to a maximum 40 hours of earned sick leave in any given year. No more than 40 hours of accrued earned sick time may be carried forward from one year into the next.[17] Employers must pay for the earned sick leave at the same rate of pay as the employee normally earns.[18]

The Sick Leave Law identifies five types of situations in which an employee can utilize his or her accrued sick leave, including for one's own physical and mental health; caring for a family member; circumstances surrounding domestic or sexual violence; closure of the employee's workplace, or the school or childcare location place of the employee's child, by order of a public official due to an epidemic or other public health emergency; and school obligations for the employee's child.[19] Employers who retaliate against employees utilizing the statutorily earned sick leave shall be subject to penalties under the New Jersey State Wage and Hour Law, including payment of the employee's actual damages plus an equal amount of liquidated damages.[20]

Workplace Democracy Enhancement Act

On May 18, Murphy signed the Workplace Democracy Enhancement Act (WDEA).[21] An amendment to the New Jersey Employer-Employee Relations Act,[22] this law was passed in anticipation of the U.S. Supreme Court decision in *Janus v. American Federation of State, County and Municipal Employees, Council 31*,[23] in which the Supreme Court was expected to, and ultimately did, hold that public sector unions cannot require nonmembers to pay representation fees. In his statement in support of signing the WDEA, Murphy explained that the WDEA will promote labor stability in the state's public sector by providing labor organizations with additional access to employees at the workplace.[24]

Under the WDEA, labor organizations now have the statutory right to meet with employees on work premises during the work day and to schedule meetings at the worksite.[25] Public employer obligations under the WDEA include sharing new employees' contact information with labor organizations, providing unions with updated information of all its members every 120 days, and allowing labor organizations to reach out to its membership through work email addresses.[26]

The other key components of the WDEA are the safeguards to minimize the risk of significant drops in union membership. All regular full-time and part-time employees who perform negotiations unit work are now considered members of the labor organization.[27] Even employees who previously were excluded from membership because they did not meet the minimum hours' threshold will be included in the unit within 90 days of the effective day of the WDEA.[28] The WDEA also prohibits public employers from encouraging members from either relinquishing membership or ending automatic deductions, to be treated as unfair practices before Public Employment Relations Commission (PERC).[29] The WDEA also amended N.J.S.A. 52:14-15.9e so that public sector employees may revoke authorization of payroll deduction fees to labor organizations only by providing written notice to their employers during the 10 days following their work anniversaries.

Administrative Appointments

In addition to the legislative achievements, Governor Murphy also nominated new chairs for both the Civil Service Commission (CSC) and PERC during his first 100 days in office. Even in the new chairs' brief terms, we have already seen significant departures from their predecessors.

Deidre Webster Cobb now serves as the chair and chief executive officer of the CSC, after previously serving as the equal employment opportunity/affirmative

action officer for the New Jersey Department of Treasury.[30] Webster Cobb joined holdovers Dolores Gorczyca and Daniel W. O'Mullan as the three current members of the CSC.[31] In Webster Cobb's first four meetings as chair, the CSC has demonstrated a newfound willingness to modify Office of Administrative Law (OAL) initial decisions in favor of employees, reducing the proposed penalty or punishment recommended by administrative law judges in eight out of its 35 decisions.[32] In its first four meetings of Webster Cobb's term, the CSC did not lengthen any penalty beyond what was recommended in the administrative law judge's (ALJ's) initial determination.[33] In comparison, during Robert Czech's last 10 meetings as chair of the CSC, the CSC reduced the proposed penalty in only one out of 52 cases, but imposed harsher penalties on four occasions.

Joel M. Weisblatt now serves as the chair of PERC,[34] after most recently serving as a mediator and arbitrator.[35] Other than Weisblatt, PERC's membership remains the same from the end of Chair P. Kelly Hatfield's term. Although it is still too early to identify clear trends, the early results indicate that PERC will be more likely to rule on the side of labor organizations in employer disputes. In the first two split PERC decisions under Weisblatt,[36] PERC ruled in favor of the labor organization either in part or in whole.[37] Split decisions at the end of Hatfield's term had been much more likely to rule in support of the employer against the labor organization. Only one of Hatfield's last eight split decisions[38] definitively ruled in support of the labor organization at least in part.[39]

It is worth keeping an eye on whether the new leadership at the CSC and PERC will continue with their divergences from the prior administration, such as with the drafting of new regulations. But it is undeniable that in his first 100+ days in office, Governor Murphy has taken significant steps to follow through on his promises to strengthen the rights of New Jersey's employees and labor organizations. ■

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Endnotes

1. https://www.murphy4nj.com/issue/income-inequality/.
2. In addition to the new laws addressed in this article, New Jersey has passed other notable laws during Murphy's first 100 days in office. Title 18A was amended so that applicants and former employers, including out-of-state employers, must identify any prior allegations and disciplines concerning child abuse and sexual misconduct notwithstanding any settlement agreements. A prospective employer must now reach out to an applicant's prior employers over the past 20 years to request such information. N.J.S.A. 18A:6-7.6 to 18A:6-7.13. In addition, N.J.S.A. 38A:14-4 was amended to cover members of the United States Armed Forces or reserves. People found in violation of the law will now be guilty of a crime in the fourth degree. The state also enacted legislation to protect employee rights to inventions made wholly outside the scope of employment. Any employment provisions requiring otherwise are now unenforceable. N.J.S.A. 34:1B-265.
3. www.nj.com/politics/index.ssf/2018/04/nj_now_has_the_strongest_equal_pay_law_in_america.html.
4. N.J.S.A. 10:5-12(a).
5. Protected categories under the LAD include but are not limited to race, sex, gender identify, color, creed, national origin, ancestry and age. *See* N.J.S.A. 10:5-12(a).
6. N.J.S.A. 10:5-12(a). The statute of limitations is either six months to go before the New Jersey Division on Civil Rights (N.J.S.A. 10:5-18) or two years to bring a complaint in court (N.J.S.A. 2A:14-2).
7. N.J.S.A. 10:5-12(r).
8. N.J.S.A. 10:5-12(t).
9. N.J.S.A. 10:5-13. Triple damages also apply to people retaliated against for speaking with co-workers, legal counsel or government authorities about differential pay.
10. N.J.S.A. 10:5-17.
11. www.njleg.state.nj.us/2018/Bills/PL18/9_.PDF.

12. www.huffingtonpost.com/entry/opinion-covert-equal-pay-day-new-jersey_us_5acbc59be4b0337ad1ead22dz; www.politico.com/states/new-jersey/story/2018/04/24/murphy-signs-landmark-equal-pay-measure-into-law-381097).
13. https://www.washingtonpost.com/business/economy/nj-governor-signs-law-requiring-paid-employee-sick-leave/2018/05/02/3a67056c-4e28-11e8-b725-92c89fe3ca4c_story.html?noredirect=on&utm_term=.502e52ee22c0.
14. N.J.S.A. 34:11D-1, *et seq.*
15. www.usatoday/com/story/money/antion-now/2018/05/03/new-jersey-paid-sick-leave/576147002.
16. Employers include any person or entity that employs employees in New Jersey, including temporary help service firms. Employers, though, do not include public employers that are otherwise required to provide employees with sick leave with full pay. N.J.S.A. 34:11D-1.
17. N.J.S.A. 34:11D-2(a).
18. N.J.S.A. 34:11D-2(c).
19. N.J.S.A. 34:11D-3(a).
20. N.J.S.A. 34:11D-5; N.J.S.A. 34:11-56a, *et seq.*
21. N.J.S.A. 34:13A-5.11, *et seq.*
22. N.J.S.A. 34:13A-1, *et seq.*
23. 2018 WL 3129785 (June 27, 2018).
24. https://nj.gov/governor/news/statements/approved/20180517e_bill_3686.shtml.
25. N.J.S.A. 34:13A-5.13(b).
26. N.J.S.A. 34:13A-5.13(c), (e).
27. N.J.S.A. 34:13A-5.15(a).
28. N.J.S.A. 34:13A-5.15(c).
29. N.J.S.A. 34:13A-5.14.
30. www.nj.gov/governor/news/news/562018/approved/20180220a_cabinet.shtml.
31. www.state.nj.us/csc/about/chair/commissioners
32. All 2017 and 2018 CSC decisions can be found online at the CSC website. www.state.nj.us/csc/about/meetings/minutes/.
33. This reference does not include cases that the CSC has remanded to the OAL for further deliberation.
34. www.state.nj.us/perc/html/commissioners.htm.
35. Weisblatt's resume as a mediator and arbitrator can be found at the PERC website. www.perc.state.nj.us/perccm.nsf/d87a2a9cde0881ef85257639005f6a3f/f922ea43e25c415285256ddc00557eae.
36. As of May 28, PERC had published 12 decisions since Weisblatt's appointment. In 10 of the cases, PERC ruled unanimously. All 2017 and 2018 PERC decisions can be found online at www.state.nj.us/perc/html/decisionreference.htm.
37. In *Newark*, *PERC 2018-040*, PERC adopted the hearing officer's granting of summary judgment for the labor organization. In *State (DEP)*, *PERC 2018-037*, PERC denied in part the state's request to restrain arbitration.
38. This analysis excludes cases involving multiple labor organizations with claims against one another. This analysis also does not include *Cape May County*, *PERC 2018-21*. In that case, PERC granted cross-motions for summary judgment, dismissing both the labor organization and employer's complaints.
39. In *Verona Bd.*, *PERC 2018-13*, PERC denied, in part, the state's request to restrain arbitration.

New Pay Equity Law Significantly Amends the LAD

by Maria Papasevastos

Governor Phil Murphy recently signed into law a pay equity bill that amends the New Jersey Law Against Discrimination (LAD) to significantly strengthen protections against pay discrimination in the workplace.[1] Effective July 1, this new law makes the LAD one of the nation's most aggressive equal pay laws. Some of the most notable amendments include that the LAD now prohibits pay disparities based on any LAD-protected characteristic, and *is not limited to gender.* The new law also expands the LAD's retaliation provisions and extends the statute of limitations for pay equity violations to six years, with liability accruing and back pay available for the entire period of a continuous violation, if within the now six-year statute of limitations. In addition, an unlawful employment practice will be found to occur on *each occasion* that an individual is affected by a discriminatory compensation decision or other practice. Further, the LAD now provides mandatory treble damages when an employer is found to have violated the equal pay or expanded non-retaliation provisions of the law. These significant changes to the law will undoubtedly impact employers, as well as how pay equity matters are litigated, in New Jersey.

Protected Characteristics Expanded Beyond Gender and Race/Ethnicity

The new law prohibits pay disparities based upon any protected characteristic covered under the LAD and *is not limited to gender.* This, of course, includes, but is not limited to, race, creed, color, national origin, nationality, ancestry, age, marital status, civil union status, domestic partnership status, affectional or sexual orientation, genetic information, pregnancy or breastfeeding, sex, gender identity or expression, and disability.[2] This change separates the New Jersey law from federal law and laws in other jurisdictions, like New York or California, which limit coverage to sex or sex and race.

The LAD now prohibits employers from paying employees who are members of a protected class at a lower rate of compensation, including benefits, than employees who are not members of the protected class "for substantially similar work, when viewed as a composite of skill, effort and responsibility."[3] The differential may be justified by: 1) a seniority system; 2) a merit system; or 3) a *bona fide* factor other than a protected characteristic, such as education, experience, training, or the quantity or quality of production so long as it is job related, and based on a legitimate business necessity, and if the employer demonstrates the factor is not based on, and does not perpetuate, a differential in compensation based on sex or any other characteristic of members of a protected class.[4] The law leaves undefined factors that tend to "perpetuate" pay equity violations. In addition, the *bona fide* factor must be applied reasonably, and explain the entire pay differential.[5] The factor will not apply if it is demonstrated there are alternative business practices that would serve the same business purpose without producing the wage differential.[6] Employers also may not resolve unexplained pay disparities by lowering compensation of a more highly paid worker.[7]

Other Key Provisions

The law makes a number of additional key changes to the LAD. First, the law allows for comparisons of pay across all of the employer's operations or facilities,[8] although it is unclear whether this is limited to locations within the state. The law also does not expressly indicate whether geographic wage and cost of living data rise to the level of a legitimate, *bona fide* factor or amount to a legitimate business necessity.

Second, the retaliation provision of the LAD is now expanded to protect employees who seek legal advice regarding rights protected under the act, share relevant information with legal counsel or share information with a government entity.[9] This provision is not limited to information shared regarding pay equity.

Third, the law specifically prohibits retaliation against an employee for discussing with or disclosing to certain categories of individuals—including any other employee or former employee, an attorney from whom the employee is seeking legal advice or any govern-

ment agency—information about any current or former employee regarding job titles, occupational categories, rates of compensation (including benefits), or protected characteristics. The discussion or disclosure may be for any reason, and is not solely limited to pursuing legal action or an investigation regarding equal pay.[10]

Fourth, employers are now prohibited from requiring employees to waive or agree to not make such disclosures as a condition of employment, as may be contained in some confidentiality provisions of employment agreements or offer letters.[11]

Finally, companies who are state contractors have additional reporting requirements, including compensation and hours worked categorized by gender, race, ethnicity, and job category, for each establishment of the employer.[12] The New Jersey Commission on Labor and Workforce Development will provide a form for employers to provide this information.

Statute of Limitations

The law extends the statute of limitations for pay equity violations to six years.[13] The law also provides that liability will continue to accrue and back pay is available for the entire period of time in which the violation has been continuous, if within the now six-year statute of limitations.[14] Further, the law expressly indicates that it does not prohibit the application of the doctrine of "continuing violation" or the "discovery rule" to any appropriate claim.[15]

Damages

Further, a jury or the New Jersey Civil Rights Commission must award treble damages when an employer is found to have violated the equal pay or expanded non-retaliation provisions of the law, in addition to back pay and liquidated and common law tort damages, which the LAD already provided.[16] As with other LAD claims, there is no requirement to file an administrative charge prior to filing a lawsuit.

An unlawful employment practice occurs on *each occasion* that an individual is affected by a discriminatory compensation decision or other practice, which includes, but is not limited to, each occasion that wages, benefits, or other compensation are paid as a result of the decision or practice, thereby increasing damages significantly.[17] The law does not expressly provide for retroactive application prior to the effective date.

The law further prohibits requiring employees or applicants to consent to a shortened statute of limitations or to waive any rights under the LAD, which is not limited to pay equity.[18]

Conclusion

These new amendments to the LAD will likely change the way pay equity matters are handled in New Jersey. New Jersey practitioners should be mindful of these changes and evaluate how the new legislation will impact their practices. There may also be more employers engaging in attorney-client privileged equal pay studies to ensure compensation differentials can be explained based on legitimate, non-discriminatory reasons.

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Endnotes

1. Senate Bill No. 104, 218th Leg., 2018 Sess. (NJ 2018), available at http://www.njleg.state.nj.us/2018/Bills/S0500/104_R2.PDF.
2. N.J.S.A. 10:5-12(t).
3. *Id.*
4. *Id.*
5. N.J.S.A. 10:5-12(t)(4).
6. N.J.S.A. 10:5-12(t)(5).
7. N.J.S.A. 10:5-12(t).
8. *Id.*
9. N.J.S.A. 10:5-12(d).
10. N.J.S.A. 10:5-12(r).
11. *Id.*
12. N.J.S.A. 34:11-56.14.
13. N.J.S.A. 10:5-12(a).
14. *Id.*
15. *Id.*
16. N.J.S.A. 10:5-13.
17. N.J.S.A. 10:5-12(a).
18. *Id.*

Trevejo v. Legal Cost Control: Telecommuting in the Gig Economy—When Does the New Jersey Law Against Discrimination Protect Out-of-State Employees?

by August W. Heckman III and Rudolph J. Burshnic II

Do the protections of New Jersey's Law Against Discrimination (LAD) apply to employees who work outside the state? More often than not, the answer is no, but a recent decision from the Appellate Division, *Trevejo v. Legal Cost Control*,[1] provides new insight into this analysis in the context of a telecommuting employee.

In prior cases, New Jersey state and federal courts have applied the "governmental interest" test to determine the extraterritorial application of the LAD.[2] In this choice-of-law analysis, for New Jersey law to apply, the state "must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."[3]

In the employment context, New Jersey courts have considered the state in which the employee worked as the most important factor in determining the LAD's applicability.[4] There are several decisions holding that the LAD did not apply to out-of-state employees,[5] though the ultimate analysis is fact specific. That an employee's work may bring him or her to New Jersey, even frequently, may not be enough to bring that employee within the protections of the LAD.[6] As noted by the Appellate Division, mere "occasional contact with New Jersey as part of [a plaintiff's] employment [i]s insufficient to turn those visits into plaintiff being 'based' in New Jersey for employment purposes."[7] Courts have also recognized the location of the allegedly discriminatory conduct as a factor, albeit not a determinative one.[8]

In *Trevejo*, the court was tasked with the question of whether a telecommuting employee working from home in Massachusetts could assert an LAD age discrimination claim against her New Jersey-based employer. The employee's connections with New Jersey were her employer's location (New Jersey), her employer-provided computer (which she used to connect remotely from her home to a company server in New Jersey), her employer-provided phone (which she used for daily phone calls with coworkers), and her company health insurance. The employee visited New Jersey on company business "a few times" between 2003 and 2008, but did not visit after that time, through her employment termination in 2015. The plaintiff never lived in New Jersey or sought or received benefits from the state of New Jersey.

The trial court granted summary judgment after it permitted limited discovery on whether the employee was an "inhabitant" of New Jersey. The *Trevejo* court took issue with this analysis, noting that 'inhabitant' was only mentioned in the statute's preamble, and that the LAD applies to "persons," which the statute does not limit to inhabitants.

Summary judgment was, therefore, premature, and the court held that "discovery is required to determine where the discriminatory conduct took place—in New Jersey or Massachusetts—and to explore whether plaintiff was employed in New Jersey or Massachusetts."[9] As noted above, while courts have found the location of employment and allegedly discriminatory conduct to be relevant, the *Trevejo* court did not cite any of the case law in this area.

Specifically, the court held that the plaintiff was entitled to discovery on the following:

- where the plaintiff's co-employees worked;
- whether those co-employees worked from home;
- the nature of the software used by the plaintiff and other employees to conduct business on behalf of the employer;
- the location of the server used to connect the plaintiff and other employees to the office in New Jersey;

- the location of the internet service provider allowing the plaintiff and other employees to connect to the employer's office in New Jersey;
- the individual or individuals who made the decision to terminate the plaintiff and the basis for the decision; and
- any other issues relevant to the plaintiff's contacts with New Jersey and her work for the employer that may demonstrate her entitlement to protection under the LAD.

The court further commented that, "[b]ased upon current computer technology and the forward thinking concept of 'telecommuting,' we are satisfied that determining who may be entitled to protection under the NJLAD is a novel question of law that involves highly significant policy considerations. Discovery yet to be completed may shed light on the matter."[10]

So while the *Trevejo* court did not decide the applicability of the LAD, the scope of the discovery delineated by the court appears to be focused on the contact analysis in the governmental interest test described above, though the court did not cite that test in the opinion.

It is expected that this extraterritoriality issue will be more prominent in the New Jersey courts moving forward, not least because of out-of-state employees seeking the additional protections in New Jersey's new pay equity law, the Diane B. Allen Equal Pay Act, which will be effective July 1.

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Endnotes

1. No. A-1377-16T4, 2018 WL 1569640 (App. Div. April 2, 2018).
2. *See Seibert v. Quest Diagnostics Inc.*, No. 11-304 (KSH), 2012 WL 1044308, at *4 (D.N.J. March 28, 2012).
3. *Blakey v. Continental Airlines, Inc.*, 164 N.J. 38, 65 (2000).
4. *See Seibert*, 2012 WL 1044308, at *4 ("Judges in the state and federal courts of New Jersey have continuously found that 'the most critical factor is the location where the employee works.'") (citation omitted).
5. *See, e.g., Buccilli v. Timby, Brown & Timby*, 283 N.J. Super. 6, 10 (App. Div. 1995) (Pennsylvania, not New Jersey, law applied to employee who resided in New Jersey but worked exclusively in Pennsylvania and the alleged wrongdoing occurred in Pennsylvania); *Santi v. Nat'l Bus. Records Mgmt., LLC*, 722 F. Sup. 2d 602, 608 (D.N.J. 2010) (LAD did not cover the New Jersey-based plaintiff who worked for Pennsylvania company, as "New Jersey courts apply the law of the state where the employee works to claims of employment discrimination").
6. *See Peikin v. Kimmel & Silverman, P.C.*, 576 F. Supp. 2d 654, 658 (D.N.J. 2008) (LAD did not protect Pennsylvania resident who was an associate based in a Pennsylvania office of a law firm even though the associate worked on cases for New Jersey clients and frequently traveled to New Jersey).
7. *Buccilli*, 283 N.J. Super. at 10-11.
8. *Seibert*, 2012 WL 1044308, at *5.
9. *Trevejo*, 2018 WL 1569640 at *3.
10. *Id.*

A Preview of Proposed EEOC Enforcement Guidance and Effects of #MeToo: Combatting Workplace Harassment With "Fully Resourced" Complaint Systems, Independent Investigations and a New Approach to Training

by Kirsten Scheurer Branigan and Jessica Stein Allen

Last year's #MeToo movement thrust the systemic workplace sexual harassment epidemic into the national spotlight. This pervasive crisis, however, has long persisted across all industries. Now, more than ever, employers need specific universal guidance on how to prevent and remediate sexual harassment as well as other forms of workplace harassment. The much-anticipated 2017 Enforcement guidance on Unlawful Harassment from the U.S. Equal Employment Opportunity Commission [hereinafter 'proposed guidance'] will provide critical and concrete methods to combat harassment in the workplace. The proposed guidance explains the legal standards for unlawful harassment and will replace earlier guidance issued in the 1990s. Significantly, the proposed guidance has been the culmination of a far-reaching EEOC study, which began even before the recent #MeToo movement fully materialized.

In 2015, the EEOC formed a Select Task Force on the Study of Harassment in the Workplace, co-chaired by Chai R. Feldblum and Victoria A. Lipnic. The co-chairs released their findings in a comprehensive Report and Executive Summary & Recommendations to the EEOC in June 2016, which focused on identifying ways to renew efforts to prevent harassment.[1]

Further, in the wake of the #MeToo movement, on Nov. 22, 2017, the EEOC issued best practices, entitled "Promising Practices for Preventing Harassment," which includes checklists and other tools identified in the select task force testimony and the select task force co-chairs' report. The promising practices mirror the core principles and much of the information set forth in the proposed guidance.[2]

The statistics on allegations of workplace harassment are staggering. As detailed by the select task force co-chairs' report, nearly a third of the 90,000 EEOC charges received by the commission in 2015 included allegations of workplace harassment, under multiple protected areas, including on the basis of sex, sexual orientation, gender identity, pregnancy, race, disability, age, ethnicity, national origin, color and religion.[3] Even more troubling is that approximately three out of four harassed employees never report the conduct, and current methods aimed at prevention have been ineffective.[4]

Significantly, the proposed guidance, which works in tandem with the select task force co-chairs' report and executive summary, will serve as a resource for employers, employees and practitioners seeking detailed information about the position of the EEOC on unlawful harassment; and for employers seeking concrete effective measures, such as having a complaint reporting system, investigation procedure and compliance training to fight workplace harassment.[5]

The proposed guidance and companion select task force co-chairs' report outline five key measures, which have generally proven effective in preventing and remedying harassment. They are: (1) strong and committed leadership; (2) regular and proven accountability; (3) robust and comprehensive harassment policies; (4) reliable and accessible complaint procedures, which include prompt and thorough investigations of harassment; and (5) routine, interactive (preferably live) training tailored to the specific workforce and workplace.[6] These five core principles are interrelated in that effective anti-harassment policies, including complaint procedures and resolution as well as workplace investigations and compliance training, cannot be implemented and made a priority without

strong leadership and accountability from senior officials and managers who must develop and maintain a culture of respect.[7] Without a commitment that harassment will not be tolerated from the highest levels of an organization's leadership, and without effective anti-harassment policies and protocols, a culture of harassment, inaction and fear of reprisal will continue to fester.

In addition to having effective anti-harassment policies, which should include a statement that employers will undertake prompt, impartial and thorough investigations,[8] the proposed guidance provides concrete recommendations for creating and ensuring an effective harassment complaint reporting system, which includes conducting proper and comprehensive investigations. An effective harassment complaint system contains the below measures, as well as others:

Is fully resourced, enabling the organization to respond promptly, thoroughly and effectively to complaints;

- Welcomes questions, concerns, and complaints; encourages employees to report potentially problematic conduct early; treats alleged victims, complainants, witnesses, alleged harassers, and others with respect; operates promptly, thoroughly, and impartially; and imposes appropriate consequences for harassment or related misconduct, such as retaliation;
- Provides prompt, thorough and neutral investigations; and
- Protects the privacy of alleged victims, individuals who report harassment, witnesses, alleged harassers and other relevant individuals to the greatest extent possible, consistent with a thorough and impartial investigation with relevant legal requirements.[9]

Further, those employees who are responsible for receiving, investigating and resolving complaints should be neutral, independent and well-trained to perform these critical functions.[10] The importance of using professional trained individuals cannot be understated. They must be able to "appropriately document every complaint, from initial intake to investigation to resolution, use guidelines to weigh the credibility of all relevant parties, and prepare a written report documenting the investigation, findings, recommendations, and disciplinary action imposed (if any), and corrective and preventative action taken (if any)."[11] Employers often engage experienced external attorney investigators who can independently evaluate harassment allegations and assess credibility.

While the proposed guidance does not define "fully resourced" harassment complaint systems, based upon the many areas highlighted, there is a clear expectation that employers devote monetary resources and time to ensure that the mechanisms for reporting and addressing complaints work. If employers fail to devote sufficient resources, such efforts may, in fact, be deemed unreasonable and lead to an inadequate result. The 'fully-resourced' requirement would likewise serve to avoid 'sham investigations,' and/or investigations where the conclusions are limited because an investigator is limited from assessing the full breadth of evidence.

Another core principle is providing effective harassment training for all employees so they can identify unlawful forms of harassment and understand how to use the reporting system. Indeed, the commitment from leadership and anti-harassment policies will only be operative if the entire workforce is aware of them. The EEOC urges that there be comprehensive training that is interactive (and preferably live) for the entire workforce—supervisory and non-supervisory alike—performed by qualified trainers. Such training should be routinely evaluated by the participants and ensure that all employees understand "organizational rules, policies, procedures, and expectations, as well as the consequences of misconduct."[12] There should be an unequivocal statement that retaliation is prohibited and will not be tolerated, and that no action will be taken against those who make good faith complaints and/or participate in investigations, regardless of whether the alleged conduct is found to violate the harassment policy.[13] The proposed guidance outlines specific recommendations on additional training guidelines for supervisors and managers who have additional responsibilities concerning identifying and reporting harassment.[14] Finally, the proposed guidance suggests that employers consider implementing new kinds of training, such as "workplace civility training and/or bystander intervention training, to prevent workplace harassment."[15]

Not only will creating and implementing these effective measures aid in preventing and addressing workplace harassment, but robust anti-harassment policies, along with substantive complaint and investigation procedures, as well as supervisory and non-supervisory compliance training, could mean the difference in terms of an employer's potential legal exposure for alleged supervisor harassment under New Jersey and federal law. In the proposed guidance, the EEOC reiterates its prior findings demonstrating how employers can establish an

affirmative defense for vicarious liability in accordance with the 1998 companion U.S. Supreme Court cases of *Burlington Indust. v. Ellerth,*[16] and *Faragher v. City of Boca Raton*,[17] where the employer exercised reasonable care to prevent and promptly correct the harassing behavior, and the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. In the 2015 seminal case of *Aguas v. State of New Jersey,*[18] the New Jersey Supreme Court provided guidance to employers defending such supervisory harassment claims under the New Jersey Law Against Discrimination and adopted the governing standards set forth by in *Faragher* and *Ellerth*. In *Aguas*, the court noted that an employer will be unable to avail itself of the prospect of an affirmative defense in litigation if the employer does not "unequivocally warn its workforce that sexual harassment will not be tolerated, provide consistent training, and strictly enforce its policy."[19]

As the past year's #MeToo movement has dramatically highlighted, a persistent and pervasive workplace harassment crisis exists. Victoria Lipnic, EEOC task force co-chair, recently commented that the impact of the #MeToo movement has not yet resulted in increased filing of EEOC charges, but she has been informed of increases in pre-litigation demand letters that may result in filing of EEOC charges.[20] Employers are poised to play a critical role in combating workplace harassment.

Armed with effective tools, such as a commitment from leadership and accountability, as well as strong anti-harassment policies, complaint procedures, prompt and independent investigations, and universal interactive compliance training, employers across all industries can help abate and prevent harassment in the workplace. While awaiting the approval of the proposed guidance by the U.S. Office of Management and Budget, the proposed guidance cannot be released soon enough. Until such time, employers would be wise now to conduct a review and full audit of their existing anti-harassment policies, complaint procedures, investigation processes and harassment training and proactively update these measures consistent with the EEOC proposed guidance. In fact, the promising practices materials and checklists recently issued by the EEOC are beneficial resources that employers may currently use to assist in their prevention and remediation efforts.[21]

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Endnotes

1. *See* Chai R. Feldblum & Victoria A. Lipnic, EEOC, Select Task Force on the Study of Harassment in the Workplace, Report of Co- Chairs Chai R. Feldblum & Victoria A. Lipnic (June 2016).
2. https://www.eeoc.gov/eeoc/publications/pro mising-practices.cfm
3. *See* Executive Summary at 1.
4. *See id.* at 2.
5. *See* Executive Summary at 5.
6. *See* proposed guidance at 68.
7. *See* proposed Guidance at 68.
8. *See id.* at 71.
9. *See id.* at 72.
10. *See id.* at 72-73.
11. *See id.* at 73.
12. *See id.* at 73.
13. *See id.* at 74.
14. *See id.*
15. *See id.* at 75.
16. 524 U.S. 742 (1998).
17. 524 U.S. 775 (1998).
18. 220 N.J. 494, 499 (2015).
19. *See id.* at 523.
20. *See* "EEOC Sees No Increase in Charges Since Start of MeToo" Law360 (March 13, 2018).
21. *See* https://www.eeoc.gov/eeoc/publications/pro mising-practices.cfm.

Litigation Costs: A Primer on Taxed Costs for the Unwary

by Luke P. Breslin and Ashley D. Chilton

Litigation takes time, energy, and money. The cost of litigating includes fees and disbursements for filing of pleadings, e-discovery, depositions, experts, service of subpoenas, and the like. These costs can significantly increase the true cost to clients, who bear these expenses, but ascertaining the proper treatment of costs expended in litigating a controversy can often leave attorneys perplexed. This article provides a primer to assist counsel in understanding the nuts and bolts of the rules governing the taxation of costs in the context of civil litigation in New Jersey.

Taxed Costs: The Basics

Taxed costs are the expenses in a given case that a court will assess against a party to the action. The procedures governing the taxation of costs in New Jersey are found within Local Civil Rule (L. Civ. R.) 54.1(a), Federal Rule of Civil Procedure (Fed. R. Civ. P.) 54(d), and New Jersey Court Rule (R.) 4:42-8, with six basic categories of taxable costs defined in 28 U.S.C. § 1920. The federal statute allows for the recovery of the following types of costs:

> (1) Fees of the clerk and marshal;
> (2) Fees for printed or electronically recorded transcripts necessarily obtained for use in the case;
> (3) Fees and disbursements for printing and witnesses;
> (4) Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case;
> (5) Docket fees under section 1923 of [Title 28]; [and]
> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of [Title [28].

In New Jersey state court practice, there is both statutory authority and guidance under the New Jersey Court Rules for counsel seeking taxed costs. N.J.S.A. 22A:2-8 provides, in pertinent part:

> A party to whom costs are awarded or allowed by law or otherwise in any action, motion or other proceeding, in the Law Division or Chancery Division of the Superior Court is entitled to include in [his or her] bill of costs [his or her] necessary disbursements, as follows:
> The legal fees of witnesses, including mileage for each attendance, masters, commissioners and other officers;
> The costs of taking depositions when taxable, by order of the court;
> The legal fees for publication where publication is required;
> The legal fees paid for a certified copy of a deposition or other paper or document, or map, recorded or filed in any public office, necessarily used or obtained for use in the trial of an issue of fact or the argument of an issue of law, or upon appeal, or otherwise;
> Sheriff's fees for service of process or other mandate or proceeding;
> All filing and docketing charges paid to the clerk of court; [and]
> Such other reasonable and necessary expenses as are taxable according to the course and practice of the court or by express provision of law, or rule of court.

Rule 4:42-8 provides, in pertinent part:

(a) Parties Entitled. Unless otherwise provided by law, these rules or court order, costs shall be allowed as of course to the prevailing party. The action of the clerk in taxing costs is reviewable by the court on motion.

(b) Defendants in Certain Actions. Costs shall be allowed against a defaulting defendant in a replevin action only if the defendant has refused to deliver the subject goods and chattels pursuant to written demand therefor made before commencement of the action. Costs shall not be allowed against a defendant in a quiet title action who defaults or files an action disclaiming any right in the subject property, and a defendant in such action who denies in the answer claiming or ever having claimed any right in the subject property may, by court order, be allowed costs.

(c) Proof of Costs. A party entitled to taxed costs shall file with the clerk of the court an affidavit stating that the disbursements taxable by law and therein set forth have been necessarily incurred and are reasonable in amount, and if incurred for the attendance of witnesses, shall state the number of days of actual attendance and the distance traveled, if mileage is charged. Such costs may include fees paid to a private person serving process pursuant to R. 4:4-3, but not in an amount exceeding allowable sheriff's fees for that service.

(d) Effective Date. If a court allows costs to be taxed later than 6 months after entry of a judgment or order, or when the judgment or order becomes the subject of review or further litigation later than 6 months after it has been finally disposed of, the judgment for costs shall not take effect before the entry in the civil docket.

The U.S. Supreme Court has observed that taxable costs under 28 U.S.C. § 1920 are "modest in scope" and "limited to relatively minor, incidental expenses" that constitute "a fraction of the taxable expenses borne by litigants[.]"[1] Nevertheless, motions to tax costs are an effective litigation tactic, allowing recoupment of expenditures incurred on a client's behalf. Moreover, awards for costs in New Jersey have been fruitful. For example, in *McCoy v. Health Net*,[2] the prevailing parties in a class action dispute were awarded in excess of $1.7 million in costs for depositions, experts, and other costs. Similarly, in *Otsuka Pharm. Co., Ltd. v. Sandoz, Inc.*,[3] taxable costs for fees of the clerk, trial transcripts, and the taking and transcribing of depositions, among other costs, were allowed in the amount of $545,498.92. Accordingly, motions to tax costs are a necessary and effective part of the practice that should be handled with care.

The following outlines a starting point to address basic questions about whether a cost is taxable and, if so, under what circumstances.

Parties Subject to Rule

Pursuant to Fed. R. Civ. P. 54(d), 28 U.S.C. § 1920, L. Civ. R. 54.1(a), and Rule 4:42-8(a), a motion for the taxation of costs and a filing of a bill of costs is made by the prevailing party.[4]

A prevailing party is one for whom the verdict or judgment is rendered, even if that verdict or judgment does not wholly vindicate the litigant's position.[5] Additionally, a party may be considered a prevailing party even if the case is disposed of before trial. For example, a party whose motion for summary judgment is granted may apply for costs,[6] as may a party who prevails on appeal despite having lost at the trial court level.[7]

Even if a court finds it lacks jurisdiction and the case is not decided on the merits, a party who succeeds in having a suit dismissed for lack of jurisdiction may also apply for costs.[8]

In the event of a mixed judgment, the court may determine that neither party prevailed, and require each to bear its own costs.[9]

Accordingly, at least with regard to federal cases, every litigant, including plaintiffs, should anticipate the possibility of being taxed for costs.[10]

Conversely, Rule 4:42-8(a) has been held generally to preclude an award of costs against the prevailing party. In *Kronisch v. The Howard Savings Institution*,[11] the court noted the "novelty of the issue in this State that no costs be assessed against plaintiffs and that both parties assume the burden of their own costs."[12]

Technical Requirements

The procedure for recovering taxed costs begins with the filing of a bill of costs. In district court, the bill of costs must be filed on Form AO 133, available in the clerk's office or from the New Jersey District Court's homepage.[13]

The time for taxing costs is prescribed by L. Civ. R. 54.1(a), which specifies that an application to tax costs must be filed and served within 30 days of: 1) the entry of a judgment allowing costs (including an appellate mandate or judgment in lieu thereof), or 2) the filing of an order disposing of the last of any timely filed post-trial motions.

However, in *Goldstein v. GNOC*,[14] the District Court for the Eastern District of Pennsylvania recognized that costs have been taxed in the Third Circuit when bills of costs were filed many months after judgment was entered.[15] Significantly, the court was not persuaded by the plaintiff's argument that the defendant's filing of the bill more than five months after judgment was entered was untimely. It noted that Fed. R. Civ. P. 54(d) allows the prevailing party to recover costs as a matter of law.[16]

Once a notice of motion is filed, the prevailing party serves the attorney for the adverse party and files with the clerk a bill of costs. L. Civ. R. 54.1(d) instructs that the notice of motion set forth the hour and date when the application will be made. The rule also specifies that, if served personally, the notice must be served three to seven days in advance of that stated time. Service by mail should occur no less than seven or more than 14 days in advance of that time.

L. Civ. R. 54.1(b) requires counsel to append copies of all invoices in support of each item on the bill of costs.[17] Failure to provide supporting documentation can result in the denial of costs.[18] In addition, the itemization needs to provide enough detail for the clerk to determine which costs are taxable under the guidelines of L. Civ. R. 54.1(g).[19] In *McCoy v. Health Net, Inc.*, the court, in awarding the prevailing party $1,725,337.06 in costs and expenses, made special note that the "Plaintiffs' counsel has substantiated its fee request with charts listing each individual who billed hours to this matter and their actual billing rate."[20]

Failure to comply can result in complete denial. For example, in *Dewey v. Volkswagen*,[21] the court denied approximately $12,000 in costs sought "for lack of specific information to show that the expenses are reasonable or how they furthered the plaintiffs' pursuit of their claims." Accordingly, either a receipt or an affidavit stating that the expenses were actually incurred and were necessary to the successful defense of the suit also must be provided.[22] A bill of costs filed without such proper verification will not be taxed.[23]

The clerk is tasked with taxing costs, which a court may review on a motion. A district court reviews the clerk's determination of costs *de novo*. A *de novo* review entails reviewing new evidence and circumstances that militate in favor of reducing the earlier imposed costs award.[24] The court retains the discretion to deny costs in an appropriate case. In *Flood v. City of East Orange*,[25] costs were denied to the defendant city as the prevailing party after the court found it to have been "woefully inattentive" to the case.[26]

Taxed Costs: The Scope

The following costs are taxable to the extent described:

Fees of the Clerk: The local rule is silent as to taxation of fees charged by the clerk and the United States marshal, though such are explicitly taxable under 28 U.S.C. §1920(1). The Third Circuit District Court for the District of New Jersey also has held that fees paid to private servers of process serving summons/complaint and subpoena(s) are taxable.[27] With regard to costs related to service in state court matters, N.J.S.A. 22A:4-8 has been interpreted to allow costs for only one fee for service of a writ by the sheriff.[28] Pursuant to Rule 4:4-3(c), if service is rendered by a person other than a sheriff, that server is entitled only to an amount not to exceed the fee plus mileage expenses to which the sheriff would be entitled.

Fees of the Court Reporter: Court reporter fees are taxable under 28 U.S.C. § 1920(2).[29] Under L. Civ. R. 54.1(g)(6), "the costs of a reporter's transcript is allowable only (A) when specifically requested by the Judge, master, or examiner, or (B) when it is of a statement by the Judge to be reduced to a formal order, or (C) if required for the record on appeal." However, according to comments to the Local Civil Rules, "the exceptions…are broad enough to cover essentially any situation where a transcript is actually used in or after a proceeding."[30] Additionally, courts have found expedited transcripts to be necessary and, therefore, taxable, on account of the length and complexity of the trial.[31] Under New Jersey Federal Practice Rule 23(g)(6),

the cost of a reporter's transcript is taxable only when specifically requested by the judge.[32]

Fees for Witnesses: Witnesses' fees are taxable under 28 U.S.C. § 1920(3).[33] Additionally, L. Civ. R. 54.1(g)(1) states, in relevant part: "The fees of witnesses for actual and proper attendance shall be allowed.[…] [T]he rates for witness fees, mileage and subsistence are fixed by statute (see 28 U.S.C. § 1821)." Under 28 U.S.C. § 1821(c)(1), a witness may travel by common carrier on the basis of the means of transportation reasonably utilized and the distance necessarily traveled to and from such witness's residence. Additionally, 28 U.S.C. § 1821(d)(1) allows a subsistence fee when an overnight stay is required, provided that the per diem rate does not exceed the rates established by the administrator of general services, pursuant to 5 U.S.C. § 5702(a). Although not expressly included in §1821, the costs of serving subpoenas to secure the appearance of witnesses will be taxable where "actually and necessarily" incurred.[34]

The fees of a court-appointed expert witness are expressly defined as taxable costs, with no statutory cap.[35] If an expert witness is not court appointed, expenditures are taxable only to the extent that ordinary witness expenditures would be.[36] Pursuant to L. Civ. R. 54.1(g)(3), a party's own costs as a witness are not taxable.[37]

Fees for Exemplification: Exemplification fees are taxable under 28 U.S.C. § 1920(4) for "any materials where the copies are necessarily obtained for use in the case." However, L. Civ. R. 54.1(g)(9) states that "[t]he fees for exemplification and copies of papers are taxable when (A) the documents are admitted into evidence or…served in support of a dispositive motion, and (B) they are in lieu of originals[.]" Nevertheless, the Third Circuit has held that L. Civ. R. 54.1(g) must give way when it conflicts with § 1920.[38]

Although this provision does not expressly refer to e-discovery costs, in recognition of the importance of e-discovery, subsection (4) was amended in 2008 to replace "the costs of making copies of papers" with "the costs of making copies of any materials." In *Race Tires America, Inc. v. Hoosier Racing Tire Corp.*,[39] the Third Circuit provided "definitive guidance" on the question of which electronic discovery activities may be considered "exemplification" for purposes of § 1920(4). It held that "only scanning and file format conversion can be considered to be making copies."

Fees for Printing and Copying: Printing and copying are taxable as costs where the copies are "necessarily obtained for use in the case."[40] L. Civ. R. 54.1(g)(9) places two limiting criteria on the taxation of costs for copying documents: the documents must be admitted into evidence or necessarily attached to a document required to be filed and served in support of a dispositive motion *and* the copies must be in lieu of originals that are not introduced at the request of opposing counsel.[41] L. Civ. R. 54.1(g) must give way when it conflicts with 28 U.S.C. § 1920.[42] The cost of copies submitted in lieu of originals because of convenience to offering counsel or his or her client is not taxable. The cost of copies obtained for counsel's own use is not taxable.[43]

Docket Fees: The fees charged by the court for filing a claim are taxable pursuant to 28 U.S.C. §1923. L. Civ. R. 54.1(g)(5) merely provides that, in any case where counsel is awarded true attorneys' fees based on services rendered and hourly rates, the statutory docket fees may not also be awarded. Docket fees are not the same as filing fees for the action itself, which are also taxable.[44]

Taxed Costs: Depositions

As to recovery as part of taxed costs by the prevailing party of deposition expenses in state law matters, N.J.S.A. 22A:2-8 provides that a party is entitled to include in the bill for costs "necessary disbursements," including "[t]he costs of taking depositions when taxable, by order of the court." However, case law makes clear that depositions should not routinely be taxed as expenses in every case.[45] On the other hand, "where fraud or other reprehensible conduct on the part of the losing party is involved or there are other extraordinary circumstances in the cause of action or conduct of the litigation, deposition costs may be properly allowable by court order."[46]

Although 28 U.S.C. § 1920 does not expressly reference the expenses incurred in taking depositions, 28 U.S.C. § 1920 encompasses several provisions for the recovery of costs that have been interpreted to allow award of routine expenses incurred in taking depositions. Those subsections of § 1920 permit an award of the following:

Fees for Printed or Electronically Recorded Transcripts: Printed or electronically recorded transcripts may be awarded as costs to the prevailing party if the court determines the transcripts were necessary for use

in the case.[47] L. Civ. R. 54.1(g)(7) allows taxation of deposition costs directly related to the use of a deposition transcript. L. Civ. R. 54.1(g)(7) states, in relevant part: "In taxing costs, the Clerk shall allow all or part of the fees and charges incurred in the taking and transcribing of depositions used at the trial under Fed. R. Civ. P. 32."[48] Fees and charges "for the taking and transcribing of any other deposition shall not be taxed as costs unless the Court otherwise orders." In *Otsuka Pharm. Co., Ltd. v. Sandoz, Inc.*,[49] the District Court for the District of New Jersey found it persuasive that the "Defendants themselves noticed a deposition as a video deposition and arranged for all matters related thereto."[50] The court held that the fact the defendants themselves requested the depositions indicated the depositions were "necessary for trial."[51]

Expert Fees: In state court, "[e]xperts' fees are not ordinarily includable as taxed costs."[52] In *Helton v. Prudential Property & Cas. Ins. Co.*,[53] the court rejected the plaintiff's claim for reimbursement of expert witness expenses, finding "no sound basis" for awarding them in the absence of a specific statute authorizing recovery of expert witness fees as taxed costs "(over and above the statutory rates provided by N.J.S.A. 22A:1-4)."[54]

Fees and Disbursements for Printing and Witnesses:[55] In addition, in *Hurley v. Atl. City Police Dept.*,[56] the court cited 28 U.S.C. § 1920(3) in support of its holding that attendance and travel fees paid to adverse deponents were taxable costs.

Fees for Exemplification: Fees for exemplification and the costs of making copies of any materials are taxable if the copies are necessarily obtained for use in the case.[57]

Conclusion

Counsel should take into account the costs incurred during the course of a litigation and determine whether they are taxable upon conclusion of the case. The final judgment can include significant additional costs beyond the attorneys' fees expended. In an effort to reduce surprise, attorneys and clients should incorporate taxable costs into their evaluation of the strengths and weaknesses of the claim or defense. Additionally, clients should be kept fully informed throughout the discovery process on how certain litigation processes may escalate costs that could eventually be taxed against them. Consider whether, and how, an agreed-upon joint discovery plan will affect taxable costs. Finally, attorneys should be careful to accurately and clearly document costs of the particular discovery tasks in order to recover such costs in the event their clients are successful in the litigation.

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Endnotes

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2. 569 F. Supp. 2d 448, 479 (D.N.J. 2008).
3. No. 07-1000 (MLC), 2015 U.S. Dist. LEXIS 137886, at *30 (D.N.J. Oct. 9, 2015).
4. *See generally Ford v. County of Hudson*, 2017 U.S. Dist. LEXIS 33549 (D.N.J. March 8, 2017); *In re Paoli R.R. Yard PCB Litig.*, 221 F.3d 449, 462 (3d Cir. 2000); *Kas Oriental Rugs, Inc. v. Ellman*, 407 N.J. Super. 538, 554 (App. Div.), *certif. denied*, 200 N.J. 476 (2009).
5. *The Knit With v. Knitting Fever, Inc.*, No. 08-4221, 2016 U.S. Dist. LEXIS 176782, at *4-5 (E.D. Pa. Dec. 21, 2016) (*citing Devex Corp. v. Gen. Motors Corp.*, 494 F. Supp. 1369, 1380 (D. Del. 1980*), judgment aff'd on other grounds*, 667 F.2d 347 (3d Cir. 1981), *judgment aff'd*, 461 U.S. 648(1983)).
6. *Peterson v. Crown Financial Corp.*, 498 F. Supp. 1177, 1180-1181 (E.D. Pa. 1980).
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9. *The Knit With v. Knitting Fever, Inc.*, *supra* note 5, at *5 (citation omitted).
10. *Goldstein v. GNOC, Corp.*, No. 90-0496, 1994 U.S. Dist. LEXIS 11731, at *4 (E.D. Pa. Aug. 22, 1994).
11. 161 N.J. Super. 592 (App. Div. 1978).
12. *Id.* at 608.
13. Available at http://www.njd.uscourts.gov/forms/bill-costs-ao-133.
14. *Goldstein*, *supra* note 10 at *4.
15. *Id.*
16. *Id.*
17. *Torriero v. Sec. Officers, Police & Guards Union Local* 1536, No. 03-5155 (AET), 2006 U.S. Dist. LEXIS 38635, at *4 (D.N.J. June 12, 2006).
18. *See Lasky v. Moorestown Twp.*, 2013 U.S. Dist. LEXIS 40951 (D.N.J. March 22, 2013) (denying categories of costs requests "absent documentation of those expenses").
19. *Id.*
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22. *Greene v. FOP*, 183 F.R.D. 445, 449 (E.D. Pa. 1998).
23. *Boyadjian v. CIGNA Cos.*, 994 F.Supp. 278, 280 (D.N.J. 1998), *aff'd*. 203 F.3d 816 (3d Cir. 1999), *cert. den*. 530 U.S. 1215 (2000). (recognizing that plaintiff failed to comply with Local Rule 54.1(b) by not providing receipts for the amounts claimed to have been spent on expenditures, but entertaining Plaintiff's motion nonetheless based on his pro se status).
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25. 563 F. Supp. 341, 344 (D.N.J. 1982).
26. *Id.*
27. *Merck Sharp & Dohme Pharms., SRL v. Teva Pharm. USA, Inc.*, No. 07-1596 (GEB), 2010 U.S. Dist. LEXIS 81938, at *5 (D.N.J. March 31, 2010) (*citing Hurley v. Atl. City Police Dept.*, No. 93-260, 1996 U.S. Dist. LEXIS 14088, 1996 WL 549298, at *8 (D.N.J. Sept. 17, 1996)).
28. *FCC Nat. Bank v. Sheriff Monmouth County*, 343 N.J. Super. 609, 619-620 (Law Div. 2001).
29. 28 U.S.C. § 1920(2).
30. N.J. Federal Practice Rules, Comment 4(d) to Rule 54.1 (Gann 2017 ed.).
31. *See Farmer v. Arabian Am. Oil Co.*, 379 U.S. 227, 234 (1964) (citation omitted).
32. *Hurley v. Atl. City Police Dept.*, *supra* note 27 at *17.
33. 28 U.S.C. § 1920(3) provides that "[a] judge or clerk of any court of the United States may tax as costs the following: (3) Fees and disbursements for printing and witnesses." L. Civ. R.54.1(g) (1) reads:

    > The fees of witnesses for actual and proper attendance shall be allowed, whether such attendance was voluntary or procured by subpoena. The rates for witness fees, mileage and subsistence are fixed by statute (*see* 28 U.S.C. § 1821).

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36. *In re Phila. Mortg. Tr.*, 930 F.2d 306, 308 (3d Cir. 1991).
37. *Romero v. CSX Transp., Inc.*, 270 F.R.D. 199, 203 (D.N.J. 2010).
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39. 674 F.3d 158 (3d Cir. 2012).
40. 28 U.S.C. § 1920(4).
41. *See* L. Civ. R. 54.1(g)(9).
42. *In re Baby Food Antitrust Litig.*, 166 F.3d at 139.
43. *N.J. Mfrs. Ins. Grp. v. Electrolux, Inc.*, Civil Action No. 10-1597 (AET), 2013 U.S. Dist. LEXIS 189347, at *24-26 (D.N.J. Oct. 21, 2013).
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45. *Finch, Pruyn & Co. v. Martinelli*, 108 N.J. Super. 156, 159-160, (Ch.Div.1969); *Sunset Beach Amusement Corp. v. Belk*, 33 N.J. 162, 170 (1960).
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51. *Ibid.* (permitting cost of videotaping deposition and cost of transcript to be taxed to defendant, but refusing to charge cost of preparing copy of videotape because plaintiffs failed to show how copy was reasonably necessary to trial).
52. Pressler and Verniero, Current N.J. Court Rules, *supra* note 46.
53. 205 N.J. Super. 196 (App. Div. 1985).
54. *Id.* at 204.
55. 28 U.S.C. § 1920(3) ("fees and disbursements for printing and witness" are taxable costs); 28 U.S.C. § 1821 ("All normal travel expenses…shall be taxable as costs").
56. *Hurley v. Atl. City Police Dept.*, *supra* note 27 at *8.
57. 28 U.S.C. § 1920(4).

New Jersey's Impending Ban on Salary History Inquiries: How it Works and What Effect it Will Have

by Michael V. Caracappa

On July 21, 2017, Governor Chris Christie vetoed legislation that would have prohibited employers from inquiring into job applicants' salary histories.[1] But Governor Christie's veto has not ended the debate, and New Jersey will likely enact a ban on salary history inquiries within the next few years.[2] It took the California Legislature three attempts before its ban was finally signed into law by Governor Jerry Brown.[3] New Jersey's new governor, Phil Murphy, has already signaled his support for a ban on salary history inquiries by utilizing his first executive order to bar public employers from inquiring into job applicants' salary histories.[4] When New Jersey enacts its ban, it will not be venturing into uncharted waters. Four other states have preceded New Jersey, all within the last two years.

New Jersey's proposed ban was intended to "strengthen protections against employment discrimination and thereby promote equal pay for women[.]"[5] The American Association of University Women (AAUW) found that, on average, women nationally make 80 cents for every dollar a male worker earns.[6] In New Jersey specifically, women take home between 80 and 84 percent of what their male counterparts receive.[7] The AAUW maintains that pay equity is not only a matter of fairness, but also a family issue because 42 percent of mothers with children under the age of 18 are the primary earner,[8] and the pay gap has a substantial impact on these families' ability to buy homes and pay higher education expenses.[9] To remedy this systemic problem, organizations like the AAUW advocate for stronger pay equity legislation, including a prohibition on employers asking about the wages of a prospective employee before making a job offer.[10]

Critics of bans on salary history inquiries argue these bans could backfire, because subconscious bias against women might cause employers to unknowingly presume a female applicant earned less than she actually did and, consequently, offer her less than the employer would have had it inquired into her salary history.[11] Worse, an employer looking to limit its payroll expenses may intentionally low-ball women, knowing the applicant would likely disclose her previous salary in order to get a better offer.[12] Critics also argue bans on salary history inquiries eliminate important tools employers use to both attract good candidates and cull unqualified or less-qualified applicants.[13]

The efficacy of these bans and whether they will achieve the desired effect of lessening the gender pay gap without unduly burdening employers will be discussed later in this article. But first, it is helpful to understand the two types of proposed salary history inquiry bans and their legal effect. To that end, the next section of this article explores the two types that have been adopted by California, Delaware, Massachusetts, and Oregon. Both types have been proposed in New Jersey. The article will then address New Jersey's proposed ban and describe the legal and practical effects of such a prohibition if it is reintroduced and enacted.

A Tale of Two Bans and Their Legal Consequences

On Dec. 14, 2017, Delaware became the first state to have a ban on salary history inquiries go into effect.[14] Delaware's act made seeking the compensation history of an applicant an unlawful employment practice under the state's employment law.[15] Despite the state's pioneering status, Delaware's ban is actually quite narrow. The act simply prescribes limited penalties on employers that violate the new prohibition. Specifically, an employer will face between a $1,000 and $5,000 fine for the first offense, and between a $5,000 and $10,000 fine for each subsequent violation.[16]

California's law, on the other hand, marginally expands the state's Equal Pay Act. California's Equal Pay Act explicitly prohibits employers from paying any employee "less than the rates paid to employees of the

opposite sex...for equal work[.]"[17] To establish a *prima facie* case, a plaintiff must show the employer paid an employee of the opposite gender more than the plaintiff for equal work on jobs requiring equal skill, effort, and responsibility, and which were performed under similar working conditions.[18] A plaintiff does not need to show discriminatory intent,[19] and the employer bears the burden of proving the wage difference was based on a seniority system; a merit system; a system that measured earnings by quantity or quality of production; or some other *bona fide* factor other than sex, race or ethnicity, such as education, training, or experience.[20] Like under the federal Equal Pay Act, under California law, paying a new employee a salary based on their earnings at a prior job may qualify as a "bona fide factor other than sex," and can operate as an affirmative defense to rebut an employee's *prima facie* case.[21] In California, the ban on salary history inquiries simply removes that defense.[22]

Massachusetts and Oregon are the only other states to enact prohibitions on salary history inquiries to date, going into effect July 2018 and Jan. 2019, respectively.[23] Massachusetts's and Oregon's bans will operate in much the same fashion as California's. Similar to how California's ban amended the state's Equal Pay Act, both the Massachusetts and Oregon bans are actually small facets of new equal pay acts. Under Massachusetts's law it will be unlawful for an employer to pay any person in its employ a salary that is less than the rates paid to its employees of a different gender for comparable work save for six safe harbors, including pay differentials caused by a seniority system; a merit system; a system that measures earnings by quantity or quality of production, sales, or revenue; the geographic location; relevant education, training or experience; or necessary travel.[24] Oregon's law enumerates the safe harbors differently, but they are substantially the same.[25] Like California's law, Massachusetts's and Oregon's bans on salary history inquiries effectively remove the ability of an employer to claim such inquiry as a defense to gender pay differentials.[26]

In addition, a handful of cities, including New York City, have enacted local bans on salary history inquiries.[27] New York City's ban, for example, operates like Delaware's by empowering the New York City Human Rights Commission to impose civil penalties of up to $250,000 for willful violations of the ordinance.[28]

New Jersey's Proposed Ban

When New Jersey's ban on salary history inquiries was first introduced in the New Jersey Assembly in March 2016, the statute mirrored Delaware's law.[29] The bill would have created a stand-alone prohibition on employers inquiring into job applicants' salary histories.[30] The penalties for a violation of the new ban would be a fine not to exceed $2,000 for the first violation and not to exceed $5,000 for each subsequent violation.[31]

In Oct. 2016, the bill was substituted with one that was substantively similar to California's ban on salary history inquiries. As noted by the New Jersey Supreme Court in the 1990 case of *Grigoletti v. Ortho Pharm. Corp.*, New Jersey "has long had an Equal Pay Act, N.J.S.A. 34:11-56.2, directed specifically toward wage discrimination against females[,]" though it had largely remained dormant.[32] In *Grigoletti*, the Court further interpreted New Jersey's Law Against Discrimination (LAD) as prohibiting pay discrimination based on gender.[33] This decision appeared to apply with equal force to men and women (as well as LAD's other protected classes).[34] Regardless, as of July 1 of this year, the New Jersey Legislature explicitly extended LAD's pay equity protections to all protected classes with the passage of the Diane B. Allen Equal Pay Act.[35] That means that, by making it an unlawful employment practice to inquire into an applicant's salary history, New Jersey's proposed ban, like California's, would remove prior salary as an affirmative defense to liability under LAD.

In essence, if the bill is reintroduced in the same form as it was vetoed, it will simply eliminate the ability for employers to rely on salary history to justify wage differentials based on gender. Such a change is not insignificant, but perhaps falls short of the sweeping reforms supporters of the #MeToo movement desire and critics are uneasy about.

Will Salary History Bans Have the Desired Effect?

As discussed earlier, the intent of New Jersey's proposed ban was to strengthen protections against employment discrimination and promote equal pay for women.[36] Critics fear such prohibitions could backfire.[37] A 2017 PayScale.com survey of 15,413 job seekers found that women who refused to answer questions about salary history in an interview were offered salaries that were, on average, 1.8 percent less than women who disclosed their pay history.[38] The study also showed that

men who refused to disclose were, on average, paid 1.2 percent more than male applicants who disclosed their salary history.[39]

Writing for the *Harvard Business Review*, Lydia Frank hypothesized that these pay disparities were caused by two social factors: 1) people react negatively when women negotiate for higher pay, and 2) employers may assume women who refuse to disclose their pay earn less.[40] She posited that, if the disparity is caused by "unconscious bias from employers toward women who refuse to answer the question, then not being able to ask may alleviate some of the gap[.]"[41] Conversely, however, she hypothesized that, if "the real issue is around employers filling in the salary blanks differently based on gender when candidates don't share their current salary, a ban on asking for pay history may not get the job done."[42] The editors of *Bloomberg* shared the same concern, but ask: Why impose a ban that could backfire without empirical studies showing it will lessen the wage gap?[43] Noam Scheiber of *The New York Times* noted these bans may actually cause unscrupulous employers to consciously low-ball female job applicants as a way to pressure them into disclosing their prior salaries.[44]

Christina Cauterucci, a staff writer for *Slate*, directly refuted *Bloomberg*'s editors' assertion that there was no evidence a prohibition on salary history inquiries would lessen the pay gap.[45] Cauterucci noted a 2013 study by the AAUW found women are paid 6.6 percent less, on average, than men in their very first jobs—even when controlling for personal demographics, occupation, and location.[46] Speaking to *Slate*, Victoria Budson, the executive director of the Women and Public Policy Program at Harvard University's Kennedy School, stated that, because research showed women start out with a lower salary, it is "empirically true" that they will make increasingly less if employers base future salaries on that first, lower salary, even if no research has specifically evaluated the claim.[47] Cauterucci also noted cases involving large corporations like Boeing, which had to pay $72.5 million in a pay discrimination lawsuit where company leadership authorized lower-level managers to offer new hires 20 percent over what they were making at their prior job.[48] Cauterucci argued that, regardless of any type of legislation, unscrupulous employers would try to continue low-balling women.[49] Nevertheless, she argued, a ban on salary history inquiries would provide: fewer opportunities for companies to judge employees based on previous pay; a more-level playing field for women and people of color; and a new obstacle to systemic gender discrimination.[50]

While no one has argued prohibitions on salary history inquiries are a panacea to gender pay disparities, critics of the prohibitions miss just how nuanced California-style bans are. Critics who argue the bans could backfire fail to consider the fact that California-style bans, like the one vetoed in New Jersey and enacted in Massachusetts and Oregon, are only small parts of larger equal pay acts. To bring a pay discrimination claim, an employee needs to show she was paid less for substantially the same work—there is no intent requirement. This means that an employer who paid women less because it guessed its female applicants were paid less at prior jobs would still be held liable. Whether the employer subconsciously or intentionally low-balled female job applicants, liability would stem—not from how the pay differential was caused—but from the simple fact that there is an unjustified pay differential. The criticism is only applicable to states, like Delaware, that do not have broader equal pay laws. And even in those states, the prohibition on salary inquiries may foreclose salary history as an affirmative defense to liability under the federal Equal Pay Act. Beyond states lacking an equal pay act, the effect of bans on salary history inquiries are exceptionally narrow (*i.e.*, eliminating an uncommon affirmative defense to liability under equal pay laws).

The critics are, however, correct in noting that employers will lose a valuable tool for attracting or disqualifying applicants. Employers will no longer be able to rely on offering substantial salary increases to attract better applicants who may have prior salaries above that of other applicants. And employers can no longer use salary as a proxy for productivity. This is an open question: Do the benefits of eliminating one affirmative defense to pay discrimination outweigh the costs to employers? It is important to keep in mind that an applicant could reveal her abnormally large prior salary and, if the prospective employer bases a substantially large salary on her superior qualifications, could offer her more without violating LAD.

Conclusion

Whether bans on salary history inquiries, in general, will help solve the gender pay gap is debatable. One

thing is clear, however, in New Jersey it is unlawful to pay men and women different salaries for substantially equivalent work, and a California-style ban on salary history inquiries will simply remove one narrow excuse an employer may try to employ to escape liability under LAD. It is a simple change that will likely have a very limited impact beyond its immediate effect of requiring New Jersey employers to stop asking job applicants about their prior salaries. Arguably, a Delaware- or New York City-style ban is more burdensome on employers, because it creates immediate civil penalties for employers that ask applicants about their salary history. A California-style ban, like New Jersey's vetoed ban, simply removes a rarely invoked affirmative defense to pay-equity liability under LAD. Nevertheless, the prospective legislation and growing attention on gender pay equity provides a great opportunity for employers to craft policies to ensure compliance with LAD.

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14. *See* H. Sub. for H.B. 1, 149th Gen. Assemb. (Del. 2017); Áine Cain & Anaele Pelisson, 9 Places Where People May Never Have to Answer the Dreaded Salary Question Again, *Bus. Insider* (Oct. 26, 2017), http://www.businessinsider.com/places-where-salary-question-banned-us-2017-10.
15. Del. Code Ann. tit. 19, § 709B(b).
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18. *Green v. Par Pools Inc.*, 111 Cal. App. 4th 620, 628–29 (2003) (finding the plaintiff clearly met her burden by showing that a newly hired male, was paid $400 a week more than her and her male replacement was paid $100 a week more than her).
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34. *Alexander v. Seton Hall Univ.*, 204 N.J. 219, 233 (2010) ("Consistent with the LAD's strong promise to eliminate discrimination from the workplace, the *Decker* and *Terry* decisions reflect the public policy of this state to treat each issuance of a pay check that reflects discriminatory treatment toward a *protected group* as an actionable wrong under the LAD") (emphasis added); *Id.* at 222 (reaffirming LAD protects against pay discrimination based on gender and age); *Pray v. New Jersey Transit, Inc.*, No. A-3831-12T3, 2014 WL 684592, at *1, 8-9 (N.J. Super. Ct. App. Div. Feb. 24, 2014).
35. S. 104, 218th Leg., 1st Sess. (N.J. 2018) ("[It shall be an unlawful employment practice f]or an employer to pay any of its employees who is a member of a protected class at a rate of compensation, including benefits, which is less than the rate paid by the employer to employees [of the other sex] who are not members of the protected class for substantially similar work, when viewed as a composite of skill, effort and responsibility.").
36. Statement of Assemb. Lab. Comm. to ACS Nos. 3480 and 4119 (Oct. 13, 2016), http://www.njleg.state.nj.us/2016/Bills/A3500/3480_S1.HTM.

37. *See* The Editors, *supra* note 11; Frank, *supra* note 11.
38. Frank, *supra* note 11.
39. Frank, *supra* note 11.
40. Frank, *supra* note 11.
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44. Scheiber, *supra* note 12.
45. Christina Cauterucci, Equal Pay Legislation Banning Salary History Questions Is Absolutely Based in Data, *Slate* (April 14, 2017, 3:41PM), http://www.slate.com/blogs/xx_factor/2017/04/14/equal_pay_legislation_banning_salary_history_questions_is_based_in_data.html.
46. *Id.*
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The New 'Gig Economy': Uber Litigation and Its Impact on Independent Contractors

by Joshua Garland and Timothy D. Cedrone

Welcome to America's new 'gig economy,' where more and more people are foregoing the traditional nine-to-five job to set their own schedule by working for companies like Uber Technologies, Inc.[1] These gig workers make up an estimated 34 percent of the current workforce.[2] And that percentage is expected to rise. However, with new areas of employment come new legal issues that need to be addressed. One of the most pertinent of these is whether these gig workers, specifically Uber drivers, are employees or independent contractors under the Fair Labor Standards Act (FLSA).[3] How Uber drivers are classified directly impacts their compensation. Currently, Uber considers its drivers to be independent contractors, not employees.[4] And because of that classification, Uber drivers are not compensated for the time they are on call, waiting for potential riders.

This article discusses two of the aforementioned new legal issues that need to be addressed. The first issue of driver classification is examined through a discussion of the single Third Circuit case. The second related issue is whether Uber drivers should be treated as employees, requiring Uber to compensate them for their on-call time.

Employee or Independent Contractor?

Since the Third Circuit case *Donovan v. DialAmerica Marketing, Inc.*, six factors have been used to determine whether a worker is an 'employee': 1) the employer's right to control the work; 2) the employee's opportunity for profit or loss; 3) the employee's investment in materials required to do the task; 4) whether the service rendered requires a special skill; 5) the degree of permanence of the working relationship; and 6) whether the service rendered is integral to the employer's business.[5] This test, colloquially known as the 'economic realities test,' examines the "circumstances of the whole activity," focusing mainly on economic dependence.[6] If, based on these factors, the worker is found to be economically dependent on the employer, the worker is considered an employee for FLSA purposes.[7]

Only one court in the Third Circuit has had the opportunity to apply the *Donovan* factors to Uber drivers. In *Razak v. Uber Techs., Inc.*, a putative class action lawsuit was brought by Uber drivers in Philadelphia on this very issue. Claiming they were misclassified as independent contractors, the plaintiffs successfully defeated a motion to dismiss by arguing an employee-employer relationship was plausible under the *Donovan* factors.[8] Specifically, they alleged the control, special-skill, and integral-to-the-business factors weighed in favor of employee status. The control factor was adequately pled because the plaintiffs alleged that Uber "control[s] the number of fares each driver receives," has "authority to suspend or terminate a driver's access to the App," drivers "are not permitted to ask for gratuity," and drivers "are subject to suspension or termination if they receive an unfavorable customer rating."[9] The special-skill factor was satisfied because the plaintiffs alleged that, to serve as drivers, they "must undergo PPA training, testing, examination, a criminal background check and driving history check."[10] And drivers are integral to the business (factor six) because Uber's business is to "provide on-demand car services to the general public," and "drivers perform on-demand transportation services for defendants."[11]

Although the court found there could be an employee-employer relationship based on those allegations, it is important to note that the standard of review required the court to take all well-pleaded facts as true. This was not a declarative ruling in favor of employee status, but rather a step in the legal process for this case to continue. And continue it has.

The court granted, in part, Uber's motion to dismiss, but allowed the drivers to file an amended complaint. After the drivers filed the amended complaint, Uber again moved to dismiss.[12] The court then denied the motion to dismiss the amended complaint in its entirety, allowing the parties to proceed to discovery. Following a substantial amount of discovery, Uber moved for partial

summary judgment on the limited issue of compensability of Uber drivers' online, or on-call time.[13]

On-Call Time in the Third Circuit

The Third Circuit uses a four-factor test to determine whether on-call time is compensable. The factors are: 1) "whether the employee may carry a beeper or leave home"; 2) "the frequency of calls and the nature of the employer's demands"; 3) "the employee's ability to maintain a flexible on-call schedule and switch on-call shifts"; and 4) "whether the employee actually engaged in personal activities during on-call time."[14] If these factors reveal that being on-call significantly interferes with the employee's personal life, the time is compensable.[15]

The *Razak* court was reluctant to make any definitive rulings based on this test.[16] Such antiquated factors, like whether or not the employee carries a beeper, are "not readily applicable to…the new 'gig economy.'"[17] However, the court did analyze the fourth factor, as in to what extent the employee's ability to engage in personal activities is restricted.[18] Four "undisputed factual issues" shaped the analysis. First, "[d]rivers have at most 15 seconds to accept a trip request from a rider which, if not accepted, will be deemed rejected."[19] Second, "[i]f a driver does not accept three trip requests in a row, the Uber App automatically switches the driver from Online to Offline."[20] Third, "[t]he rider's destination is not disclosed to the driver until the rider's trip begins."[21] Fourth, exclusive to drivers in Philadelphia, "[d]rivers may only advance in the queue at the [Philadelphia International] Airport or 30th Street Train Station if within a certain zone, and may only accept trip requests at the Airport if inside the west parking lot."[22]

These were found to reasonably restrict a driver's ability to engage in personal activities.[23] In order to respond to a given trip request in only 15 seconds, drivers are essentially "required by Uber to be tethered to their phones."[24] In addition, the threat of being switched offline after ignoring three trip requests can be "considered a severe restriction on their ability to engage in personal activities," especially during periods of frequent requests.[25] And because drivers do not know where the destination is before the ride is accepted, they are not truly in control of their time.[26]

The court denied the partial summary judgment motion on these grounds.[27] The court found that this issue should be articulated on a factual record before a jury, subject to the Rules of Evidence and a developed trial record, so a proper ruling could be had.[28]

The *Razak* Court Rules

The various motion rulings in *Razak* all appeared to be trending toward the plaintiffs being able to defeat the inevitable summary judgment motion. Then, on April 11, the Eastern District Court of Pennsylvania became the first to grant summary judgment on this question of employee status.[29] Unfortunately for Uber drivers, the court determined they were independent contractors, not employees.[30]

The court reached this decision after analyzing each of the *Donovan* factors. The first factor—control—weighed in favor of independent contractor status. Even though Uber exercises some control over its drivers, the court compared that relationship to that of a homeowner and a carpenter.[31] While the homeowner may impose conditions on the carpenter, they only apply while the carpenter is in the home, which is insufficient to establish employee status. Likewise, the conditions imposed on Uber drivers only apply when they are logged into the app.

The second factor of opportunity for profit or loss also weighed in favor of independent contractor status.[32] The court could not ignore the amount of freedom each driver could exercise. By being able to work wherever, whenever and however long they wanted, the court held that the drivers themselves had the most influence on their profits and losses.

Third, the investment factor favored independent contractor status as well.[33] The plaintiffs' conceded as much—they purchase their own vehicles after all. The court did not spend much time discussing this factor.

The fourth factor—special skill—was one of only two factors, according to the court, to favor employee status.[34] While driving itself is not a special skill, Uber drivers do more than simple delivery drivers. They must replicate the limousine experience, maintain a high level of customer service, and are subject to a number of 'requirements' and 'limitations' in order to achieve success.

The court found the fifth factor—permanence—weighed heavily in favor of independent contractor status.[35] The only real argument the plaintiffs advanced against this was that they worked for Uber for years and for "many hours a week." However, their length of employment does not change the fact that they could stop working for Uber whenever they wanted.

The sixth and final factor—integrality of service—was the other factor to favor employee status.[36] Uber simply could not exist without drivers.

Because four of the six factors were found to favor independent contractor status, the court granted summary judgment. With that ruling, drivers' hopes of being compensated for on-call time may fade away as well. However, this story is far from over since, as of this writing, the plaintiffs' appeal before the Court of Appeals for the Third Circuit is still pending.

The Future of On-Call Time for Uber Drivers

The *Razak* court noted that the case was but one of many across the country involving the compensability of on-call time for Uber drivers.[37] Given the unsettled status of these claims and the potential for different outcomes depending on the facts of each case, it may be a fool's errand to predict what the outcome of these cases will be and whether a uniform rule will emerge. However, at least within the Third Circuit, a few conclusions can be drawn at this point. First, the time when Uber drivers are considered independent contractors may be coming to a swift end. If more courts (and the Third Circuit in particular) adopt the same analysis as the district court in *Razak*, employee status may be an inevitable reality for Uber and their drivers. Relatedly, if the plaintiffs prevail before the Third Circuit and Uber drivers are deemed employees for FLSA purposes, *Razak* will provide a clear roadmap to how their on-call time can be found compensable. Finally, if a jury were to hear the case following a remand from the Third Circuit, it is plausible, if not likely, that the drivers will prevail and their on-call time will be found compensable. Of course, the case could still settle and, in that situation, Uber will be able to preserve the argument that the drivers are independent contractors while simultaneously buying itself time to modify its on-call system to potentially avoid FLSA problems going forward. Either way, the outcome of *Razak* will not be the end of the story.

Conclusion

If *Razak* reveals anything, it is that the gig economy will continue to present new issues for employment law practitioners. Likewise, courts will be forced to update antiquated multi-factor tests to account for the obsolescence of old technologies and the emergence of new technologies. Time will tell if Uber can navigate its way through the myriad FLSA cases it is defending. Regardless of those cases' outcomes, they could frame how the FLSA develops and is applied in the new gig economy. ■

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Endnotes

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33. *Id.* at *48-49.
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35. *Id.* at *51-53.
36. *Id.* at *53-54.
37. *Id.* at *26-34.