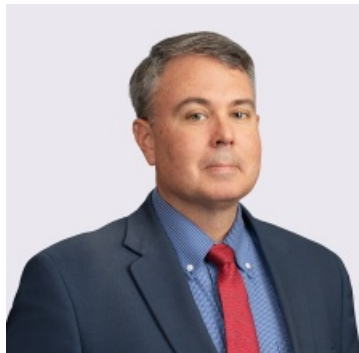


# New Jersey's Proposed Amendments to Law Against Discrimination Sure to Impact Businesses and Litigation

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The New Jersey Senate is considering a bill (Senate Proposal) that, if passed, will significantly affect business operations and employment litigation in the state for years.

Under the bill, the New Jersey Law Against Discrimination (NJLAD), N.J.S.A. § 10:5-1, *et seq.*, will be amended to include the following new provisions, among others:

- Mandatory anti-discrimination policies;
- Compulsory anti-discrimination training;
- Reporting of internal complaints (*e.g.*, discrimination, harassment, and retaliation) to the New Jersey Division on Civil Rights (DCR);
- Expansion of protections to additional classifications of individuals or workers (*e.g.*, independent contractors, interns, and domestic service workers);
- Codification of harassment and perceived disability as claims; and
- Elimination or limitation of previously available defenses.

The bill also includes a section on discoverability of prior complaints of harassment or other unlawful discriminatory practices during litigation.

While the bill is in the Senate Labor Committee, Governor Phil Murphy has announced his own plan to overhaul the NJLAD as part of his commitment “to bring sweeping changes to New Jersey’s workplace culture.” Accordingly, businesses in the state can expect amendments to the NJLAD in one form or another.

This Special Report outlines the proposed changes to the NJLAD in the Senate Proposal currently before the committee and discusses the differences between the bill and Governor Murphy’s proposal to highlight potential final amendments to the NJLAD.

### New Sections: Business Operations

Many businesses likely are in compliance with the proposed amendments, albeit to varying degrees. For example, they already maintain written policies regarding anti-discrimination and train employees on anti-discrimination. However, the bill may require revising existing policies or training materials to include mandatory policy language or training on topics not previously covered (*e.g.*, bystander intervention). Moreover, if passed, the NJLAD will require businesses to report internal complaints and dispositions to the DCR annually.

The following new sections would be effective within one year following enactment of the amendments and will affect business operations:

#### *Written Policies*

Under the bill, businesses’ written anti-discrimination and anti-harassment policies

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Employment Litigation

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(including, but not limited to, sexual harassment policies) would be customized based on the employer's industry and the number of individuals it employs.

The requirements include the following:

### *Businesses With Fewer Than 50 Employees*

- A written nondiscrimination policy that establishes policies and procedures regarding unlawful discrimination and harassment in the workplace applicable to all employees in their interactions with each other, vendors, suppliers, customers, clients, invitees, and patrons, and must include, at a minimum:
  - A statement that discrimination and harassment will not be tolerated and that sanctions will be enforced against individuals engaging in unlawful discrimination and harassment including supervisory and managerial personnel who knowingly allow such unlawful behavior to continue;
  - A definition of unlawful discrimination and harassment;
  - Examples of discriminatory and harassing behavior prohibited by the policy;
  - A description of the process for filing internal complaints, including complete contact information for the individuals to whom complaints may be made;
  - Directions advising employees on how they may contact the DCR if they believe their rights were violated;
  - The applicable statute of limitations for filing a claim of unlawful discrimination or harassment;
  - A statement that the employer prohibits retaliation against those who disclose, report, participate in an investigation, or otherwise challenge discrimination or harassment;
  - Examples of retaliatory behavior prohibited by the policy;
  - A description of the consequences for violating the policy; and
  - A statement of employer's commitment to conducting prompt, thorough, and impartial investigations of complaints of discrimination, harassment, or retaliation.
- Annual distribution of the written anti-discrimination and anti-harassment policies, and at the following times:
  - Upon commencement of employment;
  - To a complainant when they make a complaint;
  - To any employee interviewed as part of an investigation; and
  - Whenever updates are made to the policy.
- Annual review of the written anti-discrimination and anti-harassment policy to ensure compliance with any regulations, revisions, or amendments to the law made over the course of the year.
- Translation of the written policy in Spanish, English, and any language spoken by an employee who does not have English as a primary language and who has limited or no ability to read, speak, write, or understand English.

### *Businesses With at Least 50 Employees*

In addition to the obligations imposed upon businesses with fewer than 50 employees, businesses with at least 50 employees would have other requirements. Under the bill, to qualify as a business with at least 50 employees, the company must employ at least 50 individuals (whether or not located in New Jersey) for each workday during each of at

least 20 workweeks in the then-current or immediately preceding calendar year.

The additional requirements for a qualifying business also include the following:

- A customized written anti-discrimination and anti-harassment policy (incorporating all of the above points applicable to smaller businesses) that is specific to the workplace and industry by including:
  - A general description of the process by which the employer will conduct the prompt, thorough, and impartial investigation and respond to complaints regarding harassment or discrimination;
  - Provide multiple channels through which an employee may report complaints of harassment or discrimination;
- In addition to the distribution policy applicable to smaller businesses:
  - Post the policy in a prominent location on the company's website; and
  - Disseminate the policy to an employee upon their promotion.
- Translation is required and, moreover, the business must translate the policy into any language identified by an employee as their primary language if the employee does not speak English as a primary language and has a limited or no ability to read, speak, write, or understand English.

#### *Domestic Service Employers*

Any individual who employs a person for domestic work in a private residence for themselves or a family member must provide a copy of anti-discrimination and anti-harassment materials published by the DCR at the commencement of employment and at least annually.

#### *Mandatory Anti-Discrimination, Anti-Harassment Training*

##### *Non-Supervisor Training*

- All employers must provide training to non-supervisory employees within 90 days of hire and at least every two years on the prevention of unlawful discrimination and harassment (including sexual harassment) in the workplace.
- At a minimum, the training must include the following:
  - A statement that unlawful discrimination or harassment in the workplace will not be tolerated and that sanctions will be enforced against individuals engaging in discrimination or harassment and against supervisory and managerial personnel who knowingly or negligently allow the discrimination or harassment to continue;
  - A definition of unlawful discrimination and harassment;
  - Examples of discriminatory and harassing behaviors prohibited by the policy;
  - A description of the process for filing internal complaints of discrimination or harassment;
  - Directions on how to contact the DCR if a person believes their rights have been violated;
  - A description of the prohibition on retaliation against those who disclose, report, participate in an investigation of, or otherwise challenge discrimination or harassment;
  - Examples of retaliatory behaviors prohibited by the nondiscrimination policy; and

- Information regarding bystander intervention.

### *Supervisory Training*

- All employers must provide training to supervisory employees within 90 days of initial hire or promotion and at least every two years on prevention of unlawful discrimination and harassment (including sexual harassment) in the workplace.
- The training must include, at a minimum, the same information applicable to non-supervisory employees plus:
  - The specific responsibilities of a supervisor regarding prevention of discrimination and harassment in the workplace;
  - The specific responsibilities of a supervisor regarding prohibitions against retaliation; and
  - The measures and corrective actions a supervisor may take to appropriately address complaints and instances of discrimination, harassment, and retaliation.

### *Recordkeeping, Review, Translation, Live-Training Requirements*

- Employers must maintain records (which may be electronic) of all employees who complete the required trainings for a period of four years.
- Employers must provide records regarding completion of such trainings upon the DCR's request.
- The trainings must be reviewed at least annually to ensure compliance with any regulations, revisions, or amendments to the law made over the course of the year.
- Training must be in English or the primary language of someone who does not speak English as a primary language and who has limited or no ability to read, speak, write, or understand English.
- Businesses with at least 50 employees must provide the training live, in-person (with translation) so the participants may ask questions.

### *Mandatory Reporting to DCR*

The bill would mandate annual reporting requirements of internal complaints to the DCR for businesses with at least 50 employees. The reporting includes the following:

- An annual report (on a form to be provide by the DCR) on complaints received regarding: (1) unlawful workplace discrimination; (2) unlawful harassment, including sexual harassment; or (3) retaliation to include:
  - The total number of complaints filed;
  - The number of complaints found to be substantiated;
  - The number of complaints found to be unsubstantiated; and
  - The number of complaints filed with resolution still pending.
- The DCR will require the report to delineate the types of complaints (*e.g.*, discrimination, harassment, or retaliation), as well as the complainant's protected class.
- Businesses must maintain those records for a period of four years and must produce them to the DCR upon request.

### *Potential Penalties*

The potential penalties for violation of any of the provisions regarding business

operations appear to be limited to enforcement by the attorney general. In its current form, the bill does not provide an aggrieved employee a private right of action if a business fails to comply with any of its requirements. Moreover, the bill states that mere compliance with the requirements does not serve as a defense against any action an employee may file under the NJLAD.

### Expanded Coverage, Elimination of Workers' Compensation Bar

The Senate Proposal codifies legal concepts already embraced by the New Jersey courts. To the extent any confusion or ambiguity exists with respect to these, the bill would serve to eliminate any uncertainty. Moreover, the bill eliminates the “workers’ compensation bar,” which prevents an employee from seeking recovery (outside of workers’ compensation relief) for injuries (including emotional distress) sustained during the course of work.

- *Expansion:* Prohibitions against discrimination and harassment are expressly expanded to include:
  - Individuals *perceived* to belong to a protected class;
  - Individuals who associate with members of a protected class or someone who is perceived to be a member of a protected class;
  - Individuals in transition from one protected class to another; and
  - Individuals who are in transition from one state in a protected class to another state within that protected class or a different protected class.
- *Workers’ Compensation Bar:* Expressly permits an employee to recover under the NJLAD for any injury, even those deemed compensable under the Workers’ Compensation Law.

These revisions would bring clarity to businesses on the defense against claims asserted by individuals not technically covered by the language in the current NJLAD, as well as on the scope of potential recoverable damages.

### Amended Definitions, Expanded Coverage

The bill amends the definitions of several key terms, appearing to broaden the scope of those covered. Proposed amendments to key definitions include:

- *Employer* – expanded to include those who employ individuals in domestic service at a private residence (or the private residence of a family member), including any person who resides in that private residence who is at least 18 years old.
- *Employee* – revised to “all individuals employed by an employer, without regard as to whether the individual, including an intern or independent contractor, performs services in exchange for a salary or wage, and regardless of whether the individual owns shares of stocks in the employer; provided, however, that nothing in this subsection shall be construed to alter the definition of employee under any other law or regulation[.]”
- *Intern* – revised to mean “an individual who performs services for an employer on a temporary basis whose work (1) provides training or supplements training given in an educational environment[]; (2) provides experience for the benefit of the individual performing the work; and (3) is performed under the supervision of existing staff.” The definition applies whether the intern is paid or unpaid.

Furthermore, the bill amends the NJLAD to expressly provide that an employer may not discriminate against an employee on the basis of familial status or perceived disability.

While all courts understood the NJLAD's prohibition against unlawful discrimination to include harassment, the amendment explains, in no uncertain terms, that it will be unlawful for an employer "to subject any individual to sexual harassment or other unlawful harassment[.]"

Lastly, the Senate Proposal removes provisions that allowed limited actions by employers on the basis of age. First, an employer would not be permitted to refuse to hire or promote an individual over the age of 70. Second, an employer cannot mandate retirement for certain executive-level employees.

### *Defense Against NJLAD Claims*

Businesses must prepare for more challenges in defending against claims asserted under the NJLAD if the bill passes. From discovery to evidentiary burdens, the Senate Proposal will affect crucial aspects of litigation under the NJLAD.

#### *Prior Complaints*

Businesses often resisted discovery of prior complaints of discrimination or harassment on the basis of relevance. While courts typically allow discovery as the needs of the case dictate, the bill would permit no such discretion. It states:

[P]rior complaints of harassment or unlawful discriminatory practices at the same employer or relevant organization are discoverable and relevant regardless of whether the individual complaining of harassment, discrimination, or retaliation witnessed or was aware of the prior complaints.

The proposed statutory language appears not to contemplate limitations on discovery of prior complaints. Indeed, the plaintiff need not have witnessed or be aware of the complaints for the information to be considered relevant under the Senate Proposal.

#### *Litigation Burdens*

The bill would lower the plaintiff's burden to demonstrate liability for unlawful harassment and discrimination. Key provisions include:

- Elimination of the requirement that a plaintiff must demonstrate that unlawful harassment is severe or pervasive. Instead, the bill provides businesses an affirmative defense that the complained of conduct does not rise above a level of what a reasonable victim of discrimination of the same protected class would consider petty slights or trivial inconveniences.
- An employee's failure to utilize a business's complaint procedure would not be determinative of liability.
- An employee would not be required to demonstrate or identify comparators outside of the protected class.
- A plaintiff need not demonstrate any loss of a tangible job benefit or diminished productivity to establish a claim for unlawful harassment.
- Temporal proximity would no longer be a factor in retaliation claims, so long as the retaliation directly relates to the protected conduct.
- The defendant would need to prove the plaintiff failed to mitigate their damages.
- There may be no apportionment of damages, except among co-employers, predecessors, or successors.
- If a court or jury finds an employer committed a violation that would lead a

reasonable person with the same protected trait to conclude the workplace became intolerable “or damaging to their health or emotional wellbeing,” the court or jury must conclude a constructive discharge occurred.

### Expanded Statute of Limitations, DCR Procedures

The Senate Proposal expands the statute of limitations from its current two-year period to three -years within accrual or an individual’s *awareness* of a violation under the NJLAD. The revisions also expressly permit a jury to award punitive damages to a prevailing plaintiff.

Moreover, the bill changes many long-standing legal principles applicable to complaints filed with the DCR, including the following:

- A plaintiff may file complaints with the DCR within one year of a violation or their knowledge of a violation.
- A complaint may be filed with the DCR or any municipal office within New Jersey.
- Filing a complaint with the DCR does not waive an individual’s right to bring suit in Superior Court.
- A no probable cause finding will not preclude a plaintiff from filing a complaint in Superior Court.
- All statutes of limitations will be tolled during the pendency of any claim before the DCR.
- “The failure to file a complaint or otherwise participate in a relevant process created by the employer prior to filing suit in the Superior Court shall not bar the complainant from filing a suit or receiving full recovery.”

The proposal expands the statute of limitations and provides aggrieved individuals greater access to the courts by permitting employees to seek relief at the agency level and through the courts. If passed, businesses may face duplicative actions in both forums, increasing the costs of litigation and potential exposure to liability.

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Governor Murphy appears ready to expand the NJLAD. In fact, he had proposed his own revisions to the law based upon a 2020 DCR report. The Assembly introduced a bill based upon the Governor’s recommendations, which are generally consistent with the Senate Proposal, with the following exceptions, among others:

- Codifies, rather than eliminate, the familiar hostile work environment severe or pervasive standard and provides standards for guiding the determination of whether a violation has occurred.
- Three-year recordkeeping requirement;
- No elimination of the “workers’ compensation bar”;
- No expansion to “perceived as” or associational protected categories; and
- Excludes “independent contractor” from the definition of “Employee.”

Accordingly, businesses must continue to monitor the bill as an expansion in some form is likely.

Jackson Lewis attorneys will continue to monitor developments and provide updates as warranted. Please contact a Jackson Lewis attorney with any questions.

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