



Anti-discrimination Laws: New Jersey

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A Q&A guide to state anti-discrimination law for private employers in New Jersey. This Q&A addresses New Jersey laws prohibiting discrimination, harassment and retaliation. Federal, local or municipal law may impose additional or different requirements.

OVERVIEW OF STATE ANTI-DISCRIMINATION LAW

1. What employment-related anti-discrimination laws exist in your state? For each anti-discrimination law, please state its citation and title (if applicable) and include information on:

- Which protected classes are covered.
- Which employers are affected (for example, size, type or any exceptions).
- Prohibited employment-related discriminatory conduct.
- Whether managers or supervisors can be held individually liable for discriminatory acts against employees.
- What entity administers and enforces the law.
- What is the statute of limitations for filing a claim.

THE NEW JERSEY LAW AGAINST DISCRIMINATION: N.J. STAT. ANN. §§ 10:5-1 TO 10:5-49

Protected Classes Covered

The New Jersey Law Against Discrimination (NJLAD) prohibits employment and other discrimination on the basis of:

- Age (18 and older, including protection against discrimination against younger workers (see, for example, *Bergen Commercial Bank v. Sisler*, 157 N.J. 188 (1999)).
- Ancestry.
- Atypical hereditary cellular or blood trait (AHCBT). For example:
 - sickle cell trait;
 - Tay-Sachs trait; or
 - cystic fibrosis.
- Service in the US armed forces.
- Color.
- Creed.
- Disability or handicap.
- Gender identity or expression.
- Genetic information, including refusal to:
 - participate in genetic testing; or
 - provide genetic information.
- Marital status, civil union status and domestic partnership status.
- National origin.
- Nationality.

- Race, including race of the:
 - employee; and
 - individuals affiliated with the employee for personal or business reasons, such as friends, family or colleagues.
- Sex, including pregnancy.
- Sexual orientation or affectional orientation.

(*N.J. Stat. Ann. §§ 10:5-5 and 10:5-12 (2011).*)

Affected Employers

The NJLAD applies to all employers (except federal employers), regardless of size (*N.J. Stat. Ann. § 10:5-5 (2011).*)

Although outside the scope of this Q&A, the NJLAD also applies to:

- Labor organizations.
- Employment agencies.

Prohibited Conduct

New Jersey employers cannot refuse to hire or employ, discharge, or otherwise discriminate against an individual in compensation or other terms, conditions or privileges of employment based on the individual's protected status (*N.J. Stat. Ann. § 10:5-12 (2011).*) However, the NJLAD allows employers to refuse to hire or promote any person over age 70 (*N.J. Stat. Ann. § 10:5-12(a) (2011).*)

While the NJLAD protects employees, not independent contractors, New Jersey courts apply a fact-specific analysis to determine whether a person classified as an independent contractor is actually an employee protected by the NJLAD (see, for example, *Pukowsky v. Caruso*, 312 N.J. Super. 171 (App. Div. 1998) and *Hoag v. Brown*, 397 N.J. Super. 34 (App. Div. 2007)). For more information, see *Practice Note, Independent Contractor Classification* (<http://us.practicallaw.com/4-503-3970>).

Individual Supervisor Liability

Individual supervisors can only be held personally liable for aiding and abetting discrimination by an employer (*N.J. Stat. Ann. § 10:5-12(e) (2011).*)

Administration and Enforcement

Individuals may enforce their rights under the NJLAD by either:

- Bringing an administrative complaint with the New Jersey Division on Civil Rights (Division).
- Filing a complaint in state superior court (or federal court, if there is federal jurisdiction).

(*N.J. Stat. Ann. § 10:5-13 (2011).*)

An individual who initiates a claim with the Division may stop that action and initiate a court action instead if the Division has not yet made a final determination on the claim.

An aggrieved employee may recover remedies necessary to make him whole, including:

- Injunctive relief.
- Reinstatement.
- Back pay.
- Front pay.
- Compensatory damages for:
 - pain;
 - suffering; and
 - humiliation.
- Emotional distress damages.
- Punitive damages.
- Interest.
- Reasonable attorneys' fees and costs.

Statute of Limitations

Individuals must file either a:

- Claim with the Division within 180 days of the alleged unlawful employment discrimination (*N.J. Stat. Ann. § 10:5-18 (2011).*)
- Court action within two years from the date of the alleged unlawful employment discrimination (*Montells v. Haynes*, 133 N.J. 282 (1993)).

NEW JERSEY SMOKING LAW: N.J. STAT. ANN. §§ 34:6B-1 TO 34:6B-4

Protected Classes Covered

In addition to restricting the right to smoke in the workplace, the New Jersey Smoking Law prohibits employment discrimination against an employee because he does or does not:

- Smoke.
- Use tobacco products.

(*N.J. Stat. Ann. § 34:6B-1 (2011).*)

Affected Employers

The New Jersey Smoking Law applies to all employers in New Jersey, regardless of size (*N.J. Stat. Ann. § 34:6B-1 (2011).*)

Prohibited Conduct

The New Jersey Smoking Law prohibits employers from refusing to hire or employ, discharging, or taking any adverse action against any employee because that person does or does not smoke or use other tobacco products. The only exception is if the employer has a rational basis which is reasonably related to the employment, including the responsibilities of the employee or prospective employee. Although courts have not yet ruled on when this exception applies, certain employers (such as health care practices that treat lung cancer) could set out a rational basis for not hiring a smoker.



Individual Supervisor Liability

The New Jersey Smoking Law applies to employers only. No court decision has imposed liability on individual supervisors.

Administration and Enforcement

The New Jersey Department of Labor and Workforce Development administers and enforces the New Jersey Smoking Law and may impose civil penalties of up to:

- \$2,000 for the first offense.
- \$5,000 for each subsequent offense.

(*N.J. Stat. Ann. § 34:6B-4 (2011).*)

Aggrieved individuals also may file suit in court to obtain:

- Injunctive relief.
- Compensatory and consequential damages.
- Reasonable attorneys' fees and costs.

(*N.J. Stat. Ann. § 34:6B-3 (2011).*)

Statute of Limitations

Aggrieved individuals bringing a private action must file suit in court within one year after the alleged violation (*N.J. Stat. Ann. § 34:6B-3 (2011).*)

OVERVIEW OF STATE DISABILITY DISCRIMINATION LAW

2. If there is a state law prohibiting disability discrimination, please provide the following information:

- Who is considered disabled under the law?
- Does the law recognize temporary disabilities?
- Does the law recognize “regarded as” discrimination?
- Does the law protect alcohol and illegal drug users, and if so, to what extent?
- Does the law require reasonable accommodation of persons with disabilities?
- How does a person request reasonable accommodation and how must an employer respond?
- Please provide a brief overview of accommodations that courts in your jurisdiction have found to be reasonable versus not reasonable.

DISABILITY DEFINITION

The New Jersey Law Against Discrimination (NJLAD) covers both physical and mental disabilities, including:

- Physical disability, infirmity, malformation or disfigurement caused by bodily injury, birth defect or illness (including epilepsy and other seizure disorders), such as:
 - any degree of paralysis;
 - amputation;
 - lack of physical coordination;
 - blindness or visual impediment;
 - deafness or hearing impediment;
 - muteness or speech impediment; and
 - physical reliance on a service or guide dog, wheelchair, or other remedial appliance or device.
- Any mental, psychological or developmental disability (including autism or spectrum disorders) resulting from anatomical, psychological, physiological or neurological conditions which:
 - prevents the normal exercise of any bodily or mental functions; or
 - is demonstrable, medically or psychologically, by accepted clinical or laboratory diagnostic techniques.
- AIDS or HIV infection.

(*N.J. Stat. Ann. § 10:5-5(q) (2011).*)

TEMPORARY DISABILITIES

Temporary conditions that meet the definition of disability above may be covered by the NJLAD. The NJLAD does not require that handicaps limit a major life activity or otherwise be severe or immutable (see, for example, *Failla v. City of Passaic*, 146 F.3d 149 (3d Cir. 1998) and *Clowes v. Terminix Int'l, Inc.*, 109 N.J. 575 (1988)).

“REGARDED AS” DISCRIMINATION

“Regarded as” or “perceived as” claims are recognized under the NJLAD.

ALCOHOL AND ILLEGAL DRUG USERS

Under the NJLAD, disability includes:

- Alcoholism.
- Addiction or dependency on legal or illegal drugs.

(*Clowes v. Terminix Int'l, Inc.*, 109 N.J. 575, 590 (1988) and *In re Cahill*, 245 N.J. Super. 397, 400 (App. Div. 1991)).

The NJLAD also protects those who have undergone or are undergoing rehabilitative treatment for drug or alcohol addiction. However, casual or social users of drugs and alcohol are not considered disabled.

DUTY TO PROVIDE REASONABLE ACCOMMODATION

Employers must provide reasonable accommodations to applicants and employees who are disabled, unless the accommodation would impose an undue hardship on the operation of the employer's business (*N.J. Admin. Code § 13:13-2.5 (2011)*).

Factors considered when determining if the accommodation would impose an undue hardship include:

- Overall size of the employer's business, including the:
 - number of employees;
 - number and type of facilities; and
 - size of budget.
- Types of the employer's operations, including the composition and structure of the employer's workforce.
- Nature and cost of the accommodation needed.
- Extent to which the accommodation would involve waiver of an essential requirement of a job, as opposed to a tangential or non-business necessity requirement.

(*N.J. Admin. Code § 13:13-2.5(b)(3) (2011)*.)

Once the employer becomes aware of the disability and the employee requests accommodation or assistance for the disability, the employer must participate in the interactive process with the employee to determine if an accommodation can be made.

REQUESTING REASONABLE ACCOMMODATION

An employer must participate in an interactive process when an employee makes a request for an accommodation. An employer also may have to engage in the interactive process even when the employee has not requested a reasonable accommodation. In addition, an employer must consider making a reasonable accommodation before firing, demoting, or refusing to hire or promote a person with a disability because the disability precludes job performance, regardless of whether the employee requested an accommodation (*N.J. Admin. Code § 13:13-2.5(b)(2) (2011)*). For example, if an applicant has a disability that prevents him from working certain hours of the day, the employer must consider whether the applicant can be accommodated by changing the hours or job duties.

REASONABLENESS OF ACCOMMODATION

Reasonable accommodation is not defined by the NJLAD and is determined on a case-by-case basis. Examples of reasonable accommodations include:

- Making facilities accessible and usable to disabled individuals.
- Job restructuring, including part-time or modified work schedules.
- Acquiring or modifying equipment or devices.
- Job reassignment.

(*N.J. Admin. Code § 13:13-2.5(b)(1) (2011)*.)

OVERVIEW OF STATE SEXUAL HARASSMENT LAW

3. If there is a state law prohibiting workplace harassment, please provide the following information:

- Which protected classes are protected from harassment?
- Is sexual harassment prohibited and if so, how is sexual harassment defined?
- If sexual harassment is prohibited, are both quid pro quo and hostile work environment harassment prohibited?
- Is same-sex sexual harassment prohibited?
- Is an employer subject to vicarious liability for sexual harassment by their managers, supervisors, or other employees?
- Is an employer subject to vicarious liability for sexual harassment by non-employees?

PROTECTED CLASSES

The New Jersey Law Against Discrimination (NJLAD) prohibits harassment of an employee based on any protected characteristic identified in *Question 1: Protected Classes Covered*.

SEXUAL HARASSMENT

Although not defined in the statute, sexual harassment under the NJLAD has been interpreted consistently with federal law and consists of unwelcome and coercive:

- Sexual advances.
- Requests for sexual favors.
- Verbal or physical conduct of a sexual nature resulting in a change of the terms and conditions of employment.

For more information, see *Practice Note, Harassment* (<http://us.practicallaw.com/9-502-7844>) and *Preventing and Responding to Sexual Harassment Complaints Checklist: Understand the Legal Basics* (<http://us.practicallaw.com/4-500-4326>).

However, an employer is not liable for sexual harassment "if a supervisor is equally crude and vulgar to all employees" (*Lehmann v. Toys 'R' Us, Inc.*, 132 N.J. 587, 619-20 (1993)).

PROHIBITED SEXUAL HARASSMENT TYPES

The NJLAD prohibits quid pro quo and hostile work environment sexual harassment.

SAME-SEX SEXUAL HARASSMENT

The NJLAD prohibits same-sex sexual harassment (*Zalewski v. Overlook Hosp.*, 300 N.J. Super. 202 (Law Div. 1996)).



VICARIOUS LIABILITY FOR EMPLOYEE SEXUAL HARASSMENT

Under certain circumstances, employers can be liable for actions by:

- Supervisors (see *Liability and Damages*).
- Non-supervisory employees (see *Liability*).
- Third parties (see *Liability and Vicarious Liability for Non-employee Sexual Harassment*).

Liability

An employer is liable for the actions of its supervisors within the scope of their employment.

To establish employer liability where someone other than the employer or its supervisors within the scope of their employment perpetrated the harassment, such as non-supervisory employees and third parties, the complaining employee must demonstrate that the employer:

- Knew or should have known about the conduct.
- Had control over the harasser.
- Failed to take prompt and appropriate corrective action to stop or prevent the harassment.

(See, for example, *Blakey v. Cont'l Airlines, Inc.*, 164 N.J. 38 (2000).)

Damages

The New Jersey Supreme Court has established three levels of vicarious liability for damages where supervisors created a hostile work environment. An employer is:

- Strictly liable for equitable relief.
- Liable for compensatory damages for actions taken within or outside the scope of a supervisor's employment if:
 - the employer intended the conduct;
 - the employer was negligent or reckless;
 - the conduct violated a nondelegable duty of the employer; or
 - the supervisor purported to act or speak on behalf of the employer and there was reliance upon apparent authority or he was aided in the harassment by the existence of the agency relationship.
- Liable for punitive damages only if the employee demonstrates actual participation by upper management or willful indifference.

New Jersey courts have held that an employer's failure to establish and enforce an anti-harassment policy might constitute negligence, but an employer is shielded from liability for damages if it does all of the following:

- Establishes, periodically publishes and enforces an anti-harassment policy, including an effective and practical grievance process for employees to use (for a sample anti-harassment policy, see *Standard Document, Anti-harassment Policy* (<http://us.practicallaw.com/7-501-6926>)).

- Provides training for workers, supervisors and managers concerning how to recognize and eradicate unlawful harassment.
- Can demonstrate that it has taken effective remedial measures to stop the harassment when it is reported or discovered.

(See, for example, *Gaines v. Bellino*, 173 N.J. 301, 303 (2002).)

VICARIOUS LIABILITY FOR NON-EMPLOYEE SEXUAL HARASSMENT

An employer can be found liable for sexual harassment of an employee by a non-employee if the employer did all of the following:

- Knew or should have known of the harassment.
- Had control over the harasser.
- Failed to take immediate and appropriate corrective action.

(See, for example, *Woods-Pirozzi v. Nabisco Foods*, 290 N.J. Super. 252, 268-69 (App. Div. 1996).)

OVERVIEW OF STATE ANTI-RETALIATION LAW

4. Is there a state law prohibiting retaliation in your jurisdiction? If so, please include information on:

- What specific acts are protected, if any.
- How is retaliation defined?
- Whether an employer can be subject to vicarious liability for retaliatory conduct by an employee.
- Whether filing a worker's compensation claim in your jurisdiction is protected from retaliation.

PROTECTED ACTS

New Jersey Law Against Discrimination

Under the New Jersey Law Against Discrimination (NJLAD), it is unlawful to retaliate against any person because that person either:

- Opposed any practices or acts forbidden under the NJLAD.
- Filed a complaint, testified or assisted in any proceeding under the NJLAD.

(*N.J. Stat. Ann. § 10:5-12(d)* (2011).)

The NJLAD also makes it unlawful to coerce, intimidate, threaten or interfere with any person:

- In the exercise or enjoyment of any right under the NJLAD.
- Because of that person's aiding or encouraging another person in the exercise or enjoyment of any right under the NJLAD.

(*N.J. Stat. Ann. § 10:5-12(d)* (2011).)

New Jersey Conscientious Employee Protection Act

The New Jersey Conscientious Employee Protection Act (CEPA) prohibits retaliation because the employee:

- Discloses or threatens to disclose to a supervisor or a public body any activity, policy or practice of the employer, or another employer with whom there is a business relationship, that the employee reasonably believes is:
 - in violation of a law or regulation; or
 - fraudulent or criminal.
- Provides information to or testifies before any public body conducting an investigation, hearing or inquiry into any violation of law.
- Objects to, or refuses to participate in, any activity, policy or practice which the employee reasonably believes:
 - constitutes a violation of law; or
 - is incompatible with a clear mandate of public policy concerning the public health, safety or welfare, or protection of the environment.

(*N.J. Stat. Ann. § 34:19-3 (2011).*)

New Jersey Family Leave Act

The New Jersey Family Leave Act (NJFLA) prohibits employers from discharging or discriminating against employees:

- For opposing conduct prohibited by the NJFLA.
- Because the individual has filed a charge, instituted a proceeding, or given testimony or information related to an investigation or proceeding under the NJFLA.

(*N.J. Stat. Ann. § 34:11B-9 (2011).*)

DEFINING RETALIATION

Under the NJLAD, retaliation means “to take reprisals against” an employee because he:

- Opposed any practice or act forbidden under the NJLAD.
- Filed a complaint, testified at or assisted in any proceeding under the NJLAD.

The NJLAD prohibits adverse actions:

- Motivated by a desire to retaliate against an employee for reporting or complaining about conduct that the person believes is unlawful.
- Designed to discourage people from:
 - giving testimony; or
 - objecting to or reporting discrimination.

(*N.J. Stat. Ann. § 10:5-12(d) (2011).*)

VICARIOUS LIABILITY

An employer in New Jersey can be held vicariously liable for retaliation when it fails to take action against employees who treat another employee adversely after that employee reports unlawful conduct.

WORKER'S COMPENSATION CLAIMS

New Jersey's Workers Compensation Law prohibits discharge or retaliation of any kind against an employee because the employee either:

- Filed or attempted to file a workers' compensation claim.
- Testified at a workers' compensation hearing.

(*N.J. Stat. Ann. § 34:15-39.1 (2011).*)

For more information, see *Practice Note, Workers' Compensation: Common Questions* (<http://us.practicallaw.com/0-504-9497>)

5. Please provide a list of all state-specific protected classes in paragraph form that could be inserted into an employment-related agreement or policy in your jurisdiction.

Age, ancestry, atypical hereditary cellular or blood trait, service in the US armed forces, color, creed, disability or handicap, gender identity or expression, genetic information, marital status, civil union status, domestic partnership status, national origin, nationality, race, sex (including pregnancy), sexual orientation or affectional orientation.

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