

Governor Murphy Proposes Numerous Changes to the New Jersey Law Against Discrimination

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On February 18, 2020, Governor Phil Murphy proposed a host of [legislative changes](#) to the New Jersey Law Against Discrimination (NJLAD) (N.J.S.A. 10:5-1, et seq.). According to the governor, the changes aim “to clarify legal grey areas” and would (1) codify what alleged misconduct constitutes hostile work environment harassment; (2) require employers to provide anti-harassment, -discrimination, and -retaliation policies and training to employees; (3) require employees to keep detailed internal-complaint records; (4) require employees to report information about those complaints to the Division on Civil Rights (DCR); (5) bring domestic workers and interns under the protection of the NJLAD; and (6) increase the statute of limitations for most NJLAD claims to three years.

Even though the bill’s content may change, employers may want to watch its progress. The bill’s requirements will most likely increase training and compliance costs and may create unintended liability. Of particular importance is the bill’s seeming endorsement of a scenario that may be familiar to employers that have been sued for NJLAD violations: an employee basing a harassment claim on overreactions to ordinary stressors, and then bolstering that claim with gossip and exaggerated evidence of trivial slights or inconveniences. While courts historically have disregarded this evidence, the bill requires its consideration. In this respect, the bill would significantly reduce the already light burden carried by NJLAD plaintiffs and greatly reduce the viability of an employer’s standard argument that the alleged misconduct is neither severe nor pervasive enough to constitute harassment.

Formalizing the Legal Standard for Hostile Work Environment Harassment

The bill would codify the familiar hostile work environment harassment standard, but it would significantly lower the threshold for how offensive or frequent misconduct must be in order to be considered “severe” or “pervasive.” Even a single nonphysical incident could constitute harassment, and a complainant need no longer show the incident caused a “loss of tangible job benefits” or a “loss of productivity.” Similarly, the bill would require courts to weigh the alleged misconduct under “the totality of the circumstances,” including the complainant’s “subjective reactions” to the misconduct) and his or her secondhand knowledge of similar misconduct (even though the complainant may not have directly witnessed that misconduct).

The bill also would codify a negligence standard for an employer that “knew or should have known of the harassing conduct and failed to take appropriate preventive or corrective action,” which would apply to both employees and non-employees, though the bill would require courts to consider the employer’s responsibility over, or ability to control, the non-employee’s conduct. The bill would not otherwise affect employer vicarious liability standards.

Antidiscrimination and Anti-Harassment Policies

The bill would require an employer to implement “a written nondiscrimination policy . . . concerning unlawful discrimination and harassment” between employees and “vendors, suppliers, clients, and patrons” that satisfies specific (1) content; (2) posting or dissemination; (3) review and revision; and (4) language requirements, within one year of the bill’s enactment.

To help employers, and within six months of the bill’s enactment, the DCR would be required to create a model policy for employers and domestic workers, as well as “small employers” (defined as those having fewer than 50 employees nationwide), to input their employer-specific information, and adopt.

The model policy would contain (1) a statement denouncing and threatening to punish discrimination or harassment; (2) definitions of “discrimination” and “harassment”; (3) examples of discrimination and harassment; (4) a description of the employer’s internal complaint process, as well as the contact information of the individual who receives complaints; (5) instructions regarding “how to contact [the DCR] if a person believes their rights were violated”; (6) the statute of limitations periods for NJLAD unlawful discrimination claims; (7) the statute of limitations periods for NJLAD unlawful harassment claims; (8) a statement prohibiting “retaliation against [employees] who disclose, report, participate in an investigation of, or otherwise challenge such discrimination or harassment,” as well as examples of retaliation; (9) the consequences of violating the policy; and (10) a statement regarding “the employer’s commitment to conducting prompt, thorough, and impartial investigations of complaints.”

A large employer (i.e., an employer “with 50 or more employees”) would need to tailor its policy to its specific workplace and industry by including (1) “multiple channels” for the employee to report discrimination or harassment; and (2) “a general description” of the employer’s “prompt, thorough, and impartial” investigation process, as well as the process by which to respond to complaints about discrimination or harassment.

All employers would be required to annually review their policies and provide copies to each employee (1) at the beginning of his or her employment; (2) at the time an employee “complains internally about a violation of the policy”; (3) before or at the time an employee is interviewed in response to a complaint; and (4) “whenever any updates to the policy are made.” Under the bill, small employers may simply use the DCR policy posted at the time of the review. Each large employer, however, must make sure its policy is up to date and “post the policy in a prominent location on the employer’s website,” if one exists, and provide a copy of the policy “to any employee upon that employee’s promotion.”

Antidiscrimination and Anti-Harassment Training

Within six months of the bill’s enactment, the DCR would be required to create (1) a model one-hour employee training module featuring similar information, as well as information about “bystander intervention”; and (2) a model two-hour supervisory training module additionally describing a

supervisor's specific discrimination and harassment prevention responsibilities, as well as his or her responsibilities "regarding the prohibitions against retaliation."

Employers would be required to provide this interactive training within 1 year of the bill's enactment, within 90 days of a new employee's hire, and at least every 2 years thereafter. Supervisory employees would also receive training within 90 days of their promotions to supervisory status. Small employers would satisfy this training requirement by using the DCR's training modules, but large employers would be required to have interactive, participatory trainings during which employees can ask questions.

Both the policies and trainings would be made available by the DCR "in English, Spanish, and any other language deemed appropriate by the [DCR]." Large employers would need to translate the policies and trainings into any languages requested by employees with limited English proficiency.

Record-keeping Obligations

Additionally, the bill would require all employers to keep records of their regular and supervisory employees' training completions for at least three years, and make these records available to the DCR upon request. Additionally, large employers must collect (1) "the total number of complaints filed"; (2) the number of substantiated complaints; (3) the number of unsubstantiated complaints; (4) the number of pending complaints; (5) the unlawful conduct reported in a complaint; and (6) "the protected class or classes that [a] complainant alleged." This information will need to be reported the DCR annually and retained for three years.

No Private Right of Action

The bill does not provide a complainant a private right of action for an employer's violations of policy, training, recordkeeping, or reporting requirements. However, the New Jersey attorney general may investigate and enforce the foregoing violations and pursue any penalties and remedies available under the NJLAD. Likewise, an employer's compliance with these policies does not otherwise shield it from liability for other NJLAD violations.

Expansion of Employee Protections Under the NJLAD

Finally, if enacted, the bill would expand the NJLAD's protections in two distinct ways: (1) by extending the statute of limitations for many NJLAD violations from two to three years; and (2) by broadening the definition of "employee" to include domestic workers (who perform "services related to the care of persons in private residences or [the] maintenance of private residences or their premises, including, but not limited to, services performed by a nanny, au pair, babysitter, house cleaner, housekeeper, maid, caretaker, home care worker, cook, chef, butler, gardener, or household manager") and interns. The bill would not require employers to pay interns, but should they choose to do so, the bill states that they may not award compensation based upon protected characteristics.

Key Takeaways

While preliminary, the bill strongly indicates that new workplace policy and training requirements are inevitable. Employers may want to prepare for increased government scrutiny of their internal-complaint procedures and, importantly, prepare for the increased likelihood that alleged misconduct may constitute harassment.

All New Jersey employers may want to familiarize themselves with this new bill, as its policy, training, and recordkeeping requirements will require compliance to avoid additional liability. Employers may also want to consider conducting internal audits of their policy, training, and recordkeeping practices.

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