

# New Jersey Law Prohibits COVID-19-Related Employment Discrimination

Article By:

Janice Sued Agresti

Lynne Anne Anderson

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On March 20, 2020, New Jersey Governor Phil Murphy signed a new law meant to protect employees who take COVID-19-related leave. New Jersey Assembly Bill 3848 (the Act) provides protections and remedies for such employees and outlines the complaint process for aggrieved individuals. The Act is in direct response to COVID-19 and is meant to protect employees who need to take time off from work because they are or might be infected with COVID-19. The Act was effective immediately.

## WHAT SPECIFIC PROTECTIONS DOES THE ACT PROVIDE?

The Act prohibits an employer — during the ongoing Public Health Emergency and State of Emergency originally declared by Governor Murphy in Executive Order 103, and then extended on April 7, 2020 — from **terminating or refusing to reinstate** an employee who has or is likely to have an infectious disease that requires the employee to miss work. Employees also are protected from **retaliation or penalty for requesting or taking a “protected leave.”** For an employee’s time off to be deemed “protected leave,” the employee’s leave must be based on the written or electronically transmitted recommendation of a medical professional licensed in New Jersey that the employee take time off for a specified period of time because the employee has or is likely to have an infectious disease that may infect others at the employee’s workplace.

In addition, when an employee’s protected leave period expires, employers **must restore the employee to the position the employee held immediately prior to the commencement of the protected leave**, with no reduction in seniority, status, employment benefits, pay, or other terms and conditions of employment. If the employer fills the position, then the employee must be reinstated to an **equivalent position** of like seniority, status, employment benefits, pay, and other terms and conditions of employment.

## ARE THERE ANY EXCEPTIONS?

Yes. The Act provides instances in which an employment action may not be retaliatory under the Act, even though the employee is on a protected leave. Those instances are:

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- The employer conducts a reduction in force that would have affected the employee had that person been at work
  - The employee would have been impacted by the good faith operation of a *bona fide* layoff and recall system, including a system under a collective bargaining agreement that would not entitle the employee to reinstatement to the former or an equivalent position.

## HOW DO AGGRIEVED INDIVIDUALS FILE A COMPLAINT?

Any complaint filed with the Commissioner of the Department of Labor and Workforce Development that alleges a violation of the Act will be processed in the same manner as a claim for wages filed with the Division of Wage and Hour Compliance, Wage Collection Section, within the Department, under N.J.S.A. 34:11-57 *et seq.* Under procedures for the processing of a claim for wages in the Wage Collection Section, there is a hearing conducted by a Wage Collection Referee, at which the employer may be summoned, witnesses subpoenaed, oaths administered and testimony taken. Following the hearing, the Wage Collection Referee is empowered to issue a decision and order appropriate remedies.

Under the Act, any hearings of the Division of Wage and Hour Compliance, Wage Collection Section, under this chapter may be conducted remotely with the assistance of technology, such as telephone, web-based video conferencing and submission of documentary evidence by email or text.

The judgment of the Wage Collection Referee may be appealed to the Superior Court by either party upon filing a notice of appeal with the Division of Wage and Hour Compliance, Wage Collection Section, within 20 days of the judgment having been issued.

## WHAT ARE THE REMEDIES?

If the Commissioner finds that an employer has violated the Act, the Commissioner may order that the employee be reinstated and assess an administrative penalty of \$2,500 against the employer for each violation.

## ARE THERE ANY MISCELLANEOUS PROVISIONS?

Yes. The Act relies on the Unemployment Compensation Law at N.J.S.A. 43:21-19(i)(6)(A), (B) and (C), commonly referred to as the “ABC test,” and the case law interpreting and applying the ABC test, to determine whether a complainant is an employee or an independent contractor under the Act.

Note: As referenced above, on April 7, 2020, Governor Murphy signed an Executive Order, renewing the current state of Public Health Emergency for another 30 days. It is now set to expire on May 8, 2020. The Order also keeps all public health–related Executive and Administrative Orders in full force and effect.

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