

PRESIDENT'S MESSAGE
EDWARD J. FANNING, JR., ESQ.



VOLUME 27, ISSUE 2

WINTER 2012

In this issue:

**DEFENDING HOMEOWNERS ASSOCIATIONS AGAINST DERIVATIVE
LAWSUITS: THE PROCEDURAL REQUIREMENTS OF RULE. 4:32-3** **4**

By Michael Dolich, Esq. and Theresa Giamanco, Esq.

WHAT IS A "PREEXISTING CONDITION"? DO WE REALLY UNDERSTAND SCAFIDI? **8**

By Herbert Kruttschnitt, III, Esq.

**ON LAD'S HORIZON: WHAT EMPLOYERS NEED TO KNOW ABOUT THE FUTURE OF
NJ STATE LAW AGAINST EMPLOYMENT DISCRIMINATION** **14**

By Daniel Saperstein, Esq. and Lucas Markowitz, Esq.

**CAN "EXCESS" MEAN LESS? A BROADER INTERPRETATION IN
CARDIOVASCULAR INJURIES** **21**

By Kristy N. Olivo, Esq.

and more

ON LAD'S HORIZON: WHAT EMPLOYERS NEED TO KNOW ABOUT THE FUTURE OF NEW JERSEY STATE EMPLOYMENT DISCRIMINATION LAW

BY DANIEL L. SAPERSTEIN, ESQ. AND
LUCAS A. MARKOWITZ, ESQ.*

At the onset of the New Year, New Jersey employers should reexamine the year that was and prepare for the year ahead. Since 2011, there have been several legislative proposals and judicial challenges intending to enlarge the umbrella of employment discrimination protections for applicants and employees.

The New Jersey state legislature has introduced a series of proposals that would amend New Jersey's Law Against Discrimination ("LAD"), N.J.S.A. §§ 10:5-1 to -49, to insulate a host of classes from employment discrimination. Indeed, these proposals would prohibit or substantially limit discrimination based on pregnancy, childbirth or breastfeeding; credit history; and criminal record. Although not directly amending LAD, the proposed "Healthy Workplace Act" – which would prohibit workplace bullying regardless of protected class status under LAD – portends a significant expansion of New Jersey state employment discrimination law.

This article does not intend to alarm employers, but to provide caution and guidance on what the future may hold. As it stands, LAD has not been amended since 2007 and, as recently as 2011, the Third Circuit held that LAD could not be read to include familial status among the classes protected against employment discrimination. Nevertheless, employers should begin to contemplate the ways in which they would address the potential changes that are proposed.

LAD – As It Stands

LAD presently makes it an



unlawful employment practice to discriminate against an employee or prospective employee on the basis of race, creed, color, national origin, ancestry, age, marital status, civil union status, domestic partnership status, affectional or sexual orientation, genetic information, sex, gender identity or expression, disability or atypical hereditary cellular or blood trait of any individual, or because of the liability for service in the Armed Forces of the United States or the nationality of any individual, or because of the refusal to submit to a genetic test or make available the results of a genetic test to an employer. LAD provides for a private right for the unlawful employment practices enumerated therein, including retaliation, and allows for a full range of remedies, including equitable relief (such as reinstatement) and monetary awards encompassing front and back pay, compensatory damages, emotional distress damages, attorney's fees, and, even in some cases, punitive damages. In addition to the private right of action, employers that violate LAD may be subject to penalties not to exceed \$50,000.

(Continued on page 15)

LAW AGAINST DISCRIMINATION

(Continued from page 14)

LAD's list of protected employment classes has remained static for the last few years as a result of legislative inaction and judicial rendering. As noted above, in *Iovanella v. Genentech, Inc.*, No. 11-1266, 2011 WL 5833170 (3d Cir. Nov. 21, 2011), the Third Circuit recently did not construe LAD to include familial status as a class protected against employment discrimination. In support of its decision, the Third Circuit cited to the lone New Jersey state court decision addressing the issue, *Bumbaca v. Township of Edison*, 373 N.J. Super. 239 (App. Div. 2004), cert. denied, 182 N.J. 630 (2005), which reached the same conclusion. Relying on the plain text of LAD, the Third Circuit also noted that the Act expressly protects familial status in the housing context and, given its conspicuous absence from the list of unlawful employment practices, the Legislature's intent was manifest.

LAD – As It May Change

Although the Third Circuit's ruling refused to expand LAD's employment protections, the New Jersey state legislature has introduced several pieces of legislation that would enlarge the scope of the statute.

Pregnancy/Breast Feeding

In 2011, both the New Jersey State Assembly and Senate introduced bills, A.B. 1496 & S.B. 3060 (2010-2011), respectively, that would amend LAD to prohibit workplace discrimination on the basis of pregnancy, childbirth, or breast-feeding, and, as the title states, require employers to provide a daily break for breast-feeding mothers. The bill was reintroduced in the Senate, S.B. 886 (2012-2013), earlier this year and would directly amend LAD to provide aggrieved employees with a private right of action and generous remedies. An employer found to have violated LAD also would be subject to its penalty provisions.

Although S.B. 886 would create another protected class under LAD, this addition does not forebode dramatic consequence for the workplace. Indeed, many New Jersey employers are covered by federal discrimination law, i.e., Title VII of the Civil Rights Act of 1964, which protects the status of pregnancy, childbirth, and related medical conditions. It should be noted that, with respect to breast-feeding, some federal courts have held that Title VII does not apply. See, e.g., *Equal Employment Opportunity Comm'n v. Houston Funding II, Ltd.*, No. 4:11-cv-02422, slip op. (S.D. Tex. Feb. 2, 2012). At the state level, LAD protects gender, a classification broad enough that employers not covered under federal discrimination law – in an abundance of caution – tend to extend appropriate accommodations and protections to pregnant and breast-feeding employees.

Credit History/Financial Status

In 2011, New Jersey was at the vanguard of "hiring practices" law, as it became the first and only state to prohibit employers from discriminating against the unemployed in job postings, N.J.S.A. §§ 34:8B-1 to 34:8B-2. Furthermore, in *Rea v. Federated Investors*, 627 F.3d 937 (3d Cir. 2010), cert. denied, No. 10-1507 (Oct. 3, 2011), the Third Circuit held that the Bankruptcy Code permits private employers to refuse to hire an applicant based on his or her bankruptcy status – a decision followed by two other circuit courts to date (*Burnett v. Stewart Title Inc.*, 635 F.3d 169 (5th Cir. 2011)) and (*Myers v. Toojay's Mgmt. Corp.*, 640 F.3d 1278 (11th Cir. May 17, 2011)). Further changes to standard employer hiring (and personnel) practices have been on the horizon for some time.

Beginning in 2009 and continuing into 2012, the Assembly has repeatedly introduced a bill (currently A.B. 2360 (2012-2013)) that would amend LAD to make it an unlawful employment practice to

(Continued on page 16)

LAW AGAINST DISCRIMINATION

(Continued from page 15)

discriminate against an applicant or employee because of his or her credit history or financial status.

Although this bill has languished in the legislature, seven states have either banned or significantly restricted the use of credit checks performed on applicants and employees. Given this recent trend, the likelihood that the bill will pass may have increased.

Criminal Records/Background Checks

In 2012, the Assembly proposed another bill, A.B. 2300 (2012-2013), that would supplement LAD to prohibit employers from taking certain actions against applicants based on their criminal record. First, the bill would prevent an employer from requesting on its initial written application information about an applicant's criminal record unless (1) the applicant applied for a position for which any federal or state law or regulation creates a mandatory or presumptive disqualification based upon a conviction for a specific offense; or (2) pursuant to federal or state law or regulation, employers cannot hire applicants convicted of a specific offense. The bill expressly states, however, that these exceptions only allow an employer to request information about the specific convictions that would disqualify an applicant pursuant to federal or state law or regulation.

Second, this bill allows an employer to inquire about an applicant's prior criminal record during an interview conducted after a review of the initial written application determines that the applicant has preliminary eligibility for the position. The bill, however, further disallows an employer from inquiring into whether an applicant has ever been arrested, charged with a crime, convicted of a sealed non-criminal offense, or adjudicated as a juvenile delinquent.

Similar to the federal Fair Credit Reporting Act, 15 U.S.C. § 1681, et seq., any employer who per-

forms a background check on an applicant must (1) inform the applicant that a criminal background check may be requested in connection with the application for employment and obtain written consent from the applicant before conducting the criminal background check; (2) notify the applicant within 30 days that a criminal background check was requested and provide the names and address of the reporting agency or company; and (3) allow the applicant, upon the applicant's written request, to review the criminal background check.

Furthermore, like Article 23-A of the New York's Correction Law, an employer cannot deny employment based solely upon an applicant's prior criminal record unless (1) there is a direct relationship between one or more of the previous criminal offenses and the specific employment sought; or (2) the granting of employment would involve an unreasonable risk to property or to the safety or welfare of specific persons or the general public. The employer shall consider (1) the specific duties and responsibilities related to the employment sought and the bearing, if any, that the criminal offense for which the person was previously convicted will have on the applicant's ability to perform one or more such duties or responsibilities; (2) evidence of the applicant's rehabilitation (including a certificate of rehabilitation issued to the applicant pursuant to law), and (3) the amount of time which has elapsed since the criminal offense.

If an employer denies employment based solely upon an applicant's criminal record, it shall within five days provide the applicant in writing the reasons for such denial. An employer who violates any provision of the bill is subject to a civil penalty of not more than \$10,000 for a first offense and not more than \$20,000 for a subsequent offense.

(Continued on page 17)

LAW AGAINST DISCRIMINATION

(Continued from page 16)

Healthy Workplace Act

Although not directly amending LAD, S.B. 333 (2012-2013) or the “Healthy Workplace Act,” would make it an unlawful employment practice for an employer to subject an employee to abusive conduct or to permit an abusive work environment, or retaliate against an employee for opposing any such practice under the proposed Act. “Abusive conduct” is broadly defined to include the malicious conduct of an employer or employee in the workplace that a reasonable person would find hostile or offensive. Under the proposed Act, abusive conduct may include, but is not limited to, repeated infliction of verbal abuse such as the use of derogatory remarks, insults, and epithets; verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating; or the gratuitous sabotage or undermining of a person’s work performance. Additionally, an “abusive work environment” is a workplace in which an employee is subjected to abusive conduct that is so severe that it causes physical or psychological harm to the employee.

Employers who violate the proposed Act would face a private right of action, as well as a fine not to exceed \$25,000. The bill expressly provides an affirmative defense to an action regarding an abusive work environment that the employer exercised reasonable care to prevent and promptly correct the abusive conduct, and the aggrieved employee failed to take advantage of appropriate preventative or corrective opportunities provided by the employer. The available remedies are in addition to any remedies provided under the workers’ compensation laws, except that if a person elects to receive worker’s compensation in connection with the abusive workplace conduct in lieu of bringing a separate legal action, then he or she shall not be permitted to recover double damages under a separate legal action pursuant to the Act.

New Jersey courts have held consistently that LAD is not a general civility code. See, e.g., *Heitzman v. Monmouth County*, 728 A.2d 297, 304 (App. Div. 1999), overruled on other grounds, *Cutler v. Dorn*, 196 N.J. 419 (2008). And while the Healthy Workplace Act does not directly amend LAD, its enactment would substantially undercut LAD’s limited purpose. Indeed, by and large, LAD’s intent is to protect a limited class of persons based on their immutable characteristics or deeply-held beliefs.

A number of state legislatures have already proposed similar bills, including New York. If New Jersey follows suit, new policies and training may be necessary to address regulations likely to stem from the proposed Act if it becomes law.

Takeaways

The New Jersey state legislature has introduced a number of bills which, if enacted, would likely expand the groups of applicants and employees protected by LAD and other employment discrimination laws. Employers should take note of the prospect of passage, as each of these bills (or close variants) either have been proposed or passed by other states. Employers should likewise brace for changes in hiring practices and employee policies if these bills become laws.

* Daniel Saperstein and Lucas Markowitz are attorneys in the Labor and Employment Department of Proskauer in Newark. Their practice is focused on employment litigation and counseling on behalf of management.