

PSG of Mercer County

Essential Employment Law Principles for Workers in Transition: What do You Need to Know for 2024?

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Life “After” COVID-19

- ▶ **In two cases involving NJ school boards**, the 3rd Circuit says there is no First Amendment right to refuse wearing a protective mask as required by valid health and safety orders during a recognized public health emergency. Disobeying a masking requirement is actionable by the enforcing authority (decided 2/5/24).
- ▶ **Executive Order 325**: This Order rescinds COVID-19 testing requirements put in place for employees in certain healthcare and high-risk public care settings. This Order also removes vaccination requirements for employees in public care settings (i.e. nursing homes). Employees of healthcare facilities are still required to provide proof of COVID-19 vaccination to protect the higher-risk populations they serve.
- ▶ **On February 2, 2024**, the NJ Appellate Division held an employer is not required to provide remote work to an employee who claims immuno-compromise under the ADA/LAD. The risk of infection is not deemed sufficiently strong to require the requested accommodation.

Life “After” COVID-19 Continued

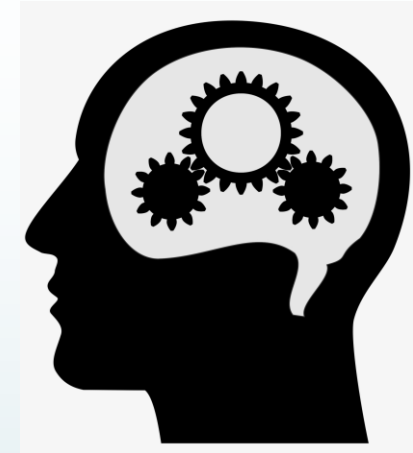
NJ WARN Act Amendments: The New Jersey Worker Adjustment and Retraining Notification (“WARN”) Act amendments took effect on April 10, 2023, after a 3-year delay due to the pandemic. Key WARN Act Amendments:

- ▶ Notice Obligations
- ▶ Severance Requirement
- ▶ Expanded Definition of “Mass Layoff”
- ▶ No Distinction Between Full-Time and Part-Time Employees for Employee Threshold Purposes
- ▶ Expanded Definition of “Establishment”



Privacy & Productivity Concerns with Remote Working

- ▶ Cybersecurity is a huge concern for employers. An employee who accesses company data while using unsecured internet networks puts the company at risk. By using unsecured networks, cybercriminals have access to confidential/sensitive information.
- ▶ Hybrid schedules are here to stay!
- ▶ Employers are faced with the difficult task of monitoring their employees' productivity without breaching privacy and confidentiality.



Food for Thought. . .

- ▶ A federal Judge ruled Cleveland State University violated the Fourth Amendment when it used software to scan a student's bedroom before an exam.
- ▶ This ruling **will** affect how schools use remote monitoring software.
- ▶ Can this ruling also affect the way employers monitor their employees who work from home?



EEOC Guidance on AI in Employment

- ▶ The EEOC has taken steps to guide employers when using AI in employment decisions. Two essential pieces of guidance have been released.
- ▶ Select issues: Disparate impact occurs when an employer uses a process that appears neutral but disproportionately affects individuals based on protected characteristics, such as race, color, religion, sex, or national origin.
- ▶ The Americans with Disabilities Act (“ADA”) and the use of software, algorithms, and AI to assess job applicants and employees: the EEOC guidance also addresses the ADA in the context of AI. It outlines three ways in which an employer’s AI tools may violate the ADA:
 - ▶ Failure to provide a “reasonable accommodation” in lieu of AI
 - ▶ Screening out a candidate with a disability who can perform essential job functions with a reasonable accommodation.
 - ▶ Conducting disability-related inquiries or medical examinations that violate the ADA’s restrictions.

NJ Temporary Workers' Bill of Rights and Manufacturing Employers Using Temporary Laborers (law took effect 8/5/2023)

- ▶ Temporary laborers assigned to certain manufacturing positions are covered.
- ▶ The obligation to pay temporary laborers the average rate of pay and average costs of benefits as the manufacturing company's own employees likely will increase the costs of using temporary laborers.
- ▶ While use of temporary laborers may still be necessary, a manufacturing company must ensure compliance with the new law to avoid potentially substantial penalties and lawsuits.



Pay Equity



► Equal Pay Act

- The Equal Pay Act of 1963, amending the Fair Labor Standards Act, protects against wage discrimination based on sex. The Equal Pay Act (EPA) protects both men and women.
- All forms of compensation are covered, including salary, overtime pay, bonuses, life insurance, vacation and holiday pay, cleaning or gasoline allowances, hotel accommodations, reimbursement for travel expenses, and benefits. If there is an inequality in wages between men and women who perform substantially equal jobs, employers must raise wages to equalize pay but may not reduce the wages of other individuals.
- Employers may defend pay differential based on seniority, education, and skills.

► Right to talk about salary with other employees in NJ

- New Jersey law prohibits retaliation against employees who discuss their jobs and compensation with their colleagues if the purpose of the discussion is to assist in investigating potential discriminatory treatment concerning “pay, compensation, bonuses, other compensation, or benefits.” The legislation (P.L.2013, c.154) prohibiting “salary secrecy” is designed to uncover wage discrimination.

Pay Equity Continued



- ▶ You have the right not to be questioned about your salary history
 - ▶ NJ Employers may not screen applicants based on salary history nor require specific salary history to satisfy minimum or maximum criteria. Employers may confirm pay history after an offer of employment. Employees may volunteer salary history.
- ▶ NYC right to be told salary ranges on employment advertising and outreach by employers
 - ▶ The salary transparency law, passed in December, took effect May 15, 2022
 - ▶ It directs businesses with four or more employees to include a 'good faith' salary range in their job posts
 - ▶ It exempts businesses with less than four workers as well as temp agencies
 - ▶ The rule is meant to address the gender pay gap and other wage disparities
 - ▶ City Council introduced an amendment last month amid business pressure. The amendment would change the rule to affect only businesses with 15 or more employees and to exempt generic 'Help Wanted' ads with no specific positions.
- ▶ **Key Takeaway:** Pay inequity is a terrible problem. These legislative policy tools allow the Government to address the inherent problem of employment secrecy.

New Jersey Wage Theft Act

- ▶ Violations of the wage theft measure include penalties that could result in:
 - ▶ Potential suspension of an employer's business license.
 - ▶ A fine of \$500 to \$1,000 for first-time violations and \$1,000 to \$2,000 for second or further violations.
 - ▶ Employers found to have violated New Jersey's wage laws are also subject to criminal penalties. They must pay fines and serve jail time of 10 to 100 days.
 - ▶ The law significantly extends the statute of limitations for minimum wage and overtime claims from two years to six years.
- ▶ Employers are required to give current and newly hired employees a written statement of wage rights, which will be provided by the New Jersey Department of Labor and Workforce Development.
- ▶ This Act expressly prohibits retaliation against employees who complain about their employers' alleged violations of the New Jersey Wage Payment Law
- ▶ Employers may defend based on seniority, knowledge, experience, and similar factors.

Wage Theft

Wage theft is the unlawful practice of employers not paying their employees in full for the work they have performed. No group of workers is immune, low wage workers are particularly vulnerable

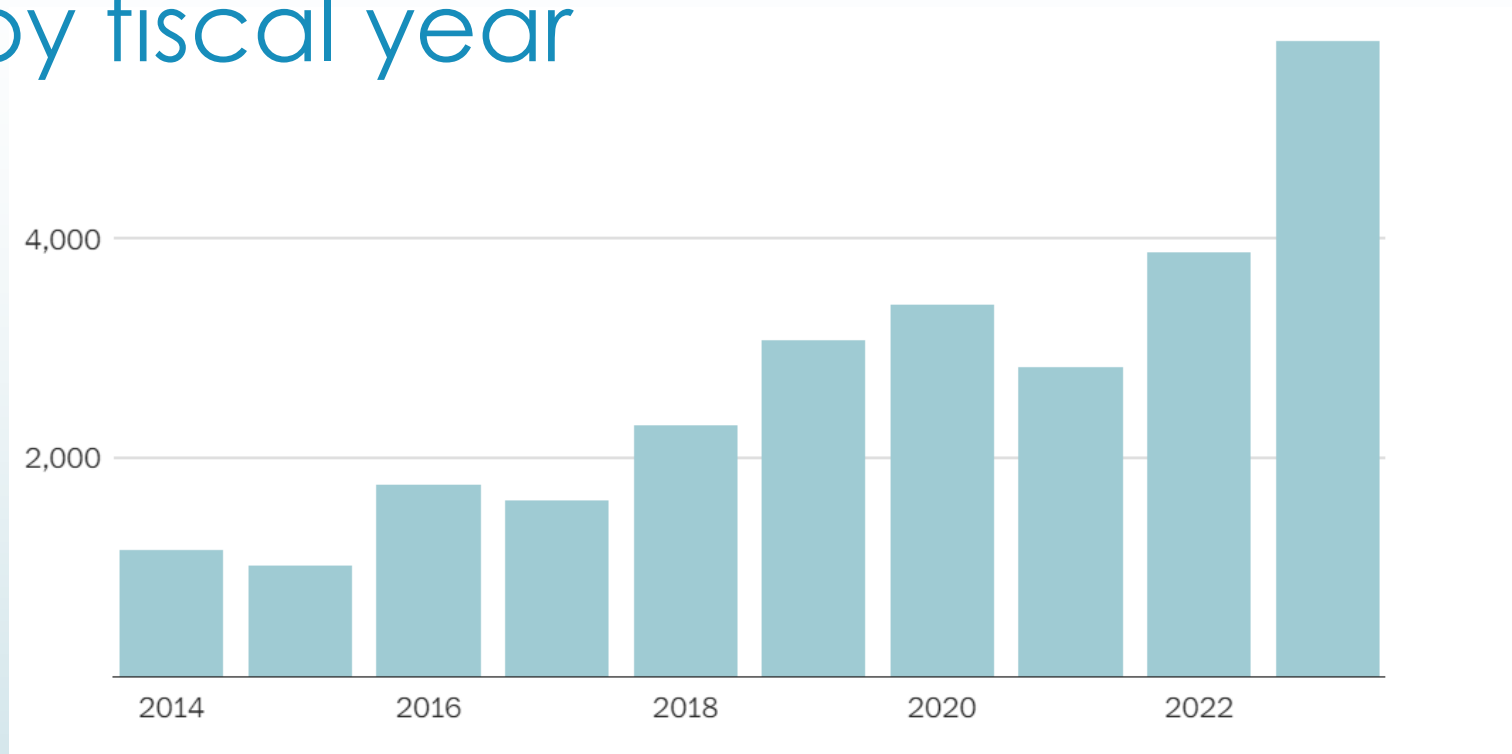


New Jersey Minimum Wage

- On January 1, 2024, New Jersey's statewide minimum wage increased to \$15.13 per hour for most workers. This increase is part of legislation signed by Gov. Murphy in February 2019 that gradually raised the minimum wage to \$15 per hour this year for most employees.
- Different rates and requirements apply to employers with fewer than six employees, employers in the agricultural industry, and employers with seasonal or tipped workers. Failure to comply with the New Jersey minimum wage law may subject employers to significant liability, which includes civil penalties and damages for unpaid wages.



Children employed in violation of US labor law by fiscal year



- Arkansas passed a bill this year that eliminates age-verification requirements for minors under 16 to work.
- Iowa approved a bill this year that extends legal working hours for 14- and 15-year-olds
- The US Department of Labor issued hundreds of citations last year for child labor violations found at McDonald's, Dunkin', Subway, and other fast-food companies.

Unlawful Interview Questions

► Unlawful interview question topics:

- Family planning
- Religious beliefs
- Marital status
- Criminal record
 - “Ban the Box” vs “Pass the Trash”
- Salary history
- Sexual or gender identity
- Racially identified tattoos or hairstyle

► How to handle them.



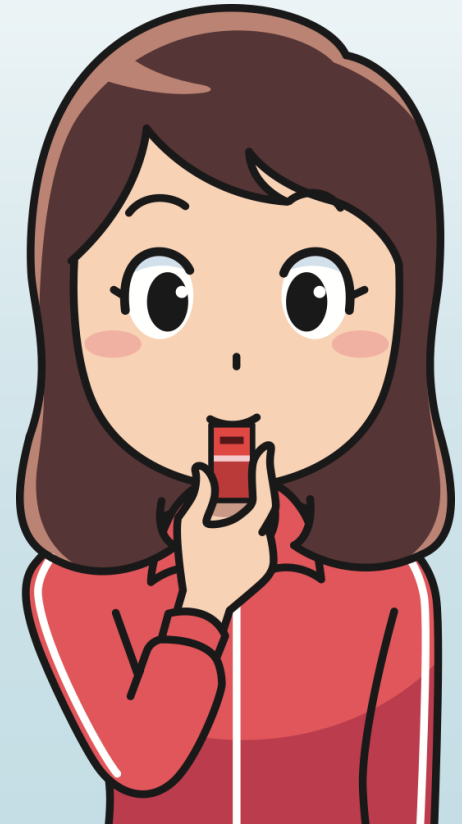
Pre-Employment Inquiries and Medical Questions



- ▶ The federal ADA and NJ Law Against Discrimination restrict employers from asking job applicants to answer medical questions, take a medical exam, or identify a disability.
- ▶ An employer **may not** ask a job applicant, for example, if (s)he has a disability (or the nature of an obvious disability).
- ▶ An employer **may** ask a job applicant whether (s)he can perform the essential duties of the position and, if (s)he presents with an obvious disability, how (s)he would perform the job.
- ▶ The law allows an employer to condition a job offer on the applicant answering certain medical questions or successfully passing a medical exam, **but only if** all new employees in the same job have to answer the same questions or take the same exam.
- ▶ Once a person is hired and has started work, an employer generally can ask medical questions or require a medical exam **but only if** the employee requests a disability-related reasonable accommodation or the employer has reason to believe an employee would not be able to perform a job successfully/safely because of a perceived medical condition or disability.

Whistleblower Claims

- In NJ, a **whistleblower** is someone who reports fraud, abuse, misconduct, dangers to public health and safety, or corruption to someone who can resolve the wrongdoing.
- A whistleblower works inside the organization where the wrongdoing occurs.
- NJ law says whistleblowers' actions are motivated by a commitment to the public interest.
- An employee must have a good faith belief in the reported wrongdoing, but they do not have to be right.
- What are the whistleblowers' remedies?





NJ Paid Sick Leave Act

- In 2018, Governor Murphy signed into law the New Jersey Paid Sick Leave Act, which provides eligible employees with paid leave for their own medical needs, needs of a family member, or for other permitted reasons. Employees will receive 1 hour of paid sick leave for every 30 hours worked, for up to 40 hours of total paid sick leave per year (1,200 max work hours). You may also carry over unused time, as long as it does not exceed the 40 hours per year limit.

NJ Paid Sick Leave Act Continued

► Accrual and Carryover

- All employees, whether temporary, part-time, full-time, salaried, hourly, or paid on commission, must accrue one hour of sick leave for every 30 hours worked. Employers may cap an employee's sick leave accrual and use at 40 hours per benefit year.
- The employer and employee may mutually agree to a payout in the final month of the benefit year of 50% or 100% of the employee's unused sick time. If unused time is paid out in full, carryover is not required. If 50% is paid out, the remaining 50% will carry over. If the employee does not want to be paid out, or the employer chooses not to offer this option, all unused time up to 40 hours will carry over.
- Employers may grant sick leave upfront in a lump sum. When using the lump sum method, employers may either pay employees for unused sick leave at the end of the calendar year or allow carryover. With lump sum plans, whether to pay out or allow carryover is the employer's choice - the agreement of the employee is not required.
- In no case will time be forfeited, unless it is in excess of the carryover limit of 40 hours.



Covenants not to compete/non-solicitation of employees/NDA's

- Confidentiality regarding discrimination claims is void in private sector cases.
- Non-compete agreements will be enforced if they are reasonable in duration and geography.
- NDA's



U.S. Moves to Bar Noncompete Agreements in Employment

- On January 5, 2023, the Federal Trade Commission ("F.T.C.") unveiled a rule that would block companies from limiting their employees' ability to work for a rival company.
- This could raise wages and increase competition among businesses.
- Although noncompete agreements are prevalent among more highly paid and more educated workers, many companies use them for low-wage hourly workers and sometimes interns.
- This proposal would cover employees, independent contractors, interns, volunteers, and other workers.
- The public will be allowed to submit comments on the proposal for 60 days, at which point the agency will move to make it final. An F.T.C. document said the rule would take effect 180 days after the final version was published.
- It is almost certain that business interests will sue to delay and derail this F.T.C. proposed regulation. Do not expect it to be in force anytime soon. However, even in defeat, it may prompt cities and states to do the same.





Severance Agreements in NJ

- ▶ Severance Agreements are contractual, not state imposed.
- ▶ There is no legal obligation to offer severance pay, not even for a day.
- ▶ Employers offer Severance Agreements either by contract or Employee Policy/Handbook.
- ▶ Such provisions are legally enforceable.
- ▶ Such Agreements protect employers against all manner of employee litigation, including contract breach, physical injury (but not Worker's Compensation, which is legally excluded from such Agreements), employment discrimination, retaliation claims, and any other sources of employee rights.
- ▶ Such Agreements also may include non-compete and non-solicitation provisions, confidentiality clauses, and NDA's (now subject to **S-121**).

Anti-discrimination and anti-retaliation laws in the workplace, including NJ LAD, federal Title VII, Americans With Disabilities Act, and sexual harassment claims (state and federal)

- ▶ NJ LAD makes it illegal for an employer to discriminate in employment (hiring, promotion, demotion, firing) based on race, religion, color, national origin, physical or mental disability, age, nationality, ancestry, marital status, affectional or sexual orientation, gender, gender identity, or liability for military service.



Employers Must Reasonably Accommodate Pregnant Workers, Too



- ▶ If you're pregnant and your employer has 15 or more employees, a new federal law may help you work longer. The Pregnant Workers Fairness Act (PWFA) gives the same protections to pregnant employees as those seeking reasonable accommodations for their disability or religious beliefs.
- ▶ Those with pregnancy-related conditions, like gestational diabetes or postpartum depression, are also covered by the law.
- ▶ Congress intends that minor changes, like extra breaks for an employee with gestational diabetes to monitor their blood sugar levels or inject themselves with insulin, may help the mother and fetus stay healthy during the pregnancy.
- ▶ Last fiscal year, 2,273 pregnant employees filed complaints with the federal agency enforcing anti-discrimination laws, the Equal Employment Opportunity Commission (EEOC), claiming discrimination and retaliation. The EEOC estimates that at least a third of the new complaints are based on allegations that employers failed to reasonably accommodate their pregnancy or related conditions.

How Will the End of Affirmative Action in College Admissions Impact Employers?

- ▶ In June 2023, by a six (6) to three (3) margin, the United States Supreme Court Justices voted to end affirmative action in college admissions.
- ▶ The new decision may result in fewer minorities attending college. Presuming their college attendance declines, minority hires may be ineligible for jobs requiring a college degree. Although the decision doesn't address hiring, it opens the door to potential legal challenges to diversity, equity, and inclusion programs, especially if race is the reason for an individual not to be hired or promoted, or if the employer sets explicit quotas for hiring or promotions.
- ▶ To succeed, a Plaintiff in a discrimination case must establish:
 - ▶ They are a member of a protected class (due to their race, sex, disability, gender, sexual orientation, etc.);
 - ▶ They are qualified for the position;
 - ▶ They suffered a negative employment action (weren't hired, for example); and
 - ▶ Afterwards, someone who was not a member of the protected class got more favorable treatment (they were hired or promoted), even though the negatively affected candidate/employee was better qualified for the position.



Independent Contractors

- ▶ Am I an employee or an independent contractor?
 - ▶ “Employee” means any person working for an employer, except for **independent contractors**. Employees are protected by many NJ labor laws, including the Unemployment Compensation Law and the New Jersey Law Against Discrimination. Independent contractors do not receive such protections.
- ▶ If your employer issued you a 1099 instead of a W-2, that alone does not mean you are properly classified.
- ▶ 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 and other laws.
- ▶ An employer who misclassifies an employee by calling him/her an independent contractor is guilty of wage theft: for taxes, insurance, and other important benefits.



Mental Health Days

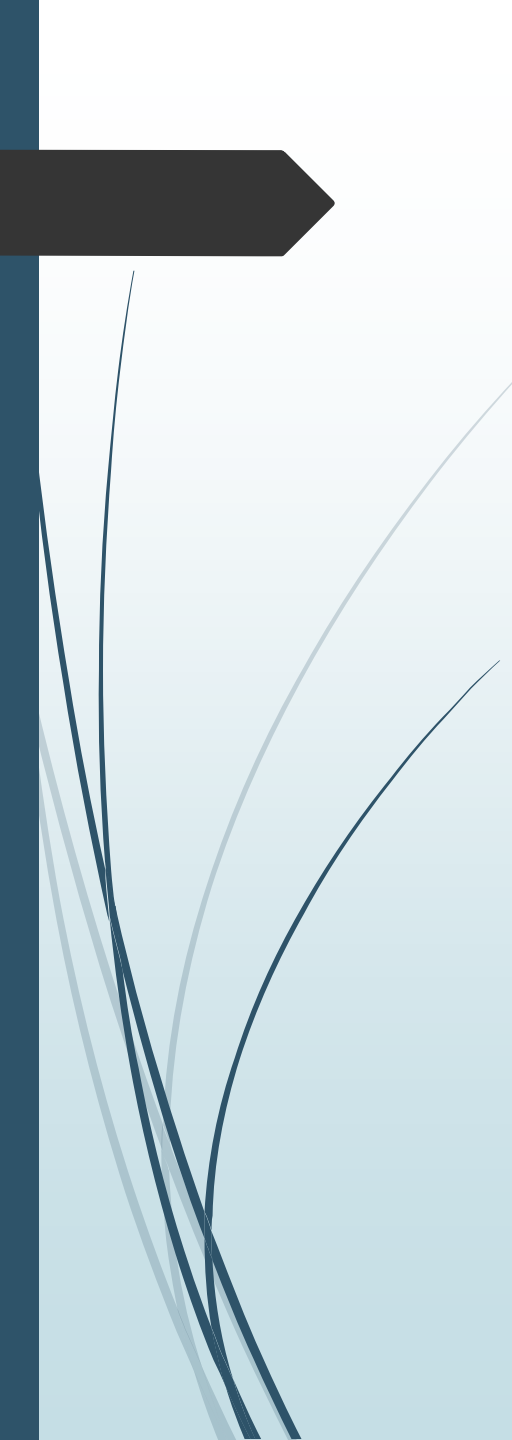


- ▶ In 2021, many companies started offering mental health days for employees.
- ▶ Questions regarding how these days will be counted are on the rise.
 - ▶ For example: Are employers compensating workers for these days? How many days should be given and for how many hours per day?
- ▶ As the uncertainty continues going into 2023, in-house counsel and HR personnel are learning and adapting by routinely updating employee handbooks to reflect any changes in company policy and state law.
- ▶ Both the **Americans With Disabilities Act** and the **LAD** categorize many mental disorders as “disabilities”.
- ▶ Therefore, employees with mental illnesses fall into a “protected class” and cannot be discriminated against in the workplace. On the other hand, if an employee cannot fulfill work requirements even with reasonable accommodations, then the employer has the absolute right to discipline, demote, or terminate the employee’s employment.

Performance Improvement Plans

- These plans are death on wheels. As soon as Management puts you on such a plan, it is time to start looking for a new job!





Termination of Employment (“You’re fired!”) **versus constructive discharge** (“We will make your work environment so uncomfortable, you will quit.”)

- Your discharge status is important. It determines whether you may collect your NJ Unemployment Insurance Benefits (UIB).
- Unless you cannot wait another instant, it is better to be fired than to quit.
- An employment quit equals zero UIB.
- It is easier to get a job when you are employed. Don’t quit unless you have somewhere to go.
- If workplace conditions are objectively and provably horrific, you may be able to prove a case of “constructive discharge”.

Unemployment Benefits in NJ

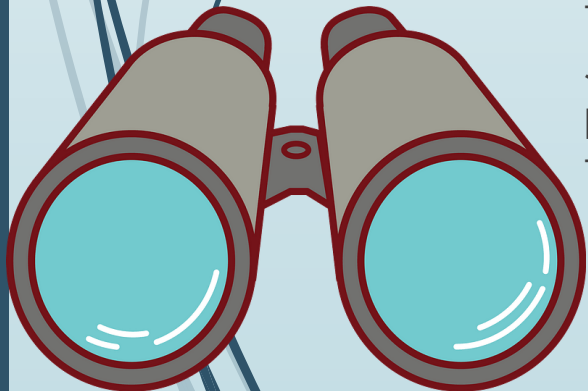
- ▶ Every NJ employee who has worked a minimum of one quarter of the year and who has paid into the UIB system through wage withholding is eligible for UIB upon firing.
- ▶ The amount and duration of UIB are determined by law, as administered by the NJ Department of Labor.
- ▶ If the fired worker has committed one or more acts that amount to severe or gross misconduct, then s/he will lose substantial benefits under the law.
- ▶ Gross misconduct is the equivalent of criminal behavior in the workplace, and results in disqualification for UIB.
- ▶ Severe misconduct results in reduction of benefit weeks includes willful, malicious, and deliberate intent to injure the employer or the workplace. Mere negligence or inadvertence will not suffice.





2024 Potential Upcoming NJ Employment Law Topics

- ▶ **New Jersey Businesses May Be Required to Provide Pay Transparency**
 - ▶ Currently, a pay transparency bill is pending in the New Jersey State Assembly, which requires NJ businesses with five or more employees to provide pay transparency in employment listings and for promotional opportunities. On March 23, 2023, this bill received an initial Assembly Labor Committee hearing, and business groups were able to persuade the bill sponsor to remove language about the possibility of enforcement by civil litigation. No action has been taken since this hearing.
- ▶ **New Jersey Bill Seeking to Limit Restrictive Covenants Still Alive**
 - ▶ New Jersey Assembly Bill 3715 is still pending before the New Jersey Legislature. If passed, the bill would immediately impose some of the strictest procedural requirements on New Jersey employers seeking to restrict their employees' post-employment activities, limit the permissible scope and enforceability of certain restrictive covenants, and greatly increase the associated costs of enforcing restrictive covenants against former employees.





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