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Failure to Contract: The LAD's Anti-Discrimination Provisions for Non-Employees

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New Jersey employers and businesses should generally be familiar with the state's anti-discrimination statute, the New Jersey Law Against Discrimination, N.J.S.A. §10:5-1 et seq. ("LAD"), which prohibits discrimination against an employee because of the employee's protected characteristics. Section 10:5-12(a) of the LAD provides far broader protections for employees than currently exist under Title VII and other federal anti-discrimination laws. The list of classifications protected under the LAD—which has expanded in recent years—includes race, creed, color, national origin, ancestry, age, marital status, civil union and domestic partnership status, sex, sexual orientation, gender identity or expression, genetic information or testing results, pregnancy, breastfeeding, disability, and military service. *Id.*

However, New Jersey employers and businesses should also familiarize themselves with the lesser-known provisions of the LAD that prohibit discrimination outside of the employment context, including discrimination in private business transactions and contracts. *See* N.J.S.A. §§10:5-12(b) (discrimination by labor organizations); 10:5-12(f) (discrimination in public accommodations); 10:5-12(g)-(h) (discrimination in real estate industry practices); and 10:5-12(i) (discrimination in banking and lending practices).

Notably, Section 12(l) prohibits all persons—whether or not a business or an employer and without regard to the person's industry—from discriminating against any other person in doing business or entering into contracts. This broadly applicable provision is unique among state anti-discrimination laws, and may catch unwary employers and businesses off guard when setting workplace polices, when engaging with independent contractors, and when executing and terminating commercial contracts.

Failure to Contract: Section 12(l) of the LAD

Section 12(l) of the LAD was adopted in 1977 and provides that the following shall be unlawful in New Jersey:

For any person to refuse to buy from, sell to, lease from or to, license, contract with, or trade with, provide goods, services or information to, or otherwise do business with any other person on the basis of the race, creed, color, national origin, ancestry, age, pregnancy or breastfeeding, sex, gender identity or expression, affectional or sexual orientation, marital status, civil union status, domestic partnership status, liability for service in the Armed Forces of the United States, disability, nationality, or source of lawful income used for rental or mortgage payments of such other person or of such other person's family members, partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers, or customers. This subsection shall not prohibit refusals or other actions (1) pertaining to employee-employer collective bargaining, labor disputes, or unfair labor practices, or (2) made or taken in connection with a protest of unlawful discrimination or unlawful employment practices.

N.J.S.A. §10:5-12(l).

New Jersey courts have interpreted this provision to prohibit the failure or refusal to contract for a discriminatory reason, as well as the termination of a contract for a discriminatory reason. *Perlowski v. Elson T. Killam Assoc.*, 384 N.J Super. 467, 477 (Law Div. 2005) (*citing Rubin v. Chilton*, 359 N.J. Super. 105, 111 (App. Div. 2003)).

Independent Contractors Under Section 12(l)

Since 1977, Section 12(l) has received negligible attention in proportion to its broad scope. In 1998, the Appellate Division, in *Pukowski v. Caruso,* held that independent contractors "are not to be considered 'employees' within the meaning of the LAD, and are therefore not entitled to avail themselves of its protections." *Pukowsky*, 312 N.J. Super. at 180. The plaintiff in *Pukowsky* worked as a roller-skating instructor at a rink owned and operated by the defendant. Plaintiff alleged that the defendant began sexually harassing her and ultimately forced her to leave the rink due to the plaintiff's refusal to return the defendant's romantic overtures. Plaintiff commenced an action in New Jersey Superior Court for quid pro quo sexual harassment under Section 12(a) of the LAD. Although New Jersey courts recognize harassment-based discrimination claims under the LAD, *Lehman v. Toys 'R' Us*, 132 N.J. 587 (1993), the Appellate Division concluded for the first time that the LAD did not apply to independent contractors, and adopted a 12-part test to distinguish employees from independent contractors under the LAD. *Pukowsky*, 312 N.J. Super. at 181-82. The Appellate Division's decision that independent contractors were not a protected class under the LAD was heavily influenced by federal authorities applying federal antidiscrimination laws. *Id.* at 180-82.

The *Pukowsky* test for independent contractor status is similar to the federal common law control test, which was established by the U.S. Supreme Court in *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992), and was adopted by the Third Circuit Court of Appeals in *Faush v. Tuesday Morning,* 808 F.3d 208, 213 (3d Cir. 2015). The *Pukowsky* test examines

(1) the employer's right to control the means and manner of the worker's performance; (2) the kind of occupation—supervised or unsupervised; (3) skill; (4) who furnishes the equipment and workplace; (5) the length of time in which the individual has worked; (6) the method of payment; (7) the manner of termination of the work relationship; (8) whether there is annual leave; (9) whether the work is an integral part of the business of the "employer"; (10) whether the worker accrues retirement benefits; (11) whether the "employer" pays social security taxes; and (12) the intention of the parties.

Pukowsky, 312 N.J. Super. at 182-83.

This test is still in use today for distinguishing independent contractors from employees under the LAD and under New Jersey's whistleblower statute, the Conscientious Employee Protection Act ("CEPA"). (New Jersey courts apply the more restrictive "ABC" test for independent contractors in other contexts such as wage-and-hour and unemployment insurance claims).

Although the *Pukowsky* decision drew parallels between state and federal anti-discrimination laws, it failed to address the LAD's broader coverage—particularly Section 12(l)—and it remains common for New Jersey litigants and judicial decisions to cite *Pukowsky* for the erroneous proposition that the LAD cannot apply outside of the employment context.

In 2003, the Appellate Division addressed the dearth of New Jersey authority on Section 12(l) in *Rubin v. Chilton*, 359 N.J. Super. 105, 110 n. 1 (App. Div. 2003). Prior to *Rubin*, the only citation to Section 12(l) in a published New Jersey opinion was a passing reference in 1993 in a franchise action, *Horn v. Mazda Motor of America*, 265 N.J. Super. 47, 63 (App. Div. 1993). The plaintiff pathologists in *Rubin* sued the hospital where they performed pathology services for alleged age discrimination in violation of the LAD. Plaintiffs, who were in their sixties, alleged that the hospital terminated the plaintiffs' contract and hired a 55-year-old to run the hospital's pathology department. *Id.* at 108. The trial court dismissed the LAD claim citing *Pukowsky*, because plaintiffs were independent contractors of the hospital and were not protected by the LAD. *Id.*

The Appellate Division reversed, finding that the plain language of Section 12(l) prohibited the hospital from terminating the plaintiffs' contract because of their age. The Appellate Division distinguished *Pukowsky* on the grounds that *Pukowsky* involved an employment discrimination claim under Section 12(a), whereas the "conduct proscribed by N.J.S.A. 10:5-12(l) is exclusively related to non-employee relationships." *Id.* at 109-110. If plaintiffs could demonstrate that "their contract was terminated because of their age … it would seem to be a refusal to contract with, or perhaps, continue to contract with them on the basis of age, in contravention of this statute." *Id.* at 110-11. In other words, the court held that Section 12(l) proscribed discriminatory terminations of contracts as well as discriminatory refusals to contract. Subsequent decisions of the Appellate Division have held that the discriminatory failure to renew a renewable contract may also constitute a violation of the LAD. *Nini v. Mercer County Community College*, 406 N.J. Super. 547, 557-58 (App. Div. 2009).

Harassment Claims Under Section 12(l)

Although the LAD does not explicitly prohibit workplace harassment, New Jersey courts have long recognized a claim for harassment under Section 12(a) of the LAD, including quid pro quo sexual harassment and hostile work environment harassment. *See Lehman v. Toys 'R' Us,* 132 N.J. 587, 600 (1993). New Jersey courts have now recognized quid pro quo harassment claims under Section 12(l), but have not yet approved of hostile work environment claims outside of the employment context.

In *J.T.'s Tire Services v. U. Rentals N. Am.*, 411 N.J. Super. 236 (App. Div. 2010), the Appellate Division recognized that quid pro quo sexual harassment may constitute a discriminatory refusal to contract. There, a female business owner alleged that the defendant withheld payments and stopped purchasing from her company because she had refused to have a sexual relationship with the defendant's branch manager. Plaintiff asserted a quid pro quo sexual harassment claim under Section 12(l). The trial dismissed the claim on the grounds that there was no evidence that any refusal to contract was on the basis of sex, but the Appellate Division reversed, holding that "[w]here … the harassment consists of sexual overtures and unwelcome touching or groping, it is presumed that the conduct was committed because of the victim's sex." *Id.* at 241. The Appellate Division cited as the basis for its decision the LAD's legislative purpose of eradicating sex discrimination in contracting, and found that if the rule were otherwise, quid pro quo sexual harassment "would stand as a barrier to women's ability to do business on an equal footing with men." *Id.* at 242.

However, *J.T.'s Tire* stopped short of accepting workplace harassment claims by non-employees under Section 12(l). *Id.* at 241-42. In more recent unpublished decisions, New Jersey courts have refused to recognize hostile work environment claims by non-employees, holding that Section 12(l) only prohibits a discriminatory refusal to contract or do business; it "does not apply to discrimination in the ongoing execution of a contract." *See e.g.*, *Axakowsky v. NFL Prods.*, No. 17-4730, 2018 U.S. Dist. LEXIS 193937, at *17-*19 (D.N.J. Nov. 14, 2018); *7-Eleven v. Sodhi*, No. 13 Civ. 3715, 2016 U.S. Dist. LEXIS 70794, at *23-*24 (D.N.J. May 31, 2016); *Rowan v. Hartford Plaza Ltd.,* No. A-0107-11T3, 2013 N.J. Super. Unpub. 766, at *25 (App. Div. April 5, 2013).

Setting aside whether New Jersey courts ultimately do or do not recognize hostile work environment claims by non-employees under the LAD, such claims may become actionable upon termination or even constructive termination of the contract. Section 12(l) should caution employers and companies operating within New Jersey to consider potential discrimination claims by independent contractors despite common wisdom that antidiscrimination laws do not apply to non-employees.

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