
Employment Law Planning Series

AVOIDING EMPLOYEE CLAIMS

Employers have a myriad of potential problems in dealing with their employees. This article discusses how an employer can take protective measures to minimize its exposure to claims and litigation.

I. Wage and Hour Issues

Under current law, certain employees are “non-exempt,” meaning that they must be paid for overtime. In New Jersey, **overtime** is defined as any work week in which the employee devotes more than 40 hours to work for the employer. Claims in this area tend to fall into two categories: inaccurate record keeping of hours worked; and failing to understand the concept of time worked. Time that an employee spends suiting up and getting ready for work, and gearing down at the end of the work day, frequently counts as time spent at work. Also, time worked includes the work from home or remote locations.

The distinction between a **non-exempt employee** (someone entitled to overtime) and an **exempt employee** (who is not entitled to overtime) is important to understand. In many cases, careful specifications of an employee’s title and responsibilities can clarify that they are an exempt employee and are not entitled to overtime pay. Current New Jersey law provides that if an employer is found to have violated wage and hour laws, the employer can be liable for an amount equal to twice the amount due to the underpaid employees. There is also the possibility of criminal prosecution and civil penalties of up to \$1,000 per violation, which can be very expensive.

II. Claims by Disgruntled and Terminated Employees

New Jersey and Federal law contains a host of potential claims against employers by disgruntled and terminated employees. For example, employees in a **protected minority status** (people over 40, racial and ethnic minorities, women and certain other classes) and employees with a **disability** have a viable claim if they can prove that an adverse employment action was taken against them based on their disability or minority status. In general, an adverse employment action can be anything from a salary reduction, a termination, a change or demotion of a position, or a failure to promote.

In New Jersey, the **Conscientious Employee Protection Act**, commonly referred to as “CEPA”, a whistle blower statute, allows an employee to bring a lawsuit if the employee believes that an adverse employment action was taken against him by the employer as a result of an employee complaint about a believed employer’s violation of state or federal law. Even if an employer has not done anything wrong, employees in an effort to gain leverage when they are about to be terminated, disciplined or demoted sometimes concoct a complaint.

Employees also have the right to bring suit if they claim that they have been subjected to **harassment** or a **hostile work environment**. A hostile work environment can include having to endure demeaning comments or ethnic or gender slurs on a regular basis or even one outlandish incident.

Proper planning is needed in order to protect an employer from these types of claims. First, employers should have in place a **written policy** prohibiting discrimination, harassment or a hostile work environment in the work place. The policy needs to include a realistic and practical means for employees who believe that they are experiencing these problems to lodge a formal complaint with an appropriate person or people in the company, and similarly must contain a workable and realistic methodology for the company to promptly and accurately investigate these claims and take remedial action if in fact, harassment, discrimination, or hostile work environment has occurred. In order for the policy to provide appropriate protection from liability, the employer will need to have annual training so that employees understand the terms of the policy, their rights under the policy, and what they can expect in the event that a complaint is filed. If an employer has the above in place, the employer has provided itself a level of protection in the event litigation is commenced.

An important policy that a company can pursue to minimize claims by disgruntled or terminated employees involves conducting **periodic reviews of all employees** (we recommend every six months). The results of these reviews are documented in writing, signed by the reviewing supervisor and the employee. To supplement this, if incidents occur in between evaluations, those incidents should similarly be documented in writing. In today’s highly litigious environment, an employee who is a poor performer, or who happens to have a disability or be in a protected minority class, may consult with an attorney in an attempt to obtain leverage to pressure the employer into settlement by claiming that they have been targeted because of their disability or minority status. The law, however, does not protect poor performers simply because they are minorities or have a disability. Therefore, if the employer can prove that the adverse employment action was taken solely because of performance related issues, having nothing to do with the minority status or disability, the employer will have a defense if a claim is manufactured by the employee. **Record keeping is therefore essential.**

Litigation by terminated or disgruntled employees is more common because many statutes including CEPA and New Jersey Law Against Discrimination, are “fee shifting statutes. That is, they provide that the prevailing employee may, in addition to damages receive counsel fees. This greatly increases the risks to employers because counsel fees could be significant, and will be payable to the employee even if the damages sustained by the employee are relatively minimal. It also gives plaintiffs tremendous settlement leverage. A **good paper trail documenting a nondiscriminatory reason** for an adverse employment action can be

used to show the Plaintiff and their counsel that they have a difficult case, which may prevent them from commencing an action or result in their settling an action for a nominal amount.

For a relatively minimal cost, the proper planning can save an employer significant costs, both in time and money in defending against employee claims. Failure to take precautionary measures, however, could leave an employer exposed to frivolous claims or could result in an employer keeping a poor performing employee simply because of the fear of litigation.



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