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Practice in focus

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# Employment Law

## Protect Yourself! Employee Lawsuits Do Happen

By Andrew S. Berns, Esq.

If you are a business owner, inevitably, this question will arise: Will your employees sue your company for discrimination?

You hope not. After all, the policies, procedures, meetings, training and employee programs you design are intended to create an environment of professionalism, trust and mutual respect.

But despite the best efforts of some of the most successful companies, the headlines tell all: "Wal-Mart Close to \$2 million settlement in Gender Discrimination and Retaliation Lawsuit," and "Lucent Technologies Employee gets \$195,000 settlement in Age Discrimination Lawsuit."

### First let's review the current state of the law:

The Law Against Discrimination in the Workplace

Title VII of the Civil Rights Act of 1964 prohibits race, color, religion, sex and national origin discrimination and it applies to all employers with 15 or more employees. The corresponding New Jersey statutory scheme is known as the New Jersey Law Against Discrimination and applies to all employers.

The Age Discrimination in Employment Act of 1967 (ADEA) prohibits age discrimination against individual who are 40 years of age or older and applies to all employers with 20 or more employees and Title I of

the Americans with Disabilities Act of 1990 (ADA) prohibits employment discrimination against qualified individuals with disabilities. The ADA applies to employers with 15 or more employees. The Equal Pay Act of 1963 (EPA) prohibits wage discrimination between men and women in substantially equal jobs within the same establishment and applies to most employers. Each of these laws has various interpretations and implications that could affect you.

### What can you do to avoid a lawsuit?

Although you can never be absolutely sure you will not be sued by an employee, there are steps you can take to reduce your risk. Consider

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## TERMINATION FROM EMPLOYMENT: UNFAIR OR UNLAWFUL?

By Timothy J. Ford, Esq.

Simply because your termination was unfair does not make it unlawful. To determine if it was unlawful, consider your termination in the context of New Jersey employment law. New Jersey is an "employment at will" state. Fortunately, if you are an at-will employee, you can quit your job at any time for any reason. Conversely, this also means that your employer can terminate you at any time for any "lawful" purpose. If you are fired, the first question to ask is whether you are an at-will employee, which applies to the overwhelming majority of employees. Generally,

unless you have an individual employment contract, group employment contract (such as a Collective Bargaining Agreement as a member of a union), or have another recognized entitlement to your position, such as tenured teachers or civil service employees do, you are an at-will employee. If this is the case, you can be fired for any "lawful" reason, or no reason at all!

The next question to ask is what constitutes a "lawful" reason for termination. In New Jersey, it is "unlawful" to discriminate against an employee based on their race, ethnicity, religion, gender, sexual orientation, na-

tionality, disability, age, or pregnancy. Termination from employment *may never* be based on these criteria. The New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, et. seq., (LAD) prohibits discrimination based upon any of these characteristics. LAD does not only protect individuals with respect to employment, it also specifically protects against discrimination in housing, public accommodations, certain business transactions, nursing homes and assisted living facilities from discriminating against an individual because of their Medicaid eligibility.

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## Employee Lawsuits Do Happen

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some of the key areas of exposure: hiring practices, accommodations for the handicapped, communications with unsuccessful job applicants, hiring policies, job descriptions and qualifications, job posting policies and practices, benefit, pension and retirement plans, performance standards, reviews, rewards and sanctions, employee evaluations, and the training of management personnel. In future articles, I will explore some of these areas of vulnerability in more detail. In general, information, documentation and communication are your key defenses. A general understanding of current employment law and knowledge of your rights and responsibilities is also key. Take care to set up systems that *prove* employees receive fair treatment. If you are a large employer, plan to do all you can to help those employees who are affected by downsizing with counseling, severance pay and other transition assistance.

### If you are sued....

Keeping up with changes in state and federal laws that could affect your company can be a daunting task. Bookmark our website to get the latest news or email your questions to us.

If a charge of discrimination through the New Jersey Division on Civil Rights or Equal Employment Opportunity Commission (EEOC) is brought against your company, business owners may try to resolve the charge using the EEOC's free mediation program. It is of course advisable to retain experienced counsel to help guide you through the bureaucratic maze of dealing with these public agencies. If you are not sure if your business is covered by these laws, or you have questions about your rights and duties, send an email to one of our Employment Law attorneys to arrange a consultation.



Remember, anyone who believes that his or her employment rights have been violated may file a charge of discrimination with EEOC and by law the EEOC *must accept* the filing of a charge and at a minimum, they must perform an investigation.

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## Termination (Continued from page 1)

There are numerous laws that protect employees from unlawful discrimination. For example, the Conscientious Employees Protection Act (CEPA) protects "whistleblowers" from retaliation and wrongful discharge. Other statutes that protect employees include: the Age Discrimination in Employment Act (ADEA), Title VII of the Civil Rights Act of 1964, the Equal Pay Act of 1963 (EPA), Americans with Disabilities Act of 1990, the Prevailing Wage Act (PWA), New Jersey Family Leave Act (FLA), and federal Family and

### Medical Leave Act (FMLA).

Frequently, it is difficult to understand an employer's decision to terminate one employee while maintaining another. Even though you may have consistently received positive employment evaluations, or even no evaluation at all, it is generally lawful for an employer to terminate you. This may be lawful even if the retained employee received less favorable employment evaluations in a similar position.

Ordinarily, unlawful employment decisions will not be blatant. Keeping a diary or log of the conduct of a supervisor if you suspect that you are being treated unlawfully

for any reason will provide evidence of this conduct should you bring a case. Similarly, employers should document all discipline or improper conduct of employees to avoid allegations of discrimination and to justify employment actions. To avoid a lawsuit, employers should be sure to follow any company disciplinary policies and progressive discipline practices. To determine if your employment action was unlawful or unfair, our employment counsel can help from both the perspective of the employer or employee.

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## Employment Lawyers: who we are and what we do....

### Andrew S. Berns, Esq.



As chair of the employment law, commercial litigation, and personal injury practices, Andrew Berns is a [Rule 1:40](#) Qualified Mediator and experienced commercial litigator. He also specializes in discrimination and harassment issues, and vigorously represents employees who fall victim to discrimination or harassment in the workplace and employers accused of such behavior.

**Timothy J. Ford, Esq.** specializes in employment law, complex commercial litigation, and corporate law. He was admitted to the NJ Bar in 2006 and NY bar in 2007.



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