MEMORANDUM

TO: Senate Labor Committee
FROM: Anthony M. Anastasio, President
SUBJECT: S3352/A4637
DATE: June 10, 2021

The New Jersey Civil Justice Institute ("NJCJI") is a statewide, nonpartisan coalition of the state's largest employers, small businesses, and leading trade associations. NJCJI's mission is to promote a fair and predictable civil justice system in New Jersey, which is an essential ingredient of economic stability and growth. This correspondence serves to identify NJCJI's core concerns regarding S3352 and A4637, which are related (but not identical) bills proposing numerous amendments to the New Jersey Law Against Discrimination ("NJLAD").

NJCJI strongly opposes all forms of discrimination and supports the sponsors' goals of eliminating sexual harassment in the workplace, housing, and education. However, in their current form, S3352 and A4637 will generate legal uncertainty and unintended consequences. For the reasons set forth below, we respectfully request that the sponsors reconsider these bills in their current form.

Reporting Requirements

Both S3352 (Section 3) and A4637 (Section 5) contain provisions that require employers with fifty (50) or more employees to annually report all complaints of discrimination, harassment, or retaliation to the New Jersey Division on Civil Rights ("DCR"). As currently drafted, these provisions appear to require large employers with a national footprint to report *all* such complaints across the country, regardless of whether they have any nexus to New Jersey. This requirement is clearly problematic.

Generally, New Jersey laws regulate conduct occurring in New Jersey, not outside of the state. *See D'Agostino v. Johnson & Johnson, Inc. (D'Agostino II)*, 133 N.J. 516, 538-39, 628 A.2d 305, (1993). Accordingly, claims of discrimination, harassment, or retaliation under the NJLAD must have a sufficient nexus to employment in New Jersey to be actionable. *See, e.g., Buccilli v. Timby, Brown & Timby*, 283 N.J. Super. 6, 660 A.2d 1261 (App. Div. 1995) (a New Jersey resident, employed in Pennsylvania, could not assert a claim under the NJLAD against a law firm even though it had offices in New Jersey); *Calabotta v. Phibro Animal Health Corp.*, 460 N.J. Super. 38, 213 A.3d 210 (App. Div. 2019)(the NJLAD could apply to a non-resident who works remotely for a New Jersey employer); *McGovern v. Southwest Airlines*, 2013 U.S. Dist. LEXIS 3095, 2013 WL 135128 (D.N.J. Jan.

8, 2013)(dismissing plaintiff's NJLAD claim where he worked exclusively at the Philadelphia International Airport and "ha[d] not alleged that he had any employment responsibilities in New Jersey"); *Wagner v. Catalent Pharm. Sols., LLC*, 2019 U.S. Dist. LEXIS 66305, 2019 WL 1746308, (D.N.J. Apr. 18, 2019) (dismissing NJLAD claim where plaintiff resided and worked in Kentucky); *Walters v. Safelite Fulfillment, Inc.*, 2019 U.S. Dist. LEXIS 52355, 2019 WL 1399550 (D.N.J. Mar. 28, 2019) (dismissing NJLAD claim where plaintiff resided and was employed in Connecticut). If such claims lack any factual nexus to New Jersey, then DCR has no authority to take enforcement action under the NJLAD.

Employers with a national presence typically receive a significant number of harassment complaints in various states across the country each year. Most of these complaints have no nexus to New Jersey and are therefore outside of DCR's jurisdiction. Considering these indisputable facts, a requirement that multi-state or national employers report all such complaints against them, across the entire country, to DCR is both overbroad and unduly burdensome.

Moreover, these reporting requirements arguably violate the dormant Commerce Clause of the United States Constitution, which places limits on the ability of states to regulate extraterritorial commerce. Under the dormant Commerce Clause, State X cannot regulate employment in State Y. This principal can be extended to preclude New Jersey from requiring an employer to report violations of New Jersey's policies occurring in other states.

For these reasons, NJCJI respectfully submits that both bills should be amended to clarify that covered employers must only report complaints arising from New Jersey employment. This limitation can certainly be tailored to reflect the unique circumstances of the modern workplace (e.g., remote work), but the law must require some nexus to our state before reporting requirements are triggered. This amendment will advance the NJLAD's remedial purpose without creating constitutionality problems or compliance hurdles that deter investment in New Jersey by large employers.

Discoverability and Relevance of Prior Complaints of Harassment or Discrimination

Section 8 of S3352 proposes addition of the following language to the NJLAD's cause of action for discrimination, harassment, and retaliation:

> For the purposes of this subsection, prior complaints of harassment or unlawful discriminatory practices at the same employer or relevant organization are discoverable and relevant regardless of whether the individual complaining of harassment, discrimination or retaliation witnessed or was aware of the prior complaints.

This proposed language essentially strips New Jersey judges of their ability to reject the discoverability or relevance of prior complaints of harassment or discrimination made to an employer. In other words, such complaints would be discoverable and admissible at trial of an NJLAD claim even if the prior complaints arose on the other side of the country and involved

individuals who were completely unknown to the plaintiff and the alleged harasser. This is highly problematic.

First, this language disregards long-standing rules governing the admissibility of evidence that were created to ensure that civil trials are fair to all parties. *See N.J.R.E.* 404(b); *N.J.R.E.* 403; *F.R.E.* 404(b); *F.R.E.* 403. Under those rules, judges must determine whether admission of prior acts or wrongs is necessary for proving important things such as a defendant's motive, intent, or knowledge. In doing so, judges must also carefully consider the inherent prejudice of such evidence. That is, jurors may easily prejudge the instant case if similar prior acts or wrongs (or alleged acts or wrongs) are allowed into evidence. Accordingly, prior acts or wrongs with little or no probative value are typically rejected from evidence to avoid the risk of undue prejudice to the defendant.

The above-quoted proposed language will eliminate this important gatekeeping function of judges, and result in unfair proceedings that are impossible for employers to defend against. For example, as mentioned above, employers with a national footprint often receive a significant number of harassment complaints in states across the country. Under this proposed language, *all* such complaints would be *admissible* at trial of an NJLAD claim regardless of their probative value. This will turn trials of NJLAD claims into free-for-alls.

The proposed language also disregards established rules for discovery in civil cases that exist to simultaneously ensure that parties have access to necessary information and prevent abusive discovery practices. *See N.J. Ct. R.* 4:10-2; *Fed.R.Civ.P.* 26(b). Referring again to the example of national or multi-state employers, all harassment complaints made to these employers would be discoverable under this proposed language. This will absolutely lead to oppressive discovery demands in *all* NJLAD cases against such employers. Faced with the astronomical expense associated with complying with such overbroad demands, employers operating in good faith will nevertheless be forced to settle illegitimate claims.

In sum, New Jersey's judges currently possess surgical tools to allow them to make precise rulings on disputes involving discovery and evidence in the pursuit of justice. The above-quoted language proposed by S3352 takes away those tools, and in their place, provides enterprising plaintiffs' attorneys with a sledgehammer to force quick and large settlements by employers. This does not further a fair and predictable civil justice system in New Jersey. For these reasons, NJCJI urges the sponsor to remove this language from S3352.

Legal Standard for Harassment Claims

Section 8 of S3352 articulates an entirely new legal standard for sexual harassment claims under the NJLAD. When coupled with the S3352's new policy and training requirements, this drastic shift in the law will create an unconscionable compliance puzzle for New Jersey employers. We urge the sponsor to reconsider this change, especially since the DCR has explicitly recommended against it.

In this regard, Section 8 provides, in relevant part:

> For purposes of this subsection, sexual harassment or other unlawful harassment shall be an unlawful discriminatory practice when it subjects an individual to inferior terms, conditions, or privileges of employment because of the individual's membership in any category protected by this subsection. The complainant need not show that the harassment was severe or pervasive. The fact that the individual did not make a complaint about the harassment to the individual's employer or other relevant organization shall not be determinative of whether the employer or organization is liable. Nothing in this section shall require an employee to demonstrate the existence of an individual to whom the employee's treatment is to be compared. It shall be an affirmative defense to liability under this subsection that the harassment does not rise above the level of what a reasonable victim of discrimination of the same protected category would consider petty slights or trivial inconveniences.
>
> (Emphasis added).

The New Jersey Supreme Court has long held that conduct must be "severe or pervasive" to sustain a claim for workplace harassment or a hostile work environment under the NJLAD. *See Lehmann v. Toys 'R' Us, Inc.*, 132 N.J. 587, 626 A.2d 445 (1993); *see also Taylor v. Metzger*, 152 N.J. 490, 498-99, 706 A.2d 685 (1998) (a single utterance of a racial epithet was sufficient to create a hostile work environment). For almost 30 years, New Jersey employers have formulated their internal policies and trained their employees in accordance with this standard. Courts have applied the standard to myriad fact patterns covering the entire spectrum of workplace conduct, and as a result, have developed a body of case law that both employees and employers can review to determine effective compliance.

For this reason, the DCR has expressly recommended against replacing the severe or pervasive conduct requirement with a completely new legal standard, citing concern for resulting confusion and unintended consequences. *See Preventing and Eliminating Sexual Harassment in New Jersey – Findings and Recommendations from Three Public Hearings*, New Jersey Division on Civil Rights, February 2020 (pgs. 27-28). S3352's total elimination of the severe and pervasive conduct requirement, without providing a clear alternative, will generate the legal uncertainty that DCR has warned about. Notably, how will employers develop effective discrimination and harassment policies and training as required by both S3352 and A4637 if they are unsure what the precise legal standard is?

Rather than eliminate the severe or pervasive conduct requirement, DCR recommends amending the NJLAD to clarify how this requirement should apply. Section 2 of A4637 appears to track DCR's recommendations in this regard. NJCJI's only concern with DCR's recommendations, as reflected in A4637, is Section 2(b)(1)(b)'s inclusion of subjective elements into threshold determinations of liability under the NJLAD. Our courts have long held that severe or pervasive conduct must be evaluated from the perspective of a reasonable person in the complainant's protected class. *Lehmann, supra,* 132 N.J. at 612-615. Our courts use an "objective rather than a

subjective viewpoint because the purpose of the [NJ]LAD is to eliminate real discrimination and harassment. It would not serve the goals of . . . equality to credit a perspective that was pretextual or wholly idiosyncratic." *Id.* at 612.

Allowing subjectivity to creep into threshold questions of liability is a double-edged sword. As the New Jersey Supreme Court noted in *Lehmann*, *supra*,

> An extraordinarily tough and resilient plaintiff might face harassing conduct that was, objectively viewed, sufficiently severe or pervasive to make the working environment hostile or intimidating, but because of her toughness, she might not personally find the workplace hostile or intimidating. Under our objective standard, such a plaintiff would state a claim even if she personally did not experience the workplace as hostile or intimidating. Sexual harassment is illegal even if the victim is strong enough not to be injured. Because such tough employees are perhaps the most likely to be strong enough to challenge harassers, the remedial purposes of the LAD are furthered by permitting claims by emotionally resilient plaintiffs without regard to subjective injury.
>
> Of course, the subjective reaction of the plaintiff and her individual injuries remain relevant to compensatory damages. However, a plaintiff's subjective response is not an element of a hostile work environment sexual harassment cause of action.
>
> 132 N.J. at 613.

In its current form, Section 2(b)(1)(b) of A4637 would hinder the ability of employees who have projected "toughness" or "resilience" in response to severe or pervasive workplace conduct to pursue claims under the NJLAD. By allowing subjective responses to be considered as part of the totality of the circumstances, employers will be able to marshal evidence that such employees were never bothered by such conduct or even participated in it to defeat liability. As the Supreme Court noted, this would undermine the remedial purpose of the NJLAD, which is to eliminate such conduct from the workplace whether it was tolerated by a particular employee or not.

In sum, S3352's elimination of the severe or pervasive conduct requirement will create a vacuum in the law that will harm employers who are operating in good faith. Plaintiffs' lawyers will exploit this vacuum to advance aggressive new theories of liability under the NJLAD that will be very difficult for employers to defend without the benefit of precedent. For these reasons, NJCJI respectfully submits that DCR's suggested clarification of the severe or pervasive conduct requirement (as reflected in A4637) should be adopted instead. However, Section 2(b)(1)(b) of A4637 should be revised to remove any reference to subjectivity.

In closing, NJCJI believes the legislature should eliminate sexual harassment in the workplace, housing, and education by advancing A4637, with minor tweaks, and reject S3352.