

PORZIO
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Thirteenth Annual
**Employment
Law Forum**



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Prescribing the Right Medical Accommodations

Presented by
Kerri A. Wright




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Overview: Applicable Law

Americans With Disabilities Act (ADA) (Prohibits discrimination on the basis of disability; requires reasonable accommodations).

New Jersey Law Against Discrimination (NJLAD) (Prohibits discrimination on the basis of disability; requires reasonable accommodations).



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You are In Good Company If you make these **MANDATORY**



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You are In Good Company

October 7, 2021, companies have instituted a vaccination requirement.

Thursday, October 7, 2021, job postings that list COVID-19 vaccination as a requirement jumped 20% in two months according to LinkedIn.

<https://www.saltbraves.com/wp-content/uploads/2021/10/4-Vaccination-Requirements-Board.pdf>

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Overview: New Mandates

New Jersey: Executive Orders

- Schools – public and private
- Health care facilities

Federal: Presidential Executive Order

- Private employers - 100 or more employees
- Private employers – contracts with federal government
- Private employers – health care workers (governed by Centers for Medicare & Medicaid Services (CMS))

Neither directive provides immunity from NJLAD or ADA

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Medical Accommodation Process

Key Questions to Ask

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Are you a covered employer under either the ADA or NJLAD?

Do you have ANY employees?
Then you are covered.



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Do you have an accommodation policy and a request form?



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Is the employee qualified for the job?

Can the employee perform the essential functions of the job with or without reasonable accommodation?




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Does the employee have a disability?

Does the employee have one of the following:


- a physical or mental impairment that substantially limits a major life activity;
- a record of a physical or mental impairment that substantially limited a major life activity;
- or
- is regarded as having such an impairment.



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Have you provided them with a medical certification form?



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You have the medical certification and have determined the employee is a qualified person with a disability.

Now what?

Interactive Process

- Back and forth
- Always document
- Make sure to include the employee




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You have the certification and have determined the employee is a qualified person with a disability.
Now what?

Reasonable Accommodation
Allows employee to perform the essential functions of his or her job without posing an undue burden on the employer or a direct threat to himself or others.



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You have the certification and have determined the employee is a qualified person with a disability.
Now what?

Undue Burden
Significant difficulty
Ask: Is it 'significantly' more difficult to readily hire temporary workers for specialized positions; provide employees with temporary assignments; remove marginal functions?

Significant expense
Ask: Is it a "significant" expense when compared to my entire budget?




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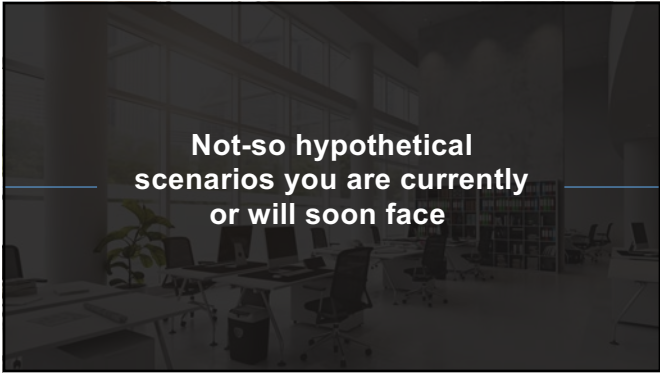
You have the certification and have determined the employee is a qualified person with a disability.
Now what?

Direct Threat

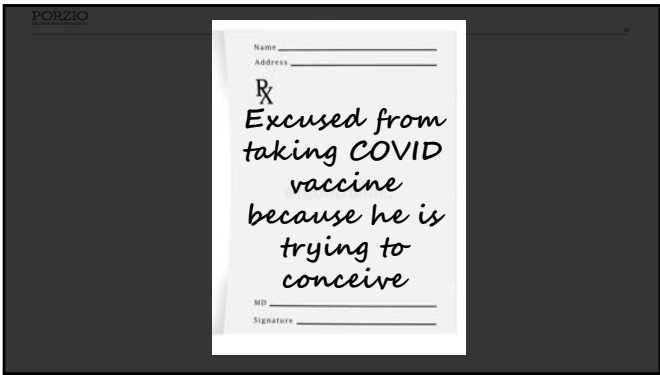
- EEOC has determined a person with COVID to be a direct threat to the health of others
- Therefore "an employer may choose to administer COVID-19 testing to employees before initially permitting them to enter the workplace and/or periodically to determine if their presence in the workplace poses a direct threat to others"



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Possible accommodations to offer during interactive process:

- Wear a face mask
- Work at a social distance from coworkers or non-employees
- Work a modified shift
- Get periodic tests for COVID-19
- Be given the opportunity to telework
- Accept a reassignment

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Name _____
Address _____

Rx


Excused from testing for COVID because patient is recovering from cancer

MD _____
Signature _____

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What am I supposed to do with this?

- Engage in the interactive process
- Doctor's note – make them give you one
- Second opinion - check with your own physician
- Offer an alternative – saliva test
- Conduct a direct threat analysis

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Name _____
Address _____

Rx

Excused from wearing a mask because of severe anxiety

MD _____
Signature _____

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Possible accommodations to offer during interactive process:

- Wear a different type of face covering
- Work at a social distance from coworkers or non-employees
- Relocate work location to a more isolated area
- Work a modified shift
- Get periodic tests for COVID-19
- Be given the opportunity to telework
- Accept a reassignment

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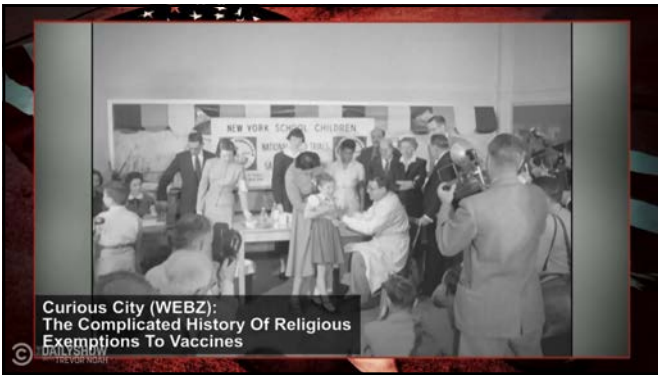
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Relevant Legal Authorities		
Title VII of the Civil Rights Act of 1964		New Jersey Law Against Discrimination
Executive Orders		Case Law

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Accommodations Standard: What is it?

Federal and state law prohibit employment discrimination based on religion. This includes refusing to accommodate an employee's sincerely held religious belief or practice, unless doing so would create an **undue hardship** or **direct threat**.

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Accommodations Standard: What does it mean?

"First, a religion **addresses fundamental and ultimate questions** having to do with deep and imponderable matters. Second, a religion is **comprehensive in nature**; it consists of a belief-system as opposed to an isolated teaching. Third, a religion often can be recognized by the presence of certain **formal and external signs**."

Fallon v. Mercy Catholic Medical Center of Southeastern Pennsylvania, 877 F.3d 487, 491 (3d Cir. 2017).



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Accommodations Standard: How do you evaluate whether it's been met?




Ask for justification

Ask for additional supporting information

Compare the information gleaned to standards set forth in case law

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Religious Accommodations Pre-Pandemic

- Biometric Scanning
- Work Schedules
- Leave/Burial Rites
- Head Scarf
- Personal Beliefs


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Religious Accommodations Pandemic

- A. v. Hochul*, 1:21-cv-1009, 2021 WL 4189533 (N.D.N.Y.)
- Crawford v. Trader Joe's*, 2021 WL 4077150 (C.D. Cal.)
- Lawton v. Summit Oaks Hosp., Inc.*, L-004235-21



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Best Practices


- Inform employees and applicants that they will make reasonable efforts
- Train managers and supervisors on how to recognize religious accommodation requests
- Develop internal procedures and policies
- Assess each request and avoid assumptions or stereotypes
- Confer fully and promptly to share any necessary information
- Train managers and supervisors to consider alternative accommodations

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Thank You!

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Not Your Mother's Maternity Leave:

2021 Considerations For Accommodating Pregnant Workers And New Parents

Presented by
Kathryn K. Forman



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Applicable Law

- New Jersey Law Against Discrimination (NJLAD)/Pregnant Workers Fairness Act (PWFA)
- New Jersey Family Leave Act (NJFLA)
- Title VII of the United States Civil Rights Act of 1964 (Title VII)/Pregnancy Discrimination Act (PDA)
- Family Medical Leave Act (FMLA)
- Fair Labor Standards Act (FLSA)/Affordable Care Act (ACA)



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- "An employer is also prohibited from discriminating against an employee because she has stated that she intends to become pregnant."
- "Adverse decisions relating to hiring, assignments, or promotion, that are based on an employer's assumptions or stereotypes about pregnant workers' attendance, schedules, physical ability to work, or commitment to their jobs, are unlawful."

Source: U.S. Equal Employment Opportunity Commission (E.E.O.C.), [Questions and Answers About The EEOC's Enforcement Guidance on Pregnancy Discrimination and Related Issues](#), June 25, 2015.

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Fertility Treatments

- GENDER
- DISABILITY
- SEXUAL ORIENTATION

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Pregnancy is **NOT** a disability, but it can require accommodation!

<p>New Jersey</p> <p>Heightened requirement for accommodating pregnant workers in some circumstances</p> <p><i>Delancy v. Twp. of Ocean</i>, 245 N.J. 394 (2021)</p>	<p>Federal</p> <p>Parity with other workers with disabilities; policies cannot disproportionately affect pregnant workers</p> <p><i>Young v. United Parcel Service, Inc.</i>, 575 U.S. 206 (2015)</p>
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Family Leave

< 30 employees or otherwise ineligible = duty to reasonably accommodate birthgiving parent's recovery from disability

NJ FLA	FMLA
30 employees	50 employees
1,000 hours in 12 months prior	1,250 hours in 12 months prior
12 weeks	12 weeks
Family member only	Self or family member
Equivalent of family relationship	Spouse/child/parent (includes step and adopted)
Unpaid	Unpaid

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Maternity Leave
Birth-giving parent recovering



Parental Leave
Parent did not give birth, or has recovered

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What do these companies have in common?



J.P. Morgan Chase




Jones Day



Estee Lauder


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• Intermittent leave
• Lactation breaks
• Family status discrimination?
• Retaliation?



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Questions?



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Thank You

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Independent Contracting Today: Are Those Workers Your Employees? Maybe Yes; Maybe No.

Presented by
Richard H. Bauch
Melanie D. Lipomanis



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Proving A Worker's Independent Contractor Status Is A High Bar To Meet In New Jersey



Employers should anticipate more administrative scrutiny over their relationships with independent contractors going in to 2022.

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New Jersey Is Cracking Down On Employers' Misclassification of Employees As Independent Contractors

1. New Laws
2. New Dedicated and Aggressive Agency Oversight
3. Increased Penalties and Fines
4. Stop Work Orders / Injunctions
5. New Legal Liabilities for Employers
6. Potential Criminal Liability



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The ABC Test
N.J.S.A. § 43:21-19

Who Qualifies as an Independent Contractor?

The Worker Who Performs the Work:

- A. Has the Right to Control
- B. Work Is Outside the Usual Course of Business
- C. Performs Work for Others

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Independent Contractor Case Law

Hargrove et. al. v. Sleepy's LLC, 220 N.J. 289 (N.J. Sup. Ct. 2015).
 In 2015, the New Jersey Supreme Court held that the "ABC" test derived from the New Jersey Unemployment Compensation Act governs whether an individual is an employee or independent contractor for purposes of resolving wage-payment and wage-and-hour claims.

Kennedy v. Weichert Co., 2021 WL 2774844 (N.J. Super. Ct. App. Div. July 2, 2021).
 On July 2, 2021, New Jersey's Appellate Court upheld a ruling finding that the ABC Test set forth in the unemployment statute is appropriate for determining whether real estate agents are independent contractors for purposes of New Jersey's Wage Payment Law ("WPL"), even though they are expressly excluded from the Unemployment Statute.

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Case Law Continued

Walfish v. Nw. Mut. Life Ins. Co., 245 N.J. 266, 267 (Feb. 12, 2021).
 Early this year the New Jersey Supreme Court certified the question of whether agents of insurance companies, customarily classified as independent contractors, were employees under the New Jersey Wage Payment Law.

JPRC, Inc. v. New Jersey Dep't of Labor and Workforce Dev., 2017 WL 3318300 (N.J. App. Div. August 4, 2017).
 The Appellate Division affirmed a Final Administrative Decision of the Commissioner of the Department of Labor and Workforce Development which determined that exotic dancers were employees under the ABC test, and assessed approximately \$9000 for unpaid contributions to the unemployment compensation fund and the State disability benefits fund.

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Case Law **Continued**

ABS Group Servs, Inc. v. Bd. of Review, 2014 WL 11291266 (N.J. App. Div. April 27, 2016)

Independent Contractor applied for disability benefits and was found to be an employee despite meeting all of the following factors:

- Written independent contractor agreement;
- He had control over his own work;
- All work was outside the usual course of business and off premises;
- Payment via invoicing and reported on 1099 Form.

Because the worker did not perform work for any other businesses, ABS was found liable for charges to the State plan for the worker's temporary disability claim.

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Immediate Employer/Business Action Items

1.

Review the businesses level of control over the work performed or services being provided by the Independent Contractors.

3.

Engage with the Independent Contractor to ascertain their level of work engagement with other entities and individuals outside of the business.

2.

Analyze whether the work actually being performed by the Independent Contractor is distinct from and outside the regular course of business.

4.

Ensure you have a legally sufficient executed work contract with the independent contractor; document the businesses justifications for classifying the worker as an independent contractor that includes an analysis and satisfaction of all 3 of the ABC factors.

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What To Expect If The Business Is Audited/Investigated By NJDOL



- Investigations usually arise when workers classified as independent contractors seek benefits related to employment such as unemployment, disability, or worker's compensation benefits.
- Audits may also be random under the new powers of the Office of Strategic Enforcement and Compliance ("OSEC").
- Gather all documentation related to the independent contractor's services including contracts, work orders, invoices, and the businesses written justifications for treating the worker as an independent contractor.
- Engage outside counsel to assist in the audit/investigation to ensure all legal requirements and applicable tests are met.

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Thank You

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Cannabis:
Considerations for
Employment
How to better protect your business

Presented by
Beau W. Huch
Ivan Tukhtin



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Federal Overview

- Cannabis remains illegal under Federal Law – Controlled Substances Act
- DEA / FDA / Department of Agriculture
- States continue to pass laws legalizing cannabis
 - Some state laws have express or implied employee protections
 - Litigation is growing, with a trend supporting employees who use cannabis for medical reasons




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Federal Overview

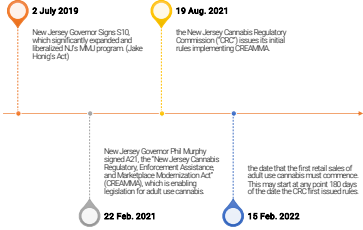
- Until/unless SCOTUS rules or federal law changes, employers are in a precarious space – especially when it comes to discipline
- What is the difference between *marjuana*, *cannabis*, and *hemp*? What are Isolates?



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CANNABIS IN THE GARDEN STATE: Where are we now and how did we get here?



2 July 2019
New Jersey Governor Signs S10, which significantly expanded and liberalized the MAU program (aka Hong's Act)


19 Aug. 2021
the New Jersey Cannabis Regulatory Commission ("CRC") issues its initial rules implementing CREAMMA.

22 Feb. 2021
New Jersey Governor Phil Murphy signed A21, the "New Jersey Cannabis Regulatory, Enforcement Assistance and Workplace Modernization Act" (CREAMMA), which is enabling legislation for adult-use cannabis.

16 Feb. 2022
the date that the first retail sales of adult-use cannabis retail commenced. This may start at any point 180 days of the date the CRC first issued its rules.

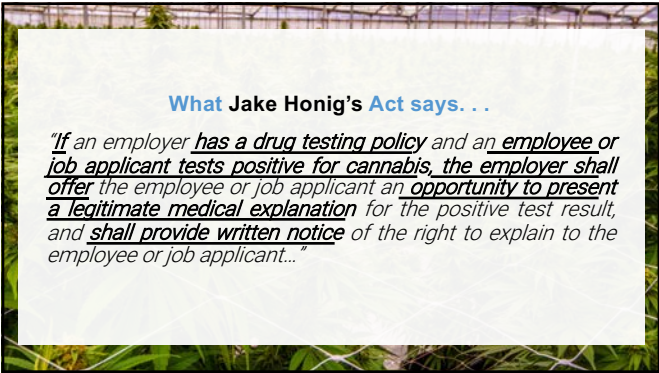
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What is Jake Honig's Act?
Who was he, and what does the law do?
Mike, Janet, and Gianna....
Why do I have this pen?

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What Jake Honig's Act says . . .

*"If an employer **has a drug testing policy** and an **employee or job applicant tests positive for cannabis**, the employer shall offer the employee or job applicant an **opportunity to present a legitimate medical explanation** for the positive test result, and shall provide **written notice** of the right to explain to the employee or job applicant..."*

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What is CREAMMA?

The recreational cannabis enabling legislation which contains the framework for the adult use marketplace. ("The Regs").

Key Employment Considerations:

- Establishes nondiscrimination rules for recreational cannabis users
- Codifies that employers do not have a duty to accommodate cannabis use in the workplace
- Establishes procedures for employer drug testing***

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What CREAMMA Says:

no employer shall ... **take any adverse action** against any employee ... **because that person does or does not** smoke, vape, aerosolize or otherwise **use cannabis** items, and an employee **shall not** be subject to any **adverse action** by an employer **solely due to the presence of cannabinoid metabolites** in the employee's bodily fluid. . .

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What Does a Drug Test Test For?

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What Can Employers Still Do?



May still prohibit cannabis and impairment in the workplace

- **MUST** have a **"drug and alcohol free"** workplace.
- Not required to accommodate the use, possession, sale, or transfer of cannabis or hashish **in the workplace**
- **May** drug test.... But with a few caveats.


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What Can Employers Still Do?

Discrimination on the basis of use is prohibited.

- **CANNOT** refuse to hire or employ unless prohibited by Federal contracting requirements, if it would jeopardize federal funding, or if in safety sensitive position.
- **CANNOT** take any adverse action against employee or applicant **SOLELY** because they use cannabis or based on a positive test for cannabis metabolites.



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What Types of Drug Testing is permissible?

CAN still conduct drug testing for cannabis:

- Pre-employment (But if positive cannot be reason for not hiring)
- Random (Must have Workplace Policy)
- Post accident
- Reasonable suspicions of use while at work
- Observable signs of intoxication


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CREAMMA and Drug Testing

CREAMMA has Two Components to a Drug Test:

1. Scientifically reliable objective testing methods (blood/urine/saliva), AND
2. Physical examination by a DRE or WIRE **



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CREAMMA and Drug Testing

WIRE: Workplace Impairment Recognition Expert:

- The CRC is to create training and Certification, in consultation with Police Training Commission – **Issue: *State v. Olenowski***
- WIRE is trained to detect and identify if an employee uses or is impaired from cannabis or other substances
- Meant to assist investigation of workplace accidents
- Can be full time or part time positions, or outside vendors.



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What CREAMMA Says on WIRE:

...the commission, in consultation with the Police Training Commission, shall **prescribe standards** in regulation **for a Workplace Impairment Recognition Expert ("WIRE")** certification, to be issued to full- or part-time employees, or others contracted to perform services on behalf of an employer, **based on education and training in detecting and identifying an employee's usage** of, or impairment from, **a cannabis item or other intoxicating substance**, and for assisting in the investigation of workplace accidents.

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The BIG catch...

Notwithstanding the provisions of N.J.S.A. 24:61-52, ***until such time*** that the Commission, in consultation with the Police Training Commission established pursuant to N.J.S.A. 52:17B-70, ***develops standards*** for a Workplace Impairment Recognition Expert certification, ***no physical evaluation of an employee being drug tested in accordance with N.J.S.A. 24:61-52 shall be required.***

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Additional Considerations for Pre-Employment

Asking about Cannabis Criminal History?

HARD STOP!!

The law provides that employers may not **rely on, require an applicant to disclose, or take any adverse action against an applicant on the basis of any arrest, charge, conviction, or adjudication of delinquency** related to **cannabis manufacture, distribution, or possession when making an employment decision**. These provisions do not apply to positions in law enforcement, corrections, the judiciary, homeland security, or emergency management.

The Commissioner of the New Jersey Division of Labor and Workforce Development enforces civil penalties for violations. Employers that violate Section 15 can be fined up to **\$1,000 for the first violation, \$2,000 for the second violation, and \$10,000 for each subsequent violation**.



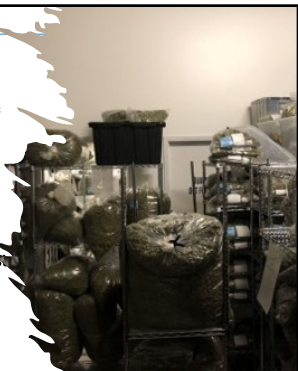
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CREAMMA:

Recap of Drug Testing Limitations

- A negative drug test **cannot** be the sole basis for revocation of job offer or other adverse employment actions.
 - Use other objective factors: i.e., work performance, accidents, or other questionable conduct.
- BUT – can use the results of a failed drug test and eventually a WIRE assessment when determining appropriate employment action (including up to termination).



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CREAMMA:

Recap of Drug Testing Limitations

Interplay with Compassionate Use Medical Cannabis Act:

- Upon positive Drug test, require:
 - Giving the applicant written notice of the opportunity to present "legitimate medical explanation..."
 - Employee gets 3 working days to explain the positive test result or request a retest of the original sample (at employee's expense).



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GOING FORWARD

New Jersey employers should consider working with experienced employment counsel to determine whether to:

- Modify their offers of employment, and consider making their workplace **a drug and alcohol-free** workplace
- Modify their procedure for employment offers
- Modify their drug testing practices for prospective and current employees
- And.... eventually... provide training to managers tasked with making reasonable suspicion determinations, and determine the best person to serve as the employer's WIRE.

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Thank You

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COMPLIANCE SERVICES

Employment Investigations

Knowing Your Employees From Onboarding Through Separation

Presented by
Kevin M. Craig
Porzio Compliance Services

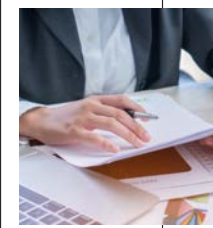


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About Porzio Compliance Services

		
Safety	Security	Investigations
<ul style="list-style-type: none"> Emergency Planning Policies and Procedures Threat Assessment Compliance Review Pandemic Mitigation 	<ul style="list-style-type: none"> Physical Security Security Assessments Workplace Violence Information Security Training and Exercises 	<ul style="list-style-type: none"> Pre-Employment Employee Misconduct Open-Source Intelligence Cyber Crime Social Media Monitoring Litigation Support

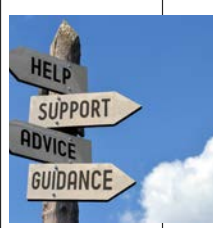
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Pre-Employment Investigations

- Thoroughly Screen Employees *BEFORE* Hiring
- Application and Interview
- Criminal History/Fingerprint Checks
- Previous Employers/Discipline
- Employment Gaps
- Executive and Employee Due Diligence
- Social Media

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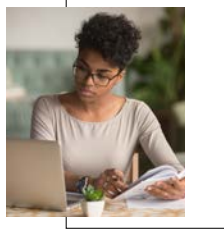
Reporting, Investigating, and Addressing Employee Concerns

- Employee Awareness Training
- Mechanism For Reporting Concerns
- Investigate All Reports
- Preserve Evidence To Support Actions
- Address Behavior Appropriately
- Threat Assessment and Management
- External Intervention

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Pandemic Related Issues
Securing the Remote Workforce

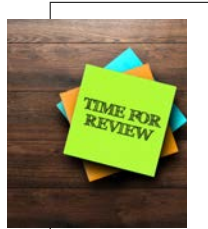
- Investigations Involving Remote Employees
- Securing Remote Meetings
- Report Issues or Concerns
- Cyber Investigations



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Evaluating and Documenting Employee
Performance and Behavior

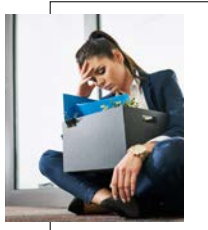
- Establish Clear Expectations
- Performance Evaluations
- Address Inappropriate Behavior
- Document Poor Performance And Behavior



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Employee Separation and Termination

- Assess The Risk and Reactions
- Prepare Documentation
- Meeting Considerations
- Connect Behavior To Policy Violation
- Conflict Mitigation Plan
- Threat Assessment and Management



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Workplace Investigations: Key Takeaways



- ❑ Thoroughly Screen Employees *BEFORE* Hiring
- ❑ Develop and Disseminate Policies and Train Staff
- ❑ Regularly Evaluate and Document Performance
- ❑ Provide Reporting Mechanisms For Concerns
- ❑ Investigate and Address Misconduct
- ❑ Plan For Terminations/Exit Interviews
- ❑ Monitor Social Media For Organizational Risk
- ❑ Investigations Are A Key Component of Safety and Organizational Integrity

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Thank You

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Government Authority During the Pandemic

A review of the emergency executive powers and how they were utilized - and checked - during COVID

Presented by
David C. Hespe
Sal M. Anderton



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Bills Signed By The Governor

Expanding protections against age discrimination by employers- A. 681. The bill expands the scope of the Law Against Discrimination (LAD) by:

- Implementing a higher standard for a government employer in terms of setting a mandatory retirement age;
- Eliminating the provision of the law that allows employers not to hire or promote workers over 70 years old;

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Bills Signed By The Governor

- Removing the provision within the law that permits higher education institutions to require tenured employees to retire at 70 years old; and
- Expanding the remedies available to an employee required to retire due to age to include all remedies available under the LAD and not just reinstatement of employment with backpay.

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Bills on the Governor's Desk

A3027- Workforce Development.

Commits \$3 million from Supplemental Workforce Fund for Basic Skill to NJ Community College Consortium for Workforce and Economic Development.

A4544 - Employment of retired school nurses.

Permits school nurse who is retired from TPAF to return to employment for up to two years without reenrollment in TPAF.

S3505 - Establishes unemployment claims handlers.

Requires the Department of Labor and Workforce Development to assign at least one full-time unemployment claims handler to each legislative district and partisan office. Appropriates \$1.8 million.

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Emergency Executive Orders

- Much of the legal guidance we have received over the past year has come from Emergency Executive orders based in the declaration of an emergency in Executive Order 103. However, these executive powers are poorly understood.
- NJ State Constitution vests Executive Powers with the Governor.

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Emergency Executive Orders

- Overview of Statutory Emergency Declarations
 1. Disaster Control Act, N.J.S.A. App.A:9-33, Et Seq. Broadly applicable to disasters from weather to earthquakes to pandemics to strikes.
 2. Emergency Health Powers Act, N.J.S.A. 26:13-1 Et Seq. Focused on health disasters.
 3. Domestic SecurityPreparedness Act, N.J.S.A. App.A:9-64 Et Seq. Focused on terrorism or other technological disaster.

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Declaration of Emergency

- A Declaration of Emergency is the first step in the process as it opens the door to implementation of directives through executive orders.
- The declaration of an emergency in and of itself does not establish directives, ie. travel restrictions during a weather emergency, which is done through subsequent executive orders.
- The emergency is intended to be limited in time (30) days but can be continued. N.J.S.A. 26:13-3(b).
- The emergency ends when the Governor terminates it.

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Enforcement

- All Orders of the Governor shall be binding on all political subdivisions, agencies and employees of the State and on each and every person in the State. N.J.S.A. App.A:9-45
- The State Legislature has established criminal penalties for individuals who violate these Executive Orders. Violators are tried in the Municipal Court of the municipality where the violation has occurred. These "Disorderly Persons Offenses" are punishable up to six months in jail and a fine of \$1,000.00.
- Aiding and abetting a violation is also an offense.
- The executive orders may also establish other enforcement mechanisms, for example, through the attorney general and civilian defense director (State Police OEM)

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Legislative Oversight

- Given that the emergency acts to suspend normal law-making processes, the continuation of the emergency for long periods of time may lead to tension with the Legislature.
- After over a year of monthly extensions (from March 9, 2020), Governor Murphy negotiated with legislative leadership an end to the Health Emergency by signing into law (A.5820) in June of this year. Not applicable to future Executive Orders. N.J.S.A. 26:13-32
- Most Executive Orders that relied upon the Public Health Emergency expired 30 days after the law's effective date.

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Powers of the Executive

- Utilize and employ all resources of the State and of local governments, including personal services and privately owned property. N.J.S.A. App.A:9-34
- Take all reasonable and necessary measures to prevent transmission of infectious disease or exposures. N.J.S.A. 26:13-12
- Appoint a civilian defense director and State Director of Emergency Management (Superintendent of State Police). N.J.S.A. App.A:9-37
- Comander personal services and private property subject to just Constitutional and statutory provisions requiring just compensation. N.J.S.A. App.A:9-51


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**“YOU’RE ON MUTE!”
OPTIMIZING THE
PERFORMANCE OF YOUR
REMOTE WORKERS**

Presented by
[Marie-Laurence Fabian](#)
[David Schloss](#)




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Tracking Hours

- Exempt Employees: Salary Same Whether in Office or Remote
- Non-Exempt Employees: Must Track Hours for Purposes of Overtime




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Tracking Hours

Non-Exempt Employees:

- Create process for reporting hours worked, including unscheduled hours and require its consistent use
- Make sure you are aware of work you have **suffered or permitted**
- Even if not specifically requested – It's compensable per 29.C.F.R. §758.11



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The Continuous Workday Rule



- Between *commencement and completion* on same workday of employee's *principal activity*. 29 C.F.R. §790.6.
- Does not include normal commute to work
- Set a schedule of start and end times for 100% remote workers

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Multistate Relocation

- Know Wage & Hour Laws in State Where Employees are Working Remotely
- Record-keeping burdens
- Reimbursement of business expenses



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Jurisdictions That Require Reimbursement

California	Illinois	Iowa	Montana
Massachusetts	New Hampshire	North Dakota	Washington, D.C.
Seattle	South Dakota	Of course, all of them are different!	

111

Caution!

- Failure to Compensate for Business expenses = Under Minimum Wage
- Employees Must Receive Wages *Free and Clear* – 29 C.F.R. §531.35
- Is employee paying for *tools of the trade specifically required for performance?*



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Employment Posters



Some remote
physical posters for onsite employees;
electronic posting for teleworking employees.

Entirely remote
electronic-only means

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Leave Issues



- Family and Medical Leave Act (FMLA) Applies.
- Employee's personal residence is not a *worksite*.
29 C.F.R. § 825.111(a)(2)
- Worksite is *office to which the employee reports from which assignments are made*.

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Tax Issues

Law regarding tax withholding for non-resident employees may change depending on whether they are hybrid or fully remote.



115

“Remote work is the future of work”

“As we’ve moved to virtual work, we haven’t just coped, we’ve actually thrived. We are more focused on the things that have the greatest impact for our customers, associates and the business. We are making quicker decisions and acting. Meetings are now more inclusive of people regardless of location, level, or other differences. We have great momentum and need to figure out how to carry it forward.” -Suresh Kumar, CTO at Walmart

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Remote Work: “New Normal”

PROS	CONS
Greater Talent Pool	More Challenging to Manage Employees
Greater Retention	Loss of Team Spirit
Infrastructure Savings	Home Office Costs
Extends Operational Hours	Fewer Face to Face Interactions
More Time with the Family	More Time with the Family

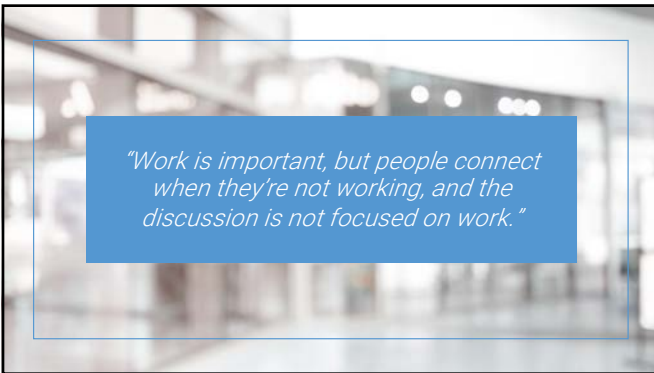
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Building Relationships In Remote Workplaces

- Without face-to-face contact a lot is lost
- Encourage your team to meet up in person
- Talk non-work stuff with your team
- Write better!
- Know when to email, text, IM, call, video chat

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"Work is important, but people connect when they're not working, and the discussion is not focused on work."

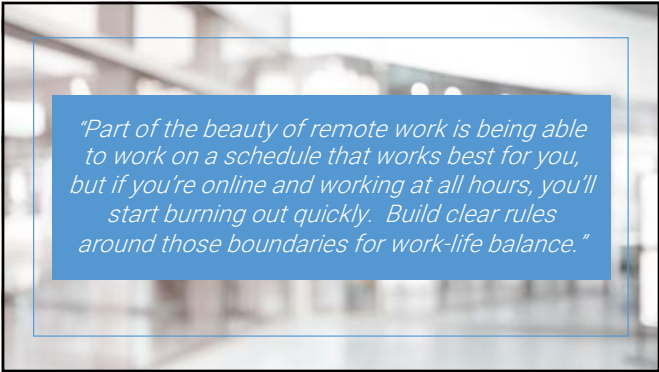
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Maintain Work/ Life Balance


- Begin with a morning routine
- Limit emails to office hours
- Design discreet home office space
- Close your laptop at 5:30 every day
- Take advantage of the time you used to waste commuting



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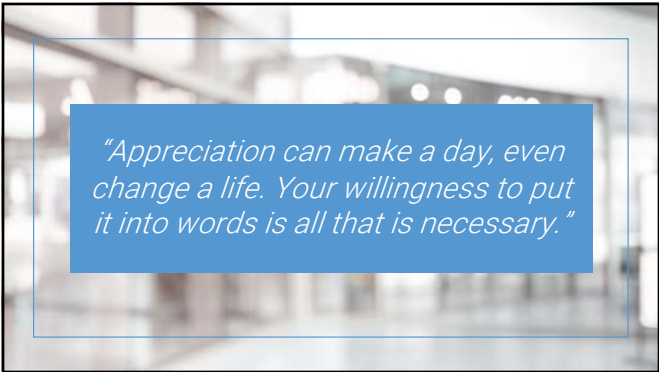
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Reward & Celebrate Remotely

- Handwritten thank you notes
- Virtual catered lunches and happy hours
- Acknowledge work anniversaries, birthdays
- Days of appreciation or service
- Informal and peer-to-peer recognition programs
- Mental health days

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How to Effectively Manage Remotely



- Set clear expectations
- Define work objectives and timelines
- One-on-ones
- Provide performance feedback
- Be honest when they take advantage of your trust
- Trust your employees

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"One of the secret benefits of using remote workers is that the work itself becomes the yardstick to judge someone's performance."

125

Remote Work is the Future of Work

"Success in a hybrid work environment requires employers to move beyond viewing remote or hybrid environment as a temporary or short-lived strategy and to treat it as an opportunity."

—George Penn, VP at Gartner



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**Political Employees
Employers' rights,
legal obligations, and
practical responses**

Presented by
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Thomas J. Reilly



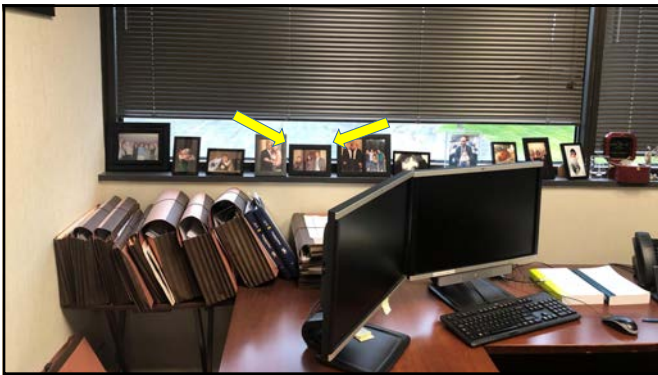
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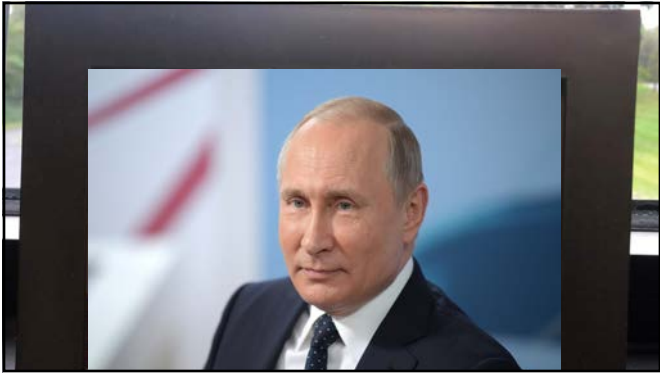
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Employee Protections

- **Private Employers**
 - No First Amendment protection for employees
 - But...
 - National Labor Relations Act
 - State Laws
- **Public Employers**
 - First Amendment Protection
 - But...
 - Limited in a variety of ways
- **Protecting Employees From Each Other**
 - Harrassment claims
 - Hostile Work Environment claims



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**Political Activity
In the Office**



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POLITICAL SLOGANS AT WORK


- *Frith v. Whole Foods Mkt., Inc.*, D. Mass.
- Can employees wear "Black Lives Matter" masks at work?
- Unequal Treatment?
- Dress Code
 - "No visible slogans, messages, logos, or advertisements."
- Court
 - Policy
 - Uniform Application



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Playing With The Facts



What if the employees had a different message?

What if the employees were all one race or religion?

What about the retaliation claims under the NLRA?

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**POLITICAL ACTIVITY
IN THE OFFICE**



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Playing With The Facts

What if the employees had a different message?

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**POLITICAL ACTIVITY
IN THE OFFICE**



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Playing With The Facts




What if the employees had a different message?

What if the employees were all one race or religion?

What about the retaliation claims under the NLRA?

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What about public employers?

- Constitutional protections apply.
- Matters of "public concern" are protected when not tied to "official duties."
 - *City of San Diego v. Roe*
 - *Pickering v. Board of Education*
 - *Garcetti v. Ceballos*



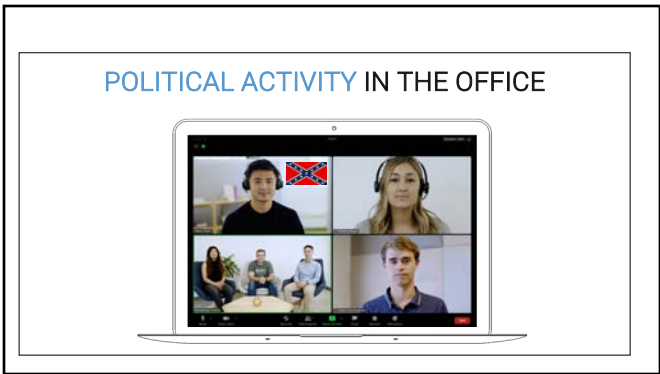
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The Workplace Is Increasingly Broad

- Private employers have substantial latitude.
- All employers can:
 - prohibit profane and malicious speech
 - prohibit speech that is disruptive or affects productivity
 - protect against harassment and hostile work environment claims



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Political Activity Outside The Office

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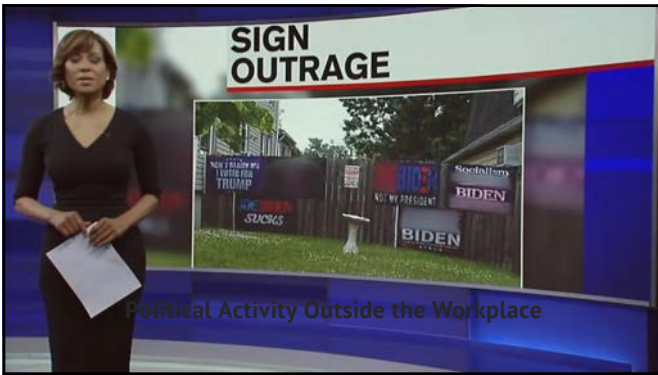
Political Activity Outside the Workplace



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Off-Duty Speech

Employers can prohibit employees from using their logo, confidential information, and proprietary information

- *Boeing Co.*, 365 NLRB No. 154 (2017)
- NLRB Advice Memorandum (Lyft Co.) (July 13, 2018)
- Employers *must* have a policy



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POLITICAL ACTIVITY OUTSIDE THE OFFICE

HENRY BORDEN

MAYOR

162

Can You Fight City Hall?

- Employers can discipline employees for violations of company policy, directives, and rules
- *Shovelim v. Central New Mexico Electric Coop.* – employee terminated after winning mayoral election



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Recommendations

- | | | |
|-------------------|--|---------------------|
| Dress Code Policy | Political Activity in the Workplace Policy | Social Media Policy |
| Zoom Protocol | Train Managers | Notify Employees |

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**LET'S "JUDGE"
FOR OURSELVES**

Presented by
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Hon. Maurice J. Gallipoli
Hon. Alvin Weiss
Hon. Jack L. Lintner



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REMOTE WORK

Leone v. Essex County Prosecutor's Office
An assistant prosecutor alleges his employer discriminated against him by denying his religious accommodation request to work from home indefinitely as pandemic remote-work schedules were phased out.

Peeples v. Clinical Support Options
Social worker claimed an entitlement to remote work because he suffered from asthma and was particularly susceptible to COVID-19.

Jordan v. Crossroads Care Center of Kenosha, LLC
Human resources and payroll manager sought to continue working remotely due to her being pregnant, having gestational diabetes, and previously working remotely during the pandemic.

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VACCINE MANDATE

In the Matter of the City of Newark
Union challenged an executive order issued by the City of Newark's Mayor mandating that all City employees be fully vaccinated against COVID-19.

Klaassen v. Trustees of University of Indiana
Students alleged the University's requirement that they either be vaccinated against COVID-19 or wear masks and be tested twice a week violated their constitutional rights.

Dahl v. Board of Trustees of Western Michigan University
Members of University's soccer team alleged constitutional and statutory violations from University's denial of religious exemption to COVID-19 vaccination requirement for student athletes.

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