

Employment Law

TRICO JIF: 2022 ANNUAL PLANNING RETREAT

HOT TOPICS IN EMPLOYMENT LAW

AGENDA

Diversity in Hiring Practices

The Use of Recreational Marijuana

Gender Neutral Policies

SAM Regulation Compliance – Volunteer Groups

Pregnant Workers Fairness Act



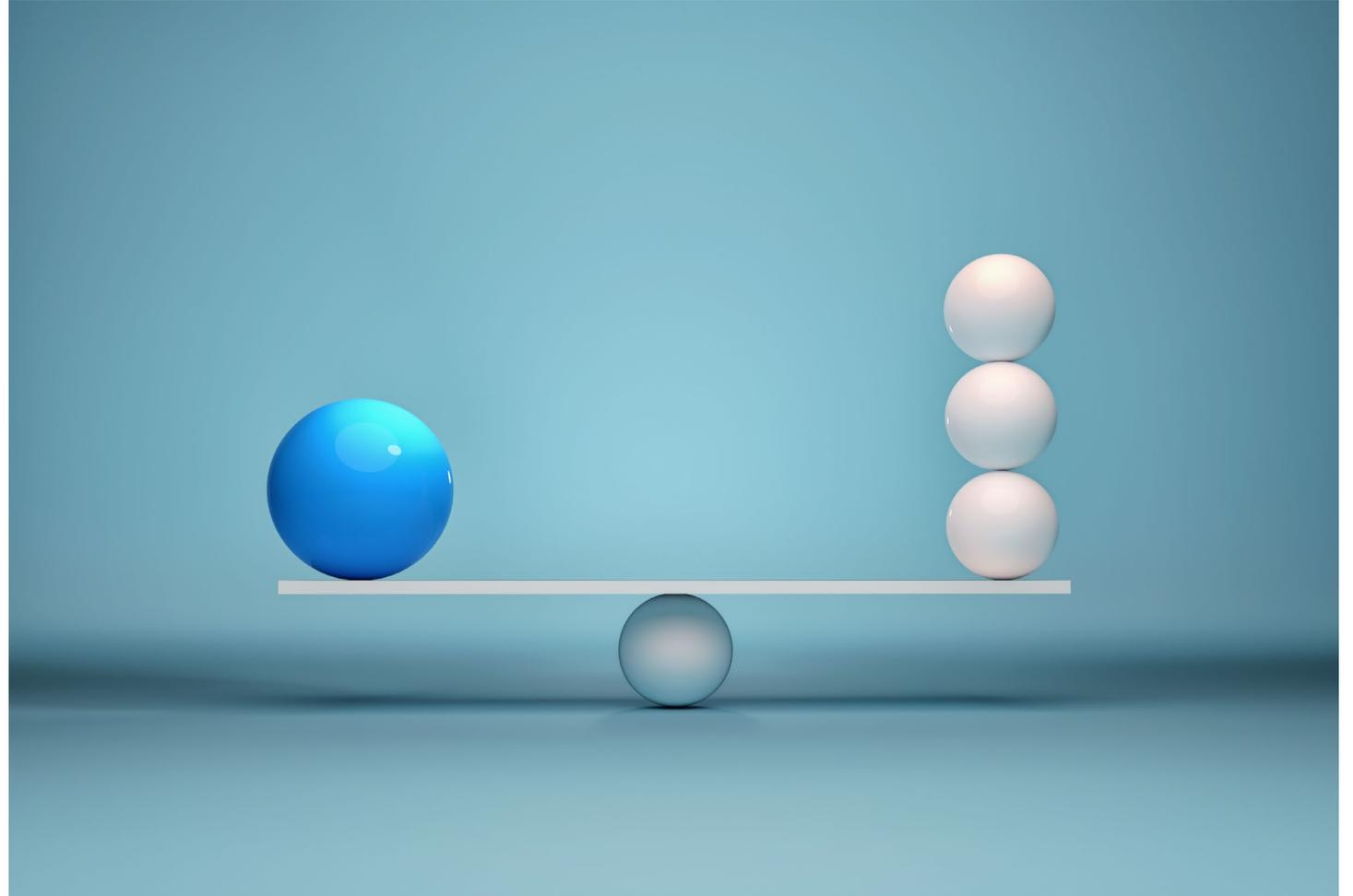
DIVERSITY IN HIRING PRACTICES

1



FINDING THE BALANCE IN HIRING DIVERSITY

Examining your work force,
how you advertise for
candidates, who makes
hiring decisions, and how.



HOW DIVERSE IS YOUR WORKFORCE?

- Does it reflect the diversity in your municipality?
- Where have you gotten your employees from – are they predominantly relatives or friends of existing employees?
- How do you recruit? In house postings? Website? Consider expanding to social media, local schools.
- Look at your job descriptions and requirements.
- Who makes hiring decisions for entry level hires?
- What does your online presence communicate about diversity.

Diversity hiring can be defined as purposely considering job candidates from a variety of backgrounds and taking steps to ensure that hiring practices are completely inclusive and free from barriers and biases based on a candidate's race, ethnicity, gender, religion and other characteristics that have nothing to do with job performance.

Danni White

Best Diversity Hiring Practices and its challenges.

<https://resources.experfy.com/future-of-work/best-diversity-hiring-practices-and-its-challenges/>



NEW JERSEY'S LEGAL "BUMPERS".

Bias in Hiring Violates the NJLAD

The candidate is a member of a protected class.

The candidate is qualified for the position sought.

The candidate is denied the position.

Someone with similar/lesser qualifications was hired or position was kept open & candidates were sought.

Reverse Bias can also Violate the NJLAD

The background circumstances must demonstrate the conclusion that the defendant is the unusual employer who discriminates against the majority.

Was race a determining factor?

Is there an agenda?

Has an affirmative action plan been adopted?



DEFENSES TO ACCUSATIONS OF BIAS

Although the LAD forbids unlawful, discriminatory employment practices, it “acknowledges the right of employers to manage their businesses as they see fit.” *Viscik*, 173 N.J. at 13. “What makes an employer's personnel action unlawful is the employer's intent.” *Zive v. Stanley Roberts, Inc.*, 182 N.J. 436, 446 (2005) (citing *Marzano v. Comput. Sci. Corp.*, 91 F.3d 497, 507 (3d Cir. 1996)).

JYOTSNA VIBHAKAR, Plaintiff-Appellant, v. STATE OF NEW JERSEY, STATE OF NEW JERSEY DEPARTMENT OF HUMAN SERVICES, ANN KLEIN FORENSIC CENTER, JENNIFER VELEZ, ELIZABETH CONNOLLY, GLENN FERGUSON, ANN KENYON, LINDA ELIAS, & VALERIE BAYLESS, Defendants-Respondents., No. A-1366-20, 2022 WL 2448297, at *3 (N.J. Super. Ct. App. Div. July 6, 2022)



**THE EXISTENCE OF AN
AFFIRMATIVE ACTION
PLAN CAN SERVE AS A
LEGITIMATE
NONDISCRIMINATORY
REASON FOR
CONSIDERING RACE IN AN
EMPLOYMENT DECISION**

We hold that race can be considered in an employment decision only pursuant to and in accordance with an established affirmative action plan. Without such a plan in place, an employer would be in violation of Title VII and the LAD. An affirmative action plan serves to assure that the employer's motive in considering race was to correct a well founded under-representation of minorities and that no unlawful purpose was at issue.

Klawitter v. City of Trenton, 395 N.J. Super. 302, 333, 928 A.2d 900, 918–19 (App. Div. 2007)

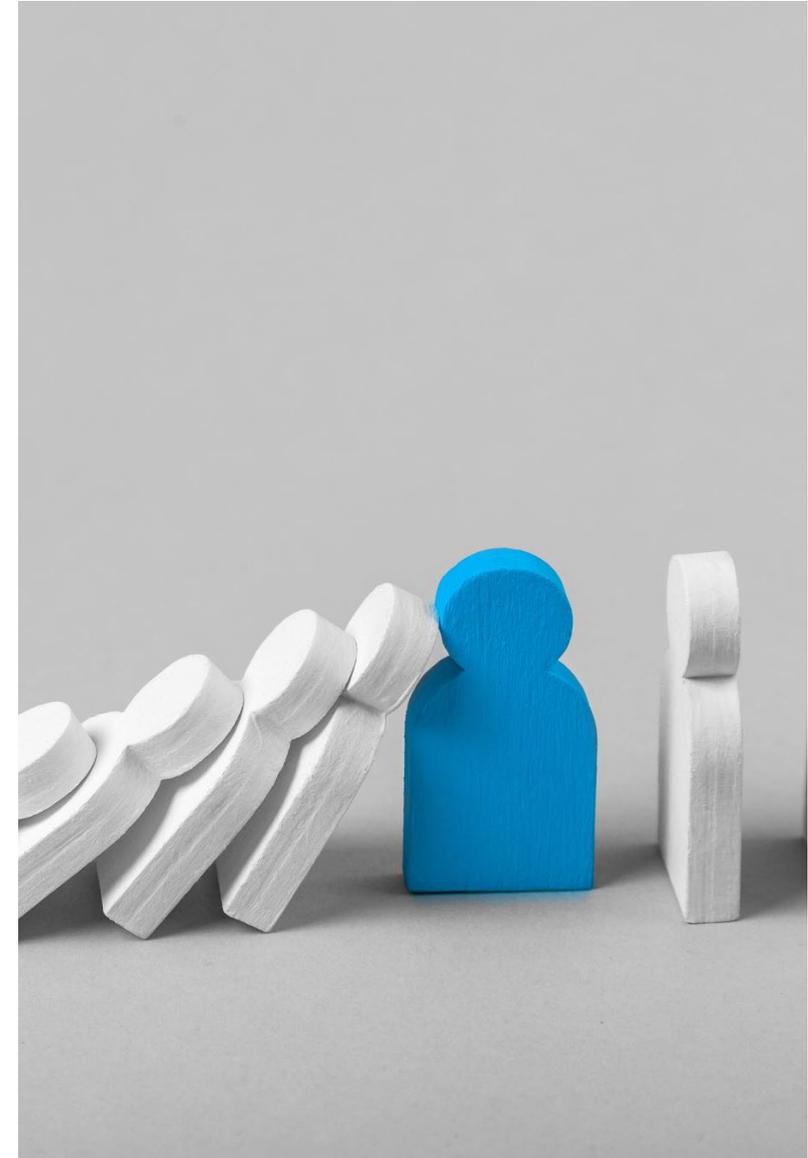


DEFENSES, POLICIES, AND PROCESSES

Articulate a legitimate business reason for the decision.

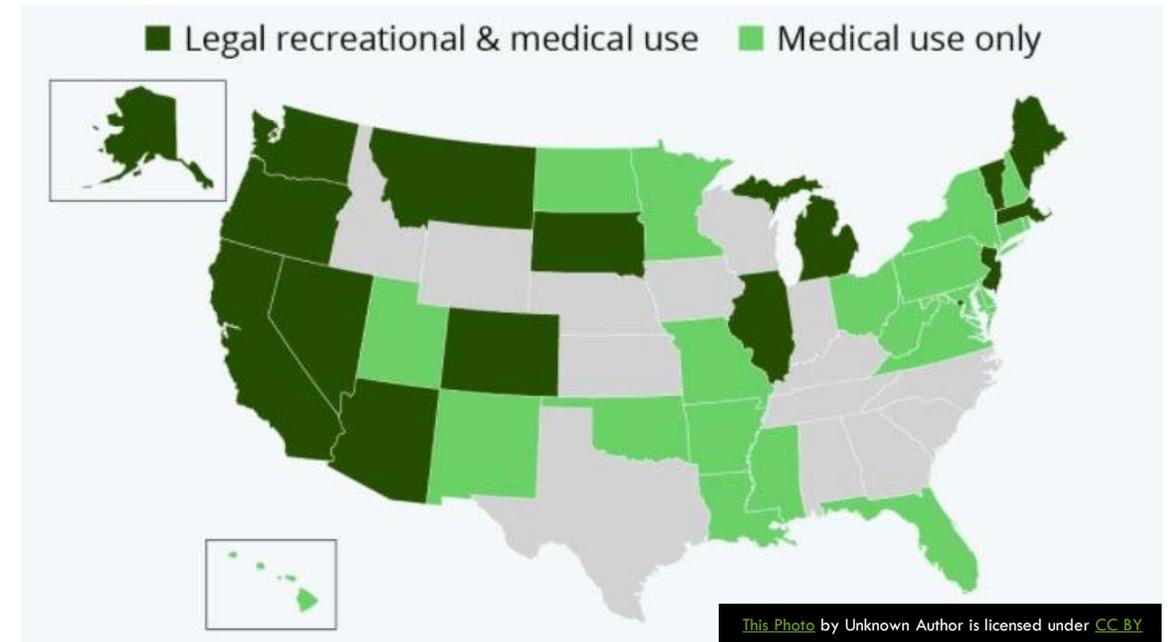
Establish, communicate, and most importantly *follow* policies and processes.

Document the processes employed.



THE USE OF RECREATIONAL MARIJUANA

02



NEW JERSEY'S LEGALIZATION OF MARIJUANA USE FOR MEDICAL AND RECREATIONAL PURPOSES AND HOW IT IMPACTS EMPLOYERS.



Jake Honig
Compassionate
Use Medical
Cannabis Act

24:6I-52. Protection from employment discrimination; construction of act with respect to driving under the influence, consumption by minors, and consumption in certain facilities; rights of property owners

New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act.”

Sorting through the clutter.

The 2019 legislation allowing medicinal marijuana use and the 2021 legislation implementing the legalization of recreational marijuana have left employers puzzling about what they can and cannot do about employee marijuana use.

What remains true is that:

Nothing in P.L.2021, c. 16 (C.24:61-31 et al.):

(1)(a) Requires an employer to amend or repeal, or affect, restrict or preempt the rights and obligations of employers to maintain a drug- and alcohol-free workplace or require an employer to permit or accommodate the use, consumption, being under the influence, possession, transfer, display, transportation, sale, or growth of cannabis or cannabis items in the workplace, or to affect the ability of employers to have policies prohibiting use of cannabis items or intoxication by employees during work hours;

WHAT HAS THE NEW JERSEY SUPREME COURT SAID?

We add only that two particular provisions of the Compassionate Use Act may affect a LAD discrimination or failure to accommodate claim in certain settings. In N.J.S.A. 24:61-14 (2018), the Legislature provided that “[n]othing in [the Compassionate Use Act] shall be construed to require ... an employer to accommodate the medical use of marijuana in any workplace.” In N.J.S.A. 24:61-8 (2018), the Legislature further stated in part that the Act “shall not be construed to permit a person to: a. operate, navigate or be in actual physical control of any vehicle, aircraft, railroad train, stationary heavy equipment or vessel while under the influence of marijuana.” To the extent that the circumstances surrounding a LAD disability discrimination claim were to implicate one or both of those provisions of the Compassionate Use Act, the Act would have an impact on that claim.

Wild v. Carriage funeral Holdings, Inc. 241 N.J. 285 (2020)



SUGGESTIONS AND DISCUSSION

Employers are permitted to maintain drug free workplaces.

No employer must accommodate the use of marijuana in the workplace or being under the influence during working hours or on the job.

Employees under the influence of marijuana – can be disciplined and dismissed as a consequence of their conduct not the use of marijuana.

Workplace rules can and should address the dangers of being under the influence on the job.

Legislation is pending addressing the recreational use of marijuana by law enforcement personnel.

Federal law may impact this area.

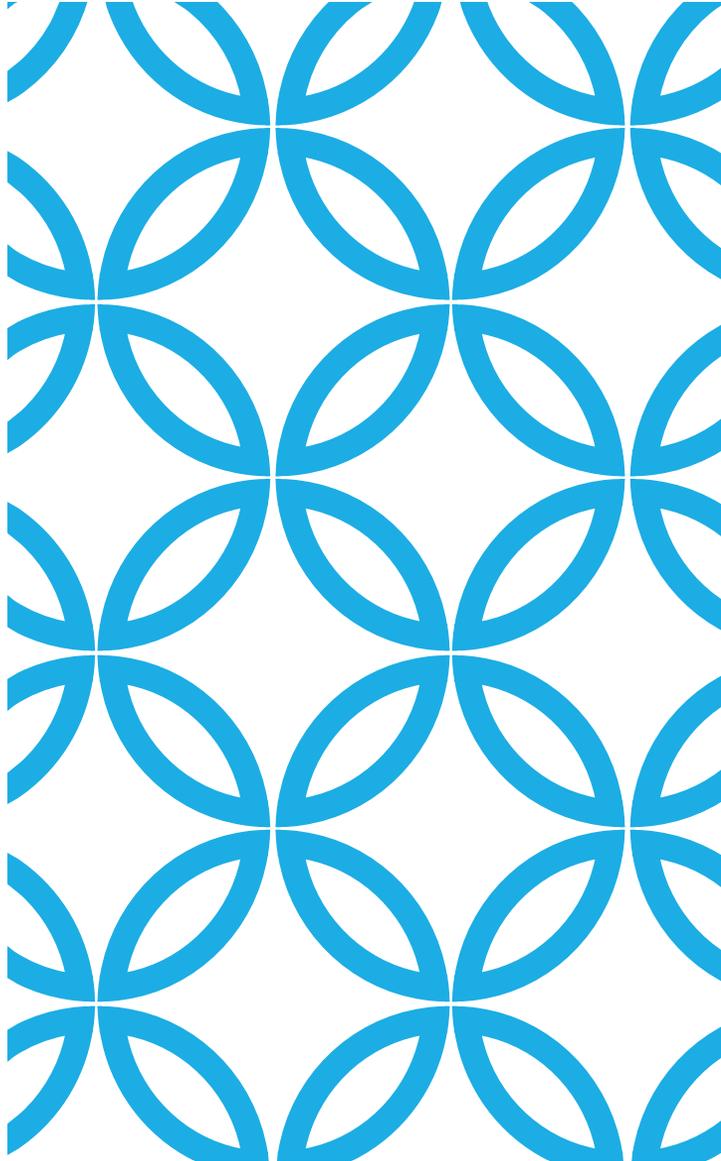


3 GENDER NEUTRAL POLICIES



Gender neutral refers to the absence of a specific gender. It can be used to describe facilities (e.g. gender neutral bathrooms that individuals can use regardless of their gender), people (those who don't subscribe to a specific gender), or pronouns (non-gender-specific pronouns like “they / them / theirs”).





USING GENDER-INCLUSIVE LANGUAGE MEANS SPEAKING AND WRITING IN A WAY THAT DOES NOT DISCRIMINATE AGAINST A PARTICULAR SEX, SOCIAL GENDER OR GENDER IDENTITY, AND DOES NOT PERPETUATE GENDER STEREOTYPES. GIVEN THE KEY ROLE OF LANGUAGE IN SHAPING CULTURAL AND SOCIAL ATTITUDES, USING GENDER-INCLUSIVE LANGUAGE IS A POWERFUL WAY TO PROMOTE GENDER EQUALITY AND ERADICATE GENDER BIAS.

[HTTPS://WWW.UN.ORG/EN/GENDER-INCLUSIVE-LANGUAGE/#:~:TEXT=USING%20GENDER%20INCLUSIVE,ERADICATE%20GENDER%20BIAS.](https://www.un.org/en/gender-inclusive-language/#:~:text=using%20gender%20inclusive,eradicate%20gender%20bias)



THE UNITED NATIONS SUGGESTIONS

In English, there is a difference between “grammatical gender”, “gender as a social construct” (which refers to the roles, behaviours, activities and attributes that a given society at a certain time considers appropriate for men or women) and “sex” as a biological characteristic of living beings.

English has very few gender markers: the pronouns and possessives (he, she, her and his); and some nouns and forms of address. Most English nouns do not have grammatical gender forms (teacher, president), whereas a few nouns are specifically masculine or feminine (actor/actress, waiter/waitress). Some nouns that once ended in -man now have neutral equivalents that are used to include both genders (police officer for policeman/policewoman, spokesperson for spokesman, chair/chairperson for chairman).

A challenge for gender-inclusive communication in English is the use of the masculine form by default. For example, “Every Permanent Representative must submit his credentials to Protocol.”

<https://www.un.org/en/gender-inclusive-language/guidelines.shtml>



GENDER NEUTRAL TERMS

Cisgender- a person is cisgender when their gender identity aligns with the sex they were assigned at birth.

Meet John, John Is Cisgender.





SAM REGULATION COMPLIANCE VOLUNTEER GROUPS

04



INDIANA JONES 5

THE SEARCH FOR DEEP POCKETS

How SAM Liability can be a Long Term Risk

WHAT ARE YOUR CONCERNS AND HOW DO YOU MINIMIZE RISK.



Require Insurance.

Require background checks.

Require a Sexual Abuse, Molestation and Harassment Prevention Policy.

Limit access to public spaces.

MINIMIZING LIABILITY RISKS FOR SEXUAL ABUSE AND MOLESTATION FOR MEMBERS OF VOLUNTEER GROUPS

Visit the MEL
Website for more
information:

www.njmel.org

LINKS:

[NJ MEL Protecting Children Resource Guide](#)

<https://njmel.org/mel-safety-institute/model-policies/protecting-children/>

[NJ.com article: Local Government's Role in Protecting Children from Abuse](#)



THE CHILD SEXUAL ABUSE ACT EXPANDED LIABILITY FOR SEXUAL ABUSE AND MOLESTATION

N.J.S.A. 2A:14-2a

2.2 a. (1) Every action at law for an injury resulting from the commission of sexual assault, any other crime of a sexual nature, a prohibited sexual act as defined in section 2 of P.L.1992, c. 7 (C.2A:30B-2), or sexual abuse as defined in section 1 of P.L.1992, c. 109 (C.2A:61B-1) against a minor under the age of 18 that occurred prior to, on or after the effective date of P.L.2019, c. 120 (C.2A:14-2a et al.) shall be commenced within 37 years after the minor reaches the age of majority, or within seven years from the date of reasonable discovery of the injury and its causal relationship to the act, whichever date is later.

2A:53A-7.4. Application of charitable immunity protection for certain sexual offenses committed by agent or employee

The immunity from civil liability granted to a nonprofit corporation, society or association organized exclusively for religious, charitable, educational or hospital purposes pursuant to the provisions of P.L.1959, c. 90 (C.2A:53A-7 to 2A:53A-11) shall not apply to a claim in any civil action that the negligent hiring, supervision or retention of any employee, agent or servant resulted in a sexual offense being committed against a person under the age of 18 who was a beneficiary of the nonprofit organization. As used in this supplementary act, P.L.2005, c. 264 (C.2A:53A-7.4 et seq.), “sexual offense” means any actions that would constitute any crime set forth in chapter 14 of Title 2C of the New Jersey Statutes or set forth in paragraph (3) or (4) of subsection b. of N.J.S.2C:24-4.

N.J. Stat. Ann. § 2A:53A-7.4 (West)



5 THE PREGNANT WORKERS FAIRNESS ACT



THE PWFA -

The PWFA amended existing portions of the New Jersey Law Against Discrimination (LAD) by including “pregnancy or breastfeeding” as a protected classification within existing LAD prohibitions or protections, see N.J.S.A. 10:5-12(a), (b), (c), (f), (h), (k), (o), (i), (l), and (m), and added an entirely new section, subsection (s), which elaborates on an employer's obligations to a pregnant or breastfeeding employee, see N.J.S.A. 10:5-12(s).



THE PWFA REQUIRES ACCOMMODATION NOT IMPOSITION.

It shall be an unlawful employment practice, or, as the case may be, an unlawful discrimination ... [f]or an employer to treat, for employment-related purposes, a woman employee that the employer knows, or should know, is affected by pregnancy or breastfeeding in a manner less favorable than the treatment of other persons not affected by pregnancy or breastfeeding but similar in their ability or inability to work.

In addition, an employer of an employee who is a woman affected by pregnancy shall make available to the employee reasonable accommodation in the workplace, such as bathroom breaks, breaks for increased water intake, periodic rest, assistance with manual labor, job restructuring or modified work schedules, and temporary transfers to less strenuous or hazardous work, for needs related to the pregnancy when the employee, based on the advice of her physician, requests the accommodation, and, in the case of an employee breast feeding her infant child, the accommodation shall include reasonable break time each day to the employee and a suitable room or other location with privacy, other than a toilet stall, in close proximity to the work area for the employee to express breast milk for the child, unless the employer can demonstrate that providing the accommodation would be an undue hardship on the business operations of the employer.

[N.J.S.A. 10:5-12(s).]

Delanoy v. Township of Ocean, 245 N.J. 384 (March 9, 2021)



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