

Insights, News & Events

# NEW JERSEY SCHOOLS NEED TO REEXAMINE POLICIES BARRING PAID WORK DURING PARENTAL LEAVE AFTER GAME-CHANGING ADMINISTRATIVE FINDING

Insights

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State authorities recently found that a school district's policy prohibiting employees from working paid extracurricular positions while on parental leave could violate state discrimination and family leave laws – and you may want to revisit your own school's policies to avoid a similar fate. The New Jersey Division on Civil Rights, tasked with enforcing the New Jersey Law against Discrimination (NJLAD) and the New Jersey Family Leave Act (NJFLA), issued three Findings of Probable Cause against a public school district last month for such a policy. It concluded the policy could disparately impact women and pregnant people in violation of the NJLAD, and could also violate the provision of NJFLA that expressly authorizes part-time employment while on leave. What should you do to ensure your school remains in compliance with the law?

## State Officials Find Possible Discrimination Violation

The NJLAD is New Jersey's primary anti-discrimination statute. It prohibits unlawful employment discrimination on the basis of certain protected categories, including sex, pregnancy, and familial status. It is one of the strongest and most protective anti-discrimination laws in the country, and in many ways tracks federal anti-discrimination laws.

### *Division Pursues Allegations With Purpose*

New Jersey employees may choose to pursue state claims with the Division instead of with the court, and the Division takes its enforcement responsibilities seriously. After investigation, the Division will issue either a Finding of No

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Probable Cause or a Finding of Probable Cause. In the case of the latter, and if the parties are unable to voluntarily resolve the matter, the Division will appoint a Deputy Attorney General to pursue the case before the New Jersey Office of Administrative Law or in court.

### ***Even Unintentional Discrimination Could Be Costly***

The NJLAD, like most anti-discrimination laws, prohibits conduct that is intended to treat people differently based on their membership in a protected class (disparate treatment). However, it also bars policies and practices that disproportionately affect those in a protected class – even when the policies and practices are neutral on their face and not intended to discriminate.

This is called “disparate impact” discrimination. Because disparate impact is a form of unintentional employment discrimination, employers often do not realize that a policy or practice violates the law until a complaint or lawsuit is filed.

### ***State Pushes Discrimination Claim Against School District***

The Division found sufficient evidence that the school district’s policy prohibiting employees from working paid extracurricular positions while on parental leave disparately impacted women and pregnant people in violation of the NJLAD. Based on data reviewed, women and pregnant people are significantly more likely than men to take extended leave to care for or bond with a new child. Therefore, under the policy, they are significantly more likely to miss out on extracurricular coaching opportunities.

The Division reviewed national data, along with school-specific data, and emphasized that although the majority of district staff were female and the majority of those taking bonding leave were female, the majority of extracurricular positions were awarded to men.

### ***State Also Finds Potential Family Leave Violations***

Meanwhile, the NJFLA provides 12 weeks of job-protected family leave to qualified employees to care for or bond with a new child. It expressly allows employees on leave to commence or continue part-time employment, and expressly prohibits employers from maintaining any policy or practice prohibiting such part-time employment.

## ***State Finds Violation in Family Leave***

The Division found sufficient evidence to conclude that the district's policy violated the NJFLA. It interpreted "paid extracurricular opportunities" to include part-time work – which is expressly permissible under the NJFLA.

### **What Should Private and Independent Schools in New Jersey Do?**

- Because private and independent schools are governed by the same anti-discrimination laws as public schools in New Jersey, the Division's Findings and liberal interpretation of the NJLAD should serve as a wakeup call to you. You should immediately consult with your attorneys to review any school policy that prohibits employees from working in paid extracurricular positions while on NJFLA leave to determine whether it should be adjusted.
- Schools across the country should also pay careful attention to the Division's disparate impact analysis, which could have implications outside of New Jersey. While the Findings are not conclusions of law, other states or administrative agencies may look to the Findings for guidance on interpreting similar claims. You should proactively review your leave and extracurricular policies with counsel to discuss whether they could be seen to disproportionately or adversely impact women and pregnant people.

### **Conclusion**

We will continue to monitor this matter, and New Jersey decisions generally, and provide updates as appropriate, so make sure you are subscribed to [Fisher Phillips' Insight System](#). If you are looking for practical advice and guidance on how to revise your leave and extracurricular policies in light of the Division's Findings, please consult your Fisher Phillips attorney, the author of this Insight, any attorney in [our New Jersey office](#), or any attorney in our [Education Practice Group](#).