

Contents

Chapter 1: Employment Contracts Express and Implied	1
I. INDIVIDUAL CONTRACTS	1
1-1 The Employment Relationship	1
1-2 Contracts for a Fixed Term	8
1-2:1 Lifetime Contracts.....	9
1-2:2 Employment at a Specific Salary.....	12
1-3 Specific Performance	13
1-4 Statute of Frauds	16
1-5 Employees Covered by Collective Bargaining Agreements	18
II. EMPLOYEE HANDBOOKS.....	21
1-6 When is a Handbook a Contract?.....	21
1-6:1 Distribution	22
1-6:2 Legally Binding Language	24
1-6:3 “Just Cause” Provisions	27
1-6:4 Economic Necessity.....	28
1-6:5 Employees Under Contract	29
1-7 Clear and Prominent Disclaimers.....	30
1-8 Revocation and Alteration.....	33
1-9 Arbitration	34
III. INFORMAL POLICIES.....	39
1-10 Oral “Woolley” Claims	39
1-11 Estoppel	41
1-11:1 Clear and Definite Representation	42
1-11:2 Detrimental Reliance	43
IV. RESTRICTIVE COVENANTS	45
1-12 General Requirements	45
1-12:1 Legitimate Interests of the Employer.....	47
1-12:2 Undue Hardship on the Employee.....	51
1-12:3 Injury to the Public.....	52
1-12:4 Consideration	53
1-13 The Professions: Doctors, Lawyers and Accountants	53
1-14 Enforcement: The Blue Pencil Doctrine.....	56
V. GOOD FAITH AND FAIR DEALING	57
1-15 Requisites	57

Contents

VI.	WAIVERS	60
1-16	Common Practice.....	60
1-17	Consideration.....	61
1-18	Duress	61
1-19	Ratification.....	63
VII.	REMEDIES	63
1-20	Compensatory Damages.....	63
1-21	Punitive Damages.....	65
1-22	Emotional Distress Damages	66
1-23	Prejudgment Interest	67
Chapter 2: Public Policy Claims		69
I.	INTRODUCTION	69
2-1	Overview	69
II.	COMMON LAW CLAIMS.....	70
2-2	<i>Pierce</i> : Public Policy Exception.....	70
2-3	Clear Mandate of Public Policy.....	71
2-3:1	Retaliation for Refusal to Engage in Illegal Conduct	73
2-3:2	Retaliation for “Whistleblowing”	74
2-3:3	Retaliation for Exercising Personal Rights.....	74
2-3:4	Retaliation Proscribed by Other State and Federal Statutes.....	76
2-3:5	Non-Retalatory Discharge.....	77
2-3:6	Causation	79
2-4	Other Coverage Issues	79
2-5	Statute of Limitations	80
2-6	Policy Expressed in Statutes	81
2-6:1	New Jersey Law Against Discrimination (LAD).....	82
2-6:2	Employee Retirement Income Security Act.....	83
2-6:3	Section 301, Labor Management Relations Act	84
2-6:4	Family Leave Act	85
2-7	Remedies	85
III.	CONSCIENTIOUS EMPLOYEE PROTECTION ACT (CEPA)	87
2-8	Coverage.....	87
2-9	Internal Complaints/Exhaustion	105
2-10	Notice.....	105
2-11	Procedure	106
2-11:1	Interaction With Other Laws	111
IV.	OTHER RETALIATION.....	115
2-12	Civil Service Whistleblowers.....	115
2-13	Reporting Child Abuse.....	116
2-14	Informing the Casino Control Commission.....	116

2-15	Informing the Ombudsman for the Institutionalized Elderly.....	117
2-16	Reporting Abuse of Vulnerable Adults.....	117
2-17	Refusing to Perform Abortions	118
2-18	Exercising Rights Granted by the Right to Know Law.....	118
2-19	Exercising Rights Under the Worker Health and Safety Act	118
2-20	Exercising Rights Under the Law Against Discrimination	119
2-21	Pursuing Workers' Compensation Benefits	119
2-22	Farm Laborers.....	121
2-23	School Employees.....	122
2-24	Family Leave Act.....	122
2-25	Asserting Rights Under the Minimum Wage Law	123
2-26	Asserting Rights Under the Prevailing Wage Law	123
2-27	Attending Court for Jury Service.....	124
2-28	Lie Detector Test Prohibition	124
2-29	Freedom from Employer Intimidation.....	125
Chapter 3: Workplace Torts.....		129
I.	INTRODUCTION	129
3-1	Overview	129
II.	INTENTIONAL INFILCTION OF EMOTIONAL DISTRESS	129
3-2	General Requirements	129
3-3	Intent.....	130
3-4	Extreme or Outrageous Behavior	131
3-4:1	Misleading Conduct/Misrepresentations.....	134
3-4:2	Discriminatory/Unkind/Unfair Conduct	135
3-4:3	Rough Treatment by the Employer	137
3-4:4	Harassment/Sexual Harassment	138
3-5	Proximate Cause.....	140
3-6	Severe Emotional Distress	142
3-6:1	Necessity of Expert Testimony	144
III.	NEGLIGENT INFILCTION OF EMOTIONAL DISTRESS.....	145
3-7	Requisites	145
3-7:1	Duty/Foreseeability.....	146
3-7:2	Genuine and Substantial Distress	147
3-8	Exclusivity of Workers' Compensation.....	147
IV.	CONTRACTUAL INTERFERENCE.....	149
3-9	Requisites	149
3-9:1	Protectable Rights.....	150
3-9:2	Intent	151
3-9:3	Causation	153
3-9:4	Damages.....	154
3-9:5	Necessity of a Tri-Partite Relationship	154

Contents

V.	DEFAMATION	158
3-10	Requisites	158
3-11	Defamatory Meaning	160
3-12	Libel	162
3-12:1	Slander	163
3-12:2	Opinion	166
3-12:3	Publication	167
3-13	Privilege	168
3-13:1	Immunity	169
3-13:2	Qualified Privilege	172
3-13:3	Abuse of the Qualified Privilege	176
3-13:4	Truth	180
3-14	Damages	182
VI.	FRAUD	184
3-15	Requisites	184
3-15:1	Material Misrepresentation	186
3-15:2	Scienter	188
3-15:3	Reliance	188
3-15:4	Detriment/Damages	190
3-15:5	Clear and Convincing Evidence	191
VII.	NEGLIGENT MISREPRESENTATION	191
3-16	Requisites	191
3-17	Duty to Disclose	192
VIII.	TORTS OF EMPLOYEES	193
3-18	Overview	193
3-18:1	<i>Respondeat Superior</i>	193
3-18:2	Nature of the Conduct	195
3-18:3	Negligent Hiring/Retention	199
3-19	Punitive Damages	202
	Chapter 4: Law Against Discrimination	205
I.	OVERVIEW	205
4-1	Introduction	205
4-2	Scope of Coverage of LAD	208
4-3	New Jersey Constitution	208
4-4	Preemption of the LAD	212
4-5	Persons Protected	216
4-6	Persons Regulated	218
II.	REGULATED CONDUCT	220
4-7	Generally	220
4-8	Age Discrimination	222
4-9	Ancestry Discrimination	225

Contents

4-10	Armed Forces Discrimination	225
4-11	A typical Hereditary Cellular or Blood Trait Discrimination	226
4-12	Color Discrimination	228
4-13	Creed Discrimination	228
4-13:1	Reasonable Accommodation Requirement	230
4-13:2	Religious Membership Requirements	231
4-13:3	Genetic Information	232
4-14	Disability Discrimination	232
4-14:1	Disability Defined.....	235
4-14:2	Reasonable Accommodation Requirement	240
4-14:3	Performance of Disabled Individuals.....	245
4-14:4	Safety Hazards Created by Disabled Employees.....	246
4-14:5	Testing	249
4-15	Marital Status, Domestic Partner Status and Civil Union Status Discrimination.....	250
4-16	National Origin Discrimination.....	252
4-17	Nationality Discrimination.....	252
4-18	Race Discrimination	253
4-19	Sex and Gender Discrimination.....	253
4-19:1	Sex-Plus Discrimination.....	254
4-19:2	Pregnancy Discrimination	256
4-19:3	Gender Identity or Expression.....	259
4-20	Affectional or Sexual Orientation Discrimination	260
4-21	Apprenticeship Programs	261
4-22	Employment Advertising and Referrals.....	262
4-23	Pre-employment Inquiries and Tests.....	264
4-24	Posting Requirements	265
4-25	Harassment	265
4-25:1	Sexual Harassment	267
4-26	Retaliation.....	279
4-27	Aiding, Abetting, and Attempting Discrimination	283
4-28	Constructive Discharge	285
4-29	Bona Fide Employee Benefit Plans.....	287
4-29:1	Mandatory Retirement	288
4-29:2	Voluntary Retirement Incentives.....	290
4-30	Bona Fide Occupational Qualifications	290
III.	STANDARDS OF PROOF	294
4-31	Overview	294
4-32	Disparate Treatment— <i>McDonnell Douglas</i> Test	295
4-32:1	The <i>Prima Facie</i> Case	298
4-32:2	The Employer’s Burden of Production	307

Contents

4-32:3	Plaintiff's Proof of Pretext/Intentional Discrimination	312
4-33	The Mixed Motives Test	314
4-34	Retaliation Claims	316
4-35	Disability Discrimination	320
4-36	Equal Pay	323
4-37	Sexual Harassment	327
4-38	Reverse Discrimination	327
4-39	Causation	328
4-40	After-Acquired Evidence	328
4-41	Disparate Impact	329
IV.	ENFORCEMENT	336
4-42	The Division on Civil Rights	336
4-43	DCR Declaratory Rulings and Advisory Opinions	338
4-44	Director's Investigations	338
4-45	Enforcement Proceedings	338
4-46	Arbitration Agreements	339
	4-46:1 Collective Bargaining Grievance Procedures	344
	4-46:2 Impact of Prior Determinations	344
	4-46:3 Waiver of LAD Rights	348
	4-46:4 Jurisdiction of the DCR	350
	4-46:5 DCR/EEOC Worksharing Agreement	351
4-47	Commencing Proceedings Before the DCR	353
	4-47:1 DCR Investigation	356
	4-47:2 Discovery	356
	4-47:3 Subpoena Power	359
	4-47:4 Fact-Finding Conference	360
	4-47:5 Probable Cause Determination	361
4-48	Conciliation	363
4-49	Hearing	363
	4-49:1 Interim Relief	364
	4-49:2 Transfer to the Office of Administrative Law	365
	4-49:3 Discovery	366
	4-49:4 Discovery of the DCR's Files	367
	4-49:5 Subpoenas	368
	4-49:6 Informal Disposition	369
	4-49:7 Summary Disposition	369
	4-49:8 Presentation of Evidence	369
	4-49:9 Rules of Evidence	371
	4-49:10 Amending the Pleadings	372
4-50	Initial Decision of the ALJ	372
	4-50:1 Filing Exceptions to the Initial Decision	373

4-51	Final Decision of the Director	373
4-52	Summary Enforcement Proceedings in the Superior Court.....	376
4-53	Commencing Proceedings in the Superior Court	377
4-54	Remedies	379
4-54:1	In DCR Proceedings.....	380
4-54:2	In Superior Court Proceedings	391
4-54:3	Front Pay.....	392
4-54:4	Emotional Distress Damages.....	392
4-54:5	Punitive Damages	393
4-54:6	Counsel Fees.....	398
4-54:7	Criminal Offenses	405
4-55	Affirmative Action.....	405
4-56	Statutes of Limitation	408
Chapter 5: Employee Privacy		415
I.	INTRODUCTION	415
5-1	Generally.....	415
II.	OFFICE SEARCHES	417
5-2	Generally.....	417
III.	E-MAIL AND INTERNET USE	420
5-3	Generally.....	420
5-4	Social Media	427
IV.	POLYGRAPH TESTS	430
5-5	Generally.....	430
V.	BACKGROUND CHECKS.....	431
5-6	Generally.....	431
5-7	Ban the Box.....	434
5-8	Identity Theft Prevention Act.....	436
5-9	COVID-19 Vaccinations	437
Chapter 6: The Family Leave Act.....		439
I.	OVERVIEW.....	439
6-1	Generally.....	439
II.	COVERAGE	442
6-2	Employers Subject to FLA	442
6-3	Employees Eligible	443
III.	TAKING LEAVE	445
6-4	Advance Notice of Leave Required	445
6-5	Circumstances Warranting Leave	446
6-5:1	Relation with Other Laws	450
6-6	Duration and Timing of Leave	452
6-6:1	Intermittent Leave	452

Contents

6-6:2	Reduced Leave Schedule	454
6-6:3	Payment During Leave.....	455
6-7	Continuation of Benefits During Leave	456
6-8	Employment During Leave.....	457
6-9	Reinstatement.....	457
6-10	Grounds for Denial or Revocation of Leave.....	458
IV.	POSTING.....	459
6-11	Posting	459
6-11:1	Sample Notice	461
V.	ENFORCEMENT.....	462
6-12	Enforcement	462
6-13	Table 1: Comparison of New Jersey Family Leave Act and Federal Family and Medical Leave Act	464
VI.	NEW JERSEY PAID FAMILY LEAVE LAW.....	472
6-14	Summary and Scope.....	472
6-15	Intersection with FLA and FMLA.....	475
6-16	Posting Requirements for Employers.....	475
6-17	Private Plan Requirements.....	476
6-18	State Plan Requirements.....	477
6-19	Fraud Prevention, Penalties, and Enforcement	479
VII.	NEW JERSEY SAFE ACT	481
6-20	Summary and Scope.....	481
6-21	Employers Subject to the NJ SAFE Act	481
6-22	Employees Eligible	481
6-23	Circumstances Warranting Leave	482
6-24	Intersection with Other Forms of Leave	484
6-25	Advance Notice and Certification Requirements for Employees.....	484
6-26	Posting Requirements for Employers	486
6-27	Enforcement	486
VIII.	NEW JERSEY EARNED SICK LEAVE ACT.....	487
6-28	Summary and Scope.....	487
6-29	Employers and Employees Subject to the ESLA	487
6-30	Employees Eligible	488
6-31	Accrual	488
6-32	Use of Earned Sick Leave	489
6-33	Recordkeeping and Notices	491
6-34	Nondiscrimination and Non-retaliation	492
6-35	Damages	492
	Chapter 7: Health and Safety	495
I.	THE RIGHT TO KNOW ACT	495
7-1	Introduction	495

7-2	Covered Employers/OSHA Preemption.....	496
7-3	Reporting Requirements.....	500
7-4	Labeling Requirements.....	502
7-4:1	Pipelines	504
7-4:2	Reaction Vessels.....	504
7-4:3	Containers Holding Two Ounces or Less	504
7-4:4	Containers Located at Storage or Transfer Facilities	505
7-4:5	Containers at Research and Development Laboratories	505
7-5	The Right to Know Survey (Public Employers).....	505
7-6	Employee Training (Public Employers).....	509
7-7	Trade Secrets—Filing of Trade Secret Claims	510
7-7:1	Access to Trade Secret Information	513
7-8	Public Employee Access to Information	515
7-9	Public Access to Reported Information	516
7-10	Enforcement Provisions.....	516
7-11	Whistleblower Protection.....	522
II.	DRUG TESTING	522
7-12	Introduction	522
7-13	New Jersey Cannabis Use Protection.....	523
7-13:1	Cannabis Testing	523
7-13:2	Exceptions	525
7-14	Public Employers.....	525
7-15	Private Employers.....	532
7-15:1	Testing of Prospective Employees	533
7-15:2	Testing of Current Employees	534
7-16	Handicap Discrimination	536
III.	SMOKING IN THE WORKPLACE.....	537
7-17	Introduction	537
7-18	Prohibition of Discrimination	537
7-19	New Jersey Smoke-Free Air Act	537
7-19:1	Signage	538
7-19:2	Enforcement	539
Chapter 8: Wage and Hour		541
I.	OVERVIEW.....	541
8-1	Scope of Chapter.....	541
II.	WAGE PAYMENT.....	543
8-2	Time of Payment/In General	543
8-2:1	Executive and Supervisory Personnel.....	545
8-2:2	Railroad Employees.....	545

Contents

8-2:3	Termination or Suspension of Employee	545
8-2:4	Death of Employee.....	546
8-3	Mode of Payment.....	546
8-3:1	Withholding or Diverting of Wages/In General	547
8-3:2	Permissible Withholding.....	547
8-3:3	Employer-Owned Stores	550
8-3:4	Payment for Medical Examinations	550
8-3:5	Other Obligations and Duties of the Employer.....	551
8-3:6	Agreements for Payment of Wages	552
8-3:7	Dispute Over Wages.....	552
8-3:8	Rights of Employees as Against Employer's Creditors	553
8-3:9	Regulation and Enforcement	554
8-3:10	Penalties	555
8-3:11	Private Right of Action	556
III.	WAGE AND HOUR LAW	558
8-4	Purpose	558
8-5	Minimum Wage Rate.....	559
8-5:1	Overtime.....	565
8-5:2	Exemptions From Overtime.....	566
8-5:2.1	Employees Prohibited from Working Overtime	570
8-5:3	Employees Exempt from Minimum Wage Rates	571
8-5:4	Regulation/Office of Wage and Hour Compliance	572
8-5:5	Creation of Wage Boards.....	572
8-5:6	Powers of Wage Boards	573
8-5:7	Procedure for Promulgation of Wage Order	574
8-5:8	Learners, Apprentices and Students.....	575
8-5:9	Handicapped Persons	575
8-6	Recordkeeping.....	576
8-7	Notice.....	578
8-8	Enforcement	578
IV.	DISCRIMINATION IN WAGES	584
8-9	Prohibition Against Sex Discrimination	584
8-10	Posting Requirement	585
8-10:1	The Diane B. Allen Equal Pay Act.....	586
8-10:1.1	Overview	586
8-10:1.2	Equal Pay Provisions.....	586
8-10:1.3	Anti-Retaliation	587
8-10:1.4	Enforcement.....	588
8-10:1.5	Statute of Limitations	588
8-10:1.6	Reporting Requirements for Employers with State Contracts	589

V.	WAGES ON PUBLIC WORKS	590
8-11	The Prevailing Wage Act	590
8-11:1	Procedure.....	593
8-11:2	Employers' Obligations.....	594
8-11:2.1	Registration.....	594
8-11:3	Obligations of the Public Body	596
8-11:4	Powers of the Commissioner of Labor	596
8-11:5	Enforcement	597
8-11:6	Debarment.....	601
VI.	EXECUTION.....	603
8-12	Judgment Creditors	603
8-12:1	Limit on Amount Garnished	604
8-12:2	Multiple Executions.....	605
8-12:3	Obligations of Employer.....	606
8-12:4	Child Support and Alimony	606
8-12:5	Due Process	608
8-12:6	Prohibition Against Discrimination.....	608
VII.	WAGE COLLECTION	608
8-13	Wage Claims.....	608
8-13:1	Settlement of Wage Claims.....	610
8-14	Set-off	610
8-15	Appeals Procedure.....	611
8-16	Jury Trial.....	611
8-16:1	Additional Wage Theft Act Provisions	611
8-16:1.1	Successor Liability	611
8-16:1.2	Joint and Several Liability for Labor Contractors	612
8-16:1.3	Notices and Outreach	612
8-16:1.4	Public Reports	613
8-16:1.5	Pattern of Wage Nonpayment	614
8-16:1.6	Retroactivity of WTA.....	614
VIII.	CHILD LABOR LAWS	614
8-17	Purpose	614
8-18	Minors Under 16 Years of Age	615
8-19	Hours of Employment	617
8-20	Prohibited Employments	619
8-21	Lunch Periods	623
8-22	Posting Requirements.....	623
8-23	Employment Certificates	624
8-24	Non-Commercial Recycling Centers.....	625
8-24:1	Exception for Educational Programs in Science.....	626

Contents

8-25	Enforcement	626
8-26	Penalties	626
8-27	Workers' Compensation and Civil Liability	628
IX.	EMPLOYEE CLASSIFICATION	629
8-28	Construction Industry Independent Contractor Act	629
X.	NEW JERSEY'S PLANT CLOSING LAW.....	632
8-29	The Millville Dallas Airmotive Plant Job Loss Act	632
Chapter 9: Unemployment Compensation.....		637
I.	INTRODUCTION	637
9-1	Generally	637
9-2	Employment Status	638
II.	BENEFITS.....	645
9-3	Measure of Benefit	645
9-4	Maximum Total Benefits	646
9-5	"Unemployment" for Entitlement Purposes	647
9-6	Eligibility/General	648
9-6:1	Filing a Claim	648
9-6:2	Able To Work	649
9-6:3	Actively Seeking Work	649
9-6:4	Available for Work	649
9-6:5	Waiting Period	651
9-6:6	Earnings Requirement	652
9-6:7	Total Disability	653
9-6:8	Part-Time Employees.....	654
9-6:9	Rules for Employees of Educational Institutions	654
9-6:10	Rules for Professional Athletes	655
9-6:11	Extended Benefits	656
9-7	Disqualification	656
9-7:1	Voluntary Termination of Employment.....	656
9-7:2	Misconduct.....	666
9-7:3	Involvement in Labor Dispute	670
9-7:4	Remuneration in Lieu of Notice	672
9-7:5	Other Benefits.....	672
9-7:6	Fraud.....	672
9-7:7	Attending School Full Time	673
9-7:8	Employees on Leave of Absence.....	673
9-7:9	Participation in Training Program	673
9-7:10	Domestic Violence	674
9-7:11	Shared Work Program	675
9-8	Offsets for Pension and Retirement Benefits.....	675
9-9	Deductions for Child Support	676

III.	PROCEDURES.....	676
9-10	Claims for Benefits	676
9-10:1	Initial Determinations	677
9-10:2	Time for Appeal of Initial Determination.....	679
9-10:3	Benefits During Pendency of Appeal	680
9-10:4	Appeal Tribunals	681
9-10:5	Action by the Board of Review.....	682
9-10:6	Judicial Review	683
9-10:7	Failure to Give Notice	684
IV.	CONTRIBUTIONS	684
9-11	By Employers	684
9-12	By Nonprofit Organizations and Governmental Entities	686
9-13	By Employees	686
9-14	Collection/Employer Obligations	687
9-14:1	Personal Liability of the Employer	687
9-14:2	Limitations Period for Action Against an Employer	688
9-14:3	Rights of the Employer	688
9-14:4	Refunds	689
V.	RIGHTS AND BENEFITS	689
9-15	Protection of Claimants	689
VI.	PENALTIES	690
9-16	Penalties for Claimants.....	690
9-17	Penalties for Employers	691

	Chapter 10: Temporary Disability	693
I.	INTRODUCTION	693
10-1	Generally.....	693
II.	BENEFITS	695
10-2	Entitlement to Benefits	695
10-3	Duration of Benefits.....	696
10-4	Maximum Amount of Benefits.....	696
10-5	Limitation of Benefits	696
10-6	Non-duplication of Benefits	699
III.	PRIVATE PLANS	701
10-7	Establishment of Private Plans	701
10-8	Benefits Under Private Plans	703
10-9	Termination of Private Plan	704
10-10	Supplementary Plans.....	706
IV.	OBTAINING BENEFITS.....	706
10-11	Filing a Claim Under the State Plan.....	706
10-12	Hearings.....	708

Contents

V.	RECORDS	710
10-13	Records of Employers Under the State Plan.....	710
10-14	Records of Employers Under Private Plans.....	710
VI.	PROTECTION OF CLAIMANTS	711
10-15	Benefits Protected.....	711
VII.	PENALTIES.....	712
10-16	Penalties for Claimants.....	712
10-17	Penalties for Employers.....	712
10-18	Penalty for Fraud	713
Chapter 11: Insurance Coverage for Employees		715
I.	GROUP LIFE INSURANCE	715
11-1	Introduction	715
11-2	Requirements for Individual Employers	717
11-3	Requirements for Labor Unions	718
11-4	Requirements for Trustee Groups.....	718
11-5	Dependents of Employees	719
11-6	Standard Provisions Applicable to Group Policies.....	720
11-7	Conversion on Termination of Employment or Membership.....	722
11-8	Conversion on Termination or Amendment of Policy	722
11-8:1	Death Within the Conversion Period	723
11-8:2	Total Disability Within the Conversion Period	723
11-8:3	Notice of Conversion Rights	723
II.	GROUP HEALTH INSURANCE	724
11-9	General Requirements.....	724
11-10	Dependents	726
11-11	Standard Provisions.....	727
11-12	Continuation Upon Total Disability.....	729
11-12:1	Termination of Continued Insurance.....	730
11-12:2	Notification	730
Chapter 12: Successor Liability		731
12-1	Introduction	731
12-2	Traditional Rules in New Jersey.....	731
12-3	Successor Liability for Employment Practices	736
Table of Cases.....		741
Index		843