

EMPLOYMENT PRACTICE LIABILITY AND FAIR LABOR STANDARDS: NEW JERSEY

Law Offices of Thomas J. Wagner, LLC

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1. Access to Personnel Records

New Jersey has no requirement. The last time an access to employment records law was introduced in 2013, the Bill died in Committee. Although there is no specific requirement that employees be allowed to review their personnel file in New Jersey, if an employee makes his/her request in order to prove that the employer has been discriminating against him/her and the employee is found to have been fired for making the request, the employer may be considered to have illegally retaliated against the employee. See *Velantzas v. Colgate-Palmolive Co.*, 109 N.J. 189 (1988) (holding that Plaintiff can pursue a claim of retaliation alleging that she was terminated because she requested to review her personnel file in order to find documents to support her gender discrimination claim). Another factor that employers must consider is that refusing an employee's request to review a personnel file may lead to unnecessary and expensive litigation because an employee may feel like the employer is hiding something (potential unlawful activity). By providing access to employees, the employer can present an impression of transparency making it less likely that an employee will bring suit.

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2. Child Labor Laws

Under New Jersey labor laws, children under 14 may work in specific fields as long as they obtain a special permit. For newspaper carriers, the minimum age is 11 years old. For farm work, the minimum age is 12 years old outside school hours, and 16 years old during school hours. For theater work, there is no minimum age. The special permit is called A310 Combined Certificate Form and can be obtained through the child's school.

All minors under the age of 18 who work in New Jersey must have an employment certificate also known as "working papers." This certificate is called [A300 Employment Certification Form](#) and can also be obtained through a child's school. There is personal information that must be completed by the minor who must take it to their employer to complete the employment information.

The minor must also obtain a physical or doctor's note. A sports physical should suffice unless the school rules require a more recent physical. A parent or guardian must also consent to the minor's employment and also provide proof of age. The minor must return the completed form to the school and the designated school official will issue the employment certificate as long as the job will not interfere with their education or damage their health.

Under New Jersey law, no one under 18 years of age can work more than 8 hours a day or 40 hours a week. When school is not in session, 14 and 15 year olds, with a parent or guardian's permission may work until 9:00 pm. For 16 and 17 year olds, they can work until 11:00pm and in certain jobs after midnight, with permission. Minors under 18 years of age must receive a 30-minute meal break after working 5 consecutive hours.

Some workplaces are required to pay minors minimum wage while others are not required to do so. For example, any food service or retail store is required to pay minimum wage. However, nursing homes, boardwalk and other seasonal amusements as well as summer camps are not required to pay minimum wage.

3. Drug Testing

New Jersey does not require or prohibit private employers from testing employees for drugs. While it is illegal for an employer to discriminate against the "handicapped" on the basis of physical or mental disability, "disability" does not include any employee or applicant who is currently engaging in the illegal use of drugs. The New Jersey Supreme Court has held that alcoholism is a handicap protected under the New Jersey Law Against Discrimination (NJLAD) in *Clowes v. Terminix International, Inc.*, 109 N.J. 575 (1988).

Following Federal law, the New Jersey Appellate Division, in *Bosshard v. Hackensack University Medical Center*, 345 N.J. Super. 78 (App. Div. 2001) held that though current illegal drug use is not encompassed within the term "handicap," rehabilitated drug addicts who no longer engage in illegal drug use fall within the protection of the NJLAD. Further, a widely cited New Jersey Supreme Court decision, *Hennessey v. Coastal Eagle Point Oil Co.*, 129 N.J. 81 (1992), the Court strongly implied that common law privacy rights forbid "random" drug testing in the private sector except for employees in "safety-sensitive" positions. Employees in other positions may be tested only "for cause," and all testing programs must conform to certain procedural "due process."

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4. Employment-at-will

Employment in New Jersey is presumed to be at will. *Woolley v. Hoffman LaRoche*, 99 N.J. 284 (1985). Where the employment is at will, the employer may discharge an employee for any reason or no reason, except for when the discharge violates a clearly mandated public policy. *English v. College of Medicine & Dentistry*, 73 N.J. 20, 23 (1977); *Witkowski v. Thomas J. Lipton*, 136 N.J. 385, 397 (1994). When the discharge is contrary to a clear mandate of public policy, an employee has a cause of action for wrongful discharge. *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 73, (1980).

The "at will" presumption can be overcome by showing that the parties contracted otherwise. Indeed, even an employee handbook or other policy statement can create enforceable contract rights if the traditional requirements for contract formation are present. *Woolley v. Hoffman LaRoche*, 99 N.J. 284, 309 (1985).

5. Equal Employment Opportunity/Non-Discrimination Categories

It is a civil rights violation for any employer to discriminate on the basis of race, color, religion, sex, national origin, ancestry, age, sexual orientation, physical or mental disability, marital status, unfavorable discharge from military service, military status, arrest record, order of protection status, or citizenship status. Sexual harassment is also a civil rights violation. *Lehmann v. Toys 'R' Us*, 132 N.J. 587 (1993); *In re Seaman*, 133 N.J. 67 (1993).

6. New Jersey Family Leave Act

To be eligible for leave under the New Jersey Family Leave Act, an employee must have worked for the covered employer for both: 12 months and 1,000 hours in the 12 months before the leave. *N.J. Stat. Ann. § 34:11B-3.e (2011)*.

New Jersey offers the following leave to employees:

- a. The birth or adoption of a child.
- b. Serious health condition of a:
 - i. child, including children under 18 years old who are biological, adopted, foster, or stepchildren or legal wards and children over 18 years old who are incapable of self-care because of a physical or mental impairment;
 - ii. parent, including biological, adoptive, foster and step parents, parents-in-law and legal guardians; or
 - iii. spouse or partner in a civil union couple. *N.J. Stat. Ann. § 34:11B-3 (2011)*.

New Jersey has enacted several other acts enumerating leave to employees, including:

- a. Military Leave: This law protects any employee who leaves work, other than a temporary position, to do any of the following:
 - i. Complete military service for the US armed forces.
 - ii. Participate in military assemblies or annual training.
 - iii. Attend service schools conducted by the US armed forces for up to a total of three months (but no more than three months over any four-year period). *N.J. Stat. Ann. § 38:23C-20*.
- b. The New Jersey Security and Financial Empowerment Act ("NJ SAFE Act"): provides that

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- c. Certain employees are eligible to receive an unpaid leave of absence, for a period not to exceed 20 days in a 12-month period, to address circumstances resulting from domestic violence or a sexually violent offense. *P.L. 2013, c.82*.
- d. Emergency Responders: Employees who are “volunteer emergency responders” are eligible for this leave. Volunteer emergency responders include:
 - i. Active members in good standing of a volunteer fire company.
 - ii. Volunteer members of a duly incorporated first aid, rescue or ambulance squad.
 - iii. Members of any county or municipal volunteer Office of Emergency Management, if the member’s official duties include responding to a fire or emergency call. *N.J. Stat. Ann. § 40A:14-214.a (2009)*.

Time Off for Voting: New Jersey does not have a law that requires an employer to grant its employees leave, either paid or unpaid, to vote.

An employer is not required to pay an employee any wages for time spent complying with a jury summons or serving on a jury. However, an employer may not discharge, penalize, threaten, or otherwise coerce an employee with respect to employment, because the employee is required to attend court for jury service. *New Jersey Stat. Ann. 2B:20-17*.

7. Genetic Testing

The NJLAD prohibits discrimination based on genetic information. *N.J. Stat. § 10:5-12*. Genetic information is defined under New Jersey state law to mean information about genes, gene products, or inherited characteristics that may derive from an individual or family member. The NJLAD also prohibits the improper collection, retention, or disclosure of such genetic information and employers cannot make employment decisions based on the genetic information of an employee or applicant and employee’s or applicant’s refusal to submit to a genetic test or otherwise reveal results of such a test. *N.J. Stat. § 10:5-12*. Likewise, an employer may not change the terms of employment or terminate employment because of genetic testing or genetic information with respect to the employee or family member.

Generally, you may not obtain, retain, or disclose genetic information from an individual or their DNA sample without informed consent.

8. Meal or Rest Break

No law requires New Jersey employers to give meal breaks. Minors under 18-years-old, however, are entitled to a meal period of at least 30 minutes if they work continuously for more than 5 hours, and no period of less than thirty minutes shall be deemed to interrupt a continuous period of work. *N.J.S.A. 34:2-21.4* (also known as the Wage Payment Law, or “WPL”).

9. Method of Payment of Wages

All wages and final compensation shall be paid in lawful money of the United States, by check, redeemable upon demand and without discount at a bank or other financial institution readily available to the employee, or by deposit of funds in an account in a bank or other financial institution designated by the employee. *N.J.S.A. 34:11-4.2*.

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In lieu of paying wages directly to employees as provided by *P.L.1965, c. 173, s. 2 (C. 34:11-4.2)*, an employer may, with the consent of some or all his employees, arrange with a financial institution or financial institutions to pay the wages of each employee so consenting by causing the amount of such employee's wages to be deposited in an account maintained in any such financial institution in the name of such employee, subject to withdrawal and other disposition by such employee to the same extent and in the same manner as if such deposit were made directly by such employee. Any such employee may, on timely notice to the employer, elect not to have his wages deposited as provided herein, and to be paid such wages directly in the manner otherwise provided by law. Financial institution as used herein means any State-chartered or Federally-chartered institution authorized to accept deposits in New Jersey. *N.J.S.A. 34:11-4.2a*.

10. Minimum Wage and Overtime Rules

Minimum wage in New Jersey is \$8.38 per hour for those individuals who are 18 years and older. Employees who do not receive tips may be paid \$7.75 for the first 90 days with employer. *N.J.A.C 12:56-3.1*.

Employees in the following occupations shall be exempt from the statutory minimum wage rates:

1. Full-time students employed by the college or university at which they are enrolled at not less than 85 percent of the effective minimum wage rate, effective March 1, 1979;
2. Outside sales person;
3. Sales person of motor vehicles;
4. Part time employees primarily engaged in the care and tending of children in the home of the employer;
5. Minors under 18 years of age, except as those individual employed in the first processing of farm products, employed in hotel and motel occupations, employed in food service occupations, and as under *N.J.A.C. 12:57, Wage Orders for Minors*; and
6. At summer camps, conferences and retreats operated by any nonprofit or religious corporation or association during the months of June, July, August and September.

N.J.A.C. 12:56-3.2.

Tipped employees' wages must equal at least the minimum wage per hour. The hourly rate is up to the employer; however, the suggested rate is a minimum of \$2.13 per hour. If the hourly rate plus tips does not equal at least the minimum wage per hour, the employer is required to make up the difference.

An employer may pay a training wage for tipped employees 18 and over in the amount of \$4.65 for the first 90 days if applying the tip credit of 40% or \$7.75 if utilizing the tip credit. After 90 days, the rate must be increased to \$4.95 if not utilizing the tip credit.

Federal law allows any employer in New Jersey to pay a new employee who is under 20 years of age a training wage of \$4.25 per hour for the first 90 days of employment. Full-time high school or college students who work part-time may be paid 85% of the New Jersey minimum wage (as little as \$7.12 per hour) for up to 20 hours of work at certain employers.

11. New Hire Reporting

Employers play a pivotal role in helping New Jersey's children receive the support they need. Children who do not receive court ordered financial support from a parent often are required to depend on public assistance programs or live in poverty. By complying with the requirements of the new hire reporting law, employers will help children receive support to which they are entitled.

Under *N.J.S.A. 2A:17-56.61* and the Federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996, all public, private, non-profit, and government employers are required to report the following individuals:

- *New employees*: Employers must report all employees who reside or work in the State of New Jersey to whom the employer anticipates paying earnings. Employees must be reported even if they work only one day and are terminated (prior to the employer fulfilling the new hire reporting requirement).
- *Re-hires or Re-called employees*: Employers must report re-hires, or employees who return to work after being laid off, furloughed, separated, granted a leave without pay, or terminated from employment. Employers must also report any employee who remains on the payroll during a break in service or gap in pay, and then returns to work. This includes teachers, substitutes, seasonal workers, etc.
- *Temporary employees*: Temporary agencies are responsible for reporting any employee who they hire to report for an assignment. Employees need to be reported only once; they do not need to be re-reported each time they report to a new client. They do need to be reported as a re-hire if the worker has a break in service or gap in wages from your company.
- *Contracted Entities*: State law requires that an independent contractor transacting business in New Jersey be reported as a new hire.

Payroll companies who contract with employers to report New Hire information will be held to the same standards as individual employers.

Failure to report a new employee could result in a fine up to \$25 per violation.

12. Non-Compete Agreements

In New Jersey, there is no state statute or regulation governing non-competes in employment generally. A covenant not to compete, assuming it is ancillary to a valid employment relationship, is reasonable only if the covenant: (1) is no greater than is required for the protection of a legitimate business interest of the employer; (2) does not impose undue hardship on the employee; and (3) is not injurious to the public. *Solari Indus. v. Malady*, 264 A.2d 53, 56 (N.J. 1970). The burden is on the employer to demonstrate the covenant's reasonableness.

Whether a legitimate business interest exists is based on the totality of the facts and circumstances of the individual case. Factors to be considered in this analysis include, but are not limited to, the near-permanence of customer relationships, the employee's acquisition of confidential information through his employment, and time and place restrictions. No factor carries any more weight than any other, but rather its importance will depend on the specific facts and circumstances of the individual case. *Coskey's Television & Radio Sales & Serv., Inc. v. Foti*, 602 A.2d 789, 794 (N.J. Super. Ct. App. Div. 1992).

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When determining whether a non-compete will cause undue hardship, a court considers: the likelihood that the employee will find other work in his or her field; and the restriction's burden on the employee. **Community Hosp. Group, Inc. v. More**, 869 A.2d 884, 898 (N.J. 2005). A court is less likely to find undue hardship if the employee terminates the employment relationship. This is because the employee's actions caused the restriction to become effective. **Pathfinder, LLC v. Luck**, No. 04-1475, 2005 WL 1206848, at *8 (D.N.J. May 20, 2005).

New Jersey courts balance the public's right to freely access professional advice with the employer's legitimate patient or client relationships. One instance can be seen, in **Community Hospital**, where the Supreme Court balanced a hospital's interest in protecting its referral bases against the potential public harm in preventing a neurosurgeon from working in an area with a neurosurgeon shortage. **Community Hosp. Group, Inc.**, 869 A.2d, at 897-99.

13. Overtime Exemptions

Certain exemptions exist to New Jersey's overtime rules. *N.J.A.C. 12:56-7*. On September 6, 2011, the New Jersey Department of Labor and Workforce Development repealed the existing rules governing exemptions from overtime pay requirements for executive, administrative, professional and outside sales employees, and instead adopted by reference the analogous regulations issued under the FLSA. Therefore, New Jersey exempts any individual employed in a bona fide executive, administrative, professional or outside sales capacity from the overtime requirements of N.J.S.A. §§ 34:11-56a – 34:11-56a30.

Under N.J.S.A. §§ 34:11-56a – 34:11-56a30, non-exempt employees, including those working in food service occupations, are to be paid overtime for all hours worked in excess of 40 hours in any week. The regulations provide a minimum overtime rate of 1.5 times the minimum wage for all hours in excess of 40 hours in the workweek. If the employee's regular hourly wage rate is more than the minimum per hour, then the overtime rate is 1.5 times the employee's regular rate. Gratuities are not counted towards the premium part of the overtime and the additional half time must be in cash.

The overtime requirement does not apply to:

- a. Skilled mechanics employed by nonmanufacturing employers primarily engaged in the business of selling new or new and used motor vehicles or in the business of automotive and/or truck repair (*N.J.S.A. 12:56-20.3*);
- b. Any individual employed by a common carrier of passengers by motor bus ;
- c. limousine drivers (*N.J.S.A. 34:11-56a4*);
- d. Employees engaged in labor relative to the raising or care of livestock (*Id.*);
- e. Employees engaged in seasonal amusement occupations (*N.J.S.A. 12:56-12.3*);
- f. Employees engaged in labor on a farm (*N.J.S.A. 34:11-56a4*);
- g. Individuals employed in a hotel (*Id.*).

14. Payment of Wages

According to *N.J.S.A. 34:11-4.1*, every employer shall pay the full amount of wages due to his or her employees at least twice during each calendar month, on regular paydays designated in advance by the employer, in lawful money of the United States or with checks on banks where suitable arrangements are made for the cashing of such checks by employees without difficulty and for the full amount for

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which they are drawn. An employer may establish regular paydays less frequently than provided that the employee shall be paid in full at least once each calendar month on a regularly established schedule.

If a regular payday falls on a day on which the workplace of an employee is not open for business, payment shall be made on the immediately preceding workday, except where it is otherwise provided for in a collective bargaining agreement.

The end of the pay period for which payment is made on a regular payday shall be not more than 10 working days before such regular payday, provided that if the regular payday falls on a nonwork day payment shall be made on the preceding work day.

15. Penalties for Violation of Certain Provisions

N.J.S.A. 34:11-4.10 sets forth the penalties for various violations. Any employer who knowingly and willfully violates any provision of Wage and Hour Law (*34:11-4.1 et seq.*) shall be guilty of a disorderly persons offense and, upon conviction for a violation, shall be punished by a fine of not less than \$100 nor more than \$1,000. Each day during which any violation of this act continues shall constitute a separate and distinct offense. As an alternative to or in addition to any other sanctions provided by law for violations of *P.L.1965, c. 173 (C. 34:11-4.1 et seq.)*, when the Commissioner of Labor finds that an employer has violated that act, the commissioner is authorized to assess and collect administrative penalties, up to a maximum of \$250 for a first violation and up to a maximum of \$500 for each subsequent violation, specified in a schedule of penalties to be promulgated as a rule or regulation by the commissioner in accordance with the "Administrative Procedure Act," *P.L.1968, c. 410 (C. 52:14B-1 et seq.)*.

Payment of the penalty is due when a final order is issued or when the notice becomes a final order. Any penalty imposed may be recovered with costs in a summary proceeding commenced by the commissioner. Any sum collected as a fine or penalty pursuant to this section shall be applied toward enforcement and administration costs of the Division of Workplace Standards in the Department of Labor.

16. Releases/Waivers

New Jersey courts have adopted the totality-of-the-circumstances test used by federal courts to assess the validity of an employee's release of claims against his employer. *Keelan v. Bell Communications Research*, 674 A.2d 603 (*App. Div. 1996*). Favoring a standard more sympathetic to employee interests, the *Swarts* court adopted a list of factors delineated by the Third Circuit in *Coventry*, supra, to determine whether a release is knowing and voluntary:

1. the plaintiff's education and business experience;
2. the amount of the time the plaintiff had possession of or access to the agreement before signing it;
3. the role of plaintiff in deciding the terms of the agreement;
4. the clarity of the agreement;
5. whether the plaintiff was represented by or consulted with an attorney;
6. whether the consideration given in exchange for the waiver exceeds employee benefits to which the employee was already entitled by contract or law;

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7. whether an employer encourages or discourages an employee to consult an attorney; and,
8. whether the employee had a fair opportunity to do so.

Swarts v. Sherwin-Williams Co., 244 N.J. Super. 170, 176-77, 581 A.2d 1328 (App. Div. 1990).

An employer who agrees to pay an employee his or her salary already earned, or accrued vacation time, would render the agreement insufficient for lack of consideration. **Swarts**. Still, an agreement to pay an employee continuously after the employment relationship ceased is adequate consideration. Specifically, to assessing an agreement's viability, New Jersey courts look to "whether the consideration given in exchange for the waiver exceeds employee benefits to which the employee was already entitled by contract or law." *Id.*

17. Temporary Assignment for Injured Workers

An employee is entitled to temporary partial disability benefits if he is working light duty on a part-time or full-time basis and earns less than he would be earning if employed in the full capacity of the job. For injury producing temporary disability, 70% of the worker's weekly wages received at the time of injury, subject to a maximum compensation of 75% of the average weekly wages earned by all employees covered by the "unemployment compensation law" (*R.S. 43:21-1 et seq.*) and a minimum of 20% of such average weekly wages a week. *N.J.S.A. 34:15-12(a)*. This compensation must be paid during the period of such disability, but not beyond 400 weeks.

The New Jersey Law Against Discrimination (LAD), *N.J.S.A. §§ 10:5-1 to -49*, does not require that an employer create an indefinite light duty position for a permanently disabled employee if the employee's disability, absent a reasonable accommodation, renders him otherwise unqualified for a full-time, full-duty position. **Raspa v. Office of Sheriff of Cty. of Gloucester**, 191 N.J. 323, 341 (2007). As a result, an employer may reasonably limit light duty assignments to those employees whose disabilities are both temporary and not inconsistent with the duties of the light duty assignment. *Id.* Conversely, the availability of light duty assignments for temporarily disabled employees does not give rise to any additional obligation on the part of the employer to assign indefinitely a permanently disabled employee to an otherwise restricted light duty assignment. *Id.*

18. Termination Obligations

Employees leaving or terminated for any reason, including labor disputes, shall be paid all wages due not later than the regular payday for the period in which the termination occurred. An additional 10 days may be allowed in the event of a labor dispute involving payroll employees. Employees paid on an incentive system shall be paid a reasonable approximation of wages due until exact amounts can be computed. Payment may be made through regular pay channels or by mail if requested by the employee

An employer must pay the final compensation of separated employees in full, at the time of separation, if possible, but in no case later than the next regularly scheduled payday for the employee. Where the employee requests in writing that his final compensation be paid by check and mailed to him, the employer must comply with this request.

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19. Sales Commissions

Commissions are included in the statute's definition of wages. *N.J.S.A. 34:11-4.1*. Wages must be paid at least twice each month, and must be paid not more than 10 working days after the end of the pay period. *N.J.S.A. 34:11-4.2*. Any employment agreement that violates the WPL "shall be deemed to be null and void." *N.J.S.A. 34:11-4.7*.

In 1996, the Department of Labor adopted § 12:55-2.4(a) of the WPL, as a new rule introducing "the procedure for the time and mode of final wage payment by the employer following the termination or voluntary leaving of an employee as set forth at N.J.A.C. 34:11-4.2." 28 N.J.R. 4160(a)(September 16, 1996). Conforming to that regulation, all final payment of wages following the voluntary leaving of employment shall be completed within 10 days from the end of the work period for which such wages were earned." *N.J.A.C. 12:55-2.4(a)*; See also, ***Neal v. E. Controls, Inc.***, No. A-4304-06T1, 2008 N.J. Super. Unpub. LEXIS 2668, at *15 (Super. Ct. App. Div. Mar. 18, 2008).

Any agreement, express or implied, that runs afoul of these requirements creates a cause of action for violation of the WPL. ***Winslow v. Corporate Exp., Inc.***, 364 N.J. Super. 128, 136, 834 A.2d 1037 (App. Div. 2003). However, the WPL does not curtail the ability of the parties to contract regarding a term of employment that does not violate the law. For example, The Appellate Division in ***Winslow*** noted that the employer was free to contractually change the commission structure previously in place, provided it did so with notice and after the employee was afforded an opportunity to decide whether he wished to continue working at a reduced rate of compensation." ***Winslow***, at 139 (citing *Nolan v. Control Data Corp.*, 243 N.J. Super. 420, 430-32, 579 A.2d 1252 (App. Div. 1990)). The failure to provide such notice, however, ran afoul of the WPL and thus provided the plaintiff with a cause of action under the statute. ***Id.*** at 136.

Note the contrast between the WPL and the Sales Representative Rights Act ("SRRA" for short). Under New Jersey's SRRA, adopted by the legislature in 1990, the commissions and other compensation earned as a result of the sales representative relationship and unpaid after the relationship is terminated shall become due and payable within 30 days of the date the contract is terminated or within 30 days of the date commissions are due, whichever is later. N.J. Stat. § 2A:61A-2. A sales representative (defined to exclude "an employee") is entitled to receive commissions on goods ordered up to and including the last day of the contract even if accepted by the principal, delivered, and paid for after the end of the agreement. The commissions are due and payable within 30 days after payment would have been due under the contract if the contract had not been terminated.

Consequently, by enacting the SRRA, the New Jersey Legislature insured that independent sales representatives not only received commissions after the termination of their contractual relationship, but also that payment was made to them in accordance with their prior agreement. In doing so, the Legislature defined when a commission was due. This obligation is regardless of the contract is in operation at the time.

Primary Contact Information

Thomas J. Wagner, Esquire

Email: tjwagner@wagnerlaw.net

EMPLOYMENT PRACTICE LIABILITY AND FAIR LABOR STANDARDS: NEW JERSEY

Law Offices of Thomas J. Wagner, LLC

Amy L. Wynkoop, Esquire

Email: alwynkoop@wagnerlaw.net

Pennsylvania (Philadelphia/Philadelphia County) Location

8 Penn Center, 6th Floor

1628 John F. Kennedy Boulevard

Philadelphia, PA 19103

Ph: 215.790.0761

Fx: 215.790.0762

New Jersey (Marlton/Camden County) Location

Five Greentree Centre, Suite 104

525 Route 73 North

Marlton, NJ 08053

Ph: 856.241.7785

Fx: 856.241.7786