

New Jersey Division on Civil Rights Proposes New Rule on Disparate Impact Discrimination

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On June 3rd, the New Jersey Division on Civil Rights (the “DCR”) proposed a new rule, N.J.A.C. 13:16, that codifies claims of disparate impact discrimination under the Law Against Discrimination (the “LAD”).

The LAD, codified at N.J.S.A. 10:5-1 through 50, prohibits practices or policies that have a disproportionately negative effect on members of a protected class, even if these practices or policies are not intended to discriminate, unless it can be shown that the practice or policy is necessary to achieve a “substantial, legitimate, and nondiscriminatory interest.”

The proposed new rule seeks to provide a standard for determining whether a practice or policy is unlawfully discriminatory, and it sets forth a burden-shifting framework for disparate impact claims. These claims have been upheld in New Jersey courts previously; however, the purpose of the new rule is to codify and clarify existing State and Federal case law on the subject.

Specifically, the proposed rule would codify Disparate Treatment claims under the LAD in the context of employment, housing, housing financial assistance, places of public accommodation, or contracting practice or policy. The burden-shifting framework for these claims first requires that a complainant show that a practice or policy has a disparate impact on a protected class using evidence that is not hypothetical or speculative. If a complainant can make such a showing, then they have established their *prima facie* case.

The burden then shifts to the respondent to show that the policy is necessary to achieve a “substantial, legitimate, nondiscriminatory interest.” Under the rule, even if the practice or policy at issue is necessary to achieve a “substantial, legitimate, nondiscriminatory interest,” it may still be unlawful if there is a less discriminatory, equally effective alternative. The rule defines “substantial interest” as a core interest of the entity that has a direct relationship to the function of that entity and “legitimate interest” as a justification for a challenged practice or policy that is genuine and not false or pretextual. The respondent must defend the practice or policy with the use of empirical evidence.

Lastly, if the respondent can satisfy their burden, the claimant may show that there is a less discriminatory, but equally effective, alternative. The DCR commented that this burden-shifting framework requires a case-specific, fact-based inquiry. This framework has been relied upon for some time in New Jersey Courts, at the State and Federal level, therefore the proposed rule will not necessarily change how these matters are handled by the Court; however, the DCR is hoping



that by passing the proposed rule they will provide further clarity to both employers and employees in this area.

If you have any questions about the above alert, please contact Jennifer R. O'Connor or Kyle Madley of Saiber LLC Employment & Labor Law practice.