



## **NEW JERSEY LAW REVISION COMMISSION**

### **Draft Final Addressing the Use of the Term “Inhabitant” in the New Jersey Law Against Discrimination**

**October 11, 2021**

The work of the New Jersey Law Revision Commission is only a recommendation until enacted.

Please consult the New Jersey statutes in order to determine the law of the State.

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## Project Summary<sup>1</sup>

The practices of discrimination against members of protected classes are matters of concern to the government of New Jersey.<sup>2</sup> To protect the “inhabitants” of the State from such discrimination, the Legislature enacted the “Law Against Discrimination.”<sup>3</sup>

The term “inhabitants,” as used in the preamble of the New Jersey Law Against Discrimination (NJLAD), is not defined in the Act.<sup>4</sup> Moreover, the use of the term is inconsistent with the language used in other provisions of the statute, namely N.J.S. 10:5-5(a), which defines the term “person,” and does not limit the definition to New Jersey residents or employees.

The breadth of protection provided by the NJLAD was the subject of *Calabotta v. Phibro Animal Health Corp.*<sup>5</sup> The *Calabotta* Court noted that the restrictive language used in the preamble created “a potential interpretive ambiguity about the statute’s coverage.”<sup>6</sup> The Appellate Division found that the Legislature did not intend for the NJLAD to apply solely to the inhabitants of New Jersey, and extended protection to an Illinois resident who worked for a New Jersey-based company.

The Commission recommends modification of the NJLAD to clarify that individuals who reside outside of New Jersey and work, or conduct business within, the State are protected by the Act.

## Statute Considered

N.J.S. 10:5-3 provides, in relevant part:

The Legislature finds and declares that practices of discrimination against any of its **inhabitants**, because of race, creed, color, national origin, ancestry, age, sex, gender identity or expression, affectional or sexual orientation, marital status, familial status, liability for service in the Armed Forces of the United States, disability or nationality, are matters of concern to the government of the State, and that such discrimination threatens not only the rights and proper privileges of the **inhabitants** of the State but menaces the institutions and foundation of a free democratic State; provided, however, that nothing in this expression of policy prevents the making of legitimate distinctions between citizens and aliens when required by federal law or otherwise necessary to promote the national interest.

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<sup>1</sup> Initial work on this project was performed by Alyssa Brandley during her time as a Legislative Law Clerk with the Commission.

<sup>2</sup> N.J. STAT. ANN. § 10:5-3 (West 2021).

<sup>3</sup> N.J. STAT. ANN. §§ 10:5-1 – 10:5-49 (West 2021).

<sup>4</sup> See N.J. STAT. ANN. § 10:5-3 and § 10:5-10 (West 2021).

<sup>5</sup> *Calabotta v. Phibro Animal Health Corp.*, 460 N.J. Super. 38 (App. Div. 2019).

<sup>6</sup> *Id.* at 62. Based on precedent, the Court held that the preamble shall make way to the other provisions of the statute. *Id.*

The Legislature further declares its opposition to such practices of discrimination when directed against any person by reason of the race, creed, color, national origin, ancestry, age, sex, gender identity or expression, affectional or sexual orientation, marital status, liability for service in the Armed Forces of the United States, disability or nationality of that person or that person's , partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers, or customers, in order that the economic prosperity and general welfare of the **inhabitants** of the State may be protected and ensured [emphasis added].

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### **Background**

In *Calabotta v. Phibro Animal Health Corp.*, the Plaintiff brought suit against his New Jersey-based former employer<sup>7</sup> for failure-to-promote and wrongful discharge, alleging associational discrimination in violation of New Jersey Law Against Discrimination (NJLAD).<sup>8</sup> At the time of the alleged incidents, the Plaintiff was a resident of Illinois and was employed by Prince Agri Product Incorporated, a subsidiary of Phibro, located in Quincy, Illinois. The Plaintiff's claim of "associational discrimination" against him was based on the fact that his wife was terminally ill with cancer at the time the incidents occurred.<sup>9</sup> In its defense, the Defendant claimed that the Plaintiff never applied for the promotion, and that it rightly discharged him for inappropriate conduct at a trade show.<sup>10</sup>

From 2008 to 2016, the Plaintiff worked for the Defendant as Vice President of Marketing and Technology Deployment. When he was hired, the Plaintiff signed three employment agreements, all of which provided, in relevant part, that:

This agreement will be governed by the laws of the state of New Jersey without regard for conflicts of law principles. I expressly consent to venue in, and the personal jurisdiction of, the state and federal courts located in New Jersey for any lawsuit arising from or relating to this agreement.<sup>11</sup>

The trial court dismissed the Plaintiff's complaint, finding that the "NJLAD does not apply to employees whose employment is based outside of New Jersey."<sup>12</sup>

### **Analysis**

On appeal, the Appellate Division considered whether the NJLAD is intended to protect

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<sup>7</sup> The Defendant is a corporation headquartered in Teaneck, New Jersey that develops and sells animal food additives.

<sup>8</sup> *Id.* at 44.

<sup>9</sup> *Id.* at 44-45.

<sup>10</sup> *Id.* at 45.

<sup>11</sup> *Id.* at 47. The Defendant argued that these employment agreements regarded only discrete subjects and thus were not applicable to the alleged discrimination claims at hand. *Id.* at 51-52.

<sup>12</sup> *Id.* at 51.

nonresident workers and job applicants, notwithstanding that the statute’s preamble, N.J.S. 10:5-3, refers specifically to “inhabitants” of this State.<sup>13</sup> To ascertain the scope of the NJLAD, and the intent of the Legislature, the Appellate Division examined the entirety of the Act.

The NJLAD is remedial in nature and should be liberally construed to “advance its beneficial purposes.”<sup>14</sup> Certain provisions of the Act contain language supporting a broad application. The NJLAD recognizes, for example, that “[a]ll persons shall have the opportunity to obtain employment...without discrimination” and declares that to be a civil right.<sup>15</sup> Additionally, N.J.S. 10:5-5(a) defines the term “person” as “one or more individuals, partnerships, associations, organizations, labor organizations, corporations, legal representatives, trustees, trustees in bankruptcy, receivers, and fiduciaries.”<sup>16</sup> The definition of “person” does not limit the term to New Jersey residents or employees. Similarly, N.J.S. 10:5-12(a) prohibits the discriminatory refusal to hire or employ, as well as the discriminatory discharge, of “any individual” and does not limit that term to New Jersey residents or employees.<sup>17</sup>

The Court also examined the language of the preamble to the Act, which, read narrowly, may limit the protection of the NJLAD.<sup>18</sup> The preamble refers to “inhabitants” in its text, but that term is not defined anywhere in the Act.<sup>19</sup> The Court referred to N.J.S. 1:1-2 for a definition of inhabitants, noting that the Legislature intended the NJLAD to, at a minimum, protect New Jersey residents.<sup>20</sup> The Court indicated that the extent of the Act’s protection was unclear, noting that “inhabitants” was not consistently used throughout the preamble.<sup>21</sup> Ultimately, the Court concluded that when a preamble is inconsistent with the clear language of the statute, “the preamble must give way.”<sup>22</sup>

After considering the text of the NJLAD, and its legislative history, the Court determined that the Legislature did not intend the protections of the NJLAD to be limited only to job applicants who live in New Jersey or to employees who perform all of their employment functions in this State.<sup>23</sup>

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<sup>13</sup> *Id.* at 45.

<sup>14</sup> *Id.* at 61 (internal citation omitted).

<sup>15</sup> *Id.* (citing N.J. STAT. ANN. § 10:5-4).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 62.

<sup>18</sup> *Id.*

<sup>19</sup> *See id.* Further at issue is that the preamble does not use the term “inhabitants” consistently throughout its text. The second paragraph states the Legislature’s “opposition to such practices of discrimination when directed against *any person*,” not solely against inhabitants, and the third paragraph declares that, due to discrimination, “*people*,” not solely inhabitants, suffer personal hardships. *Id.* at 63 (emphasis added).

<sup>20</sup> *Id.* at 63.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 62.

<sup>23</sup> *Id.* at 64. Since the NJLAD was found to extend to certain out-of-state plaintiffs, the Court next had to consider whether New Jersey law should apply, or whether choice-of-law principles favored applying Illinois law instead. *Id.* at 45. Weighing of the choice-of-law factors set forth in Restatement (Second) of Conflicts of Laws, Section 6, the Court reversed the trial court’s application of Illinois law as to the failure-to-promote claim and vacated and remanded the wrongful discharge claim for further analysis. *Id.* at 45-46.

## Preambles<sup>24</sup>

The NJLAD uses the word “inhabitants” three times in the legislative findings portion of the Act.<sup>25</sup> The term is undefined in the Act and the *Calabotta* Court determined that, under certain circumstances, the NJLAD includes plaintiffs who live or work outside of New Jersey.<sup>26</sup> In this case of first impression, however, the Court did not discuss the difference between a “preamble” and a “legislative finding.”<sup>27</sup>

### • *Preambles v. Legislative Findings*

A statute may contain a section, or sections, entitled “legislative findings” or “purpose.” These sections may appear either before, or after, the enacting clause. “These clauses are generally called *preambles* when they precede the enacting clause and *findings, purpose, or policy clauses* ... when they follow the enacting clause.”<sup>28</sup>

The principles of statutory interpretation provide that the body of a statute is composed only of the material following the enacting clause.<sup>29</sup> They also suggest that a preamble should not be given any weight, especially when it conflicts with the clear, unambiguous terms of the statute.<sup>30</sup>

In *PRB Enterprises, Inc. v. S. Brunswick Plan. Bd.*, the New Jersey Supreme Court considered the location of the “purpose” clause of a zoning ordinance.<sup>31</sup> The *PRB* Court noted that “ordinarily, the contents of the preamble are not given substantive effect, particularly where the enacting portion of the ordinance is expressed in clear and unambiguous terms.”<sup>32</sup> Conversely, the statutory sections that follow the enacting clause are considered substantive.<sup>33</sup> The “purpose clause” in *PRB* appeared after the enacting clause.<sup>34</sup> The Court therefore determined that the clause “was intended to be a part of the body of the ordinance and should be so construed.”<sup>35</sup>

### • *New Jersey’s Law Against Discrimination*

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<sup>24</sup> See generally N.J. LAW REV. COMM’N (2021) ‘Definition of Inhabitants.’ *Minutes of NJLRC meeting 18 Feb. 2021*, Newark, New Jersey.

<sup>25</sup> N.J. STAT. ANN. § 10:5-3 (West 2021). The term “inhabitants” is also found in N.J. STAT. ANN. § 10:5-10c. ¶ 1 (West 2021).

<sup>26</sup> *Id.*

<sup>27</sup> *Calabotta*, 460 N.J. Super. 38, 52 n.4.

<sup>28</sup> LINDA D. JELLM, *MASTERING STATUTORY INTERPRETATION* 154-155 (2d ed. 2013). See WILLIAM D. POPKIN, *A DICTIONARY OF STATUTORY INTERPRETATION* 213 (2006) (defining preamble as the language in a statute which usually precedes the official text of the law, before the “be it enacted” or “be it resolved” clause). See *PRB Enterp., Inc. v. S. Brunswick Planning Bd.*, 105 N.J. 1, 5-6 (1987).

<sup>29</sup> 2A Sutherland Statutory Construction § 47:4 (7<sup>th</sup> ed.) (West 2021); 2A Sutherland Statutory Construction § 20:7 (7<sup>th</sup> ed.) (West 2021) (“The action part, sometimes called the ‘enacting part,’ of a statute is comprehensively termed its purview...[and] includes all matter following the enacting clause.”).

<sup>30</sup> *Id.*

<sup>31</sup> *PRB Enterprises, Inc. v. S. Brunswick Plan. Bd.*, 105 N.J. 1, 5 (1987).

<sup>32</sup> *Id.*

<sup>33</sup> See discussion *supra* “Preambles v. Legislative Findings” p. 4.

<sup>34</sup> *PRB Enterprises, Inc. v. S. Brunswick Plan. Bd.*, 105 N.J. at 6.

<sup>35</sup> *Id.*

When the NJLAD was enacted in 1945, it contained a subsection that described the Act as intended to “prevent and eliminate practices of discrimination in employment and otherwise against persons because of race, creed, color, national origin or ancestry; to create a division in the Department of Education to effect such prevention and elimination; and making an appropriation therefor....”<sup>36</sup> As originally enacted, this language preceded the “enacting clause.”<sup>37</sup>

The current version of the NJLAD contains three separate statutory sections entitled “findings and declarations.”<sup>38</sup> The first, N.J.S. 10:5-3, is entitled “Legislative Findings and Declarations.”<sup>39</sup> The second, N.J.S. 10:5-3.1, is titled “Findings, Declarations, and Intent Regarding Workplace Discrimination of Women Who are Pregnant or Recovering from Childbirth.”<sup>40</sup> The third, N.J.S. 10:5-44, provides legislative findings and declarations pertaining to the Genetic Privacy Act.<sup>41</sup> Each of these “findings” sections appears after the Act’s enacting clause. Their location suggests that the Legislature intended them to be a part of the body of the Act and that they should be so construed.<sup>42</sup>

### **Outreach**

In connection with this Report, Staff sought comments from knowledgeable individuals and organizations including: the Office of the Attorney General; counsel for the parties in *Calabotta*; the executive of the Labor and Employment Law Section of the New Jersey State Bar Association; the National Employment Lawyers’ Association of N.J.; the Employers’ Association of N.J.; New Jersey Workforce Development; Professor Timothy Glynn, Seton Hall University School of Law; the National Employment Lawyers’ Association of N.J.; and the Academy of New Jersey Management Attorneys.

The Commission did not receive any objection to the modifications set forth in the Appendix to this report.

### **Pending Legislation**

Two bills were introduced in the 2020-2021 session of the New Jersey Legislature that

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<sup>36</sup> See L.1945, c. 169, p. 589 then entitled N.J.S. § 10:5-1.

<sup>37</sup> See also N.J.S. 10:5-3 and L.1945, c. 169, p. 589, § 3. Amended by L.1951, c. 64, p. 419, § 2; L.1962, c. 37, § 2; L.1970, c. 80, § 8, eff. June 2, 1970; L.1977, c. 96, § 1, eff. May 19, 1977; L.1990, c. 12, § 1; L.1991, c. 519, § 1, eff. Jan. 19, 1992; L.1992, c. 146, § 1, eff. Nov. 20, 1992; L.2003, c. 180, 3, eff. Jan. 1, 2004; L.2006, c. 100, § 2, eff. June 17, 2007; L.2019, c. 436, § 1, eff. Jan. 21, 2020.

<sup>38</sup> N.J. STAT. ANN. § 10:5-3 (West 2021). See N.J. STAT. ANN. § 10:5-3.1 (entitled “Findings, Declarations, and Intent Regarding Workplace Discrimination of Women Who are Pregnant or Recovering from Childbirth”); and N.J. STAT. ANN. § 10:5-44 (Legislative findings and declarations regarding the Genetic Privacy Act).

<sup>39</sup> N.J. STAT. ANN. § 10:5-3 (West 2021).

<sup>40</sup> See N.J. STAT. ANN. § 10:5-3.1 (entitled “Findings, Declarations, and Intent Regarding Workplace Discrimination of Women Who are Pregnant or Recovering from Childbirth”).

<sup>41</sup> See N.J. STAT. ANN. § 10:5-44 (Legislative findings and declarations regarding the Genetic Privacy Act).

<sup>42</sup> See *supra* discussion of Preambles and *PRB Enterprises, Inc. v. S. Brunswick Plan. Bd.*, 105 N.J. 1, 5 (1987).

pertain to N.J.S. 10:5-3,<sup>43</sup> but they do not address the issue raised in this Report.

### **Conclusion**

The New Jersey Law Against Discrimination was enacted to protect against discrimination. The case of *Calabotta v. Phibro Animal Health Corp.* addressed a potential interpretive ambiguity concerning the scope of the Act's protection.

The proposed revisions contained in the Appendix are designed to clarify the scope of the protections afforded by the Act.

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<sup>43</sup> See A.B. 4289, 219th Leg., 1st Sess. (N.J. 2020) (seeking to codify protections for persons suffering discrimination on grounds of disparate impact); New Jersey Intern Protection Act, A.B. 3563, 219th Leg., 1st Sess. (N.J. 2020) (identical bill S.100, 219th Leg., 2020 Sess. (N.J. 2020)) (seeking to provide protections and remedies for interns).

## Appendix

The proposed modifications to N.J.S. 10:5-3 and N.J.S. 10:5-10(c) (shown with ~~strikethrough~~ or underlining), follow:

### **N.J.S. 10:5-3 Legislative findings and declarations**

The Legislature finds and declares that practices of discrimination against any ~~of its inhabitants~~ person, because of race, creed, color, national origin, ancestry, age, sex, gender identity or expression, affectional or sexual orientation, marital status, familial status, liability for service in the Armed Forces of the United States, disability or nationality, are matters of concern to the government of the State, and that such discrimination threatens not only the rights and proper privileges of ~~the inhabitants of the State~~ that person, but menaces the institutions and foundation of a free democratic State; provided, however, that nothing in this expression of policy prevents the making of legitimate distinctions between citizens and aliens when required by federal law or otherwise necessary to promote the national interest.

The Legislature further declares its opposition to such practices of discrimination when directed against any person by reason of the race, creed, color, national origin, ancestry, age, sex, gender identity or expression, affectional or sexual orientation, marital status, liability for service in the Armed Forces of the United States, disability or nationality of that person or that person's family members, partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers, or customers, in order that the economic prosperity and general welfare of ~~the inhabitants of the State~~ these persons may be protected and ensured.

The Legislature further finds that because of discrimination, people suffer personal hardships, and the State suffers a grievous harm. The personal hardships include: economic loss; time loss; physical and emotional stress; and in some cases severe emotional trauma, illness, homelessness or other irreparable harm resulting from the strain of employment controversies; relocation, search and moving difficulties; anxiety caused by lack of information, uncertainty, and resultant planning difficulty; career, education, family and social disruption; and adjustment problems, which particularly impact on those protected by this act. Such harms have, under the common law, given rise to legal remedies, including compensatory and punitive damages. The Legislature intends that such damages be available to all persons protected by this act and that this act shall be liberally construed in combination with other protections available under the laws of this State.

### **Comment**

N.J.S. 10:5-3 is currently divided into two sections; one which prohibits discrimination against the inhabitants of New Jersey, and a second which prohibits discrimination against “any person.” The term “inhabitants” is used three times in the statute without a definition. N.J.S. 10:5-5 defines “person” as “one or more individuals, partnerships,



associations, organizations, labor organizations, corporations, legal representatives, trustees, trustees in bankruptcy, receivers, and fiduciaries.”

There does not appear to be a reason to distinguish between inhabitants and persons in N.J.S. 10:5-3. The draft statute has been restructured to remove the term “inhabitants” so it is not construed as limiting the protections afforded by the Act.

The proposed amendment is based on the discussion of the use of the term “inhabitants” in *Calabotta v. Phibro Animal Health Corp.*, 460 N.J. Super. 38 (App. Div. 2019).

## **N.J.S. 10:5-10. Commission’s powers and duties<sup>44</sup>**

The commission shall:

- a. Consult with and advise the Attorney General with respect to the work of the division.
- b. Survey and study the operations of the division.
- c. Report to the Governor and the Legislature with respect to such matters relating to the work of the division and at such times as it may deem in the public interest.

The mayors or chief executive officers of the municipalities in the State may appoint local commissions on civil rights to aid in effectuating the purposes of this act. Such local commissions shall be composed of representative citizens serving without compensation. Such commissions shall attempt to foster through community effort or otherwise, good will, cooperation and conciliation among the ~~groups and elements~~ members of the ~~inhabitants of the~~ community, and they may be empowered by the local governing bodies to make recommendations to them for the development of policies and procedures in general and for programs of formal and informal education that will aid in eliminating all types of discrimination based on race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, gender identity or expression, familial status, disability, nationality or sex.

Credits: L.1945, c. 169, p. 592, § 9. Amended by L.1949, c. 11, p. 42, § 6; L.1962, c. 37, § 6; L.1963, c. 40, § 5, eff. May 21, 1963; L.1970, c. 80, § 13, eff. June 2, 1970; L.1991, c. 519, § 7, eff. Jan. 19, 1992; L.1992, c. 146, § 8, eff. Nov. 20, 1992; L.2003, c. 180, § 11, eff. Jan. 1, 2004; L.2006, c. 100, § 8, eff. June 17, 2007.

N. J. S. A. 10:5-10, NJ ST 10:5-10

### **Comment**

The term inhabitant, undefined in the Law Against Discrimination, has been removed from the last paragraph of N.J.S. 10:5-10 and has been replaced with the word “members.” In addition, the phrase “groups and elements” has also been removed from the statute.

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<sup>44</sup> The Commission has not had the opportunity to review the language that has been proposed in this section. The use of the word “inhabitant” in N.J.S. 10:5-10 was noted after the Commission released this project as a Tentative Report.