February 4, 2013

David Fish, Regulatory Officer
Office of Legal and Regulatory Services
PO Box 110, 13th Floor
Trenton, NJ 08625-0110

RE: Comments to Proposed Rules Concerning Employer Notification Relating to the Right to Be Free of Gender Inequity or Bias in Pay, Compensation, Benefits, or Terms, Conditions and Privileges of Employment

Dear Mr. Fish:

Thank you for the opportunity to comment on the above captioned matter. As noted in the proposed Rule 12:2-2, the purpose of the proposed rules is to comply with P.L. 2012, c.57, specifically to proscribe posting and notification procedures for employers with 50 or more employees to follow. In particular, proposed Rule 12:2-2.3 sets forth those requirements. Appendix B sets forth the text of such notification. Please accept this letter on behalf of the Employers Association of New Jersey (EANJ) as commentary thereto.

I. Sound practice and legal precedent warrants that the proposed Notification include a statement that, in addition to those set forth under statute, employees can avail themselves of an internal remedy.

P.L. 2012, c.57 was first taken up in hearings before the Assembly Committee on Women and Children (the Committee). It was part of a four-bill package that was passed by the Assembly and Senate. Only P.L. 2012, c. 57 was signed by the Governor. The other three bills (A-2648. A-2649 and A-2650) were either vetoed or conditionally vetoed by the Governor.

As I mentioned during my appearances before the Committee, in New Jersey, about half of the state's workforce is comprised of working women. Women comprise the majority of professional, technical, administrative support workers and women comprise the majority of sales and service workers in the state. Women are obviously a vital human resource to the state's employers and not in numbers alone. They are major contributors to the state's economic wellbeing and it is beyond doubt that the success of the state's economy depends in great measure on women striving and thriving at work, which includes getting paid equitably without bias or discrimination.

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I also discussed that it is unlawful under both federal and State law to discriminate against workers because of sex or gender, including discrimination in wages and benefits and all other terms, conditions and privileges of employment.

Title VII of the Civil Rights Act of 1964 (Title VII) prohibits such discrimination and so does the N.J. Law Against Discrimination (NJLAD.) Both laws provide for a private right of action, a jury trial and robust equitable and legal damages, including punitive damages.

In addition to Title VII and NJLAD, both federal and State law prohibit unequal pay specifically because of sex or gender. The federal Equal Pay Act, which is part of the Fair Labor Standards Act, prohibits sex-based wage discrimination between men and women in the same establishment who perform jobs that require substantially equal skill, effort and responsibility under similar working conditions. Additionally, a provision of the New Jersey Wage and Hour law – N.J.S.A. 34:11-56.1- 11 - prohibits wage discrimination because of sex or gender. Like Title VII, LAD and the federal Equal Pay Act, the New Jersey equal pay statute provides robust remedies to aggrieved employees. Importantly, these laws also require posters notifying employees of their legal rights and the opportunity to complain to the Equal Employment Opportunity Commission (EEOC) or the N.J. Division on Civil Rights (the Division).

Additionally, I mentioned that in 2009, President Obama signed the Ledbetter Fair Pay Act, which in effect overruled a 2007 U.S. Supreme Court decision and extended the statute of limitations for filing a suit for unequal or discriminatory pay. As a practical matter, the Ledbetter Fair Pay Act requires employers to keep pay records for years after an employee has left employment.

Thus, I reiterate here: there are four powerful laws in the State that deter and remedy all forms of discrimination because of sex and gender. Importantly, these laws also prohibit retaliation against employees who complain to their employer about unequal pay or discriminatory pay practices or when they file a charge to the EEOC or the Division.

Clearly, the intent of P.L. 2012, c.57 is to notify that employees understand that the above-referenced laws protect them from unlawful discrimination and retaliation. Indeed, the title of the proposed notification expressly states that employees have a "right to be free" from discrimination. The notification also summarizes the laws and notes that employees should be "mindful" that the laws are qualified with certain exclusions. For example, under the Equal Pay Act, the wage disparity must be between jobs that require equal skills, effort and responsibility. Similarly, under Title VII and NJLAD, a wage disparity could be based on a reasonable factor other than sex.

The proposed notification also provides information about filing charges to the EEOC and the Division and also about filing a lawsuit under the Equal Pay Act. As employees are free to file charges and lawsuits, employers are permitted to defend themselves of such allegations. Suffice

to say, litigation in this area of the law is very complex, requiring a sophisticated understanding of burdens of proof, among other things.

Craig Sashihara, Director of the Division also appeared before the Committee. When he estimated that the percentage of unequal pay charges filed to the Division each year was minimal, some Committee members were startled. But as I explained, there was an obvious reason why unequal pay claims represented less than 2 percent of all claims. Nearly every employer with 50 or more employees distributes a written policy contained in an employee handbook or otherwise that notifies employees of their right to address their concerns directly to her employer. This direct action remedies the situation without recourse to the EEOC or the Division, although the employee remains free to file a claim to either agency. Indeed, one of the first substantive questions that an EEOC examiner will ask a claimant is whether she first sought a remedy directly with the employer, which is encouraged. This internal remedy is both proficient and efficient. Indeed, both the New Jersey Supreme Court has advised employers to deal with these issues internally. See generally *Gaines v. Bellino*, 173 N.J. 301 (2002) (Employers should accept, investigate and resolve employee complaints without retaliation.). In fact, both the EEOC and EANJ provide training to employers on how to handles and resolve discrimination complaints internally.

The notification, as proposed, is therefore incompatible with sound practice and legal precedent without a statement that advises (or reminds) employees that they can always resolve a discrimination issue directly with their employer. Accordingly, EANJ respectfully recommends the following additional language on the notification:

Please be mindful, that in addition to the rights and remedies provided by the statues referenced herein, an employee is free to raise concerns directly with his or her employer by notifying _____.

II. The proposed rules do not address the situation when an employee does not sign receipt of the acknowledgment and/or does not return it to the employer within thirty (30) days.

Proposed Rule 12:2.4 (as amended on January 22, 2013 at 45 NJR 1(2)) follows P.L. 2012, c. 57 faithfully and requires employers to obtain a signed acknowledgement of receipt of the notification from each employee, on or before December 31 of "each year." The acknowledgment must show that the employee received a copy of the notification and that they have read and understood its contents. This requirement also applies to all newly hired employees and all current employees no later than 30 days after a final Rule is published. (Employees can also request a copy).

The precise enabling section of P.L. 2012, c.57 - section 1b - states:

"The employer shall provide each worker of the employer with a *written* copy of the notification; not later than 30 days after the form of the notification is issued by the commissioner; at the time of the worker's hiring, if the worker is hired after the issuance; annually, on or before December 31 of each year: and at any time, upon the first request of the worker .." (Emphasis added)

Within 30 days after a final rule is published, covered employers will post and distribute a notification to each worker and receive within 30 days a signed acknowledgment showing that the worker received the notification and that he or she has read and understood its contents. Each year thereafter, for as long as the employee remains employed with the employer, that employee will receive the same notification and he or she must sign and return it to the employer.

EANJ asks the following rhetorical question: How many times must an employee acknowledge receipt of a notification stating that he or she has received a copy of the notification and that he or she has read and understands its contents before the employee understands the notice?

While we apologize for the rhetorical nature of the question, P.L. 2012, c.57 does not address a situation where an employee does not, or simply refuses to acknowledge receipt of the notification and/or does not return it to the employer within 30 days. Presumably, the employer will keep track of the notification's distribution and will make efforts to collect the signed acknowledgment but P.L. 2012, c.57 places the responsibility squarely on the employee to "return it to the employer within 30 days of its receipt." Section 1b(3). Accordingly, EANJ suggests that an additional section be included in the rules that address the material omission of the statute. To do so would not go beyond the Commissioner's authority because it does not modify the statute but merely implements it through appropriate rule making.

Thus, the following new section is suggested:

12:2-2.5 Employer's reasonable efforts

If a worker does not sign an acknowledgment that he or she has read the notification and understands it, or does not return it to the employer within 30 days of its receipt, the employer is relieved of any responsibility as long as it has exercised reasonable efforts to obtain the signed acknowledgement from the worker.

Thank you for the opportunity to submit these comments.

Respectfully submitted,

John J Sarno, Esq.
President
For the Employers Association of New Jersey