TENURE, UNEMPLOYMENT, AND WORKERS' COMPENSATION:
ILLUMINATING RIGHTS AND RESPONSIBILITIES IN NEW JERSEY'S
EMPLOYMENT LAW

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I. INTRODUCTION

New Jersey law provides a broad range of protections for the approximately 4.4 million members of New Jersey's civilian workforce. These statutory provisions describe the rights and responsibilities of both employers and employees in a number of different employment contexts. Tenure policies, for example, "are a highly structured and monitored portion of the general education law, embodied in N.J.S.A. 18A:28-1 to -18." New Jersey tenure laws "provide not only for the creation of rights of tenure, but also how they may be lost."

New Jersey's Unemployment Compensation Act affords additional protections to workers, which the New Jersey Supreme Court has described as "a cushion for the workers of New Jersey 'against the shocks and rigors of unemployment.'" The court further described the purpose of the Act as providing "some income for the worker earning nothing, because he is out of work through no fault or act of his own."

Additionally, "[f]or more than a century, the Workers' Compensation Act has provided employees injured in the workplace 'medical treatment and limited compensation 'without regard to the negligence of the employer.'" The Act requires that municipalities provide

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compensation insurance for volunteer firefighters and other volunteers. More broadly, it “embodies ‘an historic ‘trade-off’ whereby employees relinquish their right to pursue common-law remedies in exchange for prompt and automatic entitlement to benefits for work-related injuries.”

The mandate of the New Jersey Law Revision Commission (“Commission”) is broad in scope, calling for consideration of “the general and permanent statutory law of this State and the judicial decisions construing it” to discover “defects and anachronisms therein, and to prepare and submit to the Legislature” bills designed to remedy defects, reconcile conflicts, clarify confusing language, and eliminate redundancies. The Commission is further called on to engage in “a continuous revision of the general and permanent” statutes and to maintain them “in revised, consolidated and simplified form.”

There are times when the Commission works in related areas of law across multiple projects. That is the case with the efforts here in the employment law area. Some of these efforts are highlighted below by a discussion of the Commission’s recommendations in the areas of tenure, unemployment benefits, temporary disability benefits, and the workers’ compensation medical provider statute of limitations.

II. SELECTED COMMISSION WORK IN THE AREA OF EMPLOYMENT LAW

A. Clarification of Tenure

New Jersey law provides tenure for teaching staff members and other educational employees, including secretaries, assistant secretaries, school business administrators, business managers, and clerical employees. Certain identified school employees


10 Id.
can obtain tenure through N.J.S.A. 18A:17-2.\textsuperscript{12} In its current form, N.J.S.A. 18A:17-2 does not comprehensively address the tenure rights of the non-teaching school employees even though the law covers the non-teaching employees in transfer and promotion situations.\textsuperscript{13}

Decisions in several cases identified potential gaps in the law, including DiNapoli v. Board of Education of the Township of Verona,\textsuperscript{14} Given v. East Windsor Regional School District,\textsuperscript{15} and Colon-Serrano v. Plainfield Board of Education.\textsuperscript{16} In these cases, the courts considered the school secretaries' abilities to retain tenure rights.\textsuperscript{17}

In DiNapoli, the Appellate Division held that a secretary forfeited her tenure rights when she was voluntarily reassigned to a non-secretarial position with the same employer.\textsuperscript{18} The new position was abolished after more than three years, and DiNapoli argued that she should have been able to “bump” a non-tenured secretary and reacquire her old position.\textsuperscript{19} The court disagreed, explaining that “the Legislature did not intend to afford secretaries tenure preservation upon transfer or promotion from secretarial employment.”\textsuperscript{20} In Given, however, where a tenured school clerk accepted a separately tenurable secretary position and later involuntarily returned to her clerk position,\textsuperscript{21} the court determined that while the employee did not automatically obtain tenure as a secretary, she did retain her tenure as a clerk.\textsuperscript{22} In

\textsuperscript{13} NJLRC FEB. 20, 2020 REVISED FINAL REPORT, supra note 11, at 1–2.  
\textsuperscript{17} NJLRC FEB. 20, 2020 REVISED FINAL REPORT, supra note 11, at 2.  
\textsuperscript{18} DiNapoli, 434 N.J. Super. at 245–46.  
\textsuperscript{19} Id. at 234–35, 240.  
\textsuperscript{20} Id. at 242.  
\textsuperscript{22} See id. at 45.
Colon-Serrano, a tenured attendance aide was found to have forfeited tenure rights upon promotion to a non-clerical, non-tenurable position with the same employer.23

The Commission began a project in this area to clarify N.J.S.A.18A:17-2, and to create a uniform statutory scheme that reconciles the potentially disparate statutory treatment of tenure for teaching and non-teaching employees.24

As tenure rights have expanded in New Jersey, the statutes applying these rights to various employees “were not always made consistent[ly].”25 N.J.S.A. 18A:17-2 is silent about the movement of employees from one position to another, but N.J.S.A. 18A:28-5 and -6, pertaining to the tenure of teaching staff members, contain language regarding the movement or transfer of those employees.26

N.J.S.A. 18A:17-20.4 and N.J.S.A. 18A:17-20.5,27 which pertain to the tenure rights of superintendents and administrative principals respectively, also provided guidance to the Commission in considering the proposed changes to N.J.S.A. 18A:17-2. Although superintendent and administrative principal positions are not tenurable, the tenure rights for positions held by an individual for positions below those positions are retained by the individual.28 This means that if an individual loses their superintendent or administrative principal position, they may resume a previously tenured position.29

24 See NJLRC FEB. 20, 2020 REVISED FINAL REPORT, supra note 11.
26 NJLRC FEB. 20, 2020 REVISED FINAL REPORT, supra note 11, at 4–5.
27 N.J. STAT. ANN. § 18A:17-20.4 (2013). For example, entitled “Effect on pre-existing tenure rights; tenure rights of superintendent promoted from within district,” states that: “Nothing in this section or in this act shall affect any tenure rights which shall have already accrued to any superintendent prior to the effective date of this amendatory and supplementary act. A superintendent of schools promoted from within a district shall retain all tenure rights accrued in any position which was previously held by the superintendent in the district.” Id.
28 NJLRC FEB. 20, 2020 REVISED FINAL REPORT, supra note 11, at 7.
29 NJLRC FEB. 20, 2020 REVISED FINAL REPORT, supra note 11, at 7.
Guided by the language in these statutes, the Commission recommended adding an additional subsection to N.J.S.A. 18A:17-2. Although the statutory language pertaining to tenure for secretarial and clerical positions does not contain a tenure retention provision like that found in the statutes concerning superintendents and administrative principals, it was unclear to the Commission that the Legislature intended to disadvantage other non-teaching staff. As a result, the Commission proposed language to protect the tenure rights of secretarial, administrative, and clerical employees who change from one position to another but remain within the same job category.

The Revised Final Report released by the Commission in February 2020 included a proposed new subsection (d) in N.J.S.A. 18A:17-2. Subsection (d)(1) states that a person who is tenured or eligible to obtain tenure, and “[w]ho is transferred or promoted to another position covered by” the chapter, “shall not obtain tenure in the new position until after meeting the specific tenure requirements for the new position.” Subsection (d)(2) states, in part, that if the person is transferred or promoted to a position covered by the chapter, “but is terminated before tenure is obtained therein, and who has tenure in the same district and under the same chapter,” then that person “shall be returned to the former position at the salary which would have been received had the transfer or promotion not occurred.” Proposed subsection (e) states that a person who is tenured or eligible to obtain tenure, but “[w]ho is voluntarily transferred or promoted from the tenured position, to a position that is not tenure-eligible, or to a position that is covered by another chapter, forfeits tenure” of their prior position.

During the course of its work in this area, the Commission sought knowledgeable and interested parties before tendering its Final Report, including the New Jersey Association of School Administrators (“NJASA”), the New Jersey School Board

30 NJLRC FEB. 20, 2020 REVISED FINAL REPORT, supra note 11, at 8–10.
31 NJLRC FEB. 20, 2020 REVISED FINAL REPORT, supra note 11, at 7–8.
32 NJLRC FEB. 20, 2020 REVISED FINAL REPORT, supra note 11, at 8.
33 NJLRC FEB. 20, 2020 REVISED FINAL REPORT, supra note 11, at 11.
34 NJLRC FEB. 20, 2020 REVISED FINAL REPORT, supra note 11, at 11.
35 NJLRC FEB. 20, 2020 REVISED FINAL REPORT, supra note 11, at 11–12.
Association ("SBA"), the New Jersey Principals and Supervisors Association ("NJPSA"), the New Jersey Department of Education ("NJDE"), and the New Jersey branch of the American Federation of Teachers ("NJAFT").36

The SBA offered favorable comments and support for the proposed modification to N.J.S.A. 18A:17-2, finding that the proposed language clarifies the limits of secretarial tenure and is preferable to the existing language in the statute. The SBA indicated, however, that it supports renewable contracts with school district staff regarding tenure.37 The Commission did not receive any comments in opposition to the Report.38

B. Unemployment Benefits When an Offer is Rescinded

In New Jersey, eligibility for unemployment compensation is governed by the Unemployment Compensation Law ("UCL").39 Generally, voluntarily leaving a position causes an individual to be disqualified from unemployment benefits until they are re-employed for eight weeks.40 A 2015 amendment to N.J.S.A. 43:21-5(a), however, excluded from disqualification individuals who accept new employment that "commences not more than seven days"41 after leaving their prior employment.42 However, the amendment does not indicate how eligibility for unemployment benefits is affected if a job offer is rescinded before the start date of the new employment, and within the statute’s seven-day window.

36 NJLRC FEB. 20, 2020 REVISED FINAL REPORT, supra note 11, at 8.
37 NJLRC FEB. 20, 2020 REVISED FINAL REPORT, supra note 11, at 8.
38 NJLRC FEB. 20, 2020 REVISED FINAL REPORT, supra note 11, at 9.
40 N.J. STAT. ANN. § 43:21-5(a) (2018) (mentioning an individual is disqualified from unemployment benefits until they earn at least ten times their weekly benefit rate, as determined on a case-by-case basis).
41 McClain v. Bd. of Rev., Dep’t of Lab., 237 N.J. 445, 450–51 (2019) ("[t]he Legislature recognized the inequity facing those employees who served a substantial period with one employer and then voluntarily left for an equal or better opportunity with another employer, only to be terminated shortly afterwards.").
42 N.J. STAT. ANN. § 43:21-5(a) (2018) (providing that in addition to commencing within seven days, the new employment must have “weekly hours or pay not less than the hours or pay of the employment of the first employer”).
This question was addressed by *McClain v. Board of Review, Department of Labor*. The New Jersey Supreme Court held that an individual who leaves employment voluntarily for a new position commencing within seven days, and whose job offer is rescinded before the start date of their new position through no fault of their own, is entitled to unemployment compensation pursuant to N.J.S.A. 43:21-5(a).

*McClain* is a consolidated appeal involving two appellants (McClain and Blake), both of whom accepted new positions scheduled to begin within seven days of leaving their prior employment, and both of whom had employers rescind the offers before the start date through no fault of the appellants. The Deputy Director of Unemployment Insurance denied both appellants’ claims for unemployment compensation. The Appeal Tribunals affirmed the denials and the Board of Review (“Board”) affirmed as well. Before separate appellate panels, McClain succeeded and Blake did not. Both the Board and Blake, respectively, appealed to the New Jersey Supreme Court and the cases were consolidated as *McClain v. Board of Review, Department of Labor*.

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43 See *McClain*, 237 N.J. at 461.
44 *Id.* at 462.
45 *Id.* at 461. McClain, a preschool teacher, and Blake, a cook, both accepted new positions scheduled to begin within seven days of resigning their prior employment. McClain’s job offer was rescinded the day after she resigned her prior employment, and Blake’s was rescinded two days before she was scheduled to start her new employment. *Id.* at 452–53. McClain’s offer was rescinded because the teacher she was hired to replace returned to her position and Blake’s offer was rescinded because the organization decided to hire someone else in her stead. *Id.*
46 *McClain*, 237 N.J. at 453.
47 *Id.* at 453 (holding that eligibility for unemployment compensation required individuals actually commence employment within seven days of leaving prior employment and the Board affirmed).
48 *Id.* at 454 (holding that the statute’s plain language required only that an individual accept an offer of employment scheduled to begin within seven days because the remedial purpose of the statute’s 2015 amendment supported this interpretation).
49 *Id.* at 454–55 (interpreting the statute to require an individual to actually begin working within the seven-day window, by relying on a Senate Labor Committee report which indicated the 2015 amendment was intended to help employees who had voluntarily left their employment only to be laid off from new employment after starting).
50 *Id.* at 451.
Before the New Jersey Supreme Court, the Board argued that unemployment compensation was available only to those who actually began working within the seven-day period. The appellants argued that the statute permitted unemployment compensation so long as the applicant accepted the job offer and was scheduled to start within seven days of leaving the prior position. The McClain Court found that the statute could plausibly be interpreted both ways, and reviewed the legislative history of the statute.

Finding the legislative history ambiguous, the court determined that the language in N.J.S.A. 43:21-5(a) should be “liberally construed in favor of claimants to effectuate [the UCL’s] remedial purposes” as social legislation designed to provide financial relief to individuals unemployed through no fault of their own. The McClain court found that the appellants were entitled to unemployment compensation benefits because “(1) they qualified for UI benefits at their former employment at the time of their departure, (2) they were scheduled to commence their new jobs within seven days of leaving their former employment, and (3) their new job offers were rescinded through no fault of their own before the start date.”

As a part of its work in this area, the Commission sought feedback from knowledgeable stakeholders and organizations regarding proposed modifications to N.J.S.A. 43:21-5(a) to address the concerns raised by the McClain Court. The Employers Association of New Jersey, the National Employment Lawyers’ Association—New Jersey (“NELA”), and the New Jersey State Bar Association Labor and Employment Law Section (“NJSBA LELS”) all expressed support for the Commission’s

52 Id. at 459.
53 Id.
54 Id. at 460–61 (citing Brady v. Bd. of Rev., 152 N.J. 197, 212 (1997)).
55 McClain, 237 N.J. at 462.
56 See N.J. L. Revision Comm’n, FINAL REPORT REGARDING UNEMPLOYMENT BENEFITS WHEN AN OFFER OF EMPLOYMENT IS RESCINDED, at 4 (June 17, 2021), [hereinafter NJLRC JUNE 2021 FINAL REPORT] (other individuals and organizations from whom comments were sought include New Jersey Workforce Development, Professor Timothy Glynn of Seton Hall University School of Law, and the attorneys for the Plaintiffs in McClain).
proposed clarification. The NELA suggested (1) increasing the timeframe in the statute from seven to ten days and (2) expressly stating that the prior employer’s unemployment account should not be charged in situations covered by the modification. The NJSBA LELS recommended preserving the seven-day timeframe and modifying a different section, N.J.S.A. 43:21-7(c)(1), to make clear that neither the old nor new employer’s unemployment accounts would be charged in the circumstances contemplated by McClain.

After considering these comments, the Commission released a Tentative Report in February 2021 that proposed incorporating the holding of McClain into N.J.S.A. 43:21-5(a) as a new subsection and adding language to N.J.S.A. 43:21-7(c)(1) to make clear that neither employer’s unemployment account would be charged in situations covered by the proposed modifications to N.J.S.A. 43:21-5(a).

The Commission again sought comments during the period following its release of the Tentative Report. In response, the NELA expressed its support for the proposed revisions but said that eligibility should include any circumstance in which an employee was scheduled to begin new employment but did not, or at least extended to those whose new employment was rescinded or delayed by the employer through no fault of the employee. The NJSBA LELS suggested that the clarification in N.J.S.A. 43:21-7(c)(1) should be included in the Comments to

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57 NJLRC JUNE 2021 FINAL REPORT, supra note 56 at 4.
58 NJLRC JUNE 2021 FINAL REPORT, supra note 56 at 4.
60 See NJLRC JUNE 2021 FINAL REPORT, supra note 56 at 4.
61 NJLRC JUNE 2021 FINAL REPORT, supra note 56 at 4. The timeframe change suggested by the NELA was not accepted by the Commission because the “proposals represent an express change in the statute’s substance and are not merely a codification of the New Jersey Supreme Court’s holding in McClain v. Bd. of Review, Dep’t of Lab., or the clarification of an ambiguity.” NJLRC JUNE 2021 FINAL REPORT, supra note 56 at 7. Given the Commission’s concern “about the ramifications of such substantive revisions,” consideration of that proposed change was left to the Legislature. NJLRC JUNE 2021 FINAL REPORT, supra note 56 at 7.
62 NJLRC JUNE 2021 FINAL REPORT, supra note 56 at 5.
that section, as well as in the statutory text.63

In June 2021, the Commission released its Final Report recommending that N.J.S.A. 43:21-5(a), which was originally a single paragraph, be divided into four subsections.64 The Commission reformatted the first two subsections without changing their content, and the Commission made minor modifications to the fourth subsection to reflect proposed changes to the statute pursuant to McClain.65

The third subsection—(a)(3)—incorporated the holding of McClain, excluding from disqualification those who voluntarily leave their employment for a qualifying position that either begins within seven days or “is scheduled to commence not more than seven days after the individual leaves employment with the first employer, but the offer of employment from the second employer is rescinded prior to the start date through no fault of the individual.”66

Finally, the Commission recommended that N.J.S.A. 43:21-7(c)(1) be modified to clarify that neither the first nor the second employer’s unemployment accounts are charged when an employee makes a claim pursuant to modified subsection N.J.S.A. 43:21-5(a)(3).67

The Final Report by the Commission recommended modifications to the UCL that reflect the holding in McClain, which embodied the court’s conclusion that individuals in the same situation as the McClain appellants “fall within the category

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63 NJLRC JUNE 2021 FINAL REPORT, supra note 56 at 5.
64 See NJLRC JUNE 2021 FINAL REPORT, supra note 56 at 6.
65 NJLRC JUNE 2021 FINAL REPORT, supra note 56 at 6 (The first subsection—(a)(1)—sets forth the conditions for disqualification from unemployment benefits, and the second—(a)(2)—specifies that the subsection applies to certain agricultural workers. The fourth subsection—(a)(4)—states that, when an employer terminates an employee prior to the date the employee specified as the last day of employment, the seven-day timeframe commences from the employee’s specified date rather than the date of termination.).
66 NJLRC JUNE 2021 FINAL REPORT, supra note 56 at 6.
67 NJLRC JUNE 2021 FINAL REPORT, supra note 56 at 7 (The proposed language in N.J.S.A.43:21-7(c)(1) is as follows: “Neither the first nor the second employer’s account shall be charged for benefits paid to a claimant if the claimant’s employment by the first or the second employer was ended in any way which, pursuant to subsection (a) of R.S. 43:21-5, would have disqualified the claimant for benefits if the claimant had not satisfied the conditions set forth in paragraph (3) of that subsection to qualify for benefits.”).
of workers the Legislature intended to protect by the [2015] amendment” to N.J.S.A. 43:21-5(a).\(^{68}\)

In response to the Commission’s work in this area, identical bills adding language to N.J.S.A. 43:21-5(a)(1) that reflects the holding in *McClain* were introduced in November 2021 in the Senate and the Assembly of the New Jersey Legislature and were referred to the Senate and Assembly Labor Committees.\(^{69}\) The bills were reintroduced in the legislative session that began in early 2022, and have been referred to the Senate and Assembly Labor Committees, respectively.\(^{70}\) The bills expand unemployment benefits to “an individual who leaves work with the first employer upon receipt of an offer of employment from another employer to commence not more than 10 days after the individual leaves work, but the offer is rescinded through no fault of the individual.”\(^{71}\)

C. *Temporary Disability Benefits*

New Jersey’s Workers’ Compensation Act\(^{72}\) (“the Act”) provides workers’ compensation benefits for a range of individuals engaged in voluntary services.\(^{73}\) Since those

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\(^{71}\) S.B. 1606, 2022 Leg., 220th Sess. (N.J. 2022) (also proposing to increase the allowable time from leaving previous employment and starting new employment from seven to ten days).

\(^{72}\) N.J. REV. STAT. § 34:15-1 et seq.

\(^{73}\) N.J. REV. STAT. § 34:15-75 (2013). This provision of the Act pertains to compensation for injury and death to certain volunteers and other workers. It provides:

Compensation for injury and death, either or both, of any volunteer fireman, county fire marshal, assistant county fire marshal, volunteer first aid or rescue squad worker, volunteer driver of any municipally-owned or operated ambulance, forest fire warden or forest fire fighter employed by the State of New Jersey, member of a board of education, special reserve or auxiliary policeman doing volunteer public police duty under the control or supervision of any commission, council or any other governing body of any municipality, emergency management volunteer doing emergency management service, health care workers, public health workers and support services personnel
individuals are volunteering at the time of their injury or death, the Act provides that the compensation paid will “[b]e based on a weekly salary or compensation conclusively presumed to be received by such person in an amount sufficient to entitle him, or, in the event of his death, his dependents, to receive the maximum compensation by this chapter authorized.”

When it considered the case of Kocanowski v. Township of Bridgewater, the New Jersey Supreme Court identified language in the Act pertaining to compensation for volunteers that it considered to be unclear.

In Kocanowski, Jennifer Kocanowski was a volunteer firefighter who responded, along with other volunteer firefighters, to a multi-alarm fire where she sustained injuries while performing her firefighting duties. As a result of her injuries, which included a broken fibula, a severely damaged ankle, and torn ligaments, Kocanowski required multiple surgeries and numerous medical treatments. She was unable to return to work as a volunteer firefighter or to her previously held paid positions “as a nanny or a home health aide.”

registered with the Emergency Health Care Provider Registry pursuant to section 6 of P.L.2005, c. 222 (C.26:13-6) and doing emergency management service for the State, or any volunteer worker for the Division of Parks and Forestry, the Division of Fish and Wildlife, the New Jersey Natural Lands Trust or the New Jersey Historic Trust, shall:

a. Be based upon a weekly salary or compensation conclusively presumed to be received by such person in an amount sufficient to entitle him, or, in the event of his death, his dependents, to receive the maximum compensation by this chapter authorized; and [. . .] shall:

b. Not be subject to the seven-day waiting period provided in R.S. 34:15-14.

74 Id.
75 See Kocanowski v. Twp. of Bridgewater, 237 N.J. 3, 10–14 (2019) (holding that the “weekly salary or compensation” language in N.J.S.A.34:15-75 was unclear and this section “was intended to grant all volunteer firefighters the maximum compensation allowed, regardless of current or previous income.”).
77 Kocanowski, 237 N.J. at 6.
78 See id.
79 Id. at 6–7.
The Division of Workers’ Compensation judge denied Kocanowski’s claim for temporary disability benefits pursuant to N.J.S.A. 34:15-75 on the grounds that temporary disability benefits were intended as a replacement for wages, and Kocanowski did not have outside employment or any other source of income when she sustained her injuries.80

A volunteer firefighter for approximately seventeen years at the time of injury, Kocanowski had taken a leave of absence from her paid employment to provide care for her dying father and then her ill mother.81

The New Jersey Appellate Division affirmed the denial of Kocanowski’s benefits claim, explaining that “pre-injury outside employment is a necessary predicate to awarding temporary disability benefits to volunteer firefighters” and that proof of lost income must be provided in support of a claim.82 The New Jersey Supreme Court granted Kocanowski’s petition for certification.83

As noted above, N.J.S.A. 34:15-75 provides that a compensation award is “based upon a weekly salary or compensation conclusively presumed to be received by such person in an amount sufficient to entitle him . . . to receive the maximum compensation by this chapter authorized.”84 The statutory reference was subject to competing interpretations in *Kocanowski*85 and, as a result, the court examined extrinsic sources, including the legislative history of the statute.86

The Workers’ Compensation Act was enacted in 1911 and amended in 1931, when the requirement that every municipality and fire district provide workers’ compensation insurance for

80 *Id.* at 7.
81 *Id.* at 6.
82 *Kocanowski*, 237 N.J. at 7.
83 *Id.*
84 *Id.* at 10.
85 *Kocanowski*, 237 N.J. at 9. The Plaintiff argued that based upon the statutory history of the Act, the requirement that temporary disability benefits be awarded only to replace lost wages does not apply to volunteer firefighters. *Id.* The Defendant argued that these benefits were intended to replace lost wages and are thus unavailable to unemployed, volunteer firefighters. *Id.*
86 *Id.* at 9–10.
volunteer firefighters was first added to the statute.\textsuperscript{87} In its original form, N.J.S.A. 34:15-75 explicitly provided compensation for “volunteer firefighters who did not have ordinary wages or salaries or who were unemployed at the time of their injury,” stating that compensation would “be ascertained and paid upon the basis of the weekly compensation last received by such person when so employed.”\textsuperscript{88} The statute was changed to its current form in 1952.\textsuperscript{89}

In \textit{Kocanowski}, the New Jersey Supreme Court recognized the important role that volunteer firefighters play and the intent of the New Jersey Legislature to encourage their work through protective legislation.\textsuperscript{90} The court indicated that after years of expanding the protections afforded to volunteer firefighters, it would be “incongruous and inconsistent . . . for the Legislature to abruptly limit the class of [volunteers] who qualify for temporary disability from any volunteer firefighter who had ever been employed to only [those] employed at the time of injury.”\textsuperscript{91} The court also indicated that N.J.S.A. 34:15-75 should not be a barrier to temporary disability coverage.\textsuperscript{92}

The court determined that the language of N.J.S.A. 34:15-38, which provides the method of calculating compensation for temporary disability, was in existence and did not bar benefits to unemployed firefighters under the pre-1952 version of N.J.S.A. 34:15-75, and it was unwilling to read the statute to bar them in the \textit{Kocanowski} case.\textsuperscript{93} The court added that volunteer firefighters injured while performing their volunteer duties “were at work, [are] unable to continue at work and . . . are unable to [return to] work,”\textsuperscript{94} and requiring outside employment in order to receive compensation would lead to an absurd result because firefighters, whether employed or unemployed, take the same

\begin{itemize}
\item \textsuperscript{87} \textit{Id.} at 10–11.
\item \textsuperscript{88} \textit{Id.} at 11 (citing \textit{L.} 1931, \textsection 172, \textsection 2 (1931) (current version at N.J. REV. STAT. \textsection 34:15-75)).
\item \textsuperscript{89} \textit{Kocanowski}, 237 N.J. at 11.
\item \textit{Id.}
\item \textit{Id.} at 12.
\item \textit{Id.}
\item \textit{Id.} at 13.
\item \textit{Id.}
\end{itemize}
risks.95

The New Jersey Supreme Court reversed the Appellate Division’s decision and remanded the matter to the Division of Workers’ Compensation for an award of benefits to Kocanowski, concluding that the 1952 amendment to N.J.S.A. 34:15-75 “was intended to grant all volunteer firefighters the maximum compensation allowed, regardless of current or previous income.”96

The Commission undertook work in this area to determine whether the language of the current statute accurately reflects the intent of the Legislature and whether modification to clarify volunteers’ eligibility for benefits regardless of paid employment would be useful.97

The Commission’s proposed modifications to N.J.S.A. 34:15-75 eliminate the statutory language indicating that compensation shall be based on a weekly salary or compensation presumed received and, instead, state that the listed volunteers injured or killed as a result of their volunteer duties shall receive “the maximum compensation authorized” by the chapter “regardless of his or her outside employment status at the time of injury.”98 The proposed modifications also render the statute gender-neutral.99

In connection with its work in this area, the Commission sought comments from knowledgeable individuals and organizations, including the Workers’ Compensation Section of the New Jersey State Bar Association; the Police and Firemen’s Retirement System of New Jersey; the New Jersey Council on Safety and Health; the New Jersey Compensation Association; the Department of Labor and Workforce Development; the Director of the Division of Workers’ Compensation; the New Jersey Self-Insurers Association; and private practitioners.100

95 Kocanowski, 237 N.J. at 14 (2019) (such an interpretation would allow a volunteer firefighter working for a de minimis salary to receive the maximum compensation while an unemployed volunteer would receive none).
96 Id.
97 NJLRC JAN. 2021 FINAL REPORT, supra note 76, at 2.
98 NJLRC JAN. 2021 FINAL REPORT, supra note 76, at 8.
99 NJLRC JAN. 2021 FINAL REPORT, supra note 76, at 8.
100 NJLRC JAN. 2021 FINAL REPORT, supra note 76, at 6.
1. Comments Opposing a Change to the Statute

One commenter suggested that N.J.S.A. 34:15-75 is neither vague nor opaque, and does not need clarification.\(^{101}\) It was noted, however, that the doctrine set forth in Cunningham v. Atlantic States Cast Iron Pipe Co.,\(^{102}\) which provides that a claimant is only entitled to temporary disability benefits after termination for cause upon a showing of lost wages due to injury, has been applied inconsistently in workers’ compensation cases.\(^{103}\) The Cunningham doctrine, moreover, has “wreaked havoc in the Division of Workers Compensation since it was decided,”\(^{104}\) which is an issue of “great moment” to the Compensation Bar.\(^{105}\)

2. Comments in Support of the Commission’s Proposed Change to the Statute

The members of the Workers’ Compensation Section of the New Jersey State Bar Association (“NJSBA”) reviewed the Commission’s Report and agreed that “changes to the Workers’ Compensation Act are necessary to clarify the New Jersey Supreme Court’s conclusion in Kocanowski[,]” and that “the Legislature intended to grant volunteer workers the maximum compensation allowed, regardless of current or previous income.”\(^{106}\) The NJSBA commenters said that the recommended changes “provide that clarification, consistent with the court’s decision.”\(^{107}\)

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\(^{101}\) E-mail from Richard Rubenstein, Esq., Rothenberg Rubenstein Berliner & Shinrod, LLC, to Samuel M. Silver, Deputy Dir., New Jersey Law Revision Comm’n (Oct. 27, 2020, 15:28 EST) (on file with the NJLRC).


\(^{103}\) Rubenstein, supra note 101.

\(^{104}\) Rubenstein, supra note 101.

\(^{105}\) E-mail from Richard Rubenstein, Esq., Rothenberg Rubenstein Berliner & Shinrod, LLC, to Samuel M. Silver, Deputy Dir., New Jersey Law Revision Commission (Oct. 27, 2020, 15:41 EST) (on file with the NJLRC).


\(^{107}\) Id.
Counsel for Jennifer Kocanowski in the appeal before the New Jersey Supreme Court also supplied comments indicating that he “fully support[ed] the amendment of the statute . . . to comport with the Supreme Court’s landmark decision.”

After the release of the Commission’s Final Report, a bill was introduced in the Assembly proposing modification of N.J.S.A. 34:15-75 consistent with the Commission’s recommendations, and it was subsequently reintroduced in the 2022-23 legislative session in both the Assembly and the Senate.

D. Workers Compensation and Disputed Medical Provider Claims

In 2012, the New Jersey Legislature amended N.J.S.A. 34:15-15 and vested the Division of Workers’ Compensation (the “Division”) with “[e]xclusive jurisdiction for any disputed medical charge arising from any claim for compensation for a work-related injury or illness.” Despite this modification, uncertainty regarding the statute of limitations for such claims formed the basis of the legal action in Plastic Surgery Center, PA v. Malouf Chevrolet-Cadillac, Inc.

In Plastic Surgery Center, PA, numerous medical providers filed petitions seeking payment for services rendered to the injured employees of each defendant-employer. Each petition was filed more than two years from the date of the patient’s

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111 Id. at 568.
112 Id. (stating that the five cases on appeal each set forth a common issue). The Appellate Division consolidated these appeals for purposes of addressing the statute of limitations issue. Id. In the interest of judicial economy, Appellate Division omitted the specific facts of each case. Id. The overview set forth herein is modeled upon the statement of facts and procedural history fashioned by the appellate panel. Id.
accident, but less than six years from the accrual of the claim.\textsuperscript{113} The compensation judge interpreted the statute of limitations in N.J.S.A. 34:15-51 to require “every claimant,” including medical providers, to file a petition with the Division within two years of the date of the injured worker’s accident.\textsuperscript{114} As a result, the compensation judge determined that each of the medical provider’s actions had been filed beyond the statute of limitations and dismissed them.\textsuperscript{115} The medical providers appealed.\textsuperscript{116}

The New Jersey Appellate Division, in \textit{Plastic Surgery Center, PA}, determined whether “through its silence, the Legislature intended—via [the] 2012 amendment—to apply the two-year statute of limitations, . . . contained in the Workers’ Compensation Act [to disputed medical claims] . . . or whether the Legislature intended to leave things as they were and continue to apply the six-year statute of limitations for suits on contracts.”\textsuperscript{117} The court acknowledged the Division’s exclusive jurisdiction over all disputed medical provider claims arising from compensation for a work-related injury.\textsuperscript{118} However, the court was persuaded that the six-year statute of limitations applied to these claims because the “Legislature did not simply express that the Act’s two-year time bar would apply to medical-provider claims.”\textsuperscript{119}

The court rejected the assertion that every claimant for compensation is governed by the Act’s two-year statute of limitations and suggested that “if the Legislature intended such a sea change it would have done so directly, not inferentially.”\textsuperscript{120} Since the “Legislature failed to explain or express itself on this precise issue,” the court could not conclude that “it intended to so drastically alter existing legal principles.”\textsuperscript{121}

\begin{itemize}
\item\textsuperscript{113} \textit{Plastic Surgery Ctr., PA}, 457 N.J. Super. at 568.
\item\textsuperscript{114} \textit{Id.}
\item\textsuperscript{115} \textit{Id. at 568–69}.
\item\textsuperscript{116} \textit{Id. at 568}.
\item\textsuperscript{117} \textit{Id.}
\item\textsuperscript{118} \textit{Id.}
\item\textsuperscript{119} \textit{Plastic Surgery Ctr., PA}, 457 N.J. Super. at 571.
\item\textsuperscript{120} \textit{Id. at 571}.
\item\textsuperscript{121} \textit{Id.}
\end{itemize}
The Appellate Division rejected the reasoning of the compensation court and stated that “[i]f anything, the belief that the Legislature was already satisfied with existing procedural requirements for these claims more logically suggests it intended that the six-year statute of limitations, which undoubtedly applied to medical-provider claims prior to the amendment, would continue to apply after the amendment was enacted.”

The Appellate Division found it compelling “that the Legislature made no alteration to N.J.S.A. 34:15-51 when it amended N.J.S.A. 34:15-15.” The court reasoned that the word “claimant” in the phrase “every claimant for compensation” in N.J.S.A. 34:15-51 refers to an “employee” and that “compensation” is defined by the Act “as that to which the employee is entitled for a work related injury.” The court did not accept that “every claimant” might include everyone with an action pending in the Division or that “compensation” could mean remuneration for medical services provided to an injured worker.

The Appellate Division theorized that a medical provider may treat an individual for a period longer than two years after their accident. It posited a situation in which an individual does not receive treatment until two years after a work-related injury, and it questioned an interpretation of the statutory amendment that would mean that “a medical provider’s right to pursue a legitimate claim might actually be extinguished before it even accrued.” The court found “nothing but legislative silence on the point in controversy,” and it rejected the respondent’s arguments, reversed the judgments of the compensation court, and remanded each matter for further proceedings concerning what it termed “timely claims.”

122 Id. at 572.
123 Id.
124 Id.
125 Plastic Surgery Ctr., PA, 457 N.J. Super. at 572.
126 Id. at 572–73.
127 Id. at 573.
128 Id. at 575.
129 Id.
The employers’ petitions for certification were granted by the New Jersey Supreme Court in May of 2019. In a per curium opinion, the court affirmed the judgment of the Appellate Division for the reasons expressed in that court’s opinion. The court’s three-sentence opinion noted that, in “the 2012 amendment to N.J.S.A. 34:15-15, the Legislature did not expressly address the statute of limitations.” Regarding the clarification of the statute, the court said that “[t]he Legislature is, of course, free to do so in the future.

The Commission released a Final Report proposing several statutory modifications in July of 2021. The Report recommends the Legislature amend N.J.S.A. 34:15-15 to include a statute of limitations for disputed medical provider applications for payment or reimbursement. The Report does not, however, recommend a specific period of time within which a medical provider must bring such a claim, because the length of the statute of limitations involves policy determinations that are best suited to the Legislature. To preserve the applications for payment of medical providers who previously believed, or who had been advised they had a longer period of time to file such claims, the Commission recommends the statutory modification include a “phase-in” period.
1. A Codified Statute of Limitations

New Jersey’s Workers’ Compensation statutes contain several statutes of limitations.\(^\text{138}\) In response to the Commission’s outreach, commenters consistently expressed a desire for clear legislative direction regarding the time frame within which a medical provider must file a claim in a workers’ compensation action.\(^\text{139}\) There was also universal opposition to the codification of a six-year statute of limitations for such actions.\(^\text{140}\) A two-year, rather than a six-year, statute of limitations on actions brought by medical providers was favored by a majority of the responding commenters.\(^\text{141}\)

2. Opposition to a Six-Year Statute of Limitations

Commenters provided the Commission with historical, policy, economic, and practical reasons why the statute of limitations should not extend beyond two years. The underlying reasons fell into four categories: (1) medical provider claims are not typically based on a written contract; (2) efficiency; (3) economic impact; and (4) the statutes of limitations in

\(^{138}\) N.J. REV. STAT. ANN. § 34:15-12.6 (2021) (setting period for making application for “special benefits must be made not later than within one year from the date of the last payment of compensation to the employee.”); N.J. REV. STAT. ANN. § 34:15-34 (2021) (addressing the time for claiming compensation for an occupational disease); N.J. REV. STAT. ANN. § 34:15-35-19 (2021) (establishing the time limitations for the filing of compensation for occupational hearing loss); N.J. REV. STAT. ANN. § 34:15-41 (2021) (setting forth the statute of limitations in cases of personal injury or death); N.J. REV. STAT. ANN. § 34:15-51 (2021) (mandating the time within which a claimant is required to file a petition for compensation); and N.J. REV. STAT. ANN. § 34:15-120.28 (2021) (establishing the period of limitations for filing claims with the receiver, with the insured of an insolvent member, or the association).


\(^{140}\) Cannon, *supra* note 139, at 1, *5; Stryker, *supra* note 139, at 2; Chapland, *supra* note 139, comments at 1.

\(^{141}\) Cannon, *supra* note 139, at 2, *5; Stryker, *supra* note 139, at 3; Chapland, *supra* note 139, comments at 1.
neighboring states.

i. Medical Provider Claims Are Not Typically Based on a Written Contract

In New Jersey, employers and their workers’ compensation insurers (“payors”) are responsible for reimbursing medical providers for services provided to injured workers. A payor may “direct injured covered employees to receive non-emergency treatment from specified medical providers with whom the payor has a contractual agreement.” Under those circumstances, the parties have a pre-existing, mutual agreement regarding the fee for treatment. In that situation, reimbursement is generally not an issue.

In the absence of an agreement, a payor is statutorily responsible for reimbursing a medical provider for services provided to injured workers in amounts that “shall be reasonable and based upon the usual fees and charges which prevail in the same community for similar physicians’, surgeons’[,] and hospital services.” When the amount is disputed, “the issue typically is not a contractual one; instead the focus is on what constitutes the usual, customary, and reasonable charges and the payment that should be made for a given medical service rendered to an injured claimant.”

Since 2012, when a medical provider disputes the amount paid by a payor, it may file an application for reimbursement with the Division of Workers’ Compensation. These claims fall within the exclusive jurisdiction of the Division and serve as the provider’s exclusive remedy for payment under the statute.
Medical providers are no longer permitted to file suit in the Law Division against either payors or claimants.\textsuperscript{148} Since “the Division’s jurisdiction is limited by statute to two years,” it has been suggested that a six-year statute of limitations would “impermissibly expand[] the Division’s exclusive, specific and limited jurisdiction to decide claims for workers’ compensation benefits arising under the Act.”\textsuperscript{149}

\textbf{ii. Efficiency}

Within two years after the date on which the accident occurred, every claimant for compensation must file a petition with the Division.\textsuperscript{150} While acknowledging that treatment for serious injuries may continue for significant periods of time, commenters have noted that “with a six-year limitation period for provider claims, the compensation courts will be left to adjudicate provider claims for cases that were resolved many years before.”\textsuperscript{151} Further, some suggest that an extended look-back period “is likely to open the door to a deluge of additional filings” and significantly delay “injured workers’ claims for indemnity benefits, for authorization of treatment, and payment of current medical expenses,” as well as, “increasing the cost of . . . the administration of claims.”\textsuperscript{152}

\textbf{iii. Economic Impact}

In addition to the impact upon the Division, a six-year statute of limitations may also impact self-insured entities, insurance companies, and businesses.\textsuperscript{153} “A six[-]year statute of limitations period on provider claims will result in self-insured

\textsuperscript{148} Chapland, \emph{supra} note 139, at 2 (citing \textit{Virginia M. Dietrich, NJ DEP’T OF LAB. & WORKFORCE DEV., DIV. OF WORKER’ COMP.: TASK FORCE ON MED. PROVIDER CLAIMS}, at 3 (2002)). \textit{See also} Stryker, \emph{supra} note 139, at 4.

\textsuperscript{149} Stryker, \emph{supra} note 139, at 12–13. \textit{See also} Chapland, \emph{supra} note 139 (quoting \textit{Virginia M. Dietrich, NJ DEP’T OF LAB. & WORKFORCE DEV., DIV. OF WORKERS’ COMP: TASK FORCE ON MED. PROVIDER CLAIMS}, at 6 (NOV. 05, 2002) (suggesting that once a medical provider has submitted to the jurisdiction of the Division “the parties must submit to the Rules of the Division.”)).

\textsuperscript{150} N.J. STAT. ANN. § 34:15-51 (2021).

\textsuperscript{151} Cannon, \emph{supra} note 139, at 2–3.

\textsuperscript{152} Stryker, \emph{supra} note 139, at 12; Chapland, \emph{supra} note 139, comment at 1.

\textsuperscript{153} Cannon, \emph{supra} note 139, at 2–3.
entities... as well as insurance companies being required to manage their reserves over a much longer period of time.”

The reserves held against such claims may result in premium increases for New Jersey businesses and public and private entities. Additional reserves may also increase an insurer’s liabilities, and reduce its net worth or surplus, thereby limiting the amount of insurance it may provide to its insured. In addition to higher premiums, businesses may experience difficulties in finding coverage as a result of distorted loss profiles.

Higher reserves will similarly impact self-insureds like public entities. To maintain a larger reserve, these entities will be required to devote funds otherwise intended for public purposes as reserves against potential claims. Alternatively, funds may have to be used to satisfy higher premiums if a joint insurance fund is required to reserve additional funds for potential claims.

iv. Neighboring States

Most of the mid-Atlantic and northeastern states utilize comprehensive workers’ compensation medical “fee schedules,” or rely upon statutory or regulatory references to other medical reimbursement rates. Apart from New Hampshire, these states do not provide a frame of reference for the issue raised by the decision in Plastic Surgery Center. New Jersey is one of only six states that do not use a fee schedule for medical services in workers’ compensation cases. The others are Indiana, Iowa,

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154 Cannon, supra note 139, at 3.
135 Cannon, supra note 139, at 3.
156 Cannon, supra note 139, at 3.
157 Cannon, supra note 139, at 3.
158 Cannon, supra note 139, at 3.
159 Cannon, supra note 139, at 2–3.
160 Cannon, supra note 139, at 5; N.H. REV. STAT. ANN. § 281-A:21-a (2021) (“compensation for disability, rehabilitation, medical benefits, or death benefits under this chapter shall be barred unless a claim is filed within [three] years after the date of injury”).
161 See Madeline Kasper, MPA, MPH & Jillian Slaight, Ph.D., LEG. ANALYSTS, LEG. REF. BUREAU: WORKERS’ COMP. LAW IN WISCONSIN, at 5 (Jan. 2018); Stryker, supra note 139, at 3. See also Angela Childers, States Without Comp Fee Schedules
Missouri, New Hampshire, and Wisconsin. The statutes of limitation in these states range from six months to six years.

v. Statute of Limitations—Starting Point

While the participating commenters all agreed that the statute of limitations should be less than six years, there was no consensus regarding when the limitation period should begin. Participating commenters suggested options focused on a period of time calculated from (1) the date of the injured worker’s accident; (2) the date a medical provider receives a payment that is subsequently disputed; or (3) the date on which the injured individual receives the service.

a. The Date of the Accident

The Insurance Council of New Jersey urged the Commission “to endorse the adoption of a clarifying amendment to the Act confirming that the Act’s two-year period of limitations applies to all claims for compensation, including MPCs [medical provider claims].” Such an amendment is said to be “consistent with


\[162 \text{ Childers, supra note 161.}\]

\[163 \text{ See IOWA CODE ANN. § 85.27 (2021) (stating that per the Dep’t of Workforce Develop, medical care must first be authorized by an insurer who is then responsible for payment and disputes are therefore de minimis or non-existent); WIS. ADMIN. CODE DWD § 80.72 (2021) (stating that a provider shall file a written request to the department to resolve the dispute within six months after an insurer or self-insurer first-refuses to pay); MO. ANN. STAT. § 287.140 (2021) (stating that any application for additional reimbursement “shall be filed not later than one year from the date the first notice of dispute of the medical charge was received by the health care provider”); IND. CODE ANN. § 22-3-7-17(g) (2021) (stating that “a medical service provider must file an application for adjustment of a claim for a medical service provider’s fee with the board not later than two years after the receipt of an initial written communication from the employer, the employer’s insurance carrier, if any, or an agent acting on behalf of the employer after the medical service provider submits a bill for services” and uses a fee schedule of sorts for hospital care); N.H. REV. STAT. ANN. § 281-A:21-a (2021) (stating that compensation for medical benefits “shall be barred unless a claim is filed within three years after the date of injury”); see also Plastic Surgery Ctr., PA v. Malouf Chevrolet-Cadillac, Inc., 457 N.J. Super. 565, 572 (N.J. Super. Ct. App. Div. 2019) (applying a six-year statute of limitations to disputed medical provider claims).}\]

\[164 \text{ Stryker, supra note 139, at 2–3 (emphasis in original).}\]
established Division practice, law and public policy.”165

As discussed in Plastic Surgery Center, PA, such a statute of limitations is not without complications. Claims for compensation, as set forth in N.J.S.A. 34:15-51, require “every claimant for compensation . . . [to] submit to the Division . . . a petition . . . within two years after the date on which the accident occurred.”166 It may not be practical to expect a medical provider to know the date of the accident, or when the last benefit was paid. In addition, as noted in Plastic Surgery Center, PA, a medical provider may treat an individual for a period greater than two years after an accident.167 Further, in some circumstances, an individual may not receive treatment until two years following a work-related incident.168 In these situations, the legislative amendment urged by some of the commenters would cause “a medical provider’s right to pursue a legitimate claim” to be “extinguished before it even accrued.”169

b. The Date of Payment

The claim period can also begin two years after the payment was received from the payor.170 The Commission was asked to consider language that provided for a “phase-in” period to permit medical providers, pursuant to the Plastic Surgery Center, PA decision, to file a petition within the time specified by the Legislature.171 Once enacted, the statute of limitations would require a medical provider to file a dispute “no later than two years after the date payment was received.”172

This phase-in language is virtually identical to the language contained in S764.173 The proposed statute of limitations would

165 Stryker, supra note 139, at 2–3 (emphasis in original).
167 See Plastic Surgery Ctr. PA, 457 N.J. Super. at 573.
168 Id.
169 Id.
170 Cannon, supra note 139, at 2 (suggesting incorporating a phase-in period for services rendered before the effective date of the statutory amendment).
171 Cannon, supra note 139, at 2.
172 Cannon, supra note 139, at 2.
theoretically permit a medical provider to bring a disputed claim six years after the date that a payment is received. A situation may arise in which a payor neglects to issue a payment to the medical provider for a number of years. If the medical provider waited four-and-one-half years before they address this omission, the plain language of the statute would allow the provider two years from the date it received payment within which to bring a claim. Essentially allowing them a six and one-half year statute of limitations.

c. The Date of Service

A third option involves calculating the statute of limitations from the date that a medical provider renders services.\footnote{Chapland, supra note 139, comments at 1.} A statute of limitations tied to the date of service would make it “clear to the medical provider when legal action must be taken if a dispute arises over payment [or lack thereof] for services rendered.”\footnote{Chapland, supra note 139, comments at 1.} Such a statutory provision would arguably eliminate the filing of claims by a medical provider long after the underlying claim has been adjudicated.\footnote{Chapland, supra note 139, comments at 1.}

In response to the Commission’s outreach, the NJSBA offered favorable comments and the unanimous support of the Worker’s Compensation Section for the Commission’s proposed modification to the Workers’ Compensation statutes.\footnote{N.J. L. Revision Comm’n, Minutes NJLRC Meeting (Jul. 15, 2021) https://static1.squarespace.com/static/596f60f4ebbd1a3222db09e45/t/6148c951e33dd65ced52e2/1632160081918/MIN071521rsr2.pdf.}

III. CONCLUSION

The New Jersey Law Revision Commission, consistent with its statutory mandate, brings to the attention of the Legislature areas of New Jersey statutes that would benefit from modification to support the Legislature in its ongoing efforts to improve New Jersey’s body of statutory law.
Given the substantial number of New Jersey residents participating in the workforce, the clarity of the laws pertaining to various aspects of employment is important and worthy of attention by Commission and the Legislature.