

# Country Guide

## USA – New Jersey

Prepared by

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## I. NEW JERSEY – BACKGROUND INFORMATION

*Businesses and individuals conducting business in New Jersey must comply with all relevant federal and state laws. This Guide to Doing Business in New Jersey addresses certain New Jersey considerations applicable to certain practice areas as of May 1, 2015, but does not address federal considerations.*

### A. Geography, Location, And Climate

New Jersey is a small, but populous, northeastern state surrounded by water on three sides. Its four main land regions, the Atlantic Coastal Plain, Piedmont, New England Upland, and Appalachian Ridge and Valley Region, bring a variety of environments to the state. Due to its location on the Atlantic Ocean, the climate is fairly moderate.

New Jersey is the 5th smallest state, covering 8,722 square miles (22,589 sq km), or 0.25% of the total land in the United States. It is bordered by New York to the north, Delaware Bay to the south, the Atlantic Ocean to the south and east, and Delaware Bay and Pennsylvania to the west. Based on the April 2010 census, New Jersey had a population of 8,791,894 ranking 9th among the 50 states. The population density of 1,185 persons per square mile is the highest in the country, well above the national average of 77 persons per square mile (30 persons per sq km). The four largest cities in New Jersey are Newark (277,140 residents), Jersey City (247,597), Paterson (146,199 residents), and Elizabeth (124,969 residents).

### B. Cultural/Ethnic Background

The population of New Jersey is very diverse, made up of:

- 68.6% White Non-Hispanic
- 13.7% Black
- 8.3% Asian
- 0.3% Native American
- 6.4% Other Race
- 2.7% Mixed race

New Jersey has the 15th largest percentage of minority residents of any state. It also has the second largest Jewish population by percent (after New York) and the second largest Muslim population by percent (after Michigan). New Jersey has the third highest Italian-American population by percent of any state according to the 2010 Census. (*Wikipedia.org*)

### C. Investment Climate

New Jersey is a major industrial center, an important transportation corridor and terminus, and a long-established destination for summer vacationers.

New Jersey is noted for its output of chemicals and pharmaceuticals, machinery, and a host of other products, including electronic equipment, printed materials, and processed foods. Bayonne is the terminus of pipelines originating in Texas and Oklahoma, and there are oil

refineries in the towns of Linden, New Jersey and Carteret, New Jersey. The long history of heavy industry in New Jersey has left the state with the largest inventory of U.S. Superfund sites, and industrial cleanup is an important issue in its cities.

New Jersey has been a leader in industrial research and development since the establishment in 1876 of Thomas Edison's research facility in Menlo Park, New Jersey. Color television, the videotape recorder, and the liquid crystal display were invented in New Jersey corporate research laboratories. Today, telecommunications and biotechnology are major industries in New Jersey, and the area near Princeton has developed into a notable high-tech center. Finance, warehousing, and “big box” retailing have also become important to New Jersey's economy, attracting corporations and shoppers and to a large extent reversing New Jersey's onetime role as a suburb for commuters to New York City and Philadelphia.

A tremendous transportation system, concentrated in the industrial lowlands, moves products and a huge volume of interstate traffic through the State. Busy highways like the Garden State Parkway and the New Jersey Turnpike are part of a network of toll roads and freeways. New Jersey is linked to Delaware and Pennsylvania by many bridges across the Delaware River. Traffic to and from New York is served by railway and subway tunnels and by the facilities of the Port Authority of New York and New Jersey—the George Washington Bridge, the Lincoln and Holland vehicular tunnels, and three bridges to Staten Island. Airports are operated by many cities, and the Newark airport (controlled by the Port Authority) ranks among the nation's busiest. Shipping in New Jersey centers on the ports of the Newark Bay and New York Bay areas—notably Port Newark and Port Elizabeth—with relatively minor seagoing traffic on the Delaware as far north as Trenton.

This extensive transportation network also serves to maintain New Jersey's well-known vacation industry, reaching ocean beaches, inland lakes, forests, and mountain resort areas. Atlantic City's emergence as a casino gambling center has made it the largest visitor destination in the state.

In addition to being a center of industry, transportation, and tourism, New Jersey is a leading state in agricultural income per acre, according to Columbia University Press. The scrub pine area of the southern inland region is used for cranberry and blueberry culture. Potatoes, corn, hay, peaches, and vegetables such as tomatoes and asparagus grow north of the pine belt. Agricultural products such as dairy, eggs, and poultry also are important to the state's economy. Commercial and residential expansion, however, has taken over much of the state's farmland, and New Jersey is now almost one third developed.

## II. BUSINESS ENTITIES

The State of New Jersey, rather than the federal government, for the most part, regulates the formation and governance of business entities doing business in New Jersey, although there is a significant interplay of federal laws relating to tax, securities, labor, and other matters that must be considered when engaging in business in New Jersey. New Jersey follows the laws of Delaware closely in offering an attractive forum for companies and individuals seeking to do business in the United States. New Jersey offers a well-established body of law that provides a flexible and open statutory framework for owning and operating business ventures and taking advantage of the diverse economic developments that are continually available in New Jersey. The business organization laws of the State of New Jersey provide a comprehensive framework which enables businesses, entrepreneurs, and investors to choose from a wide variety of business entities including, corporations, partnerships, limited partnerships, registered limited liability partnerships, limited liability companies, non-profit corporations, and statutory trusts.

### A. Corporations

#### 1. Application Process

Certificate of Incorporation must be filed with:

New Jersey Department of Treasury

Division of Revenue

Corporate Filing Unit

By regular mail: P.O. Box 308, Trenton, New Jersey 08646

In person or overnight mail: 33 West State Street, 5<sup>th</sup> Floor  
Trenton, New Jersey 08608

Tel: (609) 292-9292

Fax: (609) 292-7912

Email: <https://www.state.nj.us/treasury/revenue/revencode.shtml>

Business entities may also be formed and authorized to conduct business online at the following address: <https://www.state.nj.us/cgi-bin/treasury/revenue/dcr/filing/page1.cgi>.

#### 2. Requirements for Certificate of Incorporation (N.J.S.A. 14A:2-7)

- Name of corporation
- Purpose(s) for which the corporation is organized (a general all purpose clause is permitted)
- Aggregate number of shares which the corporation shall have authority to issue (other requirements apply if the shares are to be divided into classes or into classes and series)
- Address of the initial registered office in the State of New Jersey and name of initial registered agent at such address
- Names and addresses of incorporators
- Names and addresses and number of directors
- Duration of the corporation if other than perpetual

- USD125.00 filing fee (USD75.00 for nonprofit corporations)

Corporation's existence begins at time of filing, unless the certificate provides for a later effective date (but not later than 90 days after the date of filing). N.J.S.A. 14A:2-7(2).

Corporation may be organized for any lawful business purpose. N.J.S.A. 14A:2-1.

Certificate of incorporation may include any other provisions, not inconsistent with the law, for managing the business and regulating the affairs of the corporation, defining, limiting, and regulating the powers of the corporation, its directors, and its shareholders, requiring indemnification, and permitting directors and officers to be exculpated from personal liability subject to certain exceptions. N.J.S.A. 14A:2-7(1)(f).

Certificate of incorporation may be used to alter certain statutory rules to which the corporation would otherwise be subject. N.J.S.A. 14A:2-7.

The corporate name must comply with applicable requirements, including that the name distinguish the corporation from other entities and that the name contain the word or an abbreviation for corporation, company, or incorporated, or "Ltd." or similar foreign words or abbreviations. N.J.S.A. 14A:2-2.

On or after the effective date of the certificate of incorporation, an organizational meeting of the board of directors named in the certificate of incorporation shall be held, upon five days' notice by mail to each director, by a majority of the board so named, to adopt by-laws, elect officers, authorize the issuance of shares, and transact such other business as may come before the meeting. N.J.S.A. 14A:2-8. In lieu of an organizational meeting, the initial board of directors of a corporation may adopt organizational resolutions by unanimous written consent.

### 3. Laws Governing Corporations

**Generally:** Corporations in the State of New Jersey are governed by the New Jersey Business Corporation Act. N.J.S.A. 14A:1-1 *et. seq.*

**By-laws:** Initial by-laws are adopted by the board of directors at the organizational meeting and may be subsequently amended as provided under the certificate of incorporation, by-laws or statute. The board of directors may amend and repeal the by-laws unless the power to amend or repeal the by-laws are reserved to the shareholders in the certificate of incorporation. N.J.S.A. 14A:2-9.

**General Powers:** Each corporation shall have all powers to effect all purposes for which the corporation is organized. General powers are listed in N.J.S.A. 14A:3-1. A recitation of powers of the corporation in the certificate of incorporation is not needed.

**Indemnification of Directors, Officers and Employees:** Corporations may indemnify corporate agents (directors, officers, employees or agents) against expenses (reasonable costs, disbursements and attorneys' fees) and liabilities (amounts paid or incurred in satisfaction of settlements, judgments, fines and penalties) if such corporate agent acted in good faith and in a manner such corporate agent reasonably believed to be in the best interests of the corporation

and, with respect to any criminal proceeding, such corporate agent had no reasonable cause to believe his or her conduct was unlawful. N.J.S.A. 14A:3-5.

**Exculpation:** In the certificate of incorporation, corporations may exculpate directors and officers from personal liability to the corporation or its shareholders for damages for breach of any duty owed to the corporation or its shareholders, except for any breach based upon an act or omission (1) in breach of the duty of loyalty, (2) not in good faith or involving a knowing violation of law, or (3) resulting in receipt by such person of an improper personal benefit. N.J.S.A. 14A:2-7(3).

**Registered Office and Agent:** Every New Jersey corporation, and every foreign corporation authorized to transact business in New Jersey, must continuously maintain a registered office in New Jersey and a registered agent having a business office within such registered office. N.J.S.A. 14A:4-1. The registered agent may be an individual over the age of 18 residing in the State of New Jersey, a domestic corporation, or a foreign corporation authorized to transact business in the State of New Jersey. N.J.S.A. 14A:4-1(3). Corporations, and other business entities required to appoint a registered agent in the State, may hire a service provider to act as such corporation's registered agent in the State. A foreign corporation is a corporation organized under the laws of any jurisdiction other than the State of New Jersey. N.J.S.A. 14A:1-2.1(i).

**Annual Report:** Every domestic corporation and foreign corporation authorized to transact business in New Jersey must file an annual report with the State Treasurer, executed on behalf of the corporation or executed by the registered agent, setting forth:

- Name (and jurisdiction of incorporation, if foreign)
- Address of registered office in New Jersey and name of registered agent at such address
- Names and addresses of directors and officers
- Address of main business office or headquarters
- Address of principal office in New Jersey, if any. N.J.S.A. 14A:4-5(1).

The failure of a corporation to file an annual report for two consecutive years, after written notice to the corporation at its last known business address or at the address of its registered agent, may result in the issuance of a proclamation by the State Treasurer declaring that the corporation's certificate of incorporation has been revoked. N.J.S.A. 14A:4-5(6). In the event that a corporation's certificate of incorporation has been revoked, the certificate of incorporation may be reinstated by the State Treasurer upon (a) payment of all fees due (including USD75.00 reinstatement fee, USD20.00 tax clearance fee, all delinquent annual report fees and USD200.00 reinstatement assessment), and (b) the issuance of a certificate by the Director of the Division of Taxation that no cause exists for revocation. N.J.S.A. 14A:4-5(7).



**Shareholder Meetings:**

- An annual meeting for the purpose of the annual election of directors shall be held at such time as provided in the by-laws, or as fixed by the board pursuant to authority granted in the by-laws, and, in the absence of such provision, at noon on the first Tuesday of April. N.J.S.A. 14A:5-2
- Special meetings may be called by the president of the corporation or the board, or by such other officers, directors or shareholders as provided in the by-laws. N.J.S.A. 14A:5-3
- Notice regarding the place and purpose of every meeting (annual and special) of shareholders shall be given not less than 10 nor more than 60 days before the date of the meeting, either personally or by mail, to each shareholder of record entitled to vote at the meeting. N.J.S.A. 14A:5-4
- Any action required or permitted to be taken at a meeting of shareholders may be taken without a meeting if all the shareholders entitled to vote thereon consent thereto in writing (except that certain matters also require advance notification to all other shareholders). N.J.S.A. 14A:5-6
- The holders of shares entitled to cast a majority of the votes at a meeting constitute a quorum at such meeting. N.J.S.A. 14A:5-9
- Any action, other than the election of directors, to be taken by the vote of the shareholders shall be authorized by a majority of the votes cast at a meeting of shareholders where a quorum is present, unless a greater plurality is required by the certificate of incorporation or by statute.
- A shareholder may authorize another person to act for the shareholder by written proxy. N.J.S.A. 14A:5-19
- Each outstanding share is entitled to one vote on each matter submitted to the shareholders, unless otherwise provided in the certificate of incorporation. N.J.S.A. 14A:5-10

**Books and records:** The corporation must keep books and records of account and minutes of the proceedings of its shareholders, board of directors and executive committees, if any. The corporation shall keep at its principal office, its registered office, or at the office of its transfer agent, records containing the names and addresses of all shareholders, the number, class and series of shares held by each, and the dates when they respectively became the owners of record. N.J.S.A. 14A:5-28(1).

**Right of Inspection:** Upon written request of any shareholder, the corporation shall mail to such shareholder the corporation's balance sheet at the end of the preceding fiscal year, and its profit and loss and surplus statement for such fiscal year. Minutes of the proceedings of shareholders and the record of shareholders may be examined, for any proper purpose, upon at least five days' notice, by any person who has been a shareholder of record for at least six months prior to the notice or any person holding, or so authorized in writing by the holders of, at least 5% of the outstanding shares of any class or series. However, a court may, upon proof of proper purpose, compel production of books, minutes, and record of shareholders. N.J.S.A. 14A:5-28(2)-(4).

**Liability of Shareholders:** Generally, shareholders are not personally liable for acts of the corporation. N.J.S.A. 14A:5-30.

**Board of Directors:**

- The board manages or directs the business and affairs of the corporation, except if otherwise provided in the certificate of incorporation or by statute. N.J.S.A. 14A:6-1
- Directors must be at least 18 years of age, but need not be U.S. citizens, residents of the State of New Jersey or shareholders of the corporation, unless the certificate of incorporation or the by-laws require otherwise. N.J.S.A. 14A:6-1
- The board must consist of at least one member. N.J.S.A. 14A:6-2
- Each director shall have one vote at meetings of the board or a board committee, except if otherwise provided in the certificate of incorporation and consistent with applicable statutes.
- The participation of directors with a majority of the votes of the entire board, or of any committee, shall constitute a quorum, except if otherwise provided in certificate of incorporation or by-laws. However, a quorum shall not be less than one-third of the votes of the entire board or committee. N.J.S.A. 14A:6-7.1
- Participation of a majority of the board in a meeting constitutes a quorum, unless a greater or lesser number is provided in the certificate of incorporation or by-laws. A quorum may not be less than one-third of the directors. N.J.S.A. 14A:6-7.1(3)
- Any action of the board of directors may be taken without a meeting if all directors consent and such consent is filed with the minutes of the corporation, unless the certificate of incorporation or the by-laws provide otherwise. N.J.S.A. 14A:6-7.1(5)
- One or more or all of the directors may be removed for cause or, unless otherwise provided in the certificate of incorporation, without cause by the shareholders. N.J.S.A. 14A:6-6

**Officers:**

- The officers of the corporation shall consist of a president, a secretary and a treasurer. Officers may also include a chairman of the board, or other officers as provided in the by-laws. A person may hold two or more offices but no officer shall execute, acknowledge, or verify any instrument in more than one capacity if such action is required to be undertaken by two or more officers. N.J.S.A. 14A:6-15
- Officers shall be elected by the board, except if otherwise provided in the by-laws. N.J.S.A. 14A:6-15(1)
- An officer elected by the board may be removed by the board with or without cause. An officer elected by the shareholders may be removed, with or without

cause only by vote of the shareholders, but the officer's authority to act as an officer may be suspended by the board for cause. N.J.S.A. 14A:6-16

**Authorized Shares:** Corporations shall have the power to create and issue the number of shares stated in its certificate of incorporation, which may consist of more than one class, each of which may be divided into one or more series of shares. Shares may be issued which provide preferential dividend rights or voting rights, in addition to other characteristics. N.J.S.A. 14A:7-1. There is no statutory fee based on the number of authorized shares. A corporation may amend its certificate of incorporation (a) to increase or decrease the number of shares such corporation is authorized to issue and/or (b) to amend the class, series, and preferences of the authorized shares. N.J.S.A. 14A:9-1.

**Par Value of Shares and Stated Capital:** All shares shall have no par value and no stated capital is to be maintained, unless specified in the certificate of incorporation. N.J.S.A. 14A:7-8.1.

**Dividends:** Dividends may be paid by resolution of the board, in cash, shares or other forms of property. N.J.S.A. 14A:7-15.

**Limitations on Distributions to Shareholders:** The corporation may not make a distribution if such distribution would result in the corporation being unable to pay debts as they come due in the usual course of business, or if the corporation's total liabilities exceed its total assets. N.J.S.A. 14A:7-14.1.

**Amendment to Certificate of Incorporation:** The corporation may amend its certificate of incorporation in any respect, and at any time, so long as the amendment contains only provisions which may lawfully be contained in an original certificate of incorporation. N.J.S.A. 14A:9-1. The corporation must file a certificate of amendment or restated certificate of incorporation with the Division of Revenue for every amendment of its certificate of incorporation. N.J.S.A. 14A:9-4; N.J.S.A. 14A:9-5.

**Methods of Dissolution:** A corporation may be dissolved in any of the following ways, in certain circumstances:

- Filing of a certificate of dissolution upon expiration of the period of duration stated in the certificate of incorporation
- Action of incorporators (if there has been no organizational meeting) or directors (if there was an organizational meeting), pursuant to N.J.S.A. 14A:12-2, if (i) the corporation has not commenced business, (ii) has not issued shares, (iii) has no debts/liabilities, and (iv) has not received payments for shares, or, if it has received payments, has returned such payments.
- Action of the shareholders
- Action of the board and the shareholders
- Judgment of the Superior Court of New Jersey

- Automatic proclamation by the Division of Revenue repealing or revoking a certificate of incorporation for nonpayment of taxes or failure to file annual reports
- Action of a corporation without assets. N.J.S.A. 14A:12-1

#### 4. Mergers

**Procedure for Mergers:** The board of each corporation (or other business entity) may merge pursuant to a plan of merger that sets forth the following:

- The names of the corporations or other business entities proposing to merge and the name of the corporation or other business entity into which they propose to merge (the survivor)
- The terms and conditions of the proposed merger, including a statement of any amendments in the certificate of incorporation of the surviving corporation to be effected by such merger (such amendments may be set forth in and effected by a restated certificate of incorporation which may be filed as an additional document together with the certificate of merger)
- The manner and basis of converting the shares of each corporation into shares, obligations, or other securities of the surviving corporation or of the surviving other business entity, or of any other corporation or other business entity, or, in whole or in part, into cash or other property. N.J.S.A. 14A:10-1

**Approval by Shareholders:** The plan of merger, upon approval by the board of each corporation involved in the merger, must be submitted to a vote at a meeting of shareholders and, with some exceptions, shall be approved upon the affirmative votes of a majority of the votes cast by the holders of shares of each corporation entitled to vote. N.J.S.A. 14A:10-3. A shareholder vote generally is not required of either corporation in the case of a short form merger. N.J.S.A. 14A:10-5.1.

**Certificate of Merger:** Upon approval of the plan of merger, a certificate of merger must be executed on behalf of each corporation, setting forth:

- The name of the surviving corporation and the names of the merging corporations
- The plan of merger
- The date of approval by the shareholders of each corporation of the plan of merger
- As to each corporation whose shareholders are entitled to vote, the number of shares entitled to vote thereon, including designations and numbers of shares entitled to vote for each class
- As to each corporation whose shareholders are entitled to vote, the number of shares voted for and against the plan, including the number of shares voted for and against the plan for each class
- The date when the merger is to become effective (if not upon filing, but no later than 90 days after the date of filing).

The executed original and a copy of the certificate of merger must be filed with the Division of Revenue. N.J.S.A. 14A:10-4.1.

5. Professional Service Corporations.

Domestic professional corporations and foreign professional corporations doing business in New Jersey are governed by the New Jersey Business Corporation Act (N.J.S.A. 14A:1-1 *et seq.*) and the New Jersey Professional Service Corporation Act (N.J.S.A. 14A:17-1 *et seq.*).

**Generally:** One or more persons who are licensed or legally authorized to render the same or allied professional service in the State of New Jersey may organize and become shareholders of a professional corporation for the sole purpose of rendering said professional services. N.J.S.A. 14A:17-5. A professional corporation cannot engage in any other business activity other than rendering the professional service for which it was incorporated. N.J.S.A. 14A:17-9.

**Shareholders:** All shareholders must be duly licensed or legally authorized to render the professional service for which the professional corporation was incorporated. N.J.S.A. 14A:17-10. Shareholders may not transfer shares to anyone other than the professional corporation or a person duly licensed or legally authorized to render the professional services for which the professional corporation was incorporated. N.J.S.A. 14A:17-12.

**Corporate Name:** The name of a professional corporation must contain the words “chartered”, “professional association”, “professional corporation”, “P.A.”, “P.C.”, “PA” or “PC”. The words “company”, “corporation”, or “incorporated”, or any abbreviation of such words, cannot be used. N.J.S.A. 14A:17-14.

**B. Partnerships**

**General Partnerships:** A general partnership is an association of two or more persons to carry on as co-owners of a business for profit, each with equal rights (unless the partnership agreement provides otherwise). All partners share equally in the profits and losses, and each is considered an agent for the partnership and may bind the partnership with respect to business with third parties who do business with the partnership

Requirements: May be formed by oral agreement, or implied, or formally by a written partnership agreement (preferred), which generally provides:

- Names and addresses of the partners
- Relative rights to management and profits of each partner
- Nature of partnership business
- Duration of the partnership
- Requirements for admission of new partners
- Provisions concerning the dissolution of the partnership
- Any other desired provisions

Advantages: No formal filing requirements (though advisable to file); partners have full management and control; pass-through taxation.

Disadvantages: Unlimited personal liability of the partners for obligations of the partnership.

**Limited Partnerships:** A limited partnership is similar to general partnership, but with general partners and limited partners. General partners have the same rights, powers and liabilities of partners in general partnerships. The liabilities of limited partners are limited to their investments in the business (similar to the liability of a shareholder in a corporation). Generally, limited partners do not participate in managing the business of the partnership.

Requirements: Filing of a certificate of limited partnership with the Division of Revenue and Commercial Recording Bureau, with USD125.00 fee. Requirements are set forth at N.J.S.A. 42:2A-14. Similar requirements apply to foreign limited partnerships wishing to do business in New Jersey.

Advantages: Limited liability; pass-through taxation.

Disadvantages: The limited partners may not participate in the management of the business; strict compliance with the statute required.

### **Limited Liability Partnerships (LLP):**

For a partnership to become an LLP, the partnership must:

- Approve the terms and conditions by the vote necessary to amend the partnership agreement
- File a statement of qualification with the Department of Treasury, Division of Revenue, Business Support Services, with USD125.00 fee. N.J.S.A. 42:1A-47.

Requirements: Name must end with “Registered Limited Liability Partnership”, “Limited Liability Partnership”, “R.L.L.P.”, “L.L.P.”, “RLLP,” or “LLP”. N.J.S.A. 42:1A-48.

Advantages: Limited liability for partners who manage the business; statutory compliance required.

Disadvantages: The limited liability partnership must strictly comply with the statute.

### **C. Sole Proprietorship**

One person conducts business for his/her own benefit. Sole proprietorship is not a legal entity, with no life apart from the owner of the business.

Requirements: There are no required filings with the state to register a sole proprietorship but the sole proprietorship must register a business name (different than the name of the owner) with the clerk of the county where the business is located and will be subject to the requirements for registration with the state for tax and employer responsibilities.

Advantages: No filing requirements; sole proprietor has complete control; sole proprietor owns all profits; pass-through taxation.

Disadvantages: The owner of the sole proprietorship has personal liability for all obligations of the business.

#### **D. Joint Ventures**

Two or more persons or entities combine to profit from a single business enterprise, limited in scope and duration. Generally, partnership law applies.

#### **E. Nonprofit Corporations**

Requirements: Certificate of incorporation, filed with Division of Revenue and Commercial Recording Bureau, USD75.00 filing fee. N.J.S.A. 15A:2-8.

Purposes: Any lawful purpose, other than for pecuniary profit, including, but not limited to, charitable, educational, political, religious, social, fraternal, cultural, athletic, scientific, professional, or union/trade association purposes. N.J.S.A. 15A:2-1.

Although a nonprofit corporation may not have capital stock or shares, and may not issue dividends, compensation in a reasonable amount may be paid to its members, trustees and officers for services rendered. It may also pay interest on loans and may confer benefits in conformity with its purpose. Upon dissolution, distributions, other than dividends or distributions of profits or income, may be made. N.J.S.A. 15A:2-1.

#### **F. Limited Liability Companies**

- Limited liability companies are governed by the Revised Uniform Limited Liability Company Act. (N.J.S.A. 42:2C)
- Name must contain the words “Limited Liability Company” or the abbreviation “L.L.C.” N.J.S.A. 42:2C-8
- Certificate of formation must be filed with a USD125.00 fee. N.J.S.A. 42:2C-22
- Limited liability for members, even if they participate in management. N.J.S.A. 42:2C-30
- Except as provided in the operating agreement, all remaining members must approve a transfer of membership. N.J.S.A. 42:2C-42
- Pass-through taxation

#### **G. Foreign (out-of-state) Business Entities**

No foreign (out-of-state) business entity has the right to transact business in New Jersey until it has procured a certificate of authority to do so from the Division of Revenue. N.J.S.A. 14A:13-3 (profit); N.J.S.A. 15A:13-3 (nonprofit)

A foreign business entity must determine whether its activities in New Jersey obligate the business entity to qualify to do business in New Jersey. Without excluding other activities which may not constitute transacting business in New Jersey, a foreign business entity may not be

considered to be transacting business in New Jersey, by reason of carrying on any one or more of the following activities in the state:

- Maintaining, defending or otherwise participating in any action or proceeding, whether judicial, administrative, arbitrative or otherwise, or effecting the settlement thereof or the settlement of claims or disputes
- Holding meetings of its directors or shareholders
- Maintaining bank accounts or borrowing money, with or without security, even if such borrowings are repeated and continuous transactions and even if such security has a situs in New Jersey
- Maintaining offices or agencies for the transfer, exchange and registration of its securities, or appointing and maintaining trustees or depositaries with relation to its securities

If a business entity is obligated to qualify in New Jersey, the business entity must file an application for certificate of authority to conduct business/activities in New Jersey. N.J.S.A. 14A:13-4 (profit); N.J.S.A. 15A:13-4 (nonprofit); and N.J.S.A. 42:2C-58 (limited liability companies).

**Application for Certificate of Authority.** An application for certificate of authority must be executed on behalf of the business entity, setting forth:

- The name of the business entity and the jurisdiction of its incorporation
- The date of incorporation or formation and the period of duration of the business entity
- The address of the main business or headquarters office of the business entity
- The address of the registered office of the business entity in New Jersey, and the name of its registered agent in New Jersey at such address, together with a statement that the registered agent is an agent of the business entity upon whom process against the business entity may be served
- The character of the business the business entity is to transact in New Jersey, together with a statement that it is authorized to transact such business in the jurisdiction of its incorporation or formation.

A certificate of good standing from the business entity's state of incorporation or formation not greater than 30 days old must be attached to the application.

The executed original application and the certificate of good standing from the business entity's state of incorporation or formation must be attached to the application filed with the Division of Revenue. There is a USD125.00 filing fee.



### III. TRADE REGULATIONS

Due to its role as a major industrial center, New Jersey's industry and commerce are subject to significant trade regulation. The three primary areas of trade subject to that regulation are antitrust, franchise practices, and consumer fraud. A brief summary of New Jersey law pertaining to each of those areas follows.

#### A. Anti-Trust Laws

##### 1. New Jersey Antitrust Act

The New Jersey Antitrust Act, N.J.S.A. 56:9-1 *et seq.*, prohibits restraints of trade which are secured through monopolistic practices and which act or tend to act to decrease competition.

- The Act is interpreted in harmony with case law construing federal antitrust law, and, to the extent practicable, with the laws of other states that have enacted the Act. N.J.S.A. 56:9-18.
- Primary substantive provisions:
  - Section 3: Prohibits every “contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce” in the State.
    - a. Purely unilateral conduct is not prohibited under this section.
    - b. “Vertical restraints,” *i.e.*, agreements between suppliers and downstream distributors that affect competition, are generally analyzed under a “rule of reason” standard.
      - The “rule of reason” test, as expressed under New Jersey law, requires a court to examine the relevant market or markets in which the restraint allegedly operates, to balance competitive and anticompetitive effects under all relevant circumstances, and to determine whether there was intent and an agreement to restrain trade.
      - Examples:
        - Tying arrangements: Party creating tie must possess sufficient economic power to impose appreciable restraint on free competition and it must be shown that the arrangement has affected a substantial amount of commerce in tied product.

- Territorial restrictions: Territorial restrictions, particularly in the case of franchises, are permissible when the restrictions do not have a pernicious effect on inter-brand competition and do not lack any redeeming virtues.
- Resale Price Maintenance: Although recent developments in federal law have rendered agreements to set prices between a supplier and re-seller subject only to a rule of reason analysis, New Jersey's Unfair Competition law, N.J.S.A. 56:4-1.1, provides that such agreements concerning commodities are unenforceable. There is no case law interpreting this provision, but it could be used in the future to distinguish New Jersey law from the trend toward de-regulation at the federal level.
- c. "Horizontal restraints," *i.e.*, agreements between competitors at the same level of market structure and are often deemed *per se* violations of the Antitrust Act.
  - Examples:
    - Price fixing: persuasive evidence of joint action on part of parties at same level must be introduced; "conscious parallelism" is insufficient to create horizontal restraint.
    - Refusals to deal: Where competitors agree to refuse to deal with suppliers or customers.
- Section 4: Renders unlawful monopolization, attempted monopolization or a combination or conspiracy to monopolize and prohibits certain acquisitions which may substantially lessen competition.
  - Party alleging illegal monopolization must prove relevant geographic and product market, high probability of success of monopolization, specific intent, and conduct furthering the attempt to monopolize.
- Section 5: In varying degrees, this section exempts certain activities from regulation under the New Jersey Antitrust Act such as the activities of labor organizations, agricultural or horticultural cooperatives, public utilities, joint underwriting and joint reinsurance arrangements, religious and charitable organizations, securities dealers and issuers, banking and savings and loan institutions, and professional societies.
  - Many exemptions are based upon the fact that certain of the exempt industries are governed by other regulatory schemes.

- Notably, price discrimination is not covered by the New Jersey Antitrust Act, but separate provisions against price discrimination may exist in industry-specific statutes, *see, e.g.*, N.J.S.A. 56:6-22(c) (prohibiting price discrimination in wholesale motor fuels).

## 2. Enforcement

- The New Jersey Antitrust Act designates the State Attorney General as the primary public enforcement authority. The Attorney General may direct criminal prosecution by local county prosecutors.
- Under section 7 of the Act, public penalties include: forfeiture of charter rights, franchises, privileges and powers; dissolution of the corporation or association; suspension of the privilege to conduct business within the state; other relief deemed appropriate by the Court.
- Criminal penalties under Section 11 include: fines of not less than USD50,000 nor more than USD300,000 for a person convicted of a second degree offense; fines of not less than USD25,000 nor more than USD150,000 for a person convicted of a third degree offense; fines of not less than USD250,000 nor more than USD1,000,000 for a business entity convicted of a second degree offense; fines of no less than USD100,000 nor more than USD300,000 for a business entity convicted of a third degree offense. Imprisonment is also permitted under the statute in lieu of or in addition to fines. A second degree offense affects commerce or trade of a value equal to or greater than USD1,000,000; a third degree offense affects commerce or trade of a value less than USD1,000,000.
- The Attorney General may also institute proceedings to obtain injunctive relief. N.J.S.A. 56:9-10.
- Private enforcement is also provided for in the Act through the authorization of civil actions by aggrieved parties. N.J.S.A. 56:9-12.
- The Act further provides for trebling of damages awards and the recovery of attorneys' fees and costs.
- Generally, Section 14 provides that the statute of limitations for the commencement of an action under the New Jersey Antitrust Act expires 4 years after the cause of action arises.
- Courts are expressly required by Section 18 to construe the New Jersey Antitrust Act in harmony with ruling judicial interpretations of comparable federal antitrust laws.

## B. Franchise Regulation

New Jersey does not have a statute that requires the registration of franchise offerings or otherwise regulates the process of selling franchises. New Jersey does have a statute, the New Jersey Franchise Practices Act (N.J.S.A. 56:10-1 *et seq.*) (“NJFPA”), that regulates certain aspects of the relationship between franchisees located in New Jersey and franchisors. In addition, various aspects of New Jersey common law tend to be significant in litigation between franchisors and franchisees. For example, most disputes between franchisees and franchisors involve claims for breach of contract and for breach of the implied covenant of good faith and fair dealing.

### 1. General Information

- The NJFPA defines a “franchise” as a written arrangement for any period of time during which a license to use a trade mark, trade name, or service mark is granted.
- The NJFPA applies only to franchisees that maintain a place of business in New Jersey, have gross sales (of products/services covered by the franchise) of more than USD35,000 in the 12 months preceding suit, and derive more than 20% of gross sales from the franchise.

### 2. Termination of a Franchise Agreement

- The most significant aspect of the NJFPA is that it prohibits franchisors from terminating or refusing to renew franchises without “good cause,” which is defined as the franchisee’s failure to substantially comply with the franchise agreement.
- Franchisors are prohibited from terminating or refusing to renew a franchise without giving 60 days written notice of all reasons for termination or refusal to renew, except in the following two circumstances:
  - Where the franchisee has voluntarily abandoned the franchise, only 15 days written notice is required to terminate.
  - Where the franchisee has been convicted of an indictable offense, termination is effective immediately upon the delivery and receipt of written notice at any time following the conviction.

### 3. Assignment and Transfer of a Franchise Agreement

- Franchisees are prohibited from assigning or transferring the franchise without first providing a written request to the franchisor.

- Franchisors are required to respond to the franchisee's request within 60 days after receiving it. If the franchisor denies the request, it must provide the franchisee with the material reasons relating to the business experience, financial ability, and character of the prospective transferee, for its denial.
- If the franchisor fails to respond to the request within 60 days, its approval is deemed granted.
- All assignees and transferees must agree in writing to comply with the terms of the franchise agreement in order for the assignment or transfer to be valid.

#### 4. Prohibited Practices

- Franchisors may not:
  - require franchisees to release anyone from liability under the NJFPA;
  - inhibit the right to free association among franchisees;
  - require or prohibit any change in the franchisee's management without good cause;
  - restrict the franchisee's sale of equity or transfer of securities as long as the transaction does not amount to a transfer of control;
  - impose unreasonable standards of performance on the franchisee; or
  - impose any other terms or conditions on the franchisee that violate the NJFPA.
  - require a franchisee located in New Jersey to litigate NJFPA claims in another forum.

#### 5. Actions Against Franchisor

- Franchisees may seek injunctive relief or money damages for violations of the NJFPA.
- Failure by the franchisee to substantially comply with the franchise agreement is a defense to any action brought by the franchisee.
- Successful franchisees are entitled to attorneys' fees.

## 6. Industry Specific Statutes

In addition to the NJFPA, New Jersey has enacted certain statutes that impose additional requirements on the relationship between franchisees and franchisors in specific industries. For example, New Jersey has enacted a number of statutes that regulate various aspects of the relationship between motor vehicle dealers and manufacturers/distributors, including statutes that restrict the ability of the manufacturer/distributor to open new or relocate existing dealers, and require manufacturers/distributors to reimburse dealers for warranty work at certain levels.

### C. **Consumer Protection**

#### 1. The New Jersey Consumer Fraud Act

- The New Jersey Consumer Fraud Act (“NJ CFA”), N.J.S.A. 56:8-1, *et seq.*, protects against a wide range of deceptive, fraudulent and misleading conduct related to the sale and handling of merchandise and services.
- General Provisions:
  - a. The NJ CFA generally prohibits the act, use, and employment in the sale or advertisement of merchandise or real estate of “any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation” and the knowing concealment, suppression or omission of any material fact with the intent that others rely on such concealment, suppression or omission.
  - b. A merchant can be held liable under the NJ CFA even if no consumers have been actually misled, deceived or damaged.
- Specific prohibited conduct includes, among others:
  - a. A plan or scheme to sell items or services in a way other than as advertised.
  - b. The sale of unassembled items after showing those items assembled in advertisements, unless the advertisement indicates that the item is sold unassembled.
  - c. The sale of merchandise without a price clearly marked on the item itself or where the item is displayed.
  - d. Falsely leading a consumer to believe the seller of an item is affiliated with a charitable organization when the seller is not so affiliated.

- e. Misrepresenting the identity of food and food products for consumption at eating establishments on menus, posted information, or advertisements.
- f. Transacting business under an assumed name in order to intentionally misrepresent the geographic origin or location of either the merchandise or the person transacting business.
- g. Selling non-prescription drugs, baby food or baby formula beyond the expiration date imposed by the Food and Drug Administration.
- h. Ticket scalping such as reselling tickets without a license to do so and/or reselling tickets for an amount 20% or USD3.00 (whichever is greater) above the ticket price printed on the ticket plus lawful taxes.
- i. The advertisement or sale of information services unless certain criteria is met and certain disclosures are made.
- j. Misrepresenting the mechanical condition of a used motor vehicle for resale by a dealer.
- k. Certain home loan solicitations to senior citizens.
- The NJ CFA also requires certain affirmative actions to be taken such as:
  - a. Prominently displaying refund policies.
  - b. Providing customers required to sign contracts with copies of the contracts.
  - c. Disclosing the profit-making nature of a business selling used goods unless the seller is a charitable organization.
  - d. Displaying information about and/or notifying consumers regarding defective or hazardous toys.
  - e. Posting certain disclosures related to food preparation when a merchant sells Kosher or halal foods.
  - f. Providing the consumer of a used motor vehicle purchased at a dealer with a written warranty.
  - g. Providing regular veterinary care to cats and dogs being offered for sale at a pet shop.
- The NJ CFA imposes registration, licensing and/or certification requirements on certain types of enterprises such as:

- a. Business engaged in reselling tickets to events or places of entertainment.
- b. Health clubs.
- c. Industrial hygienists.
- Enforcement
  - a. The NJ CFA designates the State Attorney General as the primary public enforcement authority.
  - b. The statute also permits private actions to be brought against alleged violators.
- Penalties for violations:
  - a. Persons who violate the New Jersey Consumer Fraud Act may be subject to monetary penalties that range from a mandate to refund all monies obtained unlawfully to fines assessed for each violation.
  - b. In some cases, a receiver may be appointed or an injunction to cease and desist may be ordered.
  - c. Failure to restore monies unlawfully obtained from a senior citizen can result in the imposition of criminal contempt penalties.
  - d. The Court may award treble or punitive damages in private actions filed by consumers.
  - e. Reasonable attorneys' fees, filing fees and reasonable costs of suit may be awarded to the prosecuting plaintiff, whether the Attorney General or a private citizen.



## IV. TAXATION

### A. General Information

New Jersey has five major taxes: Personal (Gross) Income Tax; Corporation Business Tax; Sales and Use Tax; Inheritance and Estate Tax; and Real Property Tax. In addition, there are several other taxes that are industry/activity specific; e.g., Alcohol Beverage Tax; Casino Tax; Cigarette and Tobacco Tax; Insurance Tax; Motor Fuel Tax; Real Property Transfer Tax; Spill Compensation and Control Tax. The major taxes and most other taxes are found in Titles 54 and 54A of the New Jersey Statutes Annotated.

The New Jersey Division of Taxation (the “Division”) in the Department of Treasury is responsible for the administration of all taxes in the State of New Jersey. The principal functions of the Division include: Audit; Compliance; Property Administration; Technical Services; and Technical Support. The information regarding general tax issues can be found at the Division’s web site at <http://www.state.nj.us/treasury/taxation>. Michael J. Bryan is the Director of the Division.

### B. Personal (Gross) Income Tax

The personal income tax is imposed at graduated rates on resident and non-resident individuals, estates and trusts. For married individuals filing a joint return and head of households, the rates range from 1.4% of taxable income of USD20,000 or less to 6.37% of taxable income over USD150,000, and 8.97% for taxable income over USD500,000. For single taxpayers, married filing separately, and estates and trusts, the rates range from 1.4% of taxable income of USD20,000 or less to 6.37% of taxable income over USD75,000, and 8.97% for taxable income over USD500,000.

The tax base consists of specific categories of income: e.g., salaries, wages, commissions, property or other remuneration received for services rendered; net profits from business; net gains/losses from the disposition of property; net gains or net income derived from rents, royalties, patents; distributive share of partnership income; pro-rata share of a subchapter S corporation’s income.

For tax years beginning on and after January 1, 2012, New Jersey permits taxpayers who generate income from different types of business entities to off-set gains from one type of business with losses from another, and to carry forward for 20 years business related losses.

Allowable exemptions include: USD1,000 personal exemption per person for the taxpayer and the taxpayer’s spouse who does not file separately; USD1,500 personal exemption for each qualified dependent of the taxpayer; USD1,000 for each dependent under 22 who attends an accredited institution of higher education full time and for whom the taxpayer pays at least one-half of the tuition costs and maintenance; USD1,000 additional personal exemption if the taxpayer is over age 65, blind or disabled.

Allowable deductions include: medical expenses in excess of 2% of gross income; alimony and separate maintenance payments; up to USD10,000 in real property tax paid on the taxpayer's principle residence.

Allowable credits include; credit for income taxes paid to another jurisdiction limited to the percentage that the taxpayer's out of state income is to its total New Jersey Gross Income.

### **C. Corporation Business Tax**

The Corporation Business Tax ("CBT") applies to all domestic corporations and all foreign corporations that hold a certificate of authority from the Secretary of State of New Jersey, who derive receipts from sources within New Jersey, or maintain an office, employ or own property or do business in New Jersey.

The CBT is the greater of the tax computed based on entire net income apportioned to New Jersey or based on the Alternative Minimum Assessment ("AMA"). Entire net income is prima facie Federal taxable income before NOLs and special deductions. The tax rates on entire net income are: 9% on entire net income in excess of USD100,000; 7.5% on entire net income on USD100,000 or less but greater than USD50,000; and 6.5% on entire net income on USD50,000 or less. The AMA does not apply to a New Jersey S corporation, an investment company or professional corporation. The minimum CBT is based upon New Jersey gross receipts starting at USD500 for gross receipts less than USD100,000 to USD2,000 for gross receipts of USD1,000,000 or more. A taxpayer that is a member of an affiliate group with a combined payroll in excess of USD5,000,000 shall pay a minimum tax of USD2,000.

The AMA is computed on either New Jersey gross receipts in excess of USD2,000,000 or New Jersey gross profits (which are gross receipts less cost of goods sold) in excess of USD1,000,000. The AMA is imposed at graduated rates. The rates for gross receipts range from .00125 for gross receipts in excess of USD2,000,000 to .0040 for gross receipts in excess of USD75,000,000. The rates for gross profits range from .0025 for gross profits in excess of USD1,000,000 to .0080 for gross profits in excess of USD37,500,000. For taxable periods beginning after June 30, 2006, the AMA is 0% except for taxpayers who are otherwise protected by P.L. 86-272 and do not waive such protection. The AMA is capped at USD20,000,000 for a group of five or more affiliated corporations.

There are several credits relating to economic development available against the CBT: e.g., new jobs investment credit; urban enterprise zone credit; manufacturing equipment and employment credit; recycling equipment credit; high technology credit; qualified research credit; redevelopment authority property tax credit. The credits are applied in a statutorily prescribed order and the aggregate of all credits taken cannot reduce the CBT below 50% in any year and cannot reduce the CBT below the minimum tax due in any year. None of these credits may be used to reduce the AMA.

Effective September 18, 2013, the New Jersey Economic Opportunity Act combined five economic development incentive programs, including the Business Employment Incentive Program and Urban Transit Hub Tax Credit Program, into two existing programs: the Grow New Jersey Assistance ("Grow NJ") Program, which is the State's main job creation and retention

incentive program, and the Economic Redevelopment and Growth (“ERG”) Program, which is the State’s key developer incentive program. The Grow NJ and ERG programs are administered by the New Jersey Economic Development Authority (the “Authority”). The Authority reviews the various applications for these incentives to ensure that the projects meet certain eligibility requirements and awards these incentives, as appropriate.

Investment companies are taxed at 40% of their entire net income, i.e., an effective tax rate of 3.6%.

For taxable periods beginning on and after January 1, 2014, the business allocation factor is based on a single sales fraction. New Jersey does not allow affiliated corporations to file combined or consolidated returns.

#### **D. Sales and Use Tax**

New Jersey taxes the retail sale of all tangible personal property, specified digital products, specified telecommunication charges and prepaid calling services, restaurant and catered meal charges, admission and cover charges unless otherwise exempt and certain enumerated services at the rate of 7% of the sales price. A use tax at the rate of 7% is imposed on the storage, use or consumption of tangible personal property purchased at retail on which the New Jersey sales tax has not been paid or collected. In general, New Jersey counties and municipalities do not impose sales/use taxes, except for certain Atlantic Ocean resort cities.

Effective October 1, 2005, New Jersey amended its Sales and Use tax law to conform to the Streamlined Sales and Use Tax Agreement. L.2005, c.126, AB3473. Retail sale means “any sale, lease, or rental for any purpose, other than for resale, sublease, or subrent.” N.J.S.A. 54:32B-2(e). The following are excluded from the definition of retail sale:

1. professional, insurance, or personal service transactions that involve the transfer of tangible personal property as an inconsequential element, for which no separate charges are made;
2. the transfer of tangible personal property to a corporation, solely in consideration for the issuance of its stock, pursuant to a merger or consolidation effected under the laws of New Jersey or any other jurisdiction;
3. the distribution of property by a corporation to its stockholders as a liquidating dividend; the distribution of property by a partnership to its partners in whole or partial liquidation;
4. the transfer of property to a corporation upon its organization in consideration for the issuance of its stock;
5. the contribution of property to a partnership in consideration for a partnership interest therein; or,

6. the sale of tangible personal property where the purpose of the vendee is to hold the thing transferred as security for the performance of an obligation of the seller. N.J.S.A. 54:32B-2(e)(4)(A-G).

In general, the retail sale of the following services is taxable:

- installing, maintaining and repairing tangible personal property, except where the installation results in a capital improvement to real property;
- maintaining, servicing or repairing real property except where such services would constitute a capital improvement to the real property;
- processing and printing tangible personal property provided by another who did not purchase such property for resale;
- intrastate and interstate telecommunications services (other than mobile telecommunications services) charged to a New Jersey service address;
- mobile telecommunications billed to a customer with a primary place of use in New Jersey.

Exemptions from sales and use tax are generally based on:

- the party's status; e.g., a sale to the Federal or State government; religious organization, etc.;
- the purpose or use to which the property will be applied; e.g., machinery and equipment used directly and primarily in the production of tangible personal property for sale by manufacturing, processing, assembling or refining; machinery and equipment used directly and primarily in the production, generation, transmission or distribution of gas, electricity, refrigeration, steam or water, etc.; or,
- the nature of the transaction, e.g., sale for resale, casual sale, etc.

A party claiming the benefit of an exemption must provide the vendor with the applicable New Jersey Exemption Certificate: e.g., ST-3, Resale Certificate; ST-4 Exempt Use Certificate; ST-5, Exempt Organization Certificate; ST-8 Certificate of Capital Improvement. New Jersey also accepts the Multistate Tax Commission's Uniform Sales and Use Tax Certificate-Multijurisdictional.

The vendor is obligated to collect the tax from the purchase at the time of sale and remit the tax to the Division. The purchaser is obligated to remit the tax directly to the Division if the vendor does not collect the tax from the purchaser. The vendor has the same right in respect to collecting the tax from the purchaser or in respect to non-payment of the tax by the purchaser as if the tax was a part of the purchase price of the property or service. The Division has implemented "paperless" sales and use tax filing procedures and electronic funds transfer and use of credit cards for all registered taxpayers.

In 2014, New Jersey enacted a “click through” nexus provision (N.J.S.A. 54:32B-2(i)(C), P.L. 2014, c.13). The new law creates a rebuttable presumption that an out-of-State seller who makes taxable sales of tangible personal property, specified digital products, or services, is soliciting business and has nexus in New Jersey if that seller: enters into an agreement with a New Jersey independent contractor or other representative for compensation in exchange for referring customers via a link on their website, or otherwise, to that out-of-State seller; and has sales from these referrals to customers in New Jersey in excess of USD10,000 for the prior four quarterly periods ending on the last day of March, June, September, and December.

## **E. Real Property Tax**

In New Jersey, all real property (land, improvements and personal property permanently affixed thereto, except for machinery, apparatus and equipment that is used or held for use in business and is neither a structure, nor machinery, apparatus or equipment whose primary purpose is to enable a structure to support, shelter, contain enclose or house persons or property) is subject to tax unless otherwise specifically exempt. The New Jersey Constitution requires that property shall be assessed “by uniform rules . . . and . . . according to the same standard of value . . . except as otherwise provided.” Article VIII, Section I. Real property is assessed at the “true value” thereof which has been defined by the New Jersey Courts as the “fair market value” of the property on the assessment date. One exception is for qualified farmland under the Farmland Assessment Act. Real property of certain not for profit entities which is used for a qualified exempt use may be exempt from taxation. Applications for property tax exemptions generally must be filed by November 1 of the pre-tax year, and further statements filed every third year. Structures which are omitted from assessment, or are newly constructed, may be assessed through a supplemental added or omitted assessment procedure.

Real property is assessed as of October 1<sup>st</sup> annually for the tax year beginning on the following January 1<sup>st</sup>. The assessment of the real property tax is generally administered at the local level by the 565 municipal tax assessors and the 21 county boards of taxation. Collection of the tax is also at the municipal level and the tax bill (which is paid quarterly) includes the applicable municipal, county and school taxes.

A taxpayer may appeal the assessment on his property to the County Board of Taxation or if the assessment exceeds USD1,000,000 directly to the New Jersey Tax Court. In either case the appeal must be filed on or before April 1<sup>st</sup> of the tax year at issue, or on or before 45 days from the date of the bulk mailing of notification of assessments is completed, whichever is later. In a municipality where a district-wide revaluation of properties has been implemented, the deadline is May 1<sup>st</sup> of the tax year at issue. Cross-appeals may be filed by the municipality to seek an increase in an appealed assessment. Appeals from judgments of the County Boards of Taxation may be taken to the Tax Court within 45 days of the date of judgment. Appeals of denial of farmland assessment qualification or exemption status must be filed by April 1<sup>st</sup> with the County Board of Taxation, or to the New Jersey Tax Court if the assessment at issue exceeds USD1,000,000. Appeals from added or omitted assessments must be filed on or before December 1<sup>st</sup> of the tax year with either the County Board of Taxation or the Tax Court, again, depending on the amount in issue. Appeals of an adjudication of a tax matter by the Tax Court may be appealed within 45 days of final judgment to the Appellate Division of the Superior Court of New Jersey.

The Division annually publishes a Table of Equalized Valuations showing the average ratio of assessed value to true value of real estate in each of the 565 local taxing districts. This table is used in calculating and distributing state aid to local school districts.

New Jersey does not tax most personal property, e.g., business personal property, tangible assets, merchandise, personal effects, etc. except for certain tangible property of oil refineries and local telephone exchange companies.

#### **F. Taxation of New Jersey “S” Corporations**

New Jersey has not incorporated the federal tax provisions governing S corporations set out in IRC Sec. 1361 through IRC Sec. 1379. An S corporation election form must be filed in order to be treated as an S corporation by New Jersey. An S corporation that does not elect S corporation status for New Jersey purposes is treated as a C corporation.

#### **G. Tax Benefits**

As previously noted, there are several types of credits relating to economic development available against the CBT: e.g., new jobs investment credit; urban enterprise zone credit; manufacturing equipment and employment credit; recycling equipment credit; high technology credit; qualified research credit; redevelopment authority property tax credit. The credits are applied in a statutorily prescribed order and the aggregate of all credits taken cannot reduce the CBT below 50% in any year.

In addition, the New Jersey Economic Development Authority <http://www.njeda.com/> administers several incentive programs to attract business to New Jersey. One program in particular, the Business Employment Incentive Program (“BEIP”) has generated a substantial amount of grants for expanding businesses in New Jersey. The BEIP grant provides tax benefits for new employees hired to work in New Jersey. Specific information on BEIP and details of recipients of specific BEIP grants can be found at [http://www.njeda.com/beip\\_activity.asp](http://www.njeda.com/beip_activity.asp).

#### **H. New Jersey Transfer Inheritance Tax:**

1. Transfers from the estate of a New Jersey resident decedent of all real and tangible personal property situated in New Jersey and all intangible personal property wherever situated, with a value of USD500.00 or more, are subject to New Jersey inheritance tax with respect to certain classes of beneficiaries.
2. Transfers from the estate of a non-New Jersey resident decedent of real and tangible personal property situated in New Jersey, with a value of USD500.00 or more, is subject to New Jersey inheritance tax with respect to certain classes of beneficiaries.
3. The inheritance tax is imposed on the recipient of the property transferred.
4. The classes of beneficiaries and the rates of tax are as follows:

- “Class A” beneficiaries are the decedent’s spouse, parent, grandparent, children, the issue of any child, and step-children. No New Jersey inheritance tax is imposed on transfers from an estate to “Class A” beneficiaries.
  - “Class C” beneficiaries are the decedent’s brothers, sisters, sons-in-law, and daughters-in-law. No tax on the first USD25,000. On transfers between USD25,000 and USD1.1 million the rate of tax is 11%. This increases incrementally to 16% on transfers in excess of USD1.7 million.
  - “Class D” beneficiaries are all non “Class A” and “Class C” beneficiaries not otherwise exempt. On transfers up to USD700,000 the rate of tax is 15%. On transfers in excess of USD700,000 the rate of tax is 16%.
  - Exemptions to the inheritance tax include transfers to charities, and life insurance proceeds payable to named beneficiaries other than the decedent’s estate.
5. The New Jersey Inheritance Tax Return and the payment of the inheritance tax is due within 8 months of the date of death.

#### **I. New Jersey Estate Tax**

1. The estate of every New Jersey resident decedent dying after December 31, 2001 is subject to New Jersey estate tax if the estate exceeds USD675,000. The tax is equal to the federal estate tax state death tax credit amount determined as if the decedent died in 2001.
2. There is no New Jersey estate tax on estates of non-New Jersey resident decedents.
3. The amount of estate tax is reduced by the aggregate amount of inheritance tax paid to New Jersey. In addition, by regulation, the amount of estate tax is reduced proportionally by the aggregate value of real and tangible personal property not situated in New Jersey in proportion to the aggregate value of the decedent’s adjusted gross estate.
4. The New Jersey Estate Tax Return and the payment of the estate tax is due within 9 months of the date of death.

## V. LABOR AND EMPLOYMENT

There are numerous New Jersey statutes that govern labor and employment law in New Jersey. These statutes regulate a broad range of topics, including employer-employee relations, workplace conduct, and labor and employment practices. As a result, employers should be well aware of the many legal issues that may affect their business and their employees. What follows is a list of the most relevant New Jersey statutes governing labor and employment law in New Jersey.

### A. New Jersey New Hire Reporting Requirements (N.J.S.A. 2A:17-56.1)

- Within 20 days of an employee's hiring, re-hiring, or return to work, the employer shall report the employee's (1) name, (2) address, (3) date of birth, and (4) social security number, as well as the employer's (1) name, (2) address, and (3) federal tax identification number to the department of labor
- Employers who transmit reports magnetically or electronically shall report every 15 days
- Penalties may be imposed upon employers that fail to report such information

### B. New Jersey Workers' Compensation Law (N.J.S.A. 34:15-1 *et seq.*)

- Provides benefits to workers who are injured or contract occupational disease while working
- Workers' Compensation insurance coverage is mandatory for employers
- Employer automatically liable for injury regardless of fault, unless employee is willfully negligent
- Employees, not independent contractors, covered by the law
- Provides sole remedy for work related injury;
  - exception: if employer intentionally caused injury, employee can seek damages via civil suit
- Employer may not discharge or discriminate against employee on the basis of the employee's claim or attempt to claim Workers' Compensation benefits or because the employee has testified in a Workers' Compensation hearing

### C. New Jersey Unemployment Compensation Law (N.J.S.A. 43:21-1 *et seq.*)

- Provides unemployment compensation benefits for qualified individuals whose employment has been involuntarily terminated
- To be eligible, person must: (1) file a claim; (2) make a valid claim for benefits; (3) be able to work; (4) be available for work; (5) be actively seeking work; and (6) be partially or totally unemployed for at least one week



- Amount of compensation and length of payments dependent on earnings and time worked
- Payments for maximum of 26 weeks; claimants may be eligible for an extension of benefits when regular benefits have been exhausted
- Persons may be disqualified for benefits for variety of reasons, including voluntary termination without good cause attributable to work and failure to accept suitable work; can also be temporarily/permanently disqualified for misconduct
- Employer's contribution to unemployment compensation fund is in the nature of taxes, based on total payroll and number of discharged employees claiming benefits

**D. New Jersey Temporary Disability Benefits Law (N.J.S.A. 43:21-25 *et seq.*)**

- **Individual Disability Benefits**
  - Protects employees from loss of income due to non-employment related illness/injury
  - Also covers employment related illnesses/injuries not otherwise compensable under the workers' compensation laws, provided illness/injury results in total inability to work
  - Payments for maximum of 26 weeks
  - Employers must provide it, and are automatically included in the state disability plan
  - Employer alternatively may establish private plan, but such plan must provide benefits at least equal to state plan
- **Family Temporary Disability Leave (N.J.S.A. 43:21-39.1)**
  - Provides compensable leave of up to six weeks, in a twelve month period, to an individual for care of a family member
  - Paid for in part by deductions from employees' taxable wages
  - May not simultaneously receive any other disability benefits
  - Employer may require individual to use up to two weeks of paid sick leave, vacation time, or other leave at full pay before the individual is eligible for family temporary disability leave
  - Runs concurrent with the Family Leave Act, N.J.S.A. 34:11B-1 *et seq.*, and Family and Medical Leave Act of 1993, 29 U.S.C. § 2601
  - Covered employers must conspicuously post notification consistent with commissioner regulations and shall also provide employees written notification according to specific guidelines

**E. New Jersey Law Against Discrimination [NJLAD] (N.J.S.A. 10:5-1 *et seq.*)**

- Prohibits discrimination in employment against any person on the basis of race, creed, color, sex, pregnancy and childbirth, national origin, nationality, ancestry, age, atypical hereditary cellular or blood trait, disability, affectional or sexual orientation, gender identity or expression, genetic information, refusal to submit

to genetic testing, refusal to provide genetic information, marital status, familial status, liability for service in the Armed Forces

- Also covers person's spouse, partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers, and customers
- Two year statute of limitations for actions
- Employer must make reasonable accommodation for recognized disability, provided it does not result in undue hardship on the business operation; case law has also expanded this requirement to individuals holding sincere religious beliefs
- For pregnancy-related needs, employer's obligation is triggered when a pregnant employee or an employee with a medical condition relating to pregnancy or childbirth requests an accommodation on the advice of her physician
- Law also protects harassment based on any of these characteristics
- Employer can be liable for acts of its supervisors and non-supervisors in certain circumstances
- Individual liability for those "aiding and abetting" in violation of law
- Employer may not retaliate against an employee because the employee (1) opposed any practices or acts made unlawful under the law, or (2) has or intends to file a complaint, testify, or assist in any proceeding under the law [a "retaliation" claim, if made in good faith, may prevail even if the underlying claim fails]
- Carries potential for punitive damages and attorneys' fees

**F. New Jersey Conscientious Employee Protection Act (N.J.S.A. 34:19-1 *et seq.*)**

- Prohibits an employer from taking adverse employment action against an employee because the employee: (1) disclosed, or threatened to disclose, activities by the employer which the employee reasonably believes to be illegal or against public policy; (2) provided information or testified in connection with an inquiry into the employer's violation of law; or (3) objects, or refuses to participate in, any activities the employee reasonably believes violates law or public policy
- One year statute of limitations for actions
- Under recent case law, Act applies to claimed misconduct of the employer as well as co-employees
- Employees who file under this Act waive other common law claims
- Carries potential for punitive damages and attorneys' fees

**G. New Jersey Family Leave Act (N.J.S.A. 34:11B-1 *et seq.*)**

- Provides an employee with up to 12 weeks of unpaid leave in any 24-month period for the birth or adoption of a child, or the serious health condition of an employee's child, parent, or spouse (unlike federal Family and Medical Leave Act, does not cover employee's own serious health condition)
- Requires restoration to same or comparable position upon return to work

- Employees must have worked at least 1000 hours for the same employer during the 12-month period preceding the leave
- Act applies to New Jersey employers with 50 or more employees (employees outside New Jersey count toward 50-employee threshold)
- Employer may not discharge or discriminate against an individual who has (1) filed a charge or initiated a proceeding under the Act; (2) testified, or is about to testify, or has given, or is about to give, information in connection with an inquiry or proceeding related to a right under the Act; or (3) opposes a practice made unlawful under the Act

**H. New Jersey State Wage and Hour Law (N.J.S.A. 34:11-56a *et seq.*)**

- New Jersey analog to federal Fair Labor Standards Act
- New Jersey employers must comport with both federal and state wage/hour requirements
- Minimum wage generally is same as that set by federal Fair Labor Standards Act
- Employers must pay 1½ times the employee's regular base pay for any time worked in excess of forty hours in a week
- Employers not required to pay an hourly premium for additional hours worked in a single day (*e.g.*, more than eight hours in day) or for time worked on weekends or holidays
- Sets forth types of employees who are exempt from overtime requirements of the law; the scope of the exemptions may differ from those under federal Fair Labor Standards Act
- Requires that employers keep accurate wage and hour records for employees
- Prohibits retaliation for an employee's complaint, institution of proceedings, or providing of testimony in proceedings related to the law, or for the employee's service on a wage board

**I. New Jersey Prevailing Wage Act (N.J.S.A. 34:11-56.35 *et seq.*)**

- Establishes a minimum wage rate to be paid to workers on public works (projects on property owned by or projects financed by the State of New Jersey)
- To qualify under the Act, contracts must state the prevailing wage for workers covered under contract
- Prohibits discharge or discrimination of an employee for his/her complaint, institution of proceedings, or providing of testimony in proceedings under or related to the law

**J. New Jersey Wage Payment Law (N.J.S.A. 34:11-4.1 *et seq.*)**

- Act sets forth procedural requirements for payment of wages
- Mandates that employees be paid at least twice each calendar month (once per month minimum for executives and supervisory employees)

- Enumerates specific types of permissible payroll deductions from wages (no others permitted)
- Provides time periods for payment of final check depending on circumstances underlying employee's leave of employment
- When an employee leaves employment for whatever reason, employers shall pay the employee all wages due no later than the regular pay period during which the employee left employment; employees compensated by an incentive program are entitled to a reasonable approximation of all wages due until the exact amount due can be computed
- Employers may have additional time to pay final wages to employees suspended during labor disputes

**K. New Jersey Equal Pay Act (N.J.S.A. 34:11-56.1 *et seq.*)**

- Prohibits discrimination in pay rate or method of payment based on sex
- Will not be discrimination if reasonable factors other than sex account for pay difference

**L. New Jersey Violation of Contract to Pay Law (N.J.S.A. 2C:40A-2)**

- Imposes criminal penalties on an employer who fails to pay wages when due or fails to pay compensation or benefits within thirty days after due

**M. New Jersey Wrongful Discharge of Employee Law (N.J.S.A. 2C:40A-3)**

- Imposes criminal penalties on an employer who disciplines or discharges an employee because the employee's earnings have been garnished

**N. Use of Criminal Record History Information in Hiring (N.J.A.C. 13:59-1.2 and -1.6)**

- No statutory guidance on the use of a potential employee's criminal record
- State regulations allow for the dissemination of an individual's criminal record for the purposes of determining an individual's qualification for employment
- Potential employees must be notified and given an opportunity to confirm or deny their criminal record if it is to be used to disqualify them from employment
- The New Jersey Division on Civil Rights has indicated, however, that it does not encourage employers to conduct pre-employment inquiries into an individual's criminal history because doing so disproportionately affects certain races, ethnicities, and nationalities

**O. New Jersey Worker Health and Safety Act (N.J.S.A. 34:6A-1 *et seq.*)**

- Requires the provision of reasonably safe and healthful workplaces, including the provision of protective devices in places where there is a substantial risk of injury
-

**P. New Jersey Worker and Community Right to Know Act (N.J.S.A. 34:5A-1 *et seq.*)**

- Provides mechanism for disclosing information regarding hazardous substances in the workplace
- An employer is prohibited from discharging, disciplining, or discriminating against an employee because the employee or his/her representative has exercised a right under the Act

**Q. New Jersey Employment Protection for Jury Service Law (N.J.S.A. 2B:20-17)**

- Prohibits employers from penalizing employees because of their jury duty attendance

**R. New Jersey Political Activities of Employees Law (N.J.S.A. 19:34-27 to 19:34-31)**

- Prohibits intimidation of employees to vote or refrain from voting for a particular political candidate, or to vote or refrain from voting altogether
- Employers also must refrain from attempting to influence political opinion via printed materials in employee paychecks

**S. New Jersey Developmentally Disabled Rights Act (N.J.S.A. 30:6D-1 *et seq.*)**

- Requires organizations which provide services for the developmentally disabled to take affirmative steps to employ and advance those with developmental disabilities to the extent practicable and feasible

**T. New Jersey Lie Detector Tests Law (N.J.S.A. 2C:40A-1)**

- Prohibits the requiring of an employee to take a lie detector test as a condition of current or future employment, unless business involves legally distributed controlled dangerous substances
- Law is not preempted by the federal Polygraph Protection Act

**U. New Jersey Child Abuse Law (N.J.S.A. 9:6-8.13)**

- Employees who report alleged child abuse or neglect to the Division of Youth and Family Services are protected from retaliatory discharge or any type of discrimination with respect to conditions of employment

**V. New Jersey Adult Protective Services Act (N.J.S.A. 52:27D-409a, 409d)**

- Prohibits an employer from retaliating against an individual who reports the abuse, neglect, or exploitation of a vulnerable adult to the county protective services provider

**W. New Jersey Conscience Law (N.J.S.A. 2A:65A-1 to -4)**

- An employee who refuses to participate in the performance of abortion services or sterilization procedures shall not be subject to civil or criminal liability, disciplinary action or discriminatory treatment

**X. New Jersey Public Utility Labor Dispute Act (N.J.S.A. 34:13B-1 *et seq.*)**

- Provides for right to organize and collectively bargain for employees of public utilities
- Places restrictions on strikes and lockouts of public utility employees

**Y. New Jersey Strikebreakers Act (N.J.S.A. 34:13C-1 *et seq.*)**

- Places restrictions on the importing and/or transportation of strikebreakers to interfere with lawful picketing and organizing, or as replacements of striking or locked out employees

**Z. New Jersey Railroads Law (N.J.S.A. 48:12-165)**

- Provides for criminal penalties for certain actions taken in aid of a strike against a railroad

**AA. New Jersey Worker Adjustment and Retraining Notification Act (N.J.A.C. 12:40-1.1 – 1.2)**

- In addition to complying with federal Worker Adjustment and Retraining Notification Act, employer must provide notice to dislocated worker unit within state labor department (See also Millville Dallas Airmotive Plant Job Loss Notification Act below)

**BB. Millville Dallas Airmotive Plant Job Loss Notification Act (N.J.S.A. 34:21-1 *et seq.*)**

- Applies to employers that transfer or terminate operations resulting in termination of 50 or more full-time employees within a 30 day period, or to an employer that conducts a mass layoff
- For employers who employ 100 or more full-time employees, requires notification 60 days before first termination or transfer or notification within period of time set forth in federal Worker Adjustment Retraining Notification Act, whichever is longer
- Specifies content of notification to employees
- Requires payment of severance to employees not provided proper notice
- Permits aggrieved employees to initiate suit for violations of Act

**CC. New Jersey Civil Rights Act (N.J.S.A. 10:6-1 *et seq.*)**

- Applies to both public and private employers, however, individual employees may only bring suit against government employers
- Prohibits any person, acting under the authority of the federal, state, or local government, from interfering with an individual's rights guaranteed under the Federal and New Jersey Constitutions
- Permits the Attorney General of New Jersey to bring a claim for damages against any person, irrespective of whether they are acting under governmental authority, who interferes with an individual's constitutional rights

**DD. New Jersey Domestic Partnership Act (N.J.S.A. 26:8A-1 *et seq.*)**

- Prohibits employment and other discrimination against any person because of domestic-partner status
- Also requires state employers to offer medical coverage to employees' domestic partners

**EE. New Jersey Child Labor Law (N.J.S.A. 34:2-1 *et seq.*)**

- Provides restrictions on work hours and types of work to be performed by minors (*i.e.*, those under 18 years of age) based on specific age groups, from ages 12 through 17
- Establishes permit, notice, and recordkeeping requirements with respect to child labor

**FF. New Jersey Identity Theft Prevention Act (N.J.S.A. 56:11-44 *et seq.*)**

- Applies to all employers doing business in New Jersey
- Requires that employers take steps to prevent the disclosure of Social Security numbers of employees and other personal data
- Requires the destruction of documents and electronic records containing personal information, and the notification of persons affected by any unauthorized access to personal information
- Requires that employers provide certain notification in the event of a security breach

**GG. New Jersey Smoking Law (N.J.S.A. 34:6B-1 to 34:6B-4)**

- Prohibits discrimination against a person because he/she does or does not smoke tobacco, unless the employer's decision has a rational basis reasonably related to the job
- Law does not prohibit employers from limiting or banning smoking on company premises

**HH. New Jersey Smoke-Free Air Act (N.J.S.A. 26:3D-55 *et seq.*)**

- Prohibits smoking in any indoor public place or workplace (defined as a structurally enclosed location or portion thereof at which a person performs any type of service or labor)
- Also requires employers to post "no smoking" signs at entrances and imposes fines for businesses who fail to enforce the smoking ban

**JJ. New Jersey Genetic Privacy Act (N.J.S.A. 10:5-43 *et seq.*)**

- Requires destruction of a DNA sample obtained for employment purposes immediately after the purpose for which it was retained has been accomplished

**KK. New Jersey Farm Labor Law (N.J.S.A. 34:8A-10.1)**

- Prohibits retaliation against any present or prospective seasonal farm worker for exercising rights under state or federal law

**LL. New Jersey Seasonal Farm Labor Act (N.J.S.A. 34:9A-1 *et seq.*)**

- Establishes bureau of migrant labor in Department of Labor, whose function is to enforce employment laws with respect to migrant workers

**MM. New Jersey Security and Financial Empowerment Act ("NJ SAFE Act") (N.J.S.A. 34:11C-1 *et seq.*)**

- Requires employers with 25 or more employees to provide 20 days of unpaid leave in a calendar year to any employee who is a victim of a domestic violence incident or a sexually violent offense or to any employee whose child, parent, spouse or domestic or civil union partner was the victim of such an incident
- The leave may be used for: seeking medical attention for or recovering from physical or psychological injuries; obtaining services from a victims services organization; obtaining counseling; participating in safety planning, seeking temporary or permanent relocation, or taking other actions to increase safety of employee or family member; seeking legal assistance or remedies to ensure the health and safety of employee or family member; attending, participating in, or preparing for civil or criminal court proceedings



- Employees must have worked for the employer for 12 months and at least 1,000 hours
- Leave must be taken within one year of the qualifying incident and may be used intermittently in intervals of at least one day
- Employers can require the employee to provide documentation of the qualifying incident
- Discrimination, harassment, and retaliation for taking the leave is prohibited
- One year statute of limitations for actions
- Employers must display conspicuous notice of employees' rights under this Act

#### **NN. New Jersey Gender Equity Law (N.J.S.A. 34:11-56.1 *et seq.*)**

- Requires employers with 50 or more total employees (regardless of whether those employees work in New Jersey or outside the state) to post a copy of the gender equity notice to make employees aware of their right to be free from gender-based discrimination in the workplace
- The notice must be posted in a conspicuous place in the workplace accessible by all employees or on the employer's intranet site, so long as the site is for the exclusive use of employees and all employees have access to it
- Requires employers to distribute a copy of the notice directly to employees, via e-mail, printed material, or employee internet or intranet site, under the following circumstances: (1) to all current employees as of February 5, 2014; (2) to all new employees hired after January 6, 2014 at the time of hiring; (3) to all employees annually by December 31st of each year; and (4) any time an employee requests a copy
- Finally, with each distribution, employers must obtain a signed acknowledgment or electronic verification from each employee within 30 days of the employee's receipt of the notice stating that he or she has received and read the notice and understands its terms

#### **OO. Municipal Paid Sick Leave Laws**

- As of March 2015, nine municipalities in New Jersey have enacted paid sick leave ordinances
- The paid sick leave ordinances in Newark, Montclair, Irvington, Paterson, East Orange, Passaic, Trenton, and Bloomfield are substantially similar: they require employers of 10 or more employees to provide up to 40 hours of paid sick leave and employers of less than 10 employees to provide up to 24 hours of paid sick leave
- Notably, the Jersey City ordinance requires employers of less than 10 employees to provide up to 40 hours of **unpaid** sick leave
- Generally:
  - Employees must work at least 80 hours in a calendar year in the municipality to be eligible

- Upon commencement of employment, employees accrue one hour of sick leave for every 30 hours worked; however, employees cannot start using their leave until after about three months of employment
- At minimum, leave can be taken for the employee's own health condition or treatment, including preventive care, as well as for that of a family member
- Employees accrue one hour of sick leave for every 30 hours worked (exempt employees are assumed to work 40 hours per week)
- Employees may carry over a certain amount of accrued time from year to year
- The ordinances contain notice requirements and prohibitions on retaliation
- Trenton's paid sick leave ordinance is currently being challenged in a lawsuit and the city has suspended enforcement
- Bloomfield's paid sick leave ordinance was passed on March 2, 2015 and will go into effect 120 days later, on June 30, 2015
- The respective New Jersey municipal ordinances are available here:
  - **Newark**  
[http://www.ci.newark.nj.us/wpcontent/uploads/2014/09/bus\\_Ordinance\\_Sick\\_Leave.pdf](http://www.ci.newark.nj.us/wpcontent/uploads/2014/09/bus_Ordinance_Sick_Leave.pdf)
  - **Montclair**  
<http://www.montclairnjusa.org/dmdocuments/Referendum-11-04-2014.pdf>
  - **Irvington**  
<http://ecode360.com/documents/IR0792/source/541588.pdf>
  - **Paterson**  
[http://www.patersonnj.gov/egov/docs/1421764053\\_777404.pdf](http://www.patersonnj.gov/egov/docs/1421764053_777404.pdf)
  - **East Orange**  
<http://www.eastorangenj.gov/Departments/CityClerk/PDF/Ordinance%20No.%2021%20of%202014.pdf>
  - **Passaic**  
<http://www.cityofpassaic.com/assets-pdf/CityClerk-SickLeave2014.pdf>
  - **Trenton**  
<http://www.trentonnj.org/uppages/14-45%20ORD%20SICK%20LEAVE%20FOR%20REFERENDUM%20APPROVED.PDF>
  - **Bloomfield**  
<http://www.bloomfieldtwpnj.com/documents/file/2015clerk/Ord%2015-10%20-%20203-2-15%20-%20Paid%20Sick%20Leave.pdf>
  - **Jersey City**  
[http://www.cityofjerseycity.com/uploadedFiles/For\\_Residents/Earned%20Sick%20Leave%20Ordinance.pdf](http://www.cityofjerseycity.com/uploadedFiles/For_Residents/Earned%20Sick%20Leave%20Ordinance.pdf)

**PP. New Jersey Opportunity to Compete Act (“Ban the Box”) (N.J.S.A. 34:6B-11 *et seq.*)**

- Applies to employers doing business in New Jersey with 15 or more employees, including interns and apprentices, over 20 calendar weeks
- Excludes domestic services employees, independent contractors, directors, and trustees

- Prohibits employer from mentioning criminal history in any job advertisement
- Prohibits employer from making verbal or written inquiries regarding an applicant's criminal record during the period between an applicant's first inquiry about employment and the conclusion of the first interview (unless the applicant voluntarily discloses such information)
- After this period, employer may inquire about and refuse to hire an applicant because of his or her criminal record, unless the relevant crime has been expunged and provided that the decision is consistent with other applicable laws, rules, and regulations
- Violations are subject to civil penalties up to \$10,000, depending on whether there have been previous violations of the Act

**QQ. New Jersey Social Media Privacy Law (N.J.S.A. 34:6B-5 through -10)**

- Prohibits employer from requiring or requesting current or prospective employees to provide their username or password or any other means for accessing their personal social media accounts
- Prohibits employer from requiring any individual to waive their right under this statute as a condition of applying for or receiving an employment offer
- Prohibits retaliation against individuals who: (1) refuse to disclose a user name or password to their social media account; (2) report an alleged violation to the Commissioner of Labor and Workforce Development; (3) testify or assist in any investigation concerning this law; or (4) otherwise oppose a violation of the law
- Does not prohibit employer from accessing or using publicly available information about a current or prospective employee or from implementing a policy relating to the use of an employer-issued electronic device or account that the employee uses for business purposes
- Does not prevent employer from conducting an investigation to either: (1) ensure compliance with applicable laws or prohibitions against work-related employee misconduct; or (2) respond to a receipt of specific information about the unauthorized transfer of the employer's proprietary, confidential, or financial information to an employee's personal account
- Violations are subject to civil penalties not to exceed USD1,000 for the first violation and USD2,500 for each subsequent violation

## VI. ENVIRONMENTAL

New Jersey continues to be one of the most aggressive states in the United States in the protection of the environment. Many of New Jersey's environmental laws are unique in that they implement a greater level of environmental regulation than in most other jurisdictions. What follows is a summary of New Jersey's environmental statutes.

### A. Agencies

#### 1. New Jersey Department of Environmental Protection ("NJDEP")

The NJDEP is New Jersey's lead environmental regulatory agency. The NJDEP is charged with protecting New Jersey's air, land, water and natural resources. It also delegates some of its authority to local agencies.

The NJDEP has comprehensive rulemaking and enforcement authority, which extends to administrative enforcement and adjudication, as well as to initiation of judicial actions.

The NJDEP can require the registration under various programs of any entity engaged in an operation which may pollute the environment and also require such entities to file periodic self monitoring reports. The NJDEP may conduct inspections to determine compliance and compel the production of information.

Any civil matter necessitating an administrative hearing or a hearing by the courts requires that the Office of the Attorney General in the Department of Law and Public Safety represent the NJDEP.

When the NJDEP determines that someone is in violation of any provision of an environmental statute, the NJDEP may: (1) issue an administrative order requiring the alleged violator to come into compliance; (2) bring a civil action in the state Superior Court for both equitable and legal relief, which may include a temporary or permanent injunction; (3) issue a civil administrative penalty, with the amounts dependent on the statute and regulation violated; and (4) bring an action in the state Superior Court for imposition of a civil penalty.

In addition to civil penalties, the NJDEP may also seek criminal penalties and in certain circumstances, an alleged violator can be subject to criminal prosecution irrespective of intent.

#### 2. The Delaware River Basin Commission

The Delaware River Basin Commission arose from an interstate compact between New Jersey, New York, Pennsylvania and Delaware for the purpose of coordinating the conservation, water supply, pollution protection, and potential use of the waters of the Delaware River basin. Each state enacted legislation requiring the treatment of sewage, industrial waste and other pollutants as necessary to meet the goals of the agreement.

3. Interstate Environmental Commission

The Interstate Environmental Commission is the result of an agreement between New Jersey, New York and Connecticut to control future pollution and abate existing pollution in the coastal, estuarial and tidal waters adjacent to specified parts of the states.

In New Jersey, the powers granted by the Interstate Environmental Commission include the power to seek injunctive or other relief to prevent violations or threatened violations of the water quality standards established by the Commission.

**B. Regulations**

1. Air Pollution Control Act (N.J.S.A. 26:2C-1 et seq.; N.J.A.C. 7:27, 7:27A)

The Air Pollution Control Act regulates any equipment, control apparatus, activity, facility, or “source operation” that is capable of emitting air pollutants into the atmosphere. This statute is administered by the NJDEP, which enforces regulations to implement the Act by means of an EPA-approved State Implementation Plan (“SIP”). New Jersey’s SIP provides for attainment of National Ambient Air Quality Standards, which set forth air quality criteria for the following six pollutants: ozone, carbon monoxide, particulate matter, lead, sulfur dioxide, and nitrogen oxide.

NJDEP’s primary means for regulating the emission of air contaminants is through its permitting program, including preconstruction permits and facility-wide permits. Under NJDEP’s permitting program, a preconstruction permit along with an operating certificate must be issued prior to a party’s construction, installation, or modification of designated types of equipment or control apparatus.

If a facility has the potential to emit air contaminants at levels equal to or above the per-ton annual thresholds established by NJDEP, thereby qualifying as a “major facility,” it must also make an application for a facility-wide permit that incorporates all applicable air pollution control requirements into one document, pursuant to EPA’s Title V program under the Clean Air Act.

NJDEP may enforce this statute and its related regulations through civil administrative penalty assessments, administrative orders, civil actions for injunctive relief or penalties, or criminal actions for penalties or imprisonment.

2. Brownfield and Contaminated Site Remediation Act (N.J.S.A. 58:10B et seq.; N.J.A.C. 7:26)

The Brownfield and Contaminated Site Remediation Act advances remedial and redevelopment activities at any former or current contaminated industrial site. It also established the Brownfields Redevelopment Task Force to oversee the state’s Brownfields redevelopment program, including its infrastructure, regulatory programs, financial assistance incentive programs, and provision of redevelopment planning assistance to local governments.

This Act provides defenses to liability under the Spill Compensation and Control Act for any innocent purchaser of a contaminated site who investigates and remediates the property according to remediation standards adopted by NJDEP.

This statute also provides for reimbursement of up to 75% of the total cost of remediating a contaminated site that generates new tax revenues and gives incentives to utilize innovative technology to remediate contaminated property by eliminating the requirement to post financial assurances.

This Act also requires NJDEP to investigate large areas of historic fill and the contamination levels of state aquifers.

3. Coastal Area Facility Review Act (N.J.S.A. 13:19 *et seq.*; N.J.A.C. 7:7, 7:7E)

The Coastal Area Facility Review Act establishes a permitting program to regulate certain kinds of construction activities along the state's coastal area.

A coastal permit application for a major project must include an environmental impact statement that sets forth descriptions of the site, project, and environmental assessment associated with the proposed development.

The substantive requirements that must be satisfied in order to be granted a coastal permit, collectively referred to as the Coastal Zone Management rules, are categorized into the following three groups:

- a. Location rules: All land and water areas are designated as either a General Area or a Special Area, each of which has specific development restrictions that must be preliminarily satisfied in order to continue receiving department consideration of the permit application;
- b. Use rules: The second phase of the permit screening process involves analyzing design specifications for a variety of potential uses of each proposed development; and
- c. Resource rules: The final stage of the permit review process entails assessing the proposed development with respect to its compliance with specific design requirements that are directly linked to the resource characteristics of the particular development's geographic region.

NJDEP is authorized to issue a coastal permit upon finding that the proposed development: complies with all air, water, and radiation emission and effluent standards; provides for the collection of solid waste and recyclable material; causes minimal interference with the flora and fauna in the vicinity of the proposed development; and endangers neither human life nor real property in the area of the proposed project.

This statute establishes a Shore Protection Fund in the New Jersey Department of the Treasury for the purpose of funding projects dedicated to protecting, restoring, and maintaining New Jersey's shoreline.

NJDEP may enforce this statute and its related regulations through civil administrative penalty assessments, administrative orders, or civil actions for injunctive relief or penalties.

4. Discharge Reporting Act (N.J.S.A. 13:1K-16; N.J.A.C. 7:1E-5)

The Discharge Reporting Act requires owners or operators of industrial establishments to report discharges of hazardous substances to the municipality and local board of health in which the industrial facility operates. This applies to property which at any time was the site of an industrial establishment. It does not impose liability on the person reporting a hazardous discharge for the cost of cleaning up contaminated property.

In the case of new discharges, the person responsible must immediately notify NJDEP of such discharge within 15 minutes of the time that person became aware or should have become aware of the discharge, by calling 1-877-927-6337. The report must identify, among other things, the name and address of the person reporting the discharge; the location of the discharge; the name and quantity of the hazardous substance discharged; and the name and address of any person responsible for the discharge.

5. Freshwater Wetlands Protection Act (N.J.S.A. 13:9B; N.J.A.C. 7:7A)

The Freshwater Wetlands Protection Act protects inland waterways and freshwater wetlands; regulates transition areas adjacent to freshwater wetlands of both exceptional and intermediate resource value; and requires any person conducting a "regulated activity" in a freshwater wetland or an adjacent transition area to first obtain a permit from NJDEP.

A "regulated activity" is defined as any of the following activities:

- the construction of any buildings or other structures;
- the grading, removal, dredging, or excavation of soil, sand, or gravel;
- the drainage of the water level;
- the dumping of any materials;
- the driving of pilings;
- the placing of obstructions; or
- removal or destruction of vegetation in a wetland.

A limited number of categories of State-wide general permits are available for commonly occurring, small scale regulated activities conducted in a freshwater wetland or transition area (e.g. filling in an isolated wetland of one quarter acre or less, stream crossings required for access, installation of storm water management structures, etc.)

NJDEP will issue a site-specific individual permit for a regulated activity that does not fall under one of the State-wide general permit categories only upon finding that the regulated

activity requires access to the freshwater wetland without any practicable alternative and will minimally alter the existing aquatic ecosystem. The NJDEP may require a permittee to create or restore an area of freshwater wetlands of equal ecological value to the one which will be lost either onsite or offsite.

Violators are subject to issuance of an administrative order, institution of civil or criminal proceedings, assessment of penalties, termination of permits and recording of a notice of violation on a property deed.

6. Highlands Water Protection and Planning Act (N.J.S.A. 13:20-1 *et seq.*)

The Highlands Water Protection and Planning Act was enacted to protect New Jersey's drinking water and preserve New Jersey's open space. This Act documents the geographical boundary of the Highlands Region, an over 800,000 acre region covering over 1,250 square miles and 88 municipalities in seven counties generally situated in the northwestern portion of New Jersey. The Highlands Region serves as an essential source of drinking water for half of the residents of New Jersey.

The Act also establishes the Highlands Preservation Area, which consists of approximately 398,000 acres of the Highlands Region of exceptional natural resource value, and the Highlands Planning Area, which is that portion of the Highlands Region that is not included in the Highlands Preservation Area. The Act imposes stringent limitations on the ability of property owners to undertake new development within the Highlands Preservation Area.

The Act also creates the Highlands Water Protection and Planning Council, a public body charged with preparing a regional master plan for the Highlands' Preservation area and Planning Area. The master plan is intended to protect, preserve and enhance water resources, open space and the unique natural resources within the Highlands Region; to prohibit or limit to the maximum extent possible construction or development which is incompatible with such preservation; and to encourage, consistent with the State Development and Redevelopment Plan, appropriate development, redevelopment and economic growth.

All major development as defined in the Highlands rules that is located in the Highlands Preservation Area requires a Highlands Preservation Area Approval from the NJDEP.

7. Industrial Site Recovery Act (N.J.S.A. 13:1K-6; N.J.A.C. 7:26B, 7:26C, 7:26E)

The Industrial Site Recovery Act imposes certain preconditions on the sale, transfer, or closure of "industrial establishments." An "industrial establishment" is defined in the statute as "any place of business engaged in operations which involve the generation, manufacture, refining, transportation, treatment, storage, handling, or disposal of hazardous substances or hazardous wastes on-site, above or below ground" that operated in New Jersey on or after December 31, 1983 and is classified under one of the North American Industry Classification System (NAICS) codes identified in N.J.A.C. 7:26B, Appendix C.



ISRA is applicable when there is a closing or transferring of operations, as defined in the statute, of an “industrial establishment.” Once ISRA is triggered, the NJDEP must be notified within five days of the ISRA triggering event.

An owner or operator of an “industrial establishment” that is subject to ISRA may not transfer ownership or operations of the industrial establishment until: (1) the NJDEP has issued a No Further Action Letter or a licensed site remediation professional has issued a Response Action Outcome, for the industrial establishment pursuant to N.J.A.C. 7:26B-1.7(b); (2) the NJDEP has approved or a licensed site remediation professional has certified a remedial action work plan for the industrial establishment; (3) the owner or operator has executed a remediation agreement or a remediation agreement amendment or, on or after November 4, 2009, has submitted a remediation certification pursuant to N.J.A.C. 7:26B-4.3; or (4) the NJDEP has issued an authorization letter to the owner or operator.

8. Pollution Prevention Act (N.J.S.A. 13:1D-35 *et seq.*; N.J.A.C. 7:1K)

The Pollution Prevention Act establishes a statewide integrated system to significantly reduce the generation of hazardous substances as non-product output and the use of hazardous substances at industrial facilities. This applies only to priority industrial facilities that have specified North American Industry Classification System (NAICS) codes. This statute requires an industrial facility to submit a Pollution Prevention Plan in two parts:

- Part I must include an inventory of the use of hazardous substances as well as the generation of hazardous wastes at an industrial facility.
- Part II must include a description of a facility’s production processes and targeted sources which contributed to the generation of non-product output, along with providing a feasibility analysis of potential pollution reduction goals.

This Act requires an industrial facility to submit and update every five years a Pollution Prevention Plan Summary that includes the facility’s five-year numeric goals for minimizing the use of hazardous substances as well as for diminishing the facility’s production of non-product output. It also requires an industrial facility to annually submit a Pollution Prevention Plan Progress Report that sets forth a comparison to the previous year of the use of hazardous substances per unit of production along with a description of the method used to attain a reduction in the facility’s use of hazardous substances.

An industrial facility may obtain an input-use exemption for a specific hazardous substance for which there is no reasonably viable alternative to the facility’s current level of use of the hazardous substance.

Violators are subject to the issuance of an administrative order, institution of civil proceedings, and assessment of civil or administrative penalties.

9. Spill Compensation and Control Act (N.J.S.A. 58:10-23.11 et seq.; N.J.A.C. 7:1E, 7:1J)

The Spill Compensation and Control Act establishes an absolute prohibition on the discharge of hazardous substances, including petroleum products, except for the release of hazardous substances pursuant to a federal or state permit. It also provides for the cleanup of spills of hazardous substances under NJDEP or licensed site remediation professional supervision. Persons in any way responsible for the discharge of a hazardous substance to the environment have an affirmative obligation to remediate such discharge in accordance with NJDEP standards.

The Spill Act affords NJDEP with the discretion either to clean up the discharged hazardous substance itself or to issue a directive against a responsible party to remove the discharge.

The Spill Act created the New Jersey Spill Compensation Fund (“Spill Fund”) as a non-lapsing, revolving fund under the control of NJDEP, which is used to pay for all cleanup expenses incurred by NJDEP as well as to compensate those who have suffered damages from hazardous substance discharges. It is funded by a tax on certain transfers of hazardous substances in order to ensure compensation for the costs related to cleaning up spills

This statute imposes strict, joint and several liability, regardless of fault, for all cleanup and removal costs expended by NJDEP from the Spill Fund against those entities who discharged a hazardous substance or are responsible in any way for the hazardous substance. It also provides private parties that have conducted a spill cleanup with a right of contribution against all other potentially responsible parties. The New Jersey Supreme Court has held that cost recovery and contribution actions prosecuted under the Spill Act are not subject to any statute of limitations period.

Dischargers and violators are subject to issuance of a directive or an administrative order, institution of civil proceedings, and assessment of penalties.

10. Solid Waste Management Act (N.J.S.A. 13:1E et seq.; N.J.A.C. 7:26G, 7:26H)

The Solid Waste Management Act provides for the promulgation of a Statewide Solid Waste Management Plan that NJDEP must revise and update at least once every two years. This Act designates each county and the New Jersey Meadowlands District as a Solid Waste Management District with the authority to develop and implement a Solid Waste Management Plan (“Plan”), which must be submitted to NJDEP and include, at least, the following:

- Designation of a responsible county agency to implement the Plan;
- A solid waste disposal strategy that provides for maximum use of resource recovery procedures;
- A site plan identifying all solid waste facilities in the district;
- A survey of all transportation routes and collection districts;
- Copies of all solid waste disposal agreements; and

- Information regarding the method of financing the solid waste management program.

This statute requires all solid waste collection and disposal facilities to file a registration statement and an engineering design with NJDEP, unless exempt from the registration requirement. It also permits the owner of a sanitary landfill to charge a fee for use of the disposal site and allows NJDEP and the county or local health agency to enter a solid waste facility at any time to ensure compliance with the applicable registration statement and engineering design.

Violators are subject to issuance of an administrative order, institution of civil or criminal proceedings, and assessment of penalties.

11. Toxic Catastrophe Prevention Act (N.J.S.A. 13:1K-19 *et seq.*; N.J.A.C. 7:31)

The Toxic Catastrophe Prevention Act requires facilities that handle Extraordinarily Hazardous Substances (“EHS”) to anticipate the circumstances that could result in an accidental chemical release of hazardous substances. This statute sets forth a list of EHSs. A facility that handles, uses, manufactures, or stores an EHS in a quantity equal to or greater than the designated threshold, or which has the capacity to produce the threshold quantity within one hour, must register with NJDEP.

This statute requires anyone planning to construct a new facility that will handle EHSs to register with NJDEP at least ninety days prior to construction and requires facilities subject to this statute to develop a Risk Management Program designed to reduce the possibility of accidental releases of EHSs and to submit the Risk Management Program to NJDEP.

This statute permits NJDEP to enter an EHS facility at any time to review any document the facility is required to maintain pursuant to its Risk Management Plan, including the following:

- Hazard review report;
- Safety review report;
- Accident investigation report; and
- Audit report.

The public is allowed to review any information maintained by NJDEP in connection with this Act that has not been designated as confidential, privileged, trade secret, or security information.

Violators are subject to the issuance of an administrative order, institution of civil proceedings, and assessment of penalties.

12. Underground Storage of Hazardous Substances Act (N.J.S.A. 58:10A-21 et seq.; N.J.A.C. 7:14B)

The Underground Storage of Hazardous Substances Act requires the owner of an underground storage tank to register the tank with NJDEP by submitting a Registration Questionnaire, a Certification Questionnaire, and the appropriate fee. It also requires a tank owner proposing to install, replace, expand, or modify a tank to obtain a permit from NJDEP as well as a construction permit issued pursuant to the New Jersey Uniform Construction Code.

This Act: requires a tank owner to install a monitoring system designed to detect a leak from any part of the tank; imposes substantial recordkeeping requirements on each tank owner, including maintenance of manufacturer performance claims, sampling results, monthly inventory records, and repair and calibration information; requires a tank owner to report any leak or discharge from an underground storage tank to NJDEP and the local health agency within twenty-four hours of discovery of the release; and permits NJDEP to inspect at reasonable hours any underground storage tank as well as any records related to the operation of the tank.

Violators are subject to issuance of an administrative order, institution of civil or criminal proceedings, assessment of penalties, and revocation of tank registrations or permits.

13. Water Pollution Control Act (N.J.S.A. 58:10A-1 et seq.; N.J.A.C. 7:9, 7:9B, 7:14, 7:14A)

The Water Pollution Control Act prohibits the discharge of any pollutant into the waters of the State without a valid New Jersey Pollutant Discharge Elimination System permit. Permits are issued for wastewater discharges to surface and groundwater, stormwater discharges, certain industrial discharges to municipal sewer systems, and other activities.

This Act regulates the construction and operation of sewerage treatment facilities and also imposes monthly reporting requirements on significant indirect users, major industrial dischargers, and local agencies of their monitoring results for discharges to surface waters.

A permittee under this Act is required to report to NJDEP the occurrence of any “serious violation” within thirty days of the incident, including a discharge in excess of an effluent limitation set forth in a permit.

This Act authorizes the NJDEP to enter all premises where a discharge source is located to sample the property or to inspect any monitoring equipment or records and mandates NJDEP to conduct an inspection of each permitted facility and municipal treatment works at least once a year.

Violators are subject to issuance of an administrative order, institution of civil or criminal proceedings, assessment of penalties, and revocation of permits.

14. Wetlands Act of 1970 (N.J.S.A. 13:9A et seq.; N.J.A.C. 7:7, 7:7E)

The Wetlands Act regulates construction activity in tidal and coastal wetlands and requires any person conducting a “regulated activity” in a mapped tidal wetland to first obtain a permit from NJDEP. A “regulated activity” is defined as any of the following activities:

- the removal, dredging, or excavation of soil, sand, or gravel;
- the disposal of solid or liquid domestic sewage wastes;
- the dumping of any materials;
- the driving of pilings;
- the placing of obstructions; or
- the application of pesticides on certain vegetation.

This statute imposes the same substantive requirements that must be satisfied in order to be granted a coastal permit set forth in the Coastal Zone Management rules. (*See* VI, Coastal Area Facility Review Act, *supra.*).

This statute requires a permit applicant to notify electric and gas utilities as well as property owners within 200 feet of the subject wetland of the proposed “regulated activity” and imposes any of the following mitigation requirements upon permittees who are authorized to disturb or destroy coastal wetlands:

- Restoration;
- Creation;
- Enhancement; or
- Contribution.

Violators are subject to a maximum fine of USD1,000 as well as the cost of restoring the wetland to its condition prior to the disturbance.

15. Worker and Community Right-to-Know Act (N.J.S.A. 34:5A et seq.; N.J.A.C. 7:1G, 8:59)

This Act requires disclosure of information to workers and the public concerning hazardous substances handled or stored at industrial facilities and applies only to those employers conducting business operations that have a North American Industry Classification System (“NAICS”) code listed in the regulations. This Act addresses workplace safety by authorizing the New Jersey Department of Health (“NJDOH”) to enforce the following employee safety requirements:

- Maintenance of a workplace survey that identifies all hazardous chemicals present at the facility as well as all appropriate hazardous substance fact sheets;
- Establishment of an employee education and training program on the proper handling of hazardous substances to which a facility’s employees are exposed; and

- Labeling of all containers containing hazardous substances with the appropriate chemical name and Chemical Abstracts Service number.

This Act requires each employer covered by it to provide information to NJDEP and local emergency authorities concerning all environmental hazardous substances handled at the workplace.

It also creates the Worker and Community Right to Know Fund as a non-lapsing, revolving fund under the control of the New Jersey Department of the Treasury, which is credited with all fees collected from employers subject to the Act. It permits NJDEP and NJDOH to enter an employer's facility during normal business hours to ensure compliance with the provisions of the Act.

Violators are subject to issuance of an administrative order, institution of civil proceedings, and assessment of penalties.

#### 16. Site Remediation Reform Act

The Site Remediation Reform Act ("SRRA") provides sweeping changes to the way in which sites in New Jersey are remediated and it also amends the Brownfields and Contaminated Sites Act and the Spill Compensation Control Act. SRRA establishes a program for the licensing of Licensed Site Remediation Professionals ("LSRPs") who will have responsibility for oversight of environmental investigations and cleanups. While the law changes the process of how sites are remediated, it ensures the same stringent standards required for cleanups remain intact. The New Jersey Department of Environmental Protection ("NJDEP") will retain significant authority over the remediation process and will ensure that LSRPs comply with applicable regulations, but the day to day management of site remediation will be overseen by LSRPs.

Under SRRA, NJDEP approval is no longer required prior to proceeding with remediation. Implementation of SRRA, therefore, results in more contaminated sites being cleaned up more quickly. Some of the highlights of the SRRA are:

- The establishment of the LSRP program and an LSRP Board that issues licenses to qualified individuals to conduct the remediation of sites in New Jersey.
- An affirmative obligation now exists on persons to remediate any discharge for which they would be liable pursuant to the Spill Compensation and Control Act. As such, the voluntary program which utilized Memorandum of Agreements no longer exists.
- Mandatory time frames have been established by NJDEP for the completion of key phases of remediation.
- NJDEP is required to maintain direct oversight in cases in which the remediating party is recalcitrant in conducting timely cleanups and for those sites that pose the greatest risk to human health and the environment.
- NJDEP is authorized to establish presumptive remedies for residential development, schools and childcare facilities.

## VII. INTELLECTUAL PROPERTY

New Jersey provides a broad set of protections for all types of intellectual property through statutes and well developed common law. What follows is a summary of the statutory and common law protections afforded by New Jersey law to intellectual property rights and a summary of related issues.

### A. Trade Secrets

#### 1. Statute

- In 2012, New Jersey adopted the *New Jersey Trade Secrets Act*, N.J.S.A. 56:15-1 *et seq.* (“NJTSA”)
- **Statute of Limitations:** The NJTSA includes a three year statute of limitations under N.J.S.A. 56:15-8, which departs from the six year statute of limitations previously provided under New Jersey common law. The statute of limitations is triggered when “the misappropriation is discovered or by the exercise of reasonable diligence should have been discovered.” A continuing misappropriation is considered a single claim when applying the limitation provision.
- Notably, unlike the *Uniform Trade Secret Act* upon which it was based, the NJTSA does **not** preempt non-conflicting common law claims that are based upon the same set of operable facts used to support a statutory trade secret misappropriation claim. N.J.S.A. 56:15-6. *SCS Healthcare Mktg., LLC v. Allergan USA, Inc.*, Dkt. No. C-268-12, 2012 N.J. Super. Unpub. LEXIS 2704 (Law. Div. Unpub. 2012).
- New Jersey also did not adopt section 8 of the *Uniform Trade Secret Act* that addresses uniformity of application and construction or section 10 that concerns severability. New Jersey also included a unique provision involving prohibited defenses, which has not yet been addressed by the courts. N.J.S.A. 56:15-5 (“A person who misappropriates a trade secret shall not use as a defense to the misappropriation that proper means to acquire the trade secret existed at the time of the misappropriation”).
- **Relief available:** injunctive relief, specific performance, compensatory and punitive damages, reasonable royalty, cost of investigation and attorneys’ fees. N.J.S.A. 56:15-4 & -6.
- Computer Related Offenses, N.J.S.A. 2A:38A-3, is often used when trade secrets are misappropriated through the unauthorized access of a computer database or system.
- **Criminal Theft Offenses:** New Jersey has a statute imposing criminal sanctions for theft of trade secrets. N.J.S.A. 2C:20-1i.

## 2. Common Law

- Because of the differences as to preemption, common law claims are still viable in New Jersey. These include claims predicated upon the misappropriation or misuse of information that fails to meet the statutory definition of a “trade secret.”
- In order to be judicially protected under New Jersey law, “misappropriated information need not rise to the level of trade secret, and indeed, may otherwise be publicly available.” *Lamorte Burns & Co. v. Walters*, 167 N.J. 285 (2001); see *Irvington Varnish Insulator Co. v. Van Norde*, 138 N.J. Eq. 99, 204 (E. & A. 1946) (protection from “disclosure of business and industrial methods and processes used.”)
- “The key to determining the misuse of the information is the relationship of the parties at the time of disclosure and the intended use of the information.” *Id.*; see also *Sun Dial Corp. v. Rideout*, 16 N.J. 252, 257 (1954) (“Although a substantial measure of secrecy must exist, the secrecy need not be absolute and disclosure to employees involved in its use will not ordinarily result in loss of the employer’s protection.”).
- Common law claim for misappropriation based upon information not rising to the level of a statutory trade secret may not be preemption under the NJTSA. Other common law claims would include trespass to chattels, conversion, unjust enrichment, tortious interference, and breach of duty of loyalty, and breach implied contract.
- Prior to the passage of the NJTSA, New Jersey courts had looked to Section 39 of the *Restatement (Third) of Unfair Competition*, as well as Section 757 of the *Restatement (First) of Torts*, for guidance on the elements of a trade secret.
- **Relief available:** Injunction, compensatory damages, and punitive damages.

## B. Trademarks and Service Marks

### 1. Statute (N.J.S.A. 56:3-13.1a to 13.22)

- *Registration:* Type the application on 8-1/2” x 11” bond paper, and file the application with the New Jersey Division of Revenue; include three specimens, a drawing of the mark, and USD50.00 per classification.
- No intent-to-use required, but use is a requirement for registration.
- Collective and certification marks are not registrable under the Act.
- Words not registrable under *Model Trademark Act* are not registrable in New Jersey.
- New Jersey’s classification system is same as the one used by U.S. Trademark Office.



- Mark is searched regardless of class prior to registration
- Anyone may request Certificate of Availability for up to three marks for USD25.00.
- If all registration requirements are complied with, Secretary of State issues Certificate of Registration.
- *Denial of registration:* Applicant may appeal to Office of Administrative Law or Superior Court in Mercer County.
  - Appeal cannot be filed until formal request for reconsideration is denied by Secretary of State.
  - Notice of intent to appeal must be filed at least 10 days prior to actual appeal.
  - Must serve copy on Secretary of State who has the right to participate.
- *Term & Renewal:* Registration is effective for five years from date of registration.
  - Registration may be renewed for successive periods of five years by filing renewal application within six months prior to termination of term.
  - Renewal fee is USD50.00 per class.
  - Use is required for renewal and renewal application must be accompanied by specimen which shows actual use of mark.
- *Assignment:* Any properly registered mark is subject to assignment with goodwill of business in which mark was used.
  - Assignment must be in writing and may be recorded with Secretary of State upon payment of USD50.00.
- *Infringement Relief:*
  - Injunctive relief, profits and damages.
  - If willful, award of profits and damages may be trebled; court may also award attorneys' fees and order a destruction of infringing mark.
- *Dilution Statute:* N.J.S.A. 56:3-13.20
  - Entitles owners of a mark which is famous in New Jersey to an injunction against another person's use of the mark that dilutes the distinctive quality of owner's mark.
  - Party must establish that mark is famous.
  - **Relief available:** Only injunctive relief available unless willful intent is proven.
- *Unfair Competition:* N.J.S.A. 56:4-1
  - Merchants, firms, and corporations are prohibited by law from appropriating a manufacturer's name, brand, trade-mark, reputation, or goodwill as its own even if it sells, offers for sale or deals with the manufacture's product.

## 2. Common Law

- New Jersey law is consistent with protection offered to unregistered marks under federal law, § 43(a) of the *Lanham Act*; punitive damages may be available, however, under New Jersey Law.

## C. Trade Names

### Statute - Business and Partnership Names (N.J.S.A. 56:1-1 to 1-7)

- Business and Partnership Names: Persons conducting or transacting business under an assumed name or under a name that uses the designation “and company” or “& Co.” must file a registration with the county clerk of every county where business is conducted and provide a duplicate copy to the county clerk for the county clerk to send to the Secretary of State.
- Statute does not apply to corporations duly organized under the laws of the State of New Jersey, including the New Jersey Business Corporation Act, or which were organized under the laws of any other state and lawfully doing business in this state.
- The use of alternate names by domestic corporations and foreign corporations authorized to transact business in the State is regulated by N.J.S.A. 14A:2-2.1 and requires the filing of a certificate of registration of a corporate alternate name with the Secretary of State.
- Statute does not apply to partnerships conducting business under the real names of their members.
- *Limited Partnerships*: N.J.S.A. 42:2A-6.1 covers use of names other than the actual limited partnership names, including abbreviations and acronyms, by domestic and foreign limited partnerships.
- Filing is the only requirement. Publication is not required. The failure to file an assumed or fictitious name is a misdemeanor.
- *Special Trade Names*:
  - N.J.S.A. 56:2-1. Labor unions, fraternal and other associations and organizations are permitted to register their names, mottos, or insignias with Secretary of State.
  - Misappropriation of registered trade name, motto or insignia is a misdemeanor.
  - N.J.S.A. 56:3-14 to -34. Bottle Law allows bottlers, sellers, and manufactures of liquids to register their names, marks or devices.
  - N.J.S.A. 56:3-21 to -22. Misappropriation of registered trade mark may result in criminal and civil penalties and owner may confiscate remaining infringing product.

## D. Employee Inventions – *Common Law*

- Employee not hired exclusively to invent, but employee develops idea or invention on employer’s time with the aid of other employees, employer’s machinery, material, and money. “*Shop Right Rule*”: Entitles employer to an irrevocable license to use employee’s invention or idea if employee developed idea or invention on employer’s time and with employer’s machinery, material, and money; shop right may be superseded by contract.
  - An employer is not entitled to an employee’s inventions developed outside scope of employment.

- *Implied Contract:* The shop right rule does not apply where there is an implied (or express) agreement regarding the employer's rights in an invention made by employee specifically hired to invent. Absent a specific contractual provision allocating the invention rights, if an employee is hired specifically to invent for the employer, the invention belongs to the employer.

#### **E. Employee Confidentiality – Common Law**

- Common law imposes absolute duty on employee not to use or divulge confidential knowledge acquired during employment; rule is implicit in employer-employee relationship
- Employee may, nevertheless, use general skills and knowledge acquired prior to or over course of employee's employment

#### **F. Non-Competition Clauses in Employment Contracts – Common Law**

- A non-competition agreement is not per se unenforceable. Such agreements are enforceable when they: 1) are used to protect legitimate business interests of the employer; 2) impose no undue hardship on the employee (*i.e.* covenant must be reasonable in time, space, and scope); and 3) are not injurious to the public.
- Courts determine if a covenant not to compete is overbroad by looking to its duration, geographic limits, and the scope of prohibited activities. Where overbroad, courts will re-draft overbroad sections to make them reasonable, and enforce the covenant to that extent.

#### **G. Right of Publicity – Common Law**

- Also referred to as the appropriation or misappropriation of commercial likeness, this claim is available when a defendant misappropriates the plaintiff's name or likeness for the defendant's monetary benefit. On this issue, New Jersey law follows the Restatement (Second) of Torts (1977), § 652C.
- If the right is exercised while person is alive, the right survives death of owner.
- **Relief available:** Injunction and monetary damages.

#### **H. Unfair Competition and False Advertising**

##### 1. Statute - N.J.S.A. 56:4-1 to -2

- Protects a party against unfair competition and unfair or deceptive acts or practices in conduct of trade or commerce.
- Actual damage need not be shown where conduct complained of has tendency to confuse or deceive public so that consumer is likely to purchase one product over another.
- **Relief available:** Injunction, actual damages, and treble damages.

2. Common Law

- Unfair competition is defined broadly to include palming off, unprivileged imitation, and other unfair practices beyond trade name infringement.
- **Relief available:** Injunction, actual damages, and punitive damages.

3. Related Issues

- The law of unfair competition closely tracks section 43(a) of the Lanham Act, 15 U.S.C. 1125(a).
- **Consumer Fraud Act** (N.J.S.A. 56:8-1 *et seq.*) Prohibits deception, fraud and misrepresentation in connection with the sale or advertisement of any goods or services offered directly or indirectly to public (See Section III.C. under “Trade Regulations” above for more information about this statute.)
- **Private, non-consumer scenario:** Common law provides protection outside the narrower scope of statutory law.
  - Tort of unfair competition protects business from commercial immorality of others.
  - No single standard for tort; concept is “flexible and elastic.”
  - **Relief available:** Injunction, compensatory damages, accounting of profits, and possibly damages.

I. **Trademark Counterfeiting Act (“TCA”) (N.J.S.A. 2C:21-32; 56:3-13.16)**

- TCA covers the manufacture, use, display, advertisement, distribution, or sale or possession with intent to sell or distribute, of goods or services bearing counterfeit trademarks.
- The TCA protects registered marks and marks protected by common law.
- Marks do not have to be identical in appearance to trigger Act; any owner or designee of an owner may sue as long as mark is registered in New Jersey or is protected by New Jersey common law
- **Relief available:** Treble damages, cost of suit, reasonable investigator’s fees, attorneys’ fees, injunction and other provisional and equitable remedies available under the *Lanham Act*; destruction of mark and anything used in making the mark and any other remedies available under federal, state or common law.
- See N.J.S.A. 56:13.16(h), and (i) for protections for defendants from baseless litigation.

**J. Counterfeiting and Misrepresenting Drugs, Cosmetics and Devices (N.S.J.A. 24:6D-1 to -3)**

- Covers counterfeiting of mark used for medical drugs, cosmetics or medical devices.
- Defines counterfeit trademark as one which would induce the belief that it is genuine through appearance, sound, signs, device or other means.
- Registration is not required to trigger the Act, and the marks do not have to be identical for the Act to apply.
- Enforcement of Act is controlled by the State; criminal penalties may apply.

**K. Franchise Practices Act (N.J.S.A. 56:10-1 et seq.)**

- Regulates franchise and business opportunities and extends to motor vehicle franchises (See N.J.S.A. 56:10-4; *see also* Section III.B. under “Trade Regulations” above for more information about this statute.)

**L. Trade Libel or Disparagement – *Common Law***

- Must show a) publication, b) with malice, c) of false allegations concerning plaintiff’s product or business; and d) special damages, or a showing of defamation per se.
- Defenses: truth; statements of opinion made during judicial, legislative or administrative proceedings are privileged; and comments regarding matters of public concerns are privileged; privilege can be overcome where there is abuse of the privilege (formerly referred to as malice, but does not mean ill will or bad motive).
- **Relief available:** Compensatory damages and punitive damages.

**M. Corporate Name Registration Prior to Incorporation (N.J.S.A. 14A:2-2 to -4)**

- A corporation’s corporate name must comply with applicable requirements, including that the name distinguish the corporation from other entities and that the name contain the word or an abbreviation for corporation, company, or incorporated, or “Ltd.” or similar foreign words or abbreviations. N.J.S.A. 14A:2-2.
- Corporations may reserve corporate names for a period of 120 days by filing an application to reserve a specified corporate name with the Secretary of State. Reserved corporate names must comply with N.J.S.A. 14A:2-2. The holder of a reserved corporate name may renew the reservation for additional 120-day periods by filing an application for renewal within the last 30 days of the current reservation period. N.J.S.A. 14A:2-3.
- A foreign corporation not authorized to do business in New Jersey may register a corporate name in the State, provided such corporate name is available, by filing

an application for registration. Such registration is effective until the end of calendar year in which the application was filed. N.J.S.A. 14A:2-4.

- No substantive right as to trademark or service mark rights arise from incorporation under corporate name.
- N.J.S.A. 17:9A-18: Words such as “bank,” “banker,” “banking,” or “trust,” may be used only in banking institutions or holding companies, except where otherwise provided by law.
- N.J.S.A. 14A:2-2.2: No domestic or foreign corporation may use the words “blind,” or “handicapped,” without the approval of the Attorney General, and such approval must be attached to the corporation’s certificate of incorporation.

## VIII. DISPUTE RESOLUTION

The state courts of New Jersey provide a forum for resolving civil disputes by trial and appeal. The trial and appellate courts may also refer a case to alternative dispute resolution such as arbitration or mediation, or the parties themselves may voluntarily seek alternative dispute resolution before trial.

### A. Superior Court of New Jersey

#### Law Division – Civil Part

- Hears civil cases
- Amount in controversy must exceed USD15,000
- Either party may request a jury trial
- Courts in 21 counties, as follows:
  - Atlantic County Civil in Atlantic City
  - Bergen County in Hackensack
  - Burlington County in Mount Holly
  - Camden County in Camden
  - Cape May County in Cape May
  - Cumberland County in Bridgeton
  - Essex County in Newark
  - Gloucester County in Woodbury
  - Hudson County in Jersey City
  - Hunterdon County in Flemington
  - Mercer County in Trenton
  - Middlesex County in New Brunswick
  - Monmouth County in Freehold
  - Morris County in Morristown
  - Ocean County in Toms River
  - Passaic County in Paterson
  - Salem County in Salem
  - Somerset County in Somerville
  - Sussex County in Newton
  - Union County in Elizabeth
  - Warren County in Belvidere

#### Filing a Civil Action in Superior Court, Law Division

Must file:

- Complaint
- Summons
- Case Information Statement
- Certification as to whether the matter in controversy is subject of any other pending action or arbitration
- Designation of Trial Counsel

- Jury Demand (if applicable)

Defendant must respond by filing an Answer and Case Information Statement.

Rule 4:24-1. Time for Completion of Discovery

- Civil cases are assigned to a track upon filing
- Track I allows for 150 days of discovery, Track II for 300 days of discovery, and Tracks III and IV for 450 days of discovery
- The parties may consent to extend the time for discovery for an additional 60 days by stipulation filed with the court or by submission of a writing signed by one party and copied to all parties
- Plaintiff can challenge a track assignment within 30 days of receipt of the Track Assignment Notice; other parties can challenge a track assignment by filing and serving objection with responsive pleading. *See* Rule 4:5A-2(b).

Rule 4:21A-1. Actions Subject to Arbitration; Alternative Dispute Resolution

- Court may refer certain types of cases to mandatory arbitration, including:
  1. Automobile negligence actions
  2. Personal injury actions (except for professional malpractice and products liability actions)
  3. All actions on a book account or instrument of obligation, all personal injury protection claims against plaintiff's insurer, and all other contract or commercial actions, if deemed appropriate by the Court
- Arbitration decision and award is not appealable; a party must move to confirm arbitration award within 50 days, or file demand for trial *de novo* within 30 days (Rule 4:21A-6.)
- Court may also order parties to engage in non-binding mediation. *R.* 1:40-2(b)
- Parties may stipulate to voluntary arbitration or mediation of actions that would not otherwise be subject to mandatory procedure

Rule 1:21-1. Being Admitted to New Jersey Superior Court *Pro Hac Vice*

Must file:

- Affidavit or certification stating that: (a) the applying attorney is in good standing in his/her own jurisdiction; (b) the applying attorney is associated in the matter with New Jersey counsel; (c) the client has requested to be represented by the applying attorney; (d) no disciplinary proceedings are pending against the applying attorney in any jurisdiction; and (e) no discipline has previously been imposed on applying attorney in any other jurisdiction. (Rule 1:21-2(b)(1))



- An application to be admitted *pro hac vice* is granted if the courts find one of the following: (a) the case involves a complex field of law in which applying attorney is a specialist; or (b) there is a pre-existing attorney/client relationship with the applying attorney for an extended period of time; or (c) there is a lack of local counsel with adequate expertise in the field involved; or (d) the case presents questions of law involving the law of the foreign jurisdiction in which the applicant is licensed; or (e) there is need for extensive discovery or proceedings in the foreign jurisdiction in which the applicant is licensed; or (f) other good cause shown. (Rule 1:21-2(b)(3))

Rule 6:1, *et seq.* Special Civil Part of the Civil Division

- Handles claims from USD3,000 to USD15,000
- Typically tried by a judge without a jury

Rule 6:1-2(2). Special Civil Part – Small Claims Division

- Handles claims of less than USD3,000
- Typically tried by a judge without a jury

Rule 4:3-1(a)(1). Chancery Division: General Equity Part

- Handles claims for non-monetary relief, such as injunctions, foreclosures and dissolution of a corporation or partnership
- Tried by a judge, without a jury

Rule 2:1, *et seq.* Appellate Division

- Intermediate appellate court
- Appellant has 45 days from filing of judgment or order to file a notice of appeal.
- Filing notice of appeal or motion for leave to appeal does not automatically stay the judgment, order or decision. Appellant must move for stay before trial court. If stay is denied, appellant may repeat the motion before the Appellate Division
- If appeal is of interlocutory order, appellant must file a motion for leave to appeal. Interlocutory appeals must be filed within 20 days from date of service of the order being appealed.

**B. New Jersey Supreme Court**

- Highest court in New Jersey
- Hears cases from Appellate Division
- Cases decided by Chief Justice and six Associate Justices

**C. Municipal Court**

- Hears driving offenses, illegal parking, speeding, driving while intoxicated, and minor criminal offenses such as disorderly persons or simple assault
- Operated by the city, township or borough in which the courts are located

**D. Tax Court**

- Hears appeals of tax decisions made by County Boards of Taxation and the Director of the Division of Taxation
- Has initial review jurisdiction over final tax matter decisions
- Authorized to review local property tax decisions
- 12 Tax Court judges in New Jersey
- Matters heard by single judge in Appellate Division of Superior Court
- Small claims division hears tax matters involving less than USD5,000
- Appeals from Tax Court decisions heard in the Appellate Division of Superior Court
- Attorneys may now submit Tax Court filings electronically through eCourts, a web based application designed to allow attorney to electronically file documents with the court.

## IX. SECURITIES

### A. Uniform Securities Law (1997) (N.J.S.A 49:3-47 *et seq.*)

Securities in New Jersey are regulated by the Uniform Securities Law (1997) (the “Act”), and the New Jersey Bureau of Securities (the “Bureau”).

#### 1. Registration of Securities

It is unlawful for any security to be offered or sold in New Jersey unless the security is registered under the Act, qualifies as a federal covered security or qualifies for an appropriate exemption under the Act. Securities may be registered under the Act by qualification, coordination, or notification.

a. Registration by Qualification. Any security may be registered by qualification. Registration statements submitted must include, among other things, (i) the amount of securities to be offered in New Jersey, (ii) the states in which a registration statement in connection with the offering has been or will be filed, (iii) any adverse order, judgment or decree entered in connection with the offering by the SEC, the regulatory authorities of any state or any court, (iv) an irrevocable consent appointing the Bureau chief (or successor in office) as attorney to receive service of any lawful process in any noncriminal suit, action or proceeding arising under the Act after the consent is filed, (v) information regarding any significant subsidiary of the issuer, including the form of organization, the state or foreign jurisdiction, date of organization, the general character and location of the business, a description of physical properties and equipment and a statement of the general competitive conditions in the industry or business, (vi) information regarding officers and directors of the issuer, including the shares owned by each, their compensation during the twelve previous months and estimates for the next twelve months and a description of any material interest in any material transaction with the issuer or any significant subsidiary effected within the prior three years or proposed to be effected, (vii) information regarding owners of ten percent or more of the outstanding shares of any class of equity security of the issuer, including a description of any material interest in any material transaction with the issuer or any significant subsidiary effected within the prior three years or proposed to be effected, (viii) information regarding any promoter, including shares owned and compensation paid, if the issuer was organized within the preceding three years, (ix) the capitalization and long-term debt of the issuer and any significant subsidiary, (x) the kind and amount of securities to be offered and the proposed offering price, the basis upon which the offering is to be made if other than for cash, the estimated amounts of selling expenses, the name and address of every underwriter and every recipient of a finders’ fee and a description of the plan of distribution of any securities which are to be offered other than through an underwriter, (xi) the estimated cash proceeds to the issuer from the offering, the purposes for which the proceeds are to be used by the issuer, the amount to be used for each purpose, the order or priority in which the proceeds will be used for the purposes stated, the amounts of any funds to be raised from other sources to achieve the purposes stated and the sources of any such funds, (xii) a description of any stock options or other security options outstanding, or to be created in connection with the offering, held by any officer, director, ten percent owner or promoter, (xiii) information about material contracts of the issuer, (xiv) copies of any offering materials, (xv) a

specimen or copy of the securities being registered, (xvi) an opinion of counsel as to the legality of the security being registered, (xvii) a written consent of any accountant or other professional if such person is named as having prepared or certified a report which is used in the registration statement, (xviii) a balance sheet of the issuer as of a date within four months prior to the filing of the registration statement, a profit and loss statement and analysis of surplus for each of the three fiscal years preceding the date of the balance sheet and for any period between the close of the last fiscal year and the date of the balance sheet, or for the period of the issuer's and any predecessor's existence if less than three years, and, if any part of the proceeds of the offering is to be applied to the purchase of any business, the same financial statement which would be required if that business were the registrant, and (xix) a consent to service of process. The registration statement becomes effective when the Bureau so orders.

b. Registration by Coordination. Any security for which a registration statement has been filed under the Securities Act of 1933 (the "1933 Act") in connection with the same offering may be registered by coordination. In addition to including three copies of the latest form of prospectus filed under the 1933 Act, the issuer may be required to submit certain other documents required by the Bureau chief, including copies of the articles of incorporation and bylaws of the issuer, a copy of any agreement with underwriters, copies of any indentures or other instruments governing the issuance of the security to be registered, and a specimen or copy of the securities being registered. The registration statement will become effective at the moment the federal registration statement becomes effective so long as (i) there is no stop order in effect and no proceeding is pending against any person directly or indirectly involved in the offering, (ii) the registration statement has been on file with the Bureau for at least five days, (iii) there are no outstanding comments or requests from the Bureau, and (iv) a statement of the maximum and minimum proposed offering prices and the maximum underwriting discounts and commissions has been on file for two full business days. If the registration statement is not filed with the Bureau within ten days of the filing of the registration statement with the SEC under the 1933 Act, the registration statement filed in New Jersey must be on file with the Bureau for thirty days before it will be effective.

c. Registration by Notification. Any issuer may register a security by notification if the issuer, and any predecessors, have been in continuous operation for at least five years and other financial conditions are met. The notification must include (i) a statement demonstrating eligibility for registration by notification, (ii) information with respect to any significant subsidiaries of the issuer, (iii) information with respect to any individual on whose behalf any part of the offering is to be made in a non-issuer distribution, including the amount of securities of the issuer being held by them as of the date of the filing of the registration statement and a statement of their reasons for making the offering, (iv) a description of the security to be registered, (v) the kind and amount of securities to be offered and the proposed offering price, the basis upon which the offering is to be made if other than for cash, the estimated amounts of selling expenses, the name and address of every underwriter and every recipient of a finders' fee and a description of the plan of distribution of any securities which are to be offered other than through an underwriter, (vi) a description of any stock options or other security options outstanding or to be created in connection with the offering held by any officer, director, ten percent owner, underwriter, finder or promoter, and (vii) copies of any offering materials. If no stop order is in effect and no proceeding is pending against any person directly or indirectly

involved in the offering, the registration automatically becomes effective at 3:00 p.m. Eastern Standard Time on the second full business day after the filing of the registration statement or any amendment thereto.

## 2. Registration Exemptions Under the Act

A security may be exempt from registration based on the security itself or based on the transaction.

The following securities are exempt from registration: (i) any security issued or guaranteed by the federal government, any state or local government or any agency thereof; (ii) any security issued or guaranteed by Canada, a Canadian province or any political subdivision of any such province or any other foreign government with which the United States currently maintains diplomatic relations, if the security is recognized as a valid obligation by the issuer or guarantor; (iii) any security issued by and representing an interest in or a debt of, or guaranteed by, any national or state bank, savings institution or trust company; (iv) any security issued by and representing any interest in or a debt of, or guaranteed by, any insurance company authorized to do business in New Jersey; (v) any security issued or guaranteed by any railroad, common carrier, public utility or holding company which is registered under the Public Utility Holding Company Act of 1935; (vi) any security listed or approved for listing upon notice of issuance on the New York Stock Exchange, the Nasdaq Stock Market or the American Stock Exchange, and such other exchanges or national quotation systems as the Bureau chief may from time to time designate by rule or order; (vii) any security issued by a person organized and operated exclusively for religious, educational, benevolent, fraternal, charitable or reformatory purposes and not for pecuniary profit; (viii) any commercial paper which arises out of a current transaction or the proceeds of which have been or are to be used for current transactions, and which evidences an obligation to pay cash with one year of the date of issuance; and (ix) any investment contract issued pursuant to an employee benefit plan.

The following transactions are exempt from registration: (i) any isolated non-issuer transaction; (ii) any non-issuer transaction by a registered broker-dealer of a security which has been outstanding in the hands of the public for at least ninety days prior to the transaction and which is sold at a price reasonably related to the current market price for such securities; (iii) any non-issuer transaction effected by or through a registered broker-dealer pursuant to an unsolicited order or offer to buy; (iv) any transaction between the issuer and an underwriter, or among underwriters; (v) any transaction in a bond secured by a real or chattel mortgage or deed of trust, if the entire mortgage or deed of trust, together with all the bonds, is offered and sold as a single unit; (vi) any transaction by an executor, administrator, sheriff, marshal, receiver, trustee in bankruptcy, guardian or conservator; (vii) any transaction executed by bona fide pledgee without any purpose of evading the Act; (viii) any offer or sale to a bank, savings institution, trust company, insurance company, investment company, pension or profit sharing trust, or other financial institution or institutional buyer, or to a broker-dealer; (ix) any transaction which results in sales to not more than ten persons in New Jersey in any period of twelve consecutive months if the seller reasonably believes that all buyers are purchasing for investment and no commission or other remuneration is paid for soliciting prospective buyers in the state and the securities are not offered or sold by general solicitation or general advertisement; (x) any offer or sale of a

preorganization certificate or subscription if no commission or other remuneration is paid for soliciting any prospective subscriber, the number of subscribers does not exceed ten and no payment is made by any subscriber; and (xi) any transaction by, or on behalf of, an issuer or other person if (a) the seller reasonably believes that there are no more than thirty-five purchasers of the issue in New Jersey during any twelve month period and that each purchaser who is not an accredited investor, either alone or with his representative, has the knowledge and experience in financial and business matters such that they are capable of evaluating the merits and risks of the prospective investment, (b) a written offering statement or prospectus is furnished to each non-accredited investor, (c) the securities are not offered or sold by general solicitation or general advertisement, and (d) a report of the offering is filed with the Bureau not later than fifteen days after the first sale of the security in New Jersey.

### 3. Broker-Dealer, Investment Adviser Registration

Broker-dealers, agents, investment advisers and issuers must register with the Bureau, unless they are exempt from registration.

Broker-dealer may register by filing with the Bureau an application together with a consent to service of process and an application fee. Broker-dealer registrations expire one year after the effective date. A person (which is defined to include an entity) may be exempt from registration as a broker-dealer if the person has no place of business in New Jersey, is a member in good standing of a recognized self-regulatory organization, is registered in the state in which the person is located and, during any period of twelve consecutive months, the person (i) does not effect more than fifteen transactions in New Jersey (excluding transactions with institutional investors), (ii) does not effect transactions in more than five customer accounts of New Jersey residents, or (iii) effects transactions only with persons who have no place of residence in New Jersey and who are temporarily located in New Jersey.

Agents of broker-dealers may register by filing with the Bureau a consent to service of process, a Form U-4 (Uniform Application for Securities Registration or Transfer), a non-criminal fingerprint card and a registration fee. Agents must also have passed a securities examination approved by the Bureau, the General Securities Representative Examination (Series 7) or have been granted a waiver by the Bureau chief. Agents affiliated in a securities related position with more than one employer may be registered in New Jersey if a letter is submitted with the agent's application on each affiliated firm's letterhead stating that (i) the employer is aware of the agent's multiple affiliations, (ii) the employer accepts the agent's multiple affiliations, and (iii) the employer accepts full responsibility for the agent's securities related activities. Agents who represent broker-dealers that are exempt from registration are exempt from registration if they are members in good standing of a recognized self-regulatory organization and are registered in the state where the agent is located.

Investment Advisers are required to file an application on Form ADV together with all relevant schedules, which shall be accompanied by (i) a consent to service of process, (ii) a certified statement of the investment adviser's most current financial condition as of a date within sixty days of the application, (iii) a copy of a sample investment advisory contract, (iv) a sample of any business card, letterhead, brochure, circular, newsletter, form letter, advertisement or other sales literature, (v) Form ADV-W as filed with the SEC, if the investment adviser has withdrawn or is withdrawing from SEC registration, (vi) a registration fee, and (vii) a

certification of compliance with the requirements of the state in which the investment adviser has its principal place of business, if other than New Jersey, with respect to that state's books and records, net capital and bonding requirements. An investment adviser may be exempt from registration, or from making a notice filing if, during any period of twelve consecutive months, the investment adviser does not have more than five clients who are New Jersey residents (excluding certain institutional clients).

Issuers effecting or attempting to effect a purchase or sale of securities other than through a registered broker-dealer are required to register a natural person as an agent. However, agent registration is not required for (i) an individual who represents an issuer in effecting transactions in exempt governmental securities, bank securities, or employee benefit securities, (ii) any transaction exempted under the Act, (iii) transactions with existing employees, partners or directors of the issuer, if no commission is paid for soliciting any person in New Jersey, or (iv) an individual representing a broker-dealer in effectuating transactions in New Jersey limited to those transactions described in Section 15(h)(2) of the Securities Exchange Act of 1934.

#### 4. Antifraud Provisions

It is unlawful, in connection with the offer, sale or purchase of any security, (i) to employ any device, scheme, or artifice to defraud, (ii) to make any untrue statement of material fact or to omit to state a material fact necessary to make the statements made, in light of the circumstances under which they are made, not misleading, (iii) to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person, or (iv) to fail to deliver the prospectus filed under the 1933 Act to each purchaser of a security registered under that act. In addition, it is also unlawful for any person to (a) quote a fictitious price with respect to a security, (b) effect a transaction in a security which involves no change in beneficial ownership in order to create a false or misleading appearance of active trading in a security, (c) to enter an order for the purchase or sale of a security with the knowledge that an order of substantially the same size and at substantially the same time and price for the purchase of the security has been, or will be, entered by or for the same, or affiliated, person for the purpose of creating a false or misleading appearance of active trading in a security, or (d) to employ any other deceptive or fraudulent device, scheme or artifice to manipulate the market in a security.

In addition to the general prohibitions above, it is unlawful under New Jersey law for any person acting as an investment adviser, whether required to register or not, to enter into, extend, or renew any investment advisory contract unless it provides in writing (i) that no assignment of the contract may be made by the investment adviser without the consent of the other party to the contract and (ii) that the investment adviser shall notify the other party to the contract of any change in control of the investment advisor within a reasonable time after the change. It is unlawful for any investment adviser that is required to register, or any registered broker-dealer acting as an investment adviser, to enter into, extend, or renew any advisory contract unless it provides in writing that the investment adviser shall not be compensated on the basis of a share of capital gains or capital appreciation of the funds or any portion of the funds of the client except as may be authorized by the rules of the Bureau chief; however, compensation based upon the total value of a fund averaged over a definite period, or as of definite dates, is not prohibited.

## X. REAL ESTATE

The purchase, sale, ownership and development of real property in New Jersey is governed by a legal framework that is, in many ways, similar to the laws of other states. There are many aspects of New Jersey real estate practice, however, where knowledge of New Jersey law and custom is indispensable. In particular, some customs relating to property conveyances and title insurance, and the statutes and regulations governing taxation of real property, zoning and environmental protection, among others, are unique to New Jersey. The following sections are a brief summary of the law of real property in New Jersey.

### A. Ownership

Under New Jersey law, any U.S. citizen, “alien friend” or corporate entity (partnership, limited partnership, limited liability company, etc.) may acquire real estate. “Alien friend” is defined as any alien domiciled and resident in the U.S. and licensed or permitted by the U.S. government to remain in and engage in business in the U.S. without being arrested or interned. In addition, in order to conduct business in New Jersey, non-New Jersey corporate entities must receive authority to do so from the Secretary of State.

When a corporation is conveying, mortgaging or leasing property, title companies typically require a copy of the corporate resolution authorizing the transaction. A title company typically orders a corporate status report to ensure the corporation is in good standing. When a partnership is conveying, mortgaging or leasing property, a title company may require a copy of the partnership agreement, and proof that there has been no change in the partnership’s composition. When a limited liability company is involved in a conveyance, mortgage or leasing of property, a title company may require a copy of the LLC’s operating agreement and certificate of formation.

### B. Concurrent Ownership

New Jersey recognizes the following types of ownership: tenancy in common, joint tenancy and tenancy by entirety. New Jersey does not recognize community property. A grant of ownership of real estate to two or more persons is presumed to create a tenancy in common, unless otherwise stated in the conveyance. In the case of husband and wife, a tenancy by entirety is created unless stated otherwise.

#### 1. Tenancy in common

A grant of ownership of real estate in two or more persons is presumed to create a tenancy in common unless otherwise stated. This form of ownership gives the owners a unity of possession with separate and distinct titles to the real estate belonging to each owner. Each owner has a right to separately convey and transfer his/her title to the real estate. If one of the owners dies, his or her title passes to his or her heirs. The key disadvantage in New Jersey is that each tenant-in-common is fully liable personally for all debts, lawsuits, and taxes regarding the property, since tenancies in common are treated like general partnerships.



## 2. Joint tenancy

In this form of joint ownership of real estate, each owner has one and the same interest in the real estate. The owners hold the right of survivorship, which means that if one of the owners dies, his/her interest automatically passes to the other owners. In New Jersey, the joint tenancy is a useful estate, particularly since it avoids probate. A joint tenancy can be created only by express words in an instrument indicating an intent to create a joint tenancy. Any joint tenant can, at any time, destroy the right of survivorship by severing the joint tenancy. Upon severance, the joint tenancy becomes a tenancy in common, and the right of survivorship is destroyed.

## 3. Tenancies by the Entirety

A tenancy by entirety is a form of concurrent ownership that can be created only between husband and wife, holding as one person. The surviving spouse has the right of survivorship. Although the tenancy by the entirety resembles the joint tenancy, it is unlike the joint tenancy in that severance of the tenancy by one tenant is not possible. Neither tenant acting alone can sever or destroy the right of survivorship. This is the chief difference between a tenancy by entirety and a joint tenancy. Upon dissolution of the marriage the tenants by the entirety become tenants in common.

### **C. Spousal rights**

Marital property includes most property acquired during marriage and is subject to equitable distribution by the court. Upon dissolution, the court has broad discretion in the equitable distribution of this property. Property distribution decrees are not modifiable in New Jersey. For real property held by husband and wife as “tenants by the entirety,” the estate of the spouse first dying need not be reported and may be transferred without a tax waiver, regardless of the date of death. For all other forms of concurrent ownership, unpaid inheritance taxes constitute a lien on real property and tax waivers are required to transfer real estate.

During a marriage, a husband and wife may separately sell or mortgage real estate held separately by him or her without their spouse signing onto it, however, the spouse may have an inheritance right or statutory share, in the real estate and usually the spouse joins in signing a contract, deed or mortgage. New Jersey requires that in the case of sale or mortgage of the homestead, both spouses sign the contract, deed or mortgage. As of May 28, 1980, New Jersey has abolished dower and curtesy rights.

### **D. Purchase/Sale of Real Property**

#### 1. Purchase Agreements

Typically, prepared forms are used for the conveyance of residential real estate. The buyer’s and seller’s attorneys often negotiate riders to be attached to the printed form. For commercial transactions, attorneys usually negotiate purchase and sale agreements.

Purchase agreements contain standard provisions, including buyer and seller representations and warranties, title requirements, and due diligence and closing requirements and procedures, as well as negotiated provisions specific to the individual transaction.

Contracts for the sale of residential property prepared by real estate brokers provide for a three day attorney review period. Once a signed contract has been delivered to both the seller and purchaser, the contract becomes binding after three days (not including Saturdays, Sundays or legal holidays) unless it is reviewed and disapproved by an attorney.

Purchase agreements for New Jersey real estate should include provisions for compliance with the Industrial Site Recovery Act (“ISRA”; N.J.S.A. 14:1K). ISRA applies to industrial establishments (i) of businesses falling under certain enumerated codes of the North American Industry Classification System, (ii) which were engaged in operations on or after December 31, 1983, and (iii) involved in the generation, manufacture, refining, transportation, treatment, storage, handling or disposal of hazardous substances or hazardous wastes. It is incumbent on the parties to determine if ISRA is applicable since the New Jersey Department of Environmental Protection (“NJDEP”) will no longer issue applicability determinations. Operators of such industrial establishments are obligated to notify the NJDEP prior to any closing of operations or transfer of property ownership. Under ISRA, the owner may not close operations or transfer ownership of the property until (1) the NJDEP has either issued a no further action letter or a licensed site remediation professional has issued a response action outcome for the industrial establishment; (2) NJDEP has approved or a licensed site remediation professional has certified a remedial action work plan; or the owner or operator has executed a remediation agreement or, on or after November 4, 2009, has submitted a remediation certification with respect to the property. ISRA contains exemptions and waivers allowing owners and operators to take particular actions in lieu of total compliance.

The Farmland Assessment Act of 1964 allows for a reduced amount of taxes to be paid on certain farmland. However, once such farmland use ceases, the property will be subject to roll-back taxes. Purchase agreements sometime address the allocation among the parties of this post-closing liability.

Purchase agreements should also include a provision for compliance with New Jersey’s bulk sale law requirements. In 2009, a law was adopted which inserted an entirely new provision into New Jersey’s Sales and Use Tax Act (“Bulk Sales Law”). This law expanded the tax bulk sale notice requirements to make it applicable to transactions in which any seller makes a bulk sale, not just sellers who are required to collect and remit sales tax. In addition, failure to comply results in the buyer becoming liable for all state tax obligations of the seller, not just sales tax. It has been determined that the sale of real estate falls within the new statute although a seller occupied single family residence is excluded. The new law has resulted in buyers providing notice of all proposed sale of non-single family real estate to the Division of Taxation (including a specified form). The notice must be given at least ten (10) days before the closing. Responsibility for compliance lies with the buyer since the penalty for non-compliance is imposed on the buyer. The Division will respond to the notice and advise the buyer as to the amount of closing proceeds that should either be held in escrow (until a final determination is

made) or paid over to the Division. Once the directions in this letter are complied with, the buyer is released from any further obligations with respect to the bulk sale requirements.

## 2. Protections Against Fraud

The Consumer Fraud Act (N.J.S.A. 56:8-1 *et seq.*), authorizes treble damages and attorney's fees for "the act, use or employment by any persons, of any unconscionable consumer practice, deception, fraud, false pretense, false promise, misrepresentation or the knowing concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission." The protections of the Consumer Fraud Act apply to both the sale and lease of real property. (See Section III.C. "Trade Regulation" above, for more information about this statute.)

The New Home Warranty and Builders' Registration Act (N.J.S.A. 46:3B-1 *et seq.*), requires that new home builders in New Jersey register with the State Department of Consumer Affairs and provide a 10 year limited warranty covering construction defects to their customers. At closing, the homeowner is provided information on the warranty plan for their home, a full statement of warranty coverage and warranty claims procedures. The warranty is effective when the title is first transferred from builder to owner or when possession or occupancy is first given by the builder to the owner.

The Planned Real Estate Development Full Disclosure Act regulates planned real estate developments "which are offered or disposed of pursuant to a common promotional plan, and providing for common or shared elements or interests in real property." Certain "offers or dispositions" are exempt from the Act. If subject to the Act, a development must register with the State Department of Community Affairs.

## 3. Taxation of Real Estate Conveyances

Upon the sale of real estate, a realty transfer fee is imposed on the grantor in the following manner:

- (1) if the total consideration is not in excess of USD350,000, the tax is USD2.00 per USD500 of consideration not in excess of USD150,000; USD3.35 per USD500 of consideration in excess of USD150,000 but not in excess of USD200,000 and USD3.90 per USD500 of consideration in excess of USD200,000 but not in excess of USD350,000.
- (2) If the total consideration is in excess of USD350,000, the tax is USD2.90 per USD500 of consideration not in excess of USD150,000; USD4.25 per USD500 of consideration in excess of USD150,000 but not in excess of USD200,000; USD4.80 per USD500 of consideration in excess of USD200,000 but not in excess of USD550,000; USD5.30 per USD500 of consideration in excess of USD550,000 but not in excess of USD850,000; USD5.80 per USD500 of consideration in excess of USD850,000 but not in excess of USD1,000,000; and USD6.05 per USD500 of consideration in excess of USD1,000,000.

In addition, real property zoned for residential or commercial use conveyed for consideration of USD1,000,000 or more is subject to a 1% fee on the entire consideration. This tax is imposed upon the grantee.

Pursuant to N.J.S.A. 46:15-10; 46:15-10.1 and 46:15-7.2, certain transactions are exempt or partially exempt from the realty transfer fee.

The realty transfer tax is collected by the county recorder of deeds at the time the deed is recorded.

A nonresident individual, estate or trust selling real property in New Jersey must make an estimated Gross Income Tax payment to the Division of Taxation in the amount of the greater of (i) the amount of gain reportable for federal income tax purposes on the sale of the property, multiplied by the highest rate of income tax for the taxable year (8.97% as of 2010) and (ii) 2% of the consideration paid for the property. Certain transactions are exempt from the estimated Gross Income Tax payment, pursuant to N.J.S.A. 54A:8-10. The Gross Income Tax withholding is collected by the county recorder of deeds at the time the deed is recorded.

#### 4. Closing Procedures

It is customary in New Jersey for the seller to provide an affidavit of title to the buyer and a mortgagor to provide an affidavit of title to the mortgagee. The affidavit of title includes representations relating to improvements and any liens or encumbrances on the property being conveyed/mortgaged, and the seller's/mortgagor's marital history. The purchase agreement will typically contain provisions obligating the delivery of title affidavits.

Prior to closing, a notice of settlement should be filed with the county recording officer of the county where the property is located. Notices of settlement are designed to protect a proposed lien or conveyance against an intervening lien or conveyance between the title closing and the recording of the mortgage or deed. Notices of settlement are effective for 45 days from the filing date. Notices of settlement must be signed by the proper party or legal representative, and include the names of the parties to the settlement and a description of the property. If the notice is not executed by a New Jersey attorney-at-law, the execution must be properly acknowledged or proved.

The Title Insurance Act of 1974 regulates title insurance companies in New Jersey, which requires, among other things, that title insurance rates be approved by the Commissioner of Banking and Insurance. The licensing and activities of insurance producers are regulated by the New Jersey Insurance Producer Licensing Act.

A certificate of occupancy ensures a property's compliance with applicable laws and ordinances. Some municipalities require that a certificate of occupancy be obtained upon the resale of an existing structure. All municipalities require a certificate of occupancy be obtained in transactions involving newly constructed dwellings.

New Jersey law requires that before certain residences are sold, leased or subject to an occupancy change, a certificate of smoke detector and carbon monoxide alarm compliance be obtained.

Certain wells must be tested as a condition of a contract for the sale of real property. At closing the purchaser and seller must certify in writing that they received and reviewed the water test results.

#### 5. Conveyance, Leasing and Mortgage Documents

Typically, conveyances are by bargain and sale deed with covenants against grantor's acts.

Instruments concerning the leasing and purchase of real estate are subject to the Plain Language Act, which requires consumer contracts "be written in a simple, clear, understandable and easily readable way."

The Statute of Frauds states that a transaction intended to transfer an interest in real estate is not effective unless a description of the real estate sufficient to identify it, the nature of the interest, the fact of the transfer and the identity of the transferor and transferee are established in a writing signed by or on behalf of the transferor; or the transferor has placed the transferee in possession of the real estate as a result of the transaction and the transferee has paid all or part of the consideration for the transfer or has reasonably relied on the effectiveness of the transfer to the transferee's detriment.

The Statute of Frauds states that a transaction intended to create a lease of real estate for more than 3 years is not enforceable unless the leased premises, the term of the lease and the identity of the lessor and the lessee are established in a writing signed by or on behalf of the party against whom enforcement is sought; or the real estate, the term of the lease and the identity of the lessor and the lessee are proved by clear and convincing evidence.

Mortgage "lock in" agreements must be in writing and must contain the following provisions: (1) the expiration date of the lock in, if any; (2) the interest rate locked in, if any; (3) the discount points locked in, if any; (4) the commitment fee locked in, if any; (5) the lock-in fee, if any; and (6) a statement, if applicable, advising that: (i) the lender shall make a good faith effort to process the mortgage loan application and/or stand ready to fulfill the terms of its commitment before the expiration date of the lock-in agreement and any extension; (ii) in the event a lock-in agreement is executed and the loan applied for is denied, the lender shall promptly refund any lock-in fee paid; and (iii) any lock-in agreement received by a lender by mail or through a broker must be signed by the lender before it will become effective.

Six statutory forms of mortgage covenants are as follows: (1) Covenant of seizen and warranty; (2) Covenant as to taxes paid; (3) Covenant to pay indebtedness; (4) Covenant as to insurance; (5) Covenant as to acceleration; (6) Covenant as to declaration of no offset.

In order for assignments of mortgages, releases, satisfactions, and agreements respecting mortgages to be recorded, they must state, in the body, the book and page of the original instruments, if recorded, to which they relate.

In order for a purchaser of real property to assume a mortgage he/she must assume the mortgage debt and its payment by an express agreement in writing signed by the purchaser or by the purchaser's acceptance of a deed containing a covenant that the grantee assumes the mortgage debt and its payment.

A mortgage may be canceled of record by the county recording officer if: (1) the original mortgage bearing on it the receipt given by the county recording officer at the time it was recorded is presented to the county recording officer with an endorsement on it authorizing its cancellation bearing the signature of the mortgagee or, if the mortgage has been assigned of record, of the last assignee of record of the mortgage. If the mortgagee or assignee of the mortgage is a corporation or other entity, the signature for the entity on the endorsement may be made by any person authorized by the entity to do so; or (2) an instrument constituting a satisfaction of mortgage meeting the requirements for recordation, including acknowledgment or proof is filed with the county recording officer.

## 6. Recording

The prerequisites to recording documents "affecting title to or interest in real estate or containing any agreement in relation to real estate" in New Jersey are: (1) the instrument is in English or accompanied by an English translation; (2) the instrument bears a signature; (3) the instrument is properly acknowledged or proved; (4) the names are typed, printed or stamped beneath the signatures of the parties to the instrument and the officer before whom it was acknowledged or proved; (5) any required recordation fee is paid; and (6) if the instrument is a deed conveying real property: (i) if the transfer is subject to a realty transfer fee, then the consideration must be contained in the deed, the acknowledgement, the proof of execution, or an appended affidavit (if the transfer is exempt from a realty transfer fee an affidavit stating the basis for the exemption must be appended to the deed); (ii) an affidavit concerning Gross Income Tax withholding or exemption from the requirement to withhold is attached, (ii) it includes the preparer's name and signature on its first page and (iii) it includes the property's lot and block number. If the property has been subdivided, the words "part of" must precede the reference. The deed must state if there is no lot and block or account number.

All recorded instruments must be properly acknowledged. The New Jersey officers who may take acknowledgements are an attorney-at-law, a notary public, a county clerk or deputy county clerk, a register of deeds and mortgages or a deputy register, and a surrogate or deputy surrogate. The following officers may take acknowledgements in addition to those officers listed above: (1) any officer of the United States, of a state, territory or district of the United States, or of a foreign nation authorized to take acknowledgments or proofs. If the certificate of acknowledgment or proof does not designate the officer as a justice, judge or notary, the certificate of acknowledgment or proof, or an appended affidavit, must contain a statement of the officer's authority to take acknowledgments or proofs; (2) a foreign commissioner of deeds for New Jersey within the jurisdiction of the commission; and (3) a foreign service or consular

officer or other representative of the United States to any foreign nation, within the territory of that nation.

#### **E. Easements**

Easements may arise from agreement or operation of law. An agreement for an easement is set forth in writing and is signed by the parties agreeing to it. Easements may be for a set period of time, but often run with the land and, therefore, are transferred automatically with the conveyance of the fee simple interest in the benefited property. An easement established by the operation of law results from general legal principles such as a right of ingress and egress for landlocked real estate or the right of drainage of surface water. An easement also may arise by adverse possession. This is sometimes referred to as a prescriptive easement or easement by prescription. In New Jersey, the period of adverse use to establish a prescriptive easement must be at least twenty (20) years.

#### **F. Leases**

A written lease for residential property must meet the specific requirements of the Plain Language Law (N.J.S.A. 56:12-2) which requires the language of the lease to be simple and understandable. The lease must also meet the requirements of the Statute of Frauds, set forth above.

A landlord of residential property must file a Landlord Registration Statement which contains specific information concerning the landlord, the mortgage holder of the property and so forth. Depending on the number of units in the property, the landlord is required to file the statement with either the municipality in which the property is located or directly with the State Department of Community Affairs. A New Jersey landlord must supply the tenant with a copy of the Truth in Renting statement published by the Department of Community affairs. This document sets forth the legal rights and responsibilities of tenants and landlords. (N.J.S.A 46:8-43 *et seq.*) New Jersey law also specifically prohibits the waiver of statutory rights for residential tenancies.

Pursuant to the New Jersey's Security Deposit Act, security deposits for certain "rental premises or units used for dwelling purposes" must be placed in an interest bearing account. There is no statutory requirement that security deposits in commercial leases be held in a similar manner.

Eviction of residential tenancies is governed by the Eviction for Good Cause Law and the Anti-Eviction Act. It is imperative that a landlord determine which law applies to a particular situation as the procedural requirements and necessary notices are technical and vary under each law. The statutory requirements for eviction must be strictly adhered to and fully complied with or the New Jersey courts lack jurisdiction to hear the matter.

Eviction of commercial tenancies is governed by the Eviction for Good Cause Law. However, between commercial tenants and commercial landlords it is the express agreement of the parties that controls. As with residential tenancies, the procedural requirements are technical

and must be strictly adhered to and fully complied with or the New Jersey Courts lack jurisdiction to hear the matter. A tenant who willfully holds over and remains in possession of real estate after the term expires may be subject to an action by the landlord for double the fair market rent of the premises.

## **G. Zoning**

The New Jersey legislature has delegated the authority to regulate local land use to municipalities pursuant to the Municipal Land Use Law, N.J.S.A. 40:55D-1 *et seq.* (the “MLUL”). The local bodies most directly involved with the planning and zoning process are the municipal planning board, zoning board of adjustment, and governing body.

Pursuant to the MLUL, planning board powers include, but are not limited to, the following: (1) adopting, amending and periodically re-examining a master plan (which must include, at a minimum, a comprehensive statement of planning policies and objectives and a land use element); (2) making recommendations relating to the official map and any proposed amendments to the zoning ordinance; and (3) reviewing certain subdivision, site plan, and conditional use applications. The planning board may also decide requests for “c” variances (described more fully below), in connection with subdivision, site plan, and conditional use applications. Pursuant to the MLUL, the zoning board of adjustment powers include, but are not limited to, the following: (1) hearing and deciding appeals from decisions made by municipal administrative officers relating to the enforcement of the zoning ordinance; (2) hearing and deciding requests for interpretation of the zoning map or zoning ordinance; and (3) granting “c” and “d” variances (described more fully below). The zoning board of adjustment may also exercise its ancillary jurisdiction to grant any subdivision and/or site plan approval that may be required in connection with a “d” variance application.

The municipal governing body is vested with the authority to adopt and amend a local zoning ordinance that implements the planning policies and land use element of the master plan adopted by the planning board.

“C” variances generally involve requests by developers to permit a deviation from the bulk or dimensional requirements of the zoning ordinance (e.g. required minimum lot size, street frontage, setbacks to principal buildings, etc.). A “c” variance may be granted if: (1) due to certain exceptional and/or extraordinary features (identified in the MLUL) of a particular piece of property, denying the variance would cause the applicant an undue hardship; or (2) if the purposes of zoning as set forth in the MLUL “would be advanced by a deviation from the zoning ordinance requirements and the benefits of the deviation would substantially outweigh any detriment.”

A “d” variance may be granted to permit: (1) a use or principal structure in a district restricted against such use or principal structure; (2) an expansion of a nonconforming use; (3) deviation from a specification or standard pertaining solely to a conditional use; (4) an increase in the permitted floor area ratio as defined in the MLUL; (5) an increase in the permitted residential density as defined in the MLUL, except as applied to the required lot area for a lot or lots for detached one or two dwelling unit buildings, which lot or lots are either an isolated



undersized lot or lots resulting from a minor subdivision; or (6) a height of a principal structure which exceeds by 10 feet or 10% the maximum height permitted in the district for a principal structure. The zoning board of adjustment has exclusive jurisdiction with respect to requests for a “d” variance.

With respect to both “c” and “d” variances, the burden of proof is on the applicant to establish that the requested relief can be granted without substantial detriment to the public good and will not substantially impair the intent and the purpose of the zone plan and zoning ordinance.

With certain limited exceptions, in order for most applications to be heard by a municipal planning board or board of adjustment, proper public notice must be given, pursuant to the MLUL.

Notices must include the date, time and place of the hearing, the nature of the matters to be considered, the property’s street address or tax map lot and block number, and the time and place where documents relating to the application can be inspected.

Notice must be given at least 10 days before the hearing by (i) publishing same in the official newspaper of a municipality, if there is one, or in a newspaper of general circulation in the municipality; and (ii) serving all property owners within 200 feet of the subject property by either personally serving a copy of the notice on the property owner or by mailing a copy of the notice to such property owner by certified mail at his address as shown on the current tax duplicates.

Notice may also be required to be given to the clerk of an adjoining municipality, a county planning board, the New Jersey Commissioner of Transportation, the State Planning Commission, and any utility companies that have registered with the municipality in which the subject property is located to receive notice of local land development applications.

An affidavit of proof of service indicating notice was served, in compliance with the requirements of the MLUL must be filed with the municipal agency holding the hearing.

In addition to any local land use approvals that may be required from the municipal planning board or zoning board of adjustment, it is not uncommon for development projects to require various approvals from other levels of state government, including but not limited to the county in which the subject property is located (e.g. the county planning board for projects adjacent to county roads or affecting county drainage facilities), regional bodies for property located in unique or environmentally sensitive areas (e.g. the New Jersey Pinelands Commission, the New Jersey Meadowlands Commission, etc.), and/or the State of New Jersey (e.g. the Department of Transportation for projects seeking access to a State highway, the Department of Environmental Protection for projects involving construction within freshwater wetlands or flood plains, etc.), in addition to any federal agency approvals that may be required.

## H. Mineral Rights

Ownership of subsurface rights, including minerals, may be severed from surface and thereafter constitute a separate fee in another plane of the same land. After such severance has been effected, the distinct estate of land is inheritable, leaseable or conveyable. Municipalities have general authority to regulate quarries pursuant to state's grant of police power. N.J.S.A. 40:48-1, 40:48-2.

## I. Eminent Domain (N.J.S.A. 20:3-1 to -50)

### 1. General Definitions

- To “condemn” is “to take private property for a public purpose under the power of eminent domain.” N.J.S.A. 20:3-2(a).
- The “condemnor” is the “entity, public or private, including the State of New Jersey, which is condemning private property for a public purpose under the power of eminent domain.” N.J.S.A. 20:3-2(b).
- The “condemnee” is “the owner of an interest in the private property being condemned for a public purpose under the power of eminent domain.” N.J.S.A. 20:3-2(c).

### 2. Power to Condemn and Prerequisites to Filing Suit

- The power to condemn rests with state, county and municipal corporations and certain public or private corporations.
- A condemnor must enter into “bona fide negotiations” with the condemnee before filing suit. N.J.S.A. 20:3-6.
- Before making the offer, the condemnor must appraise the property and the owner must have the opportunity to accompany the appraiser during inspection of the property. N.J.S.A. 20:3-6.

### 3. Process to Condemn

- *Verified Complaint:* A Verified Complaint must be filed in the Superior Court. N.J.S.A. 20:3-8.
- *Notice of Lis Pendens:* Within fourteen (14) days of the filing of a Verified Complaint, the condemnor must file and record in the recording office a notice of the pendency of the action. N.J.S.A. 20:3-10.
- *Declaration of Taking:* At any time contemporaneous with or after the institution of the suit, the condemnor may file a declaration of taking in the form and content specified by the rules. N.J.S.A. 20:3-17. Simultaneously with the filing of the

declaration of taking, the condemnor must deposit the amount of the estimated compensation with the clerk of the court. N.J.S.A. 20:3-18. At this point, the right to the immediate and exclusive possession and title to the property will vest in the condemnor, so long as the taking of the property is not stayed by the court. N.J.S.A. 20:3-19.

- *Commissioners' Hearing:* Upon the filing of the suit and the notice of *lis pendens*, the court will appoint three (3) commissioners to determine the compensation to be paid by the condemnor to the condemnee. N.J.S.A. 20:3-12(b). In order to determine the compensation award, the commissioners will hold hearings at which the parties and their witnesses may be heard. N.J.S.A. 20:3-12(c).

- *Final judgment:* If no appeal is taken as to the amount of compensation, the award will constitute a final judgment. The award must be paid within sixty (60) days after final judgment. N.J.S.A. 20:3-12(h).

#### 4. Relocation Assistance (N.J.S.A. 20:4-1 to -22; N.J.A.C. 5:11-1.1 to -9.3)

- Upon taking the property, the condemnor must make fair and reasonable relocation payments to displaced persons and businesses for:
  - a. actual reasonable expenses in moving himself, his family, business, farm operation, or other personal property;
  - b. actual direct losses of tangible personal property due to moving or discontinuing a business or farm operation, but not to exceed an amount equal to the reasonable expenses that would have been required to relocate such property, as determined by the taking agency; and
  - c. actual reasonable expenses in searching for a replacement business or farm. N.J.S.A. 20:4-4.
- The condemnor may also be responsible for paying for replacement housing for displaced tenants or homeowners up to a specified maximum amount. N.J.S.A. 20:4-5 to -6.

## **J. Mortgage Foreclosures**

### 1. General Procedure

A real estate mortgage may be foreclosed upon by a judicial proceeding commenced by the filing of a complaint in the Superior Court in the county in which the real estate is located. In a foreclosure action, the lender must demonstrate (i) the validity of the mortgage documents, (ii) the existence of default, and (iii) the right to foreclose, which is an equitable remedy. Only germane counterclaims and cross-claims may be pleaded in foreclosure actions without leave of court. Courts have found the following types of claims to be germane: “challenges to the validity of the loan itself, claims seeking equitable recoupment based on civil rights violations, challenges to the circumstances surrounding the origination of loan, claims arising from the

mortgage transaction, claims asserting breach of mortgagee's promise to purchase property and challenges to the amount due on a mortgage". *Wells Fargo Bank, N.A. v. Harrison*, Civ. A. No. BER-F-1033-13, 2013 N.J. Super. Unpub. LEXIS 1156, at \*11-12 (Ch. Div. May 13, 2013).

In a judicial foreclosure proceeding, the sale of the mortgaged premises is conducted by the sheriff, and the mortgagor has a statutory right for two (2) adjournments (of 14 days each) of the sheriff's sale date (unless a court order is obtained). N.J.S.A. 2A:50-64(a)(2); N.J.S.A. 2A:17-36. There is no requirement that there be a confirmation of the foreclosure sale by the Court unless the foreclosure sale is held by a person other than a sheriff or an objection to the sale has been raised. *See* N.J. Ct. R. 4:65-6.

The mortgagor has a period of 10 days following the date of the foreclosure sale to redeem the property following the date of the sheriff's sale. *See* N.J. Ct. R. 4:65-5; *Hardyston Nat'l Bank v. Tartamella*, 56 N.J. 508, 513 (1970). If the property is not redeemed within the time period permitted (barring the filing of a bankruptcy petition by the mortgagor), the sheriff will then deliver a deed of conveyance for the foreclosed property to the successful bidder at the sheriff's sale.

## 2. Limitation on "Foreclosure First" Requirement

If the property being foreclosed is a residential mortgage (a residential mortgage is defined as a mortgage in which the security is residential property occupied by the debtor, who is a natural person, or a member of the debtor's immediate family, as that person's residence), then the mortgagee must abide by the "foreclosure first" requirement before pursuing an action on the bond or note for any deficiency. Once the foreclosure proceedings have been completed and the foreclosure sale conducted, then the deficiency action must be commenced within three (3) months from the date of the foreclosure sale (or from the date of the confirmation of the sale of the mortgaged premises, if such confirmation was required). No action can be instituted for deficiency against any person who has not been made a party to the foreclosure action. N.J.S.A. 2A:50-2. If a deficiency action is pursued following a foreclosure action, the mortgagor has a statutory right to obtain a fair market value credit of the mortgaged premises against the amount due on the mortgage note. N.J.S.A. 2A:50-3.

The "foreclosure first" requirement is not applicable to non-residential mortgages or secondary residential mortgages made by banking institutions and licensed lenders (where prior mortgage is not held by such institution). N.J.S.A. 2A:50-2.3. Where foreclosure first does not apply, and the lender has sued on the obligation evidenced by the mortgage note, the court still has the authority to invoke the rule to allow a non-statutory credit for the fair market value of the mortgaged premises against the unpaid balance of the loan for which the lender is seeking a judgment. *See, e.g., MMU of N.Y. v. Geiser*, 415 N.J. Super. 37 (App. Div. 2010).

## 3. Residential Mortgages

In the event the mortgage being foreclosed upon represents a residential mortgage, then the mortgagee must comply with the Fair Foreclosure Act, N.J.S.A. 2A:50-53. The fact that the secured loan is a commercial loan is not dispositive of whether the Act applies; it is the nature of the real property that controls. Under the Fair Foreclosure Act, the mortgagor must receive a 30-

day notice of the intention of the lender to foreclose, prior to the foreclosure action being initiated. N.J.S.A. 2A:50-56. The notice of intent to foreclose must contain a number of items, including a statement providing the debtor with the right to cure the default, which right shall extend up to the entry of final judgment. Upon curing the default, the acceleration of the obligation is nullified, and the loan is reinstated, placing the debtor in the same position as though the default had not occurred. N.J.S.A. 2A:50-57. The right to cure the default under this statute is independent of any right of redemption. The notice of intention to foreclose is not required if the debtor has voluntarily surrendered the property (given the lender a deed in lieu of foreclosure) which is the subject of the residential mortgage. N.J.S.A. 2A:50-56.

The Fair Foreclosure Act provides for an optional or strict foreclosure procedure, which does not involve a judicial proceeding and actual sale of the mortgaged premises. N.J.S.A. 2A:50-63(a). The optional procedure without sale is permitted only when (i) the debtor has abandoned the property which is the subject of the residential mortgage; (ii) the debtor has voluntarily surrendered the property which is the subject of the residential mortgage by signing a deed in lieu of foreclosure in favor of the lender; or (iii) there is no equity in the property which is the subject of the residential mortgage (where the total unpaid balance of all liens and encumbrances against the property, including mortgages, tax liens and judgments against the property and any other lien is equal to or greater than 92% of the fair market value of the property).

The entry of judgment through the optional or strict foreclosure process terminates the rights of the mortgagor and other parties, thereby eliminating the need for the lender to hold a sheriff's sale and obtain a sheriff's deed. The entry of the judgment is the last step and a certified copy of the judgment is recorded as a deed with the county recording officer of the county in which the mortgaged premises is situate. A limitation of the optional procedure (or any strict foreclosure procedure) is that the United States cannot be joined as a defendant in such an action (because the federal statute waiving sovereign immunity requires that foreclosure of any federal liens must be effectuated by judicial sale). Therefore, any federal liens attaching to the mortgaged premises up to the recording of the judgment under the optional procedure would not be cut off.

#### 4. Redemption

If, after the foreclosure sale of the mortgaged premises, the person entitled to the debt shall recover a judgment for the balance of the debt, in an action on the bond or note, such recovery shall permit the person against whom the judgment has been recovered to redeem the property by paying the full amount of money for which the judgment in the foreclosure action was granted, with interest to be computed from the date of judgment in the foreclosure action, together with all costs of the deficiency action and all reasonable expenses which the purchaser at the foreclosure sale may have incurred in the meantime for taxes, assessments and the prior liens, repairs made to the property and interest on same, after deducting the amount of income such party may have derived from the possession of the premises either as rent or otherwise. Upon redemption under this statute, the foreclosure sale purchaser will lose all title to the premises. An action for redemption of the premises must be brought within six months after the entry of judgment for the balance of the debt. N.J.S.A. 2A:50-4. The statutory right of redemption after the entry of a deficiency judgment cannot be waived by the mortgagor.

There are two notable exceptions to the revival of this right of redemption after sale. First, if the parties liable for such deficiency have answered, disputing the amount of the deficiency, the effect of such answer shall be to terminate the right to redeem (from the foreclosure sale as provided under N.J.S.A. 2A:50-4), and the recovery for deficiency shall not reopen the foreclosure and sale of the premises or result in any right of redemption being revived. N.J.S.A. 2A:50-5. Second, if the deficiency being pursued by the lender relates to a junior mortgage that was extinguished by the foreclosure of a prior mortgage and sale, the entry of a deficiency judgment against the debtor will not reopen the foreclosure and result in any right of redemption. N.J.S.A. 2A:50-9.

If the “foreclosure first” requirement does not apply, the mortgage note or bond holder may sue the maker or obligor in an independent action at law, without compliance with the deficiency action statutes. In such an instance, a right of redemption does not arise on the entry of a judgment on the secured obligation.

## XI. MISCELLANEOUS

### A. Usury

New Jersey law provides only limited usury restrictions. There is no maximum civil legal rate of interest applicable to loans of USD50,000 or more, where such loans are not secured by a first lien on real property on which there is erected or to be erected a structure containing one to six dwelling units, a portion of which may also be used for non-residential purposes. N.J.S.A. 31:1-1(e)(1). Loans of USD50,000 or more (not secured by real estate of the nature referenced above) may be negotiated at any rate agreed upon by the borrower and lender, subject to criminal usury where the interest rate is in excess of (i) 30% for loans to individuals, or (ii) 50% for corporations. N.J.S.A. 2C:21-19.

For loans under USD50,000, the legal rate of interest is 6% per annum, or, where there is a written contract specifying the rate of interest, the legal rate of interest is 16% per annum. N.J.S.A. 31:1-1(a). This rate is subject to increase by regulation by the Commissioner of Banking in the case of loans secured by first liens on real estate on which there is to be erected a structure containing one to six dwelling units, a portion of which may be used for non-residential purposes.

In a situation where a contract is usurious under state law, the lender may only collect the amount lent and forfeits all interest. N.J.S.A. 31:1-3. However, a corporation, limited liability company, or limited liability partnership may not assert a defense of usury to any action brought against it to recover damages or to enforce a remedy under any obligation owed by such corporation, limited liability company, or limited liability partnership. N.J.S.A. 31:1-6. This applies to individual defendants who have executed personal guarantees of corporate debts. *See Armin Corp. v. Kullman*, 127 N.J. Super. 600, 603 (Law Div. 1974) (“It is ... well established in the decisions in New Jersey that an individual guarantor of a corporate obligation falls within the ambit of N.J.S.A. 31:1-6, *i.e.*, cannot assert the defense of usury, at least as to interest on the principal debt, which interest itself the individual has undertaken to guarantee.”).

Notwithstanding the provisions of N.J.S.A. 31:1-1 or any other New Jersey statute to the contrary, banks, saving banks, savings and loans associations and credit unions may charge any periodic percentage rate on outstanding balances and include any other charges or fees on any class or type of loan (other than residential mortgage loans and any loan which such lender is not otherwise authorized by law to make), that is permitted to any other lender by the laws of the State of New Jersey with respect to that particular class or type of loan.

### B. Professional Licensing

Licenses are required for a large number of professions and businesses. The New Jersey Division of Consumer Affairs, through numerous boards and committees, regulates approximately 80 professions and occupations. A complete list of the licensing boards regulating professions and businesses in the Division of consumer Affairs can be found at <http://www.state.nj.us/lps/ca/list1.htm>.