LITIGATION QUARTERLY
ADVISOR

IN THIS ISSUE:

NON-DISCLOSURE AGREEMENTS

Confidentiality Agreements (otherwise known as Non-Disclosure Agreements or NDA's) for employees are an important tool for employers to govern their employees' access to and use of information. NDA's are used to protect sensitive information owned by the employer, including trade secrets and other proprietary data, client lists/information, vendor names, sales/marketing plans, and company financial information. Great care should be taken to specify exactly what information an employer wants to keep secret to ensure enforceability NDAs must also account for New Jersey's restriction on keeping employee claims of discrimination, harassment or retaliation, confidential.

One consideration in the success an employer will have in enforcing the NDA is whether the employer also has to take steps to keep its information confidential. One increasingly common method of document retention is storing documents in the Cloud or similar remote storage. However, these options and the protections they offer should be carefully considered. When reviewing remote storage options, thought should be given as to whether access can be restricted, documents can be encrypted, and there are any safeguards against accidental sharing and third party access. If these protections are in place, it strengthens the employer's position that they have taken steps to keep the documents confidential and thus, makes it more likely that the employer will be able to enforce the NDA. Even with these protections, data breaches remain a concern. There is no one size fits all approach.

If you have any questions regarding NDAs, please contact:

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RESTRICTIVE COVENANTS: THE MORE THINGS CHANGE THE MORE THEY STAY THE SAME

Flashing back to 2024, the country's employers had a near universal gasp at the proposed Federal Trade Commission (FTC) rule that would have largely banned employers from imposing restrictive covenants on their employees and former employees. Then came one federal court in Texas that temporarily blocked the rule, followed by a federal court in Pennsylvania that rejected an attempt to block the rule; then came January 16, 2025 when the U.S. Department of Justice and FTC issued Antitrust Guidelines for Business Activities Affecting Workers; and then came a new administration. At this point most employers are wondering: so what exactly has changed with respect to employee restrictive covenants? The answer as of publication is: not much for most employers. So now is probably an appropriate time to remind New Jersey employers what they can and cannot do by way of restrictive covenants with employees and former employees.

As recent as 2019, in *ADP, LLC v. Kusins*, 460 N.J. Super. 368 (App. Div. 2019) and *ADP, LLC v. Rafferty*, 923 F.3d 113 (3d Cir. 2019), our New Jersey state and federal courts reiterated the long standing precedent known as the *Solari/Whitmyer* factors governing the enforceability of post-employment restrictive covenants. This test is similar to the test applied in New York and many other states that permit these restrictive covenants in the employer/employee setting.

Under the *Solari/Whitmyer* factors, a restrictive covenant is enforceable if it protects the legitimate business interests of the employer without imposing undue hardship on the employee, and is not injurious to the public. An employer's legitimate business interests include the protection of trade secrets or proprietary/confidential information, as well as customer relationships. In some instances, investment or training of an employee can constitute a legitimate business interest. But an employer does not have a legitimate interest in simply preventing competition. Therefore, employers should ensure that their restrictive covenants protect only their legitimate business interests or otherwise risk a court finding the covenant to be unenforceable. If the employer can establish a legitimate business interest, the covenant should be enforceable provided that enforcement does not cause the employee an undue hardship or harm the public interest.

All three of these factors are routinely weighed by courts when confronted with a dispute between an employer and a former employee. The case law results are as diverse as the facts and circumstances of each case. Therefore, while these covenants are enforceable in New Jersey, New York, and many other states, each dispute requires a fact specific analysis and knowledge of how courts in each venue come out in each circumstance.

Please contact us if you would like more information on restrictive covenants:

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DOMESTIC WORKER'S BILL

The Third Circuit recently upheld a whopping $7M+ award against a home healthcare company and its owner because the company had failed to pay employees for travel time to client homes, time during short breaks of twenty minutes or less, and overtime and because of its inadequate recordkeeping of time worked. *Sec'y United States Dep't of Lab. v. Nursing Home Care Mgmt. Inc.* 2025 WL 351599 (3d Cir. Jan. 31, 2025). The case began when the U.S. Department of Labor ("USDOL") conducted a fairly narrow audit of the business, identified some relatively trivial infractions, and then expanded the scope of its review.

This case is a powerful reminder of some very basic wage and hour rules.

1. Breaks of less than twenty minutes during a workday are always compensable.
2. Travel time during a workday is typically compensable, though the rules can be complex.
3. Overtime is due after forty hours during a work week for most non-exempt employees.
4. Employers must keep good daily time records and be fully prepared whenever confronting an audit request.

Employers also to have be mindful of compliance with state wage and hour and workplace laws, which often vary from federal law. If the home healthcare company in this lawsuit had employed aides in New Jersey, for example, it also would have had to comply with the recently enacted New Jersey Domestic Workers' Bill of Rights ("DWBR"). The DWBR requires employers to notify all domestic workers of their rights, and to provide employees who work more than five hours per month a written contract in English and their preferred language detailing their job duties, hourly and overtime wages, work schedule, pay method and frequency, benefits, breaks, paid holidays, paid or unpaid leave, modes of transportation and housing (if applicable), the term and duration of their contract, and any other agreed upon terms and conditions of employment. The DWBR prohibits these contracts from mandating arbitration and subjecting employees to restrictive covenants, including non-disclosure, non-competition, and non-disparagement agreements. The DWBR further requires employers to provide workers' compensation insurance, maintain records of hours worked and the accrual and use of leave, and give notice prior to termination under certain

circumstances. For those employers who have paid a domestic worker $1,000.00 or more within the past year, there are additional registration, recordkeeping, and tax obligations.

Compliance is essential and can save your business and its owners significant legal and financial exposure.

For more information on your employer obligations under the state and federal wage and hour laws and the DWBR, please contact:

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BALANCING FLEXIBILITY AND COMPLIANCE: A LEGAL GUIDE TO REMOTE WORK POLICIES

Although the COVID pandemic is behind us, many employers are still permitting their employees to work from home. Whether employees work from home full time or only one day a week, companies need to implement written "Work From Home" policies for various reasons, including to protect its confidential information.

When people work from home, they may use unsecure Wi-Fi networks, forward information to their personal email address to use their home printer, leave confidential paperwork on a kitchen table, or attend virtual meetings over third-party communication platforms with various people passing by that could hear every word spoken by all persons on the meeting. These concerns are mitigated when working in the office because companies can exercise control over these scenarios.

As a result, companies should consider remote work policies that may include:

- Procedures for handling and protecting confidential information.
- Designating a secure means for employee communications.
- Prohibiting employees from using certain identified unsecure programs and applications to communicate or upload information.
- Ensuring all remote devices possess all necessary security protections.
- Establishing security measures such as multi-level authentication, strong passwords, and automatic log-offs.
- Requiring devices to be kept in a secure, private location that can only be used by the employee.

For more information on how to adopt, implement and enforce remote work policies, please contact:

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DEI ANOTHER DAY

In January 2025, the new administration issued several executive orders and directives aimed at curtailing DEI initiatives, including:

1. The "Ending Radical and Wasteful Government DEI Programs and Preferencing" Exec. Order (January 20, 2025), which directed federal agencies to "terminate, to the maximum extent allowed by law, all … 'equity-related' grants or contracts";
2. The "Ending Illegal Discrimination and Restoring Merit-Based Opportunity" Exec. Order (January 21, 2025), which required federal contractors to certify "that it does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws";
3. The revocation of Executive Order 11246, which had required, since 1965, equal opportunity in federal contracting; and

4. A directive instructing the Attorney General to develop a "strategic enforcement plan" identifying "potential civil compliance investigations" of organizations with DEI programs.

In response to the latter directive, the U.S. Department of Justice issued a Memorandum on February 5, 2025 to identify "potential civil compliance investigations" of certain organizations, particularly "publicly traded corporations, large non-profit corporations or associations, foundations with assets of 500 million dollars or more, State and local bar and medical associations, and institutions of higher education with endowments over 1 billion dollars." The memo also directs the Civil Rights Division to "investigate, eliminate, and penalize illegal DEI and DEIA preferences, mandates, policies, programs, and activities in the private sector and in educational institutions that receive federal funds." It specifically calls for identifying "the most egregious and discriminatory DEI and DEIA practitioners in each sector" and developing proposals for "up to nine potential civil compliance investigations" targeting certain organizations.

The EEOC has also responded to the Executive Orders with various actions, including publishing on March 19, 2025 a primer "What You Should Know About DEI-Related Discrimination at Work" and formerly querying twenty of the largest law firms in the United States about their DEI programs.

All employers have had to assess (among other things) whether they have a program that might be considered a DEI program, whether their program falls within the ambit of the Executive Orders, whether the Executive Orders are enforceable, and whether having a DEI program will make them likely targets of the U.S. Dep't of Justice or the EEOC or of a plaintiff or class of plaintiffs alleging "reverse" discrimination.

For more information, please contact:

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ENGAGING IN THE INTERACTIVE PROCESS WITH DISABLED EMPLOYEES – ARE YOU DOING IT RIGHT?

Under various local, state and federal laws employers are obligated to provide reasonable accommodations to disabled employees. The employee is not required to specifically state that they are requesting a "reasonable accommodation." Rather, the employee need only let the employer know (verbally or in writing) that they need an adjustment or change at work for a reason related to a medical condition. The "interactive process" requires the employer and the disabled employee to engage in an open line of communication for the purpose of working together cooperatively to come up with an appropriate accommodation for the employee's disability.

The purpose of the interactive process is to identify and evaluate the viability of potential workplace accommodations to enable the disabled employee to perform the functions of their job. Although the employer should consider in good faith any accommodations suggested by the employee or their healthcare provider, the interactive process does not require the employer to provide the specific accommodation requested by the employee. At the same time, the employer cannot unilaterally determine the accommodation without first engaging in the interactive process with the employee. The basic purpose of this collaborative dialogue is to allow employers and employees to share crucial information and work toward solutions that:

- Address the employee's specific limitations
- Maintain workplace productivity and safety
- Consider multiple accommodation possibilities

Examples of accommodations that employers might be obligated to consider include:

- Modified work schedules
- Physical workplace modifications
- Environmental adjustments
- Modified equipment or devices
- Temporary or permanent relocation
- Leave time
- Modification of workplace policies
- Reassignment of non-essential job duties

Prudent employers and employees involved in human resources should:

- Establish clear procedures for handling accommodation requests
- Respond promptly to all accommodation inquiries
- Document the interactive process and good-faith efforts to accommodate the employee
- Train supervisors on interactive process obligations
- Review current accommodation practices periodically
- Consult with legal counsel when complex accommodation issues arise

For more information, please contact:

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LEAVES OF ABSENCE: PROTECTING YOUR BUSINESS WHILE SUPPORTING EMPLOYEES

When it comes to responding to employee leave of absence requests, it is not enough for a business to simply rely upon their own internal policies and procedures. In many situations those internal policies and procedures simply do not accurately reflect the businesses' actual obligations under the myriad of local, state and federal laws that grant employees the legal right to a leave of absence. Under some of these laws a business that has only a single employee could potentially be obligated to provide a leave of absence.

At the federal level, leave obligations may be imposed under Family and Medical Leave Act ("FMLA") and the Americans with Disabilities Act ("ADA"). In New Jersey, additional leave obligations may be imposed under the New Jersey Family Leave Act ("NJFLA") and the New Jersey Law Against Discrimination ("NJLAD"). Under these laws an employer's obligations may be triggered as soon as the employer has reason to believe a leave may be needed (i.e., even if no formal leave request has been made).

Employees should be thinking about the following:

1. What leave laws apply to a request for leave?
2. What reasons qualify an employee for leave?
3. What eligibility requirements apply?
4. What amount of leave must be provided?
5. What are the employer's notice and documentation obligations?
6. What other obligations are there beyond granting leave?

Each leave of absence is unique and fact sensitive and should be treated as such.

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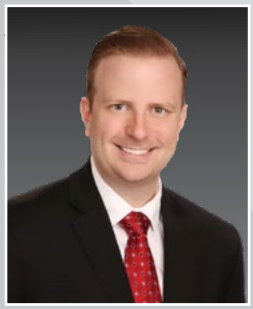
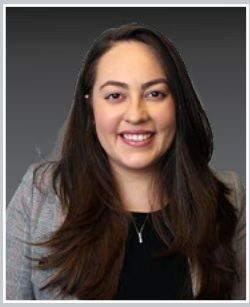
ATTORNEY **SPOTLIGHT**

Get to know the faces and stories of the people behind the articles in each issue. This month, we invite you to meet Member **Michael A. Spizzuco, Jr.** and Associate **Ashley L. Matias**.



MICHAEL A. SPIZZUCO, JR.

Michael's primary focus is assisting clients in the construction, manufacturing and supply-chain management sectors, with an expansive litigation practice encompassing both New Jersey and New York state and federal courts. He represents construction companies of all sizes in various matters including construction defects, contractual disputes, mechanic/construction lien law claims, warranty claims, and public-works project disputes. Michael also reviews and drafts contracts for businesses, project owners, general contractors, subcontractors, and suppliers. Additionally, he serves his clients in defending Division of Consumer Affairs investigations. On the weekends, Michael looks forward to traveling with his wife, Marissa, and embarrassing himself as often as possible on the golf course.



ASHLEY L. MATIAS

Ashley L. Matias concentrates her practice on labor and employment. Ashley represents employers and individual employees in the private and public sector in matters involving state and federal claims of discrimination, harassment, retaliation, and whistleblowing as well as wage and hour disputes and unemployment benefits appeals. Ashley has appeared before state and federal agencies, including the Division on Civil Rights ("DCR") and the Equal Employment Opportunity Commission ("EEOC") and participated in mediations to amicably resolve employment matters. Ashley uses her litigation experience to counsel employers across numerous industries on state and federal employment law compliance, policy drafting and implementation, and enforceability of employment agreements, including restrictive covenants. Ashley takes a proactive approach to counsel clients on employee onboarding, training, discipline, leaves of absence, and separation. Ashley also conducts internal investigations of workplace complaints and counsels clients on effective strategies to respond to and remediate workplace issues. In her spare time, Ashley enjoys spending time with her family, cooking, and writing children's books inspired by her son.

On March 4th, *The New Jersey Law Journal* published its "2025 New Partners Yearbook" which announces new partners from 2024. Brach Eichler's litigation members **Stan Barrett, Corey Dietz, Anthony Juliano, Thomas Kamvosoulis,** and **Michael Spizzuco** were recognized.

On February 15, **Susan Rubright**'s client was highlighted on *NJ.com* for a recent court decision against Chester Township for failure to enforce stormwater regulations.

On February 10, the **Honorable Lisa F. Chrystal, P.J.F.P** (Ret.), who focuses her practice in the areas of Alternative Dispute Resolution (ADR), mediation and arbitration, was selected as a 2025 "Leader in Law" by *NJBiz*, in the Third Party Neutral: Mediator, arbitrator, conciliator, evaluator, etc. category! This program honors "legal professionals – lawyers and general counsels – whose dedication to their occupation and to their communities is outstanding."

On February 10, *The New Jersey Law Journal* published **Sean Smith**'s article entitled "Sound the Alarm: Social Media, AI and the Systems that Will Create Sexual Predators" warning parents to be aware that the use of social media has and will continue to expose children to algorithms, artificial intelligence and readily available software which will result in civil lawsuits being filed against parents and other supervisors of the children for negligence, defamation and other privacy torts.

On January 9, **Keith Roberts** and **Shannon Carroll** issued a client alert entitled "Appellate Division Decides That IFPA Claims Are Not Subject to PIP Arbitration."

WINS AND SIGNIFICANT BRACH EICHLER LITIGATION DEVELOPMENTS

- **Andrew Macklin** and **Theodore McEvoy** successfully removed a Manager and Member from an LLC in a summary matter based on his misconduct in the business of the LLC as well additional misconduct unrelated to the LLC which recently landed him in federal prison. We were also able to secure an order deeming his financial interest in the company sold back to our client for $0.

- **Stuart Polkowitz** and **Theodore McEvoy** secured a significant litigation victory, defeating dismissal motions and obtaining a partial summary judgment compelling primary and excess D&O insurers to defend our clients up to the full $6 million policy limits. The Hudson County court's February 28, 2025 order requires the insurers to fund and reimburse substantial defense costs in a major underlying case pending in the Eastern District of New York. Additionally, the ruling allows the firm to seek reimbursement of attorneys' fees and costs incurred in prosecuting the coverage action.

- **Anthony Rainone** and **Michael Spizzuco** successfully filed a claim against the defendant for increased construction supply costs caused by its failure to honor a fixed price contract at a time where construction supplies (commercial pipe in this case) increased exponentially. Specifically, our client, due to the breaches of the defendant, would have to spend approximately $600,000.00 more in replacement product. After several years of litigation, and the production of relevant documents and testimony establishing Plaintiff's damages, the Trial Court found our proofs were insufficient, that we could "never" prove damages, and dismissed the claim in its entirety. On appeal, we convinced the appellate division that our claims were valid and that the evidence we had needed to be seen by a jury. The Appellate Division agreed, and reversed the decision of the trial court.

- **Anthony Rainone**, **Autumn McCourt** and **Aladekemi Omoregie** succeeded on a motion to reconsider filed on behalf of our client, plaintiff in a whistleblower/corporate governance case, which caused the trial court to reverse its own prior dismissal of several claims relating to the corporate governance aspect of the case.

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