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Statement to the New Jersey Assembly Committee on Women and Children

A-2647 A-2648 A-2649 A-2650

Thank you. It is a privilege to be back before the committee. By way of re-introduction, my name is John Sarno, President & General Counsel for the Employers Association of New Jersey (EANJ).

Let me also reiterate that I believe that the Committee is engaged in important work for every citizen in the state, particularly working women.

Let me also mention again that EANJ is nonprofit trade association comprised of New Jersey employers EANJ does not engage in lobbying. Since 1916, it has provided advice, counsel and training to employers on labor, employment and health care issues. I am a labor and employment lawyer and teach employment law. Therefore my remarks will focus on various legal issues raised by A-2647, A-2648, A-2649 and A-2650, which seek to narrow the wage gap between men and women within the state by, among other things, amending the New Jersey Law Against Discrimination (NJLAD) and the New Jersey Conscientious Employee Protection Act (CEPA).

While well-meaning, I believe that most of the substance of these bills present serious and complex obstacles to their validity and enforceability.

As I mentioned during my last appearance before the Committee on February 6th, in New Jersey, about half of the state's workforce is comprised of working women. Women comprise the majority of professional, technical, administrative support workers and women comprise the majority of sales and service workers in the state. Women are obviously a vital human resource to the state's employers and not in numbers alone. It is beyond doubt, the success of the state's economy depends upon women striving and thriving at work.

As I mentioned, there appears to be a direct correlation between caregiving and wages. Working women also provide most of the caring giving as well. Whether it is caring for a child or an ill family member, it is women that are significantly more likely than men to be caregivers. The Rutgers Center for State Health Policy has estimated that there more than 700,000 working-age adults in New Jersey that provide care for a family member. About six in ten of these care givers work full-time.

Two days ago, the Economic Policy Institute issued a report that found that the average inflation-adjusted hourly wage for male college graduates aged 23 to 29 dropped 11% over the past decade to $21.68 in 2011. For female college graduates of the same age, the average wage is down 7.6% to $18.80.

This data is troubling but suggests that the wage disparity between men and women is caused by factors other than job discrimination. Multiple factors relating to educational and occupational choices, time spent off the job, and delayed entry into the workforce all play a part in this statistical disparity.

I am not suggesting that time spent off the job and delayed entry into the workforce is the only factors that may cause wage disparities, but the Economic Policy Institute report suggest that when men and woman enter the workforce together to obtain their first entry-level job after college, the wage gap substantially narrows.

Additionally, the report clearly demonstrates the supply and demand of the Great Recession and globalization. Wages for the average worker have declined and wage growth generally has been suppressed. At the same time, the demand for educated workers, particularly in entry level jobs, has narrowed the wage gap between men and women.

As we discussed on February 6th, it is unlawful under both federal and State law to discriminate against workers because of sex or gender, including discrimination in wages and benefits

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

In addition to Title VII and LAD, both federal and State law prohibit unequal pay specifically because of sex and gender.

The federal Equal Pay Act, which is part of the Fair Labor Standards Act, prohibits sex-based wage discrimination between men and women in the same establishment who perform jobs that require substantially equal skill, effort and responsibility under similar working conditions. Additionally, a provision of the New Jersey Wage and Hour law – N.J.S.A. 34:11-56.1- 11 - prohibits wage discrimination because of sex or gender. Like Title VII, LAD and the federal Equal Pay Act, the New Jersey equal pay statute provides robust remedies to aggrieved employees.

So I will reiterate, there are four powerful laws in the State that deter and remedies wage discrimination because of sex and gender. Importantly, these laws also prohibit retaliation against employees who complain to their employer about unequal pay or discriminatory pay practices or when they file a charge to the Equal Employment Opportunity Commission or the N.J. Division on Civil Rights.

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

As employees are free to file charges and lawsuits, employers are permitted to defend themselves of such allegations. Suffice to say, litigation in this area of the law is very complex, requiring a sophisticated understanding of burdens of proof, among other things.

A-2647, A-2648, A-2649 and A-2650, seek to narrow the wage gap between men and women within the state by, among other things, amending NJLAD and CEPA. While well-meaning, I believe that most of the substance of these bills present serious and complex obstacles to their validity and enforceability.

A-2647 requires every employer in the State, regardless of size, to post notification, in a place or places accessible to all workers in each of the employer's workplaces, in a form proscribed by the Commissioner of Labor and Workplace Development, of worker rights under every applicable State and federal law that provides for gender pay equity or that prohibits wage discrimination based on gender.

The bill also requires that every employer provide each worker of the employer with a written copy of the notification: not later than 30 days after the form of the notification is issued by the commissioner; at the time of the worker's hiring, if the worker is hired after the issuance; and at any time, upon the first request of the worker.

The bill also requires that the commissioner make the notification required by this bill available in English, Spanish, and any other language that the commissioner determines is the first language of a significant number of workers in the State and that the employer post and provide the notification in English, Spanish, and any other language for which the commissioner has

made notification available and which is the first language of a significant number of the employer's workforce.

The LAD already requires such a poster and generally speaking, state law can require the distribution of a written statement and translation of that statement as well. See *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 562 (2005).

On the other hand, whether a state can require the distribution and translation of a statement summarizing federal law may be preempted by the National Labor Relations Act.

On March 2th, the U.S. District Court for the District of Columbia upheld the authority of the National Labor Relations Board (NLRB) to require most private-sector employers to post a notice notifying employees of their rights under the National Labor Relations Act (NLRA). Starting on April 30, 2012, most employers will have to post notices (and translations in many cases) at their work site and, in many cases, online.

The notice describes the NLRA and states, in relevant part, the following:

> Under the NLRA, you have the right to:
>
> - Discuss your wages and benefits and other terms and conditions of employment or union organizing with your co-workers or a union.
> - Take action with one or more co-workers to improve your working conditions by, among other means, raising work-related complaints directly with your employer or with a government agency, and seeking help from a union.

States may not regulate "activity that the NLRA protects, prohibits, or arguably protects or prohibits." *Gould, Inc.,* 475 U.S. at 286 (citing *San Diego Bldg. Trades Council* v. *Garmon,* 359 U.S. 236, 244 (1959). In *Garmon,* the Court explained that Congress intended to preempt state regulation that potentially impaired the jurisdiction of the NLRB as the federal forum for the resolution of labor disputes. State law cannot regulate the same employer or employee conduct that Congress empowered the Board to regulate under uniform national law. *See Garmon.* 359 U.S. at 242-44; *see also Gould, Inc .,* 475 U.S. at 286. When the conduct to be regulated is "plainly within the central aim of federal regulation;' then state regulation presents a "danger of conflict between power asserted by Congress and requirements imposed by state law" and "potential illustration of national purposes." *Garmon,* 359 U.S. at 244.

Garmon preemption, however, is broader than simply preempting matters plainly within the aim of the NLRA. *Garmon* preemption also applies even when it is unclear that the conduct to be regulated is subject to the Board's power under the NLRA. "When an activity is arguably subject to § 7 or § 8 of the [NLRA]. The States as well as the federal courts must defer to the exclusive competence of the NLRB if the danger of state interference with national policy is to be averted." *Id.* at 245. The preemption of state law that is "arguably" subject to the NLRA protects

the Congressional policy that allows the NLRB to decide whether a subject is to be regulated under the NLRA. *Id.* at 245. The NLRB is charged with using its procedures and "its specialized knowledge and cumulative experience" to apply the NLRA and, in many circumstances, to define the scope of what is addressed by the NLRA. *Id.* at 242. Thus, the first step in evaluating preemption under *Garmon* is to examine whether the employer conduct to be regulated by state law is "arguably subject" to being addressed by the NLRB.

A-2648 amends CEPA by prohibiting retaliation when an employee "Discloses to any other employee or former employee of the employer, or any authorized representative of the other employee or former employee, information regarding the job title, occupational category, and rate of compensation, including benefits, of any employee or former employee, or the gender, race or other characteristics of the employee or former employee for which it is a violation of law to discriminate against an individual."

The NLRA is the federal statute that regulates most private sector labor-employer relations in the United States. 29 U.S.C. § 151 et seq. The first version of the Act, known informally as the "Wagner Act," was passed by Congress in 1935. Pub. L. No. 74-198, 49 Stat. 449 (1935). It has since been amended three times, most recently in 1974. See Labor Management Relations Act ("Taft-Harley Act"), Pub. L. No. 80- 101, 61 Stat. 136 (1947); Labor Management Reporting and Disclosure Act ("Landrum-Griffin Act"), Pub. L. No. 86-257, 73 Stat. 519 (1959); Health Care Amendments, Pub. L. No. 93-360, 88 Stat. 395 (1974).

Among other things, the NLRA defines unfair labor practices for both employers and labor organizations, and, in particular, it provides: "[i]t shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [the NLRA]." 29 U.S.C. § 158(a)(1).

On balance it would appear that A-2647, as it relates to the distribution and translations of statements summarizing federal laws and A-2648, insofar as it pertains to "employee," are preempted by the NLRA.

Only "employees" have legal rights under the NLRA. Supervisors, managers and other agents of the employer are not covered by the law. Supervisors, managers and other agents of the employer owe a legal duty of loyalty, confidence and trust to the employer. See generally *Lamorte Burns & Co. v. Walters*, 167 N.J. 285 (2001). Moreover, information about wages and compensation is considered proprietary knowledge. See *Harris v. Richland Community Health Care Association*, C.A. No. 3:07-0421 (D.S.C. Sept. 14, 2009); *Niswander v. Cincinnati Ins. Co.*, 529 F.3rd 714 (6th Cir. 2008).

Employers have the legal right to protect proprietary knowledge and confidential information and supervisors, managers and other agents of the employer have the legal duty to act in the employer's best interest to protect proprietary knowledge and confidential information. The

employer therefore has the right to prevent and supervisors, managers and other agents from speaking about or disclosing proprietary knowledge and confidential information to others.

A-2648 compels supervisors, managers and other agents to violate their legal duty of loyalty, trust and confidence owed to the employer. The bill, in effect, compels an employer to think, speak and act against its own legal interest. As such, it violates the First and Fourteenth Amendments to the Constitution of the United States. See *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) ("[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all."); *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006) ("[F]reedom of speech prohibits the government from telling people what they must say.")

Likewise, A-2649 requires any employer who contracts with the State to report to the Commissioner of Labor and Workforce Development information regarding the gender, race, job title, occupational category, and rate of compensation, including benefits, of every employee of the employer employed in the State in connection with the contracts, and provide updates of the information.

The Commissioner is required to retain the information and make it available to the Division of Civil Rights in the Department of Law and Public Safety, and, upon request, provide it to anyone who is or was an employee of the employer during the period of the contracts, or any authorized representative of the employee. The bill also prohibits the disclosure by the Commissioner of the identity of the employee or representative making the request.

It is my considered opinion that the First Amendment would preempt A-2649 aw as well. See *Chamber of Commerce v. Brown*, 471 U.S. at 740 (2008) (California's labor relations neutrality statute applying to state government contractors preempted by federal law); Boy Scouts of America v. Dale, 530 U.S. 640 (2000) (First Amendment preempts NJLAD).

A-2650 would amend NJLAD and provide that "an unlawful employment practice occurs, with respect to discrimination in compensation or in terms, conditions or privileges of employment, when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation are paid, resulting in whole or in part from such a decision or other practice."

It appears that A-2650 would adopt the "paycheck rule" in the Ledbetter Fair Pay Act. Assuming that unequal pay is the result of a discriminatory act, rule would permit employees to reclaim lost compensation, no matter when the initial discrimination took place, as long as the claim is filed within NJLAD's two-year statute of limitations starting from when the last paycheck was received.

But unlike the Ledbetter Fair Pay Act, which requires employers to repay employees for decades of discriminatory pay differentials. Congress limits the amount of lost income that an employee can recover to no more than back pay for two years prior to when the employee filed the discrimination claim, A-2650 requires employers to repay employees for potentially decades of discriminatory pay differentials. Thus, as a practical matter there is no statute of limitations and an open-ended legal exposure. Truthfully, A-2650 would create a litigation nightmare in New Jersey.

Equally troubling, A-2650 makes no mention of the "market force" defense for employers. Generally speaking, where there is a pay disparity performing the same or similar job and requiring substantially equal skill, effort and responsibility under similar working conditions, an employer must show that a factor or factors other than sex accounts for the disparity. These include: (1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) a differential based on any other factor other than sex, which includes "market forces." For example, it could be that an employer is trying to lure away an employee from another company, who happens to be a man. To do so, the employer decides to raise the salary for the job as an inducement to accept the offer. That salary is now higher than an existing employee performing the same work who happens to be a woman. Paying the higher salary to induce the male to take the job is not unlawful discrimination. The wage disparity was the result of a market bargain. I have cited the relevant case law in my February 6th statement to the Committee.

Likewise, case law recognizes the years an employee logs on and off the job as a "market force." And as already noted, woman will spend more time off the job because the caregiving role within the wider society falls disproportionately on them.

As I pointed out on February 6th, this is the issue that is most complex of all. It is permissible for an employer to base a pay decision on a factor other than sex, such as years on the job. Yet woman, on average, will spend fewer years on the job because of their role as caregiver. For this same reason, women will also delay entry into the workforce in the first instance. Presumably, this decision has been made willingly. It would be immoral if not otherwise. But even if life's circumstances made this choice less than optimal, the law does not provide a remedy for this situation. It would be the same for any man. If circumstances resulted in a break in service from the job, he too would be subject to the same market forces.

In short, by commission and omission A-2650 leaves employers highly to unending litigation for just about every employment decision that is made.

In New Jersey, as well as nationally, the costs associated with employment-related litigation may be creating a significant impediment to hiring, wage growth and job creation. Employment-related litigation, such as harassment and discrimination, unequal pay and all forms of wrongful

termination, increases the costs of hiring and firing and evidence suggests that such litigation has suppressed hiring and wage growth for decades.

For now, however, I will try to answer whatever questions that you may have. Thank you.