



MEMORANDUM

TO: Members of the Assembly Labor Committee
FROM: Alida Kass, Chief Counsel
SUBJECT: Assembly Bill 2345
DATE: May 12, 2014

The New Jersey Civil Justice Institute is a statewide, bipartisan coalition of the state's largest employers, small businesses, and leading trade associations advocating for a fair and predictable civil justice system in New Jersey. On behalf of our members, **we respectfully oppose A-2345.**

While this bill appears to be a mere matter of disclosure, there are potential broader ramifications that are likely unintended.

We are concerned the bill will create a data mine of employment information of any employer doing business with any level of government. It could unfortunately be put to good use by the plaintiff trial bar to generate litigation, and prompt employers to think twice before doing business with the state. To the extent employers choose to do so, the costs of both compliance and risk will be factored into their pricing. Essentially public entities will be contracting for both the supply of services and the risk of a lawsuit, as a package deal.

As you probably know, there are two theories of liability for discrimination claims under Title VII at the federal level, and the Law Against Discrimination (LAD) at the state level: intentional discrimination, and disparate impact discrimination. Disparate impact liability results when employment practices that are neutral on their face, and not implemented with discriminatory intent, nevertheless have a disparate impact based on a protected classification.

It is reasonable to ask whether this combing through the files in search of litigation opportunities is actually beneficial. If there are violations of the law, aren't we all better off if they are addressed, no matter how they arise?

But data always reflects disparities. The danger of disparate impact litigation is that where inevitable disparities exist, the burden shifts to employer to defend the practices alleged to have caused the statistical aberrations as justified by business necessity. This is costly, burdensome, and can significantly hamper effective business practice.

A recent article in the Wall Street Journal, "When Disparate Impact Bites Back," highlights a report that the Consumer Financial Protection Bureau (CFPB), the very agency that has been

targeting banks for the disparate impact of lending practices, is itself plagued by the very same kind of disparities in its own performance review statistics.

The author of the piece, himself a former employee of the agency, details the extraordinary efforts undertaken at the agency to purge itself of unintentional discrimination, and finds it “inconceivable that CFPB’s management could be discriminating against its workers.”

The reality is, statistical disparities are astonishingly common. Which is why the appropriate start to any litigation is a plaintiff who has actually suffered an injury. Not a lawyer with a good business model.

The New Jersey Civil Justice Institute respectfully requests that the committee hold the bill.