



MEMORANDUM

TO: Members of the Assembly Labor Committee
FROM: Alida Kass, Chief Counsel
SUBJECT: Assembly Bill 2354
DATE: October 8, 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-2354.**

Although proponents of the bill focus on allowing employees to stay home when they are sick, the legislation would do much more than that. Indeed, employers that already offer more generous paid sick leave to their employees than what would be mandated under the bill are nevertheless opposing this legislation.

The reason is largely because of the liability implications of the bill.

Where feasible, employers already try to accommodate the reality that everyone gets sick on occasion or needs to care for an ill family member. When implemented on a voluntary basis, the employer is able to offer accommodation where possible, while retaining the flexibility necessary to make those accommodations work for specific circumstances of their business. So, for example, if an employee is habitually "sick" the Friday before long weekends, a discretionary sick leave policy affords the flexibility to address that practice informally. Similarly, if an employee needs to take time off, the employer can modify assignments to ensure that necessary work is done.

That flexibility is eliminated by the very aggressive liability provisions that have been included in this bill.

Under this bill, an employee who does almost anything related to paid sick leave, including simply informing any person about the availability of paid sick leave, gets a 90 day window during which any adverse employment action is presumed to be retaliatory. The burden would then be on the employer to prove in court that the action was unrelated to the employees' sick leave-related activity. But it is not at all clear that reassignments to meet business demands would even be lawful under this legislation, since "retaliatory action" is defined to include even an unfavorable work reassignment.

The expansive scope of potential liability is compounded by the severe penalties that attach to violations of this legislation. Plaintiffs are entitled to actual damages plus an equal amount of punitive damages, plus attorney fees and court costs. The bill also provides for whistleblower claims, which include treble damages and attorney fees, where an employee mistakenly alleges violations of the act, if the allegation is made in good faith.

These very aggressive liability provisions mean that whatever litigation results from this legislation would represent only its most obvious ramifications. Many claims would settle immediately because of the potential costs of double damages and one-way fee-shifting for attorney fees. And more broadly, the most significant impact - the costs resulting from the lost flexibility in managing employees, just to avoid potential claims – would not be reflected in the dockets at all, but in higher prices and inconvenience to consumers.

If this legislation is enacted, New Jersey would be the only state with these aggressive litigation remedies. To date, only California and Connecticut have implemented paid sick leave, and neither of these states provide for an individual cause of action. The statutory recourse is to file a complaint with the respective Labor Commissioner and statutory penalties in both states apply at \$100 per violation. In addition, California law expressly precludes liability for isolated and unintentional errors and has a mere 30 day window of presumptive retaliation for any complaints filed with the Commissioner. Connecticut has no window of presumptive retaliation at all.

We would encourage the committee to hold the bill.