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**MEMORANDUM**

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**TO:** Members of the Senate Labor Committee  
**FROM:** Alida Kass, Chief Counsel  
**SUBJECT:** NJCJI's Opposition to Senate Bill 280  
**DATE:** December 8, 2014

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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 S-280.**

While we realize that no one wants employees to face a hostile work environment, we have significant concerns that many of the provisions of this bill will be counter-productive, generating unnecessary litigation, and causing actual harm to workplace environments.

Employers already have a significant interest in ensuring a hospitable and well-functioning work environment for all of their employees. Subjecting employers to a new risk of liability based on a general hostile work environment would not improve those incentives, but instead would distort them. It would put employers in the position of micro-managing employee interpersonal disputes while depriving them of the flexibility to effectively address those conflicts.

Toxic workplace environments are often the result of interpersonal employee disputes, in which employees have a long list of grievances against each other. This bill would place employers in the position of refereeing such conflicts, with the threat of litigation hanging over them should they evaluate incorrectly. Often the simplest solution to such conflicts is to separate people who simply do not work well together. Unfortunately, this bill would make a change of job responsibilities a prohibited "adverse employment action." If the employer is forced to choose, this bill would encourage him or her to favor the employee who seems most likely to sue, just to avoid potential litigation – an incentive of dubious public policy value.

There are also technical aspects of the bill that would unnecessarily incentivize litigation. The open-ended standard for cause of action is coupled with very aggressive one-way fee-shifting, providing attorney's fees where the plaintiff prevails on even a portion of his claim. The scope of individuals for whom the employer can be held responsible would expand beyond his own employees, to include the actions of independent contractors and even third parties whom the employer suffers to be on the premises.

The arbitration provision which would exclude actions under this bill from arbitration agreements also suffers from technical difficulties, and would be preempted by federal law and

US Supreme Court precedent. Agreements to arbitrate may be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability, but not to defenses that apply only to arbitration. Indeed, the Court wrote that “when state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.” (*AT&T v. Concepcion*, 2011)

Finally, although the bill has been characterized as filling a gap, existing law restricting hostile work environment litigation to protected classifications is not the result of a legislative oversight or inadvertent omission. The doctrine began as an application of the 1964 Civil Rights Act, beginning in 1971, when the courts recognized that the legacy of racism and discrimination might foster “working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers.” (*Rogers v. EEOC*, 1971) The courts recognized that employers should not be able to accomplish through that work environment the discriminatory effects that were otherwise prohibited by law.

The core of this concept was the equitable treatment of all employees. Despite some concern that the standard was vague, there was a sense that important public policy principles were at stake, and that individuals should not be treated with hostility based on some immutable, protected characteristic. That rationale has helped cabin the discretion in hostile work environment actions – it is not enough to establish the hostile treatment, an action must also establish that it is the result of the individual’s identity in a protected class. By undoing that rationale, this legislation would render all workplace disagreements potential sources of litigation.

**The New Jersey Civil Justice Institute respectfully opposes S-280.**