Chapter 1

Employment Contracts Express and Implied

I. INDIVIDUAL CONTRACTS

1-1 The Employment Relationship

It is frequently said that the relation of master and servant is not susceptible to exact definition. As a result, it is normally for the trier of fact to determine, in each case, whether an employer/employee relationship exists.[1] That determination may be significant for a number of reasons, including taxation;[2] coverage under various statutes such as the Workers' Compensation Act, the Law Against Discrimination, the Wage Payment Law, the Wage and Hour Law, and the Unemployment Compensation Law;[3]

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1. *See Pelliccioni v. Schuyler Packing Co.*, 140 N.J. Super. 190, 198-99 (App. Div. 1976); *Bennett v. T & F Distrib. Co.*, 117 N.J. Super. 439, 441 (App. Div. 1971); *Boudrot v. Dir., Div. of Taxation*, 4 N.J. Tax 268, 270 (Tax Ct. 1982) (employee status is a fact issue requiring "examination of all the facts and circumstances pertaining to plaintiff's activities and his relationship with the other parties involved in those activities"); Restatement (Second) of Agency § 220 cmt. c (1958) (Restatement of Agency). *But see* New Jersey Model Jury Charges: Civil § 5.10I (when there are no facts or inferences in dispute "concerning the elements of the relationship the judge should determine whether or not there is a master-servant relationship as a matter of law").

2. *See Domenick v. Dir., Div. of Taxation*, 176 N.J. Super. 121 (App. Div. 1980) (business expense deductions of employee-salesman disallowed); *Landwehr v. Dir., Div. of Taxation*, 6 N.J. Tax 66 (Tax Ct. 1983) (plaintiff's business expense deductions found proper on ground that he was an independent contractor, not an employee); *Boudrot v. Dir., Div. of Taxation*, 4 N.J. Tax 268 (Tax Ct. 1982) (same). *See generally* Shenkman and Freedman, *Employees, Independent Contractors and Similar Relationships in the Close Corporation*, No. 142 New Jersey Lawyer, Sept./Oct. 1991, at 32.

3. *See Kurdyla v. Pinkerton Sec.*, 197 F.R.D. 128, 132 (D.N.J. 2000) (stating that independent contractors are not entitled to the protections afforded to employees under the New Jersey Law Against Discrimination); *Estate of Kotsovska ex rel. Kotsovska v. Liebman*, 221 N.J. 568, 586 (2015) (workers' compensation); *Babekr v. XYZ Two Way Radio*, No. A-3036-13T3, 2015 WL 4643657 (App. Div. Aug. 6, 2015) (workers' compensation); *Sutkowski v. Tymczyna*, No. A-0841-09T2, 2010 N.J. Super. LEXIS 2818, at *16-17 (App. Div. Nov. 23, 2010) (workers' compensation); *Auletta v. Bergen Ctr. for Child Dev.*,

and liability for torts under the doctrine of respondeat superior.[4] The determination of whether one is an employee, however, may vary depending upon the context and any applicable statutory provisions. Courts have consistently held, for example, that the remedial purposes of the Unemployment Compensation Law require utilization of a far more expansive definition of employee than at common law.[5] The United States Supreme Court has held that when the term "employee" is used in a statute without any more than a "nominal definition," resort to the common law's definition of the master-servant relationship is necessary.[6] As defined in the Restatement of Agency, a "servant"[7] is:

> a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.[8]

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338 N.J. Super. 464 (App. Div. 2001) (workers' compensation); *Pukowsky v. Caruso*, 312 N.J. Super. 171, 180 (App. Div. 1998) (holding that independent contractors are not entitled to the protections afforded to employees under the Law Against Discrimination); *Barrera v. Experience Drywall, Inc.*, No. A-5117-08T2, 2010 N.J. Super. LEXIS 667, at *8-10 (App. Div. Mar. 30, 2010) (New Jersey Law Against Discrimination); *Dee v. Excel Wood Prods. Co.*, 86 N.J. Super. 453, 455 (App. Div. 1965) (workers' compensation); *Welsh v. Warren Cnty. Special Servs. Sch. Dist.*, No. A-2425-16T4, 2018 WL 5091790, at *5 (App. Div. Oct. 19, 2018) (determining eligibility for indemnification as public employee); Chapter 4, §§ 4-5 and 4-6 and Chapter 9, below. *See also Marino v. Indus. Crating Co.*, 358 F.3d 241, 244 (3d Cir. 2004) (indicating that an employee, in addition to a primary employer, may have an additional "special employer.") Where an employee collects workers' compensation from an employer, he or she is precluded from bringing a tort action against another employer.

4. *See* Chapter 3, § 3-18:1.

5. *See, e.g.*, *E. Bay Drywall, LLC v. Dep't of Lab. & Workforce Dev.*, 467 N.J. Super. 131, 141 (App. Div. 2021) (applying "ABC" test to determine coverage under unemployment statute); *Provident Inst. for Sav. in Jersey City v. Div. of Unemployment Sec.*, 32 N.J. 585, 590 (1960); *ABS Grp. Servs., Inc. v. Bd. of Review*, No. A-1847-12T3, 2014 WL 11291266, at *4 (App. Div. Apr. 27, 2016); *N.E.I. Jewelmasters of N.J., Inc. v. Bd. of Rev., Dep't of Labor*, No. A-2333-14T3, 2016 WL 3449263, at *2 (App. Div. June 24, 2016) ("The UCL carries a 'presumption . . . by statute that all services performed by an individual for remuneration constitutes employment for purposes of the UCL,' unless the services satisfy an exception."); *Carpet Remnant Warehouse, Inc. v. Dep't of Labor*, 125 N.J. 567, 581 (1991); *Gilchrist v. Div. of Emp. Sec.*, 48 N.J. Super. 147, 153 (App. Div. 1957).

6. *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440 (2003).

7. In *New Jersey Prop.-Liab. Ins. Guar. Ass'n. v. State*, 195 N.J. Super. 4 (App. Div. 1984), the court noted that although "servant" originally was defined in cases involving the common-law liability of the master to third parties based on the doctrine of *respondeat superior*, it has for modern purposes (in that case, coverage under the Workers' Compensation Act) become synonymous with "employee." *Id*. at 9 n.2.

8. Restatement (Second) of Agency § 220, relied on in *Pelliccioni v. Schuyler Packing Co.*, 140 N.J. Super. 190, 198-99 (App. Div. 1976); *Miklos v. Liberty Coach Co., Inc*., 48 N.J. Super. 591, 602 (App. Div. 1958).

As used in this context, "control" pertains to the employer's right to regulate the means and manner of performance of a task, as distinguished from the more limited right of one procuring the services of an independent contractor to control the end result:

> Under the control test, '[t]he relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or in other words, not only what shall be done, but how it shall be done.' In contrast to a servant, an independent contractor is defined as 'one who, carrying on an independent business, contracts to do a piece of work according to his own methods, and without being subject to the control of his employer as to the means by which the result is to be accomplished, but only as to the result of the work.'[9]

It is the right to control that is determinative, not whether the right was in fact exercised.[10]

Although control is perhaps the most important factor, it is not the only factor utilized in determining whether an employment relationship exists. The entirety of the circumstances should be considered,[11] including not only control but the following factors:

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9. *New Jersey Prop.-Liab. Ins. Guar. Ass'n v. State*, 195 N.J. Super. 4, 8-10 (App. Div. 1984) (citations omitted) (workers' compensation case). *See Wilson v. Kelleher Motor Freight Lines, Inc.*, 12 N.J. 261, 264 (1953); *Landwehr v. Dir., Div. of Taxation*, 6 N.J. Tax 66, 70 (Tax Ct. 1983).

10. *Aetna Ins. Co. v. Trans Am. Trucking Serv., Inc.*, 261 N.J. Super. 316, 326-27 (App. Div. 1993) (the exercise of control is not as important as the *right* to control: "The primary factors considered significant when analyzing the right to control include: evidence of the right of control, right of termination, furnishing of equipment, and method of payment"); *Lopez v. Moser*, No. A-1535-09T2, 2010 N.J. Super. LEXIS 1502, at *8-9 (App. Div. July 8, 2010) (workers' compensation); *Johnson v. U.S. Life Ins. Co.*, 74 N.J. Super. 343, 352 (App. Div. 1962) (workers' compensation); *Boudrot v. Dir., Div. of Taxation*, 4 N.J. Tax 268, 274 (1982).

11. *See Hicks v. Mulhallan*, No. 07-1065 (SDW), 2008 WL 1995143 (D.N.J. May 5, 2008) (applying factors and finding independent contractor rather than employment relationship); *Auletta v. Bergen Ctr. for Child Dev.*, 338 N.J. Super. 464, 472 (App. Div. 2001) (where the control test is not dispositive, the focus turns to the "relative nature of the work test"); *Pelliccioni v. Schuyler Packing Co.*, 140 N.J. Super. 190, 199 (App. Div. 1976) (in determining master-servant relationship, control is important, perhaps "even the most important," factor but it "is not the be-all and end-all of the inquiry. All of the surrounding circumstances must be considered."); *Andryishyn v. Ballinger*, 61 N.J. Super. 386, 391 (App. Div. 1960); *Boudrot v. Dir., Div. of Taxation*, 4 N.J. Tax 268, 274 (1982) (no single factor is conclusive; "an overall view of the entire situation and an evaluation of the special facts of each particular case" must be undertaken); *Landwehr v. Dir., Div. of Taxation*, 6 N.J. Tax 66, 68 (1983) (same). *Cf. Wilson v. Kelleher Motor Freight Lines, Inc.*, 12 N.J. 261, 264 (1953) (control determinative; workers' compensation case) and *Sutkowski v. Tymczyna*, No. A-0841-09T2, 2010 N.J. Super. LEXIS 2818, at *12-13 (App. Div. Nov. 23, 2010) (same). In *Aetna Ins. Co. v. Trans Am. Trucking Serv., Inc.*, 261 N.J. Super. 316 (App. Div. 1993),

1. Whether the employee is engaged in a distinct profession or occupation;
2. The type of occupation, and whether it is one normally performed by an employee or by a specialist without supervision;
3. The degree of skill required;
4. Whether the employer supplies instrumentalities, tools and the place of work;
5. The length of time of employment;
6. The method of payment;[12]
7. Whether the work is part of the employer's regular business; and
8. Whether the parties believe they are in the relationship of employer and employee.[13]

While the absence of deductions from pay for social security may have some probative value on the issue of

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a Workers' Compensation case, the Appellate Division looked to both the "right to control" and "relative nature of the work" tests. The relative nature of the work test focuses on whether there is substantial economic dependence by the purported employee upon the purported employer and whether there has been a functional integration of their operations.

> In other words, the 'relative nature of the work' is tested by 'whether the work is an integral part of the employer's business and whether the worker furnishes independent business or professional service.'

Aetna Ins. Co. v. Trans Am. Trucking Serv., Inc., 261 N.J. Super. 316, 327 (App. Div. 1993). *See generally Peck v. Imedia, Inc.*, 293 N.J. Super. 151, 160-61 (App. Div. 1996) (holding that plaintiff was an independent contractor rather than an employee where she never completed an IRS W-2 form or an INS I-9 form, she did not receive an employee manual, and defendant did not take federal and state withholdings from plaintiff's compensation); *Dunellen Borough v. F. Montecalvo Constr.*, 273 N.J. Super. 23, 28-29 (App. Div. 1994) (noting that there are situations, including cases involving professional employees where the employer would not normally control the details of the work, where the control test is not dispositive); *Swillings v. Mahendroo*, 262 N.J. Super. 170 (App. Div. 1993) (finding registered nurse performing in-home services was an independent contractor and holding that the analysis applied in making that determination should reflect her professional status).

12. However, mere payment by the hour is not inconsistent with the status of independent contractor. *Dee v. Excel Wood Prods. Co.*, 86 N.J. Super. 453, 458 (App. Div. 1965) (quoting *Petrone v. Kennedy*, 75 N.J. Super. 295, 304 (App. Div. 1962)).

13. *Miklos v. Liberty Coach Co., Inc.*, 48 N.J. Super. 591, 602 (App. Div. 1958). In *Landwehr v. Dir., Div. of Taxation*, 6 N.J. Tax 66, 68-69 (Tax Ct. 1983), the eight factors listed for determining employee status under the New Jersey Gross Income Tax were: (1) the relationship the parties believed they created; (2) the extent of the right to control (regardless of whether exercised) the manner and method of performance; (3) whether the person providing service incurred substantial costs; (4) whether special training or skill was involved; (5) the duration of the relationship; (6) whether the person providing service assumed a risk of loss; (7) whether the person providing service could be discharged without cause; and (8) the method of payment utilized.

> whether an employer-employee relationship exists, neither the making nor the failure to make such deductions is in itself determinative.[14]

In *Pukowsky v. Caruso*,[15] the Appellate Division affirmed the trial court's determination that the plaintiff, a roller skating instructor, was an independent contractor and not an "employee" of the roller skating rink within the meaning of the Law Against Discrimination. Although the Court noted that the Federal courts have set forth a number of tests which employ common-law agency principles to interpret statutes which contain the word "employee," but do not helpfully define the term, the Court did not adopt any particular test.[16] The Court did, however, rely upon the following facts to determine that the plaintiff was an independent contractor: the plaintiff recruited students herself, she had sole control over what and how she taught her students, her students paid her directly, plaintiff did not receive any compensation or fringe benefits from the roller skating rink, and she characterized herself as self-employed on her 1993 and 1994 tax returns.[17] In *D'Annunzio v. Prudential Insurance*

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14. *Dee v. Excel Wood Prods. Co.*, 86 N.J. Super. 453, 458-59 (App. Div.1965). The court stated:

> While such deductions may have some probative value on the issue of whether an employment status existed, neither the making nor the failure to make such deductions is dispositive of an issue of this type.

Id. at 457. In *Dee,* the court found the deductions had been made through inadvertence and without any intention of creating or recognizing an employee status. *Id.* at 457-58. *See Arthur v. St. Peter's Hosp.*, 169 N.J. Super. 575, 578 (Law Div. 1979) (*dicta*); *Boudrot v. Dir., Div. of Taxation*, 4 N.J. Tax 268, 274-75 (1982) (issuance of W-2 not determinative).

15. *Pukowsky v. Caruso*, 312 N.J. Super. 171 (App. Div. 1998).

16. *Pukowsky v. Caruso*, 312 N.J. Super. 171, 182 (App. Div. 1998) (citing *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992); *see also Plaso v. IJKG, LLC*, 553 F. App'x 199, 205 n.4 (3d Cir. 2014) (holding that employment analysis under Title VII is "substantially similar" to the Pukowsky test and that a "principled application" of *Pukowsky* test would not yield a different outcome under the Title VII test); *Frankel v. Bally, Inc.*, 987 F.2d 86, 89-91 (2d Cir. 1993); *EEOC v. Zippo Mfg. Co.*, 713 F.2d 32 (3d Cir. 1983); *Cox v. Master Lock & Co.*, 815 F. Supp. 844, 845 (E.D. Pa.), *aff'd*, 14 F.3d 46 (3d Cir. 1993); *Franz Raymond Eisenhardt & Sons, Inc.*, 732 F. Supp. 521, 528 (D.N.J. 1990); *Carney v. Dexter Shoe Co.*, 701 F. Supp. 1093 (D.N.J. 1988).

17. *Pukowsky v. Caruso*, 312 N.J. Super. 171, 182 (App. Div. 1998). *See CPM Consulting LLC*, No. CV 19-16579, 2020 WL 5627216, at *5 (D.N.J. Sept. 21, 2020) (applying *Pukowsky* factors to determine applicability of NJLAD) *Papp v. MRS BPO LLC*, No. CIV.A. 13-3183, 2015 WL 5247005, at *4 (D.N.J. Sept. 9, 2015) (same); *Russell v. Plumbers & Pipefitters Local Union No. 9, Inc.*, No. A-5146-11T4, 2014 WL 8881706, at *8 (N.J. Super. Ct. App. Div. May 26, 2015) ("The LAD and CEPA are both anti-discrimination statutes and are examined under the same analytical framework."); *Plaso v. IJKG, LCC*, CIV.A. 11-5010 JLL, 2013 WL 2182233 (D.N.J. May 14, 2013), *aff'd*, 553 F. App'x 199 (3d Cir. 2014) ("Under the NJLAD, courts determine whether an employer-employee relationship exists between plaintiff and defendant by applying a test that is similar to the Darden test, the Pukowsky test."); *Rowan v. Hartford Plaza Ltd.*, A-0107-11T3, 2013 WL 1350095 (N.J. Super. Ct. App. Div. Apr. 5, 2013) (holding employee status to be a jury question where *Pukowsky* factors were split or disputed); *Hoag v. Brown*, 397 N.J. Super. 34 (App. Div. 2007) (applying the 12-factor test announced in *Pukowsky v. Caruso*, 312 N.J. Super. 171 (App. Div.

Co. of America,[18] the New Jersey Supreme Court refined the 12-factor test employed by the Appellate Division in *Pukowsky*,[19] for purposes of determining employee status under the Conscientious Employee Protection Act. In so doing, the Court found that when applying social legislation the three considerations for distinguishing a professional person's status as an independent contractor from that of an employee are (1) employer control, (2) the worker's economic dependence on the work relationship, and (3) the degree to which there has been a functional integration of the employer's business with that of the person doing the work at issue.[20]

In *Hargrove v. Sleepy's LLC*,[21] the Supreme Court considered the definition of "employee" under the New Jersey Wage & Hour Law and the New Jersey Wage Payment Law. The plaintiffs in *Hargrove* were delivery drivers who alleged that they were misclassified as independent contractors under the two wage statutes. The U.S. District Court applied the "right to control" test from *Nationwide Mutual v. Darden*,[22] and held that the plaintiffs were properly classified as independent contractors. On appeal to the Third Circuit, the Court of Appeals certified to the New Jersey Supreme Court the question of what was the proper test for determining who is an employee under the two wage statutes.

1998)), and finding a question of fact as to whether the plaintiff was an employee for purposes of the LAD); *see also Kurdyla v. Pinkerton Sec.*, 197 F.R.D. 128, 134-35 (D.N.J. 2000) (refusing to grant defendant Exxon's motion to dismiss plaintiff's LAD claim on the pleadings where plaintiff plead sufficient facts to allege that both Exxon and its subsidiary, Pinkerton, were plaintiff's employer). *But see Sauter v. Colts Neck Volunteer Fire Co. No. 2*, 451 N.J. Super. 581, 170 A.3d 351 (App. Div. 2017) (holding that a volunteer firefighter was not an "employee" under CEPA because he did not perform services for wages or other remuneration).

18. *D'Annunzio v. Prudential Ins. Co. of Am.*, 192 N.J. 110 (2007).

19. *Pukowsky v. Caruso*, 312 N.J. Super. 171 (App. Div. 1998).

20. *D'Annunzio v. Prudential Ins. Co. of Am.*, 192 N.J. 110, 122 (2007). *See also Mraz v. Local 254 of United Bhd. of Carpenters & Joiners of Am.*, No. A-2424-13T4, 2014 WL 11210918 (App. Div. Apr. 6, 2016) (applying *D'Annunzio* test and holding that union member was not an "employee" of union under CEPA).

21. *Hargrove v. Sleepy's, LLC*, 220 N.J. 289 (2015). *See also Morales v. V.M. Trucking, LLC*, No. A-2898-16T4, 2019 WL 2932649, at *5 (App. Div. July 9, 2019) (applying ABC test to determine coverage under New Jersey Wage Payment Law).

22. *Nationwide Mutual v. Darden*, 503 U.S. 318 (1992). In *Darden*, the U.S. Supreme Court considered who qualified as an "employee" under the Employment Retirement Income Security Act (ERISA), 29 U.S.C. § 1001-1461.

The Supreme Court in *Hargrove*[23] considered a variety of tests, but ultimately held that the "ABC" test contained in the New Jersey Unemployment Compensation Law[24] was the proper test to determine who is an employee under the wage statutes. Under the ABC test, an individual is presumed to be an employee, unless it can be shown that all of the following are true:

> (A) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact; and
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> (B) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and
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> (C) Such individual is customarily engaged in an independently established trade, occupation, profession or business.[25]

In *Kennedy v. Weichert Co.*, the Appellate Division held that the ABC test does not apply when determining whether a real estate salesperson is an independent contractor or employee under the Wage Payment Law.[26] This decision overruled the court's prior holding that fully-commissioned real estate salespersons were subject to the Wage Payment Law under the ABC test following the passage of new legislation codifying the right of real estate salespersons to work as employees or independent contractors.[27] As such, the *Kennedy* court found that the application of the ABC test to real estate salespersons would be contrary to the plain language and legislative intent of the Brokers Act.[28]

On its face, the *Hargrove* holding applied only to the two wage laws considered by the Court. It remains to be seen whether *Hargrove* will be invoked to justify applying the ABC test to employment status

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23. *Hargrove v. Sleepy's, LLC*, 220 N.J. 289, 312 (2015).

24. 4 N.J.S.A. 43:21-19(i)(6)(A)-(C). *See E. Bay Drywall, LLC v. Dep't of Lab. & Workforce Dev.*, 251 N.J. 477, 278 A.3d 783 (2022) (applying the ABC test in unemployment and temporary disability case and holding East Bay Drywall did not supply sufficient information to prove the workers' independence under the ABC test).

25. *Hargrove v. Sleepy's, LLC*, 220 N.J. 289, 305, 312 (2015).

26. *Kennedy v. Weichert Co.*, 474 N.J. Super. 541 (App. Div. 2023).

27. *Kennedy v. Weichert Co.*, 474 N.J. Super. 541 (App. Div. 2023).

28. *Kennedy v. Weichert Co.*, 474 N.J. Super. 541, 559 (App. Div. 2023).

determinations in other contexts.[29] However, in *Estate of Kotsovska ex rel. Kotsovska v. Liebman*, the Supreme Court held that, despite *Hargrove*, the ABC test is not applicable to the workers' compensation statute.[30] Instead, the proper test for workers compensation is the *D'Annunzio* test.[31]

1-2 Contracts for a Fixed Term

An employment contract may specify a fixed term of employment. However, like any other contract, such a contract must be sufficiently definite in its terms that the performance to be rendered by each party can be ascertained with reasonable certainty.[32] Thus, in *Jenkins v. Region Nine Housing Corp.*, the Appellate Division found that the plaintiff's breach of contract claim was properly dismissed in light of plaintiff's deposition testimony that "no specific term of employment was mentioned at the time of the hiring."[33]

The Appellate Division has also held that unless specifically stated otherwise in the contract, a contract of employment for a fixed term does not imply a contract of employment from year-to-year after

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29. *See Echavarria v. Williams Sonoma, Inc.*, No. CV 15-6441, 2016 WL 1670934, at *2 (D.N.J. Apr. 27, 2016) (". . . *Hargrove* solely answered the question of which test should govern 'whether a plaintiff is an employee or independent contractor for purposes of resolving a wage-payment or wage-and-hour claim.' . . . *Hargrove* did not address how a court should determine who employed and potentially misclassified a plaintiff as an independent contractor."). *See also Perez v. Access Bio, Inc.*, No. A-3071-16T4, 2019 WL 3297297, at *6 (App. Div. July 23, 2019) (holding that *Hargrove* applies to the question of whether a worker is an independent contractor or an employee, but does not apply to "all employment status disputes," including questions of joint employment); *accord E. Bay Drywall, LLC v. Dep't of Lab. & Workforce Dev.*, 251 N.J. 477, 278 A.3d 783 (2022) (holding East Bay Drywall did not supply sufficient information to prove the workers' independence under the ABC test).

30. *Estate of Kotsovska ex rel. Kotsovska v. Liebman*, 221 N.J. 568, 592 n.6 (2015).

31. "We must also determine whether, as the Appellate Division found, the jury charge given was so deficient that reversal was required. This Court in *D'Annunzio v. Prudential Ins. Co. of America*, 192 N.J. 110, 122–24, 927 A.2d 113 (2007), adopted a framework for assessing a worker's employment status in the context of social legislation. We now endorse that framework for use in ascertaining a worker's employment status for purposes of determining whether the Compensation Act's exclusive remedy provision applies." *Estate of Kotsovska ex rel. Kotsovska v. Liebman*, 221 N.J. 568, 576, 116 A.3d 1, 5 (2015). *See also Espinal v. Bob's Disc. Furniture, LLC*, No. CV172854JMVJBC, 2020 WL 6055123, at *5 (D.N.J. Oct. 14, 2020) (holding that the joint employer test, not the ABC test, is the proper test to determine whether defendants are joint employers); *Lizarno v. Morales Auto Repair*, 2020 WL 747010, at *3 (App. Div. Feb. 14, 2020).

32. *Friedman v. Tappan Dev. Corp.*, 22 N.J. 523, 531 (1956); *see also Swider v. Ha-Lo Indus., Inc.*, 134 F. Supp. 2d 607, 618 (D.N.J. 2001) (finding no "clear, specific and definitely expressed agreement" regarding plaintiff's employment and job security); *Abbate v. DMR Trecom, Inc.*, No. 98 Civ. 2710 (RPP), 1999 WL 673341 (S.D.N.Y. Aug. 27, 1999) (applying New Jersey law and holding that discussion over lunch was sufficiently clear and definite for a reasonable jury to find the existence of an oral contract for 3 to 5 years).

33. *Jenkins v. Region Nine Hous. Corp.*, 306 N.J. Super. 258, 263 (App. Div. 1997); *see also Craffey v. Bergen Cnty. Util.*, 315 N.J. Super. 345, 351 (App. Div. 1998).

completion of the fixed term.[34] To create such a contract, there must be other evidence of the parties' intent to create a year-to-year contract after the expiration of the fixed term.[35]

1-2:1 Lifetime Contracts

Lifetime contracts of employment are disfavored.[36] The burden of proving the existence of same, established in *Savarese v. Pyrene Manufacturing Co.*, is exacting.[37]

In *Savarese*, the plaintiff-employee hesitated to play on a company baseball team, and when pressed to do so asked what would happen if he got hurt. A supervisor purportedly replied: "If you get hurt I will take care of you. You will have a foreman's job the rest of your life."[38] The employee did get hurt and he did get terminated 21 years later. The Supreme Court found the alleged oral contract of lifetime employment too indefinite, and too lacking in essential terms to be enforced:

> Agreements of this nature have not been upheld except where it most convincingly appears it was the intent of the parties to enter into such long-range commitments and they must be clearly, specifically and definitely expressed. Only then is it grudgingly conceded that not all such contracts are 'so vague and indefinite as to time as to be void and unenforceable because of uncertainty or indefiniteness.'[39]

Thus, contracts for lifetime or permanent employment are unenforceable unless (1) the responsibilities assumed and obligations

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34. *Craffey v. Bergen Cnty. Util.*, 315 N.J. Super. 345, 351 (App. Div. 1998).

35. *Craffey v. Bergen Cnty. Util.*, 315 N.J. Super. 345, 351-52 (App. Div. 1998).

36. *Ashwal v. Prestige Mgmt. Servs., Inc.*, No. A-4629-05T2, 2007 WL 2989718, at *22 (N.J. Super. App. Div. Oct. 16, 2007) ("An employee's claim of promissory estoppel founded upon an alleged promise of lifetime employment is disfavored.").

37. *Savarese v. Pyrene Mfg. Co.*, 9 N.J. 595 (1952). *See Cataldo v. Moses*, No. Civ. A. 02-2588 (FSH), 2005 WL 705359 (D.N.J. Mar. 29, 2005) (declining to find a lifetime employment contract where the alleged "moral contract" lacked sufficient detail to be enforced); *Scudder v. Media Gen., Inc.*, No. 95-1073, 1995 WL 495945 (D.N.J. Apr. 15, 1995) (reaffirming the continued viability of *Savarese*; rejecting as a matter of law plaintiff's claim that he was promised he could keep his job as long as he wanted it); *Alter v. Resorts Int'l, Inc.*, 234 N.J. Super. 409, 416 (Ch. Div. 1989) (even where all elements requisite to enforcement of contract for life are proven, enforcement will not be ordered unless employee's job performance is satisfactory). *But see Rogozinski v. Airstream by Angell*, 152 N.J. Super. 133, 143-44 (Law Div. 1977) (stating that permanent contracts are difficult to prove but not unenforceable or against public policy; apparently construing a "permanent contract" as a contract not to discharge without good cause), *modified on other grounds*, 164 N.J. Super. 465 (App. Div. 1979).

38. *Savarese v. Pyrene Mfg. Co.*, 9 N.J. 595, 597 (1952).

39. *Savarese v. Pyrene Mfg. Co.*, 9 N.J. 595, 601 (1952).

imposed are clearly and unequivocally expressed in the contract itself;[40] and (2) the employee has provided some consideration for the lifetime commitment in addition to services incidental to employment.[41] Moreover, delegation of express authority to enter into such an agreement on behalf of the employer must be demonstrated. Because a contract of employment for life is of an

> extraordinary nature, outside the regular custom and usage of business, [t]he authority of a corporate officer to enter into such a contract on behalf of his principal cannot arise merely by implication.[42]

But even if all these requirements are satisfied, it would appear that truly lifetime contracts will not be recognized; that contingencies will be read into the contract. Thus, in *Savarese*, the Court quoted as "the

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40. Deficiencies noted by the Court in *Savarese* included the failure to specify a future salary and to provide for various contingencies, such as plaintiff becoming disabled from other causes or otherwise rendered incapable of working. *See Nardi v. Stevens Inst. of Tech.*, 60 F. Supp. 2d 31, 41 (E.D.N.Y. 1999) (applying New Jersey law and holding that no reasonable juror could find that the oral conversations between plaintiff and defendant's representatives convincingly evidenced an intent to bind defendant to a lifetime contract of employment); *Pitak v. Bell Atl. Network Servs., Inc.*, 928 F. Supp. 1354, 1370 (D.N.J. 1996) (requiring "specific, concrete evidence of a contract for lifetime employment" and noting that in this case the "'corporate culture'" and assurances of relocation did not prove a lifetime contract); *see also Friedman v. Tappan Dev. Corp.*, 22 N.J. 523, 531 (1956); *Piechowski v. Matarese*, 54 N.J. Super. 333, 344-45 (App. Div. 1959).

41. *Nardi v. Stevens Inst. of Tech.*, 60 F. Supp. 2d 31, 42 (E.D.N.Y. 1999) (applying New Jersey law and holding that there was no lifetime contract of employment because the alleged promise of life employment was not supported by consideration). In *Alter v. Resorts Int'l, Inc.*, 234 N.J. Super. 409, 415 (Ch. Div. 1989), the court refused to enforce an alleged lifetime contract due to lack of specificity and lack of additional consideration. It suggested, however, that lack of additional consideration alone would not be fatal: "Presumably, if the intent is clear and unequivocal, the lack of 'additional consideration' would not be critical." *See also Obendorfer v. Gitano Grp., Inc.*, 838 F. Supp. 950, 953-54 (D.N.J. 1993) ("long range employment contract is enforceable if the intention of the parties to make such a contract is clearly, specifically and definitely expressed"; such intent can be found "from the language employed, from the attendant circumstances, and from the presence of consideration from the employee additional to the services incident to his employment"; court dismissed claim for lack of specific allegations regarding terms and lack of additional consideration from the employee); *Piechowski v. Matarese*, 54 N.J. Super. 333, 344 (App. Div. 1959) (in deciding if parties intended a lifetime contract, courts look to "whether the employee gave some consideration additional to the mere agreement on his part to render service."); *Eilen v. Tappin's, Inc.*, 16 N.J. Super. 53, 56 (Law Div. 1951) (same).

42. *Savarese v. Pyrene Mfg. Co.*, 9 N.J. 595, 603 (1952). *See Nardi v. Stevens Inst. of Tech.*, 60 F. Supp. 2d 31, 43 (E.D.N.Y. 1999) (applying New Jersey law and holding that defendant's written certification on plaintiff's application to the Department of Labor that plaintiff's job offer was "permanent, contingent upon continued research funding," did not create a binding obligation of lifetime employment). *See also Labus v. Navistar Int'l Transp. Corp.*, 740 F. Supp. 1053, 1063 n.3 (D.N.J. 1990) (affirmative proof of authority of an agent to make oral representations is required only where the representation is "unusual or contrary to the employer's standard procedure"); *C.B. Snyder Realty Co. v. Nat'l Newark & Essex Bldg. Co. of Newark*, 14 N.J. 146, 159 (1953); *Alter v. Resorts Int'l, Inc.*, 234 N.J. Super. 409, 415-16 (Ch. Div. 1989).

prevailing rule" that an otherwise valid permanent employment contract will continue to operate only

> as long as the employer remains in the business and has work for the employee, and the employee is able and willing to do his work satisfactorily and does not give good cause for his discharge.[43]

The court in *Alter v. Resorts International, Inc.*,[44] in turn, relied on that language as establishing the rule that "lifetime contracts, even where upheld, only preclude a discharge 'without cause.'"[45]

If that is in fact the law, the exacting standard of *Savarese* may be of no practical import in view of the decisions holding it inapplicable where only an agreement not to terminate without cause is alleged.[46] The distinction was explained by the Supreme Court in *Shebar v. Sanyo Business Systems Corp.* as follows:

> The reason *Savarese* required that a contract for lifetime employment be demonstrated by unmistakably clear signs of the employer's intent was that at the time such contracts were deemed 'to be at variance with general usage and sound policy.' This is still so today, given the unlikelihood of an employer promising to protect an employee from

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43. *Savarese v. Pyrene Mfg. Co.*, 9 N.J. 595, 601 (1952) (internal quotation marks omitted). In *Borbely v. Nationwide Mutual Insurance Co.*, the District Court commented on the permanent/good cause distinction as follows:

> Although contracts for permanent employment and employment contracts terminable only for cause are often treated as one and the same obligation, see [*Savarese*], I have accorded them different treatment for purposes of this matter. The distinction I discern here is that "cause" may be cause on the part of the agent, such as dishonesty or inadequate performance, or cause on Nationwide's part, such as business necessity. In *Savarese*, the court treated contracts for permanent employment and contracts terminable only for cause given by the employee as identical in nature.

Borbely v. Nationwide Mut. Ins. Co., 547 F. Supp. 959, 970 n.18 (D.N.J. 1981).

44. *Alter v. Resorts Int'l, Inc.*, 234 N.J. Super. 409, 415 (Ch. Div. 1989).

45. *Alter v. Resorts Int'l, Inc.*, 234 N.J. Super. 409, 416 (Ch. Div. 1989); *see also Rogozinski v. Airstream by Angell*, 152 N.J. Super. 133, 144 (Law Div. 1977) ("As to damages, *Savarese* speaks in terms of a perpetual contract operating 'as long as the employer remains in the business and has work for the employee and the employee is able and willing to do his work satisfactorily and does not give good cause for his discharge.'"), *modified on other grounds*, 164 N.J. Super. 465 (App. Div. 1979). The district courts discussed *Savarese* and *Alter* and agreed. *Scudder v. Media Gen., Inc.*, No, 95-1073, 1995 WL 495945 (D.N.J. Aug. 15, 1995) ("As a matter of law, therefore, it seems that the best bargain an employee can strike is that he can keep his job for as long as he can satisfactorily perform it.").

46. *See, e.g.*, *First Atl. Leasing Corp. v. Tracey*, 738 F. Supp. 863, 872 (D.N.J. 1990) (holding that the *Savarese* standard of proof applies only to contracts prohibiting all terminations, not to contracts prohibiting only termination without good cause and relying on *Shebar* for that proposition).

> any termination of employment, and the difficulty of determining the terms and enforcing such an agreement. Indeed, in *Woolley*, the court recognized that such contracts for lifetime employment were extraordinary, and would be enforced only in the face of clear and convincing proof of a precise agreement setting forth all of the terms of the employment relationship, including the duties and responsibilities of both the employer and the employee. However, a lifetime contract that protects an employee from any termination is distinguishable from a promise to discharge only for cause. The latter protects the employee only from arbitrary termination.[47]
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> . . .
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> To the extent that plaintiff alleges a contract of life employment, the trial court correctly ruled that this claim was barred by *Savarese*. To the extent that plaintiff alleges a promise of discharge for cause only, plaintiff's breach of contract claim should be analyzed by those contractual principles that apply when the claim is one that an oral employment contract exists.[48]

1-2:2 Employment at a Specific Salary

In *Bernard v. IMI Sys., Inc.*, the Supreme Court held that an offer of employment at an annual salary does not constitute a contract of guaranteed employment for one year.[49] "In the absence of a contrary

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47. *Shebar v. Sanyo Bus. Sys., Corp.*, 111 N.J. 276, 287 (1988). *See Morro v. DGMB Casino LLC,* No. 13-CV-5530 JBS/JS, 2015 WL 3991144, at *13 (D.N.J. June 30, 2015) (declining to interpret CBA side agreement that the plaintiff "shall remain in such [position] and cannot be bumped]" as insufficient to support a finding of an agreement for lifetime employment); *Greenwood v. State Police Training Ctr.*, 127 N.J. 500, 509-11 (1992) (contract allowing termination only for good cause protects employee from unreasonable or arbitrary termination; employer must have substantial objective evidence).

48. *Shebar v. Sanyo Bus. Sys., Corp.*, 111 N.J. 276, 288 (1988). The Court cited the federal district court decision in *Powell v. Fuller Brush Co*., 15 F.R.D. 239, 242 (D.N.J. 1954), which states:

> Our reading of the *Savarese* case discloses no such refusal to recognize or enforce a contract of employment for life, as being the law of the State of New Jersey where this Court is sitting; nor does the case reflect any policy of the law of New Jersey indicating that such contracts are not binding in legal principle, or that they are contrary to public policy, but rather it emphasizes that such contracts are difficult in fact to prove, and that most cases involving such fail for insufficiency of evidence to establish them in fact.

49. *Bernard v. IMI Sys., Inc.*, 131 N.J. 91 (1993) (no guarantee of employment for one year created by letter agreement that: "Your compensation will be at the rate of $80,000 per year"). *See Craffey v. Bergen Cnty. Util.*, 315 N.J. Super 345, 351 (App. Div. 1998); *see also Hyman v. WM Fin.*

agreement, an employee is hired at-will, regardless of the way in which the salary is quoted in an offer letter."[50] As the Supreme Court stated:

> [I]n today's volatile employment market, it is both uncommon and unreasonable to expect employment for one year simply because an offer letter quotes an annual salary. Employees realize that the specification of salary merely determines the method of payment and not the time of employment. A salary or benefit package stated in annual terms does not, standing alone, entitle an employee to year-to-year employment.[51]

1-3 Specific Performance

Specific performance is a discretionary remedy resting in equity.[52] It provides extraordinary relief not routinely warranted, but reserved for those cases where the subject of the contract is in some way exceptional; where the services are of such a peculiar character as to be incapable of valuation by a pecuniary standard:[53]

> Generally speaking, breach of contract gives rise to an action for damages. When, but only when, that remedy is inadequate, the injured party may sue in equity.[54]

Because specific performance lies in equity, the party seeking aid of the court must have clean hands:

> [H]is conduct in the matter must have been fair, just, and equitable, not sharp or aiming at unfair advantage. The relief itself must not be harsh or oppressive. In short, it must be very plain that the claim is an equitable one.[55]

Servs., No. 07-CV-3497, 2008 WL 1924879, at *3 (D.N.J. Apr. 29, 2008) (holding that employer's agreement to pay plaintiffs in compliance with state and/or federal law cannot support a claim for breach of contract as the employer is obligated to pay these amounts by statute).

50. *Bernard v. IMI Sys., Inc.*, 131 N.J. 91, 96 (1993). This opinion overruled *Willis v. Wyllys Corp.*, 98 N.J.L. 180 (E. & A. 1922).

51. *Bernard v. IMI Sys., Inc.*, 131 N.J. 91, 106 (1993).

52. *Barry M. Dechtman, Inc. v. Sidpaul Corp.*, 89 N.J. 547, 551-52 (1982). *See generally* Hon. William A. Dreier (Ret.) & Paul A. Rowe, Guidebook to Chancery Practice in New Jersey 86-93 (4th ed. 1997).

53. *See Crowe v. DeGioia* (*Crowe* II), 203 N.J. Super. 22, 34 (App. Div. 1985).

54. *Crowe v. DeGioia*, 179 N.J. Super. 36, 41 (App. Div. 1981), *rev'd on other grounds*, 90 N.J. 126 (1982), *on remand*, 203 N.J.Super. 22 (App. Div. 1985).

55. *Barry M. Dechtman, Inc. v. Sidpaul Corp.*, 89 N.J. 547, 552 (1982) (quoting *Stehl v. Sawyer*, 40 N.J. 352, 357 (1963)).

The availability of specific performance also depends upon the clarity of the contract:

> The oft-stated rule is that the terms of the contract must be definite and certain so that the court may decree with some precision what the defendant must do.[56]

However, this test is not a mechanical one. The Supreme Court has stated that uncertainty as to subordinate details of performance need not preclude specific performance unless the uncertainty is "so great as to prevent the existence of a contract."[57]

The general rule has historically been that personal service contracts, including employment contracts, are not specifically enforceable, even when the individual rendering the services possesses a unique talent.[58] That rule precluded enforcement by the principal on the ground that "equity will not make a vain decree."[59] It precluded enforcement by the employee on the basis of (1) the precept of agency law that a principal may revoke his agency at any time, and (2) lack of mutuality of enforcement in view of inability to compel the employee to perform.[60]

Although the denial of specific performance of personal service contracts continues to be referred to as the general rule, exceptions have been made. In *American Association of University Professors, Bloomfield*

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56. *Barry M. Dechtman, Inc. v. Sidpaul Corp*., 89 N.J. 547, 552 (1982). Appropriate extrinsic evidence may be examined to determine the intent of the parties; reasonable certainty of the terms is sufficient. *Id.* "Seeming difficulties of enforcement due to uncertainties attributable to language may vanish in the light of practicalities and a full understanding of the parties' intent." *Id. See Fountain v. Fountain*, 9 N.J. 558, 565 (1952) ("If a promise such as this is capable of being made certain by an objective standard, as, for example, extrinsic facts, it is enforceable.").

57. *Fountain v. Fountain*, 9 N.J. 558, 566 (1952).

58. *Crowe v. DeGioia*, 179 N.J. Super. 36, 41 (App. Div. 1981), *rev'd on other grounds*, 90 N.J. 126 (1982), *on remand*, 203 N.J. Super. 22 (App. Div. 1985); *Sarokhan v. Fair Lawn Mem'l Hosp., Inc.*, 83 N.J. Super. 127, 133 (App. Div. 1964). *See generally* 5A Corbin on Contracts § 1204 at 398-403 (1964); Hon. William A. Dreier (Ret.) & Paul A. Rowe, Guidebook to Chancery Practice in New Jersey 90 (4th ed. 1997) ("Personal service contracts are not generally specifically enforceable, although they may be so enforced under exceptional circumstances.") (citing *Endress v. Brookdale Community Coll.* and *American Ass'n of Univ. Professors, Bloomfield Coll. Chapter v. Bloomfield Coll.*, discussed at text accompanying ns. 61 - 67).

59. *Crowe v. DeGioia*, 179 N.J. Super. 36, 41 (App. Div. 1981), *rev'd on other grounds*, 90 N.J. 126 (1982), *on remand*, 203 N.J. Super. 22 (App. Div. 1985); *Sarokhan v. Fair Lawn Mem'l Hosp., Inc.*, 83 N.J. Super. 127, 133 (App. Div. 1964) (personal services cannot be compelled by equity, "even where the contract involves a 'star' of unique talent"; "At most, equity will restrain violation of an express or implied negative covenant, thus precluding the performer from performing for somebody else.").

60. *See Crowe v. DeGioia*, 90 N.J. 126, 133-34 (1982); *Sarokhan v. Fair Lawn Mem'l Hosp., Inc.*, 83 N.J. Super. 127, 133-35 (App. Div. 1964). In *Fiedler, Inc. v. Coast Fin. Co., Inc*., 129 N.J. Eq. 161, 166-67 (E. & A. 1941), the Court denied specific performance because of the absence of mutuality: "If the enforcement of the obligation may not be granted to both contracting parties, it should not be enforced against one party." *See* 5A Corbin on Contracts § 1204, at 400-02 (1964).

College Chapter v. Bloomfield College,[61] the Appellate Division affirmed an order reinstating tenured faculty members who were found to have been discharged in breach of their employment contracts. The court acknowledged the "general rule" but found that it

> is not inflexible and that the power of a court of equity to grant such a remedy depends upon the factual situation involved and the need for that type of remedy in a particular case.[62]

More significantly, the two considerations listed by the court as warranting deviation from the "general rule" are factors that may be found in other employment contract controversies: (1) "uncertainty in measuring damages because of the indefinite duration of the contract;"[63] and (2) "the importance of the status of plaintiffs in the milieu of the college teaching profession."[64]

A somewhat similar result was obtained in *Endress v. Brookdale Community College*, where the Appellate Division upheld the reinstatement of a professor who alleged she had been terminated in breach of her contract.[65] The court acknowledged the "settled law" that "personal service contracts are generally not specifically enforceable," and reiterated its *Bloomfield College* opinion in support of the flexibility of the rule. But unlike the *Bloomfield College* case, *Endress* involved more than a breach of contract claim. The court specifically pointed out that "[a]lthough not clearly articulated below" the trial court was of the view that plaintiff's termination was in violation of her First Amendment rights of free speech and press, and that in such case the remedy of specific performance is appropriate.[66] Of course that begs the question, because if it is a constitutional injury that is being

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61. *American Ass'n of Univ. Professors, Bloomfield Coll. Chapter v. Bloomfield Coll.*, 136 N.J. Super. 442 (App. Div. 1975).

62. *American Ass'n of Univ. Professors, Bloomfield Coll. Chapter v. Bloomfield Coll.*, 136 N.J. Super. 442, 448 (App. Div. 1975).

63. *American Ass'n of Univ. Professors, Bloomfield Coll. Chapter v. Bloomfield Coll.*, 136 N.J. Super. 442, 448 (App. Div. 1975). The court included no explanation of how it reached this conclusion, or why an economist's calculation of the present value of front pay would be inadequate. *See generally* Barbara Lindemann Schlei & Paul Grossman, Employment Discrimination Law 1434-36 (2d ed. 1983) (regarding the availability of front pay as an alternative to reinstatement under federal employment discrimination laws).

64. *American Ass'n of Univ. Professors, Bloomfield Coll. Chapter v. Bloomfield Coll.*, 136 N.J. Super. 442 (App. Div. 1975).

65. *Endress v. Brookdale Cmty. Coll.*, 144 N.J. Super. 109 (App. Div. 1976).

66. *Endress v. Brookdale Cmty. Coll.*, 144 N.J. Super. 109, 130-31 (App. Div. 1976).

remedied, the traditional rule limiting specific performance for breach of contract is irrelevant. In such a case, the court is not ordering specific performance of a contract; it is voiding a termination and compelling reinstatement. The difference is more than semantics. Thus, the basis of the *Bloomfield College* rule and the circumstances in which it will be applied remain somewhat unclear.

In particular, it is not apparent from either decision the extent to which the unique nature of a tenured faculty position controlled the outcome, or whether the court's flexibility was instead based upon a more general erosion of the rule against specific performance of personal service contracts, growing out of the common availability of reinstatement as a remedy under state and federal anti-discrimination laws.[67]

1-4 Statute of Frauds

The New Jersey statute of frauds, which is codified at N.J.S.A. 25:1-5, was amended effective January 5, 1996.[68] The amendment repealed subsection (e) of the statute which previously required agreements that are not to be performed within one year from the making thereof to be in writing. Thus, oral contracts of employment for fixed-terms greater than one year are no longer rendered unenforceable under the statute of frauds.[69]

Prior to the 1996 amendment, oral employment contracts which by their terms were incapable of being performed within one year were barred.[70] In *Deevy v. Porter*,[71] a husband and wife entered into an oral contract whereby they were to be employed for a one-year period commencing at a

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67. The plaintiff in *Alter v. Resorts Int'l, Inc.*, 234 N.J. Super. 409, 413 (Ch. Div. 1989), sought specific enforcement of an alleged lifetime contract, but resolution of that issue was not necessary in light of the court's other rulings, and no discussion of the question was included.

68. P.L. 1995, c.360, section 8.

69. *See Meahan v. Michael Anthony Sign Design*, No. A-0336-12T1, 2013 WL 6817638, at *5 (N.J. Super. Ct. App. Div. Dec. 27, 2013) ("Employment contracts need not be in writing to satisfy the Statute of Frauds in New Jersey."). Oral contracts of employment for life were never barred by the statute of frauds because such contracts are capable of being performed within one year; the employee might die within a year of contract making. *See Loeb v. Peter F. Dasbjerg & Co.*, 22 N.J. 95, 99 (1956) (finding N.J.S.A. 25:1-5 "inapplicable to an oral agreement bearing no fixed term and possibly performable within one year even though complete performance in that term may be unlikely"); *Deevy v. Porter*, 11 N.J. 594, 597 (1953); *Shiddell v. Electro Rust-Proofing Corp.*, 34 N.J. Super. 278, 282 (App. Div. 1954) (alleged oral contract for lifetime employment outside the scope of statute of frauds). Similarly, a strike settlement agreement that did not specify the time within which it was supposed to be performed was found outside the scope of the statute of frauds. *I.U.E. v. ITT Fed. Labs.*, 232 F. Supp. 873, 879-80 (D.N.J. 1964).

70. *Kreuzberg v. Computer Sciences Corp.*, 661 F. Supp. 877, 879 (D.N.J. 1987). *See generally,* 2 Corbin on Contracts § 447, at 555-58 (1964).

71. *Deevy v. Porter*, 11 N.J. 594 (1953).

later date, upon their departure for Casablanca. In addition, the husband was to perform and did perform services for the employer in the United States. The Supreme Court found that the parties had bargained for an oral contract that could not be performed within one year, and that, as such, it was unenforceable under the Statute of Frauds.[72] Other fixed-term oral contracts of employment have similarly been barred.[73]

The fact that an oral employment contract for a fixed term not performable in one year may be terminable by operation of law upon death within one year did not remove it from the scope of the Statute.[74] Similarly an otherwise unenforceable fixed-term employment contract was not saved by the employee's retention of the right to quit or by the employer's retention of the right to terminate under specific circumstances such as bankruptcy. The time required for performance was controlling, not whether and when excusable non-performance might occur.[75] In the case of an employment contract, a writing or memorandum did not suffice under the Statute of Frauds prior to the 1996 amendment unless the writing itself contained the essential terms of the agreement, including the salary or other compensation to be paid.[76]

Although there were suggestions that there may be circumstances in which equitable or promissory estoppel might bar application of the Statute of Frauds to an employment contract prior to the 1996 amendment, those circumstances appear to have been neither found nor described in any New Jersey opinion.[77] However, where one party to the agreement had rendered full performance and application of the statute would have resulted in unjust enrichment, a contract otherwise unenforceable was generally enforced.[78]

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72. *Deevy v. Porter*, 11 N.J. 594, 599 (1953).

73. *See Olympic Junior, Inc. v. David Crystal, Inc*., 463 F.2d 1141, 1143-44 (3d Cir. 1972) (five-year contract of employment unenforceable under N.J.S.A. 25:1-5(e) because essential elements of contract were not in writing); *Barnes v. P. & D. Mfg. Co*., 123 N.J.L. 246, 248-50 (E. & A. 1939) (five-year oral contract for services within Statute of Frauds); *Kooba v. Jacobitti*, 59 N.J. Super. 496, 500-501 (App. Div. 1960) (two-year oral employment agreement unenforceable under Statute of Frauds).

74. *See Deevy v. Porter*, 11 N.J. 594, 597 (1953) (citing *LaBett v. Heyman Bros., Inc*., 13 N.J. Misc. 832 (Sup. Ct. 1935), *aff'd*, 117 N.J.L. 115 (E. & A. 1936)); *see also* 2 Corbin on Contracts § 447, at 555-56 (1964).

75. *See Deevy v. Porter*, 11 N.J. 594, 598-99 (1953).

76. *See Olympic Junior, Inc. v. David Crystal, Inc*., 463 F.2d 1141, 1144 (3d Cir. 1972).

77. *See generally Olympic Junior, Inc. v. David Crystal, Inc.*, 463 F.2d 1141, 1144 n.3 (3d Cir. 1972); *Kooba v. Jacobitti*, 59 N.J. Super. 496, 500-01 (App. Div. 1960); Robert A. Brazener, Annotation, *Action by Employee in Reliance on Employment Contract Which Violates Statute of Frauds as Rendering Contract Enforceable*, 54 A.L.R. 3d 715 (1974).

78. *See Kreuzburg v. Comp. Scis. Corp*., 661 F. Supp. 877, 879-80 (D.N.J. 1987) (exception not applicable to plaintiff's claim for commissions because full performance was not rendered); *Crowe v. DeGioia* (*Crowe II*), 203 N.J. Super. 22, 34 (App. Div. 1985) (unwritten agreement to transfer real

1-5 Employees Covered by Collective Bargaining Agreements

The principle of exclusive representation expressed in § 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a), generally prohibits employers from negotiating individual contracts with employees who are members of a bargaining unit, and pre-empts state law to the contrary on the ground that it would "upset the balance of power between labor and management expressed in our national labor policy."[79]

But an individual contract properly negotiated while an employee is not represented is not necessarily rendered null or subsumed into the collective agreement if the employee later moves into the bargaining unit.[80] United States Supreme Court and Third Circuit opinions suggest three criteria that must be met for such a contract to remain effective and enforceable under state law: (1) the individual contract must not be inconsistent with the collective bargaining agreement;[81] (2) enforcement of the individual contract must not constitute an unfair labor practice;[82] and (3) interpretation of the individual contract must not be substantially dependent upon interpretation of a collective bargaining agreement.[83] If the contract claim is "substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract," then any action for enforcement must either be treated as asserting a claim under

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property enforced where full performance rendered by co-habitant); *Edwards v. Wycoff Elec. Supply Co.*, 42 N.J. Super. 236, 241-42 (App. Div. 1956) (contract partially enforced on unjust enrichment theory).

79. *Teamsters v. Morton*, 377 U.S. 252 (1964). *Accord San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959) (state law that infringes upon the NLRB's primary jurisdiction over unfair labor practice charges is pre-empted). It is generally an unfair labor practice for an employer to disregard the bargaining representative by negotiating with individual employees, whether a majority or a minority, with respect to wages, hours, and working conditions. *See Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 684 (1944).

80. *See J. I. Case Co. v. NLRB*, 321 U.S. 332, 339 (1944); *see also Caterpillar Inc. v. Williams*, 482 U.S. 386, 396 (1987); *Berda v. CBS, Inc.*, 881 F.2d 20, 24 (3d Cir. 1989); *Malia v. RCA Corp.*, 794 F.2d 909, 912 (3d Cir. 1986).

81. *See J. I. Case Co. v. NLRB*, 321 U.S. 332, 339 (1944); *see also Malia v. RCA Corp.*, 794 F.2d 909, 913 (3d Cir. 1986) ("Nor does LMRA prevent an individual— whether an applicant for new employment or a current employee in a supervisory position—from negotiating for a job in a bargaining unit so long as that employment will be on the terms and conditions set forth in the collective bargaining agreement."); *Mossberg v. Standard Oil Co. of N.J.*, 98 N.J. Super. 393, 401-02 (Law Div. 1967) (collective bargaining agreement superseded individual contract).

82. *See J. I. Case Co. v. NLRB*, 321 U.S. 332, 339 (1944). *See generally San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959) (state law that infringes upon NLRB's primary jurisdiction over unfair labor charges is pre-empted).

83. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 396 (1987); *Johnson v. NBC Universal, Inc.*, 2010 U.S. App. LEXIS 24500 (3d Cir. N.J. Nov. 30, 2010) (finding that NBC employee's grievance against the company was preempted by the LMRA).

§ 301 of the Labor Management Relations Act, 1947,[84] or dismissed as pre-empted by federal labor law.[85] If a dispute can be resolved without interpreting a collective agreement, there is no pre-emption.[86]

The seminal Supreme Court opinion on the viability of individual contracts with bargaining unit employees is *J.I. Case Co. v. NLRB*.[87] That employer had entered into individual hiring contracts before a bargaining unit was certified, and then refused to bargain about matters covered by those agreements. Although noting that the "purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees," the Court did not adopt a blanket prohibition. Instead, it stated that individual contracts may be entered into if they are "not inconsistent with a collective agreement" and do not amount to an unfair labor practice.[88]

The Court reiterated the *J.I. Case* rule four decades later in *Caterpillar Inc. v. Williams*,[89] where the issue before it was when the defense of federal pre-emption of state law contract claims will support removal.[90]

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84. 29 U.S.C. § 185 (2006).

85. *Beidleman v. Stroh Brewery Co.*, 182 F.3d 225 (3d Cir. 1999) (holding that the employee's claims were preempted by § 301 of the LMRA); *Berda v. CBS, Inc.*, 881 F.2d 20, 23 (3d Cir. 1989) (quoting *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985)). Section 301 provides a federal cause of action for violations of contracts between employees and unions, and has been found to reflect congressional intent that labor contracts be governed by a uniform federal common law. *See Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

86. *See Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 413 (1988); *Voilas v. Gen. Motors Corp.*, 170 F.3d 367 (3d Cir. 1999) (holding that the employees' claim of common-law fraud was not preempted by the LMRA as its resolution did not require interpretation of the CBA); *Coefield v. JCPL Co.*, 532 F. Supp. 2d 685 (D.N.J. 2007) (LMRA did not preempt various LAD claims); *Reynolds v. TCM Sweeping, Inc.*, 340 F. Supp. 2d 541 (D.N.J. 2004) (LMRA did not preempt employee's CEPA claim); *Gerow v. Kleinerman*, No. 01-cv-138 (WGB), 2002 WL 1625417, at *4 (D.N.J. July 2, 2002) (defamation, invasion of privacy and conspiracy to defame claims not preempted by LMRA); *LaResca v. AT&T*, 161 F. Supp. 2d 323, 329-33 (D.N.J. 2001) (holding that failure to accommodate claim under the LAD was not preempted by the LMRA); *Naples v. N.J. Sports & Exposition Auth.*, 102 F. Supp. 2d 550, 555-56 (D.N.J. 2000) (holding that plaintiff's claims for disability discrimination under the LAD and retaliatory discharge were not preempted by § 301 of the LMRA); *Carrington v. RCA Global Commc'ns, Inc.*, 762 F. Supp. 632 (D.N.J. 1991).

87. *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944).

88. *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944). The question of what constitutes an unfair labor practice under the National Labor Relations Act is beyond the scope of this treatise. *See generally*, Charles J. Morris, The Developing Labor Law 566 (2d ed. 1983).

89. *Caterpillar Inc. v. Williams*, 482 U.S. 386 (1987).

90. Plaintiffs in *Caterpillar* were bargaining unit employees who were promoted into managerial positions, then returned to the bargaining unit, and then ultimately laid off. They claimed that while they were management employees the company made oral and written representations that they could look forward to indefinite and lasting employment, and that they could count on the company to take care of them. They sued for breach of these individual agreements under state law and defendant removed on the ground of complete pre-emption of plaintiffs' claims by § 301 of the Labor Management Relations Act, 1947, 29 U.S.C. § 185.

The Court also discussed when an individual contract will be found pre-empted by § 301:

> [I]ndividual employment contracts are not inevitably superseded by any subsequent collective agreement covering an individual employee, and claims based upon them may arise under state law . . . . [A] plaintiff covered by a collective bargaining agreement is permitted to assert legal rights *independent* of that agreement, including state-law contract rights, so long as the contract relied upon is *not* a collective bargaining agreement.[91]

The Third Circuit applied this rule in *Berda v. CBS, Inc.*[92] At issue in *Berda* were state law contract and tort claims for breach of an alleged oral agreement for "indefinite and lasting employment" entered into before plaintiff became a member of the bargaining unit. The court rejected the employer's contention that the contract was pre-empted by § 301 on the ground that it was not substantially dependent upon interpretation of the collective bargaining agreement. No other defenses to enforcement having been raised by the employer, no others were considered. More specifically, as the court noted, it had not been presented with the questions whether (1) the existence of the subsequent collective bargaining agreement constituted a defense under state or federal law; or (2) whether the oral agreement was void as an unfair labor practice.[93] As a consequence, no final determination of the enforceability of the contract was made.

Berda is of particular note in that the individual contract was entered into at the time plaintiff was hired into a bargaining unit position; not, as in *Caterpillar* and other prior cases,[94] at a point when the employee was

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91. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 396 (1987). It is important to note, as the *Caterpillar* Court did, that it did not resolve the validity of the individual contracts or even whether they would ultimately be found pre-empted by § 301. *Id.* at 399. It held instead that the employer was required to present those issues in the first instance in state court:

> The employer may argue that the individual employment contract has been pre-empted due to the principle of exclusive representation in § 9 (a) of the National Labor Relations Act (NLRA). Or the employer may contend that enforcement of the individual contract arguably would constitute an unfair labor practice under the NLRA, and is therefore pre-empted.

Id. at 397 (citations omitted). *But see* Charles J. Morris, The Developing Labor Law 660-67 (1982-88 supp.).

92. *Berda v. CBS, Inc.*, 881 F.2d 20 (3d Cir. 1989).

93. *Berda v. CBS, Inc.*, 881 F.2d 20, 26 (3d Cir. 1989); *see also Malia v. RCA Corp.*, 794 F.2d 909 (3d Cir. 1986).

94. *See, e.g.*, *Malia v. RCA Corp.*, 794 F.2d 909, 911 (3d Cir. 1986) (plaintiff alleged that when he accepted promotion into managerial job he was promised he could return to the bargaining unit if he didn't like his new job).

a management employee with no immediate expectation of entering the bargaining unit. Although that distinction may be irrelevant to the § 301 pre-emption test, it is highly significant to labor-management relations and the exclusive representation rights of unions.

II. EMPLOYEE HANDBOOKS

1-6 When is a Handbook a Contract?

The Supreme Court's 1985 opinion in *Woolley v. Hoffmann-LaRoche, Inc.*[95] held for the first time[96] that in appropriate circumstances, representations made in employee handbooks or manuals are enforceable:

> [w]hen an employer of a substantial number of employees circulates a manual that, when fairly read, provides that certain benefits are an incident of the employment (including, especially, job security provisions), the judiciary, instead of 'grudgingly' conceding the enforceability of those provisions should construe them in accordance with the reasonable expectations of the employees.[97]

Woolley is not an exception to the doctrine of at-will employment, but rather, "a recognition of basic contract principles concerning acceptance of unilateral contracts."[98] However, the Appellate Division has declined to extend the *Woolley* doctrine to create a contract between a university and its students based on a written antidiscrimination policy.[99] Furthermore, "[n]either *Woolley* nor any of the cases that have applied its holding and guiding principles were intended to prevent the parties from altering other terms of a contract that were not job security provisions."[100] In addition,

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95. *Woolley v. Hoffmann-LaRoche, Inc.*, 99 N.J. 284, *modified*, 101 N.J. 10 (1985).

96. Because it was a clear break with prior law, *Woolley* is not retroactively applicable:

> While it may have had its conceptual origins in antecedent contract law, it involved a novel and unanticipated interpretation and application of that law and, in fact, altered the basic structure of employer/at-will-employee relations.

Grigoletti v. Ortho Pharm. Corp., 118 N.J. 89, 116 (1990). *Accord Bimbo v. Burdette Tomlin Mem'l Hosp.*, 644 F. Supp. 1033, 1039 (D.N.J. 1986); *see Kapossy v. McGraw-Hill, Inc.*, 921 F. Supp. 234, 246 (D.N.J. 1996) (*Woolley* applies only to post-1985 handbooks).

97. *Woolley v. Hoffmann-LaRoche, Inc.*, 99 N.J. 284, 297-98, *modified*, 101 N.J. 10 (1985) (citation omitted).

98. *McQuitty v. Gen. Dynamics Corp.*, 204 N.J. Super. 514, 520 (App. Div. 1985). *Cf. Shebar v. Sanyo Bus. Sys. Corp.*, 111 N.J. 276, 286 (1988).

99. *Romeo v. Seton Hall Univ.*, 378 N.J. Super. 384 (App. Div. 2005).

100. *Vosough v. Kierce*, 437 N.J. Super. 218, 245 (App. Div. 2014). *See also Power v. Bayonne Bd. of Educ.*, No. CV165091KMJBC, 2017 WL 1536221, at *6 (D.N.J. Apr. 26, 2017) (holding that

even where an employment manual constitutes a contract, the contract is between the employee and the employer and not between the employee and other employees of the employer.[101]

In determining whether a manual is enforceable, courts must look to its meaning and effect and the circumstances under which it was prepared and distributed.[102]

1-6:1 Distribution

To be enforceable under *Woolley*, a manual must have been distributed or generally disseminated to all or to the relevant portion of the workforce. General distribution or dissemination of the terms of a manual is a vital element of a *Woolley* claim because it forms a basis for the legal presumptions that (1) the employer intended to be bound and (2) employees were generally aware of and could have reasonably relied upon the manual's terms.[103]

Thus, where a manual has not been generally distributed, employee claims have been rejected for lack of actual reliance; in effect, the asserted *Woolley* cause is rejected and the claim evaluated under an individual

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Woolley does not apply to promises in handbooks other than those concerning employment termination).

101. *Gil v. Related Mgmt. Co.*, No. 06-2174 (WHW), 2006 WL 2358574 (D.N.J. Aug. 14, 2006).

102. *Woolley v. Hoffmann-LaRoche, Inc.*, 99 N.J. 284, 298, *modified*, 101 N.J. 10 (1985). *See Nicosia v. Wakefern Food Corp.*, 136 N.J. 401 (1994) (looking to the content and distribution of a manual to determine whether employees reading it would have a reasonable expectation that it was binding); *Witkowski v. Thomas J. Lipton, Inc.*, 136 N.J. 385 (1994) (no categorical test can be applied in determining whether an employment manual when fairly read gives rise to the reasonable expectations of employees that it confers enforceable obligations; relevant factors relate to both the manual's specific provisions and the context of its preparation and distribution). *Cf. Gilbert v. Durand Glass Mfg. Co.*, 258 N.J. Super. 320, 330 (App. Div. 1992).

103. *See Woolley v. Hoffmann-LaRoche, Inc.*, 99 N.J. 284, 302-04, n.10, *modified*, 101 N.J. 10 (1985). *But see Grigoletti v. Ortho Pharm. Corp.*, 226 N.J. Super. 518, 527-28 (App. Div. 1988) (plaintiffs must prove the content and meaning of the employment manual they rely upon and that it "constituted a *promise upon which one or both plaintiffs relied*; that the promise was not kept, and that ascertainable damages flowed from the breach.") (Emphasis added.), *rev'd in part and modified in part on other grounds*, 118 N.J. 89 (1990). The extent of distribution of manuals was a factor in finding binding promises in the following cases: *Witkowski v. Thomas J. Lipton, Inc.*, 136 N.J. 385, 395 (1994) (distribution to all employees "indicates that Lipton understood that it would be read and considered by all its employees."); *Nicosia v. Wakefern Food Corp.*, 136 N.J. 401 (1994) (manual distributed to 300 of 1500 non-union employees); *Falco v. Cmty. Med. Ctr.*, 296 N.J. Super. 298, 324 (App. Div. 1997) (stating that the preparation or distribution of the employee handbook are factors to consider in determining the reasonableness of an employee's belief that a handbook created a binding, legally enforceable commitment); *see also Geldreich v. Am. Cyanamid Co.*, 299 N.J. Super. 478, 484 (App. Div. 1997), *overruled on other grounds by Dzwonar v. McDevitt*, 177 N.J. 451 (2003) (policy memorandum received by plaintiff, but not distributed to the general non-unionized workforce of defendant, met the *Woolley* distribution test because it was not marked "confidential," it was made available for review by employees who sought to review it, and there was widespread awareness of its contents by management).

estoppel burden of proof.[104] The distinction was well put by the court in *Labus v. Navistar International Transportation Corp.*, in rejecting a *Woolley* claim based upon a manual neither generally distributed nor relied upon:

> The *Woolley* court found that a presumption of reliance arises and the manual's provisions become binding at the moment the manual is distributed to the general work force. The court noted that, if reliance were not presumed, a strict contractual analysis, requiring bargained-for detriment, would protect the rights of some employees but not others. Following *Toussaint v. Blue Cross & Blue Shield of Michigan*, the court agreed that employees neither had to read the manual, know of its existence, or rely on it to benefit from its provisions any more than employees in a plant that is unionized have to read or rely on a collective bargaining agreement to obtain its benefits.[105]

Similarly, manuals distributed only to supervisory employees, and intended for their use in dealing with subordinates, have been found unenforceable under *Woolley*.[106]

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104. *See, e.g.*, *Labus v. Navistar Int'l Transp. Corp.*, 740 F. Supp. 1053, 1062 (D.N.J. 1990) (plaintiff could not reasonably rely upon promise in a manual he never saw that was distributed to only certain upper-level employees); *House v. Carter-Wallace, Inc.*, 232 N.J. Super. 42, 55 (App. Div. 1989) ("An employee cannot have a reasonable expectation of job security based on a document which was not distributed to him."). *See Gilbert v. Durand Glass Mfg. Co., Inc.*, 258 N.J. Super. 320, 330 (App. Div. 1992) (employee need not have known the particulars of a *Woolley* policy; "[i]t is enough that the employee reasonably believes that a particular personnel policy has been established and is applied consistently and uniformly to each employee."). In *Tripodi v. Johnson & Johnson*, 877 F. Supp. 233, 239-40 (D.N.J. 1995), the court found that distribution of a company credo to customers, suppliers and stockholders, as well as to employees, was an indication that it was *not* intended to create binding obligations. "This serves to emphasize the aspirational rather than the contractual nature of the document. Surely, the credo was not a contract with doctors, nurses, patients, mothers and all others that Johnson & Johnson's products and services would be of high quality and sold at reasonable prices." *Id.* at 239.

105. *Labus v. Navistar Int'l Transp. Corp.*, 740 F. Supp. 1053, 1062 (D.N.J. 1990). *Cf. Michota v. Anheuser-Busch, Inc. (Budweiser)*, 755 F.2d 330, 335-36 (3d Cir. 1985) (employees have constructive notice of terms of collective bargaining agreement).

106. *See Maietta v. United Parcel Serv., Inc.*, 749 F. Supp. 1344, 1362 (D.N.J. 1990) (book that served as a "curriculum aid" for "workshop on communication and personnel management skills for full-time management employees," and that was distributed to only senior management, was not a *Woolley* contract), *aff'd without published op.*, 932 F.2d 960 (3d Cir. 1991); *Ware v. Prudential Ins. Co.*, 220 N.J. Super. 135, 144-47 (App. Div. 1987) (reasonable expectation of benefits could not be based upon guide distributed only to supervisors—and not to plaintiff—and by its terms directed to the delineation of management responsibilities).

1-6:2 Legally Binding Language

The job security provisions of the employee handbook enforced in *Woolley* were found by the Supreme Court to be "explicit and clear," and the provisions pertaining to discipline and discharge were comprehensive. These factors appear to have been vital to the Court's determination in that case that the handbook was intended to be binding and should be enforced.[107] Conversely, the provisions of a handbook will not be enforced if the language is such that "no one could reasonably have thought it was intended to create legally binding obligations."[108] As the Appellate Division stated in *Ware v. Prudential Insurance Co.*: "If the document was intended to serve as a handbook guaranteeing employee benefits, it would be reasonable to expect that it also would specifically set forth those benefits."[109] But what is found to be too vague or indefinite to constitute a binding promise varies.

In *Levinson v. Prentice-Hall, Inc.*, the district court found the following language too vague to constitute a promise of promotion:

> The policy of Prentice-Hall is that all management personnel be supportive of employee efforts both to improve in their present jobs, and to be promoted to jobs of greater responsibility.
>
> Available jobs will be posted on bulletin boards in accordance with Prentice-Hall's policy. Employees who apply will be considered on the basis of their skills and abilities.
>
> Where prior experience in any department has given an employee knowledge and familiarity with the character and procedures which are required in the performance of the higher level job, the department head may give preference to such applicant.[110]

In *Radwan v. Beecham Laboratories*, the Third Circuit found it doubtful that *Woolley* would apply to a manual that contained a non-exclusive list of causes for discipline but lacked any detailed procedures for employee

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107. *Woolley v. Hoffmann-LaRoche, Inc.*, 99 N.J. 284, 306, *modified*, 101 N.J. 10 (1985). *See Kane v. Milikowsky*, 224 N.J. Super. 613, 616 (App. Div. 1988).

108. *Woolley v. Hoffmann-LaRoche, Inc.*, 99 N.J. 284, 299, *modified*, 101 N.J. 10 (1985). *See Normand v. Goodyear Tire & Rubber Co.*, No. Civ. A. 05-1880 (JAP), 2005 WL 1657032 (D.N.J. July 13, 2005) (finding that the employment manual did not create legally binding obligations where it did not contain comprehensive and definite provisions regarding job security).

109. *Ware v. Prudential Ins. Co.*, 220 N.J. Super. 135, 146 (App. Div. 1987).

110. *Levinson v. Prentice-Hall, Inc.*, No. 85-3440, 1988 WL 76383, at *1 (D.N.J. July 22, 1988), *aff'd in part and rev'd in part, on other grounds*, 868 F.2d 558 (3d Cir. 1989).

counseling or discipline.[111] In *Renart v. Chartwells*, the District Court noted that express language in an employment application expressly creating an at-will relationship supersedes any implied contract created by an employee handbook.[112] In *Falco v. Community Medical Center*, the employee handbook's inclusion of disciplinary guidelines that provided a comprehensive pronouncement of the employer's termination policy was not sufficiently definitive to create an employment contract.[113] The handbook contained a disclaimer and further stated that the guidelines did not prevent the employer from terminating employees with or without cause in its discretion.[114] And in *Maietta v. United Parcel Service, Inc.,* a policy statement that "We Treat Our People Fairly and Without Favoritism" was found unenforceable as an "ideal."[115]

In contrast, in *Preston v. Claridge Hotel & Casino*, the Appellate Division held that a general promise of "maximum job security," combined with a policies manual describing a progressive discipline program, and a warning in the employee manual that certain specific acts of misconduct would be grounds for discharge, constituted a promise not to discharge employees except for good cause. "Having offered these representations as

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111. *Radwan v. Beecham Labs.*, 850 F.2d 147, 151 (3d Cir. 1988) (*dicta*). In *Witkowski v. Thomas J. Lipton, Inc.*, 136 N.J. 385 (1994), the Supreme Court held that a non-exclusive list of grounds for discharge, coupled with a progressive warning notice system, constituted a promise to discharge employees only in accordance with the manual. However, the statement that a broad program of employee benefits set forth in a more than 100-page manual "will assist you in providing security and protection for your family during your working years and into retirement" was found unsupportive of a claimed protection against discharge without cause. *Brunner v. Abex Corp.*, 661 F. Supp. 1351, 1355 (D.N.J. 1986); *see also Marzano v. Comput. Sci. Corp.*, Inc., 91 F.3d 497, 512-13 (3d Cir. 1996) (holding that a two-page memorandum explaining entitlements under the New Jersey Family Leave Act did not create an implied contract of employment); *Varrallo v. Hammond Inc.*, 94 F.3d 842 (3d Cir. 1996) (employee handbook lacked requisite definiteness and comprehensiveness needed to imply a contract of "for cause" termination); *Monroe v. Host Marriot Servs. Corp.*, 999 F. Supp. 599 (D.N.J. 1998) (holding that a one-page memorandum entitled "Guarantee of Fair Treatment," which outlined the employer's grievance procedures, was lacking in specificity and explicit terms regarding job security and termination policies, and was therefore not an employment contract); *Barone v. Gardner Asphalt Corp.*, 955 F. Supp. 337, 342-43 (D.N.J. 1997) (memorandum entitled "Conditions of Employment" did not create an implied contract); *Rodichok v. Limitorque Corp.*, No. CIV. A. 95-3528, 1997 WL 392535 (D.N.J. July 8, 1997) (employee handbook did not contain language creating an implied contract); *Vanderhoof v. Life Extension Inst.*, 988 F. Supp. 507, 517 (D.N.J. 1997) (holding that the employment manual, which contained a clear and prominent disclaimer entitled "This handbook is not an employment contract," was not an employment contract).

112. *Renart v. Chartwells*, No. 01-1478 (JEI), 2003 WL 22454931, at *12 (D.N.J. Oct. 6, 2003), *aff'd*, 122 F. App'x 559 (3d Cir. 2004).

113. *Falco v. Cmty. Med. Ctr.*, 296 N.J. Super. 298 (App. Div. 1997), *overruled on other grounds by Dzwonar v. McDevitt*, 177 N.J. 451 (2003).

114. *Falco v. Cmty. Med. Ctr.*, 296 N.J. Super. 298 (App. Div. 1997), *overruled on other grounds by Dzwonar v. McDevitt*, 177 N.J. 451 (2003).

115. *Maietta v. United Parcel Serv., Inc.*, 749 F. Supp. 1344, 1361 (D.N.J. 1990), *aff'd without published opinion*, 932 F.2d 960 (3d Cir. 1991).

an attractive alternative to collective bargaining," the employer "cannot avoid its obligations on the basis of semantic differences."[116]

In *Witkowski v. Thomas J. Lipton, Inc.*,[117] the Court found an issue of fact as to whether a binding promise was created by a manual which contained no specific representation of for-cause termination only, but did contain reference to a "trial period" for new employees, a progression of three warnings and discipline, and nonexclusive list of grounds for immediate discharge. Noting that the overriding consideration in determining whether contractual obligations are created is the reasonable expectations of employees, the Court found that the nonexclusive list of grounds for immediate termination could reasonably lead an employee to conclude that he would not be terminated without either going through the progressive warning system or committing an offense like those listed as grounds for immediate discharge. The Court thus found these job security provisions sufficiently comprehensive and definite to allow a jury to decide whether an implied contract was created.[118]

In appropriate circumstances, the question of whether a document constitutes a *Woolley* contract may be resolved in a motion for summary judgment.[119]

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116. *Preston v. Claridge Hotel & Casino*, 231 N.J. Super. 81, 86 (App. Div. 1989). "[P]olicy statements cannot as a matter of law create a contractual obligation and abrogate the employment at-will doctrine." *King v. Port Auth. of N.Y. & N.J.*, 909 F. Supp. 938, 942-43 (D.N.J. 1995), *aff'd*, 106 F.3d 385 (3d Cir. 1996). In *Tripodi v. Johnson & Johnson*, 877 F. Supp. 233 (D.N.J. 1995), the court found that employees could not reasonably understand a one-page company credo to create enforceable obligations because it contained only generalized statements, did not cover the subject of termination and did not define impermissible employee conduct. The credo, which provided as follows, was deemed aspirational rather than contractual:

> We are responsible to our employees, the men and women who work with us throughout the world. Everyone must be considered as an individual. We must respect their dignity and recognize their merit. They must have a sense of security in their jobs. Compensation must be fair and adequate, and working conditions clean, orderly and safe. Employees must feel free to make suggestions and complaints. There must be equal opportunity for employment, development and advancement for those qualified. We must provide competent management, and their actions must be just and ethical.

Tripodi v. Johnson & Johnson, 877 F. Supp. 233, 235 (D.N.J. 1995).

117. *Witkowski v. Thomas J. Lipton, Inc.*, 136 N.J. 385 (1994).

118. *Witkowski v. Thomas J. Lipton, Inc.*, 136 N.J. 385, 395-99 (1994).

119. *Troy v. Rutgers*, 168 N.J. 354, 366 (2001) (stating that "when no reasonable juror could reach other than one conclusion, the question of whether a document constitutes an implied contract may be resolved on a motion for summary judgment"). *Compare Giudice v. Drew Chem. Corp.*, 210 N.J. Super. 32, 35 (App. Div. 1986), *with Radwan v. Beecham Labs.*, 850 F.2d 147, 151 (3d Cir. 1988) (citing *Ware v. Prudential Ins. Co.*, 220 N.J. Super. 135 (App. Div. 1987)). *Accord Woolley v. Hoffmann-LaRoche, Inc.*, 99 N.J. 284, 307 (ordinary division of issues between court and jury applies), *modified*, 101 N.J. 10 (1985).

1-6:3 "Just Cause" Provisions

An employment manual that prohibits termination except for just cause protects against "arbitrary discharge."[120] It remains unsettled, however,

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120. *Maietta v. United Parcel Serv., Inc.*, 749 F. Supp. 1344, 1362 (D.N.J. 1990), *aff'd without published opinion*, 932 F.2d 960 (3d Cir. 1991); *Abbate v. DMR Trecom, Inc.*, No. 98 Civ. 2710(RPP), 1999 WL 673341 (S.D.N.Y. Aug. 27, 1999) (citing *Maietta* and *Shebar* and holding that in New Jersey for cause terminations protect only against arbitrary termination and that an employer need only make a good faith determination having credible support that good cause exists to terminate an employee for cause); *Ricci v. Corp. Express of the East, Inc.*, 344 N.J. Super. 39, 46 (App. Div. 2001) (finding that a contract provision permitting termination for cause "protects an employee from unreasonable or arbitrary termination"); *see also* cases cited in *Maietta*: *Shebar v. Sanyo Bus. Sys. Corp.*, 111 N.J. 276, 287 (1988); *Woolley v. Hoffmann-LaRoche, Inc.*, 99 N.J. 284, 301 n.2, (interpreting manual as protecting employment only from arbitrary termination), *modified*, 101 N.J. 10 (1985); *Linn v. Beneficial Com. Corp.*, 226 N.J. Super. 74, 79, 80 (App. Div. 1988) (action for wrongful discharge does not generally lie for one whose loss of work is actuated by elimination of the job itself due to legitimate economic or business reasons, and not as a bad faith pretext to arbitrarily terminate the employee). In *Greenwood v. State Police Training Ctr.*, the New Jersey Supreme Court defined "good cause" in the context of a regulation permitting the suspension or dismissal of police trainees on that basis. The plaintiff in that case had been dismissed from the police academy due to a fear that his blindness in one eye would cause him harm. The court said:

> In the employment context, a rule or contract provision allowing termination only for good cause protects an employee from unreasonable or arbitrary termination. Courts have found good cause for termination in cases in which the discharge is prompted by a legitimate business concern, or in which an employee does not perform the job safely or effectively.
>
> Conversely, courts have noted that termination would be arbitrary or unreasonable and thus not for good cause if the asserted ground was irrelevant to job performance. Thus, although the good cause standard eludes precise definition, courts ordinarily uphold findings of good cause when the employee's performance is deficient or when the employee creates a risk of harm to himself or herself or others. An employer must present substantial objective evidence to meet the good-cause standard. The few New Jersey courts that have considered the issue of good-cause dismissals are in accord. *See Alter v. Resorts Int'l*, 234 N.J. Super. 409, 416-17, 560 A.2d 1290 (Ch. Div. 1989) (corporation had good cause for discharge when Casino Control Commission required corporation not to employ person who could not qualify for gaming license); *Rogozinski v. Airstream by Angell*, 152 N.J. Super. 133, 143-44, 377 A. 2d 807 (Law Div. 1977) (good cause standard not satisfied when allegations of employee incompetence stemmed from personal animosity and employer lacked clear, specific, and definitive evidence), *modified on other grounds,* 164 N.J. Super. 465, 397 A.2d 334 (App. Div. 1979).

Greenwood v. State Police Training Ctr., 127 N.J. 500, 509-10 (1992) (citations omitted).

In *Abella v. Barringer Resources, Inc.*, 260 N.J. Super. 92 (Ch. Div. 1992), plaintiff alleged that a statement that he was "terminated for cause" was defamatory. In finding a fact issue on the import of that statement, the court held as follows:

> Typically, the fair and natural import of the statement that a person was 'terminated for cause' is only that the termination was not arbitrary. *See Shebar v. Sanyo Business Sys. Corp.*, 111 N.J. 276, 287, 544 A.2d 377 (1988). On its face, it appears to this court that the statement merely posits that Abella's termination was not arbitrary and that Abella refutes this position and may litigate the matter. The statement neither alleges that Abella was incompetent nor recites the particulars that led to his termination. However, this court is not prepared to hold that the phrase 'termination by cause' is defined as a matter of law in all contexts as 'a non-arbitrary cessation of employment.'

Abella v. Barringer Res., Inc., 260 N.J. Super. 92, 99 (Ch. Div. 1992).

whether an employer may satisfy this standard by acting in good faith, or whether he must be correct, *i.e.*, that the facts upon which he acted be accurate. One district court opinion adopts the good faith standard, holding that a discharge is not arbitrary if the employer has made a good faith determination having credible support that good cause exists:

> 'Just cause' is . . . a fair and honest cause of reason, regulated by good faith on the part of the party exercising the power. A discharge for 'just cause' is one based on facts that (1) are supported by substantial evidence and (2) are reasonably believed by the employer to be true and also (3) is not for any arbitrary, capricious, or illegal reason.[121]

The Appellate Division has indicated that, in at least some circumstances, it will apply that rule. Where an employer specifically reserved to itself the right to decide when grounds for termination existed, the court held that "just cause" did not require that the employer be correct, only that he make a good faith determination with credible support.[122]

The New Jersey Supreme Court has held, in the context of an individual employment contract, that where the contract permits an employer to terminate an employee for failure to perform to the employer's satisfaction, genuine subjective dissatisfaction of the employer with the employee's performance is sufficient to justify discharge.[123]

1-6:4 Economic Necessity

Absent an express promise to the contrary, employers are assumed to have retained the right to terminate employees for economic reasons, even if the employee manual otherwise limits discharges to employee misconduct or poor performance.[124]

> [A]n action for wrongful discharge does not generally lie for one whose loss of work is actuated by elimination of the

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121. *Maietta v. United Parcel Serv., Inc.*, 749 F. Supp. 1344, 1363 (D.N.J. 1990) (quoting *Baldwin v. Sisters of Providence, Inc.*, 112 Wash. 2d 127, 769 P.2d 298, 303 (1989)), *aff'd without published op.*, 932 F.2d 960 (3d Cir. 1991).

122. *Vitale v. Bally's Park Place, Inc.*, 1989 WL 284539 (App. Div. May 5, 1989).

123. *Silvestri v. Optus Software, Inc.*, 175 N.J. 113 (2003). *See also Bogage v. Display Grp. 21, LLC*, No. A-2285-13T1, 2018 WL 1073354, at *11 (N.J. Super. Ct. App. Div. Feb. 28, 2018) (holding that where an employment agreement permitted the employer to terminate the employment relationship "at any time" and "for any reason (or no reason)," the employer did not have to show genuine dissatisfaction).

124. *Monroe v. Host Marriot Servs. Corp.*, 999 F. Supp. 599, 606 (D.N.J. 1998); *Linn v. Beneficial Com. Corp.*, 226 N.J. Super. 74, 80 (App. Div. 1988).

> job itself due to legitimate economic or business reasons, and not as a bad faith pretext to arbitrarily terminate the employee.[125]

However, an economic justification for a layoff may not in itself suffice, where procedural requirements of the manual are at issue,[126] or where the selection of employees to be affected implicates statutory concerns such as compliance with state and federal anti-discrimination laws.

1-6:5 Employees Under Contract

Employees covered by collective bargaining agreements or individual contracts of employment have been found precluded by those contracts from asserting *Woolley* claims. It is considered unreasonable for such employees to rely on an employee manual—rather than their contract—as governing the terms and conditions of employment.[127]

An employee's completion of an employment application that provides that employment would not be for a fixed period of time and may be terminated by the employer with or without cause or notice will similarly make unreasonable any employee expectation that an employee manual modifies the "at-will" nature of employment.[128]

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125. *Linn v. Beneficial Com. Corp.*, 226 N.J. Super. 74, 80 (App. Div. 1988). *See Brunner v. Abex Corp.*, 661 F. Supp. 1351, 1355 n.3 (D.N.J. 1986) (finding doubtful that Supreme Court intended to bar companies from cutting staff for economic reasons, citing "doctrine of commercial impracticability" which excuses a party from performing on a contract when "the cost of the performance has in fact become so excessive and unreasonable that the failure to excuse performance would result in grave injustice.").

126. *Geldreich v. Am. Cyanamid Co.*, 299 N.J. Super. 478, 486 (App. Div. 1997) (despite a valid reduction in force, employer required to follow procedure in its personnel policy manual to look for and offer alternative employment with the company for employees before their discharge).

127. *Ware v. Prudential Ins. Co.*, 220 N.J. Super. 135, 143 (App. Div. 1987); *see also Schlichtig v. Inacom Corp.*, 271 F. Supp. 2d 597 (D.N.J. 2003) (individual employment agreement allowing termination with or without cause or notice precluded *Woolley* claim); *Keene v. Sears Roebuck & Co., Inc.*, No. 05-828(JJH), 2007 WL 2701992 (D.N.J. Sept. 10, 2007) (same). *Cf. McQuitty v. Gen. Dynamics Corp.*, 204 N.J. Super. 514 (App. Div. 1985); *see also Gilbert v. Durand Glass Mfg. Co.*, 258 N.J. Super. 320, 327, 609 A.2d 517 (App. Div. 1992) (noting that the absence of an individual employment contract will affect the "reasonable expectations" of an employee receiving an employee manual).

128. *Schlichtig v. Inacom Corp.*, 271 F. Supp. 2d 597 (D.N.J. 2003); *Aviles v. Big M, Inc.*, No. A-4980-09T4, 2011 N.J. Super. LEXIS 564, at *18-19 (App. Div. Mar. 8, 2011) (finding that the employee's signing of an acknowledgment form which stated that her employment could be terminated at any time negated any statements made in the employee manual).

1-7 Clear and Prominent Disclaimers

Creation of an implied contract through an employee manual may be avoided by including a clear and prominent disclaimer, but to be effective the disclaimer must be strong, straightforward, and absolutely clear.[129] It should comply with the Supreme Court's description of same in *Woolley*:

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[129] *Richardson v. United Airlines, Inc.*, No. CV 16-4749, 2017 WL 3037383, at *7 (D.N.J. July 17, 2017) (finding disclaimer not sufficiently prominent where it (i) appeared on the fourth page (ii) the title "You Should Know . . ." did not indicate that it concerned a disclaimer; and (iii) although disclaimer contained bullet points that were "set aside," unrelated parts of the policy were formatted similarly, and the disclaimer was not bolded or italicized like other parts of the policy that were emphasized.); *Collado v. B'Way Corp.*, No. CV 16-604 (JLL), 2016 WL 1572541, at *3 (D.N.J. Apr. 19, 2016) (finding clear and prominent disclaimers where (i) the employee is asked to sign that he "understand[s] that this Handbook does not create a contract of employment and that it does not create a contact for benefits" and that he "further understand [s] and agree[s] that, at [the employee's] option or the Company's option, [the employee's] employment, compensation, and benefits may be terminated at any time, with or without cause." (ii) in the handbook introduction, providing in bold font: "This Handbook does not create a contract, express or implied, for any purpose, specifically including, but not limited to, . . . employment duration," and (iii) stating in the manual that "[n]othing in this policy alters the employee's at-will status, and the employee may be terminated at any time for any lawful reason"); *Metropolitan Foods v Kelsch*, No. 11-3306 (JLL), 2012 WL 956178 (D.N.J. Feb. 14, 2012) (dismissing contract claim based on manual where manual is "rife with statements it is not a contract," including a bold underlined disclaimer on the first page); *Gil v. Related Mgmt. Co.*, No. 06-2174(WHW), 2006 WL 2358574 (D.N.J. Aug. 14, 2006) (finding disclaimer to be clear and prominent). *See Magnusson v. Hartford*, No. 05-365 (GEB), 2006 WL 2528541 (D.N.J. Aug. 31, 2006) (finding language in passages on employer's is internal website sufficient to prevent creation of an implied contract); *Normand v. Goodyear Tire & Rubber Co.*, No. Civ. A. 05-1880 (JAP), 2005 WL 1657032 (D.N.J. July 13, 2005) (finding language of employee manual sufficient to constitute a clear and prominent disclaimer); *Wiegand v. Motiva Enters., LLC*, 295 F. Supp. 2d 465, 478 (D.N.J. 2003) (Language in an employment application stating "THIS HANDBOOK . . . DOES NOT CONSTITUTE AN EMPLOYMENT CONTRACT . . . THE COMPANY IS FREE TO TERMINATE THE EMPLOYEE AT ANY TIME FOR ANY REASON," above the signature line is a sufficiently clear and prominent disclaimer); *Warner v. Fed. Express Corp.*, 174 F. Supp. 2d 215, 226-29 (D.N.J. 2001) (holding that a disclaimer in an acknowledgment of receipt of a handbook constituted an effective disclaimer and stating that the sufficiency of a disclaimer can be decided as a matter of law where the language and placement of a disclaimer is not disputed); *Kennedy v. Chubb Grp. of Ins. Cos.*, 60 F. Supp. 2d 384, 399-400 (D.N.J. 1999) (holding the following disclaimer to be effective to avoid creation of an enforceable contractual obligation to allow for part-time employment: "Chubb reserves the right to terminate an individual's employment with or without cause, or to change wages and/or any other term or condition of employment of any employee without any prior consultation or agreement with the employee."); *Pepe v. Rival Co.*, 85 F. Supp. 2d 349, 384 (D.N.J. 1999) (finding the disclaimer in the employment handbook to be sufficiently clear because it plainly states that "nothing contained herein shall create employment for a definite term," it expressly reserves the right to terminate employees without notice and for any reason, and it avoids the use of specialized legal terms), *aff'd*, 254 F.3d 1078 (3d Cir. 2001); *Vanderhoof v. Life Extension Inst.*, 988 F. Supp. 507, 517 (D.N.J. 1997) (holding that the employment manual, which contained a clear and prominent disclaimer entitled "This handbook is not an employment contract," was not an employment contract); *Stroli v. Bergen Cmty. Blood Servs., Inc.*, No. A-1688-13T1, 2015 WL 4614877, at *8 (N.J. Super. Ct. App. Div. Aug. 4, 2015) (finding two disclaimers in handbook sufficient as a matter of law); *Rivera v. Trump Plaza Hotel & Casino*, 305 N.J. Super. 596, 601 (App. Div. 1997) (finding that the disclaimer, signed by each plaintiff, was sufficiently clear and definite). For examples of disclaimers that were insufficient under this standard, *see Frangione v. Twp. of Edison*, No. 06-2046, 2008 WL 2565104 (D.N.J. June 24, 2008) (finding disclaimers on the first page of a manual over 100 pages in length not sufficiently prominent given the detailed job security provisions elsewhere in the manual); *Zawadowicz v. CVS Corp.*, 99 F. Supp. 2d 518, 536-37 (D.N.J. 2000) (finding the language of the

> All that need be done [to avoid creation of a contract] is the inclusion in a very prominent position of an appropriate statement that there is no promise of any kind by the employer contained in the manual; that regardless of what the manual says or provides, the employer promises nothing and remains free to change wages and all other working conditions without having to consult anyone and without anyone's agreement; and that the employer continues to have the absolute power to fire anyone with or without good cause.[130]

The handbook in *Weber v. LDC/Milton Roy* provided that "the statements (in the handbook) are in no way intended to restrict management's obligation for final interpretation of its policies and procedures."[131] This disclaimer, coupled with the absence of a specific promise of permanent employment or the availability of any termination procedure, led the court to conclude there was no *Woolley* contract.[132] Similarly, the handbook in *Edwards v. Schlumberger-Well Services* contained a disclaimer that was sufficient to avoid the creation of a *Woolley* contract. The disclaimer, which was titled "Notice of Disclaimer," was prominently located at the front of the handbook and stated that the handbook was not a contract or guarantee of employment.[133]

However, in *Maselli v. Valley National Bancorp.*,[134] the Appellate Division held that a disclaimer that said "nothing contained in this [handbook] or in any policy or work rule of [the employer] shall constitute a contract of employment or a contract or agreement for a definite or specified term of employment" was not sufficient to disclaim all policies

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disclaimers in an employment application and an acknowledgement to an employee handbook insufficient to be effective); *Sellitto v. Litton Sys., Inc.*, 881 F. Supp. 932 (D.N.J. 1994) (a disclaimer printed in standard typeface under the heading "Note" was not prominent); *Geldreich v. Am. Cyanamid Co.*, 299 N.J. Super. 478, 486 (App. Div. 1997) (the "generalized disclaimer" in the personnel policy manual was not sufficient to allow employer to avoid complying with unqualified statements elsewhere in the manual that the company will undertake certain procedures in the event of an involuntary termination due to a reduction in force); *Preston v. Claridge Hotel & Casino*, 231 N.J. Super. 81, 87 (App. Div. 1989) (finding the disclaimer inadequate in view of a prior edition of the handbook that had contained references to "maximum job security").

130. *Woolley v. Hoffmann-LaRoche, Inc.*, 99 N.J. 284, 309, *modified*, 101 N.J. 10 (1985).

131. *Weber v. LDC/Milton Roy*, 1 IER Cases 1509, 42 FEP 1507, 1518 (D.N.J. 1986).

132. *Weber v. LDC/Milton Roy*, 1 IER Cases 1509, 42 FEP 1507, 1517-18 (D.N.J. 1986).

133. *Edwards v. Schlumberger-Well Services*, 984 F. Supp. 264, 284-85 (D.N.J. 1997).

134. *Maselli v. Valley Nat'l Bancorp.*, No. A-0440-16T1, 2018 WL 828053 (N.J. Super. Ct. App. Div. Feb. 13, 2018).

in the handbook.[135] Citing *Woolley*, the Appellate Division found that the words "contract of employment" in the disclaimer raised a fact issue as to whether the disclaimer was limited to precluding a finding that a binding promise of job security or employment for a definite period, or whether it extended to other employment-related promises in the handbook. *Woolley*, in contrast, included a "general disavowal of any contractual obligation," which would have been sufficient to preclude an employer being bound to an anti-harassment policy in the handbook.[136]

The effect of a manual also may be limited by entry into individual contracts of employment with particular employees providing that the employment is at will; they have been found to take precedence over the terms of a manual.[137] Some employers also include provisions in employment applications stating that the employment applied for will be at will.[138]

The Appellate Division has also stated that an employee manual can "narrow and define the procedure by which an employment-at-will contract can be changed by the parties."[139] Thus, where an employee manual uses clear language that is prominently placed to explain how the at-will status of an employee can be changed, this mechanism will be enforced.[140]

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135. *Maselli v. Valley Nat'l Bancorp.*, No. A-0440-16T1, 2018 WL 828053, at *2 (N.J. Super. Ct. App. Div. Feb. 13, 2018).

136. *Maselli v. Valley Nat'l Bancorp.*, No. A-0440-16T1, 2018 WL 828053, 2018 N.J. Super Unpub. LEXIS 334, at *3-4 (N.J. Super. Ct. App. Div. Feb. 13, 2018).

137. *See Radwan v. Beecham Labs.*, 850 F.2d 147, 150 (3d Cir. 1988) (employee who accepted individual agreement of employment at will could have no reasonable expectation not to be discharged except for cause based on employee manual); *Ware v. Prudential Ins. Co.*, 220 N.J. Super. 135, 144 (App. Div. 1987) (Because employers can prevent personnel policies from being legally binding by including a statement to that effect in the manual, "it follows *a fortiori* that this effect may be avoided by the execution of a written employment contract by which the employee expressly agrees to an at will employment status.").

138. Such a provision was found effective in *Radwan v. Beecham Labs.*, 850 F.2d 147, 150 (3d Cir. 1988), where the Third Circuit stated:

> Here, unlike in *Woolley*, the question of the employee's tenure was specifically dealt with in writing when he was hired, for [plaintiff] agreed that he could be discharged at any time without previous notice. Further, nothing in Radwan's application suggested that Beecham's right to discharge him was dependent upon his conduct or job performance. While this application was not part of the employees' manual, we do not understand *Woolley* to require that disclaimers of an intent to bind an employer not to discharge an employee must be in the employees' manual and not in an individual agreement.

Id. (citation omitted).

139. *Mita v. Chubb Computer Servs., Inc.*, 337 N.J. Super. 517, 527 (App. Div. 2001).

140. *Mita v. Chubb Computer Servs., Inc.*, 337 N.J. Super. 517, 526-27 (App. Div. 2001); *Kelly v. Simon Prop. Grp., Inc.*, No. 09-1274, 2010 U.S. Dist. LEXIS 112678, at *25 (D.N.J. Oct. 21, 2010) (applying the principles of *Mita* to find that a relocation agreement which failed to conform to the at-will policy expressed in company handbook did not give rise to contractual liability).

In determining the effectiveness of disclaimers, courts seem to use a common-sense standard based upon the totality of the document, which suggests that employers consider not just the language of the disclaimer, but also its prominence (*e.g.*, Is it in the front of the manual? Is it in bold face? Is it set off from other provisions by a separate heading?) and its effectiveness in light of other provisions of the manual (*e.g.*, Is a disclaimer stating that employment is at will seemingly contradicted by other portions of the manual referring to job security?).[141] In addition, the circumstances attendant to distribution of the manual may impact the interpretation and effectiveness of a disclaimer in an appropriate case.[142]

1-8 Revocation and Alteration

Where a manual without a disclaimer has been distributed, and a *Woolley* contract created, mere distribution of a subsequent manual with an otherwise effective disclaimer may not be sufficient to revoke any promises made in the first. In *Preston v. Claridge Hotel & Casino*,[143] the Appellate Division held that where the original manual (sans disclaimer) was discussed in an orientation meeting, it was inconsistent with the "basic honesty" required by *Woolley* to introduce a revised manual (with disclaimer) by merely asking employees "to pick up the handbook, read it, and sign the detachable acknowledgement form."[144] Thus, to be certain that revocation or amendment is effective, the announcement and

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141. *Zawadowicz v. CVS Corp.*, 99 F. Supp. 2d 518, 535-36 (D.N.J. 2000) (concluding that the disclaimer in the last sentence of a paragraph in an attendance policy, which was not highlighted or set off from the rest of the paragraph, was not prominent); *Pepe v. Rival Co.*, 85 F. Supp. 2d 349, 384 (D.N.J. 1999) (finding the disclaimer in the employment handbook to be sufficiently prominent because its heading "ASSOCIATE HANDBOOK STATEMENT" reflects its application to the entire handbook, and the disclaiming language is capitalized and set off), *aff'd*, 254 F.3d 1078 (3d Cir. 2001); *Vanderhoof v. Life Extension Inst.*, 988 F. Supp. 507, 517 (D.N.J. 1997) (holding that the disclaimer, set off by bold print in the first sentence, was effective to avoid creation of a contract even though it was on page 11 of a 29 page handbook; the first ten pages merely contained the corporate structure and an explanation of each division of the company); *Kapossy v. McGraw-Hill, Inc.*, 921 F. Supp. 234, 245-46 (D.N.J. 1996) (disclaimers in regular Roman type under the headings "ABOUT THIS BOOK" and "ABOUT THIS MANUAL" were not conspicuous); *Weber v. LDC/ Milton Roy*, 1 IER Cases 1509, 1510, 42 FEP 1507, 1518 (D.N.J. 1986); *Preston v. Claridge Hotel & Casino*, 231 N.J. Super. 81, 87 (App. Div. 1989); *Ware v. Prudential Ins. Co.*, 220 N.J. Super. 135, 144 (App. Div. 1987); *Jackson v. Georgia-Pacific Corp.*, 296 N.J. Super. 1, 15-16 (App. Div. 1996) (disclaimer's location in the very first paragraph under the heading "Termination of Employment-Salaried Employees" was a significant factor to the court in finding the disclaimer to be effective).

142. *See Preston v. Claridge Hotel & Casino*, 231 N.J. Super. 81, 87-88 (App. Div. 1989).

143. *Preston v. Claridge Hotel & Casino*, 231 N.J. Super. 81 (App. Div. 1989).

144. *Preston v. Claridge Hotel & Casino*, 231 N.J. Super. 81, 87-88 (App. Div. 1989). Of course, an employee's individual contract to work on an at-will basis is not modified by a subsequent distribution of a policies guide to supervisors. *Ware v. Prudential Ins. Co.*, 220 N.J. Super. 135, 144 (App. Div. 1987).

publication of a new or revised manual should be at least as prominent as that of the original manual.[145] Changes should be explained clearly, distributed to all concerned, and acknowledged. To the extent possible, advance notice of the change should be provided. Moreover, all new manuals should clearly and specifically reserve the right of amendment and revocation.[146]

1-9 Arbitration

As wrongful discharge suits proliferate, alternative dispute resolution procedures have become increasingly attractive to employers, and the courts have enforced contractual agreements to arbitrate employment disputes.[147] The New Jersey Supreme Court has held that an agreement to

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145. *See Preston v. Claridge Hotel & Casino*, 231 N.J. Super. 81, 87-88 (App. Div. 1989).

146. This reservation may not be necessary; the analysis in the above-cited cases suggests that the right to amend or revoke the provisions of a manual generally exists notwithstanding its articulation. That is particularly apparent with respect to those manuals that disclaim the intent to create a contract. However, language in *Woolley*, decisions in other jurisdictions, and pre-ERISA decisions in New Jersey applying unilateral contract principles to fringe benefit booklets, suggest articulation of a reserved right of amendment as the most appropriate course. *See generally Stopford v. Boonton Molding Co., Inc*., 56 N.J. 169 (1970); *Russell v. Princeton Labs., Inc*., 50 N.J. 30 (1967); *Bankey v. Storer Broad. Co*., 432 Mich. 438, 443 N.W. 2d 112 (Mich. 1987). The Court noted in *Woolley*:

> Further problems may result from the employer's explicitly reserved right unilaterally to change the manual. We have no doubt that, generally, changes in such a manual, including changes in terms and conditions of employment, are permitted. We express no opinion, however, on whether or to what extent they are permitted when they adversely affect a binding job security provision.

Woolley v. Hoffmann-LaRoche, Inc., 99 N.J. 284, 309, *modified*, 101 N.J. 10 (1985).

147. In *Garfinkel v. Morristown Obstetrics & Gynecology Assocs*., 168 N.J. 124 (2001), the New Jersey Supreme Court assumed, but did not hold, that the plaintiff's common law claims, including those for breach of an employment agreement and breach of the implied covenant of good faith and fair dealing, were subject to arbitration pursuant to the arbitration provision of the employment agreement. However, because the Supreme Court held that the plaintiff's LAD claims were not subject to arbitration, the Supreme Court did not compel arbitration of the common law claims, citing notions of judicial economy. *Id.* at 136-37. *See Sarbak v. Citigroup Global Mkts., Inc*., 354 F. Supp. 2d 531, 537 (D.N.J. 2004) ("In New Jersey there is a general policy in favor of arbitration of disputes."); *Russ Berrie & Co. v. Gantt*, 998 S.W.2d 713 (Tex. App. 1999) (applying New Jersey law and granting the defendant employer's motion to compel arbitration and stay litigation where the employment contract contained an agreement to arbitrate); *Angrisani v. Fin. Tech. Ventures*, L.P., 402 N.J. Super. 138 (App. Div. 2008) (enforcing arbitration provision of executive's employment agreement but declining to compel arbitration of related claims arising out of stock purchase agreement with separate entity); *Fastenberg v. Prudential Ins. Co*., 309 N.J. Super 415 (App. Div. 1998) (plaintiff required to arbitrate wrongful discharge and defamation claims). *Cf. Young v. Prudential Ins. Co. of Am*., 297 N.J. Super. 605 (App. Div. 1997) (interpreting valid arbitration agreement as excluding specific dispute). *See* Stephen S. Mayer, *ADR: An Effective Alternative to Litigation*, 123 N.J.L.J. 1218 (1989). *But see Moon v. Breathless Inc*, 868 F.3d 209 (3d Cir. 2017) (holding that, absent clear and unmistakable evidence that the parties intended the question of arbitrability to be decided by an arbitrator, it should be decided by a Court, and further holding that arbitration clause did not satisfy the requirements of *Garfinkel* and thus did not cover statutory wage claims); *Molloy v. Am. Gen. Life Cos*., No. 05-4547 (MLC), 2006 WL 2056848 (D.N.J. July 21, 2006) (declining to compel arbitration of employment dispute because employer failed to demonstrate that employee

arbitrate claims contained in an application of employment is enforceable to the same extent as such a provision in an employment contract or an employee handbook. Thus, in *Martindale v. Sandvik, Inc.*,[148] the Supreme Court found that an arbitration agreement in an employment application compelled the plaintiff to arbitrate her claims under the New Jersey Family Leave Act and the New Jersey Law Against Discrimination. However, to determine whether an employee manual's arbitration provision is enforceable, the New Jersey Supreme Court requires proof that the employee agrees to be bound by the arbitration provision.[149]

In *Atalese v. U.S. Legal Services Group, L.P.*,[150] the Supreme Court held that in order for an arbitration requirement in a consumer contract to be enforceable, the agreement "in some general and sufficiently broad way, must explain that the plaintiff is giving up her right to bring her claims in court or have a jury resolve that dispute." However, in *Flanzman v. Jenny Craig, Inc.*,[151] the Supreme Court held that an arbitration agreement signed in connection with employment need not designate an arbitral institution or general process for selecting an arbitration mechanism. Instead, it was sufficient to express mutual assent to the arbitration of disputes instead

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affirmatively agreed to arbitrate such claims); *Anthony v. Eleison Pharm., LLC*, No. A-0932-15T4, 2016 WL 3865655, at *4 (App. Div. July 18, 2016) (holding arbitration clause not enforceable where it included no reference to a waiver of plaintiff's statutory rights or a jury trial); *Epstein v. Wilentz, Goldman & Spitzer, P.A.*, No. A-1157-14T1, 2015 WL 9876918 (App. Div. Jan. 22, 2016) (declining to enforce arbitration agreement with an identical arbitration clause to the one in *Garfinkel* because the plaintiffs, who were attorneys formerly shareholders in the defendant law firm, denied that the agreement covered post-separation claims); *Quigley v. KPMG Peat Marwick LLP*, 330 N.J. Super. 252, 273-74 (App. Div. 2000) (finding that the language of the arbitration clause in the agreement plaintiff executed was too ambiguous and inadequate to constitute a waiver of the plaintiff's LAD claim).

148. *Martindale v. Sandvik, Inc.*, 173 N.J. 76 (2002); *cf. GMAC v. Pittella*, No. A-3876-08T3 2010 N.J. Super. LEXIS 1152, at *9-10 (App. Div. May 26, 2010) (questioning/citing *Martindale*).

149. *Leodori v. Cigna Corp.*, 175 N.J. 293 (2003); *AT&T Mobility Servs. LLC v. Francesca Jean-Baptiste*, No. CV 17-11962, 2018 WL 3425734, at *1 (D.N.J. July 16, 2018) (declining to enforce arbitration agreement where employer sent the plaintiff an e-mail notifying her that she would be bound by the Company's arbitration policy unless she opted-out, and employee did not respond); *Horowitz v. AT&T Inc.*, No. 3:17-CV-4827-BRM-LHG, 2019 WL 77331, at *7 (D.N.J. Jan. 2, 2019) (disagreeing with *AT&T Mobility Servs. LLC v. Francesca Jean-Baptiste* and holding that failure to opt out of arbitration agreement may be sufficient proof of affirmative agreement); *Schmell v. Morgan Stanley & Co.*, No. CV 17-13080, 2018 WL 1128502, at *3 (D.N.J. Mar. 1, 2018) (suggesting continued employment after receipt of an arbitration policy may support enforcement of mandatory arbitration provision, but finding genuine dispute of material fact as to whether the plaintiff had actually received the policy); *Dugan v. Best Buy Co. Inc.*, No. A-1897-16T4, 2017 WL 3442807 (N.J. Super. Ct. App. Div. Aug. 11, 2017) (declining to enforce arbitration policy where there is no evidence that the employee assented to it).

150. *Atalese v. U.S. Legal Servs. Grp., L.P.*, 219 N.J. 430 (2014).

151. *Flanzman v. Jenny Craig, Inc.*, 244 N.J. 119 (2020).

of a court proceeding by agreeing to "final and binding arbitration" that would take the place of "a jury or other civil trial."[152]

Furthermore, the Appellate Division, in an unpublished opinion, has held that the presence of an unambiguous disclaimer stating that nothing in an employee handbook was "intended to create contractual obligations" meant that a mandatory arbitration provision was not enforceable.[153]

In *Barr v. Bishop Rosen & Co., Inc.*,[154] the plaintiff was a stockbroker employed by an entity regulated by the Financial Industry Regulatory Authority ("FINRA"). In the course of his employment, the plaintiff twice executed a Form U-4, each of which included arbitration clauses requiring the plaintiff to arbitrate any dispute arising between him and the employer. However, neither of the arbitration clauses included an explanation of what arbitration is or any indication of how arbitration is different from a proceeding in a court of law. Instead, the employer had given the plaintiff a memorandum including a FINRA model arbitration disclosure statement containing the necessary, but the disclosure was not given at the time that the employee executed either Form U-4. The disclosure was given three years after the employee executed the first Form U-4 and nine years before he executed the second. Since the necessary disclosures were not given at the time of execution, the Court held that the arbitration clauses failed to clearly and unambiguously inform the plaintiff of his waiver, and thus they were unenforceable.

In *Jaworski v. Ernst & Young U.S. LLP*,[155] the Appellate Division recognized continued employment as sufficient to bind an employee to his employer's arbitration program. The three *Jaworski* plaintiffs had all signed employment agreements that included provisions agreeing to the terms of the arbitration program and waiving the right to a judicial forum.[156] However, one of the three plaintiffs had executed his employment agreement under a prior version of the arbitration program, and consequently he argued that he was not subject to the terms of the new program.[157] The Appellate Division rejected that argument. When the employer had enacted the new arbitration program, it applied the new program terms only prospectively and gave employees notice

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152. *Flanzman v. Jenny Craig, Inc.*, 244 N.J. 119 (2020).

153. *C.M. v. Maiden Re Ins. Servs., LLC*, No. A-2913-13T1, 2015 WL 5518087 (N.J. Super. Ct. App. Div. Sept. 18, 2015).

154. *Barr v. Bishop & Rosen Co., Inc.*, 442 N.J. Super. 599 (App. Div. 2015).

155. *Jaworski v. Ernst & Young U.S. LLP*, 441 N.J. Super 464 (App. Div. 2015).

156. *Jaworski v. Ernst & Young U.S. LLP*, 441 N.J. Super 464, 471 (App. Div. 2015).

157. *Jaworski v. Ernst & Young U.S. LLP*, 441 N.J. Super 464, 473-75 (App. Div. 2015).

that their continued employment after a certain date would constitute acceptance of the new arbitration program.[158] The employee challenging the revised program had continued his employment for more than five years after the effective date of the new program. Accordingly, the Court held that his continued employment was sufficient to bind him to the revised program.[159] However, in *Dugan v. Best Buy Co. Inc.*, the Appellate Division distinguished *Jaworski* and held that continued employment for a period of three weeks was not sufficient to bind an employee to a mandatory arbitration policy.[160]

In *Skuse v. Pfizer, Inc.*, the Supreme Court confirmed that continued employment for 60 days after receipt of notice of a mandatory arbitration policy was sufficient to make the policy binding on both the employer and the employee.[161] In *Skuse*, the employee received an email from Human Resources announcing and providing a link to a five-page "Mutual Arbitration Agreement." The agreement included prominent language stating that acknowledgement of the agreement was a condition of continued employment, and that continuing or beginning employment within 60 days after receipt of the agreement, even without acknowledging it, would constitute ratification of the agreement by the employee. The Appellate Division held that the agreement was unenforceable,[162] but the Supreme Court reversed and held that the agreement was valid and binding.

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158. *Jaworski v. Ernst & Young U.S. LLP*, 441 N.J. Super 464, 473-75 (App. Div. 2015). The reasoning of Jaworski suggests, but does not explicitly hold, that continued employment may be sufficient by itself (i.e., even in the absence of a prior agreement to arbitrate) to support a binding agreement to arbitrate.

159. The *Jaworski* plaintiffs also argued that (1) the arbitration agreement was illusory because it permitted the employer to make future amendments; (2) that they had not agreed to arbitrate claims relating to the termination of their employment; (3) that the arbitration program was not a valid waiver of the right to a jury trial, and (4) that the arbitration program was unconscionable because it imposed substantial forum costs on plaintiffs that they would not otherwise incur in a judicial forum. The Court rejected all of those arguments. *Jaworski v. Ernst & Young U.S. LLP*, 441 N.J. Super. 464, 475-83 (App. Div. 2015).

160. *Dugan v. Best Buy Co. Inc.*, No. A-1897-16T4, 2017 WL 3442807 (N.J. Super. Ct. App. Div. Aug. 11, 2017).

161. *Skuse v. Pfizer, Inc.*, 244 N.J. 30 (2020).

162 *Skuse v. Pfizer, Inc.*, 457 N.J. Super. 539 (App. Div. 2019), *overruled by Skuse v. Pfizer, Inc.*, 244 N.J. 30 (2020). The Appellate Division identified three aspects that it held were grounds for declaring the arbitration requirement invalid: (1) the agreement was disseminated by email; (2) the employer used a "training module" or training "activity" to explain the agreement; and (3) the instruction to the employee to "acknowledge" rather than "agree" to the agreement. The Supreme Court held that none of these reasons precluded the formation of a valid and binding agreement. *See also Fernandez v. Primelending*, No. CV 20-31 (FLW), 2020 WL 6042119, at *4 (D.N.J. Oct. 9, 2020) (compelling arbitration where plaintiff made arguments similar to those rejected by the Supreme Court in *Skuse*).

The United States District Court for the District of New Jersey has held that when an employee handbook provides for grievance and arbitration of claims thereunder, employees must comply with the procedure specified.[163] Noting that it has long been the rule in New Jersey that an aggrieved employee covered by a collective bargaining agreement must exhaust the remedies provided thereunder before resorting to the court for redress, the court found that principle "no less applicable here where the rights asserted by plaintiff are contained in an employee handbook."[164] As a consequence, the court found that breach of contract claims based upon employee handbooks are barred when an employee has failed to exhaust the grievance procedure.[165] It is important to note, however, that the employee claimed he should have been relieved from compliance because invoking the procedure would have been futile, and that this claim was rejected on the ground that the procedure specified in the manual was found by the court to be "extremely fair and impartial."[166]

Arbitration agreements between employer and employee may be subject to the Revised Uniform Arbitration Act, N.J.S.A. 2A:23B-1, *et seq.* In general, the Act codifies rules governing arbitrations. Arbitration agreements made on or after January 1, 2003 are subject to the Act's

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163. *Fregara v. Jet Aviation Bus. Jets*, 764 F. Supp. 940, 951-53 (D.N.J. 1991).

164. *Fregara v. Jet Aviation Bus. Jets*, 764 F. Supp. 940, 951 (D.N.J. 1991) (relying on *Jorgensen v. Pa. R.R. Co.*, 25 N.J. 541 (1958)). *See also Carfagno v. ACE, Ltd.*, No. 04-6184 (JBS), 2005 WL 1523530 (D.N.J. June 28, 2005) (compelling arbitration based on employees' signature on employment application and acknowledgement of employee guide); *Sarbak v. Citigroup Global Mkts., Inc.*, 354 F. Supp. 2d 531 (D.N.J. 2004) (compelling arbitration of discrimination claims based on waiver of rights provisions in employee handbook, employment application, employee acknowledgement form and principles of employment form).

165. *Fregara v. Jet Aviation Bus. Jets*, 764 F. Supp. 940, 953 (D.N.J. 1991) ("To the extent that the grievance procedures outlined in the alleged *Woolley* contract are detrimental to his cause of action, plaintiff cavalierly dismisses them as permissive and non-binding. If the provisions governing job security are binding, then so too is the language concerning utilization of the grievance procedures."). *See Zawadowicz v. CVS Corp.*, 99 F. Supp. 2d 518, 537-39 (D.N.J. 2000) (stating that in the circumstances of that case, the jury must decide whether the plaintiff failed to comply with the Complaint Resolution Process specified in the employment handbook before filing his lawsuit); *Hyman v. Atl. City Med. Ctr.*, No. Civ.A. 97-795 (JEI), 1998 WL 135249, at *13-14 (D.N.J. Mar. 16, 1998) (dismissing plaintiff's claim due to her failure to follow the grievance procedures outlined in the Grievance Policy and Procedures Manual).

166. *Fregara v. Jet Aviation Bus. Jets*, 764 F. Supp. 940, 952 (D.N.J. 1991). The process included several steps, including review by a company board that included elected, non-supervisory employees. *Id.* In *Grasser v. United Healthcare Corp.*, 343 N.J. Super. 241 (App. Div. 2001), the Appellate Division held that a material issue of fact existed as to whether the employee plaintiff knowingly and voluntarily waived his right to a jury trial concerning his claims under the LAD. Although the arbitration provision of the employee handbook may have been sufficiently clear to compel arbitration of LAD claims, the only document the employee signed—an Employee Handbook Acknowledgement—lacked the requisite specificity. The court did not address whether the arbitration provision of the handbook was adequate to compel arbitration of non-statutory claims, such as breach of contract.

provisions although parties to an earlier agreement can agree to follow the Act's requirements. By January 1, 2005, arbitration agreements made after July 4, 1923 will be subject to the Act. However, the Act does not apply to arbitration agreements under a collective bargaining agreement.

III. INFORMAL POLICIES

1-10 Oral *Woolley* Claims

Although the Supreme Court has held that a company-wide policy in a *written* employment manual, generally distributed to its employees, may create an enforceable unilateral contract, the court has not yet passed on the issue whether *Woolley* should be extended to orally communicated, company-wide policies. The Appellate Division has held that an unwritten company policy of non-termination of managers except for cause would be enforceable under *Woolley* if proven.[167] A plaintiff must show

> (1) that the oral employment policy contained "an express or implied promise concerning the terms and conditions of employment"; (2) that the policy was "a definitive, established, company-wide policy"; (3) that the oral statement of policy by a supervisor constituted an "accurate representation of policy"; and (4) that the

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[167] *Shebar v. Sanyo Bus. Sys. Corp.*, 218 N.J. Super. 111, 120 (App. Div. 1987), *aff'd on other grounds*, 111 N.J. 276 (1988).

> The legal question then is whether the holding in *Woolley* was intended by the Supreme Court to be limited to a general employer policy expressed only by way of a manual or handbook or whether it was intended to extend to a definitive, established, company-wide employer policy, however expressed. We conclude that the thrust of the *Woolley* holding and the rationale as well as the public policy on which it is based is directed to the existence of the employer's general policy rather than the form in which it is expressed. The difference between a manual or handbook policy and a policy otherwise expressed presents, in our view, an issue of proof rather than of substance.

Id. at 120. The Supreme Court found it unnecessary to reach this issue. It found the record did not present a claim "that defendant had established and disseminated a definitive company-wide termination policy, or that plaintiff or any other employee had ever relied on such a policy." *Shebar v. Sanyo Bus. Sys. Corp.*, 111 N.J. 276, 284 (1988). *See Gilbert v. Durand Glass Mfg. Co.*, 258 N.J. Super. 320, 328 (App. Div. 1992) (noting that the Supreme Court in *Shebar* found it unnecessary to consider whether to extend *Woolley* to instances where a company has orally communicated an established company-wide policy to its employees since the plaintiff's claim in *Shebar* was simply one for breach of a unique, oral promise made specifically to him). Instead, the Supreme Court characterized plaintiff's claim as one for breach of a unique, oral promise made specifically to him, and thus subject to normal rules of contract construction. *Shebar v. Sanyo Bus. Sys. Corp.*, 111 N.J. 276, 284 (1988).

> supervisor was "authorized to make" the oral statements of policy.[168]

Opinions on this issue have been somewhat mixed. In *Labus v. Navistar International Transportation Corp.*,[169] the United States District Court for the District of New Jersey agreed with the Appellate Division decision in *Shebar*, concluding that

> the New Jersey Supreme Court's rationale underlying its recognition of an implied contract from a written employee manual also supports the finding of an implied contract from oral communications from the employer.[170]

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168. *Fischer v. Allied Signal Corp.*, 974 F. Supp. 797, 808 (D.N.J. 1997) (relying on *Gilbert v. Durand Glass Mfg. Co.*, 258 N.J. Super. 320, 330-31 (App. Div. 1992), *and Ditzel v. UMDNJ*, 962 F. Supp. 595 (D.N.J. 1997)). *See Geaney v. Comp. Scis. Corp., No.* Civ. 03-2945 (WGB), 2005 WL 1387650 (D.N.J. June 10, 2005); *Reynolds v. Palnut Co.*, 330 N.J. Super. 162, 171-72 (App. Div. 2000) (setting forth the elements of a claim for breach of an implied oral policy and finding that plaintiff presented sufficient evidence to survive defendants' motion for summary judgment on his claim that his employer had an oral policy that no employee would be discharged without first receiving a warning). *Accord Carney v. Dexter Shoe Co.*, 701 F. Supp. 1093, 1103 (D.N.J. 1988) ("Although [the Appellate Division opinion in] *Shebar* has expanded the ways in which a company can be held to have communicated an expectation of continued employment to its employees, it has not eliminated the need, articulated in *Brunner* [*v. Abex Corp.*, 661 F. Supp. 1351 (D.N.J. 1986)], to show clear and convincing proof of a precise agreement.").

169. *Labus v. Navistar Int'l Transp. Corp.*, 740 F. Supp. 1053 (D.N.J. 1990).

170. *Labus v. Navistar Int'l Transp. Corp.*, 740 F. Supp. 1053, 1063 (D.N.J. 1990). In *Gilbert v. Durand Glass Mfg. Co.*, 258 N.J. Super. 320, 328, 609 A.2d 517 (App. Div. 1992), another panel of the Appellate Division followed Judge Pressler's analysis in *Shebar*, holding that "the difference between a written policy and a policy otherwise expressed is 'an issue of proof rather than of substance.'" The court enforced the employer's unwritten termination policy and described the standard of proof of both written and oral *Woolley* claims as follows:

> What may be distilled from the *Woolley*/*Shebar* analysis is that the policy, written or oral, must contain an express or implied promise concerning the terms and conditions of employment. It must also be 'a definitive, established, company-wide employer policy, and the employer's statements must constitute 'an accurate representation of policy' which the employer was authorized to make. However, '[n]o pre-employment negotiations need take place and the parties' minds need not meet on the subject; nor does it matter that the employee knows nothing of the particulars of the employer's policies and practices or that the employer may change them unilaterally.' It is enough that the employee reasonably believes that a particular personnel policy has been established and is applied consistently and uniformly to each employee. Also, the enforceability of such a provision must be construed in accordance with 'the reasonable expectations of the employees.'

Woolley v. Hoffmann-LaRoche, Inc., 99 N.J. 284, 300, *modified*, 101 N.J. 10 (1985).

See Fischer v. Allied Signal Corp., 974 F. Supp. 797 (D.N.J. 1997) (granting summary judgment for employer where employee failed to demonstrate a "definitive, established, company-wide policy" and only presented testimony "concerning what Allied supposedly 'kind of promised'"); *Morris v. Siemens Components, Inc.*, 928 F. Supp. 486 (D.N.J. 1996) (alleged statements by a representative of the employer's worker's compensation carrier unenforceable as a matter of law because statements were not statements of plaintiff's employer and therefore could not be accurate representations of policy which the employer was authorized to make).

To the same effect is *Palmer v. Schlott Realtors, Inc.*, where the court denied the employer's motion for summary judgment on plaintiff's claim that a form for conducting performance appraisals proved the existence of an unwritten company policy of non-termination except for good cause.[171] In *Ditzel v. University of Medicine & Dentistry of New Jersey*, the Court concluded that "good evaluations and oral praise alone do not create implied agreements to terminate upon good cause only."[172] In *First Atlantic Leasing Corp. v. Tracey*,[173] the plaintiff claimed to be due severance pay under an informal, unwritten company "policy."[174] The district court avoided the general question, holding that the plaintiff's allegations about the terms of the alleged policy were not specific or clear enough to support his claim.[175] The court had held in *Brunner v. Abex Corp.*,[176] issued before the *Shebar* decision, that "*Woolley* was unmistakably limited, even in its broadest interpretation, to commitments arising out of written communications by the employer to the employee."[177]

A clear and prominent disclaimer in an employee manual can be sufficient to avoid creation of oral agreements.[178]

1-11 Estoppel

Proof of promissory estoppel consists of four elements: (1) a clear and definite promise by the promisor; (2) the expectation that the promisee will rely thereon; (3) actual reliance by the promisee; and (4) incurrence of definite and substantial detriment as a result of the reliance.[179]

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171. *Palmer v. Schlott Realtors, Inc.*, 4 IER 1553 (D.N.J. 1989).

172. *Ditzel v. Univ. of Med. & Dentistry of N.J.*, 962 F. Supp. 595, 607 (D.N.J. 1997).

173. *First Atl. Leasing Corp. v. Tracey*, 738 F. Supp. 863 (D.N.J. 1990).

174. *First Atl. Leasing Corp. v. Tracey*, 738 F. Supp. 863, 878 (D.N.J. 1990) (it is undisputed that there was no written policy for the payment of severance).

175. The court relied on a series of cases discussing the requisites to enforcement of alleged written policies. *First Atl. Leasing Corp. v. Tracey*, 738 F. Supp. 863, 878 (D.N.J. 1990). *See Kane v. Milikowsky*, 224 N.J. Super. 613, 616 (App. Div. 1988) (written memorandum did not comprehensively treat subject of employment termination); *Ware v. Prudential Ins. Co.*, 220 N.J.Super. 135, 146-47 (App. Div. 1987) (handbook did not specifically set forth alleged employee benefits).

176. *Brunner v. Abex Corp.*, 661 F. Supp. 1351 (D.N.J. 1986).

177. *Brunner v. Abex Corp.*, 661 F. Supp. 1351, 1356 (D.N.J. 1986).

178. *See Gil v. Related Mgmt. Co.*, No. 06-2174 (WHW), 2006 WL 2358574 (D.N.J. Aug. 14, 2006).

179. *Swider v. Ha-Lo Indus., Inc.*, 134 F. Supp. 2d 607, 619 (D.N.J. 2001); *Rodichok v. Limitorque Corp.*, No. CIV. A. 95-3528, 1997 WL 392535 (D.N.J. July 8, 1997) (plaintiff failed to present evidence of clear and definite promise or reasonable reliance); *Pitak v. Bell Atl. Network Servs., Inc.*, 928 F. Supp. 1354, 1367 (D.N.J. 1996) (laid-off employees failed to create issue of fact with respect to existence of clear and definite promise or reliance); *Jevic v. Coca-Cola Bottling Co. of N.Y.*, 5 IER 765, 768 (D.N.J. 1990); *Malaker Corp. v. First Jersey Nat'l Bank*, 163 N.J. Super. 463, 479 (App. Div. 1978).

The related doctrine of equitable estoppel is distinguished by the fact that the promisor has made a representation—through act or speech—that is false. To state a basis for application of an equitable estoppel, a party must demonstrate conduct (1) amounting to a misrepresentation or concealment of material facts; (2) known to the party allegedly estopped and unknown to the party claiming estoppel; (3) done with the expectation or intention that it will be acted upon by the other party; and (4) relied upon by the other party in such a manner as to change his position for the worse.[180]

Both promissory and equitable estoppel should be reserved for the unusual case, where their application is the only method of avoiding injustice.[181] In keeping with the general rule, application of estoppel in the employment context has been limited; however, no clear rule has emerged. Some decisions suggest that special rules for estoppel obtain in the employment context. Most recent decisions fail to distinguish between equitable and promissory estoppel, treating them interchangeably.

1-11:1 Clear and Definite Representation

To support a claim for equitable or promissory estoppel, the representation or action relied upon must be clear and definite. Where it is not, estoppel has been disallowed. Past practices of the employer are insufficient. In *Linn v. Beneficial Commercial Corp.*,[182] the court rejected plaintiff's claim that his employer was estopped by very non-specific conduct from terminating him: "It cannot fairly be said that an employer commits itself to keep an employee indefinitely by promoting him, asking

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180. *Jevic v. Coca-Cola Bottling Co. of N.Y.*, 5 IER 765, 768 (D.N.J. 1990) (relying on *Carlsen v. Masters, Mates & Pilots Pension Plan Tr.*, 80 N.J. 334, 339 (1979)). As noted in Hon. William A. Dreier (Ret.) & Paul A. Rowe, Guidebook to Chancery Practice in New Jersey 20 (4th ed. 1997), these elements are also the basic elements of legal fraud. *See* Chapter 3, § 3-15, below. *See generally Pitak v. Bell Atl. Network Servs., Inc.*, 928 F. Supp. 1354, 1367 (D.N.J. 1996) (under *Quigley, Inc. v. Miller Family Farms*, 266 N.J. Super. 283 (App. Div. 1993), elements of equitable estoppel are misrepresentation of material fact, reasonable and justifiable reliance and resulting damages); *Chrisomalis v. Chrisomalis*, 260 N.J. Super. 50, 55-56 (App. Div. 1992) (matrimonial case; defining equitable estoppel). *See Barone v. Leukemia Soc'y of Am.*, 42 F. Supp. 2d 452, 463-64 (D.N.J. 1998) (applying the doctrine of equitable estoppel where the employer, knowing that the employee intended to return to work on a certain date, failed to notify the employee of her obligation to return to work on an earlier date to be protected under the employer's leave policy).

181. *See Jevic v. Coca-Cola Bottling Co. of N.Y.*, 5 IER 765, 769 (D.N.J. 1990); *Peck v. Imedia, Inc.*, 293 N.J. Super. 151, 165-68 (App. Div. 1996) (allowing plaintiff to proceed to trial on her promissory estoppel claim based on plaintiff's detrimental reliance on defendant's promise of employment that was withdrawn prior to start of work).

182. *Linn v. Beneficial Com. Corp.*, 226 N.J. Super. 74 (App. Div. 1988).

him to transfer and assisting him with expenses."[183] To the same effect is *McQuitty v. General Dynamics Corp.*, rejecting performance under an expired collective bargaining agreement as a basis for estoppel.[184] Oral representations of continued employment lacking specificity or definiteness similarly have been rejected as mere "friendly assurances."[185] Oral representations made before or at the time of signing a written agreement are also unenforceable.[186] An alleged offer of employment contingent upon a character verification of the plaintiff was found insufficient,[187] as were statements that becoming a facilitator would accelerate career growth or enhance promotional opportunities.[188]

1-11:2 Detrimental Reliance

Proof of detrimental reliance is essential to an estoppel.[189] To satisfy this standard in the employment context, something more than the mere rendition of services as an employee must be involved.[190] In *Panzino v.*

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183. *Linn v. Beneficial Com. Corp.*, 226 N.J. Super. 74, 80 (App. Div. 1988).

184. *McQuitty v. Gen. Dynamics Corp.*, 204 N.J. Super. 514, 520 (App. Div. 1985). *See also Read v. Profeta*, 397 F. Supp. 3d 597, 631 (D.N.J. 2019) (finding a lack of clear and definite promise where plaintiff merely stated what he would have liked an offer to contain, but defendant never agreed to a particular salary or benefits package).

185. *Carney v. Dexter Shoe Co.*, 701 F. Supp. 1093, 1103 (D.N.J. 1988) ("Although *Shebar* has expanded the ways in which a company can be held to have communicated an expectation of continued employment to its employees, it has not eliminated the need, articulated in *Brunner v. Abex Corp.*, 661 F. Supp. 1351 (D.N.J. 1986), to show clear and convincing proof of a precise agreement."). *See Fischer v. Allied Signal Corp.*, 974 F. Supp. 797 (D.N.J. 1997) (statements that becoming a facilitator would enhance plaintiff's career were insufficient to support a claim of promissory estoppel); *Ashwal v. Prestige Mgmt. Servs., Inc.*, No. A-4629-05T2, 2007 WL 2989718, at *22 (N.J. Super. App. Div. Oct. 16, 2007) (finding the alleged assurances not "clear, specific and definite enough to state a claim").

186. *See Jevic v. Coca-Cola Bottling Co. of N.Y.*, 5 IER 765, 768-69 (D.N.J. 1990) (alleged concealment of drug test policy could not form basis of equitable estoppel where signed pre-employment statement disclosed it); *Ware v. Prudential Ins. Co.*, 220 N.J. Super. 135, 144 (App. Div. 1987) (oral assurances of job security allegedly made at the time of execution of an individual contract for at-will employment are not enforceable).

187. *Bonczek v. Carter Wallace, Inc.*, 304 N.J. Super. 593, 600 (App. Div. 1997).

188. *Fischer v. Allied Signal Corp.*, 974 F. Supp. 797, 809 (D.N.J. 1997).

189. *See, e.g.*, *Jevic v. Coca-Cola Bottling Co. of N.Y.*, 5 IER 765, 769 (D.N.J. 1990) (requiring detrimental action specifically in reliance on the employer's representation); *Carlsen v. Masters, Mates & Pilots Pension Plan Trust*, 80 N.J. 334, 339 (1979); *see also DeJoy v. Comcast Cable Commc'ns, Inc.*, 968 F. Supp. 963, 991-92 (D.N.J. 1997) (where plaintiff alleged that he declined an offer of employment based on the defendant's alleged promise of continued employment, genuine issue of fact precluded summary judgment on plaintiff's promissory estoppel claim); *McDonald's Corp. v. Miller*, No. 92-4811, 1994 WL 507822 (D.N.J. Sept. 14, 1994) (plaintiff applicant for a McDonald's franchise could not reasonably have relied upon conditional promises that he would be granted a franchise), *aff'd*, 60 F.3d 815 (3d Cir. 1995).

190. *Baker v. Hunter Douglas, Inc.*, 270 F. App'x 159 (3d Cir. 2008) (plaintiff unable to establish the requisite detrimental reliance where plaintiff's inability to return to work was based on her medical condition rather than the statements of supervisors); *Swider v. Ha-Lo Indus., Inc.*, 134 F. Supp. 2d 607, 620 (D.N.J. 2001) (holding that plaintiff's alleged detrimental reliance of turning

Scott Paper Co.,[191] plaintiffs unsuccessfully asserted that the following incidents, among other things, constituted actionable detrimental reliance on an alleged promise of job security:

1. One plaintiff testified that, had he known he was going to lose his job, he would have immediately sought work elsewhere;
2. Another plaintiff stated that there was a possibility he would have been hired into a new job earlier if he had applied earlier;
3. One plaintiff stated that had he not been told his job was secure, he would have applied for a loan to start a new video business while he was still employed, and the loan would have been granted.[192]

The court's analysis in rejecting these claims as speculative provides a useful guide to the factors which may be considered sufficient to support an estoppel:

> An example of one extreme of this continuum might be the situation in which a plaintiff has sought and received job offers, believing his present job to be in jeopardy, but turns down the new jobs after assurances of continued employment, only to lose the job later. In that instance the actions taken in reliance were obviously detrimental and the harm concrete and certain. At the other extreme might be a situation in which a person says that had he known his job was in jeopardy he would have applied for other jobs, but he can't specify where he might have applied and he doesn't know whether other jobs were available in any event. A recovery in such a situation is obviously inappropriate.[193]

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down another job offer was inadequate to support his claim because he did not make defendant aware of the offer or his decision to turn it down in favor of a position with defendant); *Fregara v. Jet Aviation Bus. Jets*, 764 F. Supp. 940, 948 (D.N.J. 1991); *Jevic v. Coca-Cola Bottling Co. of N.Y.*, 5 IER 765, 769 (D.N.J. 1990); *Panzino v. Scott Paper Co.*, 685 F. Supp. 458, 462 (D.N.J. 1988). To the extent *Panzino* recognizes an action for violation of a public policy of equitable estoppel, it has been overruled by *DeVries v. McNeil Consumer Prods. Co.*, 250 N.J. Super. 159 (App. Div. 1991).

191. *Panzino v. Scott Paper Co.*, 685 F. Supp. 458 (D.N.J. 1988).

192. *Panzino v. Scott Paper Co.*, 685 F. Supp. 458, 461-62 (D.N.J. 1988).

193. *Panzino v. Scott Paper Co.*, 685 F. Supp. 458, 462 (D.N.J. 1988) (internal citation omitted). *See Fregara v. Jet Aviation Bus. Jets*, 764 F. Supp. 940, 949 (D.N.J. 1991) (plaintiff who was unemployed when he accepted job offer cannot establish that he suffered any detriment; he "did not forego any other job offers as there were none," and "all that [he] gave up was his right to be unemployed"); *Jevic v. Coca-Cola Bottling Co. of N.Y.*, 5 IER 765, 769 (D.N.J. 1990) (plaintiff's move to New York insufficient in circumstances of that case).

In *Peck v. Imedia, Inc.* and *Jenkins v. Region Nine Housing,* the Appellate Division ruled that the plaintiff in each case should have been permitted to proceed to trial on a claim of promissory estoppel. In *Peck,* the defendant offered plaintiff employment as a Desktop Publishing Manager in Northern New Jersey. The plaintiff, allegedly relying on the offer, gave up her desktop publishing business in Boston, rented her apartment in Boston, found an apartment in New Jersey, and hired a mover. The court held that based on these facts, and because the defendants waited for approximately ten days before informing plaintiff of their decision to rescind the job offer, the plaintiff was entitled to proceed to trial on her claim of promissory estoppel even though the offer of employment would have been at will.[194] Similarly, in *Jenkins*, the court ruled that the promissory estoppel claim of a plaintiff who was discharged after she leased a car in reliance on defendant's offer of employment should not have been dismissed. The plaintiff alleged that she did not have a car before accepting the offer, and could not afford a car but for the promise of employment, which included a car allowance. Furthermore, the job plaintiff performed required her to have a car and the defendant accompanied her to the automobile dealership and participated in the car lease.[195]

IV. RESTRICTIVE COVENANTS

1-12 General Requirements

Although agreements not to compete were at one time flatly outlawed, it has now long been recognized that they have a proper place and are enforceable under appropriate circumstances.[196] Because of important protections New Jersey affords the individual right to pursue one's profession or livelihood, a covenant not to compete incidental to the sale of a business is

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194. *Peck v. Imedia, Inc.*, 293 N.J. Super. 151, 165-68 (App. Div. 1996). *But see Sercia v. Red Bull N. Am., Inc.*, No. A-2530-07T3, 2009 WL 648988 (N.J. Super. App. Div. Mar. 16, 2009) (dismissing promissory estoppel claim where prospective employer rescinded job offer after conducting background check even though plaintiff had already submitted resignation to current employer after receiving and accepting job offer).

195. *Jenkins v. Region Nine Hous. Corp.*, 306 N.J. Super. 258, 263-64 (App. Div. 1997).

196. *Solari Indus., Inc. v. Malady*, 55 N.J. 571, 576 (1970); *see also Tatarian v. Aluf Plastics*, No. 01-CV-5372 (WGB), 2002 WL 1065880, at *13 (D.N.J. May 13, 2002) (noting the enforceability of non-competition agreements in New Jersey). For a general discussion *see* Hon. William A. Dreier (Ret.) and Paul A. Rowe, Guidebook to Chancery Practice in New Jersey 106-09 (4th ed. 1997); Valiulis, Covenants Not to Compete (1985).

more freely enforceable than one tied to the termination of employment.[197] Nonetheless, an employee's covenant will be given effect if it is reasonable under all the circumstances of his particular case.[198] A determination of reasonableness generally requires the findings that the agreement (1) simply protects the legitimate interests of the employer; (2) imposes no undue hardship on the employee; and (3) is not injurious to the public.[199]

These same criteria are utilized to determine the enforceability of "holdover" clauses—contracts that require the assignment of future or

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197. *Whitmyer Bros., Inc. v. Doyle*, 58 N.J. 25, 32 (1971); *Solari Indus., Inc. v. Malady*, 55 N.J. 571, 576 (1970). The policy was stated in *Magic Fingers, Inc. v. Robins*, 86 N.J. Super. 236, 238 (Ch. Div. 1965):

> [C]ourts have attributed much strength to the social policy that every man should be free to earn his own living and have also recognized than an employee who is asked to sign a covenant may not have the full freedom to bargain about its terms that exist in other business situations. In other words, contracts of this type – if they are to be enforced – must pass a stricter test than other types of contracts; it is not enough to say the parties signed a document in good faith and are, therefore, bound to respect all of its terms.

See also Coskey's T.V. & Radio Sales & Serv., v. Foti, 253 N.J. Super. 626, 633 (App. Div. 1992); *Hudson Foam Latex Prods., Inc. v. Aiken*, 82 N.J. Super. 508, 514 (App. Div. 1964) ("The substantial disparity in bargaining positions between a seller and a buyer, and an employee and an employer, is more than sufficient to warrant a heavier reliance on the terms of a contract in the former instance than in the latter."); *Rubel & Jensen Corp. v. Rubel*, 85 N.J. Super. 27, 35 (App. Div. 1964) (agreement not to use name or solicit customers of property sold as a going business is different from ordinary agreement not to engage in a competitive business).

198. *Maw v. Advanced Clinical Commc'ns, Inc.*, 179 N.J. 439, 447 (2004); *Karlin v. Weinberg*, 77 N.J. 408, 417 (1978); *Whitmyer Bros., Inc. v. Doyle*, 58 N.J. 25, 32 (1971); *Solari Indus., Inc. v. Malady*, 55 N.J. 571, 576 (1970); *A.T. Hudson & Co., Inc. v. Donovan*, 216 N.J. Super. 426, 432 (App. Div. 1987); *Raven v. A. Klein & Co., Inc.*, 195 N.J. Super. 209, 213 (App. Div. 1984) ("restrictive covenants will be enforced to the extent that they are reasonable as to time, area and scope of activity, necessary to protect a legitimate interest of the employer, not unduly burdensome upon the employee, and not injurious to the public interest"); *Platinum Mgmt., Inc. v. Dahms*, 285 N.J. Super. 274, 293 (Law Div. 1995). *See also Newport Capital Grp., LLC v. Loehwing*, NO. CIV.A. 11-2755 MLC, 2013 WL 1314737, at *5 (D.N.J. Mar. 28, 2013) (applying same standard to determine enforceability of non-solicitation covenant).

199. *Campbell Soup Co. v. Desatnick*, 58 F. Supp. 2d 477, 488-89 (D.N.J. 1999); *Laidlaw, Inc. v. Student Transp. of Am., Inc.*, 20 F. Supp. 2d 727, 754 (D.N.J. 1998); *Meadox Meds., Inc. v. Life Sys., Inc.*, 3 F. Supp. 2d 549, 532 (D.N.J. 1998); *Maw v. Advanced Clinical Commc'ns, Inc.*, 179 N.J. 439, 447 (2004); *Karlin v. Weinberg*, 77 N.J. 408, 417 (1978); *Whitmyer Bros., Inc. v. Doyle*, 58 N.J. 25, 32-33 (1971); *Solari Indus., Inc. v. Malady*, 55 N.J. 571, 576 (1970); *Chas. S. Wood & Co. v. Kane*, 42 N.J. Super. 122, 125 (App. Div. 1956). The validity and enforceability of restrictive covenants is fact sensitive and must be determined in light of the facts of a particular case. *U.S. Foodservice, Inc. v. Raad*, No. BER-C-82-06, 2006 WL 1029653 (N.J. Super. Ch. Div. Apr. 12, 2006). *In Coskey's T.V. & Radio Sales & Serv., Inc. v. Foti*, 253 N.J. Super. 626, 633-34 (App. Div. 1992), the Appellate Division described the *Solari* test of reasonableness:

> To be enforceable the covenant must protect a legitimate interest of the employer; it may impose no undue hardship on the employee; and it must not impair the public interest. Even if the covenant is found enforceable, it may be limited in its application concerning its geographical area, its period of enforceability, and its scope of activity.

Id. (citations omitted). *See Jiffy Lube Int'l, Inc. v. Weiss Bros., Inc.*, 834 F. Supp. 683, 690 (D.N.J. 1993) (restrictive covenants are enforceable only insofar as they are reasonable under the circumstances, determined by the *Solari* standard: "(1) it must protect a legitimate interest of the employer; (2) it may impose no undue hardship on the employee; (3) it must not impair the public interests").

post-employment patents.[200] Like the post-employment agreement not to compete, ascertaining the reasonableness of a holdover clause involves balancing competing interests: the inventor's right to enjoy his own creativity and use the general skills and knowledge obtained through prior employment, and the employer's right to protect trade secrets, confidential information, and customer relations.[201]

Restrictive covenants in a contract between employer and employee "are assignable as an incident of the business even if not made by express words."[202]

1-12:1 Legitimate Interests of the Employer

The employer has no legitimate interest in preventing competition as such; that interest would be contrary to the public policy of New Jersey as expressed in the antitrust laws.[203] However,

> the employer has a patently legitimate interest in protecting his trade secrets as well as his confidential business information and he has an equally legitimate interest in protecting his customer relationships.[204]

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200. *See Ingersoll Rand Co. v. Ciavatta*, 110 N.J. 609, 627 (1988).

201. *Ingersoll Rand Co. v. Ciavatta*, 110 N.J. 609, 626-27 (1988). Employees have a common law duty not to disclose confidential information from a former employer, *see Abalene Exterminating Co., Inc. v. Oser*, 125 N.J. Eq. 329, 332-33 (Ch. Div. 1939), or to reveal the former employer's trade secrets. *See Sun Dial Corp. v. Rideout*, 16 N.J. 252, 259 (1954); Valiulis, Covenants Not to Compete § 1.5, at 5 (1985) ("Under common law, all employees have a duty not to act in a way that is adverse to the interests of their then current employers"); *see also Pathfinder, L.L.C. v. Luck*, No. Civ. A. 04-1475, 2005 WL 1206848 (D.N.J. May 20, 2005) (same); *Tatarian v. Aluf Plastics*, No. 01-CV-5372 (WGB), 2002 WL 1065880, at *12 (D.N.J. May 13, 2002) (same); *Marsellis-Warner v. Rabens*, 51 F. Supp. 2d 508, 524-25 (D.N.J. 1999) (same, and holding that the alleged side jobs solicited by the employee-defendants, if proven, "constitute competitive commercial opportunities actionable under New Jersey law"); *Lamorte Burns & Co., Inc. v. Walters*, 167 N.J. 285, 302, 305 (2001) (stating that the duty of loyalty an employee owes his employer requires an employee not to act contrary to his employer's interest, not to compete with his employer, and not to take affirmative steps to injure the employer's business during the employment relationship); *Cameco v. Gedicke*, 157 N.J. 504 (1999) (discussing the scope of the duty of loyalty that an employee owes to an employer and the employee's duty not to compete with the employer during the period of employment). *See generally Rycoline Prods., Inc. v. Walsh*, 334 N.J. Super. 62, 71-76 (App. Div. 2000) (remanding case to the trial court for a determination as to whether former employee misappropriated former employer's trade secret when employee became employed by a competitor).

202. *A. Fink & Sons v. Goldberg*, 101 N.J. Eq. 644, 647 (Ch. 1927). *Accord J. H. Renardo, Inc. v. Sims*, 312 N.J. Super. 195, 201 (Ch. Div. 1998) (quoting *Goldberg*).

203. *See Whitmyer Bros., Inc. v. Doyle*, 58 N.J. 25, 33 (1971); *Raven v. A. Klein & Co., Inc*., 195 N.J. Super. 209, 213 (App. Div. 1984) (employer not entitled to enforce a restrictive covenant principally directed at lessening competition); *see also Ellis v. Lionikis*, 162 N.J. Super. 579, 585 (App. Div. 1978) (restrictive covenant forfeiture of benefits clause).

204. *Whitmyer Bros., Inc. v. Doyle*, 58 N.J. 25, 33 (1971); *Maw v. Advanced Clinical Commc'ns, Inc.*, 359 N.J. Super. 420, 434 (App. Div. 2003), *rev'd on other grounds*, 179 N.J. 439 (2004) (stating that when an employer's interests are strong, such as in cases involving employer's trade secrets

Thus, an employer that has paid employees to develop clients and customer relations may, in otherwise proper circumstances, restrain former employees from soliciting those customers.[205]

Matters of general knowledge within the industry, trivial differences in methods of operation, and customer lists generally accessible or compliable are not trade secrets or confidential information warranting protection.[206] Professional skills or expertise developed during the employment are similarly unprotected:

> [A] postemployment restriction on an employee requires special justification which is nonexistent where the harm caused by service to another consists merely in the fact that the new employer becomes a more efficient competitor just as the first employer did through having a competent and efficient employee.[207]

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or confidential information, a court will enforce a restrictive covenant); *A.T. Hudson & Co., Inc. v. Donovan*, 216 N.J. Super. 426, 433 (App. Div. 1987) ("While an employer may not prevent competition as such, he does have a legitimate interest in protecting his customer relationships."); *Raven v. A. Klein & Co., Inc*., 195 N.J. Super. 209, 214 (App. Div. 1984) (a unique manufacturing technique not generally known throughout the industry is protectable under post-employment restrictive agreement and common law protection afforded to trade secrets).

[205] *Campbell Soup Co. v. Desatnick*, 58 F. Supp. 2d 477, 490 (D.N.J. 1999) (holding that the plaintiff-employer proved that it was seeking to protect a legitimate interest); *Solari Indus., Inc. v. Malady*, 55 N.J. 571 (1970); *A.T. Hudson & Co., Inc. v. Donovan*, 216 N.J. Super. 426, 433-34 (App. Div. 1987); *Platinum Mgmt., Inc. v. Dahms*, 285 N.J. Super. 274, 295-98 (Law Div. 1995) (explaining that misappropriated information could even be publicly available and the "key to determining the misuse of the information is the relationship of the parties at the time of disclosure;" customer identities and employee's knowledge of customers protectible, but restrictions as to prospective customers unenforceable). *Cf. Coskey's T.V. & Radio Sales & Serv., Inc. v. Foti*, 253 N.J. Super. 626, 638-39 (App. Div. 1992) (distinguishing *A.T. Hudson & Co. v. Donovan*, 216 N.J. Super. 426 (App. Div. 1987), on the ground that the client contacts in that consulting business were close and on-going, and holding that a preliminary injunction should not have been issued against former employee where projects were of discrete duration and universe of customers was finite and well known; in that situation, the former employee's "relationships within the industry were not bought and paid for; they were merely rented during the period of employment"); *Hogan v. Bergen Brunswig Corp*., 153 N.J. Super. 37, 42 (App. Div. 1977) (dicta).

[206] *See Tatarian v. Aluf Plastics*, No. 01-CV-5372 (WGB), 2002 WL 1065880, at *10 (D.N.J. May 13, 2002) (holding that because the employer failed to establish that the customer information known to the employee was not common knowledge in the industry, the information was not protectable); *Whitmyer Bros., Inc. v. Doyle*, 58 N.J. 25, 33-34 (1971).

[207] *Whitmyer Bros., Inc. v. Doyle*, 58 N.J. 25, 33-35 (1971) (relying on 6A Corbin on Contracts § 1394) (internal quotation marks omitted). *See Meadox Meds., Inc. v. Life Sys., Inc*., 3 F. Supp. 2d 549, 553 (D.N.J. 1998) (finding that because the defendant-distributor's customer relationships were not developed with any assistance from the plaintiff, and because the agreement at issue identified the defendant as the owner of its customer contacts, plaintiff did not have a proprietary interest in the customer relationships); *Coskey's T.V. & Radio Sales & Serv., Inc. v. Foti*, 253 N.J. Super. 626, 637 (App. Div. 1992) ("An employer may not prevent an employee from using the general skills in an industry which have been built up over the employee's tenure with the employer"); *Subcarrier Commc'ns, Inc. v. Day*, 299 N.J. Super. 634, 643 (App. Div. 1997) (same); *Raven v. A. Klein & Co., Inc*., 195 N.J. Super. 209, 213-14 (App. Div. 1984) ("trade secrets or confidential information cannot

To determine what is a trade secret in this context, the Supreme Court has endorsed the definition found in § 757 of the Restatement of Torts,[208] and the six factors listed therein: (1) the extent to which the information is known outside of the business; (2) the extent to which it is known by employees and others involved in the business; (3) efforts made by the owner to guard the secrecy of the information; (4) the value of the information to the business and competitors; (5) the effort or money spent in developing it; and (6) the ease or difficulty others would have in duplicating or acquiring the information.[209]

In *Ingersoll Rand Co. v. Ciavatta*, a holdover clause case, the Supreme Court recognized a protectable interest beyond the traditional interests in trade secrets, confidential information, and customer relations. It had a difficult time articulating a standard, however, leaving definition of this new interest to the vagaries of case-by-case determinations:

> We recognize that employers may have legitimate interests in protecting information that is not a trade secret or proprietary information, but highly specialized, current information not generally known in the industry, created and stimulated by the research environment furnished by the employer, to which the employee has been "exposed" and "enriched" solely due to his employment. We do not attempt to define the exact parameters of that protectable interest. We expect courts to narrowly construe this interest, which will be deemed part of the "reasonableness" equation. The line between such information, trade secrets, and the general skills and knowledge of a highly

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merely be the facility, skill or experience learned or developed during an employee's tenure with an employer").

208. Restatement of Torts § 757:

> b. Definition of trade secret. A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers.

Restatement of Torts § 757 cmt. b (1939), quoted in *Ingersoll Rand Co. v. Ciavatta*, 110 N.J. 609, 636 (1988).

209. *Ingersoll Rand Co. v. Ciavatta*, 110 N.J. 609, 637 (1988). *See Rycoline Prods., Inc. v. Walsh*, 334 N.J. Super. 62 (App. Div. 2000) (discussing the factors for determining the existence of a trade secret and the elements of a claim for misappropriation of a trade secret). *Fluoramics, Inc. v. Trueba*, No. BER-C-408-05, 2005 WL 3455185 (N.J. Super. Ch. Div. Dec. 16, 2005) (same). *See generally Sun Dial Corp. v. Rideout*, 16 N.J. 252, 257-58 (1954).

> sophisticated employee will be very difficult to draw and the employer will have the burden to do so.[210]

The scope and duration of the agreement are also pertinent in determining whether it exceeds the permissible object of protecting legitimate interests. What is reasonable will vary from case to case depending upon the industry, the nature of the employee's position within the company, and the nature of the restriction involved:

> Whether a restraining covenant in such a category is equitable, fair, just and reasonably requisite in respect of time or territory or both in its relation to the parties thereto is essentially an inquiry of fact and not a naked matter of law.[211]

This is well illustrated by the Supreme Court's discussion in *Karlin v. Weinberg*, as to what duration would be reasonable to protect a physician's legitimate interest in protecting his relationship with patients.[212] The Court determined the length of time it would take to demonstrate his continued effectiveness to those patients, and noted that the time required to do that would necessarily vary among specialties depending upon the typical frequency of visits.[213] As a general rule the territory specified in

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210. *Ingersoll Rand Co. v. Ciavatta*, 110 N.J. 609, 638 (1988). *See Campbell Soup Co. v. Desatnick*, 58 F. Supp. 2d 477, 489 (D.N.J. 1999) (quoting the Supreme Court's opinion in *Ingersoll-Rand Co.* for the same proposition); *Lamorte Burns & Co., Inc. v. Walters*, 167 N.J. 285, 299 (2001) (stating that "information need not rise to the level of a trade secret to be protected."); *Steris Corp. v. Shannon*, No. A-4847-17T3, 2019 WL 2420048, at *3 (App. Div. June 10, 2019) (same); *see also Maw v. Advanced Clinical Commc'ns, Inc.*, 359 N.J. Super. 420, 435 (App. Div. 2003), *rev'd on other grounds*, 179 N.J. 439 (2004) (enforcement of non-competition agreement requires proof that the employee had access to the employer's trade secrets or other confidential or proprietary information).

211. *Chas. S. Wood & Co. v. Kane*, 42 N.J. Super. 122, 127 (App. Div. 1956). The court noted that in some earlier cases, extensive territorial areas had been specified:

> For illustrations, see *Wm. T. Wiegand Glass Co. v. Wiegand*, 105 N.J.Eq. 434 (Ch. 1930), and *Irvington Varnish & Insulator Co. v. Van Norde*, 138 N.J.Eq. 99 (E. & A. 1946), in which the United States was therein enveloped; in *Voices, Inc. v. Metal Tone Mfg. Co*., [119 N.J. Eq. 324 (Ch. 1936), *aff'd*, 120 N.J.Eq. 618 (E. & A. 1936), *cert. denied*, 300 U.S. 656 (1937)], where the range embraces the United States or its territories; in *A. Hollander & Son, Inc. v. Imperial Fur Blending Corp*., [2 N.J. 235 (1949)], where the expanse included all states east of the meridian passing through St. Louis, Missouri.

Id. at 128.

212. *Karlin v. Weinberg*, 77 N.J. 408 (1978).

213. *Karlin v. Weinberg*, 77 N.J. 408, 423 (1978). *See Jiffy Lube Int'l, Inc. v. Weiss Bros., Inc.*, 834 F. Supp. 683, 692 (D.N.J. 1993) (in franchise case, three-year restriction on competition found excessive and reduced to the 10 months it would take the franchisor to open a new store in the area); *Schuhalter v. Salerno*, 279 N.J. Super. 504 (App. Div. 1995) (upholding two-year restriction on servicing existing clients); *Raven v. A. Klein & Co*., Inc., 195 N.J. Super. 209, 216-17 (App. Div. 1984) (restrictive covenant enforced for 18-month period it would have taken to independently develop trade secret, plus an additional 18 months' penalty period in place of an award of development

a post-employment restraint may not be greater than that to which the business extends.[214]

1-12:2 Undue Hardship on the Employee

A mere showing of personal inconvenience or financial hardship does not amount to an "undue" hardship sufficient to prevent enforcement of an agreement not to compete.[215] Two factors identified by the Supreme Court as pertinent to this inquiry are (1) the likelihood of the employee finding work in his field elsewhere; and (2) the reason for the termination of the relationship between the parties to the employment contract.[216]

The first factor—likelihood of the employee finding work elsewhere—may in many cases be related to the scope of the agreement. The broader the geographic area and subject matter coverage of the agreement, and the longer its duration, the more likely it is to hinder the employee's re-employment. The second factor—cause of termination of the employment relationship—places a high premium on the employer's motives, and seems to operate almost as a "clean hands" requirement. The employee's personal sacrifice and lack of guile, coupled with the involuntary nature of his termination, were significant factors in *Ingersoll Rand Co. v. Ciavatta*.[217] The same analysis was outlined in *Karlin v. Weinberg*:

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costs); *Hogan v. Bergen Brunswig Corp*., 153 N.J. Super. 37, 42 (App. Div. 1977) (covenant restricting solicitation of customers in Essex and Union Counties for one-year reasonable as to time and space); *Hudson Foam Latex Prods., Inc. v. Aiken*, 82 N.J. Super. 508, 513 (App. Div. 1964) (one-year restriction not an unreasonable period as a matter of law); *Rubel & Jensen Corp. v. Rubel*, 85 N.J. Super. 27, 35 (App. Div. 1964) (five-year restriction in connection with sale of business not unreasonable); *Magic Fingers, Inc. v. Robins*, 86 N.J. Super. 236, 239-40 (Ch. Div. 1965) (restriction of competition with no geographical boundary of doubtful enforceability).

214. *Rubel & Jensen Corp. v. Rubel*, 85 N.J. Super. 27, 35 (App. Div. 1964); *Hudson Foam Latex Prods., Inc. v. Aiken*, 82 N.J. Super. 508, 513 (App. Div. 1964) ("Where the territory specified in a post-employment restraint is greater than that to which the business extends, the restriction is unenforceable.").

215. *See Karlin v. Weinberg*, 77 N.J. 408, 417-18 n.3 (1978).

216. *See Karlin v. Weinberg*, 77 N.J. 408, 423 (1978); *Platinum Mgmt., Inc. v. Dahms*, 285 N.J. Super. 274, 298-99 (Law Div. 1995) (one-year limitation on the ability to solicit customers not an undue hardship; employee did not have to move, no limitations were placed on his ability to work for competitors so long as he did not exploit customer relations and other confidential information); *see also Maw v. Advanced Clinical Commc'ns, Inc*., 359 N.J. Super. 420, 437 (App. Div. 2003) (three factors relevant to the undue hardship criteria include (1) the agreement's geographic and temporal scope; (2) whether the activities restrained are those which would place the employee in actual competition with the employer; and (3) whether the covenant will unduly burden the employee in finding work in his field), *rev'd on other grounds*, 179 N.J. 439 (2004).

217. *Ingersoll Rand Co. v. Ciavatta*, 110 N.J. 609 (1988). Although noting that the manner of an employee's departure is not dispositive, the Court found it was a factor that weighed heavily in the employee's favor in that case. He had been fired, and had the idea for his invention while installing a light fixture. He worked on it while he searched for jobs and had to borrow extensively to get his business started. The Court made a point to conclude, in effect, that he had clean hands:

> Where [the termination of employment] occurs because of a breach of the employment contract by the employer, or because of actions by the employer detrimental to the public interest, enforcement of the covenant may cause hardship on the employee which may fairly be characterized as 'undue' in that the employee has not, by his conduct, contributed to it. On the other hand, where the breach results from the desire of an employee to end his relationship with his employer rather than from any wrongdoing by the employer, a court should be hesitant to find undue hardship on the employee, he in effect having brought that hardship on himself.[218]

1-12:3 Injury to the Public

Like the other two prongs of the reasonableness equation, determination of the extent of injury to the public from any particular restrictive agreement is a fact-intensive inquiry. Courts have identified the following factors as pertinent subjects of public concern: (1) the effect of enforcement of the agreement on availability of the goods or services to which it pertains;[219] (2) the effect of non-enforcement on corporate investments in long-term research and development programs;[220] and (3) the effect of

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> His departure from Ingersoll Rand and subsequent invention and development of his own competing product do not suggest that he purposefully left to develop a competing product on the basis of knowledge he gained from his employment.

Id. at 642.

218. *Karlin v. Weinberg*, 77 N.J. 408, 423-24 (1978).

219. In *Karlin v. Weinberg*, 77 N.J. 408, 424 (1978), the Court, in remanding for a determination of the reasonableness of a restrictive agreement among physicians, instructed the trial court to consider whether enforcement would result in a shortage of physicians in the area, the extent to which patients of the precluded physician would be denied access to his services, and the extent to which new physicians could come into the area to fill any void created. *See A.T. Hudson & Co., Inc. v. Donovan*, 216 N.J. Super. 426, 434 (App. Div. 1987) (no unreasonable injury to public where no showing that clients experienced any real difficulty in locating other consultants capable of rendering similar services; commercial cases different from those involving lawyers, doctors, and accountants). A general assertion that competition from the restricted former employee would keep down the cost of bids on public works because he "had a special reputation for devising less expensive ways to provide desired results" was insufficient to raise a public interest concern for or against enforcement of a restrictive covenant. *Coskey's T.V. & Radio Sales & Serv., Inc. v. Foti*, 253 N.J. Super. 626, 634 (App. Div. 1992). *See Schuhalter v. Salerno*, 279 N.J. Super. 504, 512 n.13 (App. Div. 1995) (no injury to the public in enforcing accountants' agreement to either refrain from servicing each other's clients for two years or compensate the other if such service is provided).

220. *See Ingersoll Rand Co. v. Ciavatta*, 110 N.J. 609, 635, 639 (1988).

enforcement on individual initiative.[221] In this connection, the Supreme Court observed in *Ingersoll Rand Co. v. Ciavatta* that there is a

> current debate raging in the scientific community about the effect of secrecy in scientific research arising from increased ties between scientists, commercial enterprises, and the government, and the effect of such secrecy on the long term progress of scientific programs and innovations.[222]

1-12:4 Consideration

The employer's offer of employment or continued provision of employment has been found to be sufficient consideration for an otherwise enforceable restrictive agreement.[223] Under that rule an at-will employee who is asked to sign a restrictive agreement some time after the start of his employment would not be heard to argue the agreement was void for lack of consideration; the employer's implicit agreement not to exercise its right to terminate him would be sufficient.[224]

1-13 The Professions: Doctors, Lawyers and Accountants

Attorneys are prohibited, by Rule 5.6 of the ABA Model Rules of Professional Conduct and Rule 5.6 of the New Jersey Rules of Professional Conduct, from entering into restrictive covenants of any scope:

> A lawyer shall not participate in offering or making: (a) a partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement[.][225]

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221. *See Ingersoll Rand Co. v. Ciavatta*, 110 N.J. 609, 635, 639 (1988).

222. *Ingersoll Rand Co. v. Ciavatta*, 110 N.J. 609, 639-40 (1988).

223. *Campbell Soup Co. v. Desatnick*, 58 F. Supp. 2d 477, 492 (D.N.J. 1999) (holding that the employer's demand that the employee execute a non-competition agreement as a condition to continued eligibility for stock options constituted sufficient consideration for enforcement of the non-competition agreement); *Hogan v. Bergen Brunswig Corp.*, 153 N.J. Super. 37, 43 (App. Div. 1977). *But see* Valiulis, Covenants Not to Compete, § 1.3 at 3 (1985) (noting problems presented by continued employment as consideration and listing out-of-state cases).

224. *Hogan v. Bergen Brunswig Corp.*, 153 N.J. Super. 37, 43 (App. Div. 1977) (Employer need not verbally threaten to fire employee for failure to sign restrictive covenant "to constitute the consideration required to support a post-employment contract. Such a consequence can be inferred from conduct."). *See Quigley v. KPMG Peat Marwick LLP*, 330 N.J. Super. 252, 265 (App. Div. 2000) (stating that "employment can be deemed consideration for an employee's submission to various demands of an employer.").

225. N.J. Rules of Prof. Conduct, 5.6. The Comment to Rule 5.6(a) of the Model Rules provides in pertinent part:

As a result, it has been held that restrictive agreements that purport to limit the area in which an attorney may practice or the clients he may represent are void *per se* as contrary to public policy.[226] The public policy objective of this rule is protection of the *client's* right to select the attorney of his choice.[227] Thus, even an agreement that does not prohibit competition, but which indirectly restricts the practice of law by making receipt of severance benefits contingent upon non-competition, has been found to violate the Rule.[228] "[E]nsuring client choice is the driving force behind the ethical rule."[229] Thus, even an agreement that imposed financial penalties on voluntary departures from a law firm, whether in competition or not, was found to violate the Rule.[230] Similarly, the Supreme Court has held that an agreement that required partners to forfeit their capital accounts if they withdrew from a firm before age sixty-five for reasons other than death, disability, or judicial appointment, discouraged partners from leaving and becoming competitive with the firm, and therefore violated Rule of Professional Conduct 5.6.[231]

Restrictive agreements of physicians are not similarly barred. In *Karlin v. Weinberg*, the Supreme Court found nothing in the nature of

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> An agreement restricting the right of partners or associates to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.

See generally ABA/BNA Lawyer's Manual on Professional Conduct 51:1201-1204 (1984).

226. *Jacob v. Norris, McLoughlin & Marcus*, 128 N.J. 10 (1992). *See Karlin v. Weinberg*, 77 N.J. 408, 420 (1978); *Dwyer v. Jung*, 133 N.J. Super. 343 (Ch. Div.) (restrictive covenants among attorneys are *per se* unreasonable and therefore void as contrary to public policy), *aff'd o.b.*, 137 N.J. Super. 135 (App. Div. 1975). *See generally Heher v. Smith, Stratton, Wise, Heher & Brennan*, 170 N.J. 213 (2002). The Advisory Committee on Professional Ethics has determined that restrictive covenants for in-house or corporate counsel also violate R.P.C. 5.6. N.J. Supreme Court Advisory Comm. on Prof'l Ethics, *Restrictive Covenants for In-House Counsel, N.J. Ethics Opinion 708*, 185 N.J.L.J. 68 (July 3, 2006).

227. *Jacob v. Norris, McLaughlin & Marcus*, 128 N.J. 10, 18 (1992).

228. A restriction on the right to recruit law firm lawyers and paraprofessionals has also been found in violation of the rule. *Jacob v. Norris, McLaughlin & Marcus*, 128 N.J. 10, 18, 30-31 (1992).

229. *Jacob v. Norris, McLaughlin & Marcus*, 128 N.J. 10, 26 (1992). *Cf. Levin v. Robinson, Wayne & La Sala*, 246 N.J. Super. 167, 193-94 (Law Div. 1990) (*dicta*).

230. *Katchen v. Wolff & Samson*, 258 N.J. Super. 474, 482 (App. Div. 1992). *See Apfel v. Budd Larner Gross*, 324 N.J. Super. 133 (App. Div. 1999) (holding that the shareholders' agreement which reduced a departing shareholder's retirement benefits if the shareholder left the firm to work for another firm in the same state was anti-competitive and violated R.P.C. 5.6). However, a partnership agreement that requires a 50/50 split between a departing partner and the partnership on future contingency fees received by the departing partner from cases that originated before his departure does not violate R.P.C. 5.6. *Groen, Laveson, Goldberg & Rubenstone v. Kancher*, 362 N.J. Super. 350 (App. Div. 2003).

231. *Weiss v. Carpenter, Bennett & Morrissey*, 143 N.J. 420, 444-45 (1996).

the medical profession requiring exemption from the general rule, and thus held restrictive agreements between physicians enforceable to the extent they are reasonable in the circumstances of a particular case.[232] The legitimate interest a physician may seek to protect through such an agreement is his interest in his ongoing relationship with patients.[233]

In 2005, the New Jersey Supreme Court reaffirmed its holding in *Karlin* that a post-employment restrictive covenant in an employment contract between physicians is not *per se* unreasonable and unenforceable. In the companion cases of *The Community Hospital Group, Inc. v. More*[234] and *Pierson v. Medical Health Centers, P.A.,*[235] the Court held that such contracts or similar ones between a physician and a hospital, are not *per se* unenforceable. Rather, post-employment restrictive covenants of physicians are considered on a case-by-case basis to determine if they are unreasonable and unenforceable. However, the Appellate Division held in *Comprehensive Psychology System, P.C. v. Prince*,[236] that because the State Board of Psychological Examiners adopted a regulation restricting psychologists from entering into restrictive covenants, and because of the unique nature of the patient-psychologist relationships, the restrictive covenant in an employment contract of a licensed psychologist was not enforceable. The Supreme Court in *More* noted the Appellate Division's holding in *Prince*.[237]

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232. *See Karlin v. Weinberg*, 77 N.J. 408, 415-17 (1978) (prohibiting practice of dermatology within 10 miles of former employer's office for five years). *See Community Hosp. Grp. v. More, Inc.*, 183 N.J. 36 (2005) (holding the geographic restrictive area excessive and requiring that it be reduced to avoid being detrimental to the public interest); *Graziano v. Grant*, 326 N.J. Super. 328, 344 (App. Div. 1999) (stating that restrictive covenant in employment contract was enforceable against physician "to the extent that it protects a legitimate interest of the employer, imposes no undue hardship on the employee, and is not injurious to the public."). The Appellate Division in *Graziano* concluded that a physician who purchases a practice from a retiring physician has the right to expect that the seller will indeed retire, and if the selling physician changes his mind, the purchasing physician has a legitimate interest in protecting the patient list he acquired. The protection, however, must be reasonable and sufficiently broad to protect the purchasing physician's interest, yet sufficiently limited to protect the selling physician's right to practice medicine, and the interests of the public and individual patients. *Graziano v. Grant*, 326 N.J. Super. 328, 344-45 (App. Div. 1999).

233. *See Karlin v. Weinberg*, 77 N.J. 408, 417 (1978); *see also Community Hosp. Grp., Inc. v. More*, 365 N.J. Super. 84, 101-02 (App. Div. 2003) (indicating that an institution, as distinguished from an individual employer/physician has a legitimate and protectable interest in protecting its patient base), *aff'd in part and rev'd in part*, 183 N.J. 36 (2005).

234. *Community Hosp. Grp., Inc. v. More*, 183 N.J. 36 (2005).

235. *Pierson v. Med. Health Ctrs., P.A.*, 183 N.J. 65 (2005).

236. *Comprehensive Psychology Sys., P.C. v. Prince*, 375 N.J. Super. 273 (App. Div. 2005).

237. *Community Hosp. Grp., Inc. v. More*, 183 N.J. 36, 53-55 (2005).

Accountants have similarly been held subject to the general rule,[238] as have individuals in other service industries professing especially personal relationships with clients.[239] But, application of the *Solari* analysis in the professional setting may result in different conclusions. In *Mailman, Ross, Toyes, & Shapiro v. Edelson*, the court found that the consensual, fiduciary relationship of accountant and client created a right in the client to repose confidence in the accountant of his choice that should not readily be circumscribed.[240] It thus found that while a former employee-accountant could be barred from soliciting clients of his former employer, the clients had the right unilaterally to continue their confidential business relationship with him.[241]

1-14 Enforcement: The Blue Pencil Doctrine

Prior to the Supreme Court's 1970 opinion in *Solari Industries, Inc. v. Malady*, New Jersey generally adhered to the rule that an unreasonably broad restrictive agreement was void *per se*.[242] The "divisibility" or "selective enforcement" doctrine provided some relief from the all-or-nothing rule, but as noted by the Court in *Solari*, it also led to "tortuous interpretations and incongruous differentiations."[243] Thus, the Court adopted a variation of the "blue pencil" doctrine, thereby permitting total or partial enforcement of noncompetition agreements to the extent reasonable under the circumstances.[244] The availability of this remedy,

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238. *Mailman, Ross, Toyes, & Shapiro v. Edelson*, 183 N.J. Super. 434 (Ch. Div. 1982). *Schuhalter v. Salerno*, 279 N.J. Super. 504, 509 (App. Div. 1995) (holding a restrictive agreement between accountants subject to the *Solari* rule and specifically rejecting the assertion that restrictive agreements between professionals are void *per se*).

239. *See A.T. Hudson & Co., Inc. v. Donovan*, 216 N.J. Super. 426 (App. Div. 1987) (two-year restriction on a management consultant enforceable; no showing that other consultants not available to fulfill client needs).

240. *Mailman, Ross, Toyes, & Shapiro v. Edelson*, 183 N.J. Super. 434, 444 (Ch. Div. 1982).

241. *Mailman, Ross, Toyes, & Shapiro v. Edelson*, 183 N.J. Super. 434, 444 (Ch. Div. 1982). In *Schuhalter v. Salerno*, 279 N.J. Super. 504 (App. Div. 1995), the Appellate Division applied the rule established in *Solari Industries, Inc. v. Malady*, 55 N.J. 571 (1970), to a restrictive agreement between accounting firm partners upon the dissolution of their partnership. The court upheld, *inter alia*, an agreement that for two years after dissolution, each partner would either refrain from servicing clients designated as belonging to the other, or compensate the other for providing such service.

242. *See Solari Indus., Inc. v. Malady*, 55 N.J. 571, 583 (1970), and cases cited therein.

243. *Solari Indus., Inc. v. Malady*, 55 N.J. 571, 583 (1970).

244. *See ADP, LLC v. Kusins*, No. A-0692-17T3, 2019 WL 3367212, at *17 (App. Div. July 26, 2019) (blue penciling nonsolicitation agreement found to be overbroad); *ADP, LLC v. Rafferty*, 923 F.3d 113, 126 (3d Cir. 2019) (remanding to District Court for blue penciling restrictive covenant agreements held to be overbroad); *Richards Mfg. Co. v. Thomas & Betts Corp.*, No. Civ. 01-4677, 2005 WL 2373413 (D.N.J. 2005) (relying on blue pencil doctrine in the context of an employment confidentiality agreement); *Community Hosp. Grp., Inc. v. More*, 183 N.J. 36 (2005) (partially enforcing

however, should not impel employers to negotiate or impose overly-broad agreements. If there is credible evidence to sustain a finding that a covenant is deliberately unreasonable or oppressive, the blue pencil doctrine will not be applied:

> When an employer, through superior bargaining power, extracts a deliberately unreasonable and oppressive non-competitive covenant he is in no just position to seek, and should not receive, equitable relief from the courts.[245]

V. GOOD FAITH AND FAIR DEALING

1-15 Requisites

The covenant of good faith and fair dealing applies to employment contracts just as it does to all other contracts in New Jersey.[246] If an at-will employee enters into a contract with respect to particular aspects of his employment, the covenant of good faith and fair dealing applies to those parts of the employment that are covered by the contract.[247] The covenant also applies to implied contracts of employment contained in employment manuals and other documents that satisfy the requirements of *Woolley*.[248]

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restrictive covenant and remanding for determination of the precise limits of the geographic area of the restriction); *Maxlite, Inc. v. ATG Elecs., Inc.*, No. 15-1116 (JMV), 2021 WL 4520418, at *5 (D.N.J. Oct. 4, 2021) (employer's failure to enforce restrictive covenants against similarly situated employees is immaterial to enforceability); *Karlin v. Weinberg*, 77 N.J. 408, 420 n.4 (1978); *Solari Indus., Inc. v. Malady*, 55 N.J. 571, 585 (1970).

245. *Solari Indus., Inc. v. Malady*, 55 N.J. 571, 576 (1970).

246. *See Borbely v. Nationwide Mut. Ins. Co.*, 547 F. Supp. 959, 973 (D.N.J. 1981); *Palisades Props., Inc. v. Brunetti*, 44 N.J. 117, 130 (1965); *Nolan v. Control Data Corp.*, 243 N.J. Super. 420, 429 (App. Div. 1990); *see also King v. Port Auth. of N.Y. & N.J.*, 909 F. Supp. 938, 942 (D.N.J. 1995) (employee has claim for "breach of the implied duty of good faith and fair dealing" when "the employer attempts to deprive the employee of the benefits of the employment agreement without an honest belief that good cause for discharge is in fact present"), *aff'd*, 106 F.3d 385 (3d Cir. 1996); *Sellitto v. Litton Sys., Inc.*, 881 F. Supp. 932, 940-41 (D.N.J. 1994) (where plaintiff claimed violation of a manual's progressive discipline procedure, his cause of action, if any, should be for breach of the express terms of the implied contract and not breach of the covenant of good faith and fair dealing); *Katchen v. Wolff & Samson*, 258 N.J. Super. 474, 482 (App. Div. 1992) (noting that claim for breach of covenant of good faith and fair dealing with respect to agreement between attorney and law firm could be pursued on remand).

247. *See King v. Port Auth.*, 909 F. Supp. 938 (D.N.J. 1995); *Fregara v. Jet Aviation Bus. Jets*, 764 F. Supp. 940 (D.N.J. 1991); *Peck v. Imedia, Inc.*, 293 N.J. Super. 151, 168 (App. Div. 1996); *Nolan v. Control Data Corp.*, 243 N.J. Super. 420, 429 (App. Div. 1990). An employee may violate the implied covenant of good faith and fair dealing even while performing his or her listed job duties to perfection. *Fields v. Thompson Printing Co.*, 363 F.3d 259, 271-72 (3d Cir. 2004) ("where the terms of a contract are not specific, the implied covenant of good faith and fair dealing may fill the gaps necessary to give efficacy to the contract as written.").

248. *Jaclin v. Sea-Land Corp.*, No. 86-2791 (AMW), 1989 WL 200943 (D.N.J. Aug. 23, 1989) (motion for summary judgment denied on plaintiff's claim for breach of implied covenant of good

The covenant does not apply, however, where the employment relationship is at will and not governed by contract: "In the absence of a contract, there can be no breach of an implied covenant of good faith and fair dealing."[249]

As a consequence, efforts to utilize the covenant to engraft a general good faith requirement on the at-will employment relationship have been consistently rejected by the lower courts.[250] The Supreme Court has not addressed the issue.

Tort damages do not lie for breach of an implied covenant of good faith and fair dealing found in an employment contract.[251]

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faith and fair dealing arising out of an employment manual); *Wade v. Kessler Inst.*, 343 N.J. Super. 338, 348 (App. Div. 2001) (finding that the implied covenant of good faith and fair dealing can arise out of an implied contract contained in an employment manual), *aff'd*, 172 N.J. 327 (2002); *Noye v. Hoffmann-LaRoche, Inc.*, 238 N.J. Super. 430, 432 (App. Div. 1990) ("It is undoubted that a *Woolley* contract, like any other contract, contains an implied covenant of good faith and fair dealing.").

249. *Noye v. Hoffmann-LaRoche, Inc.*, 238 N.J. Super. 430, 434 (App. Div. 1990). *See Gil v. Related Mgmt. Co.*, No. 06-2174 (WHW), 2006 WL 2358574 (D.N.J. Aug. 14, 2006) (dismissing claim for breach of the implied covenant of good faith and fair dealing because there was no contract of employment); *Magnusson v. Hartford*, No. 05-365 (GEB), 2006 WL 2528541 (D.N.J. Aug. 31,2006) (same), *aff'd*, 258 F. App'x 444 (3d Cir. 2007); *Schlichtig v. Inacom Corp.*, 271 F. Supp. 2d 597 (D.N.J. 2003) (same); *Kennedy v. Chubb Grp. of Ins. Cos.*, 60 F. Supp. 2d 384, 399-400 (D.N.J. 1999), (same); *Pepe v. Rival Co.*, 85 F. Supp. 2d 349, 391 (D.N.J. 1999) (same), *aff'd*, 254 F.3d 1078 (3d Cir. 2001); *Barone v. Leukemia Soc'y of Am.*, 42 F. Supp. 2d 452 (D.N.J. 1998) (same); *Edwards v. Schlumberger-Well Servs.*, 984 F. Supp. 264, 285 (D.N.J. 1997) (same); *Bishop v. Okidata, Inc.*, 864 F. Supp. 416, 426 (D.N.J. 1994) (same); *Obendorfer v. Gitano Grp., Inc.*, 838 F. Supp. 950, 954 (D.N.J. 1993) (same); *Mullen v. N.J. Steel Corp.*, 733 F. Supp. 1534, 1554 n.19 (D.N.J. 1990) (New Jersey courts won't imply implied covenant of good faith in at-will employment situation); *Brunner v. Abex Corp.*, 661 F. Supp. 1351, 1356 (D.N.J. 1986) (same); *Smith v. Hartford Fire Ins. Co.*, No. 85-2323, 1985 WL 2828 (E.D. Pa. Sept. 30, 1985) (applying New Jersey law); *Wade v. Kessler Inst.*, 172 N.J. 327, 345 (2002) (an express or implied contract must exist before a jury can consider whether the implied covenant of good faith and fair dealing has been breached); *House v. Carter-Wallace, Inc.*, 232 N.J. Super. 42, 55 (App. Div. 1989); *McQuitty v. Gen. Dynamics Corp.*, 204 N.J. Super. 514, 520 (App. Div. 1985). *But see Rivera v. Trump Plaza Hotel & Casino*, 305 N.J. Super. 596, 601 (App. Div. 1997) (stating that "[t]o the extent that employment at-will nonetheless implicates a covenant of good faith and fair dealing, there is no evidence that such covenant was breached in this case."); *Peck v. Imedia Inc.*, 293 N.J. Super. 151, 167-68 (App. Div. 1996) (applying the covenant of good faith and fair dealing to an offer of at-will employment).

250. *Labus v. Navistar Int'l Transp. Corp.*, 740 F. Supp. 1053, 1063 (D.N.J. 1990); *Brunner v. Abex Corp.*, 661 F. Supp. 1351, 1356 (D.N.J. 1986); *House v. Carter-Wallace, Inc.*, 232 N.J. Super. 42, 55 (App. Div. 1989); *Citizens State Bank of N.J. v. Libertelli*, 215 N.J. Super. 190 (App. Div. 1987); *McQuitty v. Gen. Dynamics Corp.*, 204 N.J. Super. 514 (App. Div. 1985). *See Scudder v. Media Gen., Inc.*, No. 95-1073, 1995 WL 495945, at *6 (D.N.J. Aug. 15, 1995):

> Where there is no contract between the parties, there is nothing into which the Court may imply a term of fair dealing. The doctrine will not create rights or obligations between the parties in a vacuum. It is well settled that the implied term of fair dealing will not work to constrain an employer's discretion to terminate an at-will employee.

251. *Noye v. Hoffmann-LaRoche, Inc.*, 238 N.J. Super. 430, 436 (App. Div. 1990). *But see, Paul Revere Life Ins. Co. v. Patniak*, No. Civ.A. 02-3423, 2004 WL 1059805, at *2 (D.N.J. Apr. 1, 2004) (a breach of duty of good faith and fair dealing can create tort liability as well as liability under the contract).

The covenant generally requires that:

> neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract . . . .[252]

Courts applying this test in the employment context have required a showing of bad faith or unconscionable behavior by the breaching party and lack of privilege for the actions taken.[253] An employee's allegations of reliance on false promises of employment for a reasonable period of time fell "woefully short" of demonstrating the bad faith requisite to a claim of breach of the covenant of good faith and fair dealing.[254] Additionally, the Appellate Division has held that even where an "employee performs the duties contracted for satisfactorily, criminal activity by the employee can justify his discharge for breach of an employment contract."[255] But where a franchisor concealed its intent to eliminate an "exclusive" distributorship to induce the distributor's continued investment of substantial sums of money, the covenant was found breached.[256] In *Feldman v. U.S. Sprint Communications Co.*, the court found that the duty of good faith and fair dealing attached to the employer's compensation plans and prohibited the employer from interfering with the contractual procedure through which employees earned commissions:

> It could not, for example, intentionally delay installation or billing to avoid paying commission. Similarly, where Sprint unintentionally cannot produce timely invoices and therefore creates an income maintenance plan to assist its

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252. *Borbely v. Nationwide Mut. Ins. Co.*, 547 F. Supp. 959, 973 (D.N.J. 1981) (citing *Palisades Props., Inc. v. Brunetti*, 44 N.J. 117, 130 (1965)); *McGarry v. St. Anthony of Padua*, 307 N.J. Super. 525, 533 (App. Div. 1998) (same).

253. *Wade v. Kessler Inst.*, 343 N.J. Super. 338, 348 (App. Div. 2001) (stating that "bad motive or intention" is an essential element of the claim), *aff'd*, 172 N.J. 327 (2002). *See Pepe v. Rival Co.*, 85 F. Supp. 2d 349, 391 (D.N.J. 1999) (dismissing claim for breach of the implied covenant of good faith and fair dealing where plaintiff offered no more than conclusory statements or arguments to support his allegations of bad faith), *aff'd*, 254 F.3d 1078 (3d Cir. 2001); *Fregara v. Jet Aviation Bus. Jets*, 764 F. Supp. 940, 953 (D.N.J. 1991) (employee has claim for breach of an implied covenant of good faith and fair dealing if "employer attempts to deprive the employee of the benefit of the employment agreement without an honest belief that good cause for discharge in fact exists."); *Borbely v. Nationwide Mut. Ins. Co.*, 547 F. Supp. 959, 982 (D.N.J. 1981) (jury charge on breach of implied covenant "should have included an explanation of privilege and a statement on the necessity for finding unconscionable behavior on defendant's part."); *see also Wilson v. Amerada Hess Corp.*, 168 N.J. 236, 251 (2001) (stating the same but not in an employment case).

254. *Weber v. LDC/Milton Roy*, 1 IER Cases 1509, 42 FEP 1507 (D.N.J. 1986) (court's analysis assumes applicability of the covenant to the employee manual there at issue).

255. *McGarry v. St. Anthony of Padua*, 307 N.J. Super. 525, 533 (App. Div. 1998).

256. *Bak-A-Lum Corp. of Am. v. Alcoa Bldg. Prods., Inc.*, 69 N.J. 123 (1976).

> employees, it cannot use that plan to deny the employees the commissions they have actually earned and should have been paid but for its failure to send invoices.[257]

The covenant should not be used, however, to make a different or fairer contract for the parties.[258] Similarly, the covenant should not be invoked when the defendant's conduct constitutes a breach of a contract's express terms.[259]

VI. WAIVERS

1-16 Common Practice

It is common practice of many employers to seek a release of claims from employees upon the termination of employment. When a release of state and/or federal statutory claims is sought, special considerations apply, and the various statutes and regulations must be consulted for guidance.[260] However, when only employment contract claims are at issue, traditional contract principles have governed the validity of the release.[261]

Waiver, under New Jersey law, involves the intentional relinquishment of a known right, and thus it must be shown that the party charged with the waiver knew of his or her legal rights and deliberately intended to relinquish them.[262]

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257. *Feldman v. U.S. Sprint Commc'ns Co*., 714 F. Supp. 727, 731 (D.N.J. 1989).

258. *See Borbely v. Nationwide Mut. Ins. Co*., 547 F. Supp. 959, 975 (D.N.J. 1981). *See also Sellitto v. Litton Sys., Inc.*, 881 F. Supp. 932, 941 (D.N.J. 1994) (court dismissed plaintiff's claim that failure to provide a performance evaluation constituted breach of the covenant of good faith and fair dealing; without proof the parties intended a performance review or "support of plaintiff's management incentives" be part of the employment contract, "there can be no breach of an implied covenant of good faith and fair dealing"; citing *Fregara v. Jet Aviation*, 764 F. Supp. 940, 954, n.8 (D.N.J. 1991) for principle that "New Jersey does not recognize cause of action for 'negligent evaluation'").

259. *Wade v. Kessler Inst*., 172 N.J. 327, 344-45 (2002).

260. *See, e.g.*, Older Workers Benefit Protection Act, 29 U.S.C. § 626(f)(i)(H); *Coventry v. U.S. Steel Corp*., 856 F.2d 514, 522-25 (3d Cir. 1988) (special considerations beyond traditional contract principles must be applied in evaluating waivers of ADEA claims; voluntariness depends upon totality of the circumstances). *See* Chapter 4, § 4-46:3, below for a discussion of waivers under the Law Against Discrimination. Waiver is an affirmative defense that must be pled by defendant. N.J. Ct. R. 4:5-4.

261. *See Mullen v. N.J. Steel Corp*., 733 F. Supp. 1534, 1548 (D.N.J. 1990); *Shebar v. Sanyo Bus. Sys. Corp*., 111 N.J. 276, 291-92 (1988).

262. *Shebar v. Sanyo Bus. Sys. Corp*., 111 N.J. 276, 291 (1988); *Petrillo v. Bachenberg*, 263 N.J. Super. 472, 479-80 (App. Div. 1993) (waiver requires "intentional relinquishment of a known right" so the party alleged to have waived rights must be shown to have known of those rights and "deliberately intended to relinquish them."). *See also Mosley v. Bay Ship Mgmt., Inc.*, 174 F. Supp. 2d 192 (D.N.J. Aug. 7, 2000); *Camden Bd. of Educ. v. Alexander*, 181 N.J. 187, 195 (2004) (in the public sector, waiver of a legislatively conferred prerogative should be unmistakable); *Rockel v. Cherry Hill Dodge*, 368 N.J. Super. 577, 585 (App. Div. 2004) (the print size and location of an

Releases of actionable claims may be freely entered into if supported by valuable consideration, and in the absence of fraud, duress, or other compelling circumstances.[263]

1-17 Consideration

A waiver or release, like any other contract, must be supported by valuable consideration:

> 'Consideration involves a detriment incurred by the promisee or a benefit received by the promisor, at the promisor's request.' '[L]egal sufficiency does not depend [, however,] upon the comparative value of the consideration and of what is promised in return.' Rather, the consideration 'must merely be valuable in the sense that it is something bargained for in fact.'[264]

In *Borbely v. Nationwide Mutual Insurance Co.*, the court found that the employer's agreement to waive its rights in agents' policies in New Jersey, not to enforce the agents' non-competition agreements, to provide health insurance for a year, to provide severance benefits in a more desirable manner, and to pay additional commissions on certain policies constituted valuable consideration for the agents' waivers of their right to sue.[265] Additional severance or enhanced pension benefits are commonly the consideration for such agreements.[266]

1-18 Duress

Waivers or releases procured by means of duress are inoperative and void.[267] Duress in this sense requires proof that (1) there was a degree of constraint or

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arbitration provision "has great relevance to any determination to compel arbitration, particularly when, like here, the provision is contained in a contract of adhesion").

263. *See Mullen v. N.J. Steel Corp.*, 733 F. Supp. 1534, 1548 (D.N.J. 1990).

264. *Borbely v. Nationwide Mut. Ins. Co.*, 547 F. Supp. 959, 980 (D.N.J. 1981) (citations omitted). *See Petrillo v. Bachenberg*, 263 N.J. Super. 472, 480 (App. Div. 1993) (a waiver is a choice to give up "something of value or to forego some advantage" and must be "supported by either an agreement with adequate consideration, or by such conduct as to estop the waiving party from denying the intent to waive.") (citation omitted).

265. *Borbely v. Nationwide Mut. Ins. Co.*, 547 F. Supp. 959, 980 (D.N.J. 1981).

266. *See, e.g.*, *Geraghty v. Ins. Servs. Office*, 369 F. App'x 402, 406 (3d Cir. 2010) (explaining that "since the *Cirillo* decision, the ADEA statute contains its own provision applicable to a release, thereby superseding the *Cirillo* decision in this respect); *Cirillo v. Arco Chem. Co.*, 862 F.2d 448, 454-55 (3d Cir. 1988) (enhanced benefits provided for release that included federal statutory discrimination claim).

267. *Borbely v. Nationwide Mut. Ins. Co.*, 547 F. Supp. 959, 978 (D.N.J. 1981); *Rubenstein v. Rubenstein*, 20 N.J. 359, 365 (1956).

danger, either actual or threatened and impending, which in fact coerced the mind of the actor; and (2) that the pressure exerted was wrongful.[268]

> [N]ot all pressure is wrongful, and means in themselves lawful must not be so oppressively used as to constitute, e.g., an abuse of legal remedies. Thus, it is insufficient merely to show that a party's consent was involuntarily given, that his will was overborne; at least in this state, he must show as well that the act or threat is wrongful, 'not necessarily in a legal, but in a moral or equitable sense.'[269]

The test of voluntariness is a subjective one in the sense that the question is not whether a reasonable man in these circumstances would have felt compulsion, but rather whether the circumstances did in fact overcome the will of the complainant in the case at hand.[270] Whether duress exists in a particular case is generally a question of fact, but what in given circumstances will constitute duress is a matter of law.[271] Moreover, to assert the affirmative defense of duress one must demonstrate that at the time of signing there was no immediate or effective legal remedy available.[272]

The mere fact that an employee facing termination of employment may feel economic or personal pressure to agree to a waiver does not constitute duress. Something more than such a subjective reaction is required, such as "malicious, unconscionable, or outrageous motivation on [the employer's] part which might render the pressure experienced by the [employee] wrongful."[273] That is particularly so where the employee is afforded time to consider his decision and consult an attorney.[274]

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268. *Rubenstein v. Rubenstein*, 20 N.J. 359, 366-67 (1956).

269. *Borbely v. Nationwide Mut. Ins. Co.*, 547 F. Supp. 959, 978 (D.N.J. 1981) (citations omitted). *See generally* New Jersey Model Jury Charges: Civil, § 4.8 (3d ed. 1990).

270. *See Rubenstein v. Rubenstein*, 20 N.J. 359, 366-67 (1956) (recent case law indicates duress results when "unlawful threats" which do "in fact overcome the will of the person threatened, and induce him to do an act which he would not otherwise have done," and wasn't required to do).

271. *Borbely v. Nationwide Mut. Ins. Co.*, 547 F. Supp. 959, 978 (D.N.J. 1981) (quoting *Wolf v. Marlton Corp.*, 57 N.J. Super. 278 (App. Div. 1959)).

272. *See Ross Sys. v. Linden Dari-Delite, Inc.*, 35 N.J. 329, 336 (1961) ("adequacy of the remedy is to be tested by a practical standard which takes into consideration the exigencies of the situation in which the victim finds himself").

273. *Borbely v. Nationwide Mut. Ins. Co.*, 547 F. Supp. 959, 979 (1981). *See also Quigley v. KPMG Peat Marwick LLP*, 330 N.J. Super. 252, 264 (App. Div. 2000) (stating that "the economic coercion of obtaining or keeping a job, without more, is insufficient to overcome an agreement to arbitrate statutory claims"). *Cf. Ross Sys. v. Linden Dari- Delite, Inc.*, 35 N.J. 329, 335-36 (1961) (payment of wrongfully extracted commissions under fear of losing franchise was under business compulsion).

274. *Borbely v. Nationwide Mut. Ins. Co.*, 547 F. Supp. 959, 979 (D.N.J. 1981). *Cf. Coventry v. U.S. Steel Corp.*, 856 F.2d 514, 524-25 (3d Cir. 1988) (discussing impact of availability of counsel in evaluation of voluntariness of waiver of claims under ADEA).

1-19 Ratification

Even if a release is not effective when signed, it may be ratified by the acceptance of benefits thereunder.[275] Thus it has been held that the acceptance of benefits under a severance agreement and failure to complain until all checks for same had been delivered constituted a ratification of a release.[276] However, the mere acceptance of severance or other post-employment benefits will not in itself constitute a waiver of claims for wrongful discharge; there must have been an agreement to that effect. Thus, in *Shebar v. Sanyo Business Systems Corp.*, the Supreme Court held that the trial court erred in granting the employer summary judgment on its claim that Mr. Shebar had waived his wrongful discharge claims by accepting pay:

> Nothing in the record suggests that either Sanyo or Shebar had any reasonable expectation that Shebar's acceptance of the checks 'unequivocally and decisively expressed his election to forego his legal right to challenge the lawfulness of the termination.' Indeed, Shebar expressly denied that he did, asserting that he was never advised by Sanyo, either orally or in writing, that acceptance of the benefits 'constituted an agreement or a waiver of my rights or a release of my claims or a termination of Sanyo's obligations to me.'[277]

VII. REMEDIES

1-20 Compensatory Damages

Breach of an employment contract gives rise to normal contract damages. Except in limited circumstances discussed in the following sections, tort remedies of emotional distress and punitive damages are not available. "When a wrongful discharge of an employee occurs the measure of damages is usually the employee's salary for the remainder of the employment period."[278] Where the employment was

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275. *See, e.g.*, *Client's Sec. Fund v. Allstate Ins. Co.*, 219 N.J. Super. 325, 333-34 (App. Div. 1987); *Am. Photocopy Equip. Co. v. Ampto, Inc.*, 82 N.J. Super. 531, 538-39 (App. Div. 1964); *Clarkson v. Selected Risks Ins. Co.*, 170 N.J. Super. 373, 379-80 (Law Div. 1979).

276. *Mullen v. N.J. Steel Corp.*, 733 F. Supp. 1534 (D.N.J. 1990).

277. *Shebar v. Sanyo Bus. Sys. Corp.*, 111 N.J. 276, 291-92 (1988).

278. *Goodman v. London Metals Exch., Inc.*, 86 N.J. 19, 34 (1981) (discrimination case). Similarly, to recover under *quantum meruit*, the plaintiff must prove the reasonable value of

for an indefinite term, or for life, future wages may be awarded for a reasonable period.[279] Thus, in *Preston v. Claridge Hotel & Casino*, the Appellate Division rejected the employer's claim that an award of future wages was improperly based upon speculation and conjecture, finding instead that the jury could reasonably find that it would be two years before plaintiff would obtain a salary equivalent to that which she received prior to termination.[280]

Although an action for violation of an implied employment contract would normally sound in contract, it has been suggested by the Appellate Division that an employee proceeding under *Woolley* may maintain an action in tort "only to the extent they can establish a breach of duty arising out of a *Woolley* contract of employment."[281] "An employee wrongfully discharged in violation of a company policy is not entitled to tort damages."[282]

In a wrongful discharge action, the employee's lost wages will be reduced by the amount of wages the employee earned from another employer or could have secured by the use of reasonable efforts. Mitigation of damages is an affirmative defense, which is proven by demonstrating that (1) the employee made no effort or no reasonable effort to secure employment after the discharge; and (2) other employment opportunities were available that were comparable to the position that the employee lost.[283]

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the services rendered and for which compensation is sought. *West v. IDT Corp.*, No. Civ. A. 01-4372 (WHW), 2006 WL 1459971 (D.N.J. May 25, 2006), *rev'd on other grounds*, 241 F. App'x 50 (3d Cir. 2007).

279. *See Preston v. Claridge Hotel & Casino*, 231 N.J. Super. 81, 88 (App. Div. 1989).

280. *Preston v. Claridge Hotel & Casino*, 231 N.J. Super. 81, 88 (App. Div. 1989); *see also Levinson v. Prentice-Hall, Inc.*, 868 F.2d 558, 563 (3d Cir. 1989) (front pay in discrimination case); *Weiss v. Parker Hannifan Corp.*, 747 F. Supp. 1118, 1135 (D.N.J. 1990); *Wade v. Kessler Inst.*, 343 N.J. Super. 338, 353 (App. Div. 2001) ("The measure of damages for breach of an implied employment contract consists of lost wages, including future lost wages."), *aff'd*, 172 N.J. 327 (2002); *Potter v. Vill. Bank of N.J.*, 225 N.J. Super. 547, 562 (App. Div. 1988) (in action for retaliatory discharge employee entitled to recover, *inter alia*, the amount that would be due "from the time of wrongful discharge for a reasonable time until he or she finds new employment" plus any bonuses and vacation pay owed and "less any unemployment compensation received in the interim").

281. *Giudice v. Drew Chem. Corp.*, 210 N.J. Super. 32, 39 (App. Div. 1986).

282. *Gilbert v. Durand Glass Mfg. Co.*, 258 N.J. Super. 320, 332 (App. Div. 1992).

283. *Wade v. Kessler Inst.*, 343 N.J. Super. 338, 354-55 (App. Div. 2001), *aff'd*, 172 N.J. 327 (2002).

1-21 Punitive Damages

Punitive damages are traditionally reserved for civil wrongs characterized in torts. They are intended to punish the tortfeasor and prevent him from repeating the subject conduct.[284] To recover punitive damages, a plaintiff must establish "actual malice": intentional wrongdoing, an evil-minded act, or an act accompanied by a wanton and willful disregard of the rights of another.[285]

With rare exceptions, punitive damages are not available for breach of contract, including an employment contract.[286]

> Where the essence of a cause of action is limited to a breach of such a contract, punitive damages are not appropriate regardless of the nature of the conduct constituting the breach. Professor McCormick has expressed this notion in the following fashion: 'In actions, however, upon mere private contracts *even where the breach is malicious and unjustified*, exemplary damages are not allowable.'[287]

Special relationships warranting deviation from this rule include fiduciaries such as bankers and real estate brokers, public utilities and their customers, and the parties to an agreement to marry.[288] The employer-employee relationship has not been accorded this special status.[289]

The Appellate Division has suggested in dicta that punitive damages may be available for breach of contract in exceptional circumstances:

> there may arise a case involving such an aggravated set of facts that punitive damages might be appropriate regardless of the contract form of the action and even though it may be beyond the scope of the recognized exceptions in the adjudicated cases.[290]

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284. *See Sandler v. Lawn-A-Mat Chem. & Equip. Co.*, 141 N.J. Super. 437, 448 (App. Div. 1976).

285. *See Sandler v. Lawn-A-Mat Chem. & Equip. Co.*, 141 N.J. Super. 437, 448 (App. Div. 1976).

286. *Nardi v. Stevens Inst. of Tech.*, 60 F. Supp. 2d 31, 52 (E.D.N.Y. 1999) (applying New Jersey law and stating: "[p]unitive damages are not available in a breach of contract action"); *Buckley v. Trenton Sav. Fund Soc'y*, 111 N.J. 355, 369-70 (1988). *See generally Gilbert v. Durand Glass Mfg. Co.*, 258 N.J. Super. 320, 332 (App. Div. 1992) ("An employee wrongfully discharged in violation of a company policy is not entitled to tort damages").

287. *See Sandler v. Lawn-A-Mat Chem. & Equip. Co.*, 141 N.J. Super. 437, 449 (App. Div. 1976) (emphasis in original).

288. *See Sandler v. Lawn-A-Mat Chem. & Equip. Co.*, 141 N.J. Super. 437, 449 (App. Div. 1976) and cases cited therein.

289. *Cf. Kass v. Brown Boveri Corp.*, 199 N.J. Super. 42, 56 (App. Div. 1985).

290. *Sandler v. Lawn-A-Mat Chem. & Equip. Co.*, 141 N.J. Super. 437, 451 (App. Div. 1976). *See Ellmex Constr. Co. v. Republic Ins. Co.*, 202 N.J. Super. 195, 207 (App. Div. 1985) and cases cited therein.

That issue remains unresolved, however, and the circumstances—if any—that might warrant imposition of punitive damages for breach of contract remain unknown.[291]

1-22 Emotional Distress Damages

Damages for emotional distress are ordinarily not recoverable in an action for breach of contract.[292] Such damages will be permitted, however, where (1) the breach was willful and wanton; and (2) the harm was foreseeable when the contract was made.[293] A party to a contract is not responsible for a loss he had no reason to foresee as a probable result of a breach when the contract was made: "to impose liability the defendant must have had reason to foresee the injury at the time the contract was made, not at the time of the breach."[294] Employment contracts are not treated differently. In *Noye v. Hoffmann-LaRoche, Inc.*, the Appellate Division held emotional distress damages unavailable for breach of the implied covenant of good faith and fair dealing to an employment contract, finding it sufficient that the employee be compensated for his expectations under the contract.[295]

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[291] *See, e.g.*, *W.A. Wright, Inc. v. KDI Sylvan Pools, Inc.*, 746 F.2d 215, 218 (3d Cir. 1984) (there is no indication in any Supreme Court opinion that it would create an exception to the rule of non-recovery of punitive damages in contract claims for egregious contract breaches); *Unifoil Corp. v. Cheque Printers & Encoders Ltd.*, 622 F. Supp. 268, 272 (D.N.J. 1985) ("it is theoretically possible to obtain punitive damages on a contract claim, given sufficiently 'aggravated circumstances'"); *Ryno v. First Bank of S. Jersey*, 208 N.J. Super. 562, 572 (App. Div. 1986) ("even if we assume the questionable proposition that under some circumstances punitive damages could be available in this type of contract action.'").

[292] *See Coyle v. Englander's*, 199 N.J. Super. 212, 219 (App. Div. 1985); *Fiore v. Sears, Roebuck & Co.*, 144 N.J. Super. 74, 77 (Law Div. 1976). *See generally Gilbert v. Durand Glass Mfg. Co.*, 258 N.J. Super. 320, 332 (App. Div. 1992) ("An employee wrongfully discharged in violation of a company policy is not entitled to tort damages").

[293] *See Picogna v. Bd. of Educ. of Twp. of Cherry Hill*, 143 N.J. 391, 397 (1996) ("Under contract laws, recovery is permitted where the breach of contract involves conduct that is both intentional and outrageous and proximately causes severe, foreseeable emotional distress."); *Buckley v. Trenton Sav. Fund Soc'y*, 111 N.J. 355, 364-65 (1988); *Fiore v. Sears, Roebuck & Co.*, 144 N.J. Super. 74, 76-77 (Law Div. 1976).

[294] *Coyle v. Englander's*, 199 N.J. Super. 212, 220 (App. Div. 1985).

[295] *Noye v. Hoffmann-LaRoche, Inc.*, 238 N.J. Super. 430, 436-37 (App. Div. 1990). *See Zawadowicz v. CVS Corp.*, 99 F. Supp. 2d 518, 541 (D.N.J. 2000) (dismissing plaintiff's claim for emotional distress based on his claims of breach of an implied contract and breach of the implied covenant of good faith and fair dealing because the plaintiff presented no evidence to establish that he suffered from severe, foreseeable distress as a result of the alleged breach).

1-23 Prejudgment Interest

Prejudgment interest may be awarded on compensatory damages for breach of contract, whether liquidated or not.[296] Whether to award prejudgment interest in a particular case is governed by equitable principles; it is not awarded as of right.[297] Such awards are intended to be compensatory and to indemnify the claimant for the loss of moneys he would have earned had payment not been delayed.[298]

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296. *See W.A. Wright, Inc. v. KDI Sylvan Pools, Inc.*, 746 F.2d 215, 219 (3d Cir. 1984); *Preston v. Claridge Hotel & Casino*, 231 N.J. Super. 81, 88-90 (App. Div. 1989); *Ellmex Constr. Co., Inc. v. Republic Ins. Co.*, 202 N.J. Super. 195, 209-13 (App. Div. 1985). *See generally* Sylvia B. Pressler, Current N.J. Court Rules, cmt. to N.J. Ct. R. 4:42-11 (1999 ed.).

297. *See Bak-A-Lum Corp. of Am. v. Alcoa Bldg. Prods., Inc.*, 69 N.J. 123, 131 (1976).

298. *See Busik v. Levine*, 63 N.J. 351 (1973). Prejudgment interest should not be awarded for lost future wages. *Gilbert v. Durand Glass Mfg. Co.*, 258 N.J. Super. 320, 332 (App. Div. 1992).