

New Jersey Enacts Most Rigorous Pay Equity Legislation Yet

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On April 24, 2018, newly elected New Jersey Governor Pat Murphy signed into law the “Diane B. Allen Equal Pay Act” (the Act). The Act, which amends the New Jersey Law Against Discrimination (LAD), constitutes the most robust legislation nationwide protecting employees against pay inequity. The Act follows former Gov. Chris Christie’s veto on a similar pay equity bill, and goes into effect July 1, 2018.

Equal Pay for Comparable Work

Originally intended to combat pay disparities based upon sex, as passed, the Act prohibits employers from discriminating on the basis of any protected characteristic in compensation or in the financial terms or conditions of employment. Protected characteristics include—in addition to sex—race, creed, color, national origin, ancestry, age, marital status, civil union status, domestic partnership status, affectional or sexual orientation, genetic information, pregnancy or breastfeeding, gender identity or expression, disability or atypical hereditary cellular or blood traits, or service in the armed forces.

Specifically, the Act makes it an unlawful employment practice to pay employees, who are members of a protected class, at a lower rate of compensation (including benefits) compared to employees who are not members of the protected class “for substantially similar work, when viewed as a composite of skill, effort and responsibility.” Notwithstanding this general prohibition, employers may pay protected employees a different rate of compensation if the differential is made pursuant to a seniority or merit system, or if the employer demonstrates:

- That the differential is based on one or more legitimate, bona fide factors other than a protected characteristic, such as training, education or experience, or the quantity or quality of production;
- That the factor or factors are not based on, and do not perpetuate a differential in compensation based on sex or any other protected characteristic;
- That each of the factors is applied reasonably;
- That one or more of the factors account for the entire wage differential; and

- That the factors are job-related with respect to the position in question and based on a legitimate business necessity. A factor based on business necessity will not apply if it is demonstrated that there are alternative business practices that would serve the same business purpose without resulting in the differential.

Notably, determinations as to whether a pay disparity exists must be based on comparisons of wage rates in all of an employer's operations or facilities. Further, employers cannot avoid liability and correct an unlawful pay disparity by reducing another employee's compensation.

Additional Prohibitions

In addition to mandating equal pay under the parameters set forth above, the Act prohibits retaliation against any employee for requesting from, discussing with, or disclosing to—any current or former employee, an attorney from whom he or she seeks legal advice, or any government agency—information concerning the job titles, occupational categories, rates of compensation, including benefits, or the protected characteristics of the employee or any other current or former employee.

This prohibition covers requests, discussions, or disclosures for any reason, and is not limited to investigations or potential legal actions regarding discriminatory pay. Moreover, employers may not require employees, as a condition of employment, to waive or otherwise agree not to make such requests or disclosures.

Enforcement & Penalties

A violation occurs on each occasion that an individual is affected by application of a discriminatory compensation decision or other practice, including, but not limited to, each occasion that wages, benefits, or other compensation are paid, resulting in whole or in part from the decision or other practice. Employers that violate the Act will be liable for common law tort damages, backpay, and mandatory treble damages.

The law extends LAD's current statute of limitations period from two years to six years. Liability will accrue and backpay will be available for the entire six-year period for continuous violations. Significantly, the Act also makes it an unlawful employment practice to require employees to agree to a shortened statute of limitations or waive any of the LAD's protections.

Employees aggrieved under the Act need not first file an administrative charge but may file complaints in court. The Commissioner of Labor and Workforce Development, the Attorney General, or the Commissioner of Education may also initiate a complaint.

Requirements for State Contractors

The Act also imposes additional requirements on employers that contract with the state or any government agency to provide "qualifying services." "Qualifying services" is defined as the "provision of any service to the State or to any other public body," excluding the provision of goods or products. The Act requires such employers, regardless of location, to submit a report for each establishment to the Commission of Labor and Workforce Development disclosing information regarding employees' compensation and hours categorized by gender, race, ethnicity and job category. Data regarding compensation and hours worked by employees must be reported in the form by pay bands to be established by regulation. If an employer does not track the number of hours worked, the Commission may establish a standard presumption for the number of hours worked by a full-time or part-time employee. The Commission will also issue a regulatory form for submitting this report.

Recommendations

Employers should begin conducting a pay equity review to ensure their compliance with the Diane B. Allen Equal Pay Act well in advance of the July 1, 2018 effective date. Employers are also encouraged to contact counsel to

determine if an audit may be the more appropriate course of action, rather than an internal review. In particular, employers should, at minimum, review compensation records per job category to identify any pay disparities, and if so, determine whether the disparity is justified under the law and revise policies, agreements, and practices and implement training to prohibit adverse employment actions against employees who request, discuss, or disclose protected information.

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