

The Diane B. Allen Equal Pay Act: A Substantially Dissimilar

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Statistics show that in New Jersey, women are paid 82 cents for every dollar paid to men, amounting to an annual wage gap of \$11,089. “New Jersey Women and the Wage Gap,” Fact Sheet, National Partnership for Women and Families, April 2017. The wage gap is even larger for women of color. *Id.* Indeed, for every dollar paid to white, non-Hispanic men, black women are paid 58 cents, Latinas are paid 43 cents, and Asian women are paid 87 cents. *Id.* On average, New Jersey women who are employed full-time lose a combined total of more than \$32.5 billion every year due to the gender wage gap. *Id.*

To rectify the gender wage gap as well as other pay disparities, the New Jersey Legislature recently passed the Diane B. Allen Equal Pay Act (the “Act”), N.J.S.A. 34:11-56.13, an amendment to the New Jersey Law Against Discrimination (the “LAD”), N.J.S.A. 10:5-1, et seq. Governor Phil Murphy signed the Act into law on April 24, 2018. The Act—which applies to all employers in New Jersey, regardless of size—has been both hailed and criticized as the broadest pay equity law in the nation. The Act became effective on July 1, 2018, just over two months after the governor signed the law, giving New Jersey employers little time to analyze its impact or undertake remedial action to ensure compliance. In sharp contrast, Massachusetts’ Equal Pay Act, M.G.L.A. 149 § 105A, also became effective on July 1, 2018 – but was signed into law nearly two years ago on August 1, 2016.

The Act is far broader than the federal Equal Pay Act of 1963, 29 U.S.C. § 206(d), the federal Lilly Ledbetter Fair Pay Act of 2009, 42 U.S.C. § 2000e-(5)(e)(3)(a), the New Jersey Equal Pay Act, N.J.S.A. 34:11-56.2, and many similar state laws in several respects. It is expansive in scope with respect to: (i) the protected classes to which it applies; (ii) its “substantially similar work” standard; (iii) its statute of limitations; (iv) the narrow exceptions under which a pay differential is permissible; (v) the measure used to calculate the violations of the law; and (vi) the damages recoverable under the law.

While the majority of state laws mandating equal pay focus on the gender pay equity gap, the Act is far broader in that it prohibits an employer from paying an employee who is a member of any protected class (as defined under the LAD) at a rate of compensation less than that paid to employees who are not members of that protected class for “substantially similar work.” N.J.S.A. 10:5-12(t). This equal pay requirement incorporates 21 protected classes delineated in the LAD, including race, color, national origin, nationality, creed, sex, ancestry, age, affectional or sexual orientation, gender identity or expression, marital status, civil union status, domestic partnership status, pregnancy, breastfeeding, disability, service in the Armed Forces of the United States, genetic information, atypical hereditary cellular or blood trait, refusal to submit to a genetic test by the employer, and

refusal to make available the results of a genetic test to the employer. N.J.S.A. 10:5-12(b). Thus, employers need to consider not only whether men and women are paid the same for substantially similar work, but must also consider whether there are wage disparities among employees of different races, ages, and other protected categories.

Moreover, while most equal pay statutes require “equal pay for equal work,” the Act is far more expansive in that it requires equal pay for “substantially similar work.” N.J.S.A. 10:5-12(t). While there are presently no regulations providing any guidance as to this cryptic phrase, the law states that “substantially similar work” will be viewed “in light of the employees’ skills, effort and responsibility.” *Id.*

Given the ambiguity of what constitutes “substantially similar work,” lawyers counseling employers should advise their clients to conduct a complete evaluation of their compensation practices, which should include a comparison of the wage rates across all of their operations and facilities. See N.J.S.A. 10:5-12(t). This audit should identify comparable positions that entail “substantially similar work” by reviewing the aspects of every job position in the organization, including the amount of revenue overseen, the number of employees managed in that position, and other factors that comprise the position’s responsibilities and requirements. Any wage audit should go beyond a mere comparison of wages within a particular job title and must also include an in-depth analysis of the actual skills, effort, and responsibility required for each position and the compensation paid to those employees, including any benefits. In light of the Act’s extremely vague language, employees who oversee comparable amounts of revenue may be considered to be performing “substantially similar work.” The same is true with respect to employees who manage a comparable number of employees or wield comparable operational oversight.

The law provides, however, for a few very narrow exceptions where an employer may pay a different rate of compensation to employees performing “substantially similar work.” The employer may be justified in paying a different rate of compensation if the wage differential is: (1) made pursuant to a seniority system; (2) made pursuant to a merit system; or (3) based on one or more legitimate bona fide factors other than the characteristics of members of the protected class and that such factors meet a number of other criteria. N.J.S.A. 10:5-12(t). Examples of legitimate bona fide factors include training, education, experience, and quantity or quality of production. N.J.S.A. 10:5-12(t)(1). The criteria that the legitimate bona fide factors must meet are: (i) that the factor(s) are not based on and do not perpetuate a differential in wages based on sex or any other protected characteristic; (ii) that each of the factors is applied reasonably; (iii) that one or more of the factors account for the entire wage differential; and (iv) that the factors are job-related to the position in question and based on a legitimate business necessity. N.J.S.A. 10:5-12(t). The fourth criterion is not sufficient to justify the wage differential if alternative business practices would serve the same business purpose without producing the wage differential. N.J.S.A. 10:5-12(t)(5). The employer bears the burden of demonstrating that the wage differential in question meets one of the above exceptions. N.J.S.A. 10:5-12(t).

The Act also contains an expansive anti-retaliation provision. Specifically, it prohibits employers from retaliating against an employee who requests, discusses, or discloses to current or former employees or certain third parties, including lawyers or the government, information regarding the employer's compensation practices. N.J.S.A. 10:5-12(r). Likewise, the Act prohibits employers from implementing policies or otherwise requiring current or prospective employees to refrain from making requests for compensation information or disclosing compensation information. *Id.*

In addition, under the Act, an employer may not reduce any employee's compensation to ensure compliance with the Act if it discovers a wage disparity with regard to two or more employees who perform substantially similar work. N.J.S.A. 10:5-12(t). Consequently, the Act effectively mandates a pay raise for the lower paid employee to bring his or her compensation to the same level as the employee performing substantially similar work.

The Act also sets forth a six-year statute of limitations for pay equity violations, in contrast to the two-year limitations period that applies to other violations of the LAD. N.J.S.A. 10:5-12(a). This six-year limitations period is also longer than that of the federal Equal Pay Act, which provides for a two-year statute of limitations. 29 U.S.C. § 255(a). The Act's "paycheck accrual rule" provides an additional reason for employers to be especially cautious as a violation of the Act occurs on each occasion that compensation is paid to an employee (i.e., each pay period). N.J.S.A. 10:5-12(a). In other words, the statute of limitations for filing a claim restarts each time an allegedly discriminatory paycheck is issued by the employer. Moreover, the Act forbids employers from attempting to compel employees to agree to a shortened statute of limitations. *Id.*

This sweeping law, coupled with the lack of clear guidance regarding its implementation, is a potential minefield for employers. Moreover, the availability of mandatory treble damages, attorneys' fees and costs, and punitive damages (in the event that a court finds the employer's conduct was willful) to aggrieved employees should convince employers that an audit of their compensation practices is in order. However, such self-evaluations should be conducted with care, given the possibility that the results of the audit could be discoverable in litigation. Lawyers counseling employers should also carefully review their clients' employment handbooks and policies to ensure that those policies do not run afoul of the Act, as well as encourage clients to train all personnel involved in compensation decisions on the Act's requirements.

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