



New Jersey Becomes Latest State To Pass Equal Pay Legislation

Insights

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New Jersey will become the latest state to mandate a comprehensive equal pay law as Governor Phil Murphy announced that he will sign the “Diane B. Allen Equal Pay Act”—recently passed by the state legislature—on April 24, 2018. What makes this law different and more robust than laws in other states is that the New Jersey equal pay law will soon extend legal protections beyond gender and provide relief to all classes of employees protected under the state’s antidiscrimination law.

New Jersey’s existing wage and hour law already prohibits employers from “discriminat[ing] in any way in the rate or method of payment of wages to any employee because of his or her sex.” The new law, which will take effect on July 1, 2018, expands this protection and amends the New Jersey Law Against Discrimination to make discrimination in wages on the basis of **any protected class** an unlawful employment practice. With the new law soon taking effect, you need to carefully analyze your existing pay practices to ensure compliance.

Different Rates Of Compensation Only Permissible In Certain Situations

The Diane B. Allen Equal Pay Act—named after a recently retired state legislator who championed pay equity and women’s rights during her 20-plus years of service—makes it an unlawful employment practice “[f]or an employer to pay any of its employees who is a member of a protected class at a rate of compensation, including benefits, which is less than the rate paid by the employer to employees who are not members of the protected class for substantially similar work, when viewed as a composite of skill, effort and responsibility.”

Similar to the federal Equal Pay Act and other states’ equal pay laws, there are a handful of legally permissible reasons for a different rate of compensation, including if the differential is based on a seniority system or merit system. However, the “any other factor” catchall present in the federal law and other jurisdictions is much more precise under New Jersey’s law. Specifically, other than a seniority or merit system, a different rate of compensation may only be permitted if the employer demonstrates:

- The differential is based on one or more legitimate, bona fide factors other than the characteristics of members of the protected class (like training, education, experience, or the quantity or quality of production);
- The factor(s) are not based on, and do not perpetuate, a differential in compensation based on sex or any other characteristic of a protected class;

- Each of the factors is applied reasonably;
- One or more factors account for the entire wage differential; **and**
- The factors are job-related with respect to the position in question and based on a legitimate business necessity, where there is no alternative business practice that would serve the same business purpose without producing the wage differential.

The comparison of wage rates is based on the wage rates in all of an employer's operations or facilities, and is not limited to employees who work within a specific geographic area or region.

What Are The Protected Categories?

The list of protected categories in New Jersey is expansive. Under the New Jersey Law Against Discrimination (LAD), you are prohibited from discriminating against an individual on the basis of any of the following: race, creed, color, national origin, nationality, ancestry, age, marital status, civil union status, domestic partnership status, affectional or sexual orientation, genetic information, pregnancy, sex, gender identity or expression, disability or atypical hereditary cellular or blood trait of any individual, or liability for service in the armed forces.

Enhanced Damages Available To Prevailing Employees

The new law also greatly enhances damages that are available to a prevailing employee in a lawsuit filed under the LAD. Typically, an employee would be awarded compensatory damages, attorneys' fees, and costs if they succeed on a claim of discrimination against their employer. They may also recover punitive damages if the court finds that the conduct was willful.

Under the Diane B. Allen Equal Pay Act, however, if a jury determines an employer discriminated on the basis of pay, the employee will be awarded **treble damages** – three times the amount of the pay differential.

Treble damages would also be available to an employee who succeeds on a claim that the employer took reprisals against them for requesting from, discussing with, or disclosing to another employee or former employee, a lawyer from whom the employee seeks legal advice, or any government agency, information related to employee compensation. The same enhanced damages are available to an employee who prevails on a claim that they were required, as a condition of employment, to sign a waiver or agree not to make these types of requests or disclosures.

The law also provides that an unlawful employment practice occurs **each time** the employee is affected by the discrimination in compensation. That is, each occasion that wages, benefits, or other compensation are paid is a separate act of discrimination under the new law. An employee can obtain back pay for a period of six years.

What Can New Jersey Employers Do To Prepare?

As noted above, the Diane B. Allen Equal Pay Act will go into effect July 1, 2018. It is important to be proactive in order to ensure compliance with the new legal mandate and minimize the treble

damages and other costs associated with future litigation by employees and negative attention that may result from a challenge to your company's pay practices.

Over the next few months, you should take steps to ensure that your existing pay practices and policies related to compensation result in equal pay for employees who do substantially similar work. This should involve a privileged pay audit, where you can determine whether there are any troubling pay disparities and, if so, take steps to remedy any differences that could be attributed to membership in a protected class.

For more information about how this legislation could affect your workplace, contact any attorney in our New Jersey office at 908-516-1050, your regular Fisher Phillips attorney, or a member of the Pay Equity Practice Group.

This Legal Alert provides an overview of recent updates to New Jersey law. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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