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## New Jersey Enacts Comprehensive Equal Pay Law. What Employers Need to Know.

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Governor Phil Murphy recently made good on his campaign promise to make equal pay a top priority in New Jersey. On April 24, 2018, Governor Murphy signed into law the Diane B. Allen Equal Pay Act (the “Act”), which amends the New Jersey Law Against Discrimination (“NJLAD”). The Act was passed by the New Jersey Legislature on March 27, 2018, and takes effect on July 1, 2018.

The Act is being heralded as one of the most expansive equal pay laws in the country, and impacts hiring practices, compensation practices, employee arbitration agreements and how HR must respond to employee demands for information regarding their co-workers’ compensation.

To start, the Act amends the NJLAD by making it a prohibited employment practice for an employer to compensate, which includes pay and benefits, any employee who is a member of a “protected class” less than the amount paid to employees who are not members of that protected class for “substantially similar work, when viewed as a composite of skill, effort, and responsibility.” Protected classes under the NJLAD currently include the following categories: race, creed, color, national origin, nationality, ancestry, age, sex (including pregnancy), familial status, marital status, domestic partnership or civil union status, affectional or sexual orientation, gender identity or expression, atypical hereditary cellular or blood trait, genetic information, liability for military service, and mental or physical disability, perceived disability, and AIDS and HIV status.

Given that [it has been reported](#) that women in New Jersey make only 82 cents for every dollar paid to a man, and black women are paid 58 cents for every dollar paid to white, non-Hispanic men, employers will have wage gaps. Not all wage gaps are inherently discriminatory, but the Act does limit how employers can defend those gaps. Employers must prove the compensation differential is due to a seniority system, a merit system, or by satisfying all of the following five factors:

1. That the differential is based on one or more legitimate, bona fide factors other than the characteristics of members of the protected class, such as training, education or experience, or the quantity or quality of production;
2. That the factor or factors are not based on, and do not perpetuate a differential in compensation based on sex or any other characteristic of members of a protected class;
3. That each of the factors is applied reasonably;
4. That one or more of the factors account for the entire wage differential; and
5. That the factors are job-related with respect to the position in question and based on a legitimate business necessity.

While New Jersey has not yet adopted a ban on asking candidates their salary history, employers may not be able to rely on prior salary history to justify a wage gap given that an employer may not rely on a “factor” that perpetuates a pre-existing wage gap. New Jersey employers should consider adjusting their hiring practices in the same manner as recommended for locations that have engaged bans on inquiries of salary history including California, Delaware, Massachusetts, Oregon, New York City, Philadelphia, and San Francisco.

With regards to determining which employees are “substantially similar”, employers should look beyond job titles, and analyze how to group employees based on “skill, effort and responsibility”, keeping in mind that job titles/job

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descriptions do not necessarily keep pace with the evolving nature of duties and responsibilities performed by employees. In addition, the Act mandates that compensation must be compared across “all of an employer’s operations or facilities.” Therefore, “substantially similar” workers in an employer’s South Jersey facility are expected to be paid the same as workers in North Jersey/NYC metro locations. Currently, it is not clear whether this includes an employer’s out of state locations. Also, when trying to address wage disparities within budget constraints, the Act does not allow employers to lower salaries to level any pay gap.

The Act also prohibits employers from retaliating against workers for discussing pay and benefits with their co-workers. In this regard, an employer would be prohibited from retaliating against an employee for discussing with or disclosing to any other current or former employee information regarding the job title, occupational category and rate of compensation, including benefits, of the employee or any other employee or former employee of the employer, as well as the gender, race, ethnicity, military status, or national origin of the employee or any other employee or former employee of the employee regardless of whether the request was responded to.

Notably, the Act also prohibits employers from requiring current or prospective employees to agree to a shortened statute of limitations period or to waive any of the protections provided by the NJLAD. The Act also extends the NJLAD’s two-year statute of limitations to a six-year statute of period for wage discrimination. In terms of damages, an employee can receive three times the amount of pay differential if a jury finds they were discriminated against under the Act.

Finally, public contractors have new disclosure requirements under the Act. Employers who contract with the government to provide services must provide a report to the Commissioner of Labor and Workforce Development detailing the compensation and hours of employees according to gender, race, and job category, and the total compensation of every New Jersey employee of the employer in connection with such contract.

This new New Jersey law is comparable to protections afforded by California’s Fair Pay Act. See California Fair Pay Overview; Compliance with California Fair Pay Law; California Expands Fair Pay Coverage Protection Beyond Gender. California has seen an uptick in class action pay discrimination claims as a result of the passage of its Fair Pay Act, and we expect the same trend to hit New Jersey. Therefore, employers are well-served to audit and review their current payrolls and compensation structure to confirm compliance with the Act, and prior to setting budgets for FY 2019. As referenced above, hiring and other HR practices are also impacted by the law, and employers need to prepare for the July 1 effective date.

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