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The Diane B. Allen Equal Pay Act - Part One: New Jersey Employers Should Review and Update Compensation Policies and Practices to Comply

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The Diane B. Allen Equal Pay Act was passed by the New Jersey Legislature on March 26, 2018. Governor Phil Murphy has indicated he will sign the Act into law on April 24, 2018.

The new law, scheduled to take effect on July 1, 2018, mandates pay equity for employees who are protected from discrimination under the New Jersey Law Against Discrimination (NJLAD) by requiring employers to compensate such employees at the same rate of compensation as non-protected employees who perform “substantially similar work,” unless a pay differential is justified by legitimate business necessity in accordance with the Act’s provisions.

This Alert is Part One of a two-part series on the Equal Pay Act, and provides a review of measures New Jersey employers should take to ensure that their policies and procedures are in compliance with the new law. Part Two of this series will provide an overview of potential litigation issues related to the Equal Pay Act and the NJLAD.

Required Employer Conduct

The Act amends the NJLAD to expressly prohibit an employer from paying an employee who is a “member of a protected class” at a lower rate of compensation (including benefits) than an employee who is not a member of the same protected class “for substantially similar work, when viewed as a composite of skill, effort and responsibility,” unless a pay differential satisfies the Act’s requirements. For this purpose, an employee is a “member of a protected class” based on the characteristics that, under the NJLAD, may not be the basis of employment decisions with respect to the employee (e.g., race, sex, national origin, disability, age, marital status, sexual orientation or pregnancy). In view of the broad

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range of characteristics that are protected under the NJLAD, the Act's equal pay protections could, given the right circumstances, apply to any employee in an employer's workforce.

In addition to requiring equal pay for employees who perform substantially similar work, the Act:

- Prohibits retaliation against an employee for seeking legal advice regarding rights under the NJLAD or sharing information with legal counsel or a governmental entity.
- Prohibits retaliation against an employee for requesting from, discussing with, or disclosing to another current or former employee of the employer, a lawyer from whom the employee seeks legal advice, or a governmental agency, any information regarding the job title, occupational category, rate of compensation (including benefits), gender, race, ethnicity, military status or national origin of the employee (or of any other current or former employee of the employer), or conditioning employment on an agreement not to make such requests or disclosures.
- Prohibits an employer from conditioning employment on an employee's or prospective employee's waiver of protections under the NJLAD or consent to a shortened period within which the employee may timely bring an NJLAD claim.
- Requires public contractors to report employee compensation and hours worked to the New Jersey Department of Labor and Workforce Development, with such data categorized by employee gender, race, ethnicity and job category.

The Act provides that an unlawful employment practice occurs each time an employee is impacted by a discriminatory compensation decision or practice. Thus, for example, an employer who compensates an employee at a discriminatory rate of pay commits an unlawful employment practice each payroll cycle, when wages are paid to the employee. In addition to any other remedies available under the NJLAD, an employee who is discriminated against in compensation may receive back pay for the entire period of a continuous violation, up to a maximum of six years, provided the violation continues within the statute of limitations. An employee affected by discriminatory compensation practices also may be entitled to treble damages under the Act.

Permitted Pay Differentials

While the Act generally requires compensation at the same rate for employees both within and outside of a protected class, who perform substantially similar work, a pay differential is permissible if, among other requirements, the differential is based entirely "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." To justify a pay differential, such factors must be "applied reasonably" and must be "job-related with respect to the position in question and based on a legitimate business necessity." A factor is not based on business necessity if "there are alternative business practices that would serve the same business purpose without producing the wage differential." A pay differential is also permissible if it is in accordance with a seniority or merit system. An employer may not reduce an employee's compensation to comply with the Act.

Next Steps for New Jersey Employers

In view of the broad application of the Act and the significant damages that could apply in the event of a violation, employers should promptly do the following to ensure compliance:

- Review and update job descriptions for each position or job title to determine which employees perform “substantially similar work” and, thus, generally must be compensated at the same rate of pay.
- Review employee pay and benefits to confirm that employees who perform substantially similar work are compensated at the same rate, to the extent there is not a legitimate business necessity warranting a pay differential.
- Review compensation and benefits policies and practices, including the process and analysis by which compensation determinations are made, to ensure that such policies and practices are documented appropriately and applied in a fair and equitable manner. If an employer’s compensation determinations are based on a seniority or merit system, the criteria applicable under such system and the manner in which it is applied should be carefully documented.
- Thoroughly document the process and analysis by which compensation determinations are made for each employee, regardless of whether a pay differential is determined to be appropriate with respect to the employee as compared to others doing substantially similar work. If a pay differential between employees who perform substantially similar work is deemed appropriate, employers should thoroughly document the legitimate job-related factors and business necessity justifying the differential. The better an employer can substantiate the legitimate bases for its determinations, the better protected it would be if an employee were to allege discrimination in compensation based on impermissible factors, such as sex, race, disability or national origin.

Certain employers may find the Equal Pay Act to be burdensome, however those who seek to be an “employer of choice” may already have policies and practices in place that will comply with the Act. For other employers, the Act can provide a clear road map for reviewing and updating their current compensation practices. As with many other employment issues, an employer who takes reasonable action to comply with the Act today will likely avoid the potential for significant liability exposure and expense in the future.

To learn more about the equal pay requirements imposed upon New Jersey employers under the Equal Pay Act, or if you have questions regarding your company’s compensation policies and practices, please contact the authors of this Alert, **Lisa J. Clapp** or **Thomas C. Senter**.