

A New Type of Claim Under The New Jersey Law Against Discrimination: Equal Pay Violations

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On April 24, 2016, the New Jersey Law Against Discrimination ("NJLAD") was amended to include a provision specifically addressing the issue of equal pay among employees who have similar types of jobs. The amendment, entitled the Diane B. Allen Equal Pay Act ("Equal Pay Act") will go into effect on July 1, 2018.

The NJLAD already prohibits discrimination against employees on the basis of membership in a protected class and prohibits retaliation against employees who complain about said discrimination, but this new law expands those protections. The Equal Pay Act prohibits employers from paying different compensation to protected class employees who perform substantially similar work when viewed "as a composite of skill, effort and responsibility." Compensation is defined as wages, benefits or other compensation, and any comparison of wage rates must be based on the wage rates in all of an employer's operations or facilities.

To protect against violation of this amendment, an employer must first determine which types of positions it has that are similar in skill level, effort required and responsibility. Then, the employer must analyze whether members of a particular protected group tend to be employed in each type of position. Finally, an employer must compare the pay of each type of position to examine any pay differential that could be viewed as discriminatorily based upon an employee's protected class membership. If an inappropriate differential is discovered, an employer must determine how to remedy the pay disparity, so as not to violate the NJLAD. Employers should note that lowering the wage rate of the higher paid group is not an option under the Equal Pay Amendment.

The law also extends the statute of limitations for equal pay violations to six (6) years. In addition, each instance of discrimination (i.e. – each time an employer engages in an equal pay practice violation), restarts the statute of limitations. This statute is much longer than the two year statute of limitations which applies to all other NJLAD violations. In addition, the Equal Pay Act prohibits employers from requiring employees to consent to a shortened statute of limitations for this claim.

There are noteworthy exceptions to the broad prohibition against equal pay discrimination. If an employer can show that it has a seniority or merit system on which pay distinctions are based, there may not be an equal pay violation. In addition, if an employer can show any of the following, it will not be held liable for equal pay discrimination:

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

Note that a factor will not be found to be based on job-necessity if there are alternative business practices that would serve the same business purpose without producing the wage differential.

The Equal Pay Act also increases the amount of damages available to employees for this type of violation. An employee can win treble damages if there is proof the employer retaliated against him or her for requesting, discussing or disclosing to any other employee, any information regarding employee compensation. So, under the Equal Pay Act, an employer cannot prohibit its employees from comparing salaries. Likewise, an employer cannot prohibit an employee from discussing with a lawyer, from whom the employee seeks legal advice, or from any government agency, any information regarding employee compensation.

Employers should take several steps to prepare for the implementation of the Equal Pay Act on July 1, 2018:

First, employers may want to review their handbooks and policies to make sure that there is no prohibition against employees discussing wages with each other. In addition, an employer may want to institute a more wide ranging examination of its pay practices, including performing the analysis described above. In addition, employers should review job offers to new hires to determine whether prospective employees are being made offers which violate the Equal Pay Act.

TAKEAWAY: Employers should brace themselves for a new flurry of claims based on the Equal Pay Act by reviewing their policies accordingly.

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