

Double Take: New Jersey Governor Poised to Enact Equal Pay Act

By James M. McDonnell

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On April 24, 2018, New Jersey Governor Phil Murphy plans to sign the Diane B. Allen Equal Pay Act (the “Act”) into law. Senate Bill S-104, reintroduced in this legislative session, contains sweeping changes to the New Jersey Law Against Discrimination (LAD), including, among other items, a prohibition against discrimination with respect to compensation or financial terms of employment on the basis of a protected trait, a six-year statute of limitations, and treble damages against any business that violates the Act.

The Act further requires equal pay for “substantially similar work” unless the employer can demonstrate the differential resulted from a seniority system or merit system. Alternatively, the employer may demonstrate the following:

- The pay differential is based on a legitimate factor other than the protected trait (*e.g.*, training, education, experience, or productivity);
- The legitimate factor is not based upon, nor does it perpetuate, a compensation differential based upon a protected trait;
- Each factor is applied reasonably;
- One or more factors account for the entire wage differential; and
- The factors are job-related with respect to the position and based upon business-necessity.

Additionally, the Act provides that if an alternative business practice exists that serves the same purpose as an alleged business necessity (but would not result in a pay differential), that factor or consideration may not serve as a defense to any legal action. In other words, the “business-necessity” defense includes the caveat that the employer must consider alternatives before making a decision that results in a pay disparity based upon a protected trait. Comparators in compensation, moreover, go beyond the subject employee’s physical location and may reach across all of the business’s operations and facilities.

The statutory language obviously places a heavy obligation upon employers that exceeds the typical analysis of discrimination claims under the LAD. In addition to the potentially varied interpretations of the term “substantially similar work,” the Act sets forth additional obstacles to a defense against pay disparity claims. For example, the employer must not only demonstrate a legitimate reason for the differential, but also that the legitimate reason or consideration does not result in a disparate impact on a protected class. The likely result of the Act is that businesses will engage in a more rigorous analysis of titles, job responsibilities, compensation systems, annual pay increases, and so on, for compliance with the above factors. Determining which positions perform “substantially similar work” for a business may require further analysis of organizational charts to uncover potential areas of non-compliance.

Additionally, the Act contains anti-retaliation provisions that expressly permit disclosure or discussion of compensation among employees and with legal counsel. Furthermore, the Act prohibits an employer from requiring an employee to sign a waiver or agreement to not make any such requests or disclosures regarding compensation.

The Act prohibits an employer from requiring an employee to consent to a shorter statute of limitations or to waive any protections provided under the LAD. The statute of limitations accrues during each week of any violation. The Act further codifies the potential applicability of the “discovery rule” (*i.e.*, the statute of limitations accrues upon the aggrieved party’s discovery of the violation) and the “continuing violation doctrine” (*i.e.*, the occurrence of a violation within the statutory period may permit the aggrieved party to assert a claim for violations that pre-date the statute of limitations).

Finally, the New Jersey Department of Labor and Workforce Development will issue regulations

Meet the Author



James M. McDonnell

Principal
Berkeley Heights 908-795-5208
Email

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requiring businesses engaged in covered work with public entities to submit data regarding compensation and hours worked by employees, categorized by gender, race, and ethnicity. Accordingly, certified payroll records submitted in furtherance of the Prevailing Wage Act will require additional information with respect to the position, title, and demographics of the employees.

The Act, which takes effect on July 1, 2018, represents one of the most significant amendments to the LAD in years. Businesses may revisit hiring, promotion, and compensation practices during the interim in an effort to ensure compliance. Moreover, entities engaged in Prevailing Wage work or covered work with public entities will be required to disclose information regarding their respective workforces' demographics and compensation. To the extent any disparities exist, the law prohibits a business from reducing compensation to redress the differential.

Jackson Lewis attorneys are ready to assist businesses in identifying and addressing any pay disparities during the brief window before the Act takes effect.

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