New Jersey’s Diane B. Allen Equal Pay Act

James M. McDonnell, Esq. and Beth L. Braddock, Esq.  
Jackson Lewis P.C.  

June 2018

On April 24, 2018, National Equal Pay Day, New Jersey Governor Phil Murphy signed into law the Diane B. Allen Equal Pay Act (Act). The Act, which goes into effect on July 1, 2018, contains sweeping changes to the New Jersey Law Against Discrimination (NJLAD), including, among other items, a prohibition against discrimination with respect to compensation or financial terms of employment on the basis of any of the characteristics protected by the NJLAD, a six-year statute of limitations for claims alleging such discrimination, and triple damages against any employer that violates certain provisions of the Act.

The Act will apply to all employers, including nonprofits, with one or more employees.

---

With very limited exceptions, the NJLAD prohibits discrimination in employment with respect to affectional or sexual orientation; age; ancestry, national origin, or nationality; atypical hereditary cellular or blood trait, disability, or genetic information; breastfeeding, gender identity or expression, pregnancy, or sex; civil union, domestic partnership, or marital status; color or race; creed or religion; liability for service in the U.S. military; or refusal to submit to a genetic test or make available the results of a genetic test.

The provision of the Act discussed later in this article that pertains directly to equal compensation for “substantially similar work” does not expressly mention breastfeeding or refusal to submit to a genetic test or make available the results of a genetic test. Nonetheless, an employer would be well advised not to discriminate in compensation with respect to either of those characteristics.
This article summarizes many of the provisions of the Act. Nonprofits are encouraged to read the full text of the Act, which is available here, after reading this article.

**Equal Pay Required for “Substantially Similar Work”**

The Act requires equal compensation (including benefits) for “substantially similar work,” when viewed as a composite of skill, effort, and responsibility. In order to justify a differential in compensation that would otherwise violate the Act, an employer must:

1. demonstrate that the differential resulted from a seniority system or merit system; or
2. demonstrate all of the following:
   - that the differential is based on one or more legitimate, bona fide factors other than the protected characteristic of the employee with the lower compensation, such as training, education, experience, or the quantity or quality of production;
   - that the factor or factors are not based on and do not perpetuate a compensation differential based on the protected characteristic;
   - that each of the factors is applied reasonably;
   - that one or more of the factors account for the entire wage differential; and
   - that the factors are job-related with respect to the position in question and based on a legitimate business necessity.

A factor based on business necessity cannot be used to justify a wage differential if there are alternative business practices that would serve the same business purpose without producing the differential. In other words, the “business necessity” defense comes with the caveat that the employer must consider alternatives before making a decision that results in a wage disparity based upon a protected characteristic.

Comparators in compensation, moreover, stretch beyond an employee’s physical location and stretches across all of the employer’s operations and facilities. It is unclear whether the comparison is limited to just the employer’s operations and facilities in New Jersey or extends to operations and facilities nationwide.

The statutory language places a heavy obligation upon employers that exceeds the typical analysis of discrimination claims under the NJLAD. 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 employers will engage in a more rigorous analysis of titles, job responsibilities, compensation systems, annual pay increases, etc., for compliance with the above factors. Determining which positions perform “substantially similar work” for an employer might require further analysis of organizational charts to uncover potential areas of noncompliance.

Violations of this provision of the NJLAD, as amended by the Act, are subject to triple damages.

**No Retaliation for Engaging in Protected Activity**

The Act contains an antiretaliation provision that expressly permits an employee to request from, discuss with, or disclosing to any other current or former employee of the employer, a lawyer from whom the employee seeks legal advice, or a government agency information regarding the compensation (including benefits); job titles; occupational categories; and the gender, race, ethnicity, military status, or national origin of the employee or any other current or former employees. Furthermore, the Act prohibits an employer from requiring an employee or prospective employee to sign a waiver or agreement that would prohibit any such requests, discussions, or disclosures.

Violations of this provision of the NJLAD, as amended by the Act, are subject to triple damages.

**Statute of Limitations and No Waiver of Rights**

The Act prohibits an employer from requiring an employee or prospective employee to consent to shortening the six-year statute of limitations. Each occasion an employee is affected by application of a discriminatory compensation decision or other practice, including, but not limited to, each occasion that wages, benefits, or other compensation are paid, is a violation of the NJLAD. As a result, an employee will now be able to sue over the current effects of a discriminatory decision that occurred years ago.

The Act further codifies the potential applicability of the “discovery rule” (i.e., the statute of limitations doesn’t start until the aggrieved employee’s discovery of the violation) and

---

2 Employers should note that other laws may provide similar protections to employees in other circumstances. For example, the National Labor Relations Board has held that it is illegal under the National Labor Relations Act (NLRA) for an employer—whether unionized or not—to (1) discipline employees for discussing their wages, benefits, and other terms and conditions of employment, or (2) establish workplace policies that prohibit such discussions. As explained in Pro Bono Partnership’s article *Nonunion Employees Are Protected by the National Labor Relations Act*, the NLRA doctrine of “protected concerted activity” applies to all employees, including nonunion employees of nonprofits.
the “continuing violation doctrine” (i.e., the occurrence of a violation within the limitations period might permit the aggrieved employee to assert a claim for violations that pre-date the six-year look back period).

The Act prohibits an employer from requiring an employee or prospective employee to consent to waive any of the protections provided under the NJLAD.

**Employers Contracting with Public Entities in New Jersey**

Lastly, the New Jersey Department of Labor and Workforce Development will issue regulations requiring employers engaged in covered work with public entities to submit data regarding compensation and hours worked by employees, categorized by gender, race, ethnicity, and job category. Certified payroll records submitted in furtherance of the Prevailing Wage Act will now require additional information with respect to the position, title, gender, race, and compensation for every employee of the employer employed in New Jersey in connection with a public works contract.

**Next Steps**

The Act represents one of the most significant amendments to the NJLAD in years. Employers should revisit hiring, promotion, and compensation practices in an effort to ensure compliance with the Act. To the extent any disparities are found, the Act expressly prohibits an employer from reducing the compensation of other employees to redress the differential.

Employers engaged in Prevailing Wage Act work or covered work with public entities will need to prepare to disclose information regarding their respective workforces' demographics and compensation.

**Questions**

If you have any questions about the Act and you are associated with a charitable nonprofit with employees in New Jersey, feel free to contact Christine Michelle Duffy, Director of the New Jersey Program of Pro Bono Partnership, at (973) 240-6955.