
“Substantially Similar Work” Requires Equal Pay

Legal Alert

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Cherry Hill, NJ

Governor Phil Murphy, who made “equal pay for equal work” a signature campaign promise, signed a new law yesterday aimed at ending pay inequality in New Jersey. Effective July 1, 2018, New Jersey will be on the forefront of equalizing pay through the Diane B. Allen Equal Pay Act (the “Equal Pay Act”). The Equal Pay Act will greatly expand the New Jersey Law Against Discrimination by requiring equal pay for all employees who perform “substantially similar work.” This expansion of the law means that employers must consider an employee’s “skill, effort and responsibility,” not just their job title, in considering an employee’s work and pay and compensation. Once the Equal Pay Act goes into effect in July, employers must pay any and all of its employees who are members of a protected class the same as other employees who are not members of that class, who perform “substantially similar work.”

What does this mean for businesses?

The law will make it illegal for employers to discriminate against an employee (or potential employee) in his or her compensation, including benefits, or condition of employment because of the employee’s race, sex, age, national origin, or other broadly defined characteristic protected by the New Jersey Law Against Discrimination. The Equal Pay Act is even broader than the existing state law because protections will now be extended to all classes of employees protected under the New Jersey Law Against Discrimination, not just gender.

The Equal Pay Act carves out limited exceptions for when an employer may pay a different rate of compensation to its employees performing similar work, including *only if* it is due to a seniority or merit based system, or if the employer proves each of the following:

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

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The Equal Pay Act also expands the time period for filing claims and the lookback period, exposing employers to greater liability for violations. Under the new law, an unlawful employment practice can be “continuing,” i.e. it can occur weekly, monthly, or each time an employer’s pay practices discriminate against an employee, and an employee can seek back pay for six years running from the most recent occurrence. If it is determined that an employer has violated the new pay practices, treble damages, meaning three times any money damages, can be awarded.

The Equal Pay Act becomes effective on July 1, 2018, and will apply going forward. It also applies to all New Jersey employers that offer goods, services and facilities to the general public, including the State, political and civil subdivisions, and all public officers, agencies, boards, or bodies. Finally, the new law requires employers who enter into service contracts with public bodies to provide a report to the Commissioner of Labor and Workforce Development of information regarding compensation and hours worked by employees by gender, race, ethnicity, and job category. The Equal Pay Act provides similar reporting requirements for employers entering into contracts to perform public work.

How does New Jersey’s law differ from the Federal Law?

The Equal Pay Act also goes beyond the 2009 federal Lilly Ledbetter Pay Act in many ways. For example, an employer can consider “substantially similar work” across *all* of the employer’s operations or facilities, not just the one location where the complaining employee works. Additionally, under existing federal law, employees may only go back two years in certain circumstances for violations, but the new law provides for the entire period of time where the “continuing” violation occurred.

While this new Act expands protections available to employees, employers should also be aware, in addition to violating the new Equal Pay Act, discriminatory pay based on gender (or other protected characteristics) may also - and likely will - continue to violate state and federal laws prohibiting discrimination.

In advance of the July 1, 2018 effective date, employers should review their compensation practices and structures to confirm they provide for equal pay and compensation for any and all employees who perform “substantially similar work.” Employers should also expect and prepare for employees to share information about pay with one another more freely, creating an increased level of transparency with respect to pay and benefits.

If you have any questions about this legal alert or for guidance on complying with the New Jersey Equal Pay Act and other federal and state employment laws, please feel free to contact Adam Gersh or any member of Flaster Greenberg’s Labor & Employment Department.