# LABOR & EMPLOYMENT
## >>ALERT

# NEW JERSEY ENACTS NEW EQUAL PAY PROTECTIONS EFFECTIVE JULY 1, 2018

On April 24, 2018, newly elected New Jersey Governor Phil Murphy signed into law The Diane B. Allen Equal Pay Act (the Act), amending New Jersey's Law Against Discrimination. The new law becomes effective July 1, 2018, expands pay equity protections for employees and gives New Jersey one of the broadest equal pay statutes in the country.

Named for the recently retired longtime Republican state senator, the Act makes it unlawful to pay members of a protected class less than others for substantially similar work, narrows the permissible exceptions to such a requirement, expands retaliation protections, extends the statute of limitations for pay equity claims and provides for larger damage awards.

## THE BOTTOM LINE

Effective July 1, 2018, New Jersey's equal pay law will provide several new measures aimed at preventing unequal pay among employees performing substantially similar work. New Jersey employers must re-examine employee salaries to make sure any existing pay differentials are justifiable under the Act's new exacting standard. Employers should consult with counsel in this process, revise handbooks and trainings to address and prohibit pay discrimination and retaliation, and train managers and HR and benefits employees on the new requirements under the Act.

## GOING BEYOND THE GENDER PAY GAP

The Act expands the scope of the law's protections, potentially opening employers to a significant number of new legal claims. As opposed to the current law, which applies only to sex-based pay disparity claims, the Act now makes it an unlawful employment practice to pay employees unequally based on any protected characteristic, which under New Jersey law currently includes race, creed, color, national origin, nationality, ancestry, age, marital status, civil union status, domestic partnership status, affectional or sexual orientation, genetic information, pregnancy or breastfeeding, sex, gender identity or expression, disability or atypical hereditary cellular or blood trait of any individual, service in the Armed Forces of the United States, or the refusal to submit to a genetic test or make available the results of a genetic test to an employer.

## EQUAL PAY FOR "SUBSTANTIALLY SIMILAR" WORK

The Act will allow New Jersey employees to sue for pay discrimination when they are paid less than colleagues from other protected classes for "substantially similar" work. This relaxes the standards under current law, which stipulates claims may be brought if an employee's compensation is less than someone performing "similar" or "substantially equal" work.

Critically, the Act also gives employees an easier road to recovery for pay equity claims by shifting the burden of proof away from the employee.

The current law places the burden of proof on the employee to establish a discriminatory pay differential for "similar" work. Once an employer articulates a legitimate, non-discriminatory explanation, the employee must then prove that such an explanation is pretext for discrimination. The burden only shifts to the employer to prove that an exception applies if the employee meets the higher standard of showing the work was "substantially equal."

The Act eases employees' burden significantly by lowering the burden-shifting standard from "substantially equal" to "substantially similar." Under the Act, once an employee makes an initial showing of a pay differential for "substantially similar" work, the employer must prove that one of the specifically enumerated exceptions (described below) applies as a justified, non-discriminatory reason for the pay differential. The Act also clarifies that claims can rely on wage comparisons in all of the employer's operations or facilities, negating a common defense typically asserted by employers that the comparison should be localized. An employer may not reduce compensation in order to comply with the statute.

## NARROWED CATEGORY OF EXCEPTIONS WHERE PAY DIFFERENTIAL IS PERMITTED

Under current law, unequal pay claims are viable only if based on alleged gender-based pay differentials and are permissible only if the differential is due to: (i) a seniority system, (ii) a merit system, (iii) a system that measures earnings by quantity or quality of production, or (iv) a factor other than gender.

The Act significantly narrows these exceptions by allowing an employer to pay a different rate of compensation for "substantially similar" work only if the differential is made pursuant to a seniority or merit system, or if the employer demonstrates that:

>> the differential is based 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;

>> the factor or factors are not based on, and do not perpetuate, a differential in compensation based on sex or any other characteristic of members of a protected class;

>> each of the factors is applied reasonably;

>> one or more of the factors account for the entire wage differential; and

>> 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 shall not apply if it is demonstrated that there are alternative business practices that would serve the same business purpose without producing the wage differential.

## STATUTE OF LIMITATION AND REMEDIES

The Act will significantly lengthen the limitations period for pay equity claims to six years, as opposed to the two-year period applicable to other claims under the state's discrimination law. In addition, New Jersey adopted the federal law of "continuing violation doctrine," which provides that a violation occurs each time an employee is affected by a discriminatory compensation decision (i.e., each time a paycheck is issued). The Act also provides treble damages for any violation; invalidates agreements that shorten the limitations period, waive employees' statutory protections under the law, or require employees not to disclose salaries; and makes it an unlawful employment practice to require such waivers.

## RETALIATION

The Act also expands the statutory provision prohibiting retaliation. Employers now cannot retaliate against employees for discussing information relating to their compensation with other employees, former employees, their attorneys or any government agency. The Act also protects employees from retaliation for requesting from, discussing with or disclosing to any of the above people: information regarding the job title,

occupational category, rate of compensation (including benefits), gender, race, ethnicity, military status or national original of the employee or any other current or former employee.

Under previous law, employees were only protected from retaliation for requesting such information from a current or former employee for the purpose of investigating or taking legal action regarding discriminatory compensation.

## NEXT STEPS FOR NEW JERSEY EMPLOYERS

To prepare for the new law, New Jersey employers should: 1) review compensation practices to identify whether employees performing substantially similar work are paid unequally; 2) if so, determine the reasons for such differences, and whether they are permissible, non-discriminatory factors under the law; (3) revise existing employment handbooks and training materials to strengthen prohibitions against pay discrimination and retaliation; 4) update employee nondisclosure agreements to make sure they do not preclude employees from disclosing their salaries; and 5) provide information and guidance on the new requirements under the Act to managers and HR and benefits departments.