

## Publications

### *Labor and Employment Alert: New Jersey Enacts a Sweeping Equal Pay Law*

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New Jersey recently enacted the “Diane B. Allen Equal Pay Act” to significantly expand the New Jersey Law Against Discrimination (LAD) with respect to pay equity. The act makes it unlawful to pay a member of any protected class less than a member of another protected class for performing “substantially similar work.” A “protected class” is broadly defined to include race, creed, color, national origin, nationality, ancestry, age, marital status, civil union status, domestic partnership status, affectional or sexual orientation, genetic information, pregnancy, sex, gender identity or expression, disability or atypical hereditary cellular or blood trait of any individual, or liability for service in the armed forces. The act provides extensive employee protections, authorizes awards of treble damages, and imposes additional obligations on government contractors.

#### Equal pay for “substantially similar work”

The act makes it unlawful for an employer to pay any of its employees – regardless of the employee’s protected class – compensation and benefits that are less than those it pays to employees who are not members of the protected class for substantially similar work. “Substantially similar work” is a composite of skill, effort, and responsibility. Comparisons of wage rates must be based on wage rates in all of an employer’s operations or facilities.

An employer may pay a different rate of compensation only if it proves the differential is made pursuant to a seniority system or a merit system, or if the employer proves all 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. The last factor does not apply if the employee shows alternative business practices

exist that would serve the same business purpose without producing the wage differential.

An employer who is paying a rate of compensation in violation of this provision cannot reduce employees' pay or benefits in order to comply. Further, if a jury determines an employer is guilty of violating the equal pay provisions, the judge must award three times any monetary damages to the aggrieved person or persons.

### Expanded statute of limitations

The act expands the LAD's current two-year statute of limitations to six years for claims of discrimination in compensation. This means an unlawful practice occurs *each occasion* that an individual is affected by the discriminatory compensation decision or other practice, including each occasion that wages, benefits, or other compensation are paid in a discriminatory manner. An aggrieved person may obtain back pay for the entire period of time – up to six years – in which the violation with regard to discrimination in compensation has been continuous, if the violation continues to occur within the statute of limitations. The act further specifies that the common law "continuing violation" and "discovery rule" doctrines still apply.

Finally, it is unlawful to require employees or applicants to consent to a shortened statute of limitations or to waive any of the protections provided by the LAD. A violation of this provision entitles the aggrieved person or persons to treble damages.

### Retaliation

The LAD already prohibits retaliation against employees who file a complaint or testify or assist in any proceeding under the LAD. The act expands this to prohibit reprisals for seeking legal advice regarding rights under the LAD or for sharing relevant information with legal counsel or a governmental entity. It is also illegal for an employer to retaliate against an employee for requesting from or disclosing to any employee or former employee, to a lawyer from whom the employee seeks legal advice, or to any government agency information regarding the job title, occupational category, and rate of compensation and benefits. Finally, an employer may not require an employee or applicant to sign a waiver or to otherwise agree not to make those requests or disclosures. A violation of this provision entitles the aggrieved person or persons to treble damages.

### Government Contractors

An employer who contracts a public body to provide services must report to the state's Commissioner of Labor and Workforce Development the gender, race, job title, occupational category, and total compensation of every employee employed in the state in connection with the contract. The employer also must provide updates each time there is a significant change in employment status (e.g., medical leave of 12 weeks or more, hiring, termination, a change in part-time or full-time status, or a change in "employee" or "contractor" status). Similar information must be submitted in the form of certified payroll records for employers engaged in public works contracts.

## Conclusion

The Act becomes effective on July 1, 2018. Employers should review their pay policies and procedures to ensure that they comply with the new requirements. Contact your Vorys lawyer if you have questions about equal pay provisions.

