Equal Pay for Equal Work? Employers Should Prepare for NJ's Equal Pay Act

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On April 24, 2018, Governor Phil Murphy signed into law what he described as the "most sweeping equal pay legislation in America." This legislation, known as The Diane B. Allen Equal Pay Act ("the Act"), seeks to eliminate the pay disparity gap. While it is hard to argue with the Act's good intentions, many unintended consequences are anticipated due to its expansive nature. For this reason, Governor Christie vetoed a similar bill because he recognized that it would "punish as discriminatory, otherwise innocuous conduct."

The most significant consequence is the expected increase in litigation against employers. Notably, under the law, current or former employees may file lawsuits easily, years or even decades after the initial allegedly discriminatory wage-related decisions were made. These lawsuits will be difficult to defend and have the potential for significant damages. Thus, New Jersey businesses of all sizes must take steps to prepare themselves, as best they can.

Easy to Bring a Lawsuit

The Act was written intentionally to apply broadly and to make it easy to file a claim. Importantly, it applies to all businesses in New Jersey, regardless of size, number of employees, or type of employer, public or private. As an amendment to the New Jersey Law Against Discrimination, the Act prohibits an employer from paying an employee, who is a "member of a protected class," a lower rate of compensation than an employee who is not a member of the same protected class "for substantially similar work." To bring a lawsuit, all that is required of an employee is to show: (1) s/he is a member of a protected class; (2) is paid less than an employee who is not a member of the same protected class; and (3) is doing work that is substantially similar to the other employee.

Breaking down each requirement further demonstrates the broad nature of the law.

- *Protected Class*: The Act is not limited to gender discrimination, but includes every class protected under the Law Against Discrimination. This expansive list includes race, sex, religion, disability, age, sexual orientation, pregnancy and gender identity (among others). Simply stated, the first prong seemingly always will be met, as employers will be hard-pressed to find an employee who does not fall into one of the many categories of protected classes.
- *Paid Less:* The Act does not limit compensation to only salary. "Compensation" includes any benefit an employee receives, such as bonuses, paid time off, expense accounts or retirement plans.
- *Similar Work:* While most have heard the famous slogan, "equal pay for equal work," used to pass the federal Equal Pay Act, the New Jersey version is far broader. Instead of "equal work," all that is required is "substantially similar work." As a result, job titles will not be dispositive. Instead, courts will examine the actual job functions of the

employees—including the skill, effort and responsibilities of the position—to determine whether the work they are performing is "substantially similar."

Difficult to Defend Against a Lawsuit

The part of the Act with which most employers seem to struggle the most is that intent and knowledge are irrelevant. It does not matter that a business did not intend to pay an employee less because of the employee's sex or religion, or that the employer may not even have been aware that the employee was a member of a protected class. Instead, all that matters is that an employee meets the three-part test.

Since an extensive number of lawsuits under the Act are expected in the upcoming years, employers must be prepared with a defense. Unfortunately, the Act only permits three defenses: (1) seniority system; (2) merit system; and (3) meeting a five-part test. The Act does not define a seniority system or a merit system. However, the key takeaway is that a structured "system" must be in place, likely in either a company policy or in a union contract. To support a valid defense, the courts likely will require that these systems permit the employer to exercise little (if any) discretion over the salary decisions and must be based on strict guidelines established in the "system" put into place.

Since most employers prefer having significant control over their salary decisions, the five-part test likely will be the most viable. Under this test, the employer must demonstrate all of the following: (1) the difference in pay is based on one or more "legitimate bona fide factors" (the law provides a non-exhaustive list that includes training, education, experience or quantity/quality of production); (2) the factors cannot be based on or perpetuate a differential in compensation based on a characteristic of a protected class; (3) the factors must be applied reasonably; (4) the factors must account for the entire wage differential; and (5) the factors must be related to the job and based on legitimate business necessity.

While meeting one factor may seem reasonable, it is difficult to meet all five. For example, the "bona fide factor" given by the employer may be that one employee has a college degree, while another does not. Given our culture's emphasis on education, in most situations this would seem reasonable. However, under this test, the employer has the burden to demonstrate that paying an employee more for having a college degree does not perpetuate a salary differential based on a characteristic of a protected class (which may be difficult considering certain groups historically have been less likely than others to attend college) or that the college degree is sufficiently related to the job. It remains to be seen how courts will grapple with these challenging issues.

Extensive Damages

Not surprisingly, the Act greatly expanded the Law Against Discrimination's statute of limitations from two years to six years for equal pay claims. Even more troubling for employers is that the six-year statute of limitations period restarts every time an employee receives an allegedly "discriminatory" paycheck. The impact of this extended limitations period is significant, as it has the potential to require employers to defend salary decisions made decades earlier by supervisors or managers who are no longer with the company.

For example, an employee who has been with a company for 25 years can challenge the initial salary offer made by the company. In defending against such a lawsuit, the employer would have to explain a decision made a quarter of a century earlier by meeting all five prongs of the five-part test. Naturally, it is anticipated that many of the key witnesses would have little memory of the decision (assuming they still are alive or can be located), while much of the evidence may have been lost or destroyed. As a result, the statute of limitations merely represents a cap on damages (rather than an actual limitation to filing a claim), since its only true impact is to limit the damages to six years, rather than prevent claims that occurred outside the limitations period.

Assuming it cannot meet the five-part test (or establish a seniority or merit system), the damages can be staggering. For the six-year period, the employee would be entitled to back pay, front pay, compensatory damages and possibly punitive damages. In addition to these traditional damages, the Act also grants a plaintiff treble damages (i.e., 3 times the monetary damages), regardless of any finding of malice or intent. As a result, if damages are established at $100,000, the employer must pay $300,000 in damages.

Limit to the Law's Immediate Impact

New Jersey businesses received some good news when a recent New Jersey District Court decision found that the Act would not apply retroactively. In *Perrotto v. Morgan Advanced Materials*, United States District Judge William J. Martini held that the Act "is not retroactively applicable to conduct occurring prior to its effective date." The facts in *Perrotto* are rather straightforward. The employee was terminated from her employment on April 5, 2018 (before the enactment of the Act), but filed her lawsuit on July 27, 2018 (after the effective date of the Act). In a well-researched decision, the court found that the legislature intended the Act to apply only prospectively to claims arising after the Act's effective date.

The impact of this decision is that employers' immediate liability is limited to conduct occurring after July 1, 2018. However, while it is persuasive authority, this federal court decision is not binding on state courts. It also is noteworthy that because the employee was terminated before the Act went into effect, she never received a "discriminatory" paycheck—thereby triggering the six-year statute of limitations. While the court's reasoning suggests this fact is irrelevant, a state court might find that any paycheck received after the effective date of the Act is sufficient to trigger the statutory protections and allow a claim to proceed in spite of the otherwise prospective intent of the legislature.

Proactively Preparing a Defense

Given the Act's expansive nature, it appears more a question of "when" than "if" employers must defend their actions in a lawsuit brought under this Act. As such, it would behoove employers to proactively review their current and former salary decisions and take steps to shore up their defenses. The following steps should be considered by all employers:

1. Update job descriptions to reflect accurately the job duties of each category of employee;
2. Conduct an audit of the salaries and benefits of all current employees;
3. Review or create policies and procedures for making and documenting salary decisions;
4. Provide management training to ensure compliance with company procedures with regard to salary determinations; and
5. Consider and implement proactive adjustments to any salaries found to be unequal (or without sufficient documented justification for any disparity).

Documentation outlining the basis for each salary decision (both initial salary offers as well as annual raises/bonuses) will be critical to establishing a defense under this Act. Keep in mind that employers could be documenting decisions made today that may not be challenged for years to come.