Guidance Released on New Jersey's Equal Pay Act

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It has been more than two years since 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”), was enacted as an amendment to the New Jersey Law Against Discrimination (NJLAD), and sought to eliminate the pay disparity gap. While it is hard to argue with the Act's intention, many employers have struggled with its implementation due to its expansive nature, which makes defending lawsuits difficult. Broadly written, the Act leaves many questions unanswered, forcing employers to guess how courts might interpret ambiguous provisions, and its mandates remain in place notwithstanding the challenges many employers currently are facing as a result of the COVID-19 pandemic. Fortunately, employers can be aided in their understanding and application of the Act by guidance issued by the New Jersey Division of Civil Rights (“DCR”).

Background On The Law

The Act was intended to apply broadly and to make it easy to file a claim. Generally, it applies to all businesses with at least one employee whose primary place of work is in New Jersey, regardless of size, number of employees, or type of employer, public or private. To sue, an employee simply has to show (s)he: (1) is a member of a protected class as recognized by the New Jersey Law Against Discrimination (NJLAD); (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.

The Act only permits three defenses: (1) seniority system; (2) merit system; and (3) meeting a five-part test to establish that a pay differential is based on "legitimate bona fide factors." An employer's lack of intent to violate the law, or lack of knowledge of the violation, are not defenses. The Act does not define a seniority system or a merit system. As a result, employers most often rely on the five-part test, which requires the employer demonstrate all of the following: (1) the difference in pay is based on one or more “legitimate bona fide factors” (the statute 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.

For a more detailed description of the Act, please refer to our article available here.

Guidance From The Division Of Civil Rights

The guidance issued by the Division of Civil Rights (“DCR”) sets forth the DCR's interpretation of some of the Act's ambiguous provisions. Not surprisingly, the DCR's interpretations are broad and generally favor employees.

Broader Than Equal Pay for Equal Work:

DCR made clear the Act goes beyond simply protecting against unequal pay for equal work; the Act protects against unequal pay for "substantially similar work," which DCR determined was broader than "equal work." DCR defines "substantially similar work" as a combination of the: (1) skill; (2) effort; and (3) responsibility required to perform an employee's job duties. When determining whether work is substantially similar, all three factors should be examined together.

Work still can be "substantially similar" notwithstanding minor differences in skill, effort, and responsibility. Thus, neither the job title nor the work performed needs to be identical. The DCR provides the following example: in a school setting, janitorial and food service jobs may be substantially similar in terms of skill, effort, and responsibility because both may involve substantial amounts of lifting and cleaning, even though the job duties are not exactly the same.

Furthermore, DCR made clear that job descriptions -- while potentially helpful -- will not be dispositive if they do not reflect the actual duties and responsibilities being performed by the employees.

The DCR also defined the terms "skill," "effort," and "responsibility." "Skill" refers to the experience, ability, education, and training required to perform a set of job duties. These must be skills actually necessary to perform a job, as opposed to the skills a particular employee just happens to have.

"Effort" means the requirements of a job as a whole and takes into account the amount of physical or mental exertion required to complete a job. An employee's working conditions also may be relevant to the amount of effort required to perform a job. For example, a job that requires an employee to be on her feet all day likely would require more physical effort than a more sedentary job. Similarly, a job requiring employees to work long hours or meet late-breaking deadlines may require more mental exertion than a job that does not.

"Responsibility" refers to the job duties required, as well as to the degree of discretion and accountability required to perform the job. Concerning the degree of an employee's discretion and accountability, an employee who supervises others, makes high-level decisions, or enacts policies and procedures may have different responsibilities than an employee who does not. For example, as DCR notes, an executive chef likely has more responsibility than a line cook because the executive chef has more discretion, supervises others, and makes high-level decisions. However, minor or occasional differences in responsibilities will not prevent jobs from being substantially similar. Concerning an employee's job duties, DCR provides the example of a sales clerk, who occasionally may be asked to sweep up if a customer breaks a glass, despite that salespeople generally are not responsible for sweeping the floor. According to DCR, this would result in only a minor or occasional difference in responsibility, and such a difference would not prevent the sales clerk from being considered comparable to sales clerks in other departments if their duties otherwise were substantially similar.

Additionally, "compensation" includes not only base wages, commissions, overtime pay, bonus pay, merit pay, and stock options, but also cash and non-cash benefits, including but not limited to insurance, vacation time, and retirement funding.

Wage Comparison

By its very nature, the Act requires a comparison of wages between two or more employees, which requires an employer to identify employees to compare with an employee who claims to have been aggrieved by a violation of the Act. The Act states that this comparison can be to any employee in "all of an employer's operations or facilities" but is silent as to whether those operations or facilities are required to be located in New Jersey. The DCR clarified that the Act does not preclude an employee from suing even if all of her comparators are located outside New Jersey. Therefore, a New Jersey employee may file a lawsuit seeking the salary being paid to a California employee who performs substantially similar work to that of the New Jersey employee. However, the DCR recognizes that an employer may defend differences in

compensation for employees in different geographic locations if the employer can show that those differences are based on differences in cost-of-living or in relevant labor markets in those areas and are not the result of discrimination.

Seniority and Merit System

As mentioned above, the Act did not define clearly a seniority system or a merit system, i.e. two of the three possible employer defenses. The DCR defines each of these narrowly, although does allow some employers who properly draft and implement a policy that provides defined criteria to utilize these as valid defenses.

According to the DCR guidance, a "system" is a plan, policy, or practice that is predetermined or predefined by the employer, and is used by managers and others to make compensation decisions. It must be applied uniformly to employees in good faith without regard to membership in a protected class. The DCR cautions that ad hoc determinations by an employer regarding what each individual employee is "worth" to the company do not constitute a "system." Thus, a seniority system recognizes and compensates employees based on length of service with the employer. A merit system provides for variations in pay based upon employee performance measured through legitimate, job-related criteria. Although the DCR guidance does not require that a merit system's criteria be objective or quantifiable, it is anticipated that merit systems featuring such criteria may be more likely to withstand challenges.

Prior Salary History

Another recent amendment to the NJLAD prohibits employers from asking job applicants about their current salaries. For additional information about this law, please refer to our article, available by clicking here. However, prior to that law's enactment, employers typically asked about current salary to base the employee's new salary on his or her previous salary. Many argued this common workplace practice furthered institutionalized discrimination against women and minorities.

The Act provides no clarity as to whether employers can defend equal pay lawsuits by justifying compensation decisions based on an employee's prior compensation, and the DCR provides little guidance on this issue. The DCR noted that it "will depend on the specific factual circumstances" but cautioned that reliance on salary history may perpetuate a differential in compensation based on membership in a protected class where there is a preexisting wage gap for members of that protected class. Based on this guidance, employers should be wary of defending such lawsuits based purely on an employee's prior salary.

Other Guidance

Prior to the issuance of the DCR guidance, the United States District Court for the District of New Jersey evaluated whether the Act applied retroactively to the time period preceding its July 2018 enactment, and concluded that it did not.[1]

Recommendation

Although the guidance provided by the DCR does not make it easier for employers to comply with or defend against claims arising under the Equal Pay Act, the guidance provides some clarity to support employers in preparing appropriately for potential lawsuits. Employers should consider the following:

Review and Update Job Descriptions: Employers should ensure their job descriptions accurately reflect their employees' actual duties and responsibilities. Inaccurate job descriptions will not be useful when defending a lawsuit under the Act.

Conduct An Audit: It is imperative that employers conduct an audit of salaries and benefits to ensure that they are paying employees performing "substantially similar work" the same, or that they can justify any difference in compensation. To ensure effectiveness, the audit must extend across the country (or even overseas), and not just to all New Jersey facilities.

Review or Create Salary and Benefit Policies: Employers should establish policies and procedures that outline specific criteria that are used when making salary and benefit determinations. The more clearly defined criteria and the less individual discretion allowed, the easier it will be to defend lawsuits under the Act.

Consistently Follow Existing Policies: Employers also should ensure that they follow existing salary policies consistently, and that any exceptions are well-documented and based upon legitimate, non-discriminatory criteria.

Document: Employers must ensure they have proper documentation outlining the basis for each salary decision (both initial salary offers, as well as annual raises/bonuses). Documentation will be critical to establishing a defense under this Act. This is especially important because the Act's statute of limitations allows employees to challenge salary decisions years later. As a result, the individuals who made the initial salary decision may no longer be with the company, and it will be important for remaining managers to understand the justifications for the decisions of their predecessors.

Training: Employers should provide management training to ensure compliance with company procedures with regard to salary and benefit determinations.

[1] See *Perrotto v. Morgan Advanced Materials*, PLC, 2:18-13825, 2019 WL 192903, at *2-3 (D. N.J. Jan. 15, 2019).