

Preparing for New Jersey's Diane B. Allen Equal Pay Act – One of the Strongest Equal Pay Laws in the Nation

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“Equal pay for equal work” is a refrain commonly associated with equal pay legislation designed to eliminate the gender pay gap in the labor workforce. New Jersey’s recently passed Diane B. Allen Equal Pay Act (the “Equal Pay Act”), which amends the Law Against Discrimination, greatly expands the protection afforded to employees by requiring equal pay for “substantially similar work” and by including within its scope all employees of a “protected class.” The new law goes into effect July 1, 2018, and all New Jersey employers should be prepared for this sweeping reform.

What Employers Should Know About the Equal Pay Act

The Equal Pay Act makes it an unlawful employment practice “[f]or an employer to pay any of its employees *who is a member of a protected class* at a rate of *compensation, including benefits*, which is less than the rate paid by the employer to employees who are not members of the protected class for *substantially similar work*, when viewed as a composite of skill, effort and responsibility.” (emphasis added).

Unlike New Jersey’s previous equal pay legislation, which was designed to specifically address the gender pay gap, the Equal Pay Act greatly broadens the scope of its protection to include all protected classes, such as race, creed, national origin, age, sex, gender identity, and more. In addition, the Equal Pay Act requires all members of a protected class to be paid an equal rate of “compensation, including benefits.” Thus, this provision will likely be interpreted broadly to include all forms of remuneration, such as commissions, bonuses, paid time off, expense accounts, retirement plans, and other benefits. Critically, a person’s salary history will not justify a pay disparity, and the Equal Pay Act prohibits employers from cutting the wages or benefits of high-paid staff to achieve pay equity. In addition, “substantially similar work” will be based on the work the employee actually performs, taking into account the skill, effort, and responsibility associated with the position, as opposed to job title. In determining what constitutes “substantially similar work,” an employer can consider “substantially similar work” across *all* of the employer’s operations or facilities and not just the specific location where the complaining employee works.

There are some limited exceptions in the Equal Pay Act for when an employer may pay a different rate of compensation to employees performing substantially similar work. A different rate of pay is permissible *only if* due to a seniority or merit based system, or if an employer proves each of the following:

1. The difference is based on a “bona fide” factor (other than a protected characteristic), such as training, education, experience, or the quality/quantity of production;

2. The bona fide factor(s) are not based on, and do not perpetuate, a differential in compensation based on a protected characteristic;
3. Each factor 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, where there is no alternative business practice that would serve the same business purpose without producing the wage differential.

The Equal Pay Act does more than just expand the scope of employees protected under the law. It also enhances the damages available to employees if a violation is proven. Under the Equal Pay Act, treble damages, or three times the amount of the pay differential, are awarded for a violation. Moreover, the statute of limitations period has been increased from two to six years. Thus, a bi-weekly pay differential of \$500, for a period of six years, may result in damages of \$234,000 (compared with \$26,000 under the previous law).

How to Best Prepare Your Business

The Equal Pay Act's wide-ranging scope, treble damages provision, and lengthy statute of limitations period may result in an increase in the filing of pay-related claims. Businesses may want to consider conducting a privileged pay audit with the goal of identifying potential pay disparities, ascertaining whether there are lawful explanations for those disparities, and remediating any unjustified pay differentials once discovered. By retaining an experienced attorney to not only conduct a pay audit but to also provide relevant legal analysis with respect to any potential claims or defenses, you can minimize the risk of litigation and can better protect the results of the pay audit from disclosure should subsequent litigation ensue.

If you have any questions concerning the Equal Pay Act or any other federal or state employment laws, please feel free to contact Jennine DiSomma or Vincent C. Cirilli of Saiber LLC's Employment and Labor Law practice.