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Client Advisory

N.J. Governor Signs Sweeping Pay Equity Bill Requiring Employers to Justify Pay Differences Between "Substantially Similar" Jobs, or Face the Consequences

On April 24, 2018, New Jersey Governor Phil Murphy signed into law the Diane B. Allen Equal Pay Act, a sweeping revision to New Jersey's already broad Law Against Discrimination. According to a press release issued by the Governor's office, the new law represents "the most sweeping equal pay legislation in America." While few would argue against the important goal of ending wage discrimination, the new law, which becomes effective on July 1, 2018, places very significant burdens on New Jersey employers of every size by creating the presumption of illegal discrimination where any employee in any "protected class" is paid less in wages and benefits than employees outside of that protected class performing "substantially similar work."

The new law, which amended N.J.S.A. 10:5-12, is not confined to differences in pay between genders, but applies to every protected class under the law, which, as currently written covers 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, and liability for service in the armed forces. An individual in one of these protected classes can raise a claim simply by pointing to any employee outside that particular class who is performing "substantially similar work" and is making more.

The law goes far beyond requiring equal pay, inclusive of benefits, for equal work, but for work which is deemed "substantially similar." Whether two different jobs involve substantially similar work will be based on a court or jury's assessment of the "skill, effort and responsibility" involved in each position. Substantially similar work is a much more elastic concept than equal pay for equal work, but could involve the comparison of completely different jobs and different duties. Depending on how courts interpret this vague provision, the new law could require employers to justify different pay rates as between large swathes of their workforce, rather than within their specific job title.

In order to escape liability (and the imposition of triple damages and other penalties) for differences in pay for substantially similar jobs between a member of a protected class and employees outside the class, it will be the employer's burden to prove that such differences are either due to a seniority system or merit system, such as contained in a union contract, or, in the alternative, the employer may prove that the entire wage differential is reasonably 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 employer is also responsible for demonstrating that any factors it relied on do not have the effect of perpetuating differentials in compensation based on sex or any other "characteristic of members of a protected class." Finally, the employer must prove that the factors it used are "job-related with respect to the position in question and based on a legitimate business necessity." Even if the employer does prove a factor is based on a legitimate business necessity, if the employee can convince the court that some other alternative business practices exist serving the same business purpose without producing a wage difference, the employer cannot rely on the factor.

This switching of the burden of proof is extremely significant and will require employers to prove that pay differences are not based on discrimination, rather than the typical burden of proof which requires that employees prove that conduct is discriminatory. Given the very difficult standards to actually make this proof established under the law, employers face a significant danger of being found in violation of the law without any proof of an intent to discriminate.

Employees are not limited to their own facility or location to compare jobs and wage rates. The law provides that wage comparisons will be based on wage rates in all of the employer's operations or facilities. As a result, employees may even look to an employer's out of state operations to attempt to find some discrepancy upon which to base a lawsuit.

It should also be noted that the law specifically prohibits any employer from remediating a pay imbalance by reducing any employee's pay. Thus, if an employer were to review its pay rates and wished to rectify any imbalances between employees that it could not fully explain, its options appear to be limited to raising employee pay, and not, for example, reducing an employee who was being

overpaid. Not only does this highly intrusive provision appear to have no relation to eliminating gender-based pay inequity, it also opens every employer decision to reduce an employee's pay to litigation. Employers should note that such reductions can be made prior to the July 1, 2018 effective date of the new law without violating the law.

The new law has several other provisions designed to expand employee's rights to bring lawsuits under the Law Against Discrimination and to increase the amount of damages available.

The new law puts into place a provision similar to the federal "Lily Ledbetter Fair Pay Act of 2009" which made every paycheck which was negatively affected by a discriminatory decision, no matter how long ago, into a new violation of the law. In practical terms, this means that employees can sue over the current effects of any decision an employee claims was discriminatory, even though the alleged discriminatory decision may have taken place decades ago. Two key differences make this proposed change more onerous on employers than what was implemented under the federal law. First, unlike the federal law, which limits back pay to two years from when the charge of discrimination is actually filed, the New Jersey law allows recovery up to six years.

The law also contains a provision related to protecting employees in discussing, seeking or obtaining information regarding their pay and the pay of other employees. No employer may attempt to evade this provision by having a policy or employee agreement prohibiting such sharing of information.

Employers of every size with any employees in New Jersey have only a very short period of time to evaluate all the positions in their organizations to determine if they are substantially similar and if, as between such substantially similar positions, there are any wage differentials among employees which cannot be fully explained by legitimate factors which are also the least likely to perpetuate wage discrimination against members of any protected class. The attorneys of Archer & Greiner's Labor and Employment Department stand ready to assist you to make these assessments and prepare for the July 1, 2018 effective date of this new law.

If you have questions about this bill or any other related matter, please contact any member of Archer's Labor and Employment Group in Haddonfield, N.J. at 856-795-2121; Princeton, N.J. at 609-580-3700; Hackensack, N.J. at 201-342-6000; Philadelphia, Pa. at 215-963-3300, or Wilmington, Del. at 302-777-4350.