

Changes in N.J. law against discrimination would put the burden of proof on employers

Articles

03.14.2016



In February, the Obama administration announced additional efforts aimed at promoting equal pay opportunities and greater diversity and inclusion in the federal workforce. The momentum of this latest push has carried through from the White House to the New Jersey State Legislature with S.B. 992.

What is the bill?

The bill moving through the New Jersey Legislature (S.B. 992) would make significant changes to the New Jersey Law Against Discrimination in an effort to address the gender wage gap. While few would argue against the important goal of ending gender based wage discrimination the proposed law, which recently passed the New Jersey Senate, would place significant burdens on New Jersey employers by creating the presumption of illegal discrimination where any employee of one gender is paid less in wages and benefits than employees of the other gender performing “substantially similar work.”

To avoid liability, and the imposition of triple damages and other penalties, employers will be required to prove not only that the entire difference in compensation is fully justified by legitimate bona fide factors other than gender, but that any such factor does not have the effect of perpetuating gender related differences in compensation, is “job-related” to the specific work in question, and is justified by business necessity.

Bill Provisions

This bill would mandate equal pay, inclusive of benefits, between males and females not just for equal work, but for work which is deemed “substantially similar.” Whether two different jobs involve substantially similar work will be determined based on a court’s assessment of the “skill, effort and responsibility” for each position. The concept of substantially similar work is a much more elastic one than equal pay for equal work. It could extend to include the comparison of disparate jobs and disparate duties.

In order to justify any differences in pay between substantially similar jobs, it would be the employer’s obligation to prove that such differences were either due to a seniority system or merit system, like those contained in union contracts. In addition, as an alternative, the employer may prove that the entire wage differential is reasonably based on one or more legitimate, bona fide factors other than sex, such as training, education or experience, or the quantity or quality of the employee’s production. Further, the employer must demonstrate that any factors it relied on to make this determination do not perpetuate any sex-related differences in compensation. Lastly, 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 an alternative business practices exists serving the same business purpose which does not produce a wage difference, the employer cannot rely on the factor.

Employees are not limited to their own facility or location to compare jobs and wage rates. The bill 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 bill would prohibit any employer from rectifying gender wage discrepancies by reducing any employee’s pay. In other words, if an employer were to review pay rates and attempt to rectify imbalances between genders that it could not fully explain, its options appear to be limited to raising employee pay, and not, for example, reducing the wages of an employee who was being overpaid. This highly intrusive provision appears to have no relation to eliminating gender-based pay inequity and, moreover, opens an employer’s decisions to reduce any employee’s pay to potential litigation.

Employee-Lawsuits Against Employers

The proposed bill also has several other provisions to expand employees’ rights to bring lawsuits under the Law Against Discrimination.

This bill would enact into New Jersey law 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.

However, there are two key differences between the federal law and what is proposed in New Jersey:



- 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 would allow recovery for the entire period of time the employee alleges she has been affected by a discriminatory decision.
- Second, the federal law, like almost all anti-discrimination laws, requires that the employee prove illegal discrimination. Because the proposed law would reverse this burden of proof as to gender-based pay claims, employers may be at a very significant disadvantage in attempting to prove the particulars of decisions made many years before by employees long gone from the organization.

This bill would also make illegal any agreement with employees which attempts to shorten the statute of limitations with respect to claims under the New Jersey Law Against Discrimination. In 2014, the New Jersey Appellate Division approved of just such a provision contained in an employer's job application, by which applicants agreed to a six-month period for bringing claims under the Law Against Discrimination, rather than the standard two years. That case was argued before the New Jersey Supreme Court in December 2015 and the Court has not yet issued its decision. The proposed bill aims to prevent the Court from approving the use of such provisions in the future.

The bill also contains a provision related to protecting employees in seeking and obtaining information regarding their pay and the pay of other employees. However, this provision is written broadly enough that it appears to have the secondary purpose, or at least the effect, of overturning recent case law which found that the New Jersey Law Against Discrimination did not protect an employee from the criminal implications of stealing confidential employer documents, even if the employee alleged that the theft was designed to support a claim under the Law Against Discrimination.

A number of courts interpreting the New Jersey Law Against Discrimination have commented that the law is not intended to make courts "super-human resources departments" second guessing every employer decision. However, this bill as it is written and as it stands now appears to have the potential to have just the opposite effect.

Related People



David A. Rapuano

Partner

✉ drapuano@archerlaw.com

☎ 856.616.2603



Related Services

- Labor & Employment

© 2025 Archer & Greiner, P.C. All rights reserved.

