

## Client Alert

### **New Jersey Governor Signs Strict Equal Pay Bill for All Workers into Law**

April 25, 2018 – On April 24, 2018, New Jersey Gov. Phil Murphy signed into law a bill aimed at remedying discriminatory pay practices in the workplace, thereby creating substantial compliance and defense concerns for New Jersey employers.

The Diane B. Allen Equal Pay Act amends New Jersey’s Law Against Discrimination (“LAD”) and promises to be the most sweeping equal pay legislation in the country. LAD applies to all employers regardless of size and would entitle every employee to an equal rate of pay and benefits for “substantially similar” work, regardless of their gender. The definition of “substantially similar” will be based upon several factors, identified in the bill as “a composite of skill, effort, and responsibility.”

In fact, differing rates of pay for “substantially similar” work will only be lawful where the employer can affirmatively demonstrate that it results from: (1) a seniority system; (2) a merit system; or (3) one or more legitimate, *bona fide* factors, such as training, education, experience, or quantity or quality of production, provided that:

- the factors are not based on and do not perpetuate a compensation differential based on sex or any other characteristic of a protected class;
- the factors are applied reasonably;
- one or more of the factors account for the entire compensation differential; and
- the factors are related to the job and position in question, and based on a legitimate business necessity, such that there are no alternative business practices that would serve the same business purpose absent the compensation differential.

The new law would require that “[c]omparisons of rate differentials . . . be based on wage rates across all of an employer’s operations and facilities.” Moreover, an employer that is paying differing rates of compensation in violation of the law may not reduce the rate of compensation for any employee in order to achieve compliance with the new law. In other words, employers cannot decrease others’ salaries to effect compliance with the law.

While the bill is directed at closing the gender pay gap, it covers all protected characteristics including, but not limited to, race, ethnicity, disability, age, gender and sexual orientation.

Under the current LAD, an employee alleging discriminatory pay practices must demonstrate that she is paid less for “similar” or “substantially equal” work. A plaintiff bringing a claim under the “similar” category retains the burden of proof for the entirety of the lawsuit. For example, if a female employee establishes that her compensation rate is less than a male employee performing “similar” work, the employer need only articulate a legitimate, nondiscriminatory reason for the differential, at which point the employee must then establish that the employer’s explanation is a pretext for discrimination and that the actual differential is, in fact, based on gender.

Alternatively (and also under the current LAD), a female employee asserting a claim under the “substantially equal” category has the initial burden of demonstrating that her job is identical to that of a more highly compensated male counterpart. If she is able to satisfy this burden, the burden of proof shifts to the employer which must then establish that the differential was caused by (i) a seniority system, (ii) a merit system, (iii) a system that compensates employees by quantity or quality of production, or (iv) another factor other than gender.

Under the new bill, however, the burden for complaining employees is diminished by combining the “similar” and “substantially equal” categories into the above-mentioned single, less exacting, “substantially similar” category. Once this lower threshold is satisfied, the burden of proof will shift to the employer. This modification will render it more difficult for employers to refute pay inequity claims prior to discovery in litigation. In addition to shouldering the burden of proof following this lesser hurdle for a complaining employee, the employer must satisfy additional burdens of proof, including that the wage differential is based upon reasonably applied factors (as listed above) and is a business necessity. As such, geographic differences in cost of living may not be a viable defense for employers, given the necessity of comparing wage rates across an employer’s entire operation.

Employers found to have violated the new law may be liable for up to triple the amount of actual damages per violation, calculated for as much as six years prior to the claim being asserted. The law also expands the LAD’s current applicable statute of limitations by resetting the limitations period (*i.e.*, viewing such violation independently) for each unequal paycheck issued by the employer. Finally, the amendments expand prohibitions on retaliating against employees for engaging in protected activity, *e.g.*, discussing or disclosing information regarding compensation or compensation differentials to other employees or former employees, to an employee’s counsel, or to government officials. And under the new law, a court would be required to award treble damages to a complaining employee upon a jury finding that the employer violated these anti-retaliation provisions. For charges of discrimination brought before the New Jersey Division of Civil Rights, the director would also be permitted to award treble damages upon such a finding.

The law is set to take effect on July 1, 2018, so it is imperative for NJ employers to evaluate their employment and pay policies and practices and potentially update them before the law takes effect.

If you require any additional information concerning the Diane B. Allen Equal Pay Act, or about any other employment-related issues, please contact:

Jeffrey P. Englander  
(212) 735-8720  
[jenglander@morrisoncohen.com](mailto:jenglander@morrisoncohen.com)

Keith A. Markel  
(212) 735-8736  
[kmarkel@morrisoncohen.com](mailto:kmarkel@morrisoncohen.com)

Christopher W. Pendleton  
(212) 735-8783  
[cpendleton@morrisoncohen.com](mailto:cpendleton@morrisoncohen.com)

Basil C. Sitaras  
(212) 735-8849  
[bsitaras@morrisoncohen.com](mailto:bsitaras@morrisoncohen.com)