

Alert | Labor & Employment



April 2018

New Jersey Legislation Raises the Stakes in Unequal Pay Claims

Last week, the New Jersey Legislature passed a high profile bill proposing sweeping amendments to New Jersey’s Law Against Discrimination (LAD). The most noteworthy amendments are designed to broaden LAD’s protections against alleged discriminatory pay practices. If Governor Murphy signs the bill into law, as is almost certain, New Jersey’s equal pay law will be among the nation’s most expansive laws of its kind and will carry severe penalties for employers who run afoul of its mandates.

The bill declares it unlawful for employers to pay employees within a protected class less than those outside that class for “substantially similar work, when viewed as a composite of skill, effort and responsibility.” Employers may escape liability if they demonstrate “that the [pay] differential is made pursuant to a seniority system [or] a merit system,” or if they satisfy a list of requirements demonstrating that the pay differential is based on a “bona fide factor[] other than the characteristics of members of the protected class, such as training, education or experience, or the quantity of production. . . .”

Until regulations are promulgated and case law is developed, it remains unclear how New Jersey courts will interpret the bill’s ambiguous “substantially similar work” standard, in particular whether it will be deemed a lower threshold than the Federal Equal Pay Act’s (EPA) “equal work” standard. In the meantime, employers may look to federal regulations and case law interpreting the EPA for guidance. The EPA similarly prohibits pay discrimination on the basis of sex for wages paid for “equal work on jobs the performance of which requires equal skill, effort and responsibility and which are performed under similar working conditions” 29 U.S.C. § 206. Federal regulations provide that “[i]t should be kept in mind that “equal” does not mean “identical.” Insubstantial or minor differences in the degree or amount

of skill, or effort, or responsibility required for the performance of jobs will not render the equal pay standard inapplicable. On the other hand, substantial differences, such as those customarily associated with differences in wage levels when the jobs are performed by persons of one sex only, will ordinarily demonstrate an inequality as between the jobs justifying differences in pay.” 29 C.F.R. § 1620.14.

Where the New Jersey bill differs from its federal counterpart is in the scope of its application and its damages provisions. While the EPA only applies to sex-based discrimination, New Jersey’s bill applies to all protected classes under LAD (for example, gender, race, national origin, age, etc.).

The bill additionally carries harsher penalties than the EPA. LAD generally allows for compensatory damages, punitive damages, attorney’s fees, and costs. The proposed bill, however, extends the amount of back pay a plaintiff can recover for unequal pay violations to six years, as compared to the EPA’s two-year (three-year if discriminatory conduct is willful) back pay period. The New Jersey bill additionally allows for trebling of “monetary damages,” although it is unclear from the face of the bill how and to which specific damages the trebling will apply.

There is more. New Jersey’s bill contains an employee-friendly statute of limitations that effectively restarts the period governing these claims each time the employee receives an alleged unequal paycheck, benefit, or other form of compensation. Thus, for every receipt of alleged unequal compensation, an employee’s six-year back pay period is reset.

And if you thought that was not enough, also of note are proposed amendments (i) making it unlawful for employers “to require employees or prospective employees to consent to a shortened statute of limitations or waive any of the protections provided by [LAD],” and (ii) making it unlawful to require, as a condition of employment, any employee or prospective employee to agree not to discuss “job titles, occupational categories, rates of compensation, gender, race, ethnicity, military status, or national origin of employees or former employees.” What this means in practice will likely—and regrettably—be fleshed out in litigation.

Employer Takeaway:

This bill serves as a stark reminder of LAD’s growing complexity and reach. Although it is unclear how courts will interpret and apply the bill’s mandates, it is all but certain that, if (when) it is signed into law, the significant increase in potential damages will encourage the plaintiffs’ bar to more frequently pursue pay discrimination claims, particularly in our current toxic political climate.

Employers should carefully examine their policies, handbooks, and compensation practices and take steps to comply with the ever-increasing trend of federal, state, and local laws governing employee compensation. Employers, particularly those in so-called “white-collar” professional services industries where the bases for such compensation decisions are more amorphous, should consult with counsel to scrutinize their discretionary compensation practices to determine whether they can withstand the likely onslaught of new claims.

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