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But Wait, There's More! Equal Pay Act Contains Other Important Provisions

The act also includes broad anti-retaliation protections, a six-year statute of limitations, and exposure to treble damages.

By **Andrew M. Moskowitz** | May 24, 2018

The Diane B. Allen Equal Pay Act, which becomes effective July 1, 2018, does not simply address the issue of equal pay. Although the equal pay component is significant, the act also contains several other important provisions, including an expansive anti-retaliation section, enhanced damages, a longer statute of limitations, and a prohibition against the shortening of the Law Against Discrimination's two-year statute of limitations. In addition, the act imposes extensive reporting requirements for employers that contract with public bodies.



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Equal Pay Provisions

The Equal Pay Act (available at http://www.njleg.state.nj.us/2018/Bills/S0500/104_R2.pdf) provides that, except in circumstances where a “seniority system” or “a merit system” is utilized, an employer may not compensate employees who are members of a protected category and who do “substantially similar work” at a rate less than that paid to employees outside the protected category. In comparing wage rates, one must look not only at a specific geographic area or region, but at the rates in all of an employer’s operations or facilities. Although the act has been touted as addressing discriminatory pay practices due to gender, it also bars discrimination based on, inter alia, age, race, national origin, marital status, sexual orientation, disability or service in the armed forces.

To justify different rates of compensation, an employer must demonstrate that:

- (1) The differential is based on one or more legitimate, bona fide factors such as training, education or experience, or the quantity or quality of production;
- (2) These factors are not based on, and do not perpetuate a compensation differential based on a protected characteristic;
- (3) Each of the factors is applied reasonably;
- (4) One or more of the factors account for the entire wage differential; and
- (5) The factors are job-related and based on a legitimate business necessity.

Where an employee demonstrates that an alternative business practice would serve the same business purpose and would not produce the wage differential, such a showing would defeat the “legitimate business necessity” defense.

Anti-retaliation Provisions

The Equal Pay Act extends and broadens the anti-retaliation provisions of the New Jersey Law Against Discrimination (LAD). In addition to protecting individuals who seek legal advice, the act also codifies the right to share information regarding other employees' job title, occupational category and rate of compensation with counsel, current or former employees or a government agency.

In addition, an employer cannot require, as a condition of employment, an employee or prospective employee to sign a waiver or to otherwise agree not to make such disclosures. For example, an employee handbook provision that contains a blanket prohibition against the disclosure of other employees' work history, salary and benefits would appear to be unlawful. Similarly, prohibiting employees from disclosing payroll data and practices would violate the act.

Treble Damages

Under the LAD, a plaintiff may be awarded compensatory damages, an attorney fee award and, in some cases, punitive damages. N.J.S.A. §§10:5-3; 10:5-27.1; N.J. Model Jury Charge 8.61. The Equal Pay Act provides an additional remedy for an aggrieved plaintiff. Specifically, where a jury determines that an employer has violated the equal pay or retaliation provisions of the act, the plaintiff is entitled to recover an amount equal to three times his or her monetary damages.

Longer Statute of Limitations and Prohibition Against Agreeing to Shorter Period

The Equal Pay Act permits an aggrieved party to obtain back pay for a period extending for six years where the alleged violation “has been continuous, if the violation continues to occur within the statute of limitations.” Under the act, an unlawful employment practice occurs on each occasion that an individual is affected by a discriminatory compensation decision.

The act further provides that its provisions do *not* prohibit the application of the doctrine of “continuing violation” or the “discovery rule.” The continuing violation doctrine permits a plaintiff to aggregate certain actions “which together show a pattern of discrimination ... [in which] the last act is said to sweep in otherwise untimely prior non-discrete acts.” *Roa v. Roa*, 200 N.J. 555, 566 (2010). In turn, “[t]he discovery rule prevents the statute of limitations from running when injured parties reasonably are unaware that they have been injured or, although aware of an injury, do not know that the injury is attributable to the fault of another.” *Henry v. New Jersey Dept. of Human Services*, 204 N.J. 320, 336 (2010) (quoting *Baird v. Am. Med. Optics*, 155 N.J. 54, 66 (1998)). Application of either doctrine could potentially extend the Equal Pay Act’s statute of limitations beyond six years.

The act also addresses the possibility that an employer may seek to require employees to consent to a shortened statute of limitations. Although the LAD does not contain a statute of limitations, the New Jersey Supreme Court has determined that it is two years. *See Montells v. Haynes*, 133 N.J. 282 (1993). The court has held that an employer’s attempt to shorten this limitations period was unenforceable. *See Rodriguez v. Raymours Furniture Co.*, 225 N.J. 343 (2016).

The Equal Pay Act essentially codifies the *Rodriguez* holding. Accordingly, it provides that an employer may not require employees or prospective employees to consent to a shortened statute of limitations or to waive any of the protections provided by the Law Against Discrimination.

Reporting Requirements for Employers who Contract with Public Bodies

Finally, the Equal Pay Act imposes extensive requirements for employers that contract “with a public body to provide qualifying services” The act directs the Commissioner of Labor and Workforce Development to promulgate regulations requiring such employers to provide the total compensation and hours worked by employees and to categorize this information by gender, race, job title, ethnicity, and occupational and job category. For the duration of the contract, the employer must provide the commissioner with an update to the report each time there is a significant change in any of this information “or other significant change in employment status, including, but not limited to, medical leave of 12 weeks or more, hiring, termination for any reason, a change in part-time or full-time status, or a change in ‘employee’ or ‘contractor’ status.”

Conclusion

The New Jersey legislature has provided employees who have been subject to a discriminatory compensation practice with a powerful new weapon. Unlike other discrimination statutes such as the LAD, which place the burden of proof on the employee, the Equal Pay Act requires the employer to justify different rates of compensation. Employers should review their existing pay policies and practices to ensure that similarly situated employees receive comparable compensation. In addition, employers must ensure that their handbooks and other agreements do not prohibit the disclosure of compensation information.

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