

Management Alert



New Governor, New Result: New Jersey Legislature Passes Pay Equity Bill

By William P. Perkins, Camille Olson, Annette Tyman, Christine Hendrickson, Howard M. Wexler, Lisa

Savadjian, and Meredith-Anne Berger

Seyfarth Synopsis: On March 26, 2018, the New Jersey Legislature passed Senate Bill 104, entitled the “Diane B. Allen Equal Pay Act,” an act modifying the Law Against Discrimination to promote equal pay for all protected classes under the LAD rather than being limited to gender. Governor Phil Murphy is widely expected to sign the measure into law, which is set to become effective July 1, 2018.

New Jersey passed an all-encompassing new pay equity law. The bill, [S 104](#), was first introduced in Committee on January 9, 2018. Because Governor Murphy recently issued an Executive Order requiring equal pay in state agencies, he is expected to continue the momentum began in the Legislature and sign the bill into law.

Protected Characteristics Expanded Beyond Gender and Race/Ethnicity

The law prohibits pay disparities based upon any protected characteristic protected by the New Jersey Law Against Discrimination (“LAD”), and *is not limited to gender*. Additional protected characteristics under the LAD include race, creed, color, national origin, nationality, ancestry, age, marital status, civil union status, domestic partnership status, affectional or sexual orientation, genetic information, pregnancy or breastfeeding, sex, gender identity or expression, and disability. However, the LAD broadly defines protected characteristics and they are not limited to the list above. This change separates the New Jersey law from federal law and laws in other jurisdictions, like [New York](#) or [California](#), which limit coverage to sex or sex and race. The [Oregon](#) law prohibits pay discrimination based on gender, race, national origin or color and also on religion, sexual orientation, marital status, veteran status, disability or age.

The law prohibits employers from paying employees who are members of a protected class at a lower rate of compensation, including benefits, than employees who are not members of the protected class “for substantially similar work, when viewed as a composite of skill, effort and responsibility.” The differential may be justified by:

- A seniority system,
- A merit system, or
- A bona fide factor other than a protected characteristic, such as education, experience, training, or the quantity or quality of production so long as it is job-related, and based on a legitimate business necessity, and if the employer demonstrates that the factor is not based on, and does not perpetuate, a differential in compensation based on

sex or any other characteristic of members of a protected class. The law leaves undefined factors which tend to “perpetuate” pay equity violations. In addition, the bona fide factor must be applied reasonably, and explain the entire pay differential. The factor will not apply if it is demonstrated that there are alternative business practices that would serve the same business purpose without producing the wage differential. Employers may not resolve unexplained pay disparities by lowering compensation of a more highly paid worker. Employers can expect that reliance on a bona fide factor other than a protected characteristic, as described in the law, will present new hurdles and defense challenges in litigation.

Other Key Changes

The law also had other key changes to New Jersey’s pay equity law:

- The LAD is broader than the Federal Equal Pay Act in numerous ways. For example, it allows for comparisons of pay across all of the employer’s operations or facilities (it is unclear whether this is limited to locations within the State). However, the law does not expressly indicate that geographic wage and cost of living data rise to the level of a legitimate, bona fide factor or amount to a legitimate business necessity.
- The retaliation provision of the LAD was also expanded to protect employees who seek legal advice, share relevant information with legal counsel, or information with a government entity. This provision is not limited to information shared regarding pay equity.
- The law also specifically prohibits retaliation against any employee for discussing, or disclosing to any other employee or former employee, an attorney seeking legal advice, or any government agency information about any current or former employee regarding job titles, occupational categories, rates of compensation, including benefits, or the protected characteristic of a current or former employee, for any reason, and not solely limited to pursuing legal action or an investigation regarding equal pay.
- Employers are prohibited from requiring employees to waive or agree to not make such disclosures as a condition of employment, as may be contained in some confidentiality provisions of employment agreements or offer letters.
- Companies who are state contractors have additional reporting requirements, including compensation and hours worked categorized by gender, race, ethnicity, and job category, for each establishment of the employer. The New Jersey Commission on Labor and Workforce Development will provide a form for employers to provide this information.

Statute of Limitations

The law has extended the statute of limitations for pay equity violations to six years. The proposed amendment also provides that liability will continue to accrue and back pay is available for the entire period of time in which the violation has been continuous, if within the now six-year statute of limitations. Further, the law expressly indicates that it does not prohibit the application of the doctrine of “continuing violation” or the “discovery rule” to any appropriate claim.

Damages

Further, a jury or the New Jersey Civil Rights Commission must award treble damages where an employer violated the equal pay or expanded non-retaliation provisions of this bill, in addition to back pay and liquidated and common law tort damages which the LAD already provided. As with other LAD claims, there is no requirement to file an administrative charge prior to filing a lawsuit.

An unlawful employment practice occurs *each occasion* that an individual is affected by a discriminatory compensation decision or other practice, which includes, but is not limited to, each occasion that wages, benefits, or other compensation are paid as a result of the decision or practice, thereby increasing damages significantly. The law does not expressly provide for retroactive application prior to the effective date.

The bill further prohibits requiring employees or applicants to consent to a shortened statute of limitations or to waive any rights under the LAD, which is not limited to pay equity.

Recommendations to Employers

Employers should consider engaging in attorney-client privileged equal pay studies to ensure that compensation differentials can be explained based on legitimate, non-discriminatory reasons. Such studies should also be considered at the time that bonuses, merit increases, and other benefits are being finalized to ensure that potentially violative salary differentials are not unwittingly triggered.

Salary History Ban Under Consideration Again in New Jersey

In another notable development, the New Jersey Senate also passed [S559](#), which proposes amending the LAD to prohibit inquiries into an applicant's prior wages or salary. The New Jersey General Assembly has not yet voted on S559. Specifically, S559 would prohibit any employer from relying on an applicant's salary in determining a salary amount in any stage of the hiring process, including finalizing the employment contract, as well as prevent inquiries about the salary history of the job applicant, including compensation and benefits.

This is the second attempt to pass pay equity legislation in New Jersey. As we previously reported [here](#), former New Jersey Governor Chris Christie vetoed Senate Bill 992, a similar pay equity bill. At the time, the New Jersey Senate was unable to muster up the two-thirds majority's votes to override the veto.

These developments follow the trend of the pay equity movement taking place in cities and states nationwide. In light of New Jersey's focus on pay equity, employers should be mindful of these new restrictions and evaluate how the new legislation may impact their practices.

Seyfarth Shaw is tracking this emerging area of law closely and will report on any developments. For information on how this law might affect your company, contact any member of Seyfarth's Pay Equity Group, or [William P. Perkins](#) at wperkins@seyfarth.com, [Camille Olson](#) at colson@seyfarth.com, [Annette Tyman](#) at atyman@seyfarth.com, [Christine Hendrickson](#) at chendrickson@seyfarth.com, [Howard M. Wexler](#) at hwexler@seyfarth.com, [Lisa Savadjian](#) at lsavadjian@seyfarth.com, or [Meredith-Anne Berger](#) at mberger@seyfarth.com.

We hope you will join us on Equal Pay Day, April 10, 2018, for a joint presentation of Seyfarth's Pay Equity and Complex Discrimination Litigation Groups, as we launch our first Trends and Developments in Pay Equity Litigation report. You can register for the Pay Equity Webinar [here](#).

www.seyfarth.com

Attorney Advertising. This Management Alert is a periodical publication of Seyfarth Shaw LLP and should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have. Any tax information or written tax advice contained herein (including any attachments) is not intended to be and cannot be used by any taxpayer for the purpose of avoiding tax penalties that may be imposed on the taxpayer. (The foregoing legend has been affixed pursuant to U.S. Treasury Regulations governing tax practice.)

Seyfarth Shaw LLP Management Alert | April 2, 2018

©2018 Seyfarth Shaw LLP. All rights reserved. "Seyfarth Shaw" refers to Seyfarth Shaw LLP (an Illinois limited liability partnership). Prior results do not guarantee a similar outcome.