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NEW EQUAL PAY LAW ON THE HORIZON IN THE GARDEN STATE

By Asad Rizvi

A new pay equity bill passed by the New Jersey State Legislature would significantly increase the potential liability of employers doing business in New Jersey by amending the Law Against Discrimination (LAD) to make it unlawful to have any employment practice that discriminates on the basis of sex in “compensation or in the financial terms or conditions of employment” for the performance of “substantially similar work, when viewed as a composite of skill, effort and responsibility.”

If signed by Governor Christie, the law would go beyond the existing protections afforded to employees by the federal Lilly Ledbetter Fair Pay Act of 2009 (LLFPA) and New Jersey law.

Perhaps the most significant change in the New Jersey pay equity bill is the adoption of what is, in effect, an unlimited statute of limitations. Under the proposed law, liability would be triggered “for the entire period of time in which the violation with regard to discrimination in compensation or in the financial terms or conditions of employment has been continuous, if the violation continues to occur within the statute of limitations.”

Under existing state and federal law, employees may go back only two years. As such, the new law would go beyond not only the LLFPA but also the New Jersey Supreme Court’s own precedent in *Alexander v. Seton Hall University*, 204 N.J.

219 (2010), where the court held that plaintiffs’ discriminatory wage claims under LAD were timely at least with regard to the wages that were paid within the two-year statute of limitations period even though the original unlawful pay decision was made before that period. The *Alexander* court further held that the “continuing violation” doctrine could not revive any such claims if no discriminatory wages were actually received within that two-year limitations period. Under the proposed legislation, employees would be able to pursue claims for backpay going back decades if the “discrimination in compensation or in the financial terms or conditions of employment” was continuous.

Secondly, the state Legislature’s bill would turn on its head the traditional burden of proof that exists under most employment laws at both the state and federal levels. Under the new law, there would be a presumption of illegal discrimination where any employee of one sex is paid less in wages/benefits than a similarly situated employee of another sex. To justify unequal compensation of any two similarly situated employees of the opposite sex, employers would need to demonstrate the existence of a “seniority” or “merit” system.

In the absence of such an arrangement, employers would be required to demonstrate that:

- The differential is based on one or more

legitimate, bona fide factors other than sex, such as training, education or experience, or the quantity or quality of production;

- That these bona fide factors do not perpetuate a sex-based differential in compensation;
- That each of the factors is applied reasonably;
- That one or more of the factors account for the entire wage differential; **and**
- That the factors are job-related with respect to the position in question and based on legitimate business necessity.

Importantly, in setting forth this affirmative defense, employers would be obligated to compare compensation across **all** operations or facilities, not solely the employee's work location. Employers will be required to engage in this particularly onerous exercise to justify each and every purported discriminatory pay decision. Unfortunately, the new law would prohibit employers from reducing a particular employee's wages in order to comply with the law.

Another significant difference between the proposed law and existing state and federal laws covering pay equity is the expansion of claims beyond wage discrimination. As referenced above, the bill would apply not only to compensation but also to "financial terms and conditions of employment." The expansive nature of this language should give employers pause, as its plain language and likely future judicial interpretation could extend liability to situations far beyond discriminatory wages.

Apart from these key features, there are significant, additional provisions in the bill that

should be of concern to New Jersey employers. For example, state contractors will be mandated to report to the Commissioner of Labor and Workforce Development information regarding the gender, race, job title, occupational category, and total compensation of every one of its employees employed in New Jersey working on a particular state contract. In addition, employers will no longer be able to compel employees to stipulate to shorter limitation periods than those provided by statute under LAD. Finally, the law declares that employers shall be prohibited from retaliating against employees for seeking any legal advice under LAD or sharing relevant information with counsel and/or a governmental entity.

Given the magnitude of the changes proposed, Garden State employers should take steps now to be ready if the legislation is signed into law. Employers seeking to engage in preemptive compliance should:

- Ensure that compensation is tied to legislatively prescribed "bona fide" factors, such as training, education or experience or the quantity or quality of production;
- Audit employee job titles and job descriptions in concert with the applicable compensation arrangements; and
- Document and review pay differentials across "substantially similar" jobs and evaluate whether such differences are justified under the bonafide factors.

For more information about this alert or if you have any questions or concerns, please contact [Asad Rizvi](mailto:Asad.Rizvi@foxrothschild.com) at 973.994.7817 or arizvi@foxrothschild.com or any member of Fox Rothschild's [Labor & Employment Department](#).



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