

Press Release
March 9, 2021

2021 Gender Equity Review and Future of the ERA

*“If I could choose an amendment to add to the Constitution,
it would be the Equal Rights Amendment.”*

Ruth Bader Ginsburg

New Jersey native and lawyer Alice Paul drafted the Equal Rights Amendment (ERA) almost 100 years ago, in 1923, effectively guaranteeing legal gender equality for women and men as the Constitution had been framed and adopted under the influence of the English Common Law which did not regard women as legal persons, but rather as the property of their fathers or husbands. The ERA was officially passed by Congress in 1972, but the constitutional amendment required ratification by three-fourths of the states (38 states) within 7 years of passage (by 1979, which was then extended to 1982). While the ERA gained traction during that time and 35 states ultimately ratified it, the proposed amendment expired without the requisite number of states. Nevada ratified the ERA in 2017, followed by Illinois in 2018, and Virginia in 2020, but a federal judge recently ruled that the recent state votes to ratify the ERA were too late to amend the Constitution. On March 1, 2021, in honor of Women’s History Month, a Joint Resolution (H.J. Res. 28) was introduced in both the House and the Senate to restart the amendment ratification process with the respect to the ERA. It remains to be seen whether 2021 will finally be the year the ERA becomes law and women can finally attain true equality under the Constitution.

Women’s History Month is a time to recognize and educate ourselves on the many accomplishments of inspiring women. However, it is also a time to reflect on the adversity women and the advancement of civil rights for women have faced throughout our history.

Despite increased legal protections over the past century, women continue to suffer discrimination and harassment at work and are still not paid equal wages, making only 81 cents for every dollar earned by a man. According to the US Bureau of Labor Statistics,¹ women who were full-time wage and salary workers in 2019 had median usual weekly earnings that were 82 percent of the earnings of male full-time wage and salary workers.

Notably, earning differences between women and men were largest among Asians and among Whites. Asian women earned 77 percent of the earnings that Asian men received in 2019, and White women earned 81 percent of the earnings that White men received. In comparison, Black women’s median earnings were 92 percent of Black men’s earnings, and Hispanic women’s earnings were 86 percent of Hispanic men’s. (However, Black and Hispanic men do not generally earn as much as Asian and White men.)

¹ <https://www.bls.gov/opub/reports/womens-earnings/2019/home.htm>

In the meantime, over the past century, New Jersey has been at the forefront of protecting and furthering women’s rights, especially in the workplace. However, more must be done to ensure full equality.

Pre-#MeToo Legislation and Cases

- ***New Jersey Law Against Discrimination—Sex, Marital Status, and Pregnancy***

Since its inception in 1945, the New Jersey Law Against Discrimination (NJ LAD) is the standard for workplace protections for race, national origin, creed, national origin, or ancestry, and other “protected categories.” However, the NJ LAD did not specifically prohibit discrimination on the basis of sex and marital status until 1970.

The next 30 years brought several other positive amendments to the NJ LAD, preventing discrimination on the basis of affectional or sexual orientation (1991), familial status (1992), disability (2003), domestic partnership status (2003), civil union status (2006), and gender identity or expression (2007). Most recently, after a long battle to enact legislation protecting pregnant workers, the Pregnant Workers Fairness Act (PWFA) was signed into law on January 21, 2014 as an amendment to the NJ LAD, providing not only protection from discrimination, harassment, and retaliation, but also the right to reasonable, pregnancy-related accommodations, upon request, absent a showing of undue hardship.² *N.J.S.A. 10:5-12(s)*.

- ***New Jersey Constitution and New Jersey Civil Rights Act***

In 1947, New Jersey enacted its present State Constitution, in which it changed all “men” to all “persons.” The effect of changing this word led courts to acknowledge that women enjoy constitutional protections in employment and as to property that are equal to those of men. In 2004, the New Jersey Civil Rights Act (NJ CRA) was enacted, providing a private right of action to protect employees’ New Jersey and United States constitutional rights.

- ***New Jersey Family Leave Act***

In 1989, New Jersey enacted the New Jersey Family Leave Act (NJ FLA) to protect employees needing time off to care for a newborn or adopted child or to care for a family member with a serious health condition. The NJ FLA was adopted four years before the federal Family Medical Leave Act (FMLA). Under the NJ FLA, employees of a covered employer who have worked the requisite number of hours are entitled to take up to 12 weeks of unpaid leave during a 24-month period for the care of a newborn. These requirements were generally applicable to employers with 50 or more employees, but the NJ FLA was amended in 2019, reducing the application to employers with 30 or more employees.

² In *Delanoy v. Township of Ocean*, (A-68-19) (084022) (N.J., March 9, 2021), the New Jersey Supreme Court rendered its first decision regarding the PWFA and held that the PWFA explicitly provides an employee with three distinct causes of action: (1) a claim for unequal or unfavorable treatment based on pregnancy; (2) a claim for failure to provide a reasonable accommodation; and (3) a claim that the pregnant employee was unlawfully penalized based upon her pregnancy or accommodation request.

- ***Sexual Harassment Protections***

In 1992, in *Lehmann v. Toys 'R' Us*, the New Jersey Supreme Court decided the standards of liability for sexual harassment cases in New Jersey. To be actionable under *Lehmann*, sexual harassment need not be sexual in nature; rather, it need only be directed toward a person because of the person's sex. The Court found that liability could be imposed upon employers for supervisory sexual harassment. In short, *Lehmann* recognized that employers will be liable for supervisory harassment "in most cases" where supervisors abuse the authority delegated to them by employers. However, the longstanding protections under *Lehmann* and its progeny have been limited and are in need of statutory clarity.³

- ***New Jersey Temporary Disability Benefits and New Jersey Family Leave Insurance***

In 1948, New Jersey became one of a limited number of states to provide temporary disability benefits to employees. Temporary disability benefits may be utilized for many disabilities, including pregnancy, so women are not out of work without financial support.

In 2008, New Jersey again became a trailblazer as one of the few states providing a financial benefit to working mothers to enable them to bond with a newborn or newly adopted child, or to care for a seriously ill family member under New Jersey family temporary disability benefits, also known as New Jersey Family Leave Insurance.

- ***New Jersey SAFE Act***

Another area where strides have been made for women in the workplace involves protections for victims of domestic violence. Enacted in 2013, the New Jersey Security and Financial Empowerment Act (NJ SAFE Act) provides domestic violence victims and their caregivers with protected leave from work and prohibits discrimination, harassment, and retaliation against covered employees who take or request such leave. Affected employees may be entitled to up to 20 days of unpaid leave to obtain medical attention and psychological counseling, join a victim services group, and seek legal help and/or relocation services during the 12-month period following a documented offense. The caregiver benefit allows for the same amount of leave to someone caring for a parent, spouse, child, or civil union or domestic partner who was the victim of domestic violence. If a need for the leave is foreseeable, the employee must provide the employer with written notice as far in advance as is reasonable and practical under the circumstances. The law also prohibits employers from asking questions that invade the employee's privacy and protect the employee from discrimination based on a refusal to release such information.

³ In early 2015, the New Jersey Supreme Court eliminated some significant protections afforded under *Lehmann* in *Aguas v. State of New Jersey*. In *Aguas*, the Court endorsed what is commonly referred to as the *Faragher/Ellerth* defense, which enables employers to avoid liability for supervisory harassment by maintaining effective anti-harassment policies and remedial measures that were not followed by the person subjected to harassment.

Post-#MeToo Legislation and Proposed Legislation

Beginning in October 2017, the #MeToo movement shined a spotlight on the issue of workplace sexual harassment with a number of accusations against high profile players in almost every industry (i.e., news, entertainment, food, sports, politics) leading to terminations, forced resignations, and in some cases, criminal prosecutions. In the wake of the #MeToo movement, New Jersey has led the way in pressing for and passing key legislation aimed at enhancing discrimination and harassment protections, fostering pay equity, increasing transparency when it comes to harassment, discrimination, and retaliation claims, and protecting women in the workplace.

- ***Diane B. Allen Equal Pay Act***

The Diane B. Allen Equal Pay Act (Diane B. Allen EPA), enacted on April 24, 2018 and effective on July 1, 2018, focuses on rooting out pay discrimination and helping women and minorities obtain pay parity throughout the state. *N.J.S.A. 10:5-12(t)*.

Broad in scope, the Diane B. Allen EPA applies to virtually all public and private employers in New Jersey regardless of size or industry. Additionally, its protections extend to all protected classes under the NJ LAD (i.e., sex, race, creed, color, nation origin, nationality, ancestry, age marital status, sexual orientation, gender identity, disability, etc.) and is not limited to sex-based equal pay claims.

The Diane B. Allen EPA prohibits an employer from paying employees who are members of a protected class at a rate of compensation, including benefits, that is less than the rate paid to employees who are not members of the protected class for “substantially similar work when viewed as a composite of skill, effort, and responsibility.” Accordingly, a woman performing substantially similar work as her male counterpart can no longer receive a lesser salary unless the employer can show a bona fide justification for it.

The Diane B. Allen EPA also contains extensive anti-retaliation protections and prohibits retaliation against employees for disclosures to, or discussions with, current or former employees, lawyers, or government agencies regardless of whether such discussions were for the purpose of pursuing legal action or in connection with an internal complaint/investigation. Similarly, employers cannot require waivers from employees (or prospective employees as a condition of employment) that give up the right to engage in the above-referenced disclosures or requests about compensation. *N.J.S.A. 10:5-12(r)*.

The law also contains expanded remedies and enforcement provisions, including a six-year statute of limitations and instructions that a separate statutory violation occurs each time an employee receives a paycheck. Liability shall accrue for backpay for the entire time period (up to six years) in which the discriminatory pay violation has been continuous if the violation occurred within the NJ LAD’s two-year statute of limitations. *N.J.S.A. 10:5-12(a)*. Additionally, the Diane B. Allen EPA enables employees to recover treble damages for violations.

[Read more here.](#)

- ***NJ LAD Amendment Limiting Nondisclosure Agreements***

In an effort to bring greater transparency to discrimination and harassment claims, a March 18, 2019 amendment (“March 18, 2019 Amendment”) to the NJ LAD provides that non-disclosure provisions in employment contracts or settlement agreements that have the purpose or effect of concealing the details relating to a claim of discrimination, retaliation, or harassment violate public policy and will be unenforceable against a current or former employee who is a party to the agreement. However, if the employee “publicly reveals sufficient details of the claim so that the employer is reasonably identifiable,” the non-disclosure provision will be deemed unenforceable against the employer as well.

The March 18, 2019 Amendment prohibits any provision in an employment contract that waives any substantive or procedural right or remedy relating to a claim of discrimination, retaliation, or harassment, deeming them unenforceable and against public policy. The statute also expressly prohibits any provision that prospectively waives rights or remedies under the NJ LAD or any other statute or case law. This prohibition impacts arbitration agreements, jury waivers, and class action waivers, but not collective bargaining agreements. Since there is a trend toward permitting arbitration in New Jersey, it remains to be seen whether the courts will uphold the prohibition against mandatory arbitration agreements with respect to employment discrimination, harassment, and retaliation claims.

[Read more here.](#)

- ***Salary History Ban***

On July 25, 2019, New Jersey passed a law prohibiting employers from inquiring about a prospective worker’s wage and salary history. Under the law, which took effect January 1, 2020, New Jersey employers are no longer permitted to use a prospective employee’s salary history as part of the consideration to hire. This was another important step in promoting pay equality in New Jersey.

The law prohibits employers from assessing new job applicants based on their prior wages, including salaries or benefits, and requiring that an applicant’s salary history satisfy any minimum or maximum criteria. While organizations are not permitted to require applicants to provide this information, the law does not forbid individuals from voluntarily providing salary history to a prospective employer or employment agency. If the employer receives this information, without prompting, it may be used to determine compensation for a newly hired employee. Furthermore, an employer may acquire publicly available salary history information provided it does not retain or consider that information when determining the applicant’s salary, benefits, or other compensation unless the applicant voluntarily provided such information without prompting or coercion by the prospective employer. However, employers may not consider an applicant’s refusal to volunteer or provide this information in any employment decision.

The ban against inquiring into an employee’s previous salary history is designed to eliminate systemic bias against protected classes, including women, that result in them receiving lower wages. It is an important step toward eliminating the “glass ceiling” so many women face.

[Read more here.](#)

▪ ***Pending NJ LAD Amendment to Expand Anti-Harassment Protections***

The #MeToo movement also encouraged states such as New Jersey to revisit their anti-discrimination and anti-harassment statutes in an effort to strengthen employee protections. A comprehensive report was released in February 2020 by the New Jersey Division on Civil Rights (DCR), Office of the Attorney General, entitled “Preventing and Eliminating Sexual Harassment in New Jersey—Findings and Recommendations from Three Public Hearings” (DCR Report). In response, the New Jersey Legislature has taken steps to expand protections in the NJ LAD regarding harassment policies, training, reporting, investigations, and clarifying and codifying the common law with respect to harassment claims and affirmative defenses. (See [NJ Bill A4637](#) – introduced to the New Jersey General Assembly on September 14, 2020; [NJ Bill S3352](#) - introduced to the New Jersey Senate on January 11, 2021). These amendments have not yet passed.

Key components of the proposed NJ LAD Amendment are:

- Requiring both interactive and participatory training regarding discrimination, harassment, and retaliation against all protected categories for all employees of both large and small employers on a regular basis;
- Requiring all employers to disseminate and implement written harassment and anti-discrimination policies, including their investigation procedures;
- Imposing obligations on employers to make annual reports to the DCR on complaints received regarding unlawful workplace discrimination or harassment;
- Expanding employee coverage and the statute of limitations under NJ LAD;
- Codifying unlawful harassment and the standards for hostile environment claims; and
- Clarifying and limiting an employer’s use of the *Aguiar/Faragher-Ellerth* affirmative defense; by providing that compliance with policy and training requirements will not, in and of itself, protect an employer from liability.

While the NJ LAD Amendment does not specify the requirements for effective investigations into complaints, the DCR Report articulated “Best Practices” on conducting impartial, objective, and well-trained investigations regarding discrimination, harassment, and retaliation complaints. It also cautioned employers to “consistently enforce prohibitions on retaliation throughout the investigations process and maintain the confidentiality of the complainant to the fullest extent possible to prevent retaliation.”

[Read more here.](#)

Conclusion

New Jersey has made, and continues to make, significant legal strides that are changing the face of women's rights in the workplace. The #MeToo Movement played a pivotal role in propelling the state to go even further with regard to enhanced legal protections. However, there still remains room for improvement and further growth, at both the state and federal level, to ensure women receive true equality.

Practitioners are keeping a close watch to see if New Jersey will join states like California that now require employers to submit annual information on their employees' pay data by gender, race, and ethnicity to the state's Department of Fair Employment and Housing (DFEH) (similar to the Equal Employment Opportunity Commission's (EEOC) now discontinued EEO-1 Component 2 reporting requirement). Also of note is whether the Diane B. Allen EPA be amended to make clear that New Jersey employers may not rely upon prior salary when assessing pay disparities, similar to legal protections in California and Philadelphia.

In addition to passage of the ERA, vast room for improvement and further growth is also needed on the federal level to ensure women receive true equality. Various federal measures have been introduced on the national level but have not yet been enacted. This includes:

- The Bringing an End to Harassment by Enhancing Accountability and Rejecting Discrimination in the Workplace Act (BE HEARD Act) (expanding Title VII's protection to smaller workplaces as well as to independent contractors, volunteers, interns, fellows, and trainees, limiting the use of nondisclosure agreements and forced arbitration provisions, and enhancing harassment protections and remedies);
- The Paycheck Fairness Act (limiting an employer's justifications for a pay disparity, prohibiting employers from using salary history to set wages or make hiring decisions, and banning employers from prohibiting employee wages discussions);
- The Pregnant Workers Fairness Act (requiring employers to offer employees reasonable work accommodations when their abilities are limited by pregnancy, childbirth, or a related condition); and
- The Family and Medical Insurance Leave Act (the FAMILY Act) (requiring employers to provide employees with paid sick leave).

President Biden's administration also seems to be renewing an emphasis on the collection of employee pay data and the total hours worked in connection with sex, race, ethnicity, and job category and a resurrection of the EEO-1 Component 2 requirement.

During this 2021 Women's History Month, it is inspiring to look back and to see how much progress has been made, but there is still much to do for continued progress and change.

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Workplace Investigations, among others. KS Branigan Law is celebrating its 15th year as a woman-owned business.