The Growing Legacy of New Jersey's Diane B. Allen Equal Pay Act

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Nearly three years ago, New Jersey enacted the historic Diane B. Allen Equal Pay Act (EPA), amending Title 34 regarding Wage Discrimination and the New Jersey Law Against Discrimination (LAD). N.J.S.A. 34:11-56.1-56.14; N.J.S.A. 10:5-1, et seq. Some interpretative sources now exist that are helpful to aid in compliance. In the coming years, New Jersey state and federal courts will undoubtedly provide additional clarity.

Breadth and Scope of EPA

Unique in breadth and scope, the EPA applies to virtually all public and private employers in New Jersey regardless of size or industry. N.J.S.A. 10:5-5. Additionally, its protections extend to all protected classes under the LAD (i.e., sex, race, creed, color, nation origin, nationality, ancestry, age, marital status, sexual orientation, gender identity, disability, etc.), not just sex-based equal pay claims. N.J.S.A. 10:5-12(t). The 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." Id. The "substantially similar work" requirement is broader than the "equal work" standard for sex-based discrimination under the federal Equal Pay Act. 29 U.S.C.A. §206(d)(1).

To establish an EPA violation, a plaintiff must show: (1) membership in a protected class; (2) the defendant employed the plaintiff and one or more employees who are not members of that protected class in jobs requiring substantially similar work; and (3) the plaintiff was paid a lower wage than one or more employees who are not part of that protected class. The plaintiff need not show that the defendant intended to discriminate against the plaintiff based on protected class status. New Jersey Model Civil Jury Charge 2.24A.

Under N.J.S.A. 10:5-12(t), the employer has two possible defenses. An employer must either demonstrate that the pay disparity is the result of a seniority or merit system, or it must show *all five* of the following factors:

1. The pay differential is based on legitimate factors other than the employee's protected characteristic, such as training, education or experience, or the quantity or quality of production;
2. These legitimate factors do not perpetuate a pay differential based upon the employee's 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. A factor based on business necessity shall not apply if the employee can demonstrate that there are alternative business practices that would serve the same business purpose without producing the wage differential.

Other key provisions of the EPA include:

- An employer may not reduce the compensation of one employee to cure a pay disparity of another. N.J.S.A. 10:5-12(t).

- Comparisons of wage rates shall be based on wage rates in all of the employer's operations or facilities.

- A separate statutory violation occurs each time an employee receives a paycheck, and 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 LAD's two-year statute of limitations. N.J.S.A. 10:5-12(a).

- Employees are entitled to recover treble damages for both EPA pay discrimination claims *and* EPA retaliation claims. N.J.S.A. 10:5-13; N.J.S.A. 10:5-12(r) and (t). Notably, the award of treble damages is mandatory once a jury determines a violation of the EPA occurred. N.J.S.A. 10:5-13.

- Employees cannot be retaliated against for compensation or protected class discussions/ disclosures involving current or former employees, lawyers, or government agencies regardless of whether such discussions were for the purpose of pursuing legal action or related to an internal complaint/investigation. N.J.S.A. 10:5-12(r).

- 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.

Interpretation Through Model Jury Charges, DCR Guidance, and Cases

The language and intent of EPA provisions that lack definitions have been hotly debated. The adoption of the New Jersey Model Civil Jury Charge 2.24A (MJC) for EPA cases, guidance issued by the New Jersey Division on Civil Rights (DCR), and court decisions provide valuable insights. Key developments shaping application of the EPA are summarized below.

- *No Retroactive Application of the Law*

In *Perrotto v. Morgan Advanced Materials,* 2019 WL 192903 (D.N.J. Jan. 15, 2019), the district court held that the EPA's plain language and legislative history, including postponement of the initial effective date, indicated an intent to apply the EPA prospectively only, not retroactively. *Id*. at *2. Thus, the court did not permit the EPA to be applied because Perrotto had separated from employment prior to the EPA's July 1, 2018 effective date.

- *Six-Year Damages Lookback*

In a motion decided in 2020, the Law Division permitted the six-year lookback period as back pay damages from 2013 until the date the complaint was filed in 2019. *Norcia v. New Jersey City University*, Docket No. PAS-L-001972-19, Tr. of Decision (Feb. 10, 2020), pp.10-11. The court noted that "to hold otherwise would mean that even though the LAD was amended effective July 1, 2018, a plaintiff would not be able to invoke the six-year lookback period until July 1, 2024 and the Legislature did not make any such declaration when the LAD was amended." *Id.* at p.11. Additionally, the court highlighted that, since employers were already on notice of prohibitions against discriminatory wages in N.J.S.A. 10:5-12(a) of the LAD, and since that was the section amended, the EPA provision only served to extend the period for damages. *Id.*

- *MJC and DCR Guidance*

The MJC was approved in March 2019 and revised in November 2019. In March 2020, the DCR issued "Guidance on Diane B. Allen Act, March 2020" (DCR Guidance).

- *Compensation*

The DCR Guidance defines "compensation" as an employee's base wages, commissions, overtime pay, bonus pay, merit pay, stock options, and cash and non-cash benefits (including insurance, vacation time, retirement funding etc.). DCR Guidance, p.6. The MJC additionally cites "profit sharing, expense account, use of company car, gasoline allowance," and "holiday pay" as compensation. MJC, p.9.

- *Substantially Similar and Skill, Effort, and Responsibility*

The DCR Guidance and the MJC also explain how to determine whether employees have engaged in "substantially similar work when viewed as a composite of skill, effort, and responsibility." Employment positions do not need to be identical; they only need to

be substantially similar on balance. Minor differences in skill, effort, and responsibility do not preclude work from being deemed substantially similar. DCR Guidance, p.6.

Employers cannot rely solely upon job descriptions and job titles in determining substantially similar work since they are not always determinative and do not always reflect an employee's current duties. An assessment of the duties actually being performed is most relevant. *Id. at 7*.

The DCR Guidance also states (at p.6):

- *Skill* involves the "experience, ability, education, and training required to perform a set of job duties."
- *Effort* involves the "amount of physical or mental exertion required to complete a job."
- *Responsibility* involves the "job duties required," as well as the "degree of discretion and accountability required to perform a job."

Regarding skill, both sources are consistent that jobs may require "similar skill" even if one job does not require workers to use these skills as often as another job. It is important to compare the jobs, not the employees, and consider only the qualifications and skills necessary to perform the jobs. MJC, pp.5-6. As such, if an employee has a degree that is not required to perform the job, the degree should not be factored into the analysis of similar skill. DCR Guidance, p.6.

Regarding effort, assessing whether the job requires mental or physical exertion (or both), the work conditions, and the amount of exertion should be considered. DCR Guidance, p.6. Effort will include evaluating the time required for the job (i.e., long hours and late breaking deadlines) or whether the job is sedentary or requires physical activity. *Id.* Duties that result in mental or physical fatigue or emotional stress, as well as factors that alleviate fatigue and stress, should be weighed together in assessing the relative effort involved. However, similar effort does not require that the jobs use effort in exactly the same way. MJC, p.6.

Regarding responsibility, the job duties required, the degree of discretion and accountability, whether there are supervisory functions, whether high-level decisions are made (including enacting policies and procedures) are also assessed. DCR Guidance, p.6. Other factors to be considered include the level of authority delegated to the employee, to what degree the employee directs the work of others, whether the employee represents the employer in dealing with customers or suppliers, and the consequences to the employer of the employee's effective performance in the job. MJC, p.7.

- *Merit and Seniority Systems*

The DCR Guidance states that a "merit or seniority system" must be a "plan, policy, or practice that is predetermined or predefined by the employer," used by managers and others to make compensation decisions, and uniformly applied to employees in good faith without regard to membership in a protected class. DCR Guidance, p.9. A seniority system recognizes and compensates employees based on their length of service, whereas a merit system provides for pay variations based upon employee performance as measured through legitimate, job-related criteria. DCR Guidance, p.9.

- *Salary History Consideration and Effect of Discrimination*

On July 25, 2019, New Jersey passed a law (that took effect Jan. 1, 2020) prohibiting employers from inquiring into prior salary history during the hiring process. N.J.S.A. 10:5-12.12. The DCR cited this salary inquiry ban in interpreting the EPA. Both laws are directed at closing pay disparity gaps.

Under the EPA, the five-part alternative defense requires the employer to show, in part, that "legitimate factors do not perpetuate a pay differential based upon the employee's protected characteristic." The DCR Guidance indicates that factors are legitimate if they have not been historically associated with wage gaps for members of protected classes. Moreover, even if the factor has not been historically associated with wage gaps, it

cannot be used to justify a pay disparity if it is used as a pretext or has the effect of discriminating on the basis of that characteristic. DCR Guidance, p.9.

Defending a pay differential based upon prior salary history depends upon the specific factual circumstances. However, "reliance on salary history may perpetuate a differential in compensation based on membership in a protected class where there is a preexisting wage gap for members of that protected class." *Id.* at 10. Also, employers may not have records to demonstrate their reliance upon a prior salary during the hiring process, especially for longtime employees. These limitations and the current salary inquiry ban can make prior salary history a challenging argument for employers.

- *Compensation Across Operations or Facilities*

While the EPA broadly requires that employee wages must be compared to those of employees performing substantially similar work in any of the employer's operations or facilities, the DCR Guidance provides helpful instruction as to geographic regions. An employer may rely on geographical market differences to justify pay differentials if the employer can show the differential is based on the cost-of-living or regional demands for the position. *Id.* at 10.

- *Self-Evaluation/Compliance Audits*

The DCR strongly urges employers to take proactive steps to address pay disparities among employees and to ensure EPA compliance, such as a self-evaluation of pay practices and adjusting compensation based upon that self-evaluation, emphasizing that those adjustments will not be treated as an admission of liability. *Id.* at 12. Although not an affirmative defense in itself, conducting self-evaluations or audits can help to identify and correct pay disparities, thereby limiting continuing liability and damages.

Trends and High Costs of Noncompliance

A recent settlement involving the Township of Verona demonstrates the high costs of equal pay claims. In *Kiernan v. Township of Verona*, Docket No. ESX-L-000781-19, the complaint alleged that the female Township Clerk, making $73,451, was paid substantially less than other department heads, her male peers/comparators, the Township Manager (earning $143,222), and the Township CFO (earning $125,000) in violation of the EPA. In *Varela v. Township of Verona*, Docket No. ESX-L-002391-19, the female Municipal Court Administrator (earning $78,810) also alleged substantially less compensation than the same department heads, male peers/comparators, Township Manager, and the Township CFO. Verona settled the lawsuits, agreeing to pay Kiernan and Varela back pay, raises, amounts for emotional distress, and attorney fees in a combined settlement of approximately $500,000. Verona also increased the salaries of both women.

Since the passage of the EPA, employees are bringing expansive equal pay claims against private and public sectors employers. Institutions of higher education, law firms, and public entities seem to be particular targets, likely because their compensation structures are ripe for disparate pay challenges. Given the tremendous exposure and risk, it is essential for employers to be proactive, undertake comprehensive self-evaluation audits, and promptly correct any pay disparities to comply with the EPA.

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