A "Lookback" on New Jersey's Diane B. Allen Equal Pay Act and the Road Ahead

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Nearly four years ago (on April 24, 2018), New Jersey enacted the historic Diane B. Allen Equal Pay Act, which amended Title 34 regarding Wage Discrimination and the New Jersey Law Against Discrimination, and went into effect on July 1, 2018.[1] Over the past several years, some interpretative sources have been issued and cases decided that have helped to provide clarity on certain EPA provisions. However, in the coming years, New Jersey state and federal courts will undoubtedly provide additional insights and valuable instruction for practitioners and their clients.

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.[2] Additionally, its protections extend to all protected classes under the LAD (i.e., sex, race, creed, color, national origin, nationality, ancestry, age, marital status, sexual orientation, gender identity, disability, etc.), not just sex-based equal pay claims.[3] 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."[4] The "substantially similar work" requirement is broader than the "equal work" standard for sex-based discrimination under the federal EPA.[5]

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.[6]

The employer has two possible defenses. Either an employer must demonstrate that the pay disparity is the result of a seniority or merit system[7] *or* an employer 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 accounts for the entire wage differential; *and*
5. The factors are job-related *and* based on a legitimate business necessity. A factor based on a 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.[8]

Other key provisions of the EPA provide that:

- An employer may not reduce the compensation of one employee to cure a pay disparity of another.[9]
- Comparisons of wage rates shall be based on wage rates in all of the employer's operations or facilities.[10]
- A separate statutory violation occurs each time an employee receives a paycheck, and liability shall accrue for back pay 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.[11]
- Employees are entitled to recover treble damages for both EPA pay discrimination claims *and* EPA retaliation claims.[12] Notably, the award of treble damages is mandatory once a jury determines a violation of the EPA occurred.[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.[14]

- 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.[15]
- The law also provides that any employer entering into a contract with the state of New Jersey or an instrumentality of the state for qualifying services or public works must provide to the Department of Labor and Workforce Development wage and demographic data (i.e., gender, race, ethnicity, job category, compensation, and number of hours worked by each employee) for all employees who are employed in connection with the contract (for public works) and for all employees (for qualifying services).[16]

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 for EPA cases, guidance issued by the New Jersey Division on Civil Rights, 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,*[17] the District Court of New Jersey 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.[18] Thus, the court did not permit retroactive application of the EPA because Perrotto had separated from employment prior to the EPA's July 1, 2018 effective date.[19]

Six-Year Damages Lookback

In a motion decided in 2020, the New Jersey Law Division permitted the six-year lookback period as back pay damages from 2013 until the date the complaint was filed in 2019.[20] 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."[21] 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.[22]

EPA Claim Accrues with Each Discriminatory Paycheck[a]

In *Victorin v. Jones Lange LaSalle,*[23] the District Court of New Jersey held that a claim under the EPA was not time-barred because the EPA amended the LAD to provide that claims for discrimination in pay occur and accrue on "each occasion that an individual is affected by application of a discriminatory compensation decision or other practice."[24] In other words, each new paycheck reflecting a discriminatory wage starts the LAD's two-year limitations period running afresh. Thus, the court recognized the plaintiff's assertion that he was "paid less than similarly situated non-Black employees and that he has been relegated to low-paying positions…stems from [his supervisor's] discrimination against him and refusal to promote him."[25] The court thus held that the complaint asserted "a colorable, timely claim because Victorin, as a current employee, continues to feel the effects of a 'discriminatory compensation decision or other practice.'"[26]

Further, the court rejected the defendant's argument to dismiss the complaint because it did not allege conduct after the EPA's effective date (July 1, 2018) and the EPA did not apply retroactively. In doing so, the court noted that the EPA, and the *Alexander v. Seton Hall Univ.*[27] case before it, allowed claims to accrue based on each discriminatory paycheck—even if the underlying decision to underpay an employee occurred earlier.[28] "Victorin alleges just that, so his claim is colorable and timely."[29]

Supervisory Liability under the EPA

Also in *Victorin*, the court addressed the issue of whether a supervisor can be held liable under the EPA for wage discrimination. In *Victorin*, the court rejected the defendant's argument that only employers, but not supervisors, could be liable for discriminatory pay, noting that individual supervisors can be individually liable for aiding and abetting other acts of discrimination. In doing so, the court reasoned that there is at least "a colorable argument" that the plaintiff's supervisor played a role in the plaintiff's lower wages because the supervi-

sor relegated the plaintiff to lower paying positions and created an environment in which the employer's management unfairly disliked him.[30] Further, the court reasoned that "to completely disentangle [the supervisor] from the alleged discriminatory pay would require 'an intricate analysis of state law,' not to mention the underlying facts," which the court declined to undertake.[31]

MCJC and DCR Guidance

New Jersey Model Civil Jury Charge 2.24A was approved in March 2019 and revised in November 2019. In March 2020, the New Jersey Division on Civil Rights issued "Guidance on Diane B. Allen Act, March 2020."

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.).[32] The MCJC additionally cites "profit sharing, expense account, use of company car, gasoline allowance," and "holiday pay" as compensation.[33]

Substantially Similar and Skill, Effort, and Responsibility

The DCR Guidance and the MCJC also explain how to determine whether employees have engaged in "substantially similar work when viewed as a composite of skill, effort, and responsibility."[34] 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.[35]

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.[36]

The DCR Guidance defines the factors:

- *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."[37]

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.[38] 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.[39]

Regarding effort, assessing whether the job requires mental or physical exertion (or both), the work conditions, and the amount of exertion should be considered.[40] 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.[41] 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, jobs can involve similar effort without using effort in exactly the same way.[42]

Regarding responsibility, the job duties required, the degree of discretion and accountability, whether there are supervisory functions, and whether high-level decisions are made (including enacting policies and procedures) are assessed.[43] 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.[44]

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.[45] A seniority system recognizes and compensates employees based on their length of service, whereas a merit system provides for pay variations based upon an employee's performance as measured through legitimate, job-related criteria.[46]

Affirmative Defenses, Salary History Consideration, and Effect of Discrimination

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. Additionally, the factor must be job-related with respect to the position in question and "based on a legitimate business necessity." A factor is not "based on a legitimate business necessity" if there are "alternative business practices that would serve the same business purpose without producing the wage differential."[47]

It is not entirely clear from the DCR Guidance what constitutes a factor that is not based on, and does not perpetuate, a differential in compensation based on membership in a protected class. For example, the DCR Guidance advises that 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."[48] 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 fact that New Jersey passed a law (effective Jan. 1, 2020) prohibiting employers from inquiring into prior salary history during the hiring process and aimed at closing the pay gap, may make prior salary history a challenging argument for employers.[49]

Further, it is unknown whether other traditional affirmative defenses under the federal EPA such as the market forces defense, the negotiations defense, and the revenue defense could be asserted under the EPA because the DCR Guidance is silent and the courts have not yet ruled on these issues.

Compensation Across Operations or Facilities

While the EPA broadly requires the comparison of employee wages 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.[50]

Self-Evaluation/Compliance Audits

The DCR strongly urges employers to take proactive steps to address pay disparities among employees and ensure EPA compliance, such as a self-evaluation of pay practices and adjustments to compensation based upon that self-evaluation, emphasizing that those adjustments will not be treated as an admission of liability.[51] 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 public settlement involving the Township of Verona in October 2020 demonstrates the high costs of equal pay claims. In *Kiernan v. Township of Verona*, 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.[52] In *Varela v. Township of Verona*, 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 attorneys' fees in a combined settlement of approximately $500,000.[53] Verona also increased the salaries of both women.[54]

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.

For example, in *American Association of University Professors and American Federation of Teachers (AAUP-AFT) v. Rutgers, The State University of New Jersey*, five female tenured professors at Rutgers brought a lawsuit under the EPA in October 2020, alleging that they were paid significantly less when compared to other Rutgers male professors in the same field. The lawsuit came a year after Rutgers and the union agreed to a pay-equity program that would permit faculty to submit requests for salary review of pay inequities. However, the lawsuit alleged that Rutgers failed to address the requests for salary reviews.[55]

Likewise, in July 2021, the former Ridgefield Park School Superintendent, Dr. Angela Bender, sued the all-male board of education in Ridgefield Park, claiming the

board suspended her because of her sex and replaced her with a man. Bender traced the animus back to 2018, when, as an elementary school principal in the district, she complained to the board that her pay was discriminatory and violated the EPA. The lawsuit alleged that the board members offered Bender the superintendent job "in exchange for her dropping the unequal pay issue, which she accepted in good faith."[56] Bender claimed she suffered adverse employment actions since taking the position at the hands of a "misogynistic majority" that treated her "less favorably because of her sex."[57]

Further, following the growing trend of Equal Pay Act cases at the national level against law firms, law firms in New Jersey have also been the target of equal pay lawsuits under the EPA. In December 2020, in *Affrunti v. Reed Smith*, an attorney sued Reed Smith under the EPA, alleging that she was "continuously paid substantially less than her male comparators both within and outside of the firm's Princeton office against whom she outperformed or equally performed" and she was denied opportunities within the firm and with firm clients that her male comparators regularly and repeatedly received.[58]

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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Endnotes

1. N.J.S.A. 34:11-56.1 to -14; N.J.S.A. 10:5-1 *et seq.*
2. N.J.S.A. 10:5-5.
3. N.J.S.A. 10:5-12(t).
4. *Id.*
5. 29 U.S.C.A. § 206(d)(1).
6. New Jersey Model Civil Jury Charge 2.24A, *available at* njcourts.gov/attorneys/assets/civilcharges/2.24A.pdf.
7. *See supra*, n.3.
8. *Id.*
9. *Id.*
10. *Id.*
11. N.J.S.A. 10:5-12(a).
12. N.J.S.A. 10:5-13; N.J.S.A. 10:5-12(r) and (t).
13. N.J.S.A. 10:5-13.
14. N.J.S.A. 10:5-12(r).
15. *Id.*
16. N.J.S.A 34:11-56.14.
17. *Perrotto v. Morgan Advanced Materials,* 2019 WL 192903 (D.N.J. Jan. 15, 2019).
18. *Id.* at *2.
19. *Id.*
20. *Norcia v. New Jersey City University*, Docket No. PAS-L-001972-19, Tr. of Decision (Feb. 10, 2020), at 10-11.
21. *Id.* at 11.
22. *Id.*
23 *Victorin v. Jones Lange LaSalle,* 2021 WL 651200 at *3 (D.N.J. Feb. 18, 2021).
24. *See supra*, n.11.

25. *See supra* n.23, at *9-10.
26. *Id.* at *10.
27. 204 N.J. 219 (2010).
28. *See supra*, n.11.
29. *See supra* n.23, at *10.
30. *Id.* at *5.
31. *Id.* at *10 (citing *Batoff v. State Farm Ins. Co.*, 977 F.2d 848, 853 (3d Cir. 1992); *McDermott v. CareAllies, Inc.*, 2020 WL 7022749, at *8–9 (D.N.J. 2020)).
32. *See* nj.gov/oag/dcr/downloads/DCR-Equal-Pay-Guidance-3.2.20.pdf at 6.
33. *See* supra, n.6, at 9.
34. *See* supra, n.7.
35. *See* supra, n.32.
36. *Id.* at 7.
37. *Id.* at 6.
38. *See* supra, n.6, at 5-6.
39. *See* supra, n.32.
40. *Id.*
41. *Id.*
42. *See* supra, n.6, at 6.
43. *See* supra, n.32.
44. *See* supra, n.6, at 7.
45. *See* supra, n.32, at 9.
46. *Id.*
47. *Id.* at 9-10.
48. *Id.* at 10.
49. N.J.S.A. 34:6B-20; N.J.S.A. 10:5-12.12.
50. *See* supra, n.32, at 10.
51. *Id.* at 12.
52. *See* Complaint, *Kiernan v. Twp. of Verona*, No. ESX-L-000781-19, at ¶¶ 11, 16.
53. *See* Complaint, *Varela v. Twp. of Verona*, No. ESX-L-002391-19, at ¶¶ 93, 94, 96.
54. David Wildstein, Two Verona Official [sic] Win Settlement in Lawsuit Under Diane B. Allen Equal Pay Act, *New Jersey Globe* (Oct. 22, 2020), *available at* newjerseyglobe.com/local/two-verona-official-win-settlement-in-lawsuit-under-diane-b-allen-equal-pay-act/.
55. *See* rutgersaaup.org/wp-content/uploads/securepdfs/2020/10/Pay-Equity-Complaint.pdf.
56. Anthony Attrino, Superintendent Sues All-Male School Board, Says She Was Suspended By Misogynistic 'All-Boys Club,' *NJ.com* (July 21, 2021), *available at* nj.com/bergen/2021/07/superintendent-sues-all-male-school-board-says-she-was-suspended-by-misogynistic-all-boys-club.html.
57. *Id.*
58. *See* abajournal.com/files/Reed_Smith_complaint.pdf.