Equal Pay Audits: Essential Action in Light of New Jersey's Broad Equal Pay Act

by Kirsten Scheurer Branigan and Carole Lynn Nowicki

An Overview of the Equal Pay Act

The Diane B. Allen Equal Pay Act (EPA) went into effect in New Jersey on July 1, 2018.[1] The EPA amends the New Jersey Law Against Discrimination (LAD), which was already an expansive law. The EPA was named for New Jersey State Senator Diane B. Allen, who experienced wage discrimination herself while working as a TV anchor. She worked toward the passage of the statute prior to her retirement in 2018.[2]

"Substantially Similar Work," Compensation/ Benefits, Legitimate Reasons for Disparities

The EPA is unprecedented in breadth and scope on liability and damages in pay disparity claims. Like the LAD, the EPA applies to virtually all public and private employers in New Jersey, regardless of size or industry.[3] The act also applies to all protected classes identified in the LAD, which includes discrimination based on race, creed, color, national origin, nationality, ancestry, age, marital status, civil union status, domestic partnership status, affectional or sexual orientation, genetic information, pregnancy, sex, gender identity or expression, disability or atypical hereditary cellular or blood trait of any individual, or liability for service in the armed forces.[4]

Under the act, it is unlawful for an employer to pay its employees who are members of a protected class at a *rate of compensation, including benefits*, that is less than employees who are not members of the protected class for *substantially similar* work.[5] However, *compensation, including benefits* are terms that are not defined. Based on interpretations of equal pay statutes from other jurisdictions and the Equal Employment Opportunity Commission (EEOC), other types of compensation and benefits will likely include overtime, commissions, bonuses, profit sharing, deferred compensation, paid time off, expense accounts, car and gas allowances, phone allowances, housing allowances, retirement plans, insurance, etc.[6]

The standard of *substantially similar work* is an expansion from the standard of "equal" or "substantially equal" pay as previously applied to claims asserting wage disparity based on gender discrimination brought under the LAD.[7] Under the Equal Pay Act, employers cannot rely on minutely different tasks to justify a lower or higher salary. *Substantially similar work* is determined based on a *composite of skill, effort and responsibility.*

Significantly, employers are *not* permitted to reduce the compensation levels of other employees in order to equalize pay rates.[8] As a result, the only option to achieve parity is to increase the lower compensation.

An aggrieved employee may bring a lawsuit if certain prerequisites exist. An employee needs to show only that he or she is: 1) a member of a protected class; 2) paid less than an employee who is not in the same protected class; and 3) performs work that is "substantially similar" to employees not in the same protected class. It does not matter that the employer lacks an intent to pay differently based upon protected status. Once the employee shows the above three elements, the burden then shifts to the employer to justify the differential in pay. To do so, the employer must demonstrate that:

- The differential is pursuant to a *seniority system*, a *merit system*, or the existence of *legitimate, bona fide factors* other than the characteristics of members of a protected class, such as *training, education, experience, quantity of production, or quality of production*;
- The factors are not based on, and *do not perpetuate, a differential in compensation based on sex or any other characteristic* of members of a protected class;
- Each of the factors is *applied reasonably*;
- One or more of the factors accounts for the *entire wage differential*; *and*
- The factors are job-related with respect to the position at issue and based on a *legitimate business necessity.*[9]

A legitimate business necessity does not apply if *alternate business practices* would serve the same business purpose without producing the wage differential. Also, the act requires that "comparisons of wage rates *shall* be based on the *wage rates* in *all* of an employer's

operations or facilities."[10] This strikingly broad language does not limit itself to wage comparisons within a specific geographic area.

While the act does not define what would qualify as *seniority* and *merit systems*, structured systems would need to be in place. The EEOC has addressed these systems in application of federal law. The EEOC has opined that an employer may lawfully compensate employees differently based on a *bona fide* seniority, merit, or incentive system. According to the EEOC, a seniority system "rewards employees according to the length of their employment." It states that a merit system "rewards employees for exceptional job performance." An incentive system, according to the EEOC, "provides compensation on the basis of the quality or quantity of production." It defines a *bona fide* system as that which has not been adopted with discriminatory intent and is based on predetermined criteria. Additionally, the system must have been communicated to employees and been applied consistently to employees of both sexes.[11]

Many employers will not be able to establish that they have such systems in place. Employers that do not have seniority or merit systems will need to justify compensation based upon the above-referenced five-factor test. It may prove challenging for employers to meet all five factors.

One issue that has often perpetuated pay disparity has been a lesser salary from prior employment. Decisions based upon prior salary alone will not meet the five-factor test when training, education, experience or quantity/quality of production is otherwise the same among the employees. Relying upon prior salary may also perpetuate differentials in compensation, particularly among women and women of color who have been repeatedly underpaid. Furthermore, to be considered *legitimate, bona fide factors*, the factors must be "job-related with respect to the position in question and based on a legitimate business necessity." A factor based on business necessity shall not apply if it is demonstrated that *alternative business practices* exist that would serve the same business purpose without producing the wage differential.

Anti-Retaliation Provisions and Compensation Discussions/Inquiries

The EPA added prohibitions to the already broad anti-retaliation prohibitions of the LAD. First, the original LAD anti-retaliation section was amended to prohibit an employer from taking reprisals against an employee for seeking legal advice regarding rights under the LAD, or sharing information with legal counsel or a government agency.[12] Second, the act created a new anti-retaliation section that prohibits employers from engaging in employee reprisal based upon discussions and disclosures among employees themselves about job title, occupational category, compensation, benefits and other protected class information.[13] These disclosures do not need to be made solely in response to requests and/or to disclosures for the purpose of assisting in an investigation of discrimination and/or taking legal action. Simply put, employer prohibitions on employee salary discussions are a thing of the past. Third, the new anti-retaliation provisions also prohibit employers from requiring, as a condition of employment, an employee to sign a waiver or agreement not to make those requests or disclosures about compensation and/or the other information cited above.[14]

While not addressed in the EPA, there has been a trend toward prohibiting inquiries regarding past salary history. Governor Murphy signed Executive Order No. 1 into law, effective Feb. 1, 2018, prohibiting state agencies and offices from asking about or investigating an applicant's past salary history.[15] Other states and cities have also passed similar laws. For example, in New York City, effective Oct. 31, 2017, it is illegal for public and private employers of any size to ask about an applicant's salary history during the hiring process, including in job advertisements, applications, or interviews.[16] New York state amended its labor law to reflect similar guidelines.[17] While New Jersey has not yet passed a law regarding private employment, it would not be unforeseeable given other recent legislative changes. Considering the EPA and salary inquiry bans, some entities have shifted toward changing their internal procedures, even in the absence of a legal requirement in New Jersey.

Statute of Limitations and Waiver

Under the act, an unlawful employment practice occurs on each occasion that an individual is affected by application of a discriminatory compensation decision or other practice, including, but not limited to, *each occasion* when wages, benefits, or other compensation is paid, resulting, in whole or in part, from the decision or other practice. Therefore, the clock restarts with each paycheck, and will not be limited by the fact that the discriminatory practice may have started years ago. This language is consistent with the Lilly Ledbetter Fair Pay

Act of 2009, which amended Title VII of the Civil Rights Act of 1964 to reflect that the statute of limitations for filing an equal pay lawsuit regarding pay discrimination resets with each new paycheck affected by that discriminatory action.[18] This statute was enacted in response to *Ledbetter v. Goodyear Tire & Rubber Co.,* in which the U.S. Supreme Court decided that the statute of limitations for presenting an equal pay lawsuit began on the date the employer made the initial discriminatory wage decision, not the date of the most recent paycheck.[19]

Claims involving discrimination in compensation or in the financial terms or conditions of employment shall accrue, and an aggrieved person may obtain relief, for *back pay for the entire period of time except not more than six years* 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.[20] The act specifically provides that the applications of "continuing violation" or "discovery rule" will still exist in New Jersey.[21]

The six-year period is far greater than the two-year statute of limitations under the LAD.[22] There are arguments as to whether an aggrieved employee could seek redress for conduct that occurred before the enactment of the EPA. At least one federal court in New Jersey has addressed the issue. In January of this year, in the case of *Perrotto v. Morgan Advanced Materials, PLC*, the United States District Court for the District of New Jersey addressed this issue and determined that the act should *not* be applied retroactively to include conduct that predated the effective date of the act.[23] Some practitioners believe New Jersey state courts may decide that the act should be applied retroactively because the LAD previously prohibited discrimination, including in compensation. However, others believe the New Jersey state courts will limit the application consistent with the *Perrotto* court.

Under the act, employers may not require employees or prospective employees to consent to a shortened statute of limitations or waive *any of the protections provided by the LAD.*[24] This protection extends to more than pay equity matters.

Damages and Reporting Requirements

Not only can an aggrieved employee obtain the full breadth of an LAD recovery (*i.e.*, punitive damages, emotional distress and attorneys' fees, etc.), but, under the EPA, he or she can additionally receive back pay for up to *six years*, and the *treble damages.*[25] In fact, the act provides that, if a jury finds an employer to be in violation of either the provisions involving discriminatory compensation or the new anti-retaliation provisions, the judge *shall* award *three times* any monetary damages.[26] Aggrieved employees can file suits directly in court or with the New Jersey Division on Civil Rights (DCR).

As to employers contracting with the state or any agency or instrumentality of the state, the act also imposes an affirmative obligation to report their compliance through submission of certified payroll records by March 31 of each year, and whenever payroll records are required to be submitted.[27]

Federal EEO Reporting Obligations

Additionally, all employers with 15 or more employees are required to keep employment records. Employers with 100 or more employees, and/or that perform federal contract work, have reporting obligations via form EEO-1 to the EEOC, pursuant to Title VII of the Civil Rights Act of 1964[28] and its regulations, if the employers meet certain criteria.[29]

There are two components to the EEOC reporting obligations. Component 1 seeks demographic data on race, gender, and ethnicity by job category, and is due annually on May 31.[30] There is also a new Component 2, originally introduced by the EEOC Jan. 29, 2016, which requires employers to report W-2 wage data and hours worked for employees within 12 specified pay bands.[31] The EEOC's 2016 intended requirement to submit Component 2 pay data had been stayed by the Office of Management and Budget but was recently reinstated through judicial action. Based on the decision in *National Women's Law Center, et al., v. Office of Management and Budget, et al.*,[32] the EEOC has issued notices reinstating employers' obligations to submit Component 2 pay data for 2017 and 2018.[33] The deadline to submit Component 2 data for calendar years 2017 and 2018 is Sept. 30 of this year.

Equal Pay Act Audits

To ascertain their compliance with the EPA and to remedy pay inequities proactively, many employers are now performing internal equal pay audits. For numerous reasons, such as confidentiality/privilege concerns and time constraints of internal staff, employers might engage outside counsel to conduct the audits. Outside counsel can devote time to conducting the audits that in-house employees might not have, especially if the

employer has numerous employees or locations to audit. There may be other reasons to engage outside counsel as well, such as maintaining privileges and avoiding any internal challenges and dynamics. Additionally, the employers might find it easier to accept recommendations suggested by outside, independent counsel.

Equal pay audits can be structured to: 1) determine pay disparities among employees doing comparable work; 2) evaluate whether any lawful explanations exist to support those disparities; 3) identify any weaknesses in the organization's systems that should be addressed to prevent potential pay disparity claims; and 4) implement procedures to remediate those weaknesses and any unlawful pay disparities.

Pre-Audit Engagement Agreement, Privileges, Scope

Prior to commencing the audit, counsel should have a clear engagement agreement establishing the parameters, such as whether the audit will be performed on a flat fee or hourly basis, and the specifics on what will be performed. Conducting audits in separate phases (as detailed below) can be an effective way to manage the process. If the purpose of the audit is to facilitate the rendering of legal advice, it should be designated as *privileged,* pursuant to the attorney-client privilege, along with other prepared documents. Another consideration is whether the audit is in anticipation of litigation and should be designated as privileged attorney work product.

Given the six-year period set forth in the act, consider how far back to look. Some employers will want to focus on the present, whereas others may want to go back farther to assess disparities.

While methods for conducting audits vary, it can be effective to manage the information by approaching it in structured phases, as set forth below. It may be helpful to delineate the expected scope or work for each phase in the engagement agreement.

Prior to commencing the audit, the auditors should establish a direct line of communication with the in-house counsel, human resources, compliance or an employer representative(s) who can provide all compensation, benefits and protected class information for employees, connect the auditors with the necessary personnel for interviews, and answer questions throughout the course of the audit. Cooperation of internal staff is key. It is helpful to have an internal manager of the project to intervene as needed, if staff is not being as responsive to outside auditors.

The auditors, with the assistance of the designated representative(s), should gather the below-referenced comprehensive information regarding employees. This information may be requested during different phases, as needed. The auditors may also determine that some of the information may not be necessary, depending upon preliminary analysis.

Audit Phase One

During phase one of the audit, it should be determined which employees are to be included and excluded from the audit. Employees whose salaries are dictated by collective bargaining agreements, statutes, or resolutions may potentially be analyzed differently.

Information documents to be requested include: organizational information on structure, supervision and hierarchy (organizational charts); employee names; job title; job code/grade; division/department/business unit; work location; job functions (job descriptions); full-time/part-time/temporary status; exempt/non-exempt status (hourly/salary); dates of employment; dates in current role; amounts of salary, bonuses, commissions, overtime pay, shift differential pay and any other forms of compensation/benefits; and whatever protected class information is available (*i.e.*, race/nationality, age, gender, etc.).

The auditors should inquire as to whether there are any seniority or merit systems, and obtain documents reflecting them. It would also be helpful to gather any documents that address compensation, raises, bonuses, and commissions. If there are variations in benefit distribution, these documents should be obtained as well.

However, accessibility to the protected class information may prove challenging in itself. Employers that have over 100 employees, and are required to submit EEO-1 annual reports, have to report on employees based upon the following breakdowns: race/ethnicity, gender, and job placement.[34] Even for those employers that are required to submit annual EEO-1 reports, the guidelines suggest that self-identification is the preferred method for identifying race and ethnicity. If an employee declines to self-identify, the employee cannot be required to make such disclosures. In those cases, employment records and observation are suggested as alternative methods of identification.[35] Some employers have access to employee ages for benefits purposes, while others do not. There are other protected categories

that come up even less and are less likely to be disclosed by all employees, such as disability and sexual orientation. If employers are not otherwise aware of protected classes, those classes should not be sought out for purposes of the audit because making such inquiries into those areas could create other liability problems.

It is key during phase one of the audit to gather information regarding each employee's functional job duties. Use of audit questionnaires can be considered. In some instances, they could be helpful. In others, the questionnaires might create too much of a delay, result in data that may not be sufficiently robust and/or create privilege implications. Requests for job descriptions will also be helpful to understand the functional duties of certain positions. However, sometimes, job descriptions do not exist and/or are outdated, in that they do not include all functions. As such, a full review of all current job functions is key to assessing employees performing *substantially similar* work.

If accurate and current job descriptions do not exist, the auditors should meet with department heads or those who know best what work employees are actually performing. Meetings create accountability and often result in effective information gathering. Prior to each meeting, the employer representative should be instructed to prepare, or have their employees prepare, a description of each employee's day-to-day job duties, to be reviewed and expanded upon during the audit meetings. Following these in-person meetings, additional information may be required. Meetings can be particularly helpful in the public sector, where civil servant job titles and descriptions are not entirely representative of the duties an employee actually performs on a daily basis. As such, requests for *functional* job titles and job descriptions are essential.

Audit Phase Two

During phase two of the audit, after the auditors have gathered all essential information and conducted interviews, a comprehensive review and analysis are necessary to identify compensation disparities based on employees performing substantially similar duties. This can be challenging given the requirement that wage rate comparisons occur across *all* of the employer's operations or facilities. During this phase, additional interviews or information requests might be necessary. Also, it may be helpful to select employees to be interviewed to ensure full disclosure and a comprehensive gathering of information needed for analysis. A random selection may work for certain audits. In others, it may be preferred to interview employees who are in positions identified as receiving disparate pay in order to obtain more information.

Audit Phase Three

If a wage disparity is revealed during phase two, the auditors will need to evaluate in the final phase whether the differential is pursuant to a *seniority system*, a *merit system*, or the existence of *legitimate, bona fide factors* (training, education, experience, quantity of production, or quality of production).[36] This may also require reviewing resumes and performance evaluations, speaking to employees, and reviewing other information.

Of course, in a real-life setting, other factors besides substantially similar duties come into play when setting the pay rate for employees. In the final stage of the audit, the auditors will assist in this process by interviewing the employees in question to determine if there are lawful justifications for the pay disparities. If wage gaps are discovered for which no lawful justifications exist, the audit will reveal those disparities so employers can make pay adjustments that increase the compensation of the lower-paid employees.

At this point, the auditors should gather and examine documents that may contain employees' level of education (degrees), prior work experience, and special licenses/certifications. Additionally performance ratings should be considered. Resumes, job applications, and performance reviews are relevant documents to request during this phase. The auditors may also need to speak to the employees themselves, and/or managers, to assess this information and review other information as needed.

The full scope of the phase three assessment may vary, depending upon whether the auditors are asked to provide recommendations and/or to report on the findings and have another counsel and/or representative make recommendations. The auditors should assess all five factors under the EPA set forth above, particularly if they have been asked to make recommendations. If pay disparities are discovered for which no lawful justifications exist, the audit will reveal those disparities so employers can make pay adjustments that increase the compensation of the lower-paid employees.

Following the Audit—Training

Aside from evaluating existing compensation for unlawful inequities, employers need to ensure future

compliance with the act. Additional training for professionals and leaders involved in the hiring process and compensation decisions on the requirements of the Equal Pay Act will help ensure this compliance. Training can also be provided to help employers deal with the effects of an equal pay audit, including the anti-retaliation provisions contained in the act.

Conclusion

In enacting the EPA, New Jersey is on the forefront of a wave of equal pay initiatives occurring across the country. In the years to come, there will undoubtedly be court decisions to help shed light on certain provisions. Given the breadth and scope, employers should take a proactive approach to determine if they are in compliance with the act before they are faced with defending against violations in costly litigation. Retaining legal counsel to conduct an equal pay audit, and training those involved in hiring and compensating professionals, are ways that employers can reduce their exposure under the act and rectify employee pay inequities. ■

Kirsten Scheurer Branigan is the owner of KSBranigan Law, P.C., and Carole Lynn Nowicki is a partner at KSBranigan Law, P.C. in Montclair. Alternative dispute resolution, workplace investigations, employment compliance and audits, and training are among the firm's practices areas. Both Branigan and Nowicki are arbitrators with the American Arbitration Association.

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Endnotes

1. Diane B. Allen Equal Pay Act (P.L. 2018, c. 9), N.J.S.A. 10:5-12(t).
2. Long Overdue:N.J. Finally Guarantees Women Equal Pay, nj.com (April 27, 2018), available at https://www.nj.com/opinion/2018/04/long_overdue_nj_finally_guarantees_women_equal_pay.html.
3. The LAD only excludes domestic workers. N.J.S.A. 10:5-5(f).
4. N.J.S.A. 10:5-12(t).
5. *Id.*
6. Benefits other than straight wages have been considered in connection with federal equity statutes. For example, courts have considered monthly contributions and payouts under deferred compensation plans (*Arizona Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris,* 463 U.S. 1073,1079 (1983)), severance pay and additional time on the payroll to find new work (*Korzen v. Local Union 705, Int'l Bhd. of Teamsters*, 851 F. Supp. 291, 297-99 (N.D.Il. 1994)), and housing benefits and commission rates (*Prise v. Alderwoods Group, Inc.*, 657 F. Supp. 2d 564, 612-615 (W.D. Pa. 2009)). Equal pay acts adopted by other states also mandate consideration of fringe benefits. *See, e.g.*, *Jancey v. School Comm.,* 421 Mass. 482, 489-93 (1995) (determining that health insurance and other types of remuneration should be considered under the Massachusetts Equal Pay Act). Additionally, the EEOC's Fact Sheet on the Equal Pay Act of 1963 (77 Stat. 56) includes all of the benefits listed herein. *See* Facts About Equal Pay and Compensation Discrimination FSE/15, available at https://www.eeoc.gov/eeoc/publications/fs-epa.cfm.
7. *Grigoletti v. Ortho Pharmaceutical*, 118 N.J. 89, 109-110 (1990) (adopting the standards of the federal Equal Pay Act, 29 U.S.C.A. § 206(d), to gender-based wage disparity claims brought under the LAD, and requiring more onerous proofs for plaintiffs showing "substantially equal" work); *Bitsko v. Main Pharmacy, Inc.,* 289 N.J. Super. 267, 272-273 (App. Div. 1996).
8. N.J.S.A. 10:5-12(t).
9. *Id.*
10. *Id.*
11. EEOC Directives Transmittal 915.003 Section 10-IV(F)(1) (Dec. 5, 2000).
12. N.J.S.A. 10:5-12(d).

13. N.J.S.A. 10:5-12(r).
14. N.J.S.A. 10:5-12(d).
15. Exec. Order No. 1 (2018).
16. New York City Human Rights Law, N.Y. Admin Code 8-101, *et seq.* Additionally, facts regarding the law can be found at NYC.gov/SalaryHistoryNYC.
17. New York Labor Law—LAB § 194-4(a). No employer shall prohibit an employee from inquiring about, discussing, or disclosing the wages of such employee or another employee.
18. 123 Stat. 5 (2009); Notice Concerning the Lilly Ledbetter Fair Pay Act of 2009, available at https://www.eeoc.gov/laws/statutes/epa_ledbetter.cfm.
19. 550 U.S. 618 (2007).
20. N.J.S.A. 10:5-12(a).
21. *Id.*
22. *Perrotto v. Morgan Advanced Materials, PLC*, 2019 U.S. Dist. LEXIS 6745, 2019 WL 192903 (D.N.J. Jan. 15, 2019).
23. *Id. See also* "You Have to Start Somewhere: The Equal Pay Act Cannot Be Retroactively Applied to Conduct Occurring Before July 1, 2018," Daniel M. Santarsiero, *New Jersey Labor and Employment Quarterly*, Vol. 40, No.3 – May 2019.
24. N.J.S.A. 10:5-12(a).
25. N.J.S.A. 10:5-12(a); N.J.S.A. 10:5-13.
26. *Id.*
27. N.J.S.A. 34:11-56.14.
28. 42 U.S.C. 2000e, *et seq.*, as amended.
29. https://www.eeoc.gov/employers/eeo1survey/2007instructions.cfm.
30. https://www.eeoc.gov/employers/eeo1survey/index.cfm.
31. 42 U.S.C. § 2000c-8.
32. 358 F. Supp. 3d 66 (D.D.C. 2019).
33. https://www.eeoc.gov/employers/eeo1survey/index.cfm.
34. 42 U.S.C. § 2000e-8.
35. EEO-1 Frequently Asked Questions and Answers, available at https://www.eeoc.gov/employers/eeo1survey/faq.cfm.
36. N.J.S.A. 34:11-56.14.