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Mind the Gap: How to Navigate Pay Disparity and Comply With Equal Pay Requirements

This summer marked the first anniversary of the effective date of New Jersey's Diane B. Allen Equal Pay Act (NJ Equal Pay Act), which amended the New Jersey Law Against Discrimination (NJLAD) to prohibit employers from discriminating against employees in compensation practices based on all the protected categories under the NJLAD. Unlike the federal Equal Pay Act and other states' laws that only prohibit pay discrimination based on gender, the NJ Equal Pay Act has broad application to all the protected categories under the NJLAD, which include race, creed, color, national origin, ancestry, age, marital status, civil union status, affectional or sexual orientation, sex, gender identity or expression, disability, and pregnancy.

Summary of the NJ Equal Pay Act

Notwithstanding the broad coverage and protections under the NJ Equal Pay Act, the law permits employers to differentiate pay among similarly situated employees under limited circumstances, such as a result of seniority or merit-based systems. The NJ Equal Pay Act also allows employers to differentiate pay among peers if they can demonstrate the following:

1. The differences in compensation are based on "bona fide factors other than the characteristics of members of the protected class, such as training, education or experience, or the quantity or quality of production."
2. The factors "are not based on, and do not perpetuate, a differential in compensation based on sex or another characteristic of members of a protected class."
3. "[E]ach of the factors is applied reasonably."
4. "[O]ne or more of the factors account for the entire wage differential."
5. The factors "are job-related with respect to the position in question and based on a legitimate business necessity."

Notably, the NJ Equal Pay Act also prohibits employers from differentiating employee compensation based solely on geography. The act expressly states that the comparison of wage rates must be "based on wage rates in all of an employer's operations or facilities." With this legal landscape, on July 25, New Jersey amended the NJLAD, prohibiting private employers from asking prospective employees about their salary history before making an offer of employment, which is effective January 1, 2020.

Similar equal pay laws have been enacted in other states, including Massachusetts, Connecticut, and New York. Unlike the all-encompassing NJ Equal Pay Act, the laws in Massachusetts and Connecticut target the issue of pay equality based on gender. Although it is not as expansive as the NJ Equal Pay Act, the New York Equal Pay for All Act will prohibit differential pay based on a protected class.

How to Conduct an Equal Pay Audit

Employers should consider performing an equal pay audit to ensure they are complying with applicable pay equity laws. First, employers should determine the scope of the audit, considering questions such as the following:

- Who will conduct the audit? Will it be an internal group or outside counsel?
- Will the audit be protected by attorney-client privilege? If yes, consider who will handle communications with business managers and Human Resources.
- What groups will be audited?
- What data will be reviewed and by whom?
- Do certain groups within the organization pose a higher risk than others?

While at first blush employers may be inclined to have an internal group perform a pay audit, there are substantial risks in this approach. For instance, any results in connection with the pay audit may be discoverable in future litigation. On the other hand, hiring outside counsel to render legal advice in connection with the pay audit may protect the employer under attorney-client privilege.

Second, once the scope is determined, the data must be gathered. Data may include:

- job descriptions;
- employee observations or testimonials regarding daily duties;
- tenure;
- seniority;
- years of experience;
- salary, bonus, stock, equity, etc.; and
- performance evaluations.

Employers should also consider the number of years of data to review. For example, reviewing data for a single year may not provide enough information for the employer to evaluate risk. Rather, reviewing at least two to three years' data may be necessary.

Third, organize the data into groups of similarly-situated employees. Analyze the data and determine whether there are any patterns or commonalities among the individuals in the group, including membership in protected categories. It is crucial to look beyond the surface to ensure that implicit or explicit biases are not the basis for any differences in compensation. As stated above, the NJ Equal Pay Act defines the limited circumstances when compensation may vary for similarly situated work.

Finally, if pay inequity exists without legal justification, employers will need to assess their next steps. Depending on the number of affected individuals, employers may decide to address pay disparities individually or issue communications to address compensation differences for a larger group.

In summary, the number of states with equal pay laws in effect has steadily increased in recent years, and more laws on this issue are likely to come. Employers are encouraged to proactively examine pay disparities to minimize risk.

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