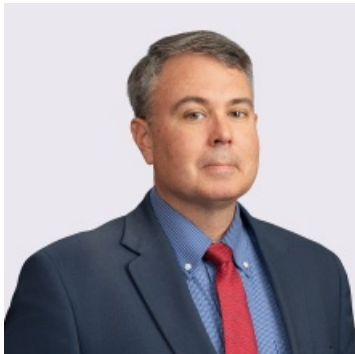


New Jersey Division on Civil Rights Releases Enforcement Guidance on State Equal Pay Act

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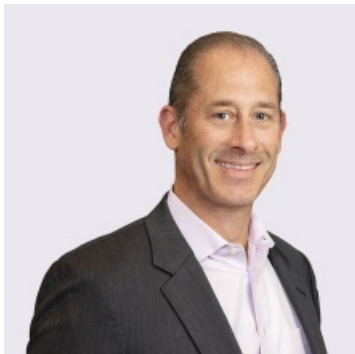


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The New Jersey Division on Civil Rights (DCR) has released a 25-page guidance explaining its enforcement policies with respect to the state's equal pay law. The guidance provides much-needed direction to companies navigating the pitfalls associated with compensation systems and policies.

The guidance addresses questions ranging from multistate employees to affirmative defenses to the role of employer self-evaluations in the agency process. Furthermore, the DCR offers a guide to employer self-evaluations; however, it also cautions that such self-evaluation "is not, in and of itself, an affirmative defense to a claim brought under the Diane B. Allen Equal Pay Act."

Overview of the Law

The guidance's overview section includes a general explanation of the terms of the Equal Pay Act and the key differences between the state law and its federal counterpart. For example, the state law applies to all protected traits under the New Jersey Law Against Discrimination (LAD), which include traits not covered by federal law, such as military status. The state law also prohibits pay disparities for *substantially similar* work, as opposed to *equal* work under the federal law.

The DCR references figures from the U.S. Bureau of Labor Statistics, which show that Hispanic women earn only 62 percent the compensation of white men, for example. The agency states that it intends to enforce the Equal Pay Act to address any such unlawful disparities that may exist.

Additionally, the DCR explains the Act contains a six-year lookback period for damages, rather than a six-year statute of limitations. The guidance makes clear that the Act allows "an employee who establishes discrimination in compensation to recover up to six years of back pay as long as the discrimination was continuous and the most recent violation occurred within the LAD's two-year statute of limitations."

The guidance concludes the overview section with discussions on anti-retaliation, remedies, and reporting requirements. Significantly, the DCR explains the anti-retaliation provisions apply to all employee actions concerning requests for information or legal counsel "related to job title or compensation of employees or former employees, as well as the 'gender, race, ethnicity, military status, or national origin' of those employees, *even if the employee's action is unrelated to a claim for equal pay*" (emphasis added). The DCR also explains that while a jury *must* award treble damages in the event of a violation, the DCR *may* award treble damages in the event of a violation.

Frequently Asked Questions

The guidance's Frequently Asked Questions (FAQs) section is key. It explains that:

- The Act applies to out-of-state companies if the company maintains employees

with a primary workplace in New Jersey.

- Out-of-state employees may bring claims under the Act if they have a primary workplace in New Jersey. The DCR explains, by way of example, “an employee who lives in Pennsylvania but works in New Jersey *several days a week* is protected by the Equal Pay Act” (emphasis added).
- Compensation under the Act includes not only the obvious (*e.g.*, base wages, commissions, overtime pay, bonus pay, merit pay, and stock options), but such non-cash benefits as insurance, vacation time, and retirement funding.
- Positions may meet the *substantially similar* threshold despite minor differences in skill, effort, and responsibility.
- Skills not necessary to perform the functions of a particular job are irrelevant to the determination of whether positions are substantially similar (*e.g.*, if an employee possesses a degree not relevant to the job performed).
- Positions with separate functions may meet the *substantially similar* threshold. The DCR provides two examples of apparently different responsibilities that may meet the threshold: (1) contract review attorneys and litigators; and (2) janitors and food service employees.
- The DCR will not rely solely on position descriptions and job titles in any enforcement matter; however, “they may be relevant to assessing whether two jobs require a similar degree of skill, effort, and responsibility.”

Significantly, on whether geographic differences constitute a bona fide reason for a pay disparity, the DCR answers in the affirmative. However, it cautions, if a company’s pay disparity stems from cost-of-living or demand differences, for example, the company also must demonstrate: (1) cost-of-living or demand are not based on and do not perpetuate an unlawful pay differential; (2) the factors were applied reasonably; (3) the factors account for the entire differential; and (4) the factors are job-related and based on business necessity. The DCR also notes that objective matters such as “sales numbers” constitute a bona fide reason for pay disparities.

Finally, while not expressly prohibiting *ad hoc* compensation decisions, the FAQs discuss the hallmarks of a *seniority* or *merits* system a company may rely on in defense against claims under the Act as being “predetermined or predefined by the employer” and uniformly applied without regard to employee membership in a protected class. The guidance cautions that individual determinations regarding an employee’s “worth” do not satisfy the requirement for a defense under the Act.

Self-Evaluations

The DCR directs companies to the New Jersey Civil Service Commission’s “Guide to Self-Evaluations for Public Sector Employers,” which provides basic instructions on the steps involved in a self-evaluation. However, the DCR cautions that any self-evaluation, or actions taken to address a pay disparity, do not constitute an affirmative defense to a claim under the Equal Pay Act.

Indeed, the only affirmative defenses under the Act are those in the statute: the differential must be based on a seniority or merit system or the disparity is:

- Based on a legitimate factor other than the protected trait (*e.g.*, training, education, experience, or productivity);
- The legitimate factor is not based on or does not perpetuate a compensation

differential based on a protected trait;

- Each factor is applied reasonably;
- One or more factors account for the entire wage differential; and
- The factors are job-related with respect to the position and based on business necessity.

The DCR, however, will not consider any adjustments to compensation as an admission as to liability in any proceedings before the agency.

Takeaways

Key takeaways for companies from the DCR guidance include:

- Revisit position descriptions to accurately capture skill, effort, and responsibility. Differences in anticipated physical exertion, mental exertion, supervisory responsibilities, credentials required to perform the functions of the position, and so on should be captured in the description.
- An employee census focused on location of work (rather than any reporting structure) is the most important factor in applicability of the Act.
- To the extent demand or geography requires pay differentials, ensure that a uniform disparity explains the gap.
- Do not rely on a self-evaluation as an affirmative defense. While self-evaluations are recommended to limit any potential liability, any backpay does not shield an employer from legal action.

The guidance serves as useful direction to employers seeking to ensure compliance efforts meet requirements under the Act. Please contact a Jackson Lewis attorney with any questions about the Act or the guidance.

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