

## **Possible Amendment to New Jersey's Anti-Discrimination Law Would Likely Mean More Claims, Greater Liability Risks, and Larger Damages Awards**

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Earlier this week, the ***New Jersey General Assembly*** passed a bill that would amend the ***New Jersey Law Against Discrimination ("NJLAD")*** to address specifically pay differentials among employees of different sexes who perform "substantially similar" work. The amendment, which the state Senate passed last month, will now be delivered to the Governor for consideration.

As the NJLAD exists now, an employee can bring a pay-related claim only by alleging that the differential amounts to sex discrimination and satisfying a comparatively higher standard. If the bill is signed into law, New Jersey would follow in the footsteps of other states like New York and California, which have recently updated their discrimination laws to provide a separate cause of action specifically for unequal pay.

The bill, if enacted into law, would severely limit the circumstances under which an employer can pay male and female employees different amounts for "substantially similar" work. An employer would be permitted to do so if it can demonstrate that it is utilizing a seniority (pay based on tenure) or merit (pay based on achieving certain goals) system. Alternatively, the employer would need to demonstrate that each of the following factors exists:

- The differential is based on one or more legitimate, bona fide factors other than sex, such as training, education or experience, or the quantity or quality of production;
- The factor or factors do not perpetuate a sex-based differential in compensation;
- Each of the factors is applied reasonably;
- One or more of the factors account for the entire wage differential; and
- The factors are job-related with respect to the position in question and based on a legitimate business necessity, and there are no alternative business practices that would serve the same business purpose without producing the wage differential.

If enacted, the New Jersey bill would also significantly increase potential employer exposure, in that the recovery period would be extended to pick up the entire time period when the pay differential existed.

With the passing of this bill by both houses, and with laws specifically targeting gender-based pay differences on the rise generally, employers would be wise to look at their employees' titles and job descriptions to identify "substantially similar" positions and any pay differentials among the employees in those positions. Where such differences exist, employers will want to explore the reason for those differences and whether changes need to be made. If an employer has an established seniority or merit-based system on which it intends to rely, it is important that the system be set forth in detail and made available to all employees, so that there is no question as to its existence and applicability later.

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