

# WHAT NJ BUSINESS OWNERS NEED TO KNOW

## About The Diane B. Allen Equal Pay Act (Allen Act)

### OVERVIEW

Taking into effect on July 1, 2018, the NJ legislature passed the Diane B. Allen Equal Pay Act (the "Act"), which amends the NJ Law Against Discrimination ("LAD"), to strengthen protections against employment discrimination and promote equal pay for women.

The Act amends the LAD by making it an unlawful employment practice for an employer to pay any employee who is a member of a protected class less than the rate paid to other employees who are not members of that protected class for "substantially similar work when viewed as a composite of skill, effort, and responsibility." Therefore, the Act is much broader than just advocating gender pay equity, instead, the Act expands equal pay on the basis of membership in the protected class which includes, among others, race, creed, color, national origin, ancestry, age, marital status, civil union status, domestic partnership status, affectional or sexual orientation, genetic information, pregnancy or breastfeeding, sex, gender identity or expression, disability or atypical hereditary cellular or blood trait of any individual, or liability for service in the armed forces.

Comparison of wage rates shall be based on wage rates in all of an employer's operations or facilities. In other words, a challenge by an employee can compare positions throughout an employer's operation, thereby nullifying a defense that an employer might have tried to assert to the effect that a comparison should be more localized.

### STATUTE OF LIMITATIONS AND DAMAGES

The Act provides that a violation of the law occurs each time an employee is affected by a discriminatory compensation decision or practice. Essentially, a new claim arises with each paycheck an employee receives.

Next, an employee can recover back pay going back as far as six years. Moreover, when a violation is proved, the Division of Civil Rights or a court is required to award treble damages, meaning the employee recovers three times the amount of the underpayment. Specifically, the Act states: "if a jury determines that an employer is

guilty of an unlawful employment practice prohibited by subsection r. or t. of section 11 of P.L.1945, c.169 (C.10:5-12), the judge shall award three times any monetary damages to the person or persons aggrieved by the violation."

Therefore, amended subsection r. and newly added subsection t. detail the specific circumstances in which treble damages will be awarded if a violation is found. The text of the amended subsections are as follows:

#### Subsection r.:

For any employer to take reprisals against any employee for requesting from, discussing with, or disclosing to, any other employee or former employee of the employer, a lawyer from whom the employee seeks legal advice, or any government agency information regarding the job title, occupational category, and rate of compensation, including benefits, of the employee or any other employee or former employee of the employer, or the gender, race, ethnicity, military status, or national origin of the employee or any other employee or formal employee of the employer, regardless of whether the request was responded to [ , if the purpose of the request for the information was to assist in investigating the possibility of the occurrence of, or in taking of legal action regarding, potential discriminatory treatment concerning pay, compensation, bonuses, other compensation, or benefits], or to require, as a condition of employment, any employee or prospective employee to sign a waiver, or to otherwise require an employee or prospective employee to agree, not to make those requests or disclosures. Nothing in this subsection shall be construed to require an employee to disclose such information about the employee herself to any other employee or former employee of the employer or to any authorized representative of the other employee or former employee.

#### Subsection t.:

For an employer to pay any of its employees who is a member of a protected class at a rate of compensation, including benefits, which is less than the rate paid by the employer to employees [of the other sex] who are

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not members of the protected class for substantially similar work, when viewed as a composite of skill, effort and responsibility. An employer who is paying a rate of compensation in violation of this subsection shall not reduce the rate of compensation of any employee in order to comply with this subsection.

### EXCEPTIONS

The Act carves out limited exceptions regarding when an employer may pay a different rate of compensation. An employer may pay a different rate of compensation only if the employer demonstrates that the differential is made pursuant to a seniority system, a merit system, or the employer demonstrates each of the following:

1. That the differential is based on one or more legitimate, 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. That the factor or factors are not based on, and do not perpetuate differential in compensation based on sex or any other characteristic of members of a protected class;
3. That each of the factors is applied reasonably;

4. That one or more of the factors account for the entire wage differential; and

5. That the factors are job-related with respect to the position in question and based on a legitimate business necessity.



**SCARINCI | HOLLENBECK**  
ATTORNEYS AT LAW



**Robert E. Levy**

Partner  
Chair, Litigation Law Group  
P: 201-896-7163  
rlevy@sh-law.com