

TRUSAIC

GET TO KNOW NEW JERSEY'S DIANE B. ALLEN EQUAL PAY ACT

On April 24, 2018, Governor Phil Murphy signed into law the Diane B. Allen Equal Pay Act ("NJ EPA"), which amends New Jersey's anti-discrimination statute, the Law Against Discrimination. The NJ EPA applies to all New Jersey employers, regardless of size. It is widely considered to be the most aggressive pay equity law in the United States, based on its expansion of protected classes, mandated pay data reporting for companies doing business with the state, and steep penalties for non-compliance. The NJ EPA went into effect on July 1, 2018. In June 2018, the New Jersey Department of Labor and Workforce Development ("NJ DLWD") issued pay data reporting instructions and forms, which was updated in March 2019.

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What Are the Main Requirements of the NJ EPA?

Pay Equity Mandate

The NJ EPA's most significant change to New Jersey law is its prohibition on compensation discrimination—including benefits—against a member of any protected class in New Jersey. The NJ EPA radically expands the definition of protected class to include: "race, creed, color, national origin, nationality 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 because of the liability for service in the Armed Forces of the United States."

Comparable Employees

Like pay equity legislation across the United States and globally, the NJ EPA does not require that all employees across an employer's workforce be paid the same. Instead, liability arises when there exists disparities in compensation between employees who: (1) are within a protected class as compared to those that do not fall into the protected class and (2) perform "substantially similar work, when viewed as composite of skill, effort and responsibility." Further, under the NJ EPA, comparable employees need not work in the same office, plant, or facility—comparisons may occur across "all of an employer's operations or facilities." This creates a much broader comparison pool than the federal Equal Pay Act, which requires "equal pay for equal work" in the same establishment. However, the NJ Division of Civil



Rights issues out Guidance to clarify that differences based on geographic locations are allowed "by showing that those differences are based on differences in cost-of-living or in relevant labor markets in those areas and are not the result of discrimination."

Affirmative Defenses

The NJ EPA has only limited exceptions and subject to the employer's burden of proof. The first is that pay differentials may be made pursuant to a seniority system or a merit system. The second requires a demonstration that (1) the pay differential is based on one or more legitimate, reasonably applied factors other than characteristics of the protected class, (2) that the factor(s) are based on, and do not perpetuate, a differential based on a protected class, (3) that the factors are applied reasonably, (4) that the factor(s) account for the entire differential, and (5) that the factors accounting for the differential (such as training, education or experience, or the quantity or quality of production) are job-related and based on business necessity. Notably, a factor based on business necessity does not apply if it is shown

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that there are alternative business practices that would serve the same business purposes without producing the pay differential.

Who is Required to Undertake Pay Data Reporting?

The NJ EPA specifies that any business that enters into a qualifying services or public works contract with the State of New Jersey, a state agency, or a state “instrumentality” must submit an annual pay data report to the NJ DLWD. This includes out-of-state contractors. “Instrumentality” is not defined in the statute or NJ DLWD pay data reporting instructions, but the pay data reporting requirement does not apply to contractors of local government (such as counties or municipalities). It remains unclear whether subcontractors are also subject to the NJ pay data reporting requirements.

What Must Be Reported?

Both “Qualifying Services” and “Public Works” contractors must submit NJ pay data reporting. Contractors of “Public Works” are limited to those contractors subject to New Jersey’s Prevailing Wage Act, and do not include the provisions for goods or products. “Qualifying Services” means the provision of any service or than Public Work.

Both types of employers with multiple establishments must submit a report for each establishment. However, Qualifying Service contractors must report on all employees who perform work in New Jersey while Public Works contractors must report on those employed in New Jersey in connection with a contract to perform any Public Work.

The content of the pay data report also differs depending on whether the employer is a contractor for “Qualifying Services” or “Public Works” contractor. The process appears similar to the EEO-1 reporting whereby Qualifying Services contractors are required to submit reporting akin to Component 1 and 2 while Public Works contractors are required only to submit reporting akin to Component 1.



For Qualifying Services contractors, the following must be reported:

- **Identification of employees:** Employers should report this by preparing a list under the heading of “Number of employees” on the Annual Equal Pay Report of the number of employees who meet each of the criteria in the succeeding columns entitled: job category, demographics, hours and compensation (the instructions make clear that an employer is not required to identify any employee by name.)
- **Identification of employee’s sex, race, and ethnicity:** Employers must give their employees the opportunity to self-identify these categories. If specific employees decline, the employer may use employment records or “observer indication” (their best guess). The definitions of sex, race, and ethnicity are also drawn from the EEO-1 report. Sex may be reported as “non-binary.”
- **Description of job categories:** This mirrors the federal EEO-1 report. All reported jobs must be placed in one of the ten EEO-1 categories.
- **Hours worked:** For Fair Labor Standards Act non-exempt employees, this means the actual number of hours worked that year. For exempt employees, employers may use a 40-hour proxy for full-time and 20-hour-per-week proxy for part-time employees.
- **Pay bands:** in 2016 the federal Equal Employment Opportunity Commission (EEOC) proposed a pay data reporting

requirement to be included in EEO-1 reports using 12 pay bands derived from Box 1 of the W-2 form. The pay bands range from “1) = \$19,239 and under” to “12) = \$208,000 and over.” That rule was rescinded by the Trump Administration in 2017. The NJ EPA resurrects this rule.

For Public Works contractors, only the identification of employees’s sex, race and ethnicity and hours worked are required to be reported.

How will New Jersey Use the Collected Pay Data?

From the statute and NJ DLWD instructions, it remains unclear as to how the state of New Jersey will use the collected pay data. The NJ EPA requires retention of pay data records for at least five years.

What Are the Penalties for Failing to Comply with the NJ EPA?

Employers should be aware of two important developments in the area of pay discrimination penalties. The NJ EPA contains:

1. An expansion of the statute of limitations for compensation discrimination from two to six years. Until recently, it was unclear as to whether the NJ EPA would apply retroactively, thereby creating exposure for employers dating back to 2012. A federal district court in New Jersey has partially resolved this issue, holding that the NJ EPA is prospective, i.e. enforceable only from July 1, 2018 onwards. See *Perrotto v. Morgan Advanced Materials, PLC*, No. 2:18-13825 (D.N.J. Jan.

15, 2019). However, this ruling is only applicable to federal court cases. A New Jersey state court could read the statute differently and hold that the NJ EPA is retroactive in state court.

2. "Treble" (triple) damages will be awarded in favor of the plaintiff where a jury finds an employer guilty of compensation discrimination.
3. This means that exposure for employers under the NJ EPA is heavy: a successful plaintiff will receive three times (3x) monetary damages. This arises in addition to other remedies available under the Law Against Discrimination, such as for emotional distress, and for payment of attorneys' fees and costs.

**"I NEVER DOUBTED THAT
EQUAL RIGHTS WAS THE RIGHT
DIRECTION. MOST REFORMS,
MOST PROBLEMS ARE
COMPLICATED. BUT TO ME THERE
IS NOTHING COMPLICATED
ABOUT ORDINARY EQUALITY."**

ALICE STOKES PAUL

What Should I Do?

Conduct a Pay Equity Analysis. Many companies have been hesitant to do this for fear of finding a problem. Fight your fear and get this done for your organization. A comprehensive pay equity analysis is the best place to start to understand what your company is doing right, and where it can improve, before the New Jersey Department of Labor and Workforce Development requires submission of pay data. Many employers do not have the technical expertise to conduct this analysis on their own. If your company falls into this category, you should seriously consider engaging a company experienced in pay data and analytics to work with your legal counsel in completing the pay equity analysis and protecting its findings from unauthorized disclosure. This is true for the simple reason that having clean, validated, and segmented data will reduce the risk of misreporting under the NJ EPA. A meaningful review of pay practices depends on the integrity of your employment data.