



LABOR & EMPLOYMENT

ALERT

NEW JERSEY'S LEGISLATURE SEEKS TO EXPAND EMPLOYER'S LIABILITY FOR WAGE DISCRIMINATION

By Kenneth A. Rosenberg, Esq.

Recently, New Jersey's Legislature sent Senate Bill, No. 1933/Assembly Bill 2650 (the "Bill") to Gov. Christie's desk for signature. The Bill provides:

For purposes of this subsection, an unlawful employment practice occurs with respect to discrimination in compensation or in the financial terms or conditions of employment each occasion that an individual is affected by application of a discriminatory compensation decision or other practice, including, but not limited to each occasion that wages, benefits or other compensation are paid, resulting in whole or in part from such a decision or other practice.

Nothing in this subsection shall: prohibit the court's authority to apply the doctrine of "continuing violation" to any appropriate claim as that doctrine currently exists in New Jersey common law; weaken, obstruct, or eliminate any potential equitable application of the "discovery rule" as that doctrine is currently cognizable in New Jersey common law; or affect any applicable statute of limitation.

The Bill seeks to amend New Jersey's Law Against Discrimination (NJLAD), N.J.S.A. 10:5-1 et seq. to provide that an unlawful employment practice occurs,

with respect to discrimination in compensation each time wages, benefits and compensation are paid to an individual. In addition, and perhaps even more problematic for employers, the Bill allows a court to treat the initial discriminatory decision as part of a "continuing violation" thereby creating potential liability for an employee's entire work history. As such, employers should be concerned that if Gov. Christie signs the Bill, employers would be liable for discriminatory compensation decisions that were made years and perhaps even decades ago.

If this Bill is not enacted into law, then the New Jersey Supreme Court's ruling in *Alexander v. Seton Hall University*, 204 N.J. 219 (2010) regarding pay discrimination would remain in effect. There, the New Jersey Supreme Court held that each payment of wages tainted by an original discriminatory compensation decision was an individual discrete actionable wrong under the NJLAD. Importantly, however, it did not provide that such decisions were subject to the "continuing violation" theory as the NJLAD includes a two-year statute of limitations. Thus, the Supreme Court's ruling limited recovery of back pay to paychecks received within the two-year period immediately preceding the filing of a lawsuit and maintained consistency with the Lilly Ledbetter Fair Pay Act of 2009, which also includes a limitation on recovery to two years back pay.

While it seems likely Gov. Christie will veto the Bill due to his pro-business bent, it is unclear whether New Jersey's Legislature will have sufficient votes to override veto power. Thus, initially, employers may not feel threatened by the Bill. However, taking a "wait and see" approach may not be in an employer's best interests. Although the future of the Bill remains uncertain, the idea of equal pay for equal work is not going away anytime soon on either the national or state stage.

Accordingly, employers should not only monitor the Bill and other similar legislative efforts, but they should also immediately review their wage and compensation plans to ensure they do not disparately treat or impact individuals in protected classes, i.e. race,

national origin, gender, etc. If the Bill does become law, employers will also need to review their record retention policies, since they may have to justify compensation decisions years after the fact. Employers should seek counsel with questions regarding the Bill's impact on their compensation plans and/or if they are interested in taking preemptive action to correct any discriminatory pay practices that may currently exist.

If you have questions about this Alert, please contact Kenneth A. Rosenberg at 973.994.7510 or krosenberg@foxrothschild.com or any member of Fox Rothschild's Labor and Employment Department.

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