



# DIVISION ON **CIVIL RIGHTS**

## **Guidance on the Diane B. Allen Equal Pay Act March 2020**

On April 24, 2018, Governor Phil Murphy signed into law the Diane B. Allen Equal Pay Act (Equal Pay Act).<sup>1</sup> The Equal Pay Act expanded upon the equal pay protections that already existed in the New Jersey Law Against Discrimination (LAD), and has been called “the most sweeping equal pay legislation in the nation.”<sup>2</sup> The Act generally prohibits an employer from paying an employee who is a member of an LAD-protected class less than what it pays an employee who is not a member of that LAD-protected class for substantially similar work. By contrast, the federal Equal Pay Act, 29 U.S.C. § 206, covers only gender-based pay disparities and only requires equal pay for “equal” work, not “substantially similar” work. The new law took effect on July 1, 2018.

This enforcement guidance document summarizes the changes that the Equal Pay Act made to the LAD and explains how those changes affect employers and employees. It is broken down into two sections. The first section provides an overview of the Equal Pay Act, summarizing the Act’s main provisions. The second section contains frequently asked questions about the Act.<sup>3</sup>

### **I. OVERVIEW OF THE LAW**

The New Jersey Legislature created the New Jersey Division on Civil Rights (DCR) to enforce the New Jersey Law Against Discrimination (LAD) and to “prevent and eliminate discrimination” in the State of New Jersey. N.J.S.A. § 10:5-6.

The LAD prohibits discrimination, bias-based harassment, and retaliation in employment, housing, and places of public accommodation. It has long prohibited discrimination in compensation based on race, religion, gender, sexual orientation, gender identity or expression, national origin, disability, and other protected characteristics. N.J.S.A. § 10:5-12(a) (2017).<sup>4</sup>

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<sup>1</sup> The Equal Pay Act is available on DCR’s website at <https://www.nj.gov/oag/dcr/downloads/Equal-Pay-Act.pdf>.

<sup>2</sup> Matt Arco, *N.J. now has the strongest equal pay law in America*, NJ.com (Apr. 24, 2018), <https://www.nj.com/politics/2018/04/nj-now-has-the-strongest-equal-pay-law-in-america.html>.

<sup>3</sup> The purpose of this enforcement guidance is to clarify and explain DCR’s understanding of existing legal requirements in order to facilitate compliance with the LAD. This enforcement guidance does not impose any new or additional requirements that are not included in the LAD, does not establish any rights or obligations for any person, and will not be enforced by DCR as a substitute for enforcement of the LAD. This document does not provide legal advice and should not be treated as providing legal advice. Employees and employers with questions about the Equal Pay Act or LAD are encouraged to speak with a qualified attorney to address their specific questions.

<sup>4</sup> A notation of (2017) in a citation to the LAD signifies that the quoted language appeared in the LAD prior to the passage of the Equal Pay Act.

Notwithstanding the LAD’s protections, pay gaps still exist in New Jersey and across the country. In 2018, women in New Jersey earned only 81.3% as much as their male counterparts.<sup>5</sup> Black women nationwide earned only 80% as much as white women, and only 65% as much as white men.<sup>6</sup> Hispanic women earned only 76% as much as white women nationwide, and only 62% as much as white men.<sup>7</sup>

The Equal Pay Act made numerous changes to the LAD, with the goal of further reducing and eliminating pay disparities based on protected characteristics. Those changes include:

#### *Expanding the Remedies for Pay Discrimination*

Prior to the passage of the Equal Pay Act, Section 10:5-12(a) of the LAD already prohibited employers from discriminating “in compensation or in terms, conditions or privileges of employment” based on many protected characteristics, including “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, liability for service in the Armed Forces of the United States, nationality,” and refusing to “submit to a genetic test or make available the results of a genetic test.” N.J.S.A. § 10:5-12(a) (2017). This prohibition has long been enforceable in lawsuits brought by employees against their employers for pay discrimination. *See, e.g., Alexander v. Seton Hall University*, 204 N.J. 219 (2010).

Historically, employees could recover up to two years of back pay for successful pay discrimination claims under the LAD’s preexisting statute of limitations. *See id.* at 234-36. The Equal Pay Act, however, amended Section 10:5-12(a) to create a six-year “lookback” period, allowing 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 Equal Pay Act also codified the New Jersey Supreme Court’s holding that a violation of the LAD occurs each time an employee is “affected by application of a discriminatory compensation decision or other practice,” including each time an employee receives a paycheck. N.J.S.A. § 10:5-12(a); *see Alexander*, 204 N.J. at 235.

#### *Equal Pay for Substantially Similar Work*

The Equal Pay Act also added a new subsection to the LAD, N.J.S.A § 10:5-12(t). Subsection (t) prohibits an employer from paying any employee “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 who are not members of the protected class for *substantially similar work, when viewed as a composite of skill, effort and responsibility.*” N.J.S.A § 10:5-12(t) (emphasis added). The protected classes for subsection (t) are the same as for subsection (a): “race, creed, color, national origin, nationality, ancestry, age, marital status, civil union status, domestic partnership status, affectional

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<sup>5</sup> U.S. Bureau of Labor Statistics, *Women’s Earnings in New Jersey – 2018*, at 1 (Dec. 2019), available at [https://www.bls.gov/regions/new-york-new-jersey/news-release/pdf/womensearnings\\_newjersey.pdf](https://www.bls.gov/regions/new-york-new-jersey/news-release/pdf/womensearnings_newjersey.pdf).

<sup>6</sup> U.S. Bureau of Labor Statistics, *BLS Reports: Highlights of Women’s Earnings in 2018*, at 3 (Nov. 2019), available at <https://www.bls.gov/opub/reports/womens-earnings/2018/pdf/home.pdf>.

<sup>7</sup> *Id.*

or sexual orientation, genetic information, pregnancy, sex, gender identity or expression, disability or atypical hereditary cellular or blood trait of any individual, or liability for service in the armed forces.” N.J.S.A. § 10:5-12(t).

If a member of a protected class demonstrates that they are compensated less for substantially similar work than a person who is not a member of that protected class, the employer is liable under the Equal Pay Act unless it can demonstrate either:

1. That the pay differential is made *pursuant to a seniority system or a merit system; or*
2. That all five of the following are true:
  - a. “That the [pay] 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;
  - b. That the factor or factors are not based on, and do not perpetuate, a differential in compensation based on sex or any other characteristic of members of a protected class;
  - c. That each of the factors is applied reasonably;
  - d. That one or more of the factors account for the entire wage differential; and
  - e. That the factors are job-related with respect to the position in question and based on a legitimate business necessity. A factor based on business necessity shall not apply if it is demonstrated that there are alternative business practices that would serve the same business purpose without producing the wage differential.”

N.J.S.A. § 10:5-12(t).

Subsection (t) specifies that “[c]omparisons of wage rates shall be based on wage rates in all of an employer’s operations or facilities.” N.J.S.A. § 10:5-12(t). It also prevents employers from reducing anyone’s compensation in an effort to cure a violation of the Equal Pay Act. N.J.S.A. § 10:5-12(t).

### *Anti-Retaliation Provisions*

Prior to the Equal Pay Act, the LAD prohibited retaliation against any person who “opposed any practices or acts forbidden under” the LAD or who, among other things, “filed a complaint, testified or assisted in any proceeding” under the LAD. N.J.S.A. § 10:5-12(d) (2017). The Equal Pay Act broadens that protection by further prohibiting retaliation against anyone who seeks “legal advice regarding rights” under the LAD, “share[s] relevant information with legal counsel,” or “shares information with a governmental entity.” N.J.S.A. § 10:5-12(d). That applies to any rights under the LAD, not simply claims for equal pay.

Prior to the Equal Pay Act, Section 10:5-12(r) prohibited employers from retaliating against employees who requested information about: (1) job title or compensation; or (2) the “gender, race, ethnicity, military status, or national origin” of employees, when the employee requested such information for the purpose of investigating or taking legal action regarding potential pay discrimination. N.J.S.A. § 10:5-12(r) (2017).

The Equal Pay Act amends subsection (r) with respect to those protections in order to cover a broader range of conduct. The amended provision now prohibits any retaliation “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 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. The Equal Pay Act also prohibits employers from requiring employees to waive their right to make any such requests or disclosures. N.J.S.A. § 10:5-12(r).

### *Remedies*

An employee who establishes any violation of the LAD can receive some or all of the following remedies:

1. An order requiring the employer to cease and desist from the unlawful employment practice;
2. Lost wages and benefits;
3. Hiring, reinstatement, or promotion as appropriate, with back pay and interest;
4. Emotional distress damages;
5. Reasonable attorneys’ fees if the complainant was represented by counsel;
6. Out-of-pocket expenses associated with pursuing the complaint; and
7. Punitive damages (in cases filed in Superior Court only).

DCR may also order attorneys’ fees and affirmative relief (e.g., training, policy changes, and monitoring) and may impose statutory penalties that the respondent must pay to the State Treasury:

1. Up to \$10,000 for the first violation in a five-year period
2. Up to \$25,000 for the second violation in a five-year period
3. Up to \$50,000 for the third violation (and any additional violations) in a seven-year period.

In addition to those existing remedies under the LAD, the Equal Pay Act amends Sections 10:5-13 and 10:5-17 of the LAD to allow for treble damages (three times any monetary damages) for violations of the prohibition on unequal pay for substantially similar work in § 10:5-12(t) and for violations of the anti-retaliation prohibitions in § 10:5-12(r). If a jury finds a violation of subsection (t) or subsection (r), the judge *must* award treble damages to the plaintiff. If the Director of the Division on Civil Rights determines an employer violated subsection (t) or subsection (r), the Director may award treble damages, but is not required to do so.

### *New Reporting Requirements*

The Equal Pay Act requires any employer entering into a contract with the State of New Jersey or an instrumentality of the State for “qualifying services” or “public works” to provide to the Department of Labor and Workforce Development wage and demographic data for all employees who are employed in connection with the contract (for public works) and for all employees (for qualifying services). This requirement does not apply to employers who contract with counties, municipalities, or other local government entities. The report must contain the gender, race,

ethnicity, job category, compensation, and number of hours worked by each employee. These reporting requirements are enforced by the Commissioner of the Department of Labor and Workforce Development. Instructions for complying with them are available at: [https://nj.gov/labor/forms\\_pdfs/equalpayact/MW-564%20\(3-19\)%20Instructions.pdf](https://nj.gov/labor/forms_pdfs/equalpayact/MW-564%20(3-19)%20Instructions.pdf).

## **II. FREQUENTLY ASKED QUESTIONS**

### **A. Covered Employers**

#### **Q: Who must comply with the Equal Pay Act?**

The Equal Pay Act covers nearly all employers in New Jersey. An employer need not have a minimum number of employees for the Equal Pay Act to apply—even one employee in New Jersey is enough. The Equal Pay Act does not apply to the federal government as an employer, but it does apply to the State and to municipal governments.

#### **Q: Does the Equal Pay Act apply to employers located outside of New Jersey?**

Yes. The employer need not be located in New Jersey for the Equal Pay Act to apply, as long as it has employees with a primary place of work in New Jersey.

### **B. Covered Employees**

#### **Q: Which employees are covered by the Equal Pay Act?**

Nearly all employees are covered by the Equal Pay Act, including full-time, part-time, seasonal, per-diem, and temporary employees. However, the Equal Pay Act does not apply to “any individual employed in the domestic service of any person” or any federal employee.

#### **Q: Does the Equal Pay Act apply to government employees?**

Yes. The Equal Pay Act applies to state, county and municipal employees. It does not apply to employees of the federal government.

#### **Q: Does the Equal Pay Act apply to employees who live outside of New Jersey?**

Employees can bring a claim under the Equal Pay Act as long as they have a primary place of work in New Jersey. Employees who satisfy this requirement are not excluded from Equal Pay Act protection if they live outside of New Jersey. So, for example, an employee who lives in Pennsylvania but works in New Jersey several days a week is protected by the Equal Pay Act.

#### **Q: What are protected characteristics under the Equal Pay Act?**

The Equal Pay Act’s protected characteristics are race, creed, color, national origin, nationality, ancestry, age, marital status, civil union status, domestic partnership status, affectional or sexual orientation, genetic information, pregnancy, sex, gender identity or expression, disability, atypical hereditary cellular or blood trait of any individual, or liability for service in the armed forces.

### **C. Requirement of Equal Pay for Substantially Similar Work**

**Q: Does the Equal Pay Act prohibit only unequal pay for equal work?**

No. The Equal Pay Act prohibits an employer from paying any employee who is a member of a protected class less compensation than an employee who is not a member of the protected class for substantially similar work.

**Q: What constitutes compensation under the Equal Pay Act?**

Compensation includes an employee’s base wages, commissions, overtime pay, bonus pay, merit pay, and stock options. Compensation also includes cash and non-cash benefits, including but not limited to insurance, vacation time, and retirement funding.

**Q: What does “substantially similar” work mean?**

Substantially similar work is evaluated as a combination of the skill, effort, and responsibility required to perform an employee’s job duties. Therefore, two employees perform “substantially similar work” when their job duties require a similar degree of skill, effort, and responsibility. When determining whether work is substantially similar, all three factors should be examined together. Work is substantially similar where, on balance, the jobs are substantially similar, but they need not be identical. Minor differences in skill, effort, and responsibility do not preclude work from being substantially similar.

**Q: What does “skill” mean in this context?**

Skill refers to the experience, ability, education, and training required to perform a set of job duties. This term refers to the skills actually necessary to perform a job, as opposed to the skills a particular employee just happens to have. Therefore, skills not necessary to perform a particular job are not relevant to determining whether jobs are substantially similar. For example, for an accountant who happens to have a Master’s Degree in Literature, knowledge of English Literature typically would not be a skill required to perform the job because it is typically not related to an accountant’s job duties.

**Q: What does “effort” mean in this context?**

Effort refers to the requirements of a job as a whole and takes into account the amount of physical or mental exertion required to complete a job. An employee’s working conditions may also be relevant to the amount of effort required to perform a job.

For example:

- A job that requires an employee to be on her feet all day would likely require more physical effort than a more sedentary job.
- A job requiring employees to work long hours or meet late-breaking deadlines may require more mental exertion than a job that does not.

**Q: What does “responsibility” mean in this context?**

Responsibility refers to the job duties required and to the degree of discretion and accountability required to perform the job. An employee who supervises others, makes high-level decisions, or enacts policies and procedures may have different responsibilities than an employee who does not.

However, minor or occasional differences in responsibilities will not prevent jobs from being substantially similar.

For example:

- An executive chef likely has more responsibility than a line cook because the executive chef has more discretion, supervises others, and makes high-level decisions.
- An employee who supervises a team and has final authority to approve the written documents the team produces likely has more responsibility than an employee on the team who conducts initial research to help in drafting the documents.
- At a large department store, salespeople generally are not responsible for sweeping the floors. However, the fact that a sales clerk in the home goods department is occasionally asked to sweep up if a customer breaks a glass would only be a minor or occasional difference in responsibility; that minor difference would not prevent her from being considered comparable to sales clerks in other departments if their duties were otherwise substantially similar.

**Q: Do two positions have to be identical as a composite of skill, effort, and responsibility in order to be “substantially similar” under the Equal Pay Act?**

No. Neither job title nor actual work performed have to be identical, and minor differences in skill, effort, and responsibility do not preclude work from being substantially similar.

For example:

- In a school setting, janitorial and food service jobs may be substantially similar in terms of skill, effort and responsibility because both may involve substantial amounts of lifting and cleaning, even though the job duties are not exactly the same.
- Attorneys reviewing contracts versus attorneys litigating cases may be performing substantially similar work in terms of skill, effort, and responsibility even though the job duties are not exactly the same.

**Q: Can an employer rely solely on job titles or job descriptions to determine which positions are substantially similar?**

No. What is most important to determining whether two employees perform substantially similar work is the work itself, viewed as a composite of skill, effort, and responsibility. Job titles and job descriptions do not necessarily keep pace with the actual nature of duties and responsibilities performed by employees. Accordingly, job title and job description are not determinative, although they may be relevant to assessing whether two jobs require a similar degree of skill, effort, and responsibility. For example, a secretary and executive assistant might perform substantially similar work even though their job titles are different and their job duties may not be exactly the same.

**Q: If an employer discovers that it is paying an employee in a protected class less than an employee outside of the protected class who performs substantially similar work, may it reduce the latter employee’s pay in order to come into compliance with the Equal Pay Act?**

No. The Equal Pay Act specifically prohibits reducing an employee’s pay to resolve a pay disparity.

**Q: Can an employer be found to have violated the Equal Pay Act if the employer did not intend to discriminate against a member of a protected class?**

Yes. In order to establish liability under the Equal Pay Act, an employee does not need to establish that an employer intended to discriminate against a member of a protected class.

**Q: If an employee makes a claim under the Equal Pay Act, to whom are his wages compared?**

An employee's wages are compared to those of employees performing substantially similar work in any of an employer's operations or facilities.

**Q: When someone makes a claim under the Equal Pay Act, can her wages be compared to the wages of other employees located outside the State of New Jersey?**

Yes. Subsection (t) states that "[c]omparisons of wage rates shall be based on wage rates in all of an employer's operations or facilities." So an employee is not precluded from filing a claim under the Equal Pay Act even if all of her comparators are located outside the State of New Jersey. However, as discussed below, an employer may defend differences in compensation for employees in different geographic locations 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.

**Q: How does the Equal Pay Act differ from the federal Equal Pay Act?**

New Jersey's Equal Pay Act is broader than the federal Equal Pay Act in two fundamental respects. First, New Jersey's Equal Pay Act covers members of all of the protected classes listed in the section entitled "Overview of the Law" above, whereas the federal Equal Pay Act covers only gender-based pay disparities. Second, the federal Equal Pay Act requires equal pay for only *equal work*, whereas New Jersey's Equal Pay Act requires equal pay for *substantially similar work*.

**D. Permissible Variations in Pay**

**Q: Are there exceptions to the general rule that prohibits an employer from paying an employee who is a member of a protected class less for substantially similar work than an employee who is not a member of that protected class?**

Yes. Even if two employees perform substantially similar work, an employer may pay them different rates of compensation if the employer can demonstrate:

1. That the pay differential is made *pursuant to a seniority system or a merit system*; or
2. That all five of the following are true:
  - a. "That the [pay] 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;
  - b. That the factor or factors are not based on, and do not perpetuate, a differential in compensation based on sex or any other characteristic of members of a protected class;
  - c. That each of the factors is applied reasonably;
  - d. That one or more of the factors account for the entire wage differential; and
  - e. That the factors are job-related with respect to the position in question and based on a legitimate business necessity. A factor based on business necessity shall not apply if it is demonstrated that there are alternative business practices that would serve the same business purpose without producing the wage differential."



**Q: Who bears the burden of proving that a pay differential for substantially similar work is nonetheless permissible under the Equal Pay Act as outlined above?**

The employer.

**Q: What is a system?**

A “system” is a plan, policy, or practice that is predetermined or predefined by the employer. A system is used by managers and others to make compensation decisions. A system is uniformly applied to employees in good faith without regard to membership in a protected class. Ad hoc determinations by an employer regarding what each individual employee is “worth” to the company do not constitute a “system.”

**Q: What is a seniority system?**

A seniority system is a system that recognizes and compensates employees based on length of service with the employer.

**Q: What is a merit system?**

A merit system is a system that provides for variations in pay based upon employee performance as measured through legitimate, job-related criteria.

**Q: What is a legitimate, bona fide factor other than the characteristics of members of the protected class?**

A legitimate, bona fide factor other than the characteristics of members of the protected class could be any genuine justification for a pay differential, including (but not limited to) training, education, experience, or the quantity or quality of production.

**Q: If an employer establishes that the difference in compensation is based on one or more legitimate, bona fide factors other than the characteristics of members of the protected class, can the employer still be liable?**

Yes. Even when an employer demonstrates that a pay disparity is based on a legitimate, bona fide factor other than a protected characteristic, the employer must still meet the other four requirements under subsection (t). Specifically, the employer must demonstrate that the factor or factors are not based on, and do not perpetuate, a differential in compensation based on membership in a protected class; that each of the factors is applied reasonably; “that one or more of the factors account for the entire wage differential”; *and* that “the factors are job-related with respect to the position in question and based on a legitimate business necessity.”

**Q: What is a factor that is not based on, and does not perpetuate, a differential in compensation based on membership in a protected class?**

A factor that is not based on, and does not perpetuate, a differential in compensation based on membership in a protected class is one that has not historically been associated with wage gaps for members of LAD-protected classes—for example, sales numbers. However, if a factor that was previously used to justify pay disparities did not explicitly refer to a protected characteristic but was used as a pretext for or had the effect of discriminating on the basis of that characteristic, that factor could not be used to justify pay disparities under the Equal Pay Act.

**Q: Can an employer rely on salary history in determining compensation, or would salary history be a factor that is based on or perpetuates a differential in compensation based on membership in a protected class?**

The answer will depend on the specific factual circumstances. However, reliance on salary history may perpetuate a differential in compensation based on membership in a protected class where there is a preexisting wage gap for members of that protected class.

**Q: When is a factor job-related with respect to the position and based on a legitimate business necessity?**

A factor is job related with respect to the position in question and based on a legitimate business necessity when it has both a direct relationship to the position and a direct relationship to the employer's legitimate business interests. A legitimate business interest can include financial considerations. However, a factor is not "based on a legitimate business necessity" when "it is demonstrated that there are alternative business practices that would serve the same business purpose without producing the wage differential." N.J.S.A. § 10:5-12(t).

**Q: Can geographic differences ever be a legitimate bona fide factor justifying a difference in compensation?**

Yes. Any such claim would be evaluated on a case-by-case basis and the employer is responsible for establishing any asserted affirmative defense. For example, a national employer could argue that its computer programmers in one city are paid more than its computer programmers in another location because of the higher cost-of-living in the former or because of the higher demand for computer programmers in the former market. It would then have to demonstrate that cost-of-living and/or demand are not based on, and do not perpetuate, a differential in compensation based on sex or any other protected characteristic; that both factors were applied reasonably and together accounted for the entire wage differential; and that both were job-related and based on a legitimate business necessity.

**Q: Who bears the burden of proving that there are alternative business practices that would serve the same business purpose without producing the wage differential?**

The employee.

**E. Prohibitions on Retaliation**

**Q: May an employer retaliate against an employee for disclosing or requesting compensation information?**

No. The Equal Pay Act specifically prohibits any employer from retaliating against any employee for requesting from, discussing, or disclosing to any employee, lawyer, or government agency, information about job title, occupational category, and compensation of any other employee or former employee, as well as the gender, race, ethnicity, national origin, or military status of those other employees. It is also unlawful for an employer to require an employee or prospective employee to agree not to discuss compensation as a condition of employment.

**Q: Does the Equal Pay Act extend protections for those seeking to vindicate their rights under the LAD more generally?**

Yes. Prior to the Equal Pay Act, Section 10:5-12(d) of the LAD prohibited any person from retaliating against a person who “opposed any practices or acts forbidden under” the LAD or who, among other things, “filed a complaint, testified or assisted in any proceeding” under the LAD. The Equal Pay Act broadens that protection by further prohibiting retaliation against anyone who seeks “legal advice regarding rights” under the LAD, “share[s] relevant information with legal counsel,” or “shares information with a governmental entity.” That applies to all rights under the LAD, not simply claims for equal pay.

**Q: May employers require employees to waive protections under the LAD or to consent to a shorter statute of limitations?**

No. The Equal Pay Act amends the LAD to make clear that “[i]t shall be an unlawful employment practice to require employees or prospective employees to consent to a shortened statute of limitations or to waive any of the protections provided by” the LAD.

**F. Liability and Enforcement**

**Q: How is the Equal Pay Act enforced?**

An employee who believes his/her rights under Equal Pay Act have been violated may either: (1) file a lawsuit in court; or (2) file a complaint with DCR by visiting [www.NJCivilRights.gov](http://www.NJCivilRights.gov) or by calling (973) 648-2700.

**Q: When does a violation of the Equal Pay Act occur?**

The Equal Pay Act is violated each time disparate wages (or other compensation) are paid. In other words, if an employee who is a member of a protected class is paid less for substantially similar work than an employee who is not a member of that protected class, and the employer cannot justify the disparity as explained above, then each paycheck is a separate violation of the Equal Pay Act.

**Q: When must a claim under Equal Pay Act be brought?**

A complaint filed with DCR will be considered timely if it is filed within 180 days of the most recent discriminatory paycheck, compensation, or other benefit. Lawsuits alleging violations of the Equal Pay Act must be filed in court within two years of the most recent discriminatory paycheck, compensation, or other benefit.

**Q: Are employees required to make or submit a complaint to their employer before filing in court or with DCR?**

No. Employees are not required to make or submit complaints to their employer before filing in court or with DCR.

## **G. Damages and Remedies**

### **Q: What kind of damages and remedies may an employee recover if the Equal Pay Act was violated?**

Under the LAD, an employee who establishes a violation of the Equal Pay Act can receive some or all of the following remedies:

1. An order requiring the employer to cease and desist from the unlawful employment practice;
2. Lost wages and benefits;
3. Hiring, reinstatement, or promotion as appropriate, with back pay and interest;
4. Emotional distress damages;
5. Reasonable attorneys' fees if the complainant was represented by counsel;
6. Out-of-pocket expenses associated with pursuing the complaint; and
7. Punitive damages (in cases filed in Superior Court only).

DCR may also order attorneys' fees and affirmative relief (e.g., training, policy changes and monitoring) and may impose statutory penalties that the respondent must pay to the New Jersey Department of Treasury:

1. Up to \$10,000 for the first violation in a five-year period
2. Up to \$25,000 for the second violation in a five-year period
3. Up to \$50,000 for the third violation (and any additional violations) in a seven-year period.

In addition to these existing remedies under the LAD, the Equal Pay Act amends the LAD to provide treble damages (three times any monetary damages) for violations of the prohibition on unequal pay for substantially similar work found in 10:5-12(t) and for violations of the anti-retaliation prohibitions found in 10:5-12(r). If a jury finds a violation of subsection (t) or subsection (r), the judge *must* award treble damages to the plaintiff. If the Director of DCR determines an employer violated subsection (t) or subsection (r), the Director *may* award treble damages but is not required to do so.

## **H. Proactive Steps to Address Equal Pay**

### **Q: What happens if an employer undertakes a proactive review of its compensation practices and takes steps to rectify any pay disparities?**

DCR encourages employers to take proactive steps to address pay disparities among their employees and to ensure they are in compliance with the Equal Pay Act. In proceedings before DCR, if an employer has proactively conducted a self-evaluation of its pay practices and then made adjustments in compensation based on that self-evaluation, those adjustments will not be treated as an admission of liability.

## **I. Reporting Requirements**

### **Q: What are the new reporting requirements in the Equal Pay Act?**

Under the Equal Pay Act, any employer entering into a contract with the State of New Jersey or an instrumentality of the State for “qualifying services” or “public works” must provide to the Department of Labor and Workforce Development wage and demographic data for all employees who are employed in connection with the contract (for public works) and for all employees (for qualifying services). This requirement does not apply to employers who are contracting with local governments (for example, municipalities and counties). The report must contain the gender, race, ethnicity, job category, compensation, and number of hours worked by each employee.

### **Who enforces the new reporting requirements in Equal Pay Act?**

These reporting requirements are enforced by the Commissioner of the Department of Labor and Workforce Development. Instructions for complying with those reporting requirements can be found at: [https://nj.gov/labor/forms\\_pdfs/equalpayact/MW-564%20\(3-19\)%20Instructions.pdf](https://nj.gov/labor/forms_pdfs/equalpayact/MW-564%20(3-19)%20Instructions.pdf). In addition, the Department has codified rules to enforce those requirements. *See* N.J.A.C. 12:10.

## **J. More Information**

### **Q: Where can I find out more?**

The full text of Equal Pay Act is available on DCR’s website at: <https://www.nj.gov/oag/dcr/downloads/Equal-Pay-Act.pdf>.

A one-page fact sheet that explains the Equal Pay Act in understandable language is on DCR’s website in English at [https://www.nj.gov/oag/dcr/downloads/fact\\_EqualPay.pdf](https://www.nj.gov/oag/dcr/downloads/fact_EqualPay.pdf) and in Spanish at [https://www.nj.gov/oag/dcr/downloads/fact\\_EqualPay\\_ESP.pdf](https://www.nj.gov/oag/dcr/downloads/fact_EqualPay_ESP.pdf).



Rachel Wainer Apter  
Director, New Jersey Division on Civil Rights  
March 2020



## New Jersey Civil Service Commission

### **APPENDIX A: A BASIC GUIDE TO SELF-EVALUATIONS FOR PUBLIC SECTOR EMPLOYERS**

The Civil Service rules, as set forth in N.J.A.C. 4A, et seq, were enacted to establish a personnel system that provides a fair balance between managerial needs and employee protections for the effective delivery of public services consistent with N.J.S.A. 11A:1-2. However, as a result of the Diane B. Allen Equal Pay Act, Appointing Authorities must consider new standards when setting salaries for certain new State employees such as new Senior Executive Service (“SES”) and/or Unclassified employees, and during certain promotions. Additionally, employers may wish to undertake a proactive self-evaluation to identify and correct instances of pay disparity prior to receiving an official complaint. The information provided below is intended only as general guidance and does not constitute legal advice.

NOTE: The *Compensation Worksheet Form for No-Range Titles* is to be used only for employees in no-range titles. Employees in career service titles are paid pursuant to the Civil Service System which is considered a bona fide merit/seniority system under the Diane B. Allen Equal Pay Act. Similarly, employees in unionized titles covered by a collective bargaining agreement (“CBA”) that bases salary on a bona fide seniority and/or merit system do not need to be included in the self-evaluation.

#### SELF-EVALUATIONS

Employers should undertake a self-evaluation to identify and address any possible pay disparities under the Diane B. Allen Equal Pay Act. Employers should ensure that the self-evaluation is reasonable in scope and detailed based on the individual circumstances of the Appointing Authority.

NOTE: A self-evaluation is a tool that may be used by employers to identify and correct instances of pay disparity prior to receiving an official complaint. It is not, in and of itself, an affirmative defense to a claim brought under the Diane B. Allen Equal Pay Act. Affirmative defenses recognized under the Diane B. Allen Equal Pay Act are noted in step 4.

Below are steps that employers should consider undertaking as part of a comprehensive self-evaluation; however, the complexity of the analysis required will vary depending on the size, make-up, and resources of each Appointing Authority. The steps outlined below are intended only as a general guide.

#### **Step 1: Gather Relevant Information**

Gather data and other information necessary to performing a thorough self-evaluation. Such information includes, but is not limited to, the following for each current and former employee in a no-range title<sup>1</sup> for the past year:

1. Name/employee ID
2. Gender
3. Age and/or birth year
4. Race
5. Ethnicity
6. Primary work location
7. Work type (full-time, part-time, temporary, etc.)
8. Exempt/non-exempt status
9. Date(s) of hire
10. Job title
11. Job duties performed
12. Job code/range/band
13. Date in most recent job code/range/band
14. Division/unit scope
15. Job function/family
16. Supervisor
17. Performance rating(s)
18. Highest level of relevant education
19. Relevant license(s), certification(s), etc.
20. Pay type (hourly, salary, etc.)
21. Annualized salary or hourly rate
22. Shift differential
23. Bonus eligibility
24. Eligible benefit plans/programs
25. Bonus paid, if applicable
26. Hours worked/type (regular, OT, etc.)
27. Total compensation

## **Step 2: Identify Comparable Jobs**

Utilizing a composite of skill, effort, and responsibility for the job duties performed, identify which positions within the organization are comparable. As noted previously, consideration of these factors is based on the work actually performed and not based on the job title or official job description. While job titles may be useful, they alone do not determine comparability. Similarly, do not assume that jobs in different divisions and/or unit scopes are not comparable. In addition, consider working conditions, which includes the physical surroundings, hazards encountered, and the time of day that the work is performed.

## **Step 3: Calculate Salaries and Identify Membership in one or more Protected Class**

Within each comparable job group identified in Step 2, calculate the salary for each employee and identify his/her membership in one or more protected classes as defined by the New Jersey Law Against Discrimination.

## **Step 4: Assess Whether Differences in Pay Are Justified Under the Diane B. Allen Equal Pay Act**

As noted previously, the Diane B. Allen Equal Pay Act permits wage differentials pursuant to a seniority system, a merit system, or if all five of the following are true:

- 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;

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<sup>1</sup> As noted above, NJ State employees in Career Service titles that are covered by the Civil Service System and employees in unionized titles covered by a CBA that bases pay on a bona fide merit and/or seniority system should not be included in the self-evaluation.

- The factor or factors are not based on, and do not perpetuate, a differential in compensation based on sex or any other characteristic of members of a protected class;
- 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. A factor shall not be based on a legitimate business necessity if it is demonstrated that there are alternative business practices that would serve the same business purpose without producing a wage differential.

Using the analysis from Step 3, indicate whether any of the pay disparities is permissible based on these five factors.

### **Step 5: Remediate Any Pay Disparities**

Employers should take steps to remediate, in a timely fashion, any differentials in pay for members of a protected class performing substantially similar work as individuals who are not members of a protected class, where the pay disparity is not justified under Step 4. Be mindful that when remediating pay disparities, the employer cannot reduce an employee's pay to correct a pay disparity. Instead, the pay of the lower paid employee(s) must be increased.

### **Step 6: Adjust Compensation Practices**

Employers who identify pay differentials between employees who are members of a protected class and employees who are not members of the protected class should attempt to determine the reason(s) for such differentials and take steps to prevent them in the future.

The Diane B. Allen Equal Pay Act states that employers must justify different rates of compensation for substantially similar work. Therefore, it is recommended that Appointing Authorities utilize the form in Appendix B titled *Compensation Worksheet Form for No-Range Titles* when hiring an individual into a job title that is designated no-range. In this instance, the comparable employee(s) are incumbent workers and/or other new hires who are performing substantially similar work but were hired at a different salary rate than the new employee.

NOTE: As noted above, the *Compensation Worksheet Form for No-Range Titles* is to be used only for employees in no-range titles. Employees in career service titles are covered by the Civil Service System and thus need not be included in the self-evaluation.



## **APPENDIX B: SAMPLE COMPENSATION WORKSHEET FORM FOR NO-RANGE TITLES**

See attached worksheet to be used for:

- New hires or promotions into no-range job titles.

NOTE: Employees in no-range job titles are in the unclassified service but fall outside of N.J.A.C. 4A:3-4.1(d) which states:

In State service, the Civil Service Commission shall establish, maintain, and approve changes in a compensation plan for all employees in the career and unclassified services. See N.J.A.C. 4A:3-2.5 for Senior Executive Service compensation.

1. The compensation plan shall establish pay rates and a series of salary ranges.
2. Each employee in the career and unclassified services shall be paid within the salary range or at the pay rate assigned to the employee's job title and pay shall be adjusted in accordance with this subchapter, except as otherwise provided by law, rule, or action of the Civil Service Commission.



## New Jersey Civil Service Commission

### COMPENSATION WORKSHEET FORM FOR NO-RANGE TITLES

**INSTRUCTIONS:** This form is to be completed to determine the salary of a new hire or promoted employee into a no-range title.

Identify all current employees, including other new hires and promoted employees, if applicable, who are performing substantially similar work as the new hire or promoted employee.

**Please print out and complete a separate form for each comparable employee. It is recommended that a copy of this form be maintained in the event that salary is challenged.**

**NOTE:** Pursuant to the Diane B. Allen Equal Pay Act (P.L. 2018, c. 9), it is an unlawful employment practice for an employer to discriminate against an employee by paying a rate of compensation to employees of a protected class which is less than the rate paid to employees not of the class for substantially similar work. Substantially similar work must consider:

- Skill: experience, ability, education, and training required to perform the job.
- Effort: the amount of physical or mental exertion needed to perform the job.
- Responsibility: the degree of discretion, accountability, and/or involvement in decision making; duties regularly required to perform; amount of supervision received; and whether the employee supervises others.

*Consideration of these factors is not based on job title or official job descriptions but is based on what work the employee actually performs.*

**Check below to indicate the purpose of the form:**

New SES Employee

New Unclassified Employee

Promotion<sup>1</sup>

1. NEW EMPLOYEE / PROMOTION	
A. NAME (First, Initial, Last)	B. REQUESTED SALARY
C. TITLE OF POSITION	D. RANGE AND TITLE CODE
E. YEARS OF RELEVANT EXPERIENCE (include copy of resume)	F. YEARS OF STATE SERVICE (if applicable)
1A. PROMOTION SPECIFIC INFORMATION	
E. TITLE OF PROMOTIONAL POSITION	F. RANGE AND TITLE CODE OF PROMOTION
G. TIME IN CURRENT TITLE	H. DATE OF MOST RECENT PROMOTION

<sup>1</sup> Complete section 1A for Promotions only.

<b>2. COMPARABLE EMPLOYEE</b>	
A. NAME ( <i>First, Initial, Last</i> )	B. CURRENT SALARY
C. CURRENT CIVIL SERVICE TITLE	D. RANGE AND TITLE CODE
E. TIME IN CURRENT TITLE	F. YEARS OF STATE SERVICE

<b>3. APPOINTING AUTHORITY</b> <i>(Geographic location, Department, Division/Bureau/Institution, and Unit/Section)</i>	
A. NEW EMPLOYEE / PROMOTION	B. COMPARABLE EMPLOYEE

4A. WORK (DUTIES) PERFORMED - NEW EMPLOYEE / PROMOTION	
PERCENT OF TIME	DUTIES

4B. WORK (DUTIES) PERFORMED - COMPARABLE EMPLOYEE	
PERCENT OF TIME	DUTIES

<b>5. DEMOGRAPHICS</b>
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A. NEW EMPLOYEE / PROMOTION	B. COMPARABLE EMPLOYEE
SEX ( <i>Male, Female, or Non-Binary</i> )	SEX ( <i>Male, Female, or Non-Binary</i> )
RACE ( <i>see key on page 5</i> )	RACE ( <i>see key on page 5</i> )
ETHNICITY ( <i>Hispanic or Non-Hispanic</i> )	ETHNICITY ( <i>Hispanic or Non-Hispanic</i> )

<b>6. EDUCATION</b> <i>(if college graduate, list Degrees and years attained)</i>	
A. NEW EMPLOYEE / PROMOTION	B. COMPARABLE EMPLOYEE

<b>7. TRAINING</b> <i>(List training name, year, and any license(s)/certification(s) received)</i>	
A. NEW EMPLOYEE / PROMOTION	B. COMPARABLE EMPLOYEE

<b>8. RESPONSIBILITY</b> <b>NEW EMPLOYEE / PROMOTION</b>	
A. TYPE OF SUPERVISION RECEIVED ( <i>check one, see definitions on page 5</i> ) <input type="checkbox"/> CLOSE <input type="checkbox"/> LIMITED <input type="checkbox"/> GENERAL <input type="checkbox"/> OTHER ( <i>Explain</i> ) _____	
B. DOES THIS POSITION SUPERVISE OTHER EMPLOYEES? <input type="checkbox"/> YES ( <i>if yes, complete Items i thru v</i> ) <input type="checkbox"/> NO  i. <input type="checkbox"/> OCCASIONALLY?    [or] <input type="checkbox"/> REGULARLY?  ii. RESPONSIBLE FOR THE PREPARATION OF PERFORMANCE EVALUATIONS? <input type="checkbox"/> YES <input type="checkbox"/> NO  iii. ASSIGN WORK? <input type="checkbox"/> YES <input type="checkbox"/> NO	v. LIST THE NAMES AND TITLES OF THE EMPLOYEES SUPERVISED DIRECTLY ( <i>if the employees supervised comprise one or more complete units, include the names of the units</i> )

iv. REVIEW COMPLETED WORK OF EMPLOYEES SUPERVISED? <input type="checkbox"/> YES <input type="checkbox"/> NO	
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**COMPARABLE EMPLOYEE**

A. TYPE OF SUPERVISION RECEIVED ( <i>check one, see definitions on page 5</i> )	
<input type="checkbox"/> CLOSE <input type="checkbox"/> LIMITED <input type="checkbox"/> GENERAL <input type="checkbox"/> OTHER ( <i>Explain</i> ) _____	
B. DOES THIS POSITION SUPERVISE OTHER EMPLOYEES? <input type="checkbox"/> YES ( <i>if yes, complete Items i thru v</i> ) <input type="checkbox"/> NO  i. <input type="checkbox"/> OCCASIONALLY?    [or] <input type="checkbox"/> REGULARLY?  ii. RESPONSIBLE FOR THE PREPARATION OF PERFORMANCE EVALUATIONS? <input type="checkbox"/> YES <input type="checkbox"/> NO  iii. ASSIGN WORK? <input type="checkbox"/> YES <input type="checkbox"/> NO  iv. REVIEW COMPLETED WORK OF EMPLOYEES SUPERVISED? <input type="checkbox"/> YES <input type="checkbox"/> NO	v. LIST THE NAMES AND TITLES OF THE EMPLOYEES SUPERVISED DIRECTLY ( <i>if the employees supervised comprise one or more complete units, include the names of the units</i> )

**CERTIFICATION**

Signature of Department Head: _____	DATE: _____
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**SUPPLEMENTAL INSTRUCTIONS**

**ITEM 3** – Comparisons of wage rates shall be based on wage rates in all of an Appointing Authority’s operations or facilities. Thus, employees working for the same Appointing Authority but at different geographic locations or in different units or sections should all be considered for purposes of the Act.

**ITEM 4** – The answer to this item requires an exact account of what the new employee/person being promoted (Item 4A) and the comparable employee (Item 4B) do – it should not be a reiteration of the job description. Start with the most important duties; use a separate paragraph for each major duty. In the column at left, indicate to the best of your ability the percentage of time which should be devoted to each major job duty. Be specific regarding any physical and/or mental exertion needed to perform each job duty.

<b>EXAMPLES OF GOOD AND POOR DUTIES STATEMENTS</b>	
<b>Poor Statements</b>	<b>Good Statements</b>
1. Assist in handling correspondence.	1. Receive, open, time stamp, and route incoming mail
2. Maintain grounds and landscaped areas.	2. Mow lawn with power mower and hand mowers; trim trees from ground and ladder using power saws; lubricate mowers.
3. Finished concrete work.	3. Place forms; mix, pour, and finish concrete walks and curbing.
4. Keep claim registers.	4. Prepare registers of all claims showing allocation of budget expenditures and total monthly expenditures.
5. General kitchen work.	5. Clean and cut vegetables; wash pots and pans; serve at steam table; once or twice a month, bake cookies and tarts.
6. Maintain purchasing records.	6. Compare invoices with purchase orders; review requisitions submitted by different Departments for accuracy and submit requisitions to Purchasing Agent for approval.

**ITEM 5** – select from the below key to insert race information for the new employee/person being promoted (Item 5A) and the comparable employee (Item 5B):

<p><b>Key – Race Categories</b></p> <ul style="list-style-type: none"> <li>- Asian</li> <li>- Black or African American</li> <li>- Native Hawaiian or Other Pacific Islander (NHOPI)</li> <li>- American Indian or Alaska Native (AIAN)</li> <li>- White</li> <li>- Two or More Races</li> </ul>
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**ITEM 8A**

- **CLOSE SUPERVISION:** Work is performed according to detailed instructions and supervision is available on short notice.
- **LIMITED SUPERVISION:** Work is performed on individual’s initiative while complying with policies, practices, and procedures prescribed by the supervisor. The supervisor generally answers questions only on the more important phases of the work.
- **GENERAL SUPERVISION:** Work is performed independently. The individual seldom refers matters to supervisor except for clarification of policy.
- **OTHER:** If the individual’s work is supervised in a manner different from all if the above, please describe briefly how the work is assigned and supervised

**APPENDIX C: FULL TEXT OF THE DIANE B. ALLEN EQUAL PAY ACT**

See attached.

CURRENT VERSION OF TEXT<sup>c</sup> As reported by the Senate Budget and Appropriations Committee on March 13, 2018, with amendments.

**AN ACT** concerning equal pay <sup>1</sup>[for women]<sup>1</sup> and employment discrimination, requiring public contractors to report certain employment information, amending P.L.1945, c.169, and supplementing P.L.1952, c.9 (C.34:11-56.1 et seq.).

**BE IT ENACTED** by the Senate and General Assembly of the State of New Jersey:

<sup>2</sup>1. (New section) This act shall be known and may be cited as the “Diane B. Allen Equal Pay Act.”<sup>2</sup>

<sup>2</sup>[1.] 2.<sup>2</sup> Section 11 of P.L.1945, c.169 (C.10:5-12) is amended to read as follows:

11. It shall be an unlawful employment practice, or, as the case may be, an unlawful discrimination:

a. For an employer, because of the 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 because of the liability for service in the Armed Forces of the United States or the nationality of any individual, or because of the refusal to submit to a genetic test or make available the results of a genetic test to an employer, to refuse to hire or employ or to bar or to discharge or require to retire, unless justified by lawful considerations other than age, from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment; provided, however, it shall not be an unlawful employment practice to refuse to accept for employment an applicant who has received a notice of induction or orders to report for active duty in the armed forces; provided further that nothing herein contained shall be construed to bar an employer from refusing to accept for employment any person on the basis of sex in those certain circumstances where sex is a bona fide occupational qualification, reasonably necessary to the normal operation of the particular business or enterprise; provided further that nothing herein contained shall be construed to bar an employer from refusing to accept for employment or to promote any person over 70 years of age; provided further that it shall not be an unlawful employment practice for a club exclusively social or fraternal to use club membership as a uniform qualification for employment, or for a religious association or organization to utilize religious affiliation as a uniform qualification in the employment of clergy, religious teachers or other employees engaged in the religious activities of the association or organization, or in following the tenets of its religion in establishing and utilizing criteria for employment of an employee; provided further, that it shall not be an unlawful employment practice to require the retirement of any employee who, for the two-year period

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<sup>c</sup> EXPLANATION – Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law. Matter underlined thus is new matter. Matter enclosed in superscript numerals has been adopted as follows:

<sup>1</sup>Senate SLA committee amendments adopted March 5, 2018.

<sup>2</sup>Senate SBA committee amendments adopted March 13, 2018.



immediately before retirement, is employed in a bona fide executive or a high policy-making position, if that employee is entitled to an immediate non-forfeitable annual retirement benefit from a pension, profit sharing, savings or deferred retirement plan, or any combination of those plans, of the employer of that employee which equals in the aggregate at least \$27,000.00; and provided further that an employer may restrict employment to citizens of the United States where such restriction is required by federal law or is otherwise necessary to protect the national interest.

The provisions of subsections a. and b. of section 57 of P.L.2003, c.246 (C.34:11A-20), and the provisions of section 58 of P.L.2003, c.246 (C.26:8A-11), shall not be deemed to be an unlawful discrimination under P.L.1945, c.169 (C.10:5-1 et seq.).

For the purposes of this subsection, a "bona fide executive" is a top level employee who exercises substantial executive authority over a significant number of employees and a large volume of business. A "high policy-making position" is a position in which a person plays a significant role in developing policy and in recommending the implementation thereof.

For the 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 the decision or other practice.

In addition to any other relief authorized by the "Law Against Discrimination," P.L.1945, c.169 (C.10:5-1 et seq.) for discrimination in compensation or in the financial terms or conditions of employment, liability shall accrue and an aggrieved person may obtain relief for back pay for the entire period of time, <sup>2</sup>except not more than six years,<sup>2</sup> in which the violation with regard to discrimination in compensation or in the financial terms or conditions of employment has been continuous, if the violation continues to occur within the statute of limitations.

Nothing in this subsection shall prohibit the application of the doctrine of "continuing violation" or the "discovery rule" to any appropriate claim as those doctrines currently exist in New Jersey common law. It shall be an unlawful employment practice to require employees or prospective employees to consent to a shortened statute of limitations or to waive any of the protections provided by the "Law Against Discrimination," P.L.1945, c.169 (C.10:5-1 et seq.).

b. For a labor organization, because of the race, creed, color, national origin, ancestry, age, marital status, civil union status, domestic partnership status, affectional or sexual orientation, gender identity or expression, disability, pregnancy or breastfeeding, or sex of any individual, or because of the liability for service in the Armed Forces of the United States or nationality of any individual, to exclude or to expel from its membership such individual or to discriminate in any way against any of its members, against any applicant for, or individual included in, any apprentice or other training program or against any employer or any individual employed by an employer; provided, however, that nothing herein contained shall be construed to bar a labor organization from excluding from its apprentice or other training programs any person on the basis of sex in those certain circumstances where sex is a bona fide occupational qualification reasonably necessary to the normal operation of the particular apprentice or other training program.

c. For any employer or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment, or to make an inquiry in connection with prospective employment, which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, ancestry, age, marital status, civil union status, domestic partnership status, affectional or sexual orientation, gender identity or expression, disability, nationality, pregnancy or breastfeeding, or sex or liability of any applicant for employment for service in the Armed Forces of the United States, or any intent to make any such limitation, specification or discrimination, unless based upon a bona fide occupational qualification.

d. For any person to take reprisals against any person because that person has opposed any practices or acts forbidden under this act or because that person has sought legal advice regarding rights under this act, shared relevant information with legal counsel, shared information with a governmental entity, or filed a complaint, testified or assisted in any proceeding under this act or to coerce, intimidate, threaten or interfere with any person in the exercise or enjoyment of, or on account of that person having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by this act.

e. For any person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this act, or to attempt to do so.

f. (1) For any owner, lessee, proprietor, manager, superintendent, agent, or employee of any place of public accommodation directly or indirectly to refuse, withhold from or deny to any person any of the accommodations, advantages, facilities or privileges thereof, or to discriminate against any person in the furnishing thereof, or directly or indirectly to publish, circulate, issue, display, post or mail any written or printed communication, notice, or advertisement to the effect that any of the accommodations, advantages, facilities, or privileges of any such place will be refused, withheld from, or denied to any person on account of the race, creed, color, national origin, ancestry, marital status, civil union status, domestic partnership status, pregnancy or breastfeeding, sex, gender identity or expression, affectional or sexual orientation, disability, liability for service in the Armed Forces of the United States or nationality of such person, or that the patronage or custom thereof of any person of any particular race, creed, color, national origin, ancestry, marital status, civil union status, domestic partnership status, pregnancy or breastfeeding status, sex, gender identity or expression, affectional or sexual orientation, disability, liability for service in the Armed Forces of the United States or nationality is unwelcome, objectionable or not acceptable, desired or solicited, and the production of any such written or printed communication, notice or advertisement, purporting to relate to any such place and to be made by any owner, lessee, proprietor, superintendent or manager thereof, shall be presumptive evidence in any action that the same was authorized by such person; provided, however, that nothing contained herein shall be construed to bar any place of public accommodation which is in its nature reasonably restricted exclusively to individuals of one sex, and which shall include but not be limited to any summer camp, day camp, or resort camp, bathhouse, dressing room, swimming pool, gymnasium, comfort station, dispensary, clinic or hospital, or school or educational institution which is restricted exclusively to individuals of one sex, provided individuals shall be admitted based on their gender identity or expression, from refusing, withholding from or denying to any individual of the

opposite sex any of the accommodations, advantages, facilities or privileges thereof on the basis of sex; provided further, that the foregoing limitation shall not apply to any restaurant as defined in R.S.33:1-1 or place where alcoholic beverages are served.

(2) Notwithstanding the definition of "a place of public accommodation" as set forth in subsection l. of section 5 of P.L.1945, c.169 (C.10:5-5), for any owner, lessee, proprietor, manager, superintendent, agent, or employee of any private club or association to directly or indirectly refuse, withhold from or deny to any individual who has been accepted as a club member and has contracted for or is otherwise entitled to full club membership any of the accommodations, advantages, facilities or privileges thereof, or to discriminate against any member in the furnishing thereof on account of the race, creed, color, national origin, ancestry, marital status, civil union status, domestic partnership status, pregnancy or breastfeeding, sex, gender identity, or expression, affectional or sexual orientation, disability, liability for service in the Armed Forces of the United States or nationality of such person.

In addition to the penalties otherwise provided for a violation of P.L.1945, c.169 (C.10:5-1 et seq.), if the violator of paragraph (2) of subsection f. of this section is the holder of an alcoholic beverage license issued under the provisions of R.S.33:1-12 for that private club or association, the matter shall be referred to the Director of the Division of Alcoholic Beverage Control who shall impose an appropriate penalty in accordance with the procedures set forth in R.S.33:1-31.

g. For any person, including but not limited to, any owner, lessee, sublessee, assignee or managing agent of, or other person having the right of ownership or possession of or the right to sell, rent, lease, assign, or sublease any real property or part or portion thereof, or any agent or employee of any of these:

(1) To refuse to sell, rent, lease, assign, or sublease or otherwise to deny to or withhold from any person or group of persons any real property or part or portion thereof because of race, creed, color, national origin, ancestry, marital status, civil union status, domestic partnership status, pregnancy or breastfeeding, sex, gender identity or expression, affectional or sexual orientation, familial status, disability, liability for service in the Armed Forces of the United States, nationality, or source of lawful income used for rental or mortgage payments;

(2) To discriminate against any person or group of persons because of race, creed, color, national origin, ancestry, marital status, civil union status, domestic partnership status, pregnancy or breastfeeding, sex, gender identity or expression, affectional or sexual orientation, familial status, disability, liability for service in the Armed Forces of the United States, nationality or source of lawful income used for rental or mortgage payments in the terms, conditions or privileges of the sale, rental or lease of any real property or part or portion thereof or in the furnishing of facilities or services in connection therewith;

(3) To print, publish, circulate, issue, display, post or mail, or cause to be printed, published, circulated, issued, displayed, posted or mailed any statement, advertisement, publication or sign, or to use any form of application for the purchase, rental, lease, assignment or sublease of any real property or part or portion thereof, or to make any record or inquiry in connection with the prospective purchase, rental, lease, assignment, or sublease of any

real property, or part or portion thereof which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, ancestry, marital status, civil union status, domestic partnership status, pregnancy or breastfeeding, sex, gender identity, or expression, affectional or sexual orientation, familial status, disability, liability for service in the Armed Forces of the United States, nationality, or source of lawful income used for rental or mortgage payments, or any intent to make any such limitation, specification or discrimination, and the production of any such statement, advertisement, publicity, sign, form of application, record, or inquiry purporting to be made by any such person shall be presumptive evidence in any action that the same was authorized by such person; provided, however, that nothing contained in this subsection shall be construed to bar any person from refusing to sell, rent, lease, assign or sublease or from advertising or recording a qualification as to sex for any room, apartment, flat in a dwelling or residential facility which is planned exclusively for and occupied by individuals of one sex to any individual of the exclusively opposite sex on the basis of sex provided individuals shall be qualified based on their gender identity or expression;

(4) To refuse to sell, rent, lease, assign, or sublease or otherwise to deny to or withhold from any person or group of persons any real property or part or portion thereof because of the source of any lawful income received by the person or the source of any lawful rent payment to be paid for the real property; or

(5) To refuse to rent or lease any real property to another person because that person's family includes children under 18 years of age, or to make an agreement, rental or lease of any real property which provides that the agreement, rental or lease shall be rendered null and void upon the birth of a child. This paragraph shall not apply to housing for older persons as defined in subsection mm. of section 5 of P.L.1945, c.169 (C.10:5-5).

h. For any person, including but not limited to, any real estate broker, real estate salesperson, or employee or agent thereof:

(1) To refuse to sell, rent, assign, lease or sublease, or offer for sale, rental, lease, assignment, or sublease any real property or part or portion thereof to any person or group of persons or to refuse to negotiate for the sale, rental, lease, assignment, or sublease of any real property or part or portion thereof to any person or group of persons because of race, creed, color, national origin, ancestry, marital status, civil union status, domestic partnership status, familial status, pregnancy or breastfeeding, sex, gender identity or expression, affectional or sexual orientation, liability for service in the Armed Forces of the United States, disability, nationality, or source of lawful income used for rental or mortgage payments, or to represent that any real property or portion thereof is not available for inspection, sale, rental, lease, assignment, or sublease when in fact it is so available, or otherwise to deny or withhold any real property or any part or portion of facilities thereof to or from any person or group of persons because of race, creed, color, national origin, ancestry, marital status, civil union status, domestic partnership status, familial status, pregnancy or breastfeeding, sex, gender identity or expression, affectional or sexual orientation, liability for service in the Armed Forces of the United States, disability or nationality;

(2) To discriminate against any person because of race, creed, color, national origin, ancestry, marital status, civil union status, domestic partnership status, familial status, pregnancy

or breastfeeding, sex, gender identity or expression, affectional or sexual orientation, disability, nationality, or source of lawful income used for rental or mortgage payments in the terms, conditions or privileges of the sale, rental, lease, assignment or sublease of any real property or part or portion thereof or in the furnishing of facilities or services in connection therewith;

(3) To print, publish, circulate, issue, display, post, or mail, or cause to be printed, published, circulated, issued, displayed, posted or mailed any statement, advertisement, publication or sign, or to use any form of application for the purchase, rental, lease, assignment, or sublease of any real property or part or portion thereof or to make any record or inquiry in connection with the prospective purchase, rental, lease, assignment, or sublease of any real property or part or portion thereof which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, ancestry, marital status, civil union status, domestic partnership status, familial status, pregnancy or breastfeeding, sex, gender identity or expression, affectional or sexual orientation, disability, liability for service in the Armed Forces of the United States, nationality, or source of lawful income used for rental or mortgage payments or any intent to make any such limitation, specification or discrimination, and the production of any such statement, advertisement, publicity, sign, form of application, record, or inquiry purporting to be made by any such person shall be presumptive evidence in any action that the same was authorized by such person; provided, however, that nothing contained in this subsection h., shall be construed to bar any person from refusing to sell, rent, lease, assign or sublease or from advertising or recording a qualification as to sex for any room, apartment, flat in a dwelling or residential facility which is planned exclusively for and occupied exclusively by individuals of one sex to any individual of the opposite sex on the basis of sex, provided individuals shall be qualified based on their gender identity or expression;

(4) To refuse to sell, rent, lease, assign, or sublease or otherwise to deny to or withhold from any person or group of persons any real property or part or portion thereof because of the source of any lawful income received by the person or the source of any lawful rent payment to be paid for the real property; or

(5) To refuse to rent or lease any real property to another person because that person's family includes children under 18 years of age, or to make an agreement, rental or lease of any real property which provides that the agreement, rental or lease shall be rendered null and void upon the birth of a child. This paragraph shall not apply to housing for older persons as defined in subsection mm. of section 5 of P.L.1945, c.169 (C.10:5-5).

i. For any person, bank, banking organization, mortgage company, insurance company or other financial institution, lender or credit institution involved in the making or purchasing of any loan or extension of credit, for whatever purpose, whether secured by residential real estate or not, including but not limited to financial assistance for the purchase, acquisition, construction, rehabilitation, repair or maintenance of any real property or part or portion thereof or any agent or employee thereof:

(1) To discriminate against any person or group of persons because of race, creed, color, national origin, ancestry, marital status, civil union status, domestic partnership status, pregnancy or breastfeeding, sex, gender identity or expression, affectional or sexual orientation, disability,

liability for service in the Armed Forces of the United States, familial status or nationality, in the granting, withholding, extending, modifying, renewing, or purchasing, or in the fixing of the rates, terms, conditions or provisions of any such loan, extension of credit or financial assistance or purchase thereof or in the extension of services in connection therewith;

(2) To use any form of application for such loan, extension of credit or financial assistance or to make record or inquiry in connection with applications for any such loan, extension of credit or financial assistance which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, ancestry, marital status, civil union status, domestic partnership status, pregnancy or breastfeeding, sex, gender identity or expression, affectional or sexual orientation, disability, liability for service in the Armed Forces of the United States, familial status or nationality or any intent to make any such limitation, specification or discrimination; unless otherwise required by law or regulation to retain or use such information;

(3) (Deleted by amendment, P.L.2003, c.180).

(4) To discriminate against any person or group of persons because of the source of any lawful income received by the person or the source of any lawful rent payment to be paid for the real property; or

(5) To discriminate against any person or group of persons because that person's family includes children under 18 years of age, or to make an agreement or mortgage which provides that the agreement or mortgage shall be rendered null and void upon the birth of a child. This paragraph shall not apply to housing for older persons as defined in subsection mm. of section 5 of P.L.1945, c.169 (C.10:5-5).

j. For any person whose activities are included within the scope of this act to refuse to post or display such notices concerning the rights or responsibilities of persons affected by this act as the Attorney General may by regulation require.

k. For any real estate broker, real estate salesperson or employee or agent thereof or any other individual, corporation, partnership, or organization, for the purpose of inducing a transaction for the sale or rental of real property from which transaction such person or any of its members may benefit financially, to represent that a change has occurred or will or may occur in the composition with respect to race, creed, color, national origin, ancestry, marital status, civil union status, domestic partnership status, familial status, pregnancy or breastfeeding, sex, gender identity or expression, affectional or sexual orientation, disability, liability for service in the Armed Forces of the United States, nationality, or source of lawful income used for rental or mortgage payments of the owners or occupants in the block, neighborhood or area in which the real property is located, and to represent, directly or indirectly, that this change will or may result in undesirable consequences in the block, neighborhood or area in which the real property is located, including, but not limited to the lowering of property values, an increase in criminal or anti-social behavior, or a decline in the quality of schools or other facilities.

l. For any person to refuse to buy from, sell to, lease from or to, license, contract with, or trade with, provide goods, services or information to, or otherwise do business with any other

person on the basis of the race, creed, color, national origin, ancestry, age, pregnancy or breastfeeding, sex, gender identity or expression, affectional or sexual orientation, marital status, civil union status, domestic partnership status, liability for service in the Armed Forces of the United States, disability, nationality, or source of lawful income used for rental or mortgage payments of such other person or of such other person's spouse, partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers, or customers. This subsection shall not prohibit refusals or other actions (1) pertaining to employee-employer collective bargaining, labor disputes, or unfair labor practices, or (2) made or taken in connection with a protest of unlawful discrimination or unlawful employment practices.

m. For any person to:

(1) Grant or accept any letter of credit or other document which evidences the transfer of funds or credit, or enter into any contract for the exchange of goods or services, where the letter of credit, contract, or other document contains any provisions requiring any person to discriminate against or to certify that he, she or it has not dealt with any other person on the basis of the race, creed, color, national origin, ancestry, age, pregnancy or breastfeeding, sex, gender identity or expression, affectional or sexual orientation, marital status, civil union status, domestic partnership status, disability, liability for service in the Armed Forces of the United States, or nationality of such other person or of such other person's spouse, partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers, or customers.

(2) Refuse to grant or accept any letter of credit or other document which evidences the transfer of funds or credit, or refuse to enter into any contract for the exchange of goods or services, on the ground that it does not contain such a discriminatory provision or certification.

The provisions of this subsection shall not apply to any letter of credit, contract, or other document which contains any provision pertaining to employee-employer collective bargaining, a labor dispute or an unfair labor practice, or made in connection with the protest of unlawful discrimination or an unlawful employment practice, if the other provisions of such letter of credit, contract, or other document do not otherwise violate the provisions of this subsection.

n. For any person to aid, abet, incite, compel, coerce, or induce the doing of any act forbidden by subsections l. and m. of section 11 of P.L.1945, c.169 (C.10:5-12), or to attempt, or to conspire to do so. Such prohibited conduct shall include, but not be limited to:

(1) Buying from, selling to, leasing from or to, licensing, contracting with, trading with, providing goods, services, or information to, or otherwise doing business with any person because that person does, or agrees or attempts to do, any such act or any act prohibited by this subsection; or

(2) Boycotting, commercially blacklisting or refusing to buy from, sell to, lease from or to, license, contract with, provide goods, services or information to, or otherwise do business with any person because that person has not done or refuses to do any such act or any act prohibited by this subsection; provided that this subsection shall not prohibit refusals or other actions either

pertaining to employee-employer collective bargaining, labor disputes, or unfair labor practices, or made or taken in connection with a protest of unlawful discrimination or unlawful employment practices.

o. For any multiple listing service, real estate brokers' organization or other service, organization or facility related to the business of selling or renting dwellings to deny any person access to or membership or participation in such organization, or to discriminate against such person in the terms or conditions of such access, membership, or participation, on account of race, creed, color, national origin, ancestry, age, marital status, civil union status, domestic partnership status, familial status, pregnancy or breastfeeding, sex, gender identity or expression, affectional or sexual orientation, disability, liability for service in the Armed Forces of the United States or nationality.

p. Nothing in the provisions of this section shall affect the ability of an employer to require employees to adhere to reasonable workplace appearance, grooming and dress standards not precluded by other provisions of State or federal law, except that an employer shall allow an employee to appear, groom and dress consistent with the employee's gender identity or expression.

q. (1) For any employer to impose upon a person as a condition of obtaining or retaining employment, including opportunities for promotion, advancement or transfers, any terms or conditions that would require a person to violate or forego a sincerely held religious practice or religious observance, including but not limited to the observance of any particular day or days or any portion thereof as a Sabbath or other holy day in accordance with the requirements of the religion or religious belief, unless, after engaging in a bona fide effort, the employer demonstrates that it is unable to reasonably accommodate the employee's religious observance or practice without undue hardship on the conduct of the employer's business. Notwithstanding any other provision of law to the contrary, an employee shall not be entitled to premium wages or premium benefits for work performed during hours to which those premium wages or premium benefits would ordinarily be applicable, if the employee is working during those hours only as an accommodation to his religious requirements. Nothing in this subsection q. shall be construed as reducing:

(a) The number of the hours worked by the employee which are counted towards the accruing of seniority, pension or other benefits; or

(b) Any premium wages or benefits provided to an employee pursuant to a collective bargaining agreement.

(2) For an employer to refuse to permit an employee to utilize leave, as provided for in this subsection q., which is solely used to accommodate the employee's sincerely held religious observance or practice. Except where it would cause an employer to incur an undue hardship, no person shall be required to remain at his place of employment during any day or days or portion thereof that, as a requirement of his religion, he observes as his Sabbath or other holy day, including a reasonable time prior and subsequent thereto for travel between his place of employment and his home; provided that any such absence from work shall, wherever practicable in the reasonable judgment of the employer, be made up by an equivalent amount of time and work



at some other mutually convenient time, or shall be charged against any leave with pay ordinarily granted, other than sick leave, and any such absence not so made up or charged, may be treated by the employer of that person as leave taken without pay.

(3) (a) For purposes of this subsection q., "undue hardship" means an accommodation requiring unreasonable expense or difficulty, unreasonable interference with the safe or efficient operation of the workplace or a violation of a bona fide seniority system or a violation of any provision of a bona fide collective bargaining agreement.

(b) In determining whether the accommodation constitutes an undue hardship, the factors considered shall include:

(i) The identifiable cost of the accommodation, including the costs of loss of productivity and of retaining or hiring employees or transferring employees from one facility to another, in relation to the size and operating cost of the employer.

(ii) The number of individuals who will need the particular accommodation for a sincerely held religious observance or practice.

(iii) For an employer with multiple facilities, the degree to which the geographic separateness or administrative or fiscal relationship of the facilities will make the accommodation more difficult or expensive.

(c) An accommodation shall be considered to constitute an undue hardship if it will result in the inability of an employee to perform the essential functions of the position in which he or she is employed.

(d) (i) The provisions of this subsection q. shall be applicable only to reasonable accommodations of religious observances and shall not supersede any definition of undue hardship or standards for reasonable accommodation of the disabilities of employees.

(ii) This subsection q. shall not apply where the uniform application of terms and conditions of attendance to employees is essential to prevent undue hardship to the employer. The burden of proof regarding the applicability of this subparagraph (d) shall be upon the employer.

r. For any employer to take reprisals against any employee for requesting from <sup>1</sup>, discussing with<sup>1</sup>, 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 former employee of the employer, regardless of whether the request was responded to <sup>1</sup>], 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]<sup>1</sup>, 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.

s. For an employer to treat, for employment-related purposes, a woman employee that the employer knows, or should know, is affected by pregnancy or breastfeeding in a manner less favorable than the treatment of other persons not affected by pregnancy or breastfeeding but similar in their ability or inability to work. In addition, an employer of an employee who is a woman affected by pregnancy shall make available to the employee reasonable accommodation in the workplace, such as bathroom breaks, breaks for increased water intake, periodic rest, assistance with manual labor, job restructuring or modified work schedules, and temporary transfers to less strenuous or hazardous work, for needs related to the pregnancy when the employee, based on the advice of her physician, requests the accommodation, and, in the case of a employee breast feeding her infant child, the accommodation shall include reasonable break time each day to the employee and a suitable room or other location with privacy, other than a toilet stall, in close proximity to the work area for the employee to express breast milk for the child, unless the employer can demonstrate that providing the accommodation would be an undue hardship on the business operations of the employer. The employer shall not in any way penalize the employee in terms, conditions or privileges of employment for requesting or using the accommodation. Workplace accommodation provided pursuant to this subsection and paid or unpaid leave provided to an employee affected by pregnancy or breastfeeding shall not be provided in a manner less favorable than accommodations or leave provided to other employees not affected by pregnancy or breastfeeding but similar in their ability or inability to work. This subsection shall not be construed as otherwise increasing or decreasing any employee's rights under law to paid or unpaid leave in connection with pregnancy or breastfeeding.

For the purposes of this section "pregnancy or breastfeeding" means pregnancy, childbirth, and breast feeding or expressing milk for breastfeeding, or medical conditions related to pregnancy, childbirth, or breastfeeding, including recovery from childbirth.

For the purposes of this subsection, in determining whether an accommodation would impose undue hardship on the operation of an employer's business, the factors to be considered include: the overall size of the employer's business with respect to the number of employees, number and type of facilities, and size of budget; the type of the employer's operations, including the composition and structure of the employer's workforce; the nature and cost of the accommodation needed, taking into consideration the availability of tax credits, tax deductions, and outside funding; and the extent to which the accommodation would involve waiver of an essential requirement of a job as opposed to a tangential or non-business necessity requirement.

t. For an employer to pay any of its employees <sup>1</sup>who is a member of a protected class<sup>1</sup> at a rate of compensation, including benefits, which is less than the rate paid by the employer to employees <sup>1</sup>[of the other sex] who are not members of the protected class<sup>1</sup> 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. 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:

(1) That the differential is based on one or more legitimate, bona fide factors other than <sup>1</sup>[sex] the characteristics of members of the protected class<sup>1</sup>, such as training, education or experience, or the quantity or quality of production;

(2) That the factor or factors <sup>1</sup>are not based on, and<sup>1</sup> do not perpetuate<sup>1,1</sup> a <sup>1</sup>[sex-based]<sup>1</sup> differential in compensation <sup>1</sup>based on sex or any other characteristic of members of a protected class<sup>1</sup>;

(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. A factor based on business necessity shall not apply if it is demonstrated that there are alternative business practices that would serve the same business purpose without producing the wage differential.

Comparisons of wage rates shall be based on wage rates in all of an employer's operations or facilities. <sup>1</sup>For the purposes of this subsection, "member of a protected class" means an employee who has one or more characteristics, including race, creed, color, national origin, nationality, ancestry, age, marital status, civil union status, domestic partnership status, affectional or sexual orientation, genetic information, pregnancy, sex, gender identity or expression, disability or atypical hereditary cellular or blood trait of any individual, or liability for service in the armed forces, for which subsection a. of this section prohibits an employer from refusing to hire or employ or barring or discharging or requiring to retire from employment or discriminating against the individual in compensation or in terms, conditions or privileges of employment.<sup>1</sup> (cf: P.L.2017, c.263, s.1).

<sup>2</sup>3. Section 12 of P.L.1945, c.169 (C.10:5-13) is amended to read as follows:

12. Any person claiming to be aggrieved by an unlawful employment practice or an unlawful discrimination may, personally or by an attorney-at-law, make, sign and file with the division a verified complaint in writing which shall state the name and address of the person, employer, labor organization, employment agency, owner, lessee, proprietor, manager, superintendent, or agent alleged to have committed the unlawful employment practice or unlawful discrimination complained of and which shall set forth the particulars thereof and shall contain such other information as may be required by the division. Upon receipt of the complaint, the division shall notify the complainant on a form promulgated by the director of the division and approved by the Attorney General of the complainant's rights under this act, including the right to file a complaint in the Superior Court to be heard before a jury; of the jurisdictional limitations of the division; and any other provisions of this act, without interpretation, that may apply to the complaint. The Commissioner of Labor and Workforce Development, the Attorney General, or the Commissioner of Education may, in like manner, make, sign and file such complaint. Any

employer whose employees, or some of them, refuse or threaten to refuse to co-operate with the provisions of this act, may file with the division a verified complaint asking for assistance by conciliation or other remedial action.

Any complainant may initiate suit in Superior Court under this act without first filing a complaint with the division or any municipal office. Upon the application of any party, a jury trial shall be directed to try the validity of any claim under this act specified in the suit. All remedies available in common law tort actions shall be available to prevailing plaintiffs. These remedies are in addition to any provided by this act or any other statute. Prosecution of such suit in Superior Court under this act shall bar the filing of a complaint with the division or any municipal office during the pendency of any such suit. 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.

At any time after 180 days from the filing of a complaint with the division, a complainant may file a request with the division to present the action personally or through counsel to the Office of Administrative Law. Upon such request, the director of the division shall file the action with the Office of Administrative Law, provided that no action may be filed with the Office of Administrative Law where the director of the division has found that no probable cause exists to credit the allegations of the complaint or has otherwise dismissed the complaint.

A party to an action based upon a violation of this act shall mail a copy of the initial pleadings or claims, amended pleadings or claims, counterclaims, briefs, and legal memoranda to the division at the same time as filing such documents with the Office of Administrative Law or the court. Upon application to the Office of Administrative Law or to the court wherein the matter is pending, the division shall be permitted to intervene.<sup>2</sup> (cf: P.L.1990, c.12, s.2)

<sup>2</sup>[2.] 4.<sup>2</sup> Section 16 of P.L.1945, c.169 (C.10:5-17) is amended to read as follows:

16. If, upon all evidence at the hearing, the director shall find that the respondent has engaged in any unlawful employment practice or unlawful discrimination as defined in this act, the director shall state his findings of fact and conclusions of law and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful employment practice or unlawful discrimination and to take such affirmative action, including, but not limited to, hiring, reinstatement or upgrading of employees, with or without back pay, or restoration to membership, in any respondent labor organization, or extending full and equal accommodations, advantages, facilities, and privileges to all persons, as, in the judgment of the director, will effectuate the purpose of this act, and including a requirement for report of the manner of compliance. If the conduct violative of this act constitutes any form of unlawful economic discrimination prohibited in [section 11, subsections] subsection 1., m., [and] or n. of [this act,] section 11 of P.L.1945, c.169 (C.10:5-12), or any form of unlawful employment practice prohibited by subsection r. or t. of section 11 of P.L.1945, c.169 (C.10:5-12), the affirmative action taken by the director may include the award of three-fold damages to the person or persons aggrieved by the violation. The director shall have the power to use reasonably certain bases, including but not limited to list, catalogue or market prices or values, or contract or advertised

terms and conditions, in order to determine particulars or performance in giving appropriate remedy. In addition to any other remedies provided by P.L.1945, c.169 (C.10:5-1 et seq.), a prevailing complainant may recover damages to compensate for emotional distress caused by the activities found to be in violation of P.L.1945, c.169 (C.10:5-1 et seq.) to the same extent as is available in common law tort actions. In any case in which the director, Attorney General, or appropriate organization is a complainant, on behalf of named or unnamed individuals or a class of individuals, any of the remedies or relief allowed by this act may be awarded or applied to the named or unnamed individual victims of discrimination. If, upon all evidence, the director shall find that the respondent has not engaged in any such unlawful practice or unlawful discrimination, the director shall state his findings of fact and conclusions of law and shall issue and cause to be served on the complainant an order dismissing the said complaint as to such respondent. (cf: P.L.2003, c.180, s.16)

<sup>2</sup>[3.] 5.<sup>2</sup> (New section) a. Any employer, regardless of the location of the employer, who enters into a contract with a public body to provide qualifying services to the public body shall provide a report to the Commissioner of Labor and Workforce Development, in a form issued by regulation promulgated by the commissioner, of information regarding the <sup>2</sup>compensation and hours worked by employees categorized by<sup>2</sup> gender, race, <sup>2</sup>[job title] ethnicity<sup>2</sup>, <sup>2</sup>[occupational] and job<sup>2</sup> category <sup>2</sup>], and total compensation of every employee of the employer employed in the State in connection with the contract]<sup>2</sup>. <sup>2</sup>[The employer shall provide the commissioner, throughout the duration of the contract or contracts, with an update to the report each time there is a significant change in any of the information that the employer is required to report pursuant to this section, or other significant change in employment status, including, but not limited to, medical leave of 12 weeks or more, hiring, termination for any reason, a change in part-time or full-time status, or a change in “employee” or “contractor” status] Data regarding compensation and hours worked by employees shall be reported in the form by pay bands to be established by regulation promulgated by the commissioner. The commissioner may establish a standard presumption for the number of hours worked by a fulltime employee or by a part-time employee for whom an employer does not track actual hours worked. An employer shall provide a report for each establishment of the employer<sup>2</sup>.

b. Any employer, regardless of the location of the employer, who enters into a contract with a public body to perform any public work for the public body shall provide to the commissioner, through certified payroll records required pursuant to P.L.1963, c.150 (C.34:11-56.25 et seq.), information regarding the gender, race, job title, occupational category, and rate of total compensation of every employee of the employer employed in the State in connection with the contract. The employer shall provide the commissioner, throughout the duration of the contract or contracts, with an update to the information whenever payroll records are required to be submitted pursuant to P.L.1963, c.150 (C.34:11-56.25 et seq.).

c. The commissioner shall retain the information provided by the employer during any period of time that one or more contracts are in effect between the employer and any public body and not less than five years after the end of that period. The retained employment information shall be made available by the commissioner to the Division on Civil Rights in the Department of Law and Public Safety, and, upon request, provided to anyone who is or was an employee of the

employer during the period of any of the contracts between the employer and any public body, or any authorized representative of the employee.

d. For the purposes of the section:

“Public body” means the State or any agency or instrumentality of the State;

“Public work” means public work as defined in section 2 of P.L.1963, c.150 (C.34:11-56.26) and which is subject to the provisions of P.L.1963, c.150 (C.34:11-56.25 et seq.). Public work shall not include the provision of goods or products.

“Qualifying services” means the provision of any service to the State or to any other public body, except for public work as defined in section 2 of P.L.1963, c.150 (C.34:11-56.26).

“Service” means any act performed in exchange for payment, including the provision of professional services, but shall not include the sale of goods or products.

<sup>2</sup>[4.] 6.<sup>2</sup> This act shall take effect <sup>2</sup>[immediately] on July 1, 2018<sup>2</sup>.