

CLIENT ALERT

Out Like a Lion: March Brings New Obligations to Employers Doing Business in New Jersey

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Employers that do business in the State of New Jersey, and particularly those who hold services contracts with the State of New Jersey, are finding more lions than lambs as the month of March comes to a close. In the last two weeks, employers who provide “qualifying services” to the State of New Jersey received important new guidance regarding the Equal Pay Reports that they must file by March 31, 2019. And all employers who do business in the State of New Jersey must now account for a new law that renders unenforceable certain mandatory arbitration provisions in employment agreements and confidentiality pledges commonly used in settlement agreements.

Annual Equal Pay Report Update

A year after New Jersey’s Diane B. Allen Equal Pay Act (P.L. 2018, c. 9) was signed into law, employers that hold services contracts with the State of New Jersey must take into account new guidance that impacts the first-ever, mandatory, annual “Equal Pay Report” that must be submitted by March 31. While the new guidance provides some important clarity, significant ambiguity remains as the March 31 deadline approaches.

The new guidance comes through a revised reporting Form (MW-563) and associated instructions for completing the Form [the MW-563 is available here; revised instructions are available here]. Several of the highlights of the newly-issued Form and instructions either reverse the instructions that were issued in 2018 or provide additional clarity that was lacking in the original instructions, including the following:

- The previous form and instructions (available from 2018 until March 2019) would have required reporting employers to include in the Equal Pay Report each **individual employee by name**, along with his or her “job category,” sex, race, ethnicity, total hours worked annually, and pay band. The prior instructions likewise provided no limiting definition of the term “employee,” so employers feared the reporting requirement could have attached to the employer’s entire workforce and not just those working in New Jersey. The newly-issued Form and instructions provide some relief, as they do **not** require a reporting employer to identify each individual employee separately; instead, reporting employers may group together all employees who: (1) work in the same “job category” (which track the federal EEO-1 categories), (2) work the same number of hours, and (3) have earnings that fall into the same “pay band.” The employer must provide the aggregate sex, race, and ethnicity demographics for each resulting group of employees.
- The revised instructions limit the universe of employees included in the Report to those “employees who are performing work in New Jersey.” There remains some ambiguity as to this issue, as the instructions fail to specify the point at which an employee will be considered to “perform work” in New Jersey. This unanswered question is particularly salient for employers with employees based outside of New Jersey, but who perform some or most of their work in New Jersey.

Completing the Forms

The new instructions require a qualifying services contractor to submit one report for its principal or headquarters office (in the State of New Jersey), a report for each establishment in New Jersey with 50 or more employees, and a consolidated report for all its establishments in New Jersey with fewer than 50 employees. The term “establishment” is given the same meaning as that used in the federal EEO-1 reporting scheme, and the reporting is based on a snapshot of employees included in any pay period from October through December of the prior year. Thus, qualifying services contractors submitting their first report by March 31, 2019 should base their initial report on a snapshot of employees from any pay period between October 2018 and December 2018.

Job Categories

The newly-issued instructions also clarify that employers will report using the same “job categories” utilized in the federal EEO-1 reports. Accordingly, each employee must be classified into one of the following categories:

- Executive/Senior Level Officials and Managers
- First/Mid Level Officials and Managers
- Professionals
- Technicians
- Sales Workers
- Administrative Support Workers
- Craft Workers
- Operatives
- Laborers and Helpers
- Service Workers

Hours Worked

For non-exempt employees, the reported number of hours worked must be the actual hours worked. For exempt employees, the employer may report the actual hours an employee worked OR may calculate the hours of exempt employees as follows:

- Full time employees: 40 hours/week multiplied by the number of weeks worked in the applicable year.
- Part time employees: 20 hours/week multiplied by the number of weeks worked in the applicable year.

Pay Bands

The instructions provide that reporting employers must use the “pay bands” that were proposed by the federal government in connection with the EEO-1 wage reporting obligations that were promulgated during the Obama Administration. The 12 pay bands, which apply to employees’ annual earnings (as reflected in Box 1 of employees’ W-2 Forms), are the following:

- Band 1: \$19,239 and under
- Band 2: \$19,240 - \$24,439
- Band 3: \$24,440 - \$30,679
- Band 4: \$30,680 - \$38,999
- Band 5: \$39,000 - \$49,919

- Band 6: \$49,920 - \$62,919
- Band 7: \$62,920 - \$80,079
- Band 8: \$80,080 - \$101,919
- Band 9: \$101,920 - \$128,959
- Band 10: \$128,960 - \$163,799
- Band 11: \$163,800 - \$207,999
- Band 12: \$208,000 and over

Demographic Information

Once the reporting employer has determined each subgroup of employees within a common job category, hours, and pay band, it should identify the aggregate race, ethnicity, and gender demographics of each subgroup. While the race/ethnicity categories follow the federal standards, the sex category differs from the federal standard in that it provides for non-binary identification in addition to “male” or “female.” To the extent possible, the employer should rely upon employees’ voluntary self-identification to identify race and gender. However, if employees fail to self-identify, employers are not permitted to omit such information; instead, they should rely on “employment records or observer identification.”

New Jersey Governor Signs #MeToo Related Legislation Into Law

A second major development for employers doing business in New Jersey is the enactment of Senate Bill 121, which New Jersey governor Phil Murphy signed into law on March 18, 2019. The bill is a direct response to concerns about transparency and accountability raised in connection with the #MeToo movement, and mirrors legislation enacted in other states. The bill, which applies to all contracts and agreements entered into, renewed, modified, or amended on or after March 18, 2019, contains three key measures:

1. It renders unenforceable any provision in an employment contract that waives a substantive or procedural right or remedy relating to a claim of discrimination, retaliation, or harassment, such as mandatory arbitration provisions (except in collective bargaining agreements).
2. It prevents employees from prospectively waiving any right or remedy under the New Jersey “Law Against Discrimination,” or any other statute or case law.
3. It declares non-disclosure provisions in employment contracts or settlement agreements relating to claims of discrimination, retaliation, or harassment to be against public policy and unenforceable against a current or former employee who is a party to the contract or settlement. If the current or former employee publicly releases information such that the employer is reasonably identifiable, a non-disclosure provision would also be unenforceable against the employer.

Practically speaking, this law will likely limit the use of arbitration agreements in connection with claims of discrimination, retaliation, or harassment. It will also effectively prevent employers from enforcing language in contracts or settlement agreements that prevents employees from disclosing the details about their discrimination, retaliation or harassment claims, including the dollar value of any settlement reached with the employer.

In short, employers doing business in New Jersey must take immediate steps to comply with these new requirements. Employers that contract with the State of New Jersey or its instrumentalities to provide “qualifying services” have precious little time to comply with the approaching March 31 deadline to submit their first Equal Pay Reports.

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