



Presented by  
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# Pay Equity

# Workshop:

## New Jersey's Diane B. Allen Equal Pay Act ("NJEPA")

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# Agenda

## Section One:

Understanding the Legal Framework

## Section Two:

Practical Application

## Section Three:

Considerations When Reviewing  
Pay Equity Complaints

## Section Four:

Hypotheticals

## Section Five:

Fixes

**Section One:**  
Understanding the  
Legal Framework

# The Diane B. Allen Equal Pay Act

## Overview

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- Effective July 1, 2018
- Amends the New Jersey Law Against Discrimination (“NJLAD”)
- Applies to all New Jersey employers, regardless of size
- Applies to full-time, part-time, seasonal, per-diem, and temporary employees

## Purpose

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- It is an unlawful employment practice for an employer to discriminate against an employee by paying a rate of compensation to an employee of a protected class which is less than the rate paid to employees not of the protected class for **substantially similar work.**
- Prohibits discrimination on the basis of all categories protected under the NJLAD.

## Purpose (cont'd)

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- Allows for an employee to recover up to six years back pay for violations, so long as the violation was continuous, and the most recent violation occurred within the 2-year statute of limitations.
- A violation “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.”

## Remedies Under the NJLAD

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- An order requiring the employer to cease and desist from the unlawful employment practice
- Lost wages and benefits
- Hiring, reinstatement, or promotion as appropriate, with back pay and interest;
- Emotional distress damages
- Reasonable attorney's fees
- Out-of-pocket expenses associated with pursuing the complaint
- Punitive Damages (Superior Court Only)
- The DCR may also award attorney's fees' and affirmative relief (training, policy changes, and monitoring) and may impose up to \$50,000 in statutory penalties to be paid to the state treasury, depending on the number of violations occurring within a specific time frame.

## Additional Remedies Under the NJEPA

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- Employees may recover up to 6-years back pay for the entire period of time in which a violation regarding discrimination in compensation has been continuous, so long as the violation continues to occur within the statute of limitations.
- Treble damages (three times any monetary damages) for violations of the act and for violations of the anti-retaliation prohibitions
  - If a violation is found by a jury, the Judge **MUST** award treble damages
  - If a violation is found by the Division on Civil Rights, the Division **MAY** award treble, but is not required to do so

## Statute of Limitations

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- Two years
- Begins to run from the last discriminatory paycheck
- Employers cannot require employees to consent to a shorter statute of limitations
- The Law also codifies the potential applicability of the discovery rule, which would mean that the statute of limitations would not begin to run on an NJEPA claim until the complainant discovers or by reasonable diligence and intelligence should have discovered the violation.
- Perrotto v. Morgan Advanced Materials (DNJ, 2019)
  - No retroactivity: Complainant cannot have received most recent discriminatory paycheck prior to July 1, 2018 – the effective date of the Law.

## Prohibitions

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- Employers are prohibited from retaliating against any employee who:
  - Discusses with another current or former employee information relating to job title, occupational category, rate of compensation/benefits, or the race, gender, ethnicity, military status, or national origin of the employee or any other employee.
  - Opposes any practice or acts forbidden under the Law
  - Seeks legal advice regarding his/her rights under the Law
  - Shares relevant information with legal counsel or a government entity
  - Files a complaint, testifies, or assists in any proceeding

## Prohibitions (cont'd)

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- Employers cannot coerce, intimidate, threaten, or interfere with any person seeking the privileges of the NJEPA, or who has aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by the act.

## Reporting Requirements

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- Companies that win contracts from public agencies are required to submit reports to the Commissioner of Labor and Workforce Development regarding the compensation and number of hours worked by employees, categorized by:
  - Gender
  - Race
  - Ethnicity
  - Job Category

## Comparison to Other State and Federal Equal Pay Laws

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- Protected Classes:
  - NJEPA – 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, liability for service in the armed forces.
  - Federal Equal Pay Act – sex
  - New Jersey Discrimination in Wage Law – sex
  - Title VII – race, age, color, religion, sex, national origin

## Examples (Comparison to Other Laws)

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- A female employee complains that she is being paid less than her male comparator. Under which law might she bring a claim?
- An employee complains that he is being paid less than a comparator, who is younger than he is. Under which law might he bring a claim?

## Comparison to Other State and Federal Equal Pay Laws (cont'd)

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- What Must a Complainant Prove?:
  - NJEPA – “substantially similar” work
  - Federal EPA – “equal” work
- New Jersey Discrimination in Wage law – “No employer shall discriminate in any way in the rate or method of payment of wages to any employee because of his or her sex. “
- Title VII – “similar” work

## Comparison to Other State and Federal Equal Pay Laws (cont'd)

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- How Long Does a Complainant Have to Bring a Claim?:
  - NJEPA – 2 years
  - Federal EPA – 2 years for non-willful violations/ 3 years for willful violations
  - Discrimination in Wage Law – 6 years
  - Title VII – 180/300 days (EEOC/ dual-filing), 90 days (after receiving right to sue letter)

**Section Two:**  
**Practical Application**

## What Are The Elements of a Successful Claim?

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1. Complainant is member of a protected category
  2. Comparators perform substantially similar work
  3. Complainant received less compensation than one or more comparators doing substantially similar work who are not a member of that protected category
- An employer can be found to have violated the EPA even if the employer did not intend to discriminate against a member of a protected class.

## Protected Categories

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- race
- creed
- color
- national origin
- ancestry
- age
- marital status
- civil union status
- domestic partnership status
- affectional or sexual orientation
- genetic information
- pregnancy or breast feeding
- sex
- gender identity or expression
- disability or atypical hereditary cellular or blood trait of any individual
- because of the liability for service in the Armed Forces of the United States
- the nationality of any individual
- because of the refusal to submit to a genetic test or make available 24 the results of a genetic test to an employer

## Comparators

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- Another employee with whom a complainant can compare their salary to determine whether they are equal
- Applies to employees of all of an employer's operations and facilities, even outside of New Jersey

# The Diane B. Allen Equal Pay Act

## Compensation

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- Compensation is NOT limited to salary
- Compensation Includes:
  - Base wages,
  - commissions,
  - overtime pay,
  - bonus pay,
  - merit pay stock options
- Cash and non-cash benefits, such as
  - insurance,
  - vacation time,
  - retirement funding

# Can Employers Restrict Discussions About Compensation?

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- NO!! It is unlawful for an employer to:
  - Retaliate against an employee from discussing with, or disclosing to another employee or former employee, a lawyer from whom the employee is seeking legal advice, or any government agency, information related to employee compensation
  - Require an employee, as a condition of employment, to sign a waiver or agree not to make these types of requests or disclosures

## Substantially Similar Work

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- Whether work is substantially similar does not rely on job classifications, titles or descriptions, but rather the actual work performed by the employees holding the position.
- Substantially similar work is evaluated as a combination of skill, effort, and responsibility.
- The jobs need not be identical.
- Minor differences in skill, effort, and responsibility do not preclude work from being substantially similar.

## Note: Job Title and Job Descriptions

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- Job title and description are not determinative, although they may be relevant to assessing whether two jobs require a similar degree of skill, effort, and responsibility.

### Example:

- An Administrator and an Executive Assistant might perform substantially similar work even though their job titles are different, and their job duties may not be exactly the same.

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## Skill

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- Refers to the skills actually necessary to perform the job, not the skills a particular employee just happens to have.
  - Level of education
  - Experience
  - Training
  - Ability necessary to meet the performance requirements of the respective jobs

### Example:

- A Master's Degree in Literature would typically not be a skill required to perform a job as an accountant.

## Additional Examples (Skill) [as explained by DCR]

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- 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.

# The Diane B. Allen Equal Pay Act

## Effort

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- Mental and physical requirements for performing the job

### Examples:

- A job that requires an employee to be on her feet all day would require more physical effort than an office job, where an employee sits at a desk the entire workday.
- A job that requires an employee to work long hours or meet or meet late breaking deadlines may require more mental exertion.

## Responsibility

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- Degree of discretion or accountability involved
  - Duties regularly required to be performed
  - Amount of supervision received
  - Whether employee supervises others
  - Degree employee is involved in decision making
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- Minor or occasional differences in responsibilities will not prevent jobs from being substantially similar.

## Examples (Responsibility)

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- 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 with drafting the documents.
- Two employees that have the exact same exact responsibilities, except one of them has the additional responsibility of turning off the lights at the end of the workday, is a minor difference in responsibility.

## Compensation Adjustment

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- Employers are encouraged to conduct a self-audit to determine whether salary adjustments need to be made.
- Employers may only adjust compensation upwards to correct a pay disparity.
- Employers are prohibited from reducing the compensation of any employee in order to comply with the Law.

## Defenses: When a Compensation Adjustment is NOT Required

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- Even if a Complainant can prove all three elements of an unequal pay claim, the employer still will not be liable if it can show that the unequal pay is based on:
  - Merit System
  - Seniority System
  - Legitimate, Non-discriminatory Factor
    - As defined by the Law

## What is a System?

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- A plan, policy, or practice that is predetermined or predefined by the employer.
- Used by managers and others to make compensation decisions.
- 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.”

### Example:

- Ad hoc salary determinations based upon an employee’s performance is not a valid system.

## Defense: Merit System

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- Employer has an organized and structured procedure under which employees are systematically evaluated according to established standards that are designed to determine the relative merits of the employees.
- The merit system must reward persons because they performed better; the reward must not be based upon their positions, but upon their personal performance.
- Employer must inform its employees of the existence of the merit system, either by writing or in some other way.
- Merit system must not be based upon legitimate, job-related criteria, not on discriminatory criteria.

## The Diane B. Allen Equal Pay Act

### Pitfalls: Merit System

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- Is a Union Contract the only way to award employees based upon merit?

## Defense: Seniority System

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- Employer uses a valid seniority system that gives employees rights and benefits that improve the longer they work for the employer.
  - A valid seniority system ordinarily includes rules that:
    - define when the seniority time clock begins ticking;
    - specify how and when a particular person's seniority may be lost;
    - define which time will count toward the accrual of seniority and which will not;
    - specify the types of employment conditions that will be governed by seniority and those that will not.
- Employer must regularly consider seniority rather than doing so randomly or on a case-by-case basis.
- Employer must apply its system uniformly in its decisions.

## Pitfalls: Seniority System

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- Is a Union Contract the only way to award employees based upon seniority?

# QUIZ QUESTION

Employers may discipline employees for discussing their salaries if:

- A. Employees are paid different amounts for different types of work.
- B. It causes discord among employees
- C. Salaries are subject to collective bargaining
- D. None of the above

## Defense: Legitimate, Non-Discriminatory Factor (All 5 Factors Must Apply)

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1. 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;
2. 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;
3. That each of the factors is applied reasonably;

## Defense: Legitimate, Non-Discriminatory Factor (All 5 Factors Must Apply)

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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 legitimate business interest can include financial considerations.
  - 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.

## Unions

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- Unions and collective bargaining reduce gender and racial pay gaps.
- Having a CBA that bases compensation on a valid seniority or merit system can justify pay disparities.

## Geographic Differences

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- Employees in New Jersey should be compared to their New York counterparts.
- Geographic differences may be a legitimate bona fide factor justifying a difference in compensation.
- . Claims are evaluated on a case-by-case basis.
- Differences in cost-of-living or in market demand for certain positions in different geographic areas may justify a difference in compensation.
- The cost-of –living/ market demand differential still has to meet the remaining 4 prongs to be a valid defense.

## Market Rate

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- Reliance on market rate is not a get out of jail free card.
- Compensation based on market rate is typically a generalized approach, but justification must be on a case-by-case basis.
- Often times, the market rate does not account for the entire differential.
- Employers have sufficient evidence to justify the market rate **for each year** – remember, employees can recover up to 6 years back pay for violations.
- Particular labor markets may be tainted by discriminatory practices.

## Examples (Market Rate)

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- A law firm employs three 5-year attorneys, whom they hired at market rate. The 2021 market rate for 1<sup>st</sup> year attorneys is almost double the salary of the 5-year attorneys. The firm wants to hire a 1<sup>st</sup> year attorney at the current market rate.
- A law firm employs three 5-year attorneys, whom they hired at market rate. Since that time, market rate has decreased drastically. Now, newly hired attorney are starting at half the rate of the 5-year attorneys.

# Can Salary History Justify a Current Pay Disparity?

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## New-Hires

- Executive Order prohibits public employers from inquiring about salary history during the interview process and considering an applicant's refusal to volunteer compensation history in any employment decision.
- Legislation prohibits salary history inquiries by private employers.

## Other (Lateral Transfer/ Promotion, etc.)

- 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.

## Litigation

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- Kiernan v. Township of Verona (2019)
  - Plaintiff, Township Clerk, brought suit against her employer, the Township of Verona, claiming she was paid less than her two male counterparts, the Township Chief Financial Officer and Township Manager.
- Varela v. Township of Verona (2019)
  - Plaintiff, Municipal Court Administrator, brought suit against her employer, the Township of Verona, claiming she was paid less than her two male counterparts, the Township Chief Financial Officer and Township Head, and paid more comparably to her female counterpart, in the above case.

## Litigation (cont'd)

	<u>Varela</u>	<u>Kiernan</u>	<u>CFO</u>	<u>Township Manager</u>
<u>2014</u>		\$69,900	\$90,000	
<u>2015</u>	\$75,000	\$69,900	\$106,350	\$120,000
<u>2016</u>	\$75,750	\$70,599	\$107,414	\$120,159
<u>2017</u>	\$75,750	\$70,599	\$107,563.92	\$135,000
<u>2018</u>	\$75,750	\$72,011	\$109,562	\$139,050
<u>2019</u>	\$78,810	\$73,451	\$125,000	\$143,222

## Litigation (cont'd)

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### TOWNSHIP CLERK

- The Municipal Clerk serves as the Secretary of the Municipal Corporation; Secretary to the Governing Body, Chief Administrative Office of all Elections, Chief Registrar of Voters, Administrative Officer, and Records Coordinator, Manager and Custodian
- Attends all Council meetings; records minutes; prepares the Council meeting agenda.
- Acts as a liaison between the public and the governing body
- Oversees local elections
- Processes applications for licenses and permits
- Conducts business with other municipal departments
- Serves as information officer to the public and to the media
- Custodian of all government records.
- Implements local archives and records retention programs as mandated.

## Litigation (cont'd)

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### TOWNSHIP MANAGER

- The Township Manager serves as both the Chief Executive and Chief Administrative Officer of the Township.
- Prepares Mayor and Council meeting agendas;
- Executes and enforces Township ordinances, resolutions and other council policies;
- Selects and appoints all Department Head and Township personnel;
- Conducts labor negotiations with employee bargaining units in coordination with the Township Attorney;
- Oversees all Township purchasing and capital improvement projects;
- Prepares and presents the Township's annual budget;
- Represents the Township and its best interests to the Verona Board of Education, neighboring municipalities, the County of Essex and the State of New Jersey.

## Princeton University Settlement (Not NJEPA)

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- The Office of Federal Contract Compliance Programs (“OFCCP”) Enforces Executive Order 11246, which makes it unlawful for government contractors to engage in sex-based compensation discrimination
- OFCCP regularly conducts reviews of contractors’ pay practices, called Compliance Evaluations
- OFCCP conducted a university-wide review of all full-time professors’ compensation at Princeton University
- OFCCP found that from 2012-2014, 106 female full-time professors were paid less than their similarly situated male counterparts
- Princeton claimed that professors’ compensation varied by department, which accounted for market factors that OFFCP’s process did not consider
- OFCCP’s Compensation model controlled for: (1) years in current job; (2) other years at Princeton; (3) department; (4) full-time status; (5) highest degree earned; and (6) prior experience in years.
- On September 30, 2020, Princeton entered into an Early Resolution Conciliation Agreement with OFCCP to pay \$925,000 in back wages as restitution to the 106 female full-time professors

**Section Three:**  
**Considerations When Reviewing  
Pay Equity Complaints**

# PRIVILEGE

## Privilege

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- Establish a protocol to maintain privilege.
- You must have an attorney involved to argue the assessment is privileged.
- Treat the analysis as privileged throughout. Mark all documents **“Prepared at the Request of Legal Counsel”** or **“Privileged and Confidential”**
- Think about the impact if this document is subject to discovery.

# The Diane B. Allen Equal Pay Act

## Steps Suggested by the DCR

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### Step One: Gather Relevant Data

- Name/employee ID
- Protected categories
- Primary work location
- Work type (full-time, part-time, temporary, etc.)
- Exempt/non-exempt status
- Date(s) of hire
- Job title
- Job code/grade/band
- Date in most recent job code/grade/band
- Division/department/business unit
- Job function/family
- Supervisor
- Performance ratings
- Highest level of education
- Special licenses, certifications, etc.
- Pay type (salary, hourly, etc.)
- Annualized salary or hourly rate
- Shift differential
- Bonus eligibility
- Eligible benefit plans/programs
- Bonus paid
- Hours worked/type (regular, OT, etc.)
- Total compensation

## Steps Suggested by the DCR (cont'd)

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- **Step Two**: Identify comparable jobs.
- **Step Three**: Calculate whether members of a protected class are paid equally as those outside of the protected class.
- **Step Four**: Assess whether differences in pay are justified under the law.
- **Step Five**: Remediate any unjustified pay differentials.

## Equal Pay Analysis: Purpose

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- Conducting the pay review/internal complaint review is used to help identify and correct any instances of pay disparity before a potential lawsuit.
- It is not, in and of itself, an affirmative defense to a claim brought for violations of the NJEPA.
- Affirmative defenses recognized under the NJEPA are those previously mentioned.
  - Seniority System
  - Merit System
  - Legitimate, non-discriminatory reason, as defined by the NJEPA (5-prong analysis)

# **Section Four:** **Hypotheticals**

## Scenario # 1

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- Complainant, Deputy VP of Training for Bus Operations, complains he is being paid less than his Comparator, Senior Director of Training, Rail Operations.
- Complainant makes \$100K annually, and his Comparator makes \$115K annually.
- Complainant was hired for his current position in January 2020 but has been with the company since 2000.
- His Comparator began her career with the company in January 2020 as Senior Director of Training for Rail Operations.

## Hypotheticals

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- What if the Comparator negotiated a higher salary?
- Would the analysis change if Comparator has since left the company?
- Would the analysis change if Complainant held the position one year ago, but recently became aware of Comparator's salary?

## Scenario # 2

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- Complainant, Rail Repair Person, who is 45 years old, complains she is being paid less than her Comparator, Bus Mechanic, who is 28 years old, for substantially similar work.
- Complainant makes \$64,000.00 per year, and her Comparator makes \$67,500.00 per year.
- They have each been employed for approximately two years.
- Complainant is located in Morrisville, Pennsylvania, and her Comparator is located in Newark, New Jersey.

## Hypotheticals

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- Would the analysis change if Complainant holds a Degree in Hydraulics?
- Would the analysis change if currently no one holds the Bus Mechanic position, but two years ago, someone in the position made \$67,500.00 per year?
- Would the analysis change if both of these positions were unionized?

# Section Five: Fixes

## Correct Systemic Problems

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- Review or create compensation policies and procedures – including checks and balances – and train managers on implementation
- Consider implementing standard pay ranges or guidelines for each position or classification
- Communicate with employees about pay increases and their eligibility
- Standardize performance evaluations process
- Train decision makers:
  - How to make proper pay decisions that comply with organizational policies and the applicable law
  - Appropriate factors to consider when making pay decisions
  - How to apply guidelines and exercise discretion properly
  - How to document the bases for decisions.

## Correct Systemic Problems

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- Create or update job descriptions
- Update applications and hiring documents to eliminate questions seeking salary history information – okay to ask for salary expectations
- Update handbooks, policies, and hiring documents to eliminate any prohibitions against employees discussing pay and confidentiality provisions aimed at compensation
- Train employees involved in the hiring process about prohibitions against seeking salary history and the changing pay equity laws more broadly.

## The Diane B. Allen Equal Pay Act

### Key Takeaways

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- Conduct privileged pay equity analyses
- Review job descriptions, NOT JOB TITLES, for similar duties
  - All facilities, satellite offices, client sites, and anywhere your employees are performing their duties – on-site or off.
- Train Human Resources on new pay equity laws
- Revise handbook policies on anti-discrimination, anti-retaliation, complaint procedures

# Contact Us



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