

Oregon Enacts New Equal Pay Law

On June 1, Oregon Governor Kate Brown signed into law new equal pay protections for employees and restrictions for Oregon employers. The Oregon Equal Pay Act of 2017 curbs salary history inquiries by employers, and provides a limited safe harbor from liability for equal pay violations for employers that proactively evaluate their pay practices and take steps to eliminate wage disparities. To minimize potential exposure to pay equity claims, employers should review their pay practices before the new pay discrimination provisions take effect.

Background

Increasingly, states on both coasts have targeted gender-based pay discrimination, adopting pay equity laws aimed at narrowing the pay gap between men and women. California's Fair Pay Act was touted as the country's most aggressive of these laws when it took effect in 2016, raising the bar for employers to justify wage differentials among their California-based employees. Since then, California has expanded and extended pay equity protections to eliminate race- or ethnicity-based pay differences as well. (See our [October 7, 2016](#) *For Your Information*.)

Within the past year, New York, Massachusetts and Maryland have enacted equal pay laws targeting the gender pay gap. (See our [February 2, 2017](#) *For Your Information* and [August 3, 2016](#) *FYI Alert* publications.) Other state and local measures intended to close the gap have focused on curbing the use of salary information to screen applicants, evaluate their candidacy, and formulate job offers. Salary history restrictions have already been enacted in Massachusetts, Philadelphia and New York City, and are being considered in other jurisdictions. (See, for example, our [June 9, 2017](#) and [May 10, 2017](#) *For Your Information* publications.)

Oregon Equal Pay Act

On June 1, 2017, Governor Kate Brown signed into law the Oregon Equal Pay Act of 2017 ([House Bill 2005](#)), intended to close the gender wage gap by creating new obligations and expanding potential liability for public and private employers alike. Although Oregon law already barred gender-based pay discrimination, the new law extends equal pay protections to nine other classes – making it unlawful to discriminate in payment of wages or other compensation on the basis of race, color, religion, sexual orientation, national origin, marital status,



disability, age and veteran status.

Pay Disparities

The new law generally prohibits an employer from paying any employee wages, salaries, bonuses, benefits, fringe benefits or equity-based compensation at a rate greater than it pays employees of a protected class for work of comparable character. For these purposes, “work of a comparable character” is defined as work requiring substantially similar knowledge, skill, effort, responsibility and working conditions, regardless of job title or description.

Even if the work is comparable, the law allows pay differences in certain circumstances – if the disparity is based on *bona fide* job-related reasons, such as seniority, merit, and production-related systems, workplace location, travel, education, training, experience or a combination of those factors. However, it prohibits reducing an employee’s compensation to correct an unlawful wage differential and bring its pay practices into compliance.

Salary History Restrictions

In addition to the comparable pay requirement, the new law restricts employers’ use of prospective employees’ pay histories during the hiring process. It bars employers from screening job applicants or determining compensation for a job offer based on a prospective employee’s current or prior compensation, and from seeking an applicant’s salary history until an offer that includes compensation is made. After securing written authorization, employers may seek to confirm the prospective hire’s pay history post-offer. Notably, the law does not prevent employers from considering current employees’ salary history for internal transfers, moves or new positions with the same employer.

Blockquote: Salary History Bans Gain Traction

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Earlier this year, Philadelphia became the first U.S. city to prohibit salary history inquiries during the hiring process, which faced immediate legal challenge. (See our [FYI publications dated January 27, 2017, April 28, 2017 and June 9, 2017.](#)) Last month, New York City enacted similar restrictions. (See our [May 10, 2017 FYI.](#))

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Expanded Legal Remedies

Employers will face considerable potential exposure under the new law. An employee alleging pay discrimination will be able to file a complaint with the Bureau of Labor and Industries or bring a lawsuit in Oregon Circuit Court within one year after the allegedly unlawful practice occurred. Notably, the law expressly allows employees to bring claims for unpaid wages as a class action as well as on their own behalf.

A successful claim may trigger an award of two years' back pay, compensatory and punitive damages, and attorneys' fees. Because the law provides that a violation occurs each time an employee is paid under a discriminatory compensation decision or other practice, a pay disparity may constitute an ongoing unlawful employment practice, with each payday restarting the statute of limitations.

A Limited Safe Harbor

The new law limits potential liability for employers that proactively conduct an "equal-pay analysis" and take steps to correct pay disparities. Under the law, an equal-pay analysis is defined as "an evaluation process to assess and correct wage disparities among employees who perform work of comparable character."

While such analyses do not provide a complete defense against pay discrimination claims, they do provide a limited safe harbor for employers who conduct them. An employer may rely on an equal pay analysis to escape liability for compensatory and punitive damages if it can demonstrate that it:

- Completed, within three years preceding the civil action, a good faith analysis of its pay practices that was both reasonable in detail and scope given the employer's size and related to the relevant protected class
- Eliminated wage differentials for the plaintiff and made reasonable and substantial progress toward eliminating wage differentials for the relevant protected class

Even if the employer makes such a showing, a court may award up to two years' back pay and reasonable attorney fees but not compensatory or punitive damages.

Effective Date

The law takes effect on the 91st day after the 2017 regular legislative session adjourns on July 10. While the ban on salary history inquiries will take effect then, most other provisions of the law become effective in 2019. However, a private right of action for violating the salary history prohibition is not authorized until 2024.

In Closing

Oregon employers will no longer be able to use salary history to screen applicants, evaluate their candidacy, or formulate job offers, once the new law takes effect. Employers should update their employment applications and hiring practices, and train employees involved in the hiring process to ensure compliance. To minimize exposure to future pay equity claims, employers should evaluate their pay practices and take any steps needed to eliminate impermissible wage disparities.

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