



# Employers Should Act Now to Prevent New Compensation Discrimination Claims

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Despite more than 50 years of legislative effort, beginning with the Equal Pay Act of 1963, statistics show that we have made little progress in advancing equal pay for women and minorities. A growing number of states and cities have responded by enacting legislation regulating how employers hire and compensate employees. On June 1, 2017, Oregon joined the bandwagon when Governor Kate Brown signed the Oregon Equal Pay Act.

Oregon's new law, which applies to virtually all employers, prohibits discrimination based on much more than just gender. The law prohibits compensation discrimination based on any "protected class," including race, color, religion, sex, sexual orientation, national origin, marital status, veteran status, disability and age. The new law also broadly applies to all types of compensation including wages, salaries, bonuses, benefits, fringe benefits and equity benefits.

The law prohibits Oregon employers from paying any employee at a rate greater than that at which the employer pays wages or other compensation to employees of a protected class for "work of comparable character." This term is defined to mean "work that requires substantially similar knowledge, skill, effort, responsibility and working conditions in the performance of work, regardless of job description or job title."

The new law contains an exception allowing employers to pay employees different amounts for comparable work if the wage disparity is a "bona fide factor" related to the job. This includes, for example, a seniority system, a merit system, workplace locations, education, training and experience, travel, or a system that measures earnings by quality or quantity of production. The employer must show that one or more bona fide factors accounts for the entire compensation differential. This is obviously a very high burden.

The Equal Pay Act also prohibits employers from screening job applicants based on their current or past compensation or prohibits employers from obtaining salary history information of applicants and employees.

## Noncompliance Could Be Costly

The Oregon Equal Pay Act contains a carrot and a stick; it provides employees with remedies but also provides employers with ways to avoid damages. Turning first to the stick, the law allows employees to recover two years of unpaid wages, compensatory damages, punitive damages, attorneys' fees, injunctive relief and any other equitable relief that may be appropriate.

Turning next to the carrot, an employer may avoid compensatory and punitive damages if it can prove that (1) it completed an equal pay analysis of its pay practices within three years before the date an employee files an equal pay complaint in court or with the Oregon Bureau of Labor and Industries (BOLI); and (2) it eliminated the wage variances for the complaining party and made "reasonable and substantial progress" in eliminating the wage variances for all members of the same protected class.

## What Employers Should Do Now to Prepare

While most of the Equal Pay Act will not become effective until January 1, 2019, employers should act now to ensure compliance and update policies as needed.

First, the new law prohibits employers from obtaining salary history from applicants and employees. Employers should therefore review and update their job applications and interview questions to ensure they are not inquiring directly or indirectly about salary history. Handbook policies should be revised to prohibit any inquiry into an applicant or employee's pay history at former jobs. HR and hiring managers should also receive training about the pay history prohibition.

Second, employers should consider conducting a pay-equity analysis to assess and correct any wage disparities among employees who perform work of comparable character. If disparities exist, they should be corrected unless the employer can show that the variances are attributable to one or more of the "bona fide factors" identified in the law. When correcting pay variances, employers are prohibited



from reducing any employee's pay. Employers should consult with counsel before conducting any pay equity audit.

Salary history bans and pay equity laws are sweeping the country, and have passed in California, Delaware, Massachusetts and New York City. Washington's Legislature is considering several bills. Accordingly, employers with multistate workforces should continue to monitor these developments and be prepared to defend their policies and practices. ■



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