

PAY EQUITY ARTICLE

AUTHORS:

Jennifer Nelson

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TITLE:

Another Potential Landmine for Employers: Oregon Pay Equity Bill Signed by the Governor

Last year, Governor Kate Brown signed into law House Bill 2005, which created considerable new obligations and areas of liability for Oregon employers. The law took effect in October 2017, and prohibits pay discrimination on the basis of protected class, defined as race, color, religion, sex, sexual orientation, national origin, marital status, veteran status, disability, or age. In other words, employers may not pay employees performing comparable work at different rates of pay because of their membership in one of these protected classes. The law will further prohibit employers from screening job applicants based on current or past compensation and from determining compensation for a position based on a prospective employee's current or past compensation. Employers will be able to inquire only about a job applicant's salary history after making a job offer including a compensation amount.

When Are Different Rates of Compensation Acceptable?

The law provides that employees performing comparable work may be compensated at different levels if the difference is based on a bona fide factor related to the position in question, including seniority, merit, and production-related systems, as well as workplace locations, travel needs, education, training, and/or experience.

Significant Exposure to Liability

Employers may want to take particular notice of this law, as the potential exposure for its violation is considerable. An employee alleging pay equity discrimination will be able to file a complaint for unpaid wages and/or discrimination either with the Bureau of Labor and Industries (BOLI) or in Oregon Circuit Court. If successful, the employee could be awarded two years' back pay at the employee's regular rate of pay, compensatory and punitive damages, and attorneys' fees. What's more, the law provides that each time an employee is paid constitutes a potential violation, making alleged pay disparity an ongoing unlawful employment practice with a continually renewing statute of limitations. There is also class action exposure, as the law specifically provides for employees to bring claims for unpaid wages not only on their own behalf, but on behalf of a class of similarly situated employees.

The law includes a defense for employers that significantly reduces exposure, however. An employer may escape liability for compensatory and punitive damages where it is able to show that, within three years before the date the employee filed a legal action, the employer (1) completed an equal pay analysis of its pay practices in good faith that was reasonable in detail and scope in light of the employer's size; and (2) eliminated wage differentials for the plaintiff and made reasonable and substantial progress toward eliminating wage differentials for the protected class asserted by the plaintiff.

Effective Dates and How to Prepare

Employees will have a private right of action under the majority of the law beginning January 1, 2019. Because the statute of limitations associated with this law is one year, many current pay practices that violate it will be actionable on that date. Employees will have a private right of action under the provision prohibiting employers from inquiring into prospective employees' salary histories beginning January 1, 2024. The law took effect in October 2017.

Prior to its implementation, it is a good idea for employers to conduct the "equal-pay analysis" referenced in the law—both to ensure legal compliance and to benefit from the defense to compensatory and punitive damages should an employee file suit. That being said, it is important that employers be cautious that inquiry is not made into protected statuses that are not self-evident or self-reported, as to do so could give rise to additional claims and unintended consequences. The law defines "equal-pay analysis" as "an evaluation process to assess and correct wage disparities among employees who perform work of comparable character." "Work of comparable character" means work requiring substantially similar knowledge, skill, effort, responsibility, and working conditions (regardless of the job description or job title).

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