PAY EQUITY
COMPLIANCE CHALLENGES, BUSINESS RISKS, AND LEGAL RAMIFICATIONS

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I. Introduction

The federal Equal Pay Act (EPA)[2] has been in place for decades; however, the gender pay gap persists, with male employees continuing to earn more than female employees. That is true for employees of all ethnicities, but the gap is even wider for non-white employees. In recent years, these ongoing pay disparities have garnered the attention of state and local legislatures, the Equal Employment Opportunity Commission (EEOC), the media, and socially conscious corporate boards. This has led to the enactment of laws and ordinances more demanding of employers than the EPA, to the widely publicized #TimesUp movement, and to campaigns like Paradigm for Parity, a coalition committed to advancing leadership opportunities for women.

An increasing number of jurisdictions are adopting pay equity legislation, posing even greater compliance challenges for employers. Further complicating matters, the U. S. Department of Labor's Office of Federal Contractor Compliance Programs (OFCCP) has become more aggressive in enforcing federal affirmative action requirements, making compensation disparities its highest enforcement priority in federal contractor and subcontractor audits. To avoid and defend against lawsuits and protect your company's reputation, it is critical for you to understand the requirements of the EPA and other federal and state laws, so that you can review your company's pay practices, and take necessary steps to correct current pay disparities and prevent their recurrence.

II. Federal Equal Pay Act

Enacted in 1963 as an amendment to the Fair Labor Standards Act (FLSA), the EPA requires that men and women in the same workplace be given equal pay for equal work. Specifically, the EPA provides:

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[2] 29 U.S.C. § 206(d).

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions[.][3]

Additionally, the EPA provides that "an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee."[4]

A. What Constitutes Equal Pay?

The definition of wages, or compensation, is very broad under the EPA and "generally includes all payments made to [or on behalf of] an employee as remuneration for employment."[5] Thus, it includes "all forms of compensation irrespective of the time of payment . . . and whether called wages, salary, profit sharing, expense account, monthly minimum, bonus, uniform cleaning allowance, hotel accommodations, use of company car, gasoline allowance, or some other name." The equal pay requirement also applies to fringe benefits.[6] These include such things as "medical, hospital, accident, life insurance and retirement benefits, profit sharing and bonus plans; leave; and other such concepts."[7]

Of course, the equal pay requirement does not mean employers must guarantee equal compensation to all similarly-situated employees; the focus is on the "rate" of pay, which "refers to the standard or measure by which an employee's wage is determined and is considered to encompass all wages, whether calculated on a time, commission, piece, job incentive, profit

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[3] 29 U.S.C. § 206(d)(1).
[4] *Id.*
[5] 29 C.F.R. § 1620.10.
[6] *Id.*; § 1620.11(b).
[7] *Id.* § 1620.11(a).

sharing, bonus, or some other basis."[8] Certainly, an hourly employee who works more hours at a given rate will earn more money. The same is true for commissioned employees, whose sales dictate how much they earn. The question under the EPA is whether the rate of pay or commission structure differs between the sexes for jobs that are "substantially similar." If so, an employer generally must be able to justify that difference on a non-gender basis.[9]

Historically, in comparing wages for EPA purposes, all compensation should be considered in the aggregate. For example, if a female employee earns a lower base pay than her male counterparts, but the inclusion of her performance bonus means she earns more than her male counterparts, there has been no EPA violation (although an employer should be able to articulate a legitimate reason for the difference in base pay).[10]

B. How To Evaluate "Equal" Jobs

To evaluate whether two or more employees have substantially equal jobs, employers must go beyond job titles—which may be inaccurate or misleading—and review the employees' actual job duties and the work they actually perform. This requires the employer to review the *skill*, *effort*, and *responsibility* associated with the positions to determine if they are, in fact, substantially equal.[11]

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[8] *Id.* § 1620.12(a).

[9] Accordingly, a part-time employee is not necessarily foreclosed from attempting to compare herself to a full-time employee. The question is whether their rates of pay are different. *See Lovell v. BBN Solutions, LLC*, 295 F. Supp. 2d 611, 619 (E.D. Va. 2003).

[10] *See Kienzle v. Gen. Motors, LLC*, 903 F. Supp. 2d 532, 544 (E.D. Mich. 2012); *Gallagher v. Kleinwort Benson Gov't Sec., Inc.*, 698 F. Supp. 1401, 1405-05 (N.D. Ill. 1988).

[11] *See Brennan v. Prince William Hosp. Corp.*, 503 F.2d 282, 291 (4th Cir. 1974) (application of EPA depends not simply on job titles, descriptions, or classifications, but rather on the actual requirements, performance, and content of the jobs being compared). Notably, these are three separate tests (of skill, effort, and responsibility), each of which must be satisfied independently of the other two. *See Forsberg v. Pac. Nw. Bell Tel. Co.*, 840 F.2d 1409, 1414 (9th Cir. 1988); *Locke v. Gas Research Inst.*, 935 F. Supp. 994, 1004 (N.D. Ill. 1996).

In terms of skill, employers must evaluate the level of experience, training, and education each brings to the position.[12] "Skill" can refer to either skill *level* or *type* or both. Indeed, two jobs may involve superficially similar tasks, and yet not be substantially similar because they require qualitatively different skills in their performance.[13] Additionally, the quality of each employee's performance should be considered.

With respect to effort, the amount of physical or mental exertion needed to perform a job should be examined.[14] Job factors that either cause, or relieve, mental fatigue or stress also should be considered. While the *level* and *kind* of effort may be considered, differences in kind that "are not ordinarily considered a factor in setting wage levels" may not support a variation in pay.[15] Moreover, the "occasional or sporadic" performance of an activity requiring greater physical or mental exertion is unlikely to justify a wage disparity.[16]

Responsibility includes the degree of discretion or accountability involved with the role, the duties the employee is regularly required to perform, the amount of supervision received, whether the employee supervises others, the degree to which the employee is involved in decision making, and the importance of the job obligation.[17] Once again, both the *level* and *kind* of responsibility should be considered. For example, if two employees generally perform the same tasks, but one also has supervisory responsibility or responsibility periodically for performing certain additional, significant tasks, their responsibility levels are unlikely to be deemed

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[12] 29 C.F.R. § 1620.15(a).
[13] *Forsberg*, 840 F.2d at 1415; *Angelo v. Bacharach Instrument Co.*, 555 F.2d 1164, 1171-73 (3d Cir. 1977).
[14] 29 C.F.R. § 1620.16(a).
[15] *Id.* § 1620.16(b) (male supermarket checker who sometimes carries out heavy packages may exert similar "effort" as female checker who sometimes performs fill-in work that requires greater dexterity).
[16] *Id.*
[17] *Id.* § 1620.17(a).

"substantially similar."[18] That said, if two employees have similar roles but responsibility for different yet insignificant tasks, or different tasks of similar importance, their jobs are more likely to be "substantially similar."[19]

Finally, in performing this analysis, employers should consider working conditions and whether the employees work in the same establishment.[20] This is a "flexible standard" applied using "practical judgment" in light of "whether the differences in working conditions are the kind customarily taken into consideration in setting wage levels."[21] The "working conditions" factor generally concerns two sub-factors: (1) surroundings, and (2) hazards.[22] It does not, however, encompass shift differentials in and of themselves.[23]

Whether a job is "substantially equal" is determined on a case-by-case basis, and "resolved by an overall comparison of the work, not its individual segments."[24] Determinations of whether jobs are "substantially equal" can vary and it is not always predictable how a court will decide.

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[18] *Krenik v. County of Le Sueur*, 47 F.3d 953, 961 (8th Cir. 1995) (maintenance engineer position not substantially similar to assistant maintenance engineer position notwithstanding the fact that they performed a number of similar tasks because the former engaged in certain additional tasks and also supervised the latter); *Pfeiffer v. Lewis Cty.*, 308 F. Supp. 2d 88, 99 (N.D.N.Y. 2004) ("the performance of some common tasks does not make jobs substantially equal when material differences also exist").

[19] 29 C.F.R. § 1620.17(b)(3) (where one office worker checks time cards and another makes out paychecks "the difference in responsibility involved would not appear to be of a kind that is recognized in wage administration as a significant factor in determining wage rates").

[20] *Id.* § 1620.18(a).

[21] *Id.*

[22] *Id.* "Surroundings" refers to "the elements, such as toxic chemicals or fumes, regularly encountered by worker, their intensity and their frequency." *Id.* Similarly, "hazards" refers to the "physical hazards regularly encountered, their frequency and the severity of the injury they can cause." *Id.; see Pfeiffer,* 308 F. Supp. 2d at 101-02 (where female officers work in secure control room and male officers worked directly with inmates, their working conditions were not similar for EPA purposes).

[23] *Id.*

[24] *See Odomes v. Nucare, Inc.*, 653 F.2d 246, 250 (6th Cir. 1981); *Gunther v. Wash. Cty.*, 623 F.2d 1303, 1309 (9th Cir, 1979) ("It is the overall job, not its individual segments, that must form the basis of comparison.")

Jobs that have different titles and some different duties and responsibilities may still ultimately be deemed "substantially equal" in the eyes of the fact-finder.[25]

C. Affirmative Defenses Available to Employers

The EPA provides a limited number of exceptions under which a differential in pay is lawful, and which function as affirmative defenses to an EPA lawsuit. Specifically, a differential in pay among employees performing substantially equal jobs in the same establishment is justified if the employer can demonstrate the difference is based on: "(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on *any other factor* other than sex."[26]

Historically this fourth exception, known as the "catch-all," was used to defeat most EPA claims and blunted the statute's "teeth." However, more recently, this catch-all exception has come under more scrutiny by the courts, who are narrowing its scope.[27] Many state laws have restricted the catch-all exception by requiring the factor-other-than-sex to be bona fide, job related, based on a legitimate business necessity, and/or that there be no alternative business practice that would serve the same business purpose without producing the wage differential.[28]

For example, offering, and ultimately paying, a prospective employee greater compensation as a means of enticing him to join the company (in order, say, to lure him away from his current employer), or paying him more compensation as a means of retaining him (as when prospective employers are trying to lure him away), generally are "reasonable, gender-

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[25] *See Beck-Wilson v. Principi*, 441 F.3d 353 (2006) (finding, based on the facts in that case, nurse practitioners similarly situated to physician assistants).
[26] 29 U.S.C. § 206(d)(1) (emphasis added).
[27] *See Rizo v. Yovino*, 887 F.3d 453, 460 (2018) (catch-all "limited to legitimate, job-related factors such as a prospective employee's experience, educational background, or prior job performance"); *see also Tomka v. Seiler Corp.*, 66, F.3d 1295, 1310 (2d Cir. 1995).
[28] *See infra* Section III.

neutral business tactics" and therefore may fall within the EPA's catch-all exception.[29] On the other hand, the federal courts of appeals are split as to whether consideration of an employee's salary history is permissible, with the majority view being that it is not. As the Ninth Circuit recently explained, "It is inconceivable that Congress, in an Act the primary purpose of which was to eliminate long-existing 'endemic' sex-based wage disparities, would create an exception for basing new hires' salaries on those very disparities—disparities that Congress declared are not only related to sex but caused by sex."[30]

With respect to fringe benefits, an employer cannot justify differences based on sex-based actuarial studies under the catch-all exception.[31] Nor can an employer (1) justify differences in fringe benefit plans because their cost is higher for one sex than the other; (2) make benefits available to spouses or families of employees of one sex, but not the other; or (3) maintain a pension or retirement plan that "establishes different optional or compulsory retirement ages based on sex or which otherwise differentiates in benefits on the basis of sex."[32]

The employer bears the burden of proving one or more of these affirmative defenses justifies the pay disparity at issue.[33] The EPA "'creates a type of strict liability' for employers who pay men and women different wages for the same work: once a plaintiff demonstrates a wage disparity, she is *not* required to prove discriminatory intent."[34]

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[29] *See Drury v. Waterfront Media, Inc.*, No. 05 Civ. 10646 (JSR), 2007 WL 737486, at *4 (S.D.N.Y. Mar. 8, 2007).
[30] *See Rizo*, 887 F.3d at 460; 29 C.F.R. § 120.22.
[31] 29 C.F.R. § 1620.11(b).
[32] *Id.* § 1620.11(d), (e), & (f). While an employer *may* be able to condition an employee's entitlement benefits on him or her being the "head of the household" or "principal wage earner" in the family unit, the implementation of such a condition will be "closely scrutinized." *Id.* § 1620.11(c).
[33] *See Corning Glass Works v. Brennan*, 417 U.S. 188, 197 (1974). Unlike Title VII cases, in which the burden shifts back to the employee to prove pretext once the employer has articulated a legitimate, nondiscriminatory reason for its challenged action, in EPA cases the burden of establishing a legal justification for a pay disparity generally rests on the employer. *See id.*
[34] *See Rizo*, 887 F.3d at 459.

D. Litigation And Potential Damages

To succeed with an EPA claim, an employee must establish that: (1) lower wages were paid to employees of the opposite sex in the same establishment; (2) those employees perform substantially equal work; and (3) their jobs are performed under similar working conditions. As already noted, an employee does *not* need to establish an *intent* to discriminate to succeed on an EPA claim.[35] Therefore, even employers attempting to comply with the EPA are vulnerable if lower wages were paid to an employee of the opposite sex performing substantially equal work.[36]

An employee who prevails on an EPA claim is entitled to the amount of her unpaid wages, an additional equal amount as liquidated damages, and attorneys' fees and costs.

The statute of limitations for an EPA claim is two years; three years if the violation was willful.

The EPA also permits employees to file claims as a collective action on behalf of themselves and other similarly situated employees, pursuant to the same two-step certification process used for FLSA claims. Accordingly, after a collective action is filed, the court may conditionally certify the collective. Notice of the EPA claims is then sent to all similarly-situated employees who have the opportunity to opt-in to the lawsuit. The possibility of a collective action, not to mention liquidated damages, can turn a small wage differential for one female employee into a multi-million dollar problem.

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[35] *See Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 641 (2007).

[36] *See* 29 C.F.R. § 1620.13 ("where an employee of one sex is hired or assigned to a particular job to replace an employee of the opposite sex but receives a lower rate of pay than the person replaced, a prima facie violation of the EPA exists.")

III. State Equal Pay Laws

A. State Pay Equity Laws At A Glance

A majority of states have some type of equal pay legislation on the books. The laws generally fall into three categories: (1) laws that generally prohibit discrimination in wages on the basis of sex; (2) laws that mimic the EPA; and (3) laws with a longer reach than the EPA. This third category is rapidly growing, with bellwether states such as California, Massachusetts, New Jersey, and New York paving the way for more robust laws.

While the EPA already requires equal pay for "equal work," many of these newer state laws look to whether the work is "similar," arguably an easier standard for aggrieved employees to meet, broadening the scope of employees that can be compared. For example, some state laws compare employees who are "similarly situated" and perform work that requires *equal* skill, effort, and responsibility, and is performed under similar working conditions. Other statutes compare employees who perform "substantially similar" work—that is, work which is *mostly similar* when viewed as a composite of skill, effort, and responsibility under similar working conditions. Another variation appears in statutes that compare employees who perform "comparable work," which requires *substantially similar* skill, effort, and responsibility and is performed under similar working conditions.

Many of these state laws also expand the protected categories beyond gender, include pay transparency provisions that make it unlawful for employers to prohibit employees from discussing their wages, and tend to limit the lawful justifications (affirmative defenses) for paying men and women differently.

B. Notable Provisions Of More Robust State Pay Equity Statutes

1. California

The California Fair Pay Act (FPA)[37] went into effect January 1, 2016, with subsequent amendments effective January 1, 2017. The FPA prohibits paying employees of one sex, race, or ethnicity at a lower rate than employees of a different sex, race, or ethnicity, when both perform "substantially similar" work.[38] Race and ethnicity are not defined. Unlike the federal EPA, the "comparator" employees (those with whom the aggrieved employees are compared) do not have to be at the same worksite or even in the same state.

a. Substantially Similar Work

A critical issue under the FPA is identifying employees who perform "substantially similar work," as that term is not limited to employees with the same job title. The statute does not specifically define the phrase "substantially similar," stating instead that it should be "viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions"[39] Hannah Beth Jackson, the legislator who drafted the FPA, provided this example: a housekeeper and the janitorial staff at a hotel would likely be performing "substantially similar" work, even though they are presumably cleaning different areas of the hotel and have different job titles.

The California Labor Commissioner's Office has provided some guidance on the meanings of "skill," "effort," "responsibility," and "working conditions." The Labor Commissioner's guidance has not been formally incorporated into the statute and is not binding on the courts; however, it provides the best parameters currently available.

According to the Labor Commissioner,

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[37] Cal. Lab. Code **§** 1197.5
[38] The 2017 amendments added race and ethnicity as protected categories.
[39] Cal. Lab. Code **§** 1197.5(a)

- *Skill* refers to the experience, ability, education, and training required to perform the job;
- *Effort* refers to the amount of physical or mental exertion needed to perform a job;
- *Responsibility* refers to the degree of accountability or duties required in performing the job.
- *Working conditions* means the physical surroundings (temperature, fumes, ventilation) and hazards.[40]

In determining whether employees perform "substantially similar work," employers must look beyond job title. A pay differential justified merely on technicalities of position name will not suffice under the FPA.

b. Justifications For Wage Differentials Under The FPA

If an employer pays employees of a different sex, race, or ethnicity performing substantially similar work different compensation, then the employer has violated the FPA, unless it can show that there is a legitimate reason for the wage differential. The FPA identifies four acceptable bases for wage differentials:

(A) a seniority system;

(B) a merit system;

(C) a system that measures earnings by quantity or quality of production; or

(D) a bona fide factor other than sex, race, or ethnicity.[41]

An employer has additional burdens if relying on a bona fide factor other than sex, race, or ethnicity. It must be legitimate and job-related, and can include such considerations as educational background, training, ability, prior job performance, or experience and cannot be

[40] California Labor Commissioner's Office, California Equal Pay Act, *What Does Substantially Similar Work Mean?*, https://www.dir.ca.gov/dlse/California_Equal_Pay_Act.htm.
[41] Cal. Lab. Code 1197.5(a)(1)(A)-(D); Cal. Lab. Code 1197.5(b)(1)(A)-(D)

based on or derived from a sex, race, or ethnicity-based differential in compensation.[42] The factor must account for the entire wage differential, be job related, and consistent with a business necessity.[43] For this purpose, "business necessity" means an overriding legitimate business purpose such that the factor relied upon effectively fulfills the business purpose it is supposed to serve.[44] The employee's prior salary may not justify any disparity in compensation.[45]

Even if the employer establishes a bona fide factor, the employee can still prevail by demonstrating that an alternative business practice exists that would serve the same business purpose without producing the wage differential.[46]

c. Salary History Inquiries In California

California Labor Code section 432.4 prohibits employers from asking about past salary information from applicants or from relying on salary history as a factor in determining whether or at what salary to offer employment to an applicant.[47] Salary history information includes both compensation and benefits.[48] The ban is comprehensive, prohibiting employers from seeking this information "orally or in writing, personally or through an agent."[49] Thus, a third-party recruiter cannot seek salary history information from an applicant on the employer's behalf.

However, an employer can accept and rely on salary history information when an applicant voluntarily discloses the information unprompted.[50] Where salary history information has been voluntarily disclosed, nothing in the statute prohibits an employer from relying on and

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[42] Cal. Lab. Code 1197.5(a)(1)(D); Cal. Lab. Code 1197.5(b)(1)(D)
[43] Cal. Lab. Code 1197.5(a)(1)(D); Cal. Lab. Code 1197.5(b)(1)(D)
[44] *Id.*
[45] Cal. Lab. Code § 1197.5(a)(4)
[46] *Id.*
[47] Cal. Lab. Code § 432.3(a), (b).
[48] *Id.*
[49] *Id.*
[50] Cal. Lab. Code § 432.3(h).

considering that information in determining the salary for that applicant. Nevertheless, employers should be cautious in relying on prior salary in any compensation decisions for an applicant because prior salary history alone cannot justify disparities in compensation.[51] Thus, an employer may be vulnerable to equal pay claims if prior salary is the only factor justifying a differential in compensation. Finally, the statute clarifies that employers may make a compensation decision based on a current employee's existing salary when making raise decisions, so long as any resulting wage differential is justified by a bona fide factor other than sex, race or ethnicity.[52]

Employers can ask applicants their "desired salary" for a position. Section 432.2 does not restrict "an employer from asking an applicant about his or her salary expectation for the position being applied for."[53] Employers can use this inquiry to determine whether the parties' needs and expectations align. But any disparity in compensation ultimately offered to an applicant will still likely need to be justified by a bone fide factor other than sex, race or ethnicity.

d. Applicants May Request a Pay Scale

California allows for applicants to ask employers for compensation ranges for the position. California Labor Code section 432.3 requires an employer, upon reasonable request, to provide the pay scale for a position to an applicant applying for employment.[54] "Applicant" does not include current employees.[55]

"Pay scale" under Section 432.3 is defined as "a salary or hourly wage range."[56] Under the initial version of the law, pay scale requests could be made by anyone who submitted a resume or application. The 2019 amendment limits a "reasonable request" to one made after an applicant

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[51] Cal. Lab. Code § 1197.5(a)(4).
[52] Cal. Lab. Code § 1197.5(a)(4)
[53] Cal. Lab. Code § 432.3(i)
[54] Cal. Lab. Code § 432.3(c).
[55] Cal. Lab. Code § 432.3(k).
[56] Cal. Lab. Code § 432.3(c).

completes an initial interview with the employer.[57] Employers should be aware that a phone conversation or other abbreviated inquiry made to the applicant could constitute an "initial interview" under the law, and entitle the applicant to request pay scale information.

2. *Illinois*

The Illinois Equal Pay Act,[58] originally enacted in 2003, prohibits gender- and race-based wage discrimination. Prior to 2019, the Act only addressed gender-based wage discrimination. The Act was amended effective January 1, 2019, to expand its protections to African-American employees.[59] The Act places more stringent restrictions on employers than the federal Equal Pay Act, imposes civil penalties against violating employers, mandates posting and record-keeping requirements, and provides employees with various avenues to seek damages.

a. The Illinois Equal Pay Act's Protections

The Illinois Equal Pay Act applies to all employers in Illinois, private and public.[60] The Act prohibits employers from paying wages to employees at less than the rate at which the employer pays wages to another employee of the opposite sex "for the same or substantially similar work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."[61] The Act also prohibits employers from paying African-American employees less than those employees who are not African-American within the same parameters.[62] Even if employees carry different job titles, an employee may possess a valid claim if the actual work performed by the comparator employee is the same.[63]

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[57] *Id.*
[58] 820 ILCS § 112/1 *et seq.*
[59] *See* P.A. 100-1140, § 5, *amending* 820 ILCS § 112/10.
[60] 820 ILCS § 112/5.
[61] 820 ILCS § 112/10(a).
[62] *Id.*
[63] Illinois Department of Labor, *Equal Pay Act FAQ*, available at https://www2.illinois.gov/idol/FAQs/Pages/equal-pay-faq.aspx.

Furthermore, and unlike the federal Equal Pay Act. which mandates equal pay within an establishment or "distinct physical place of business," the Illinois Equal Pay Act is not limited to individuals who work at the same physical location as the comparator outside her protected class.[64] Rather, the Act broadens its scope to employees within the same county.[65] In other words, an employer may not pay unequal wages to employees of the opposite sex (or of different races) who perform substantially similar work in different facilities within the same county. The Act also prohibits employers from reducing the wages of any employee in an effort to comply with the Act.[66]

b. Permissible Exceptions

The Illinois Equal Pay Act permits compensation differentials (1) under a seniority system, (2) under a merit system, (3) under a system that measures earnings by quantity or quality of production, or (4) on any other factor other than sex or race or a factor that would constitute unlawful discrimination under the Illinois Human Rights Act.[67] The Act is silent as to whether collective bargaining agreements are also an exception to its equal pay requirements, so employers should assume wage structure provisions in collective bargaining agreements must be compliant with the Act.

c. Anti-Retaliation Provisions

The Illinois Equal Pay Act also contains several anti-retaliation provisions. The Act prohibits employers from interfering with, restraining, or denying the exercise of, or attempt to exercise any right under the Act.[68] Nor may an employer discharge or discriminate against any

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[64] *Id.*
[65] 820 ILCS § 112/10(a).
[66] *Id.*
[67] *Id.*
[68] 820 ILCS § 112/10(b).

individual for inquiring about, disclosing, comparing, or otherwise discussing the employee's wages or the wages of any other employee, or aiding or encouraging any person to exercise his or her rights under the Act.[69] Finally, it is unlawful for an employer to take adverse action against an employee because the employee has (1) filed a charge of discrimination or any other proceeding under the Act; (2) has given any information, or will give information, in connection with any inquiry or proceeding relating to any right under the Act; or (3) has testified, or will testify, in any inquiry or proceeding relating to any right provided under the Act.[70]

d. Available Forum For Aggrieved Employees And Statute Of Limitations

Employees may file a complaint before the Illinois Department of Labor against their employers for violation of the Act. Department of Labor complaints must be brought within one year from the date of the alleged violation.[71]

The Department of Labor may also initiate its own investigation on behalf of the complaining employee and similarly situated individuals.[72] In such instances, the Department has the authority to gather data regarding wages, hours, and other conditions of employment, enter and inspect the employee's place of business during regular business hours, interview employees, and take any action necessary or appropriate to determine whether a violation of the Act has occurred.[73] If the employer refuses to cooperate, the Act also provides the Department with authority to subpoena witnesses for deposition or subpoena the production of records relative to the investigation.[74]

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[69] *Id.*
[70] 820 ILCS § 112/10(c).
[71] 820 ILCS § 112/15(b).
[72] 56 Ill. Adm. Code 320.200.
[73] 820 ILCS § 112/15(c).
[74] 820 ILCS § 112/25.

The Department of Labor may also refer a complaint to the Illinois Department of Human Rights (IDHR) for investigation if the subject matter of the complaint includes a violation of the Illinois Human Rights Act.[75] If the complaint is referred to the IDHR, the latter, rather than the Department of Labor, will be the primary agency responsible for investigating the complaint.[76] The Department of Labor will subsequently review the IDHR's investigation and findings to determine whether a violation of the Act occurred or whether further investigation by the Department of Labor is necessary.[77]

If further investigation is necessary, the Department of Labor will take any necessary or appropriate action required to enforce the provisions of the Act.[78] The Act does not prescribe the specific actions the Department of Labor may take; however, the scope of action likely includes the full capacity of investigative power afforded to the Department of Labor in § 112/15 and § 112/25 of the Act (discussed above), including but not limited to the power to conduct inspections, interview employees, subpoena witnesses, and subpoena documents.

In lieu of filing a complaint with the Department of Labor, the Act also permits employees to file a civil action before Illinois state courts.[79] All civil suits must be filed within five years of the alleged violation.[80] Should an employee prevail in a civil suit and the employer does not comply with the court's order to pay the judgment to the employee, the employee may request the Department of Labor, or the Department may file on its own, a motion to bring "any legal action

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[75] 820 ILCS § 112/15(d).
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] 820 ILCS § 112/30(a).
[80] *Id.*

necessary" on behalf of the employee to collect the amount claimed.[81] If the Department of Labor asserts such claim, the employer must pay the costs incurred in collecting the claim.[82]

e. *Available Damages And Penalties*

If an employer is found liable under the Act, the employee may recover the entire amount of the underpayment with interest, costs, and attorneys' fees.[83] In addition, employers violating the Act are subject to a civil penalty. Employers with fewer than four employees may be fined up to $500 for the first offense, $2,500 for the second offense, and $5,000 for a third and any subsequent offense.[84] Employers with more than four employees may be fined up to $2,500 for the first offense, $3,000 for a second offense, and $5,000 for a third and any subsequent offense.[85] The Department of Labor will assess the amount of the penalty based on the size of the business and the severity of the violation.[86]

f. Recordkeeping Requirements

All employers are required to preserve records that document the name, address, and occupation of each employee, the wages paid to each employee, and any other information that may be deemed "necessary and appropriate for enforcement of [the] Act."[87] In addition, the employer must preserve any records made in the regular course of business that relate to: (1) personnel records; (2) employee qualifications for hire; (3) promotion, transfer, discharge, or other disciplinary action; (4) wage rates; (4) skills testing certifications; (5) job evaluations; (6) job descriptions; (7) merit systems; (8) seniority systems; (9) written job offers; (10) individual

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81 *Id.*
82 *Id.*
83 *Id.*
84 820 ILCS § 112/30(c)(1).
85 820 ILCS § 112/30(c)(2).
86 820 ILCS § 112/30(d).
87 820 ILCS § 112/20.

employment contracts; (11) collective bargaining agreements; and (12) description of practices or other matters that explain the basis for any wage differential between employees of different sexes or race and that may be pertinent to a determination whether the differential is based on a factor other than sex or race.[88]

Required records must be preserved for at least five years, though if they relate to an ongoing investigation or enforcement action under the Act they must be maintained until their destruction is authorized by the Department of Labor or court order.[89] The Act does not state whether the records must be kept electronically or in hard copies. Thus, electronic file-keeping is likely permissible.

g. Notification Requirements

Employers must post in a conspicuous place on their premises a notice that summarizes the requirements of the Act and provides information for filing a charge.[90] The Department of Labor has issued a poster for employers that complies with the Act.[91]

h. Future Amendments

The issue of screening of job applicants based on wage or salary history has been a subject of discussion in Illinois for several years. On January 15, 2019, new Illinois Governor J.B. Pritzker's signed an executive order prohibiting state agencies from asking job candidates about their salary histories.[92] This is likely to be followed by legislation of broader applicability.

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[88] 56 Ill. Adm. Code 320.140.
[89] *Id.*
[90] 820 ILCS § 112/40.
[91] Illinois Department of Labor, *Required Posters*, available at https://www2.illinois.gov/idol/employers/pages/posters.aspx.
[92] Alexia Elejalde-Ruiz, *State agencies can no longer ask job candidates for salary history, and employers across Illinois are probably next*, Chicago Tribune, January 16, 2019, available at https://www.chicagotribune.com/business/ct-biz-pritzker-illinois-no-salary-history-20190116-story.html.

Illinois State Representative Anna Moeller has already indicated that in 2019, she plans to reintroduce a bill that would amend the Illinois Equal Pay Act to prohibit all employers (not just state agencies) from: (1) screening job applicants based on their wage or salary history; (2) requiring that an applicant's prior wages satisfy minimum or maximum criteria; and (3) requesting or requiring an applicant to disclose the applicant's prior wages or salary as a condition of employment.[93] Such prohibitions would essentially preclude any inquiry into an applicant's past wages during the application process. Given the State's emphasis on pay equity issues, Illinois employers should expect to be subject to these requirements in 2019 and beyond.

3. Maryland

Maryland's Equal Pay for Equal Work Act took effect on October 1, 2016, and amended the state's existing Equal Pay law.[94] The Act extended the state's prohibition against pay discrimination and "providing less favorable employment opportunities" for employees who work "in the same establishment and perform work of comparable character or work on the same operation, in the same business, or of the same type" beyond the basis of sex, to include gender identity.[95] The Act also broadened the definition of wage beyond base compensation – the law covers "all compensation for employment," which includes "board, lodging, or other advantage provided to an employee for the convenience of the employer."[96]

The Act's definition of "same establishment" is an expansion of its existing protections, as it expands the pool of employees against which employees can compare themselves. Under the

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[93] *Id.*; Illinois General Assembly, *Bill Status for HB4163*, available at http://www.ilga.gov/legislation/BillStatus.asp?DocNum=4163&GAID=14&DocTypeID=HB&SessionID=91&GA=100.
[94] Md. Code, Lab, & Empl. §3-301, et seq.
[95] *Id.* at § 3-304(b)(1).
[96] *Id.* at § 3-301(d).

Act, employees are considered to be working at the "same establishment" if they work for the same employer at workplaces located in the same county.[97]

a. Permissible Reasons For Wage Disparities

The Act lists seven non-discriminatory reasons that may be a basis for a difference in wages:

1. a seniority system that does not discriminate on the basis of sex or gender identity;
2. a merit increase system that does not discriminate on the basis of sex or gender identity;
3. jobs that require different abilities or skills;
4. jobs that require the regular performance of different duties or services;
5. work performed on different shifts or at different times of day;
6. a system that measures performance based on a quality or quantity of production; or
7. a bona fide factor other than sex or gender identity, such as education, training, or experience.[98]

These seven exceptions "[do] not preclude an employee from demonstrating that an employer's reliance on an exception […] is a pretext for discrimination on the basis of sex or gender identity."[99]

b. Wage Transparency

The Act promotes pay transparency by prohibiting employers from restricting employee discussion about their own wages or those of other employees. Employers may, however, set forth written policies in their employee handbooks that establish reasonable limitations on the time, place, and manner of such discussions. Such reasonable limitations must be drafted in a way

[97] *Id.* at § 3-304(b)(2).
[98] *Id.* at § 3-304(c).
[99] *Id.* at § 3-304(d).

that does not "diminish employees' rights to negotiate the terms and conditions of employment under federal, State, or local law."[100]

c. Recovery And Statute Of Limitations

The Act gives employees a private cause of action and allows them to bring suit on behalf of themselves or similarly situated employees.[101] Employees must file an action under the Act within three years after receiving their final paychecks from their employers.[102] To prevail on a claim of disparate pay, an employee must prove that her employer "knew or reasonably should have known" that the wages paid to the employee differed from the wages paid other employees due to sex or gender identity and that there was no legitimate, non-discriminatory reason for the disparity.[103] If an employee prevails, she may obtain injunctive relief and damages in the amount of the difference in wages, plus liquidated damages in the same amount.[104]

To prevail on a claim of violations of the pay transparency provisions of the Act, an employee must prove that her employer "knew or reasonably should have known" that its conduct violated those provisions.[105] If an employee prevails, she may obtain injunctive relief, actual damages, and liquidated damages in the same amount as the actual damages.[106] Moreover, the Act allows prevailing parties to recover reasonable attorneys' fees and costs, and prejudgment interest.[107]

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[100] *Id.* at § 3-304.1(e)(2).
[101] *Id.* at § 3-307(a)(3).
[102] *Id.* at § 3-307(c).
[103] *Id.* at § 3-307(a)(1).
[104] *Id.*
[105] *Id.* at § 3-307(a)(2).
[106] *Id.*
[107] *Id.* at § 3-307(e).

4. Massachusetts

The Massachusetts Equal Pay Act (MEPA)[108] went into effect on July 1, 2018. The purpose of MEPA is to ensure greater fairness and equity in the workplace, and to clarify what constitutes unlawful wage discrimination. On March 1, 2018, the Office of the Massachusetts Attorney General, which is charged with enforcing MEPA, issued guidance on the new law.[109]

Under MEPA, employers in Massachusetts, irrespective of their size, are prohibited from paying different wages to employees of different genders performing "comparable work,"[110] with very limited exceptions. As with the EPA, the employer's intent is irrelevant.[111] MEPA also prohibits employers from reducing the rate of compensation of any employee in order to comply with this requirement.[112]

a. Permissible Reasons For Wage Disparities

Consistent with the EPA and other states' equal pay laws, there are legal justifications for paying men and women who perform comparable work differently. However, those justifications are much narrower under MEPA than under the EPA and most state laws. They are expressly limited to the following: (i) a system that rewards seniority with the employer (provided, however, that time spent on leave due to a pregnancy-related condition and protected parental, family, or medical leave cannot reduce seniority); (ii) a merit system; (iii) a system which measures earnings by quality and quantity of production, sales, or revenue; (iv) the geographic location in

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[108] M.G.L. c. 149 § 105A.
[109] https://www.mass.gov/files/documents/2018/03/01/AGO%20Equal%20Pay%20Act%20Guidance.pdf ("MEPA Guidance").
[110] "'Wages' are broadly defined to include all forms of remuneration for work performed, including commissions, bonuses, profit sharing, deferred compensation, paid personal time off, vacation and holiday pay, expense accounts, care and gas allowances, retirement plans, insurance and other benefits, whether paid directly to the employee or to a third-party on the employee's behalf." MEPA Guidance at p. 8; *see also* M.G.L. c. 149, § 105A(a).
[111] M.G.L. c. 149, § 105A; MEPA Guidance at p. 12.
[112] M.G.L. c. 149, § 105A(b).

which a job is performed; (v) education, training, or experience to the extent such factors are reasonably related to the particular job in question; or (vi) travel, if the travel is a regular and necessary condition of the particular job.[113]

Noticeably absent from this list is the catch-all "any-reason-other-than-gender" defense that exists under the EPA[114] or similar defense under other state equal pay laws. As a result, the lawful justifications for differences in pay are much more limited in Massachusetts than in most of the rest of the country. This could have a particularly big impact on employers with unionized workforces. Under the EPA, the fact that one employee's pay is governed by a collective bargaining agreement and another's is not has been found to be a lawful justification for paying men and women performing substantially equal work as a "factor other than sex."[115]

Without that or any similar justification under MEPA, employers with unionized workforces in Massachusetts face a host of special challenges in complying with the new law, including the fact that if potentially unlawful disparities exist, they cannot unilaterally change the compensation of union members to try to come into compliance. It is anticipated that this aspect of MEPA may face a number of legal challenges, including federal preemption.

b. Available Damages For Violations And Statute Of Limitations

A successful MEPA plaintiff is entitled to: (1) the amount of the affected employee's unpaid wages; (2) an equal amount of unpaid wages – i.e., double damages; and (3) reasonable attorneys' fees and other costs.[116] The employee need not prove intent to receive double damages.

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[113] M.G.L. c. 149, § 105A(b); MEPA Guidance, at p. 9.
[114] 29 U.S. Code § 206(d).
[115] *See, e.g., Perkins v. Rock-Tenn Servs., Inc.*, 700 F. App'x 452, 457 (6th Cir. 2017) (holding that "a wage differential resulting from status as a union member constitutes an acceptable 'factor other than sex' for purposes of the Equal Pay Act"); *Goodrich v. Int'l Broth. Of Elec. Workers AFL-CIO*, C.A. No. 81-3214, 1985 WL 5992, at *8 (D.D.C. Dec. 30, 1985), aff'd, 815 F.2d 1519 (D.C. Cir. 1987) (holding that membership in a union constitutes a "factor other than sex' within the meaning of the Equal Pay Act).
[116] M.G.L. c. 149, § 105A(b); MEPA Guidance, at p. 15.

MEPA lawsuits must be filed within three years of the date of the alleged violation.[117] A violation occurs "(i) when a discriminatory compensation decision is or other practice is adopted; (ii) when an employee becomes subject to a discriminatory compensation decision or other practice; or (iii) when an employee is affected by the application of a discriminatory compensation decision or practice, *including each time wages are paid, resulting in whole or in part from such a decision or practice*."[118]

c. Affirmative Defense

One key difference between MEPA and most other state equal pay laws, as well as the federal Equal Pay Act, is that MEPA provides a defense to wage discrimination claims for any employer that has conducted a "good faith, reasonable self-evaluation" of its pay practices within the previous three years and before an action is filed against it.[119] In order to take advantage of this affirmative defense, an employer must take "meaningful steps" towards eliminating any unlawful gender-based wage differentials identified by the self-evaluation.[120] Although employers are not required to conduct self-evaluations and will not be penalized for choosing not to, conducting a self-evaluation can significantly reduce an employer's potential liability.

d. Miscellaneous Provisions

In addition to prohibiting unlawful gender-based wage differentials, MEPA also bars employers from seeking the wage history of a prospective employee.[121] Employers may, however, ask prospective employees about their salary expectations, so long as such questions are not framed in a way that is intended to elicit information about salary or wage history.[122]

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[117] M.G.L. c. 149, § 105A(b); MEPA Guidance, at p. 17.
[118] M.G.L. c. 149, § 105A(b) (emphasis added).
[119] M.G.L. c. 149, § 105A(d); MEPA Guidance, at pp. 17-19
[120] *Id.*
[121] M.G.L. c. 149, § 105A(c)(1); M.G.L. c. 149, § 105A(c)(2).
[122] MEPA Guidance, at p. 13.

Employers may not prohibit employees from discussing their pay or that of their co-workers, except that an employer may prohibit an employee whose job responsibilities require or allow access to other employees' compensation information from disclosing such information.[123] MEPA also prohibits employers from retaliating against employees who exercise their rights under the law.[124]

e. *Pending Cases*

The issue under MEPA which has garnered the most attention is the meaning of the phrase "comparable work." MEPA defines "comparable work" as work that requires substantially similar skill, effort, and responsibility, and is performed under similar working conditions.[125] The question of "comparable work" is central in two recent MEPA lawsuits.[126]

The first was filed against the Boston Symphony Orchestra (BSO).[127] A top female flutist for the BSO accuses the organization of paying her substantially less than her closest male counterpart in the orchestra, an oboist, even though they both lead woodwind sections as endowed chairs.[128] The BSO's position, however, is that the flutist and oboist are not performing comparable work because the oboe is more difficult to play.[129] The central issue in the second lawsuit is whether executive directors of different departments in a public school system are

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[123] M.G.L. c. 149, § 105A(c)(3)
[124] *Id.*; MEPA Guidance, at p. 15.
[125] M.G.L. c. 149, § 105A(a); MEPA Guidance, at pp. 5-8.
[126] *Elizabeth Rowe v. Boston Symphony Orchestra, Inc.*, C.A. No. 18-02040D (Suffolk Superior Court, July 2018); *Kim Tasi, Priya Tahiliani, and all others similarly situated v. Boston Public Schools*, C.A. No. 18-3652E (Suffolk Superior Court, November 2018).
[127] *Elizabeth Rowe v. Boston Symphony Orchestra, Inc.*, C.A. No. 18-02040D (Suffolk Superior Court, July 2018).
[128] *Id.*
[129] *Id.*

performing comparable work.[130] Both of suits are being closely watched by employers, attorneys, and the media.

As more MEPA cases are filed, it is a good time for employers to examine their pay practices and consider conducting a privileged self-evaluation for purposes of taking advantage of MEPA's affirmative defense.

5. Nevada

Nevada tends to have a lower wage gap than the national average, which may be due to Nevada's two existing pay equity Statutes: Nev. Rev. Stat. (NRS) § 608.017 and NRS § 613.330. Recent Nevada Legislation has made additional inroads in the area of pay equity, and Nevada employers should keep close watch on 2019 legislation for further developments.

a. Existing Statutes Addressing Pay Equity And Discrimination

Originally enacted in the early 1970's, NRS § 608.017 prohibits wage discrimination on basis of sex by making it "unlawful for any employer to discriminate between employees, employed within the same establishment, on the basis of sex by paying lower wages to one employee than the wages paid to an employee of the opposite sex who performs equal work which requires equal skill, effort and responsibility and which is performed under similar working conditions."[131]

It is interesting to note that, unlike other states' laws which require employers to consider all employees in a job classification throughout all the company's facilities, Nevada's statute is limited to employees "employed within the same establishment."[132] This quirk in the law may

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[130] *Kim Tasi, Priya Tahiliani, and all others similarly situated v. Boston Public Schools*, C.A. No. 18-3652E (Suffolk Superior Court, November 2018).
[131] NRS § 608.017(1).
[132] *Id.*

result from more than just the acknowledgement of regional wage differences between facilities in opposite corners of the state (e.g., compare a facility in Las Vegas to a facility in Reno). This may also be reflective of the influence of the hospitality industry and the acknowledged need to differentiate between employees at luxury properties versus employees in the same positions at moderate or budget-friendly properties.

Additionally, Nevada has taken the progressive approach in NRS § 613.330 and extended the prohibition on wage and compensation discrimination to all protected categories, including race, color, religion, sex, sexual orientation, gender identity or expression, age, disability or national origin.[133]

The most recent addition to this statute also extends protection to an employee who "has inquired about, discussed or voluntarily disclosed his or her wages or the wages of another employee." [134]

b. Interesting Notes On Nevada's Pay Equity Statutes

An interesting quirk in Nevada is NRS § 613.350,[135] which has been held to allow employers to maintain a different dress code and appearance standard for male and female employees, so long as the requirements impose essentially equal burdens on both employees.[136] Employers should tread carefully in this area, lest they impose higher appearance and clothing

[133] NRS § 613.330(a) ("it is an unlawful employment practice for an employer . . . to discriminate against any person with respect to the person's compensation, terms, conditions or privileges of employment, because of his or her race, color, religion, sex, sexual orientation, gender identity or expression, age, disability or national origin").
[134] NRS § 613.330(1)(c).
[135] NRS §613.350(6) ("It is not an unlawful employment practice for an employer to require employees to adhere to reasonable workplace appearance, grooming and dress standards so long as such requirements are not precluded by law, except that an employer shall allow an employee to appear, groom and dress consistent with the employee's gender identity or expression.").
[136] *See Jespersen v. Harrah's Operating Co.*, 280 F.Supp.2d 1189 (D. Nev. 2002) (*applying Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775 (1989)), *aff'd*, 444 F.3d 1104 (9th Cir. 2006).

costs on female employees that are more than a *de minimis* burden and so constitute a *de facto* wage disparity.[137]

For example if a female employee is required to buy a specific, costly type of pantyhose and wear a dress that must be dry cleaned, while a male employee is free to wear generic slacks that can be cleaned in a standard washing machine, the female employee is effectively paid less for the same job even though the hourly wage rate of the two employees is identical. [138]

c. Permissible Reasons For Wage Disparities

Nevada's statute tracks the language of the Federal EPA in its list of legally permissible reasons ("affirmative defenses") for disparate rates of compensation between the sexes. These include: (a) a seniority system; (b) a merit system; (c) a compensation system under which wages are determined by the quality or quantity of production; or (d) a wage differential based on factors other than sex.[139]

Nevada's antidiscrimination statute in NRS Chapter 613 provides similar affirmative defenses, permitting an employer "to apply different standards of compensation, or different terms, conditions or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations," provided the differences in pay are not the result of intentional discrimination.[140] It also creates an express exception for employers who "give and [ ] act upon

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[137] *Id.*

[138] *See also* § 608.165, providing that "[a]ll uniforms or accessories distinctive as to style, color or material shall be furnished, without cost, to employees by their employer. If a uniform or accessory requires a special cleaning process, and cannot be easily laundered by an employee, such employee's employer shall clean such uniform or accessory without cost to such employee."

[139] NRS § 608.017(2).

[140] NRS § 613.380 ("a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, if those differences are not the result of an intention to discriminate because of race, color, religion, sex, sexual orientation, gender identity or expression, age, disability or national origin").

the results of any professionally developed ability test, if the test, its administration or action upon the results is not designed, intended or used to discriminate" on the basis of a protected category.[141]

One potential problem area is the "age" category, since there is often a significant correlation between age and seniority. Another area of challenge can be the pre-employment test—whether the test is properly developed and not a subterfuge for discrimination.

Nevada law further mirrors the federal EPA by providing that an employer found to have violated the provisions of NRS § 608.017 "shall not reduce the wages of any employees in order to comply with such provisions."[142] This makes proactive self-audits and appropriate corrective actions important for employers.

Nevada also has a fairly standard provision stating that employers are ***not*** required to show preferential treatment or affirmative action in hiring merely because there is an imbalance between the existing number or percentage of the workforce who fall within a given protected category compared to the total number or percentage of persons in that protected category in the community.[143] This is a notable difference from the requirements of Nevada's neighbor to the east, California.[144]

d. Recent Legislative Developments

The 2017 Nevada legislative session saw the passage of two laws aimed at addressing issues on the periphery of pay equity. Senate Bill 343, codified as NRS §§ 75A.400 to 75A.430, creates an annual survey on gender equality in the workplace. Assembly Bill 276, codified in NRS

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[141] *Id.*
[142] NRS § 608.017(3). *Compare* 29 U.S.C. § 206(d)(1).
[143] NRS § 613.400. For example, if the population in the community is 42% Latino and only 3% of the workforce is Latino, an employer is *not required* to show preferential treatment towards Latinos in hiring employees.
[144] See Insert on California Pay Equity.

§ 613.330(1)(c), protects disclosure and discussion of wage information, by prohibiting discrimination against an employee who "has inquired about, discussed or voluntarily disclosed his or her wages or the wages of another employee."[145]

The only exception is a person who has access to wage information as part of his or her essential job functions and discloses the information to a person without access, except as ordered by the Labor Commissioner or a court of competent jurisdiction.[146] For example, employers can prohibit human resources or payroll representatives from sharing wage information with other employees, unless the disclosure is otherwise required by law.[147]

Nevada employers are likely to see a marked increase in litigation over violations of these new statutes, and should focus on revising outdated handbooks and policies that might violate them.

e. *Future Developments*

The 2017 legislative session also saw the veto of Senate Bill 397, which would have amended Nevada's pay equity laws to give additional power to the Nevada Equal Rights Commission (NERC), including the ability to impose civil penalties of $25,000 on top of compensatory damages and attorney's fees. In his veto statement, former Republican Governor Brian Sandoval listed "concern over the Commission's expanded disciplinary powers, enhanced penalties, and the uncertainty of an increase in the filing of frivolous complaints" as among the reasons for his veto.[148]

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[145] NRS § 613.330(1)(c).
[146] NRS § 613.330(7),
[147] *Id.*
[148] Veto Message regarding S.B. 397, available online at: https://www.leg.state.nv.us/Session/79th2017/Reports/VetoMessages/SB397_79th_VetoMessage.pdf.

However, with the change in legislative control and the election of Democrat Steve Sisolak as Governor, employers in Nevada might see the reintroduction Senate Bill 397 (or the introduction of a similar bill) in the 2019 Nevada Legislative Session.[149] Nevada employers should watch the progress of this bill and keep a close eye on further developments.

6. New Jersey

The Diane B. Allen Equal Pay Act, an amendment to the New Jersey Law Against Discrimination (LAD),[150] went into effect on July 1, 2018. Prior to the enactment of the Act, New Jersey's wage and hour law prohibited employers from "discriminat[ing] in any way in the rate or method of payment of wages to any employee because of his or her sex."[151] The Allen Act expands this protection to prohibit discrimination in wages on the basis of any class protected under state law.

The Allen Act makes it an unlawful employment practice "[f]or an employer to pay any of its employees who is a member of a protected class at a rate of compensation, including benefits, which is less than the rate paid by the employer to employees who are not members of the protected class for substantially similar work, when viewed as a composite of skill, effort and responsibility."[152] It also prohibits employers from reducing the rate of compensation of any employee in order to comply with this requirement.[153]

a. Permissible Reasons For Wage Disparities

Similar to the federal EPA and other states' equal pay laws, there are a handful of legally permissible reasons for differential rates of compensation, including seniority and merit

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[149] Nevada's Legislature only meets every other year.
[150] N.J.S.A. 10:5-1 *et seq.* The Act was named after a recently retired state legislator who championed pay equity and women's rights during her 20-plus years of service.
[151] N.J.S.A. 34:11-56.2.
[152] N.J.S.A. 10:5-12(t).
[153] *Id.*

systems.[154] However, the New Jersey law restricts the "catch-all" affirmative defense that is contained in the EPA.

Specifically, for a differential to be permissible in New Jersey, it must be based on one or more legitimate, bona fide factors other than the characteristics of members of the protected class (such as training, education, experience, or the quantity or quality of production); the factor(s) must not be based on or perpetuate a differential in compensation based on sex or any other characteristic of a protected class; each factor must be applied reasonably; one or more such factors must account for the entire wage differential; and the factors must be job-related with respect to the position in question and based on a legitimate business necessity, where there is no alternative business practice that would serve the same business purpose without producing the wage differential.[155] For example, an employee may be paid more for performing substantially similar work due to that employee's years of experience, so long as the experience is related to the job and accounts for the entire wage gap.

Further, the comparison of wage rates is based on all of an employer's operations or facilities; it is not limited to employees who work within a specific geographic area or region or the same establishment.[156] This may mean that a New Jersey employee can identify employees who work in different states as comparators and the salaries and benefits of those out-of-state comparators can be considered in determining whether the employer has violated the Act with respect to the compensation of a New Jersey employee.

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[154] *Id.*
[155] *Id.*
[156] *Id.*

b. Other Protected Classes Also Protected

What makes New Jersey's law the most expansive in the country is that it goes beyond gender and applies to all protected classes recognized under the LAD. In New Jersey, the list of protected classes includes 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 or atypical hereditary cellular or blood trait of any individual, or liability for service in the armed forces.[157]

The law also prohibits employers from retaliating against employees who exercise their rights under the law and from requiring employees to sign a waiver or agree not to make requests or disclosures concerning employee compensation as a condition of employment.[158]

c. Available Damages For Violations

The Allen Act greatly enhances damages available to a prevailing employee in an LAD lawsuit. Typically, an employee would be awarded compensatory damages, attorneys' fees, and costs if they succeed on a claim of discrimination against their employer under the LAD. They may also recover punitive damages if the court finds that the conduct was willful.[159]

However, if a jury determines that an employer discriminated on the basis of pay, the employee will be awarded *treble damages* – three times the amount of the pay differential.[160] Employees who succeed on a claim that their employer took reprisals against them or were required to sign a waiver or agree not to make these types of requests or disclosures would also be entitled to treble damages.[161]

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[157] *Id.; see* N.J.S.A. 10:5-12(a).
[158] N.J.S.A. 10:5-12(r).
[159] N.J.S.A. 10:5-13.
[160] *Id.*
[161] *Id.*

d. Statute Of Limitations And Multiple Violations

The statute of limitations on these claims is six years.[162] However, a federal judge in New Jersey recently determined that the statute does not apply retroactively to claims that arose before the effective date of the Allen Act.[163]

The law further provides that an unlawful employment practice occurs *each time* the employee is affected by the discrimination in compensation. Thus, each occasion that wages, benefits, or other compensation are paid is a separate act of discrimination under the new law.[164] This means that each and every pay check where an employee is paid less than someone who performs substantially similar work constitutes a separate cause of action.

Further, the law provides that its provisions do not prohibit the application of the continuing violation doctrine or the discovery rule.[165] Either of these could extend the statute of limitations beyond six years, although such a theory would certainly be tested in the courts.

e. Public Contractors

In addition to amending the LAD, the Allen Pay Act also amends the New Jersey labor law to impose requirements on employers who enter a contract with a public body. The Act requires employers who enter into public contracts to provide a report to the Commissioner of Labor and Workforce Development containing information regarding the compensation and hours worked by employees organized by gender, race, ethnicity, and job category.[166]

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[162] N.J.S.A. 10:5-12(a).
[163] *Perrotto v. Morgan Advanced Materials, PLC*, No. 2:18-13825 (D.N.J. Jan. 15, 2019). In *Perrotto*, the plaintiff alleged gender-based discrimination and retaliatory compensation practices under the Diane B. Allen Equal Pay Act during her employment, which ended on April 5, 2018. The court ruled that the Act is not retroactively applicable to conduct occurring prior to its July 1, 2018 effective date and therefore dismissed the plaintiff's claims under the Act with prejudice.
[164] N.J.S.A. 10:5-12(a).
[165] *Id.*
[166] N.J.S.A. 34:11-56.14(a).

Such employers must also provide the Commissioner with certified payroll records containing information regarding the gender, race, job title, occupational category, and rate of total compensation of every employee employed in New Jersey in connection with the contract.[167]

f. Miscellaneous Provisions

In addition to the restrictions of the Allen Act, public employers in New Jersey are prohibited from inquiring about an applicant's current or previous salary history, which is discussed more fully below.[168] There is proposed legislation in New Jersey that would prohibit private employers from screening job applicants based on wage or salary history, and it is anticipated that it will become New Jersey will have salary history ban in place for all employers in the near future.

Because the Allen Act has been in effect for less than a year, there are few court decisions addressing it. As more lawsuits are filed, there will likely be litigation over a number of unresolved questions, including whether damages under the LAD and EPA may be "stacked."

7. New York

The Achieve Pay Equity Act (APEA), an amendment to the New York Labor Law, went into effect January 19, 2016.[169] Prior to the APEA's effective date, New York's pay equity law mirrored the EPA. In fact, the two laws still prohibit, in nearly identical language, an employee to "be paid a wage at a rate less than the rate at which an employee of the opposite sex in the same establishment is paid for equal work on a job the performance of which requires equal skill, effort,

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[167] N.J.S.A. 34:11-56.14(b).
[168] Executive Order No. 1, *available at https://nj.gov/infobank/eo/056murphy/pdf/EO-1.pdf.*
[169] N.Y. Lab. Law § 194.

and responsibility, and which is performed under similar working conditions." [170] However, the APEA contains a number of significant provisions that make the New York law much more employee friendly than the EPA.[171]

a. Permissible Reasons For Wage Disparities

As with the EPA, there are a handful of lawful justifications for a wage differential, such as a seniority system, merit system, or a system which measures earnings by the quantity or quality of production.[172] The APEA, however, has a more limited catch-all affirmative defense than the EPA, which allows employers to justify a pay differential if they can prove the disparity was based on "any other factor other than sex." Under the APEA, employers must prove that the pay differential was based on "a *bona fide* factor other than sex such as education, training, or experience."[173]

Moreover, this *bona fide* factor cannot be based upon or derived from a sex-based differential in compensation, and must be job-related with respect to the position in question and consistent with business necessity.[174] The APEA allows for an employee to overcome the affirmative defense by demonstrating: (1) the employer's practice causes a disparate impact on the basis of sex, (2) an alternative practice exists that would serve the same purpose and not cause a differential, and (3) the employer has refused to adopt that alternative practice.[175] The

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[170] N.Y. Lab. Law § 194(1).
[171] Public employees are afforded more expansive equal pay protections than employees in the private sector in New York. Whereas private employers are only prohibited from paying employees a lower wage based on their sex, public employers are prohibited from paying employees a disparate wage based on their gender, race or ethnicity, their prior employer, or prior earnings. *See* 2017 New York Exec. Order No. 161.
[172] N.Y. Lab. Law § 194(1).
[173] N.Y. Lab. Law § 194(1)(d).
[174] *Id.*
[175] *Id.*

EPA does not allow an employee to overcome the affirmative defense with such rebuttal evidence.

b. The APEA Expands Pool Of Comparators

New York's APEA increases the pool of comparators to which plaintiffs can point to in order to demonstrate a disparity in pay. Under both federal law and the APEA, relevant comparators performing "equal work" must work in the same "establishment."[176] The relevant comparators for a plaintiff bringing a claim under the EPA are generally limited to other employees located in the same store or office as the plaintiff. However, under the APEA "establishment" has a broader meaning: Employees are deemed to work in the same "establishment" if they work for the same employer at workplaces in the "same geographical region, no larger than a county."[177] The APEA allows courts to consider the "population distribution, economic activity, and/or the presence of municipalities" in the two locations in determining the appropriate, relevant geographical region.[178]

c. Litigation And Potential Damages

The litigation stakes are much higher under the APEA than under the EPA.[179] Procedurally, the options available to APEA plaintiffs are broad, as claims can proceed as opt-out class actions (as opposed to opt-in collective actions under the EPA), and a six-year statute of limitations applies (as opposed to three years under the EPA).[180]

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[176] 29 U.S.C. § 206(d)(1); N.Y. Lab. Law § 194(3).
[177] N.Y. Lab. Law § 194(3).
[178] *Id.*
[179] The requirements for a plaintiff to set forth a *prima facie* case under the APEA tracks federal law. *See Chiaramonte v. The Animal Med.l Ctr.*, 2017 WL 390894, at *1 (2d Cir. 2017); *see also Mauze v. CBS Corp.*, 340 F. Supp. 3d 186 (E.D.N.Y. Oct. 19, 2018). To set forth a *prima facie* case under the EPA, a plaintiff must demonstrate that (1) the employer pays different wages to employees of the opposite sex; (2) the employees perform equal work on jobs requiring equal skill, effort, and responsibility; and (3) the jobs are performed under similar working conditions.
[180] N.Y. Lab. Law § 198(3); 29 U.S.C. § 255(a).

Further, in addition to an award of the salary differential, a successful plaintiff can recover *300% liquidated damages*—that is, an employee is entitled to the salary differential plus three times that amount as liquidated damages.[181] To illustrate, a pay disparity of only $5,000 per year could yield damages of $20,000 per year under the APEA ($5,000 pay disparity plus $15,000 in liquidated damages). A successful plaintiff can also recover attorneys' fees and costs, which can be quite high, particularly in the class action context.

d. Protection For Employees Discussing Wages With Other Employees

New York's APEA, like analogous statutes in many other states, makes it unlawful for employers to prohibit employees from discussing their wages or the wages of other employees.[182] In other words, not only does the APEA broaden the scope of pay equity claims beyond its federal counterpart, but it also empowers employees to openly discuss pay equity issues. Employers are permitted to impose reasonable limitations on the time, place, and manner of employees' wage discussions. If an employer wishes to implement such restrictions, they must be set forth in a written policy.[183]

Additionally, employers are permitted to prohibit employees who have access to wage information of other employees as part of their job functions, such as human resources or payroll personnel, from disclosing the wages of employees to individuals who would not otherwise have access to such information.[184]

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[181] N.Y. Lab. Law § 198(1-a) (stating that liquidated damages may be up to three hundred percent of the total amount of the wages found to be due for a willful violation of N.Y. Lab. Law § 194).
[182] N.Y. Lab. Law § 194(4)(a).
[183] New York Lab. Law § 194(4)(b).
[184] New York Lab. Law § 194(4)(d).

e. *Prohibitions On Inquiries About Salary History*

In addition to the requirements of the APEA, in certain localities in New York, employers are prohibited from asking applicants their past compensation history during the application or interview process, and/or from using salary history in determining what compensation to offer when extending a job offer. Specifically, employers in New York City,[185] Albany County,[186] and Westchester County[187] are prohibited from asking a job applicant about their compensation history or relying on salary history in setting compensation; a Suffolk County measure takes effect

[185] N.Y. Code § 8-107(25). The New York City salary history law took effect October 31, 2017 and applies to all employers regardless of size. Under the New York City law, it is unlawful for employers or employment agency to ask applicants about their salary history during the hiring process, or rely on the pay history of applicants in determining compensation. N.Y. Code § 8-107(25)(b). The ban not only extends to questions or statements put directly to job applicants, but also to any such inquiries made to their current or former employer or any search of publicly available records for the purpose of obtaining information about salary history. N.Y. Code § 8-107(25)(a). If an applicant voluntarily and without prompting discloses salary history, the employer can consider the information when determining salary and take steps to verify the applicant's representations. N.Y. Code § 8-107(25)(d). The salary history ban does not apply to applicants for internal transfer or promotion or public positions where compensation is determined by a collective bargaining agreement. N.Y. Code § 8-107(25)(e).

[186] Local Law No. P for 2016. Effective December 17, 2017, the Albany salary history law applies to employers with four or more employers, and to employment agencies. Specifically, the law prohibits employers from: screening job applicants based on their current or prior wages, benefits, or other compensation; requiring that an applicant's prior wages satisfy minimum or maximum criteria; requesting or requiring that an applicant disclose salary history as a condition of being interviewed or considered for an offer of employment; or seeking an applicant's salary history from his or her current or former employers. Local Law No. P for 2016, § (2)(i). The Albany law contains only one narrow exception. After an employer extends an offer of employment with compensation, the employer can then confirm the applicant's salary history if the applicant provides written authorization. Local Law No. P for 2016, § (2)(i)(3).

[187] Westchester Cty. Admin. Code § 700.03(a)(9). The Westchester Wage History Anti-Discrimination Law applies to employers with at least four employers, labor organizations, employment and licensing agencies, and employees and agents and took effect July 9, 2018. Under the Westchester law, employers are prohibited from asking job applicants their salary history or relying on the applicant's salary history in determining the salary to offer the applicant, unless it is voluntarily provided by a prospective employee to support a higher wage than that offered by the employer. Westchester Cty. Admin. Code § 700.03(a)(9)(i) Additionally, employers are not allowed to ask an applicant's current or former employer for the applicant's salary history, unless an employer is seeking to confirm wage information after an applicant has voluntarily disclosed it to support a higher wage than that offered by the employer. Westchester Cty. Admin. Code § 700.03(a)(9)(iii). In such circumstances, written authorization must be obtained from the applicant before seeking confirmation. *Id.*

June 30, 2019.[188] Statewide, public employers in New York are prohibited from asking applicants about their salary history.[189]

8. Oregon

Most of the Oregon Equal Pay Act of 2017[190] went into effect on January 1, 2019. The Oregon Equal Pay Act amended Oregon's prior sex-based pay discrimination law, which prohibited employers from discriminating in any manner "between the *sexes* in the payment of wages for work of comparable character, the performance of which requires comparable skills."[191] The new law is now more far-reaching, expanding the prohibition to members of any class protected under state law.

The Oregon Equal Pay Act makes it an unlawful employment practice to "discriminate between *employees of a protected class* in the payment of wages or *other compensation* for work of comparable character, the performance of which requires comparable skills," or to "pay wages or *other compensation* to any employee at a rate greater than that at which the employer pays wages to employees of a protected class for work of comparable character."[192] "Comparable character" is defined as work requiring "substantially similar knowledge, skill, effort, responsibility, and working conditions in the performance of work," regardless of job description

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[188] The Restrict Information Regarding Salary and Earnings (RISE Act) amends Suffolk County's existing Human Rights Law. Suffolk County Code § 528-7(13). The RISE Act prohibits employers and employment agencies (or any agent thereof) in Suffolk County from inquiring about a job applicant's wage or salary history, including both compensation and benefits. Suffolk County Code § 528-7(13)(a). The prohibition applies to written and oral inquiries, as well as searches of publicly available records or reports. *Id.* Moreover, the RISE Act prohibits employers from relying on salary history when determining the wage or salary to offer a job applicant. Suffolk County Code § 528-7(13)(b). The RISE Act does not apply to actions taken pursuant to any federal, state, or local law that requires the disclosure or verification of salary for employment purposes, or to the exercise of any right pursuant to a collective bargaining agreement. Suffolk County Code § 528-7(13)(c) and (d).

[189] 2017 New York Executive Order No. 161.

[190] *Oregon Equal Pay Act of 2017*, Or. Rev. Stat. § 652.220, *et seq.*

[191] Or. Rev. Stat. § 652.220.

[192] Or. Rev. Stat. § 652.220(1)(a)-(b).

or title.[193] It also broadened the definition of "compensation" to include wages, salary, benefits, bonuses, fringe benefits, and equity based compensation.[194] Further, the law prohibits employers from retaliating against an employee who files a complaint or testifies, or is about to testify, or because the employer believes the employee may testify in an investigation, proceeding, or criminal action.[195]

The Oregon Equal Pay Act prohibits employers from reducing the rate of compensation of any employee in order to comply with the statute.[196] Employers must give employees notice of the new law by posting a sign, provided on the Oregon Bureau of Labor & Industries (BOLI) website, detailing the requirements of the Act in a conspicuous place.[197] If a poster is not feasible, employers can distribute a written notice to each employee personally by mail or email, or by including it with their paycheck. Also, the notice may be added to an employee handbook or manual in both print and electronic format.

The new law also bars employers from using salary history when determining new workers' pay,[198] ensuring that pay inequities do not become entrenched from one job to another. Businesses are also barred from firing workers who ask what their coworkers earn, so employers should make sure any confidentiality provisions they might have in their policies do not interfere with this right.

Additionally, employers may not use salary history at all when setting compensation, except when establishing pay for a current employee during a transfer or hire to a new position

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[193] Or. Rev. Stat. § 652.210(12).
[194] Or. Rev. Stat. § 652.210(1).
[195] Or. Rev. Stat. § 652.220(3)
[196] Or. Rev. Stat. § 652.220(4).
[197] Or. Rev. Stat. § 652.220(7).
[198] Or. Rev. Stat. § 652.220(1)(c)-(d).

within the same employer. Thus, an employer cannot use salary history to determine compensation even if candidates voluntarily reveal their salary history. This means there will likely not be much of a prior salary defense, like there is for the federal Equal Pay Act, for employers facing claims.

a. Permissible Reasons For Wage Disparities

The Oregon Equal Pay Act allows employers to pay employees for "work of comparable character at different compensation levels" if the *entire difference* in compensation levels is based on a bona fide factor related to the position, and a seniority system; a merit system; a system that measures earnings by quantity or quality of production, including piece-rate work; workplace locations; travel, if travel is necessary and regular for the employee; education; training; experience; or any combination of these factors, if the combination of factors accounts for the entire compensation differential.[199]

These bona fide factors must be coherent, consistent, and verifiable. They cannot be post hoc. For this protection to be available, the employer's compensation philosophy must be known, documented, and implemented.

b. Safe Harbor Provision

Notably, the Oregon Equal Pay Act includes a safe harbor provision that allows an employer to plead, as an affirmative defense, that it conducted an "equal-pay analysis."[200] An employer facing litigation can avoid paying compensatory or punitive damages if it is able to show completion of an equal pay analysis—essentially an internal audit—of its pay practices within the

[199] Or. Rev. Stat. § 652.220(2).
[200] Or. Rev. Stat. § 652.220(3).

three years before the date the employee filed the action, and if it has also eliminated the compensation gap.

c. BOLI Regulations

On November 19, 2018, BOLI published regulations under the Oregon Equal Pay Act. Among the key takeaways, BOLI clarified that unsolicited disclosure of past compensation does not constitute a violation of the law, so long as you don't consider such information when making a hiring decision. Additionally, the administrative rules indicate that employers should evaluate benefits offered, as opposed to benefits received, when determining whether employees performing work of a comparable character are equally paid.

Further, the rules provide examples of the "bona fide factors" that compensation differences can be based on. One interesting example addresses "workplace location." The rules state that "workplace location considerations may include, but are not limited to, the following: cost of living; desirability of worksite location; access to worksite." Arguably, by bracketing these similar things into three independent categories, the rules suggest that an employer may pay more to an employee assigned to an undesirable location than one performing comparable work at a more desirable location.

Lastly, the Oregon Equal Pay Act prohibits employers from reducing any employee's compensation to comply with the law. However, the administrative rules make it clear that you can red circle, freeze, or hold an employee's compensation constant while bringing other employees' compensation into alignment. Interestingly, BOLI did not include guidance related to the equal-pay analysis safe harbor provision, a hot topic among Oregon employers.

d. Damages, Statute Of Limitations, And Multiple Violations

Under Oregon's Equal Pay Act, employees asked about their salary history or alleging pay equity discrimination will now be able to pursue a private right of action through BOLI, which can order violators to pay as much as two years' back pay.[201] If a worker opts to go through the court system, punitive damages would also be on the table.[202] Effective January 1, 2024, employees may bring a civil suit under the provision prohibiting employers from inquiring into prospective employees' salary histories, and may also bring a suit on behalf of others who are similarly situated (*i.e.*, a class action).[203]

Furthermore, though claims must generally be brought within one year of the unlawful conduct, each time an employee is underpaid is a separate violation carrying its own statute of limitations.[204] Thus, each and every paycheck compensating an employee less than someone outside the protected class performing substantially similar work constitutes a separate cause of action.

e. Recent Case Law

Nike, one of Oregon's largest employers, recently became the target of a class action lawsuit,[205] filed by four women alleging unequal compensation and promotional opportunities. The lawsuit has grown to seven plaintiffs. In November 2018, Nike filed a motion to dismiss three of the four claims in the lawsuit, including those under the Federal Equal Pay Act and Oregon Equal Pay Act, and a claim for intentional discrimination under the Oregon Equality Act. Nike

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[201] Or. Rev. Stat. § 659A.870(4).
[202] Or. Rev. Stat. § 659A.885(3)(a).
[203] Or. Rev. Stat. § 659A.885(10).
[204] Or. Rev. Stat. § 652.230(5)-(6).
[205] *Cahill et al. v. Nike, Inc.*, No. 3:18-cv-01477-JR.

denied the allegations supporting the fourth claim—for disparate impact under the Oregon Equality Act—but did not ask for the claim to be dismissed.

According to Nike, the complaint lacks sufficient facts, and has an overbroad class definition. "The proposed class would span thousands of female employees in hundreds of disparate job categories," the court filing reads, suggesting that women in different jobs come from entirely different backgrounds and that each has a unique set of circumstances. Nike goes on to argue that "Plaintiffs plead no factual predicate that makes it plausible that all class women at Nike's headquarters share anything in common (other than their gender), let alone that they suffered a common harm on a theory susceptible to common proof." We are staying tuned to see how the Oregon court rules on such an important issue.

9. Pennsylvania

The Pennsylvania Equal Pay Law went into effect on March 17, 1960.[206] The Law makes it an unlawful employment practice for an employer to discriminate between employees "on the basis of sex by paying wages to employe[e]s in such establishment at a rate less than the rate at which he pays wages to employe[e]s of the opposite sex in such establishment for equal work on jobs, the performance of which, requires equal skill, effort, and responsibility, and which are performed under similar working conditions."[207] It also prohibits employers from reducing the rate of compensation of any employee in order to comply with this requirement.[208]

The Pennsylvania Equal Pay Law is substantially similar to the federal Equal Pay Act, and, expressly excludes from its coverage any employee who already is covered by the federal EPA.[209]

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206 43 P.S. § 336.1 *et seq.*
207 43 P.S. § 336.3(a).
208 *Id.*
209 43 P.S. § 336.2(a).

Because the Pennsylvania Equal Pay Law, therefore, has an extremely limited application, there are few decisions addressing it.

a. Permissible Reasons For Wage Disparities

Like the federal EPA and other states' equal pay laws, the Pennsylvania Equal Pay Law contains a handful of legally permissible reasons for a different rate of compensation. The differential may permissibly be based on a seniority system, merit system, a system which measures earnings by quantity or quality of production, or any factor other than sex.[210]

b. Available Damages For Violations

Typically, a prevailing employee is awarded compensatory damages, attorneys' fees, and costs. An employee may also recover liquidated damages if the court finds the employer's conduct was willful.[211]

Additionally, an employer who willfully and knowingly violates the Pennsylvania Equal Pay Law may be subject to a fine of not less than $50 and not more than $200.[212] Each day of such violation is a separate offense.[213]

c. Statute Of Limitations And Multiple Violations

The statute of limitations is two years.[214] Case law suggests the continuing violation doctrine and the discovery rule apply to Pennsylvania Equal Pay Law claims,[215] which would extend the statute of limitations beyond two years.

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210 *Id.*

211 43 P.S. § 336.5(a) ("any employer who willfully and knowingly violates this act, shall be liable to the employee or employees affected in the amount of their unpaid wages and in addition, an equal amount as liquidated damages").

212 43 P.S. § 336.8(a).

213 *Id.*

214 43 P.S. § 336.5(b).

215 *Lazarz v. Brush Wellman, Inc.*, 857 F. Supp. 417, 422 (E.D. Pa. 1994) (plaintiff alleging a violation of the federal Equal Pay Act and the Pennsylvania Equal Pay Law raises a genuine issue of material fact as to whether defendants may be liable under the theory of continuing violation).

d. Additional Ordinances And Executive Orders

Pittsburgh city employees and Commonwealth agency employees may not inquire about an applicant's current or previous salary history at any stage during the hiring process, as discussed more fully below.[216]

Philadelphia's history with salary history inquiry bans is more complicated. On December 8, 2016, Philadelphia City Council passed Philadelphia Bill No. 16084, prohibiting all employers from inquiring about an applicant's current or previous salary history at any stage during the hiring process. The Ordinance was signed into law on January 13, 2017, but on April 6, 2017, the Chamber of Commerce for Greater Philadelphia filed a federal lawsuit challenging the Ordinance on First Amendment grounds and seeking a preliminary injunction barring enforcement of the Ordinance. The Court stayed enforcement and eventually issued a somewhat inconsistent ruling on April 20, 2018, holding that employers are ***not*** prohibited from ***asking*** prospective employees about salary histories, but that they ***are*** prohibited from ***relying*** on them to determine prospective employees' salary.

There also is proposed legislation in Pennsylvania that would prohibit private employers from screening job applicants based on wage or salary history, but given the path of the Philadelphia Ordinance, it is not certain whether Pennsylvania will have salary history ban in place for all employers in the near future.

C. Pay Equity Interactive Map

In order to keep abreast of the ever changing landscape of state pay equity laws, Fisher Phillips has developed an online Pay Equity Interactive Map. The Pay Equity Interactive Map is a

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216 Executive Order 2018:18-03, *available at https://www.governor.pa.gov/executive-order-2018-18-03-equal-pay-for-employees-of-the-commonwealth/*.

useful tool that contains a summary of the state laws impacting equal pay, key language, and state-specific requirements.

IV. Salary History Inquiry Bans

A. State And Local Ordinances

Many states and local jurisdictions have enacted laws and ordinances prohibiting or limiting employers from making salary history inquiries of applicants and using salary history in setting compensation. The rationale behind these laws is that pay discrimination can follow employees, and particularly women, from job to job throughout their careers, resulting in a systemic reduction in earning power. If an employee experiences pay inequality in a prior job, disclosing past salary when applying for a new job may perpetuate the effect of the past discrimination.

As of the date of this publication, the following states and local jurisdictions have enacted bans on inquiring about salary history:

- Albany County, New York (effective 12/17/17)[217]
- California (effective 1/1/18)[218]
- Chicago, Illinois (city employees only, 4/10/18)[219]
- Connecticut (effective 1/1/19)[220]
- Delaware (effective 12/14/17)[221]
- Hawaii (effective 1/1/19)[222]
- Illinois (state agencies only, effective 1/15/19)[223]

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217 Local Law No. P for 2016, Albany County Legislature.
218 Cal. Lab. Code § 432.3.
219 Executive Order No. 2018-1, Mayor Rahm Emanuel, Apr. 10, 2018.
220 Conn. Gen. Stat. § 31-40z.
221 Title 19 Del. Code § 709B.
222 HI Rev. Stat. Sec. 378-2.4.
223 Executive Order 2019-02, Gov. JB Pritzker, Jan. 15, 2019.

- Kansas City, Missouri (city employees only, effective 7/28/18)[224]
- Louisville, Kentucky (Louisville/Jefferson County employees only, effective 5/17/18)[225]
- Massachusetts (effective 7/1/18)[226]
- New Jersey (public employees only, effective 2/1/18)[227]
- New Orleans, Louisiana (city employees only, effective 1/25/17)[228]
- New York City, New York (effective 10/31/17)[229]
- Oregon (effective 10/6/17)[230]
- Pennsylvania (state agencies only, effective 9/4/18)[231]
- Philadelphia, Pennsylvania (effective date to be determined; local ordinance stayed pending court challenge)[232]
- Pittsburgh, Pennsylvania (city employees only, effective 1/30/17)[233]
- Puerto Rico (effective 3/8/17)[234]
- San Francisco, California (effective 7/1/18)[235]
- Suffolk County, New York (effective 6/30/19)[236]

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224 Resolution No. 180519.
225 Louisville/Jefferson County Metro Government Ordinance No. 066, Series 2018.
226 M.G.L. c. 149 § 105A(c).
227 Executive Order No. 1, Gov. Philip D. Murphy, Jan. 16, 2018.
228 Executive Order MJL 17-01.
229 City of New York, Administrative Code, Law 2017/067.
230 ORS 652.220 §2(c) & (d).
231 Executive Order No. 2018-18-03.
232 Philadelphia Code § 9-1131(2).
233 Pittsburgh Code of Ordinances, Title One, Art. XI § 181.13.
234 Act 16-2017.
235 San Francisco Police and Administrative Codes, Ordinance No. 142-17.
236 Local Law No. 25-2018, Suffolk County, NY.

- Vermont (effective 7/1/18)[237]
- Westchester County, New York (effective 7/9/18)[238]

While these laws differ by jurisdiction, they generally prohibit employers from screening applicants based upon compensation history, asking the applicant about compensation history, and asking the applicant's current or prior employers about the applicant's compensation history. In certain jurisdictions, an applicant's compensation history may be verified after an offer of employment is made and/or accepted. In other jurisdictions, if an applicant voluntarily discloses their compensation history without any prompting by the employer, salary history may be considered.

Interestingly, Wisconsin and Michigan have bucked this trend, and enacted laws which *prohibit* local legislation that *prohibits* salary history inquiries.[239] Legislation banning salary history inquiries was introduced, but failed, in Minnesota, Mississippi, and Washington.

Employers should bear in mind that just because a state does not prohibit an employer from inquiring about salary history, that does not necessarily mean that compensation decisions based upon salary history are lawful. Whether or how salary history can be used in making compensation decisions varies significantly from state to state.[240] It is, however, still lawful in every state to discuss and negotiate compensation *expectations*.

B. Salary History Under The EPA

Under the EPA, whether compensation decisions based upon salary history are lawful depends, at least for now, on which federal circuit you're in. In a recent landmark decision, the

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[237] Vt. Stat. Title 21 § 495(B).
[238] Laws of West Chester County § 700.03.
[239] Wis. Stat. §103.36; MCL Ch. 123 § 1384.
[240] *See* discussion *supra* for state laws. *See also* Fisher Phillips' Pay Equity Interactive Map. https://www.fisherphillips.com/equity

Ninth Circuit[241] Court of Appeals ruled that prior salary does not fall within the "any factor other than sex" exception and therefore cannot be used by employers, whether alone or in connection with other factors, in setting employee pay.[242] The Ninth Circuit explained:

> Prior salary does not fit within the catchall exception because it is not a legitimate measure of work experience, ability, performance, or any other job-related quality. It may bear a rough relationship to legitimate factors other than sex, such as training, education, ability, or experience, but the relationship is attenuated. More important, it may well operate to perpetuate the wage disparities prohibited under the Act [EPA]. Rather than use a second-rate surrogate that likely masks continuing inequities, the employer must instead point directly to the underlying factors for which prior salary is a rough proxy, at best, if it is to prove its wage differential is justified under the catchall exception.[243]

At the other extreme, the Seventh Circuit Court of Appeals[244] has held that prior salary is *always* a "factor other than sex" that justifies a pay disparity between male and female employees.[245] Between the two extremes are the Second,[246] Eighth,[247] Tenth,[248] and Eleventh[249] Circuits. The Tenth and Eleventh Circuits have ruled that prior pay alone cannot justify a compensation disparity.[250] The Eighth Circuit has adopted a similar approach, permitting the use

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241 The states that make up the Ninth Circuit are Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington.

242 *Rizo v. Yovino*, 887 F.3d 453 (9th Cir. 2018). A petition for certiorari was filed with the United States Supreme Court on September 4, 2018.

243 *Id.* at 466.

244 The Seventh Circuit includes the states of Wisconsin, Illinois, and Indiana.

245 *See Wernsing v. Dep't of Human Servs., State of Illinois*, 427 F.3d 466, 468–70 (2005).

246 The Second Circuit includes the states of Connecticut, New York, and Vermont.

247 The Eighth Circuit includes the states of Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota.

248 The states that make up the Tenth Circuit are Colorado, Kansas, New Mexico, Oklahoma, Wyoming, and Utah.

249 The Eleventh Circuit includes the states of Alabama, Florida and Georgia.

250 *See Riser v. QEP Energy*, 776 F.3d 1191, 1199 (10th Cir. 2015) (an employer may decide to pay an elevated salary to an applicant who rejects a lower offer, but the Act "precludes an employer from relying solely upon a prior salary to justify pay disparity"); *Irby v. Bittick*, 44 F.3d 949, 955 (11th Cir. 1995) ("This court has not held that prior salary can never be used by an employer to establish pay, just that such a justification cannot solely carry the affirmative defense.").

of prior salary as a defense, but "carefully examin[ing] the record to ensure that an employer does not rely on the prohibited 'market force theory' to justify lower wages" based solely on sex.[251] The Second Circuit allows the prior-salary defense, but only if the employer can prove that a "bona fide business-related reason exists" for a wage differential—i.e., one that is "rooted in legitimate business-related differences in work responsibilities and qualifications for the particular positions at issue."[252]

The issue of whether or to what extent compensation decisions based on salary history can be a defense under the EPA seems particularly ripe for review by the United States Court Supreme Court. A petition for certiorari was filed with the Court on September 4, 2018 in the *Rizo* case, but the Court has yet to decide on the petition. In the meantime, employers across the country must determine whether to eliminate questions about salary history during the application process and from compensation decisions altogether in order to comply with the rapidly changing landscape at both the federal and state level.

V. Compensation And Federal Contractors

In 1965, Executive Order 11246 was issued, prohibiting federal contractors and subcontractors,[253] with certain contract values, from discriminating in employment decisions on the basis of race, color, religion, sex, sexual orientation, gender identity,[254] and national origin. This "policy of equal opportunity" requires Contractors to "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to

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[251] *Drum v. Leeson Elec. Corp.*, 565 F.3d 1071, 1073 (8th Cir. 2009) (It is "prohibited" to rely on the 'market force theory' to justify lower wages for female employees simply because the market might bear such wages.")

[252] *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 525–26 (1992).

[253] Federally assisted construction contractors have similar requirements. *See* Executive Order 11246 and its implementing regulations.

[254] Executive Order 11246; 41 C.F.R. § 60-1.1. Sexual orientation and gender identity were added as protected categories in 2014 by Executive Order 13672.

their race, creed, color, or national origin."[255] This affirmative action requirement applies to all aspects of employment and includes rates of pay and other forms of compensation.[256] Affirmative action compliance also requires the contractor to prepare a written affirmative action program for each of its establishments and to conduct periodic compensation self-audits.[257]

A. Who Are Federal Contractors?

As a threshold issue, it is necessary to determine the existence of federal contractor status to determine the applicability of Executive Order 11246 and its implementing regulations. Entities that have 50 or more employees and have a government contract or subcontract of $50,000 or more are required to develop and maintain an annual Affirmative Action Program for each establishment.[258] The $50,000 requirement refers to a single contract; aggregating several smaller contracts does not place the contractor into this category.[259]

In addition, a contractor with 50 or more employees must implement an affirmative action program if it: (1) has government bills of lading in any 12-month period that total (or reasonably can be expected to total) $50,000 or more; (2) serves as a depository of government funds in any amount; or (3) is a financial institution that is an issuing and paying agent for United States savings bonds and notes in any amount, including financial institutions that contract for FDIC insurance coverage.[260] Subcontractors that provide services or supplies necessary to the performance of a federal contract are also covered by the affirmative action requirements.

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[255] Executive Order 11246
[256] *Id.*
[257] 41 C.F.R. § 60-1.40.
[258] 41 C.F.R. § 60-1.40
[259] *Id.*
[260] *Id.*

The Office of Federal Contract Compliance (OFCCP) enforces Executive Order 11246 and its companion laws relating to veterans and individuals with disabilities.[261] OFCCP's enforcement authority includes issuing directives regarding the interpretation of the implementing regulations, and conducting compliance audits, which OFCCP calls "compliance reviews."

B. What Are Contractors' Obligations?

In addition to completing annual affirmative action plans, federal contractors are required to develop and implement an auditing system that periodically measures the effectiveness of its total affirmative action program, including compensation.[262] "Compensation" is defined by the regulations as "any payments made to, or on behalf of, an employee or offered to an applicant as remuneration for employment, including but not limited to salary, wages, overtime pay, shift differentials, bonuses, commissions, vacation and holiday pay, allowances, insurance and other benefits, stock options and awards, profit sharing, and retirement."[263]

With such an expansive definition, reviewing compensation for pay disparities can be quite complex. Recognizing the complexities, the OFCCP has issued several directives providing guidance regarding enforcement and compliance. First, in 2006, OFCCP issued a Compensation Practices for Compliance with Nondiscrimination Requirements of Executive Order 11246 with Respect to Systemic Compensation Discrimination. Revised in 2013 and again in 2018, the compensation guidance requires contractors to review and monitor their compensation systems to determine whether there are gender, race, or ethnicity based disparities.[264] Thus, for federal

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[261] 41 C.F.R. § 60-1.2. The companion laws are Section 503 of the Rehabilitation Act of 1973, implemented by 41 C.F.R. § 60-741, relating to individuals with disabilities, and the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA) of 1974, implemented by 41 C.F.R. § 60-300, related to veterans.

[262] 41 C.F.R. § 60-2.17.

[263] 41 C.F.R. § 60-1.3

[264] Directive 2018-05, issued Aug. 24, 2018.

contractors, reviewing compensation is a legal requirement to prevent and correct prohibited pay discrimination.[265]

C. What Is Compensation Discrimination?

Compensation or pay discrimination, similar to discrimination under Title VII, can manifest itself under two different theories: disparate treatment and disparate impact.[266] Under the disparate treatment theory, an individual has a single allegation of compensation discrimination or there exists a pattern or practice allegation of *intentional* compensation discrimination on a group level.[267] A disparate impact theory of compensation discrimination involves a facially neutral policy or practice that *unintentionally* results in group-level compensation disparities.[268] Periodic review of compensation data is required to ensure that compensation discrimination does not exist and, to the extent that it is found to exist, the contractor must take steps to remedy it.[269]

While self-audits can detect and remedy instances of compensation discrimination, they can also prophylactically identify problems that could lead to liability if a compliance audit is conducted by OFCCP. OFCCP audits comply with the affirmative action legal requirements, with incidences of discrimination being tied to financial liability. The OFCCP has indicated that compensation is a major focus of compliance reviews—with the remedy for the under-compensation of women and minorities being back-pay.[270]

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[265] 41 C.F.R. § 60-1.1
[266] Directive 2018-05, issued Aug. 24, 2018.
[267] *Id.*
[268] *Id.*
[269] *Id.*
[270] *Id.* ("Pay discrimination by federal contractors is unlawful, and its elimination is a key enforcement priority for the agency.").

The OFCCP focuses its attention on all types of compensation disparities[271]—whether they result from systemic compensation discrimination,[272] including pattern or practice discrimination, or disparate impact discrimination or both.[273] Using statistical comparisons, the OFCCP conducts regression analyses on compensation data in an attempt to identify systemic discrimination.[274] These regression analyses are designed to evaluate the effect of sex or race in compensation while also controlling for factors such as education, job–level or grade, or performance ratings or rankings.

In conducting its statistical analyses, the OFCCP evaluates "similarly situated" employees—those who would be expected to be paid the same based on job similarity, (skills required, effort, responsibility, working conditions, and complexity), and other objective factors such as minimum qualifications or certification.[275] OFCCP evaluates these similarly situated employees by developing pay analysis groups (PAGs) of comparable employees and then statistically controlling for further differences among the individuals in the PAGs such as division, business unity, company tenure, experience, education, and grade level.[276] The use of PAGs is OFCCP's attempt to mirror the contractor's compensation system with an eye towards conducting a "meaningful systemic statistical analysis."[277]

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[271] In rescinded Directive 2013-03 (also known as Directive 307), OFCCP indicated that compensation disparities could present themselves as measurable differences in compensation on the basis of sex, race, or ethnicity. "Measurable difference" was generally defined as a statistically significant difference, two or more standard deviations, consistent with Title VII principles, to the extent there was sufficient data to use a regression analysis.

[272] The OFCCP defines "systemic discrimination" as a recurring practice or continuing policy rather than an isolated act of discrimination. United States Dep't of Labor OFCCP FAQ, https://www.dol.gov/ofccp/regs/compliance/faqs/ForEmployers/ForEmployersQ17.htm (last visited February 12, 2019).

[273] Directive 2018-05, issued August 24, 2018.

[274] *Id.*

[275] *Id.*

[276] *Id.*

[277] *Id.*

"Where OFCCP believes that there are indicators of systemic discrimination in compensation, it will seek to fully understand the contractor's compensation system, policies, and practices through interviews with the contractor's subject matter experts and employees, and a holistic review of the contractor's EEO and diversity and inclusion policies."[278] This non-statistical information can include anecdotal evidence gleaned from review of documents and interviews with managers and workers.[279]

For example, interviews that reveal that biased statements have been made, or that certain actions have been taken based on an employee's membership in a protected class could support a finding that compensation discrimination based on a prohibited characteristic has occurred.[280] OFCCP also reviews employment opportunities, promotions, training, base salary and bonus information, as well as other items which make up an employee's "compensation" – including benefits.[281] The OFCCP has stated that it is less likely to pursue a matter where the statistical data are not corroborated by non-statistical evidence unless the statistical evidence is very strong.[282]

D. What Are Some Best Practices for Government Contractors?

To effectively self-audit their programs, contractors should take several steps and engage legal counsel where appropriate. For example, contractors should review job titles. OFCCP compares compensation of "similarly situated" individuals, so job titles should accurately reflect the jobs being performed. But job titles are not enough; contractors should also evaluate the job duties actually performed to ensure individuals are "similarly situated."

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[278] *Id.*
[279] *Id.*
[280] *Id.*
[281] *Id.*
[282] *Id.*

Similarly, contractors should review and update job descriptions to ensure they clearly state the basic job qualifications. Contractors should also consider identifying, in writing, how the standards for offering different starting compensation for jobs with the same job title are developed. Decision makers should be identified, and the use of market analyses should be described, as should any industry standards to which the contractor must adhere. Contractors should also review of compensation by job titles and departments and develop their own PAGs for evaluating compensation.

Notably, if the contractor does not identify its own PAGs, the OFCCP will use job groups or EEO categories to evaluate the workforce. Contractors should also evaluate whether identified compensation disparities require a more sophisticated statistical analysis, such as a multiple regression analysis. This review is accomplished by identifying relevant variables for use in the analysis and utilizing outsourced statistical analysis of the disparities.[283] Finally, Contractors should also document their self-audit in a form that could be produced to OFCCP upon request.

VI. Conducting A Privileged Audit And Identifying Potential Unlawful Wage Disparities

To ensure employees are paid in accordance with federal and state law, many employers proactively conduct pay audits in order to identify and remedy pay disparities. Under the new Massachusetts, Oregon, and Puerto Rico equal pay laws, carrying out such audits before a lawsuit is filed can provide a complete defense to a pay equity lawsuit.[284] Sometimes your best defense will be a good offense. That is particularly true when it comes to protecting your business against expensive pay equity litigation and ensuring employees are paid equitably.

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[283] Notably, coordinating with counsel during the outsourcing process may allow you to assert attorney client or attorney work product privileges on the analyses.

[284] *See* Part III *supra*; M.G.L. c.149 § 105A(d) (Massachusetts); Or. Rev. Stat. § 652.220(3) (Oregon); Act 16-2017 (Puerto Rico Equal Pay Act).

A. 8 Steps For Conducting An Effective Pay Equity Audit

1. Set Goals And Get Buy-in

The planning stage is critical to an effective pay audit. The first step of any successful pay audit is to identify its purpose or goals. In some cases, it may be to limit legal risk and take advantage of a safe harbor under state law. In other cases, it may be to respond to a shareholder demand for a "pay gap" analysis or to an OFCCP compliance review. The employer may also simply want to ensure it is paying its employees equitably. The process and the methodology of the audit will be driven by its goals, so identifying those goals at the very beginning of the planning process is a vital first step.

Federal law requires equal pay for equal work. However, most state laws require equal pay for "comparable" or "substantially similar" work. If the purpose of the audit is to limit risk and ensure compliance with state and federal law, identifying which employees perform comparable or substantially similar work will be a key step in the pay audit process. Additionally, there is a growing trend among new state equal pay laws to expand the equal pay obligation beyond gender lines, and to include other protected categories such as race and national origin. In the recently passed Diane B. Allen Pay Equity Act in New Jersey, for example, there are more than 17 protected classes, among them gender, race, national origin, sexual orientation, age, and disability. Once you identify the comparator groups, you can use statistical and cohort analyses to identify potentially unlawful pay disparities as discussed below.

A shareholder demand for a "pay gap" analysis may be seeking an entirely different type of analysis. Often, a "pay gap" analysis identifies the difference between the average compensation of men and women, regardless of position. This is the "80-cents-or-less-on-the-dollar" that women are reported to make in comparison to men nationally. This type of analysis is particularly

useful for identifying opportunity gaps within a company, but would not be the best method to use to identify potentially unlawful pay disparities between protected classes of employees performing comparable work.

Another key element of the planning process to get buy-in from senior management. A pay audit is not a simple undertaking. It takes significant human and financial resources so it is important to develop a plan that addresses the human resources necessary to complete the audit and a budget that addresses the costs associated with collecting and analyzing the data as well as correcting potentially unlawful pay disparities. As the President and Chief People Officer of one of Fortune's "100 Best Companies to Work For" aptly put it when proposing a pay equity audit to the CEO, the one thing employers should not do is look under the hood, see a big dollar sign, and then shut the hood.

2. Put The Right Team In Place

Assembling the right team for the audit is also a very important step in the planning process. Critical members of the team include human resources personnel (who are familiar with the positions to be examined and the company's historical and current pay practices), finance or payroll personnel (who have access to compensation data), and legal counsel. Employers should also partner with internal or external legal counsel early in the process to try to protect the audit and its findings from discovery in litigation. Appropriate legal protections and privilege protocols should be in place at the start of the audit to protect potentially harmful documents and information from disclosure.

3. Examine Pay Policies And Practices

Understanding historical and current pay practices and policies is another key step in the audit process, both for establishing the correct methodology for the audit, and for understanding

and explaining pay disparities. Identifying the various components of compensation, the criteria relied upon by decision makers in making pay decisions, and how much discretion individuals making compensation decisions have will be instructive in determining what data should be collected and how it should be analyzed. Often, the answers to these questions vary within organizations by division, department, or geography, particularly if the employer has grown by acquisition.

4. Collect The Data

Once the criteria used in making compensation decisions are identified, the data necessary to analyze the results of those compensation decisions must be collected. The data ordinarily include employees' job title, department, job grade or level, hire date, gender (and, depending on the scope of the audit, other protected class identifiers such as race), job location, hours worked over the past 52 weeks, base wage or salary, overtime pay, and bonuses or other forms of compensation.

It may also be necessary to collect such data as performance scores or ratings, level of education (if related to the job), and years of experience in the relevant field or industry if such criteria are used in making compensation decisions. Some or most of this data may be available in human resource information systems and payroll systems. However, it may be necessary to coordinate with information technology staff to evaluate the compatibility and capabilities of these systems and determine the best means to extract the data.

5. Identify Employees Performing "Comparable Work"

Only employees performing "comparable" or "substantially similar" work must be paid the same. "Comparable" or "substantially similar" work under most state laws is broader and more inclusive than "equal work" under federal law. State law ordinarily defines "comparable"

work as work that requires substantially similar skills, responsibilities, and effort, and that is performed under similar working conditions.

While job titles and descriptions may be useful in grouping employees, they alone should not determine comparability. Determining whether jobs are comparable requires looking at each job as a whole. Employers should not assume that just because jobs are in different business units or departments, the work required to do those jobs is not comparable. Also, depending upon the state(s) where the employees work, employers may need to consider other state-specific requirements or guidance for grouping employees.

6. Analyze the Data

The goal in analyzing the data is to determine whether male and female (or other classes of protected employees) within the group are paid equally. The methodology used to make that determination can vary based upon the size of group and the complexity of the compensation scheme. A comparator analysis of the average pay of men or women (or other protected employees within the group) or a cohort analysis may be sufficient to identify disparities for smaller groups of employees with relatively simple pay structures.

For larger groups, typically those with 30 or more employees with at least five comparators in each category (for example, five men and five women), or groups with more complex pay structures, conducting a regression analysis may be more appropriate. Regression analyses which control for certain variables such as time in job, years of experience, or performance ratings are often the best way to identify potentially unlawful disparities or "red flags."

7. Assess Whether Differences Are Justified Under The Law

Employees performing comparable work are rarely paid exactly the same. However, the fact that male and female or other protected employees are paid differently does not mean such disparities are unlawful. There are many lawful reasons for paying employees differently. Those lawful justifications vary from state to state and under federal law, however, so employers must consider the law(s) of the applicable jurisdiction(s) when assessing whether pay disparities are lawful.[285]

When making the assessment, consider whether outliers—employees whose compensation is significantly above or below the average—are grouped properly. In many cases, the job groupings may need to be reconstituted and the analyses re-run as the employer examines and refines job groupings as part of the assessment process. If lawful justification(s) for the disparities exist, it is important for the employer to document those justification(s) as part of the audit process.

8. Take Corrective Actions, If Necessary, To Remediate Pay Disparities

If pay differentials cannot be explained by one or more of lawful justifications under federal and applicable state law, steps should be taken to remedy the pay disparities. In most cases, this will require your company to make adjustments to compensation. Under state and federal law, employers may not reduce the compensation of an employee to remedy a pay disparity. When making pay adjustments, timing is an important consideration. When possible, changes in compensation should be rolled into annual pay adjustments. It is also very important to communicate with hiring managers and others responsible for pay decisions about the issues

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[285] See Part II-III, *supra*.

identified in the pay audit and the corrective actions being taken to remedy the problems so that the inequities do not continue.

VII. Best Practices For Establishing Compliant Compensation-Setting Policies

In order to ensure compliant compensation-setting policies, employers should examine their existing compensation policies and procedures and train personnel involved in compensation decisions appropriately.

A. Updating Documents

Applications and hiring documents should be reviewed and updated to ensure that questions regarding salary history are removed from the written application and interview questions. Additionally, handbooks and policies should be reviewed to ensure that there are no prohibitions on employees asking questions about their compensation and the compensation of others at the company. Employees must be permitted to discuss their wages and the wages of their colleagues, and any retaliation or mistreatment of an employee for doing so may be a violation of state law.

Job descriptions should be reviewed and updated to ensure they align with the actual work being performed by employees. New job descriptions should be created to reflect any new job titles created as a result of a pay audit; such descriptions should clearly distinguish the duties and responsibilities of the new job title as compared to the old job title.

B. Reevaluate Compensation And Performance Evaluation Processes

Employers should review their compensation processes to determine if changes are needed to address issues identified in the pay audit. This may include implementing standard pay ranges or guidelines for each position or classification. It may also include reviewing or creating

compensation policies and procedures, like a checks and balances system, to ensure that compensation decisions are made consistently and in compliance with federal and state law.

Often, compensation decisions are tied to the performance evaluation process such that employees receive a raise or bonus following their annual review. The relationship between the evaluation and compensation processes should be evaluated to determine the role performance evaluations play in pay decisions and ensure that the process is standardized.

C. Train Employees Involved In Hiring And Compensation-Setting

All individuals who are involved in hiring, performance evaluations, and setting compensation should receive training on the EPA and related federal, state, and local laws, and on how to make pay decisions that comply with organizational policies. The training should include a component on implicit bias, and how it might result in an unlawful pay differential.

Those who set compensation need to understand how to apply compensation guidelines and properly exercise their discretion in a consistent manner. They should also be instructed to document the bases for compensation decisions so that the reasons each employee is receiving a certain raise or bonus payment are clear, and so that any differences from others who perform substantially similar work are based upon legitimate factors permitted by federal and state law.

D. Future Audits

It is recommended that an audit be repeated at reasonable intervals to ensure that the company continues to be in compliance with federal, state, and local laws.

VIII. Conclusion

The pay equity laws are complex and evolving, and it is clear that litigation is destined to increase. In order to protect your company and ensure compliance, it is important to review your current compensation practices, conduct a privileged audit, and take affirmative steps to

correct any pay disparities. The Fisher Phillips Pay Equity Practice Group consists of attorneys practicing throughout the country who can assist you with proactive audits, compliance efforts, and litigation, and who are monitor legislative and other developments in this area of law on an ongoing basis. For more information, please visit https://www.fisherphillips.com/services-pay-equity.