

# A PAY AUDIT IS THE PERFECT WAY FOR SCHOOLS TO RING IN THE NEW YEAR

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The end of the year is always a good time to assess what measures you can take to ensure compliance with employment laws and strive for a positive work environment at your school. A pay equity audit is one such measure that schools should have in their arsenal – and it may of especially vital importance this coming year. If your school has not conducted a pay audit recently, 2022 could be the perfect time to do so. In fact, the acting chair of the Equal Employment Opportunity Commission has recently stated that she expects that pay equity will be a top enforcement priority under the Biden administration. Accordingly, pay equity should also be a top priority for all employers, including schools.

## The Basics

The [Equal Pay Act](#) (EPA) is a federal law which requires that men and women in the same workplace be compensated with equal pay for equal work. In other words, employees who perform “substantially equal” work in the same “establishment” on jobs requiring equal skill, effort, and responsibility, and performed under similar working conditions, must be compensated the same. Equality in pay includes all forms of compensation, including base salary or wages, overtime, bonuses, benefits, and any other perks or remuneration.

While the federal law is limited to pay differences based upon sex, many states now have similar laws that are broader to include other protected categories as well. For example, states such as California, Maryland, New Jersey, and Oregon have passed laws prohibiting pay discrepancy

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based upon race, religion, or ethnicity. Fisher Phillips maintains [a comprehensive Pay Equity map](#) detailing various state laws on pay equity from across the country so that you can quickly check the lay of the land in your state. Importantly, in addition to a more expansive definition of potential violations, state laws also tend to have much more substantial damages associated with those violations.

## **Why Schools Should Focus on Pay Equity**

For schools, pay equity laws generally mean that employees who perform “substantially equal” work under similar working conditions must be compensated the same. However, the EPA does provide exceptions for unequal pay when the pay is based on a seniority system, a merit system, a system which measures earnings or quality or quality of production, or a differential based on any factor other than sex.

Schools should be proactive to ensure they are not running afoul of either the EPA or any applicable state laws where you operate. A common problematic scenario occurs when a hiring party for your school makes a larger than anticipated offer in order to hire or retain a new teacher. Another common example: someone offers a stipend for coaching opportunities that the teacher ends up discontinuing, but the school does not revert the pay scale back to the original pre-coaching levels. Such bumps in pay may be carried on for years on end without formal administrative notice. Then, if a teacher of the opposite gender brings a EPA lawsuit, the school can have a difficult time explaining why there was a discrepancy in pay.

## **Proactive Steps Could Save You**

Importantly, although you may ultimately be able to establish that no legal violations occurred in the above or similar scenarios, your school may have been able to avoid being in this risky (and costly) situation by taking some proactive measures to avoid even the appearance of impropriety in pay.

One such step is to take a careful look at the current pay for all of your teachers and staff. You may be able to quickly determine whether there are any outliers amongst them. If there are, consider why that is that case and if you have any documentation to justify any such pay decisions. For example, what do the performance appraisals and job

descriptions for the employees at issue say? There may in fact be legitimate factors other than gender (or, depending on your state, other protected categories) that could justify a pay difference between employees performing substantially similar work. However, this is a good opportunity to ensure that is the case and to consider how you may be able to prove those factors if you ever had to do so.

When considering pay differentials, keep in mind that in some areas of the country you are specifically prohibited from using salary history as basis for pay. For example, in New York, state law prohibits employers from requesting or relying on pay history. Thus, regardless of if you have a potential hire who volunteers his pay history and states his pay expectation based upon that history, a New York school could not use this history to justify paying him a higher amount than another female new hire.

If you have noticed a pay discrepancy amongst your payroll, now is a good time to take proactive steps to level the playing field and bridge any existing gaps. Some states, such as Massachusetts and Oregon, have created "safe harbor" provisions into their laws. They provide an affirmative defense to equal pay claims if you can show you voluntarily and proactively conducted a self-evaluation of your pay systems and took active steps to remedy any discrepancies.

## **5-Step Roadmap to Start 2022 Off on the Right Foot**

Schools can also choose to conduct a detailed privileged pay audit to ensure pay equity compliance. In October 2020, an Oregon federal court provided a roadmap in *Cahill et al. v. Nike, Inc.*, for ensuring that employer's own internal pay audits remain confidential in the wake of pay equity litigation. The court provided five clear steps employers can follow to ensure your pay equity audits remain confidential:

- 1. Plan.** If you want to rely on attorney-client privilege for your pay audit, it is important to involve attorneys at the earliest possible time in the process. This way, the privilege attaches sooner.
- 2. Purpose.** A documentation trail establishing that the purpose of the audit is for legal, not business, purposes will help ensure that the attorney-client privilege attaches to the work. This is especially important if your school has

a in-house counsel who is performing the audit, as opposed to an outside attorney.

3. **Protect.** Ensuring that only the individuals who must communicate with counsel regarding the audit do so will limit the risk of an inadvertent disclosure that could result in a loss of privilege.
4. **Preserve.** Be careful about reporting any information regarding your audit to anyone externally. Such actions will also potentially waive attorney-client and work-product privileges.
5. **Pick Wisely.** Keep in mind that if you intend to rely on advice of counsel as an affirmative defense to liability in a pay equity litigation, the contents of the audit will likely become subject to discovery. Accordingly, you will need to choose wisely if you want to use your audit as either a "shield" or a "sword."

In short, schools can help mitigate their risks for pay equity lawsuits by being aware of the various state and local laws where they operate, as well as the federal EPA. With the EEOC advising that pay equity is a priority for 2022, now is the time for schools to take proactive steps to either do an informal review and self-correction of pay discrepancies, or a more thorough privileged pay audit.

We'll continue to monitor developments in this area and provide updates as warranted. To ensure you stay up to speed, make sure to subscribe to receive [Fisher Phillips Insights](#) directly to your inbox. If you have questions about pay equity audits for your school, please contact your Fisher Phillips attorney, the author of this Insight, or any attorney in our [Education Practice Group](#) or [Pay Equity Practice Group](#).