

YEAR-END REVIEWS PAIR WELL WITH A PAY EQUITY AUDIT: A 4-STEP PLAN FOR EMPLOYERS

Insights

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Many employers are now turning to the year-end performance review process and making decisions about bonuses, raises, and incentives for employees — which makes this an ideal time to audit your pay practices and fix any potential disparities. With sweeping pay equity legislation being enacted from coast to coast, you'll want to ensure your organization complies with all the relevant federal and state laws. Here are four key steps you should consider taking this comp season to ensure pay equity, level the playing field, and avoid significant penalties.

1. Review Relevant Laws

Pay equity covers all forms of compensation, including base salary or wages, overtime, bonuses, benefits, and any other perks or remuneration. You should review all the relevant rules that impact your workplace, as the details vary depending on location. Consider the following:

- **The federal Equal Pay Act (EPA).** This law requires you to provide men and women in your workplace with equal pay for equal work. Under federal law, disparities in pay among employees with substantially equal job duties are only legally permissible if based on a factor other than sex, such as seniority, merit, qualifications, skills, education, or level of responsibility.
- **State Law.** Many state laws go well beyond federal law in terms of scope and lawful justifications for pay differentials. State pay equity statutes also provide for far-

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reaching remedies, including triple damages in states such as New York and New Jersey.

- **Gender-based pay equity laws.** Nearly every state has its own law that also prohibits gender-based wage discrimination. But most state pay equity laws – especially those passed in recent years – are far more demanding than federal law and require pay differentials to be:
 - justified by bona fide factors other than sex;
 - job-related to the position in question; and
 - consistent with business necessity.
- **Expanded laws with more protected categories.** Many states – including California, New York, New Jersey, and Oregon – have expanded their pay equity laws to go beyond gender and extend to other legally protected categories, including race, ethnicity, age, and religion.

[Check out the Fisher Phillips Pay Equity Interactive Map for a comprehensive listing of requirements in all jurisdictions.](#)

2. Create a Year-End Checklist

- **Review compensation policies before finalizing pay decisions.** Critically examine your compensation policies and practices to ensure that, moving forward, pay inequality does not persist among employees with substantially equal job duties. When conducting your review, you should consider the following questions:
 - Are compensation decisions based on objective or subjective criteria?
 - Is there documentation to justify the pay decisions?
 - If pay differentials are based on performance, do performance appraisals and related documentation support your decisions?
 - Are there legitimate factors other than gender (or another protected category, depending on the state) that justify a pay disparity between employees performing substantially similar work?

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- **Consider making adjustments.** Based on your answers to the questions above, you should consider making adjustments before compensation decisions are finalized to ensure they are based on objective, well-documented criteria and that any disparities among employees who perform substantially similar work are due to legitimate reasons identified under applicable federal and state law. Also, consider whether higher paid “outliers” should be promoted, as the pay discrepancy may be a function of job title. Notably, many jurisdictions across the country do not allow you to justify a wage differential based on salary history. Check with your legal counsel if you are unsure whether this standard applies to your organization.
- **Provide bonuses or raises to eliminate potential disparities.** Whether you conducted a pay audit earlier this year or informally reviewed the compensation paid to your employees, you may have noticed a few red flags where compensation for employees performing the same job could not be explained by bona fide factors like experience, education, seniority, or job responsibilities. Year-end is a good time to identify and correct these potential disparities. You may want to award end-of-year bonuses to bridge the gap from the last year — and you may also want to provide pay raises to correct any pay disparities going forward into next year and beyond.

3. Track Pay Transparency Trends

- **Salary disclosure.** In addition to rules on equal pay for equal work, many states are now requiring employers to disclose salary ranges in job listings. Indeed, pay transparency is one of the hottest trends impacting the workforce today, and it affects all aspects of workplace relationships – including hiring, recruitment, and retention efforts; supervision and leadership; and compensation and benefits.
- **Patchwork of new state laws.** Multistate compliance with these laws is complicated, particularly since the details vary. [Colorado](#) was the first state to enact a pay transparency law in 2021 and other states rapidly followed suit, including [California](#), Connecticut, [Hawaii](#), [Illinois](#), [Minnesota](#), Nevada, [New York](#), Rhode Island, [Washington](#), and [Washington, D.C.](#) Most recently, [Vermont](#), [Massachusetts](#), and [Maryland](#) joined the trend — and [New Jersey](#) is poised to do soon. You should also note that some cities — including in New York, New Jersey, and

Ohio — have their own requirements. Many of these laws have already taken effect and others are slated for 2025, so you should take the time now to review the rules in your locations and ensure compliance.

- **Costly litigation.** Failure to comply with state pay transparency laws has begun to spawn costly litigation. For example, [the 2023 job posting requirements to Washington State's pay transparency law](#) have led to an avalanche of class action litigation filed on behalf of “job applicants” seeking to recover statutory damages in the amount of \$5,000 per applicant to any noncompliant posting, plus attorneys’ fees and prejudgment interest. This illustrates the importance of developing compliant policies and practices.

4. Plan for the Future

- **Stay ahead of pay equity issues.** While your organization may only make compensation decisions annually, pay equity is an ongoing compliance issue that requires vigilance. After the year-end compensation decisions are made, your company should consider what additional steps can help you stay ahead of equal pay issues.
- **Conduct a privileged pay audit.** One of the best ways to determine whether your company has any significant pay disparities is to conduct a legally privileged pay audit. Through an audit, you will be able to identify potential pay disparities among employees performing comparable work, determine whether there are lawful explanations for those disparities, and take steps to correct them as appropriate. An audit also provides an opportunity to identify and correct weaknesses in the organization’s systems, so you can protect against future pay equity claims.
- **Work with legal counsel.** In some locations, such as Massachusetts, you may even be able to avail yourself of a legal safe harbor if you can prove you undertook a valid pay equity audit. We recommend that any such audit be conducted with advice from an attorney, preferably someone who understands the nuances of pay equity laws, so that it is cloaked with the attorney-client privilege and can remain confidential.
- **Consider any systemic changes that should be made going forward.** This would include drafting formal

compensation policies and procedures and establishing safeguards to avoid exceptions that could result in unlawful pay differentials. Some companies may want to implement standard pay ranges or guidelines for each position or job classification.

- **Train your managers.** You should train your decisionmakers on:
 - how to make proper pay decisions that comply with organizational policies and the applicable law;
 - the appropriate factors to consider when making pay decisions;
 - how to apply guidelines and exercise discretion properly; and
 - how to document compensation decisions.

By taking these steps, your organization will be better positioned to make compensation decisions and ensure compliance with federal and state equal pay laws while minimizing the risk for litigation based on equal pay.

Conclusion

We will continue to monitor developments throughout the country on pay equity. Make sure you are subscribed to [Fisher Phillips' Insight System](#) to get the most up-to-date information. If you have questions, please contact your Fisher Phillips attorney, the authors of this Insight, or any member of our [Pay Equity Practice Group](#)