



A Deeper Dive Into Oregon's Landmark Pay Equity Law

Insights

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Six months ago, the Oregon legislature passed the most sweeping statewide equal pay law in the nation. It was a confusing move for some. After all, Oregon has had an equal pay law on the books since the early 1980s, while the federal Equal Pay Act has been in place in 1963.

But in the 54 years since the EPA became law, some would say the promise of pay equity has not been fulfilled. The median American white women working full-time makes an average of 82 cents for every dollar in comparison to what a white man earns, and the gap is even starker for women of color. Meanwhile, people in Oregon and across the nation have proven slow to bring lawsuits for unequal pay. The lack of continued improvement in bridging the wage gap spurred Oregon to act, and act it did.

Oregon's Equal Pay Act of 2017 is arguably the most all-encompassing, and, strangely, most quietly passed employment law in the United States in 2017. It makes every other equal pay law, at the state or federal level, pale in comparison. Let's take a closer look at how life will change for Oregon employers given this new statute.

Asking About Past Salary History Is Now Prohibited

Starting in October 2017, it became illegal for employers and their managers to ask employee prospects what their past pay or salary was on a job application, in an interview, or over a coffee, lunch, or cocktail that you are pretending is not a preliminary interview. You also can't screen or select employee based on past pay, and you can't have your recruiters do so either. To borrow a phrase from 1963, it's a real bummer, man.

Or is it? You're a sophisticated businessperson. You're not trying to dial anyone from a rotary phone anymore. Just as you've adjusted your phone dialing practices in the past half-century, you can also adjust your hiring practices. There's nothing stopping you from asking people what salary they're looking for, not what they had in the past. We recommend that you adjust your application materials to remove questions about past salary history and replace them with a question asking about current salary expectations. In concert with that revised practice, you can also put the job's salary range in your job ad and ensure you are attracting candidates best suited for your organizational budget.

There is some good news for employers. Although the past pay prohibition law is now officially on the books and has taken effect, enforcement of this provision can only take place through complaints

filed with the Oregon Bureau of Labor and Industries (BOLI) through 2023. Effective January 1, 2024, an employee or prospective employee can sue you in court.

Equal Pay Under The Law

The new law will also soon prohibit you from paying wages or other compensation to any employee at a rate greater than the wages you pay to employees of a protected class for work of a comparable character. Starting in January 2019, an employee alleging pay equity discrimination will be able to file a complaint for getting paid differently based on their “protected class” (discussed below) either with BOLI or in court.

Available damages under such pay equity differential suits will include unpaid wages, liquidated damages (i.e., an equal amount in unpaid wages added on), compensatory damages, punitive damages, and attorneys’ fees and costs. This change in law will make the statutory amendments very financially lucrative to the plaintiffs’ bar, increasing the chances that you will be sued in the future.

One of the things that makes this law more radical than most is that it doesn’t simply cover pay differences between men and women. It covers ten different “protected classes” that are shielded from unequal pay systems:

- Race;
- Color;
- Sex;
- Religion;
- Sexual orientation;
- National origin;
- Marital status;
- Veteran status;
- Disability; and

This means that when you set or audit the pay rate for each job candidate and employee, you will have layers of protected classes to consider beyond your employees’ gender.

Privileged Safe Harbor Audits Should Be In Your Future

Whether or not you are concerned about the new law, you should conduct a privileged pay equity analysis every three years so that you can take benefit from the new law’s safe harbor provision. If you conduct a pay equity analysis and fix any problems you find, then the law will shelter you from exposure to compensatory and punitive damages. If you do this pay equity analysis on consultation with your attorney, you could have the added bonus of having the investigation subject to the attorney-client privilege.

When you do your pay equity analysis, realize that the old state and federal standard that had you examining whether work was “substantially similar” in nature, we now look to whether the work is of “comparable character” – a much lower threshold. Job titles are dead.

We recommend that you review your job descriptions, interview managers to figure out what’s actually happening on the ground, and update job descriptions as necessary. Consider whether the job titles and job descriptions accurately reflect the duties, experience, skills, education, and training required to do the job, as well as whether they accurately reflect the degree of hazards, responsibility, accountability, and physical or emotional exertion required of the job.

Once you have your pay analysis groups of people performing comparable work, think about whether any of the statute’s bona fide factors justify differences in pay. The law provides that you may pay employees for work of comparable character at different rates ***if the entire difference in compensation*** levels is based on a bona fide factor is based on 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 necessary and regular for the employee); education; training; experience; or any combination of these factors if the combination accounts for the entire compensation differential.

This is one of the other truly unique components of the law. There is no “or other factors” catch-all language at the end of that list. If you can’t explicitly explain the difference based on the specifically enumerated statutory factors, the difference isn’t “bona fide,” and you could risk liability.

5-Step Plan To Comply With The New Law

To comply with the new legislation, we suggest you do the following:

1. Amend your job application and other hiring forms to exclude any questions regarding pay history. Instead, you can still ask about desired salary or accepted salary ranges.
2. Train your hiring managers on revised interviewing and hiring practices in light of the new law.
3. Inform any third-party recruiters not to screen candidates based on salary, nor to inquire about pay history (and certainly not to inform you of any past salary information).
4. Work with your counsel to conduct a privileged equal pay analysis to ensure legal compliance and to benefit from the law’s safe harbor provisions.
5. Post a notice regarding the requirements of the law in every establishment in Oregon where your employees work (BOLI will soon provide a template notice).

Related People





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