Florida Lawmakers Introduce 2 Pay Equity Bills

Insights
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The first day of the legislative session in Florida saw the introduction of two pay equity bills referred to as the "Senator Helen Gordon Davis Fair Pay Protection Act." The bills, SB 594 and HB 393, would create additional causes of action arising out of unequal pay or unequal opportunities in employment based upon gender. Additionally, the bills propose new protections for discussing employee wages in the workplace, and would bar employers from inquiring about past wage and salary histories of applicants and employees.

Pay Equity Bill: The Attempted Expansion of Florida Statute 448.07
The primary focus of SB 594 and HB 393 is to amend Florida Statute Section 448.07 to include stronger language regarding pay equity and to create additional causes of action under the statute. The bills further propose lowering the burden of employees claiming equal pay violations by replacing the requirement that an employee prove that the jobs being performed require "equal work" with a "substantially similar" standard.

Currently, under Florida Statute 448.07, no employer shall discriminate on the basis of gender by paying wages to employees at a rate less than the rate at which the employer pays wages to employees of the opposite sex for equal work on jobs the performance of which require equal skill, effort, and responsibility and which are performed under similar working conditions, except when such payment is made pursuant to:

1. A seniority system;
2. A merit system;
3. A system which measures earnings by quantity or quality of production; or
4. A differential based on any reasonable factor other than sex when exercised in good faith.

SB 594 and HB 393 would revise the equal work requirement and only require an employee to demonstrate that they performed substantially similar work requiring equal skill, effort, and responsibility and which is performed under similar working conditions. If the bills are passed and signed into law, they would likely create more litigation over the issue of whether work was substantially similar while also lowering the burden of proof for employees claiming unequal pay in violation of the statute.

Additionally, the proposed bills remove the fourth exception above—a differential based on "any reasonable factor"—and replace it with a "bona fide factor" standard. Such a new exception would mean an employer would need to demonstrate that the bona fide factor is not based upon a sex-based wage differential, but that it is job related with respect to the position in question and is consistent with business necessity.

Furthermore, if the Senator Helen Gordon Davis Fair Pay Protection Act becomes law, employees would be entitled to liquidated damages, have three years to file suit, and be able to file suit on their own behalf or on behalf of other similarly situated employees. Employers would also be subject to civil penalties up to $5,000.00.

Proposed Modifications to the Florida Private Whistleblower Act

SB 594 and HB 393 also propose to expand causes of action under the Florida Private Whistleblower Act to include claims arising out of the discussion or disclosure of an employee's own wages. Additionally, the following would be considered protected activity:

- Inquiries about another employee's wages;
- A request that the employer provide a reason for the amount of the employee's own wages; and
- Discussion of another employee's wages if such wages were voluntarily disclosed by such employee.

The proposed modifications would greatly expand the standing of employees or former employees to file suit under the Florida Private Whistleblower Act. If passed, the additional protected activity falling under the Florida Private Whistleblower Act would likely result in increased litigation for employers operating in Florida.

Proposed Salary History Inquiry Ban

SB 594 and HB 393 also include the creation of Florida Statute Section 448.111, which would prohibit employers from relying on the wage and salary history of an employee to determine wages or salary for that employee. Additionally, employers would no longer be able to seek, request, or require the wage or salary history from an employee as a condition of employment or promotion.

Under the proposed statute, employers would be prohibited from barring employees from discussing or disclosing their own wages, inquiring about another employee's wages, discussing another employee's wages if the wages were voluntarily disclosed, and requesting that the employer provide a reason for the amount of the employee's own wages. Likewise, employers could not require an employee to sign a waiver or any other document that prohibits an employee from the above referenced discussion, disclosure, or inquiry of employee wages.

Overall, the proposed law would only allow an employer to confirm wage or salary history if an employee or applicant responds to an offer of employment by providing prior wage information to support a higher wage than that offered by the employer.

If passed, Florida would join many other states and municipalities that are now passing laws prohibiting the inquiry of past wage history of an employee or applicant. In fact, California, Oregon, New York City, Philadelphia, and San Francisco passed laws in the past year alone prohibiting employers from relying upon an applicant's wage and salary history to determine their wages.

Conclusion

If passed by the Florida legislature and signed into law by Governor Scott, these laws would take effect on July 1, 2018. Employers should monitor the progress of the bills in order to ensure that they have compliant pay, interview, and hiring practices in place in the event the Senator Helen Gordon Davis Fair Pay Protection Act becomes law in Florida. We'll monitor their progress here on this blog; check back often for updates, or reach out to your regular Fisher Phillips attorney.

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Pay Equity