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# EQUAL PAY FOR EQUAL WORK: WASHINGTON UPDATES EQUAL PAY ACT FOR THE FIRST TIME IN OVER 70 YEARS

Insights  
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With heightened attention on gender-based workplace discrimination, Washington recently passed new legislation that creates additional pay equity requirements for Washington employers. Signed into law by Governor Jay Inslee on March 21, 2018, HB 1506 will update and expand the state's Equal Pay Act (EPA) for the first time since it was enacted in 1943.

Although the old version of the EPA was not a prominent source of legal claims, the new law is likely to lead to a surge of claims given that it creates new requirements and enforcement mechanisms. Because the new law will take effect on June 7, 2018, you should carefully analyze your existing policies and practices to ensure compliance.

## HOW DOES THIS CHANGE THE EQUAL PAY ACT?

State and federal law already prohibit gender-based discrimination. But this new law will expand employers' potential liability for certain specific workplace practices and will provide additional remedies in an effort to achieve gender pay equity.

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Washington's updated EPA explicitly prohibits any gender-based discrimination in providing "compensation" between employees who are "similarly employed." Compensation is broadly defined to include discretionary and nondiscretionary wages as well as benefits. Employees are considered to be similarly employed if their job performance requires similar skill, effort, and responsibility, and is performed under similar working conditions. Determining who is similarly employed requires a fact-intensive analysis—job titles alone are not determinative.

The EPA sets out specific factors that can support a valid basis for compensation differences between employees who are similarly employed. A compensation differential will not be considered discriminatory if it is "based in good faith on bona fide job-related factors" that: (1) are consistent with business necessity, (2) are not based on or derived from a gender-based differential, and (3) account for the entire differential. Bona fide factors include:

- education, training, or experience;
- a seniority system;
- a merit system;
- a system that measures earnings by quantity or quality of production; or
- a regional difference in compensation levels.

However, an employee's previous wage history will not be a valid defense under the new law, so you will not be able to justify current pay gaps based on an analysis of past compensation levels.

### Career Advancement Opportunities

Washington distinguished itself from many other states by taking its pay equity statute beyond compensation. The new law will also prohibit employers from limiting or depriving "career advancement opportunities" based on gender.

The legislation does not specifically define this phrase, but it includes two examples: failing to announce or provide access to career advancement opportunities, or failing to provide training that is under the employer's control. While not clearly defined at this time, this feature of the legislation broadens the scope of the EPA.

## Wage Disclosure

Washington also took steps to promote wage transparency in the workplace. The EPA now prohibits employers from restraining an employee's ability to discuss his or her wages. You may not require nondisclosure of wages as a condition of employment, or require an employee to sign any document that prevents them from disclosing the amount of their wages.

Discharge or retaliation against an employee is likewise prohibited for: (1) discussing wages, (2) inquiring about the employee's wages or lack of advancement opportunities, or (3) for aiding or encouraging an employee to exercise any right under the EPA. This is intended to make it easier for coworkers to share information and discover pay disparities.

## Administrative And Judicial Remedies

The new EPA will also expand potential remedies for employees. In addition to bringing a traditional civil lawsuit, employees may file a complaint with the Washington State Department of Labor and Industries (L&I), which is now authorized to investigate and enforce claims under the EPA. Potential remedies against a liable employer include actual damages, statutory damages equal to the actual damages or \$5,000 (whichever is greater), interest, as well as the employee's costs and attorneys' fees. Wages and interest owed may reach back up to four years.

L&I may also issue civil penalties and require payment for the costs of its investigation and enforcement. The agency is likely to adopt additional rules to implement

certain portions the EPA, so stay tuned for updates. With this new agency enforcement mechanism, the EPA will play a more prominent role in gender discrimination claims.

## **HOW CAN EMPLOYERS ENSURE COMPLIANCE?**

These updates to the EPA should, at the very least, prompt you to carefully review your existing policies and practices related to compensation, advancement opportunities, and wage disclosure. If compensation differs between similarly situated employees, you should examine the basis for that difference to determine whether it is valid under the EPA. A compensation difference based on an employee's previous wage history warrants particular scrutiny. You should also make certain you are retaining wage records that relate back at least four years.

With the EPA's additional emphasis on career advancement opportunities, you need to be all the more conscientious in providing equitable advancement opportunities for all employees. Any policies or practices that could have a disproportionate effect on such opportunities based on gender should be reconsidered. Finally, any policies or practices that would restrain an employee from discussing his or her own wages, or discipline an employee on that basis, should be revised.

Every employer would (or should) agree that compensation differences should not be based on gender. Yet many still have room for significant progress on this front. By proactively reviewing relevant policies and practices, you can ensure compliance with the EPA and achieve gender pay equity for all of your employees.

For more information about how this legislation could affect your workplace, contact any attorney in our [Seattle office](#) at (206) 682-2308 or your regular Fisher Phillips attorney.

*This Legal Alert provides an overview of recent updates to Washington's Equal Pay Act. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.*