

5 TAKEAWAYS FROM OREGON'S NEW PAY EQUITY REGULATIONS

Insights

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Weeks before the bulk of Oregon's new equal pay law will take effect, the state Bureau of Labor and Industries released [implementing regulations](#) to clarify the obligations that will soon be borne by the state's employers. Employers with operations in Oregon will want to review and familiarize themselves with these regulations before the January 1 effective date. Here are the five things you need to know about the new rules, along with a list of five action items for you to consider in advance of the new year.

THE BASICS

As most employers know, [the Oregon Equal Pay Act of 2017](#) (OEP) prohibits screening job applicants based on current or past compensation. The OEP also forbids compensation discrimination on the basis of a protected class (unlike other equal pay laws across the country, Oregon requires equitable compensation across multiple *protected classes* and not just gender). Our detailed summary of the law can be found [here](#).

The ban on salary history inquiries went into effect in October 2017. A majority of the remaining provisions of the OEP will go into effect on January 1, 2019, which is the same day that the Oregon Bureau of Labor and Industries (BOLI) will also be able to enforce the law. The provision that provides an individual with the opportunity to pursue a private action against an employer for alleged violations of the OEP will not go into effect until January 1, 2024.

FIVE KEY POINTS

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Stephen Scott

Regional Managing Partner

[503.205.8094](tel:503.205.8094)

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Fortunately, on the eve of implementation, BOLI issued the [final administrative rules](#) for the OEP, which provide clarity to key portions of the law. Here are five key takeaways:

- 1. Unsolicited Information Does Not Violate Salary History Ban:** As most know, the OEP already prohibits you from screening job applicants based on current or past compensation. It prohibits “using any information about an applicant’s past compensation, regardless of how the information was obtained, to determine a job applicant’s suitability or eligibility for employment.” The good news is that the new rules clarify that unsolicited disclosure of a past compensation does not constitute a violation of the law, so long as you don’t consider such information when making a hiring decision.
- 2. Total Compensation Offered Should Be Considered:** The administrative rules indicate that you should evaluate benefits offered, as opposed to benefits received, when determining whether employees performing work of a comparable character are equally paid. The rules provide this specific example: “If an employee chooses not to take advantage of a health insurance policy offered by an employer because the employee is covered under their spouse’s plan, the cost of providing the benefit that would have been incurred by the employer to provide the employee with the benefit offered may be included as part of the employee’s total compensation.”
- 3. Clarifying “Work Of Comparable Character”:** The OEP states employers cannot “in any manner discriminate between employees on the basis of a protected class in the payment of wages or other compensation for work of *comparable character*.” The rules define comparable character as requiring “substantially similar knowledge, skill, effort, responsibility, and working conditions in the performance of work, regardless of job description or job title.” The rules provide examples of the aforementioned categories. For example, the rules say “skill” considerations may include, but are not limited to, “ability, agility, coordination, creativity, efficiency, experience, or precision.” You should rely on these definitions and examples when drafting job descriptions and evaluating OEP compliance.
- 4. Acceptable Pay Differences—aka Bona Fide Factor Analysis:** The OEP permits you to compensate employees differently, when they perform work of a comparable

character, if the entire difference in compensation levels is based on one of the following bona fide factors: 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.

The rules seek to explain and provide examples of these bona fide factors. One interesting example from the finalized rules is “workplace location.” The rules state that “workplace location considerations may include, but are not limited to the following: cost of living; desirability of worksite location; access to worksite...” Arguably, by bracketing these similar things into three independent categories, the rules suggest that you may pay more to an employee assigned to an undesirable location than one performing comparable work at a more desirable location.

- 5. Reduction In Employee Compensation:** The OEP prohibits employers from reducing any employee’s compensation in an effort to comply with the OEP. Fortunately, the administrative rules make it clear that you can red circle, freeze, or hold an employee’s compensation constant while bringing other employees’ compensation into alignment.

NEXT STEPS: A FIVE-POINT PLAN

Starting in just a few short weeks, employees will be permitted to file claims for OEP violations with BOLI. To avoid such claims, you should develop and implement the following compliance strategy:

1. Remind individuals responsible for interviews about the limitations and peril related to salary history disclosures during the interview process, offering training as necessary;
2. Update employee handbooks, job applications, and interview forms to comply with pay equity and salary history requirements (for example, replacing questions about prior salary history with a job about compensation expectations);

3. Post this mandatory [poster](#);
4. Update your performance evaluations to ensure they have a rating system that evaluates job-related factors. A satisfactory rating system is “a devised coherent, consistent, verifiable and reasonable method that was in use at the time of the alleged violation to identify, measure and apply appropriate variables in an orderly, logical and effective manner;” and
5. 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, which allow an employer to file a motion to disallow punitive or compensatory damages brought under the OEP.

CONCLUSION

Although the rules clarify much of the OEP, there are some areas that remain unclear. You should expect additional legislation or regulations in 2019 to clarify gray areas, like how to account for the protected classes that are not self-evident or self-reported. Fisher Phillips will continue to monitor new developments on the OEP, so you should ensure you are subscribed to [Fisher Phillips’ alert system](#) to gather the most up-to-date information. For help with compliance steps or to answer questions, please contact your Fisher Phillips attorney or any attorney in our [Portland office](#).

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