

ALABAMA'S NEW EQUAL PAY ACT SET TO SOON TAKE EFFECT

Insights
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The State of Alabama passed an Equal Pay Act in the 2019 legislative session that is set to take effect on September 1, 2019. Employers must begin their preparations to comply with the law now because there are new timekeeping and wage records that will be required of all employers in Alabama as a result.

THE BASICS OF THE EQUAL PAY ACT

Under the new law, an employer is prohibited from paying "any of its employees at wage rates less than the rates paid to employees of another sex or race for equal work within the same establishment on jobs the performance of which requires equal skill, effort, education, experience, and responsibility, and performance under similar working conditions." While the Act does not mention the concept of "discrimination" on its merits, the new law by its terms prohibits discrimination based upon race or sex. Alabama employers are already aware that the state has an existing law prohibiting age discrimination.

There are four exceptions that would permit employers to pay different wages to people of a different race or sex:

- a seniority system;
- a merit system;
- a system that measures earnings by quantity or quality of production; and
- a differential based on any factor other than race or sex.

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If a worker believes they have a valid claim under the law, they may file a claim in the Alabama Judicial System. The Act does not specify which court will have jurisdiction of these claims. Any claim over \$10,000 will be filed in the Circuit Court and, amounts below that figure must be filed in the District or Small Claims Courts.

NEW RECORDKEEPING OBLIGATIONS

The enhanced obligation for employers is that they must now “adopt the rules for record keeping established by the United States Department of Labor for the Fair Standards Act (FLSA), Title 29, Part 516 of the Code of Federal Regulations.” Imposing this requirement on every employer – not limited by number of employees, gross income, or type of business – will be onerous. Of course, large employers and some operating in specific industries (such as bars and restaurants), already maintain these records because they are subject to the FLSA.

While there is no statutory penalty provision if an employer fails to comply with the recordkeeping requirement, that doesn’t mean you should ignore this new obligation. You can expect Alabama courts to borrow the interpretations from federal law that hold an employer liable for the claims made in the absence of required records.

If a worker were to bring a claim because of the recordkeeping requirements, they seem to have a heightened burden as compared to claims brought under the FLSA. The complaint must be pleaded “with particularity” in demonstrating that they were paid less than someone for equal work despite possessing equal skill, effort, education, experience, and responsibility, and that the applicable wage schedule at issue was or is not correlated to any exceptions noted above.

Appearances are deceiving, but this provision appears to impose a pleading requirement similar to the “fraud or mistake” language found at Rule 9(b) of the Federal Rules of Civil Procedure. This promises to generate a fair amount of conflict, as parties will no doubt soon be arguing over the degree to which a claimant must “demonstrate” a violation in the complaint. For instance, motions for more definite statement or to dismiss as not “plausible on its face” can be expected from defendants.

MISCELLANEOUS PROVISIONS

The Act prohibits a double recovery from a state and federal lawsuit, mandating a “return to the employer” of the lesser of the state or federal recovery. It is easy to see this “return” being hard to realize, unless there are agreements with the employee, or their attorney, or careful planning by the employer’s attorney.

The statute of limitations requires a filing no later than two years after the act of discrimination giving rise to a cause of action. Attorneys can anticipate the Alabama courts will borrow heavily from the federal decisions interpreting the statute of limitations from the federal Equal Pay Act.

One advantage a claimant will have once the new law goes into effect is the opportunity to file a claim in a state court and get a jury trial within the county, rather than a federal district. Another is that the state court judge is more likely to send the case to the jury without imposing the stricter comparator test recently announced by the 11th Circuit of Appeals, which covers Alabama. Trial attorneys should anticipate claimants filing in federal court to obtain initial disclosures and early discovery deadlines, and then dismissing the case only to refile the claim in state court.

CONCLUSION

All Alabama employers must begin keeping careful records consistent with those required by the FLSA regulations. You should also begin the process of training managers on the meaning of equal pay, and its exceptions in this Act.

By way of prudent planning, you should perform random pay equity audits, consisting of examining and questioning wage payments of all employees. Ideally, you should work with counsel to conduct this initial review under the protection of the attorney-client privilege. By conducting your own audit of pay practices, you will be able to determine whether any pay gaps exist that might otherwise trigger a claim under the new law. Due to the increased complications, we strongly encourage you to get your attorney involved in this analysis early in the process.

We will continue to assess the situation and provide necessary updates, so you should ensure you are subscribed to [Fisher Phillips' alert system](#) to gather the most

up-to-date information. If you have questions, please contact your Fisher Phillips attorney.

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