

Wage and Hour Issues:

Are You Ready For The Government's Changes To Your Pay Practices?

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Current Pay Equity Issues

- Pay equity questions
 - focus for plaintiff attorneys and;
 - more importantly, state legislatures
 - considered the discrepancy between the earnings of women and of men in the workforce
 - spread more broadly to include the traditional analysis of racial and ethnic discrimination, but most of the cases we see still involve the disparity between women and men

Equal Pay Act

- Requires that work which is equal must be paid the same
 - requires same level of skill, effort, and responsibility performed under the same working conditions in the same establishment
 - been found difficult to meet because of many variables
- “Comparable jobs”
 - Obama Administration

OFCCP

- OFCCP; August of 2018
 - clarifies the analysis that should be made for pay equity
 - provides further guidance to corporations covered by Executive Order 11246, which is essentially larger government contractors
 - compensation analysis requirements:
 - performed on similarly situated groupings as determined by job similarity
 - similar tasks performed, skills required, effort, responsibility, working conditions and complexity

States Move Ahead of Feds

- California's Fair Pay Act
 - prohibits employers from paying any of its employees rates less than the rates paid to employees of another race or ethnicity for substantially similar work
 - more attainable than Equal Pay Act
 - eliminates requirement that work be in same establishment

Other Fair Pay Laws

- New York Achieve Pay Equity Act;
- Maryland Fair Pay Act;
- Illinois Equal Pay Act;
- Puerto Rico Equal Pay Act;
- Massachusetts Act to Establish Pay Equity;
- Oregon Equal Pay Act;
- New Jersey Diane B. Allen Equal Pay Act;
- Washington State Equal Pay Opportunity Act;
- Connecticut Public Act No. 18-8.

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- More than 20 other states have pending legislation

Do You Ask Prior Salary History When Hiring?

- Several states have passed salary history laws
 - New York & Massachusetts
 - make sure your state is not one before asking past salary history
- Pay disparity
 - causes resentment towards company and fellow employees
 - presents the potential for a wage discrimination claim
 - over a lifetime, the discrepancy can grow much larger than first perceived

Do You Ask Prior Salary History When Hiring?

- Why ask?
 - hire someone for smallest salary possible
 - unfair if skills, experience, etc. of applicants are equal
 - undefinable pay disparities
- Better off to establish relevant pay range for a specific job based on similar qualities and then pay accordingly
- Paying a person what the job is worth is always defensible

Defenses to Unequal Pay for the Same Job Under the Equal Pay Act

- Seniority system;
- Merit system;
- System that measures quantity or quality of production;
- Factors other than sex.

The Maine statute recognizes the same exceptions as the Federal Equal Pay Act.

Massachusetts Equal Pay Act

- Went into effect January 1, 2018
- Prohibits pay differences based on gender for “comparable work”
 - Work that requires substantially similar skill, effort and responsibility and performed under similar working conditions

Prohibitions

- Discriminating on the basis of gender in the payment of wages
- Requiring employees to refrain from inquiring about, discussing, or disclosing wage information
- Screening job applicants based on their wage histories
- Requesting or requiring in the application process that an applicant disclose wage history
- Seeking salary history of a prospective employee from a former employer
- Retaliation for engaging in protected activities

Defenses

- Seniority
 - Time spent on leave due to a pregnancy related condition and protected family or medical leave shall not reduce seniority
- Merit system
- Quantity or quality of production or sales
- Geographic location
- Education, training, or experience
 - If job related and consistent with business necessity
- Travel

Affirmative Defenses

- Within 3 years before the commencement of a lawsuit, the employer
 - Completed a self-evaluation of its pay practices
 - Has made reasonable progress toward eliminating pay disparities based on gender in accordance with the evaluation
- Self-evaluation may be of the employer's own design as long as it is reasonable in detail and scope in light of the size of the employer

New York Pay Equity Law

- Effective January 19, 2016
- Prohibits pay differences based on gender in jobs requiring equal skill, effort, and responsibility
- Performed under similar working conditions

Change in the Law

- Pre-amendment defense to gender banned wage differential if based on or justified by:
 - Seniority system
 - Merit system
 - System measuring earnings based on quantity or quality of work
 - Any factor other than sex
- Last factor changed to “bona fide factor”

“Bona Fide Factor”

- Examples
 - Education
 - Training
 - Experience
 - But the factor must also be “job related” and “consistent with business necessity”

Liability

- Plaintiff can win if shows
 - Employer's practice causes a disparate impact on basis of sex
 - A reliable alternative exists that would both remove the wage differential and serve the same business purpose
 - The employer refused to adopt the alternative practice

Other Changes

- Extension of “same establishment”
 - Was: same establishment
 - Now: same geographic region, but not larger than the county
- Right to discuss wages (with limitations)
 - Co-workers’ permission required
 - Special access to others’ information
- Liquidated damages increased to 300% of the unlawful pay difference

States Prohibiting Inquiring About/ Or Using Past Salary History

- Vermont and Massachusetts
- Connecticut as of January 1, 2019
- Some exceptions for “volunteered” information
- May not base compensation on prior history
- All other New England states have or are actively considering a ban

Looking Ahead

- Equal pay efforts are likely here to stay
- Significant action at the State level
- At the federal level
 - Unlikely that the Equal Pay Act will see significant changes
 - The changes adopted by the OFCCP and DOL during the Obama Administration likely will not be rolled back

Recommendations

- Review applicable handbooks and policies for treatment of compensation issues
- Review and update job descriptions
- Review and train compensation decision-makers on the non-gender-based criteria organization the uses
- Document grounds for compensation decisions
- Do not rely on pre-hire salary history (in Massachusetts, do not inquire)
- Consider creating an internal complaint procedure – including advising employees of right to see review

Recommendations

- Correct compensation disparities that you cannot justify
- Be sure managers understand they cannot prohibit employees discussing wages
- Conduct a “trial run” of the EEO-1 report with 2016 pay data
- Conduct a privileged wage audit
 - Determine which positions are “substantially similar”
 - Determine whether pay disparities exist
 - Determine if there is a reasonable non-gender justification
 - Seniority
 - Reliable merit-based system
- Quality or quantity of work (will revenue be a sufficient basis?)

Options for Changing Pay Practices

- Use salary-benchmarking data to set wages
- Use lock-step approach
- Create and use wage ranges
 - What is the job worth?
 - Create a range of potential wages for each job
 - What factors justify a higher or lower wage within the range?
 - Qualifications and experience for that job
 - Evaluate fairness

New England and New York State Minimum Wage Chart

Jurisdiction and Source of Law	Minimum Wage (as of the date noted)	Scheduled Increases
Connecticut Conn. Gen. Stat. Ann. § 31-58(i)	\$10.10, effective January 1, 2017.	No scheduled increases.
Maine Me. Rev. Stat. tit. 26 § 664(1) ; see also Maine Department of Labor, New Minimum Wage Increases	\$11.00, effective January 1, 2019.	\$12.00, effective January 1, 2020. Annual indexing, effective January 1, 2021.
Maine Municipalities:		
Bangor The city repealed its minimum wage ordinance because the state minimum wage is now higher than the city's minimum (ME DOL: New Minimum Wage Increases).	Not applicable.	Not applicable.
Portland Amendment to Portland City Code Chapter 33 (Minimum Wage) (see also Portland Maine Minimum Wage)	\$10.90, effective July 1, 2018.	Annual indexing, effective July 1, 2018.
Massachusetts Mass. Gen. Laws ch. 151, § 1 (see also Massachusetts Minimum Wage Program)	\$12.00, effective January 1, 2019.	\$12.75, effective January 1, 2020. \$13.50, effective January 1, 2021. \$14.25, effective January 1, 2022. \$15.00, effective January 1, 2023.

New England and New York State Minimum Wage Chart

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New Hampshire N.H. Rev. Stat. Ann. § 279:21	\$7.25, effective September 1, 2008.	New Hampshire employers are required by state statute to pay the federal minimum wage.
New York (including local wages for New York City and Nassau, Suffolk, and Westchester Counties) 12 NYCRR §§ 141-1.3, 142-2.1, 146-1.2 (see also New York Department of Labor, Minimum Wage and Hospitality Industry Wage Order)	Effective December 31, 2018: \$15.00 (New York City employers of 11 or more employees). \$13.50 (New York City employers of 10 or fewer employees). \$15.00 (fast food workers in New York City). \$12.75 (fast food workers outside New York City). \$12.00 (Nassau, Suffolk, and Westchester Counties). \$11.10 (remainder of New York). Tiered minimum cash wages apply to tipped service employees and tipped food service workers (12 NYCRR §§ 146-3.3 and 146-3.4 ; see also Practice Note, State Tip Credit and Tip Pooling Restrictions Chart: Overview).	New York City Employers of 10 or Fewer Employees: \$15.00, effective December 31, 2019. Fast Food Workers Outside New York City: \$13.75, effective December 31, 2019. \$14.50, effective December 31, 2020. \$15.00, effective July 1, 2021. Nassau, Suffolk, and Westchester Counties: \$13.00, effective December 31, 2019. \$14.00, effective December 31, 2020. \$15.00, effective December 31, 2021. Remainder of New York: \$11.80, effective December 31, 2019. \$12.50, effective December 31, 2020. Annual increases for the remainder of New York will continue until the rate reaches \$15.00. On December 4, 2018, the New York City Taxi and Limousine Commission (TLC) announced new income and transparency rules applicable to taxi and for-hire vehicle (FHV) drivers. The rules are expected to take effect in January 2019. (See NYC TLC Press Release (Dec. 4, 2018) ; NYC TLC Driver Income and Transparency Rules .)
Rhode Island R.I. Gen. Laws § 28-12-3(h)	\$10.50, effective January 1, 2019.	No scheduled increases.
Vermont 21 V.S.A. § 384(a)	\$10.78, effective January 1, 2019.	Annual indexing, effective January 1, 2019.