# Emerging Trends In State And Local Equal Pay Efforts

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Equal pay for equal work is a bedrock concept that no reasonable person would dispute as being professionally and morally appropriate. Yet, it is an ideal that is far from ubiquitous in the workplace. As an understated, but equally important, corollary to the #MeToo movement, resolving this historical inequity is the focus of increased attention of state and local legislation. State and local governments are taking novel approaches to combat the issue and employers must be prepared to adjust business practices to ensure compliance.

The federal Equal Pay Act of 1963, or EPA, enacted one year before Title VII of the Civil Rights Act, was the first legislation to recognize and attempt to combat the issue. It straightforwardly prohibits employers from discriminating "between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which [it] pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." Under the EPA, lawful differences in pay must be attributable to seniority systems, merit systems, quantity/quality of production systems, or "any factor other than sex that is job related."

As prescient as the EPA was at the time, it has not eliminated the issue. As of 2017, the median earnings of a full-time, year-round female worker is just 80.5 percent of the wages paid to a full-time, year-round male worker. While this is a notable improvement from the nearly 40 percent differential that existed in 1980, the United States still trails behind developed nations and is on par with countries like Latvia and Chile. Scholars have advanced various theories to explain the reasons for the continuing wage gap: education, voluntary career choices, underrepresentation in higher-paying jobs, poor workplace policies that impose economic penalties for primary caregivers, and familial divisions of labor, among others. Nevertheless, as the Ninth Circuit recently remarked in Rizo v. Yovino, "[s]alaries speak louder than words … the financial exploitation of working women embodied by the gender pay gap continues to be an embarrassing reality of our economy."

In the face of relative inaction by the federal government, state and local governments have increasingly waded into the fray by resort to a variety of approaches spanning the spectrum from incentivization to penal. Employers must be cognizant not only of laws existing in their jurisdictions, but of laws existing in other jurisdictions too, as state and local governments will often resort to a "copycat" approach when seeking to root out matters as reprehensible as discrimination in the workplace. Legislation conforming to the following approaches have emerged as the most predominant.

First, a number of states have acted to strengthen their existing EPA-analogues and narrow potential defenses to pay equity claims. New Jersey, Oregon and Washington have legislatively modified the concept of "equal work" in favor of a concept of "substantially similar work" or "comparable work," to provide a broader array of potential comparisons between men and women. New York and California have eliminated the requirement that workers be in the "same establishment," and instead allow, respectively, for comparisons of workers in the same county or across the state. And Oregon, New Jersey and New York no longer excuse a pay differential if based on "any factor other than sex that is job related," but instead require that an employer tie the differential to a statutorily prescribed criteria, such as seniority, location, travel, education, training or past experience. Indeed, New York now allows for a "disparate impact" approach to liability that would hold an employer responsible, not only for intentionally discriminatory pay decisions, but for imposing a policy that unintentionally results in a gender-based pay differential where an alternative exists that would serve the same business purposes without causing a pay differential.

Second, 17 states have taken steps to promote pay transparency under the belief that pay secrecy, stemming from workplace policies designed to discourage employees from discussing wages, allows unfair pay differentials to perpetuate. California, Colorado, Illinois, New Jersey, New York and Oregon, among others, thus prohibit employers from discriminating against or retaliating against employees who discuss their wages. These pay transparency efforts are a far cry from the gender pay reporting regulations enacted in Great Britain in 2017, which require employers of 250 or more employees to affirmatively publish pay differential data annually, but are rooted in the same principle.

Third, some states have prohibited employers from using salary information or even inquiring about a given employee's salary history. These laws are premised on the theory that a prior compensation decision may have been infected by discrimination such that using it as a benchmark for future salary decisions perpetuates, even unintentionally, prior discrimination in wages. California, Delaware, Massachusetts and Oregon have pioneered legislation of this type, and prohibit any salary inquires prior to the extension of a formal job offer setting forth proposed compensation. New York City enacted a law that goes even further and prohibits employers from conducting independent research into the salary history of an applicant online or through public records. That New York City, for example, authorizes penalties of up to $150,000 for unintentional violations and $250,000 for willful and malicious violations underscores the seriousness with which the issue is appropriately taken.

Finally, some states have enacted legislation to incentivize voluntary self-correction of potentially unlawful pay disparities. In Oregon, for example, an employer can defend against an award of compensatory or punitive damages if it has conducted an audit within the prior three years, made "reasonable progress" toward eliminating the pay gap, and eliminated, in fact, the pay gap alleged by the plaintiff. In Massachusetts, similarly, an employer can plead an affirmative defense to liability altogether if it has conducted an audit within the last three years in good faith and can demonstrate that

“reasonable progress” has been made toward eliminating the pay gap. Any such audit should be carefully structured and deployed both to meet the requirements of these laws and to ensure any legal issues are adequately addressed.

Employers should strive to meet compliance with these laws not simply to avoid the penalties for noncompliance, but to reap the benefits of attracting and maintaining a workforce that is free from any form of discrimination, in pay or otherwise. It is, at this point, a simple and accepted fact that employees who believe they are being rewarded fairly for their work are more engaged and motivated, which boosts retention and productivity, and generates financial rewards for their employer.