



EMPLOYERS SHOULD BE SENSITIVE TO COMPENSATION TRAPS FOR THE UNWARY

Given the recent wave of pay equity legislation and salary history bans, employers are well advised to take a close look at their compensation policies and practices. Having an inequitable pay structure can subject employers to a number of threats including litigation, government investigations or compliance audits. While these threats alone give cause for action, the statutory remedies employers may face for collective or class pay equity claims can be costly. When navigating this evolving area of the law, employers must review the parameters of the laws in which they do business, keeping in mind the considerations outlined below.

WHO IS PROTECTED?

Although pay equity legislation is often rooted in a desire to end the gender wage gap, some pay equity laws apply to protected classes beyond just sex and gender.

- ▶ California: gender, race and ethnicity
- ▶ Maryland: sex and gender identity
- ▶ Massachusetts: gender
- ▶ New Jersey: race, creed, color, national origin, nationality, ancestry, age, marital status, civil union status, domestic partnership status, affectional or sexual orientation, genetic information, pregnancy, sex, gender identity or expression, disability or atypical hereditary cellular or blood trait of any individual or liability for service in the armed forces
- ▶ New York: sex
- ▶ Pennsylvania: sex

ARE YOU COMPARING THE RIGHT JOBS?

Equal pay legislation demands equal pay for equal work. However, jurisdictions vary on their definitions of “equal work.” Some states group employees by those who perform “substantially similar” work, while others focus on grouping employees by those who perform work of “comparable character.” When it comes to grouping employees, employers should be cognizant of applicable state law definitions and should consult with counsel to determine the appropriate comparators.

Employers should review job descriptions, job postings and even job-specific performance appraisal forms to ensure they accurately reflect duties and responsibilities of positions. Employers should also examine job descriptions, wage and hour classifications, and job functions when grouping employees, as simply grouping by “job titles” may not suffice.

HOW CAN YOU LEGITIMATELY JUSTIFY PAY DIFFERENCES?

If a pay disparity is found to exist, many states’ pay equity laws allow employers to justify discrepancies based on various considerations, including seniority systems, merit-based systems, education and training, and other bona fide factors. However, not every state recognizes the same justifications for differences in pay. Some jurisdictions (like New York and New Jersey) require that bona fide factors must be job-related and consistent with business necessity to constitute legitimate grounds for a wage differential.

To limit the risk of liability, employers should review internal mechanisms to ensure employees have equal access to opportunities, which often affect compensation. Employers should analyze hiring and compensation practices and take appropriate steps to document decisions affecting compensation (including base pay at the time of hire, pay increases, incentive compensation and benefits) based on recognized statutory justifications for job-related pay differences.

WHAT ABOUT GEOGRAPHIC JUSTIFICATIONS?

State laws vary on the issue of whether pay differentials can be justified by geographic locations. Such justifications are permissible in:

- ▶ California
- ▶ Massachusetts
- ▶ Maryland
- ▶ New York
- ▶ Pennsylvania

Notably, New Jersey does not allow for pay differentials based on geographic location.

HOW LONG ARE YOU EXPOSED TO LIABILITY?

The statute of limitations on pay equity claims varies by jurisdiction:

- ▶ California: 2 years from the date of the violation (each paycheck counts as a violation); 3 years if willful
- ▶ Massachusetts: 3 years (each paycheck counts as a violation)
- ▶ Maryland: 3 years after the employee receives wages paid upon termination of employment
- ▶ New Jersey: 6 years (each paycheck counts as a violation)
- ▶ New York: 6 years
- ▶ Pennsylvania: 2 years

WHAT DAMAGES DO YOU FACE?

In California, Maryland, Massachusetts, Pennsylvania, New York and New Jersey, potential damages include wages and interest, liquidated damages and attorneys' fees. In New York, an employee can recover up to 300 percent of wages due based on a willful violation.

CAN I ASK ABOUT AN EMPLOYEE'S PRIOR SALARY?

While starting salaries are often an integral part of pay decisions, jurisdictions across the country are passing laws prohibiting employers from inquiring about or relying on an applicant's prior salary history when setting an employee's pay. These "salary history ban" laws are directed at reducing wage gaps. Jurisdictions with some form of salary history ban include, but are not limited to:

- ▶ California
- ▶ Connecticut
- ▶ Delaware
- ▶ Hawaii
- ▶ Massachusetts
- ▶ New Jersey (public employers)
- ▶ New York (public employers)
- ▶ Oregon
- ▶ Puerto Rico
- ▶ Vermont
- ▶ San Francisco, California
- ▶ Albany, New York
- ▶ New York City, New York
- ▶ Philadelphia, Pennsylvania*
- ▶ Westchester, New York
- ▶ Chicago, Illinois (public employers)
- ▶ Louisville, Kentucky (public employers)
- ▶ New Orleans, Louisiana (public employers)
- ▶ Pittsburgh, Pennsylvania (public employers)

**On April 30, 2018, the U.S. District Court for the Eastern District of Pennsylvania found some, but not all, of Philadelphia's wage equity ordinance unconstitutional.*

Employers should document differences in skills, experience and performance as the reason for pay differences. Employers should consider banning questions about salary history on job applications. Even though certain jurisdictions do not expressly prohibit such an inquiry, the impact of asking may create substantial risks under pay equity and other laws. Furthermore, it is unclear if salary history may be a justification for a wage difference under many jurisdictions' pay equity laws. To limit potential risks, employers should also consider adopting a formal policy regarding the process for determining starting salaries and should train managers and human resource professionals involved in the hiring process on traps for the unwary, given the pay equity movement afoot.

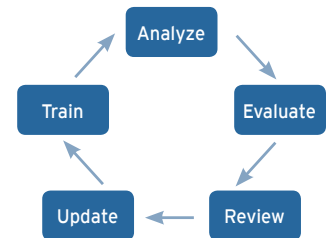


CAN EMPLOYEES CHAT ABOUT COMPENSATION?

Many jurisdictions' pay equity laws, including, amongst others, Connecticut, Massachusetts, New York, New Jersey and Washington state, prohibit employers from taking reprisals against any employee for discussing with, or disclosing to, any other employee or former employee of the employer, information about compensation. Remember, nonsupervisory employees are also afforded protection for such discussions under the National Labor Relations Act. Thus, employers should consider removing any language prohibiting such practices from any personnel handbooks or policies.

WHAT ARE YOUR NEXT STEPS?

- ▶ **Analyze pay:** Conduct privileged pay audits with the aid of counsel to identify existing pay disparities based on protected categories in your jurisdiction.
- ▶ **Evaluate factors:** Evaluate permitted factors that explain pay differences and formulate strategies for compliance.
- ▶ **Review:** Review organizational policies and practices affecting compensation.
- ▶ **Update pay and policies:** Correct disparities; modify policies including, but not limited to, employee handbooks, retaliation policies and record retention policies.
- ▶ **Train:** Train human resource professionals, managers and supervisors regarding best practices during the hiring process and when making compensation decisions, and educate them on the pay transparency provisions of the equal pay laws that govern your operations.



FOR MORE INFORMATION, PLEASE CONTACT:

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Due to the slight, but often significant, variations in each state's law, employers should consult with legal counsel when conducting compensation analyses and determining any necessary remediation. Duane Morris LLP has years of experience assisting employers in interpreting pay equity laws, conducting pay analyses and conducting trainings for human resources personnel and managers. Duane Morris attorneys focus on compliance and risk management—identifying vulnerabilities and matching employers with practical solutions. Duane Morris takes a practical approach to pay audits and aims to make compliance easier for employers. Employers with employees in the affected states should consider conducting privileged pay audits with the aid of counsel to ensure compliance with the governing pay equity laws, thereby decreasing the potential for pay equity claims and/or preparing to defend such claims should litigation ensue. We offer practical solutions that are cost-effective and designed to promote greater confidence in management and instill a sense of fairness in the workplace.

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