Legal Update Article

Oregon Publishes Final Rule Implementing its Expansive Equal Pay Act, Effective January 1, 2019

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A majority of the provisions of Oregon's Equal Pay Act will go into effect on January 1, 2019. The Act's ban on salary history inquiries went into effect in October 2017. Beginning 2019, the Bureau of Labor and Industries (BOLI) will enforce the Act, including the inquiry ban, and employees and applicants may file claims with BOLI. However, employees and applicants may not pursue private actions against employers for alleged violations of the Act until January 1, 2024.

BOLI has published a final rule (guiding regulations) to implement the Act. While the Final Rule clarifies and provides guidance regarding key provisions of the Act, as discussed below, it omits any references to the topic of most interest to Oregon employers: the pay equity analysis safe harbor provision.

Employers with Oregon operations should review their application forms and pay practices with the BOLI guidance in mind. Employers also should consult legal counsel to determine their specific organizational needs, as well as to determine the proactive, privileged pay analysis likely to comply with the safe harbor provision. Jackson Lewis attorneys are available to discuss these matters, including providing assistance on conducting a pay equity analysis contemplated by the new law.

Key Provisions and Guidance

Expanded Protected Classes: Oregon law prohibits pay discrimination on the basis of race, color, religion, sex, sexual orientation, national origin, marital status, veteran status, disability, and age.

- *Final Rule:* No helpful clarification or guidance.

"Compensation": The Act defines "compensation" as wages, salary, bonuses, benefits, fringe benefits, and equity-based compensation, but it does not define any of these terms.

- *Final Rule:* "Compensation" excludes tips and incurred expense reimbursements, such as relocation, mileage, and other out-of-pocket expenses.

  In addition, the Final Rule defines the operative terms, including: benefits, bonus, equity-based compensation, fringe benefits, and salary. For example, bonuses include a broad variety of payments, such as signing, attendance, retention, and longevity bonuses, as well as performance and productivity bonuses. These definitions make it evident the Act intends to encompass many different sources of employee income.

  Benefits must be included in the measure of compensation, including for pay equity analyses, but an employer may offer different benefits to employees performing comparable work if, of course, the same options are offered to all workers performing comparable work. More important, the Final Rule provides that "[t]he

cost of a bona fide benefit offered by an employer, but declined by an employee, may be considered as part of the total amount of compensation paid to the employee." Thus, employers are not held liable in pay equity analyses when some employees do not select valuable benefit options that other employees select.

Work of Comparable Character: This is defined by the Act as requiring "substantially similar knowledge, skill, effort, responsibility, and working conditions in the performance of work, regardless of job description or job title." No single factor is determinative.

- *Final Rule:* Numerous examples of these terms are provided. For example, "skill considerations" may include, but are not limited to, ability, agility, coordination, creativity, efficiency, experience, or precision. These examples may help employers better define the necessary and desired skills for a job, as well as more precisely distinguish pay for differently skilled new hires and employees.

Allowable Pay Differences: Defensible pay differences may be based on the following factors, provided they are *bona fide* and related to the job in question: a seniority or merit system, quality or quantity of work, work location, travel requirements, education, training, experience, or a combination of these factors that accounts for the entire differential.

- *Final Rule:* Defines each of these terms. A defensible merit system must be based on job-related performance criteria that "measures employee performance using a set numerical or other established rating scale, such as from 'unsatisfactory' to 'exceeds expectations,' and takes employees' ratings into account in determining employee pay rates." Moreover, merit and seniority "systems" must be well defined. A qualifying 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." In other words, informal, *ad hoc* pay method systems will not suffice.

  Work location as a pay factor may include such considerations as cost of living, "desirability of worksite location," access to worksite location, minimum wage zones, and wage and hour zones. The inclusion of "desirability of worksite location" as an independent addition to the "cost of living" factor is interesting. Presumably, an employer may justifiably pay more to an employee assigned to an undesirable location than one performing comparable work at a more desirable location, despite the fact that the cost of living at the undesirable location may be lower.

  Experience may include "any relevant experience that may be applied to the particular job." The guidance does not require the experience to be strictly job-related, only relevant. That may mean that desired experience not directly job-related may be sufficient as a distinguishing pay factor.

  Of course, the Act does not allow employers to reduce employee pay to achieve compliance. However, the Final Rule helpfully clarifies that "[r]ed circling, freezing or otherwise holding an employee's compensation constant as other employees come into alignment are not considered reductions in the compensation level for the employee whose compensation is being held constant."

Salary History: The Act prohibits employers from screening applicants, or pegging starting pay for new hires, based on salary history. Likewise, employers may not "seek" an applicant's salary history, either from the applicant or from other employers. While

employers may not confirm salary history *before* making an offer of employment, even if the applicant voluntarily discloses the information, an employer may confirm prior compensation *after* the employer makes an employment offer that includes compensation, as long as the employee provides authorization.

- *Final Rule:* The term "screening" means "using information, however obtained, about a job applicant's current or past compensation to determine a job applicant's suitability or eligibility for employment." In other words, employers may not reject a job seeker because his or her current salary is higher than that of another job seeker.

  Where a job seeker or other third party discloses his or her current salary without employer solicitation, the employer would not violate the Act if it does not consider the job seeker's current pay in making any employment or pay determination.

Pay Equity Analyses – Limited Safe Harbor: The law broadly defines "equal-pay analysis" as "an evaluation process to assess and correct wage disparities among employees who perform work of comparable character." To meet the safe harbor requirements, an employer, in good faith, must complete a reasonable pay analysis within three years prior to any lawsuit. The employer also must show reasonable efforts based on the analysis to eliminate any indefensible wage disparities for the protected class asserted by the plaintiff.

There is a catch, however. Unlike the Massachusetts Equal Pay Act, conducting a proactive pay analysis does not offer a complete defense to any pay equity claim. Rather, the Oregon Act only permits employers to file a motion to disallow compensatory or punitive damages in any case, including class actions, brought under the new law. The employer still would be responsible for up to two years' back pay and attorneys' fees.

- *Final Rule:* No additional guidance regarding the safe harbor pay equity analysis and does not even mention the safe harbor.

Employee Notices: Employers must provide employees notice of the Act's requirements. Oregon BOLI will provide a poster that employers must display for employees in each of its locations.

- *Final Rule:* "If displaying the poster is not feasible," alternatives to satisfy the notice requirement include: distributing the written notice to each employee personally by regular mail or email, or by including it with a paycheck; incorporating the written notice into a handbook or manual made available to employees, whether in a print or electronic format; or posting "the written notice in a conspicuous and accessible location in each workplace of the employer or via electronic format that is reasonably conspicuous and accessible."

Please contact a Jackson Lewis attorney with any questions about this or other workplace developments.

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