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Pay equity coming to Rhode Island

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After years of sponsoring different versions of the law, earlier this month, Governor McKee signed into law a bill that amends the Wage Discrimination Based on Sex Act and is geared towards ensuring pay equity. With the Law's passage, Rhode Island joins a number of other states that already have some version of a pay equity law on the books. So, what do Rhode Island employers need to know and do before the law's effective date on January 1, 2023?

The basics

Who and what is protected?

The law is meant to address wage discrimination based on any protected class, including race, religion, sex, sexual orientation, gender identity, disability, age, and country of origin, and works to ensure that all employees are paid fairly and equally. Like many other pay equity laws already in place in other states, Rhode Island's law prohibits requests for an applicant's wage history before an initial offer of employment (including an offer of compensation), prohibits the use of salary history in setting a candidate's pay, requires transparency around salary ranges, and protects employees who discuss their pay—all in an effort to achieve pay equity. Unlike the pay-equity laws in many other states, which focus solely on gender equity, Rhode Island's Law seeks to achieve parity across all protected classes.

Defining "comparable work"

With some exceptions, employers must pay their employees the same pay for comparable work. Rhode Island's definition of "comparable work" is similar to neighboring Massachusetts' definition in its pay-equity law—"work that requires substantially similar skill, effort, and responsibility, and is performed under similar working conditions." Importantly, minor differences do not prevent two jobs from being considered comparable. Whether two jobs are comparable may be one of the most critical, yet difficult, questions for employers to answer as they forge ahead to comply with the law. If two positions are comparable, employers are prohibited from reducing the pay of the higher-earning employee to achieve compliance; rather, employers must raise the pay of the comparable lower-earning employee to reach equity.

Permitted pay differentials

The Law does provide that, in limited circumstances, employers can maintain a pay differential among employees performing the same work. Specifically, pay differences can be lawful where there is a system in place such as a seniority system, a merit system, or a system that measures earnings by quantity or quality of production. Geographic location also is a permissible reason for a different pay rate, provided that Rhode Island is considered one geographic region for purposes of cost of living. Reasonable shift differentials can be paid to employees that amount in a wage differential, and education, training, experience, and work-related travel also may be used to justify pay differences. The law also provides that employers can pay employees differently based on a bona fide factor that is job-related with respect to the position in question, is consistent with business necessity, and does not otherwise run afoul of the law. Because there are a number of factors to consider, determining whether there is unequal treatment across different classes of employees will require a fact-intensive analysis and should be documented.

Employer self-evaluations/wage audits

The law protects employers who proactively conduct a wage audit (called a "self-evaluation" in the law) in an effort to identify and correct any unlawful pay practices. While employers may use their own template, the law provides that the Department of Labor and Training will issue an approved form for employers to complete a self-evaluation. Assuming an employer engages in a compliant self-evaluation *and eliminates any unlawful pay differentials*, the employer will be entitled to an affirmative defense. Until June 30, 2026, this affirmative defense will apply to all liability under the law. After that date, the affirmative defense merely eliminates the possibility of liquidated damages, compensatory damages, or civil penalties; however, the employer may still be liable for unpaid wages.

What should employers do now?

Although employers have some time before the law goes into effect, businesses should start thinking about conducting a self-evaluation now. While employers will not be penalized for *not* conducting a self-evaluation under the law, it is a good idea for employers to review their pay practices and ensure they are paying their employees fairly across the board—not least because the law creates the added incentive of avoiding some or all liability by doing so. (The law allows individuals to file complaints either with the Department of Labor and Training or in court). Any self- evaluation should involve a review of job descriptions and employee classifications to ensure those reflect equitable practices. If the self-evaluation shows pay inequities or inequities in positions or classifications, employers will have time over the next year and a half to rectify those inequities and comply with the law when it becomes effective in January 2023.

In addition to potentially changing pay practices, employers also may need to change their hiring practices to be in line with the new law. Specifically, employers should review job postings, job applications, interview materials, handbooks, and policies that touch on any of these issues. Employers should train employees involved in interviewing and hiring so they understand what questions related to wages and wage history they can and cannot ask going forward.

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