Be Proactive

Pay Equity Initiatives at the State and Local Level

By Jill S. Stricklin

State and local pay equity laws have gained steam in recent years. Adjusting practices now makes good sense for employers.

In addition to federal laws concerning pay equity, several state and local governments have recently enacted legislation designed to address pay differentials based on gender, race, and other protected factors. Although some of these laws essentially mirror the federal Equal Pay Act, certain critical distinctions exist. For example, several of the state and local laws expand pay equity protections to provide additional protections for applicants and employees and otherwise make it easier for them to establish claims of pay discrimination in comparison to the federal act. Some state and local laws also contain restrictions that bar employers from obtaining or using an applicant's salary history, and some contain notice, posting, and disclosure requirements designed to increase transparency regarding compensation and opportunities for promotion. Finally, some state and local laws actually offer possible relief for employers by providing a "safe harbor" defense for those that conduct pay equity audits and implement measures to eliminate pay disparities.

State and local pay equity legislation varies considerably by jurisdiction. Given the rapid and ongoing implementation of new laws and guidance, the legislation will require close study and monitoring. Some of the most critical distinguishing features of these state and local initiatives are summarized below, along with practice pointers to help employers ensure compliance.

Key Distinguishing Features of State and Local Pay Equity Laws

Among the most crucial features of the state and local pay equity laws that make them distinct from the federal act are that they may broaden legal standards; expressly limit the legitimate, permissible justifications for pay decisions; provide a "safe harbor" defense, based on pay equity self-audits; ban salary history acquisition or use; or require promotion and pay practices transparency.

Broadened Definitions: Equal Pay for "Comparable" Work

Unlike the federal Equal Pay Act, which prohibits sex-based discrimination between men and women who perform

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jobs at the same establishment that require substantially equal skill, effort, and responsibility, some state and local governments have enacted laws prohibiting pay disparities among employees performing "comparable" or "substantially similar" work. These broadened legal standards make it easier for employees to pursue claims of unequal pay under state and local laws in comparison with the requirements under the federal act.

The Massachusetts Equal Pay Act, for instance, requires employers to pay men and women equally for "comparable work." Mass. Gen. Law. ch. 149, §105A(a). In connection with legislative amendments imposing more stringent equal pay requirements, which took effect on July 1, 2018, the Massachusetts Attorney General issued guidance in March 2018 defining "comparable work" as work that "requires substantially similar skill, effort, and responsibility, and is performed under similar working conditions." *An Act to Establish Pay Equity: Overview and Frequently Asked Questions*. The guidance explicitly states, "'Comparable work' is broader and more inclusive than the 'equal work' standard of the federal Equal Pay Act." *Id*. Similar to Massachusetts, several other states have enacted pay equity statutes employing broadened "comparable work," "substantially similar work," or "similarly employed" standards.

Permissible and Impermissible Justifications for Pay Disparities

Unlike the Equal Pay Act, which contains a "catch-all" provision allowing employers to justify a pay differential based on a nondiscriminatory "factor other than sex," some state and local pay equity laws expressly limit the factors that an employer may cite as a legitimate explanation for its pay decisions.

For instance, the guidance interpreting the Massachusetts pay equity statute, referenced above, makes clear that the enumerated factors (a seniority system; a merit system; a system that measures earnings by quantity or quality of production, sales, or revenue; geographic location; job-related education, training or experience; and regular travel necessitated by a particular job) must, either individually or combined, justify the entire pay differential. The guidance further states that the following will *not* justify a gender-based pay gap: wage or salary history, changes in the labor market, and the lack of discriminatory intent.

Similarly, Colorado's recently enacted Equal Pay for Equal Work Act, which was signed into law on May 22, 2019, and becomes effective on January 1, 2021, specifies the limited ways in which employers may justify a wage gap. The new Colorado statute permits employers to justify a pay disparity by demonstrating that the differential is based on one or more of the same job-related factors listed above in connection with the Massachusetts law, and by further showing that any factors relied on were applied reasonably, that these factors account for the entire wage disparity, and that prior wage-rate history was not used to justify the pay disparity. S.B. 19-085 (Colo. 2019); Colo. Rev. Stat. Ann. §8-5-102(1)(a)–(d).

"Safe Harbor" Defense Based on Pay Equity Audits

A few states do provide an incentive for employers to conduct self-evaluations of their pay practices proactively by making available a "safe harbor" defense in litigation involving claims of pay discrimination. The Massachusetts Equal Pay Act, for example, provides a defense to its pay equity provisions for an employer that "has both completed a self-evaluation of its pay practices in good faith and can demonstrate that reasonable progress has been made towards eliminating wage differentials based on gender for comparable work, if any." Mass. Gen. Law. ch. 149, §105A(d). To assert the defense, an employer must have conducted the self-evaluation within the three-year period before the litigation commenced, and moreover, it must have been done before the lawsuit commenced. *Id*.

The guidance issued by the Massachusetts Attorney General states that an employer's eligibility for the affirmative defense turns on whether the self-evaluation "was conducted in good faith and was reasonable in detail and scope," not whether a court ultimately agrees with the employer's analysis of whether jobs are comparable or whether pay differentials are justified under the law. Mass. Att'y Gen., *An Act to Establish Pay Equity: Overview and Frequently Asked Questions* (2018). Attached to the Massachusetts guidance is an Appendix that contains a helpful, basic guide for employers to use in undertaking these required self-evaluations. The guidance stresses, however, that the "complexity of the analysis required will vary significantly depending on the size, make-up, and resources of each employer." *Id*.

The Oregon Equal Pay Act, which took effect on January 1, 2019, provides a defense against compensatory and punitive damages in civil actions for employers that can demonstrate that they conducted a proactive equal pay analysis within three years before the lawsuit was filed, eliminated the wage differentials for the plaintiff, and made reasonable and substantial progress toward eliminating wage differentials for the plaintiff's protected class. Or. Rev. Stat. §652.235. *See also* Bureau of Labor & Industries, *Technical Assistance for Employers: Oregon Equal Pay Law*. Colorado's newly enacted equal pay law, which will become

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effective on January 1, 2021, will also enable employers to establish a "good-faith" defense to liquidated damages by performing a comprehensive pay audit in the two years before the filing of the lawsuit with the specific goal of identifying and rectifying pay disparities. S.B. 19-085 (Colo. 2019); Colo. Rev. Stat. Ann. §8-5-104(1)(b).

These laws are seemingly intended to ensure that compensation decisions are based on job-related criteria and to prevent historical pay disparities from perpetuating.

Salary History Bans

Several states and local governments have enacted salary history prohibitions (also known as wage history or pay history laws) that restrict an employer from obtaining or using an applicant's salary history information for certain purposes during the pre-employment process or when setting compensation. These laws are seemingly intended to ensure that compensation decisions are based on job-related criteria and to prevent historical pay disparities from perpetuating.

Specific provisions vary considerably by jurisdiction, but salary history bans generally prohibit employers from getting or using wage history information (which in most cases is defined to include benefits data) to screen applicants, make hiring decisions, establish the compensation level for a particular new hire or position, or justify a pay differential. Most of these salary history bans prohibit employers from soliciting pay history data from the applicant or another source, such as a current or previous employer. Some jurisdictions, such as Hawaii and New York City, restrict employers from searching for, or using, publicly available information concerning compensation paid to others with the same job title as the applicant at the applicant's current or past employers. *See* Haw. Rev. Stat. §378-2.4(d); New York City Comm'n on Human Rights, *Salary History Law: Frequently Asked Questions,* at II (what employers can and cannot do to learn about applicants' salary expectations). Finally, some of these laws also bar employers from retaliating against an applicant for refusing to disclose wage history information.

The state and local pay history bans also generally preclude employers from making prohibited salary history inquiries indirectly through the use of recruiters or other third parties who are engaged during the pre-employment process. Delaware's salary history statute contains a unique "safe harbor" provision stating that an employer may avoid liability for an agent's violations of the salary history ban components of the law by showing that (1) the agent was not an employee, and (2) the employer informed the agent of the requirements of the law's salary history requirements and instructed the agent to comply with them. Del. Code Ann. tit. 19, §709B(c).

It is important to note that despite the ban on the use of an applicant's specific salary history under these state and local laws, not all discussions about salary or compensation are prohibited. Employers are generally permitted to notify applicants of the salary range for the job, ask about and negotiate compensation expectations, and inquire about objective productivity measures applicable to a particular job (such as sales volume and related objectives, revenue, and books of business). Moreover, salary history legislation typically applies only to applicants, and not to current employees. Consequently, employers in most jurisdictions may use salary history information when making selection and compensation decisions about internal transfers and promotions.

Most state and local pay history bans do contain limited exceptions, such as permitting employers to rely on (for at least some purposes), or confirm, an applicant's voluntary disclosure of salary history information; to request salary history information after the employer has made (and the applicant, in some cases, has accepted) an offer that includes compensation terms; or to comply with applicable law. Again, the specific provisions of each state and local salary history legislation, including any exceptions, vary widely, so it is important to review the relevant laws and regulations in your jurisdiction closely.

Aside from these state and local developments, whether employers may rely on salary history data to justify wage differentials as a "factor other than sex" under the federal Equal Pay Act remains an open question. In February 2019, the US Supreme Court vacated the Ninth Circuit Court of Appeals' decision in *Yovino v. Rizo*, holding that salary history was not a "factor other than sex" to justify a pay disparity under the federal statute. Because Judge Stephen Reinhardt, who voted on the en banc decision and wrote the majority opinion, died before the Ninth Circuit issued its ruling, the Supreme Court vacated the decision without examining it on its merits and remanded it to the Ninth Circuit for further proceedings. *Yovino v. Rizo*, ___ U.S. ___, 139 S. Ct. 706, 203 L.Ed.2d 38 (2019).

Transparency in Promotion and Pay Practices

Some state and local pay equity laws also contain provisions designed to enhance the transparency of employers' compensation and promotion systems. Colorado's Equal Pay for Equal Work Act, for example, will require employers to (1) disclose in each job posting the compensation and benefits offered for the position, and (2) make reasonable efforts to announce promotional opportunities to all current employees on the same calendar day and before making a promotion decision. S.B. 19-085 (Colo. 2019); Colo. Rev. Stat. Ann. §8-5-201(1)–(2). California employers must provide the pay scale for the job on the applicant's reasonable request, defined as a request made after an applicant has completed an initial interview with the employer. Cal. Lab. Code §432.3(c). Employers in Colorado and Massachusetts are generally restricted from prohibiting employees from discussing their own wages or their coworkers' wages, and with certain exceptions, employers are restricted from disclosing wage information to any person or entity. *See* S.B. 19-085 (Colo. 2019); Colo. Rev.

Stat. Ann. §8-5-102(2)(e)–(f); Mass. Att'y Gen., *supra*. The Oregon Equal Pay Act requires employers to post notice of the statute's requirements "in every establishment where employees work." Or. Rev. Stat. §652.220(7).

Practice Pointers

You will want to take several concrete steps, described below, to make sure that your client complies with state and local pay equity law.

Determine Which State and Local Pay Equity Laws Apply

Analyze all aspects of your client's business operations and determine which state and local laws apply. Consider not only the locations to which employees are regularly assigned, but also the jobsites where they frequently work (including home offices and other remote working arrangements) and sites where recruitment, selection, and hiring activities take place. Review the pertinent pay equity and salary history laws and determine the jurisdictional reach of each potentially applicable law.

Review All Aspects of Existing and Prospective Laws

Determine which activities each law prohibits, the conduct expressly permitted, and the topics on which a particular law might be silent. Note the legal standard that applies, as well as any exceptions or exemptions, posting or disclosure requirements, and any "safe harbors" or affirmative defenses that might be available. Remember, pay equity and wage gap laws differ considerably from jurisdiction to jurisdiction, and some contain unique provisions that warrant special attention.

Devise Overall Strategy and Approach

Devise an overall strategy for structuring hiring and compensation practices and complying with pay equity and salary history laws. Although this is particularly critical for employers with multistate operations, even employers operating in only a single jurisdiction should consider their pay equity and compliance goals and determine how to address any concerns in this rapidly developing area proactively.

Consider Various Alternatives for Addressing Jurisdictional Differences

Options for employers operating in multiple jurisdictions include the following: (1) complying with state and local requirements only to the extent required by specific laws, even if this means implementing separate hiring and compensation protocols for use in different jurisdictions; (2) implementing a uniform pay equity policy and salary history ban, compliant with the most restrictive of the applicable laws, for use in all jurisdictions that presently have a salary history ban in place; or (3) using a single, fully compliant policy throughout the employer's operations, even in jurisdictions that currently do not have a salary history ban in place.

Audit Existing Policies and Practices

Identify all policies and processes relating to recruitment, selection and hiring, transfers and promotions, compensation levels, and pay increases. In unionized settings, this should include collective bargaining agreements. As part of this process, identify all personnel who are involved, including both internal staff and third parties. Flag any documents and practices that might incorporate or give rise to salary history inquiries or disclosures. This should include digital processes, including internal and external online platforms and the algorithms for any artificial intelligence (AI) screenings that an employer might use to screen applicants.

Review Existing Documents

Review all policies and procedures, guidelines, employment applications, reference check and interview forms, screening questionnaires, selection matrixes, and other materials used during the recruitment, selection, and hiring processes. Identify any revisions that might be necessary to remove any direct or indirect requests for salary history information and to incorporate all required notices and disclosures, using jurisdiction-specific riders if necessary.

Develop Pay Equity and Salary History Policies

Devise policies for distribution to all internal personnel (*i.e.*, recruitment personnel, human resources professionals, hiring managers) involved in the hiring, selection, recruitment, and compensation-setting processes. Consider what other existing policies (such as those pertaining to nondiscrimination and equal employment opportunity, compensation, promotions and job transfers, performance reviews, and merit increases) should be modified to incorporate pay equity objectives.

Create New Pre-Employment, Transfer, and Promotion Protocols

Determine what new procedures might be needed to ensure compliance with applicable pay equity-related laws and policies during pre-employment, transfer, and promotion processes. Establish guidelines for online searches concerning applicant information that might inadvertently reveal restricted salary history information. Develop a protocol for use when an applicant voluntarily discloses wage history data or when such information is inadvertently obtained during the pre-employment process.

Consider Modifying Compensation-Setting Practices

Review all processes related to the establishment of compensation and pay levels for categories of positions as well as individual applicants and employees, including protocols for pay increases and salary negotiations. Consider establishing the salary or pay scale for a position before beginning the recruitment, selection, or hiring processes.

Address Third-Party Compliance

Create a separate pay equity and salary history policy for use with any third parties involved in the recruitment, selection, and hiring processes. This should include, for example, outside recruiters and headhunters, staffing agencies, and background or reference check companies that the employer uses. Review vendor contracts and identify any modifications that might be needed to incorporate salary history restrictions. Consider including indemnification provisions related to a third party's violation of wage history laws.

Conduct Necessary Training

Train all personnel involved in the pre-employment processes and compensation-

related decisions on pay equity and salary history laws and regulations and related protocols. Provide specific guidance on which compensation-related discussions are permissible and impermissible during pre-employment processes and how to address voluntary disclosure or inadvertent discovery of an applicant's salary information.

Make Required Postings and Disclosures

Be sure to comply with any applicable posting, notice, and disclosure requirements under the governing state and local laws. This should include any requisite compensation-related disclosures during the pre-employment processes. Be mindful of any external job posting or advertising activities, as well as internal postings and communications. Remember that these transparency-related mandates are highly jurisdiction specific.

Consider Conducting Pay Equity Self-Evaluations

Determine whether to conduct pay equity audits to monitor compliance with pay equity provisions and correct any unjustified disparities that might be identified. Consider the appropriate intervals for such audits, factoring in the employer's overall objectives as well as the time periods specified in any applicable "safe harbor" provisions contained in governing state and local laws and regulations.

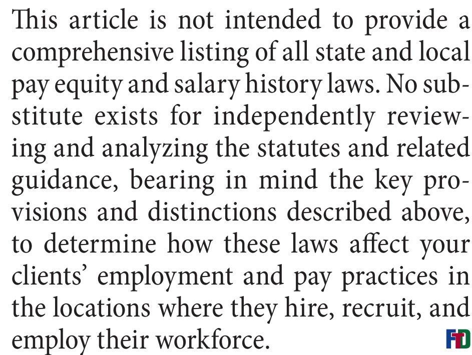
Monitor on an Ongoing Basis

Regularly review pre-employment and compensation processes to monitor ongoing compliance with salary history prohibitions and related requirements. Stay attuned to legislative developments and be sure to make any necessary adjustments based on your findings.

Be Mindful of Privilege Issues

When conducting compensation audits or other pay equity self-assessments and related processes, whether for purposes of ensuring compliance or availing a client employer of a "safe harbor" defense (or both), carefully consider whether the self-assessment should be privileged, and if so, consider how best to accomplish that objective.

Conclusion



This article is not intended to provide a comprehensive listing of all state and local pay equity and salary history laws. No substitute exists for independently reviewing and analyzing the statutes and related guidance, bearing in mind the key provisions and distinctions described above, to determine how these laws affect your clients' employment and pay practices in the locations where they hire, recruit, and employ their workforce. FD