

Minding the Pay Gap: What Employers Need to Know as Pay Equity Protections Widen



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I. Introduction

The pay gap – or paying women and other historically marginalized groups less for the same or substantially similar work – has increasingly been in the media spotlight. Politicians have also taken note. While there have been pay discrimination laws on the books at the federal level and in most states for decades, over the past several years, state and local governments and Puerto Rico have passed numerous new laws all aimed at closing the pay gap. Since 2016, more than 200 bills addressing pay equity were introduced in nearly every state. At the time of publication, 13 states have enacted “second wave” pay equity laws; 24 states and municipalities – along with Puerto Rico – have enacted salary history inquiry bans; and 19 states have enacted wage transparency provisions. In addition, employers with 100 or more employees that are subject to Title VII and certain government contractors are now required to report compensation data to the Equal Employment Opportunity Commission (EEOC) annually.¹

While the federal Equal Pay Act prohibits employers from paying employees less for equal work because of gender, these second wave pay equity laws revise this standard – prohibiting unequal pay for “comparable” work as opposed to “equal” work. The newly enacted salary history inquiry bans restrict employers’ ability to inquire into the salary history of applicants. Finally, wage transparency measures prohibit employers from banning pay disclosure in the workplace or from retaliating against employees who discuss their wages. Employers must comply with federal law and this growing patchwork of state and local laws.

The plaintiffs’ bar also has gotten in on the action. Since 2016, over 250 pay equity cases have been filed in the United States. High profile pay equity cases are in the news frequently – the proposed class and collective action filed in California federal court by all 28 members of the U.S. Women’s soccer team is just one example. Law firms and technology companies also have been targets. Indeed, to a large extent, the cases target professional services organizations and professional positions: lawyers, engineers, professors, scientists, managers and doctors. In addition to an equal pay claim, these lawsuits frequently include claims of discrimination, sexual harassment or wrongful termination. These lawsuits have been filed in state and federal courts across the nation as both single plaintiff cases and class or collective actions.

This white paper provides a discussion of the nuts and bolts of the various existing pay equity laws, including:

- the elements a plaintiff must establish to prove a claim;
- the defenses available to employers;
- the damages available; and
- the procedural mechanisms that allow for these cases to be brought as class or collective actions – increasing the exposure for employers.

We also provide practical advice to help employers avoid pay inequities. Finally, we provide recommendations on how employers can seek to remediate pay inequities identified through a self-audit or otherwise.

II. The Nuts and Bolts of Pay Equity

A. Federal Law

While there has been significant attention to the expanding state and local pay equity laws and their attendant compliance challenges for and potential lawsuits against employers, state equal pay claims are frequently brought with an accompanying federal equal pay claim.

¹ See Jim Paretti, David Goldstein, and Lance Gibbons, [Court Orders EEOC to Collect Compensation Data by September 30, 2019](#) Littler ASAP (Apr. 25, 2019).

1. The Federal Equal Pay Act

The Equal Pay Act, 29 U.S.C. § 206(d), has been in effect since 1963. It prohibits wage discrimination on the basis of sex. Specifically, an employer cannot discriminate between employees within the same “establishment” on the basis of sex by “paying wages to employees at a rate less than the rate at which the employer pays wages to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.”²

a. Elements of a Claim

An employee asserting an EPA claim has the burden of establishing a *prima facie* case of an equal pay violation. To do this, the employee must show: (1) the employer pays different wages to employees of a different sex at the same establishment and (2) the employees perform substantially equal work (3) under substantially equal working conditions.³

An “establishment” is defined as a “distinct physical place of business instead of a business enterprise. Only in unusual circumstances may two or more distinct physical portions of a business enterprise be treated as a single establishment. Such treatment may be appropriate where a central administrative unit hires all employees, sets wages, and assigns the location of employment.”⁴

An employee does not have to show that the job of their higher paid comparator is identical in every respect, only that they are substantially equal.⁵ However, “jobs that are merely alike or comparable are not ‘substantially equal’ for purposes of the EPA.”⁶ Job titles or classifications are not determinative in establishing whether the work is substantially equal. Instead, the actual job duties of the plaintiff and the plaintiff’s comparators are examined to determine whether the work is substantially equal.⁷ Job differences that are not significant in amount or degree

² 29 U.S.C. § 206 (d)(1).

³ 29 U.S.C. 206(d); *Corning Glass Works v. Brennan*, 417 U.S. 185, 195 (1974); *Price v. Northern States Power Co.*, 664 F.3d 1186, 1191 (8th Cir. 2011). In cases where whether the plaintiff and the plaintiff’s comparators work in the same “establishment” is not an issue, courts sometimes articulate the elements for a *prima facie* case differently. See *EEOC v. Maryland Ins. Admin.*, 879 F.3d 114, 120 (4th Cir. 2018) (“A plaintiff establishes a *prima facie* case of discrimination under the EPA by demonstrating that (1) the defendant-employer paid different wages to an employee of the opposite sex (2) for equal work on jobs requiring equal skill, effort, and responsibility, which jobs (3) all are performed under similar working conditions.”); *Lauderdale v. Ill. Dep’t of Human Servs.*, 876 F.3d 904, 907 (7th Cir. 2017) (“To establish a *prima facie* cause of action under the Act, an employee must demonstrate a difference in pay for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.”) (internal quotations and citations omitted); *Riser v. QEP Energy*, 776 F.3d 1191, 1196 (10th Cir. 2015) (“To establish a *prima facie* case of pay discrimination under the Equal Pay Act, a plaintiff must demonstrate that: (1) she was performing work which was substantially equal to that of the male employees considering the skills, duties, supervision, effort and responsibilities of the jobs; (2) the conditions where the work was performed were basically the same; (3) the male employees were paid more under such circumstances.”); *Steger v. General Elec. Co.*, 318 F.3d 1066, 1077-78 (11th Cir. 2003) (“An employee demonstrates a *prima facie* case of an Equal Pay Act violation by showing that the employer paid employees of opposite genders different wages for equal work for jobs which require equal skill, effort, and responsibility, and which are performed under similar working conditions.”) (internal citations and quotations omitted).

⁴ *Price*, 664 F.3d at 1194 (internal citations and quotations omitted).

⁵ *Corning Glass Works*, 417 U.S. at 203 n.24; *Gumbs v. Del. DOL*, Case No. 17-2977, 2018 U.S. App. LEXIS 23810 (3rd Cir. Aug. 23, 2018) (“To determine whether two jobs are equal for purposes of the EPA, the crucial finding . . . is whether the jobs to be compared have a common core of tasks, i.e., whether a significant portion of the two jobs is identical. The inquiry then turns to whether the differing or additional tasks make the work substantially different. Equal means substantially equal and any other interpretation would destroy the remedial purposes of the EPA.”) (internal quotations and citations omitted).

⁶ *Riser*, 776 F.3d at 1196.

⁷ *Santiago v. United States*, 107 Fed. Cl. 154, 161 (2012); *Riser*, 776 F.3d at 1196 (“Work is ‘substantially equal’ for purposes of the EPA if it requires ‘equal skill, effort, and responsibility.’ This determination turns on the actual content of the job – not mere job descriptions or title.”) (internal citations omitted).

will not support a wage differential. Moreover, “differences in skill, effort or responsibility do not support a finding that two jobs are not equal under the EPA where the greater skill, effort, or responsibility is required of the lower paid sex.”⁸ As the Fourth Circuit recently explained:

Equality under the Act is a demanding threshold requirement. It requires a comparator to have performed work ‘virtually identical’ (or the apparent synonym, ‘substantially equal’) to the plaintiff’s in skill, effort, and responsibility. *Wheatley v. Wicomico Cty.*, 390 F.3d 328, 332–33 (4th Cir. 2004). Similarity of work is not enough; the Act explicitly distinguishes between the work itself (which must be ‘equal’) and the conditions of work (which need only be ‘similar’). 29 U.S.C. § 206(d)(1). The Act does not provide courts with a way of evaluating whether distinct work might have ‘comparable’ value to the work the plaintiff performed. See *Wheatley*, 390 F.3d at 333; see also *Simms-Fingers v. City of Indianapolis*, 493 F.3d 768, 771 (7th Cir. 2007) (Posner, J.) (explaining that, when trying to identify ‘comparable’ pay for unequal work, “there are ‘no good answers that are within the competence of judges to give.”) Instead, the Act’s inference of discrimination may arise only when the comparator’s work is equal to the plaintiff’s.⁹

A plaintiff in an EPA claim can meet the burden of establishing a *prima facie* case by pointing to a single comparator of a different gender who performs substantially equal work under substantially equal working conditions who is paid more.¹⁰ Similarly, an EPA plaintiff establishes a *prima facie* case where they point to a predecessor or successor of the opposite sex who is paid more.¹¹ Claims under the EPA may be brought by both women and men.¹²

b. Defenses

If the plaintiff establishes a *prima facie* case, the burden shifts to the employer to prove a gender-neutral factor explains the discrepancy.¹³ The EPA provides four affirmative defenses an employer may use to show the pay difference is not discriminatory: (1) seniority; (2) merit; (3) quantity or quality of production; or (4) a differential based on any factor other than sex.¹⁴

Unlike a plaintiff pursuing a claim under Title VII, a plaintiff bringing a cause of action under the EPA does not have the burden of proving intentional discrimination.¹⁵ Moreover, “a defendant cannot escape liability merely by articulating a legitimate non-discriminatory reason for the employment action...[it] must prove the pay differential was based on a factor other than sex.”¹⁶

⁸ *Riser*, 776 F.3d at 1196–97.

⁹ *Spencer v. Virginia State Univ.*, Case No. 17-2453, 2019 U.S. App. LEXIS 7887, at *4–8 (4th Cir. Mar. 18, 2019) (affirming grant of summary judgment in favor of employer on the basis that plaintiff did not perform equal work to her two selected comparators, who were also full professors at the same university on the basis that “professors are not interchangeable like widgets,” where plaintiff taught classes in a different university department and taught undergraduates as opposed to graduate students).

¹⁰ See *Maryland Ins. Admin.*, 879 F.3d at 122 (“An EPA plaintiff is not required to demonstrate that males, as a class, are paid higher wages than females, as a class, but only that there is discrimination in pay against an employee with respect to one employee of the opposite sex.”); *Riser*, 776 F.3d 1196 (reversing grant of summary judgment in favor of employer and explaining that there was a fact question as to whether plaintiff’s work was substantially equal to the work of a higher paid male comparator).

¹¹ *Ackerson v. Rector and Visitors of the Univ. of Va.*, Case No. 3:17-cv-00011, 2018 U.S. Dist. LEXIS 107786, at *19 n.3 (W.D. Va. June 27, 2018).

¹² *Maryland Ins. Admin.*, 879 F.3d at 120, n.5 (“The EPA is written in gender-neutral terms so that it is available to remedy discriminatory actions against both men and women.”).

¹³ *Lauderdale*, 876 F.3d at 907; *Riser*, 776 F.3d at 1198 (explaining that for an employer to meet its burden with respect to these affirmative defenses, “an employer must submit evidence from which a reasonable factfinder *could* conclude not merely that the employer’s proffered reasons *could* explain the wage disparity, but that the proffered reasons *do in fact* explain the wage disparity”) (citations omitted; emphasis in the original).

¹⁴ *Lauderdale*, 876 F.3d at 907; *Riser*, 776 F.3d at 1198.

¹⁵ See *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 640 (2007); *Spencer*, 2019 U.S. App. LEXIS 7887, at *12; *Maryland Ins. Admin.*, 879 F.3d at 120 (collecting cases).

¹⁶ *Price*, 664 F.3d at 1191 (quoting *Taylor v. White*, 321 F.3d 710, 716 (8th Cir. 2003)); *Maryland Ins. Admin.*, 879 F.3d at 120 (“An EPA plaintiff need not prove that the employer acted with discriminatory intent to obtain a remedy under the statute.”); *Eng v. City of New York*, Case No. 17-1308, 2017 U.S. App. LEXIS 22858, at *3 (2nd Cir. Nov. 14, 2017).

The employer's burden in proving an affirmative defense under the EPA is described by some courts as a "heavy one."¹⁷

The federal case law is not uniform with respect to the scope of the "any factor other than sex" affirmative defense. As will be discussed below, many states have passed their own pay equity laws and either have eliminated entirely, or severely restricted, the scope of this defense. In addition, many states have expressly prohibited employers from using prior salary to justify pay differentials.

The Second Circuit has imposed a requirement that the employer prove "a *bona fide* business-related reason exists for using the gender-neutral factors that results in a wage differential in order to establish the factor-other-than-sex defense."¹⁸ The Sixth Circuit also has adopted a "legitimate business reason" requirement for the "factor-other-than-sex" defense.¹⁹ Consequently, these courts, along with the Tenth and Eleventh Circuits, have held that employers may not rely on salary history alone to support a wage disparity.²⁰ As the Eleventh Circuit has explained, "[t]he question is whether other business reasons reasonably explain the utilization of prior salary."²¹

Courts recognize that permitting an employer to rely on prior salary history has the potential to perpetuate gender discrimination in wages. The Seventh and Eighth Circuit Courts of Appeals have refused to adopt a *per se* rule that would exclude past salary or salary retention as a "factor other than sex."²² Instead of adopting a *per se* rule, the Eighth Circuit explained that courts:

need to carefully examine the record in cases where prior salary or salary retention policies are asserted as defenses to claims of unequal pay. In particular, it is important to ensure that employers do not rely on the prohibited "market force theory" to justify lower wages for female employees simply because the market might bear such wages. In addition, it is important to ensure that reliance on past salary is not simply a means to perpetuate historically lower wages.²³

Similarly, while holding employers may rely on prior wages to explain a pay disparity, the Seventh Circuit cautioned: "basing pay on prior wages could be discriminatory if sex discrimination led to the lower prior wages."²⁴

¹⁷ See *Maryland Ins. Admin.*, 879 F.3d at 120; *Perkins v. Rock-Tenn Servs., Inc.*, 700 Fed. Appx. 452, 2017 U.S. App. LEXIS 11772 (6th Cir. June 30, 2017); *Jamilik v. Yale Univ.*, 362 Fed. Appx. 148, 150, 2009 U.S. App. LEXIS 22144 (2nd Cir. Oct. 8, 2009).

¹⁸ *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 526 (2d Cir. 1992).

¹⁹ *EEOC v. J.C. Penney Co.*, 843 F.2d 249, 253 (6th Cir. 1988).

²⁰ See *Riser*, 776 F.3d at 1198; *Glenn v. General Motors Corp.*, 841 F.2d 1567, 1571 (11th Cir. 1988); *Irby v. Bittick*, 44 F.3d 949 (11th Cir. 1995); *Angove v. Williams Sonoma*, Case No. 02-5079, 70 F. App'x 500 (10th Cir. July 8, 2003) ("Consideration of a new employee's prior salary is not forbidden under section 206(d)(iv). The EPA only precludes an employer from relying solely upon a prior salary to justify a pay disparity. However, where an employer sets a new employee's salary based upon that employee's previous salary and the qualifications and experience the new employee brings, the defendant has successfully invoked the Act's affirmative defense.") (internal citations omitted).

²¹ *Irby*, 44 F.3d at 955 (internal quotation and citation omitted) (affirming summary judgment in favor of employer on the basis that pay differential was justified based on prior pay and more experience.)

²² *Taylor*, 321 F.3d at 718-19; *Covington v. Southern Ill. Univ.*, 816 F.2d 317, 322-23 (7th Cir. 1987).

²³ *Taylor*, 321 F.3d at 718 (internal citations omitted).

²⁴ *Lauderdale*, 876 F.3d at 909.

In 2018, the Ninth Circuit, sitting *en banc*, overruled its prior precedent and held an employer may not rely on prior salary to set initial wages. Specifically, in *Rizo v. Yovino*, the court held that under the EPA, prior salary, either alone or in combination with other factors, cannot be used to justify a wage differential between male and female employees.²⁵ As the court explained:

“any other factor other than sex” is limited to legitimate, job-related factors such as a prospective employee’s experience, educational background, ability, or prior job performance. It is inconceivable that Congress, in an Act the primary purpose of which was to eliminate long-standing “endemic” sex based wage disparities, would create an exception for basing new hires’ salaries on those very disparities – disparities that Congress declared are not only related to sex but caused by sex. To accept the [employer’s] argument would be to perpetuate rather than eliminate the pervasive discrimination at which the Act was aimed.²⁶

Rizo was vacated and remanded by the U.S. Supreme Court,²⁷ however, because the opinion was issued 11 days after the death of the Honorable Stephen Reinhardt, who authored it. The Supreme Court held that “federal judges are appointed for life, not eternity;” setting aside Judge Reinhardt’s vote, the five remaining votes approving the opinion were not enough to constitute a majority of the *en banc* panel. In issuing its ruling, the Supreme Court did not opine on the substance of the Ninth Circuit’s holding in *Rizo* with respect to the EPA’s any-factor-other-than-sex defense. Employers within the Ninth Circuit must wait and see as to whether the Ninth Circuit will issue an opinion on remand that is consistent with Judge Reinhardt’s ruling in *Rizo*. However, five Ninth Circuit judges who concurred in the Ninth Circuit’s judgment in *Rizo* explained in concurrences that they would permit, to some differing extent, the use of prior salaries as part of this defense.

The decisions construing the EPA also are inconsistent with respect to whether having a pay disparity as the result of differences in salary negotiations constitutes a factor-other-than-sex under the statute.²⁸

The statute of limitations for an EPA claim is generally two years.²⁹ The statute of limitations may be increased to three years if the violation is willful.³⁰ Regardless of the limitations period, a court can consider evidence from before the statute of limitations period when assessing the employee’s claim.³¹

c. Damages

The potential damages for a violation of the EPA include the amount of wages the employee was underpaid, liquidated damages equal to 100% of the underpaid wages, and reasonable attorneys’ fees and costs.³² A court may decline to award liquidated damages if the employer shows its actions were in good faith and it had reasonable grounds for believing its actions did

25 *Rizo v. Yovino*, 887 F.3d 453, 456 (9th Cir. 2018) (vacated by, remanded by *Yovino v. Rizo*, 139 S. Ct. 706 (2019)).

26 *Id.* at 460.

27 *Yovino v. Rizo*, 139 S. Ct. 706 (2019).

28 *Compare Grigsby v. AKAL Sec., Inc.*, Case No. 5:17-cv-06048, 2018 U.S. Dist. LEXIS 104219 (W.D. Mo. June 21, 2018) (granting summary judgment in favor of employer and explaining that negotiations leading to a comparator’s higher salary, or a demand for a specific salary, may establish a factor-other-than-sex defense to an EPA claim), with *Duncan v. Texas HHS Comm’n*, Cause No. AU-17-CA-00023, 2018 U.S. Dist. LEXIS 64279, at *11 n.3 (W.D. Tex. Apr. 17, 2018) (denying employer’s motion for summary judgment and noting that “it is an open question whether negotiation even qualifies as a ‘factor other than sex’”).

29 29 U.S.C. § 255(a).

30 *Id.*

31 *Price*, 664 F.3d at 1191.

32 29 U.S.C. § 216(b).

not violate the EPA.³³ An individual can pursue a claim on their own behalf and on behalf of an opt-in collective of similarly situated individuals. In addition, Congress charged the EEOC with enforcing the EPA. However, an individual does not have to first file a Charge of Discrimination with the EEOC prior to bringing a lawsuit against the employer.

2. Title VII of the Civil Rights Act of 1964

Under Title VII, an employer cannot “discriminate against any individual with respect to [their] compensation . . . because of such individual’s race, color, religion, sex, or national origin.”³⁴

a. Elements and Burden of Proof

The burden of proof on a plaintiff bringing a Title VII claim for a pay disparity is different than the burden of proof on a plaintiff bringing an EPA claim.³⁵ Unlike in an EPA claim, in a Title VII case, the plaintiff maintains the burden of proof. As a result, liability under the EPA may not always prove a Title VII violation.³⁶

A plaintiff bringing a Title VII claim must establish intentional discrimination by using direct or circumstantial evidence of intentional discrimination. In the alternative, a Title VII plaintiff may use the *McDonnell Douglas* burden-shifting framework to develop an inferential case of discriminatory intent.³⁷

In order to establish a *prima facie* pay-disparity case under the *McDonnell Douglas* burden-shifting framework, the plaintiff must show they are paid less than a member of the opposite gender in similar jobs.³⁸ Under Title VII, the jobs only have to be “similar” instead of “equal.” There is no bright-line rule, but courts typically look at “whether the employees (i) held the same job description, (ii) were subject to the same standards, (iii) were subordinate to the same supervisor, and (iv) had comparable experience, education, and other qualifications – provided the employer considered these latter factors in making the personnel decision.”³⁹ Although the “similarity” requirement under Title VII is less demanding than the “equality” requirement under the EPA, it is not toothless. Instead, the plaintiff bears the burden of proving they and any appropriate comparator(s) are not only similarly situated in *some* respects, but rather, “similarly-situated *in all respects*.”⁴⁰ The Seventh Circuit has explained that while the comparators do not need to be identical in “every conceivable way,” the court “must conduct a common-sense examination.”⁴¹

If the plaintiff establishes a *prima facie* case, the burden of production shifts to the employer to proffer a legitimate, nondiscriminatory explanation for the wage disparity.⁴² In contrast with the

33 29 U.S.C. § 260.

34 42 U.S.C. § 2000e-2(a)(1).

35 *Lauderdale*, 876 F.3d at 907.

36 *Lauderdale*, 876 F.3d at 910; *Angove*, 700 F. App’x at 505 (“As noted, an EPA violation does not establish Title VII liability as Title VII still requires evidence of intentional discrimination.”) (emphasis in original); *but see Martinez v. Davis Polk & Wardwell, LLP*, Case No. 16-3476-cv, 2017 U.S. App. LEXIS 23444 (2d Cir. Nov. 21, 2017) (explaining that a claim for unequal pay for equal work under Title VII is generally analyzed under the same standards used in an EPA claim).

37 *Anupama Bekkem v. Wilkie*, 915 F.3d 1258, 1267 (10th Cir. 2019); *Spencer*, 2019 U.S. App. LEXIS 7887, at *12-13.

38 *Sprague v. Thorn Ams., Inc.*, 129 F.3d 1355, 1363 (10th Cir. 1997); *see also Spencer*, 2019 U.S. App. LEXIS 7887, at *13; *Mengistu v. Miss. Valley State Univ.*, 716 F. App’x 331, 333-34 (5th Cir. 2018) (explaining that “[i]n order to make out a prima facie case of pay discrimination under § 1981 or Title VII, a plaintiff must show (1) that he was a member of a protected class; (2) that he was paid less than a non-member; and (3) that his circumstances are nearly identical to those of the better-paid non-member”) (internal citations and quotations omitted).

39 *Spencer*, 2019 U.S. App. LEXIS 7887, at *13 (internal quotation omitted); *Mitchell v. Mills*, 895 F.3d 365, 370-71 (5th Cir. 2018); *Lauderdale*, 876 F.3d at 910.

40 *Spencer*, 2019 U.S. App. LEXIS 7887, at *14 (quoting *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583 (6th Cir. 1992)).

41 *Johnson v. Advocate Health & Hosps. Corp.*, 892 F.3d 887, 895 (7th Cir. 2018); *see also Ackerson*, 2018 U.S. Dist. LEXIS 107786, at *25 (explaining that if a plaintiff satisfies her burden of showing that jobs are “substantially equal” under the EPA, she has also satisfied Title VII’s burden of showing that the jobs are similar).

42 *Spencer*, 2019 U.S. App. LEXIS 7887, at *14-15.

EPA, the employer's burden at this stage has been called "exceedingly light."⁴³ The employer is not required to prove its non-gender-based reasons for the pay disparity, but merely must proffer them.⁴⁴ Title VII also incorporates the defenses available under the EPA.⁴⁵

If the employer meets this burden of production, then the burden shifts back to the plaintiff to prove the defendant's proffered explanation is merely pretext for intentional discrimination.⁴⁶ An employee can prove pretext by showing the employer's proffered reason was "(1) factually baseless; (2) not the employer's actual motivation; (3) insufficient to motivate the action; or (4) otherwise pretextual."⁴⁷ As the Fifth Circuit has explained, the plaintiff is required to "put forward substantial evidence to rebut each of the nondiscriminatory reasons the employer articulates. The plaintiff may do so by showing a discriminatory motive is more likely than a nondiscriminatory one, or that her employer's explanation is unworthy of credence."⁴⁸

In order to pursue a claim for unequal pay under Title VII, an employee must file a charge of discrimination with the EEOC within 180 or 300 days of the discriminatory pay practice.⁴⁹ The Lilly Ledbetter Fair Pay Act extends the statute of limitations on these claims by providing that "a discriminatory compensation decision . . . occurs each time compensation is paid pursuant to the [discriminatory decision]."⁵⁰

b. Damages

Damages available under Title VII include lost wages, front pay, compensatory damages, punitive damages, and reasonable attorneys' fees. Compensatory and punitive damages are capped on a sliding scale ranging from \$50,000 to \$300,000 depending on the size of the employer.

B. State Equal Pay Laws

Every state except Mississippi has some type of equal pay law. Most of these state pay discrimination laws have been on the books for decades. However, since January 1, 2016, a number of states have either enacted or significantly amended their equal pay statutes. This section discusses these "second wave" pay equity laws. State legislatures have employed several different approaches to narrow the pay gap, including:

- Expanding the scope of positions that can be considered in comparing pay, both functionally (moving from equal work to work that is substantially similar or comparable) and geographically (moving from comparing employees at the same establishment to comparing employees in the same county, city, or state);

43 *Anupama Bekkem*, 915 F.3d at 1268; see also *Maryland Ins. Admin.*, 879 F.3d at 120 n.7 (comparing the burdens between EPA and Title VII claims and explaining: "In contrast, in a Title VII case, the employer need only proffer a legitimate, non-discriminatory reason for the challenged action, and is not required to establish that the cited reason *in fact* motivated the employer's decision.") (emphasis in original).

44 *Sprague*, 129 F.3d at 1363.

45 42 U.S.C. § 2000e-2(h) ("It shall not be an unlawful employment practice under this title [42 USC §§ 2000e et seq.] for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d))").

46 *Spencer*, 2019 U.S. App. LEXIS 7887, at *14-15.

47 *Lauderdale*, 876 F.3d at 910 (internal quotation and citation omitted).

48 *Mengistu*, 716 F. App'x at 34.

49 42 U.S.C. § 2000e-5(e)(1).

50 42 U.S.C. § 2000e-5(e)(3). The Ledbetter Act was enacted in 2009 and retroactively effective to May 28, 2007. It overturned the United States Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618 (2007), in which the Supreme Court rejected the EEOC's rule that every paycheck issued was a separate act of discrimination and thereby tightened the timeframe for employees to bring pay discrimination claims. As a result of the Ledbetter Act, the date that each new discriminatory paycheck is issued restarts the statute of limitations for filing a pay discrimination claim. The Ledbetter Act also broadened the type of occurrences that constitute an unlawful employment action. Under the Ledbetter Act, an unlawful employment practice occurs when: (1) a discriminatory compensation or other practice is adopted; (2) an individual becomes subject to the discriminatory pay decision or practice; or (3) an individual is affected by application of the discriminatory decision or practice, including each time discriminatory compensation is paid.

- Narrowing the scope of the “any-factor-other-than-sex” defense to require the factor be job-related and consistent with business necessity, be applied reasonably and account for the entire difference, and disallow the defense if: (i) the plaintiff demonstrates an alternative employment practice exists that would serve the same business purpose without producing the wage differential and (ii) the employer refused to adopt such alternative practices;
- Prohibiting the use of prior salary to justify pay disparities;
- Prohibiting or limiting the ability of an employer to inquire into the salary history of job applicants;
- Imposing new requirements on employers to increase wage transparency; and
- Providing safe harbors for employers that conduct pay equity audits.

Protected Classes of Employees

Virtually all of the second wave state statutes prohibit wage discrimination on the basis of sex or gender. Under some state laws, such as Massachusetts and Washington, sex or gender are the only protected categories.⁵¹

However, some states have included additional protected categories. For example, Maryland’s Equal Pay for Equal Work statute prohibits discrimination based on sex or gender identity.⁵² The California Fair Pay Act prohibits wage discrimination on the basis of sex, race or ethnicity.⁵³ Alabama’s newly enacted statute prohibits wage discrimination based on sex or race.⁵⁴ New Jersey’s statute goes even further and protects the following categories: 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, or military service.⁵⁵ Oregon protects race, color, religion, sex, sexual orientation, national origin, marital status, veteran status, disability or age.⁵⁶ New York just amended its statute to protect the following categories: age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, or domestic victim status.⁵⁷

The Functional Scope of Positions That Can Be Compared

Many of the second wave pay equity statutes have broadened the scope of positions that are deemed comparable for purposes of establishing a violation. While under the federal EPA, the comparators must perform “substantially equal work,” under the California Fair Pay Act the comparators must perform only “substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions.”⁵⁸

Similarly, under the New Jersey statute, employees are entitled to equal pay (including benefits) for “substantially similar work,” which is “viewed as a composite of skill, effort and responsibility.”⁵⁹

Alabama likewise requires equal wage rates for “substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions.”⁶⁰

Massachusetts mandates equal pay for “comparable work,” which is work requiring “substantially similar skill, effort and responsibility” that is “performed under similar working conditions” without regard to job titles

51 Wash. Rev. Code § 49.58.020(1); Mass. Gen. Laws ch. 149, § 105A.

52 Md. Code Ann., Lab. & Empl. § 3-304(b)

53 Cal. Lab. Code § 1197.5(a)-(b).

54 Clarke-Figures Equal Pay Act, 2019 Ala. Reg. Sess., Act No. 2019-519 (H.B. 225) (2019) (effective Sept. 1, 2019) [hereinafter *Clarke-Figures Equal Pay Act*].

55 N.J. Stat. Ann. § 10:5-12(t).

56 Or. Rev. Stat. § 652.210 (5).

57 29 C.F.R. § 1620.14.

58 Cal. Lab. Code § 1197.5(a)-(b).

59 N.J. Stat. Ann. § 10:5-12(t).

60 Clarke-Figures Equal Pay Act § 1(a).

or job descriptions.⁶¹ Minor differences in skill, effort, or responsibility will not prevent two jobs from being considered “comparable.”⁶² A job is “substantially similar” with respect to the factor being considered if the factors “are alike to a great or significant extent, but are not necessarily identically or alike in all respects.”⁶³

Like Massachusetts, the Oregon Equal Pay Act applies to “work of comparable character.”⁶⁴

Maryland’s Equal Pay for Equal Work statute requires that the work be of comparable character or work on the same operation, in the same business or of the same type.⁶⁵

Under the New York Equal Pay Act, pay equity is required for “equal work on a job the performance of which requires equal skill, effort and responsibility, and which is performed under similar working conditions.” Similarly, Washington’s Equal Pay Opportunity Act defines individuals as “similarly employed” if the individuals: (1) work for the same employer; (2) the performance of the job requires similar skill, effort, and responsibility; and (3) the jobs are performed under similar working conditions.⁶⁶

As under federal law, under state pay equity laws, job titles alone are not determinative as to whether positions or employees are comparable.⁶⁷

Geographic Limitations on Comparators

Under the federal EPA the plaintiff must prove the comparator works in the same “establishment,” which is typically a “distinct physical place of business.” Several second wave state pay equity laws have expanded the geographic scope of who can be considered comparators. For example, under the California law, comparators can be state-wide.⁶⁸ In Maryland, “establishment” includes an employer’s workplaces within the same county in Maryland. The New Jersey statute expressly provides that the comparison “shall be based on wage rates in *all* of an employer’s operations or facilities” and not just limited to the location of the employee at issue.⁶⁹ Under the New York law, employees are deemed to work in the same “establishment” if they work “for the same employer at workplaces located in the same geographic region, no larger than a county, taking into account population distribution, economic activity and/or the presence of municipalities.”⁷⁰

What Is Included in Compensation?

Several state statutes expressly define what types of compensation are included for equal pay purposes. For example, the New Jersey statute specifies that benefits are included.⁷¹ The Oregon statute provides that compensation includes wages, salary, bonuses, benefits, fringe benefits and equity-based compensation.⁷² The Washington statute defines compensation to include both discretionary and nondiscretionary wages and benefits.⁷³

Permitted Bases for Wage Differentials

Many of the second wave statutes have narrowed the permitted bases for wage differentials as compared with federal law. While most of the second wave statutes incorporate the EPA’s affirmative defenses of permitting

61 Mass. Gen. Laws ch. 149, § 105A(a).

62 Mass. Office of the Att’y Gen., *An Act to Establish Pay Equity: Overview and Frequently Asked Questions*, at 5 (Mar. 1, 2018), available here (last accessed July 29, 2019).

63 *Id.*

64 Or. Rev. Stat. §§ 652.220; 652.235.

65 Md. Code Ann., Lab. & Empl. § 3-304(b).

66 Wash. Rev. Code § 49.58.020 (2).

67 Wash. Rev. Code § 49.58.020 (2); Mass. Gen. Laws ch. 149, § 105A(a); Or. Rev. Stat. §§ 652.210 (12).

68 See Cal. Lab. Code § 1197.5.

69 N.J. Stat. Ann. § 10:5-12(t) (emphasis added).

70 N.Y. Lab. Law § 194

71 N.J. Stat. Ann. § 10:5-12(t).

72 Or. Rev. Stat. §§ 652.210 (1).

73 Wash. Rev. Code § 49.58.010 (1).

wage differentials based on seniority, merit, or the quantity or quality of production, certain states have restricted or eliminated the “any factor other than [protected category]” defense.

For example, in California this defense has been narrowed to “a *bona fide* factor other than [protected category x], such as education, training or experience.”⁷⁴ For an employer to be able to rely upon “a *bona fide* factor other than [protected category],” the employer must demonstrate the factor “is not based on or derived from a sex-based [or race-based or ethnicity-based] differential in compensation, is job related with respect to the position in question, and is consistent with business necessity.”⁷⁵ “Business necessity” is “an overriding legitimate business purpose such that the factor relied upon effectively fulfills the business purpose it is supposed to serve.”⁷⁶ Importantly, an employer may not rely on the *bona fide* factor other than sex defense if the employee “demonstrates that an alternative business practice exists that would serve the same business purpose without producing the wage differential.”⁷⁷

New Jersey similarly incorporates the *bona fide* factor defense. To rely on the legitimate *bona fide* factor exception under New Jersey law, the employer must establish all of the following elements:

1. the factors at issue are not characteristics of the protected class and do not perpetuate a differential that is based upon characteristics of the protected class;
2. each of the factors is applied reasonably;
3. one or more of the factors accounts for the *entire* wage differential; and
4. the factors are job-related with respect to the position in question and based on legitimate business necessity.

If the plaintiff demonstrates there is an alternative business practice that would serve the same business purpose without creating the pay disparity, then the legitimate business necessity prong is not satisfied.⁷⁸ The statute cites “training, education or experience” and “the quantity or quality of production” as examples of legitimate *bona fide* factors that may justify a pay disparity if the other requirements are established.⁷⁹

Likewise, New York’s Equal Pay Act includes a *bona fide* factor other than sex defense, and the statute identifies education, training or experience as examples.⁸⁰ To constitute a *bona fide* factor other than sex, the factor must not “be based upon or derived from a sex-based differential in compensation” and must be “job-related with respect to the position in question and shall be consistent with business necessity.”⁸¹ A factor is consistent with business necessity if the factor “bears a manifest relationship to the employment in question.”⁸² In addition, an employee can avoid application of this catch-all exception if the employee shows: (1) the employer uses an employment practice that causes a disparate impact on the basis of compensation; (2) an alternative employment practice exists that would serve the same business purpose and not produce the pay differential; and (3) the employer has refused to adopt the alternative practice.⁸³

Alabama also includes a *bona fide* factor other than sex or race defense and, like New York, identifies education, training or experience as examples. The Alabama statute tracks the New York statute with respect to this defense except that “business necessity” is defined as “an overriding legitimate business purpose such that the factor relied upon effectively fulfills the business purpose it is supposed to serve.” The employee

74 Cal. Lab. Code § 1197.5(a)-(b).

75 Cal. Lab. Code § 1197.5(a)-(b).

76 *Id.*

77 *Id.*

78 N.J. Stat. Ann. § 10:5-12(t).

79 N.J. Stat. Ann. § 10:5-12(t).

80 N.Y. Lab. Law § 194.

81 *Id.*

82 *Id.*

83 N.Y. Lab. Law § 194.

can avoid application of the catch-all exception if the employee “demonstrates that an alternative business practice exists that would serve the same business purpose without producing the wage differential.”⁸⁴ In addition, under the Alabama statute for any affirmative defense to apply, the factor(s) relied upon must be applied reasonably and must account for the entire wage differential.⁸⁵

Maryland also incorporates the *bona fide* factor other than sex defense, with statutory language that closely tracks California, namely the factor must not be based on or derived from a gender-based differential in compensation; must be job-related with respect to the position and consistent with a business necessity; and must account for the entire differential.⁸⁶ The Maryland statute does not incorporate the Alabama, California and New Jersey provisions that disallow the defense if the employee demonstrates an alternative practice that would have worked. Maryland’s law also provides that wage differentials are permissible for jobs that require different abilities or skills; that require regular performance of different duties or services; and where the work is performed on different shifts or at different times of day.⁸⁷

A pay differential under Washington’s Equal Pay Opportunity Act is lawful if it is based in good faith on a *bona fide* job-related factor or factors that: (i) are consistent with business necessity; (ii) are not based on or derived from a gender-based differential; and (iii) alone or in combination with other factors account for the *entire* differential.⁸⁸

The Washington statute provides a non-exhaustive list of *bona fide* factors: (i) education, training or experience; (ii) a seniority system; (iii) a merit system; (iv) quantity or quality of production; or (v) a *bona fide* regional difference in compensation levels.⁸⁹ The employer bears the burden of proof on these defenses.⁹⁰

Massachusetts does not incorporate the “any factor other than sex” defense. Instead, variation in wages for comparable work is permissible under the Massachusetts law **only** if the variation can be explained by one or more of six factors:

1. a seniority system;⁹¹
2. a merit system;
3. a system that measures earnings by quantity or quality of production, sales or revenue;
4. the geographic location;
5. education, training or experience to the extent such factors are reasonably related to the job in question; or
6. travel, if travel is a regular and necessary condition of the particular job.⁹²

Oregon’s Equal Pay Act, like Massachusetts’, does not include a catch-all defense. Instead, wage disparities are not unlawful *only* if all of the difference is based on a *bona fide* factor that is related to the position in question and is based on:

- vii. a seniority system;
- viii. a merit system;

84 *Clarke-Figures Equal Pay Act* § 1(a)(1)(d).

85 *Id.* § 1(a)(2)-(3).

86 Md. Code Ann., Lab. & Empl. § 3-304(c).

87 Md. Code Ann., Lab. & Empl. § 3-304(c).

88 Wash. Rev. Code § 49.58.010 (3).

89 *Id.*

90 *Id.*

91 Time spent on leave due to a pregnancy-related condition, and protected parental, family and medical leave, shall not reduce seniority. See Mass. Gen. Laws ch. 149, § 105A(b).

92 See Mass. Gen. Laws ch. 149, § 105A(b).

- ix. quantity or quality of production;
- x. workplace location;
- xi. travel, if travel is necessary and regular for the employee;
- xii. training;
- xiii. experience; or
- xiv. any combination of these factors as long as they account for the entire pay differential.⁹³

Burden of Proof

Similar to the federal EPA, under most second wave state laws, the burden of proof is initially on the plaintiff to demonstrate a pay disparity with a comparator outside of the protected class. The burden is then on the employer to prove that the pay differential is permissible under the state statute.⁹⁴ As with the federal EPA, an employee typically is not required to prove the employer intended to discriminate based on gender.⁹⁵

Prohibition Against Using Prior Salaries or Salary History to Justify Pay Differentials

Historically, employers have sought to determine a job candidate's current salary in order to consider it, along with other factors, in setting proposed starting compensation. This practice has come under fire because, even if the prospective employer does not have discriminatory intent, relying on a candidate's salary history in setting starting compensation in a new job may continue the cycle of pay inequity. As the late Ninth Circuit Judge Reinhardt explained in *Rizo*, to allow employers to rely on salary history to explain pay differentials, "would be to perpetuate rather than eliminate the pervasive discrimination at which the [Equal Pay] Act was aimed."⁹⁶

While the courts are split regarding whether prior salaries or salary history may lawfully justify a pay disparity under federal law, many of the second wave state laws disallow this justification.⁹⁷

There currently are 24 state and local jurisdictions that have enacted laws prohibiting employers from inquiring into or considering a job applicant's wage or salary history: Alabama;⁹⁸ California;⁹⁹ San Francisco, California;¹⁰⁰ Colorado;¹⁰¹ Connecticut;¹⁰² Delaware;¹⁰³ Hawaii;¹⁰⁴; Illinois;¹⁰⁵ Massachusetts;¹⁰⁶ Maine;¹⁰⁷ Kansas City, Missouri;¹⁰⁸ New Jersey;¹⁰⁹ New York;¹¹⁰ New York City, New York;¹¹¹ Albany County, New York;¹¹² Suffolk

93 Or. Rev. Stat. §§ 652.220 (2).

94 See, e.g., Cal. Lab. Code § 1197.5(a)-(b); *Clarke-Figures Equal Pay Act* § 1(a); N.J. Stat. Ann. § 10:5-12(t).

95 Mass. Office of the Att'y Gen., *An Act to Establish Pay Equity: Overview and Frequently Asked Questions*, at 12.

96 *Rizo*, 887 F.3d at 460.

97 Cal. Lab. Code § 1197.5(a)-(b); Mass. Gen. Laws ch. 149, § 105A(b); Or. Rev. Stat. §§ 652.220 (2).

98 *Clarke-Figures Equal Pay Act*.

99 Cal. Lab. Code § 432.3(a), (b), (i).

100 S.F., Cal. Police Code § 3300J.4(a), (b), (c), (f).

101 Colo. Rev. Stat. § 8-5-101 (effective Jan. 1, 2021).

102 Conn. Gen. Stat. § 31-40z(a)(5).

103 Del. Code Ann. tit. 19, § 709B.

104 Haw. Rev. Stat. § 378-2.4.

105 820 ILCS 112/10(b-5) - (b-20).

106 Mass. Gen. Laws ch. 149, § 105A(c)(2).

107 Me. Stat. tit. 5, § 4577 (effective Sept. 17, 2019).

108 Kansas City, Mo Code of Ordinances § 38-102 (effective Oct. 31, 2019).

109 Act of July 25, 2019, N.J. 218th Legis., Pub. L. No. 2019-199 (A.B. 1094) (2019) (effective Jan. 1, 2020).

110 N.Y. Lab. Law § 194-a (effective Jan. 6, 2020).

111 N.Y.C., N.Y. Admin. Code § 8-107(25); New York City Commission on Human Rights, [Employer Fact Sheet: Protections Against Inquiries Into Job Applicants' Salary History](#).

112 Albany County, N.Y. Local Law No. 1 for 2000 (Omnibus Human Rights Law for Albany County), as amended by Local Law No. P for 2016 § 7(1)(i).

County, New York;¹¹³ Westchester County, New York;¹¹⁴ Cincinnati, Ohio;¹¹⁵ Toledo, Ohio;¹¹⁶ Oregon;¹¹⁷ Puerto Rico;¹¹⁸ Philadelphia, Pennsylvania;¹¹⁹ Vermont;¹²⁰ and Washington.¹²¹

Typically, employers of all sizes are subject to the restrictions. The prohibition against asking about an applicant's salary history usually is not limited by these state and local laws to questions on a job application or in an interview. Obtaining this same information through other means also may violate these laws.

Some of these salary history restrictions incorporate an exception to the general prohibition against salary history inquiries for voluntary disclosures by an applicant of their salary history. States that incorporate some version of this exception into their salary history bans include California, Connecticut, Hawaii, Maine, Massachusetts, Oregon, and Vermont.

Moreover, California's law affirmatively requires an employer to provide the pay scale for a position to an applicant applying for employment upon the applicant's reasonable request. "Pay scale" means a salary or hourly wage range. "Reasonable request" means a request made after an applicant has completed an initial interview with the employer.¹²²

On the other hand, Wisconsin and Michigan have enacted preemption provisions to prevent local jurisdictions from passing laws banning salary history inquiries.

Prohibition Against Reducing the Wages of Other Employees to Comply

Several of the second wave state statutes expressly provide that if an employer discovers a wage disparity prohibited by the state equal pay law, the employer cannot reduce the wages of other employees to come into compliance. For example, under Massachusetts law, an employer cannot reduce the wages of any employee "solely in order to comply" with the statute.¹²³ New Jersey has a similar prohibition.¹²⁴ While the Oregon statute also contains this express prohibition,¹²⁵ the Oregon Bureau of Labor and Industries has clarified in its administrative order and rules implementing the statute that "red circling, freezing or otherwise holding an employee's compensation constant as other employees come into alignment are not considered reductions in compensation level for the employee whose compensation is being held constant."¹²⁶

Self-Audits as a Defense

Two states, Massachusetts and Oregon, provide a statutory "carrot" to employers that voluntarily conduct pay equity audits. The Massachusetts Equal Pay Act provides employers with an affirmative defense if the employer can show that, within the last three years, it (1) "completed a self-evaluation of its pay practices in good faith;" and (2) "can demonstrate that reasonable progress has been made towards eliminating wage differentials

113 Suffolk Cty., N.Y. Code of Ordinances § 528-7(13) (effective June 30, 2019).

114 Westchester Cty., N.Y. Code of Ordinances § 700.03(9) (will automatically sunset when New York's statewide law takes effect Jan. 6, 2020.)

115 Cincinnati, Ohio Mun. Code § 804-03 (effective Mar. 12, 2020).

116 Toledo, Ohio Mun. Code § 768.02 (effective July 4, 2020).

117 Or. Rev. Stat. §§ 652.220, 659A.357; Oregon Bureau of Labor & Industries, [Oregon Equal Pay Law](#) (Sept. 2017).

118 Puerto Rico Law No. 16 (Mar. 8, 2017) art. 4(a).

119 Phila., Pa. Code § 9-1131. The Philadelphia ordinance was partially enjoined by *Chamber of Commerce for Greater Philadelphia v. City of Philadelphia*, No. 2:17-cv-01548 (E.D. Pa. April 30, 2018) (motion for preliminary injunction granted in part), and a stay of the law's effective date remains in place "until further notice." (Docket No. 102, June 29, 2018).

120 Vt. Stat. Ann. tit. 21, § 495m(a).

121 Wash. Rev. Code § 49.58.010 (as amended by H.B. 1696, effective July 28, 2019).

122 Cal. Lab. Code § 432.3.

123 Mass. Gen. Laws ch. 149, § 105A(b).

124 N.J. Stat. Ann. § 10:5-12(t).

125 Or. Rev. Stat. §§ 652.220 (4).

126 Or. Admin. R. 839-008-0025.

based on gender for comparable work.¹²⁷ The self-audit must be reasonable in detail and scope in light of the employer's size. The Massachusetts Attorney General has issued basic guidelines for employers with respect to self-audits.¹²⁸

An employer alleged to have violated the Oregon Equal Pay Act may file a motion to disallow an award of compensatory and punitive damages, if it has conducted a self-audit satisfying certain criteria. In that event, the court *shall* grant the motion if the employer demonstrates, by a preponderance of the evidence, that the employer has: (1) completed, within three years of the date the lawsuit was filed, an equal pay analysis of the company's pay practices that was reasonable in detail and scope given the size of the employer and related to the protected class asserted by the plaintiff in the lawsuit; and (2) eliminated the wage differential for the plaintiff and made reasonable and substantial progress towards eliminating wage differentials for the protected class asserted by the plaintiff.¹²⁹

In addition, even outside of Oregon and Massachusetts, conducting a pay equity audit may shield an employer from a "willfulness" finding, which may decrease the exposure.

Wage Secrecy Prohibitions

Several states have adopted express statutory wage secrecy prohibitions. For example, in Massachusetts and Washington, employers may not prohibit employees from disclosing or discussing their wages.¹³⁰ Similarly, in New York and Alabama, employers cannot prohibit employees from inquiring about, discussing, or disclosing wages.¹³¹ However, even in states without such a statute, prohibiting employees from discussing their wages typically runs afoul of the federal National Labor Relations Act.

Anti-Retaliation Provisions

Five of the second wave state statutes include express anti-retaliation provisions: Alabama, California, Massachusetts, New York and Washington.¹³² The New York statute defines unlawful retaliation as any action, more than trivial, that would have the effect of dissuading a reasonable worker from engaging in conduct protected by the statute.¹³³ In California, employers may not discharge, discriminate or retaliate against an employee because the employee has invoked the statute or *assisted in any manner* with the enforcement of the statute.¹³⁴ Nonetheless, employees who engage in conduct protected by the pay equity statutes in states that do not include an express anti-retaliation provision are likely protected from retaliation by state whistleblower statutes and/or common law wrongful discharge causes of action.

Prohibitions on Providing Less Favorable Opportunities

In addition to requiring pay equity, two state statutes prohibit providing less favorable opportunities. The Maryland statute prohibits "providing less favorable employment opportunities" based on sex or gender identity.¹³⁵ Providing less favorable employment opportunities is defined to mean: (1) assigning or directing the employee to a less favorable position or less favorable career track; (2) failing to provide information about promotions or advancement in the full range of career tracks offered by the employer; or (3) limiting or depriving an employee of advancement opportunities that would be available but for the employee's sex or gender identity.¹³⁶

127 Mass. Gen. Laws ch. 149, § 105A(d).

128 Mass. Office of the Att'y Gen., *An Act to Establish Pay Equity: Overview and Frequently Asked Questions*.

129 Or. Rev. Stat. § 652.23(1).

130 Mass. Gen. Laws ch. 149, § 105A(c); Wash. Rev. Code § 49.58.040.

131 N.Y. Lab. Law § 194; *Clarke-Figures Equal Pay Act* § 1(e)(1).

132 *Clarke-Figures Equal Pay Act* § 1(e)(1); Cal. Lab. Code § 1197.5(k); Mass. Gen. Laws ch. 149, § 105A; N.Y. Lab. Law § 194; Wash. Rev. Code §§ 49.58.040, 49.58.050.

133 N.Y. Lab. Law § 194.

134 Cal. Lab. Code § 1197.5(k).

135 Md. Code Ann., Lab. & Empl. § 3-304(b).

136 *Id.*

The Washington law also prohibits employers from limiting or depriving an employee of “career advancement opportunities” based on gender.¹³⁷ The law does not define “career advancement opportunities.” In order for a complainant to be entitled to remedies for a career advancement violation, the employer must have “committed a pattern of violations . . . as to an employee or committed a violation . . . through application of a formal or informal employer policy or practice.”¹³⁸

No Exhaustion of Administrative Remedies

While many state statutes provide for administrative enforcement of their pay equity statutes, they also allow for the filing of civil actions by aggrieved employees without first filing a Charge of Discrimination.

For example, in California, the Division of Labor Standards Enforcement is charged with enforcement of the California Fair Pay Act. An aggrieved employee may file a complaint with the DLSE. The DLSE also is authorized to bring a civil action on behalf of the employee who filed the complaint and on behalf “of a similarly affected group of employees” to recover unpaid wages and liquidated damages and the costs of bringing suit.¹³⁹ Aggrieved employees also may file a civil action without first exhausting administrative remedies.¹⁴⁰

Similarly, the Massachusetts Equal Pay Act provides for both a private right of action and for enforcement by the Massachusetts attorney general. An employee is not required to file a charge of discrimination with the Massachusetts Commission Against Discrimination before bringing a civil action for violation of the Massachusetts Equal Pay Act.¹⁴¹

In Oregon, an aggrieved employee may file a complaint with the Commission of the Bureau of Labor and Industries. In addition, an aggrieved employee may file suit under either Oregon Revised Statutes § 652.230 or § 659A.885. There is no exhaustion requirement prior to filing a civil suit.

The Washington law provides for both a private right of action and enforcement by the Washington State Department of Labor & Industries. An employee is not required to file a complaint with the Department of Labor & Industries before filing a civil lawsuit.¹⁴²

Statute of Limitations

There is significant variation among the states in the applicable statute of limitations. In Alabama and Oregon, the statute of limitations is only one year.¹⁴³ In California, the statute of limitations is two years, but increases to three years if the plaintiff demonstrates the differential was willful.¹⁴⁴ Massachusetts, Maryland and Washington each have a three-year statute of limitations.¹⁴⁵ However, in Maryland, the statute of limitations is three years from the employee’s receipt of their final paycheck.¹⁴⁶ In Washington, while an employee must file suit within three years of the date of the alleged violation, recovery of any wages or interest owed “must be calculated from four years from the last violation prior to the date of filing the civil action.”¹⁴⁷ Under Washington law, a violation occurs when a discriminatory decision or practice is adopted and each time discriminatory compensation is paid.¹⁴⁸ New York and New Jersey both have *six-year* statutes of limitations.¹⁴⁹

137 Wash. Rev. Code § 49.58.030 (2).

138 Wash. Rev. Code § 49.58.030 (4).

139 Cal. Lab. Code § 1197.5(g).

140 Cal. Lab. Code § 1197.5(h).

141 Mass. Gen. Laws ch. 149, § 105A(b).

142 Wash. Rev. Code § 49.58.070.

143 *Clarke-Figures Equal Pay Act* § 1(e)(3); Or. Rev. Stat. §§ 652.230 (6).

144 Cal. Lab. Code § 1197.5(i).

145 Mass. Gen. Laws ch. 149, § 105A(b); Md. Code Ann., Lab. & Empl. § 3-307; Wash. Rev. Code § 49.58.070.

146 Md. Code Ann., Lab. & Empl. § 3-307.

147 Wash. Rev. Code § 49.58.070.

148 Wash. Rev. Code § 49.58.080.

149 N.J. Stat. Ann. § 10:5-12; N.Y. Lab. Law § 198.

Remedies

While all of the second wave state statutes permit the recovery of unpaid wages and most permit the recovery of attorneys' fees and costs, there are significant differences in the liquidated damages or penalties available. In addition, the length of the relevant statute of limitations can have a significant impact in the damage exposure for pay equity claims.

In Alabama, the damages available to an aggrieved employee include only the wages the employee was deprived by reason of the violation, interest, and an equal amount as liquidated damages.¹⁵⁰

In California, the damages available to an aggrieved employee include the wages the employee was deprived because of the violation, interest, and an equal amount of liquidated damages, as well as attorneys' fees and costs, interest, and civil penalties (including those potentially due under the California Private Attorneys General Act).¹⁵¹

In Maryland, the damages available to plaintiffs include: (1) the unpaid wages; (2) liquidated damages equal to 100% of the unpaid wages; (3) reasonable attorneys' fees and costs; and (4) prejudgment interest.¹⁵² Effective October 1, 2019, the Commissioner of Labor and Industry or a court *must* require an employer that is found to have violated the Act to pay a civil penalty equal to 10% of the amount of damages owed by the employer. The Commission or a court *may* order additional civil penalties. Civil penalties awarded are paid to the state's general fund.¹⁵³

The damages available to plaintiffs under Massachusetts law include: (1) the unpaid wages; (2) liquidated damages equal to 100% of the unpaid wages; and (3) reasonable attorneys' fees and costs.

The damages in New Jersey are especially significant as they include treble damages (three times the compensatory damages) and attorneys' fees.¹⁵⁴ When coupled with New Jersey's six-year statute of limitations, the treble damages provision has sharp teeth.

Like New Jersey, the New York penalties are noteworthy. The damages available to an employee who wins a claim brought under the New York Equal Pay Act include damages equal to the pay differential going back six years, liquidated damages equal to three times the pay differential, attorneys' fees, costs, and interest.¹⁵⁵

In Oregon, a plaintiff may proceed under two different statutes that have different available remedies. Remedies available to employees under Oregon Revised Statute § 652.230 include the unpaid wages to which the employee is entitled for the one-year period of time before the commencement of the lawsuit and an additional amount of liquidated damages.¹⁵⁶ Courts *shall* (as in "must") award reasonable attorneys' fees to a prevailing plaintiff. If the plaintiff had "no objectively reasonable basis for asserting the claim" then the court *may* award reasonable attorneys' fees and expert witness fees incurred by a defendant.¹⁵⁷

The remedies available to an employee under Oregon Revised Statutes § 659A.885 include: injunctive or equitable relief (including reinstatement), back pay for the two years immediately preceding the filing of the complaint, compensatory damages or \$200, whichever is greater, and punitive damages.¹⁵⁸ A court may award costs and reasonable attorneys' fees to the prevailing party.¹⁵⁹ To be entitled to punitive damages, the plaintiff

150 *Clarke-Figures Equal Pay Act* § 1(b).

151 Cal. Lab. Code § 1197.5(c).

152 Md. Code Ann., Lab. & Empl. § 3-307.

153 Act of May 25, 2019, Equal Pay Remedies and Enforcement Act, 2019 Md. Reg. Sess. (H.B. 790) (2019) (effective Oct. 1, 2019).

154 N.J. Stat. Ann. § 10:5-13.

155 N.Y. Lab. Law § 198.

156 Or. Rev. Stat. § 652.230 (1).

157 Or. Rev. Stat. § 652.220 (2).

158 Or. Rev. Stat. § 659A.885.

159 Or. Rev. Stat. § 659A.885 (1).

must prove “by clear and convincing evidence” that the employer “has engaged in fraud, acted with malice or active with willful and wanton misconduct” or the employer was adjudicated previously for a violation of the Oregon Equal Pay Act.¹⁶⁰

In Washington, a prevailing plaintiff may recover: actual damages, statutory damages equal to actual damages or \$5,000 (whichever is greater), interest of one percent per month on all compensation owed, and costs and reasonable attorneys’ fees.¹⁶¹ An employee must file suit within three years of the date of the alleged violation, but recovery of any wages or interest owed “must be calculated from four years from the last violation prior to the date of filing the civil action.”¹⁶² The court also may order reinstatement and injunctive relief.¹⁶³

C. Procedural Distinctions Between Representative Actions Brought Under Different Pay Equity Laws.

The financial exposure to employers from a pay equity claim increases dramatically if the claim is brought not only on behalf of a single aggrieved employee, but on behalf of a class or collective of similarly situated employees. In addition, the cost of defending the litigation rises significantly when a class or collective action is involved. Plaintiffs filing suit under the federal EPA may use the collective action procedures found in Section 216(b) of the Fair Labor Standards Act. Plaintiffs filing claims in federal court under Title VII or state pay equity laws may assert a class action under Rule 23 of the Federal Rules of Civil Procedure. Collective actions under § 216(b) differ from class actions under Rule 23 in some important ways.

First, in a Rule 23 class action, once a class is certified, a class member must affirmatively opt-out in order to avoid being part of the class. Under § 216(b), an individual must affirmatively opt-in to the proceeding. The opt-in requirement of § 216(b) collective actions is advantageous to employers because typically fewer class members participate if they are required to affirmatively join the lawsuit rather than, as under Rule 23, remaining part of a class merely by doing nothing.

Second, when an individual affirmatively opts-in to an EPA collective action, they become a party plaintiff. As a party plaintiff, the opt-in may be required by the court to participate in discovery, and the court may dismiss opt-in plaintiffs who fail to respond to discovery that has been ordered. The amount of discovery permitted of absent Rule 23 class members typically is more limited.

Another major distinction between EPA collective actions and Rule 23 class actions asserting Title VII or state law violations is the impact of the statute of limitations. A plaintiff suing to recover for an EPA violation may recover the wage differential for the two-year period prior to the date they file their lawsuit, or three years if the employer acted willfully. The filing of a collective action complaint does not toll the statute of limitations for anyone other than the individuals who file a consent to join along with the complaint. Instead, the statute of limitations is tolled only upon an opt-in plaintiff’s filing a written consent form, affirmatively joining the lawsuit. In a Rule 23 class action, on the other hand, the filing of the complaint halts the running of the statute of limitations for all individuals who ultimately are determined to be part of the class until the court decides whether to certify the case as a class action.

There also are important differences between EPA collective actions and Rule 23 Title VII or state law class actions in the standards for certification and issuance of notice to class or putative collective members. A plaintiff bringing a Rule 23 class action must satisfy all of the four requirements of Rule 23(a): numerosity, commonality, typicality, and adequacy of representation. In addition, the plaintiffs must all show that the case qualifies under one of three categories listed in Rule 23(b).

¹⁶⁰ Or. Rev. Stat. § 659A.885 (4).

¹⁶¹ Wash. Rev. Code §§ 49.58.060, 49.58.070.

¹⁶² Wash. Rev. Code § 49.58.070.

¹⁶³ Wash. Rev. Code § 49.58.070.

A plaintiff pursuing an EPA collective action must prove they are “similarly situated” to other potential members of the collective. Most courts have adopted a two-stage procedure for certifying collective actions. Because the statute of limitations is not tolled until an EPA plaintiff affirmatively files a consent to join the litigation, plaintiffs’ counsel are incentivized to quickly move for conditional certification, the first stage of the two-stage procedure, so the court will authorize the sending of court-approved notice to the members of the putative collective. Where plaintiffs’ counsel moves for conditional certification before significant discovery has occurred, courts typically apply a lenient standard for conditional certification. If more discovery has occurred, some courts will apply an intermediate standard for conditional certification. If the court grants conditional certification, the court authorizes notice to be sent to all putative class members, describing the litigation and explaining how they can join. The second stage of the two-stage process usually occurs after the close of discovery when the employer moves for decertification. It is at the decertification stage that courts apply a rigorous analysis comparable to the commonality, typicality and predominance analysis courts apply in Rule 23 class actions.

The difference in certification standards between EPA collective actions and Rule 23 class actions is illustrated by the recent case of *Ahad v. Board of Trustees of Southern Illinois University*.¹⁶⁴ Plaintiff, a doctor, brought a claim on her own behalf and on behalf of other female physicians employed by the defendants, asserting that female physicians were paid lower compensation than male physicians for the same or equal work in violation of the EPA, Title VII, and Illinois state law. In 2017, the district court granted conditional certification of plaintiff’s EPA claim, and notice was sent out. In 2018, the court, applying the rigorous Rule 23 certification standard, denied plaintiff’s Motion for Rule 23 Class Certification. In denying Rule 23 certification, the court found that, even though plaintiff presented an expert report based on a multivariable regression analysis that concluded there was a statistically significant gender pay disparity, the plaintiff had not met the commonality requirement under Rule 23. As the court explained, “the statistical evidence here does not and cannot show whether a common cause existed regardless of the statistically significant showing of pay disparities based on gender.”

Even if the employer is able to have an EPA collective action decertified successfully, this ordeal is an expensive process in terms of attorneys’ fees, as well as business disruption and distraction. In addition, if the EPA claim is decertified, the claims of the opt-in plaintiffs are dismissed without prejudice and they can refile individual claims. If a meaningful number of these individuals do so, the attorneys’ fees of defending dozens of individual lawsuits can mount quickly.

III. Practical Advice for Employers to Avoid Pay Equity Issues

Pay equity is a moral, legal and business imperative. Getting this issue wrong can have serious consequences for employers. Class action lawsuits focused on fair pay are increasing and they are expensive to defend, both in terms of legal costs, and in terms of employee morale and company culture. Moreover, the unwanted publicity from these lawsuits can have a negative impact on employee recruiting, retention, and customer relationships. It can have a lasting detrimental impact on the company’s reputation. Following are strategies that companies may consider to help them avoid pay equity problems.

Understand Your Company’s Compensation Philosophy. What is your company trying to accomplish through its pay structure and what factors does your company want to drive compensation? Some companies have a clearly defined compensation philosophy that is well understood throughout the organization. If your company does not, partner with the appropriate stakeholders to get agreement on the company’s compensation philosophy and the drivers of compensation. The drivers of compensation

¹⁶⁴ Case No. 15-cv-3308, 2018 U.S. Dist. LEXIS 155243 (C.D. Ill. Sept. 12, 2018).

likely will vary for the different functions within the company. Examples of drivers of compensation include experience in the industry, time in the job, past performance ratings, education, financial results, scope of responsibility, location, market rate for a particular skillset, or business unit.

Evaluate Your Company's Compensation to Ensure the Factors Impacting Compensation Comply with Applicable Law. As discussed above, many states and municipalities have passed their own pay equity laws and salary history bans that limit the permissible factors that may be used to explain pay differentials. Consider having legal counsel review your company's compensation philosophy and the factors influencing compensation with an eye toward compliance with all relevant laws for the jurisdiction(s) in which your company has employees.

Educate the Decision makers. Evaluate (and, if needed, take) the steps that would be helpful to ensure the managers who make compensation decisions for your organization understand your company's compensation philosophy and the permissible and impermissible factors in making compensation decisions.

Job Leveling and Salary Bands. Consider reviewing job descriptions to confirm they accurately describe the job being performed by the incumbents holding that position. Job titles also should reflect what job employees actually are performing. Employees whose job duties are different typically should not be given the same job title. Consider implementing a job-leveling framework that evaluates positions in the company against a series of factors, such as job requirements and job scope, impact, value and accountability. Consider assigning salary bands to each job level or grade to keep compensation consistent.

Decide What the Job Is Worth. Since differences in pay for similar jobs must be justified, consider setting the amount a particular job or set of job duties is worth to the organization, which then will drive the job level or grade in which that role is placed and, ultimately, the compensation offered to individuals performing those job duties. To the extent similar job duties are valued differently by the organization, document the rationale before someone is hired to fill those roles.

Understand the Potential Impact of Negotiation. New hires and those seeking to advance their careers may be tempted to negotiate with the organization for higher pay, signing bonuses or similar compensation benefits. But such negotiations can create an instant pay equity issue if those negotiations take the proposed pay outside of the range set for the position or deviate significantly from what current incumbents are making. Be prepared to explain the company's philosophy of paying what the job is worth when a potential hire tries to negotiate their pay.

Consider limiting discretion in setting compensation. Consider requiring hiring managers to obtain approval if the hiring manager wants to pay an employee more or less than the midpoint of the salary band for the position at issue. The approval process should ask the manager to explain the reasons for the deviation and document the decision making process, which may help ensure it is not discriminatory and provide a defense should issues with respect to pay equity arise. As part of this process, the company can provide hiring managers with a list of acceptable reasons for varying from the midpoint of the salary band in setting compensation.

Document Reasons for Pay Decisions. As discussed above, some state pay equity laws provide extremely long statutes of limitations. For example, under the Maryland statute, the statute of limitations extends three years after the employee's final paycheck, and essentially permits the employee to litigate over compensation decisions that were made years prior to termination. New York and New Jersey both

have six-year statutes of limitations. As a result, companies may need to defend pay decisions made by managers who have long since left the organization. Requiring documentation of the reasons for pay decisions can enable the company to be able to defend against these claims.

Consider Training Recruiters and Hiring Managers on Salary History Bans. It is important to make sure managers are aware of the ever-changing law in this area and are not unknowingly violating state or local law. In particular, hiring managers and recruiters should understand what factors can go into setting compensation. They should also know how to recognize impermissible factors, such as prior compensation, when establishing a newly-hired employee's rate of pay.

Have an Adequate Internal Complaint Procedure. Your organization is much better off learning of a pay equity issue from an employee directly rather than through an attorney demand letter, charge of discrimination, or lawsuit. Having a robust system for internal complaints, a strong anti-retaliation policy and practice, and a culture of compliance can encourage employees to come forward with issues so that they can be fixed by the company, if appropriate, before they become expensive litigation and negative publicity.

Conduct a Pay Equity Audit. Consider conducting a pay equity audit to determine whether there are positions or divisions in your organization that have potential pay equity issues. An audit can help your company identify pay disparities and determine whether they are statistically significant. If your organization is going to conduct an audit, it should be done correctly and the company should be committed to dealing with the results if an inequity is found.

And in a couple of jurisdictions, a self-audit may offer additional benefits. In Massachusetts, an employer that conducts a pay equity audit and takes reasonable steps towards correcting discrepancies has an affirmative defense to a pay equity claim brought under its laws. In Oregon, conducting a pay equity audit may allow an employer to avoid an award of compensatory and punitive damages.

In most cases, it makes sense to have an audit conducted under privilege to reduce the risk of disclosure during an agency investigation or litigation. It is important to ensure the audit compares all individuals performing substantially similar work and does not just look at job titles. Personnel involved in an audit should try to think creatively about what positions and incumbent employees could be reasonably argued to be comparators. Typically, a pay equity audit will take your company's data, including the control variables your organization believes are driving compensation, and perform a multivariable regression analysis to determine whether there are gender or other protected class pay differences that cannot be explained. Pay equity audits also allow the company to determine whether its compensation philosophy actually is working as intended – are the control variables the company identified actually driving compensation or do they make pay disparities worse?

IV. Practical Advice to Employers Remediate Pay Equity Issues

If your company becomes aware of potential pay inequities, it should consider evaluating different options for remediating the issue. First, the company might explore whether there are protected classification-neutral factors supported by legitimate business reasons that explain the pay differential. If there are, the company should document those reasons so that if a question or claim arises, the rationale for any pay differentials can be explained. If there are not, the company should explore what compensation adjustments may be needed to eliminate the unlawful pay disparity. Ideally, this discussion should be conducted in a privileged setting with counsel. Recall that under many state pay equity laws, pay disparities cannot be remedied by lowering the compensation of comparator employees. As a result, remediation

necessarily must include a pay increase for one or more employees. Advice on who should receive those pay increases and in what amount can be provided at the conclusion of a pay equity audit performed by legal counsel. Discussions about whether and to what extent those increases alleviate the company's risk of a claim are also helpful.

Careful consideration should be given to both the timing of any wage increases and the messaging to employees regarding why they are receiving an increase. Consider whether it is possible to make the remedial pay adjustments as part of the company's normal compensation and performance review cycle. The message communicated to an employee who affirmatively makes a complaint regarding pay equity about remediation measures likely will be different than the messaging surrounding pay equity issues identified through an employer-initiated prospective pay equity audit.

Employers should attempt to discover the source of the pay inequity so it can be addressed and prevent the problem from recurring:

- Are the issues focused in a particular business unit, department, or part of the organization, suggesting that hiring or compensation managers need training regarding the company's compensation philosophy and the permissible factors to consider in setting pay?
- Are the inequities focused in a particular type of pay, such as base pay, bonus amounts, or other types of incentive payments, such that any modification of the company's compensation structure and philosophy should be concentrated in a particular area of compensation?
- Did the inequities arise with the setting of starting compensation? If so, the employer should explore its process for setting starting compensation and consider implementing some of the measures described in Section III, above, for avoiding pay equity issues.
- Do the pay equity issues arise from a merger or acquisition in which the compensation philosophies of the two companies have not yet been integrated?

Finally, the company should consider regularly conducting pay equity audits, ideally as part of the company's normal compensation and performance review cycle to ensure that pay equity issues do not recur.

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