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Oregon's New Equal Pay Law: 6 Key Questions to Help Your Company Prepare

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Published August 20, 2018

With an increasing number of questions about Oregon's new Equal Pay Law, staying ahead on pay equity compliance seems like a daunting task for many employers. For example, where do we as employers even start? How do we evaluate who is performing work of comparable character? What does the law mean by "systems"? And a big one: how do we perform a pay equity analysis? Be in the know with answers to key questions that will provide employers with an outline for how to comply with Oregon's Equal Pay Law.

Specifically, the law prohibits employers from discriminating between employees based on their protected class status in the compensation for work of comparable character. The law also says that employers cannot compensate any employee at a greater rate than the employer compensates other employees in a protected class for work of a comparable character. This prohibition is expansive because it does not require any intentional discrimination from the employer in order to find a violation. Further, employers cannot ask applicants about their pay history whether on application forms or during interviews.

Many employers are realizing that compliance with this law requires an expansive review and update to current practices, policies, and procedures. We have seen a common trend in compliance questions that provide a strong starting point for companies looking to address this new law.

Question: How do I even start a Pay Equity internal review?

Answer: Update your job descriptions!

If you needed yet another reason to update your job descriptions, this law provides one more. The law defines work of comparable character as work that requires substantially similar knowledge, skill, effort, responsibility and working conditions in the performance of work, regardless of job description or job title. Proactive employers reviewing their current pay practices first need to be able to compare employees that are performing similar work, which can be more difficult to do in larger companies if job descriptions are outdated. Some employers are even interviewing current employees on their regular duties in order to improve job descriptions. Making sure a job description accurately reflects the work performed in the role makes it easier for employers to compare which employees are performing comparable work and identify any pay discrepancies.

Question: What are the next steps to make sure we're in compliance by the January 1 enforcement date?

Answer: Once you have job descriptions that accurately capture the work performed in each position, take a step back and consider whether there is enough overlap between job titles to where the

employees in those positions are arguably performing work of a comparable character. If you find employees performing work of comparable character, then you need to make sure that any pay disparities among those employees are justified by bona fide factors related to the position in question, and that those factors are captured in coherent, consistent, and verifiable “systems.”

Question: What’s all this talk about needing “systems”?

Answer: Another key part of the law explains that employers are allowed to compensate employees performing work of a comparable character differently if all of the difference is based on a bona fide factor related to the position *and* is based on: (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quality or quantity of production, including piece-rate work; (4) workplace locations; (5) travel, if travel is regular and necessary for the employee; (6) education; (7) training; (8) experience; or (8) any combination of these factors, if the combination of factors accounts for the entire compensation differential.

What this means for employers is that having good systems in place will help explain legitimate reasons for pay differentials between employees in the same job classifications. However, just saying that the company has a system without any proof will not be a winning defense. Proactive employers will want to review and make any necessary improvements to current seniority, merit, or other systems in place to make sure they account for current compensation distinctions between employees who perform work of comparable character. These systems should also be written, known, and adhered to by those who make employee compensation decisions. If your workplace has not traditionally had any specific system, now is a great time to put one in place.

Question: What does the law mean by an “equal pay analysis”?

Answer: In the event an employee sues their employer for pay equity violations, the law provides a partial safe harbor if the employer has performed an equal pay analysis within the past three years. Specifically, the law allows an employer to move for no award of compensatory and punitive damages to the employee. This defense is attractive to many because it should significantly limit the employer’s economic exposure in the event of a lawsuit.

However, to qualify for this defense, the employer has to show that the equal pay analysis that it performed was (1) reasonable in detail and scope in light of the size of the employer; (2) related to the protected class asserted by the plaintiff in the action; and (3) eliminated the wage differentials for the plaintiff and has made reasonable and substantial progress toward eliminating wage differentials for the protected class asserted by the plaintiff. Determining the extent of analysis a company must undertake to qualify for this defense requires considering a multitude of factors, such as the nature of the workforce, centralization of compensation decisions, and the value of various benefits available to employees.

Question: How do I do an analysis?

Answer: The first consideration is whether the organization wants its equal pay analysis covered by the attorney-client privilege and/or work product doctrine. If there is a desire to maximize the privilege or confidentiality surrounding the analysis, then employers should consult with an attorney first and perform their analysis at the direction of (and under the supervision of) an attorney.

Next, it is important for the organization to review how many different job titles (and pay grades) they have, as well as how employee information is stored. For instance, how easy is it to pull each employee's pay and benefit information, relevant training, education, seniority history, and performance feedback and evaluations? The easier that information is to access and analyze, the easier your equal pay analysis will be.

Companies will also want to compile and review the various compensation and benefit policies and practices they follow, so that they can perform a complete and thorough review about how compensation and benefit decisions are currently made. This review will help the company evaluate whether any large changes or minor refinements to those systems are necessary to reflect the priorities of the company and the compensation decisions that have been made (and will be made in the future).

Finally, employers should consider how much information they have on the demographics of their workforce. Specifically, does the employer have information regarding each employee's race, color, religion, sex, sexual orientation, national origin, marital status, veteran status, disability and age? Although most employers do not have all this information, let alone centralized in one place, the question then becomes whether it makes sense to survey the workforce to gather more complete information regarding who belongs to which protected categories. This is a very delicate process fraught with pitfalls, so such a survey should only be done in consultation with an attorney.

Once you have all of the information compiled, you can map where employees' compensation and benefit packages fall within specific job categories and begin developing a sense of who appears to be overpaid or underpaid after the company's compensation and benefits programs and systems are applied to each specific worker. This information is central to identifying outliers who may need to have their pay increased or frozen in order to bring the employee data into alignment with the company's updated compensation systems and considerations.

Question: What do I do with the findings of my analysis?

Answer: One of the most difficult decisions employers face after completing a pay equity analysis is balancing the risk against the cost of remedying the pay disparities that were discovered. Specifically, many employers have implemented pay increases or pay freezes so that employees begin to be paid appropriately at the completion of the analysis. However, only some employers are taking the additional step of providing relevant employees with back pay going back two years to address potential past pay disparities.

The danger of this approach is that those employees are now on notice that the company has decided they are not being paid appropriately for the work they are completing, and it is not a big jump for that employee to then ask whether he or she should also be receiving back pay. This is another area where advice of counsel is helpful in finalizing the messaging surrounding any compensation changes that result from the pay equity analysis, as well as whether and how to provide back pay.

While it may seem like a daunting to-do list, these steps will help employers looking to get ahead on pay equity compliance. For questions on Oregon's Equal Pay Law or for assistance with performing an equal pay analysis, contact attorneys Andrew Schpak at (503) 276-2156 and Nicole Elgin at (503) 276-2109.