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Mid-Year Roundup: Equal Pay and Related Bills Command Attention in 2017

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Consistent with a major theme of the 2016 election cycle, equal pay and similar wage proposals dominated the attention of state legislatures in the first half of 2017.¹ More than 100 such bills were introduced in the recent legislative sessions in more than 40 jurisdictions, including Washington, D.C. and Puerto Rico.² While most of these bills have languished or were vetoed—most recently, a Maine proposal to expand its equal pay law reached the desk of Governor Paul LePage, only to be vetoed as the legislative term closed on June 30—the trend is apparent.

The measures considered by the various legislatures this year work towards the goal of equal pay using one or more of three approaches. The most progressive proposals would prohibit unequal pay for “comparable” work, subject to certain exceptions.³ Because of the difficulty in assessing what constitutes such “comparable” work, some states are entertaining pared-down pay equity bills that seek to narrow the pay gap in more concrete ways. Two such options are “wage transparency” and “salary history” bills.

Wage transparency measures prevent employers from banning pay disclosure in the workplace, or from retaliating against employees who discuss their wages with others. Many state laws that address wage transparency include exceptions for human resources or payroll employees, whose jobs involving handling employee pay information. The third emerging pay equity-related issue involves restrictions on employer salary history inquiries. The rationale underlying salary history bills is that pay inequities are perpetuated when current pay is based on past employer decisions that could have been discriminatory. Both salary history and pay transparency measures have been introduced as standalone bills or incorporated into more expansive pay equity legislation.

With these principles in mind, we review noteworthy pay equity laws recently enacted or effective at the state and local levels. We also briefly highlight bills that remain pending.

Enacted Equal Pay Laws

California. In 2016, California amended its equal pay statute, which generally prohibits employers from paying employees a lower wage rate than that paid to employees of the opposite sex when they are working in the same job requiring equal skill, effort, and responsibility, under similar working conditions. A new amendment to this law, effective January 1, 2017, clarifies that prior salary does not, by itself, justify any disparity in employee compensation. It also forbids pay differentials based on employee race or ethnicity. A prior amendment effective in 2016 had added a wage transparency provision.

Maryland. Like California, Maryland updated its equal pay law as of October 2016.⁴ Under the Equal Pay for Equal Work (EPEW) amendments, pay disparities are unlawful if based on gender identity, as well as sex. The EPEW now prohibits employers from engaging in wage discrimination and also from providing less favorable employment opportunities due to an employee's sex or gender identity. Additionally, employers may not take adverse employment action against an employee who inquires about, discusses, or discloses his or her own wages or the wages of another employee, if that information was disclosed voluntarily. Nonetheless, the EPEW permits an employer, in a written policy, to establish reasonable workday limitations on the time, place, and manner for inquiries about or the discussion of an employee's wages.

Massachusetts. On August 1, 2016, Massachusetts Governor Charlie Baker signed the Act to Establish Pay Equity (AEPE).⁵ The AEPE, which takes effect on July 1, 2018, makes it illegal to pay employees compensation at a lower rate than the rate paid to employees of a different gender for comparable work. "Comparable work," moreover, is not limited to employees who have the same job title.

In addition, the AEPE includes both salary history and wage transparency provisions. The law states that employers may not: (1) require that an employee refrain from inquiring about, discussing or disclosing information about the employee's own wages, or any other employee's wages; (2) screen job applicants based on their wages; (3) request or require an applicant to disclose prior wages or salary history; or (4) seek the salary history of any prospective employee from any current or former employer, unless the prospective employee provides express written consent, and an offer of employment—including proposed compensation—has been made. Retaliation against employees who oppose an action or practice banned by the AEPE is also unlawful.

Oregon. Just a few weeks ago, Governor Kate Brown signed the Oregon Equal Pay Act of 2017 into law.⁶ This statute outlaws discrepancies in compensation (which includes wages as well as bonuses, benefits, and equity-based compensation) on the basis of any protected characteristic—such as race, religion, sex, sexual orientation, national origin, marital status, veteran status, disability or age. The Equal Pay Act also restricts salary history inquiries, expands existing remedies available to employees, and provides a safe harbor for employers that have voluntarily assessed their pay practices to identify and eliminate discriminatory pay practices. As with similar statutes in other jurisdictions, employers may not reduce the wages of employees to comply with the law. The bulk of the new provisions become operative on January 1, 2019.

Puerto Rico. On March 8, 2017, Puerto Rico enacted an equal pay bill, known as Act 16.⁷ Pursuant to Act 16, employers may not engage in pay discrimination based on sex among employees performing comparable job functions or duties that require the same skill, effort or responsibility under similar working conditions. The statute incorporates both wage transparency and salary history prohibitions. Act 16 also makes it unlawful to retaliate against employees who address or discuss pay inequality. Indeed, employers that retaliate face double damages under Act 16. While the new law took immediate effect, employer penalties authorized by Act 16 are not recoverable until March 8, 2018 so that employers may take corrective measures.

Enacted Salary History Laws

Delaware. Delaware is the latest state to pass a law limiting employer inquiries into pay history. On June 14, 2017, Governor John Carney signed House Substitute Bill 1 into law, which is slated to take effect in December 2017. The statute makes it unlawful for an employer to screen applicants based on their compensation histories, including by requiring that an applicant's prior compensation satisfy minimum or maximum criteria for the job. H.S. 1 also prohibits an employer from seeking the compensation history of an applicant from the applicant or a current or former employer, except under narrow circumstances. Monetary penalties for violations of this law are steep, ranging from \$1,000 to \$5,000 for a first offense, and up to \$10,000 for a subsequent offense. That being said, the law does not specifically prohibit employers from considering salary history when setting compensation, if applicants voluntarily disclose that history.⁸

New York City. As of October 31, 2017, it will be illegal for New York City employers to make any salary inquiry of an applicant, or the applicant's current or former employer, or a current or former employee or agent of the applicant's current or prior employer.⁹ Employers likewise may not conduct any form of search through publicly available information for a prospective employee's salary history. Under this recent amendment to the city's Human Rights Law, it is also an unlawful discriminatory practice for an employer to consider an applicant's salary history in determining the salary, benefits, or other forms of compensation for that applicant. However, if an applicant voluntarily and without prompting provides salary history, then this information can be used to determine the salary, benefits, and other compensation, and the employer may verify the salary history.

The State of New York has its own equal pay statute on the books, which was most recently amended in 2016 to include a wage transparency provision.¹⁰ Employers in New York must be particularly vigilant with their pay practices in light of these ongoing developments.

Philadelphia. The Philadelphia Wage Equity Ordinance (WEO) was enacted last year and scheduled to take effect on May 23, 2017.¹¹ The WEO applies to employers doing business in the City of Brotherly Love and prohibits such employers from inquiring into an applicant's wage history. It further precludes employers from relying on the wage history of prospective employees when setting compensation at any stage in the employment process, including negotiation of a contract, unless the applicant knowingly and willingly disclosed his or her wage history.

Before the WEO become operative, however, the Chamber of Commerce for Greater Philadelphia filed a lawsuit in federal court, seeking an injunction to prevent enforcement of the new ordinance. The Chamber contends that the WEO: (1) violates the First Amendment by chilling protected speech of employers and impairing their ability to make informed hiring decisions; (2) violates the Due Process clause by imposing severe penalties for violation of vague provisions, such as a definition of "employer" that would apply beyond the city and state borders; (3) violates the Commerce Clause by having extraterritorial effect that burdens interstate commerce; and (4) violates the Pennsylvania Constitution and Home Rule Act by regulating individuals who neither live nor work in Philadelphia. With the city's consent, the court stayed enforcement of the WEO pending resolution of the preliminary injunction motion.

The complaint was initially dismissed on standing grounds, but on June 13, 2017, the Chamber filed an amended complaint identifying several businesses that would be adversely affected by the WEO. For now, the stay remains in effect. If the court lifts the stay or denies the Chamber's injunction, however, employers should prepare for implementation of the WEO.

Enacted Wage Transparency Laws

Colorado. Colorado recently amended its wage transparency bill, effective August 9, 2017. Existing Colorado law prohibits an employer from discharging, disciplining, coercing, intimidating, or otherwise discriminating against an employee because the employee inquired about, disclosed, compared, or discussed his or her wages. The law also prohibits an employer from requiring, as a condition of employment, nondisclosure by an employee of his or her wages or requiring an employee to sign a waiver or other document that purports to deny an employee the right to disclose his or her wage information. Under the amendment, this law now covers all employers—including those exempt from the National Labor Relations Act, who had been excepted from the wage transparency provisions.

Nevada. Nevada has amended its fair employment practices statute, effective June 3, 2017, to make it unlawful for a covered employer, employment agency, or labor organization to discriminate against a person with respect to employment or membership, as applicable, for inquiring about, discussing, or voluntarily disclosing information about his or her own wages or the wages of another individual. This prohibition applies to any employer that employs 15 or more employees for each working day in each of 20 or more calendar weeks in the same or the preceding calendar year as when the unlawful employment practice occurred.

Notable Pending Pay Equity Measures

Legislative sessions have adjourned in many states. In some instances, pending bills are therefore dead. But in other states, bills may be carried over into the next term for further consideration. Several pay equity bills thus remain under review, either during the current or upcoming legislative session. A few interesting bills that could advance are summarized below.

California. Two measures are making headway in California. The Gender Pay Gap Transparency Act (AB 1209), would require large employers (250 or more employees) to provide the Secretary of State information relating to “gender pay differentials.” Specifically, a large employer would be required to identify the difference between the mean and medial salary of male exempt employees and female exempt employees, by each job classification or title. Similar information would be required for male and female board members. The bill would require that the information be published on or before July 1, 2020, on a website available to the public. Annual updates would be required thereafter. AB 1209 has passed the California State Assembly and moved on to the State Senate, where it has been referred for committee review.

Meanwhile, Assembly Bill 168 would prohibit inquiries into the pay history of job applicants. The law would prohibit any employer (both public and private sector) from seeking any salary history information, including compensation and benefits, about an applicant for employment. Violation of the law would constitute a misdemeanor. To date, AB 168 has also passed the California State Assembly and proceeded before a Senate committee. This proposal is similar to a law vetoed in 2015 by Governor Jerry Brown. At that time, Governor Brown explained that he wanted to give amendments to the state’s equal pay law time to work, before limiting pay history inquiries.

Illinois. As of June 28, 2017, House Bill 2462 cleared both legislative chambers and landed on Governor Bruce Rauner’s desk. The bill would prohibit an employer from screening job applicants based on their wage or salary history and from requiring that an applicant’s prior wages satisfy minimum or maximum criteria. It would further make it unlawful for employers to request or require, as a condition of being interviewed or as a condition of continuing to be considered for an offer of employment, that an applicant disclose prior wages or salary. It is unclear whether Governor Rauner, a Republican, will veto the bill.

New Jersey. Several pay equity bills have been floated in New Jersey this year, but one proposal (AB 3480/S 2536) has passed both houses as of June 26, 2017. This bill would prohibit an employer from screening a job applicant based on the applicant's wage or salary history. New Jersey's governor, Chris Christie, also a Republican, may veto the bill if it faces opposition from the business community. (He has vetoed equal pay legislation in recent years.)

San Francisco. The San Francisco Board of Supervisors approved a salary history measure (Ordinance 170450) on June 27, 2017. This measure would amend the Police and Administrative Codes to ban employers, including city contractors and subcontractors, from asking applicants about their current or past salary or considering an applicant's salary information in determining whether to hire an applicant or what salary to offer. The ordinance would also prohibit employers from disclosing a current or former employee's salary history without that employee's authorization, unless the salary history is publicly available. This ordinance must pass a second reading on July 11, 2017 to move forward. If enacted, the new requirements would take effect July 1, 2018.

Finally, additional pay equity measures of one kind or another still have life in: (1) Washington, D.C.; (2) Georgia; (3) Hawaii; (4) Iowa; (5) Michigan; (6) Nebraska; (7) New York; (8) North Carolina; (9) Oklahoma; (10) Pennsylvania; (11) Rhode Island; (12) South Carolina; (13) Tennessee; (14) Vermont; and (15) Washington. Although many of these state legislatures have adjourned for 2017, the pending measures could be taken up in 2018.¹²

Given the number of pending pay equity bills, and the unlikelihood federal equal pay legislation will advance this year, efforts to promote pay equity legislation at the state and local level are expected to persist. We will continue to monitor and report back on these developments.

- 1 The U.S. Congress has also introduced such proposals, including approximately four bills in the House of Representatives and another three in the Senate. None of these proposals appear likely to progress.
- 2 At this point in 2017, bills have not been proposed in Alabama, Alaska, Kansas, New Hampshire, New Mexico, North Dakota, Ohio, South Dakota, Utah, and Wyoming. Several Montana bills introduced in 2016 died in early 2017. As discussed herein, Massachusetts enacted a pay equity law in 2016 and thus has not evaluated any additional proposals this year.
- 3 Typical exceptions under these types of equal pay laws may include: (1) bona fide seniority or merit-based systems; (2) compensation based on quality or quantity of production (e.g., piece-rate work); (3) workplace locations; (4) differing levels of education, training or experience, to the extent relevant to the particular job; or (5) travel, if necessary and regular for the specific job.
- 4 See Steven Kaplan & Eunju Park, [Key Legislation Emerging from the 2016 Maryland General Assembly Session and Local Ordinances to Remember](#), Littler ASAP (May 23, 2016).
- 5 See Christopher Kaczmarek et al., [Massachusetts Adds Teeth to Equal Pay Obligations](#), Littler Insight (July 28, 2016).
- 6 See Cody Emily Schvaneveldt, [Oregon Enacts New Equal Pay Law that Includes Salary History Inquiry Restrictions](#), Littler ASAP (June 1, 2017).
- 7 See José Dávila Caballero & Mariela Rexach, [Puerto Rico Adopts Local Equal Pay Act](#), Littler ASAP (Mar. 9, 2017).
- 8 See Joon Hwang, [Delaware Enacts Law to Address Gender Pay Gap By Prohibiting Employers from Requesting Compensation History of Job Applicants](#), Littler ASAP (June 19, 2017).
- 9 See María Cáceres-Boneau et al., [New York City Set to Ban Inquiries About Salary History](#), Littler ASAP (Apr. 14, 2017); María Cáceres-Boneau & David M. Wirtz, [New York City Agencies Are Prohibited from Making Pay History Inquiries – At Least for Now](#), Littler ASAP (Nov. 22, 2016).
- 10 See Jean L. Schmidt, [New York Expands Protections for Women with Passage of Women's Equality Act](#), Littler Insight (Nov. 3, 2015).
- 11 See Martha Keon, [The City of Philadelphia Has Agreed To Stay The Enforcement of The Philadelphia Wage Equity Ordinance Pending Resolution of Court Challenge](#), Littler ASAP (Apr. 20, 2017); Denise Maher & Martha Keon, [The Philadelphia Wage Equity Bill Will Ban Employers From Asking Prospective Employees About Their Past Wages and Fringe Benefits](#), Littler Insight (Dec. 14, 2016).
- 12 These jurisdictions have two-year legislative cycles with "carryover" to even-numbered years.

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