The Gender Pay Equity Challenge: A Critique of How States and Localities Are Trying to Narrow the Gap

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**HR Policy Association** is the lead public policy organization of chief human resource officers representing the largest employers doing business in the United States and globally. The Association brings these executives together not simply to discuss how human resource practices and policies should be improved, but also to create a vision for successful HR strategies and pursue initiatives that promote job growth, employment security and competitiveness. Senior corporate officers participate in the Association to leverage the combined power of the membership as a positive influence to improve public policy, increase returns on human capital, and advance the human resource profession.

The HR Policy Association consists of more than 380 large and influential corporations. Collectively our members employ more than 20 million employees worldwide and have a market capitalization of more than $7.5 trillion. In the United States, Association members employ more than nine percent of the U.S. private sector workforce.

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Littler’s Workplace Policy Institute (WPI) was created to be an effective resource for the employer community to engage in legislative and regulatory developments that impact their workplaces and business strategies. WPI harnesses the deep subject-matter knowledge of Littler – the nation’s largest employment and labor law firm devoted exclusively to representing management – to ensure that policymakers in Washington and around the country hear the voice of employers. WPI is engaged with Congress, the executive branch and the courts on the most critical employment, labor and benefits issues of the day, including the requirements of the Affordable Care Act (ACA), the Fair Labor Standards Act (FLSA), the National Labor Relations Act (NLRA), Title VII and ever-changing implementing regulations.

The WPI provides timely alerts and updates on federal, state and local legislative, regulatory and judicial developments that affect employers. In addition, WPI can help employers shape workplace policy in a variety of ways. The WPI provides timely alerts and updates on federal, state and local legislative, regulatory and judicial developments that affect employers. In addition, WPI can help employers shape workplace policy in a variety of ways.

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EXECUTIVE SUMMARY

No one seriously disputes that women and men should be paid equal pay for equal work.

While existing law has achieved significant progress in achieving this goal, the broader challenge of substantially narrowing, or ideally eliminating, the pay gap between men and women in our economy is far from being fully realized. Women entered the work force in greater numbers during and following World War II, often earning lower pay in less-respected positions designated as “women’s work.” As career opportunities for women expanded, pay gaps persisted because of myriad factors, including choice of career field, education, marital status and family considerations, and workforce interruptions, along with likely hiring and pay bias.

Over the years, local and federal policymakers have sought legal solutions to this vexing pay gap. This paper looks at six legislative trends we are currently seeing at the state and municipal levels, adopted in an effort to achieve pay equity between men and women.

Those initiatives include:

- Broadening the scope of positions to be considered in comparing pay, both functionally and geographically;
- Limiting employer defenses for equal pay claims;
- Prohibiting or restricting the ability of employers to consider the pay history of a job applicant to eliminate or minimize the effects of prior discrimination;
- Expanding the penalties or remedies for equal pay violations;
- Imposing new requirements on employers to increase pay transparency and assist with targeting potential violations; and
- Providing safe harbors for employers that engage in certain preferred practices.

Having reviewed these developments closely, we conclude that the local trend to add more regulation on top of existing laws—when pay discrimination is already illegal—could easily lead to unintended consequences, over-regulation, and conflicting requirements.

America’s employers work in good faith to follow this growing patchwork of equal pay laws. HR Policy Association’s members report that monitoring, operating within, and complying with this regulatory thicket can be “virtually impossible.” Members point out that many of these laws contain vague provisions, leaving practical application to employers seeking to comply and charging regulators with their interpretation and enforcement. Meanwhile, laws across state lines often conflict with one another, even while large, multi-state employers seek the implementation of uniform policies within their jurisdictions.

Given the importance of this issue to all stakeholders, large employers remain ready and willing to work with policymakers at all levels of government to develop ideas that make compliance easier and the goal of equal pay more attainable.
INTRODUCTION

The effort to narrow the gender pay gap—the relative difference in the earnings of women and men within the United States economy—is a priority for both employers and policymakers. Because of its many causes, the challenge is more acute because the gap is only partly attributable to factors within an employer’s control. The degree of such attribution, however, is a subject of intense debate among economists and others who have studied this area. While efforts to eliminate such discrimination must continue, the gap will only be narrowed to any significant extent by broader cultural changes requiring a multi-pronged approach.

Most large employers believe that their own solutions, coupled with needed changes in the education and workforce development systems, hold the key to progress. These efforts are aimed in part at eliminating discrimination or its historic effects but also go to the broader needs of ensuring greater diversity in many of the higher-paying occupations. For both ethical and business reasons, employers are committed to achieving this progress. Even as business continue these efforts, there is an active—and recently intensified—effort by state governments to ensure that the laws against discrimination are sufficient and relevant to today’s workplace.

Laws prohibiting intentional and/or unintentional pay discrimination exist at the federal and state levels and have the potential to effectuate meaningful results—a fact that’s often overlooked or given short shrift by policymakers in the debate. States and localities acting to strengthen laws should be wary of unintended consequences that can occur from over-regulation of how compensation is determined. In addition, states and localities should recognize the impact of a multiplicity of differing—and often conflicting—requirements on large employers doing business throughout the several states. Given the mobility of today’s workforce, uniform policies by these companies are highly desirable from the perspective of both the employer and the employee perspective.

This paper seeks to examine the various state and local enactments—and proposals—within this broader context and provide guidance to stakeholders and policymakers as this debate continues.

What Causes the Pay Gap

Many statistics are used to describe the gender wage gap. One often-cited number comes from the Census Bureau, which finds the annual earnings gap between men and women who work full-time year-round to be 19.5 percent.1 Another measure of the wage gap comes from the Bureau of Labor Statistics, which finds the difference between the median weekly earnings of full-time men and women who are wage and salary workers, for the third quarter of 2017, to be 18.1 percent.2 However, a great deal of contention surrounds these two broad statistical

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1 Jessica L. Semega, Kayla R. Fontenot, and Melissa A. Kollar, U.S. Census Bureau, Income and Poverty in the United States: 2016 (Sept. 12, 2017). In 2016, the real median earnings of men and women who worked full-time, year-round was $51,640 and $41,554, respectively.

measures because they do not compare men and women with identical skills doing identical work, so their use by equal pay proponents can be misleading and counterproductive.

The observable differences between men and women that contribute to the gender wage gap have been intensively investigated for decades, and numerous studies have concluded that several nondiscriminatory factors account for a significant part of the gap. For example, gender differences in occupations and industries account for over one-half (50.5 percent) of the wage gap. Other nondiscriminatory factors, including workforce interruptions and shorter working hours (that is, labor market experience), account for another 14.1 percent of the gap.

The impact of the gender division of labor in families also accounts for part of the wage gap. Current research continues to find evidence that marital status and the presence of children account for a significant part of the gap. Moreover, the greater tendency of men to determine the geographic location of the family also continues to be a factor.

However, some portion of the wage gap, around seven percent, remains unexplained and is often viewed as an estimate of labor market discrimination. While there may be other unmeasured nondiscriminatory factors for the unexplained portion of the wage gap, other research suggests discrimination continues to exist. For example, many studies that use “blind” experiments have found that both men and women exhibit some hiring and pay bias. Moreover, the choices that married families make regarding the division of labor, and the education and career choices that men and women make, are viewed by some as the result of various forms of unconscious, cultural, or institutional discrimination.

Nevertheless, there is abundant evidence that most of the gender wage gap is attributable to factors other than pay discrimination. As the Department of Labor (DOL) concluded in 2009, a review of the economic research on the wage gap “leads to the unambiguous conclusion that the differences in the compensation of men and women are the result of a multitude of factors and

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5 *Id.*


7 *Id.*

8 This figure represents the HR Policy Association’s estimate, formulated using the Blau and Kahn estimate for unexplained wage gap in 2010 (38%), times the Census Bureau and BLS estimates of the wage gap (19.5% and 18.1%).

that the raw wage gap should not be used as the basis to justify corrective action.”10 A broader approach involving much more in-depth analysis will be needed.

Policymakers should be aware that the legal mandate to achieve equal pay does not, and should not, require employers to create pay parity. Although equal pay demands that pay decisions be based on legitimate nondiscriminatory factors, employers should still be permitted to consider personal skills and abilities when deciding wages. Employees want to be respected for the individual skills and value they bring to the workplace, and they expect to be paid accordingly.

How Companies Are Addressing the Gap

Employer responses to the gender pay gap are best understood in the context of how companies generally set pay for their employees. Most companies have long-established pay policies and programs that are designed to serve a legitimate business purpose: to attract and retain the talent needed to drive business results. These practices are intended to deliver compensation based on legitimate, nondiscriminatory factors including differences in expertise, education, and experience. Other factors that can influence pay include tenure or a seniority system, shift differentials, a unique skill set or network, exceptional rapport with team members, and geographic differences in the cost-of-living.

In setting pay policy, employers recognize their vested interest in paying all employees competitively and fairly. If companies fall short of competitive pay levels, the talent market will quickly respond and turnover will increase, as employees move to more lucrative opportunities. Companies that systemically underpay women will eventually feel the impact of this market discipline, as other companies target and recruit away their best and brightest. Not only that, no company wants to suffer the reputational damage, shareholder scorn, or stock price hits that would follow a significant pay equity lawsuit.

Employer efforts to address the gender pay gap are primarily geared toward educating managers and employees about existing pay policies, monitoring the application of those policies through self-evaluations, and complying with emerging state and local regulations.

Educating Stakeholders

Companies are reinforcing the intent and operation of existing pay policies through education. Enhanced communication efforts are directed at managers who make pay decisions to ensure they understand the company’s pay philosophies and policies, as well as the evolving public policy environment—especially in jurisdictions where new regulations have been introduced. Some companies are going further, expanding education to include training on the impact of explicit or implicit bias in the workplace, and how it may impact pay and other talent-related decisions. Some companies are also communicating more information about pay policy and

practices to their employees, reflecting a more general tendency toward greater transparency in how organizations relate to their stakeholders.

Monitoring Performance

Companies have conducted self-evaluations to test whether their pay policies are being applied fairly and equally for years, if not decades. In fact, federal contractors and subcontractors, who employ approximately 20 percent of the private sector workforce, are required to periodically perform a self-audit of their compensation system. These self-evaluations are generally based on a key assumption: that an accurate assessment of pay equity requires that the analysis compare “apples to apples.” Because of this principle, most company assessments compare the pay of employees performing the same or a very similar job. This approach highlights a critical point, because much of the data discussed in the public debate are aggregate statistics that do not account for differences between men and women in the professions they choose. As noted above, men choose higher-paying professions at a higher rate than women, contributing to the overall difference in pay levels.

In response to the current debate on the gender pay gap, self-evaluations are increasing. In some cases—especially among west coast technology firms—the results of the evaluations are being disclosed publicly to key stakeholders. When the results show a disparity, company responses vary widely. A small number discuss the issue and their response publicly. Most companies take a more measured and targeted approach to addressing any pay disparities uncovered by the analysis.

Complying with Regulations

Companies in jurisdictions where gender pay laws have been implemented are ensuring compliance and adapting policies. Notable corporate responses have developed in several states that recently banned salary history inquiries; under such laws, employers are prohibited from obtaining and/or using compensation history in making an offer of employment.

In addition to ensuring compliance, most companies that operate in a jurisdiction impacted by this new type of regulation are considering whether to apply the new policies beyond the jurisdiction in question. Companies that operate across the country recognize that it is inefficient and potentially confusing to its candidates and employees to maintain separate policies and processes for individual jurisdictions. They view a single, standardized approach as a matter of efficiency. Other companies are using the new regulations to create a larger internal dialogue about whether their policies and processes are truly “gender-neutral” and how they can be adapted to reduce or eliminate any differences in pay not attributable to legitimate factors.

11 41 CFR 60–2.17(b)(3) currently requires federal contractors to periodically perform in-depth self-audits of their compensation system(s) to determine whether there are gender, race, or ethnicity–based disparities. They must also develop and execute action-oriented programs designed to correct any problem areas that are identified (41 CFR 60–2.17(c)), including reviewing the results of the self-audit with all levels of management (41 CFR 60–2.17(d)(3)) and advising top management (41 CFR 60–2.17(d)(4)).
An Overview of Federal and State Actions

While the states have recently stepped up activity in the pay equity area, federal policymakers have been active for some time. More recent federal actions to address gender equity and the wage gap include introduction of the Paycheck Fairness Act (PFA) \(^{12}\) and various Republican alternatives to the PFA, \(^{13}\) President Obama’s pay secrecy Executive Order (EO 13665) \(^{14}\) for federal contractors and subcontractors, \(^{14}\) and the Equal Employment Opportunity Commission’s (EEOC) effort to annually collect pay data from employers. \(^{15}\) Aside from the prohibition on pay secrecy for federal contractors, however, no other gender equity mandates have been enacted and implemented lately at the federal level.

In the absence of new federal legislation, state legislatures—and city councils—across the country have been exploring equal pay and similar wage proposals, seeking to strengthen existing laws that require fair pay. More than 100 such bills were introduced in 2017 in more than 40 jurisdictions. While most of those bills languished in state houses or were vetoed, about a half-dozen pay equity bills took effect in 2017, and a few others were enacted with future operative dates. Indeed, this legislative wave shows no signs of subsiding in the future.

The new state-based measures seek to work towards the goal of equal pay using various approaches, such as:

- Revising the standard—prohibiting unequal pay for “comparable” work as opposed to “equal” work, subject to certain exceptions;
- Limiting reliance on salary history—restricting an employer’s ability to ask about and rely on a job applicant’s current or former wages; and
- Enhancing wage transparency—prohibiting employers from banning pay disclosure in the workplace, or retaliating against employees who discuss their wages with others.

Both salary history and pay transparency measures have been introduced as standalone bills or incorporated into more expansive pay equity legislation.

Given all that transpired in 2017, taking stock of the situation is particularly crucial and challenging for employers operating in numerous jurisdictions, as they must grapple with different requirements for different sets of employees. This paper next summarizes recent

\(^{12}\) H.R. 1869 and S. 819, 115th Congress.

\(^{13}\) H.R. 1890 and S. 44, 115th Congress; S. 2773, 114th Congress.


changes in this area of law and offers practical insights for employers and policymakers facing this rapidly changing landscape.

**Federal Efforts to Address the Gender Equity Issue**

- **Paycheck Fairness Act**

  Advocates have introduced the Paycheck Fairness Act (PFA) in every Congress since 1997, but it has never been enacted.\(^{16}\) The bill would amend the federal Equal Pay Act of 1963 to:
  
  - Limit employer defenses and widen the law’s “same establishment” standard to include other employer workplaces located in the same county;
  - Prohibit employers from retaliating against an employee for inquiring or disclosing the wages of the employee;
  - Significantly increase penalties to include unlimited compensatory and punitive damages; and
  - Require the EEOC to collect pay data from employers.

  A key provision of the PFA that has drawn significant criticism would impact employer defenses to Equal Pay Act claims. Currently, an employer may defend a claim by showing that a pay disparity was a result of “any other factor” besides gender. Under the PFA an employer would have to show that pay differences are the result of “bona fide” factors that are “job-related” and “consistent with business necessity,” but a plaintiff could refute this defense by simply showing that an “alternative employment practice” exists that would serve the same business purpose without producing the wage differential. This attack on legitimate pay practices led *The Washington Post* to characterize this provision as “invit[ing] too much intrusion and interference with core business decisions.”\(^{17}\) Moreover, the PFA departs from all other equal employment opportunity laws by providing for unlimited compensatory and punitive damages. Such a provision would directly contradict precedent set by Title VII and the Americans with Disabilities Act, which have a cap on damage awards.

- **Republican Alternatives to the Paycheck Fairness Act**

  In the current, 115\(^{th}\) Congress, GOP alternatives (S. 44, H.R. 1890) to the PFA focus on extending President Obama’s pay secrecy Executive Order (EO 13665, discussed below) to all employers and prohibiting employers from retaliating against an employee for filing an Equal Pay Act charge or for participating in any investigation. In the 114\(^{th}\) Congress, Sen. Kelly Ayotte (R-NH) introduced the Gender Advancement in Pay (GAP) Act (S. 2773). While not as onerous as the PFA, the GAP Act would require employers to show that pay differences are the result of bona fide factors such as expertise, shift differentials, or a business-related factor other than sex, including but not limited to education, training, or experience. The GAP Act would

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\(^{16}\) In 2008, an earlier version of the PFA passed the House of Representatives, but the Senate version was never brought up for debate, and the bill was never enacted despite substantial Democratic majorities in 2009 and 2010. The latest version of the Paycheck Fairness Act (S. 819 and H.R. 1869) was introduced in 2017 by Sen. Patty Murray (D-WA) and Rep. Rosa DeLauro (D-CT), but is unlikely to be enacted in the GOP controlled Congress.

also create civil monetary penalties of $15,000 for each affected employee working for large employers.

- Prohibitions Against Pay Secrecy Policies

Wage transparency measures prevent employers from banning pay disclosure in the workplace, or from retaliating against employees who discuss their wages with others. On January 11, 2016, the Office of Federal Contract Compliance Programs (OFCCP) published a final rule implementing EO 13665 that generally prohibits federal contractors and subcontractors from retaliating or discriminating against an employee or applicant for inquiring about, discussing, or disclosing his or her own compensation, or the compensation of any other employee or applicant.\(^{18}\) President Trump has not rescinded the Order and it is likely to remain in effect. In addition, the National Labor Relations Act (“NLRA” or “Act”) already protects the rights of employees to discuss and disclose their wages to one another. The NLRA jurisprudence in this area is well-developed and is founded on the Act’s protected concerted activity doctrine.

- Collecting Pay Data from Employers

At the end of the Obama Administration, the EEOC changed the annual EEO-1 form to require, beginning in 2018, employers with 100 or more employees to report the number of employees by race, ethnicity, and gender that fall within 12 prescribed pay bands for each of the 10 EEO-1 job categories, for each establishment and the headquarters’ location. Large employers would also be required to report the total number of hours worked in the last year by employees that fall within each of the 12 prescribed pay bands for each of the 10 EEO-1 job categories, by race, ethnicity, and gender. In August 2017, however, the Office of Management and Budget indefinitely stayed the new pay data reporting requirement to give the Commission time to review the Obama-era mandate.

The criticism against efforts to bolster the collection of pay data is that it is likely to generate inaccurate results. For example, reliance on such data may result in significant numbers of “false positives” that would waste federal, state, or local government resources and inappropriately target non-discriminating employers, who will then need to spend significant time, money, and resources defending themselves against meritless allegations. Moreover, it would generate a significant number of “false negatives,” where true discriminators would be identified as non-discriminators and thus would fail to be targeted for investigation. The fundamental problem with the using the EEO-1 to collect pay data is the wide variation of occupations and positions falling within each pay band. Collecting pay data by specific job title also cannot account for all the nondiscriminatory factors for pay differences. In addition, variations between companies and industries—and companies operating within multiple industries—are likely to generate even more misleading results. As the DOL noted in 2009, using the raw wage gap without fully explaining the reasons behind the gap can “be used in misleading ways to advance public policy

\(^{18}\) 80 Fed. Reg. 54934. The final rule protects employees and applicants as long as the employee did not obtain the pay information through performance of their essential job functions.
agendas.” California Gov. Jerry Brown recently reached a similar conclusion when he vetoed legislation that would have required employers to report the median earnings of men and women by job categories, explaining that the bill “could be exploited to encourage more litigation than pay equity.”

**How States and Localities Are Addressing the Issue**

With the Paycheck Fairness Act stalled in Congress since 2008, proponents of equal pay laws are focusing on moving legislation at the state and local level. These laws are becoming an increasing concern for multi-state employers that strive to maintain uniformity in their workplace policies.

Briefly, these measures address several aspects of the gender pay equity challenge, most notably:

- Broadening the scope of positions to be considered in comparing pay, both functionally and geographically;
- Limiting employer defenses for equal pay claims;
- Prohibiting or restricting the ability of employers’ consideration of the pay history of a job applicant, in order to eliminate or minimize the effects or prior discrimination;
- Expanding the penalties or remedies for equal pay violations;
- Imposing new requirements on employers to increase pay transparency and assist with targeting potential violations; and
- Providing safe harbors for employers that engage in certain preferred practices.

**Broadening the Scope of Positions to Be Compared**

In applying the standard of “equal pay for equal work,” one must determine what constitutes “equal work.” In the narrowest sense, it would be two positions with the same title, job description, and location. However, proponents of equal pay reforms argue that this is too narrow and have sought to broaden the scope of jobs to be considered in the comparison. The various attempts include:

- Moving from “equal work” to “work that is substantially similar,” or “comparable work;” and

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• Moving away from comparing employees at a specific establishment or location, to comparing all employees in a county, city, or state.

Analysis of the Different Approaches. Nearly every state has an equal pay law on the books, in most cases enacted well before the current efforts to bolster the laws in this area. Historically, these laws require pay equity where employees perform work that requires equal skill, effort, and responsibility, under similar working conditions. However, some states, including California, New York, Oregon, Massachusetts, and Maryland have recently reworked their equal pay laws to expand the type of jobs that can be compared when considering pay discrimination claims.

For example, the new Massachusetts law, which goes into effect July 1, 2018, broadens the definition of equal work to include “work of comparable character” that is “substantially similar” in content and requiring substantially similar skill, effort and responsibility, and is performed under similar working conditions. The law also specifically provides that comparable work is not limited to employees who have the same job title. California and Oregon have similar definitions. California also changed its law from comparing employees at the same establishment to anyone employed under similar working conditions across all an employer’s locations in the state. New York also broadened the meaning of “same establishment” to include workplaces located in the “same geographic region,” but no larger than a county. And in Maryland, the law now covers employees who work for the same employer at workplaces located in the same county and who “perform work of comparable character or work in the same operation, in the same business, or of the same type.”

Unfortunately, to date, there has been little helpful guidance from these states on how employers, agencies, and courts should interpret the key but often vague terms of such laws. For example, although the Massachusetts law authorizes the state attorney general to promulgate regulations, that office has not done so. Neither Maryland, nor California, has implemented interpretative regulations concerning their equal pay statutes. Employers, therefore, have no substantive guidance on what the statutes mean when they use terms like “comparable” or “substantially similar” work.

The courts eventually may help with statutory interpretation by issuing explanatory opinions in resolving complaints; for now, however, these comprehensive equal pay laws are a sleeping giant. Most have not been tested (even where effective), and the courts have not had a chance to weigh in on the meaning of essential terms.

However, even if these boundaries were better defined, it will be difficult for employers to constantly monitor the work performed by each individual employee to assess and reassess similarities and dissimilarities relevant for comparing compensation. These laws seem to require gathering qualitative information about employees and their performance and boiling that information down into a more quantitative comparison, and such a task is not well-suited to many types of positions.

Moreover, it makes little sense to compare the same job across an entire state when rural areas and smaller cities with lower living costs typically pay less than large urban areas that have significantly higher living costs. Comparing an assistant manager in San Francisco to a substantially similar assistant manager in Yuba City, Modesto, Fresno, or Bakersfield in a pay
discrimination case is arguably inappropriate for the simple nondiscriminatory reason that the cost of living in the Central Valley is significantly lower than California’s major urban centers. Employers recognize this wider context, and pay accordingly. For example, the average hourly wage of registered nurses in San Francisco is $65.68, while it is $42.34 in Fresno, CA.\textsuperscript{21} New York recognized such discrepancies when it broadened the meaning of “same establishment” to include workplaces located in the “same geographic region,” but no larger than a county—although that too may be inappropriate in some regions and counties.

Relatedly, some states are expanding their pay discrimination laws beyond gender. For example, Oregon’s recent pay discrimination legislation made it illegal to pay less based on race, color, religion, sexual orientation, national origin, marital status, disability or age. This trend in particular poses potentially significant ramifications for employers, as they must evaluate compensation (and claimants might assert claims) based on combinations of characteristics that can be difficult to monitor. Moreover, some of these characteristics, such as sexual orientation, gender identity, and disability, might not be tracked by an employer as a practical matter and, even if tracked, may not be considered except in certain circumstances.

Further, some states are also expanding their gender discrimination laws beyond compensation. For example, Maryland’s law prohibits employers from “providing less favorable employment opportunities,” which includes placing employees into “less favorable career tracks” or positions, “failing to provide information about promotions or advancement,” and “limiting or depriving” employees of employment opportunities because of sex or gender identity. This change poses significant challenges and potential legal liability for employers, as they must address highly subjective terms such as “less favorable” only to be second guessed by the courts or enforcement agencies.

\textit{Limiting Employer Defenses for Equal Pay Claims}

While state equal pay laws generally require equal pay for equal, comparable, or substantially similar work, they also provide a few exceptions (or “employer defenses”) that allow for nondiscriminatory pay differences based on bona fide factors other than gender. Historically, States have allowed pay differences based on a seniority system; a merit system; a quantity or quality of production based pay system; or any other factor other than sex that is job related (\textit{e.g.}, education, experience, training and ability).

Recent amendments to state equal pay laws have generally moved to narrow these employer defenses. For example, laws may mandate:

\begin{itemize}
  \item That the “any other factor other than sex” exemption applies only when the factor is job related and “consistent with a business necessity;”
  \item That the factors are applied reasonably and account for the entire difference; and
\end{itemize}

• Elimination of employer defenses if: (1) a complainant demonstrates that an alternative employment practice exists that would serve the same business purpose without producing the wage differential; and (2) the employer has refused to adopt such alternative practice.

Notably, Massachusetts’ new equal pay law contains important affirmative defenses for employers that were not available under the old state law. For example, an employer may not be liable if it can demonstrate that a pay disparity is based on workplace geographic locations, differing levels of education, training or experience, or travel, if necessary and regular for the specific job.

Analysis of the Different Approaches. These changes to state law severely diminish legitimate nondiscriminatory reasons for wage differentials that employers can use as legal defenses against pay discrimination claims. These changes are unlikely to reduce actual discrimination but will certainly increase unnecessary and costly litigation.

To show job-relatedness, an employer must demonstrate that the qualification standard (i.e., education, training, experience) fairly and accurately measures the individual’s actual ability to perform the essential functions of the job. To further establish that the disputed employment practice (such as a pay structure) is consistent with business necessity, the employer must show that it substantially promotes the business’s needs. Indeed, the “business necessity” standard is quite high, and could be insurmountable even where legitimate factors are used that are entirely unrelated to discrimination.

California’s updated equal pay law also narrows legitimate employer defenses by requiring that an employer’s stated justifications for a wage disparity be applied reasonably and account for the entire wage differential. Yet the law does not clarify whether an employer must account for the entire differential only when using a combination of factors or when using just one factor to explain a pay difference. Therefore, how employers might permissibly pay different wage rates is uncertain.

But the fundamental problem with these approaches is that even if the employer establishes that a wage difference is based on a bona fide factor that is job related and consistent with business necessity, the employee would then be given an opportunity to defeat the employer’s use of this defense altogether by showing that an alternative means to achieve the legitimate business purpose exists without resulting in a wage differential. In other words, employees would be given the final opportunity to defeat the employer’s legitimate nondiscriminatory defenses, simply by showing that a statistical wage disparity exists and some alternative compensation system is available. This type of employer “defense” will no doubt lead to a battle of experts in the courts with corresponding complex statistical analysis for judges and juries to interpret. As noted above, this challenge to legitimate pay practices will do nothing to reduce or eliminate pay discrimination and will only intrude and interfere with core nondiscriminatory business decisions.

The Washington Post issued two separate editorials that shed light on this quandary, assessing a similar provision in the Paycheck Fairness Act. One editorial commented that the proposal:
Mandates that the business necessity defense “shall not apply” when the employee “demonstrates that an alternative employment practice exists that would serve the same business purpose without producing such differential and that the employer has refused to adopt such alternative practice.” But what if the employer has refused because it has concluded that the alternative is -- contrary to the employee’s assertion -- more costly or less efficient? What if the employee and employer disagree on what the business purpose is or should be?22

_The Washington Post_ continued by noting that:

This approach also could make employers vulnerable to attack for responding to market forces. Take an employer who gives a hefty raise to a valued male employee who has gotten a job offer from a competitor. Would a court agree that the raise advanced a legitimate business purpose or could the employer be slammed unless he also bumps up the salary of a similarly situated female employee?23

Another _Washington Post_ editorial concluded that the PFA “potentially invites too much intrusion and interference with core business decisions[,] . . . risks tilting the scales too far against employers and would remove, rather than restore, a sense of balance.”24

These criticisms hold true today of related state-law provisions. Federal and state equal pay laws should continue to recognize that employers are permitted to take into consideration individual factors, factors applying to groups and personal skills and abilities when deciding wages.

Equal pay certification therefore does not involve any requirement to the effect that individuals should receive the same wages for the same work or for comparable work. It is still recognized that employers will be permitted to take into consideration individual factors, personal skills and abilities when deciding wages.

Nevertheless, it does make the inflexible demand that decisions on wages are based on relevant considerations, such as individuals' qualifications, experience, responsibilities or job performance, such things not involving gender discrimination of any type, direct or indirect.

The standard could also be used to eliminate discrimination based on other grounds such as ethnicity, sexuality and nationality.

**Limiting Consideration of Pay History**

When seriously considering making an offer to applicants, employers have frequently sought to determine a candidate’s current salary, either by asking the applicant directly or through external

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23 _Id._

research. The criticism of this approach is that, even where a prospective employer has no discriminatory intent, reliance on a candidate’s salary history may perpetuate any prior discrimination that may have previously occurred.

There are various and ongoing attempts to limit salary history consideration at the state and local level. California recently enacted a statewide salary history ban, effective January 1, 2018, for example. An Illinois proposal was blocked by Gov. Bruce Rauner (R-IL), but its advocates have already reintroduced the bill for the 2018 session. These salary history measures often affect private employers and incorporate several approaches, including:

- Prohibiting private employers from asking applicants about their salary history before making a formal job offer that includes compensation (CA, DE, MA, OR, as well as Albany County, NY, New York City, NY, and San Francisco, CA);²⁶
- Requiring employers to provide the pay scale for a position to an applicant upon a reasonable request (CA);
- Prohibiting an employer from basing a new hire’s pay on salary history (CA, OR);
- Prohibiting employers from screening applicants based on their current wages (DE, MA, OR, and Albany County, NY);
- Prohibiting employers from seeking the salary history of any prospective employee or from any current or former employer, unless the prospective employee provides express written consent (MA, Albany County, NY, and San Francisco, CA); and
- Restricting the use of salary history alone to justify paying one person less for “substantially similar work” (CA).

The jurisdictions vary in applying sanctions and remedies for violations of these prohibitions. In San Francisco, employers face fines from $100-$500 per employee per violation, while New York City may impose a civil penalty of up to $125,000 for an unintentional violation, and up to $250,000 for a willful violation. In Philadelphia, the penalties are the same as those under the city’s Fair Practices Ordinance, including compensatory damages, punitive damages, reasonable attorney’s fees and court costs. Penalties for repeat and/or willful violations include a fine of up to $2,000 per violation and in extreme cases, imprisonment of up to 90 days. In Massachusetts, a prevailing plaintiff may recover unpaid wages, an equal amount of liquidated damages, plus attorney’s fees and costs, and employees may proceed on behalf of themselves and other “similarly situated” employees, opening the door for costly class actions.

**Analysis of the Different Approaches.** These statutes and ordinances are not exactly uniform, but they all have the same goal in mind: to eliminate, or at least alleviate, the perpetual pay

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²⁵ Some localities—such as New Orleans, Louisiana and Pittsburgh, Pennsylvania—have imposed such restrictions on city agencies but have not extended the prohibitions to private employers.

²⁶ A salary history law was also adopted in Philadelphia, Pennsylvania, but enforcement of that law has been stayed pending the outcome of a federal lawsuit challenging the measure.
inequalities that result from basing future pay on past payment practices of other employers. The basic idea is that if a worker were to experience pay discrimination at some point during his/her career, requiring that worker to disclose his/her salary history may result in a disadvantageous negotiating position when it comes time to discuss salaries, inhibiting the applicant’s ability to obtain his/her actual market value. Despite the variations by jurisdiction, employers can rely on some basic policy consistencies. On a fundamental level, these bans restrict an employer from requiring the presentment of, inquiry into, or seeking out of salary history without the consent of the applicant before making an offer of employment that includes both salary and benefit packages. These laws often further prevent employers from seeking this information from the applicant’s current or former employer, or current or former co-workers. Once an offer of employment with salary has been made, employers generally are free to confirm salary history information.

Employers, however, are more concerned about the discrepancies between these laws and how they may infringe on the ability to implement a uniform company policy. For instance, in Delaware and New York City, it is permissible for the employer to consider the salary history information if it is voluntarily offered by the applicant; but, in Oregon, the employer is not permitted to use that information even if given voluntarily. This discrepancy has significant, practical consequences. It is very difficult for an employer to stop an applicant from voluntarily sharing what he or she earned at a former job—or to “un-ring the bell” once that disclosure is made. Further, it is nearly impossible for an employer to show that the applicant’s disclosure was voluntary, and even if the employer was able to present such a defense, questions will remain as to how the disclosed information was used. Despite the availability of safe harbors and affirmative defenses to employers (discussed later), the cost of winning a case in court would still weigh heavily on a company that is not able to employ a uniform hiring policy throughout its company. Additionally, the reputational damage to a company that is a target of these types of lawsuits (and similar equal pay litigation) could be considerable and significantly harm its recruiting initiatives.

Employers have also expressed confusion about whether they may use salary history information when evaluating internal applicants for transfer or promotion. Some jurisdictions, including New York City and Oregon, specifically state that reliance on salary data is appropriate and permissible in such situations. Yet other states and municipalities have not made that exception explicit. In addition, none of the laws appear to address how these restrictions apply to overseas partners that hire Americans. Presumably, the coverage of the salary history laws turns on the applicant’s location, but no guidance has been issued on this topic.

By way of further example of the complications facing employers, in Delaware and New York City, an employer is permitted to discuss the applicant’s salary expectations, which ensures that the employer and applicant have an idea of their negotiating positions—so long as these discussions do not result in the prodding or outright inquiry of salary information. However, Philadelphia also allows the use of voluntarily disclosed information, but that law is currently stayed, so it remains to be seen whether it goes into effect.

In New York City, an employer is permitted to discuss the anticipatory salary for the position being discussed, and is permitted to discuss salary expectations. These expectations also include asking whether the applicant would be giving up any unvested equity or deferred compensation if the applicant leaves his or her current employer. This
based on the language of legislation in other jurisdictions, it is unclear whether this kind of conversation could be unlawful in other states or municipalities. The permission to discuss expectations in negotiating sessions or in initial interviews is an important aspect of the hiring process that must be protected. When the employer and the applicant sit down at the negotiating table, it is only fair for both parties to start on an informed, equal playing field. Advocates argue that applicants should not be unfairly burdened with requirements to give employers their salary history but, by the same token, employers should not be unfairly disadvantaged by engaging in negotiations without knowing the applicant’s expectations. This is particularly problematic in California where employers are required to provide, upon reasonable request, the pay scale for a position to a job applicant but are prohibited from inquiring about the applicant’s current salary. Indeed, an employer that must make an offer without such information could wind up making an offer well below what the employee expects or even currently earns. This misstep could very quickly slam the door on what otherwise could be a highly successful employment arrangement. Clearly, both parties are best served by understanding their positions and being able to accurately determine the position of the other party, while also being required to operate within reasonable boundaries. For this reason, an effective, reasonable policy that understands and encompasses the needs of applicants and employers alike is increasingly necessary.

Of course, one of the most efficient manners by which a company can enact process change is by employing a new, uniform policy. However, the lack of uniformity between state laws makes the administration of a new company-wide policy risky and difficult to formulate. When a company is forced to abide by conflicting laws on the same subject, the risk of liability, or at least litigation, expands with each additional nuance. In other words, the margin of error grows, putting companies at risk of litigation and applicants at risk of unintentional unfair treatment. The alternative—juggling the differing state and local laws depending on the location of the applicant—is equally troublesome because administrative and training methods will be inconsistent throughout the company, increasing the possibility for inadvertent error.

By and large, policies that seek to balance the scales are largely accepted by the business community, which is working to achieve this goal on its own, apart from legislative developments. It has become clear, however, that companies cannot efficiently do their part if they are constantly monitoring and adapting to new statutes and local ordinances. There is no question that a state legislature or city council can and should enact laws that it believes are in the best interest of the citizens within its jurisdictions. But some uniformity with like-legislation would help enable a smooth transition for the businesses that put these policies into action. Governing bodies are encouraged to consider the legal ramifications of salary history regulations for local employers, and the potential pitfalls.

information gives employers the ability to understand their negotiating positions without being permitted to rely on the individual’s salary history. In Delaware, employers are permitted to have discussions and negotiate with applicants regarding the compensation to be offered, but those discussions cannot bleed into individual salary history. Again, this approach allows the employer to understand its negotiating position rather than remain in the dark about individual expectations. While it is widely known and understandable that employers do not want to pay more than necessary to obtain qualified employees, employers also cannot afford to constantly lowball employees due to a lack of knowledge regarding individualized expectations. Once expectations are known, the parties are more likely to engage in efficient and productive negotiations, which is best for both parties at the table.
By the same reasoning, states and municipalities choosing to act in this area should give employers ample time to adjust their practices and comply with these new regulations. The transition for changes in hiring practices cannot happen overnight; expecting employers to quickly come into compliance with a new law that fundamentally changes how they do business is only asking for trouble (i.e., litigation). A great example of an extended enforcement delay can be found in Oregon, where the law was passed in 2017 and became effective in October of the same year. The law specifies, however, that no civil actions against employers are permitted until January 1, 2024, giving employers ample time to retrain their employees and revamp their application and hiring processes. On the other hand, New York City has chosen to give companies a total of six months to update their hiring practices, which requires retraining hiring personnel, IT modifications for online applications, consulting with background checking services to prevent accidental disclosure of salary history, and other compliance necessities. While New York City’s law gives employers more leeway in their practices regarding what can and cannot be discussed (see above), a change of this magnitude, regardless of how necessary the state legislature or city council may find it, must be done in a realistic manner—especially when extensive monetary penalties are threatened.

Expanding Penalties or Remedies for Equal Pay Violations

Generally, the scope of remedies and damages available in state and local equal pay laws are more expansive than federal law. Although two states (Alabama and Mississippi) have no equal pay laws, many states have statutes that create a cause of action to sue for damages, including:

- Back pay and interest;
- Liquidated damages;
- Civil monetary penalties;
- Criminal penalties and imprisonment;
- Capped compensatory damages and punitive damages; and
- Attorney’s fees and court costs.

A few states have recently increased their penalties, particularly regarding the new prohibitions on salary histories. For example, the penalty in New York City for violating the salary history ban is a very steep civil penalty of up to $125,000 for an unintentional violation, and up to $250,000 for a willful violation. The penalties under Delaware’s salary history law, by comparison, are a more modest $1,000 to $5,000 for a first offense, and up to $10,000 for a subsequent offense. New York state also recently increased its liquidated damages penalty for pay discrimination to up to 300 percent of wages due for a willful violation, and in Colorado, plaintiffs can now recover compensatory and punitive damages in addition to their actual damages.

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29 The New York City ordinance was passed in May of 2017 and took full effect on October 31, 2017.
Analysis of the Different Approaches. There is a wide variety of remedies and penalties for pay discrimination claims at the state level. In 35 states, employers are liable for damages, but in 15 states they are not. Although most states have limits or caps on the amount of compensatory and punitive damages for pay discrimination, some states allow employees to be awarded these damages without limit. Sixteen states allow for class action lawsuits or for claims to be joined, and seven states have additional penalties for multiple violations. Employers are also liable for court costs and reasonable attorney’s fees in 33 states.

Advocates for stronger state pay discrimination penalties often tout the legislation to give the Equal Pay Act “new teeth.” Such a statement would lead one to believe that there is currently little to no protection against wage discrimination based on gender under federal law and that stronger state penalties are required. However, both the federal Equal Pay Act (EPA) and Title VII of the Civil Rights Act of 1964 already provide significant remedies. For example, the EPA provides back pay, plus that amount doubled, injunctive relief, and attorney’s fees if an employee simply shows a wage disparity between themselves and a person of the opposite gender (intentional or unintentional) so long as the employer cannot provide a legitimate nondiscriminatory reason for the disparity. Title VII provides an even broader array of remedies including compensatory and punitive damages, front pay, back pay, and attorney’s fees and costs if an employee can demonstrate that they are receiving lower wages based on gender because of the employer’s intentional discrimination. Indeed, both statutes already provide the plaintiff an arsenal of remedies in challenging an employer’s pay practices, systems, or decisions under both intentional and unintentional theories of discrimination.

Importantly, when Colorado added compensatory and punitive damages to its employment discrimination law, the legislation imposed some reasonable limitations on the penalties. For example, in Colorado, compensatory and punitive damages are often only available to an employee who can prove they suffered intentional discrimination, not discrimination resulting merely from a “disparate impact” on a protected group. Another limitation is that punitive damages will only be available if the employee establishes (by a higher standard of proof than in usual cases) that the employer discriminated with “malice or reckless disregard.” And, if the employer can show that it acted in good faith to avoid discriminatory conduct, punitive damages will not be available in any case.

Because of the complexity and factual specificity of wage discrimination cases, states should limit liquidated, compensatory, and punitive damages where an employer has acted in “good faith” and with “reasonable grounds for believing” its conduct was lawful. In such cases, courts should be authorized to limit or deny liquidated damages. In the past, employers have relied on this just and important defense, limiting their liability in cases where they had acted in reliance on advice from their lawyers, on opinions of the EEOC, or upon reasonable, but ultimately incorrect, wage comparison data. The absence of a good faith defense to compensatory and punitive damages in any state or local law could pose significant problems for employers.


31 Id.

32 Id.
About penalties and remedies associated with the new prohibitions against salary history inquiries, the penalty should be stiff enough to ensure that employers take notice and implement changes in their procedures. However, it should also be recognized that in many cases the violation will involve little or no discrimination—or perpetuation of previous discrimination. Indeed, if an employer seeks the information to avoid offering an amount that is insufficient (or even insulting) to the employee, the effect of the violation is likely to be minimal. As a result, there is no need to treat salary history violations in the same manner as actual, affirmative discrimination. Viewed in this context, severe penalties (like those possible under the New York City ordinance) seem both unnecessary and excessive.

In sum, jurisdictions should seek to make it easier, not harder, for employers to comply. Some municipalities, like New York City and Philadelphia, have issued Frequently Asked Questions or promulgated interpretations. Companies earnestly want to comply and would welcome a better understanding, or simpler consistent requirements, both to avoid any claims or penalties and to do the right thing.

Imposing New Requirements On Employers In Order To Increase Pay Transparency

Wage transparency laws are another tool that state legislatures are incorporating into their equal pay laws to reduce or eliminate wage disparities. Approximately 17 states, including the District of Columbia, have added pay transparency laws to their books, including two states in the 2017 legislative session. Pay transparency laws cover a range of policy initiatives, but they have been primarily focused on three areas:

- Pay secrecy laws that make it illegal to prohibit employees from inquiring, discussing, or voluntarily disclosing their wages or the wages of another employee to co-workers;

- Anti-retaliation laws that make it illegal to discharge, discipline, discriminate against, coerce, intimidate, threaten, or otherwise interfere with an employee because that employee inquired about, disclosed, compared, or otherwise discussed their pay; and

- Policies that require employers to disclose the pay differences between men and women based on the classifications or job titles of its employees.

Generally, the rationale for pay transparency laws is that wage disparities will be lessened or eliminated if employees can discuss their wages without repercussions or employers are required to publicly disclose pay differences.

**Prohibiting Pay Secrecy.** Those states that have enacted pay secrecy laws generally have similar language that prohibits employers from having policies that discourage employees from discussing their pay with coworkers. For example, in Maryland, employers may not forbid employees from “inquiring about, discussing, or disclosing” their wages or the wages of other employees. There are some differences and various exceptions for certain employees. For example, Maryland permits employers, 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, although such a policy may run up against the National Labor Relations Act (NLRA), as
noted below). In Massachusetts, employers are not obligated to disclose an employee’s wages to another employee or a third party. Another common carve out is for employees whose essential job functions provide access to wage information (e.g., payroll or human resources personnel).

**Anti-retaliation Provisions.** Anti-retaliation laws on this subject generally have the same language that makes it unlawful for an employer to “discharge, discipline, discriminate against, coerce, intimidate, threaten, or otherwise interfere with” an employee because that employee “inquired about, disclosed, compared, or otherwise discussed” his or her wages. However, there can be notable differences. For example, Massachusetts law prohibits retaliating against an employee who has “opposed any act or practice made unlawful” under the statute, and California law prohibits employers from retaliating against employees for invoking the employee’s rights.

**Pay Data Collection and Dissemination.** To date, only one state—California—has tried to require employers to report and disclose pay differences between men and women. Gov. Brown vetoed the measure, however, after it had passed both legislative chambers. The California bill would have required employers with 500 or more employees to collect information on the difference between the mean, and median, wages of male and female exempt employees located in California, by job classification or title, and the difference between the mean, and median, wages of male and female board members. The pay data would be collected biennially and submitted to the California Secretary of State for publication on a “web site available to the public.” Without context or understanding of the methodology, this data will be subject to misinterpretation and confusion. Importantly, the data could not be used as prima facie evidence of any violation of existing law. Although the bill was scuttled by Gov. Brown, proponents have vowed to pursue the legislation in the future. Policymakers should be aware that achieving equal pay, which employers are legally liable for, does not, nor should not, require employers to create pay parity. Although equal pay demands that pay decisions be based on legitimate nondiscriminatory factors, employers should still be permitted to consider personal skills and abilities when deciding wages. Employees want to be respected for the individual skills and value they bring to the workplace, and expect to be paid accordingly.

**Analysis of the Different Approaches.** The foundation for state pay secrecy and anti-retaliation laws is rooted in language and interpretation of the National Labor Relations Act (NLRA). Specifically, the National Labor Relations Board, the independent federal agency primarily responsible for enforcing the NLRA, has long ruled that an employer violates the NLRA when it prevents, prohibits, or punishes employees for discussing pay levels and compensation packages. In addition to this longstanding rule, President Obama’s EO 13665 prohibits federal contractors and subcontractors from discharging or otherwise discriminating against their employees and job applicants for discussing, disclosing, or inquiring about compensation. Although EO 13665 is largely redundant of the NLRA, it expands the policy to reach managers and job applicants, who are not covered by the NLRA.

Many of the state pay secrecy and anti-retaliation pay laws, while expanding the list of employers that must comply and employees that gain protection beyond the NLRA, do not bring

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33 The National Labor Relations Act guarantees covered employees the right to engage in “concerted activity” for their “mutual aid and protection,” and makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed” by the NLRA.
new requirements or expectations to the table. Accordingly, employers have come to largely accept these laws. Moreover, because employers are generally not required to change their practices due to the passive nature of the policy, these state level additions are likely to have little impact on large employers. There is also a relatively low likelihood that these policies will result in litigation costs for companies, as claims are not frequently litigated individually. Nonetheless, employers are advised to stay abreast of new state wage transparency laws to avoid any new penalties that could be added to existing laws.

The third wage transparency effort at the state level—collecting pay data—would be of little or no use to those tasked with analyzing it (the government) while placing a substantial administrative burden on those providing it (employers). This approach thus appears to offer a low return on the investment and has been widely criticized by the business community. As discussed earlier, a significant problem with efforts to collect pay data and use it for enforcement or public dissemination is the likelihood that the data standing alone will generate significant numbers of “false positives” and “false negatives.” Moreover, collecting pay data by specific job title cannot account for all the nondiscriminatory factors for pay differences, and it would mislead the public if such data were published or posted on the internet. As the California Chamber of Commerce has pointed out, “[j]ob titles and descriptions are not determinative of whether two jobs are the same for purpose of equal pay under [California law] or the federal Equal Pay Law.” Indeed, the data might serve only as a confusing talking point, bringing employers, lawmakers, and policy analysts no closer to solving the issue of gender pay inequality. California Gov. Brown recognized these flaws when he vetoed legislature’s bill because it “could be exploited to encourage more litigation than pay equity.” Without any useful data that helps employers close the gender pay gap (i.e., information that accurately compares male and female wages based on legally useful characterizations), such legislation would only to add administrative burdens and high risks of litigation to a business community that is making strides to alleviate the gender pay gap.

Providing Safe Harbors for Employers

As states have made it easier for plaintiffs alleging pay discrimination to prevail in court, two states have recently enacted safe harbors, or “self-evaluation” defenses, to encourage employers to conduct self-audits of their pay practices and take steps to eliminate compensation differences based on gender. Generally, these safe harbors provide an affirmative defense to liability for an equal pay violation if an employer completes a good-faith self-audit of their pay practices within three years of a claim (MA, OR), and:

- Can demonstrate that “reasonable progress has been made towards eliminating compensation differentials based on gender” (MA); or
- Eliminated the wage differentials for the plaintiff and has made reasonable and substantial progress toward eliminating wage differentials for the protected class at issue (OR).

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In Massachusetts, the self-audit may be of the employer’s own design so long as it is reasonable in scope or detail considering the size of the employer, or is consistent with standard templates to be issued by the state attorney general. In Oregon, however, the self-audit must be reasonable in detail and scope and related to the protected class asserted by the plaintiff. Importantly for Massachusetts employers, evidence of an employer’s self-evaluation or remedial measures is not admissible in later lawsuits, under certain circumstances.

Analysis of the Different Approaches. Although these state laws employ different means, they serve the same end. These approaches aim to narrow the pay gap by providing incentives to employers to conduct self-audits and take steps to remedy unexplained statistical differences in pay. In fact, encouraging employers to conduct self-audits may be the best way to reduce pay discrimination as less than one percent of federal contractors who periodically perform such audits were required to remedy pay discrepancies by the federal Office of Contract Compliance Programs over the past four years.\(^{35}\)

There are notable differences in the state laws. As noted above, in Oregon the scope of the self-audit must relate to the protected class of the plaintiff, whereas Massachusetts has no such requirement. In Oregon, the safe harbor is available for three years after an audit if an employer can show it remedied the differential as to the plaintiff and is making reasonable efforts based on the analysis to eliminate prohibited wage disparities within his or her class. The defense is available in Massachusetts, however, if an employer can demonstrate that it has developed and begun implementing in good faith a plan to address any wage differentials. Moreover, the Massachusetts safe harbor provides a complete affirmative defense for employers that have both completed a pay audit in good faith and can demonstrate that “reasonable progress” has been made towards curing disparities, while the Oregon safe harbor only disallows compensatory or punitive damages. That is, even with the defense, Oregon employers would still be required to pay back pay and reasonable attorney’s fees.

A common concern among employers considering self-audits and remedial action is that the results of their evaluations might be used against them in court. Such concerns severely constrain the incentive to conduct such audits. Massachusetts addresses this issue by providing that self-evaluation and remedial steps shall not be admissible as evidence of a legal violation, provided that the initiative complies with prescribed time and scope parameters, and a self-audit may not be used against an employer if a violation occurs before the employer’s self-evaluation is completed or within six months of its completion. However, Oregon law provides no such privilege protections.

The Massachusetts law also authorizes the state attorney general to promulgate regulations, on what constitutes an acceptable pay audit, though the office has not yet done so. Nor have the contours of any self-audit been delineated in Oregon. While these provisions present an opportunity for employers to make good-faith efforts targeted at eradicating pay disparities,

\(^{35}\) 41 CFR 60–2.17(b)(3) currently requires federal contractors to periodically perform in-depth self-audits of their compensation system(s) to determine whether there are gender, race, or ethnicity–based disparities. They must also develop and execute action-oriented programs designed to correct any problem areas that are identified (41 CFR 60–2.17(c)).
without more guidance from regulators and/or courts, employers may fall short on that burden of proof and, at best, may lack confidence that their efforts would qualify for safe harbor protection.

**CONCLUSION**

This paper has provided an overview of recent state legislation regarding equal pay, an analysis of the maze of different approaches policymakers have taken, and the serious challenges well-intentioned employers face in trying to comply with the law.

The trend in statehouses and on city councils to supplement existing laws, which already prohibit pay discrimination, is likely to result in unintended consequences, over regulation, and conflicting obligations. These added layers of regulation, furthermore, come with little guidance and no guarantee they will succeed in eliminating unfair pay disparities.

There are compelling business reasons to establish and maintain a workplace that not only treats employees fairly but goes above and beyond to recognize the outsized role many working parents play in running a household and raising a family. Fostering such a culture is also the right thing to do.

In addition to the elimination of discrimination, critical to any long-term solution to the gender pay gap is the furtherance of education, training, and occupational development of women, particularly investments that increase their representation in occupations and positions that involve higher levels of compensation. Businesses that take steps to achieve these goals gain both a competitive advantage and a loyal workforce. State legislators should take steps to encourage companies that are making these efforts. The proliferation of an increasingly complicated patchwork of laws stretching from coast to coast can actually hinder these goals.

It makes business sense for employers—large and small—to be innovative in recruiting and retaining talented women. HR Policy Association will continue to work with elected and appointed policymakers, thought leaders, and coalition partners to close the gender pay gap with all due speed.
The Gender Pay Equity Challenge:  
A Critique of How States and Localities Are Trying to Narrow the Gap

This appendix summarizes key components of several of the most stringent equal pay regulations in the United States. This overview is provided for illustrative purposes and, given its nature, does not address all significant provisions of these laws. This summary, moreover, does not address all relevant ordinances that may have been enacted by localities (i.e., New York City, San Francisco, etc.) within these states. Employers requiring detailed information or guidance on these laws should not rely simply on this matrix but should consult the applicable laws and regulations as well as knowledgeable employment counsel.

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<tr>
<th>Jurisdiction</th>
<th>Scope of Equal Pay Comparison</th>
<th>Permissible Employer Explanations</th>
<th>Salary History Restrictions</th>
<th>Wage Transparency</th>
<th>Employer Safe Harbors</th>
<th>Remedy and Penalty Highlights</th>
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| California   | Employers may not pay less to employees of the opposite sex, or another race or ethnicity, for substantially similar work, when viewed as a composite of skill, effort and responsibility, and performed under similar conditions. | Wage differentials are permitted if: (1) based on one or more of these factors:  
- Seniority system;  
- Merit system;  
- System measuring quantity or quality of production; or  
- Bona fide factor other than sex (i.e., training, education, experience); | Employers cannot rely on salary history as a factor in deciding whether to offer a job or what salary to offer the candidate. They also may not seek such information, whether orally or in writing, personally or through an agent. Voluntary disclosures by applicants, | Employers cannot prohibit employees from discussing or asking about their own wages or the wages of others. Employers may not require employees, as a condition of working, to refrain from such disclosure or to sign a waiver of these rights. Retaliation is also prohibited. | None | Employees may file with the DLSE or file a civil action. Time limits depend on the claim. Initial violations of the equal pay law result in $100 civil penalty, per employee, per failure, with $200 penalties for subsequent or intentional offenses, plus 25% of the |
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<td>California</td>
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<td>(2) each factor is applied reasonably; and (3) factors account for the entire disparity. Prior salary alone cannot justify a gap. This defense does not apply if the employee shows an alternative practice was available.</td>
<td>without prompting, are permitted; in that event, employers may use the pay information to set salary. Employers may provide pay scales to applicants. San Francisco has an ordinance on this subject; beginning 7/1/19, it imposes penalties from $100 to $500.</td>
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<td>amount withheld. Willful violations of the equal pay law may result in 6 months’ jail time or fines of up to $10,000. Individual liability may apply. Aggrieved employees may also pursue claims under PAGA.</td>
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<tr>
<td>Delaware</td>
<td>Employers may not pay less to employees of the opposite sex, in the same establishment, for equal work where job performance</td>
<td>Wage differentials are permitted if based on a: • Seniority system; • Merit system; • System measuring</td>
<td>Employers cannot screen applicants based on salary history, including by requiring prior salary to meet min. or max.</td>
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<td></td>
<td>Employees may file a civil action within 1 year. Violations, including retaliation, result in penalties of $1000 to $5000</td>
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<td>Jurisdiction</td>
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| Delaware     | requires equal skill, effort and responsibility, under similar conditions. | quantity or quality of production; or:  
- Any factor other than sex. | criteria. Nor can they seek pay history from an applicant’s current or former employer. Voluntary disclosures by applicants are permitted; in that event, employers can discuss and negotiate salary. Employers may also confirm pay history after an offer is made that covers compensation. | not require employees, as a condition of working, to refrain from such disclosure or to sign a waiver of these rights. Retaliation is also prohibited. | None | per violation, and up to $10,000 for subsequent offenses. |
| Maryland     | Employers may not discriminate in pay based on sex or gender identity if both employees work in the same | Wage differentials are permitted if based on a:  
- Non-discriminatory seniority system; | None | Employers cannot prohibit employees from asking about, discussing or disclosing their wages or the wages of others. | None | Employees may file a civil action within 3 years. Willful equal pay violations are misdemeanors and result in |
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<td>Maryland</td>
<td>establishment and perform work of comparable character or work on the same operation, in the same business, or of the same type. “Same establishment” covers the employer’s workplaces within the same county. Employers also may not provide “less favorable employment opportunities” because of sex or gender identity.</td>
<td>• Non-discriminatory merit system; • Job requiring different abilities; • Job requiring the regular performance of different duties or services; • Work performed on different shifts; • System measuring quantity or quality of production; or • Bona fide factor other than sex or gender identity (i.e., training, education, experience), so long as that factor is not based on gender-based pay disparities, is job-related, and</td>
<td>They also cannot ban requests that the employer explain why the employee’s wages are a condition of employment. Employers may not require employees to sign a waiver of these rights. Retaliation is also prohibited</td>
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<td>fines of up to $300.</td>
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<td>Massachusetts (as of 7/1/2018)</td>
<td>Employers may not discriminate in pay on the basis of gender for comparable work. “Comparable work” is work that is substantially similar, in that it requires substantially similar skill, effort and responsibility and is performed under similar conditions. “Working conditions” means environmental and other circumstances customarily considered,</td>
<td>Wage differentials are permitted if based on: - Seniority system, except time spent on certain leaves does not reduce seniority; - Merit system; - System measuring quantity or quality of production; - Geographic location, training, or experience, if reasonably related to the particular job in question; or - Travel, if it is a regular and necessary condition of the particular job.</td>
<td>Employers cannot seek an applicant’s wage history from him or her, or from a current or former employer. Nor may employers require prior salary to meet certain criteria. Voluntary disclosures by applicants are permitted; in that event, employers can confirm prior salary information or allow the candidate to do so. Employers may also seek and confirm history after</td>
<td>Employers cannot prohibit employees from discussing or asking about their own wages or the wages of others, as a condition of employment. Certain restrictions may be imposed, on employees with access to wage information (i.e., supervisors, HR staff).</td>
<td>An employer has an affirmative defense to liability, if it: (1) performed a good-faith self-evaluation of pay practices, within 3 years of a previous claim for equal pay; and (2) can show progress toward eliminating pay differentials based on gender. The self-audit and remedial steps are not admissible as evidence of a legal violation.</td>
<td>Employees may file a civil action within 3 years. No administrative exhaustion is required. Plaintiffs can recover unpaid wages, an equal amount as liquidated damages, plus fees and costs. As of 1/1/2018, employers that violate equal pay laws will be fined up to $1000.</td>
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<td>New York</td>
<td>Employers may not discriminate in pay on the basis of sex for equal work on a job in the same establishment that requires equal skill, effort and responsibility and that is performed under similar conditions. “Same establishment” includes workplaces in the same geographical region, no larger than a county, taking into account population.</td>
<td>Wage differentials are permitted if based on a: - Seniority system; - Merit system; - System measuring quantity or quality of production; or - Bona fide factor other than sex (i.e., training, education, experience), so long as that factor is not based on sex-based pay disparities, is job-related, and is consistent with business necessity. This defense does not apply if the employee shows a wage differential not at the state level, but (1) NYC and (2) Albany County adopted ordinances. The NYC law prohibits inquiring about or relying on salary history; violations may result in penalties up to $125,000 for unintentional violations, and up to $250,000 for willful, wanton, or malicious acts.</td>
<td>None at the state level, but (1) NYC and (2) Albany County adopted ordinances. Employers cannot prohibit employees from discussing or asking about their own wages or the wages of others. They can prohibit employees from discussing a co-worker’s wages unless the co-worker grants permission. This provision does not apply to employees with access to wage data who disclose it to those without authorization, unless as part of an investigation.</td>
<td>None</td>
<td>Employees may file with the NYDOL or file a civil action within 6 years. Violation of the state equal pay law may result in a fine of $500 for each violation. In addition, a first violation is a misdemeanor, punishable by up to 1 year in jail or fines ranging from $500 to $20,000. Additional violations within 6 years are felonies, with similar consequences.</td>
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<td>Oregon</td>
<td>Employers may not discriminate in pay on the basis of any protected class (race, color, religion, sex, sexual orientation, national origin, marital status, veteran status, disability, age) for work of a comparable character. Work of “comparable character” requires substantially similar knowledge, skill, effort,</td>
<td>Wage differentials are permitted if based on: • Seniority system; • Merit system; • System measuring quantity or quality of production; • Workplace locations; • Travel, if it is a regular and necessary condition; • Education; • Training; or • Experience; or</td>
<td>Employers may not seek the salary history of a candidate from him or her, or from the candidate’s current or former employer. Employers may not screen applicants based on prior compensation or set pay based on prior salary history. These restrictions do not apply for a current</td>
<td>Employers may, by written policy, impose reasonable limitations for discussion of wages at work.</td>
<td>An employer has an affirmative defense to liability for damages (compensatory and punitive) if it: (1) performed a good-faith self-evaluation of pay practices, within 3 years prior to the claim; (2) can show the pay analysis was reasonable in detail and scope in light of its size and was related to the protected class</td>
<td>Employees may file equal pay claims with the BOLI or by civil action within 1 year. A new violation occurs each time compensation is paid. Unpaid wages, plus liquidated damages in the same amount, may be recovered, along with fees and costs.</td>
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<td>distribution, economic activity, and/or the presence of municipalities.</td>
<td>disparate impact and that an alternative practice was available but the employer refused to adopt it.</td>
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<td>Liquidated damages and civil penalties may also be imposed.</td>
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<td>responsibility, and working conditions, regardless of the job title or description.</td>
<td>• Any combination of these factors if they account for the entire disparity.</td>
<td>employee’s transfer or move within the same employer. This provision took effect 10/6//17.</td>
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<td>at issue; and (3) eliminated the differential for the plaintiff and made substantial progress toward curing the problem for that class. If successful, a court will limit any award to 2 years’ of back pay, plus costs and fees. An employer’s lack of a pay analysis may not be used as evidence of a violation.</td>
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