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2018 • ISSUE 2

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Expansion of Oregon's Equal Pay Act: Highlights and Proactive Tips to Reduce Viability of Unwarranted Claims

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Without taking appropriate proactive measures, the well-intended Equal Pay Law—Oregon House Bill 2005, signed into law in June 2017 (the “Act”)—may produce costly and unintended consequences to Oregon employers. This article briefly summarizes the most material provisions of the Act and outlines a handful of fundamental measures employers should implement prior to the Act’s January 1, 2019, effective date.



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Overview of Oregon's New Equal Pay Law

As a starting point, the Act greatly expanded the protected classes to include race, color, religion, sex, sexual orientation, national origin, marital status, veteran status, disability, and age.¹ Prior to the Act, ORS 652.220 only protected against sex-based discriminatory pay practices. In addition to the above expansion of protected classes, the Act now prevents employers from (1) discriminating between employees on the basis of a protected class in the payment of wages or other compensation for work of comparable character, (2) screening job applicants based on current or past compensation, and (3) determining a

prospective employee’s compensation on his or her current or past compensation² (not applicable to current employee’s pay during a transfer, move or hire of the employee to a new position with the same employer).³ Additionally, as of October 6, 2017, employers may no longer seek the pay history of an applicant or employee, either from the individual or from their current or former employer before making an offer of employment that discloses the amount of compensation offered to the employee.⁴

Under the new law, employers are fully permitted to pay employees for work of comparable character at different compensation levels. However, the entirety of the difference in compensation must be based on one or a combination of the following factors: a seniority system; a merit system; a system that measures earning by quantity or quality of production; workplace locations; travel, if necessary and regular for the employee; education; training; and/or experience.⁵

Advising Clients Under the New Law: Be Aware and Be Proactive

Since passage of the Act, many of us have continued to encounter business owners and HR professionals who believe that the Act doesn’t impact their operations, since their companies do not determine employee compensation

based on an employee’s inclusion in or exclusion from a protected class. From this perspective, these individuals perceive little to no risk of an employee bringing a viable claim for violation of the Act. While these employers may be operating honorably, this complacent mentality nonetheless has the potential to produce unwanted and unexpected consequences. While employers may not intentionally determine employee compensation in violation of the Act, employers who fail to acknowledge the need to proactively document the bases upon which their employees’ compensation is or was determined will increase the difficulty of successfully defending against unwarranted claims for violation of the Act.

Accordingly, when advising clients on the application of the Act to existing employees, the key is to educate and assist clients in developing and implementing proactive procedures and in maintaining adequate documentation. To improve an employer’s probability of success in defending against unwarranted and unfounded claims for pay-related violations of the Act brought by existing employees, employers should direct their focus to employee files. First, employers should familiarize themselves with the permissible bases upon which a pay disparity may exist.⁶ Second, employers

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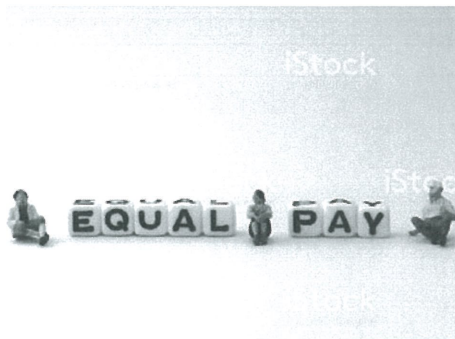
should carefully review employee files to determine whether each employee's compensation, and the basis for determination thereof, are adequately documented within the file. Third, if employee files are not adequately documented so as to clearly demonstrate the permissible reasons upon which each employee's pay is based, employers should consider drafting a memorandum or similar document that clearly specifies the permissible bases upon which each employee's pay is currently determined (without including any comparisons between employees), to be included in each employee's personnel file. Fourth, after evaluating employee pay against the requirements of the Act, employers should consider increasing compensation of an employee who performs work of comparable character to others, but who receives comparatively less compensation, and whose employee file does not contain the bases upon which the pay disparity is lawfully justified.

Finally, employers may want to craft policies for inclusion in employee handbooks that address the process and bases upon which employee compensation will be lawfully determined.

While these proactive measures may not operate to conclusively resolve unwarranted claims under the Act, so long as the above measures are observed, such documentation will likely operate as persuasive indicia that an employer operated in a manner permitted under the Act.

New Hires: Screening, Salary Determination, and Pay History

In addition to the proactive measures to be applied to existing employees, discussed above, employers should evaluate their employment application,



standard interview questions, and general screening criteria to ensure compliance with the Act. After doing so, employers should educate those with the authority to hire employees and determine employee compensation, or those who otherwise participate in the screening process of prospective employees, on the various requirements and new prohibitions of the Act. This might be practically accomplished through various training seminars and/or a detailed memorandum to those with the above authority. Finally, employers should create defined processes and documentation to be used to memorialize the lawful bases upon which each new hire's compensation is determined, and for the reasons stated above, should include such documentation in each new hire's employee file.

Conclusion

This article is not intended to comprehensively address all new requirements of the Act, and does not suggest the exclusive means by which employers may prepare themselves for enforcement of the Act. Consequently, defense counsel and their employer clients should take some time to understand additional provisions of the Act and the various avenues of relief available to employees (including a private right

of action) and the benefits that may be afforded through performance of an equal-pay analysis.⁷

With the above in mind, proactive measures are required to develop adequate written evidence demonstrating the employer's compliance with the Act. In light of the January 1, 2019 enforcement date, assessment of compliance and implementation of proactive and corrective measures should be commenced now. Doing so will provide an employer with the proper tools and documentation not only to avoid violation of the Act, but to successfully defend against unwarranted claims for violation of the Act, the importance of which is heightened by the expanded recourse and remedies available to employees under the Act.

Endnotes

1. ORS 652.210(5).
2. ORS 652.220(1)(a-d).
3. ORS 652.220(1)(d).
4. *Oregon Equal Pay Law*, OREGON.GOV, <http://www.oregon.gov/boli/TA/Pages/Equal%20Pay%20Law.aspx> (last visited Mar. 22, 2018).
5. ORS 652.220(2)(a-i).
6. See ORS 652.220(2) for a list of permissible bases upon which employee compensation may be determined.
7. See ORS 625.210(4) for the definition of equal-pay analysis. See ORS 625.235 which contains a description of benefits afforded to employers if an equal-pay analysis is properly conducted.