Federal Judge Reinstates Revised EEO-1 Pay Data Reporting Requirement

On March 4, 2019, the U.S. District Court for the District of Columbia issued an order lifting the stay on the EEO-1 pay data reporting requirements, leaving employers uncertain about their obligations.

Background

As we previously discussed, for the last 50 years, large employers with 100 or more employees, and federal contractors with 50 or more employees, must submit annual Employer Information Reports (EEO-1) to the Equal Employment Opportunity Commission (EEOC), which identifies the number of employees working for the company by job category based on race, sex and ethnicity.

In September of 2016 under the Obama administration, the EEOC finalized regulations expanding the information collected in the annual EEO-1 report to include pay data. The revised EEO-1 form would require employers to collect aggregate W-2 earnings and report the number of employees in each of the twelve pay bands for the ten EEO-1 job categories, classified by race, sex and ethnicity. In addition, the revised EEO-1 form would also require employers to report the total hours worked during the year, which would help explain partial year or part-time employment.

The revised EEO-1 form was intended to combat pay discrimination by identifying wage disparities. However, the revised EEO-1 form was widely criticized by employers claiming that the collection of W-2 earnings, without any context to explain legitimate non-discriminatory reasons for pay disparities (*e.g.,* education, training, experience, tenure, merit, etc.) would unnecessarily open the door to increased scrutiny and investigations. Following the post-election transfer of power, the Office of Management and Budget (OMB), under the Trump administration, issued a memorandum announcing the immediate stay of the revised EEO-1 form, citing concerns that aspects of the new form "lack practical utility, are unnecessarily burdensome, and do not adequately address privacy and confidentiality issues." In an effort to reinstate the revised EEO-1 form, several advocacy groups, including the National Women's Law Center, sued the EEOC and the OMB in furtherance of their mission to close the gender wage gap by educating the public and policymakers about pay disparity in the workplace.

Court Revives Pay Data Collection

The OMB's stay of the revised EEO-1 form remained in effect until March 4, when Judge Tanya S. Chutkan of the U.S. District Court for the District of Columbia vacated the stay. Judge Chutkan authored a 42-page opinion ultimately ruling the OMB's decision to halt the collection of pay data was arbitrary and capricious. Specifically, the Court found that the OMB's stated concerns directly contradicted the EEOC's findings when it issued the regulations in 2016 and the OMB failed to explain these inconsistencies or provide a reasoned explanation for changing its policy. The Court noted that employers had more than a year to collect pay data before the OMB issued the stay, so the reinstatement of the pay data reporting requirement should not have "potentially disruptive consequences." Still, many predict that the OMB will appeal the decision, which would likely put the implementation of the revised EEO-1 form on hold, yet again.

EEOC Aims to Modernize Data Analysis

Meanwhile, and perhaps in response to public skepticism over how the agency would use pay data information other than as a screening tool to target companies for pay discrimination, the EEOC has been revamping its data analytic practices. The agency hired its first Chief Data Officer, Chris Haffer, tasked with implementing the EEOC's data analytics modernization program. Haffer intends to create a comprehensive inventory of

workforce data, along with analytical tools that the public can access, while protecting companies' privacy.

The EEO-1 portal will open on March 18, allowing employers to electronically submit their 2018 workforce data by the May 31, 2019 filing deadline (extended from March 31, 2019 due to the government shutdown). Although it is unknown whether the EEOC will require compensation data to be included or whether it will roll-out a delayed reporting deadline, employers should be prepared to comply with the pay data reporting requirement.

Be Prepared and Prioritize Pay Equity

In addition to the ruling reinstating the revised EEO-1 form, state legislatures have been actively passing comprehensive equal pay laws, which have led to an uptick in wage discrimination lawsuits. In New Jersey, the recently enacted Diane B. Allen Equal Pay Act is being heralded as one of the most expansive equal pay laws in the country. Therefore, it would behoove employers to conduct an internal audit to identify any pay disparities and then consult with legal counsel to analyze the bona fide business reasons for any discrepancies to become prepared.

March 18, 2019

Written by: Alexa E. Miller and Lynne Anne Anderson

Category: Gender and Pay Equity

Tags: EEO-1, equal pay, pay data

EEO-1 Update: Pay Data Now Due September 30, 2019

As we previously reported, the Equal Employment Opportunity Commission (EEOC) now requires employers to disclose equal pay data on its Employer Information Report (EEO-1). The equal pay data, otherwise known as "Component 2" of the EEO-1, has been the subject of ongoing litigation. Most recently, the EEOC requested court approval to extend the deadline for employers to report Component 2 data until September 30, 2019—later than the deadline for other EEO-1 data, which is due May 31, 2019. Several organizations supporting equal pay initiatives had argued that the agency should collect the data by May 31, but the agency told the court that the May 31 deadline was not feasible.

Judge Tanya S. Chutkan of the D.C. federal district court has granted the EEOC's request. In an Order on April 25, Judge Chutkan ruled that the EEOC must "immediately take all steps necessary to complete the EEO-1 Component 2 data collections for calendar years 2017 and 2018 by September 30, 2019." The court further ordered the EEOC to publish a notice to employers regarding the Component 2 data collection by no later than April 29, 2019.

The court also gave the EEOC an option of foregoing Component 2 data collection for the year 2017, in favor of collecting the same data for the year 2019. If the EEOC chooses to do so, employers will have until September 30, 2019 to report 2018 Component 2 data only. The same information for 2019 will be due in the 2020 EEO-1 reporting period.

April 29, 2019

Written by: Brooke Razor and Lynne Anne Anderson

Category: Counseling & Compliance Training, Gender and Pay Equity

Tags: EEO-1, EEOC

Reliance on Salary History No Defense to Pay Disparity Under Equal Pay Act

Just in time for Equal Pay Day (April 10), in its *en banc* opinion in *Rizo v. Yovino, Fresno County Superintendent of Schools,* the Ninth Circuit held earlier this week that prior salary alone, or in combination with other factors, cannot justify a wage differential between male and female employees under the Equal Pay Act ("EPA"). In reaching this holding, the Ninth Circuit affirmed the district court's denial of summary judgment to Fresno County and overruled a prior Ninth Circuit decision, *Kouba v. Allstate Insurance Co.*, 691 F. 2d 873 (9th Cir. 1982). The court in *Rizo* also took a view of available EPA affirmative defenses which conflicts with the views held by other circuits and the EEOC.

Plaintiff Aileen Rizo was a math consultant for Fresno County. When she was hired, she had master's degrees in educational technology and mathematics education. Her salary, upon joining the County, was based on its hiring schedule, which dictated that a new hire's salary was to be determined by taking the hired individual's prior salary, adding 5% and placing the new employee on the corresponding step of the hiring schedule.

Fresno County did not dispute that it paid Rizo less than comparable employees for the same work, but it argued that the wage differential was lawful under the EPA, which provides defenses to wage disparities when payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex. The County

argued that Rizo's wage differential was based on the fourth "catchall exception" because a prior salary can constitute a "factor other than sex."

In interpreting the meaning of the catchall exception in the EPA, the *en banc* court reviewed the legislative history of the EPA and the decisions of other federal circuits and concluded:

> Prior salary does not fit within the catchall exception because it is not a legitimate measure of work experience, ability, performance, or any other job-related quality. It may bear a rough relationship to legitimate factors other than sex, such as training, education, ability, or experience, but the relationship is attenuated. More important, it may well operate to perpetuate the wage disparities prohibited under the …[EPA]. Rather than use a second-rate surrogate that likely masks continuing inequities, the employer must instead point directly to the underlying factors for which prior salary is a rough proxy, at best, if it is to prove its wage differential is justified under the catchall exception.

The court took the *Rizo* case *en banc* to clarify the law and address the Ninth Circuit's prior holding in the 1982 *Kouba* decision. In that case, the court had held that the EPA "does not impose a strict prohibition against the use of prior salary." The three judge panel in *Rizo* concluded that *Kouba* permits an employer to "maintain a pay differential based on prior salary … only if it showed that the factor 'effectuate[s] some business policy' and that the employer 'use[s] the factor reasonably in light of the employer's stated purpose as well as its other practices." The *Rizo en banc* court overruled *Kouba*, (and criticized the concurring opinions), stating that it is impossible to reconcile "how what is impermissible alone [*e.g.*, consideration of salary history], somehow becomes permissible when joined with other factors."

In light of the Ninth Circuit's *en banc* decision in *Rizo*, the law is now quite clear that employers may not use past salary as a factor in initial wage setting, "alone or in conjunction with less invidious factors."

As noted in one of the concurring opinions, the standard adopted by the majority opinion in *Rizo* is not aligned with the views of other federal circuit courts or the EEOC. The

EEOC, which filed an amicus brief in the case, takes the position that a prior salary cannot by itself justify a compensation disparity, but that employers may consider prior salaries as part of a mix of other factors.

Similarly, the Tenth and Eleventh circuits hold that prior salary *alone* cannot justify a pay disparity. The Eighth and Second circuits also allow the use of prior salary, but require that the employer prove that its reliance on past salary is rooted in legitimate business reasons. The Seventh Circuit, on the other hand, has held that prior salary is a "factor other than sex" for purposes of stating a defense under the EPA.

In light of *Rizo*, employers in Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington should carefully examine their compensation-setting practices to ensure that they comply with this newly articulated standard. The use of prior salary history in setting compensation is squarely in the robust California and national dialogue on pay equity, and there are bound to be further developments, which we will continue to monitor.

April 11, 2018

Written by: Kate S. Gold and Philippe A. Lebel

Category: Counseling & Compliance Training, Gender and Pay Equity

Tags: equal pay, equal pay act, salary history

Alabama Enacts New Equal Pay Law to Prevent Wage Disparity on Basis of Sex or Race

On June 11, 2019, Alabama's governor, Kay Ivey, signed equal pay legislation (the "Act"), which goes into effect on September 1, 2019. Alabama now joins a growing number of states, including California, Colorado, Maryland, Massachusetts, and New Jersey, with newly enacted equal pay laws.

PAY EQUITY

The Act prohibits an employer from paying any of its employees a wage rate less than the wage rates paid to employees of another sex or race for substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions.

An employer can avoid legal liability under the Act, however, if it demonstrates that the entire wage differential is pursuant to at least one of the following:

1. A seniority system;
2. A merit system;
3. A system that measures earnings by quantity or quality of production; or
4. A bona fide factor other than sex or race, such as education, training, or experience. This factor only applies, however, if the employer demonstrates that the factor is not based on or derived from a sex or race-based differential in

compensation, is job-related with respect to the position in question, and is consistent with a business necessity.

Employees who unlawfully receive lower wage rates in violation of the Act can recover the amount of wages, with interest, that the employee should have received, and an equal amount (double) as liquidated damages.

COMPENSATION TRANSPARENCY REQUIREMENTS

Under the Act, an employer may not prohibit an employee from:

1. Disclosing their own wages;
2. Discussing the wages of others;
3. Inquiring about another employee's wages; or
4. Aiding or encouraging any other employee to exercise his or her rights under the Act.

Nothing in the Act, however, creates an obligation for an employee to disclose his or her wages.

NON-RETALIATION AND PRIVATE CAUSE OF ACTION

Under the Act, an employer may not discharge, discriminate, or retaliate against any employee who exercises his or her rights under the Act. Aggrieved employees who have been discharged, discriminated against, or retaliated against can file a civil cause of action up to one year after a violation occurs, and can seek reinstatement, reimbursement for lost wages and benefits, and equitable relief.

RECORD KEEPING REQUIREMENTS

The Act requires employers to maintain records of the wages and wage rates, job classifications, and other terms and conditions of their employees' employment for a period of three years.

WHAT EMPLOYERS SHOULD DO NOW

The Act goes into effect on September 1, 2019. Employers with employees in Alabama, as well as other jurisdictions with newly enacted equal pay laws, should consider privileged fair pay audits to ensure future compliance. Employers also should review handbooks, policies and practices concerning confidentiality requirements relating to discussion of employee wages, as well as their record keeping requirements to ensure that records concerning employee wages, wage rates, job classifications, and other terms and conditions of employer are kept for three years.

June 13, 2019

Written by: Lynne Anne Anderson and Gregg Settembrino

Category: Gender and Pay Equity

Maine and Cincinnati (Ohio) Join the Growing List of Jurisdictions Banning Salary History Inquiries

Maine and Cincinnati have joined other jurisdictions, such as New York City, California, Connecticut, Delaware, Massachusetts and Oregon, that prohibit employers from making salary history inquiries of potential employees in an effort to stop the perpetuation of wage gaps from job to job. The newly enacted legislation for Maine and Cincinnati is discussed in turn below.

Maine

On April 12, 2019, Maine's governor, Janet Mills, signed into law "An Act Regarding Pay Equality," which takes effect on September 17, 2019. The new law prohibits employers from using, inquiring about or confirming an applicant's compensation history until after an offer of employment has been negotiated and made, and the offer must include all terms of compensation.

There are some exceptions. For example, an employer may confirm an applicant's compensation history if the applicant disclosures it voluntarily. Further, the salary history ban does not apply to an employer who inquires about compensation history pursuant to any federal or state law that specifically requires the disclosure or verification of compensation history for employment purposes.

Notably, even a single incident of an employer's direct or indirect inquiry about the compensation history of a prospective employee is evidence of unlawful employment discrimination under the Maine Human Rights Act and the Maine Equal Pay Law, and provides grounds for the affected applicant or Maine's Department of Labor to file a civil action. The new law also provides for monetary penalties between $100 and $500 per violation.

Finally, as we have seen with equal pay laws in other states and cities, Maine's new law includes a wage transparency provision that bars employers from prohibiting employees from discussing their wages, or wages of their co-workers.

Cincinnati (Ohio)

On March 13, 2019, Cincinnati adopted Ordinance No. 83-2019, which becomes effective next year on March 13, 2020 and will apply to employers within Cincinnati with 15 or more employees.

The Ordinance prohibits employers from:

- Asking for information about an applicant's current or prior wages, benefits, or other compensation;
- Screening job applicants based on their current or prior wages, benefits, other compensation, or salary histories;
- Relying on an applicant's salary history when deciding whether to make an offer of employment or determining the amount of salary, benefits, or other compensation during the hiring process; or
- Refusing to hire or retaliating against applicants for not disclosing their salary to the employer.

The Ordinance also provides applicants the right to bring a private cause of action against an employer that violates the salary history ban. The applicant has two years from the date of the violation to bring a lawsuit, and can seek damages, reasonable attorneys' fees and costs.

Takeaways

Prior to the effective dates of Maine's Law and Cincinnati's Ordinance, employers operating in Maine and Cincinnati should consider the following proactive measures.

- Review job applications and hiring policies and practices to ensure that salary information is not unlawfully solicited from applicants or prior employers unless a statutory exemption applies.
- Train recruiters and any personnel interviewing or interacting with applicants on the respective law's prohibitions.
- Review compensation practices and pay for comparable positions when setting compensation for new hires for purposes of compliance with newly enacted equal pay laws, as well as existing federal, state and local anti-discrimination laws that generally apply to pay practices.

May 6, 2019

Written by: Lynne Anne Anderson and Gregg Settembrino

Category: Counseling & Compliance Training, Gender and Pay Equity

Tags: maine, ohio, salary history

Get Ready New York Employers: Threshold Salaries for Exempt Employees Are Going Up

The Fair Labor Standards Act and New York Labor Law include exemptions from overtime and minimum wage requirements for employees holding certain executive and administrative positions. In order to qualify for the executive or administrative exemption, an employee must, among other things, earn at least the minimum threshold salary. Under federal law, the current minimum threshold salary is $455 per week ($23,660 per year). However, the minimum threshold salary is higher under New York law and, as of December 31, 2018, is scheduled to rise even higher.

The new minimum thresholds vary depending on the size of the employer and the employee's work location, as set forth below.

New Minimum Threshold Salaries for NY Administrative and Executive Employees	
New York City For Employers with 11 or More Employees	$1,125 per week ($58,500 annually)
New York City	$1,012.50 per week ($52,650 annually)

For Employers with 1 to 10 Employees	
Nassau, Suffolk, Westchester	$900 per week ($46,800 annually)
Other Parts of New York State	$832 per week ($43,264 annually)

An employer that currently pays its New York “executive” and “administrative” exempt employees less than the new minimum thresholds must be sure to increase their salaries or convert their positions to non-exempt. If an employer raises their salaries, the increase must take effect by no later than the first day of the workweek in which December 31 falls. Likewise, any reclassification of currently-exempt employees must take effect on the first day of the workweek in which December 31 falls. Because each employer defines the start and end days of its workweek, the first day of the workweek in which December 31 falls may vary from one employer to another.

November 27, 2018

Written by: William R. Horwitz

Category: Gender and Pay Equity

Tags: fair labor, fair pay, New York, overtime

New Jersey Enacts Comprehensive Equal Pay Law – What Employers Need to Know

Governor Phil Murphy recently made good on his campaign promise to make equal pay a top priority in New Jersey. On April 24, 2018, Governor Murphy signed into law the Diane B. Allen Equal Pay Act (the "Act"), which amends the New Jersey Law Against Discrimination ("NJLAD"). The Act was passed by the New Jersey Legislature on March 27, 2018, and takes effect on July 1, 2018.

The Act is being heralded as one of the most expansive equal pay laws in the country, and impacts hiring practices, compensation practices, employee arbitration agreements and how HR must respond to employee demands for information regarding their co-workers' compensation.

To start, the Act amends the NJLAD by making it a prohibited employment practice for an employer to compensate, which includes pay and benefits, any employee who is a member of a "protected class" less than the amount paid to employees who are not members of that protected class for "substantially similar work, when viewed as a composite of skill, effort, and responsibility." Protected classes under the NJLAD currently include the following categories: race, creed, color, national origin, nationality, ancestry, age, sex (including pregnancy), familial status, marital status, domestic partnership or civil union status, affectional or sexual orientation, gender identity or expression, atypical

hereditary cellular or blood trait, genetic information, liability for military service, and mental or physical disability, perceived disability, and AIDS and HIV status.

Given that it has been reported that women in New Jersey make only 82 cents for every dollar paid to a man, and black women are paid 58 cents for every dollar paid to white, non-Hispanic men, employers will have wage gaps. Not all wage gaps are inherently discriminatory, but the Act does limit how employers can defend those gaps. Employers must prove the compensation differential is due to a seniority system, a merit system, or by satisfying all of the following five factors:

1. That the differential is based on one or more legitimate, bona fide factors other than the characteristics of members of the protected class, such as training, education or experience, or the quantity or quality of production;
2. That the factor or factors are not based on, and do not perpetuate a differential in compensation based on sex or any other characteristic of members of a protected class;
3. That each of the factors is applied reasonably;
4. That one or more of the factors account for the entire wage differential; and
5. That the factors are job-related with respect to the position in question and based on a legitimate business necessity.

While New Jersey has not yet adopted a ban on asking candidates their salary history, employers may not be able to rely on prior salary history to justify a wage gap given that an employer may not rely on a "factor" that perpetuates a pre-existing wage gap. New Jersey employers should consider adjusting their hiring practices in the same manner as recommended for locations that have engaged bans on inquiries of salary history including California, Delaware, Massachusetts, Oregon, New York City, Philadelphia, and San Francisco.

With regards to determining which employees are "substantially similar", employers should look beyond job titles, and analyze how to group employees based on "skill, effort and responsibility", keeping in mind that job titles/job descriptions do not necessarily keep pace with the evolving nature of duties and responsibilities performed by employees. In addition, the Act mandates that compensation must be compared across "all of an

employer's operations or facilities." Therefore, "substantially similar" workers in an employer's South Jersey facility are expected to be paid the same as workers in North Jersey/NYC metro locations. Currently, it is not clear whether this includes an employer's out of state locations. Also, when trying to address wage disparities within budget constraints, the Act does not allow employers to lower salaries to level any pay gap.

The Act also prohibits employers from retaliating against workers for discussing pay and benefits with their co-workers. In this regard, an employer would be prohibited from retaliating against an employee for discussing with or disclosing to any other current or former employee information regarding the job title, occupational category and rate of compensation, including benefits, of the employee or any other employee or former employee of the employer, as well as the gender, race, ethnicity, military status, or national origin of the employee or any other employee or former employee of the employer regardless of whether the request was responded to.

Notably, the Act also prohibits employers from requiring current or prospective employees to agree to a shortened statute of limitations period or to waive any of the protections provided by the NJLAD. The Act also extends the NJLAD's two-year statute of limitations to a six-year statute of period for wage discrimination. In terms of damages, an employee can receive three times the amount of pay differential if a jury finds they were discriminated against under the Act.

Finally, public contractors have new disclosure requirements under the Act. Employers who contract with the government to provide services must provide a report to the Commissioner of Labor and Workforce Development detailing the compensation and hours of employees according to gender, race, and job category, and the total compensation of every New Jersey employee of the employer in connection with such contract.

This new New Jersey law is comparable to protections afforded by California's Fair Pay Act. See California Fair Pay Overview; Compliance with California Fair Pay Law; California Expands Fair Pay Coverage Protection Beyond Gender. California has seen an uptick in class action pay discrimination claims as a result of the passage of its Fair Pay Act, and we expect the same trend to hit New Jersey. Therefore, employers are well-

served to audit and review their current payrolls and compensation structure to confirm compliance with the Act, and prior to setting budgets for FY 2019. As referenced above, hiring and other HR practices are also impacted by the law, and employers need to prepare for the July 1 effective date.

May 3, 2018

Written by: Lynne Anne Anderson and Gregg Settembrino

Category: Counseling & Compliance Training, Gender and Pay Equity

Tags: equal pay act, fair pay, NJLAD, wage gap

New Jersey Equal Pay Data Reporting Forms Released

New Jersey's comprehensive new equal pay law, the Diane B. Allen Equal Pay Act (the "Act"), took effect last month. The law amends the New Jersey Law Against Discrimination ("NJLAD") by making it a prohibited employment practice for an employer to compensate an employee who is a member of a "protected class" less than the amount paid to employees who are not members of that protected class for "substantially similar work, when viewed as a composite of skill, effort, and responsibility." Employers can prove a compensation differential is lawful by showing it is due to a seniority system, merit system, or by satisfying several factors including that the differential is based on legitimate, bona fide factors other than the employee's membership in a protected class, and that the factors supporting the differential are job-related and based on a legitimate business necessity. The Act extends the NJLAD's two-year statute of limitations to a six-year statute of limitations for wage discrimination claims.

The Act also imposes pay reporting requirements on employers that contract with a public body to provide "public work" or other "qualifying services." The New Jersey Department of Labor and Workforce Development recently released mandatory reporting forms to monitor and enforce the reporting requirements. These include the Payroll Certification for Public Works Projects, the Annual Equal Pay Report for Qualifying Services Other than Public Works Projects, and instructions for both forms.

The Payroll Certification for Public Works Projects is applicable to employers contracting with the state or any state agency to provide "public work." Public work is defined as

“construction, reconstruction, demolition, alteration, custom fabrication, or repair work, or maintenance work, including painting and decorating,” where such work is “done under contract and paid for in whole or in part out of the funds of a public body, except work performed under a rehabilitation program.” Public work also includes work that is not paid from public funds, if, at the time the parties entered the contract, “the property or premises is owned by the public body or: (a) [n]ot less than 55% of the property or premises is leased by a public body, or is subject to an agreement to be subsequently leased by the public body; and (b) [t]he portion of the property or premises that is leased or subject to an agreement to be subsequently leased by the public body measures more than 20,000 square feet.” All employers performing public work are required to submit the Payroll Certification for Public Works Projects on a weekly basis. The form’s requirements are similar to those already imposed under the Prevailing Wage Act (“PWA”), and uses the same job categories as the PWA, with additional data required for each employee.

The Annual Equal Pay Report for Qualifying Services Other than Public Works Projects is applicable to employers contracting with the state or any state agency to provide “qualifying services” other than public works. Qualifying services are defined as “the provision of any service to the State or to any other public body, except for public work.” All employers performing qualifying services are required to submit the Annual Equal Pay Report for Qualifying Services Other than Public Works Projects on an annual basis, no later than March 31 of the year following the reporting year. Employers are permitted to use payroll data from any pay period from October through December of the preceding year. The form requires employers to disclose pay information and other data for employees, and to sort employees into one of the following job categories: Executive/Senior Level Officials and Managers, First/Mid Level Officials and Managers, Professionals, Technicians, Sales Workers, Administrative Support Workers, Craft Workers, Operatives, Laborers and Helpers, and Service Workers. A description of each of these categories can be found in the instructions.

Each of the forms collects information regarding employees’ pay and job classification, as well as employees’ sex, race, and ethnicity. The Department advises that “[v]oluntary self-identification is the preferred method of identifying an employee’s sex, race, and ethnicity” and that employers must give employees an opportunity to self-identify. If an employee declines to self-identify, employers must use “observer identification.” The Department of

Labor allows the designation, “non-binary,” for employees who do not identify as either male or female. Employers should use caution when soliciting this information from employees, and when conducting observer identifications where necessary. The Department of Labor provides a suggested statement regarding the voluntary nature of self-identification in the form instructions.

For both forms, “multi-establishment” employers must submit a report covering the principal office, as well as a separate report for each office employing 50 or more employees, and a consolidated report for each office employing 50 or fewer employees. Additionally, the forms require that employers disclose the number of hours worked by each employee. For non-exempt employees, employers must report the actual number of hours worked. For exempt employees, employers may report 40 hours per week for full-time employees, or 20 hours per week for part-time employees. Finally, employers filing the Annual Equal Pay Report for Qualifying Services Other than Public Works Projects must sort employees into one of twelve “pay bands” as detailed in 81 F.R. 45479.

We refer all employers to our prior blog regarding this new law for additional background beyond that applicable to employers with public contracts.

August 21, 2018

Written by: Lynne Anne Anderson and Brooke Razor

Category: Gender and Pay Equity

Tags: equal pay act, fair pay, NJLAD

Massachusetts Equal Pay Act Took Effect July 1, 2018

Massachusetts recently joined a growing list of states amending their equal pay legislation. On July 1, 2018, the Act to Establish Pay Equity, originally passed in 2016, took effect, amending Massachusetts' existing Equal Pay Act.

The law bans pay differentials on the basis of sex where two people perform comparable work, adopting the more liberal "equal pay for comparable work" standard, as opposed to the federal law's "equal pay for equal work" standard. Comparable work is defined as work that requires substantially similar skill, effort, and responsibility that is performed under similar working conditions. Like other equal pay laws, employers can plead certain affirmative defenses in response to an employee's claim of pay discrimination, if the employer can show the pay differential is due to:

- A seniority system;
- A merit system;
- A system that measures earnings based on quantity or quality of production, sales, or revenue;
- Education, training or experience that is reasonably related to the particular job in question and consistent with business necessity;
- Geographic location where the job is performed; and
- Travel, if travel is a regular and necessary condition of a particular job.

The law also touches on the recent trend of banning employer inquiries into an applicant's salary history. Specifically, the law prohibits employers from requesting an applicant to disclose prior wages, screening job applicants based on wages, and seeking the salary history of a prospective employee from a current or former employer absent written consent and a pending offer of employment that includes proposed compensation. These prohibitions are similar to recent legislation enacted in California, Delaware, Oregon, New York City, and Philadelphia.

Additional protections for employees include an anti-retaliation provision and a provision making it illegal for employers to ban employees from discussing or inquiring about his or her own wages or the wages of another employee. The law creates an exception for human resources or other employees "whose job responsibilities require or allow access to other employees' compensation information," allowing employers to prohibit those employees from disclosing wage information without prior written consent, unless the information is a public record. Employers should continue to watch the growing trend of equal pay legislation around the country and ensure policies and practices are updated as appropriate.

August 1, 2018

Written by: Brooke Razor, Alan S. King and Lynne Anne Anderson

Category: Gender and Pay Equity

Tags: equal pay, equal pay act