

What Types of Pay Equity Laws Should I Be Aware of and How Can I Best Comply?

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Dear QQ:

I am the HR Director for a technology company. We have offices in three states and hire employees from all over the country. Since 2020 we have let employees work remotely from the state of their choice. I've been hearing a lot about pay equity, but am not clear on the different types of laws and where they apply. Are they all basically the same thing? Because of them, I've been advising senior management that we should conduct a pay equity study, but I'm not sure how to conduct one.

Pay equity is a hot topic for employers in 2022. There have been high profile developments, such as the preliminary court approval of a \$24 million settlement payment by U.S. Soccer to the U.S. Women's players, as well as a number of new requirements issued by President Biden and state and local legislatures.

The current push for new tools to achieve pay equity is in large part a response to inequities exposed by the COVID-19 pandemic and recent social movements including Black Lives Matter and #MeToo, because despite the non-discrimination requirements on the books, pay inequity persists. Women and people of color still earn less than white men do, and the disparity is even greater for women of color.

New requirements aim to increase the likelihood that traditionally underpaid groups earn as much as their historically advantaged counterparts and to decrease historical power imbalances between employers and employees. These developments have occurred in three main areas: salary transparency requirements in the hiring process, protections for employees who discuss their—or their colleagues'—wages, and bans on asking applicants their salary histories. Pay transparency laws and protections for employee wage disclosures seek to reduce or eliminate secrecy surrounding compensation with the aim of putting all candidates on equal footing. Pay history bans help to equal the playing field in new hire salary negotiations and to support equitable pay for longer-term

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employees by forcing employers to set compensation based on the position rather than building on a candidate's prior, potentially discriminatory, compensation. Many employers are conducting or plan to conduct pay equity studies to ensure pay fairness in their organization and to limit exposure to pay discrimination claims.

New state and local laws of these types are being enacted with some frequency, so employers are advised to check on requirements prior to posting advertisements for positions.

Salary Transparency Laws

Colorado led the salary transparency charge in 2021. Its law requires, among other things, that any employer with at least one employee in the state, when posting for a position which could be potentially filled by a Colorado resident (whether working onsite or remotely), include compensation information in the job posting, notify existing employees of promotional opportunities, and maintain records of job descriptions and applicable wage rates. Connecticut; certain localities, for example, in New York State: Ithaca, Westchester County, and New York City (eff. Nov. 2022); Maryland; Nevada; Rhode Island (eff. 2023); and Washington also have salary transparency laws in effect. Among other requirements, the laws generally require employers to provide compensation information to job applicants either proactively or upon request.

The state legislatures in California and New York recently passed similar broad-based salary transparency bills that await their respective governors' signatures. State legislatures in Alaska, Massachusetts, Michigan, South Carolina, and Vermont have proposed comparable legislation. The laws vary as to which job postings are covered and the scope of requirements. The Colorado law, for example, requires covered employers to list Colorado compensation ranges in ads for positions that are linked to a Colorado location or may be performed remotely from Colorado. The California bill does not appear to limit coverage to employees in California and so it would seem to apply to covered employers' postings for remote positions. The New York bill would apply to covered employers' postings for all jobs which "can or will be performed, at least in part, in the State of New York" and so would seem to also apply to remote positions. Requirements range from requiring employers to publish salary information in advertisements to notifying current employees of a new position's salary range to providing pay scales upon request (as is already required of some California employers).

Employers who will be subject to salary transparency laws should think carefully about how the required disclosures could affect current employees. Employers should make sure pay bands are current and positions are appropriately placed in them. Then they should analyze how current employees' compensation stacks up to the disclosed compensation and how current employees may react when they see posted salary information. Employees earning less than publicized rates may allege that the difference is based on discrimination unless employers are prepared to articulate legitimate reasons for the differences.

Wage Disclosure Protections

California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, New York, Oregon, Puerto Rico, Rhode Island (eff. 2023), Vermont, Virginia, Washington, and the federal National Labor Relations Act provide employees with wage disclosure protections. The laws generally prohibit employers from limiting employees' right to disclose their own wages and from taking adverse action against employees who disclose their own wages or discuss the voluntarily-disclosed wages of another employee.

As with pay transparency laws, employers subject to wage disclosure laws should consider the potential impact of employee compensation becoming more widely known among employees.

Salary History Bans

Many of the states and localities noted above, and others, such as Alabama and Wisconsin, restrict employers from asking job applicants about their current and/or past compensation history and impose other limitations on the way applicants' wage or salary history may be used. Additionally, in March 2022, President Biden issued an executive order instructing the FAR Council to consider whether rules should limit or prohibit Federal contractors and subcontractors from seeking and considering information about job applicants' and employees' existing or past compensation when making employment decisions. The Office of Personnel Management anticipates issuing a proposed regulation that will bar the use of prior salary history in the hiring and pay-setting processes for federal employees.

For example, New York's law prohibits employers from:

- relying on applicants' wage or salary history in deciding whether to offer employment or in determining wages;
- seeking, requesting, or requiring applicants or employees to provide their salary history as a condition of being interviewed, employed, or promoted; or
- refusing to interview, employ, or promote, or otherwise retaliating against applicants or employees based on their prior wage or salary history or their refusal to provide it.

Pay Equity Studies

With all of this in mind, many employers are conducting or considering pay equity studies. Pay equity studies are a great way for employers to understand whether their employees are paid fairly and can be a strong defense against claims of system-wide or disparate impact discrimination. But employers should proceed thoughtfully, because a poorly planned or executed pay equity study could end up causing more harm than good and open the door to discrimination claims.

Best practices when conducting a pay equity study include the following:

- Obtain leadership buy-in before beginning the pay equity study. You don't want to find problematic compensation and then have no tools to correct it.
- Evaluate position placement in pay bands, as well as rates in position, before you begin. You want to use good data.
- Conduct the study under attorney-client privilege. While the underlying salaries are not privileged, you want the study itself to be.
- Determine appropriate segmentation of positions. If these are not appropriately selected, you may end up comparing apples to oranges.
- Conduct a statistical analysis. Many employers hire consultants with this expertise to "do the math," but there are also companies that provide software to allow employers to perform the comparisons in-house.
- Determine whether legitimate job differences or compensation philosophies and practices explain discrepancies.
- Determine salary adjustments to make, perhaps over time, and think through the best way to present any adjustments to employees.
- If you find structural pay disparities, identify and change pay practices that may create or continue them.