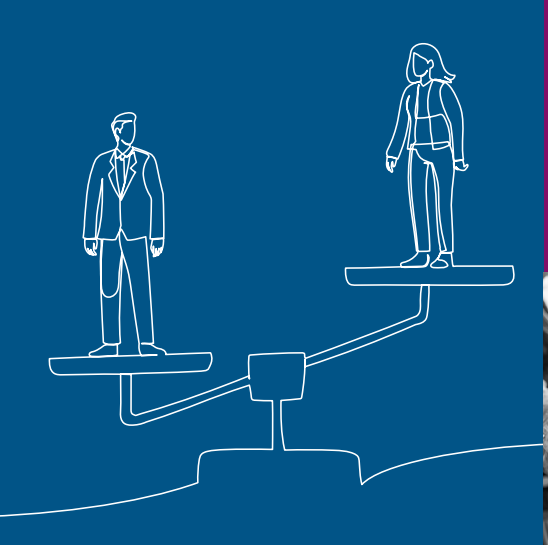

# Minding the Pay Gap:

## What Employers Need to Know as Pay Equity Protections Widen


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# Contents

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## I. Introduction

The pay gap – or paying women and other historically marginalized groups less for the same or substantially similar work – has long been in the media spotlight. But as employees, boards, consumers, and the public are increasingly expecting more from organizations surrounding diversity, equity, and inclusion, the stakes for employers regarding pay equity continue to rise. Politicians have also taken note. While there have been pay discrimination laws on the books at the federal level and in most states for decades, over the past several years, state and local governments and Puerto Rico have passed numerous new laws all aimed at closing the pay gap. Since 2020, more than 200 bills addressing pay equity were introduced in nearly every state. At the time of publication, 21 states have enacted "second wave" pay equity laws; 29 states and municipalities have enacted salary history inquiry bans; and 21 states have enacted wage transparency provisions.

While the federal Equal Pay Act prohibits employers from paying employees less for equal work because of gender, these second wave pay equity laws revise this standard – prohibiting unequal pay for "comparable" work as opposed to "equal" work. The newly enacted salary history inquiry bans restrict employers' ability to inquire into the salary history of applicants. Wage transparency measures prohibit employers from banning pay disclosure in the workplace or from retaliating against employees who discuss their wages. Finally, several states have recently enacted legislation that requires employers to publicly report employee compensation data to the state. Employers must comply with federal law and this growing patchwork of state and local laws.

The plaintiffs' bar also has gotten in on the action. Since 2016, over 600 pay equity cases have been filed in the United States. High-profile pay equity cases are in the news frequently – the class and collective action filed in California federal court by all 28 members of the U.S. Women's soccer team – which recently settled for $24 million – is just one example. Law firms and technology companies also have been targets. Indeed, to a large extent, the cases target professional services organizations and professional positions: lawyers, engineers, professors, scientists, managers and doctors. In addition to an equal pay claim, these lawsuits frequently include claims of discrimination, sexual harassment or wrongful termination. These lawsuits have been filed in state and federal courts across the nation as both single plaintiff cases and class or collective actions.

The EEOC has focused on pay equity in the last several years, and stated that pay equity claims were one its six major priorities in 2021.[1] Indeed, the number of charges filed relating to Equal Pay Act claims has remained high in recent years, with 1,117 charges filed in 2019, 980 in 2020 and 885 in 2021, resulting in $45.4 million dollars in settlements.[2,3] Further, since 2015, the EEOC has filed approximately 40 lawsuits involving Equal Pay Act claims. The EEOC has extensive authority to investigate whether an employer

[1] EEOC Strategic Enforcement Plan (SEP), 2017-2021 at 8, available at https://www.eeoc.gov/eeoc/plan/sep-2017.cfm.

[2] See EEOC, Enforcement and Litigation Statistics, available at https://www.eeoc.gov/eeoc/statistics/enforcement/index.cfm.

[3] While there has been a decline in the amount of EPA lawsuits brought by the EEOC over the last several years, there has been a decline of EEOC lawsuits in general. Many attribute this decline due to changes in EEOC leadership under the Trump administration, and the amount of EEOC lawsuits under the Biden administration is expected to again increase.

may be violating the Equal Pay Act, even where no charge of discrimination has been filed. During these investigations, the EEOC has broad authority to make far-reaching requests for information.[4]

This white paper provides a discussion of the nuts and bolts of the various existing pay equity laws, including:

- the elements a plaintiff must establish to prove a claim;
- the defenses available to employers;
- the damages available; and
- the procedural mechanisms that allow for these cases to be brought as class or collective actions – increasing the exposure for employers.

We also provide practical recommendations to help employers avoid pay inequities. Finally, we provide tips on how employers can seek to remediate pay inequities identified through a self-audit or otherwise.

# II. The Nuts and Bolts of Pay Equity

## A. Federal Law

While there has been significant attention to the expanding state and local pay equity laws and their attendant compliance challenges for employers, state equal pay claims are frequently brought with an accompanying federal equal pay claim.

### 1. The Federal Equal Pay Act

The Equal Pay Act, 29 U.S.C. § 206(d), has been in effect since 1963. It prohibits wage discrimination on the basis of sex. Specifically, an employer cannot discriminate between employees within the same "establishment" on the basis of sex by "paying wages to employees at a rate less than the rate at which the employer pays wages to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."[5]

#### *a. Elements of a Claim*

An employee asserting an EPA claim has the burden of establishing a *prima facie* case of an equal pay violation. To do this, the employee must show: (1) the employer pays different wages to employees of a different sex at the same establishment and (2) the employees perform substantially equal work (3) under substantially equal working conditions.[6] The focus at the *prima facie* stage is on the jobs, not the

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[4] As an example, in one case, the court enforced a broad-based request for nationwide data stemming from an EPA directed investigation. *See EEOC v. Performance Food Group Company LLC*, Case No. 1:09 cv-02200, Docket No. 29 (Memorandum and Order re Subpoena Enforcement) (D. Md. Feb. 18, 2010). While EPA claims are limited to alleged pay disparities at the "same establishment" (See 29 U.S.C. § 206(d) and 29 CFR Part 1620; also see 29 CFR 1620.9). The Performance Food Group investigation was coupled with a Title VII charge, which led the court to permit a more broad-based investigation across an entire division of the employer.

[5] 29 U.S.C. § 206 (d)(1).

[6] 29 U.S.C. 206(d); *Corning Glass Works v. Brennan*, 417 U.S. 185, 195 (1974); *Price v. Northern States Power Co.*, 664 F.3d 1186, 1191 (8th Cir. 2011). In cases where whether the plaintiff and the plaintiff's comparators work in the same "establishment" is not an issue, courts sometimes articulate the elements for a *prima face* case differently. *See EEOC v. Maryland Ins. Admin.*, 879 F.3d 114, 120 (4th Cir. 2018) ("A plaintiff establishes a prima facie case of

employees, and so "only the skills and qualifications actually needed to perform the job are considered," rather than individual factors such as the level of education and experience of a particular comparator.[7]

An "establishment" is defined as a "distinct physical place of business instead of a business enterprise.[8] Only in unusual circumstances may two or more distinct physical portions of a business enterprise be treated as a single establishment.[9] Such treatment may be appropriate where a central administrative unit hires all employees, sets wages, and assigns the location of employment."[10]

An employee does not have to show that the job of their higher paid comparator is identical in every respect, only that they are substantially equal.[11] However, "jobs that are merely alike or comparable are not 'substantially equal' for purposes of the EPA."[12] Likewise, "broad generalizations at a high level of

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discrimination under the EPA by demonstrating that (1) the defendant-employer paid different wages to an employee of the opposite sex (2) for equal work on jobs requiring equal skill, effort, and responsibility, which jobs (3) all are performed under similar working conditions."); *Lauderdale v. Ill. Dep't of Human Servs.*, 876 F.3d 904, 907 (7th Cir. 2017) ("To establish a prima facie cause of action under the Act, an employee must demonstrate a difference in pay for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.") (internal quotations and citations omitted); *Riser v. QEP Energy*, 776 F.3d 1191, 1196 (10th Cir. 2015) ("To establish a prima facie case of pay discrimination under the Equal Pay Act, a plaintiff must demonstrate that: (1) she was performing work which was substantially equal to that of the male employees considering the skills, duties, supervision, effort and responsibilities of the jobs; (2) the conditions where the work was performed were basically the same; (3) the male employees were paid more under such circumstances."); *Steger v. General Elec. Co.*, 318 F.3d 1066, 1077-78 (11th Cir. 2003) ("An employee demonstrates a prima facie case of an Equal Pay Act violation by showing that the employer paid employees of opposite genders different wages for equal work for jobs which require equal skill, effort, and responsibility, and which are performed under similar working conditions.") (internal citations and quotations omitted).

[7] *Galligan v. Detroit Free Press*, No. 17-cv-13349, 2020 WL 475341, at *4 (E.D. Mich. Jan. 29, 2020) (quoting *Beck-Wilson v. Principi*, 441 F.3d 353, 363 (6th Cir. 2006); *Perry v. Zoetis LLC*, No. 4:18CV3128, 2020 WL 2556799, at *8-9 (D. Neb. May 20, 2020) (quoting *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1533 (11th Cir. 1992) (other citations omitted).

[8] 29 C.F.R. 1620.9(a); EEOC COMPLIANCE MANUAL, *Section 10, Compensation Discrimination*, available at https://www.eeoc.gov/laws/guidance/section-10-compensation-discrimination.

[9] *Meeks v. Computer Assocs. Int'l*, 15 F.3d 1013, 1017 (11th Cir. 1994) (holding that evidence did not "demonstrate the level of centralization necessary to justify treating all of the company's technical writers as working at a single establishment" where "the specific salary to be offered a job applicant is determined by the local supervisor"); *Moazzaz v. Metlife, Inc.,* No. 19-cv-10531 (JPO), 2021 WL 827648 (S.D.N.Y. Mar. 4, 2021) (determining that plaintiff could cite global comparators at the pleadings stage, as plaintiff and the global comparators "all appear to be members of the [employer's] leadership team," who reported to plaintiff and other centralized high-level officers); *but cf. Winks v. Va. Dep't of Transp.,* No. 3:20-cv-420-HEH, 2021 WL 5614764 (E.D. Va. Nov. 30, 2021)(Where plaintiff sought to assert comparators who did not work in her same establishment, the court found that there were no unusual circumstances that would justify expanding the definition of an establishment, as the defendant state agency comprised nine regional districts, which operated independently from its central office with regards to hire and salary decisions.)

[10] *Price*, 664 F.3d at 1194 (internal citations and quotations omitted).

[11] *Corning Glass Works*, 417 U.S. at 203 n.24; *Gumbs v. Del. DOL*, Case No. 17-2977, 2018 U.S. App. LEXIS 23810 (3rd Cir. Aug. 23, 2018) ("To determine whether two jobs are equal for purposes of the EPA, the crucial finding . . . is whether the jobs to be compared have a common core of tasks, i.e., whether a significant portion of the two jobs is identical. The inquiry then turns to whether the differing or additional tasks make the work substantially different. Equal means substantially equal and any other interpretation would destroy the remedial purposes of the EPA.") (internal quotations and citations omitted)

[12] *Riser*, 776 F.3d at 1196.

abstraction" are insufficient to establish equality under the EPA.[13] Job titles or classifications are not determinative in establishing whether the work is substantially equal.[14] Instead, the actual, specific job duties of the plaintiff and the plaintiff's comparators are examined to determine whether the work is substantially equal.[15] For a job to be substantially equal, a plaintiff must perform more than "some" overlapping job duties with her comparator or share more than "certain core competencies," and they should have a similar scope of responsibility.[16] Put differently, the jobs must share a "common care of tasks" and must not involve "additional tasks [that] make the jobs substantially different."[17] Job differences that are not significant in amount or degree will not support a wage differential.[18] However,

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[13] *Spencer v. Virginia State Univ.*, 919 F.3d 199, 204 (4th Cir. 2019); *Galligan v. Detroit Free Press*, No. 17-cv-13349, 2020 WL 475341, at *10 (E.D. Mich. Jan. 29, 2020) ("testimony describing similarities among all reporters at the highest and most general level is not sufficient" in light of evidence showing "clear differences in the *specific* duties"); *See Carey v. Foley & Lardner LLP*, 577 F. App'x 573, 580 (6th Cir. 2014)(requiring a focus on the "specific" job duties of the positions that allegedly involve "equal work").

[14] 29 C.F.R. § 1620.13 ("Application of the equal pay standard is not dependent on job classifications or titles but depends rather on actual job requirements and performance."); *see also Wheatley v. Wicomico Cnty.*, 390 F.3d 328, 332 (4th Cir.2004) ("We decline to accept the argument ... that employees with the same titles and only the most general similar responsibilities must be considered 'equal' under the EPA.")

[15] *Santiago v. United States*, 107 Fed. Cl. 154, 161 (2012); *Riser*, 776 F.3d at 1196 ("Work is 'substantially equal' for purposes of the EPA if it requires 'equal skill, effort, and responsibility.' This determination turns on the actual content of the job – not mere job descriptions or title.") (internal citations omitted).

[16] *Talbott v. Pub. Serv. Co. of New Mexico*, No. CV 18-1102 SCY/LF, 2020 WL 2043481, at *9-10 (D.N.M. Apr. 28, 2020) (finding jobs were not substantially equal where "significant features of the jobs…were significantly different" and plaintiff's area of responsibility was much smaller geographically and by number of employees); *Wilson v. Wilkie*, No. 2:18-CV-515, 2020 WL 2128613, at *7-8 (S.D. Ohio May 5, 2020) (finding jobs were not substantially equal where higher-graded job only performed the same duties 20-30% of the time and other duties required greater responsibility, independence, and difficulty); *Galligan v. Detroit Free Press*, No. 17-cv-13349, 2020 WL 475341, at *10 (E.D. Mich. Jan. 29, 2020) (holding that reporters were not "fungible" because they performed different duties, even though they shared certain core competencies and sometimes moved between positions); *see also Kob v. Cty. of Marin*, No. C 07-2211 JL, 2009 WL 10680775, at *2 (N.D. Cal. Nov. 25, 2009), aff'd, 425 F. App'x 634 (9th Cir. 2011)("First, a court determines whether the jobs have a common core of tasks, that is whether a significant portion of the two jobs is identical . . . Second, if there is a common core of tasks, the court determines whether the jobs substantially differ because one job has additional tasks.").

[17] *Rivera v. East Bay Municipal Utility Dist.*, 799 Fed. Appx. 481, 483 (9th Cir. 2020) (unpublished) (holding that jobs were not substantially equal where they required different training and technical knowledge) (citing *Stanley v. Univ. of S. California*, 178 F.3d 1069, 1074 (9th Cir. 1999). *See also Moreau v. Caddo Par. Dist. Attorney Office*, No. 5:18-CV-0982, 2020 WL 1494142, at *10 (W.D. La. Mar. 26, 2020) (finding that male attorneys were not substantially equal where they performed additional duties as supervising attorneys).

[18] However, job fungibility—meaning whether an employer treats employees' roles interchangeably—may support an inference that the jobs are substantially equal. *See EEOC v. Port Auth. of New York & New Jersey*, 768 F.3d 247, 256–59 (2d Cir. 2014)( "bland abstractions—untethered from allegations regarding Port Authority attorneys' actual job duties—say nothing about whether the attorneys were required to perform 'substantially equal' work . . . while it is conceivable that the EEOC might have alleged facts supporting its contention that the attorneys' job duties were treated interchangeably, potentially giving rise to an inference that they performed 'substantially equal' work, no such specific allegations can be found in the EEOC's complaint"); *Beck–Wilson v. Principi*, 441 F.3d 353, 360–61 (6th Cir.2006)( (holding that evidence that jobs were "fungible" could "support a prima facie case under the EPA" where plaintiffs established that defendant hospital "employed [predominantly female nurse practitioners] and [predominantly male physician assistants] interchangeably" and that "the basic duties of both [of those] jobs at the [hospital] c[ould] be performed by either [nurse practitioners] or [physician assistants]"); *Galligan v. Detroit Free Press,* 436 F. Supp. 3d 980, 996 (E.D. Mich. 2020)("[T]he reporter-plaintiffs' testimony describing similarities among all reporters at the highest and most general level is not sufficient to overcome the clear evidence in this record that

supervision, meaning "how much supervision an employee requires or, alternatively, the extent of the supervisory functions an employee performs" is a relevant basis upon which to determine that two jobs are not substantially similar.[19] Moreover, "differences in skill, effort or responsibility do not support a finding that two jobs are not equal under the EPA where the greater skill, effort, or responsibility is required of the lower paid sex."[20] As the Fourth Circuit recently explained:

> Equality under the Act is a demanding threshold requirement. It requires a comparator to have performed work 'virtually identical' (or the apparent synonym, 'substantially equal') to the plaintiff's in skill, effort, and responsibility. *Wheatley v. Wicomico Cty.*, 390 F.3d 328, 332-33 (4th Cir. 2004). Similarity of work is not enough; the Act explicitly distinguishes between the work itself (which must be 'equal') and the conditions of work (which need only be 'similar'). 29 U.S.C. § 206(d)(1). The Act does not provide courts with a way of evaluating whether distinct work might have 'comparable' value to the work the plaintiff performed. *See Wheatley*, 390 F.3d at 333; *see also Simms-Fingers v. City of Indianapolis,* 493 F.3d 768, 771 (7th Cir. 2007) (Posner, J.) (explaining that, when trying to identify 'comparable' pay for unequal work, "there are 'no good answers that are within the competence of judges to give.") Instead, the Act's inference of discrimination may arise only when the comparator's work is equal to the plaintiff's.[21]

A plaintiff in an EPA claim can meet the burden of establishing a *prima facie* case by pointing to a single comparator of a different gender who performs substantially equal work under substantially equal working conditions who is paid more.[22] Similarly, an EPA plaintiff establishes a *prima facie* case where they point to a predecessor or successor of the opposite sex who is paid more.[23] Claims under the EPA may be brought by both women and men.[24]

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different reporter positions at the Free Press have different duties and that all of the reporter positions are thus not fungible.").

[19] 29 C.F.R. § 1620.17(b).

[20] *Riser*, 776 F.3d at 1196-97.

[21] *Spencer v. Virginia State Univ.*, 919 F.3d 199, 204 (4th Cir. 2019) (affirming grant of summary judgment in favor of employer on the basis that plaintiff did not perform equal work to her two selected comparators, who were also full professors at the same university on the basis that "professors are not interchangeable like widgets," where plaintiff taught classes in a different university department and taught undergraduates as opposed to graduate students).

[22] *See Maryland Ins. Admin.*, 879 F.3d at 122 ("An EPA plaintiff is not required to demonstrate that males, as a class, are paid higher wages than females, as a class, but only that there is discrimination in pay against an employee with respect to one employee of the opposite sex."); *Riser*, 776 F.3d 1196 (reversing grant of summary judgment in favor of employer and explaining that there was a fact question as to whether plaintiff's work was substantially equal to the work of a higher paid male comparator); *Gutierrez v. City of Converse,* No. 5:17-cv-01233-JKP, 2020 WL 156707, at *3 (W.D. Tex. Jan. 10, 2020)(acknowledging that the evidence showed that a female firefighter was better paid than all of her male peers with the exception of one, but holding: "[i]t is enough for the plaintiff to show that there is discrimination in pay with respect to one employee of the opposite sex") (quoting *Lenihan v. Boeing Co.,* 994 F. Supp. 776, 799 (S.D. Tex. 1998)); *see also Eisenhauer v. Culinary Inst. of Am.,* No. 19-cv-10933 (PED), 2021 WL 5112625 (S.D.N.Y. Nov. 3, 2021)(holding that a plaintiff may identify a single comparator at the initial stage of a case to meet the *prima facie* burden).

[23] *Ackerson v. Rector and Visitors of the Univ. of Va.*, Case No. 3:17-cv-00011, 2018 U.S. Dist. LEXIS 107786, at *19 n.3 (W.D. Va. June 27, 2018); *Bourque v. Powell Electrical Mfg. Co.*, 617 F.2d 61, 64 (5th Cir. 1980) (holding that a female employee made out a prima facie claim under the EPA by comparing her salary to her predecessor's).

[24] *Maryland Ins. Admin.*, 879 F.3d at 120, n.5 ("The EPA is written in gender-neutral terms so that it is available to remedy discriminatory actions against both men and women.").

### *b. Defenses*

If the plaintiff establishes a *prima facie* case, the burden shifts to the employer to prove a gender-neutral factor explains the discrepancy.[25] The EPA provides four affirmative defenses an employer may use to show the pay difference is not discriminatory: (1) seniority; (2) merit; (3) quantity or quality of production; or (4) a differential based on any factor other than sex.[26] A merit system that is not governed by neutral, consistent, and objective measurements of merit is unlikely to meet the employer's burden.[27]

Unlike a plaintiff pursuing a claim under Title VII, a plaintiff bringing a cause of action under the EPA does not have the burden of proving intentional discrimination.[28] Moreover, "a defendant cannot escape liability merely by articulating a legitimate non-discriminatory reason for the employment action...[it] must prove the pay differential was based on a factor other than sex."[29]

The employer's burden in proving an affirmative defense under the EPA is described by some courts as a "heavy one."[30]

The federal case law is not uniform with respect to the scope of the "any factor other than sex" affirmative defense. As will be discussed below, many states have passed their own pay equity laws and either have eliminated entirely, or severely restricted, the scope of this defense. In addition, many states have expressly prohibited employers from using prior salary to justify pay differentials.

The Second Circuit has imposed a requirement that the employer prove "a *bona fide* business-related reason exists for using the gender-neutral factors that results in a wage differential in order to establish the factor-other-than-sex defense."[31] The Sixth Circuit also has adopted a "legitimate business reason" requirement for the "factor-other-than-sex" defense.[32] Consequently, these courts, along with the Tenth and Eleventh Circuits, have held that employers may not rely on salary history alone to support a wage

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[25] *Lauderdale*, 876 F.3d at 907; *Riser*, 776 F.3d at 1198 (explaining that for an employer to meet its burden with respect to these affirmative defenses, "an employer must submit evidence from which a reasonable factfinder could conclude not merely that the employer's proffered reasons *could* explain the wage disparity, but that the proffered reasons *do in fact* explain the wage disparity") (citations omitted; emphasis in the original).

[26] *Lauderdale*, 876 F.3d at 907; *Riser*, 776 F.3d at 1198.

[27] *See Galligan v. Detroit Free Press*, No. 17-cv-13349, 2020 WL 475341, at *8 (E.D. Mich. Jan. 29, 2020).

[28] *See Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 640 (2007); *Spencer*, 919 F.3d at 207; *Maryland Ins. Admin.*, 879 F.3d at 120 (collecting cases); *Maxwell v. City of Tucson*, 803 F.2d 444, 446 (9th Cir. 1986); *Rizo v. Yovino*, 950 F.3d 1217, 1223 (9th Cir.), cert. denied, 141 S. Ct. 189, 207 L. Ed. 2d 1115 (2020).

[29] *Price*, 664 F.3d at 1191 (quoting *Taylor v. White*, 321 F.3d 710, 716 (8th Cir. 2003)); *Maryland Ins. Admin.*, 879 F.3d at 120 ("An EPA plaintiff need not prove that the employer acted with discriminatory intent to obtain a remedy under the statute."); *Eng v. City of New York*, Case No. 17-1308, 2017 U.S. App. LEXIS 22858, at *3 (2nd Cir. Nov. 14, 2017).

[30] *See Maryland Ins. Admin.*, 879 F.3d at 120; *Perkins v. Rock-Tenn Servs., Inc.*, 700 Fed. Appx. 452, 2017 U.S. App. LEXIS 11772 (6th Cir. June 30, 2017); *Jamilik v. Yale Univ.*, 362 Fed. Appx. 148, 150, 2009 U.S. App. LEXIS 22144 (2d Cir. Oct. 8, 2009); *EEOC v. Enoch Pratt Free Libr.*, No. CV SAG-17-2860, 2019 WL 5593279, at *6 (D. Md. Oct. 30, 2019); *Kling v. Montgomery Cty., Maryland*, 324 F. Supp. 3d 582, 589 (D. Md. 2018), aff'd, 774 F. App'x 791 (4th Cir. 2019); *Brunarski v. Miami Univ.,* No. 1:16-CV-311, 2018 WL 618458, at *10 (S.D. Ohio Jan. 26, 2018); *Hong Liu v. Queens Libr. Found., Inc.*, No. CV 14-7311, 2017 WL 4217121, at *10 (E.D.N.Y. Sept. 20, 2017).

[31] *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 526 (2d Cir. 1992); *Birchmore v. Granville Cent. Sch. Dist.*, No. 118CV1456GLSCFH, 2021 WL 22606, at *4 (N.D.N.Y. Jan. 4, 2021).

[32] *EEOC v. J.C. Penney Co.*, 843 F.2d 249, 253 (6th Cir. 1988); *Briggs v. Univ. of Cincinnati*, No. 20-4133, 2021 WL 3782657, at *5 (6th Cir. Aug. 26, 2021).

disparity.[33] As the Eleventh Circuit has explained, "[t]he question is whether other business reasons reasonably explain the utilization of prior salary."[34]

Courts recognize that permitting an employer to rely on prior salary history has the potential to perpetuate gender discrimination in wages. The Seventh and Eighth Circuit Courts of Appeals have refused to adopt a *per se* rule that would exclude past salary or salary retention as a "factor other than sex."[35] Instead of adopting a *per se* rule, the Eighth Circuit explained that courts:

> need to carefully examine the record in cases where prior salary or salary retention policies are asserted as defenses to claims of unequal pay. In particular, it is important to ensure that employers do not rely on the prohibited "market force theory" to justify lower wages for female employees simply because the market might bear such wages. In addition, it is important to ensure that reliance on past salary is not simply a means to perpetuate historically lower wages.[36]

Similarly, while holding employers may rely on prior wages to explain a pay disparity, the Seventh Circuit cautioned: "basing pay on prior wages could be discriminatory if sex discrimination led to the lower prior wages."[37]

In 2018, the Ninth Circuit, sitting *en banc*, overruled its prior precedent and held an employer may not rely on prior salary to set initial wages. Specifically, in *Rizo v. Yovino*, the court held that under the EPA, prior salary, either alone or in combination with other factors, cannot be used to justify a wage differential between male and female employees.[38] As the court explained:

> "any other factor other than sex" is limited to legitimate, job-related factors such as a prospective employee's experience, educational background, ability, or prior job performance. It is inconceivable that Congress, in an Act the primary purpose of which was to eliminate long-standing "endemic" sex based wage disparities, would create an exception for basing new hires' salaries on those very disparities – disparities that Congress declared are not only related to sex but caused by sex. To accept the [employer's] argument would be to perpetuate rather than eliminate the pervasive discrimination at which the Act was aimed.[39]

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[33] *See Riser*, 776 F.3d at 1198; *Glenn v. General Motors Corp.*, 841 F.2d 1567, 1571 (11th Cir. 1988); *Irby v. Bittick,* 44 F.3d 949 (11th Cir. 1995); *Angove v. Williams-Sonoma*, Case No. 02-5079, 70 F. App'x 500 (10th Cir. July 8, 2003) ("Consideration of a new employee's prior salary is not forbidden under section 206(d)(iv). The EPA only precludes an employer from relying *solely* upon a prior salary to justify a pay disparity. However, where an employer sets a new employee's salary based upon that employee's previous salary and the qualifications and experience the new employee brings, the defendant has successfully invoked the Act's affirmative defense.") (internal citations omitted).

[34] *Irby*, 44 F.3d at 955 (internal quotation and citation omitted) (affirming summary judgment in favor of employer on the basis that pay differential was justified based on prior pay and more experience.)

[35] *Taylor*, 321 F.3d at 718-19; *Covington v. Southern Ill. Univ.*, 816 F.2d 317, 322-23 (7th Cir. 1987).

[36] *Taylor*, 321 F.3d at 718 (internal citations omitted).

[37] *Lauderdale*, 876 F.3d at 909. *See also, Kellogg v. Ball State Univ.*, 984 F.3d 525, 529 (7th Cir. 2021), reh'g denied (Jan. 28, 2021).

[38] *Rizo v. Yovino*, 887 F.3d 453, 456 (9th Cir. 2018) (vacated by, remanded by *Yovino v. Rizo*, 139 S. Ct. 706 (2019)).

[39] *Id*. at 460.

*Rizo* was vacated and remanded by the U.S. Supreme Court,[40] however, because the opinion was issued 11 days after the death of the Honorable Stephen Reinhardt, who authored it. The Supreme Court held that "federal judges are appointed for life, not eternity." Setting aside Judge Reinhardt's vote, the five remaining votes approving the opinion were not enough to constitute a majority of the *en banc* panel. In issuing its ruling, the Supreme Court did not opine on the substance of the Ninth Circuit's holding in *Rizo* with respect to the EPA's any-factor-other-than-sex defense. On February 27, 2020, however, the full Ninth Circuit reiterated its prior holding that employers cannot use salary history to justify sex-based pay disparities. The court explained:

> The express purpose of the [EPA] was to eradicate the practice of paying women less simply because they are women. Allowing employers to escape liability by relying on employees' prior pay would defeat the purpose of the Act and perpetuate the very discrimination the EPA aims to eliminate. Accordingly, we hold that an employee's prior pay cannot serve as an affirmative defense to a prima facie showing of an EPA violation.[41]

The decisions construing the EPA also are inconsistent with respect to whether having a pay disparity as the result of differences in salary negotiations constitutes a factor-other-than-sex under the statute.[42]

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[40] *Yovino v. Rizo*, 139 S. Ct. 706 (2019).

[41] *Rizo v. Yovino*, 950 F.3d 1217, 1219–1220 (9th Cir.), cert. denied, 141 S. Ct. 189, 207 L. Ed. 2d 1115 (2020).

[42] *Compare Grigsby v. AKAL Sec., Inc.*, Case No. 5:17-cv-06048, 2018 U.S. Dist. LEXIS 104219 (W.D. Mo. June 21, 2018) (granting summary judgment in favor of employer and explaining that negotiations leading to a comparator's higher salary, or a demand for a specific salary, may establish a factor-other-than-sex defense to an EPA claim); *Dey v. Colt Const. & Dev. Co.*, 28 F.3d 1446, 1462 (7th Cir. 1994)(citations omitted)("It also is undisputed that Colt initially offered Maloney approximately $30,000, but that he negotiated an annual salary closer to what he had been earning at Allnet. It is not surprising that Maloney would be unwilling to become Colt's controller unless he was compensated at or near his previous rate. Such evidence must be considered with some caution, of course, as undue reliance on salary history to explain an existing wage disparity may serve to perpetuate differentials that ultimately may be linked to sex . . . Yet when we consider Colt's initial offer and the ensuing negotiations in conjunction with Maloney's superior educational background and the fact that Colt hired Maloney almost a full year after Dey's last pay raise, we are convinced that Maloney's higher salary is unrelated to his sex. Colt was therefore entitled to summary judgment on the EPA claim."); *Jones v. Trane US, Inc.*, No. 3:19-0453, 2020 WL 5088211, at *11 (M.D. Tenn. Aug. 28, 2020), *report and recommendation adopted*, No. 3:19-CV-00453, 2020 WL 5569834 (M.D. Tenn. Sept. 17, 2020)("Of the factors asserted by Defendant, Kelly's educational experience, his work history with Defendant, his prior salary, and his requested salary are all factors which have been found to be the type of factors 'other than sex' which justify a salary differential.")(citations omitted); *EEOC v. Home Depot U.S.A., Inc.*, 2009 WL 395835 at *10 (N.D. Ohio Feb. 17, 2009) (a negotiated higher starting salary was a factor "other than sex" which justified a salary differential).; *Balmer v. HCA, Inc.*, 423 F.3d 606, 613 (6th Cir. 2005), *abrogated on other grounds by Fox v. Vice*, 563 U.S. 826, 131 S. Ct. 2205, 180 L. Ed. 2d 45 (2011); *Warren v. South Carolina Dept. of Corrections*, No. 3:20-cv-04001-SAL, 2022 WL 2339445 at *5 (D.S.C. June 29, 2022) (holding that Defendant had provided evidence of factors "other than sex" that explained the disparity in pay, including that the male comparator (1) was in a higher position at his prior employer; (2) had more relevant experience; (3) made more money prior to being hired; and (4) negotiated a higher salary before accepting the position), *with Duncan v. Texas HHS Comm'n*, Cause No. AU-17-CA-00023, 2018 U.S. Dist. LEXIS 64279, at *11 n.3 (W.D. Tex. Apr. 17, 2018) (denying employer's motion for summary judgment and noting that "it is an open question whether negotiation even qualifies as a 'factor other than sex'"); *Cavazos v. Hous. Auth. of Bexar Cty.*, No. SA-17-CV-00432-FB, 2019 WL 1048855, at *10 (W.D. Tex. Mar. 5, 2019)("Whether differences in salary negotiations can constitute a legitimate, non-discriminatory reason for paying members of opposite sexes disparate amounts is an open question in the Fifth Circuit."); *Dreves v. Hudson Grp. (HG) Retail, LLC*, No. 2:11-CV-4, 2013 WL 2634429, at *8 (D. Vt. June 12, 2013) ("In this Court's view, a pay disparity is no more justified when it is the result of a single negotiation than when it is the result of a market-wide phenomenon, for what is a marketplace other

The statute of limitations for an EPA claim is generally two years.[43] The statute of limitations may be increased to three years if the violation is willful.[44] Regardless of the limitations period, a court can consider evidence from before the statute of limitations period when assessing the employee's claim.[45]

### *c. Damages*

The potential damages for a violation of the EPA include the amount of wages the employee was underpaid, liquidated damages equal to 100% of the underpaid wages, and reasonable attorneys' fees and costs.[46] A court may decline to award liquidated damages if the employer shows its actions were in good faith and it had reasonable grounds for believing its actions did not violate the EPA.[47] An individual can pursue a claim on their own behalf and on behalf of an opt-in collective of similarly situated individuals. In addition, Congress charged the EEOC with enforcing the EPA. However, an individual does not have to first file a Charge of Discrimination with the EEOC prior to bringing a lawsuit against the employer.

## 2. Title VII of the Civil Rights Act of 1964.

Under Title VII, an employer cannot "discriminate against any individual with respect to [their] compensation . . . because of such individual's race, color, religion, sex, or national origin."[48]

### *a. Elements and Burden of Proof*

The burden of proof on a plaintiff bringing a Title VII claim for a pay disparity is different from the burden of proof on a plaintiff bringing an EPA claim.[49] Unlike in an EPA claim, in a Title VII case, the plaintiff maintains the burden of proof. As a result, liability under the EPA may not always prove a Title VII violation.[50]

A plaintiff bringing a Title VII claim must establish intentional discrimination by using direct or circumstantial evidence of intentional discrimination. In the alternative, a Title VII plaintiff may use the *McDonnell Douglas* burden-shifting framework to develop an inferential case of discriminatory intent.[51]

In order to establish a *prima facie* pay-disparity case under the *McDonnell Douglas* burden-shifting framework, the plaintiff must show they are paid less than a member of the opposite gender in similar

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than an amalgamation of many negotiations? Permitting an employer to defend itself simply by showing that a disparity was the product of one negotiation with a male employee would lead to the same result: a marketplace that values the work of men and women differently").

[43] 29 U.S.C. § 255(a).

[44] *Id.*

[45] *Price*, 664 F.3d at 1191.

[46] 29 U.S.C. § 216(b).

[47] 29 U.S.C. § 260.

[48] 42 U.S.C. § 2000e-2(a)(1).

[49] *Lauderdale*, 876 F.3d at 907.

[50] *Lauderdale*, 876 F.3d at 910; *Angove*, 70 F. App'x at 505 ("As noted, an EPA violation does not establish Title VII liability as Title VII still requires evidence of *intentional discrimination.*") (emphasis in original); *Briggs v. Univ. of Cincinnati*, 11 F.4th 498, 512 (6th Cir. 2021) (noting the employer's differing burden under EPA, as compared to Title VII) *but see Martinez v. Davis Polk & Wardwell LLP*, 713 F. App'x 53, 55 (2d Cir. 2017)(unpublished) (explaining that a claim for unequal pay for equal work under Title VII is generally analyzed under the same standards used in an EPA claim.).

[51] *Anupama Bekkem v. Wilkie*, 915 F.3d 1258, 1267 (10th Cir. 2019); *Spencer v. Virginia State Univ.*, 919 F.3d 199, 207 (4th Cir.), *as amended* (Mar. 26, 2019), *cert. denied*, 140 S. Ct. 381, 205 L. Ed. 2d 216 (2019).

jobs.[52] Under Title VII, the jobs only have to be "similar" instead of "equal." There is no bright-line rule, but courts typically look at "whether the employees (i) held the same job description, (ii) were subject to the same standards, (iii) were subordinate to the same supervisor, and (iv) had comparable experience, education, and other qualifications – provided the employer considered these latter factors in making the personnel decision."[53] Courts have also analyzed whether comparators performed duties requiring similar training and skill sets in similar environments, finding blue-collar and white-collar jobs dissimilar, for example.[54] Although the "similarity" requirement under Title VII is less demanding than the "equality" requirement under the EPA, it is not toothless. Instead, the plaintiff bears the burden of proving they and any appropriate comparator(s) are not only similarly situated in *some* respects, but rather, "similarly-situated *in all respects*," such that "they cannot reasonably be distinguished."[55] The Seventh Circuit has explained that while the comparators do not need to be identical in "every conceivable way," the court "must conduct a common-sense examination."[56]

If the plaintiff establishes a *prima facie* case, the burden of production shifts to the employer to proffer a legitimate, nondiscriminatory explanation for the wage disparity.[57] In contrast with the EPA, the employer's burden at this stage has been called "exceedingly light."[58] The employer is not required to

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[52] *Sprague v. Thorn Ams., Inc.*, 129 F.3d 1355, 1363 (10th Cir. 1997); *see also Spencer*, 919 F.3d at 207; *Mengistu v. Miss. Valley State Univ.*, 716 F. App'x 331, 333-34 (5th Cir. 2018) (explaining that "[i]n order to make out a prima facie case of pay discrimination under § 1981 or Title VII, a plaintiff must show (1) that he was a member of a protected class; (2) that he was paid less than a non-member; and (3) that his circumstances are nearly identical to those of the better-paid non-member") (internal citations and quotations omitted).

[53] *Spencer*, 919 F.3d at 207 (internal quotation omitted); *Mitchell v. Mills*, 895 F.3d 365, 370-71 (5th Cir. 2018); *Lauderdale*, 876 F.3d at 910; *see also Brown v. Chicago Transit Auth.*, No. 17 cv 08473, 2020 WL 777296, at *9 (N.D. Ill. Feb. 14, 2020) (considering experience, responsibilities, and conduct to find comparators similar); *Lee v. Belvac Prod. Machinery, Inc.*, No. 6:18-cv-00075, 2020 WL 3643133, at *7 (W.D. Va. July 6, 2020) (holding that, although comparator held same job title, he performed many specific duties and possessed qualifications that plaintiff did not).

[54] *Deter v. Borough of Skyesville*, No. 500 C.D. 2019, 2020 WL 973341, at *4 (Pa. Commw. Ct. Feb. 28, 2020); s*ee also Heatherly v. Univ. of Ala. Bd. of Trustees*, No. 7:16-cv-00275, 2018 WL 3439341, at *16 (N.D. Ala. July 17, 2018) ("When determining whether an individual is a proper comparator, courts examine the amount of years an individual has worked for the employer, the type of expertise the individual has, and the supervisor of the alleged comparator versus that of the plaintiff, among other factors.") (citations omitted), *aff'd*, 778 F. App'x 690 (11th Cir. 2019); *Lewis v. City of Union City, Georgia*, 918 F.3d 1213, 1228 (11th Cir. 2019)("[o]rdinarily,...a similarly situated comparator...will share the plaintiff's employment [ ] history.")(*quoting Tennial v. United Parcel Serv., Inc.*, 840 F.3d 292, 304 (6th Cir. 2016))

[55] *Spencer*, 919 F.3d at 207-208 (quoting *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583 (6th Cir. 1992)); *Vinson v. Macon-Bibb County*, No. 5:18-cv-00306-TES, 2020 WL 2331242, at *6 (M.D. Ga. May 11, 2020) (quoting *Lewis v. City of Union City*, 918 F.3d 1213, 1227 (11th Cir. 2019) (internal quotations omitted); *Calicchio v. Oasis Outsourcing Grp. Holdings, L.P.*, No. 19-CV-81292-RAR, 2021 WL 3123767, at *17 (S.D. Fla. July 22, 2021); *Barnett v. Roanoke County Sch. Bd.*, No. 7:20-cv-00663, 2021 WL 5611317, at *5 (W.D. Va. Nov. 30, 2021).

[56] *Johnson v. Advocate Health & Hosps. Corp.*, 892 F.3d 887, 895 (7th Cir. 2018); *Cook v. Yarbrough*, No. 18 C 4583, 2021 WL 1784691, at *5 (N.D. Ill. May 5, 2021); *see also Ackerson*, 2018 U.S. Dist. LEXIS 107786, at *25 (explaining that if a plaintiff satisfies her burden of showing that jobs are "substantially equal" under the EPA, she has also satisfied Title VII's burden of showing that the jobs are similar).

[57] *Spencer*, 919 F.3d at 208.

[58] *Anupama Bekkem*, 915 F.3d at 1268; *see also Maryland Ins. Admin.*, 879 F.3d at 120 n.7 (comparing the burdens between EPA and Title VII claims and explaining: "In contrast, in a Title VII case, the employer need only proffer a legitimate, nondiscriminatory reason for the challenged action, and is not required to establish that the cited reason *in fact* motivated the employer's decision.") (emphasis in original); *Briggs*, 11 F.4th at 513 (holding that employer had "satisfied its lower Title VII burden of articulating a legitimate business explanation for the disparity.").

prove its non-gender-based reasons for the pay disparity, but merely must proffer them.[59] Title VII also incorporates the defenses available under the EPA.[60] Legitimate, non-discriminatory reasons may include that positions require different expertise, skills, or levels of responsibility.[61]

If the employer meets this burden of production, then the burden shifts back to the plaintiff to prove the defendant's proffered explanation is merely pretext for intentional discrimination.[62] An employee can prove pretext by showing the employer's proffered reason was "(1) factually baseless; (2) not the employer's actual motivation; (3) insufficient to motivate the action; or (4) otherwise pretextual."[63] As the Fifth Circuit has explained, the plaintiff is required to "put forward substantial evidence to rebut each of the nondiscriminatory reasons the employer articulates. The plaintiff may do so by showing a discriminatory motive is more likely than a nondiscriminatory one, or that her employer's explanation is unworthy of credence."[64] The plaintiff is not required, however, to come forward with independent evidence that the employer's proffered reason was pretext for discrimination.[65]

In order to pursue a claim for unequal pay under Title VII, an employee must file a charge of discrimination with the EEOC within 180 or 300 days of the discriminatory pay practice.[66] The Lilly Ledbetter Fair Pay Act extends the statute of limitations on these claims by providing that "a discriminatory compensation decision . . . occurs each time compensation is paid pursuant to the [discriminatory decision]."[67]

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[59] *Sprague*, 129 F.3d at 1363.

[60] 42 U.S.C § 2000e-2(h) ("It shall not be an unlawful employment practice under this title [42 USCS §§ 2000e et seq.] for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d))").

[61] *Rivera v. East Bay Municipal Utility Dist.*, 799 Fed. Appx. 481, 483-84 (9th Cir. 2020) (unpublished).

[62] *Spencer*, 919 F.3d at 208; *see also Mayes v. WinCo Holdings, Inc.*, 846 F.3d 1274, 1280 (9th Cir. 2017) ("If the employer articulates such a reason, the burden shifts back to the [employee] to show that the employer's [stated] reason is a pretext for discrimination.") (internal quotation marks omitted).

[63] *Lauderdale*, 876 F.3d at 910 (internal quotation and citation omitted).

[64] *Mengistu*, 716 F. App'x at 34; *see also Morris v. Texas Health & Hum. Servs. Comm'n*, No. CV H-16-3116, 2019 WL 3752762, at *9 (S.D. Tex. Aug. 8, 2019)("Morris's evidence that she had more state experience than McDougald and that she was not paid the full amount budgeted for her position is not evidence from which a reasonable fact-finder could conclude that the THHSC's stated reasons for paying Lightfoot more than her were false, unworthy of credence, or motivated by animus for her race and/or her gender.").

[65] *Briggs*, 11 F.4th at 509, *quoting Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148 (2000) ("[A] plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.")

[66] 42 U.S.C. § 2000e-5(e)(1).

[67] 42 U.S.C. § 2000e-5(e)(3). The Ledbetter Act was enacted in 2009 and retroactively effective to May 28, 2007. It overturned the United States Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618 (2007), in which the Supreme Court rejected the EEOC's rule that every paycheck issued was a separate act of discrimination and thereby tightened the timeframe for employees to bring pay discrimination claims. As a result of the Ledbetter Act, the date that each new discriminatory paycheck is issued restarts the statute of limitations for filing a pay discrimination claim. The Ledbetter Act also broadened the type of occurrences that constitute an unlawful employment action. Under the Ledbetter Act, an unlawful employment practice occurs when: (1) a discriminatory compensation or other practice is adopted; (2) an individual becomes subject to the discriminatory pay decision or practice; or (3) an individual is affected by application of the discriminatory decision or practice, including each time discriminatory compensation is paid.

### *b. Damages*

Damages available under Title VII include lost wages, front pay, compensatory damages, punitive damages, and reasonable attorneys' fees. Back pay cannot go back more than two years prior to the charge.[68] Compensatory and punitive damages are capped on a sliding scale ranging from $50,000 to $300,000 depending on the size of the employer.[69]

## B. State Equal Pay Laws

Every state has some type of equal pay law. Most of these state pay discrimination laws have been on the books for decades. However, since January 1, 2016, a number of states have either enacted or significantly amended their equal pay statutes. This section discusses these "second wave" pay equity laws. State legislatures have employed several different approaches to narrow the pay gap, including:

- Expanding the scope of positions that can be considered in comparing pay, both functionally (moving from equal work to work that is substantially similar or comparable) and geographically (moving from comparing employees at the same establishment to comparing employees in the same county, city, or state);

- Narrowing the scope of the "any-factor-other-than-sex" defense to require the factor be job-related and consistent with business necessity, be applied reasonably and account for the entire difference, and disallow the defense if: (i) the plaintiff demonstrates an alternative employment practice exists that would serve the same business purpose without producing the wage differential and (ii) the employer refused to adopt such alternative practices;

- Prohibiting the use of prior salary to justify pay disparities;

- Prohibiting or limiting the ability of an employer to inquire into the salary history of job applicants;

- Imposing new requirements on employers to increase wage transparency or affirmatively report employee compensation data to the state; and

- Providing safe harbors for employers that conduct pay equity audits.

### Protected Classes of Employees

Virtually all of the second wave state statutes prohibit wage discrimination on the basis of sex or gender. Under some state laws, such as Massachusetts, Washington, and Mississippi, sex or gender are the only protected categories.[70]

However, some states have included additional protected categories. For example, Maryland and Colorado's Equal Pay for Equal Work statutes prohibit discrimination based on sex or gender identity.[71] The California Fair Pay Act prohibits wage discrimination on the basis of sex, race or ethnicity.[72] Alabama's and Illinois' statutes prohibit wage discrimination based on sex or race.[73] New Jersey's statute goes even

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[68] 42 U.S.C. § 2000e-5(g)(1).

[69] Remedies For Employment Discrimination, EEOC, available at https://www.eeoc.gov/remedies-employment-discrimination.

[70] WASH. REV. CODE § 49.58.020(1); MASS. GEN. LAWS ch. 149, § 105A; MISSISSIPPI H.B. 770 (2022).

[71] MD. CODE ANN., LAB. & EMPL. § 3-304(b); COLO. REV. STAT. §§ 8-5-201 - 85-5-202.

[72] CAL. LAB. CODE § 1197.5(a)-(b).

[73] Ala. Code § 25-1-30.; 820 ILCS 112/10.

further and protects the following categories: race, creed, color, national origin, nationality, ancestry, age, marital status, civil union status, domestic partnership status, affectional or sexual orientation, genetic information, pregnancy, sex, gender identity or expression, disability or atypical hereditary cellular or blood trait, or military service.[74] Oregon protects race, color, religion, sex, sexual orientation, national origin, marital status, veteran status, disability or age.[75] New York amended its statute to protect the following categories: age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, or domestic victim status.[76] Further, effective January 1, 2023, Rhode Island's statute will protect "race, or color, or religion, sex, sexual orientation, gender identity or expression, disability, age, or country of ancestral origin."[77]

## The Functional Scope of Positions that Can Be Compared

Many of the second wave pay equity statutes have broadened the scope of positions that are deemed comparable for purposes of establishing a violation. While under the federal EPA, the comparators must perform "substantially equal work," under the California Fair Pay Act the comparators must perform only "substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions."[78]

Similarly, under the New Jersey statute, employees are entitled to equal pay (including benefits) for "substantially similar work," which is "viewed as a composite of skill, effort and responsibility."[79]

Alabama likewise requires equal wage rates for "substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions."[80]

Massachusetts mandates equal pay for "comparable work," which is work requiring "substantially similar skill, effort and responsibility" that is "performed under similar working conditions" without regard to job titles or job descriptions.[81] Minor differences in skill, effort, or responsibility will not prevent two jobs from being considered "comparable."[82] A job is "substantially similar" with respect to the factor being

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[74] N.J. STAT. ANN. § 10:5-12(t).
[75] OR. REV. STAT. § 652.210 (5).
[76] 29 C.F.R. § 1620.14.
[77] R.I. GEN. LAWS § 28-6-18 (*as amended by* Rhode Island HB 5261 (2021)); Likewise, Ohio's statute includes the following protected categories: race, color, religion, sex, age, national origin, or ancestry. OHIO REV. CODE §§ 4111.14, 4111.17. Iowa's statute also protects employees on the basis of age, race, creed, color, sex, sexual orientation, gender identity, national origin, religion, or disability. IOWA CODE § 216.6A.
[78] CAL. LAB. CODE § 1197.5(a)-(b). *See Beard v. Int'l Bus. Machines Corp.*, No. C 18-06783 WHA, 2020 WL 1812171, at *13 (N.D. Cal. Apr. 9, 2020) (finding that comparator positions did not meet this standard where plaintiff did not provide evidence about the details, complexity, activity, work hours, and travel required by those positions); *see also Pak v. GitHub, Inc.*, No. A159585, 2021 WL 3660375, at *6 (Cal. Ct. App. Aug. 18, 2021)(unpublished)("While certain tasks performed by Pak and Avalos may have been similar, the scope of their positions was not. Avalos always held a position with Github with significantly greater responsibilities than Pak ever had at the company.").
[79] N.J. STAT. ANN. § 10:5-12(t).
[80] Ala. Code § 25-1-30.
[81] MASS. GEN. LAWS ch. 149, § 105A(a).
[82] Mass. Office of the Att'y Gen., *An Act to Establish Pay Equity: Overview and Frequently Asked Questions*, at 5 (Mar. 1, 2018), available here (last accessed Aug. 15, 2022).

considered if the factors "are alike to a great or significant extent, but are not necessarily identically or alike in all respects."[83]

Like Massachusetts, the Oregon Equal Pay Act applies to "work of comparable character."[84]

Maryland's Equal Pay for Equal Work statute requires that the work be of comparable character or work on the same operation, in the same business or of the same type.[85]

Under the New York Equal Pay Act, pay equity is required for "equal work on a job the performance of which requires equal skill, effort and responsibility, and which is performed under similar working conditions." Similarly, Washington's Equal Pay Opportunity Act defines individuals as "similarly employed" if the individuals: (1) work for the same employer; (2) the performance of the job requires similar skill, effort, and responsibility; and (3) the jobs are performed under similar working conditions.[86]

Under amendments to Illinois' Equal Pay Act, employers must compensate employees equally, without regard to sex or race, where they perform "substantially similar work," the performance of which requires "substantially equal" skill, effort, and responsibility.[87]

As under federal law, state pay equity laws specify that job titles alone are not determinative as to whether positions or employees are comparable.[88]

## Geographic Limitations on Comparators

Under the federal EPA the plaintiff must prove the comparator works in the same "establishment," which is typically a "distinct physical place of business."[89] Several second wave state pay equity laws have expanded the geographic scope of who can be considered comparators. For example, under the California law, comparators can be state-wide.[90] In Maryland, "establishment" includes an employer's workplaces within the same county in Maryland. The New Jersey statute expressly provides that the comparison "shall be based on wage rates in *all* of an employer's operations or facilities" and not just limited to the location of the employee at issue.[91] Under the New York law, employees are deemed to work in the same "establishment" if they work "for the same employer at workplaces located in the same geographical region, no larger than a county, taking into account population distribution, economic activity and/or the presence of municipalities."[92]

## What Is Included in Compensation?

Several state statutes expressly define what types of compensation are included for equal pay purposes. For example, the New Jersey statute specifies that benefits are included.[93] The Oregon statute provides that compensation includes wages, salary, bonuses, benefits, fringe benefits and equity-based

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[83] *Id.*
[84] OR. REV. STAT. §§ 652.220; 652.235.
[85] MD. CODE ANN., LAB. & EMPL. § 3-304(b).
[86] WASH. REV. CODE § 49.58.020 (2).
[87] 820 ILCS 112/10(a); IL LEGIS 102-277 (2021).
[88] WASH. REV. CODE § 49.58.020 (2); MASS. GEN. LAWS ch. 149, § 105A(a); OR. REV. STAT. § 652.210 (12).
[89] 29 C.F.R. § 1620.9(a).
[90] *See* CAL. LAB. CODE § 1197.5.
[91] N.J. STAT. ANN. § 10:5-12(t) (emphasis added).
[92] N.Y. LAB. LAW § 194(3).
[93] N.J. STAT. ANN. § 10:5-12(t).

compensation.[94] The Washington statute defines compensation to include both discretionary and nondiscretionary wages and benefits.[95] The Colorado statute provides that, for an employee paid on an hourly basis, compensation includes "the hourly compensation paid to the employee plus the value per hour of all other compensation and benefits received by the employee from the employer."[96] For an employee paid on a salary basis, the Colorado statute provides that compensation includes the "total of all compensation and benefits received by the employee from the employer."[97]

## Permitted Bases for Wage Differentials

Many of the second wave statutes have narrowed the permitted bases for wage differentials as compared with federal law. While most of the second wave statutes incorporate the EPA's affirmative defenses of permitting wage differentials based on seniority, merit, or the quantity or quality of production, certain states have restricted or eliminated the "any factor other than [protected category]" defense.

For example, in California this defense has been narrowed to "a *bona fide* factor other than [protected category x], such as education, training or experience."[98] For an employer to be able to rely upon "a *bona fide* factor other than [protected category]," the employer must demonstrate the factor "is not based on or derived from a sex-based [or race-based or ethnicity-based] differential in compensation, is job related with respect to the position in question, and is consistent with business necessity."[99] "Business necessity" is "an overriding legitimate business purpose such that the factor relied upon effectively fulfills the business purpose it is supposed to serve."[100] Importantly, an employer may not rely on the *bona fide* factor other than sex defense if the employee "demonstrates that an alternative business practice exists that would serve the same business purpose without producing the wage differential."[101]

New Jersey similarly incorporates the *bona fide* factor defense. To rely on the legitimate *bona fide* factor exception under New Jersey law, the employer must establish all of the following elements:

(1) the factors at issue are not characteristics of the protected class and do not perpetuate a differential that is based upon characteristics of the protected class;

(2) each of the factors is applied reasonably;

(3) one or more of the factors accounts for the *entire* wage differential; and

(4) the factors are job-related with respect to the position in question and based on legitimate business necessity.[102]

If the plaintiff demonstrates there is an alternative business practice that would serve the same business purpose without creating the pay disparity, then the legitimate business necessity prong is not satisfied.[103]

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[94] Or. Rev. Stat. §§ 652.210 (1).
[95] WASH. REV. CODE § 49.58.010 (1).
[96] COLO. REV. STAT. ANN. § 8-5-101(9).
[97] *Id.*
[98] CAL. LAB. CODE § 1197.5(a)-(b).
[99] CAL. LAB. CODE § 1197.5(a)-(b).
[100] *Id.*
[101] *Id.*
[102] N.J. STAT. ANN. § 10:5-12(t).
[103] N.J. STAT. ANN. § 10:5-12(t).

The statute cites "training, education or experience" and "the quantity or quality of production" as examples of legitimate *bona fide* factors that may justify a pay disparity if the other requirements are established.[104]

Under the amended Illinois Equal Pay Act, pay differences may be justified by any factor other than race or sex as long as it "(A) is not based on or derived from a differential in compensation based on sex or another protected characteristic; (B) is job-related with respect to the position and consistent with a business necessity; and (C) accounts for the differential."[105]

Likewise, New York's Equal Pay Act includes a *bona fide* factor other than sex defense, and the statute identifies education, training or experience as examples.[106] To constitute a *bona fide* factor other than sex, the factor must not "be based upon or derived from a sex-based differential in compensation" and must be "job-related with respect to the position in question and shall be consistent with business necessity."[107] A factor is consistent with business necessity if the factor "bears a manifest relationship to the employment in question."[108] In addition, an employee can avoid application of this catch-all exception if the employee shows: (1) the employer uses an employment practice that causes a disparate impact on the basis of compensation; (2) an alternative employment practice exists that would serve the same business purpose and not produce the pay differential; and (3) the employer has refused to adopt the alternative practice.[109] Connecticut and Rhode Island's equal pay laws track New York's bona fide defense language, as well.[110]

Maryland also incorporates the *bona fide* factor other than sex defense, with statutory language that closely tracks California's, namely the factor must not be based on or derived from a gender-based differential in compensation; must be job-related with respect to the position and consistent with a business necessity; and must account for the entire differential.[111] The Maryland statute does not incorporate the California and New Jersey provisions that disallow the defense if the employee demonstrates an alternative practice that would have worked. Maryland's law also provides that wage differentials are permissible for jobs that require different abilities or skills; that require regular performance of different duties or services; and where the work is performed on different shifts or at different times of day.[112]

A pay differential under Washington's Equal Pay Opportunity Act is lawful if it is based in good faith on a *bona fide* job-related factor or factors that: (i) are consistent with business necessity; (ii) are not based on or derived from a gender-based differential; and (iii) alone or in combination with other factors account for the *entire* differential.[113]

The Washington statute provides a non-exhaustive list of *bona fide* factors: (i) education, training or experience; (ii) a seniority system; (iii) a merit system; (iv) quantity or quality of production; or (v) a *bona*

[104] N.J. STAT. ANN. § 10:5-12(t).
[105] 820 ILCS 112/10(a)(4)(i); IL LEGIS 102-277 (2021).
[106] N.Y. LAB. LAW § 194.
[107] *Id.*
[108] *Id.*
[109] N.Y. LAB. LAW § 194.
[110] CONN. GEN. STAT. § 31-75; R.I. GEN. LAWS § 28-6-18
[111] MD. CODE ANN., LAB. & EMPL. § 3-304(c).
[112] MD. CODE ANN., LAB. & EMPL. § 3-304(c).
[113] WASH. REV. CODE ANN. § 49.58.020 (3).

*fide* regional difference in compensation levels.[114] The employer bears the burden of proof on these defenses.[115]

Massachusetts does not incorporate the "any factor other than sex" defense. Instead, variation in wages for comparable work is permissible under the Massachusetts law **only** if the variation can be explained by one or more of six factors:

(1) a seniority system;[116]

(2) a merit system;

(3) a system that measures earnings by quantity or quality of production, sales or revenue;

(4) the geographic location;

(5) education, training or experience to the extent such factors are reasonably related to the job in question; or

(6) travel, if travel is a regular and necessary condition of the particular job.[117]

Oregon's Equal Pay Act, like Massachusetts', does not include a catch-all defense. Instead, wage disparities are not unlawful *only* if all of the difference is based on a *bona fide* factor that is related to the position in question and is based on:

(i) a seniority system;

(ii) a merit system;

(iii) quantity or quality of production;

(iv) workplace location;

(v) travel, if travel is necessary and regular for the employee;

(vi) training;

(vii) experience; or

(viii) any combination of these factors as long as they account for the *entire* pay differential.[118]

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[114] *Id.*

[115] *Id.*

[116] Time spent on leave due to a pregnancy-related condition, and protected parental, family and medical leave, shall not reduce seniority. *See* MASS. GEN. LAWS ch. 149, § 105A(b).

[117] *See* MASS. GEN. LAWS ch. 149, § 105A(b).

[118] Or. Rev. Stat. §§ 652.220 (2).

On the other hand, Mississippi's Equal Pay for Equal Work Act (last state in the nation to enact an equal pay law) does not narrow the defense based on "any factor other than sex" at all.[119] To the contrary, it may expand that defense, as the Act articulates what some of those "other factors" can be. The Act defines factors other than sex so as to include, but not be limited to:

(a) The salary history or continuity of employment history as compared to an employee of the opposite sex;

(b) The extent to which there was competition with other employers for the employee's services as compared to employees of the opposite sex; and

(c) The extent to which the employee attempted to negotiate for higher wages as compared to employees of the opposite sex in the same establishment.

## Burden of Proof

Similar to the federal EPA, under most second wave state laws, the burden of proof is initially on the plaintiff to demonstrate a pay disparity with a comparator outside of the protected class. The burden is then on the employer to prove that the pay differential is permissible under the state statute.[120] As with the federal EPA, an employee typically is not required to prove the employer intended to discriminate based on gender.[121]

## Prohibition Against Using Prior Salaries or Salary History to Justify Pay Differentials

Historically, employers have sought to determine a job candidate's current salary in order to consider it, along with other factors, in setting proposed starting compensation. This practice has come under fire because, even if the prospective employer does not have discriminatory intent, relying on a candidate's salary history in setting starting compensation in a new job may continue the cycle of pay inequity. As the Ninth Circuit explained in *Rizo*, "[t]he express purpose of the Act was to eradicate the practice of paying women less simply because they are women. Allowing employers to escape liability by relying on employees' prior pay would defeat the purpose of the Act and perpetuate the very discrimination the EPA aims to eliminate." [122]

While the courts are split regarding whether prior salaries or salary history may lawfully justify a pay disparity under federal law, many of the second wave state laws disallow this justification.[123]

There currently are 29 state and local jurisdictions that have enacted laws prohibiting employers from inquiring into or considering a job applicant's wage or salary history: Alabama;[124] California;[125] San

[119] MISSISSIPPI H.B. 770 (2022).
[120] *See, e.g.*, CAL. LAB. CODE § 1197.5(a)-(b); Ala. Code § 25-1-30.; N.J. STAT. ANN. § 10:5-12(t).
[121] Mass. Office of the Att'y Gen., *An Act to Establish Pay Equity: Overview and Frequently Asked Questions*, at 12.
[122] *Rizo v. Yovino*, 950 F.3d 1217, 1219 (9th Cir.), *cert. denied*, 141 S. Ct. 189, 207 L. Ed. 2d 1115 (2020).
[123] CAL. LAB. CODE § 1197.5(a)-(b); MASS. GEN. LAWS ch. 149, § 105A(b); OR. REV. STAT. §§ 652.220 (2); WASH. REV. CODE § 49.58.020; COLO. REV. STAT. § 8-5-102.
[124] Ala. Code § 25-1-30.
[125] CAL. LAB. CODE § 432.3(a), (b), (i).

Francisco, California;[126] Colorado;[127] Connecticut;[128] Delaware;[129] Hawaii;[130] Illinois;[131] Maine;[132] Maryland;[133] Massachusetts;[134] Kansas City, Missouri;[135] Nevada;[136] Jersey City, New Jersey;[137] New Jersey;[138] New York;[139] New York City, New York;[140] Albany County, New York;[141] Suffolk County, New York;[142] Westchester County, New York;[143] Cincinnati, Ohio;[144] Toledo, Ohio;[145] Oregon;[146] Philadelphia, Pennsylvania;[147] Puerto Rico;[148] Rhode Island;[149] Vermont;[150] and Washington.[151]

Typically, employers of all sizes are subject to the restrictions. The prohibition against asking about an applicant's salary history usually is not limited by these state and local laws to questions on a job application or in an interview. Obtaining this same information through other means also may violate these laws.

Some of these salary history restrictions incorporate an exception to the general prohibition against salary history inquiries for voluntary disclosures by an applicant of their salary history. States that incorporate some version of this exception into their salary history bans include California, Connecticut, Hawaii, Illinois, Maine, Maryland, Massachusetts, New Jersey, New York, Oregon, Rhode Island, Vermont, and Washington.

Moreover, a growing number of states require employers to provide job applicants or employees with a position's pay scale or salary or wage range. For example, California's law affirmatively requires an employer to provide the pay scale for a position to an applicant applying for employment upon the applicant's reasonable request. "Reasonable request" means a request made after an applicant has

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[126] S.F., CAL. POLICE CODE § 3300J.4(a), (b), (c), (f).
[127] COLO. REV. STAT. § 8-5-101 (effective Jan. 1, 2021).
[128] CONN. GEN. STAT. § 31-40z(a)(5).
[129] DEL. CODE ANN. tit. 19, § 709B.
[130] HAW. REV. STAT. § 378-2.4.
[131] 820 ILCS 112/10(b-5) - (b-20).
[132] ME. STAT. tit. 5, § 4577.
[133] MD. CODE ANN., LAB. & EMPL. § 3-301.
[134] MASS. GEN. LAWS ch. 149, § 105A(c)(2).
[135] KANSAS CITY, MO CODE OF ORDINANCES § 38-102.
[136] NEVADA SB 293 (2021)(effective Oct. 1, 2021).
[137] CODE OF ORDINANCES § 148-4.1.
[138] N.J. STAT. ANN. §§ 10:5-12.12, 34:6B-20. .
[139] N.Y. LAB. LAW § 194-a.
[140] N.Y.C., N.Y. ADMIN. CODE § 8-107(25); New York City Commission on Human Rights, *Employer Fact Sheet: Protections Against Inquiries Into Job Applicants' Salary History*.
[141] Albany County, N.Y. Local Law No. 1 for 2000 (Omnibus Human Rights Law for Albany County), as amended by Local Law No. P for 2016 § 7(1)(i).
[142] SUFFOLK CTY., N.Y. CODE OF ORDINANCES § 528-7(13).
[143] WESTCHESTER CTY., N.Y. CODE OF ORDINANCES § 700.03(9) (sunset when New York's statewide law took effect Jan. 6, 2020.)
[144] CINCINNATI, OHIO MUN. CODE § 804-03.
[145] TOLEDO, OHIO MUN. CODE § 768.02.
[146] OR. REV. STAT. §§ 652.220, 659A.357; Oregon Bureau of Labor & Industries, *Oregon Equal Pay Law* (Sept. 2017).
[147] PHILA., PA. CODE § 9-1131.
[148] PUERTO RICO LAW NO. 16 (Mar. 8, 2017) art. 4(a).
[149] R.I. GEN. LAWS § 28-6-22; RHODE ISLAND HB 5261 (2021))(effective January 23, 2023).
[150] VT. STAT. ANN. tit. 21, § 495m(a).
[151] WASH. REV. CODE § 49.58.010 (as amended by H.B. 1696).

completed an initial interview with the employer.[152] Connecticut, Maryland, Nevada, Rhode Island and Washington likewise include requirements that employers provide some form of a salary or wage range to employees or job applicants upon request.[153] Colorado, Washington (effective January 1, 2023) and several localities in New York, including New York City, go a step further and requires employers to salary range information directly in a job posting with some jurisdictions requiring specific categories of information.[154] In Colorado, the information required to be included on the posting includes "the hourly rate or salary compensation (or a range thereof) that the employer is offering for the position, including a general description of any bonuses, commissions, or other forms of compensation that are being offered for the job" and "a general description of all employment benefits the employer is offering for the position."[155] In Washington, employers must include the wage scale or salary range of each position, as well as a general description of all benefits and other compensation.[156] New York City, effective November 1, 2022, requires that an employer include a position's minimum and maximum annual salary or hourly wage when advertising for any job, promotion or transfer opportunity.[157] New York City employers are not required to include a general description of benefits or other compensation.[158] The City of Ithaca and Westchester County salary range laws are very similar to the New York City requirements.[159]

On the other hand, Wisconsin and Michigan have enacted preemption provisions to prevent local jurisdictions from passing laws banning salary history inquiries.[160]

### Prohibition Against Reducing the Wages of Other Employees to Comply

Consistent with a similar prohibition under the federal statute,[161] several of the second wave state statutes expressly provide that if an employer discovers a wage disparity prohibited by the state equal pay law, the employer cannot reduce the wages of other employees to come into compliance. For example, under Massachusetts law, an employer cannot reduce the wages of any employee "solely in order to comply" with the statute.[162] California, Illinois, Maryland, New Jersey, and Rhode Island have similar prohibitions.[163] While the Oregon statute also contains this express prohibition,[164] the Oregon Bureau of Labor and Industries has clarified in its administrative order and rules implementing the statute that "red circling, freezing or otherwise holding an employee's compensation constant as other

[152] CAL. LAB. CODE § 432.3.
[153] CONN. GEN. STAT. § 31-40Z; MD. CODE ANN., LAB. & EMPL. § 3-304.2; NEVADA SB 293 (2021); R.I. GEN. LAWS §§ 28-6-17, 28-6-22 (EFFECTIVE JANUARY 23, 2023); WASHINGTON HB 1696 (2019).
[154] COLO. REV. STAT. §§ 8-5-201 - 85-5-202; 7 COLO. CODE. REGS. 1103-13, §§ 4.1 - 4.2; SB 5761; INT. NO. 134-A, ITHACA CITY CODE §§ 215-2 AND 215-3; LAWS OF WESTCHESTER COUNTY § 700.03(A)(9)(I).
[155] COLO. REV. STAT. §§ 8-5-201 - 85-5-202; 7 COLO. CODE. REGS. 1103-13, §§ 4.1 - 4.2.
[156] SB 5761
[157] INT. NO. 134-A.
[158] *Id.*
[159] LAWS OF WESTCHESTER COUNTY § 700.03(A)(9)(I); ITHACA CITY CODE §§ 215-2 AND 215-3.
[160] WIS. STAT. § 103.36; MICH. COMP. LAWS § 123.1384.
[161] 29 U.S.C. § 206(d). The statutes in Delaware, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, North Dakota, Ohio, Pennsylvania, Tennessee, and West Virginia closely mirror the federal statute and also contain this prohibition.
[162] MASS. GEN. LAWS ch. 149, § 105A(b).
[163] CAL. LAB. CODE § 1199.5; 820 ILL. COMP. STAT. 112/10(a).; MD. CODE ANN., LAB. & EMPL. § 3-304; N.J. STAT. ANN. § 10:5-12(t); R.I. GEN. LAWS § 28-6-18 (as amended by RHODE ISLAND HB 5261 (2021)).
[164] OR. REV. STAT. §§ 652.220 (4).

employees come into alignment are not considered reductions in compensation level for the employee whose compensation is being held constant."[165]

## Self-Audits as a Defense

Two states, Massachusetts and Oregon, provide a statutory "carrot" to employers that voluntarily conduct pay equity audits. The Massachusetts Equal Pay Act provides employers with an affirmative defense if the employer can show that, within the last three years, it (1) "completed a self-evaluation of its pay practices in good faith;" and (2) "can demonstrate that reasonable progress has been made towards eliminating wage differentials based on gender for comparable work."[166] The self-audit must be reasonable in detail and scope in light of the employer's size. The Massachusetts Attorney General has issued basic guidelines for employers with respect to self-audits.[167]

An employer alleged to have violated the Oregon Equal Pay Act may file a motion to disallow an award of compensatory and punitive damages, if it has conducted a self-audit satisfying certain criteria. In that event, the court *shall* grant the motion if the employer demonstrates, by a preponderance of the evidence, that the employer has: (1) completed, within three years of the date the lawsuit was filed, an equal pay analysis of the company's pay practices that was reasonable in detail and scope given the size of the employer and related to the protected class asserted by the plaintiff in the lawsuit; and (2) eliminated the wage differential for the plaintiff and made reasonable and substantial progress towards eliminating wage differentials for the protected class asserted by the plaintiff.[168] Puerto Rico's statute likewise provides that an employer may avoid an award of penalties (but not an award of unpaid wages) if the employer demonstrates that, within the last year, it completed or initiated a self-evaluation of its pay practices.[169]

Rhode Island's statute, when it takes effect in 2023, will likewise provide that an employer has an additional defense to liability under the statute if it can demonstrate that it conducted a good-faith "fair pay analysis" of its pay practices within the previous two years prior to the commencement of the relevant action and "eliminated the wage differentials for the plaintiff and…made reasonable and substantial progress toward eliminating wage differentials for the protected class asserted by the plaintiff."[170]

In addition, even outside of the above jurisdictions, conducting a pay equity audit may shield an employer from a "willfulness" finding, which may decrease exposure.

## Wage Secrecy Prohibitions

Several states have adopted express statutory wage secrecy prohibitions. For example, in California, Colorado, Hawaii, Illinois, Maryland, Massachusetts, New Jersey, Oregon, Rhode Island and Washington

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[165] OR. ADMIN. R. 839-008-0025. *See also* 29 C.F.R. § 1620.26(a); *Timmer v. Mich. Dept. of Commerce*, 104 F.3d 833, 844–45 (6th Cir. 1997) (recognizing as an affirmative defense under the federal Equal Pay Act when there are "certain unusual, higher than normal, wage rates which are maintained for reasons unrelated to sex," especially where the policy creating the red circle rate was maintained for reasons unrelated to sex, specifically to avoid demoralizing employees whose job classifications changed through no fault of their own.)

[166] MASS. GEN. LAWS ch. 149, § 105A(d).

[167] Mass. Office of the Att'y Gen., *An Act to Establish Pay Equity: Overview and Frequently Asked Questions*.

[168] OR. REV. STAT. § 652.235(1).

[169] PUERTO RICO LAW NO. 16 (March 8, 2017) art. 3

[170] R.I. GEN. LAWS § 28-6-18 (as amended by Rhode Island HB 5261 (2021).

employers may not prohibit employees from disclosing or discussing their wages.[171] Similarly, in Connecticut, Delaware, New York and Vermont, employers cannot prohibit employees from inquiring about, discussing, or disclosing wages.[172] However, even in states without such a statute, prohibiting employees from discussing their wages typically runs afoul of the federal National Labor Relations Act.

## Anti-Retaliation Provisions

Eight of the second wave state statutes include express anti-retaliation provisions: Alabama, California, Connecticut, Hawaii, Illinois, Massachusetts, New York, and Washington.[173] The New York statute defines unlawful retaliation as any action, more than trivial, that would have the effect of dissuading a reasonable worker from engaging in conduct protected by the statute.[174] In California, employers may not discharge, discriminate or retaliate against an employee because the employee has invoked the statute or *assisted in any manner* with the enforcement of the statute.[175] Nonetheless, employees who engage in conduct protected by the pay equity statutes in states that do not include an express anti-retaliation provision are likely protected from retaliation by state whistleblower statutes and/or common law wrongful discharge causes of action.

## Prohibitions on Providing Less Favorable Opportunities

In addition to requiring pay equity, two state statutes prohibit providing less favorable opportunities. The Maryland statute prohibits "providing less favorable employment opportunities" based on sex or gender identity.[176] Providing less favorable employment opportunities is defined to mean: (1) assigning or directing the employee to a less favorable position or less favorable career track; (2) failing to provide information about promotions or advancement in the full range of career tracks offered by the employer; or (3) limiting or depriving an employee of advancement opportunities that would be available but for the employee's sex or gender identity.[177]

The Washington law also prohibits employers from limiting or depriving an employee of "career advancement opportunities" based on gender.[178] The law does not define "career advancement opportunities." In order for a complainant to be entitled to remedies for a career advancement violation,

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[171] CAL. LAB. CODE § 1197.5; COLO. REV. STAT. § 8-5-102; HAW. REV. STAT. § 378-2.3(b); 820 ILCS 112/10(b); MD. CODE ANN., LAB. & EMPL. § 3-304.1; MASS. GEN. LAWS ch. 149, § 105A(c); OR. REV. STAT. § 659A.355; R.I. GEN. LAWS § 28-6-18 (effective January 23, 2023); WASH. REV. CODE § 49.58.040. The state statutes in Connecticut, District of Columbia, Maine, Michigan, Minnesota, Nebraska, Nevada, New Jersey, Oregon, Vermont and Virginia also contain similar prohibitions.

[172] CONN. GEN. STAT. § 31-40Z(B)(5); DEL. CODE ANN. TIT. 19, § 711(I); N.Y. LAB. LAW § 194; VT. STAT. ANN. TIT. 21, § 495.

[173] *Clarke-Figures Equal Pay Act* § 1(e)(1); CAL. LAB. CODE § 1197.5(k); CONN. GEN. STAT. § 31-40z; D.C. CODE § 32-1452; HAW. REV. STAT. § 378-2.3(b); 820 ILCS 112/35(b); 820 ILL. COMP. STAT. 112/30; MASS. GEN. LAWS ch. 149, § 105A; N.Y. LAB. LAW § 194; WASH. REV. CODE §§ 49.58.040, 49.58.050. *See Melendez v. Los Angeles Unified Sch. Dist.*, No. B295052, 2021 WL 3508276, at *18 (Cal. Ct. App. Aug. 10, 2021)(unpublished)("Labor Code section 1197.5 prohibits retaliation for actions an employee takes *pursuant* to that section. (Lab. Code, § 1197.5, subd. (k)(1) ['An employer shall not discharge, or in any manner discriminate or retaliate against, any employee by reason of any action taken by the employee to invoke or assist in any manner the enforcement of this section.']).")(emphasis in original).

[174] N.Y. LAB. LAW § 194.

[175] CAL. LAB. CODE § 1197.5(k).

[176] MD. CODE ANN., LAB. & EMPL. § 3-304(b).

[177] *Id.*

[178] WASH. REV. CODE § 49.58.030 (2).

the employer must have "committed a pattern of violations . . . as to an employee or committed a violation . . . through application of a formal or informal employer policy or practice."[179]

## No Exhaustion of Administrative Remedies

While many state statutes provide for administrative enforcement of their pay equity statutes, they also allow for the filing of civil actions by aggrieved employees without first filing a Charge of Discrimination.[180]

For example, in California, the Division of Labor Standards Enforcement is charged with enforcement of the California Fair Pay Act. An aggrieved employee may file a complaint with the DLSE. The DLSE also is authorized to bring a civil action on behalf of the employee who filed the complaint and on behalf "of a similarly affected group of employees" to recover unpaid wages and liquidated damages and the costs of bringing suit.[181] Aggrieved employees also may file a civil action without first exhausting administrative remedies.[182]

Similarly, the Massachusetts Equal Pay Act provides for both a private right of action and for enforcement by the Massachusetts attorney general. An employee is not required to file a charge of discrimination with the Massachusetts Commission Against Discrimination before bringing a civil action for violation of the Massachusetts Equal Pay Act.[183]

In Oregon, an aggrieved employee may file a complaint with the Commission of the Bureau of Labor and Industries. In addition, an aggrieved employee may file suit under either Oregon Revised Statutes § 652.230 or § 659A.885. There is no exhaustion requirement prior to filing a civil suit.

The Washington law provides for both a private right of action and enforcement by the Washington State Department of Labor & Industries. An employee is not required to file a complaint with the Department of Labor & Industries before filing a civil lawsuit.[184]

## Statute of Limitations

There is significant variation among the states in the applicable statute of limitations. In Alabama, Illinois, Ohio, and Oregon, the statute of limitations is only one year.[185] In California, the statute of limitations is two years, but increases to three years if the plaintiff demonstrates the differential was willful.[186] Massachusetts, Maryland, Rhode Island, and Washington each have a three-year statute of limitations.[187] However, in Maryland, the statute of limitations is three years from the employee's receipt of their final paycheck.[188] In Washington, while an employee must file suit within three years of the date of the alleged violation, recovery of any wages or interest owed "must be calculated from four years from the last

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[179] WASH. REV. CODE § 49.58.030 (4).
[180] Similarly, a plaintiff is not required to exhaust administrative remedies with respect to a Federal Equal Pay Act claim.
[181] CAL. LAB. CODE § 1197.5(g).
[182] CAL. LAB. CODE § 1197.5(h).
[183] MASS. GEN. LAWS ch. 149, § 105A(b).
[184] WASH. REV. CODE § 49.58.070.
[185] *Clarke-Figures Equal Pay Act* § 1(e)(3), ALA. CODE § 25-1-30; 820 ILCS 112/15; OR. REV. STAT. §§ 652.230 (6); OH REV. CODE § 4111.17(E).
[186] CAL. LAB. CODE § 1197.5(i).
[187] MASS. GEN. LAWS ch. 149, § 105A(b); MD. CODE ANN., LAB. & EMPL. § 3-307; R.I. GEN. LAWS § 28-6-18 (as amended by Rhode Island HB 5261 (2021); WASH. REV. CODE § 49.58.070.
[188] MD. CODE ANN., LAB. & EMPL. § 3-307.

violation prior to the date of filing the civil action."[189] Under Washington law, a violation occurs when a discriminatory decision or practice is adopted and each time discriminatory compensation is paid.[190] New York and New Jersey both have **six-year** statutes of limitations.[191]

## Remedies

While all of the second wave state statutes permit the recovery of unpaid wages and most permit the recovery of attorneys' fees and costs, there are significant differences in the liquidated damages or penalties available. In addition, the length of the relevant statute of limitations can have a significant impact in the damage exposure for pay equity claims.

In Alabama, the damages available to an aggrieved employee include only the wages the employee was deprived by reason of the violation, interest, and an equal amount as liquidated damages.[192]

In California, the damages available to an aggrieved employee include the wages the employee was deprived because of the violation, interest, and an equal amount of liquidated damages, as well as attorneys' fees and costs, interest, and civil penalties (including those potentially due under the California Private Attorneys General Act).[193]

In Maryland, the damages available to plaintiffs include: (1) the unpaid wages; (2) liquidated damages equal to 100% of the unpaid wages; (3) reasonable attorneys' fees and costs; and (4) prejudgment interest.[194] In addition, the Commissioner of Labor and Industry or a court *may* require an employer that is found to have violated the Act to pay a civil penalty equal to 10% of the amount of damages owed by the employer. Civil penalties awarded are paid to the state's general fund.[195]

The damages available to plaintiffs under Massachusetts law include: (1) the unpaid wages; (2) liquidated damages equal to 100% of the unpaid wages; and (3) reasonable attorneys' fees and costs.[196]

The damages in New Jersey are especially significant as they include treble damages (three times the compensatory damages) and attorneys' fees.[197] When coupled with New Jersey's six-year statute of limitations, the treble damages provision has sharp teeth.

Like New Jersey, the New York penalties are noteworthy. The damages available to an employee who wins a claim brought under the New York Equal Pay Act include damages equal to the pay differential going back six years, and potentially liquidated damages equal to three times the pay differential, attorneys' fees, costs, and interest. In most circumstances liquidated damages will be limited to no more than 100% of the pay differential; in cases of a willful violation, however, the statute provides for liquidated damages up to 300% of the pay differential.[198]

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[189] WASH. REV. CODE § 49.58.070.
[190] WASH. REV. CODE § 49.58.080.
[191] N.J. STAT. ANN. § 10:5-12; N.Y. LAB. LAW § 198.
[192] *Clarke-Figures Equal Pay Act* § 1(b); ALA. CODE § 25-1-30.
[193] CAL. LAB. CODE § 1197.5(c).
[194] MD. CODE ANN., LAB. & EMPL. § 3-307.
[195] MD. CODE ANN., LAB. & EMPL. § 3-308 (d).
[196] MASS. GEN. LAWS ch. 149, § 105A(b).
[197] N.J. STAT. ANN. § 10:5-13.
[198] N.Y. LAB. LAW § 198.

In Oregon, a plaintiff may proceed under two different statutes that have different available remedies. Remedies available to employees under Oregon Revised Statute § 652.230 include the unpaid wages to which the employee is entitled for the one-year period of time before the commencement of the lawsuit and an additional amount of liquidated damages.[199] Courts *shall* (as in "must") award reasonable attorneys' fees to a prevailing plaintiff. If the plaintiff had "no objectively reasonable basis for asserting the claim" then the court *may* award reasonable attorneys' fees and expert witness fees incurred by a defendant.[200]

The remedies available to an employee under Oregon Revised Statute § 659A.885 include: injunctive or equitable relief (including reinstatement), back pay for the two years immediately preceding the filing of the complaint, compensatory damages or $200, whichever is greater, and punitive damages.[201] A court may award costs and reasonable attorneys' fees to the prevailing party.[202] To be entitled to punitive damages, the plaintiff must prove "by clear and convincing evidence" that the employer "has engaged in fraud, acted with malice or actedwith willful and wanton misconduct" *or* the employer was adjudicated previously for a violation of the Oregon Equal Pay Act.[203]

In Washington, a prevailing plaintiff may recover: actual damages, statutory damages equal to actual damages or $5,000 (whichever is greater), interest of one percent per month on all compensation owed, and costs and reasonable attorneys' fees.[204] An employee must file suit within three years of the date of the alleged violation, but recovery of any wages or interest owed "must be calculated from four years from the last violation prior to the date of filing the civil action."[205] The court also may order reinstatement and injunctive relief.[206]

## C. Procedural Distinctions Between Representative Actions Brought Under Different Pay Equity Laws

The financial exposure to employers from a pay equity claim increases dramatically if the claim is brought not only on behalf of a single aggrieved employee, but on behalf of a class or collective of similarly situated employees. In addition, the cost of defending the litigation rises significantly when a class or collective action is involved. Plaintiffs filing suit under the federal EPA may use the collective action procedures found in Section 216(b) of the Fair Labor Standards Act. Plaintiffs filing claims in federal court under Title VII or state pay equity laws may assert a class action under Rule 23 of the Federal Rules of Civil Procedure. Collective actions under § 216(b) differ from class actions under Rule 23 in some important ways.

First, in a Rule 23 class action, once a class is certified, a class member must affirmatively opt out in order to avoid being part of the class. Under § 216(b), an individual must affirmatively opt in to the proceeding. The opt-in requirement of § 216(b) collective actions is advantageous to employers because typically fewer class members participate if they are required to affirmatively join the lawsuit rather than, as under Rule 23, remain part of a class merely by doing nothing.

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[199] OR. REV. STAT. § 652.230 (1).
[200] OR. REV. STAT. § 652.230 (2).
[201] OR. REV. STAT. § 659A.885.
[202] OR. REV. STAT. § 659A.885 (1).
[203] OR. REV. STAT. § 659A.885 (4).
[204] WASH. REV. CODE §§ 49.58.060, 49.58.070.
[205] WASH. REV. CODE § 49.58.070(5).
[206] WASH. REV. CODE § 49.58.070.

Second, when an individual affirmatively opts in to an EPA collective action, they become a party plaintiff. As a party plaintiff, the opt in may be required by the court to participate in discovery, and the court may dismiss opt-in plaintiffs who fail to respond to discovery that has been ordered. The amount of discovery permitted of absent Rule 23 class members typically is more limited.

Another major distinction between EPA collective actions and Rule 23 class actions asserting Title VII or state law violations is the impact of the statute of limitations. A plaintiff suing to recover for an EPA violation may recover the wage differential for the two-year period prior to the date they file their lawsuit, or three years if the employer acted willfully. The filing of a collective action complaint does not toll the statute of limitations for anyone other than the individuals who file a consent to join along with the complainant. Instead, the statute of limitations is tolled only upon an opt-in plaintiff's filing a written consent form, affirmatively joining the lawsuit. In a Rule 23 class action, on the other hand, the filing of the complaint halts the running of the statute of limitations for all individuals who ultimately are determined to be part of the class until the court decides whether to certify the case as a class action.

There also are important differences between EPA collective actions and Rule 23 Title VII or state law class actions in the standards for certification and issuance of notice to class or putative collective members. A plaintiff bringing a Rule 23 class action must satisfy all four requirements of Rule 23(a): numerosity, commonality, typicality, and adequacy of representation. In addition, the plaintiffs must all show that the case qualifies under one of three categories listed in Rule 23(b).

A plaintiff pursuing an EPA collective action must prove they are "similarly situated" to other potential members of the collective. Most courts have adopted a two-stage procedure for certifying collective actions. Because the statute of limitations is not tolled until an EPA plaintiff affirmatively files a consent to join the litigation, plaintiffs' counsel is incentivized to quickly move for conditional certification, the first stage of the two-stage procedure, so the court will authorize the sending of court-approved notice to the members of the putative collective. Where plaintiffs' counsel moves for conditional certification before significant discovery has occurred, courts typically apply a lenient standard for conditional certification. If more discovery has occurred, some courts will apply an intermediate standard for conditional certification. If the court grants conditional certification, the court authorizes notice to be sent to all putative class members, describing the litigation and explaining how they can join. The second stage of the two-stage process usually occurs after the close of discovery when the employer moves for decertification. It is at the decertification stage that courts apply a rigorous analysis comparable to the commonality, typicality and predominance analysis courts apply in Rule 23 class actions.

The difference in certification standards between EPA collective actions and Rule 23 class actions is illustrated by the recent case of *Ahad v. Board of Trustees of Southern Illinois University*.[207] Plaintiff, a doctor, brought a claim on her own behalf and on behalf of other female physicians employed by the defendants, asserting that female physicians were paid lower compensation than male physicians for the same or equal work in violation of the EPA, Title VII, and Illinois state law. In 2017, the district court granted conditional certification of plaintiff's EPA claim, and notice was sent out. In 2019, the court, applying the rigorous Rule 23 certification standard, denied plaintiff's Motion for Rule 23 Class Certification. In denying Rule 23 certification, the court found that, even though plaintiff presented an expert report based on a multivariable regression analysis that concluded there was a statistically significant gender pay disparity, the plaintiff had not met the commonality requirement under Rule 23.

[207] *Ahad v. Bd. of Trustees of S. Illinois Univ.*, No. 15-CV-3308, 2019 WL 1433753, at *8 (C.D. Ill. Mar. 29, 2019)(Not Reported).

As the court explained, "the statistical evidence here does not and cannot show whether a common cause existed regardless of the statistically significant showing of pay disparities based on gender."[208]

Even if the employer is able to have an EPA collective action decertified successfully, this ordeal is an expensive process in terms of attorneys' fees, as well as business disruption and distraction. In addition, if the EPA claim is decertified, the claims of the opt-in plaintiffs are dismissed without prejudice and they can refile individual claims. If a meaningful number of these individuals do so, the attorneys' fees of defending dozens of individual lawsuits can mount quickly.

## Efforts Around the United States and Globally for Increased Pay Transparency

One way that proponents of pay equity aim to shrink the gender pay gap is to encourage greater wage or pay transparency. For example, as discussed above, some states' equal pay statutes expressly preclude employers from discouraging or otherwise retaliating against employees for sharing their own wages, inquiring about others' wages, or encouraging their colleagues to do the same. Another way to promote pay transparency is to require employers to publicly disclose, or report to a government agency, employee compensation data. The efforts to promote this type of pay transparency made headlines in 2016, when the EEOC under the Obama administration announced that it proposed to collect pay data correlated to employee demographic groups as part of an employer's annual EEO-1 Report filing (commonly referring to as EEO-1 "Component 2" data). Following litigation that continued until 2019, the EEOC announced that it would not require employers to provide the agency with employee compensation data as part of annual EEO-1 Reports. Thus, at present, there is no federal obligation for employers to report employee compensation data to the EEOC. That said, in April 2022, the EEOC chair hinted that the EEOC under the Biden administration may revisit the collection of Component 2 data.

However, two states—California and Illinois—recently enacted statutes that require employers to disclose employee demographic and compensation data to state agencies on an annual basis.[209] Effective January 1, 2021, California Senate Bill 973 (codified as California Government Code 12999) requires that private employers with 100 or more employees (with at least one employee in California) annually report certain pay and employee demographic data to the Department of Fair Employment and Housing (DFEH). Similar to the defunct EEO-1 Component 2 requirements, the statute requires California employers provide a report to the DFEH that includes a summary of employee compensation according to particular predefined pay bands, job categories and demographic categories, commonly referred to as a "pay data report."[210] Illinois likewise requires employers with 100 or more employees to obtain an "equal pay registration certificate" from the Illinois Department of Labor. In order to obtain this certificate, Illinois employers must submit a copy of their most recently filed EEO-1 Report, which includes a breakdown of employees according to gender, race and ethnicity categories, and report the "total wages" paid to each employee included within the EEO-1 Report within the last calendar year, "rounded to the nearest hundredth

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[208] *Id*. (emphasis added).

[209] 2019 California Senate Bill No. 973, California 2019-2020 Regular Session, 2019 California Senate Bill No. 973, California 2019-2020 Regular Session; Illinois Senate Bill 1480, available at https://www.ilga.gov/legislation/fulltext.asp?DocName=&SessionId=108&GA=101&DocTypeId=SB&DocNum=1480&GAID=15&LegID=118365&SpecSess=&Session=.

[210] CAL. GOVT. CODE § 12999.

dollar."[211] Illinois' pay data reporting obligations begin January 1, 2023 and employers must be prepared to apply for an equal pay certificate as early as March 24, 2022.[212]

However, California and Illinois are not the only jurisdictions that have enacted pay transparency obligations. In Europe, the United Kingdom enacted a statute in 2017 that requires certain large employers (those with 250 or more employees) within the UK to circulate and publish certain gender pay gap information annually.[213] Germany also passed the Pay Transparency Act, which creates the right for employees to access employee compensation information for employers who maintain a workforce of more than 200 employees.[214] France has likewise enacted the Professional Future Act, which requires employers to report sex-based pay differentials according to the average pay of each group, reported by age and job category. French employers with between 50 to 250 employees are also required to publish a pay index, which includes a review of employee salary data from the preceding 12-month period.[215]

## III. Practical Recommendations for Employers to Help Avoid Pay Equity Issues

Pay equity is a moral, legal and business imperative. Getting this issue wrong can have serious consequences for employers. Class action lawsuits focused on fair pay are increasing and they are expensive to defend, both in terms of legal costs, and in terms of employee morale and company culture. Moreover, the unwanted publicity from these lawsuits can have a negative impact on employee recruiting, retention, and customer relationships. It can have a lasting, detrimental impact on the company's reputation. Following are strategies that companies may consider to help them avoid pay equity problems.

**Understand Your Company's Compensation Philosophy.** What is your company trying to accomplish through its pay structure and what factors does your company want to drive compensation? Some companies have a clearly defined compensation philosophy that is well understood throughout the organization. If your company does not, partner with the appropriate stakeholders to get agreement on the company's compensation philosophy and the drivers of compensation. The drivers of compensation likely will vary for the different functions within the company. Examples of drivers of compensation include experience in the industry, time in the job, past performance ratings, education, financial results, scope of responsibility, location, market rate for a particular skillset, or business unit.

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[211] Illinois Senate Bill 1480, available at https://www.ilga.gov/legislation/fulltext.asp?DocName=&SessionId=108&GA=101&DocTypeId=SB&DocNum=1480&GAID=15&LegID=118365&SpecSess=&Session=.

[212] *See* Barry Hartstein, Jennifer Jones and Paul Newendyke, *Illinois Equal Pay Requirements Amended*, Littler ASAP (Aug. 24 2021); Meg Karnig, Paul Newendyke, and Barry Hartstein, *Illinois Will Require EEO-1 Transparency and Equal Pay Data*, available at https://www.littler.com/publication-press/publication/illinois-will-require-eeo-1-transparency-and-equal-pay-data.

[213] *See* Raoul Parekh and Kate Potts, *UK Gender Pay Gap – Where are We Now*? Littler ASAP (May 1, 2019), *available at* https://www.littler.com/publication-press/publication/uk-gender-pay-gap-where-are-we-now. *See also* Gov.UK, Collection: Gender Pay Gap Reporting, *https://www.gov.uk/government/collections/gender-pay-gap-reporting*.

[214] See *New Law Promotes Equal Pay and Creates New Employer Obligations*, Litter Global Guide, Q2- 2017 (July 11, 2017).

[215] See Edward Carlier et al., *Littler Lightbulb: Highlighting Recent Developments Across Europe*, Littler Lightbulb (Oct. 23, 2019).

**Evaluate Your Company's Compensation to Ensure the Factors Impacting Compensation Comply with Applicable Law.** As discussed above, many states and municipalities have passed their own pay equity laws and salary history bans that limit the permissible factors that may be used to explain pay differentials. Consider having legal counsel review your company's compensation philosophy and the factors influencing compensation with an eye toward compliance with all relevant laws for the jurisdiction(s) in which your company has employees.

**Educate the Decision Makers.** Evaluate (and, if needed, take) the steps that would be helpful to ensure the managers who make compensation decisions for your organization understand your company's compensation philosophy and the permissible and impermissible factors in making compensation decisions.

**Job Leveling and Salary Bands.** Consider reviewing job descriptions to confirm they accurately describe the job being performed by the incumbents holding that position. Job titles also should reflect what jobs employees are actually performing. Employees whose job duties are different typically should not be given the same job title. Consider implementing a job-leveling framework that evaluates positions in the company against a series of factors, such as job requirements and job scope, impact, value and accountability. Consider assigning salary bands to each job level or grade to keep compensation consistent.

**Decide What the Job Is Worth.** Since differences in pay for similar jobs must be justified, consider setting the amount a particular job or set of job duties is worth to the organization, which then will drive the job level or grade in which that role is placed and, ultimately, the compensation offered to individuals performing those job duties. To the extent similar job duties are valued differently by the organization, document the rationale before someone is hired to fill those roles.

**Understand the Potential Impact of Negotiation.** New hires and those seeking to advance their careers may be tempted to negotiate with the organization for higher pay, signing bonuses or similar compensation benefits. But such negotiations can create an instant pay equity issue if those negotiations take the proposed pay outside of the range set for the position or deviate significantly from what current incumbents are making. Be prepared to explain the company's philosophy of paying what the job is worth when a potential hire tries to negotiate their pay.

**Consider Limiting Discretion in Setting Compensation.** Consider requiring hiring managers to obtain approval if the hiring manager wants to pay an employee more or less than the midpoint of the salary band for the position at issue. The approval process should ask the manager to explain the reasons for the deviation and document the decision-making process, which may help ensure it is not discriminatory and provide a defense should issues with respect to pay equity arise. As part of this process, the company can provide hiring managers with a list of acceptable reasons for varying from the midpoint of the salary band in setting compensation.

**Document Reasons for Pay Decisions.** As discussed above, some state pay equity laws provide extremely long statutes of limitations. For example, under the Maryland statute, the statute of limitations extends three years after the employee's final paycheck, and essentially permits the employee to litigate compensation decisions that were made years prior to termination. New York and New Jersey both have six-year statutes of limitations. As a result, companies may need to defend pay decisions made by managers who have long since left the organization. Requiring documentation of the reasons for pay decisions can enable the company to be able to defend against these claims.

**Consider Training Recruiters and Hiring Managers on Salary History Bans.** It is important to make sure managers are aware of the ever-changing law in this area and are not unknowingly violating state or local law. In particular, hiring managers and recruiters should understand what factors can go into setting compensation. They should also know how to recognize impermissible factors, such as prior compensation, when establishing a newly-hired employee's rate of pay.

**Have an Adequate Internal Complaint Procedure.** Your organization is much better off learning of a pay equity issue from an employee directly rather than through an attorney demand letter, charge of discrimination, or lawsuit. Having a robust system for internal complaints, a strong anti-retaliation policy and practice, and a culture of compliance can encourage employees to come forward with issues so that they can be fixed by the company, if appropriate, before they become expensive litigation and negative publicity.

**Conduct a Pay Equity Audit.** Consider conducting a pay equity audit to determine whether there are positions or divisions in your organization that have potential pay equity issues. An audit can help your company identify pay disparities and determine whether they are statistically significant. If your organization is going to conduct an audit, it should be done correctly and the company should be committed to dealing with the results if an inequity is found.

And in a couple of jurisdictions, a self-audit may offer additional benefits. In Massachusetts, an employer that conducts a pay equity audit and takes reasonable steps towards correcting discrepancies has an affirmative defense to a pay equity claim brought under its laws. Rhode Island will provide a similar protection to employers when its amended statute takes effect in 2023. In Oregon, conducting a pay equity audit may allow an employer to avoid an award of compensatory and punitive damages.

In most cases, it makes sense to have an audit conducted under attorney-client privilege to reduce the risk of disclosure during an agency investigation or litigation. It is important to ensure the audit compares all individuals performing substantially similar work and does not just look at job titles. Personnel involved in an audit should try to think creatively about what positions and incumbent employees could be reasonably argued to be comparators. Typically, a pay equity audit will take your company's data, including the control variables your organization believes are driving compensation, and perform a multivariable regression analysis to determine whether there are gender or other protected class pay differences that cannot be explained. Pay equity audits also allow the company to determine whether its compensation philosophy is actually working as intended – are the control variables the company identified actually driving compensation or do they make pay disparities worse?

# IV. Practical Recommendations to Employers to Remediate Pay Equity Issues

If your company becomes aware of potential pay inequities, it should consider evaluating different options for remediating the issue. First, the company might explore whether there are protected classification-neutral factors supported by legitimate business reasons that explain the pay differential. If there are, the company should document those reasons so that if a question or claim arises, the rationale for any pay differentials can be explained. If there are not, the company should explore what compensation adjustments may be needed to eliminate the unlawful pay disparity. Ideally, this discussion should be conducted in a privileged setting with counsel. Recall that under many state pay equity laws, pay disparities cannot be remedied by lowering the compensation of comparator employees. As a result, remediation necessarily must include a pay increase for one or more employees. Advice on who should

receive those pay increases and in what amount can be provided at the conclusion of a pay equity audit performed by legal counsel. Discussions about whether and to what extent those increases alleviate the company's risk of a claim are also helpful.

Careful consideration should be given to both the timing of any wage increases and the messaging to employees regarding why they are receiving an increase. Consider whether it is possible to make the remedial pay adjustments as part of the company's normal compensation and performance review cycle. The message communicated to an employee who affirmatively makes a complaint regarding pay equity about remediation measures likely will be different from the messaging surrounding pay equity issues identified through an employer-initiated prospective pay equity audit.

Employers should attempt to discover the source of the pay inequity so it can be addressed and the problem prevented from recurring:

- Are the issues focused in a particular business unit, department, or part of the organization, suggesting that hiring or compensation managers need training regarding the company's compensation philosophy and the permissible factors to consider in setting pay?

- Are the inequities focused in a particular type of pay, such as base pay, bonus amounts, or other types of incentive payments, such that any modification of the company's compensation structure and philosophy should be concentrated in a particular area of compensation?

- Did the inequities arise with the setting of starting compensation? If so, the employer should explore its process for setting starting compensation and consider implementing some of the measures described in Section III, above, for avoiding pay equity issues.

- Do the pay equity issues arise from a merger or acquisition in which the compensation philosophies of the two companies have not yet been integrated?

Finally, the company should consider regularly conducting pay equity audits, ideally as part of the company's normal compensation and performance review cycle to ensure that pay equity issues do not recur.