

Insights

PAY TRANSPARENCY AND EQUITY ISSUES

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HISTORY OF PAY INEQUALITY

Pay discrimination is not new in the United States. In 1963, Congress enacted the Equal Pay Act to address a centuries-old problem of sex-based discrimination in the payment of wages by employers and labor organizations. A year later, Title VII of the Civil Rights Act (“Title VII”) prohibited wage discrimination based on sex, race and other protected categories. States also passed their own equal pay laws aimed at breaking the cycle of unfair compensation. Despite efforts at the federal and state levels to break the cycle of unfair compensation, the pay gap between men and women continues to persist.^[1] Recently, states have taken a new approach to alleviating gender- and/or race-based wage disparities by enacting salary history bans and pay transparency laws.

FEDERAL PROTECTIONS

I. The Equal Pay Act of 1963

The Equal Pay Act prohibits sex-based employment discrimination. “No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment *for equal work* on jobs the performance of which requires *equal skill, effort, and responsibility, and which are performed under similar working conditions...*” 29 U.S.C. § 206(d)(1). The Equal Pay Act was an effort to provide a remedy for what was perceived to be a serious and endemic problem of employment discrimination in private industry that reflected “an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same.”^[2]

If there is an inequality in wages between men and women who perform substantially equal jobs at the same establishment, the employer is required to raise wages to equalize pay. Employers also are prohibited from reducing wages in order to comply with the Equal Pay Act. 29 USC §206(d).

The law provides guidelines for when unequal pay is permitted – specifically, when there is: (a) a bona fide seniority system; (b) a merit system; (c) a system that measures earnings by quantity or quality of production; or (d) a differential based on any factor other than sex (also known as the four affirmative defenses). 29 U.S.C. § 206(d)(1).

II. Other Equal Pay Laws

Following the passage of the Equal Pay Act, Congress enacted other laws to reduce employment discrimination based not only on sex, but also on other protected categories.

- Title VII of the Civil Rights Act of 1964 bans employers from discriminating based on race, color, religion, sex or national origin.
- The Pregnancy Discrimination Act of 1978 expands the protections of Title VII by making it illegal for employers to discriminate against women on the basis of pregnancy, childbirth or related medical conditions.
- The Lilly Ledbetter Fair Pay Act of 2009 strengthens worker protections against pay discrimination by overturning the Supreme Court's decision in Ledbetter v. Goodyear Tire & Rubber Co., Inc., 550 U.S. 618 (2007), which restricted the time period for filing complaints of wage discrimination under various federal anti-discrimination laws. The Act states that pay discrimination occurs, under Title VII, the Americans with Disabilities Act of 1990 and the Age Discrimination in Employment Act of 1967, every time wages, benefits or other compensation is paid.

STATE PROTECTIONS

Many states have enacted their own statutory protections to address pay inequity and to protect job applicants and current employees who may be subject to discrimination based on sex (including pregnancy, childbirth and related medical conditions), race, religion, disability and age. These laws bar employers from: (1) prohibiting employees from inquiring about, discussing, or disclosing their own wage or that of their colleagues;^[3] (2) requesting salary history and compensation information from job applicants and their prior employers; and (3) advertising jobs, promotions and transfer opportunities without disclosing the pay or pay range.

I. Salary History Bans

Salary history bans prohibit employers from inquiring about job applicants' wage or salary history at a prior employer as a condition for hiring or determining the salary to offer for a position. They may also prohibit employers from accessing and considering current employees' salary in determining the salary to offer for a promotion. Below is a list of states with some type of salary history ban and their effective dates:

State	Effective Date
Alabama	August 1, 2019
California	January 1, 2018
Colorado	January 1, 2021
Connecticut	October 1, 2021
Delaware	December 14, 2017
Hawaii	January 1, 2019
Illinois	January 15, 2019
Maine	September 19, 2019
Maryland	October 1, 2020

Massachusetts	July 1, 2018
Nevada	October 1, 2021
New Jersey	January 1, 2020
New York	January 6, 2020
Oregon	October 6, 2017
Rhode Island	January 1, 2023
Vermont	July 1, 2018
Washington	July 28, 2019

II. State Pay Transparency Laws

Pay transparency laws provide job applicants with transparent information about compensation in an effort to close the wage gap. Employers are required to disclose the minimum and maximum pay for a position to job applicants at some point in the hiring (or promoting) process. Some states have extended the requirements to current employees, requiring employers to disclose the pay range for the current employee's position.

- **California:** Since 2018, the California Equal Pay Act ("CEPA") has prohibited employers from asking applicants about their salary history, including compensation and benefits, during the hiring process. California also requires employers to provide the pay scale for a position upon reasonable request by an applicant. However, in 2022, California passed SB 1162, which expanded the disclosure requirements imposed on employers, effective January 1, 2023.
- **Colorado:** Colorado's Equal Pay for Equal Work Act ("EPEWA") requires employers to include compensation and benefits information in all job postings and notifications of promotional opportunities.^[4]
- **New York State:** On December 21, 2022, Governor Kathy Hochul signed New York State's pay transparency bill and the new law goes into effect on September 17, 2023. In advance of the September 17 effective date, the state legislature passed and Governor Hochul signed an amendment, on March 3, 2023, to address many open questions.

As of March 1, 2023, there are five additional states with pay transparency laws. Below is a brief summary of those laws:

- **Connecticut's** transparency law went into effect on October 1, 2021, and applies to employers who have one or more employees in the state. Employers may not fail or refuse to provide applicants with the wage range for the position for which they are applying, upon the earliest of either (a) an applicant's request, or (b) prior to or at the time a job offer is extended. Additionally, employers may not fail or refuse to provide employees with the wage range for their position upon their hiring, a change in their position with the employer, or their first request for a wage range. An employer who violates this law may be found liable for compensatory damages, attorney's fees and costs, punitive damages and other legal and equitable relief.

- **Maryland's** Equal Pay for Equal Work Law ("EPEWL") took effect on October 1, 2020. It requires all employers, who engage in a business, trade, industry, profession, trade or other enterprise in the state, to provide applicants, upon request, with the wage range for the position for which they are applying. Further, employers are prohibited from retaliating against or refusing to interview, hire, or employ applicants because they request the wage range for the position for which they are applying. Maryland's Division of Labor and Industry enforces the EPEWL in conjunction with the state's attorney general's office. Violations range from having to comply with the Commissioner of Labor's letter/order compelling compliance to civil penalties of up to \$600 for each applicant for employment for whom the employer is not in compliance if the violation occurred within three years after a previous determination that a violation had occurred.
- Since October 1, 2021, all private employers in **Nevada** are required to comply with Nevada's Pay Equity Law for employment within the state. An employer must provide a position's salary range or rate of pay to applicants after an initial interview. Employers are also required to provide the wage or salary range or rate of pay for promotions or transfers to new positions if employees have (a) applied for the transfer or promotion; (b) completed an interview for or been offered the transfer or promotion; or (c) requested the wage or salary range or rate of pay for the promotion or transfer. Employers who violate Nevada's Pay Equity Law may be subject to penalties, including civil actions by aggrieved employees and applicants, actions by the Labor Commissioner, and administrative penalties of up to \$5,000 for each violation and costs for the proceeding including investigative costs and attorneys' fees.
- On January 1, 2023, **Rhode Island's** Pay Equity Act was expanded to require employers, with at least one employee in Rhode Island, to provide a position's wage range to applicants for employment upon request. Employers should provide the wage range to an applicant prior to discussing compensation. For current employees, an employer must provide the wage for their current position both at the time of hire, when they move into a new position, and upon their request. The Act includes an anti-retaliation provision. In addition to administrative proceedings and penalties by the state's Department of Labor and Training, alleged violators may be sued civilly, under certain conditions, and be liable for compensatory or special damages, equitable relief, and reasonable attorneys' fees and costs.
- In 2019, **Washington State** enacted the Equal Pay and Opportunity Act ("EPOA") which required employers, with 15 or more employees, to disclose the position's minimum wage or salary upon the applicant's request, after a conditional offer of employment. Effective January 1, 2023, EPOA now requires employers to disclose, in each job posting, the wage scale or salary range, and a general description of all benefits and other compensation. Upon request of an employee offered an internal transfer to a new position or a promotion, employers must provide the wage scale or salary range for the employee's new position. Aggrieved applicants and employees can file a complaint with the Department of Labor or a civil lawsuit against the employer in court. Penalties for employers out of compliance include: a civil penalty ranging from \$500 for the first violation to \$1,000 (or 10% of the damages) for a repeat violation, a citation and/or notice of assessment, an order to pay actual damages to applicant or employee, double statutory damages (or \$5,000 which is greater), interest, investigative costs, attorneys' fees, and other appropriate relief.

III. Cities and Counties with Pay Transparency Laws

Several cities and counties have also adopted pay transparency laws, including:

- Albany County, New York
- Cincinnati, Ohio

- Ithaca, New York
- Jersey City, New Jersey
- [New York City, New York](#)
- Toledo, Ohio
- Westchester County, New York

TAKEAWAYS AND BEST PRACTICES

Pay transparency undoubtedly will create challenges for many employers, particularly those employers with a multi-state workforce. Employers should become familiar with the state and local pay transparency laws that apply to the business, as well as consider conducting a pay equity audit to assess any disparity in pay. Finally, employers should be mindful of any recording-keeping requirements and seek the advice of counsel when considering how to communicate any remedial changes to the workforce.

[1] According to the United States Government Accountability Office, in 2021, the U.S. Census Bureau reported that women earned about \$0.82 for every dollar men earned (an overall pay gap of 18 cents on the dollar), with White women earning about \$0.79, Black women earning about \$0.63 and Hispanic women earning about \$0.58 for every dollar White men earned. <https://www.gao.gov/products/gao-23-106041#:~:text=Overall%2C%20women%20earned%20about%20%24.,every%20dollar%20White%20men%20earned>

[2] *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974).

[3] Exception: Certain employees (e.g.HR) cannot disclose salary information of other employees as it may violate privacy and confidentiality laws.

[4] Colorado requires employers to make reasonable efforts to notify all employees of promotional opportunities.

RELATED PRACTICE AREAS

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