

## **Oregon Expands Employer Obligations and Liability with Equal Pay Act of 2017**

June, 2017

Oregon employers are facing new obligations and areas of potentially significant liability with Governor Kate Brown's June 1, 2017, enactment of the Oregon Equal Pay Act of 2017 (Oregon Equal Pay Act of 2017 (HB 2005)). Though the title of the Act implies that it simply prohibits discriminatory pay practices, it also prohibits the use of information regularly used by employers in recruiting. Additionally, even though the prohibitions of the Act take effect on a rolling basis (beginning in October 2017), employers should begin preparing now for the Act's implementation.

### **What Does the Act Prohibit?**

The main purpose of the Act is to extend equal pay protections to all protected classes in Oregon. To do this, the Act prohibits employers from paying employees performing comparable work at different rates because of their membership in a protected class. For purposes of this law, protected classes are defined as race, color, religion, sex, sexual orientation, national origin, marital status, veteran status, disability, and age. Additionally, the Act prohibits an employer from lowering an employee's pay to eliminate unlawful pay differences.

The Act does allow an employer to pay employees differently for work of comparable character if the difference in pay is based on a bona fide factor that is related to the position at issue and is based on the following:

- A seniority system;
- A merit system;
- A system that measures earnings by quantity or quality of production, including piece-rate work;
- Workplace locations;
- Travel, if travel is necessary and regular for the employee;
- Education;
- Training;
- Experience; or
- Any combination of the above factors, if the combination of factors accounts for the entire compensation differential.

The Act also prohibits employers from screening job applicants based on current or past compensation. To this end, a prospective employer may not seek an applicant's salary history information unless the prospective employer has made an offer of employment, with an amount of compensation included, to the prospective employee. Furthermore, other than for internal hires/transfers, employers may not determine the compensation for a position based on the current or past compensation of a prospective employee.

### **Employer Liability for Violations**

The potential exposure for a violation of the Act is significant. An employee alleging a violation will be able to file a complaint for unpaid wages and/or discrimination with the Bureau of Labor and Industries (BOLI) or Oregon Circuit Court. If successful, the employee could recover two years of back pay, compensatory and punitive damages, and attorney's fees. The Act also creates class action exposure because it allows employees to bring claims for unpaid wages on their own behalf and on the behalf of a class of similarly situated employees. Furthermore, though claims must generally be brought within one (1) year of the unlawful conduct, each time an employee is paid constitutes a potential violation that effectively extends the statute of

limitations.

### **Potential Defense to Compensatory and Punitive Damages**

The Act includes a defense that significantly reduces an employer's exposure, but carries a potentially heavy burden. An employer may escape liability for compensatory and punitive damages when it can show that, within three (3) years of the employee's legal action being filed, it (1) completed an "equal pay analysis" of its pay practices in good faith that was reasonable in detail and scope considering its size, and (2) eliminated wage differentials for the plaintiff and made reasonable and substantial progress toward eliminating wage differentials for the protected class asserted by the plaintiff. The Act defines "equal-pay analysis" as "an evaluation process to assess and correct wage disparities among employees who perform work of comparable character." "Work of comparable character" means work requiring "substantially similar knowledge, skill, effort, responsibility, and working conditions (regardless of the job description or job title."

### **Effective Dates of Obligations**

The Act has a number of deadlines that employers need to be aware. First, the Act will take effect 91 days after Oregon's 2017 regular legislative session adjourns (currently scheduled for July 10, 2017). This results in a current effective date of October 9, 2017. An employee's private right of action under a majority of the law, however, will not begin until January 1, 2019. The private right of action under the provision prohibiting employers from inquiring into prospective employees' salary histories does not become effective until January 1, 2024.

### **Steps Employers Should Take Now**

To prepare for the new protections and obligations required by the Act and statutory defense outlined above, employers should take the following steps before October 9, 2017:

1. Train recruiters, human resources professionals, and supervisors on proper and lawful recruiting/hiring procedures. This includes training them on the prohibitions in the ACT such as the prohibition on using salary information to screen prospective employees;
2. Conduct the "equal-pay analysis" referenced in the Act to ensure legal compliance and to benefit from the defense to compensatory and punitive damages should an employee file suit. When conducting the analysis, employers should be careful not to inquire about protected statuses that are not self-evident or self-reported. Doing so could give rise to additional claims by employees;
3. Have lawful reasons for any pay rate differences for work of comparable character; and
4. Contact your legal counsel to discuss any issues uncovered during the "equal-pay analysis."