

## Alert | Labor & Employment



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### Closing the Salary Gap & Practical Tips for Employers

Given the national spotlight on pay equity, in 2016 there was a radical change in the equal pay legal landscape, as federal administrative agencies and states implemented laws and regulations to improve and enforce pay equity for individuals in protected classes (*i.e.*, sex, race, ethnicity, gender identity, color, religion, national origin, and sexual orientation). Prior to 2016, equal pay claims were largely enforced via Title VII. In some cases, equal pay claims were also enforced via the Equal Pay Act (EPA), which only protects pay inequity between the sexes. The recent changes in state equal pay laws post-2016 not only seek to aggressively close the pay gap, but lower the bar for employees to bring equal pay lawsuits.

In January 2016, California and New York led the movement of aggressively attempting to close the salary gap by implementing laws that drastically altered the way we have traditionally analyzed pay equity claims. Specifically, the California Fair Pay Act protects against pay differentials based on sex, race, and ethnicity and only requires an employee to show that she performed substantially similar work and worked in similar working conditions, but was paid less. Similarly, the New York Achieves Pay Equity law protects against pay inequity between the sexes and only requires an employee to show that she performed equal work and worked in similar working conditions, but was paid at a lower rate. Both states place the burden on the employer to explain any wage differentials. Both states also impose penalties for certain violations, including the imposition of liquidated damages against violators.

In May 2016, Maryland joined California and New York and expanded its equal pay act. Maryland's equal pay provision extends protections of the law to pay inequities based upon gender identity, as well as sex.

Additionally, Maryland's equal pay act protects against discrimination where an employer pays less for comparable work at the same establishment and/or provides less favorable employment opportunities.

Other states have also joined the movement to close the salary gap by implementing pay equity laws that will go into effect within the coming year. Massachusetts is among those states, as it amended its equal pay act to expand protections for pay differentials based on sex, which is slated to take effect on July 1, 2018. Similarly, Oregon enacted the Oregon Equal Pay Act of 2017, which prohibits discrepancies in compensation on the basis of any protected characteristic. A majority of Oregon's new provisions will take effect Jan. 1, 2019. Additionally, on March 8, 2017, Puerto Rico enacted an equal pay act, which prohibits employers from engaging in pay discrimination based on sex. Although Puerto Rico's new law took immediate effect, penalties authorized by the new law will not take effect until March 8, 2018.

As the fight to close the pay equity gap aggressively moves forward, some states and cities have even enacted salary history laws, which preclude employers from inquiring into employees' pay history. As of Oct. 31, 2017, in New York City, it is illegal for an employer to make any salary inquiry of an applicant or an applicant's current or former employer. New York City employers are also prohibited from conducting any public searches to obtain information regarding a prospective employee's [salary history](#). Philadelphia also enacted a similar law, which was scheduled to take effect on May 23, 2017; however, due to pending litigation over the act, the effective date of the law has been stayed. Also, effective Oct. 6, 2017, Oregon prohibits employers from seeking an applicant's or employee's history from a current or former employer. Delaware is the latest state to pass a law limiting an employer's inquiry into pay history; its law will take effect December 2017.

Additional pay equity bills are pending and likely to be taken up during the 2018 legislative year in the following states: Washington, D.C., Georgia, Hawaii, Iowa, Michigan, Nebraska, New York, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, and Washington.

Given the significant emphasis on pay equity issues and potential fines employers face if they violate these laws, employers should consider:

- Reviewing compensation policies and practices.
- Updating applications to remove questions regarding salary history.
- Training all employees who are involved in interviewing and hiring prospective employees on all new and pending laws regarding pay equity.
- Conducting an audit to help ensure pay ranges are equitable.
- Advising all employees involved in interviewing prospective employees to refrain from making inquiries regarding salary history.
- Consulting legal counsel to review these new and pending laws.

**Breakdown of Pay Equity Laws:**

<b>State &amp; U.S. Territory</b>	<b>Law</b>	<b>Protected Class</b>	<b>Comparison Group</b>	<b>Penalties/ Damages  Awarded to Employee</b>	<b>Effective Date</b>
California	California Fair Pay Act	Sex, Race, Ethnicity	Substantially similar work and working conditions	The act grants an employee the right to file an administrative claim with the Labor Commissioner's office or file an action in court. Employee may recover the difference in wages, interest, and an equal amount as liquidated damages. If an employee files a case in court, he or she may recover attorneys' fees.	Jan. 1, 2016
New York	New York Achieve Pay Equity	Sex Only	Equal work and similar working conditions	The act grants the employee the right to file a civil action against Employers who violate the law. Employers may be subject to pay liquidated damages in the amount of 100 percent of the total amount of the wages found to be due or up to 300 percent of the wages owed.	Jan. 16, 2016

				Employees may also recover attorney's fees and pre-judgment interest.	
Maryland	Maryland Equal Pay for Equal Work	Sex and Gender Identity	Employees who work for the same employer in the same county and who perform work of comparable character, or work in the same operation, in the same business, or of the same type	The act grants the employee a right to sue. The employee is entitled to injunctive relief, actual damages, an additional amount as liquidated damages, and attorney's fees.	May 2016
Massachusetts	Massachusetts Equal Pay Act	Sex Only	Substantially similar skill, effort, and responsibility and performed under similar working conditions	The act grants both the employee and the Attorney General the right to sue. Successful claimants can recover unpaid wages and an additional liquidated damages for 100 percent of unpaid wages, plus attorney's fees and costs.	July 1, 2018
Oregon	Oregon Equal Pay Act	Any protected characteristic	Comparable work	The act grants the employee a right to sue. The employee is entitled to injunctive relief, back pay, and compensatory	Jan. 1, 2019

				damages.	
Puerto Rico	Puerto Rico Equal Pay Act	Sex Only	Comparable work	The act grants the employee a right to sue. The employee is entitled to recover amount of wages due plus an additional penalty in an equal amount, as well as attorney's fees.	March 8, 2017; March 8, 2018 (penalty effective)

**Breakdown of Salary History Laws:**

<b>State or City</b>	<b>Law</b>	<b>Penalties</b>	<b>Effective Date</b>
New York City	Employer prohibited from making any salary inquiry of an applicant or an applicant's current or former employer. Employers are also prohibited from conducting any public searches to obtain information of a prospective employee's salary history.	The New York City Commission on Human Rights may impose civil penalties against an employer for up to \$125,000 for an unintentional violation and up to \$250,000 for "willful, wanton, or malicious act." Employees may also bring civil actions against employers for alleged violations and recover lost wages, compensatory damages, punitive damages, and attorney's fees.	Oct. 31, 2017
Philadelphia	Employer banned from salary inquiries	Employee is entitled to compensatory damages, punitive damages, injunctive relief and reasonable attorney's fees. The Commission may issue penalties for repeat and/or willful violation,	May 23, 2017 (currently stayed due to pending litigation)

		which include a fine of up to \$2,000 per violation and possible imprisonment up to 90 days.	
Delaware	Employers banned from asking job applicants about salary history	The Department of Labor may seek civil penalties of not less than \$1,000 nor more than \$5,000 for each violation. The state Department of Labor also has authority to file a civil penalty claim for violations in court.	Dec. 14, 2017
Massachusetts	Employers banned from asking job applicants about salary history	Employee may recover actual damages, as well as an equal amount in liquidated damages, and attorney's fees.	July 1, 2018
Oregon	Employers prohibited from seeking pay history of an applicant or employee from the applicant's or employee's current or former employer	Employee is entitled to injunctive relief, back pay, and compensatory damages.	Oct. 6, 2017, but employers cannot be sued for violating the provision until Jan. 1, 2019
Puerto Rico	Employers prohibited from asking about an applicant's salary history	Employee is entitled to recover amount of wages due plus an additional penalty in an equal amount, as well as attorney's fees.	March 8, 2017, penalties effective March 8, 2018

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