

Pay Equity – Are you Ready?

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Oregon's sweeping Pay Equity law takes effect on January 1, 2019.

Are you prepared?

Don't worry. You are not alone.

In 2017, the Oregon Legislature passed a sweeping pay equity law aimed to address pay inequities amongst protected classes. Oregon's law has quickly gained recognition as one of the most progressive Pay Equity laws in the country, requiring employers to assess pay scales based on 10 protected classes. The following article is meant to provide general compliance guidance for Oregon's wheat growers and small farmers. It is not meant as legal counsel and outside professional assistance and review may be appropriate depending on the size and scope of your operation.

What do you need to know?

The new law applies to all employers, regardless of your size. It covers all your employees working in Oregon and does not include independent contractors. There are three major components of the new law:

- Employers are prohibited from asking for prior salary history (this portion of the law took effect Oct. 6, 2017). Is this field still on your job applications? REMOVE IT!
- Employers are prohibited from considering or screening new hires based on prior salary history.
- Employers are prohibited from paying employees for work of comparable character at different levels based on discriminatory pay practices.

The law doesn't require equal pay. It prohibits discriminatory pay practices linked to the 10 protected classes (based on a protected class: race, color, religion, sex, sexual orientation, national origin, marital status, veteran status, disability or age).

Let's break that down a bit. I know what asking for prior salary history means – what does consider, or screen mean? The rules released by the Bureau of Labor and Industries (BOLI) on November 20, 2018 define screening job applicants based on current or past compensation as “using information, however obtained, about a job applicant's current or past compensation to determine a job applicant's suitability or eligibility for employment.” OAR 839-008-0005(2). Essentially this means you can't determine a new hirees salary or hourly rate based on their current or past compensation and you can't consider the fact that they were making \$50,000 a year makes them ineligible for your \$25,000 a year job, for example.

What about existing employees? The law does allow you to consider the compensation of a current employee when promoting or moving to a new position, however, you can't screen for that promotion based on current salary. So, if Jim is making \$50,000 in his current position, you can consider raising his salary to \$55,000 in the new position, but you can't consider whether his current rate of pay makes him eligible for the new \$55,000 position.

Confusing? It's going to be as you dive into your payroll books. I continue to believe that the overwhelming majority of employers do not have intentional discriminatory pay practices on their books, however, statistics show us pay inequities do exist and the purpose of this law is for all of us to reevaluate. The State of Oregon, for example, included \$15 million in the Governor's Recommended Budget this fall for the State's possible pay inequity problem...with access to the best and brightest Human Resource and legal teams, this discrepancy shows that pay inequity can happen anywhere.

Ok. Back to making sense of this new law.

What all is included when the law says I'm prohibited from discriminating between employees on the basis of a protected class in the payment of wages or other compensation for work of comparable character? Again, we look to the rules. The rules define compensation to include: wages, salary, bonuses, benefits, fringe benefits and equity-based compensation. Compensation does not include tips or reimbursement for any actual costs incurred including, but not limited to, relocation reimbursements, mileage, and out-of-pocket expenses. 839-008-0000(3)(a)(b). Benefits includes everything from pension, retirement, insurance, unemployment benefits to life insurance, sick leave, vacation or holiday pay. 839-008-0000(1). The rules make a helpful clarification that your calculation is based on benefits "offered" not necessarily accepted. This means that if you offer a family health care package, but your single employee doesn't need the family coverage you have still "offered" the same benefit. See OAR 839-008-0020. Bonus includes: attendance, retention, performance and productivity bonuses. 839-008-0000(2).

So, I don't have to pay everyone the same...but what does that look like in practice?

First you need to understand what could be deemed a discriminatory pay practice. Arguably, paying different compensation levels for "work of comparable character" that is not based on a "bona fide factor" could be deemed a discriminatory pay practice.

What is "Work of Comparable Character"?

The law states: "An employer may pay employees for work of comparable character at different compensation levels if all of the difference in compensation levels is based on a bona fide factor that is related to the position in question and is based on one of 8 factors that are further defined in the rules. ORS 652.220(2). "Work of comparable character" means work that requires substantially similar knowledge, skill, effort, responsibility and working conditions in the performance of work, regardless of job description or job title. 839-008-0000(17). Working conditions includes work environment, hours, time of day, physical surroundings and potential

hazards encountered by an employee. OAR 839-008-0000(16). The rules further define each of the delineated terms in the comparable character definition. For example, “knowledge” may include, but is not limited to: Certifications, Licenses, Certificates; Education; Experience; or Training. “Skill may include, but not limited to: Ability; Agility; Coordination; Creativity; Efficiency; Experience or Precision. See OAR 839-008-0010.

Ok, but I thought the law allows for pay differentials based on bona fide factors. It does. And this is the crux of the law where “equal pay” doesn’t necessarily mean “same pay.”

What are the Bona Fide Factors?

The law states: “An employer may pay employees for work of comparable character at different compensation levels if all of the difference in compensation levels is based on a bona fide factor that is related to the position in question and is based on one of 8 factors that are further defined in the rules. ORS 652.220(2). An employer may pay at different compensation levels for work of comparable character if based on one or ANY combination of the bona fide factors – as long as the combination accounts for the entire compensation differential. ORS 652.220(2)(i).

The law provides for 8 bona fide factors: 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 or Experience. The rules [OAR 839-008-0015(1)(a)-(h)] provide helpful direction on each of the 8 bona fide factors. So, what do they mean?

Seniority System: A seniority system that recognizes and compensates employees based on length of service with the employer.

Merit System: A merit system that provides for variations in pay based upon employee performance as measured through job-related criteria, for example, a written performance evaluation plan or policy that measures employee performance using a set numerical or other established rating scale, such as from “unsatisfactory” to “exceeds expectations,” and takes employees’ ratings into account in determining employee pay rates.

Piece Rate: A system that measures earnings by quantity or quality of production, including piece-rate work

Workplace locations: May include but are not limited to: Cost of living; Desirability of worksite location; Access to worksite location; Minimum wage zones; or Wage and hour zones.

Travel: if travel is necessary and regular for the employee

Education: May include, but not limited to: substantive knowledge acquired through relevant coursework, as well as any completed certificate or degree program

Training: May include, but not limited to: on-the-job training acquired in current or past positions as well as training acquired through a formal training program

Experience: May include, but not limited to; any relevant experience that may be applied to the particular job

Is your payroll system based on one of the above? Now is the time to evaluate, re-evaluate, and outline that system. These parameters will help you as you review your own payroll book. Some employers will seek outside help in this assistance, but for the majority of Oregon's small employers this review will fall on the business owner (which I know also means bookkeeper, legal counsel, human resources, scheduler, and full-time employee!).

I want to flag one challenging (I know there are many more!) aspect of this new law. The BOLI rules include a complicated definition for system, as it is used for the bona fide factors. While it doesn't require you to outline your merit system in writing, it does require that your merit system be "a devised coherent, consistent, verifiable and reasonable method that was in use at the time of the alleged violation to identify, measure and apply appropriate variables in an orderly, logical and effective manner." OAR 839-008-0015(2). I know that's a lot of adjectives and modifiers. The best advice I can give you today is try your best to make sense of this complicated definition and while not required, document your system (and that probably means in writing). Transparency could be a very useful tool in the practical application of this law. Also know that amending this complicated and confusing definition is one of our priorities to fix when the 2019 Legislature convenes.

How will the new law be enforced?

Like most unlawful employment practice act violations there are two tracks for enforcement of this new law – the BOLI complaint process and the civil court process. An employee may file a complaint alleging a pay equity violation with BOLI or pursue a lawsuit. There is a one-year statute of limitations for the new law, however each pay check serves as a new violation for the purposes of that statute of limitations, meaning each paycheck resets the clock.

If a violation is found by BOLI, an employer will be ordered to pay back pay. This will be calculated based on the **lesser** of:

- The two-year period immediately preceding the filing of the complaint, plus the period of time commencing with the date on which the complaint is filed and ending on the date on which the commissioner issued the order; or
- The period of time the complainant was subject to an unlawful wage differential by the employer plus the period of time commencing with the date on which the complaint is filed and ending on the date on which the commissioner issued the order. ORS 659A.870(4).

If a violation is found by the Court, the Court may award injunctive relief and any other equitable relief that may be appropriate, including back pay, as well as compensatory and punitive damages. ORS 659A.885(4)-(5). Punitive damages are limited to a finding that:

- By clear and convincing evidence an employer has engaged in fraud, acted with malice or acted with willful and wanton misconduct; or
- An employer was previously adjudicated. See ORS 659A.885(4).

What can I do?

The law provides employers protection from excessive court awards through an “Equal Pay Analysis.” If an employer performs an Equal Pay Analysis, then it serves as a potential bar to compensatory and punitive damages and limits the award to 2-years of back pay and reasonable attorney fees. See ORS 652.210, Section 12(1). The rules provide no guidance on how to perform an equal pay analysis except to define an “Equal-pay analysis” as an evaluation process to assess and correct wage disparities among employees who perform work of comparable character. OAR 839-008-0000(6).

The law provides that an Equal Pay Analysis must:

- Be completed within 3-years before the date that the employee filed the action;
- Be done in good faith;
- Be reasonable in detail and in scope in light of the size of the employer; and
- Related to the protected class asserted by the plaintiff in the action; and
- Eliminated the wage differentials for the plaintiff and has made reasonable and substantial progress toward eliminating wage differentials for the protected class asserted by the plaintiff.

In addition to the Equal Pay Analysis, which the law does not require employers perform, best practices also suggest reviewing your general pay practices. Do you have a pay practice based on seniority, merit or piece rate? What does that mean? Update your job descriptions so they accurately reflect current roles and responsibilities. Update your Employee Handbooks.

The law also requires you to post notice of the new law. You can download BOLI’s poster here: <http://bit.ly/BOLIposter>. The poster is required to be displayed in every establishment where employees work or if displaying the poster is not feasible, you may distribute notice in writing via mail or email or with a paycheck or incorporate into your handbook or manual.

It is important to keep in mind that the law prohibits employers from reducing an employee’s compensation to come into compliance with the new law. It does, however, allow you to freeze or hold an employee’s compensation constant as others come into alignment.

Where do we go now?

The late release of the rules has been challenging for employers across the State as we all seek compliance. This law was never meant to be a “gotcha” for Oregon employers. Legislators were thoughtful in their 1-year delay of the law (Jan. 1, 2019), however BOLI’s delayed release of the rules have drastically curtailed Oregon’s employer’s ability to understand this new law and take necessary steps to come into compliance. Sen. Taylor, one of the Chief Sponsors of the Pay Equity Law in 2017 and current Chair of the Senate Workforce Committee recently said “The execution of this bill did not go the way I hoped it would. This has left a lot of people rather frustrated. Unfortunately, I didn’t hear any justifiable reason why it [the release of the rules] didn’t happen earlier.” So, know you aren’t alone as you dive into your payroll next weekend. And know that your lobby team will continue to work on delaying punitive court enforcement, allowing employers time to get this right before you are forced into courtrooms with steep legal fees, as well as identifying other necessary fixes for ease of administration and compliance.

Helpful Links:

BOLI FAQ: Ch. 197 - Pay Equity Law - <http://bit.ly/BOLIfaqpe>

Ch. 197 - Pay Equity Law - <http://bit.ly/PayEquityLawOR>

Final Rules: <http://bit.ly/ORgov-boliPermRulePE>

(web addresses have been shortened for ease of access from print media)

Amanda Dalton served on the employer negotiating team for the Pay Equity law during the 2017 Legislative Session. She has continued to serve on BOLI's Rulemaking Advisory Committee in 2018 helping to craft rules that provide needed guidance to Oregon's small and large employers. She is currently working with Legislative Leadership to identify and advance necessary 'fixes' to the Pay Equity Law. This article is not meant to serve as legal counsel and outside counsel and review is recommend for specific inquiries.