Employer Update

Weil

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2019 Trends Assessment: What to Expect in Employment Law

By Weil's Employment Litigation Practice Group

In This Issue

The past year ushered in a range of impactful legislative, judicial and social developments affecting employers. Below, we discuss a number of new and continuing legal trends that we expect to see in 2019, and offer recommendations as to how employers can navigate these changes and developments.

Sexual Harassment

The legislative response to the #MeToo movement gained additional momentum in 2018, as revelations about sexual harassment claims against dozens of high-profile figures continued to fill headlines. At least 125 bills addressing #MeToo issues were introduced across the country in 2018, and at least 11 states enacted legislation targeting employer practices, such as mandatory arbitration, non-disclosure requirements, and investigations relating to sexual harassment claims, as well as anti-sexual harassment workplace policies and training. At the federal level, 2018 was the first calendar year in which legislation (enacted in December 2017) became effective denying employers a tax deduction for "any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement, or . . . attorney's fees related to such a settlement or payment." 26 U.S.C. § 162(q). To date, there has been no definitive guidance as to how the federal government defines settlements or payments "related to" sexual harassment or sexual abuse, but employers should keep this amendment in mind when assessing the benefits of entering into a nondisclosure agreement.

Several states also enacted legislation regulating settlements of workplace sexual harassment claims. For example, Maryland now requires employers with 50 or more employees to submit information on the number of settlements of sexual harassment claims entered into by the employer to the Maryland Commission on Civil Rights on or before July 1, 2020, and then again on or before July 1, 2022. Other states, including California, New York, and Washington, enacted legislation restricting employers' ability to require sexual harassment complainants to keep their allegations confidential as part of a settlement of their claims. These laws are far from uniform, however, so employers that operate in multiple jurisdictions may be required to navigate many disparate requirements.

Several states, including Maryland, New York, Vermont, and Washington, also passed laws attempting to ban mandatory arbitration of sexual harassment claims. We expect employers to challenge these state laws as contrary to the Federal Arbitration Act, which preempts state laws that limit the enforceability of arbitration agreements. In light of the Supreme Court opinion in favor of the enforcement of arbitration agreements in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018) and a long line of pro-arbitration rulings by the Supreme Court, there appears to be a strong likelihood that the courts will agree with many of these challenges.

New York State and City, along with other states including California, Delaware, and Louisiana, enacted anti-sexual harassment training and policy requirements. New York State's law imposes a broad range of requirements on employers, from policies and training to recommended complaint forms and investigation protocols. The necessary content and frequency of training vary from state to state.

The legislative response to the #MeToo movement shows no signs of abatement in 2019, and many additional states and cities may issue regulations or other interpretative guidance in the coming year further clarifying the new laws already enacted. In addition, we have recently seen shareholders' lawsuits, such as those filed against Google's parent company, Alphabet, Inc., alleging breach of fiduciary duty by boards of directors and engaging in corporate waste by failing to investigate and covering up claims of sexual harassment by corporate executives and paying executives found to have engaged in such harassment severance upon the termination of their employment. Given the rapidly changing legislative and judicial environment, employers should monitor changes in the laws in the jurisdictions in which they operate in 2019.

Class Action Waivers in Arbitration Agreements

As a result of the Supreme Court's May 2018 decision in *Epic Systems Corp. v. Lewis* rejecting a challenge under the National Labor Relations Act to mandatory class-action waivers in individual arbitration agreements, more employers are adopting such individual arbitration agreements including a class action waiver. According to current estimates, approximately 60 million employees in the United States are covered by arbitration agreements. A countervailing force to this trend, however, is the increased public scrutiny of mandatory arbitration of certain types of employment claims in the wake of the #MeToo movement, in addition to the high cost of arbitration. For example, in 2017 and 2018, companies such as Google, Uber, and Facebook voluntarily ended mandatory arbitration of sexual harassment claims.

Any federal legislative attempts to undo the holding in *Epic Systems* will likely be unsuccessful in a divided Congress. While state and local governments may seek to limit the enforceability of such arbitration agreements, we expect such efforts will be challenged as contrary to the Federal Arbitration Act. Notwithstanding the clear dictates of federal law, New York enacted legislation in 2018 which provides that employers may no longer include in any written agreement, a provision mandating arbitration of sexual harassment claims or allegations, except where such a prohibition is "inconsistent with federal law." Because most arbitration agreements are likely to fall within the scope of the FAA, and the Supreme Court has held in a long line of cases, including *Epiq Systems*, that the FAA mandates the enforcement of arbitration agreements as written, employees seeking to rely on new state legislation precluding arbitration of certain claims face an uphill battle against FAA preemption.

State Pay Equity Legislation

The pay equity movement aimed at closing the wage disparity between men and women will continue to have an impact on virtually all employers in 2019. In 2017 and 2018, several state and local jurisdictions introduced legislation banning salary history inquiries in an effort to avoid perpetuating pay disparities or gender-based wage discrimination that may have affected female applicants in their prior work experiences. States and localities that have already implemented such legislation include Albany County,

Westchester County, New York City, California, San Francisco, Massachusetts, Kansas City, New Jersey, Delaware, Oregon, and Vermont. These laws typically prohibit employers from asking an applicant for their compensation history. Some of these laws also prohibit an employer from using pay or salary history to determine a new hire's pay, even if the employer has obtained the information inadvertently or the applicant has volunteered the information.

In 2019, more state and local legislation will become effective to alleviate the pay disparity between men and women. Effective January 1, 2019, Hawaii prohibits employers from asking applicants about salary histories, and employers cannot rely on that information to determine salary, benefits or other compensation, unless volunteered without prompting by the applicant. Hawaii, however, does permit "discussions with an applicant for employment about the applicant's expectations with respect to salary, benefits and other compensation." Effective January 1, 2019, Connecticut also prohibits employers from asking about pay history, unless voluntarily disclosed. Connecticut, however, does not prohibit an employer from inquiring about other elements of a prospective employee's compensation structure, "as long as such employer does not inquire about the value of the elements of such compensation structure." Effective June 30, 2019, Suffolk County will also prohibit employers from not only asking about an applicant's wage or salary history, but also from conducting searches of public records for the same. In an effort to thwart the growth of state and local laws banning inquiry into salary history, at least two states have recently passed preemption measures to prohibit local jurisdictions from banning pay history inquiries. A Michigan bill specifically provides, in relevant part, that "[a] local governmental body shall not adopt, enforce, or administer an ordinance, local policy or local resolution regulating information an employer or potential employer must request, require, or exclude on an application for employment or during the interview process from an employee or potential employee." In a similar vein, Wisconsin passed preemption legislation that specifically cites salary history among issues that local jurisdictions cannot address through ordinances.

Employers should continue to be vigilant about reviewing their hiring procedures and documents, and properly training individuals with hiring responsibilities to ensure that they do not violate any prohibitions on inquiries and use of compensation history. Employers also should continue to evaluate and identify, where appropriate, any pay disparities impacting protected groups, as robust private and governmental enforcement efforts in this area will undoubtedly continue and possibly increase in frequency. Employers also should take steps to conduct such pay audits under the protection of the attorney-client privilege, which privilege will also provide employers with more flexibility to communicate regarding relevant issues and solutions stemming from the pay audit. To this end, from the outset of any pay audit, in addition to the human resources department, employers should work in conjunction with its in-house legal department and/or outside counsel, and document through an internal memorandum (for in-house counsel) or an engagement letter (for outside counsel) that the scope of the audit includes providing legal advice. Finally, employers should also be aware of any state or local guidance in this area, in connection with a sale or purchase of the assets of a business. In this context, aggressive plaintiffs' lawyers may argue that the buyer should not use compensation history in making offers of employment even though the buyer does not consider the transferred employees to be job applicants covered by the law.

Paid Leave Laws

Increasingly more states have continued the trend of enacting paid leave laws. Massachusetts has joined six other states in recently passing legislation granting eligible employees paid family medical leave. Massachusetts's law became effective January 1, 2019, but benefit payments will not begin until January 2021. Washington D.C. and Washington State enacted paid family leave measures in 2017, but benefit payments will not begin under either law until 2020. New York's paid family leave law began

phased implementation in 2018, and the number of paid weeks eligible employees can take increased from 8 to 10 as of January 1, 2019, and will increase to 12 weeks in 2021. In addition, various localities have passed legislation requiring employers to provide paid family medical leave. Relatedly, 11 states and Washington D.C., as well as numerous localities including New York City and San Francisco, have enacted legislation requiring employers to provide paid short-term sick leave and to permit carryover of accrued sick time. The paid sick leave laws of Maryland, New Jersey, and Washington State all became effective in 2018, and Michigan's paid sick leave law will become effective in April 2019.

State and local paid leave laws impose new mandates on employers which the federal Family Medical Leave Act (FMLA) does not require. The FMLA requires employers, under certain circumstances, to provide employees with up to 12 weeks of leave, but does not require that employees be paid during the leave period.

The United States also does not require employers to provide paid sick leave for their employees. The state family leave laws of California, New Jersey, New York, and Rhode Island have created funding mechanisms requiring employees, not employers, to pay for the paid leave benefits under taxing schemes related to state workers' compensation and disability laws. Washington D.C.'s program will be financed by employers via payroll taxes on employers, and the programs enacted by Washington State and Massachusetts will be jointly financed by employers and employees. There are efforts currently underway in 21 additional states to pass paid family medical leave legislation, so employers can expect to see additional jurisdictions adopting such paid family medical and sick leave laws in 2019. Employers should review their policies and procedures to ensure compliance with state and local laws.

Laws and Other Activities Limiting Enforceability of Restrictive Covenants

In 2018, employers witnessed governmental action limiting the enforceability of restrictive covenants. This trend, which has been picking up steam since becoming an initiative during the latter years of the Obama administration, likely will continue in 2019.

The most significant milestone in 2018 in the area of further restrictions on employers' use of restrictive covenants was the passage of the Massachusetts Noncompetition Agreement Act, which goes further than nearly any other state law (short of the outright bans on non-competes, other than in limited circumstances, in California, Oklahoma, and North Dakota) in restricting the use of post-employment covenants not to compete. Under this new Massachusetts law, which applies to agreements signed on or after October 1, 2018, non-competition restrictions are limited to 12 months in duration; cannot be used with non-exempt employees and other low wage workers; cannot be enforced against employees laid off or terminated without cause; and must be supported by additional consideration beyond "continued employment" for current employees. Additionally, in a particularly unique aspect of this new law, employers must pay employees half their salary or "other mutually agreed-upon consideration" during the non-compete period. The law does not define "other mutually agreed-upon consideration," and we anticipate that employers will take creative approaches in providing non-monetary benefits as consideration.

The Massachusetts legislation comes on the heels of laws restricting the use of non-competes in several other states – such as a 2016 Utah law that, among other things, like the Massachusetts law, prohibits non-competes of more than one year – and could be followed by bills targeting non-competes that have been proposed in other state legislatures, including a proposal in Vermont to ban nearly all non-competes (similar to California). And just this month, a group called the Center for American Progress issued a report calling on state lawmakers to take additional (and stronger) actions to limit the use of restrictive covenants – a further sign that the recent trend of state-level restrictive covenant legislation is likely to continue.

This state-level activity in the area of non-competition agreements comes against the backdrop of significant recent activity at both the state and federal levels

targeting so-called "no-poach" agreements as violations of antitrust law. Following the October 2016 publication by the Department of Justice of its "Antitrust Guidance for Human Resources Professionals," which declared the DOJ's position that "no-poach" agreements – *i.e.*, agreements between companies not to recruit or hire each other's employees – are violations of federal antitrust law, employers have seen litigation as well as state and federal enforcement activities targeting these types of agreements. Most recently, this activity has included a wave of class action lawsuits involving fast-food restaurant chains (such as McDonald's, Burger King's, Papa John's, Little Caesar's, and several others), alleging that individual franchise locations of each of these chains unlawfully agreed not to hire employees from other franchisors of the same chain.

Finally, while 2018 saw several noteworthy judicial decisions in the restrictive covenant space, what was likely the most significant decision came down in November when a California appellate court affirmed an order precluding the enforcement of an employee non-solicitation agreement against employees who had left their company to join a competitor. While it remains to be seen whether the decision in *AMN Healthcare v. Aya Healthcare*, 28 Cal. App. 5th 923, 926 (Ct. App. 2018), was unique to the facts of that case (which involved recruiters of travel nurses whose very job was to recruit travel nurses for temporary assignments) or whether it means that California courts will now consistently treat employee non-solicitation agreements like non-competition agreements (*i.e.*, as *per se* unlawful) – indeed, *Barker v. Insight Glob.*, LLC, 2019 WL 176260, at *2-3 (N.D. Cal. Jan. 11, 2019) did just that, relying on *AMN Healthcare* in holding that California law prohibits employee non-solicitation agreements – the decision was yet another blow to employers in a year full of "tightening of the reins" in the restrictive covenant space.

Age Discrimination

As discussed in our October 2018 *Employer Update*, age discrimination claims frequently arise from hiring and recruitment practices. Job *applicants* rather than current employees (unless the claim relates to an internal hiring) typically bring these claims. The law clearly authorizes applicants to bring claims of *intentional* discrimination, but courts disagree as to whether applicants can bring claims of disparate impact, or unintentional discrimination based on neutral practices that tend to eliminate older applicants.

Our October 2018 Employer Update described *Villarreal v. R.J. Reynolds Tobacco Co.*, 839 F.3d 958, 961 (11th Cir. 2016), in which the Eleventh Circuit found that the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634, does not authorize job applicants to bring disparate impact claims. The Seventh Circuit recently reheard a case in which the 58-year-old applicant alleged disparate impact discrimination based on a job posting for someone with "3 to 7 years (no more than 7 years) of relevant legal experience." *Kleber v. CareFusion Corp.*, 888 F.3d 868, 870 (7th Cir. 2018) (opinion vacated). While an early 2018 Seventh Circuit panel decision found the ADEA to permit claims of disparate impact by job applicants, the full court reheard the case and determined in a January 23, 2019 opinion that the ADEA does *not* do so. The dissenting judges argued that the textual analysis was less clear than the majority found, and that the decision was contrary to the intent behind the ADEA.

The Seventh Circuit's alignment with the Eleventh Circuit may be an indication of a trend in U.S. Circuit Courts of Appeal to limit the scope of the ADEA and appears to strengthen employers' ability to argue that the ADEA does not protect job applicants against disparate impact discrimination. However, courts in other circuits may find differently, setting the issue up for Supreme Court review. For example, an ongoing case in the Northern District of California is awaiting an order on class certification in connection with a claim of disparate impact discrimination against older applicants through the filling of entry-level positions exclusively through on-campus recruiting. *Rabin v. PricewaterhouseCoopers LLP*, 236 F. Supp. 3d 1126 (N.D. Cal. 2017). Job applicants may also bring claims under state law, which could be more specific and provide broader protections than ADEA.

Therefore, employers should be mindful of the ongoing possibility of disparate impact claims by applicants and assess whether their neutral hiring and recruitment practices tend to exclude older workers. Employers can then determine whether these practices are targeted at a reasonable business purpose and consider other ways to achieve the same purpose. For example, employers may currently use an experience cap to deter those applicants with greater experience who may require a higher salary. Including a target salary in the job posting could deter these applicants (who may be older), without precluding them from applying in the event they are willing to accept the lower salary. Given the current uncertainty in the law, employers should nevertheless assess their current hiring and recruitment practices to ensure that they are defensible and to modify those that may not be.

2019 Supreme Court Term

The U.S. Supreme Court's rulings in 2019 will likely usher in noteworthy legal developments affecting employers, particularly with respect to arbitration programs. In early January 2019, in *Henry Schein, Inc. v. Archer and White Sales, Inc.*, the Supreme Court unanimously held that the "wholly groundless" exception to the general rule that courts must enforce contracts that delegate threshold arbitrability questions to an arbitrator, not a court, is inconsistent with the Federal Arbitration Act (FAA). 586 U.S. ___ (2019), 2019 WL 122164 (U.S. 2019). Under that exception, courts were empowered to determine the arbitrability of a dispute, even if the contract delegated the question of arbitrability to an arbitrator, if the argument that the arbitration agreement applies to a dispute was "wholly groundless." *Archer & White Sales, Inc. v. Henry Schein, Inc.*, 878 F.3d 488, 495 (5th Cir. 2017), *vacated and remanded*, 586 U.S. ____ (2019). Now, under the Supreme Court's decision in *Schein*, when a contract delegates threshold arbitrability questions to an arbitrator, courts may not override the contract even if the argument that the arbitration agreement applies to a particular dispute is "wholly groundless." *Schein*, 586 U.S. ____ (2019). In light of this development, employers who wish to bolster the likelihood that their disputes will be resolved in arbitration, should review their arbitration agreements with employees and may wish to ensure that such agreements expressly delegate the threshold question of arbitrability to an arbitrator.

The Supreme Court also recently held in *New Prime Inc. v. Oliveira* that the FAA's mandate that courts enforce arbitration provisions does not apply to independent contractors who work in transportation industries. 586 U.S. ___ (2019), 2019 WL 189342 (U.S. Jan. 15, 2019). Ordinarily, the FAA requires courts to enforce private arbitration agreements. As the Supreme Court stated in *New Prime*, however, the FAA, "like most laws[,] . . . bears its qualifications." *Id.* In particular, the FAA exempts "contracts of employment" for transportation "workers" (*e.g.*, railroad workers, truckers, and airline attendants). 9 U.S.C. § 1. In the past, some courts had ruled that the FAA's transportation worker exemption applied only to contracts between employers and employees. In *New Prime*, however, the Supreme Court clarified that the exemption applies to independent contractors, as well. Focusing on the definition of "employment" at the time Congress enacted the FAA, as well as the statute's broad use of the term "workers," the Supreme Court held that the FAA's exemption applied to "any contract for the performance of *work* by *workers*" in the transportation industry. *New Prime*, 586 U.S. at ___.

Later in 2019, the Supreme Court will rule on its third employment-related arbitration case, *Lamps Plus, Inc. v. Varela*, 701 F. App'x 670, 672 (9th Cir. 2017), *cert. granted*, 138 S. Ct. 1697 (2018). In that case, the Supreme Court will determine whether the FAA prohibits lower courts from applying state law to interpret arbitration agreements to authorize class arbitration in the absence of an express provision authorizing class claims. The *Lamps Plus* dispute centered on an employer and an employee's opposing arguments that the general arbitration clause in their employment agreement authorized – or that it was too ambiguous to authorize – the employee's pursuit of arbitration on a collective basis. Applying California contract law to construe the parties' employment agreement, the Ninth Circuit concluded that the litigants' arbitration provision was

sufficiently clear and possessed an adequate "contractual basis" that demonstrated the parties' agreement to class arbitration. *Id.* at 673. On review, the Supreme Court will decide whether courts are permitted to interpret similar general arbitration agreements to provide for class arbitration under state law.

The Supreme Court may hear two additional employment cases in 2019. Litigants have filed a petition for certiorari in a case that could determine whether Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on sexual orientation or gender identity. *EEOC v. R.G. &. G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 574–75 (6th Cir. 2018), *petition for cert. filed* (July 20, 2018) (18-107) (concluding that "discrimination on the basis of transgender and transitioning status violates Title VII"). In a different case, further, the Supreme Court could determine whether an employer is permitted to consider salary history as a "factor other than sex" when making pay determinations under the Equal Pay Act. *Rizo v. Yovino*, 887 F.3d 453, 456 (9th Cir. 2018), *petition for cert. filed* (Aug. 30, 2018) (18-272) (holding that "prior salary alone or in combination with other factors cannot justify a wage differential").

"Comparable" but not "Equal" – Varying Standards Under New State Equal Pay Laws

By Samantha Caesar

For the past half-century, federal law has required employers to compensate men and women equally for equal work. In recent years, however, the renewed nation-wide focus on closing the gender pay gap has led to an explosion of new state and local pay equity laws. While many of these new laws track the language of the federal Equal Pay Act, many of them diverge. In this article, we discuss some of the recently enacted state pay equity laws and offer advice for employers on how to navigate this rapidly changing area.

The Federal Equal Pay Act

The federal Equal Pay Act, 29 U.S.C. §206(d) (the EPA), was enacted in 1963, aimed at abolishing sex-based wage discrimination. After decades of continuing wage disparity between the sexes, in 2010, President Obama established the National Equal Pay Task Force to renew the momentum behind enforcement of the federal EPA. The Task Force joined together professionals in various federal agencies to crack down on equal pay, namely by collecting pay-gap data, and educating employers of their obligations on employees of their rights. Equal pay efforts gained the attention of private employers again in 2016, when a conglomerate of the nation's most successful companies signed the Equal Pay Pledge. By taking the pledge, employers commit to conducting annual reviews of their own pay data to help reduce the gender pay gap. To date, over 100 major companies have pledged to conduct annual, internal pay equity audits, including Airbnb, Amazon, Cisco, Deloitte, Johnson & Johnson, L'Oreal USA, PepsiCo, PwC, Salesforce, Spotify, and Staples – just to name a few.

The "Equal Work" Standard Under the Federal EPA

The EPA prohibits employers from compensating men and women differently for performing "equal work." The statute defines equal work as "jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." Though "equal work" does not mean identical work, federal courts have stated that the jobs must be "virtually identical,"[1] or "substantially equal"[2] such that there is "substantial identity of job functions."[3]

In determining whether jobs are substantially equal, courts focus on overall job content. While job title may be relevant to the analysis, job title, alone, is not determinative of whether male and female employees are performing substantially equal work.[4] In *Hunt v. Nebraska Public Power District*, the Eighth Circuit explained, "[w]hether two jobs are substantially equal 'requires a practical judgment on the basis of all the facts and circumstances of a particular case' including factors such as level of experience, training, education, ability, effort, and responsibility."[5] Although the Code of Federal Regulations provides that the terms "skill, effort, and responsibility" "constitute separate tests, each of which must be met in order for the equal pay standard to apply,"[6] courts frequently do not break their analyses down by individual criterion.[7] For example, the Sixth Circuit has held that "[w]hether the work of two employees is substantially equal 'must be resolved by the overall comparison of work, not its individual segments.'"[8] When comparing the work of two employees, the EPA requires that courts look at the skill set *required by the job* rather than the skill set of the individual employees, to determine if the jobs work being compared is "substantially equal."[9]

"Substantially Similar" and "Comparable Work" Standards Under State Laws

Today, every state except Alabama and Mississippi, as well as the District of Columbia, has enacted its own version of the Equal Pay Act, and a plethora of local jurisdictions within each of the states has done so as well. Of the 48 states with their own pay equity statutes, approximately half contain language that does not precisely mirror the federal EPA.[10] Rather than using "equal work" as the comparator standard, these statutes use language such as: "comparable work," "comparable worth," "equivalent services or the same amount of class work," "same or substantially similar work," "same quantity and quality of the same classification of work," "similarly employed," or "work of a comparable character." While courts in a number of these states have nonetheless interpreted the state statute as using the same analysis under the federal EPA in determining whether the work compared is "equal" or "substantially similar," many of these statutes have not yet been interpreted by state judiciaries.[11] Further, a handful of states that have very recently passed new pay equity laws, or amended existing ones, have issued guidance explaining that the statutes are intended to apply more broadly than the federal EPA.

California

California led the way in explicitly moving away from a standard congruent with the federal EPA. On January 1, 2016, an amendment to the California Fair Pay Act took effect, modifying the relevant statutory language from "equal" work to "substantially similar work."[12] The California Department of Industrial Relations issued guidance advising that "'[s]ubstantially similar work' refers to work that is *mostly similar* in skill, effort, and responsibility." (emphasis added).[13] The guidance also provides examples of "skill," which refers to "experience, ability, education, and training;" "effort," which refers to "amount of physical or mental exertion;" and "responsibility," which refers to "the degree of accountability or duties," required to perform the job. The California statute was also the first to explicitly state that these three factors are "viewed as a composite."

Washington

On June 7, 2018, Washington State followed in California's footsteps when its legislature passed the Equal Pay Opportunity Act (HB 1506). According to the act, the relative compensation of male and female employees in Washington may be compared if the employees perform merely "similar," rather than

"substantially similar," work.[14] The Washington law also codifies the generally accepted principle that "[j]ob titles alone are not determinative of whether employees are similarly employed."[15]

Massachusetts

Massachusetts introduced yet another language variation on the comparator standard on July 1, 2018, when the legislature amended the State's existing Pay Equity Act.[16] The amendment requires equal pay for "comparable work" rather than "equal work." The amendment followed California in defining the comparator standard as "work that is substantially similar in that it requires substantially similar skill, effort, and responsibility," and followed Washington in explicitly stating that job titles, alone, "shall not determine comparability." Guidance issued by the Massachusetts State Attorney General's Office provides that "'[c]omparable work' is broader and more inclusive that the 'equal work' standard of the federal Equal Pay Act."[17] The guidance goes on to say that while skill, effort, and responsibility need not be "identical or alike in all respects," they should be "alike to a great or significant extent." The guidance emphasizes that these elements are considered together, as a whole.

Significantly, the new Massachusetts law offers a complete defense to liability to an employer who can establish it has completed "a self-evaluation of its pay practices in good faith" and that "reasonable progress has been made towards eliminating wage differentials based on gender for comparable work, if any, in accordance with that evaluation" within the prior three years.[18]

New Jersey

In like manner, this past summer, New Jersey passed the Diane B. Allen Equal Pay Act, which took effect on July 1, 2018. The law tracks the language of California's statute, comparing "substantially similar" work when viewed as a "composite" of skill, effort, and responsibility. Notably, the law requires equal pay among fourteen protected classes – not just sex. Moreover, the New Jersey law provides for treble damages in the event that an employer is found to have violated its provisions.

Oregon

Effective January 1, 2019, the Oregon Equal Pay Act of 2017 introduces yet another variation in statutory language, requiring equal pay for "work of a comparable character."[19] While the standard for assessing "comparable character" is, like others, whether the work is "substantially similar," notably, the Oregon statute adds "knowledge" to the traditional list of considerations (skill, effort, and responsibility).

Interestingly, the Oregon Bureau of Labor and Industries (BOLI) Guide, Best Practices for Employers, informs employers that they may increase the salary of a current employee with a competing job offer without increasing the salaries of all employees performing work of a comparable character.[20] On the flip side, if a new hire negotiates a higher starting salary or better benefits, an employer *must match* that compensation for all employees performing work of comparable character.[21]

Like Massachusetts, the Oregon law offers an employer who has undertaken a good-faith self-evaluation process and taken reasonable steps to eliminate a wage disparity a defense to liability, albeit limited as against compensatory or punitive damages.[22]

Advice for Employers

Employers may wish to consider conducting equal pay audits on an annual basis, particularly if they operate in a jurisdiction that offers a defense for employers who do so. In conducting equal pay audits, employers should be careful to compare not only men and women, but also other classifications protected under the laws of the applicable state or local jurisdictions within which the employer operates.

Employers also may wish to review existing job descriptions that may reflect similar or comparable work yet provide for different pay to determine whether the descriptions should be revised or the pay adjusted. Employers may also consider creating salary bands or pay ranges not just for individual jobs, but for classifications of positions that require similar skills, knowledge, experience and qualifications. This practice could help to ensure fair and consistent

employee compensation, while posting the salary ranges of open positions allows applications to decide whether they wish to pursue a position given the stated salary range.

[1] *Cohens v. Md. Dep't of Human Res.,* 933 F. Supp. 2d 735, 747 (D. Md. 2013).

[2] *Shultz v. Wheaton Glass Co*., 421 F.2d 259 (3d Cir. 1970).

[3] *Hodgson v. Golden Isles Convalescent Homes, Inc.,* 468 F.2d 1256, 1258-59 (5th Cir. 1972).

[4] *See, e.g.*, *Conti v. Universal Enters., Inc*., 50 F. App'x 690, 696 (6th Cir. 2002) (holding that resolution of an EPA claim "depends not on job titles or classifications but on actual job requirements and performance").

[5] 282 F.3d 1021, 1030.

[6] 29 C.F.R. § 1620.14(a) (2005).

[7] *Id.*

[8] *Buntin v. Breathitt County Board of Education*, 134 F.3d 796, 799 (1998).

[9] 29 C.F.R.§1620.15(a)(2005).

[10] *See* Stephanie Bornstein, Equal Work, 77 Md .L. Rev. 581, 614 (2018).

[11] *Id.*

[12] Cal. Lab. Code § 1197.5(a) (2019).

[13] California Department of Industrial Relations guidance - State of California, Dep't of Industrial Relations, *California Equal Pay Act: Frequently Asked Questions* (Oct. 2017), *available at* https://www.dir.ca.gov/dlse/California_Equal_Pay_Act.htm.

[14] Wash. Rev. Code Ann. § 49.58.020 (2018).

[15] *Id.*

[16] Mass. Gen. Laws ch. 149, § 105A (2018).

[17] State Attorney General's Office guidance Commonwealth of Massachusetts, Office of the Att'y General, *an Act to Establish Pay Equity: Overview and Frequently Asked Questions* (Mar. 1, 2018) *available at* https://www.mass.gov/files/documents/2018/05/02/AGO%20Equal%20Pay%20Act%20Guidance%20%285-2-18%29.pdf.

[18] Mass. Gen. Laws ch. 149, § 105A(d) (2018).

[19] OR. Rev. Stat. Ann. §§ 652.210-220 (2017).

[20] This is permitted "so long as the increase does not result in a difference in wages or compensation for work of a comparable character between employees on the basis of a protected class or is justified by one or more of the bona fide factors provided by law." Oregon Bureau of Labor and Industries (BOLI) Guide, *Best Practices for Employers available at* https://www.oregon.gov/boli/TA/Pages/FactSheetsFAQs/PayEquity.aspx.

[21] Unless the higher compensation is justified by one or more bona fide factors provided by law. *Id.*

[22] OR. Rev. Stat. Ann. § 652.235 (2017).

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