What CHROs Need to Know About State Equal Pay Laws

*Equal Pay Proponents Focused On Moving New State Laws With Paycheck Fairness Act Stalled In Congress*

In 2015, California enacted the strictest equal pay law in the country which requires equal pay for substantially similar work across all of an employer’s locations in the state, and New York passed legislation imposing a greater burden on employers to justify wage differentials across establishments in the same “geographic region” of the state. Most recently, Massachusetts became the first state to bar employers from asking job applicants about their salary history before making a formal job offer that includes compensation. In 2016, a coalition of progressive and women’s groups is actively working to advance equal pay bills in nearly half the states, and this effort will certainly continue in 2017.

**California Equal Pay Law** The California law, which significantly resembles the proposed Paycheck Fairness Act, significantly relaxes the evidentiary burden of proof on employees alleging equal pay discrimination. Previously, an employee had to show that they were not being paid at the same rate as someone of the opposite sex at the same establishment for “equal work.” Under the new law, which took effect January 1, 2016, employees need only show unequal pay for “substantially similar work,” which is a composite of skill, effort, and responsibility, performed under similar working conditions.

However, similar to the Equal Pay Act, the California law does permit different pay for similar work if the difference is the result of:

- A seniority system;
- A merit system;
- A system that measures earnings by quality or quantity of production; or
- A *bona fide* factor other than sex, such as education, training, or experience.

An employer must also show that its reliance on any or all of the above factors is reasonable, and that one or more of the factors is the entire reason for any wage differential. By adding these provisions to the law, it significantly increases the employer’s burden in defending a claim of unfair pay practices by requiring an employer to show, through competent evidence, that any difference in compensation is not gender-based, is related to the position in question, and there exists a business necessity for the wage differential. Moreover, like the PFA, employees have the ability to rebut this defense by demonstrating an alternative business practice exists that would serve the same business purpose without the difference in wages.

The California law also prevents the employer from retaliating against employees for invoking the employee’s rights, extends the time period for keeping records related to employee’s terms and conditions of employment from two to three years, and allows an employee to recover the amount of wages the employee was not paid due to the wage differential along with interest, plus an additional equal amount as liquidated damages. The California law also prohibits employers from having “pay secrecy” policies that discourage employees from discussing their pay with coworkers.
**New York Equal Pay Law**  Like California, the New York law requires employers to justify pay differentials, limits the factors employers can use to explain differences in pay, and places on employers the burden of proving the reasons for any pay differences. The new law, which took effect January 19, 2016:

- Broadens the meaning of “same establishment” to include workplaces located in the “same geographic region” (but no larger than a county), taking into account population distribution, economic activity and/or the presence of municipalities;

- Replaces the “any other factor other than sex” employer defense for wage differences and with “a bona fide factor other than sex, such as education, training, or experience” defense where employers must show the wage differential is job-related with respect to the position in question and is consistent with a business necessity;

- However, like the PFA, the “bona fide” factor defense does not apply where the employer uses an employment practice that causes a disparate impact on the basis of sex, or an employee shows that an alternative employment practice exists that would serve the same purpose without causing a disparate impact; and the employer has refused to adopt the alternative practice.

The New York law also increased liquidated damages for willful violations to 300 percent of wages due, and prohibits employers from having “pay secrecy” policies that discourage employees from discussing their pay with coworkers.

**Maryland Equal Pay Law**  Maryland’s updated Equal Pay for Equal Work Act, which takes effect on October 1, 2016, prohibits pay discrimination on the “basis of sex or gender identity,” and covers employees who work for the same employer at workplaces located in the same county of the state and who “perform work of comparable character or work in the same operation, in the same business, or of the same type.” Moreover, the law covers more than just pay disparities. It also prohibits employers from “providing less favorable employment opportunities,” which includes placing employees into “less favorable career tracks” or positions, “failing to provide information about promotions or advancement,” and “limiting or depriving” employees of employment opportunities because of sex or gender identity. Additionally, employers may not forbid employees from “inquiring about, discussing, or disclosing” their wages or the wages of other employees.

**Massachusetts Equal Pay Law**  Most recently, Massachusetts became the first state to prohibit employers from asking prospective hires about their salary histories until after they make a job offer that includes compensation, unless the applicants voluntarily disclose the information. The new Massachusetts law, which goes into effect July 1, 2018:

- Broadens the definition of “comparable work” to include work that is “substantially similar” in content and requiring substantially similar skill, effort and responsibility, and is performed under similar working conditions.

- Prohibits pay differentials unless they are based on:
  - Seniority (however, seniority may not reduce by time spent on leave related to pregnancy or FMLA);
• A bona fide merit system;
• A bona fide system which measures earnings by quantity or quality of production or sales;
• Geographic location; or
• Education, training, or experience to the extent such factors are reasonably related to the particular job in question and consistent with business necessity.

- Bans “pay secrecy” policies or practices that discourage employees from “inquiring about, discussing or disclosing information about either the employee’s own wages or about any other employee’s wages,” however, employers are not obligated to disclose an employee’s wages to another employee or a third party; and
- Prohibits retaliating against an employee who has inquired about another employee’s compensation or otherwise “opposed any act or practice made unlawful” under the Act.

Importantly, under the new law, employers who complete a good faith self-evaluation of their pay practices within three years of a claim, and can demonstrate that "reasonable progress has been made towards eliminating compensation differentials based on gender," have an affirmative defense to liability for an equal pay violation. The self-evaluation may be of the employer's own design, so long as it is reasonable in scope or detail in light of the size of the employer. Importantly, the self-evaluation or remedial steps taken by the employer cannot be used against an employer in court.

Conclusion Regardless of which party controls Congress and the White House come January 20, 2017, the gender pay equity issue is likely to remain front and center for the foreseeable future, and advocacy groups will continue to press for stronger state laws as long as the Paycheck Fairness Act remains stalled in Congress. If Secretary Clinton is the next president, she will vigorously press for enactment of the Paycheck Fairness Act. If Donald Trump is the next president, it is possible that congressional Republicans could come to together around some Republican alternative.