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# BOLI Releases Oregon Equal Pay Act Rules. Does Your Business Have an Effective Pay Equity Strategy?

Labor, Employment & Benefits Legal Update

On November 19, 2018, the Oregon Bureau of Labor and Industries (BOLI) issued its much anticipated [final administrative Rules](#) for the Oregon Equal Pay Act. With the key provisions of the Act becoming effective on January 1, 2019, these Rules provide employers doing business in Oregon with important guidance on how to comply with Oregon's new law.

Oregon's Equal Pay Act requires employers to equally compensate employees who perform work of comparable character, unless a difference in compensation can be justified by one or more specifically enumerated bona fide factors. Oregon's pay equity law differs from other federal and state pay equity laws because it requires equitable pay across *all protected characteristics*, not just gender; it contains a robust salary history ban (as discussed [here](#)); and it provides a qualified safe harbor to employers who conduct pay equity audits, allowing them to reduce potential exposure to compensatory and punitive damages in litigation. The Act also promotes pay transparency by protecting employee discussions regarding compensation.

The final Rules provide further detail on how to comply with the Act in some key areas. Here are five quick takeaways from the Rules, including how they should impact your pay equity strategy.

- 1. The Rules describe extensively the factors that can be considered when determining what is “work of a comparable character” and define in greater detail the eight bona fide factors that can justify pay disparities.** Employers should rely on these definitions when preparing job descriptions, defining job groupings (such as classifications), making pay decisions, conducting pay equity audits, and responding to pay equity complaints. The Rules do not provide a method to determine when work is comparable. Importantly, they do confirm that an employer need only compare *Oregon* employees when evaluating work of comparable character.
- 2. The Rules provide clarity regarding how benefits will be considered when evaluating pay equity.** The Rules clarify that employers should evaluate the benefits *offered*, rather than benefits actually *received*. In other words, benefits will be considered equitable if the same benefit options are offered to all employees performing work of a comparable character.
- 3. The Rules permit freezing or “red circling” wages to address pay disparity.** Employers cannot reduce any employee’s compensation to achieve equitable pay across a group of employees. Employers, however, can freeze or “red circle” employees’ pay, while increasing the pay of others.
- 4. The Rules provide no guidance on how to actually conduct a pay equity analysis.** The Rules define an “equal-pay analysis” as “an evaluation process to assess and correct wage disparities among employees who perform work of a comparable character.” However, the Rules do not provide any direction on how to conduct an equal pay audit or what steps will likely satisfy the safe harbor requirements. In particular, the Rules do not define when an audit will be considered sufficiently “reasonable in detail and scope.” Nor do the Rules describe what constitutes “reasonable and substantial progress toward eliminating wage differentials,” a prerequisite to relying on the safe harbor provision. Until case law is developed in Oregon, employers and their counsel must develop their own best pay equity practices based on industry standards and guidance from other jurisdictions.
- 5. The Rules require BOLI to prepare a template notice for Oregon employers to post, and the poster is available [here](#).** Oregon employers are generally required to display a pay equity poster in every establishment where employees work.

## What should employers be doing now?

On January 1, 2019, employees can start filing individual and class action pay discrimination lawsuits under the Act. To avoid such claims, Oregon employers should develop and implement a pay equity compliance strategy that includes the following:

- Update employee handbooks and other policies, job applications, and interview forms to comply with pay equity, salary history, and pay transparency requirements;
- Review and update written descriptions for jobs and classifications to incorporate factors related to work of a comparable character and bona fide factors for pay disparities;
- Train recruiters, hiring managers and others involved in the hiring process on limitations and risks related to salary history;
- Establish a pay transparency communication plan and train HR and managers on how to implement it;
- Review compensation programs, pay decision-making practices and related internal policies to ensure they promote and support pay equity;
- Assess and refine your performance evaluation or merit system to ensure it has an established rating scale and evaluates job related factors;
- Conduct pay equity audit of all or part of your workforce and establish a plan for remedying pay inequities; and
- Monitor legislative developments. It is expected that legislation will be introduced in the 2019 legislative session to clarify and modify some aspects of the Act.

Lane Powell's employment lawyers are available to work with you to prepare a tailored pay equity strategy based on the needs of your business.