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CLIENT ALERT: Rhode Island Pay Equity Law Update

On July 6, 2021, Rhode Island Governor Daniel McKee signed into law a sweeping reform of the state's Wage Discrimination Based on Sex Act, often referred to as the Equal Pay Law or Pay Equity Law. This new law provides protection from pay inequities based on protected characteristics (such as race, gender, age, and sexual orientation) for employees performing "comparable work."

Who is Protected?

The current version of the law, General Laws § 28-6 *et seq.*, applies only to wage discrimination based on gender. The amended pay equity law, which takes effect January 1, 2023, takes broader aim at wage discrimination in a similar manner to the Massachusetts Pay Equity Law that took effect July 1, 2018. Rhode Island's amended pay equity law will also prohibit wage differentials for comparable work except under rare circumstances, and the statute will allow employers to avoid or limit liability through a self-evaluation of pay practices. The major distinction between the two, however, is that while Massachusetts' Pay Equity Law was limited to gender, Rhode Island's amended pay equity law will cover race or color, religion, sex, sexual orientation, gender identity or expression, disability, age, or country of ancestral origin.

The Rhode Island legislature has defined "comparable work" as meaning "work that requires substantially similar skill, effort, and responsibility, and is performed under similar working conditions." The statute makes it clear that showing the existence of only minor differences will not prevent two jobs from being considered comparable for the purposes of this analysis, such that the pay would need to be the same absent extenuating circumstances.

Exceptions to the Rule

Given the existence of the current Wage Discrimination Based on Sex Act, Rhode Island employers are already aware of the exceptions to the rule where wage differentials are allowed for comparable work. The amended statute expands on that list of exceptions, however, in that differentials will be permitted where they are based on:

- A seniority system that does not deduct for pregnancy, parental, family, or medical leave;
- A merit system;
- A system measuring earnings by quantity or quality of production;
- Geographic location where the locations correspond with different costs of living, though no location within Rhode Island will be considered to have a sufficiently different cost of living;
- Reasonable shift differential;
- Education, training, or experience to the extent those factors are job-related and consistent with business necessity; or
- Another bona fide factor that is job-related and consistent with business necessity.

The final, open-ended exception to the rule is far more akin to the federal Equal Pay Act of 1963,

which allows for wage differentials "based on any other factor other than sex." Although it is currently limited to just protecting gender, the Massachusetts statute has broader potential application because it removed other bona fide factors related to business necessity as a reason to justify a pay gap. As noted, Rhode Island has decided to retain this catch-all exception, while broadening the protections beyond gender.

Wage History

Rhode Island's amended pay equity law will also bring change to how an individual's wage history is discussed and used in the calculation of that individual's salary. Specifically, employers will be prohibited from using wage history to justify an otherwise unlawful wage differential. In other words, just because a new employee was underpaid at a previous job, the new employer cannot start the employee at that low rate of pay if employees performing comparable work receive a higher rate of pay.

The amended law will also bolster wage transparency among employees, as employers will not be permitted to prohibit employees from inquiring about, discussing, or disclosing their wages or the wages of another employee. Although this prohibition on wage discussions has always been prohibited for non-supervisory employees under the National Labor Relations Act, the new Rhode Island act has this rule apply to all employees. The law also protects those employees who may not be so willing to discuss pay so openly, as it makes clear that employers may not require their employees to disclose their wages.

Employers will largely not be able to inquire into or use wage history during the pre-offer hiring phase. The amended law will prohibit employers from:

- Relying on the wage history of an applicant when deciding whether to consider them for employment;
- Requiring that an applicant's wage history satisfies minimum or maximum criteria as a condition of being considered for a position;
- Relying on an applicant's wage history in determining the wages an applicant is to be paid upon hire; or
- Seeking the wage history of an applicant.

Once an offer of employment is made with an offer of compensation, the rules become more flexible, as an employer who receives wage history information given voluntarily by the prospective employee may:

- Rely on the prospective employee's wage history to support a wage higher than the wage originally offered by the employer;
- Seek to confirm the wage history of the prospective employee to support a wage higher than the wage originally offered by the employer; and
- Rely on wage history in ensuring that a higher wage does not create an unlawful pay differential.

Anti-Retaliation Provision

Employers must not only be careful to ensure employees are being paid evenly for substantially similar work. Employers must also take caution when addressing internal and external complaints regarding wage differentials and, especially, in dealing with employees who have already complained. Just as with the state's anti-discrimination laws, the amended equal pay law will provide anti-retaliation protection for those employees who submit internal or external wage differential complaints or otherwise participate in a corresponding investigation.

Penalties

Employer liability for violating the amended pay equity law may include damages paid to the aggrieved employee in the form of compensatory damages, special damages not to exceed $10,000, equitable relief, and reasonable attorneys' fees and costs. Significantly, employers may also be liable in fines to the Department of Labor and Training. A first violation incurs a fine of up to $1,000, while a second violation within the five (5) years prior to the complaint or action being filed incurs a fine of up to $2,500. If an employer has had two (2) or more violations within a seven (7) year period prior to the complaint or action being filed, the employer may incur a fine of up to $5,000.

Self-Evaluation and the Safe Harbor Provision

Similar to the protections offered in Massachusetts, the amended Rhode Island law will offer a safe harbor provision and total affirmative defense against wage differential liability for employers doing due diligence on their pay equity practices. In order to qualify for the affirmative defense, an employer must have conducted a good faith self-evaluation within the two (2) years prior to the commencement of an action against it. The employer will also have to demonstrate that any unlawful wage differentials revealed by the self-evaluation were eliminated in the wake of the audit. Employers will be allowed to use their own self-evaluation blueprint or one issued by the Department of Labor and Training at some point in the future.

Employers can expect that self-evaluations will be closely scrutinized by the Department of Labor and Training, and employers should be sure to retain all related records showing their work. Those who do not retain records run the risk of the Department of Labor and Training or a court inferring that due diligence was not exercised in the self-evaluation, which may preclude application of the affirmative defense.

Beyond simply performing the self-evaluation, the affirmative defense will only be available to employers who eliminate unlawful wage differentials revealed by the evaluation. Employers learning of illegal wage differentials for comparable work must be sure to adjust wage rates within ninety (90) days of the self-evaluation.

The affirmative defense contemplated by the amended statute remains available for employers from January 1, 2023 through June 30, 2026. After June 30, 2026, employers who have complied with the affirmative defense requirements will not be liable for liquidated damages, compensatory damages, or other civil penalties, but they may still be liable for unpaid wages.

Even though the amended law does not take effect until January 1, 2023, employers are advised to take steps to be prepared for compliance, including training recruitment and hiring personnel on inquiring into wage history, updating relevant applications and forms, educating managers that all employees will be allowed to discuss wages freely, and, of course, examining positions that may run afoul of equal pay for comparable work requirements.

Employers with questions about the hiring process, pay equity, and self-evaluations should consult with their MBJ attorney. In the interim, MBJ will continue to monitor any related guidelines or regulations implemented by the Department of Labor and Training.

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