

## Pay Equity : What it Means Today

### Foundation of the Law

TCS monitors current trends and issues in compensation and benefits areas for its clients and survey participants. This year, we note a high level of interest in Pay Equity. The concept of Pay Equity is not new. It is founded in the 1938 Fair Labor Standards Act and supported by the 1963 Equal Pay Act. However, what's new in today's marketplace is that individual states are now mandating compliance with the Federal law by passing and enforcing their own state laws. As of July 2019, most states and some major cities have followed examples set by California, New York, Massachusetts, and Maryland by becoming active in the enforcement of long-standing laws designed to protect American workers.

Pay Equity laws were originally designed to protect workers who suffer wage discrimination based on sex, gender, race or ethnicity, religion, and national origin. They have grown also to protect workers based on sexual orientation and gender identity. However, Pay Equity laws are being interpreted to include all the protected classes listed above as well as to correct long-standing fundamental bias. Under the name of *Equal Pay for Equal Work*, employers are being required to redefine how they set pay for their workforce.

Specifically, workers can no longer be solely compared to either female or male dominant roles. They must be compared based on comparability of knowledge, skills and experience to do their respective jobs. For example, where Secretaries were previously compared to Administrative positions, they must now be compared to all comparable positions (including male dominated positions) to neutralize the inherent gender bias in the previous comparison.

As mentioned above, most states have addressed this issue head-on by passing Equal Pay/Pay Equity Acts. California passed its law in 2016, and this has become a prototype for other states. While the New York, Maryland and Massachusetts laws are not exact replicas of the California law, they address sex and gender equity discrimination in ground-breaking terms.

### The State Laws

Most of the 50 states now have laws to protect American workers from wage discrimination based on sex, gender or gender identity, race or ethnicity, religion, national origin, or physical disability. In addition, employers are being restricted from asking about an employee's salary history when they are recruiting new employees. This offshoot of the Pay Equity law is designed to help stop the compounding of inherent bias. Employers are even being held accountable for violations that they may not even intend to commit. Some noteworthy states are highlighted below.

## California

California was one of the first to mandate Equal Pay under the California Fair Pay Act. The act was specifically designed to address sex discrimination in wages at a specific location and covers substantially equivalent jobs. Under the California law, pay differentials are only allowed for the following reasons: tenure or seniority; individual merit; individual productivity; or bona fide occupational qualifications such as: skills acquired, educational level, specific training, or geographic location among other reasons. These are the main requirements of the law which also incorporates stringent enforcement guidelines for California employers.

## New York

The New York law provides a narrower focus on geographic differentials than the California law. New York requires employers to compare positions/roles to other employers within their respective counties in contrast to the California law which allows comparison across the entire state. Most of the other restrictions, including the burden of proof resting with the employer, are included in the New York law.

## Massachusetts

The approach in Massachusetts puts more restrictions on employers than most of the other states. In particular, Massachusetts employers are not allowed to make pay determinations based upon a potential employees' salary history. This restriction may inhibit some employers from offering positions without extensive background checks and research on applicant performance. Massachusetts allows employers to preemptively defend their compensation practices by completing a self-evaluation within three years of any complaint. This is a form of relief that employers will certainly use to mitigate any nuisance complaints. While most of its elements are similar to the California law, Massachusetts does not allow qualifications, educational level, or experience to be used as a justification for salary differentials.

## Maryland

The Maryland law seems to take the definitions provided by early adopting states and codifies them into a concise set of requirements for employers to follow. However, Maryland adds gender identity to the protected class making it illegal to discriminate based on that factor. In addition, the Maryland law makes it illegal to provide less favorable opportunity to the protected classes. In other words, all employees must be given opportunities to advance their career within the company without discrimination based on sex or gender identity. While the burden of proof rests with the employer, this last element of the Maryland law may be difficult for employers to defend.

## New Jersey

One of the most recent Equal Pay laws was adopted by New Jersey. Of interest in the New Jersey legislation is the comprehensive list of protected groups including *atypical hereditary cellular or blood type* as a protected class. In addition to the comprehensive list of protected classes, the New Jersey law specifies a longer statute of limitation (6 years) than most other states. Other elements of the New Jersey law are similar to the other states.

## Municipalities/Cities

Employers in several major cities should also be aware of some of the lesser known elements of the law. In particular, San Francisco and Philadelphia expressly prohibit retaliation by an employer if a recruit does not voluntarily offer their salary history. In other words, they cannot request salary history or cajole salary history from a recruit, and they cannot retaliate if the candidate does not supply salary history. This may open an entirely new litigation category for the courts in these respective cities. Meanwhile, the New York City law even prohibits researching an individual's salary history via public documents.

## Other Elements of the Law

'No Intent Required' – each of the state laws do not require *intent to discriminate* as a measure of actually discriminating against a protected class. In other words, the mere existence of a pay differential based on sex or gender identity could be considered an offense.

Specific Location – while some of the state laws are more or less restrictive, it would seem that geographic location within a specific county or city would be the most appropriate comparison to make. States that do not have a narrowly defined geographic comparison area might be subject to a comparison of high cost-of-labor and low cost-of-labor areas.

Pay Information Exchange – under state laws, employers are no longer able to restrict sharing of compensation levels and amounts between employees. In fact, employees who share their pay information with others are now protected under these state laws.

Non-retaliation – In addition to the prohibition of requests for salary history, employers may not retaliate against candidates who do not voluntarily offer their salary history. In other words, a negative hiring decision may be interpreted by the candidate as retaliation.

Maintenance of records – employers have always been required to maintain records of various human resources transactions (hiring rates, promotion rates, salary adjustments, etc.). The new laws require a longer holding period for these records presumably to support claims against the employer should litigation be required

Employee Complaints – the only requirement to initiate an investigation under these new laws is an employee complaint. Each state will unilaterally start to investigate an employer's compensation practices if they receive a single complaint. A form of relief is available in the 'self-evaluation' element of the law found in the Massachusetts act.

## TCS Recommendations

Develop a formal Compensation Philosophy that declares the policies to be followed by all employees of the company and the compensation practices to be used. This is a presumptive statement or declaration of all of the practices which the employer endorses. And, it allows management to effectively recruit, hire, and reward employees within the requirements of the various states' pay equity laws.

Document pay decisions and keep records of how pay was determined. Consider using grids that stipulate pay increases/levels based on *bonafide* reasons for pay decisions (performance, seniority, experience, specialized skills, hazardous working conditions, etc.). Wherever possible, eliminate discretion in determining pay.

Document each job with a job description that outlines the duties and responsibilities of the position/role. It is advisable for each job description to include bona fide occupational qualifications for the job (e.g., skills required, educational level required, training required, etc.).

Adopt a formal job evaluation system that incorporates a systematic means of evaluating the scope of each position/role. Whether it's a factor-based system or a whole-job based system, the existence of a methodical approach to determining the compensation level for each position is a mitigating factor in any potential complaint against an employer.

Analyze compensation data and make appropriate matches using compensation surveys that are industry specific, cover the geographic territory where the employer is located, and reference the size and scope of the work required (either in terms of corporate revenue, operating budget or some other measure of the financial size of the entity). As part of this step, employers may want to develop a position matrix that illustrates the pay levels which may be achieved with additional training, years of service, or performance.

## TCS' Role in Pay Equity

TCS continues to monitor and report on compensation issues for our clients and survey subscribers. Using our survey processing system, we can assist companies in identifying, in general, areas where sex and/or gender bias may appear. With more detailed analysis and subsequent collection of employee data, we can assist in helping to mitigate potential complaints against employers in your state, industry, or geographic location.

## Resources:

[www.pay-equity.org](http://www.pay-equity.org)

[www.payequity.gov](http://www.payequity.gov)