



*Eye On Washington*

# Legislative Update



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## Legislative Trends: Pay Equity Policies Require Careful Employer Review

*The Eye on Washington series focuses on the latest HR regulatory trends taking place at the federal, state, and local level. Topics include tax and HR compliance, Health Care Reform, payroll, benefits, leaves, reporting obligations and more.*

### Background

The concept of equal pay has been around for decades. Since 1963, the Federal Equal Pay Act has required that men and women in the same workplace be given equal pay for equal work. And pay means much more than base salary or rate of pay. All forms of compensation are covered – including items such as overtime pay, bonuses, stock options, profit sharing, and life insurance. To advance pay equity efforts, in September 2016 the [Equal Employment Opportunity Commission \(EEOC\) issued a revised form to modify](#) the annual EEO-1 report to include W-2 earnings and hours worked, by race, ethnicity, and gender. These new categories increased the number of entries significantly, from 140 potential data elements to 3,360. Employers with 100 or more employees will be required to file the new EEO-1 report in March 2018 for the 2017 calendar year.

For many employers, pay equity is not only at the heart of these new compliance rules, but also is emerging as a social responsibility issue that can define an organization's commitment to equal pay for equal work. As businesses focus on acquiring

talent, there are growing expectations for greater transparency regarding equal pay for equal work.

In addition to federal requirements, [most states](#) have pay equity laws or pay equity language as part of their general antidiscrimination laws. Even at the local level, cities such as Philadelphia are enacting pay equity laws.

### Impact to Employers

To meet federal requirements, the time for employers to start preparing their new EEO-1 filing for 2017 (due in March 2018) begins now. In order to collect the additional data required for the updated EEO-1 report, it may be necessary to coordinate between Human Resources and Payroll functions. The EEO-1 report has often been administered by Human Resources within large employer organizations, but with the addition of annual W-2 earnings and hours worked, it will be necessary to include data from Payroll, as well as timekeeping and other systems, to prepare the report.

Notwithstanding its intended purpose, the new EEO-1 report may not directly identify inappropriate pay disparities because, among other things, it does



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not take into consideration years of experience, education and vocational background, or other factors that may account for pay differences as defined by applicable federal and state laws. While employers will only report the required information, many are expected proactively to conduct more thorough pay equity analyses; for example, analyzing comparable job families and taking into consideration other relevant background factors and qualifications. Since a more detailed analysis may be necessary in the event that an EEOC pay equity inquiry is ever received, employers should consider whether to conduct a proactive analysis before the updated EEO-1 report is due.

At the state level, there are some common requirements employers need to keep in mind:

- There is a general prohibition against pay differentials based solely on gender. However, even this is not the same in all states. For example, the Maryland Equal Pay for Equal Work Act extends the protection against wage discrimination further than on the basis of gender to wage discrimination based on gender identity.
- Under most state laws, pay equality goes beyond base compensation similar to the Federal Equal Pay Act (i.e., includes bonus, commissions, etc.).
- Many states also include anti-pay secrecy requirements. In some states, employers can't prohibit employees from talking about their

pay, and some states (e.g., Massachusetts) prohibit asking applicants for their pay history. Maryland's revised equal pay law prohibits any employer from barring employee discussions about salary. California enacted a similar law against wage secrecy.

Employers should also make certain that, when they are looking at state laws, they remember that these laws can take many forms and may require specific posting, disclosure, and periodic reporting requirements. For example, California has extended the number of years that employers must maintain wage and other employment-related records from two to three years. Employers should also carefully track and manage effective dates and deadlines.

## How Can Employers Protect Themselves?

Even the most diligent employer may have an unanticipated compliance risk associated with pay equity. There are, however, some actions employers can take now:

- Evaluate and document bona fide factors to justify differences (check relevant law) using factors such as skill, effort, and responsibility.
- Examine compensation policies and documents, review employment applications and job descriptions, train HR managers, and document differences in pay.



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- Develop a policy for setting starting salary (pay grades, midpoints) by updating policies and documenting the process in an employee handbook.
- Consult with your internal or outside counsel about the best way to structure a pay equity analysis that is protected by attorney-client privilege.

Complying with the numerous pay equity laws will have its challenges, particularly for employers that operate in multiple states, where separate

pay equity laws contain varying provisions. As an employer, you will need to review the differences of each law that is applicable to your workforce and ensure you are complying with the requirements called for under the stricter law. Employers may wish to evaluate the recently enacted laws noting any questions; review current company policies; and consult with legal counsel to develop a plan to help ensure other legal and compliance requirements are being met.

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