

## Maryland Enacts Pay Equity Legislation – Joining Growing List of States Enacting Pay Fairness Laws

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Maryland Governor Larry Hogan (R) recently signed into law a significant expansion of the Maryland Equal Pay law. The new provisions, which go into effect on October 1, 2016, prohibit pay discrimination on the basis of gender identity and ensure employees the ability to discover and discuss disparities in pay. The Maryland legislation, Equal Pay for Equal Work Act (Act), follows the recent trend of states enacting more robust pay transparency and pay equity laws. This briefing provides an overview of the Maryland legislation and summarizes the trends and outlook for other state pay fairness laws.

### Maryland's Equal Pay for Equal Work Act: Senate Bill 481 and House Bill 1003

#### **Expanding Prohibitions on Disparate Pay and Employment Opportunities Based on Sex and Gender Identity**

In passing the equal pay legislation, Maryland joins the national conversation concerning employment protections based on gender identity. Now, in addition to prohibiting employers from paying different wages based on a person's sex, Maryland's Equal Pay for Equal Work law prohibits compensation discrimination based upon a person's gender identity.

As expanded, the law generally prohibits employers from paying a wage to employees of one sex or gender identity at a rate less than employees of another sex or gender identity "if both employees work in the same establishment and perform work of comparable character or work on the same operation, in the same business or of the same type." Employees are now deemed to work "in the same establishment," and thus subject to comparison, if they work in the same county, even if they work in different offices or locations. In addition, in response to activists seeking employment protections beyond just wages, the Act prohibits employers from "providing less favorable employment opportunities" on the basis of sex or gender identity. Examples of "less favorable employment opportunities" include: (1) placing employees into "less favorable career tracks" or positions; (2) failing to provide all employees with information regarding promotions or advancement; and (3) limiting employment opportunities that would otherwise be available to the employee but for the employee's sex or gender identity.

The law, however, provides for certain defenses that may justify a pay differential. Examples of permissible justifications for pay disparities include: (1) a seniority or merit increase system; (2) job requirements calling for different skills, abilities, duties, or shifts; or (3) systems that measures performance based on a quality or quantity of production. Finally, the Act allows for a pay differential if based on “a bona fide factor other than sex or gender identity, including education, training, or experience” but only if that factor “is not based on or derived from a gender-based differential in compensation; is job-related with respect to the position and consistent with a business necessity; and accounts for the entire pay differential.”

### **Protecting Employee Pay Discussions and Pay Transparency**

Maryland also joins the growing list of states to enact legislation giving workers the right to inquire about and discuss wages. Advocates for pay transparency laws argue that a lack of information about pay contributes to the wage gap between genders. To address this concern, the Maryland law provides that employers may not: (1) prohibit an employee from inquiring about, discussing, or disclosing the wages; (2) prohibit an employee from requesting “that the employer provide a reason for why the employee’s wages are a condition of employment;” or, (3) require an employee to sign a waiver that would deny the employee the right to disclose or discuss wages.

In addition, the law prohibits employers from retaliating against an employee for:

- inquiring about another employee’s wages;
- disclosing the employee’s own wages;
- discussing another employee’s wages if those wages were disclosed voluntarily;
- asking the employer to provide a reason for the employee’s wages; or
- aiding or encouraging another employee’s exercise of his or her right to discuss or disclose wage information.

The law does, however, allow employers to implement written policies establishing reasonable workday limitations on the time, place, and manner for employee inquiries and discussion of wages. While employers may prohibit employees from disclosing the wages of others without prior permission, employees are able to disclose such information if it is in response to an investigation or complaint, and if the employee has access to wage information as part of their essential job function.

Additionally, the Act explicitly provides that, among other things, it does not: (1) require an employee to disclose wages; (2) limit the rights of an employee under any other law or collective bargaining agreement; (3) permit an employee, without written consent of an employer, to disclose proprietary information, trade secret information, or privileged or legally protected information; or (4) permit an employee to disclose wage information to an employer’s competitor.

Finally, the Act requires the Commissioner of Labor and Industry, in consultation with the Maryland Commission on Civil Rights, to develop educational materials and make training available to assist employers in creating training, policies, and procedures that comply with these requirements.

## **Other States Addressing Pay Equity**

Although the majority are narrowly tailored, 17 states have taken additional measures addressing pay fairness, which surpass the requirements of the Lilly Ledbetter Fair Pay Act of 2009. While the majority of these states have enacted legislation addressing only pay transparency, some states— including California, Maryland, Minnesota, and New York – have adopted more sweeping legislation. (See our recent client briefings regarding pay equity legislation in [California](#), [Minnesota](#), and [New York](#)).

So far this year, Nebraska and Rhode Island have joined Maryland in passing some form of pay equity legislation.

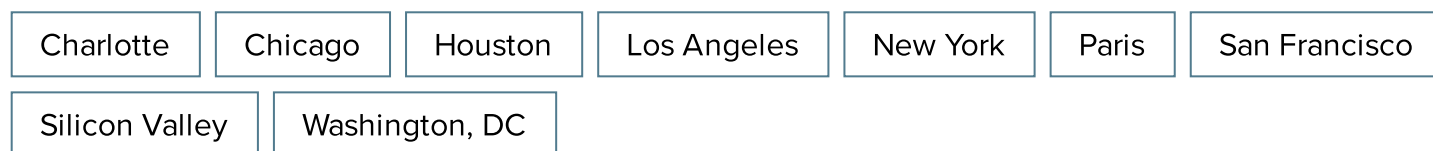
- Nebraska: In March 2016, Nebraska expanded the number of entities subject to the state’s pay equity laws by reducing the threshold number of employees from fifteen to two.
- Rhode Island: In February 2016, Rhode Island implemented a “tip line” for employees to anonymously report employers suspected of violating pay equity laws.

As the stalemate over pay equity continues within the U.S. Congress, the number of states addressing pay equity is likely to grow. And if proposed legislation in Hawaii, Massachusetts, and Washington – those states whose pay equity legislation commentators believe are most likely to be enacted this term – is any indication, employers should expect states to adopt more expansive legislation as part of this trend.

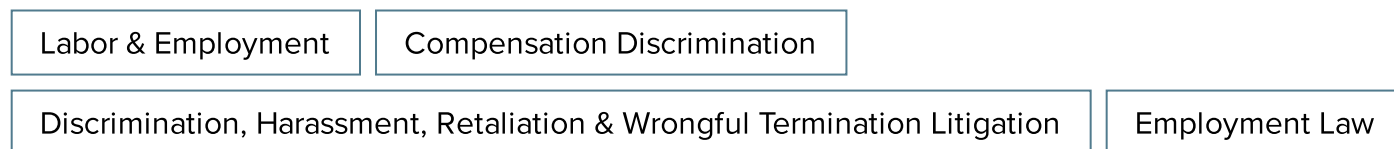
Employers should consult with counsel to consider whether to conduct a pay equity review or audit, either internally or with external guidance. Employers should also review all applicable policies and procedures to ensure compliance with applicable pay equity and transparency laws.

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