

THE EQUAL PAY ACT & THE ILLINOIS' EQUAL PAY ACT 2019 AMENDMENTS

In the era of #MeToo and #TimesUp, the focus is back on equal pay.

History

- Kennedy signs the Equal Pay Act in 1963, remarking that it “prohibits arbitrary discrimination against women in the payment of wages.”
- In 1963, there are ~25M women in the workforce, and the average woman earned 60% of what a man earned
- By 1980, the gap closed by merely 4%, with the average woman earning \$.64 for every \$1.00 a man earned
- Today, there are ~75M women in the workforce, and the average woman earns 80% of what a man earns
- In 2014, the average African-American woman earned \$.64/\$1.00 and the average Latina earned \$.55/\$1.00 compared to white men
- If equal pay were instituted today, across the board, there would be a \$447.6 billion annual gain nationally for women
- Over 15 years, the average woman loses \$499,101 due to pay inequality

Federal Law

- Equal Pay Act of 1963
 - Prohibits sex-based discrimination in the same establishment between men and women who perform jobs that require “equal skill, effort and responsibility, and which are performed under similar working conditions.” 29 U.S.C. §206(d).
 - Employee must show the work was equal and a pay disparity exists
 - No proof of discriminatory intent needed: irrelevant if pay disparity is intentional or unintentional
 - What justifies a pay disparity? Seniority and merit systems, a system that measures earning by quantity or quality of production, and *any other factor other than sex* are acceptable explanations
 - These are affirmative defenses
 - Employer has burden of proof
- Pay discrimination need not be raised only under the EPA: Title VII, the ADEA and other statutes create independent causes of action

State Laws

- ~45 States have some form of equal pay law with more on the horizon
- At least eight states have passed or amended equal pay laws in the past two years
- In general, state laws expand coverage beyond equal work to “substantially similar work” when considering skill, effort, responsibility and performance under similar working conditions
- Employees at different locations in the state are compared
- Salary history cannot be sole justification for discrepancy
- Safe harbor and affirmative defenses for self-evaluation

Illinois

The Illinois Equal Pay Act (“IEPA”) was amended on July 31, 2019 with changes effective September 29, 2019. The IEPA prohibits pay disparity between employees of the “opposite sex” and as to African-American employees. Three key amendments:

1. Wage and Salary History Inquiries Prohibited:
 - Employers cannot screen applicants based on compensation history (includes wages, salary history, benefits and other compensation)
 - Employers cannot request or require an applicant to disclose compensation history as a condition of being considered for a job, being interviewed, receiving a job offer or employment
 - An employer can articulate its pay range for a position
 - An employer can ask a candidate’s expectations for compensation
 - Beware if a candidate *voluntarily* discloses past compensation because it cannot be considered in making a hiring decision or setting future compensation
 - Civil cause of action for actual damages, attorneys’ fees, and special damages up to \$10,000
2. Pay Transparency: Employers cannot require employees to sign a contract or waiver prohibiting them from disclosing or discussing information about their compensation or benefits.
 - Exception for Human Resources, supervisors and others who learn such information about others during the scope of their employment
3. Comparators Expanded: Previously pay was compared based on “*equal*” skill, effort and responsibility. NOW, pay is compared for “*substantially similar*” skill, effort and responsibility. Compensatory and punitive damages are now available for equal pay violations.

Best Practices

1. Regularly audit pay practices
 - a. Conduct a compensation analysis. Note that the “soft” benefits are often missed: vacations, company cars, phones, equipment/technology, relocation and travel, etc.
 - b. Attorney/client privilege issues – lay foundation for audit
3. Regularly review and update policies and create new templates
4. Train Human Resources (“HR”) and Talent Acquisition (“TA”) to spot pay issues
5. Develop an internal complaint procedure to address pay equity complaints
 - Compliance Officer or function focused on equal pay?
6. In Illinois, remove all wage and salary history inquiries from job postings and applications; ensure HR and TA are trained in the IEPA and its prohibitions; revise policies and agreements that limit an employee’s ability to discuss compensation.



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