



The New U.S. Pay Equity Laws: Answering the Biggest Questions

Created by Seyfarth's Pay Equity Group



How will you remember 2016? As the year of a new president? The year of the Rio Olympics? Perhaps.

But for employers, 2016 will have a different legacy: the year of groundbreaking change to equal pay laws, as administrative agencies and states aggressively move forward to improve pay equity and enforce equal pay laws.

In January, new laws in California and New York fundamentally altered how equal pay claims are analyzed in those states, lowering the bar for an equal pay lawsuit.

In March, Nebraska's governor approved an amendment to the state's equal pay act, while a similar bill landed on the governor's desk in New Jersey but was conditionally vetoed in May.

Also in May, Maryland's Governor Hogan signed Senate Bill [481](#) (cross-filed with House Bill 1003), another state specific pay equity law. The law will go into effect in October.

In August, Massachusetts' Governor Baker signed amendments to the Massachusetts Equal Pay Act that will go into effect in July 2018.

And as the equal pay trend sweeps the U.S., more pay data may soon be required from employers due to the EEOC's pending proposal to expand annual EEO-1 reports, which the EEOC claims would "assist the agency in identifying possible pay discrimination and assist employers in promoting equal pay in their workplaces."

Given the significant emphasis on pay equity issues from multiple sources, employers are well advised to take a close look at their compensation policies and practices. Conducting a compensation analysis and determining any necessary remediation is not for the inexperienced. When you sit down with your legal counsel and review these new and pending laws, here's what you'll find.

A Competition to Pass the Nation's "Most Aggressive" Pay Equity Bill

Even before the California Fair Pay Act was signed into law in October, *The Los Angeles Times* wrote that it "may be the nation's most aggressive attempt yet to close the salary gap between men and women."

Three weeks after that law took effect, one bill in New York's eight-bill package known as the "Women's Equality Agenda" expanded protections for women in the workplace.

These new laws focus squarely on pay inequality between the sexes. Yet both federal and state laws already prohibit gender-based pay discrimination. On a federal level, the Equal Pay Act and Title VII of the Civil Rights Act of 1964 forbid employers from discriminating in pay and benefits based on sex. And like most states, both California and New York already have statutes addressing pay discrimination by gender.

What's new about these laws is the reach.



The 4 Major Changes of the California Fair Pay Act

The new California law—which amends [Section 1197.5 of the California Labor Code](#)—changes pay claims in the Golden State in 4 major areas: pay equity, pay transparency, record retention, and enforcement.

1. Pay equity

The California Fair Pay Act expands existing laws pertinent to pay equity in three significant ways:

- **Employee comparison based on location.** Employees can be compared even if they do not work at the same establishment. This means that the pay of an employee may be compared to the pay of other employees who work hundreds of miles apart.
- **Employee comparison based on responsibility.** Employees can be compared even if they do not hold the “same” or “substantially equal” jobs. The new law would require only a showing that the employees are engaged in “substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions.”
- **New rules for justifying pay.** Employers will be required to justify pay differentials and the law limits the factors that employers can use in its defense. The factors must be applied reasonably and, when viewed together, must explain the entire amount of the pay differential.

The permitted reasons for pay differences are:

- A seniority system
- A merit system
- A system that measures earnings by quantity or quality of production
- A bona fide factor other than sex, including skills, education, training, experience, shift, or geography.

2. Pay transparency

Under the Act, employers may not prohibit employees from disclosing or discussing their own wages or the wages of others, or from aiding or encouraging other employees to exercise their rights under the law. These anti-pay secrecy requirements echo

similar prohibitions under the National Labor Relations Act, under existing California law, and under an Executive Order that applies to federal contractors.

(For more information from Seyfarth about the final regulations for federal contractors implementing that Executive Order, read [“OFCCP Announces Final Rule to Promote Pay Transparency.”](#))

3. Records retention

The Act extends—from two years to three—an employer’s obligation to maintain records of wages and pay rates, job classifications, and other terms of employment.

4. Enforcement

Lastly, the Act creates an additional private right of action—this one with a one-year statute of limitations—for employees who allege they have been discharged, discriminated, or retaliated against for engaging in any conduct protected by the statute. These employees may seek reinstatement and reimbursement for lost wages and benefits, interest, and “appropriate equitable relief.”

The California Fair Pay Act also provides these employees an alternative: they may file complaints with the California Division of Labor Standards Enforcement, alleging employer violations of the new prohibitions on discrimination, retaliation, and restricting employee wage-information discussions.

(For more information from Seyfarth about the California Fair Pay Act, read [“California Governor Signs Strictest Equal Pay Law in U.S.”](#))



New York's New Law Approaches Reach of California's

The New York law will not be quite as far reaching as the California Fair Pay Act, yet will nevertheless demand meaningful changes from employers with New York-based employees.

Like the California law, the New York law requires employers to justify pay differentials, limits the factors employers can use to explain differences in compensation, and places on employers the burden of proving the reasons for any pay differences.

New York's new statutory provisions include fair pay protections which will make it far easier for plaintiffs to pursue gender-based pay equity claims. Like the California bill, employees in New York can be compared even if they do not work at the same establishment. This measure is more restrictive in New York than

in California, where comparators can be hundreds of miles apart. The New York law requires that comparators must work in the same "geographic region," no larger than the same county.

Liquidated damages for willful violations of § 194 will be increased to 300% of wages due.

(For more information from Seyfarth on the New York laws, read "[Significant Changes to New York Laws On Pay Equity, Transgender Protection, and Wage Payments.](#)")



The Massachusetts Equal Pay Act

In some ways, the Massachusetts legislation goes farther than any prior pay equity legislation in the U.S.

Massachusetts is the first state to ban employers from seeking information about applicants' compensation history in the hiring process. When the amendments take effect, Massachusetts employers will be prohibited from seeking the compensation history of a prospective employee prior to making an offer, unless the prospective employee has "voluntarily" disclosed such information. This will require many employers to revise their employment applications and make significant changes to their recruitment and hiring processes. The new law will also make it unlawful for employers to prohibit employees from discussing or disclosing their own or other employees' wages.

In another first, the new Massachusetts law creates an affirmative defense to wage discrimination claims for an employer that has (1) completed a self-evaluation of its pay practices that is "reasonable in detail and scope in light of the size of the employer" within

the three years prior to commencement of the action; and (2) made "reasonable progress" toward eliminating pay differentials uncovered by the evaluation.

As in California, the Massachusetts law will prohibit differences in pay for "comparable work," which is defined as work that is "substantially similar in that it requires substantially similar skill, effort and responsibility and is performed under similar working conditions." The new law will limit the factors employers may use to explain differences in compensation. However, unlike in California, there is no "catch-all" provision that would allow an employer to point to any bona fide factor other than sex to justify a pay differential. The Massachusetts amendments will explicitly permit employers to rely on "geographic location" to justify wage differentials.



Maryland’s New Law Reaches Beyond Pay

Maryland’s pay equity law strengthens protection against pay discrimination in the workplace, and prohibits employers from providing less favorable employment opportunities because of sex or gender identity.

Maryland’s updated Equal Pay for Equal Work Act prohibits pay discrimination on the “basis of sex or gender identity,” and covers employees who work for the same employer at workplaces located in the same county of the state and who “perform work of comparable character or work in the same operation, in the same business, or of the same type.” Thus, the revised requirements significantly expand protections for Marylanders.

The law covers more than just pay disparities. It also prohibits employers from “providing less favorable employment opportunities,” which includes placing employees into “less favorable career tracks” or positions, “failing to provide information about promotions or advancement,” and “limiting or depriving” employees of employment opportunities because of sex or gender identity. Additionally, employers may not forbid employees from “inquiring about, discussing, or disclosing” their wages or the wages of other employees.

Pay Equity Laws—A Breakdown

Laws	Protected Classes	Comparison Group	Same Location	Proof	Remediation
CA Fair Pay Act	Sex Only	Substantially similar work and working conditions	No	No Intent Required	Must explain entire wage differential
NY Achieves Pay Equity	Sex Only	Equal work and similar working conditions	No (but same geographic region)	No Intent Required	Must explain entire wage differential
Maryland Equal Pay for Equal Work Act	Sex and Gender Identity	Employees who work for the same employer in the same county and who perform work of comparable character, or work in the same operation, in the same business, or of the same type.	No (but same county)	Not Stated	Not Stated
Massachusetts Equal Pay Act (effective July 1, 2018)	Gender	Substantially similar skill, effort, and responsibility and performed under similar working conditions	Yes (location may be used to explain differentials)	No Intent Required	Not Stated
Federal Equal Pay Act	Sex Only	Equal work and similar working conditions	Yes	No Intent Required	Must explain entire wage differential
Title VII	Sex, Race/Ethnicity, Color, Religion, National Origin	Similarly Situated Employees	No	Discriminatory Intent or Impact	Typically only in statistically significant groups
E.O. 11246	All from Title VII + Sexual Orientation and Gender Identity	Similarly Situated Employees	Yes	Discriminatory Intent or Impact	Typically only in statistically significant groups

What Are the Next Steps?

Given the national and international spotlight on pay equity, it is critical that employers conduct attorney-client privileged internal pay equity audits to keep abreast of their organizations' pay trends and ensure compliance with these laws. Conducting a proactive pay equity analysis is often the first and best step employers can take to ensure fair pay and diminish legal risk.

Through the use of statistical models and analyses, employers can test the extent to which permissible factors explain existing pay differentials. This sophisticated work includes developing the appropriate employee groupings, isolating the factors that explain pay, adjusting the model, and interpreting the results. Importantly, you minimize the risk that this analysis and related deliberations might be discovered in litigation by engaging legal counsel who routinely conduct these analyses to direct and conduct this work under attorney-client privilege.

Have questions? You're not alone. Read on for answers to frequently asked questions about the new pay equity laws.

Frequently Asked Questions

Q1: "Does this apply just to base pay?"

California Labor Code Section 200 says that "wages" include all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation. In this definition, "wages" also includes base salary and other forms of compensation (e.g., bonuses, commissions, etc.).

In N.Y. Labor Law § 190(1), "wages" means the earnings of an employee for labor or services rendered, regardless of whether the amount of earnings is determined on a time, piece, commission or other basis. The term "wages" also includes benefits.

In Massachusetts, "wages" are defined broadly to include "all forms of remuneration for employment."

Q2: "Who is compared under these laws? Should we use job titles?"

California, New York, Maryland, and Massachusetts law differ when it comes to grouping employees.

New York: Group employees by those who perform equal work that requires equal skill, effort, and responsibility, and which is performed under similar working conditions.

Maryland: Group employees who work for the same employer at workplaces located in the same county in the state and who "perform work of comparable character or work in the same operation, in the same business, or of the same type."

California: Group employees by those who perform substantially similar work that requires substantially similar skill, effort, and responsibility, and which is performed under similar working conditions.

In California, substantially similar work is determined by:

- **Skill:** Experience, ability, education, and training required to perform the job
- **Effort:** Amount of physical or mental exertion needed to perform the job
- **Responsibility:** The degree of accountability required in performing the job
- **Working Conditions:** Physical surroundings (e.g., temperature, fumes, and ventilation) and hazards

A good place to start in developing employee groups is to identify “buckets” of major job categories or groupings your organization already uses. These might include:

- Grades and levels
- Job functions and job families
- Job descriptions
- Skills or job ladders
- Wage and hour classifications

Massachusetts: Group employees by those who perform substantially similar work that requires substantially similar skill, effort, and responsibility, and is performed under similar working conditions.

Q3: “Are we not allowed to take into account differences in market anymore? The market in San Francisco (or NYC) is so different from the market in Fresno (or Rochester).”

When it comes to geographic differentials, California, New York and Maryland law diverge. In New York, comparators must work in the same “geographic region,” defined as no larger than the same county, and employers must take into account population distribution, economic activity, and/or the presence of municipalities. In Maryland, comparators must work in the same county of the state.

In the California law, employees can be compared to others who do not work in the same establishment or region but consideration of geographic differentials may still be a legitimate basis for pay differences. Geographic, shift, or hours differentials can be a “bona fide factor,” as described by California State Senator Hannah-Beth Jackson in this letter to the California Senate Daily Journal:

“[T]he amendments to this bill that strike ‘work is performed at different geographic locations’ and ‘work is performed on different shifts or at different times of day’ should not be construed as the Legislature’s intent to make those factors unavailable to an employer responding to an equal pay complaint. Rather, the employer may claim a ‘bona fide factor,’ that may be specifically described by the employer as work that is performed at different geographic locations or work that is performed on different shifts or at different times of day, so long as the employer can prove that the factor is consistent with business necessity, as specified in the bill.”

In Massachusetts, geographic location is one of the factors employers may use to explain wage differentials.

Q4: “But does this mean that under the California Fair Pay Act employees can be compared to employees in other states?!”

In New York and Maryland, the answer to this question is no. In California, the answer is “maybe,” since nothing in the California Fair Pay Act explicitly prohibits such comparisons. Stay tuned for further developments.

Q5: “What are the factors that employers may legitimately use to explain differences in pay?”

In California, there are 4 permitted factors to explain pay differences:

- A seniority system based on length of service
- A merit system based on performance
- Quantity or quality of production
- A bona fide factor other than sex, such as education, experience, training, certifications, geographic, shift, or hours differentials

The New York factors are:

- A seniority system
- A merit system
- A system that measures earnings by quantity or quality of production; or
- A bona fide factor other than sex such as education, training, or experience

The Maryland factors are:

- A non-discriminatory seniority system
- A non-discriminatory merit increase system
- Jobs that require different abilities or skills
- Jobs that require the regular performance of different duties or services
- Work that is performed on different shifts or at different times of day
- A system that measures performance based on a quality or quantity of production; or
- A bona fide factor other than sex or gender identity, including education, training, or experience, in which the 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* differential.

The Massachusetts factors are:

- A system that rewards seniority; provided, however, that time spent on leave due to a pregnancy-related condition and protected parental, family and medical leave, shall not reduce seniority
- A merit system
- A system which measures earnings by quantity or quality of production, sales, or revenue
- Geographic location in which a job is performed
- Education, training or experience to the extent such factors are reasonably related to the particular job in question
- Travel, if the travel is a regular and necessary condition of the particular job

Q6: “One of the main reasons employees are paid different amounts is because they were paid different amounts by their prior employer. Every employer takes this into account. Is this not permitted?”

The Massachusetts law forbids employers from inquiring about wage or salary history before making an offer of employment that includes the compensation offered. If a prospective employee “voluntarily” discloses such information, the employer may confirm it. (For more information from Seyfarth on what’s new in Massachusetts, read [“Massachusetts Governor Signs Stringent Pay Equity Requirements, Effective in 2018.”](#))

While neither the California nor New York law prohibit inquiring about prior salary, an industry standard practice, the legislative history references that such inquiries could perpetuate wage discrimination.

Starting salary is typically the most important pay decision. Prior salary can reflect differences in skills, experience, and performance. However, it has been shown that employees who begin their careers on a lower salary track continue to be paid lower and the gap in pay increases over time. This is known as the “Start Low/Stay Low” phenomenon.

To avoid risk, employers should document differences in skills, experience, and performance rather than prior salary as the reason for pay differences. Employers should consider developing a formal policy regarding how it sets starting salary.

Q7: “How about salary negotiation? Are we still able to negotiate with candidates?”

Salary negotiation is not expressly prohibited by these acts but pay differences should be based on a specific bona fide reason—such as skill, experience or location. For example, in California, the burden on the employer is to prove that differences are job related with respect to the position in question and consistent with a “business necessity” (i.e., the factor relied upon effectively fulfills the business purpose it is supposed to serve). This defense does not apply if the plaintiff can demonstrate an alternative business practice that would serve the same business purpose without producing the pay differential. In Massachusetts, employers may not seek a prospective employee’s wage or salary history during salary negotiations.

Q8: “What damages could be awarded under the laws?”

California: Wages and interest, plus an equal amount as liquidated damages, and reasonable attorneys’ fees. Willful violation may be commenced no later than three years after the cause of action occurs.

New York: Wages and interest, plus an equal amount as liquidated damages, and reasonable attorneys’ fees. If willful violation is found, up to 300% of wages are due to the plaintiff.

Maryland (effective October 1, 2016): For knowing discrimination (including if an employer should have known of violation), wages and interest, plus an equal amount as liquidated damages, and reasonable attorneys’ fees. For knowing violations of the provision protecting wage disclosures, actual damages, plus an equal amount as liquidated damages, and reasonable attorneys’ fees. Statute of limitations is three years from the date on which employee receives final pay.

Massachusetts: Wages and interest, plus an equal amount as liquidated damages, and reasonable attorneys’ fees. The suit must be commenced within three years after the alleged violation. A pay violation occurs each time an employee is paid.

Q9: “How can we evaluate and mitigate our risks under these acts?”

Start by documenting the relative skill, effort, responsibility, and working conditions of positions so you can differentiate and distinguish roles. These differences may be reflected in:

- Job matrices
- Job evaluation systems
- Job descriptions

You should also document the factors that influence pay, such as experience, education, starting pay, market at start, and performance ratings.

In Massachusetts, the affirmative defense to pay discrimination claims based on an employer's self-evaluation of its pay practices provides a unique way for employers to attempt to insulate against pay equity claims. However, any evaluation used to substantiate a defense under Massachusetts law might be used against a company in litigation under federal law, which provides no similar defense. Thus, conducting audits protected by the attorney-client privilege is essential in Massachusetts, as in all states.

Q10: "Where should we go from here?"

Here are four key steps to take now:

- Understand appropriate job groupings
- Evaluate permitted factors that explain pay differences
- Analyze pay (cohort and statistical methods)
- Modify policies and practices

Before you begin, understand the risks of proceeding without attorney-client privilege. It's essential to partner with internal and external counsel and implement a privilege protocol to keep the process confidential and limited only to those who "need to know."

You must take into account the practical realities of conducting a pay analysis. You are likely to need additional resources and budget to:

- Conduct appropriate compensation analyses
- Correct disparities found

Consider the timing of this work and optimally align it with the compensation cycle.

Train HR, managers, and supervisors regarding the pay transparency provisions of the equal pay laws that govern your operations.

Likewise, you will need to modify organization policies and practices, such as:

- Employees handbook to remove any prohibitions on employees disclosing their compensation to others
- Retaliation policy
- Record retention policy
- In Massachusetts, application fields and hiring practices requesting wage or salary history

Seyfarth Shaw has for many years been in the forefront of assisting employers to interpret pay equity laws and conducting pay analyses. Employers with employees in the affected states should consider an attorney-client privileged pay review as soon as possible.

Please contact payequity@seyfarth.com.



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