The Landscape of Federal and State Equal Pay Laws

By Ilona M. Turner[1]

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As referenced in the articles in this issue, multiple federal and state nondiscrimination statutes may apply to equal pay claims. General employment discrimination laws like Title VII cover discrimination in pay as well as discrimination in other terms and conditions of employment. The federal government and 42 states have also adopted statutes that specifically prohibit employers from providing unequal pay to workers of different genders. Some state laws also apply to protected characteristics beyond gender. Pay equity laws include the federal Equal Pay Act ("EPA"),[2] California's Equal Pay Act,[3] and New York's Achieve Pay Equity Act.[4] One important difference between claims brought under these equal pay laws and regular discrimination claims is that equal pay laws generally provide for strict liability; discriminatory intent is not required. That is, unequal pay for employees doing the same work violates the law unless the employer can prove one of the statutory exceptions applies.

The federal EPA only covers pay discrimination based on gender, not other protected categories. The statute says that an employee cannot be paid less than an employee of a different sex for performing "equal work" on a job that requires "equal skill, effort, and responsibility." The federal EPA includes four exceptions, for differences that are based in (1) a seniority system, (2) a merit system, (3) a production-measuring system, or (4) "a differential based on any other factor other than sex."

California's equal pay law applies to both gender and race/ethnicity. Under amendments passed in 2015, California made it easier for employees to bring these claims forward. The state law no longer requires a showing that two employees performed "equal" work, only "substantially similar" work. Additionally, California narrowed the fourth exception that can justify unequal pay: this must be a "bona fide factor other than sex, such as education, training, or experience," which is job-related and required by business necessity.

New York's equal pay law is very similar to California's. The New York law applies to a wide range of protected categories, including age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, or domestic violence victim status. Other states have also amended their equal pay laws to broaden protections in recent years, including Colorado, Illinois, Maryland, Massachusetts, New Jersey, Oregon, Vermont, and Washington.

Despite the differences in wording among the various statutes, court decisions have interpreted federal and state equal pay laws in similar ways, applying the same two-step analysis: First, are there two employees of different genders (or other protected classes) who are paid differently for performing the same kind of work? Second, is that differential justified by one of the permissible factors?

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One point of disagreement among federal courts is whether the factor used to justify a pay disparity must be job-related. In 1974, the U.S. Supreme Court held that market forces are not a "factor other than sex," rejecting the employer's argument that it paid men more because men refused to work for the low wages the company paid women.[5] Following this logic, the Ninth Circuit Court of Appeals held in 2020 that an employee's prior salary is also not a "factor other than sex," because that could perpetuate pay inequity indefinitely.[6] This recognition is codified in the state laws in California and many other states that explicitly prohibit employers from asking about or relying on salary history in setting pay.

Other federal courts have come out differently on that question, however. In an October 2023 decision, *Eisenhauer v. Culinary Institute of America*,[7] the Second Circuit Court of Appeals disagreed with the Ninth Circuit. That case involved a sex-neutral compensation plan that locked in different pay rates for employees as of the time of hire, even if the passage of time lessened the original differences in their qualifications. While the Ninth Circuit ruled that the "factor other than sex" must be job-related, the Second Circuit concluded this interpretation was not supported by the plain text of the federal EPA. It held that the compensation plan—even if not job-related—was a valid justification for the pay differential under the federal law. However, the Second Circuit noted that the compensation plan might not pass muster under New York's state-level pay equity law, which explicitly required that the "factor other than sex" that justifies a pay differential must be "job-related with respect to the position in question." The appeals court reversed the lower court's ruling in favor of the employer and remanded the case for reconsideration of the state law claim.

What does all this mean for workplace investigators? Because of the very specific and narrow exceptions that can justify a pay disparity under these laws, an investigation of an equal pay complaint will usually involve comparing the justifications offered by the decision-maker with the justifications allowed under a particular law or policy, to determine if any of the exceptions have been met. Workplace investigators will therefore benefit from getting familiar with the equal pay laws that may apply, including the factors that can and cannot justify unequal pay in your state. ■

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Ilona M. Turner, AWI-CH, *is a Senior Attorney at Oppenheimer Investigations Group and a member of the AWI Journal Editorial Board. She can be reached at* ilona@oiglaw.com.

Endnotes

[1] Adapted from Ilona M. Turner, *When Is Unequal Pay Not OK? Comparing Federal and State Equal Pay Laws*, The Recorder (Feb. 28, 2024).

[2] 29 U.S.C. § 206(d).

[3] Cal. Labor Code § 1197.5.

[4] N.Y. Labor Law § 194(1).

[5] *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974).

[6] *Rizo v. Yovino*, 950 F.3d 1217 (9th Cir. 2020) (*en banc*).

[7] *Eisenhauer v. Culinary Institute of America*, 84 F.4th 507 (2d Cir. 2023).