STATE PAY EQUITY LAWS: WHERE A FEW GO, MANY MAY FOLLOW

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1. Equal Pay Laws in Flux

According to a recent study by the American Association of University Women, in 2015, the average earnings of women in the United States was approximately 20 percent less than the average earnings of men.[1] That 20 percent difference is commonly known as the "pay gap." And while few dispute the pay gap is real, its causes, the best ways to address it, and who bears responsibility remain anything but settled.[2]

At the federal level, equal pay advocates attempted to address the pay gap through federal legislation in the form of the Paycheck Fairness Act, which was first introduced in

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[1] American Association of University Women, *The Simple Truth about the Gender Pay Gap (Spring 2017),* AAUW (July 18, 2017) (available at http://www.aauw.org/research/the-simple-truth-about-the-gender-pay-gap/).

[2] For terminology purposes, it is important to distinguish between the "pay gap" and "pay equity," which refers to the concept of paying equal pay for equal (or, depending upon the jurisdiction and as discussed further in this paper, "substantially similar" work). Just as the national "pay gap" refers to the simple ratio of median earnings between men and women, irrespective of the type of work performed, employers sometimes also refer to their own company's "pay gap," which typically refers to a comparison of the median earnings of men and women company-wide. This paper discusses both concepts, but also recognizes the important distinction between them.

Congress in 1997. Twenty years later, however, and despite multiple attempts, enhanced equal pay legislation at the federal level has not come to fruition. Perhaps because efforts at the federal level failed, pay advocacy groups instead have focused their efforts at the state and local level, and have successfully influenced the passage of equal pay bills in nearly half of all states and a growing number of major cities. While these statutes and ordinances have varied in their specific content, many contain three key provisions: laws aimed at enhancing pay transparency; laws banning or restricting inquiries into salary history; and laws expanding the "equal work" comparator standard, and otherwise increasing an employer's burden of defending against a pay discrimination claim. Two states (Massachusetts and Oregon) also encourage employers to undertake voluntary pay audits through "safe harbor" provisions.

With respect to pay transparency, equal pay advocates argue that prohibiting employees from discussing or inquiring about pay perpetuates the pay gap because it prevents employees from uncovering illegal wage practices. As articulated by President Obama, "When employees are prohibited from inquiring about, disclosing, or discussing their compensation with fellow workers, compensation discrimination is much more difficult to discover and remediate, and more likely to persist."[3]

[3] Executive Order 13665 ("Non-Retaliation for Disclosure of Compensation Information") (April 8, 2014) (available at https://obamawhitehouse.archives.gov/the-press-office/2014/04/08/executive-order-non-retaliation-disclosure-compensation-information).

Equal pay proponents similarly argue that basing current salary on prior salary perpetuates existing pay gaps by allowing them to endure as employees change jobs. As explained in San Francisco's recent "Parity in Pay" ordinance, "The problematic practices of seeking salary history from job applicants and relying on their current or past salaries to set employees' pay rates contribute to the gender gap by perpetuating wage inequalities across the occupational spectrum. . .In effect, to the extent employers consider applicants' salary history in setting salaries of new hires, historical patterns of gender bias and discrimination repeat themselves, causing women to continue earning less than their male counterparts and less than they would have earned, but for their gender."[4]

Finally, several states have relaxed the legal standards for proving an equal pay violation. For example, California's Equal Pay Act, now the most employee-friendly of the state laws, took effect at the start of 2016 and requires employers to pay employees equally if they perform "substantially similar work" under "similar working conditions."[5] Previously, employees were required to demonstrate they performed "equal work," which

[4] San Francisco Article 33J ("Parity in Pay" Ordinance) (July 19, 2017) (available at https://sfgov.legistar.com/View.ashx?M=F&ID=5096758&GUID=E9033BB0-1110-41C1-A79A-62599476B1A0).

[5] Cal. Lab. Code § 1197.5(a) (2017) ("An employer shall not pay any of its employees at wage rates less than the rates paid to employees of the opposite sex for substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions").

is a higher standard derived from the federal Equal Pay Act. Even more significantly, the California law increases the burden on employers to justify any pay differential among employees doing substantially similar work. While these changes purport to ease the burden for employees who believe they have suffered from wage discrimination, they also bring uncertainty to employers regarding how they should comply.

This paper provides an overview of the changes to pay transparency laws, salary history laws, and the shifting legal standards in equal pay legislation. The paper focuses particularly on the significant legislative changes in three states: California, Massachusetts, and Oregon. Finally, the paper looks at a trend that states may embrace as the new wave of legislation aimed at addressing the pay gap: governmental collection – and potential publication – of compensation data, including data on pay gaps.

2. Pay Transparency Laws

As of 2010, nearly 50 percent of workers nationally stated that they were either forbidden or strongly discouraged from discussing their pay with coworkers.[6] Although the National Labor Relations Act provides protection to non-supervisor employees who discuss wages and working conditions with coworkers when that discussion is part of a concerted improvement effort, it does not reach supervisory employees or inquiries about

[6] U.S. Dep't. Labor, Women's Bureau, Issue Brief, Pay Secrecy (June 2016) (available at https://www.dol.gov/wb/resources/WB_PaySecrecy-June16-F-508.pdf).

pay that do not otherwise constitute protected concerted activity.[7] Accordingly, in an effort to increase pay transparency among employees of federal contractors, President Obama amended Executive Order 11246 to "prohibit federal contractors and subcontractors from discharging or otherwise discriminating against their employees and job applicants for discussing, disclosing, or inquiring about compensation."[8] The revised regulations took effect on January 11, 2016, and apply to all covered contracts entered into or modified as of that date. They prohibit federal contractors and subcontractors from discharging or otherwise discriminating against their employees and job applicants for discussing, disclosing, or inquiring about compensation.[9] The regulations also require that federal contractors incorporate a prescribed nondiscrimination provision into their existing employee manuals or handbooks and disseminate that provision to employees and to job applicants.[10]

Several states and municipalities also have passed, or are considering passing, laws prohibiting employers from enacting policies forbidding discussion of salary. Some

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[7] National Labor Relations Board, *Employee Rights* (July 18, 2017) (available at https://www.nlrb.gov/rights-we-protect/employee-rights).

[8] Office of Federal Contract Compliance Programs, *Executive Order 13665: Pay Transparency* (January 11, 2016) (available at https://www.dol.gov/ofccp/PayTransparency.html).

[9] Office of Federal Contract Compliance Programs, 80 Fed. Reg. 54,934 (Sept. 11, 2015) (to be codified at 41 C.F.R. pt. 60-1) (available at https://www.gpo.gov/fdsys/pkg/FR-2015-09-11/pdf/2015-22547.pdf).

[10] *Id.*; *see also* Office of Federal Contract Compliance Programs, *Pay Transparency Nondiscrimination Provision* (available at https://www.dol.gov/ofccp/PayTransparencyNondiscrimination.html).

of these states include: California, Colorado, Connecticut, Illinois, Louisiana, Maine, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, Oregon, and Vermont. Not surprisingly, California has enacted one of the strongest pay transparency laws.[11] Specifically, California's pay transparency statute not only states that employers may not prohibit employees from discussing their own wages or discussing or inquiring about the wages of others, it also provides a private right of action for employees who claim they have experienced retaliation for engaging in such conduct.[12]

Massachusetts' new equal pay legislation, which takes effect in January 2018, also prohibits employers from forbidding employees from discussing or inquiring about pay, as well as prohibits retaliation for engaging in such activities.[13] The Massachusetts law also prohibits employers from contracting with employees to avoid pay transparency obligations.[14] The law permits employers, however, to prohibit employees who have access to the pay data of others due to their job responsibilities from disclosing other employees' compensation information without first obtaining the permission of the other

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[11] "No employer may do any of the following:
(a) Require, as a condition of employment, that an employee refrain from disclosing the amount of his or her wages.
(b) Require an employee to sign a waiver or other document that purports to deny the employee the right to disclose the amount of his or her wages.
(c) Discharge, formally discipline, or otherwise discriminate against an employee who discloses the amount of his or her wages." Cal. Lab. Code § 1197.5(j)(1).

[12] Cal. Lab. Code § 1197.5(k).

[13] S. 2119, 189th Gen. Assemb., Reg. Sess. (Mass. 2016) (available at https://malegislature.gov/Bills/189/Senate/S2119).

[14] *Id.*

employee. It also confirms that employers are not obligated to disclose employee wages to any third party.[15]

3. Salary History Laws

Currently, federal law does not prohibit salary history inquiries. On May 11, 2017, however, Congresswoman Eleanor Holmes Norton (and a former EEOC chair) introduced House Resolution 2418, the Pay Equity for All Act of 2017, which would prohibit screening of employees based on previous wages, or requesting or requiring, as a condition for an interview or offer, the disclosure of previous wages.[16] The bill was referred to the House Committee on Education and the Workforce, but the Committee has taken no additional action. In the meantime, several cities and states have taken the matter into their own hands, and have passed salary history laws at the state and local level.

Massachusetts was the first state law limiting an employer's ability to inquire into an employee's salary history.[17] More specifically, Massachusetts' law prohibits employers from inquiring about a job candidate's prior salary or other forms of compensation.[18] An exception exists, however, in cases where a prospective employee voluntarily discloses wage and salary history. Specifically, the exception provides, "(i) if a prospective employee has voluntarily disclosed such information, a prospective

[15] *Id.*
[16] H.R. 2418, 115th Cong. (2017).
[17] MASS. GEN. LAWS ch. 149 § 105A(c)(2) (2017).
[18] MASS. GEN. LAWS ch. 149 § 105A(c) (2018).

employer may confirm prior wages or salary or permit a prospective employee to confirm prior wages or salary; and (ii) a prospective employer may seek or confirm a prospective employee's wage or salary history after an offer of employment with compensation has been negotiated and made to the prospective employee."[19]

The governor of Delaware signed a similar law on June 14, 2017, with an effective date of December 14, 2017.[20] The Delaware law prohibits employers from screening applicants on the basis of past compensation and from seeking wage history information from applicants as well as applicants' current and former employers before an employment offer is made.[21] Initial violations of the Delaware statute carry civil penalties of $1,000 to $5,000, while employers are subject to penalties ranging from $5,000 to $10,000 for each subsequent violation.[22]

Additionally, Oregon's governor signed a similar bill into law on June 1, 2017. Comparable to other salary history laws, the Oregon bill makes it illegal for employers to seek salary history information from applicants for employment, other than after making an offer of employment that includes amount of compensation.[23] Indeed, Oregon's law

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[19] *Id.*

[20] Del. H.B. No. 1 (June 6, 2017) (available at http://legis.delaware.gov/BillDetail?legislationId=25664).

[21] *Id.*

[22] *Id.*

[23] Or. H.B. 2005 (June 1, 2017) (available at https://olis.leg.state.or.us/liz/2017R1/Downloads/MeasureDocument/HB2005).

appears to go even further than other laws prohibiting salary history inquiries in that it does not contain a carve-out for situations where a job candidate voluntarily discloses his or her prior salary information before a job offer is made.[24]

Most recently, on October 12, 2017, California's governor signed Assembly Bill 168, which adds California to the growing list of states that prohibit employers from asking job candidates about their prior pay.[25] The law will take effect on January 1, 2018. As with several other state laws prohibiting salary history inquiries, California's new law allows employers to consider prior salary information if a job candidate voluntarily discloses it.[26] "AB 168" also contains a unique provision that requires employers to disclose to job candidates the "pay scale" for the position at issue if the job candidate requests it.[27]

Several municipalities also have passed history laws. For example, in November 2016, Mayor Bill de Blasio of New York City issued an executive order prohibiting city government employers from asking for a candidate's salary history.[28] Additionally, Philadelphia, New Orleans, and Pittsburgh have followed suit.[29] Philadelphia's law,

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[24] *Id.*

[25] California Assembly Bill 168 (available at https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB168).

[26] *Id.*

[27] *Id.*

[28] N.Y.C. Exec. Order No. 21, "Restriction on Inquiries regarding Pay History" (Nov. 4, 2016).

[29] *See* New Orleans Exec. Order No. MJL17-01; City of Pittsburgh Ord. No. 2017-1121.

however, already has faced legal challenges. Specifically, the Philadelphia Chamber of Commerce contested the new law, stating that it violates employers' free speech rights and obstructs interstate commerce, with little or no evidence that the law will be successful in improving pay equity.[30] For that reason, the Philadelphia law has been temporarily placed on hold.[31]

Finally, San Francisco recently passed the "Parity in Pay Ordinance," which prohibits both private and public employers from asking job applicants to disclose their salary history, and will take effect July 1, 2018.[32] Although San Francisco's ordinance prohibits employers from *inquiring* about salary history, if the applicant voluntarily *discloses* the information without prompting from the employer, the ordinance permits an employer to consider it in determining starting pay for the applicant.[33] The ordinance makes clear, however, that in such circumstances, salary history shall not by itself be used to justify paying employees of a different sex, race, or ethnicity differently for

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[30] *Chamber of Commerce Greater Philadelphia v. City of Philadelphia et al*., 2:17-cv-01548, (E.D. Pa. 2017).

[31] Daniel Wiessner, *Philly Chamber renews push to block city's salary history law*, Reuters (June 16, 2017) (available at https://www.reuters.com/article/us-usa-fastfood-schedules-idUSKBN1A20VC).

[32] San Francisco Article 33J ("Parity in Pay" Ordinance) (July 19, 2017) (available at https://sfgov.legistar.com/View.ashx?M=F&ID=5096758&GUID=E9033BB0-1110-41C1-A79A-62599476B1A0).

[33] Erin M. Connell, *San Francisco Adopts "Parity In Pay" Ordinance And Becomes The Latest City To Ban Employers From Asking About Prior Pay*, ORRICK BLOG (July 28, 2017) (available at http://blogs.orrick.com/equalpaypulse/2017/07/28/san-francisco-adopts-parity-in-pay-ordinance-and-becomes-the-latest-city-to-ban-employers-from-asking-about-prior-pay/).

performing substantially similar work under similar working conditions, which in this respect, brings the ordinance in accordance with California's Equal Pay Act (Labor Code Section 1197.5).[34] The ordinance also permits employers, without inquiring about salary history, to "engage in discussion" with an applicant about the applicant's "expectations" with respect to starting pay, including but not limited to any unvested equity or deferred compensation or bonus that an applicant would forfeit or have cancelled by virtue of the applicant's resignation from his or her current employer.[35]

4. Safe Harbor Provisions

The equal pay laws of Massachusetts and Oregon contain a unique component: both states have added safe harbor provisions that provide incentives to employers to conduct internal analyses of pay, as well as take action based on any adverse findings. The Massachusetts law provides employers an affirmative defense to an equal pay claim if they can show they have voluntarily conducted a self-evaluation of their pay systems, and are actively working to combat any discrepancies.[36] Specifically, the law provides, "an employer…who, within the previous 3 years and prior to the commencement of the action, has both completed a self-evaluation of its pay practices in good faith and can

[34] *Id.*

[35] *Id.*

[36] American Association of University Women, *Where Equal Pay Flourished (and Failed) in 2016*, AAUW (Oct. 27, 2016) (available at http://www.aauw.org/research/the-simple-truth-about-the-gender-pay-gap/).

demonstrate that reasonable progress has been made towards eliminating wage differentials based on gender for comparable work…shall have an affirmative defense to liability…".[37] Oregon, on the other hand, still holds employers generally liable for back-pay resulting from gender discrimination, but provides a limited safe harbor against other types of damages.[38]

5. Comparable Work Standards and New Burdens Employers Now Face

(a) The California Equal Pay Act

Taking the lead among the states, California originally passed the California Equal Pay Act on October 6, 2015.[39] It took effect on January 1, 2016, and was further amended in 2017.[40] While employees rarely used California's previous equal pay law, the California Equal Pay Act makes several changes that already have resulted in both individual and class action law suits. For example, the law changes the comparator standard from "equal" work to "substantially similar" work.[41] More importantly, the act made significant changes in the affirmative defenses for employers attempting to defend a pay

[37] Mass. Gen. Laws ch. 149 § 105A(d) (2018).
[38] Or. H.B. 2005 (June 1, 2017) (available at https://olis.leg.state.or.us/liz/2017R1/Downloads/MeasureDocument/HB2005).
[39] Cal. Dep't of Indust. Relations, California Equal Pay Act: Frequently Asked Questions (July 17, 2017) (available at https://www.dir.ca.gov/dlse/California_Equal_Pay_Act.htm). Although the initial Act was referred to as the California Fair Pay Act, given its subsequent amendments, we refer to it in this paper as the California Equal Pay Act.
[40] Cal. Lab. Code § 1197.5 (2016); Cal. Lab. Code § 1197.5 (2017).
[41] Cal. Lab. Code § 1197.5 (2016).

discrimination claim.[42] Additionally, the 2017 amendments expand the law to also prohibit wage discrimination on the basis of race or ethnicity in addition to sex.[43]

More specifically, the California Equal Pay Act includes the following significant changes: (1) it eliminates the requirement that comparative jobs are located at the same establishment, (2) it replaces the "equal" work with a comparison standard of "substantially similar" work, (3) it increases the burden on employers attempting to justify pay differentials, (4) it contains a new anti-retaliation protection for workers who assist coworkers who bring claims under the Act, and (5) it prohibits employers from taking adverse actions against employees for disclosing or discussing wages.[44]

The amendments to the burden of proof to justify pay disparities constitutes the Act's most significant change. Consistent with federal law and the law of several other states, California recognizes the four affirmative defenses traditionally available in pay cases: a seniority system, a merit system, system that measures earnings by quantity or quality of production, and "a bona fide factor other than sex."[45] California law differs, however, because it now states that the "catch all" affirmative defense (a "bona fide factor other than sex") applies only if an employer can demonstrate:

> [T]he factor is not based on or derived from a sex-based differential in compensation, is job related with respect to the position in question, and is consistent with a business necessity. For purposes of this subparagraph,

[42] *Id.*

[43] Cal. Lab. Code § 1197.5 (2017).

[44] *Id.* (emphasis added)

[45] Cal. Lab. Code § 1197.5(a)(1)(D) (2017).

> 'business necessity' means an *overriding legitimate business purpose* such that the factor relied upon effectively fulfills the business purpose it is supposed to serve. This defense shall not apply if the employee demonstrates that an alternative business practice exists that would serve the same business purpose without producing the wage differential.[46]

Thus, California doubles down on changes to this affirmative defense. The law adds a burden on employers to demonstrate that the factor is (1) not based on or derived from a sex-based differential in compensation, (2) is job-related with respect to the position in question; and (3) is consistent with a business necessity.[47] Additionally, even once an employer makes such a showing, the burden shifts back to the employee who can revive the claim if he or she demonstrates that an alternative business practice exists that would serve the same business purpose without producing the wage differential.[48]

Adding even more ambiguity, the California law also presents another avenue through which employees can prevail. Particularly, the law requires that "[e]ach (pay) factor relied upon is applied *reasonably*,"[49] and "[T]he one or more factors relied upon account for the entire wage differential."[50] Pursuant to its 2017 amendments, the Act further provides that prior salary, shall not by itself, justify any disparity in compensation."

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[46] *Id.*

[47] Gary Siniscalco and Lauri Damrell, *As Calif. Goes on Equal Pay, So Goes the Nation?* Law360 (Sep. 10, 2015), (available at https://www.law360.com/articles/699503).

[48] *Id.*

[49] Cal. Lab. Code § 1197.5(a)(2) (2017) (emphasis added).

[50] Cal. Lab. Code § 1197.5(a)(3) (2017) (emphasis added).

This provision regarding prior salary leaves employers with yet another undefined standard not used in any other federal or state equal pay law.

In addition to changing a key affirmative defense for employers, the "substantially similar" standard also leaves a great deal open to interpretation. Specifically, sections (a) and (b) of the law read,

> [a]n employer shall not pay any of its employees at wage rates less than the rates paid to employees…for substantially similar work, when viewed as a *composite* of skill, effort, and responsibility, and performed under similar working conditions, except where the employer demonstrates [one of the four affirmative defenses].[51]

The Act does not define "*composite* of skill, effort, and responsibility." Moreover, the "guidance" provided by the California Department of Industrial Relations does little to clarify "substantially similar" work. Instead, it simply observes that "substantially" means "mostly" and is silent on the concept of a "composite":

> 'Substantially similar work' refers to work that is mostly similar in skill, effort, responsibility, and performed under similar working conditions. Skill refers to the experience, ability, education, and training required to perform the job. Effort refers to the amount of physical or mental exertion needed to perform the job. Responsibility refers to the degree of accountability or duties required in performing the job. Working conditions has been interpreted to mean the physical surroundings (temperature, fumes, ventilation) and hazards.[52]

Thus, while it is clear that the comparator standard under California law is now broader than the prior "equal work" standard, it remains to be seen exactly how broad California

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[51] Cal. Lab. Code § 1197.5(a)-(b) (2017) (emphasis added).

[52] State of California, Department of Industrial Relations, California Equal Pay Act: Frequently Asked Questions (July 17, 2017) (available at https://www.dir.ca.gov/dlse/California_Equal_Pay_Act.htm).

courts and administrative agencies will interpret it to be. California courts may look to Title VII case law for guidance, which apply a "similarly situated" comparator standard for purposes of proving discrimination under Title VII.

(b) Massachusetts

On August 1, 2016, Massachusetts updated its equal pay law, originally passed in 1945. Much like California's equal pay legislation, Massachusetts' new equal pay law also places a greater burden on employers to justify any gender based wage disparities. Specifically, the bill allows employers to overcome a pay differential by pointing to a bona fide seniority system (in which seniority is not reduced when an employee is on protected leave, such as family, medical or pregnancy leave), a bona fide merit system, a bona fide production system, geographic location of the job, travel required by the job, and education, training or experience.[53] Unlike federal law, but similar to California, the bona fide factor must be job-related and consistent with business necessity.[54] Notably, Massachusetts' law does *not* include the "catch all" defense of any "bona fide factor other than sex."

While worded differently than California's "substantially similar" standard, the

[53] Jill Rosenberg, Christopher Wilkinson, & David Harvey, *Massachusetts Signs Into Law Far Reaching Pay Equity Bill*, Orrick Blog (Aug. 2, 2016) (available at http://blogs.orrick.com/equalpaypulse/2016/08/02/massachusetts-signs-into-law-far-reaching-pay-equity-bill/).

[54] *Id.*

Massachusetts law also modifies the comparator standard for employees. Rather than requiring a showing of "equal work," the Massachusetts law requires employees to show "comparable" work.[55] In defining "comparable work," however, the Massachusetts law points to a "substantially similar" standard.[56] Specifically, the law defines "comparable work" as "work that is *substantially similar* in that it requires *substantially similar* skill, effort and responsibility and is performed under similar working conditions; provided, however, that a job title or job description alone shall not determine comparability."[57] Accordingly, courts may interpret the California and Massachusetts comparator standards to be the same, despite the different language used in the statutes.

Finally, as discussed in Sections 2-4, *supra*, Massachusetts' equal pay law also includes a prohibition on prior salary inquiries, a safe harbor provision for employers who voluntarily conduct pay audits and take appropriate remedial action, and a pay transparency requirement.

(c) Oregon

Oregon passed its Equal Pay Act of 2017 with the goal of "shrink[ing] the stubborn pay gaps between genders, races and those in other protected classes by expanding protections for people who are regularly discriminated against, and by encouraging

[55] Mass. Gen. Laws ch. 149 § 105A(a) (2018).
[56] *Id.*
[57] *Id.* (emphasis added).

companies to proactively examine their own pay practices before a lawsuit is filed."[58] Many of the provisions of the bill, however, do not go into effect until January 1, 2019. Like California and Massachusetts, Oregon's law does permit affirmative defenses for employers in cases where an employer can justify differences in compensation levels using bona fide factors related to the position and is based on (1) a seniority system, (2) a merit system, (3) a system that measures earning by quantity or quality of production, (4) workplace location, (5) travel, (6) education, (7) training, (8) experience, or (9) a combination of factors.[59]

The law also resembles the Massachusetts statute in that it contains a safe harbor provision, although the provisions are structured differently. Specifically, Oregon allows employers to file a motion in order to combat compensatory and punitive damages through a showing that the employer:

> [c]ompleted within three years before the date that the employee filed the action, an equal-pay analysis of the employer's pay practices in good faith that was reasonable in detail and scope in light of the size of the employer and related to the protected class asserted by the plaintiff in the action; and eliminated the wage differentials for the plaintiff and has made reasonable and substantial progress toward eliminating wage differentials for the protected class asserted by the plaintiff.[60]

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[58] Anna Marcum, *Oregon Senate passes Equal Pay Act of 2017; what it means for you*, The Oregonian (May 18, 2017) (available at http://www.oregonlive.com/politics/index.ssf/2017/05/what_the_oregon_equal_pay_act.html).

[59] Or. H.B. 2005 (June 1, 2017) (available at https://olis.leg.state.or.us/liz/2017R1/Downloads/MeasureDocument/HB2005).

[60] *Id.*

If a court grants the employer's motion, the court may only award back pay for the two year period immediately preceding the filing of the action.[61] Also as discussed in Section 3, *supra,* Oregon law prohibits employers from asking applicants about their current or past compensation for purposes of setting starting pay.[62]

6. Governmental Collection of Pay Data

One trend that may pose the next wave of equal pay legislation is the concept of governmental collection – and/or publication – of compensation data. Although at present, federal efforts to require employers to submit pay data to the government are suspended, states may move forward with their own pay data collection initiatives, just as they did with more aggressive equal pay laws when Congress failed to pass the Paycheck Fairness Act.

(a) The Revised EEO-1 Form Is Currently on Hold

On January 29, 2016, the EEOC announced a proposal to revise the EEO-1 form to require employers to report aggregate W-2 pay data, as well as hours worked, by gender, race, and ethnicity across 12 pay bands for the 10 EEO-1 job categories beginning in March 2018.[63] The job categories would have remained unchanged from

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[61] *Id.*

[62] *Id.*

[63] U.S. Equal Employment Opportunity Commission Press Release, *EEOC Announces Proposed Addition of Pay Data to Annual EEO-1 Reports* (available at https://www.eeoc.gov/eeoc/newsroom/release/1-29-16.cfm).

the prior EEO-1 form, and included broad groupings such as "Professionals" and "Service Workers." While proponents of the revised EEO-1 form claimed it would assist the EEOC in identifying possible pay discrimination and assist employers in promoting equal pay in their workplaces,[64] opponents claimed that its methodology – including but not limited to the use of W-2 income data and broad pay bands and job categories – would have little predictive or probative value, could lead to both false positives and negatives, and the would not justify the high burden on employers to collect and report the data.[65]

Approximately one year later, on February 27, 2017, the U.S. Chamber of Commerce asked the Director of the Office of Management and Budget ("OMB") to undertake a renewed review of the EEOC's revisions to the EEO-1 form, and reject them under the Paperwork Reduction Act ("PRA").[66] Specifically, the Chamber asserted that the EEOC grossly understated the burden that would be associated with the revised EEO-1, and claimed the EEOC has not met its requirement to satisfy the burden, benefit of confidentiality prerequisites of the PRA.[67] Shortly thereafter, members of Congress also wrote to OMB opposing the revised EEO-1 form and claiming that it "lack[ed] practical

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[64] *Id.*

[65] Gary Siniscalco, *Orrick to Provide Testimony on EEOC's Proposed Revisions to the EEO-1 Report*, Orrick Blog (March 10, 2017) (available at http://blogs.orrick.com/employment/2016/03/10/orrick-to-provide-testimony-on-eeocs-proposed-revisions-to-the-eeo-1-report/).

[66] Letter to OMB Requesting Review of the EEOC's Revisions to the EEO-1 Form (available at https://www.uschamber.com/letter/letter-omb-requesting-review-the-eeocs-revisions-the-eeo-1-form).

[67] *Id.*

utility, [was] unnecessarily burdensome, and [did] not adequately address privacy and confidentiality issues."[68]

In response to the concerns raised, on August 29, 2017, OMB informed the EEOC it was issuing an immediate stay of the revised EEO-1 form.[69] Acting EEOC Chair Victoria Lipnic, who consistently has opposed the revised EEO-1 form, issued a statement in response to OMB's stay underscoring the EEOC's commitment "to strong enforcement of our federal equal pay laws," and confirming that the stay will "not alter EEOC's enforcement efforts."[70] Acting Chair Lipnic further confirmed that the EEOC would consider its options going forward, and stated that she hoped "that this decision will prompt a discussion of other more effective solutions to encourage employers to review their compensation practices to ensure equal pay and close the wage gap."[71]

(b) States May Pick Up Where the Revised EEO-1 Form Left Off

While the fate of a national pay data collection remains up in the air, state and local governments may move ahead with their own pay data collections, just as they did with more aggressive equal pay laws when Congress repeatedly failed to pass the Paycheck

[68] Letter to OMB Requesting Rescission of Approval of Revised EEO-1 Form (available at http://www.constangy.net/nr_images/eeo-1-letter-from-sens-to-omb-april-2017-c1.pdf).

[69] OMB Memorandum from Neomi Rao, Administrator, Office of Information and Regulatory Affairs, to Acting Chair Victoria Lipnic, Equal Employment Opportunity Commission (available at https://www.reginfo.gov/public/jsp/Utilities/Review_and_Stay_Memo_for_EEOC.pdf).

[70] What You Should Know: Statement of Acting Chair Victoria A. Lipnic about OMB Decision on EEO-1 Pay Data Collection (available at https://www.eeoc.gov/eeoc/newsroom/wysk/eeo1-pay-data.cfm).

[71] *Id.*

Fairness Act. States such as New York and New Mexico already have enacted such requirements for state contractors. For example, in January 2017, New York Governor Andrew Cuomo signed Executive Order 162, which requires state contractors to report the job title and salary of each employee performing work on a state contract.[72] New Mexico Governor Bill Richardson signed a similar executive order in 2009 that requires state contractors to submit "pay equity reports" to the state government as a requirement for obtaining a state contract.[73] Similarly, Minnesota requires public employers such as cities, counties and school districts to submit reports disclosing the wages of men and women performing comparable jobs.[74]

Most recently, the California legislature passed Assembly Bill 1209 (known as the "Gender Pay Gap Transparency Act"), which – if it had become law – would have required California employers with more than 500 employees to report their gender wage differentials for California employees and board members to the Secretary of State biennially, which the Secretary of State could have then posted publicly on the Internet.[75]

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[72] New York State Executive Order 162 ("Ensuring Pay Equity by State Contractors") (January 9, 2017) (available at https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_162.pdf).

[73] New Mexico Executive Order #2009-049 ("Fair And Equal Pay For All New Mexicans") (December 18, 2009) (available at http://www.generalservices.state.nm.us/uploads/FileLinks/864df4748b2440569b3af8a95ce155d8/eo2009-049.pdf).

[74] Minnesota Statutes 471.991 to 471.999 ("Minnesota Local Government Pay Equity Act") (available at https://www.revisor.mn.gov/statutes/?id=471.991).

[75] California Assembly Bill 1209 (available at https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB1209).

Specifically, the law would have required employers to report, by job classification or title, the difference between the mean and median of all California male exempt employee wages compared to all California female exempt employee wages.[76] Reporting also would have been required for board members located in California. The legislation did make clear, however, that even if there is a differential, it does not necessarily reflect a violation of the California Equal Pay Act.[77]

On October 12, 2017, California Governor Jerry Brown vetoed the law. Leading up to the veto, "AB 1209" received a fair amount of criticism, including from employer groups and the California Chamber of Commerce.[78] As with the revised EEO-1 form, opponents argued that overly simplified statistics, without proper context of analysis, are misleading. Critics further claimed that the public display of the misleading data would add insult to injury because it inevitably would subject employers to litigation, even though any published wage gaps do not paint an accurate and complete picture of whether the company pay its employees equitably.[79]

Even though AB 1209 did not become law, the California legislature (or the legislatures of other states) may attempt to pass similar legislation in the future. Indeed,

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[76] *Id.*

[77] *Id.*

[78] Jennifer Barrera and Kara Bush, "Why blow up a good deal on equal pay?" *The Sacramento Bee,* August 30, 2017 (available at http://www.sacbee.com/opinion/op-ed/soapbox/article170118902.html).

[79] *Id.*

even though California's governor recently signed AB 168 (prohibiting salary history inquires), he vetoed similar legislation in 2015, demonstrating the resolve of the California legislature when it comes to pushing the envelope when it comes to equal pay.

7. Conclusion

Whether the recent wave of equal pay laws has a meaningful impact on closing the wage gap remains to be seen. In the meantime, however, employers will need to adapt as the equal pay landscape continues to evolve, particularly at the state and local level.