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Oregon's Equal Pay Act Exclusion of Incentive Payments Set to Expire September 28

By Missy Oakley & Joshua Waugh

The current labor market is challenging, and it has never been more difficult for employers to hire and retain good employees. Last year, the Oregon legislature amended the Oregon Equal Pay Act (“OEPA” or “the Act”) to temporarily exclude vaccine incentives as well as hiring and retention bonuses from pay equity considerations. The amendments were a relief for many employers because they allowed extra flexibility in providing compensation to hire and retain talent, or to encourage employees to get vaccinated.

While the justifications for these amendments may still exist today, the amendments are set to expire on September 28, 2022. Employers need to be aware of this change, so they do not find themselves unintentionally out of compliance. The expiration of last year’s amendments makes now a good time for employers to review the requirements of the OEPA.

OEPA Requirements

The OEPA went into effect on January 1, 2019, and included sweeping pay equity protections that extended even beyond those provided by federal law. (The federal Equal Pay Act prohibits an employer from compensating employees differently on the basis of sex, while Oregon law prohibits an employer from compensating employees differently on the basis of *any* protected class for work of comparable character.)

The Act defines “work of a comparable character” as work that requires substantially similar knowledge, skill, effort, responsibility, and working conditions, regardless of job description or job title. This does not mean that employers can never pay employees differently. Employees performing work of comparable character can be compensated differently so as long as the differences are based entirely on one or more of the “bona fide” factors provided in the Act.

These factors include: a seniority system; a merit system; a system that measures earnings by production, such as piece-rate work; location; travel, if necessary for work; education; training; experience; or any combination of these factors. The Act broadly defines “compensation” to include more than just wages. Compensation includes wages, salary, bonuses, benefits, fringe benefits, and equity-based compensation—and on September 28, 2022, will no longer exclude vaccine incentives or hiring and retention bonuses.

Further, employers should document compensation decisions when deciding to pay employees differently. This is not only a good business practice, but also essential to defending against a pay equity claim.

Pay Equity Audits

The OEPA does contain a mechanism for employers who want to proactively protect themselves in equal pay lawsuits. If an employer conducts a thorough “equal-pay analysis” in good faith and uses it to address wage differences among their employees, then the employer may be shielded from certain categories of damages in a lawsuit claiming pay equity violations. However, the equal-pay analysis must have been completed within three years of an employee’s claim. This means that as a best practice, employers should conduct a new equal-pay analysis every three years.

As a reminder, the Act expressly prohibits reducing the compensation of one employee as a means of coming into compliance with the Act’s requirements. Instead, an employer is permitted to freeze or red-circle wages of certain employees in order to bring compensation levels into balance. Pay equity decisions should be considered on a case-by-case basis to ensure that the solutions are legal and in alignment with an employer’s business needs and economic realities.

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