

Employment Law Corner

Monthly Report



August 2025

August Updates

[Blame it On AI? Not a Good Idea.](#)

[How to Improve the Dog Days of Summer](#)

Pay Equity and Transparency

Across the country, states are applying the principle that sunlight is the best disinfectant to unequal pay practices. Widespread adoption of state pay transparency has picked up steam in recent years. Employees now have new tools to ensure that they receive equal pay for equal work and avoid lowball offers. Now more than ever, employers must ensure that their pay practices can withstand state and federal scrutiny to avoid costly claims.

Employees are generally entitled to equal wages for comparable work. For the purposes of the federal Equal Pay Act, Comparable work is work that is substantially similar in that it requires substantially similar skill, effort and responsibility and is performed under similar working conditions. Employers cannot escape liability by slapping different labels on similar positions - a job title or job description alone does not determine if jobs are comparable, and minor differences in skill, effort or responsibility do not prevent two jobs from being considered comparable. Instead, investigators look to the substantive terms and conditions of employment to determine if two employees are performing comparable work and are entitled to equal pay. If a wage disparity exists, the employer cannot reduce wages to eliminate it – rather, the floor has to be raised so that all similarly situated workers benefit from higher wages offered to another employee.

The Equal Pay Act does not exist in a vacuum – the realities of the workplace often mean wage differentials exist between employees for a variety of good-faith reasons. The Equal Pay Act permits wage differentials that are based on one of the following factors:

1. A seniority system that rewards employees based on length of employment;
2. A merit system that rewards employees for exceptional job performance;
3. An incentive system that pays employees based on the quality of their work or the amount of work they perform; or
4. Another factor related to job performance or business operations, such as paying a shift differential to workers on less popular shifts.

The fourth factor is a catch all that gives employers flexibility and recognizes that employers may have many good faith reasons why one employee should be paid at a higher rate than another without the pay differential being actionable discrimination.

State laws can raise the floor for protections beyond federal law. For example, the Massachusetts Equal Pay law eliminates the “catch all” fourth factor. Instead, a wage differential is allowed between employees performing comparable work only if the differential is based on:

1. A seniority system (as long as protected parental, family and medical leave or leave due to a pregnancy-related condition does not reduce seniority);
2. A merit system that provides for variations in pay based on employee performance as measured through legitimate, job-related criteria;
3. A system that measures earnings by quantity or quality of production, sales or revenue;
4. The geographic location in which a job is performed;
5. Education, training or experience, to the extent these factors are reasonably related to the job in question; or
6. Travel, if the travel is a regular and necessary condition of the particular job.

By limiting the bases for when wage differentials are permitted, Massachusetts requires employers to think carefully about why a wage differential exists. If the differential is not justifiable under the provided list of factors, it must be eliminated.

This example illustrates how states can make their equal pay laws more aggressive than the federal law by narrowing the affirmative defenses an employer can use to justify pay differentials. States also have the option of applying the equal pay framework to other protected classes beyond sex. For example, New York’s equal pay law applies to each protected class under New York’s human rights law, including age, race, creed, color, national origin, citizenship or immigration status, sexual orientation, gender identity or expression, military status, sex, and disability. These broader equal pay laws further raise the risk of illegal pay differentials between employees, as employers will have to justify differentials within each protected class if they exist.

Increasingly, though, states are turning to another tool to ensure equal pay for equal work - pay transparency laws. Pay transparency is a growing movement that gives information to employees and applicants about the salary range of the job they are applying to and the salary ranges of their coworkers. This knowledge is intended to help workers identify when they are being underpaid and increase worker bargaining power.

Several states have implemented pay transparency laws in recent years, including California, Colorado, Connecticut, Massachusetts, New York, Nevada, Rhode Island, and Washington. As with equal pay laws, pay transparency laws vary significantly

by state regarding when, where, and how much information must be provided in each job posting.

For example, Massachusetts requires employers with more than 25 employees to post a good-faith estimate of the pay range (either the annual or hourly wage) but does not require the disclosure of available fringe benefits or bonuses. This applies to all advertisements and job postings intended to induce people to apply for a job, including third party job postings.

Employees also have a legal right to request information about their pay range, as well as the pay range for internal promotions or transfers when offered a new role. Pay transparency laws are also a new source of anti-retaliation protection, enhancing the existing protections around employees discussing their wages that are found in state laws and the National Labor Relations Act. Employees who engage in actions protected by their state transparency laws, including requesting pay range information, are protected from retaliation for exercising their pay transparency-related rights.

If employees are not being paid equally for comparable work, and the employer cannot justify the differential with an affirmative defense, the cost can be significant. An employer who violates the Massachusetts Equal Pay Act is generally liable for twice the amount of the unpaid wages owed to the affected employee—the difference between the employee's wages and the wages paid to an employee of a different gender performing comparable work—plus reasonable attorneys' fees and costs. For large employers or employers with substantial pay differentials, this liability can become very costly very quickly.

As employees acquire more means to uncover more broadly defined pay inequity, employers can protect themselves with a **pay equity audit**. In Massachusetts, a self-audit can provide employers in violation of the equal pay law with an affirmative defense if the audit was conducted within the last 3 years and the employer is working to eliminate gender-based wage differentials. An audit can also reveal other potential wage and hour violations, including failure to pay overtime or tips, misclassification of employees (either as independent contractors or as overtime exempt), inadequate timekeeping, and more. Beyond being a legal defense to unequal pay claims, self-audits are essential tools for identifying and resolving risky or illegal pay practices before they turn into costly litigation.

Why perform a pay equity audit now? The worst time to find out that your organization has engaged in unlawful pay practices is after a complaint has been filed. If you have not recently taken a look at your pay practices, **we can help!** We offer a variety of audits, including **equal pay audits**, to ensure that your organization is complying with applicable employment laws, mitigate risk, and protect your organization from the financial and reputational costs of inequitable pay practices.

Questions? Contact us.

We can help! Our **Employment Counsel On-Call Triage Service** is a perfect resource for employers of all sizes looking to receive guidance on employment law and HR-related questions. We work with clients day in, day out to help them navigate complex legal issues and implement best practices. We receive unique questions every day through the **On-Call Service** and are ready to tackle any issue where you need help!

Who We Are:

- We represent employers exclusively from coast to coast in all facets of employment law and litigation. Our mission is solving problems and anticipating issues so you can concentrate on your business.
- We are constantly searching for the trends and upcoming issues in the law that will impact our clients. We want our clients to be informed and ready. Our familiarity with the workplace and our approach sets us apart from other law firms, making us well equipped to handle your unique needs.
- We are not like other firms: Anyone can tell you what the law states and its limits. That is easy. We find creative solutions within those restrictions that move your business forward. We seek to minimize your risk so you can get back to business. Learn how we can help your business: **Foley & Foley PC attorneys specialize in Employment and Labor Law in the Public and Private Sectors (foleylawpractice.com).**

Contact Us



www.foleylawpractice.com

info@foleylawpractice.com

(844) 204-0505

Meet Gregory Paal

Greg has experience advising employers on regulatory compliance, contract matters and employment-related litigation. Greg has worked with employers both large and small to meet various challenges, including implementing overtime and leave policies, drafting employment agreements and privacy policies, and resolving discrimination complaints! For more info, check out his full bio **here!**

