Rhode Island's New Pay Equity Law Changes How Employers Must Compensate Their Workforce

Description

On July 6, 2021, Rhode Island Governor Daniel McKee signed Pay Equity legislation (the "Act") (H 5261A, S 0270A) into law. The Act is a broad piece of legislation that applies to *all* employers. While the Act does not go into effect until January 1, 2023, given the penalties and damages available under the Act, and the safe harbor for employers to eliminate those penalties and liabilities, employers should be familiar with the Act and the safe harbor and other requirements well in advance of the Act's effective date.

Pay Equity

The crux of the Act prohibits an employer from paying "wages" to any of its employees at a rate less than the rate it pays to employees of another "race, color, religion, sex, sexual orientation, gender identity or expression, disability, age (40 or over), or country of ancestral origin" ("Protected Class") for the performance of "comparable work" unless the employer can demonstrate that the wage differential is pursuant to one or more permissible justifications prescribed under the Act. The term "wages" includes nearly all forms of compensation, whether it be a fixed amount or an amount based upon a time, task, piece or commission basis, and it even includes employee benefits. However, the Act excludes under the definition of "wages" both tips and overtime pay.

The Act defines "comparable work" as work that requires "substantially similar skill, effort, and responsibility, and is performed under similar working conditions." Determining whether jobs are comparable will require an analysis of the jobs "as a whole" and "minor differences in skill, effort, or responsibility" will not prevent two jobs from being considered comparable.

If two workers are performing "comparable work", the Act provides only a limited set of reasons that may justify the employer paying the two workers differently:

1. A seniority system; provided that time spent on leave due to a pregnancy-related condition or parental, family and medical leave may not reduce seniority.
2. A merit system.
3. A system that measures earnings by quantity or quality of production.
4. Geographic location if the locations have different costs of living; but no location within Rhode Island can be considered to have a sufficiently different cost of living.
5. A reasonable shift differential that is not based upon or derived from an employee's Protected Class.
6. Education, training, or experience but only to the extent such factors are job-related and consistent with a business necessity.
7. Work-related travel if the travel is regular and a business necessity.
8. Any other "bona fide" factor that is not based upon an employee's Protected Class, which must be job-related with respect to the position in question and consistent with business necessity. However, this factor will not be valid if the employee can demonstrate that an alternative business practice exists that is not cost-prohibitive and would serve the same business purpose without producing the wage differential, and the employer has refused to adopt such alternative practice.

Additional constraints on the employer's ability to justify a wage differential are as follows:

- Employers that utilize a seniority system, merit system, and/or a system that measures earnings by quantity or quality of production must be able to demonstrate that these systems are "fair" and not a

"pretext" for unlawful wage differentials.
- Employers may not reduce the wages of any of its employees in order to comply with the Act.
- Employees' wage histories cannot on their own justify an otherwise unlawful wage differential.
- The Act prohibits employees from agreeing to be paid less than what they are entitled to under the Act.
- The Act also forbids employers from retaliating against an applicant or employee for opposing any practice made unlawful by the Act, for filing a charge or complaint under the Act, or for participating in an investigation into violations of the Act.

Consequences for Unlawful Wage Differentials

The consequences for violating the Act's prohibition against wage differentials are significant. Employees and former employees may file claims against employers for alleged violations of the Act with either the Rhode Island Department of Labor and Training ("RIDLT") or in court, and claim damages in the form of unpaid wages and/or benefits, compensatory damages, and liquidated damages in an amount up to two (2) times the amount of unpaid wages and/or benefits owed, as well as an award of appropriate equitable relief, including reinstatement of employment, fringe benefits and seniority rights, and reasonable attorney's fees and costs.

The Act places a unique procedural hurdle for individuals wishing to file complaints in that prior to filing a complaint, employees and former employees must provide employers with written notice of their intent to commence legal action at least forty-five (45) days prior to filing the complaint. Presumably, this pre-filing requirement is designed to give employers the opportunity to investigate their pay practices and the chance to resolve potential claims without intervention from the courts or the RIDLT.

In addition, an employer found to have violated the Act may face a civil penalty to be paid to the RIDLT ranging from $1,000 to $5,000 depending upon the amount of previous violations of the Act, if any. In determining the penalty amount, the RIDLT or the court is tasked to consider the size of the employer's business, the good faith of the employer, the gravity of the violation, the history of previous violations, and whether or not the violation was an innocent mistake or willful. The Act gives employers two (2) years of breathing room as no civil penalties can be assessed from January 1, 2023 to December 31, 2024.

Affirmative Defense or Safe Harbor

The Act provides an avenue for an employer to be completely absolved from liability against legal action for wage differentials where the employer can demonstrate that it conducted a "good faith self-evaluation" of its pay practices within the previous two (2) years and prior to commencement of the action, and if it can show that any unlawful wage differentials revealed by the self-evaluation were eliminated. To be eligible for this affirmative defense, the elimination of the wage differentials must occur within ninety (90) days from the completion of the self-evaluation.

An employer's self-evaluation may consist of the employer's own design or via a template to be issued by the RIDLT. Moreover, the scope and detail of the self-evaluation must reflect the exercise of "due diligence" by the employer to identify, prevent, and mitigate violations of the Act in light of the employer's size. In determining whether an employer exercises "due diligence," the factors courts and the RIDLT will consider include, but are not limited to: (i) whether the evaluation includes all relevant jobs and employees within those relevant jobs; (ii) whether the employer's analysis makes a reasonable effort to identify similar jobs and employees using a consistent, fact-based approach; (iii) whether the employer has tested explanatory factors for an unbiased and relevant relationship to pay; (iv) whether the evaluation takes into account all reasonably relevant and available information; and (v) whether the evaluation is reasonably sophisticated in its analysis of potentially comparable work, employee compensation, and the application of the permissible reasons for wage differentials under the Act. An employer's failure to retain the records necessary to show the manner in which it evaluated and applied these factors may give rise to an inference that the employer did not exercise due diligence in conducting its self-evaluation.

Interestingly, the Act places an expiration date on this affirmative defense—June 30, 2026. Thereafter, an employer that has conducted a good faith self-evaluation and eliminated any unlawful wage differentials will not

be liable for compensatory or liquidated damages or civil penalties, but it may still be liable for any amount of unpaid wages owed. To avoid all liability even after the June 30, 2026 expiration, the Act makes clear that employers that have conducted a good faith self-evaluation, eliminated any unlawful wage differentials, *and have compensated its employees for any unpaid wages owed under the Act* will have a complete affirmative defense to all liability.

Wage History and Wage Range

Section 22 of the Act prohibits employers from: (i) relying on the wage history of an applicant both when deciding whether to consider the applicant for employment as well as when determining what amount of wages to pay the applicant upon hire; (ii) requiring that an applicant's prior wages satisfy minimum or maximum criteria as a condition of employment; and (iii) seeking the wage history of an applicant. The Act defines "wage history" as the wages paid to an applicant for employment by the applicant's current employer and/or previous employer or employers, but it specifically excludes "any objective measure of the applicant's productivity, such as revenue, sales, or other production reports."

Despite Section 22's restrictions on the use of an applicant's wage history, Section 22 does allow employers to take into consideration an applicant's wage history after an initial offer of employment is made for the purposes of *increasing* the amount of wages initially offered to the applicant if the wage history is voluntarily provided by the applicant without prompting from the employer.

Finally, Section 22 imposes a new obligation upon employers to provide the "wage range" of a position to an applicant for the position being sought upon the applicant's request and to provide the same to an employee for a current position upon request. The Act defines "wage range" as "the wage range that the employer anticipates relying on in setting wages for the position" and it may include reference to any applicable pay scale, previously determined range of wages for the position, the actual range of wages for those currently holding equivalent positions, or the budgeted amount for the position, if any. In addition, even without a request, employers must provide wage ranges to employees both at the time of hire and when employees move into a new position. Section 22 permits the RIDLT to publicize additional guidance to assist employers in determining what information must be provided as part of a position's "wage range."

Employers are prohibited from refusing to interview, hire, promote, or employ applicants for employment or employees and may not retaliate against them because they requested the wage range for a position. Employers that violate Section 22 will be liable for any compensatory damages not to exceed $10,000, appropriate equitable relief, and reasonable attorneys' fees and costs.

Notice and Additional Guidance

Employers are required to post a notice containing excerpts and other information about the Act for employees. The RIDLT is required to develop the form of notice and has not indicated a timeframe as to when the notice is expected to be approved.
The RIDLT has also been tasked with developing a set of Regulations that should further define and explain the requirements of the Act, and in particular the safe harbor provisions.

Enforcement

The Act provides the RIDLT with broad authority to carry out and enforce its provisions. Moreover, applicants, employees, and former employees may file complaints either with the RIDLT or in court to seek relief for employers' alleged violations of the Act for which they may be awarded the damages discussed above. All claims filed under the Act must be filed within two (2) years of when the claimant knew of, or "should have known of," the employer's violation of the Act. However, claims may be made within three (3) years if claimants file a sworn complaint demonstrating facts that establish a "willful and wanton" violation of the Act.

Employers should begin taking the necessary action to comply with the Act. The Employment & Labor Practice Group at Partridge Snow & Hahn is fully updated on this and other related issues and are available to answerto your questions.

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