

RHODE ISLAND'S NEW WAGE LAW — ARE YOU READY?

Beginning on New Year's Day 2023, Rhode Island employers will be subject to a new and sweeping law designed to promote pay equity and fairness in the workplace. This new pay equity law will have major implications on Rhode Island businesses and expose employers to substantial liability even where employers mistakenly or innocently violate the law's requirements. The Rhode Island General Assembly passed this new regulatory scheme in 2021 and gave employers two years to get ready for it. Therefore, ignorance of the law will provide no excuse or defense for any employers who violate it.

Expanded Protections Based Upon Employee Characteristics

So, what does this new law require? The law has many components and details, but several critical highlights are worth mentioning here. Its primary goals are to provide employees with more rights and protections relating to their wages, how those wages are set, and preventing discrimination on the basis of protected characteristics. Historically, pay equity laws have been drafted in such a way as to ensure that employees were not treated unfairly based upon their sex (i.e., to close the so-called "gender pay gap").

However, Rhode Island's new law greatly expands the class of workers to include protections from wage discrimination on the basis of race, color, religion, sex, sexual orientation, gender identity or expression, disability, age, or country of ancestral origin.

Wage Transparency

Another major theme of the new law is transparency. The law prohibits employers from restricting an employee from "inquiring about, discussing, or disclosing" the employee's (or another employee's) wages or retaliating against any employee who engages in this activity. This provision is intended to permit employees to be able to freely discuss their wages with their co-employees and to prevent employers from retaliating against them for this protected activity. Another major right grants job applicants the ability to obtain wage range data (upon request) from employers for an open position. This wage range can be based upon the employer's pay scale, previously determined wage ranges for that particular position, current wage ranges for the position, or how much the employer has budgeted for the position. Employers should start giving some careful thought on how they will answer these inquiries, knowing that once they disclose the wage ranges to an applicant, the "bidding" will likely be set at or near the higher end of the wage range disclosed to the applicants.



Wage Differentials Still Permitted

This does not mean, of course, that employers must pay all of their workers equally. The new law permits wage differentials based upon non-discriminatory factors such as seniority, merit, productivity, geography, education, experience, training, travel requirements, shift differentials, and other defensible reasons for the wage differential. However, employers will need to demonstrate through objective evidence that such pay differentials were truly based on one or more of these factors, and not on any of the law's protected characteristics. And, not surprisingly, if an employer discovers that its current pay structure violates the law, it cannot remedy it by reducing other employees' wages to equalize the illegal pay differential.

Wage and Salary Histories

The new law prevents employers from seeking or relying upon a job applicant's wage or salary in either deciding whether to hire the applicant or in setting the applicant's pay, if hired. However, if an employer makes an initial offer to an applicant, the employer may rely on the applicant's wage history to support or justify a higher wage for the new employee, but only if the applicant volunteers that information without prompting by the employer. Also, nothing in this law materially changes the rules about conducting background checks on applicants, so long as such checks do not seek wage or salary history.

Employer Self-Evaluations – Safe Harbor Provision

Recognizing that this new law drastically changes how employers conduct their hiring and wage-setting practices, the General Assembly wisely created a "safe harbor" provision in the new law. From January 1, 2023 through June 30, 2026, employers may conduct a good-faith and "reasonably sophisticated" self-evaluation of their pay practices to confirm or demonstrate that any unlawful wage differentials uncovered by that analysis have been eliminated. If so, then employers will enjoy certain immunities from liability under the law. But, if the employer's self-evaluation reveals unlawful discrepancies in its pay practices, it must remedy those discrepancies within 90 days.

Employers may conduct this self-evaluation themselves, through one of the many outside consultants offering these services, or by using a form that may be provided by the Rhode Island Department of Labor and Training. However, note that these self-evaluations are completely voluntary and that no adverse inference may be drawn against any employer who has not conducted such an exercise.

Regulations and Posting Requirements

The law delegates enforcement of the new law to the Department of Labor and Training (DLT). The DLT is currently finalizing regulations that will provide further guidance and clarity to employers. The DLT is also expected to issue a form poster or notice that employers may post in their workplaces to comply with the new law's requirement that employers post information sufficient to advise employees of their rights under it. Failing to do so will subject employers to fines ranging from \$100 to \$500. Employers should continue to check the DLT's website this summer and fall for these final regulations and posting information.

Recommendations

Because this new law will impact how employers recruit and hire employees, as well as impose substantial penalties and legal risk for violations, now is the time to start preparing. Waiting until December to start thinking about these new requirements will be too late. Because this article does not identify every specific detail required by the new law, employers should begin to familiarize themselves with the law's requirements, consult with counsel to ensure that they understand the law and applicable regulations, review their internal hiring and compensation policies, make any necessary adjustments to those practices, and train management on how to comply with the new law. Employers and managers need to understand that the old way of hiring and setting wages will be drastically changed by this new scheme, and they should assume that applicants and employees will be well-versed in the law's protections.

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