

# PUBLICATION

---

## Three Pay Equity Trends to Watch in 2018

Authors: Nakimuli O. Davis-Primer

February 01, 2018

**Closing the pay gap between men and women is not only a target in the EEOC's Strategic Enforcement Plan, it is also a priority for state legislators. Indeed, 2017 ended with a rise in state pay disparity legislation that revealed notable trends for 2018. Employers should remain up-to-date on pay disparity laws not only on a federal level, but also on state and local levels.**

President John Kennedy signed the Equal Pay Act (EPA) into law in 1963 explaining that the Act "prohibits arbitrary discrimination against women in the payment of wages." More than 50 years later, the pay gap persists and has become a public issue. In 2017, state legislators in upwards of 40 jurisdictions introduced approximately 100 bills that related to equal pay. While not all of the bills were passed or ultimately became law, there are some notable trends.

One notable trend is that states are seeking to prohibit employer inquiries of or reliance on a candidate's prior salary during the hiring process and/or to set the candidate's salary. At least four states – California, Delaware, Maine, and Oregon – have banned an employer's ability to ask about or otherwise consider a candidate's pay history when setting a candidate's salary. Puerto Rico, New Orleans (for public employees), New York City, Philadelphia, Pittsburgh (for city employees), and San Francisco also have salary history bans; similar laws are pending in more than ten other states. Although states are moving toward banning use of salary histories, the federal EPA and a number of courts evaluating the same issue have held that prior salary is a "factor other than sex" that an employer may rely upon to support a pay differential. In fact, on November 30, 2017, the Seventh Circuit (Illinois, Indiana and Wisconsin), in *Lauderdale v. Ill. Dep't of Human Servs.*, No. 16-3830, affirmed summary judgment in favor of an employer who relied on prior salary finding that such reliance was allowed as long as it was not a product of bias. The Ninth Circuit (Alaska, Arizona, California and Hawaii) has similarly held that prior salary is a legitimate factor of consideration "other than sex," the issue was reargued on a December 12, 2017 en banc oral argument in *Rizo v. Yovino*, No. 16-15372 so it is left to be seen whether the Ninth Circuit will maintain their prior ruling. Absent state legislation to the contrary, it appears that utilization of salary histories is still legal in most states but this is certainly a trend to watch.

A second notable trend is that some states are more broadly defining the equal pay standard. The EPA requires employers to pay employees "equal pay for equal work," meaning pay equity for "substantially similar" jobs (similar in skill, effort, responsibility, working conditions, same establishment etc.). However, states have proposed legislation to require equal pay for "comparable work," Mass. Gen. Laws Ch. 149 § 105, "substantially similar work," Cal. Lab. Code § 1197.5, and "work of a comparable character." Or. Rev. Stat. § 652.220. These states are similarly broadening the geographical restriction to allow comparisons of employee salaries who work in different locations. More specifically, the EPA requires that men and women be given equal pay for equal work in the same establishment. New York, however, permits comparison in the "same geographic region" and Maryland within "the same county."

A third notable trend is that several states are also including pay transparency provisions that would allow employees to openly discuss wages, and defenses under recent legislation varies. For example, Oregon has no "catch-all" defense; California and New York require proof of a bona fide factor other than sex like education, training or experience; and some states have expanded defenses for employers who self-audit.

Because of the differences in each state or local law, it is important that employers remain vigilant to ensure compliance not only with the federal law but also with state and local laws. Employers should contact their counsel to ensure compliance in each state they have employees. Employers should also consider pay audits, pay scales, and updating compensation policies where appropriate because the trend for pay equity legislation is only gaining traction.