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Maryland Strengthens Protections and Adds Pay Transparency Provisions Under Its Equal Pay Law [Ober|Kaler]

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Proposals for equal-pay legislation that purport to address the core causes of wage disparities, including secrecy surrounding wages, and deter employers from paying unequal wages are on the rise across the country. Maryland has joined the short list of states strengthening equal pay protections for employees. On May 19, 2016, Governor Hogan signed the Equal Pay for Equal Work Act (“the Act”) into law amending Maryland’s existing equal pay law in two significant ways: (1) it expands and strengthens prohibitions on discriminatory pay practices, and (2) it adds pay transparency protections broader than those found under the National Labor Relations Act (“NLRA”).

Although not discussed in detail below, the Governor also signed a bill into law creating an [Equal Pay Commission](#) to among other things, “continually evaluate the extent of wage disparities based on race, sex, or gender identity and to “establish a mechanism to collect data from employers” to assist the Equal Pay Commission to evaluate wage disparities. The EEOC has recently undertaken a similar effort to add aggregate data on pay ranges and hours worked to the EEO-1 information collected, beginning with the September 2017 report. The proposed changes were published in the [Federal Register](#) on February 1, 2016.

The Act, which is effective on October 1, 2016, expands protections for employees in the following ways:

Expanded Protections for Employees against Discriminatory Pay Practices

- **Add protections on the basis of gender identity.** In addition to the protected category of “sex,” the Act expressly provides that employers may not discriminate against employees in their pay practices because of an employee’s “gender identity.” Maryland’s Fair Employment Practices Act (“FEPA”) also expressly covers “gender identity,” and the Act adopts the meaning of “gender identity” in the FEPA.
- **Broadens the definition of “same establishment.”** Rather than looking at the location at which the employee works to determine whether a pay disparity exists, all of an employer’s locations within the same county will now constitute the “same establishment” for purposes of determining if the employer discriminated against an employee in pay.
- **Expands the definition of “employer.”** Along with any “person engaged in business,” the State, the counties, and municipal governments, the Act defines “employer” to include “a person who acts directly or indirectly in the interest of another employer with an employee.” This may encompass, for example, a recruiting firm and/or temporary agency that acts “in the interest” of an employer.
- **Prohibits employers from discriminating by providing “less favorable employment opportunities” based on gender identity or sex.** Under the Act, an employer may not:
 - Assign or direct an employee into a less favorable career track, if career tracks are offered;
 - Fail to provide information about promotions or advancement in the full range of career tracks that an employer offers; or
 - Limit or deprive an employee of opportunities that would otherwise be available but for the employee’s sex or gender identity.

The Act also expands the exceptions that might account for differences in wages. Current law provides that if a pay disparity exists because of a seniority system, a merit increase system, shift differentials, or jobs that require different skills and/or abilities, that disparity may not constitute a violation of the law. The Act adds the following exceptions:

- a system that measures performance based on quality or quantity of production, or
- a bona fide factor other than sex or gender identity, including education, training, or experience, provided that the factor is not:
 - based on or derived from a gender-based differential in compensation,
 - is job-related with respect to the positions and consistent with business necessity, *and*
 - the factor accounts for the entire differential in pay.

New Pay Transparency Protections

If decisions by the National Labor Relations Board have not convinced Maryland employers that employees' discussions about wages constitute protected activity, the Act removes any doubt. The Act is broader than the NLRA because it protects *all* employees, not just those employees who are supervisors as defined by the NLRA. Similarly, federal contractors must comply with the [Pay Transparency Order](#), which was effective on January 11, 2016. Like the Act, the Pay Transparency Order protects all employees.

The Act makes it unlawful for an employer to:

- prohibit an employee from inquiring about, discussing, or disclosing his or her wages, *or the wages of another employee*,
- prohibit an employee from asking the employer to provide a reason for why his or her wages are set at a certain rate or salary,
- require an employee to sign a waiver or other document that denies the employee the right to disclose or discuss his or her wages (obviously this encompasses employers' policies and handbooks), or
- take an adverse action against an employee for:
 - inquiring about another employee's wages,
 - disclosing the employee's own wages,
 - discussing another employees' wages if those wages have been disclosed voluntarily,
 - asking an employer to provide a reason for the employee's wages, or
 - aiding or encouraging another employee to exercise his or her rights under the Act.

The Act allows employers, however, to establish a written policy governing reasonable limits on the time, place and manner for discussions about wages and, an employer may discipline an employee for violating that policy. For example, an employer could lawfully institute a policy that limits employee discussions of wages to off-duty hours.

Additionally, the pay transparency provisions of the Act do not apply to employees who have access to wage data as a part of his or her job function – but if, and only if, the employee obtained the wage data as part of the employee's job function – and not from a discussion with co-workers about their wages. The difference may be hard to discern and, thus, employers should tread carefully with respect to this “job-related” exemption from the Act's protections.

Enhancements to Damages and Remedies

An employer will be found liable for a violation of the Act if the employer “knew or reasonably should have known” that its actions violated the law. The Act also:

- ***Gives employees more time to file a claim.*** Employees will now have three years from the date on which they receive their final paycheck following termination to file a claim, rather than three from the date on which the alleged discriminatory act took place.
- ***Injunctive relief, actual and liquidated damages.*** Violations of the Act will subject employers to injunctive relief as well as actual and liquidated damages for differences in wages that are based on sex or gender identity.

Further, the Act requires the Maryland Department of Labor, Licensing and Regulation, in consultation with the Maryland Commission on Civil Rights, to develop educational materials and make training available to assist employers with compliance with the Act.

To ensure compliance with the Act, employers should review and revise policies, handbooks, and practices as necessary to comply with the pay transparency provisions of the Act. Employers should also consider an audit of pay practices and wages within the “same establishment” to assess whether any unexplainable pay disparities based on sex and/or gender identity exist and consider correcting those unexplainable disparities.