Oregon Pay Equity Law – Final Rules. Now What?
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*Our summary of the final rules implementing Oregon’s new Pay Equity Law is not meant to serve as, or replace, legal counsel review and recommendation for personal company implementation of the law.
Pay Equity Law 101

- The new law applies to EVERYONE
  - Private Employers
  - Public Employers
  - Regardless of number of employees - 1 or more
  - Including non-profits and employees covered by a CBA

- Three Major Components of the Law:
  1. Prohibition on asking for prior salary history
     - Effective Oct. 6, 2017 (Private Right of Action Effective January 1, 2024)
  2. Prohibition on considering/screening new hires based on prior salary history
     - Effective January 1, 2019 - Enforcement January 1, 2019
  3. Prohibition on paying employees for work of comparable character at different levels based on discriminatory pay practices
     - Effective January 1, 2019 - Enforcement January 1, 2019

Summary provided as a courtesy to clients of Dalton Advocacy, Inc.
Salary History of Prospective/Current Employees

- ORS 652.220 makes it an unlawful employment practice to:
  - Seek prior salary history of employees or prospective employees OAR 839-008-0005(1)
  - Screen job applicants based on current or past compensation
    - “to screen job applicants based on current or past compensation” includes using information, however obtained, about a job applicant’s current or past compensation to determine a job applicant’s suitability or eligibility for employment.” OAR 839-008-0005(2)
  - Determine compensation based on current or past compensation of a new employee

- Existing Employees
  - The law allows you to consider the compensation of a current employee when promoting or moving to a new position, but you can’t screen for that promotion based on current salary.

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It is an unlawful employment practice under ORS chapter 659A for an employer to:

- In any manner discriminate between employees on the basis of a protected class in the payment of wages or other compensation for work of comparable character.

- Compensation includes: wages, salary, bonuses, benefits, fringe benefits and equity-based compensation. (b) Compensation does not include tips or reimbursement for any actual costs incurred including, but not limited to, relocation reimbursements, mileage, and out-of-pocket expenses. 839-008-0000(3)(a)

- Benefits includes everything from pension, retirement, insurance, unemployment benefits to life insurance, sick leave, vacation or holiday pay. 839-008-0000(1)
  - Same benefits “offered” not necessarily accepted. See OAR 839-008-0020

- Bonus includes: attendance, retention, performance and productivity bonuses. 839-008-0000(2)
Key Terms

Employee Means: 839-008-0000(4)
- All employees working in Oregon
- Does not include independent contractors

Protected class means:
- A group of persons distinguished by race, color, religion, sex, sexual orientation, national origin, marital status, veteran status, disability or age. 839-008-0000(9)
  - Sexual orientation: means an individual’s actual or perceived heterosexuality, homosexuality, bisexuality or gender identity, regardless of whether the individual’s gender identity, appearance, expression or behavior differs from that traditionally associated with the individual’s sex at birth. 839-008-0000(12)
  - See veteran definition at ORS 408.225: https://www.oregonlaws.org/ors/408.225

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What does it mean?

- The law doesn’t require equal pay - it prohibits discriminatory pay practices linked to the 10 protected classes

- What could be deemed discriminatory pay practices?
  - Different compensation levels for “work of comparable work” that is not based on a “bona fide factor”
What is Allowed Under the Law?

- The law states: “An employer may pay employees for work of comparable character at different compensation levels if all of the difference in compensation levels is based on a bona fide factor that is related to the position in question and is based on one of 8 factors that are further defined in the rules. ORS 652.220(2)
  - “Work of comparable character” means work that requires substantially similar knowledge, skill, effort, responsibility and working conditions in the performance of work, regardless of job description or job title. 839-008-0000(17)
    - Working conditions includes work environment, hours, time of day, physical surroundings and potential hazards encountered by an employee. OAR 839-008-0000(16)
“Work of comparable character” includes substantially similar knowledge, skill, effort, responsibility and working conditions. All of these terms are further defined in OAR 839-008-0010:

- **Knowledge**
  - May include, but not limited to: Certifications, Licenses, Certificates; Education; Experience; or Training.

- **Skill**
  - May include, but not limited to: Ability; Agility; Coordination; Creativity; Efficiency; Experience or Precision

- **Effort**
  - May include, but not limited to: Amount of physical or mental exertion needed; Amount of sustained activity; Complexity of job tasks performed.
Criteria for Evaluating Work of Comparable Factors

“Work of comparable character” includes substantially similar knowledge, skill, effort, responsibility and working conditions. All of these terms are further defined in OAR 839-008-0010:

- Responsibility
  - May include, but not limited to: Responsibility considerations may include, but are not limited to, the following: Accountability, decision-making discretion or impact of an employee’s exercise of their job functions on the employer’s business; Amount, level or degree of significance of job tasks; Autonomy or extent to which the employee works without supervision; Extent to which the employee exercises supervisory functions; or Extent to which an employee’s work or actions expose an employer to risk or liability.

- Working Conditions
  - Include the following: Work environment; Hours, which may include, but are not limited to, the following considerations: Alternative scheduling such as split shifts; Level of busyness during hours of work; Limited duration assignments; Number of hours; Overtime hours; or Part-time or full-time work. Time of day, which may include, but is not limited to, the consideration of shift differentials related to the day of the week or time of day work shifts are scheduled; Physical surroundings, which may include, but are not limited to, the following considerations: Air quality; Distractions; Dust; Exposure to weather; Isolation; Lighting; Noise; Physical design or layout of workspace; Temperature; Ventilation; or Wetness. Potential hazards, which may include, but are not limited to, the following considerations: Degree or severity of potential injury; Frequency of exposure; Intensity; Physical hazards; Risk of injury; or Toxicity.

Note no single factor will be determinative.

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Bona Fide Factors for Compensation Differentials

- The law states: “An employer may pay employees for work of comparable character at different compensation levels if all of the difference in compensation levels is based on a bona fide factor that is related to the position in question and is based on one of 8 factors that are further defined in the rules. ORS 652.220(2)

- An employer may pay at different compensation levels for work of comparable character if based on one or ANY combination of the bona fide factors - as long as the combination accounts for the entire compensation differential. ORS 652.220(2)(i)
ORS 652.220(2)(a)-(h) provides the following 8 bona fide factors:

- A seniority system
- A merit system
- A system that measures earnings by quantity or quality of production, including piece-rate work
- Workplace locations;
- Travel, if travel is necessary and regular for the employee
- Education
- Training
- Experience

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Bona Fide Factors Defined

- OAR 839-008-0015(1)(a)-(h) provides helpful direction on each of the 8 bona fide factors.

- An employer may rely on any combination of the 8 factors, as long as the combination of those factors accounts for the entire compensation differential. OAR 839-008-0015(i)

- The rules define “system” as it relates to seniority system, merit system, piece rate system:
  - “system” means a devised coherent, consistent, verifiable and reasonable method that was in use at the time of the alleged violation to identify, measure and apply appropriate variables in an orderly, logical and effective manner. OAR 839-008-0015(2)

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Bona Fide Factors - Defined in 839-008-0015

- A seniority system
  - A seniority system that recognizes and compensates employees based on length of service with the employer.

- A merit system
  - A merit system that provides for variations in pay based upon employee performance as measured through job-related criteria, for example, a written performance evaluation plan or policy that measures employee performance using a set numerical or other established rating scale, such as from “unsatisfactory” to “exceeds expectations,” and takes employees’ ratings into account in determining employee pay rates.

- A system that measures earnings by quantity or quality of production, including piece-rate work

- Workplace locations
  - May include, but are not limited to: Cost of living; Desirability of worksite location; Access to worksite location; Minimum wage zones; or Wage and hour zones.

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Bona Fide Factors - Defined in 839-008-0015

- Travel, if travel is necessary and regular for the employee
- Education
  - May include, but not limited to: substantive knowledge acquired through relevant coursework, as well as any completed certificate or degree program
- Training
  - May include, but not limited to: on-the-job training acquired in current or past positions as well as training acquired through a formal training program
- Experience
  - May include, but not limited to: any relevant experience that may be applied to the particular job
How will the law be enforced?

- BOLI Complaint
  - An employee may file a complaint with the Commissioner of the Bureau of Labor & Industries
- Private Right of Action
  - Or pursue a lawsuit

Each pay check serves as a new violation of the unlawful compensation practice. OAR 839-008-0035
  - AND for the purposes of the statute of limitations, a new violation resets the time limitation ORS 652.230(5)

Statute of Limitations: ORS 652.230(6)-(7)
  - Private Employees: 1-year after the occurrence of the unlawful practice
  - Public Employees: Within 300 days of discovery of the alleged loss or injury

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How much is the penalty?

- **BOLI Complaint Process:**
  - If a violation is found, an employer will be ordered to pay back pay - the **lesser** of:
    - The two-year period immediately preceding the filing of the complaint, plus the period of time commencing with the date on which the complaint is filed and ending on the date on which the commissioner issued the order; or
    - The period of time the complainant was subject to an unlawful wage differential by the employer plus the period of time commencing with the date on which the complaint is filed and ending on the date on which the commissioner issued the order. ORS 659A.870(4).
How much is the penalty?

- **Private Right of Action**
  - If a violation is found, the Court may award injunctive relief and any other equitable relief that may be appropriate, including back pay, as well as compensatory and punitive damages. ORS 659A.885(4)-(5).

- Punitive damages are limited to a finding that:
  - By clear and convincing evidence an employer has engaged in fraud, acted with malice or acted with willful and wanton misconduct; or
  - An employer was previously adjudicated in a proceeding under this section or under ORS 659A.850 for a violation of ORS 652.220. See ORS 659A.885(4)

**UNLESS…**

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Equal Pay Analysis

- If an employer performs an Equal Pay Analysis it:
  - Serves as a bar to compensatory and punitive damages
  - And limits the award to 2-years of back pay and reasonable attorney fees
  - See ORS 652.210, Section 12(1)

- “Equal-pay analysis” means an evaluation process to assess and correct wage disparities among employees who perform work of comparable character. OAR 839-008-0000(6)

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The Equal Pay Analysis will be reviewed by a court based on a preponderance of the evidence that shows:

- The employer completed the analysis within 3-years before the date that the employee filed the action
- The equal pay analysis of the employer’s pay practices was in good faith and:
  - Reasonable in detail and in scope in light of the size of the employer; and
  - Related to the protected class asserted by the plaintiff in the action; and
  - Eliminated the wage differentials for the plaintiff and has made reasonable and substantial progress toward eliminating wage differentials for the protected class asserted by the plaintiff.
How Do I Comply With New Law?

- Employers are prohibited from reducing the compensation levels of employees to comply with the law. ORS 652.220(4); OAR 839-008-0025
  - Red circling, freezing or otherwise holding an employee's compensation constant as others come into alignment is allowed and is not considered a reduction in compensation levels. OAR 839-008-0025.

- Employers are not required to perform an Equal Pay Analysis

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Required Posting & Notice

- BOLI will provide a template that satisfies the notice requirements of the law
  - Not yet available (11/20/18)
  - Required to post January 1, 2019
- The poster is required to be displayed in every establishment where employees work
- If displaying the poster is not feasible:
  - An employer may distribute notice in writing via mail or email or with a paycheck;
  - Incorporate into a handbook or manual

See OAR 839-008-0030

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Helpful Links

- BOLI FAQ: Ch. 197 - Pay Equity Law
  - [https://www.oregon.gov/boli/TA/Pages/FactSheetsFAQs/PayEquity.aspx](https://www.oregon.gov/boli/TA/Pages/FactSheetsFAQs/PayEquity.aspx)

- Ch. 197 - Pay Equity Law

- Final Rules:

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