

Maryland Legislature Pursues Changes to Equal Pay Law

By Hope Eastman

In the waning days of the legislative session, the Maryland Legislature enacted legislation addressing gender identity and making significant changes in the way employers will have to prove that pay differences are not discriminatory. The bill is awaiting signature by the Governor. He has not taken a position on the law and has given no indication thus far as to whether he will sign the bill. If he does, it will be effective on October 1, 2016.

Advice for employers: Because the equal pay provisions are embedded in a bill to protect against discrimination in pay and opportunities based on gender identity and the Governor has allowed other bills on gender identity to become law following this session, he may well let this one become law. Employers will need to take a strong look at their pay practices because it will become much more difficult to defend differences based on gender (including gender identity). If employers haven't done so already, they need to remove policies that try to impose secrecy on wage discussions.

Maryland will join Montgomery County, Howard County, Baltimore County and Baltimore City in providing protections against discrimination based on gender identity. Although it is not the focus of this blog, Maryland employers will need to think about how to address the bathroom issues about which so much has been written.

The proposed law also makes it unlawful for an employer to prohibit an employee from asking about, discussing or disclosing his or her own wages or that of another employee or asking for a reason for the amount of his or her wages and prohibits retaliation against employees who do these things. This is already prohibited by the NLRB and for government contractors by Executive Order. Employers can have reasonable workday limits on time, place and manner for discussions of wages. They need to be in writing.

It is in the equal pay provisions where the most difficulties for employers will be seen. Two provisions are the most problematic.

- Under Maryland's existing equal pay law (which this proposed law amends), establishment was understood to be a single location or locations in very close proximity to each other. Under the proposed law, all employer facilities in a single county are treated as a single establishment, making it impossible to respond to differences in market salaries in different areas of the county, no matter how much the market differs from one part of the county to another.
- Under existing Maryland law, employers who can show that pay disparities are a result of seniority, merit, skill and ability, duties, or shift or time differentials may defeat a claim for equal pay. The proposed new law adds another provision which allows the employer to rely on another bona fide factor, including education, training or experience, but only if it is not based on or derived from a gender-based differential in compensation, is job related with respect to the position and consistent with business necessity (these situations are not always easy to establish) and ACCOUNTS FOR THE ENTIRE DIFFERENTIAL. Labor economists who regularly do pay equity analyses will tell you that it is 100% impossible to account for the entire differential even with the most sophisticated regression analyses.
- When the bill was amended before passage, the introduction originally discussed remedies for employees who do work "of a comparable character or the same type of work." Before passage, the phrase "who do work of a comparable nature" was stricken. However, in what may have been careless drafting, the phrase "comparable work" in the original Equal Pay Act was not stricken. This leaves some confusion as to the type of work that can be compared in making a discrimination claim.

For now, employers need to await the Governor's decision and be thinking about how to approach their existing pay practices.

