THE OREGON PAY EQUITY ACT IS HERE

by
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When Congress passed the Equal Pay Act of 1963, it did so to "insure, where men and women are doing the same job under the same working conditions that they will receive the same pay." Fifty-five years later, we are still not there. The ACS Census estimates that for 2018 the gender wage gap is 80 cents. That is, women earn 80 cents for each dollar men earn. According the National Women's Law Center, women in Oregon earn 79.3 cents for every dollar earned by men. In the last few years, numerous states have passed equal pay laws designed to correct for the shortcomings of federal law. With a few exceptions, enforcement of Oregon's latest effort at pay equality, the Oregon Pay Equity Act of 2017 (OPEA), begins January 1, 2019. In this Article we anticipate legal issues that will arise from the OPEA's enforcement, raise uncertainties and address the proposed regulations issued by the Oregon Bureau of Labor and Industries. We pay particular attention to complexities involved in conducting pay equity analyses that will prove sufficient for employers to enjoy the OPEA's "safe harbor" provision. In the end, we conclude that the OPEA is a welcome step toward pay equity for the incentives it creates for employers to voluntarily investigate wage structures within their workplaces.

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INTRODUCTION

When Congress passed the Equal Pay Act of 1963,[1] it did so to "insure, where men and women are doing the same job under the same working conditions that they will receive the same pay."[2] An amendment to the Fair Labor Standards Act, the Equal Pay Act of 1963 (EPA) "provides that employers may not pay unequal wages to men and women who perform jobs that require substantially equal skill, effort and responsibility, and that are performed under similar working conditions within the same establishment."[3]

Fifty-five years later, we are still not there. The American Community Survey Census estimates that for 2018 the gender wage gap is 80 cents. That is, women earn 80 cents for each dollar men earn.[4] According the National Women's Law Center, women in Oregon earn 79.3 cents for every dollar earned by men.[5] The National Committee on Pay Equity created "Equal Pay Day" in 1996 to create public awareness of the gap between women's and men's wages. Equal Pay Day is the date the typical woman must work into the new year to make what the typical man made at the end of the previous year. Last year (2017), Equal Pay Day was April 10, 2018.[6] This year (2018) it is April 2, 2019.[7]

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[1] 29 U.S.C. § 206(d) (2012).

[2] H.R. REC. No. 88-109, pt.7, at 9196 (1963).

[3] *Facts About Equal Pay and Compensation Discrimination*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc/publications/fs-epa.cfm (last visited Nov. 1, 2018).

[4] *Equal Pay & The Wage Gap*, NAT'L WOMEN'S L. CENTER, https://nwlc.org/issue/equal-pay-and-the-wage-gap/.

[5] *Oregon–NWLC*, NAT'L WOMEN'S L. CENTER, https://nwlc.org/state/oregon/.

[6] *Equal Pay Day 2018*, EQUALPAYDAY.ORG, http://www.equalpaytoday.org/equal-pay-day-2018.

[7] *Equal Pay Day 2019,* NAT'L COMMITTEE ON PAY EQUITY, https://www.pay-equity.org/day.html.

But the "gender pay" gap is not the same thing as the "unequal pay" gap; only the latter is exclusively concerned with unequal pay resulting from protected class discrimination. By contrast, "traditional" factors other than discrimination which likely contribute to the gender pay gap include: labor force participation, education, experience and work hours, gender differences in formal training and turnover, motherhood, and locational factors like occupation and industry.[8] We add to this list structural gender discrimination not currently remediable under federal, state, or local law.[9]

A conspicuous debate regarding gender difference in pay is worth mentioning before getting on to business. The debate concerns the extent to which gender pay differences are justified based on individual "choices" such as motherhood and care-giving.[10] While this debate falls outside the scope of this paper, we note the issue can usefully be framed differently, in terms of whether the traditional workplace can be restructured to accommodate such choices without great cost to employers—for the sake of pay equality.

Harvard economist Claudia Goldin has argued that "[t]he gender gap in hourly compensation would vanish if long, inflexible work days and weeks weren't profitable to employers—that is, if firms did not have a financial incentive to pay employees working 80 hours a week more than twice what they would receive for 40-hour weeks."[11] In Goldin's view,

> The solution [to gender equality in pay] does not have to involve government intervention and it does not depend on the improvement of women's bargaining skills or heightened will to compete. Nor must men become more responsible in the home (although that would greatly help).
>
> What is needed are changes in how jobs are structured and remunerated, enhancing the flexibility of work schedules. *To succeed, the changes must decrease employers' costs in substituting the hours of one worker for another.* Firms that have family-friendly policies—and there are many of them—are moving in the right direction. But if those policies are accompanied by decreases in women's average hourly pay and dimmer prospects for promotion because the

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[8] Francine D. Blau & Lawrence M. Kahn, *The Gender Wage Gap: Extent, Trends, and Explanations* 29 (Nat'l Bureau of Econ. Research, Working Paper No. 21913, 2016), http://www.nber.org/papers/w21913 ("To the extent that gender differences in outcomes are not fully accounted for by productivity differences due to gender differences in human capital and other supply-sides sources, models of labor market discrimination offer an explanation.").

[9] *See, e.g.*, Tristin K. Keen, *Work Culture and Discrimination*, 93 CAL. L. REV. 623, 644–50 (2005).

[10] *See, e.g.*, Shelley J. Correll et. al., *Getting a Job: Is Motherhood a Penalty?*, 112 AM. J. SOC. 1297, 1297–1338 (2007).

[11] Claudia Goldin, *How to Achieve Gender Equality in Pay*, MILKEN INST. REV. 24, 26 (2015), http://www.milkenreview.org/articles/how-to-achieve-gender-equality-in-pay?IssueID=9.

> cost of accommodating flexible hours remains high, they will only reinforce gender differences in the workplace.[12]

Food for thought: in the last few years, numerous states have passed or proposed equal pay laws designed to correct for the shortcomings of federal law.[13] With a few exceptions, enforcement of Oregon's latest effort at pay equality, the Oregon Pay Equity Act of 2017 (OPEA), begins January 1, 2019.[14] In this Article, we anticipate legal issues that will arise from the OPEA's enforcement, raise uncertainties, and recommend some best practices until the Oregon Bureau of Labor and Industries (BOLI) issues regulations.[15] Part I briefly introduces the Federal EPA in order to contrast it with the new OPEA. Part II summarizes the new OPEA. Part III raises concerns and identifies gaps in the new OPEA. Part IV recommends that employers perform a compensation practices self-evaluation and take other immediate steps to defend against claims that could be filed against them in just a few months.

I. THE FEDERAL EPA IN BRIEF[16]

A *prima facie* case under the Federal EPA requires a plaintiff to show that: (1) the employer pays different wages[17] to employees of the opposite sex; (2) the employees perform equal work on jobs requiring "equal skill, effort and responsibility;" and (3) the jobs are performed in similar working conditions.[18] Under the EPA, as compared with Title VII for example, a plaintiff need not establish that the employer

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[12] *Id.* (emphasis added).

[13] *See, e.g.*, CAL. LAB. CODE § 1197.5 (West 2018); S. 481, 436th Sess. (Md. 2016); MASS. GEN. LAWS ch. 149, § 105A(d) (2018); S. 992, 217th Leg., 1st Annual Sess. (N.J. 2016); Act of Oct. 21, 2015, ch. 362, sec. 1-3, § 194, 2015 N.Y. Laws 362; Act effective June 7, 2018, ch. 116, sec. 1-13, § 12.175, 2018 Wash. Sess. Laws 1 (providing for workplace practices to achieve gender pay equity).

[14] Act effective Oct. 6, 2017, ch. 197, sec. 1-15, §§ 652.210, 652.220, 652.230, 659A.820, 659A.870, 659A.875, 659A.885, 2017 Or. Laws 1 (providing for pay equity). Some parts of the OPEA are already in effect. Key effective dates: As of October 6, 2017, employers may no longer screen candidates based on current or past compensation. As of January 1, 2019, employees may file claims against employers with the Oregon Bureau of Labor and Industries or employees may file lawsuits against employers for pay equity violations.

[15] As of this writing, BOLI has not announced a date when it will issue final administrative regulations for the OPEA.

[16] The Federal EPA applies to almost all employers, as it does not have a minimum employee requirement. *See* 29 C.F.R. § 1620.8 (2016); 29 U.S.C. § 203(d) (2012).

[17] By regulation the EPA covers not just "wages" but all forms of pay, including salary, overtime pay, bonuses, stock options, profit sharing and bonus plans, life insurance, vacation and holiday pay, cleaning and gasoline allowances, hotel accommodations, and reimbursement for travel and benefits. *See* 29 C.F.R. § 1620.10 (2016).

[18] 29 U.S.C. § 206(d)(1) (1963). *See also* Osborn v. Home Depot U.S.A, Inc., 518 F. Supp. 2d 377, 383–84 (D. Conn. 2007).

acted with "discriminatory intent"; rather, the EPA creates a type of strict liability.[19] Once the plaintiff has made out her *prima facie* case, the burden of persuasion shifts to the defendant to prove that the pay disparity is justified by one of four affirmative defenses: (1) a "seniority system"; (2) a "merit system"; (3) "an earnings system based on 'quantity or quality of production'"; or (4) some other, non-gender-based factor implemented for a "legitimate business reason."[20] The plaintiff may counter the employer's claimed defenses "by offering evidence showing that the reasons sought to be proved are a pretext for sex discrimination."[21]

Unlike Title VII discrimination claims, a claimant need not file an EPA charge with the U.S. Equal Employment Opportunity Commission (EEOC) before filing a lawsuit. In practice, claimants usually do so, however, because they will have a Title VII in their court complaint *along with* their EPA claim. The statute of limitations for EPA claims is two years from the day the employee received the last discriminatory paycheck (extended to three years in the case of "willful" violations).[22] Damages are limited to back pay and, for reckless or malicious violations, liquidated damages equal to the amount of back pay awarded to the victim.[23]

II. THE OREGON PAY EQUITY ACT OF 2017[24]

> "I applaud the Legislature's bipartisan efforts to pass the Pay Equity Bill and make great strides toward a more equitable and prosperous Oregon."[25]

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[19] *Osborn*, 518 F. Supp. 2d at 384. This explains why female plaintiffs in Oregon have historically brought pay discrimination claims under OR. REV. STAT. § 659A instead of under the Oregon Pay Equity Act. In cases where there is little *prima facie* evidence of wage discrimination, but circumstantial evidence of other protected class discrimination, plaintiffs are advantaged, and open a route to discovery of pay records, by attaching pay discrimination claims to other OR. REV. STAT. § 659A claims. *See, e.g.*, Bureau of Labor and Industries v. City of Roseburg, 706 P.2d 956, 958 (Or. Ct. App. 1985) *rev. den* 715 P.2d 92 (Or. 1986) (alleging the City of Roseburg committed an unlawful employment practice by discriminating against complainant because of her sex under ORS § 659.030(1)(b) instead of under the Oregon Pay Equity Act).

[20] *Osborn*, 518 F. Supp. 2d at 384.

[21] *Id.* (quoting Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520, 526 (2d Cir. 1992) (internal quotations omitted).

[22] Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111–2, 123 Stat. 5 overturned Ledbetter v. Goodyear Tire & Rubber Co., Inc., 421 F.3d 1169, 1180 (11th Cir. 2005), which restricted the time period for filing employment discrimination complaints concerning compensation. The Act states that each paycheck that contains discriminatory compensation is a separate violation regardless of when the discrimination began.

[23] 29 U.S.C. § 255(a) (2012).

[24] OR. REV. STAT. § 652.210(2) (2018) ("Employer" means "any person employing one or more employees. . . .").

[25] Governor's Office, *Governor Brown to Sign Pay Equity Legislation*, OREGON.GOV (May 31, 2017), https://www.oregon.gov/newsroom/Pages/NewsDetail.aspx?newsid=2086.

— Governor Kate Brown

Believe it or not, Oregon's original Pay Equity Act was passed in 1955, nearly a decade before the Federal EPA. But despite the OPEA's nearly 65-year history, there have been a total of only four reported cases of pay disparity and one unreported case.[26] Also, there are only a handful of published final orders from BOLI interpreting the OPEA.[27] The paltry case law that has been built around the OPEA is remarkable. But for reasons explained below, the new OPEA contains express and perhaps unanticipated motivation for employers to avoid litigation by ensuring that their workplaces follow the new law. That, or new case law is rapidly on its way.

A. Scope

> Dear Chair Taylor, Vice-Chair Knopp, and Members of the Committee,
>
> Oregon public universities are committed to ending persistent pay disparities faced by women, people of color, LBGTQ workers, workers with disabilities, veterans, and all other protected classes in Oregon. . . . We support the underlying concept embodied in HB 2005, but would like to flag questions around how this bill will be implemented at our institutions. . . . Some of the questions we have include ensuring that the definition of comparable work accounts for the differences between faculty members and staff working in different fields or disciplines. Additionally, because our institutions compete for faculty members at the national and international level, it will be important to understand how we can work within the framework of this legislation while also remaining competitive. Finally, we will want to understand how our practice of offering stipends in the form of endowed chairs and the like to high performing faculty members fits under this bill. Again, universities are supportive of the intent of HB 2005. We would, however, like to

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[26] Clemente v. Oregon Dep't of Corr., 315 F. App'x 657, 658 (9th Cir. 1999) (female employee failed to demonstrate that employer's proffered reason for disparity between her starting salary and that of male coworker was pretextual, as required to prevail in her pay discrimination action under Equal Pay Act); Delima v. Home Depot U.S.A, Inc., 616 F. Supp. 2d 1055, 1065 (D. Or. 2008) (genuine issues of material fact existed, in former employee's gender discrimination action against home improvement retailer, as to whether retailer's decisions concerning plaintiff's compensation reflected gender-based discrimination, precluding summary judgment on former employee's claims brought under Oregon statutes specifically addressing wage discrimination); Smith v. Bull Run Sch. Dist. No. 45, 722 P.2d 27 (Or. Ct. App. 1986) (substantial evidence supported judgment that female school teachers were not improperly denied equal pay for equal or comparable work under either federal or state statute); Civil Serv. Bd. of Portland v. Bureau of Labor & Indus., 655 P.2d 1080 (Or. Ct. App. 1982) (fact that the municipality, although specifically included under Fair Employment Practices Act, is specifically excluded from coverage under Equal Pay Act does not prevent governmental employers from being subject to actions for pay discrimination under Fair Employment Practices Act).

[27] *See, e.g.*, Wild Plum Rest., 10 B.O.L.I. 19, 32–33 (1991) (finding the difference in pay between a male and female restaurant manager was due to skill, effort, and responsibility exercised by the respective manager and not due to the complainant's sex).

> pursue further discussions about how language could be altered to accommodate the unique circumstances of public universities.
>
> — Oregon Council of Presidents[28]

The original OPEA made it unlawful for an employer to "in any manner discriminate between *the sexes* in the payment of *wages*" or to "[p]ay wages to any employee at a rate less than that at which the employer pays wages to employees *of the opposite sex* for work of comparable character."[29]

The new OPEA dramatically expands the law's scope. First, in accordance with ORS Chapter 659A, "sex" is replaced with "protected class" to prohibit wage discrimination on the ten bases of race, color, religion, sex, sexual orientation, national origin, marital status, veteran status, disability and age.[30] Second, "wages" is replaced with "[c]ompensation," understood to include "wages, salary, bonuses, benefits, fringe benefits and equity-based compensation."[31] Third, "[w]ork of comparable character" is defined to mean "work that requires substantially similar knowledge, skill, effort, responsibility and working conditions in the performance of work, regardless of job description or job title."[32]

We included the legislative history at the start of this section to reflect early concern among a specific subset of Oregon employers that their current pay practices do not comply with the new OPEA's definition of "work of comparable char-

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[28] Senate Workforce Committee, *Letter from the Oregon Council of Presidents*, OR. ST. LEG. (April 26, 2017), https://olis.leg.state.or.us/liz/2017R1/Downloads/CommitteeMeetingDocument/123309.

[29] OR. REV. STAT. § 652.220(1) (2018) (emphasis added); *see* Bureau of Labor & Indus. v. City of Roseburg, 706 P.2d 956, 959 (Or. Ct. App. 1985) *rev den* 715 P.2d 92 (Or. 1986) ("work of comparable character," as used in employment discrimination action alleging unequal compensation for comparable work, is broader than [the Federal Equal Pay Act's] "equal work," and does not require equality, but that compared forms of work had "important common characteristics.").

[30] Act effective Oct. 6, 2017, ch. 197, sec. 2, § 652.210, 2017 Or. Laws 1 (providing for pay equity). Maryland's "Equal Pay for Equal Work Act of 2016" is unique for explicitly adopting "gender identity" as a protected class within the state's definition of sex-based discrimination. *See, e.g.*, S. 481, 436th Sess. (Md. 2016). Washington State has taken a whole new tack by prohibiting conduct that deprives an employee of "career advancement opportunities." Act effective June 7, 2018, ch. 116, sec. 4, 2018 Wash. Sess. Laws 3. Still, Oregon is the only state with ten classes protected by its equal pay law.

[31] Act effective Oct. 6, 2017, ch. 197, sec. 1, § 652.210, 2017 Or. Laws 1.

[32] *Id.* BOLI's proposed regulations dramatically expands all of these definitions. New Rules Implement Equal Pay Law, including Definitions, Work of Comparable Character, Exceptions, Posting Notice, OAR 839-008-0010 (proposed August 28, 2018) (to be codified at OAR Chapter 839, Division 8).

acter." What is interesting, however, is that the language "work of comparable character" is not at all new—it appears in the 1955 OPEA. The new OPEA simply provides a definition for that term, which does not seem like a basis for alarm.

The concerns of the Oregon Council of Presidents likely stem from two recent, high-profile equal pay cases.[33] In our opinion, those cases also strongly suggest three things which are cause for alarm among institutions of higher education. First, institutions of higher education have historically relied upon squishy, discrimination-prone valuation for purposes of pay and compensation—valuations which are very unlikely to withstand equal pay scrutiny.[34] Second, the fine-tuned and aggressive enforcement of equal pay laws against institutions of higher education exposes them to substantial liability. Third, like most other employers in Oregon, institutions of higher education will likely be forced to make sweeping changes to their current recruitment, promotion, tenure, and retention incentives. The lesson is that the less lock-step the industry is in pay, the more risk it faces under equal pay laws.

B. Employer Defenses: "Bona Fide" Factors

The original OPEA contained only two enumerated defenses. Employers could pay at different rates only if made "pursuant to a seniority or merit system which does not discriminate on the basis of sex" and where the differential in wages was "based in good faith on factors other than sex."[35] Under the new OPEA, employers can pay at different rates only if the difference is based on a "bona fide" factor that is related to the position in question and is based on one of eight grounds: (1) a seniority system; (2) a merit system; (3) "[a] system that measures earnings by quantity or quality of production"; (4) workplace locations; (5) "[t]ravel, if travel is necessary and regular for the employee;" (6) training or education; (7) experience; or (8) any combination of factors "if the combination of factors accounts for the entire compensation differential."[36]

While the new OPEA offers more bona fide factors than the Federal EPA, the approach also eliminates the Federal EPA's catch-all provision and replaces that with a bona fide factor (factor 8).[37] Taken together, factors (1)–(7) constitute an exhaustive list of independent bona fide factors that will allow an employer to pay at different rates.[38] Where a single factor cannot account for the entire pay differential,

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[33] The cases, involving faculty at the Universities of Denver and Texas, are fully discussed in the context of gender pay discrimination in Paula A. Monopoli, *The Market Myth and Pay Disparity in Legal Academia*, 52 IDAHO L. REV. 867, 872–79 (2016).

[34] *Id.* at 872 ("The definition of merit in academia is highly subjective . . . .").

[35] OR. REV. STAT. § 652.220(2)(a)–(b) (2017).

[36] *Id.* at § 652.220(2).

[37] *Compare* 29 U.S.C. § 206(d)(1) (2012) *with* OR. REV. STAT. § 652.220(2)(a)(1).

[38] BOLI's Proposed Regulations contain additional definitional guidance for what constitutes a "seniority system," a "merit system," and a "system that measures earnings by quantity or quality of production, including piece rate work." New Rules Implement Equal Pay

the employer can only rely upon some combination of the remaining factors to explain the balance. The approach responds to long and heavy criticism that "catch-all" provisions, in the Federal EPA and elsewhere, really function as wide loopholes for employers to creatively escape liability for conduct meant to be prohibited under equal pay laws.[39]

C. Restrictions on Candidate/Employee Pay Considerations

As of October 6, 2017, the OPEA made it unlawful for employers to "[s]creen job applicants based on current or past compensation" or "[d]etermine compensation for a position based on current or past compensation."[40] These provisions anticipated *Rizo v. Yovino*, an April 2018 Ninth Circuit Court of Appeals case holding much the same under the Federal EPA.[41]

The question before the court in *Rizo* was whether an employer can "justify a wage differential between male and female employees by relying on prior salary."[42] "[T]he answer is clear: No."[43]

> Prior to this decision, our law was unclear whether an employer could consider prior salary, either alone or in combination with other factors, when setting its employees' salaries. We took this case *en banc* in order to clarify the law, and we now hold that prior salary alone or in combination with other factors cannot justify a wage differential. To hold otherwise—to allow employers to capitalize on the persistence of the wage gap and perpetuate that gap *ad infinitum*—would be contrary to the text and history of the Equal Pay Act, and would vitiate the purpose for which the Act stands.[44]

The facts of the case are worth reporting. "Aileen Rizo was hired as a math consultant by the Fresno County Office of Education in October 2009."[45] She was "employed in Maricopa County, Arizona as a middle and high school math teacher. In her prior position, Rizo earned an annual salary of $50,630 for 206 working days.

Law, including Definitions, Work of Comparable Character, Exceptions, Posting Notice, OAR 839-008-0015(1) (proposed Aug. 28, 2018) (to be codified under OAR Chapter 839, Division 8).

[39] *See, e.g.*, Sabrina L. Brown, *Negotiating Around the Equal Pay Act: Use of the 'Factor Other Than Sex' Defense to Escape Liability*, 78 OHIO ST. L.J. 471, 482–93 (2017) (identifying problems with salary negotiations as a factor other than sex); *see also* Jeanne M. Hamburg, *When Prior Pay Isn't Equal Pay: A Proposed Standard for Identification of 'Factors Other Than Sex' Under the Equal Pay Act*, 89 COLUM. L. REV. 1085, 1108 (1989) (arguing that when use of prior salary results in unequal pay employers should carry the burden).

[40] § 652.220(2).

[41] Rizo v. Yovino, 887 F.3d 453 (9th Cir. 2018).

[42] *Id.* at 456.

[43] *Id.*

[44] *Id.* at 456–57.

[45] *Id.* at 457.

She also received an educational stipend of $1,200 per year for her master's degrees in educational technology and mathematics education."[46] Upon joining the County, Rizo's new salary was

> determined in accordance with the County's Standard Operating Procedure 1440 ("SOP 1440"), informally adopted in 1998 and formally adopted in 2004. The County's hiring schedule consists of 10 stepped salary levels, each level contained 10 salary steps within it. SOP 1440 dictates that a new hire's salary is to be determined by taking the hired individual's prior salary, adding 5%, and placing the new employee on the corresponding step of the salary schedule. Unlike the County's previous hiring schedule, SOP 1440 does not rely on experience to set an employee's initial salary. SOP 1440 dictated that Rizo be placed at step 1 of level 1 of the hiring schedule, corresponding to a salary of $62,133 for 196 days of work plus a master's degree stipend of $600. During a lunch with colleagues in 2012, Rizo learned that her male colleagues had been subsequently hired as math consultants at higher salary steps. In August 2012, [Rizo] filed a complaint about the pay disparity with the County . . . .[47]

In response, the county stated:

> all salaries had been set in accordance with SOP 1440. The County claimed to have reviewed salary-step placements of male and female management employees for the past 25 years (so including before the policy was even informally adopted), finding that SOP 1440 placed more women at higher compensation steps than males.[48]

Rizo sued Jim Yovino in his official capacity as the Superintendent of the Fresno County Office of Education in February 2014 under the Equal Pay Act, Title VII, and California Government Code § 12940(k).[49]

> In June 2015, the County moved for summary judgment. It asserted that, although Rizo was paid less than her male counterparts for the same work, the discrepancy was based on Rizo's prior salary. The County contended that her prior salary was a permissible affirmative defense to her concededly lower salary than her male counterparts under the fourth, catchall clause, a "factor other than sex."[50]

The County didn't dispute that Rizo had established a *prima facie* case and that none of the three specific statutory exceptions applied. Instead, the County contended that the fourth catchall exception, "any other factor other than sex," included

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[46] *Id.*

[47] *Id.* at 457–58.

[48] *Id.* at 458.

[49] *Id.*

[50] *Id. See supra* notes 37–39 and accompanying text regarding the misuse of catchall provisions by employers to avoid liability for conduct intended to be prohibited under equal pay laws.

an employee's prior salary and applies when her starting salary is based on her prior salary.[51] The County acknowledged that if it was wrong, it had no defense to Rizo's Equal Pay Act claim.[52] Consequently, *Rizo* turned on the meaning of the Federal EPA's catchall exception.

> We conclude, unhesitatingly, that "any other factor other than sex" is limited to legitimate, job-related factors such as a prospective employee's experience, educational background, ability, or prior job performance. It is inconceivable that Congress, in an Act the primary purpose of which was to eliminate long-existing "endemic" sex-based wage disparities, would create an exception for basing new hires' salaries on those very disparities—disparities that Congress declared are not only related to sex but caused by sex. To accept the County's argument would be to perpetuate rather than eliminate the pervasive discrimination at which the Act was aimed. . . . Prior salary, whether considered alone or with other factors, is not job related and thus does not fall within an exception to the Act that allows employers to pay disparate wages. Reflecting the very essence of the Act, we hold that by relying on prior salary, the County fails as a matter of law to set forth an affirmative defense.[53]

Although *Rizo* concerns the Federal EPA, expect Oregon courts to follow suit at the first opportunity. Aileen Rizo's case would never have been had not someone "spilled the beans" over a casual lunch. This is not uncommon and highlights a fatal flaw in first generation equal pay laws: the burden of discovery is on employees in a setting where employers, at least private ones, carry no obligation to be transparent about employee pay and, indeed, carry some legal obligations to do just the opposite.[54]

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[51] *Rizo*, 887 F.3d at 460.

[52] *Id.*

[53] *Id.*

[54] Employers concerned about the new OPEA will be relieved that they aren't in the United Kingdom. Last year, the U.K. issued 2017 Regulations updating its Equality Act 2017 (Gender Pay Gap Information). The regulations impose a duty upon employers to annually publish statistical data on pay differentials between men and women for the previous three years using calculation formulae set by the government. The data must be published on the employer's own website and on the Secretary of State's website "in a manner that is accessible to all its employees and to the public." The Equality Act 2010 (Gender Pay Gap Information) Regulations 2017, 2017, §§ 208(4), (5)(b), (8) (Eng.). Compensation disclosure regulations have hit our shores, however. Proposed amendments to New Jersey's equal pay law (the New Jersey Law Against Discrimination) would require some government contractors to provide information on compensation and hours worked, broken down by gender, race, ethnicity and job category. *See* Diane B. Allen Equal Pay Act, P.L. 2018, c. 9, sec. 5, 2018 N.J. Laws 10–11.

D. *Damages and the "Safe Harbor" Incentive to Manage Risk*

> I write to share with you my brief comments on HB 2005A. As you may know, I was the lone Republican in supporting the engrossed version of the bill off the House floor. I particularly want to voice my support for a key provision that was included in the Minority Report, the Affirmative Defense . . . . There are many affirmative defenses that could be raised in this kind of action—not just the one that's mentioned in the minority report. But this affirmative defense does something that I think is very important: it not only encourages companies, large and small, to determine if they have a problem, but then gives them a tool in the event that they find that they do have a problem, one that does not require them to spend tens, perhaps hundreds of thousands of dollars in legal fees to solve that problem.
>
> I do believe the addition of this particular affirmative defense strengthens the ability of this bill to do what we all want it to do, to discourage the practice of discrimination at all levels.
>
> — Representative A. Richard Vial[55]

Claimants charging violations of the OPEA may either file a complaint with BOLI *or* file a lawsuit in court. The statute of limitations for OPEA claims is one year from the date of the unlawful practice.[56] The OPEA also extends the notice period under the Oregon Tort Claims Act from 180 days to 300 days of discovery of the alleged loss or injury.[57] Damages include: up to two years back pay, liquidated damages equal to the amount of back pay,[58] compensatory damages, and punitive damages in cases of fraud, malice, willful and wonton misconduct to deter repeat offenders.[59]

1. *Safe Harbor: Will the Carrot Become the Stick?*

Caring about pay equity abstractly is one thing. Asking an employer to devote the resources necessary to discover how it discriminates across multiple protected classes—and then doling out raises—is something else altogether.

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[55] H.B. 2005, Senate Committee on Workforce, 79th Or. Legis. Assembly (2017) (testimony of Rep. A Richard Vial).

[56] OR. REV. STAT. § 652.230(5) (2017) is a sort of mini-Lily Ledbetter Act: "a compensation practice that is unlawful under ORS 652.220 occurs each time compensation is paid pursuant to a discriminatory compensation decision or other practice." *See* 42 U.S.C. § 2000e-5(e) et seq. (2012).

[57] OR. REV. STAT. § 652.230(7) (2017).

[58] As recently as October 2018, BOLI's Technical Assistance for Employers asserted that employees could only recover back pay for pay equity violations until January 1, 2024, sparing employers the need for the OPEA's safe harbor provision. BOLI's Technical Assistance for Employers has since acknowledged that all remedies set forth in the OPEA will be available to plaintiffs on January 1, 2019.

[59] OR. REV. STAT. § 659A.885(2)–(4) (2017).

In January 2018, following a compensation assessment for its women and minority employees in the U.S., the U.K., and Germany, Citigroup announced that both women and minority employees received 99% of what male and non-minority employees did.[60] Citigroup then pledged to give 1% raises where needed.[61] Of course, multinational corporations—with shareholders, and communications, publications and vision departments, etc.—are motivated by special considerations. Considerations which most employers, and especially smaller-budgeted ones, neither share nor in their estimation can afford.

Reducing pay to achieve pay equity isn't an option. Under both the Federal EPA and the OPEA, employers cannot equalize wage disparities by reducing pay.[62] So how do you get employers to voluntarily "pay up" to wage equality?

In general, the incentive for employers to comply with antidiscrimination laws is a simple threat: choose to comply now or pay later when you are discovered. But compliance is typically in the form of prohibiting misconduct through transparency, training, investigation, and discipline—not in the form of checks. Plus, for some if not many employers, the *degrees* of wage disparity within their companies are likely to be something of a black box; something not looked for in order that it not be found.

To encourage employers to take the plunge, the OPEA contains a safe harbor provision that is significant.[63] Employers who have conducted an equal-pay analysis

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[60] Laura Sanicola, *Citigroup Reports Virtually No Gap in Gender or Racial Pay*, CNN (Jan. 16, 2018), https://money.cnn.com/2018/01/15/news/companies/citigroup-pay-gap/index.html.

[61] Tanya Tarr, *How Citigroup and Other Leading Corporations Are Making Equal Pay a Reality*, FORBES (Jan. 23, 2018), https://www.forbes.com/sites/tanyatarr/2018/01/23/how-citigroup-and-other-leading-corporations-are-making-equal-pay-a-reality/#32624aac5ab5.

[62] 29 U.S.C. § 206(d)(1) (2012); *see* Act effective Oct. 6, 2017, ch. 197, sec. 2, § 652.220, 2017 Or. Laws 1 (providing for pay equity). Under BOLI's proposed regulations, "[r]ed circling, freezing, or otherwise holding an employee's salary constant, as other salary positions come into alignment" is not prohibited. New Rules Implement Equal Pay Law, including Definitions, Work of Comparable Character, Exceptions, Posting Notice, OAR 839-008-0025(2) (proposed Aug. 28, 2018) (to be codified under OAR Chapter 839, Division 8).

[63] *See* Act effective Oct. 6, 2017, ch. 197, sec. 12, §§ 652.210–652.230, 2017 Or. Laws 7 (providing for pay equity). The OPEA's safe harbor provision mirrors the safe harbor provision contained in Massachusetts' Equal Pay Act of 2018 (MEPA), effective July 1, 2018. *See* MASS. GEN. LAWS ch. 149, § 105A(d) (2018) ("An employer against whom an action is brought alleging a violation of subsection (b) and who, within the previous 3 years and prior to the commencement of the action, has both completed a self-evaluation of its pay practices in good faith and can demonstrate that reasonable progress has been made towards eliminating wage differentials based on gender for comparable work, if any, in accordance with that evaluation, shall have an affirmative defense to liability under subsection (b) and to any pay discrimination claim under section 4 of chapter 151B. For purposes of this subsection, an employer's self-evaluation may be of the employer's own design, so long as it is reasonable in detail and scope in light of the size of the employer, or may be consistent with standard templates or forms issued by the attorney general. An employer who has completed a self-evaluation in good faith within the previous 3

within the three-year period leading up to the filing of a complaint may, if found to have violated the OPEA, "file a motion to disallow an award of compensatory and punitive damages."[64] Courts "shall" grant the motion if the employer demonstrates, by a preponderance of the evidence, that the employer meets the following four factors: (a) completed a good faith equal-pay analysis of the employer's pay practices within the three years leading up to the complaint; (b) the analysis was "[r]easonable in detail and in scope in light of the size of the employer;" (c) the analysis "[r]elated to the protected class asserted by the plaintiff in the action;" and (d) the employer "[e]liminated 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."[65] As an additional incentive, an employer's equal-pay analysis is not admissible in any other proceeding.[66] In sum, employers who volunteer to clean their own houses, and who make a genuine effort to do so, greatly reduce their exposure under the OPEA.

III. CONCERNS

Notwithstanding its noble purposes, the OPEA contains significant unanswered questions and gaps for employers who wish to fully comply with the law. At the time of this publication, BOLI has only issued *proposed* regulations for the administration of the OPEA, the comment period for which closed October 12, 2018.[67] The regulations are sparse—ten very general rules—and unfortunately provide little guidance for employers. In this section we present issues which will likely

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years and prior to the commencement of the action, and can demonstrate that reasonable progress has been made towards eliminating wage differentials based on gender for comparable work in accordance with that evaluation, but cannot demonstrate that the evaluation was reasonable in detail and scope, shall not be entitled to an affirmative defense, but shall not be liable for liquidated damages under this section. Evidence of a self-evaluation or remedial steps undertaken in accordance with this subsection shall not be admissible in any proceeding as evidence of a violation of this section or section 4 of chapter 151B that occurred prior to the date the self-evaluation was completed or that occurred either (i) within 6 months thereafter or (ii) within 2 years thereafter if the employer can demonstrate that it has developed and begun implementing in good faith a plan to address any wage differentials based on gender for comparable work. An employer who has not completed a self-evaluation shall not be subject to any negative or adverse inference as a result of not having completed a self-evaluation."). The Massachusetts' Office of the Attorney General recently issued guidance to implement MEPA; rules which should prove influential for BOLI's rulemaking process. *See infra* note 82.

[64] Act effective Oct. 6, 2017, ch. 197, sec. 12, §§ 652.210–652.230, 2017 Or. Laws 1 (providing for pay equity).

[65] *Id.* sec. 1, § 652.210.

[66] *Id.* sec. 12, §§ 652.220–652.230.

[67] *See* New Rules Implement Equal Pay Law, including Definitions, Work of Comparable Character, Exceptions, Posting Notice, OAR 839-008-0030 (proposed Aug. 28, 2018) (to be codified under OAR Chapter 839, Division 8).

need to be resolved by courts or through future legislative fixes. Below we identify some issues we hope BOLI will revisit prior to adoption of their final regulations.

A. *The "Pay Equity Analysis": Lack of Guidance and Cost*

The OPEA provides employers with an affirmative defense but does not tell them how to use it. Defined as "an evaluation process to assess and correct wage disparities among employees who perform work of comparable character,"[68] neither the OPEA nor the proposed regulations even attempt to describe what kind of "evaluation process" may (or may not) be used to identify and "correct wage disparities among employees." This lack of guidance not only leaves a good-faith employer without instruction about how to comply with the law, but potentially puts employers at risk of being erroneously at ease about their compensation practices.

The first criticism is a practical one: without knowing what an OPEA- and BOLI-approved pay equity analysis is supposed to involve, how can an employer know what to look at or consider when conducting such an analysis? Is a side-by-side comparison of two similar job descriptions enough, or is the employer required to interview the employees covered by those job descriptions as well? Is a survey of employees required or recommended, and what should such a survey address? If an employer is supposed to do a historical analysis of pay practices, what kind of history should be considered (particularly if the job descriptions or nature of the work has changed over time)? Can such a pay equity analysis receive the protection of the work-product doctrine or attorney-client privilege if it is conducted under the direction of an attorney? These questions and more can only be answered after January 1, 2019, when the first lawsuits are filed, and the first employers sued under OPEA attempt to justify their pay equity analyses before BOLI or a court.[69]

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[68] Act effective Oct. 6, 2017, ch. 197, sec. 1, § 652.210. *See* New Rules Implement Equal Pay Law, including Definitions, Work of Comparable Character, Exceptions, Posting Notice, OAR 839-008-000(6) (proposed Aug. 28, 2018) (to be codified under OAR Chapter 839, Division 8) (an "equal pay analysis" is "an evaluation process to assess and correct wage disparities among employees who perform work of comparable character."). The proposed regulations do not define any of these words, other than "employee."

[69] *See* New Rules Implement Equal Pay Law, Including Definitions, Work of Comparable Character, Exceptions, Posting Notice, OAR 839-008-0000(6) (proposed Aug. 28, 2018) (to be codified under OAR Chapter 839, Division 8). An earlier draft of the regulations submitted to BOLI's Rules Advisory Committee in July 2018 included the following language for discussion, though never intended the language to be part of the rule: "Whether an equal pay analysis is reasonable in detail and in scope in light of the size of the employer will be fact specific to each employer. *BOLI will be including additional resources on its Technical Assistance (TA) website to provide further guidance*." *Draft Rules for RAC Discussion on July 11, 2018*, http://fwaa.org/wp-content/uploads/
2018/07/Pay-Equity-Rules-RAC-Draft-July-11th-Discussion-Document3.pdf (emphasis added) (last visited Sep. 14, 2018).

Possibly in an effort to address these unanswered questions, or in response to criticism that earlier drafts of the regulations included no guidance on the issue of equal pay analyses, BOLI's Proposed Regulations include a proposed regulation called "Equal-Pay Analysis Surveys."[70] This instructs employers that they can (but are not required to) conduct a survey of employees "to elicit protected class status information[,]" but only if the employer "inform[s] employees of the purpose of the survey" and gives employees "the means and option to complete the survey without including their name."[71]

But there are concerns about OAR 839-008-0030's approach to "elicit[ing] protected class information."[72] For example, such surveys assume that employees will be truthful and open when presented with such surveys; essentially, that employees will act in good faith. However, there are circumstances where employees will have reasons either not to report or to deliberately misreport protected class status. Imagine an all-male legal department save for one female. The female employee will likely think twice about disclosing her protected class status knowing that her identity is not truly anonymous. Employees with "hidden" disabilities or a previously unannounced sexual orientation may not feel comfortable using a so-called anonymous survey to "reveal" themselves. Also, employers should anticipate voluntary employee "blindsiding," that is, deliberately misreporting protected class status. Or, at least, failure to control for misinformation could affect the accuracy and validity of any equal pay analysis.

The "survey" suggested by OAR 839-008-0030 also identifies another issue employers face with respect to a legally defensible equal pay analysis. An employer does not necessarily know all of the protected classes represented in its employee population. And as noted above, an employer may not learn of such information even after conducting a "survey" conducted under the Proposed Regulations. But if an employer only learns of an employee's membership in a protected class *after* a lawsuit is filed, on the bases of religion, national origin or sexual orientation, for example, the employer cannot do a pay equity analysis that will survive judicial scrutiny or take advantage of the affirmative defense. The law should be clarified to require a pay equality analysis only when the employer reasonably knows the class, or the employee voluntarily provides or discloses the class.

The second criticism (and impact) of BOLI's failure to provide guidance regarding the "equal pay analysis" is OPEA's use of the phrase "work of comparable

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[70] *See* New Rules Implement Equal Pay Law, including Definitions, Work of Comparable Character, Exceptions, Posting Notice, OAR 839-008-0030 (proposed Aug. 28, 2018) (to be codified under OAR Chapter 839, Division 8). Interestingly, BOLI appears to deliberately avoid discussing the issue of pay equity analyses altogether. In its "Cost of Compliance" section of the regulations, BOLI erroneously states that equal pay analyses are "required by the law, not by the rules." *Id.*

[71] *Id.*

[72] *Id.*

character." Under proposed regulation OAR 839-008-0010, "'work of comparable character' includes substantially similar knowledge, skill, effort, responsibility and working conditions . . . *with no single factor being determinative*."[73] The regulation does provide an extensive list of "[k]nowledge considerations," "[s]kill considerations," "[e]ffort considerations," "[r]esponsibility considerations," and "[w]orking condition considerations" as factors that could be relevant—forty-five in all.[74] However, Justice Scalia rightly observed that a "totality-of-the-circumstances test" is "not a test at all but an invitation to make an ad hoc judgment."[75] In its current form, OAR 839-008-0010 punts. Rather than give actual guidance to employers which, if followed diligently and in good faith, earns that employer the affirmative defense, OAR 839-008-0010 makes "work of comparable character" a matter for the courts. Employers will not know if their equal pay analyses are legally defensible without litigation.

Next, a pay equity analysis of a single protected class (e.g., women and men) can be complicated and costly. The suggestion that every, or even most, employers can do ten different pay equity analyses is Sisyphean. And the variety of methods which could be used for such a task abound. For example, suppose an employee is a member of two protected classes. How should the pay equity analysis apply in that situation? For example, Alvin is both disabled as a matter of law and Asian-American. Is Alvin a "class of one;"[76] is the employer required to perform a pay equity analysis based on how the wages paid to a disabled employee who is a member of a racial minority compares to the wages paid to non-disabled, non-racial minority employees? Or is the employer supposed to break apart Alvin's protected classes and do two separate pay equity analyses? The current lack of practicality relating to the equal pay analysis affirmative defense is glaring. It makes it nearly impossible to implement.

We appreciate the incentive which the safe harbor provision gives to employers to immediately act in favor of pay equity, but as we have suggested above, such analyses can prove difficult—and costly. Earlier we introduced testimony from Representative A. Richard Vial praising the OPEA's affirmative defense as "a tool in the event that they find that they do have a problem, one that does not require them to

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[73] *Id.* (emphasis added).

[74] *Id.*

[75] City of Arlington v. FCC, 569 U.S. 290, 307 (2013); *see also* ABC, Inc. v. Aereo, Inc., 134 S. Ct. 2498, 2517 (2014) (Scalia dissenting) ("th'ol' totality-of-the-circumstances test (which is not a test at all but merely assertion of an intent to perform test-free, ad hoc, case-by-case evaluation)").

[76] *See* North Pacifica, LLC v. City of Pacifica, 526 F.3d 478, 486 (9th Cir. 2008) ("A class of one plaintiff must show that the discriminatory treatment 'was intentionally directed just at him,' as opposed . . . to being an accident or a random act.") (alteration in original) (citation omitted).

spend tens, perhaps hundreds of thousands of dollars in legal fees to solve that problem."[77] But employers cannot perform just any pay equity analysis: only one which earns them the affirmative defense. When we consider employers conducting pay equity analyses every three years, adjusting salaries, steps, longevity pay, etc., we think that for many employers such work will be an expensive proposition. We do not offer this observation as a criticism, but only as a realism worth embracing through the rulemaking and possibly future legislative processes.

Finally, neither the OPEA's safe harbor provision nor BOLI's proposed regulations explain what it means to "correct wage disparities among employees." For example: the OPEA makes no distinction between employees who are represented by a union versus those who are not. There is no carve-out for temporary employees, or employees who are jointly employed (e.g., when an employer contracts with a temp agency for workers). If "work of comparable character" is performed by a non-represented employee at a rate of pay lower than that of his or her union counterparts, an employer might find itself having to raise the pay for the non-represented employees, given that union representation is not one of OPEA's "bona fide factors." With a joint employment arrangement, the issues get even more muddled: Which employer is responsible for correcting a deficiency if, for example, the jointly employed employee is paid less than another employer's part-time employees?

Employers (particularly in the public sector) often pay firms to conduct "class and compensation" studies to determine whether the wages paid to their employees are commensurate with what comparable employers pay their employees for comparable work. Based on the limited definition of the "pay equity analysis," such "class and comp" studies will not satisfy the affirmative defense's requirements because such studies do not consider the protected classes (if any) of the individuals holding the positions at issue. We do not think that the Legislature intended for such market analyses to be irrelevant in pay equity analyses. Employers must be able to consider market factors which might drive up the salary demands of one individual, regardless of whether that person has protected class status.

B. Shortcomings in Scope and Definitions

1. No Exceptions for Represented or Other Categories of Employees.

One common employer complaint since the OPEA was enacted is the law's failure to address the wage and benefit differences between employees who are covered by collective bargaining agreements versus those who are not. As noted above, "among employees"[78] is not defined. This, in turn, puts employers who want to eradicate pay inequities in a difficult position. Collective bargaining agreements are the product of bargaining and yield similar classifications/jobs across members of a

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[77] *See* Vial, *supra* note 55 and accompanying text.

[78] Act effective Oct. 6, 2017, ch. 197, sec. 1, § 652.210, 2017 Or. Laws 1 (providing for pay equity).

particular union with bargained-for pay plans, cost-of-living adjustments, leave accruals, and benefit packages.[79] Similarly, unions negotiate longevity pay plans, pay for education or special certification, and other "add-to-pays" not received by all of an employer's employees. These "benefits" and "compensation" items could be dramatically different (and more expansive) than what is offered to non-represented employees, even though the work performed by both could be of "comparable character." We do not think that the OPEA was designed or has the legal authority to turn a union into a representative of even non-represented employees when it comes to compensation or benefits. For reasons that are unclear, BOLI chose not to address the impact of OPEA (if any) on union-represented employees or collective bargaining agreements, even though earlier versions of the rules included an outright statement that such agreements would not serve as a "valid defense" under the OPEA.[80]

2. No Ability for Employers to Defend Against Voluntary Applicant/Employee Disclosures.

Example: During an interview an applicant is asked about her salary expectations. She responds, "Well, I currently make $90,000 so I'd like to be paid $95,000 in this new job." However, the prospective employer only set aside a salary of $85,000. Under OPEA, this prospective employer would have to show that it had already set the salary limit in place before it received the information from the applicant, and that it did not ask the applicant to tell it what she currently earned. The employer's involuntary knowledge of the applicant's salary expectations cannot help but influence this employer's decision. Based upon the applicant's disclosure, the employer now has to decide whether it is worth extending the $85,000 or upping the offer to $90,000. In either case, the employer appears to violate the OPEA because the applicant's salary at her existing job was taken into consideration. The OPEA does not provide a "carve out" for these kinds of situations and BOLI's proposed regulations shift responsibility on the employer to essentially not find itself in this situation, where information is voluntarily provided or disclosed by an applicant. BOLI's proposed regulations state that the "unsolicited disclosure of a job applicant's current or past compensation by a job applicant, employee or a current or former employer of the applicant or employee *that is not considered by an employer*

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[79] *See, e.g.*, *Collective Bargaining Agreement Between City of Wilsonville and SEIU Local 503, OPEU*, WILSONVILLE OREGON, https://www.ci.wilsonville.or.us/sites/default/files/fileattachments/human_resources/page/3921/cba_2017-2020_-_seiu.pdf (last visited Sep. 28, 2018); *Agreement: City of Corvallis and the Corvallis Police Association*, CITY OF CORVALLIS OREGON (Feb. 21, 2018), https://archives.corvallisoregon.gov/public/ElectronicFile.aspx?dbid=0&docid=934419.

[80] *See Draft Rules for RAC Discussion on July 11, 2018*, http://fwaa.org/wp-content/uploads/2018/07/Pay-Equity-Rules-RAC-Draft-July-11th-Discussion-Document3.pdf (last visited Sep. 14, 2018).

does not constitute a violation" of the OPEA.[81] This regulation, however, puts the burden on the employer to not only show that they did not ask for salary information but that they did not consider it when making a decision about a particular applicant. Massachusetts adopted a more simple, straightforward approach where "[t]he information will qualify as 'voluntarily disclosed' if a reasonable person in the prospective employee's position would not think, based on the employer's words or actions, that the employer suggested or encouraged the disclosure."[82]

IV. RECOMMENDATION: PERFORM A COMPENSATION PRACTICE SELF-EVALUATION[83]

As noted earlier, the OPEA was signed by Governor Brown in June 2017. Yet for reasons unknown, there is no record of BOLI publicly considering the administrative regulations to accompany that law until it convened a Rules Advisory Committee (RAC) until April 2018. Although BOLI published proposed rules in late August 2018, final rules may not be available until early 2019, after OPEA's enforcement date. BOLI's inaction could mean that no Oregon employer will be able to take advantage of the affirmative defense built into the OPEA for any early lawsuits because a pay equity analysis under the law could not have been "completed . . . within three years before the date that the employee filed the action.[84]

Oregon employers can still prepare for the law's enforcement date using some "defensive management" techniques at their disposal.[85] As will be discussed, doing some form of a compensation practices self-evaluation and making any necessary

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[81] New Rules Implement Equal Pay Law, including Definitions, Work of Comparable Character, Exceptions, Posting Notice, OAR 839-008-0005 (proposed Aug. 28, 2018) (to be codified under OAR Chapter 839, Division 8) (emphasis added).

[82] Office of Attorney Gen., *An Act to Establish Pay Equity: Overview and Frequently Asked Questions*, MASS.GOV (Mar. 1, 2018), https://www.mass.gov/files/documents/2018/05/02/AGO%20Equal%20Pay%20Act%20Guidance%20%285-2-18%29.pdf.

[83] Some larger employers may choose to hire an outside consultant to conduct a pay equity analysis. Those employers should question whether the price paid will yield the necessary results. OPEA is the only pay equity law in the country with ten protected classes, and experience with federal or other states' laws will have limited applicability, particularly because BOLI has failed to identify what goes into a "pay equity analysis." The reality is that no one has experience conducting a pay equity analysis under OPEA.

[84] Act effective Oct. 6, 2017, ch. 197, sec. 12, §§ 652.210–652.230, 2017 Or. Laws 7 (providing for pay equity).

[85] "Defensive management" is a phrase used by the authors to describe any number of steps an employer can take in its day-to-day management of employee relations to help better protect itself against the possibility of claims or lawsuits in the future. It is derived from a phrase used in the medical profession—"defensive medicine"—which describes how malpractice-weary health care providers engaged in an overabundance of caution when treating patients (e.g., ordering extra tests).

corrections now will have value should a lawsuit get filed shortly after OPEA's enforcement date.[86] If nothing else, the employer will be prepared to defend against meritless claims of pay inequity due to its analysis of the job, the employees, and the connection with the "bona fide" factors identified in the OPEA, or show that inequities were corrected (thereby minimizing damages). Also, this is a good time to assess whether the culture at any given organization creates or contributes to pay inequities, either through policies or practices.

A. Messaging

Before reviewing any potentially underpaid positions, consider who within the organization will be told that a self-evaluation is underway. As a best practices measure, employers should strongly consider keeping the entire process as "quiet" as possible and letting as few employees know as possible.[87] An employer eager to show solidarity with the principles of the OPEA may wish to publicize the organization's undertaking of a salary audit. But the prudent employer will pause before doing so. News of a pay equity analysis may have employees thinking about whether their paychecks will rise and lead to increased complaints if the analysis reveals no basis for salary increases. Other employees may use the news to bolster existing or potential discrimination claims, to add to the argument that the organization "knew or should have known" that discriminatory animus existed. For these reasons, consider limiting disclosure and knowledge of the preliminary analysis to those in HR, or in a finance capacity, or to upper management. Even then, information should be shared on a need-to-know basis.[88]

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[86] The State of Massachusetts developed an excellent self-help guide of sorts for employers when it comes to compensation practices self-evaluations. *See* Office of Attorney Gen., *supra* note 82.

[87] Employers should consider before engaging in this process whether the protection afforded by attorney-client privilege is available. Otherwise, the results of the employer's analysis, fact gathering, and conclusions could all later become subject to discovery during litigation or, for public employers, subject to public records requests. Unless the analysis is conducted in response to current or threatened litigation (which would protect it under the work-product doctrine), the analysis is not private. Employers should consult with trusted employment law counsel on this issue.

[88] The suggestion in BOLI's proposed regulations to use a "survey" as part of or exclusively for an equal pay analysis counters this recommendation by requiring employers to tell employees that protected class information is sought for purposes of an equal pay analysis. *See* New Rules Implement Equal Pay Law, including Definitions, Work of Comparable Character, Exceptions, Posting Notice, OAR 839-008-0030 (proposed Aug. 28, 2018) (to be codified under OAR Chapter 839, Division 8). This requirement, if ultimately adopted, could dissuade some employers from using a survey as part of an equal pay analysis.

B. *History and Practice*

Employers should assess what policies or other statements they use to explain how employee salaries and wages are established. This could include handbook policies, collective bargaining agreement provisions, job descriptions, offer of employment letter templates, and any other similar "statements" made by the organization during the past three to six years. Look for statements or policies on starting pay, merit increases, bonuses, and the like. Consider how classification specifications are written, and whether they include any of the "bona fide factors" identified in the OPEA and, currently, BOLI's proposed regulations. Review employment contracts that have pay or bonus structures that may be unique to the contracted employee and analyze the history behind the structure.

A similar gathering should occur with all benefit programs offered to the organization's employees, and a search should be undertaken for how the organization has determined which employees receive which benefits (and at what levels). It is important to note those instances where either the law (e.g., the Public Employees Retirement System) or some outside party (e.g., a health care insurance company) impose a differential over which the organization has no control.[89] Once these documents are in place, consider whether they have been consistently applied, or whether exceptions occurred in the last couple of years. Consider issuing a questionnaire to managers to assess their practice of awarding pay increases or bonuses to assess whether the organization's practice is consistent with the policies in place. Developing a familiarity with this history and restrictions is essential if the organization wants to move past facially neutral (or even facially positive) pay practices that are causing a disparate impact, and to explain why any discrepancies exist.

C. *Look for "Hot Spots"*

Identify departments or positions in the organization that are most likely to be viewed as having skewed pay methodology (or that are likely to raise questions) and start the self-evaluation there. Accept right now that any number of employees in an organization are likely being paid at widely varying rates. Some employers have considered in the past how those positions should be paid; such criteria needs to be reassessed in light of OPEA's requirements as well as the current position's demands and level of service within the organization.[90] For some positions, a deeper dive will be required: look to the employee's time in the job, performance evaluations, special

[89] BOLI's proposed regulations do attempt to address this issue by defining what "benefits" means under the OPEA. New Rules Implement Equal Pay Law, including Definitions, Work of Comparable Character, Exceptions, Posting Notice, OAR 839-008-0000(1) (proposed Aug. 28, 2018) (to be codified under OAR Chapter 839, Division 8). The definitions focus on the "rate of contribution" or the "rate of costs" made or incurred by the employer.

[90] This is also an excellent time to review the position's job description to determine if it accurately captures the duties performed by the position and to revise accordingly (with the employee's participation).

education or skills—can we explain the disparity by accurately stating that the two positions at issue do not perform "work of comparable character"? This is a step in the self-evaluation that will need to be repeated if there are several "hot spots" within your organization, and each will need to be assessed individually and in conformance with the OPEA. Reviewing the compensation for newly-created or newly-vacated positions and comparing them to other positions of comparable character is also a simple but possibly revealing step.

D. Correct Discrepancies

With knowledge of the organization's policies and history, and the jobs and individuals in question, employers can make informed decisions about which salaries or benefits must or should be adjusted. Consult with legal counsel about the results of the compensation practices self-review, and secure advice about how best to address the discrepancies. Regardless, if compensation discrepancies are identified and not likely to pass the law's muster, resolve them promptly. But do so *only after planning how the employee will be informed about the discrepancy, and who will communicate the information*. An employee who is identified as having been underpaid could be in a good position to claim retaliation later, either by jealous co-workers or managers who disagree with the pay adjustment. The person who delivers the news—and the check for the back pay—must be someone who the employee can return to in the future with any concerns, and the message must be one of absolute candor.

Consider stating that the reason for the pay adjustment is due to ongoing compliance efforts undertaken by the organization. If the employer has concerns about a lawsuit from the employee, it should consider paying an additional sum beyond the back wages and securing a signed release of all claims.[91] Finally, consider which policies, job descriptions, applications, and statements made by the organization regarding pay issues need to be corrected or clarified, and update them accordingly. Policies prohibiting employees from discussing pay-related issues must be eliminated, and applications requesting salary history must be updated to remove the inquiry.

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[91] Because the employer's payment of back wages is something that the law would recognize as a payment to which the employee was already entitled to, such a payment by itself (with or without accrued interest) would not likely suffice as valid consideration to bind an employee to a release of all claims. This is also true because OPEA provides for damages in addition to back pay, such as punitive damages and compensatory damages.

E. Plan

An organization that passes scrutiny today with its existing pay practices may not be as fortunate in the future due to changing positions, demographics, and organizational needs. It is recommended that organizations develop a timeline for reassessing positions, job descriptions, and pay levels, and do so every two to three years. Employee input in the process will be essential. If, during the review of existing practices, the methods used within the organization are inconsistent and difficult to explain, consider creating a consistent compensation system, and identifying criteria for new hires.[92] Input from unions will be required, as wage issues are subjects of mandatory bargaining under the Public Employee Collective Bargaining Act and the National Labor Relations Act.[93] Until, and even after BOLI issues regulations, any decisions made by an organization with respect to an applicant or employee's pay must have solid internal documentation to support the level ultimately paid to the employee and the decision-making process behind it.

Similarly, it is clear that BOLI expects employers to do a better job of beefing up polices relating to "seniority systems," "merit systems," and other systems employers use to determine when employees should be considered for raises, bonuses and the like. For example, employers who use annual evaluations to determine whether an employee should receive raises often use evaluation systems with phrases such as "Exceeds Expectations" or "Needs Improvement" and, combined with a scoring system, determine that employees who achieve a certain score (or an overall "exceeds expectations" rating) are eligible for a raise. Under OPEA, an employer may have disparate compensation levels for "work of comparable character" if "bona fide factors" are at work, but the original law failed to take into account whether such a system was permissible. Under BOLI's proposed regulations, employers who utilize such systems must "devise [a] 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."[94] Practically speaking, that means employers must develop a policy for such systems that is: (a)

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[92] For example, if an employee is hired but not paid at the bottom grade of a pay scale, require the hiring managers to justify bringing candidates on above the minimum grade, and have HR review justification.

[93] *See* 29 U.S.C. § 158(d) (2012), which created a "duty to bargain" "with respect to wages, hours, and other conditions of employment, or the negotiation of an agreement, or any question arising thereunder."; OR. REV. STAT. § 243.672(2)(b) (2017); OR. REV. STAT. § 243.666 (2017). With respect to organizations that use pay scales or steps to determine compensation increases, it would not be logical nor necessarily competitive to simply hire every new employee at step one. But if the employer hires someone at step 2 or 3, how will the employer explain it? Will there be a review process when a hiring manager wants to hire someone at a higher step, and who within the organization will review it?

[94] *See* New Rules Implement Equal Pay Law, including Definitions, Work of Comparable Character, Exceptions, Posting Notice, OAR 839-008-0015(2) (proposed Aug. 28, 2018) (to be codified under OAR Chapter 839, Division 8).

in writing; (b) written in clear language that someone with a high school education can understand; and (c) consistently applied (the employer will have the burden of showing that such a policy has always been followed). Employers should also expect to have the burden of showing that its decision-makers were trained on these policies.

F. Publicize Commitment

Finally, consider announcing the organization's commitment to the OPEA. This can be done in an organization-wide announcement, or in the form of a new policy. Employees should be encouraged to come to specified individuals outside their direct line of supervision with complaints or concerns about pay equity issues. The more the employer can announce acceptance of the new law, and a willingness to abide by it, the more likely an employee may be to bring his or her grievance internally, as opposed to an external audience like BOLI or an attorney. Such policies announced with great fanfare will have little effect if they are not revisited. An employer must be committed to revisiting such policies in the future, and be prepared to show prompt, effective responses to complaints that are brought forward. Training for managers, HR staff, and other employees may also be offered on the subject of the OPEA.

CONCLUSION

The Oregon Pay Equity Act of 2017 is here. It is rightly ambitious and has the potential to do something which we believe most Americans have lost hope for—to eliminate at least one form of discrimination and economic inequality. Eliminating this form of discrimination isn't about intentions. It is about readily available data on employer pay practices. We've noted that in the fifty-five-year history of the OPEA, most equal pay claims have not been brought under the OPEA but instead have brought under ORS Chapter 659A. That is because, as with *Rizo v. Yovino*, obtaining *prima facie* evidence of pay discrimination is an elusive burden for employee-plaintiffs to carry. While the 2017 OPEA is to be lauded, it is behind a trend gaining traction outside of the United States: requiring employers to disclose protected class wage gaps statistics for everyone to see. Wage discrimination and disparity is easily discoverable. Wage equality could be accomplished easily. But we have to want it.