Updates
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What Employers Don’t Know Can Hurt Them: Assessing EPOA Risk

Since July 2018, Washington businesses have been operating under Washington's Equal Pay and Opportunities Act (EPOA). The EPOA, which significantly expanded the state's 1943 Equal Pay Act, is one of the most stringent equal pay laws in the country.[1] As we approach the three-year anniversary of the revised law (which coincidently includes a three-year statute of limitations for claims brought under the act), employers may want to consider reassessing their equal pay risk. While conducting a comprehensive risk assessment may seem like a daunting, not to mention expensive, prospect, the Washington State Department of Labor and Industries (L&I) offers employers free resources to assess their compliance with the EPOA, including free consultations. Employers who do not have the resources to engage legal counsel to conduct an equal pay audit may want to consider utilizing these cost-effective resources ... because what businesses don't know about their pay practices can hurt them.

The EPOA Has Teeth

The EPOA's primary purpose is to prohibit discrimination in the payment of discretionary and nondiscretionary wages, as well as employment benefits and advancement opportunities, between "similarly employed" workers.[2] Employees are "similarly employed" if they perform work that requires similar skill, effort, and responsibility, under similar conditions, for the same employer. It is the employer's burden to show that any differential treatment in pay or in opportunities is based, in good faith, on bona fide job-related factors that: (1) are consistent with business necessity, (2) are not based on or derived from a gender-based differential, and (3) account for the entire differential. The EPOA provides examples of such factors that include:

- Level of education, training, and experience
- A seniority system
- A merit system
- A production-based earnings system
- Regional differences in compensation levels

An employee's pay history is **not** an acceptable factor.

Employees have two options for enforcing their rights under the EPOA: (1) file a complaint with L&I, or (2) file a civil lawsuit for damages. In either case, if an employer is found in violation, it could potentially be on the hook for actual damages, statutory damages equal to the actual damages (double damages) or $5,000 (whichever is greater), interest of 1% per month on all compensation owed, and costs and attorney fees. Per the statute, back pay and interest awards are automatically calculated back four years from the last violation. L&I could also order payment of a civil penalty, with greater penalties for repeat violations, and a court could order reinstatement and injunctive relief.[3] The statute also provides that a violation occurs at the time a discriminatory pay decision is made, **and at** each payroll period thereafter in which the employee's pay is affected by the decision.[4]

Since any pay discrepancy between "similarly employed" individuals of different genders could potentially be a violation, employers are strongly encouraged to assess their current compensation structures and pay practices to ensure compliance and to understand their potential risk.

Employers Don't Know What They Don't Know

In a perfect world, all Washington employers would seek the services of trusted legal counsel to assist in conducting an equal pay audit. That way, the assessment could be conducted to preserve the attorney-client and work product privileges and protect the resulting analysis from disclosure in future litigation. Unfortunately, not all employers have the resources to initiate such an audit. So, what can employers do instead?

L&I offers employers free resources that they can use to conduct a self-assessment. Employers can access the EPOA Employer's Guide, which includes a comprehensive overview of the law as well as guidance on how to conduct a self-assessment. The guide also includes a checklist that employers can use to gauge policy compliance and identify potentially problematic practices.

Additionally, L&I has posted an Equal Pay Calculation Tool (click the link to download here), along with detailed instructions, that employers can use to determine if they are paying similarly employed employees within comparable job groupings differently.

Employers can also request a free consultation with an L&I expert. The L&I consultation will provide the employer both education about the law and an informed assessment of its risk of liability. The L&I consultant may also propose specific actions the employer can take to minimize risk and ensure compliance. Perhaps most importantly, L&I promises that an employer who requests a free consultation will not be penalized or fined if potential violations are identified (so long as there are no active EPOA complaints filed against the organization during the course of the consultation).

More information about L&I's Employer Consultation services can be found here.

Takeaways for Employers

Employers are strongly encouraged to assess their equal pay risk. Forewarned is forearmed, after all. An audit conducted by legal counsel is ideal to preserve and protect the results under the attorney-client and work product privileges. However, such an audit may be prohibitively expensive for some employers. In those cases, utilizing free L&I-provided resources may be an accessible alternative.

Endnotes

[1] The EPOA was further amended in 2019, placing additional burdens on employers. *See* RCW 49.58.010 et seq.

[2] RCW 49.58.020 and 030. The EPOA also prohibits some wage history inquiries, protects certain employee activities from adverse action/retaliation, and imposes wage disclosure requirements. RCW 49.58.040-050 and 100-101.

[3] *See* RCW 49.58.030 and 070.

[4] RCW 49.58.080.

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