

Maryland Expands State Equal Pay Act and Broadens Employees' Right to Discuss Wages

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Maryland has now joined New York and several other states that have recently passed legislation expanding state equal pay laws and/or broadening the right of employees to discuss their wages with each other (often called "wage transparency"). The [Equal Pay for Equal Work Act of 2016](#) ("Act"), signed by Governor Hogan on May 19, 2016 and set to take effect October 1, 2016, amends Maryland's existing Equal Pay law (Md. Code, Labor and Employment, §3-301, *et seq.*), which applies to employers of any size, in several significant aspects.

First, as to the equal pay provisions, the Act:

- Extends the protections of the law to differentials based on gender identity as well as sex.
- Bars discrimination not only by paying less for work at the same establishment of comparable character or on the same operation, but also by "providing less favorable employment opportunities."
- Defines "providing less favorable employment opportunities" to include assigning or directing an employee into a less favorable career track; failing to provide information about promotions or advancement in the full range of career track offered by the employer; or otherwise limiting or depriving an employee of employment opportunities that would otherwise be available but for the employee's sex or gender identity
- Expands the definition of "same establishment" to include any workplace of the same employer located in the same county.
- Adds a new exception for a system that measures performance based on quality or quantity of production.
- Explicitly allows an employee to demonstrate that an employer's reliance on one of the now seven exceptions is a pretext for discrimination.

Second, on the apparent theory that if employees gather more information on wages, employers will be more likely to decrease or eliminate wage disparities, the Act adds an entirely new provision that bars employers from prohibiting any employees from inquiring about, discussing, or disclosing the employee's wages or those of another employee, or requesting that the employer provide a reason for why the employee's wages are a condition of employment. It also bars any agreement to waive the employee's right to disclose or discuss the employee's wages. In particular, an employer may not take any adverse employment action against an employee for:

- Inquiring about another employee's wages;
- Disclosing the employee's own wages;
- Discussing another employee's wages if those wages have been disclosed voluntarily;



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- Asking the employer to provide a reason of the employee's wages; or
- Aiding or encouraging another employee's exercise of rights under this law.

However, an employer may in a written policy provided to each employee establish reasonable workplace limitations on the time, place and manner for inquiries relating to employee wages, so long as it is consistent with standards adopted by the Commissioner of Labor and Industry and all other state and federal laws. (For example, under the National Labor Relations Act, rules limiting discussions to non-working time have been held valid). For example, a limitation may include prohibiting discussion or disclosure of another employee's wages without that employee's prior permission, except where the employee has access to that information as part of the employee's essential job functions and uses it to respond to a complaint or charge, or in furtherance of an investigation, proceeding, hearing or action under the Act. Violation of such a policy may be a defense for adverse action.

The Act expressly does not, however, require an employee to disclose his or her wages; diminish employees' rights to negotiate the terms and conditions of their employment, or the rights provided under any other provision of law or collective bargaining agreement; create an obligation on any employer or employee to disclose wages; permit disclosure without written consent of an employer's proprietary information, trade secret information, or information otherwise subject to a legal privilege or protected by law; or permit disclosure of wage information to a competitor.

These provisions enlarging employee sharing of wage information are similar to rules that have long existed under the National Labor Relations Act for employees other than managers and supervisor, and recently promulgated by Executive Order 13665 (April 8, 2014) as to employees of federal contractors. These rights are now expanded to all Maryland employees.

The Act further expands the remedies for violation of the equal pay provisions to include injunctive relief and creates a cause of action under the disclosure provisions for injunctive relief and both actual damages and an additional equal amount as liquidated damages. Existing law allowing recovery of attorney's fees and costs apply to both types of claims. Finally, similar to the provisions of federal Title VII law, the Act now extends the statute of limitations to three years after discovery of the act which a lawsuit is based, rather than just three years after the act itself.

Maryland employers should review any rules they have regarding employee discussions about their wages for compliance with the Act's protections for such discussions.

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