

Employer-Side Lawyers Parse Pay Equity Law (And Urge Action Sooner Rather Than Later)

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PS&H partner Alicia Samolis was one of the employer-side attorneys who recently weighed in on the new Rhode Island pay equity law to *Rhode Island Lawyers Weekly*.

Alicia first advised that “[a]s a conceptual matter, don’t think of this as a discrimination law. Forget about ‘protected class’ status. Every single employee is of a gender, race and sexual orientation. Instead, think of it as a law limiting the factors an employer can consider when setting wages.”

Alicia and other employer-side lawyers noted agreed there were several ambiguities in the Act that will hopefully be clarified by guidance and regulations.

In the interview, Alicia stated that the eighth permissible reason to pay people differently – the statute’s “catch-all” exception allowing for differentials for any nondiscriminatory reason that it is “job-related to the position” and “consistent with business necessity” – to be vague. “How exactly the catch-all will be interpreted by the future regulations and guidance is very significant,” Alicia explained. “What is not clear is whether the requirement of being ‘job-related’ and ‘consistent with business necessity’ will be a broad concept similar to a ‘sound business reason’ or whether it will be narrowly interpreted to require the reason not to relate to individual factors or the circumstances of the particular hire.” On the other hand, Alicia pointed out that a broad interpretation of this factor would “decrease the significance of the law drastically” because of the unlikelihood of an employee-side attorney undertaking the costly exercise of demonstrating the existence of a cost-effective alternative business practice that serves the same purpose without creating a wage difference (a provision that only applies to the “catch all” exception). For example, it appears crystal clear that justifying a pay difference because the individual is related to the owner or has a college degree unrelated to the position would not be permissible. What is uncertain are the more likely sound business reasons, such as the candidate asked for more money upon hire or promotion.

Alicia also noted that the provision requiring the “wage range” to be provided to new hires, employees who are put in new positions and applicants who request the range was too vague to predict how significant requirement will be. Alicia advised “[a]s long as the regulations do not become more specific and require reference to [an existing pay scale, previously determined range, range of those holding the position, amounts budgeted for the position or wages for incumbents in equivalent positions] or prohibit pay outside the range given, then this likely will not be too problematic, as essentially the employer can give a large range on what it expects to subjectively pay for a position and then set the actual salary at whatever amount is needed.” However, Alicia noted if the regulations do set out specific requirements for wage ranges, it could be a real headache for employers.

Despite the ambiguities, Alicia and several of the other attorneys who were interviewed stressed the importance of not waiting until the January 1, 2023 effective date or the regulations to take action, particularly because an employer cannot lower anyone’s compensation once the law becomes effective.

Alicia advises employers take the following steps:

- (1) Immediately eliminate questions in the hiring process regarding past salary.

(2) If possible, for new hires, try to pay new hires a similar wage to those in existing comparable positions. Unfortunately, that may not be possible right now given the current labor pool is so small and so competitive (so employers are overpaying for new hires). If an employer cannot pay a similar wage, she advises to first see if there is justification under reasons 1-7 in the law and if so, document the reason. If there is no reason under 1-7 try to identify a business reason unrelated to the hot job market (because if the reason is the status of the job market at the time of hire, this will become the illegal reason of a historical pay difference when the statute takes effect).

(3) For existing employees, in the next 6 months (or when the regulations come out, whichever comes sooner) identify positions with similar skill, effort, responsibility and work conditions (excluding jobs where there are only minor differences in these factors). For categories of jobs where there are pay differences that will not fall into an enumerated reason and which are not likely to fall within the catch-all (no matter how it is defined), address those issues or implement plans on how to address the issue prior to January 1, 2023. Think creatively where needed. For example, compensation can be tied to required work travel, so if the too-highly paid relative of the owner also is one of the only employees that has to travel for work, the amount paid for travel could be increased across the board while the base salary of the individual in question is decreased. Alternatively, the position itself could be modified prior to January 1, 2023 so that it is no longer comparable to lower-paid positions. Alicia cautions to be sure to try to fix pay differences in this analysis where the pay is known to be based upon a prior salary history (outside the narrow exception in the statute).

(4) Finish the good faith audit to try to limit damages if a claim does arise at least 6 months prior to the effective date. In addition to compiling the previously identified permissible reasons for pay differences, this will mean revisiting the positions identified in (2) and (3) that did not fit within the specifically enumerated reasons in 1-7 but that could potentially fit within the catch-all and determine based upon the guidance available at that time, if the catch-all applies. If not, change compensation to eliminate the pay difference.

The [Employment & Labor Practice Group](#) at Partridge Snow & Hahn is ready to assist Rhode Island businesses with their compliance efforts. For a general summary of the law, please read the previously published client alert, [Rhode Island's New Pay Equity Law Changes How Employers Must Compensate Their Workforce](#)

The full article as published in *Rhode Island Lawyers Weekly*, can be viewed [here](#). (Subscription required)

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