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Fair Pay, Better Pay, and Paid Leave

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Fair Pay, Better Pay and Paid Leave

This article covers recent statutory, regulatory, and case law developments regarding pay equity and paid leave. The article begins by discussing state specific pay disclosure legislation, moving on to a discussion of pay transparency developments under the National Labor Relations Act (NLRA), then a discussion of state statutes and recent cases under the Equal Pay Act (EPA), and finishing with a section on state paid family and medical leave (FML) legislation.

The material in this article is for general reference only and is not legal advice. Businesses or individuals with legal questions should seek advice of counsel.

Pay Transparency Laws

Several types of laws fall under the heading of pay transparency laws. First there are pay disclosure laws, which require covered employers to disclose pay information for positions under specific conditions. Second there are salary history bans that restrict employers in if and how they can request and use the salary history of potential job applicants. Third there are laws that require employers to provide pay data to government regulators. Finally, there are laws that prohibit employers from taking adverse action against employees for sharing or discussing pay information.

Pay Disclosure Laws

Pay disclosure laws require a covered employer to disclose the wage or salary range for a position. However, some laws go further, such as Colorado's pay disclosure law which requires employers to disclose all federally taxable employment benefits.[i] Pay disclosure laws differ along several variables, such as coverage, the conditions under which disclosure is required, and enforcement mechanisms and penalties.

Pay disclosure laws intend to promote pay equity by providing employees the ability to compare their pay against similar positions, both within their organization and at other employers. Additionally states that require disclosure in job postings and advertisements make it easier for potential applicants to decide whether they want to apply for a job based on the provided pay information. The intended effect is that underpaid individuals armed with this information are better able to advocate for equal or higher pay.

State and Municipalities with Pay Disclosure Laws

Currently, eight states and at least seven municipalities have passed pay disclosure laws. The states are California, Colorado, Connecticut, Maryland, Nevada, New York, Rhode Island, and Washington.[ii] Cities include Jersey City, NJ; Albany, Ithaca, and New York City, NY; and Cincinnati and Toledo, OH.[iii] The Hawaii legislature passed a pay disclosure law on May 4, 2023, that would require disclosures in job postings if signed by the governor.[iv] A similar bill passed both houses of the Illinois legislature on May 17, 2023.[v]

Pay Disclosure Law Coverage

Most pay disclosure law coverage is relatively broad. Some pay disclosure laws include an exemption for small employers, typically for employers with less than four (New York)[vi] to fifteen employees (California, Washington, Cincinnati, Toledo).[vii] Other exceptions deal with remote workers, such as Colorado, which exempts employers who have no *employees* in Colorado[viii], or Connecticut, which exempts *employers* located outside of the state.[ix] Additionally, almost all pay disclosure laws apply to both outside job applicants *and* current employees seeking transfer or promotion with a few narrow exceptions.

Triggers for Disclosure and Required Information

The triggers for when this information must be disclosed also vary. California, Colorado, Jersey City, New York, and Washington require the information to be disclosed in job postings and advertisements.[x] Connecticut

requires employers to provide the disclosure no later than at the time an offer is made.[xi] Nevada requires the information to be disclosed at the completion of a job interview.[xii] Most other pay disclosure laws (e.g. Maryland, Rhode Island) require disclosure only at the request of the employee or applicant.[xiii]

Pay Disclosure Law Enforcement and Penalties

Most pay disclosure laws are overseen by state departments of labor. Labor commissioners or similar administrative positions often have some discretion in adjudicating penalties. Not surprisingly, penalties usually increase for multiple or subsequent violations. Civil penalties range from a few hundred up to tens of thousands of dollars (New York City is an outlier with penalties up to $250,000 for a first violation that goes uncured).[xiv] California, Connecticut, Washington, and several other jurisdictions also give employees or applicants a private cause of action with statutory damages.[xv]

Salary History Bans

Salary history bans prohibit employers from seeking or requiring applicants to disclose prior pay history when applying for a position. The intent behind salary history bans is to prevent past pay information, which may be the result of discrimination, from influencing future employer decisions about an employee's level of pay. Like pay disclosure laws, salary history bans vary in coverage, enforcement, and penalties.

Twenty states have enacted some form of statewide salary history ban, including Alabama, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Nevada, New Jersey, New York, North Carolina (state agencies only), Oregon, Pennsylvania (state agencies only), Puerto Rico, Rhode Island, Vermont, Virginia (state agencies only), and Washington.[xvi] Many individual cities and counties have enacted similar laws. Conversely, Michigan[xvii] and Wisconsin[xviii] have prohibited local governments from enacting salary history bans.

Pay Data Reporting

Pay data reporting requirements are often the most taxing form of pay transparency law on employers.[xix] Pay data reporting laws require that an employer collect and provide pay data on current employees often correlated to race and gender to enforcement or regulatory authorities. The intent is that by requiring employers to collect and process the data employers may become more aware of inequity within their organization. Additionally, the data is used to formulate pay equity policy and potentially for enforcement purposes.

Federal Pay Data Reporting

In 2016 the Equal Employment Opportunity Commission (EEOC) implemented a pay data reporting measure, applicable to 2017 and 2018 reporting. The EEOC collection effort applied to employers of 100 employees or more and was included as part of the annual filing of Employment Information Report EEO-1. The revised filing included a much more thorough collection of information, including race, gender, and ethnicity information. The EEOC did not renew the measure in 2017, so the additional information did not need to be reported starting in 2019 onward. [xx] However, in 2020 the Biden EEOC considered revisiting the issue.[xxi]

State Pay Data Reporting

Since the expiration of the federal requirement, two states have enacted state-level pay data reporting requirements, California and Illinois. Like the federal requirement, both state laws are limited to employers with 100 or more employees. The California law[xxii], enacted in 2020, requires covered employers to disclose pay data by sex, race, and ethnicity annually to the Department of Fair Employment and Housing. The data may not be disclosed except in aggregated form.

The Illinois law[xxiii], effective January 1, 2023, requires covered entities to not only disclose pay information by

race, sex, and ethnicity, but also to obtain an equal pay registration certificate from the Illinois Department of Labor, certifying that the entity is not paying female and minority employees consistently below average compensation. Additionally, to obtain a certification, employers cannot restrict access to job classifications on the basis of sex and must make retention and promotion decisions without regard to sex. Covered entities must recertify every two years. Like the federal and California requirements, Illinois prohibits disclosure of the information except in aggregated and anonymized form.

Pay Transparency under the National Labor Relations Act

The NLRA is a federal statute that covers most private sector employers within the United States.[xxiv] Section 7 of the NLRA provides protections for concerted activity of covered employees. Included in the definition of "concerted activity for mutual aid or protection" under Section 7 is the sharing of pay information, not only with coworkers, but also with the public, such as on social media.[xxv] The NLRA may protect employee discussion of wages, even when done by a single employee, because "discussions of wages are often preliminary to organizing or other actions for mutual aid or protection."[xxvi]

Employee Disclosures of Pay Information under the National Labor Relations Act

An employer generally violates the NLRA when they take any kind of adverse action against a covered employee who discloses pay information.[xxvii] Likewise, under the National Labor Relations Board's interpretations of the NLRA in two of the last three administrations, an employer may violate the NLRA where it maintains a rule prohibiting or interfering with employees' ability to share or disseminate wage information, whether or not an employee faced any adverse action as a result of the rule.[xxviii]

Importantly, while the NLRA protects an employee's right to share pay information, it does not establish an affirmative obligation for employers to share such information with current or prospective employees. Employer-maintained information on employee wages need not be disclosed to employees (with some exceptions for unionized workplaces during grievance proceedings or bargaining).[xxix]

The Board's Decisions in Boeing *and* Argos Ready Mix

In 2017 the Board revised its framework for evaluating employer rules in *The Boeing Company*. *Boeing* created three groups of employer rules (1) presumptively lawful types of rules, (2) rules that required individual scrutiny, and (3) presumptively unlawful types of rules.[xxx] General confidentiality rules protecting proprietary or customer information are presumptively lawful, whereas rules restricting employee discussion of wages or benefits are presumptively unlawful. Importantly the Board held that rules should be interpreted from the perspective of objectively reasonable employees, aware of their rights, who view rules through the "everydayness" of their job.[xxxi]

In 2020 in *Argos Ready Mix*, applying the *Boeing* standard, the Board found that an employer handbook rule forbidding employees from disclosing "earnings" and "employee wages" was lawful based on its context within a paragraph about trade secrets.[xxxii]

The Biden National Labor Relations Board

Since taking office in 2021, the Biden Board and General Counsel have been less friendly toward employer interests. In an August 12, 2021 memo, National Labor Relations Board General Counsel Jennifer Abruzzo listed *Boeing* and its progeny as priorities for reversal, foreshadowing a likely expansion of protections for employee disclosures of information.[xxxiii]

Likewise, the Board's decision in *McLaren Macomb* on May 10, 2023 reflected a less employer friendly direction.

In that case the Board held that a severance agreement that placed confidentiality restrictions on former employees violated the act because it interfered with employees' ability to discuss terms and conditions of employment (such as wages) with other current and former employees, thereby impeding employee rights under Section 7.[xxxiv]

State Laws Protecting Employee Discussions of Pay

In addition to protections for employee discussions of pay adjudicated under the NLRA, twenty-one states have statutes explicitly protecting employee discussions of pay including California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, New York, Oregon, Rhode Island, Vermont, Virginia, and Washington.[xxxv] Most of these laws apply broadly to all employers, even those exempted from NLRA coverage. A few states allow small employers, generally those employing under four to fifteen employees, to be exempt from the legislation.[xxxvi]

Like the NLRA, these statutes forbid retaliation, discrimination, or discipline against employees that disclose, discuss, or inquire about pay information and forbid employers from making rules that obstruct employees' right to share or discuss pay information. Many laws specify that there is no affirmative obligation for employers to disclose wage information.[xxxvii] Some laws provide for additional exemptions, such as allowing employers to forbid disclosure of pay information to competitors,[xxxviii] protections for proprietary and confidential information,[xxxix] and protections for employee privacy.[xl]

Common penalties for violating these laws include statutory damages and injunctive relief, such as reinstatement of an unlawfully terminated employee. Penalties are typically enforced via state labor boards or other administrative procedures, but many also allow for private civil actions by aggrieved employees.[xli]

The Equal Pay Act

The EPA amended the Fair Labor Standards Act (FLSA) to allow employees to sue when subjected to unequal pay for equal work.[xlii] However, the EPA explicitly allows for differences in pay based on (i) seniority, (ii) a merit system, (iii) differences in quantity or quality of production, or (iv) "any other factor other than sex." These exceptions function as affirmative defenses to claims under the EPA.

Although the EPA is meant to be liberally construed,[xliii] the actual requirements are interpreted somewhat stringently.[xliv] For instance, additional duties, effort, or responsibilities, or different work conditions may not meet the requirements of "equal work" to bring suit under the EPA. While implementing regulations only require that work be "substantially equal," some federal courts have required that jobs be "virtually identical" in order to qualify as "equal work."[xlv]

The Supreme Court's Decision in Yovino v. Rizo.

In 2019 in *Yovino v. Rizo*, the Supreme Court heard a case in which the Ninth Circuit, in an *en banc* panel, held that prior salary did not qualify as a "factor other than sex" under the EPA. Instead of deciding the merits of the case, the Supreme Court vacated and remanded the case on a technicality.[xlvi] On remand, the Ninth Circuit reaffirmed its previous ruling.[xlvii] On July 2, 2020, the Supreme Court refused to hear the case,[xlviii] leaving a circuit split on the issue.

Circuit Court Approaches to the Equal Pay Act

The differences between circuits are rather broad. Currently, the Ninth Circuit has held that prior salary is never a factor other than sex.[xlix] On the other end of the spectrum, the Seventh Circuit has held that prior pay information may always be used to justify a pay differential, based on a more literal reading of the statute.[l]

A common approach, established by the Second Circuit in *Aldrich v. Randolph Central School District*, is to require that pay distinctions be based on "job-related factors."[li] Courts that follow the job-related factors reasoning generally do not allow for prior salary alone to justify a pay difference, though it may be considered among other factors.[lii]

State Equal Pay Laws

In addition to federal legislation, like the EPA or Title VII of the Civil Rights Act of 1964, almost all states have some form of equal pay legislation, the last to pass being Mississippi in April 2022. The legislation in most states is either written or interpreted to be coextensive with the EPA.[liii], [liv], [lv]

States with both broader language and interpretations include California, Colorado, Connecticut, Illinois, Maryland, Massachusetts, New Jersey, New York, Oregon, Rhode Island, and Washington. The Connecticut, and Massachusetts laws require only that work be "comparable" and bar prior salary as a consideration for pay differences.[lvi] The Maryland statute adds gender identity as a protected category and limits the affirmative defenses available.[lvii] The New Jersey law adds multiple protected classes and creates a five-factor affirmative defense that requires all elements to be met.[lviii] New York has a salary history ban, "substantially similar work" language, and a limit to the "factor other than sex" affirmative defense.[lix]

The California law arguably goes even further, requiring "substantially similar" work and explicitly excluding factors derived from a sex-based difference.[lx] California also added race and ethnicity as protected groups under its equal pay law and has a salary history ban.[lxi]

The Oregon law uses the "comparable" work standard in language similar to Massachusetts. In Oregon the courts have long held that this standard is broader than the EPA.[lxii] The Oregon law amended in 2019 also eliminated the catchall "factor other than sex," instead requiring that pay differences be based on one or more of eight enumerated factors.[lxiii] Like California, Oregon also expands the protections to other protected classes and offers protections based on prior salary.[lxiv]

The Colorado law limits acceptable reasons for wage differentials to six categories, expands protections to all protected categories, and uses the "substantially similar" language.[lxv]

Leave Laws

Another area of change has been in state leave laws.

State Family Medical Leave Laws

The FMLA generally provides twelve weeks of unpaid family or medical leave to eligible employees of covered employers. Many states have expanded upon these protections. Some expansions are relatively minor, such as in Nevada, which requires employers that already provide sick leave to allow employees to use the paid sick leave for the care of immediate family members.[lxvi] Others allow employers to voluntarily participate in family medical leave insurance schemes, such as New Hampshire.[lxvii] Other states have more comprehensive or mandatory family medical leave insurance schemes, such as in Connecticut and Oregon.[lxviii]

Often these laws cover purposes beyond caring for sick family members, such as parental leave and domestic violence victims.[lxix]

State Paid Sick Leave Laws

A smaller number of states have passed paid sick leave laws. Currently, states with paid sick leave laws are

Arizona, California, Colorado, Connecticut, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Virginia[lxx], and Washington.[lxxi] Typical accrual rates for paid sick leave are around one hour accumulated for every thirty hours worked.[lxxii] Other states, such as Maine, have less favorable rates, accruing one hour of paid leave for every forty hours worked.[lxxiii]

Typically, these laws will exempt smaller employers. Michigan and Nevada exempt employers with less than fifty employees.[lxxiv] Other states, like Massachusetts, require all employers to provide sick leave, but only require employers with 11 or more employees to provide *paid* sick leave.[lxxv] Paid sick leave laws generally limit maximum accrual to around forty to sixty hours.[lxxvi]

It is also important for practitioners to know local ordinances, as many cities have passed paid leave laws that differ from state laws[lxxvii] or in states where paid leave laws otherwise do not exist.[lxxviii] Many states, including Alabama, Arkansas, Florida, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Mississippi, Missouri, New Jersey, Ohio[lxxix], Oklahoma, South Carolina, Tennessee, and Texas preempt city governments from passing paid sick leave laws that are more favorable than those under state law.[lxxx] Of these states, presently, only Maine and New Jersey have paid sick leave laws, so in effect for all other states listed, this preemption bans cities from passing any paid sick leave ordinance.

State Paid Time Off and Vacation Laws

In addition to paid sick or family medical leave, a few states also have paid time off requirements for other reasons. These can vary widely from paid time off for jury duty[lxxxi], voting, pregnancy[lxxxii] or adoption, or even just vacation. Often, these categories are covered by amendments to existing paid sick leave or paid family medical leave laws, such as Vermont's family medical leave law, which requires that employers allow employees to use sick leave when the employee is the victim of domestic violence.[lxxxiii]

Arizona's earned paid leave laws, amended in the wake of the COVID-19 pandemic, are amongst the most employee friendly in the nation. Covered Arizonan employees can use paid leave for the employee's or an immediate family member's (broadly defined) illness, preventative or routine medical care, quarantine, vaccination, or health condition; if the employee's workplace or the employee's child's school or care facility is closed by a public official as a result of a public emergency; for the employee's or employee's family member's absences related to sexual assault or domestic violence, including legal services and relocation; and for psychological or mental healthcare for the employee or the employee's family member.[lxxxiv] Although Arizona's law is broad, many other jurisdictions have similarly broad language.[lxxxv]

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[i] *See* Colo. Rev. Stat. § 8-5-201 to 203 (2023).
[ii] *See* Cal. Lab. Code § 432.3 (2023); Colo. Rev. Stat. §§ 8-5-101, 8-5-201, 8-5-203 (2023); Conn. Gen. Stat. § 31-40z (2023); Md. Code Ann., Lab. & Empl. §§ 3-101 to 3-308 (2023); Nev. Rev. Stat. §§ 613.133 to 613.134, 613.320, 613.432 (2023); N.Y. Lab. Law § 194B (2023); R.I. Gen. Laws § 28-6-22 (2023); Wash. Rev. Code. Ann. § 49.58.110 (2023).
[iii] *See, e.g.*, Cincinnati, Ohio Code of Ordinances Sec. 804-01 to 804-09 (2023).
[iv] *See* An Act Relating to Equal Pay, Haw. H.B. 1192, Haw. 30th Legislature (2019).
[v] *See* An Act Concerning Employment, Ill. H.B. 3129, 103rd Gen. Assemb. (2023).
[vi] *See* N.Y. Lab. Law § 194B (2023).
[vii] *See, e.g.*, Cincinnati, Ohio Code of Ordinances Sec. 804-01(c) (2023).
[viii] *See* Colo. Rev. Stat. § 8-5-203 (2023).
[ix] *See* Conn. Gen. Stat. § 31-40z (2023).
[x] *See, e.g.*, N.Y. Lab. Law § 194B (2023).
[xi] *See* Conn. Gen. Stat. § 31-40z (2023).

[xii] *See* Nev. Rev. Stat. §§ 613.133 to 613.134, 613.320, 613.432 (2023).
[xiii] *See, e.g.*, R.I. Gen. Laws § 28-6-22 (2023);
[xiv] *See* N.Y.C. Admin. Code §§ 8-102, 8-107, 8-109 to 8-126, 8-129 (2023).
[xv] *See, e.g.*, Cal. Lab. Code § 432.3 (2023).
[xvi] *See, e.g.*, Ala. Code § 25-1-30(2023); Cal. Lab. Code § 432.3 (2023); Colo. Rev. Stat. § 8-5-102(2) (2023); Conn. Gen. Stat. § 31-40z (2023); Del. Code Ann. tit. 19, § 709B (2023); Md. Code Ann., Lab. & Empl. § 3-304.2 (2023); Mass. Gen. Laws ch. 149, § 105A (2018); N.J. Stat. § 34:6B-20 (2023); N.Y. Lab. Law § 194-a (2023); R.I. Gen. Laws §§ 28-6-17 to 28-6-24 (2023).
[xvii] *See* Mich. Comp. Laws Serv. § 123.1384 (2023).
[xviii] *See* Wis. Stat. Ann. § 66.0134 (2023).
[xix] *See* Stephanie Bornstein, *The Enforcement Value of Disclosure*, 72 Duke L.J. 1771, 1790 (2023).
[xx] *See id.* at 1790-91.
[xxi] *See* Press Release, EEOC, *EEOC Announces Analysis of EEO-1 Component 2 Pay Data Collection* (July 16, 2020), https://www.eeoc.gov/newsroom/eeoc-announces-analysis-eeo-1-component-2-pay-data-collection.
[xxii] *See* Cal. Gov't Code § 12999 (2022).
[xxiii] *See* 820 Ill. Comp. Stat. Ann. 112/11.
[xxiv] *See* 29 U.S.C.S. §§ 151 to 167.
[xxv] *See* 29 U.S.C.S. § 157; *Lion Elastomers LLC*, 372 NLRB No. 83, slip op. at 2; 2 fn. 10 (2023); *El Gran Combo*, 284 NLRB 1115, 1117 (1987).
[xxvi] *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218, 220 (1995).
[xxvii] *See Triana Indus., Inc.*, 245 NLRB 1258, 1258 (1979) (Discussion of wages "is clearly concerted activity.").
[xxviii] *See Boeing Co.*, 365 NLRB No. 154, slip op. at 4 (2017).
[xxix] *See Texas Instruments v. NLRB*, 637 F.2d 822 (1st Cir. 1981).
[xxx] *See Boeing*, 365 NLRB at 3-6.
[xxxi] *LA Specialty Produce Co.*, 368 NLRB No. 93, slip op. at 2 (2019).
[xxxii] *See Argos Ready Mix, LLC*, 369 NLRB No. 26, slip op. at 2-3 (2020).
[xxxiii] *See* General Counsel Memorandum, National Labor Relations Board, GC 21-04, *Mandatory Submissions to Advice* (August 12, 2021), https://apps.nlrb.gov/link/document.aspx/09031d4583506e0c.
[xxxiv] *See McLaren Macomb*, 372 NLRB No. 58, slip op. at 1 (2023); *see also* General Counsel Memorandum, National Labor Relations Board, GC 23-05, *Guidance in Response to Inquiries about the McLaren Macomb Decision* (March 22, 2023), https://apps.nlrb.gov/link/document.aspx/09031d45839f6ad1.
[xxxv] *See* Cal. Lab. Code §§ 232, 1197.5(k) (2022); Colo. Rev. Stat. §§ 8-5-101 to 106 (2022); Conn. Gen. Stat. § 31-40z (2022); 19 Del C. §§ 710 to 719 (2022); Haw. Rev. Stat. Ann. § 368, 378 (2022); 820 Ill. Comp. Stat. Ann. 112/1 to 112/90 (2022); Me. Rev. Stat. tit. 26 § 628 (2022); Md. Code Ann., Lab. & Empl. §§ 3-301 to 309 (2022); Mass. Ann. Laws ch. 149 §§ 105A to 105C (2022); Mich. Comp. Laws Serv. §§ 408.471 to 408.490 (2022); Minn. Stat. Ann. § 181.172 (2022); Neb. Rev. Stat. Ann. § 48-1114 (2022); Nev. Rev. Stat. Ann. § 613.330 (2022); N.H. Rev. Stat. Ann. § 275:36 to 41d (2022); N.J. Stat. § 10:5-12(r) (2022); N.Y. Lab. Law § 194 (2022); Or. Rev. Stat. Ann. § 659A.355 (2022); R.I. Gen. Laws § 28-6-18(f) (2022); 21 V.S.A. § 495(a)(7)(B) (2022); Va. Code Ann. § 40.1-28.7.9 (2022); Wash. Rev. Code Ann. § 49.58.040.
[xxxvi] *See, e.g.*, 19 Del C. § 710(7) (employer defined as employing four or more employees, and exempting children employed by parents, and agricultural or domestic workers among a few other exemptions); Neb. Rev. Stat. Ann. § 48-1102(1), (2) (employer defined as employing 15 or more employees); Nev. Rev. Stat § 613.310(2), (6) (15 or more employees);
[xxxvii] *See, e.g.*, Minn. Stat. Ann. § 181.172(b)(1) ("nothing in this section shall be construed to… create an obligation on any employer or employee to disclose wages").
[xxxviii] *See* Md. Code Ann., Lab. & Empl. § 3-304.1(e)(6) (2022).
[xxxix] *See, e.g.*, Neb. Rev. Stat. Ann. § 48-1114(2)(b) (2022) ("Nothing in [the law] shall… permit an employee… to disclose proprietary information, trade secret information, or information that is otherwise subject to legal privilege.").
[xl] *See* 820 Ill. Comp. Stat. Ann. 112/10(b) (human resources can be prohibited from disclosing pay information without prior consent from the employee).
[xli] *See, e.g.*, 21 V.S.A. § 495b (2022) (allowing enforcement by (1) the state attorney general; (2) a private court action by an aggrieved person; or (3) filing a complaint with the Vermont Human Rights Commission under CVR 80-250-001(2)).
[xlii] *See* 29 USC § 206(d) (2022).

[xliii] *See* 29 C.F.R. § 1620.34.
[xliv] *See* 29 C.F.R. §§ 1620.13 to 1620.18.
[xlv] *See, e.g.*, *Brennan v. City Stores, Inc.*, 479 F.2d 235, 238 (5th Cir. 1973); *Cohens v. Md. Dep't of Human Res.*, 933 F. Supp. 2d 735, 747 (D. Md. 2013).
[xlvi] The Ninth Circuit opinion, written by Judge Reinhardt, was issued eleven days after the author's death. Judge Reinhardt's vote was required in order to form a majority opinion.
[xlvii] *See Rizo v. Yovino*, 950 F.3d 1217, 1227-29 (9th Cir. 2020).
[xlviii] *See Yovino v. Rizo*, 141 S. Ct. 189 (2020).
[xlix] *See Yovino*, 620 F. 3d at 1227-29 (9th Cir. 2020).
[l] *See Wernsing v. Dep't of Hum. Servs.*, 427 F.3d 466, 468-69 (7th Cir. 2005).
[li] *See Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 525 (2d Cir. 1992)
[lii] *See, e.g.*, *EEOC v. Md. Ins. Admin.*, 879 F.3d 114, 123 (4th Cir. 2018); *Riser v. QEP Energy*, 776 F.3d 1191, 1198 (10th Cir. 2015); *Balmer v. HCA, Inc.*, 423 F.3d 606, 612 (6th Cir. 2005); *Irby v. Bittick*, 44 F.3d 949, 955 (11th Cir. 1995); *see also Spencer v. Va. State U.*, 919 F.3d 199, 204-06 (4th Cir. 2019) (allowing for prior salary to be considered as a factor).
[liii] Al. Code § 25-1-30 (2022) expands the EPA to include race and has a salary history ban.
[liv] The Texas statute applies to public sector workers only.
[lv] *See, e.g.*, Ariz. Rev. Stat. § 23-341; Del. Code Ann. tit. 19, § 1107A (2023); Fla. Stat. Ann. § 448.07 (2023); Ga. Code Ann. § 34-5-3 (2023); Haw. Rev. Stat. Ann. § 378-2.3 (2023); Ind. Code Ann. § 22-2-2-4 (2023); Kan. Stat. Ann. § 44-1205 (2023); Ky. Rev. Stat. § 337.423 (2023); Minn. Stat. Ann. § 181.67 (2023); Nev. Rev. Stat. Ann. § 608.017 (2023); N.H. Rev. Stat. Ann. § 275:37 (2023); N.M. Stat. Ann. § 28-23-3 (2023); Ohio Rev. Code Ann. § 4111.17 (2023); 43 Pa. Stat. Ann. § 336 (2023);
[lvi] *See* Mass. Ann. Laws ch. 149, § 105A (2022); Conn. Gen. Stat. § 31-75 (2023).
[lvii] Md. Code Ann., Lab. & Empl. § 3-304 (2023) limits the "factor other than sex" by requiring it not to be "based or derived from a gender-based differential," requiring it to be "job related with respect to the position and consistent with business necessity" and it must account for the entire differential.
[lviii] *See* N.J. Stat. § 10:5-12 (2023) (Affirmative defenses must be (1) based on legitimate bona fide factors, (2) that do not perpetuate differentials based on protected class, (3) the factors must be applied reasonably, (4) account for the entire wage differential, and (5) must be job-related and based on a legitimate business necessity without a non-discriminatory alternative).
[lix] *See* N.Y. Lab. Law § 194 (2023) (under the New York law a plaintiff can nullify the affirmative defense if the practice causes a disparate impact, an alternative means exists that would not produce the disparate impact, and the employer refused to adopt the alternative practice.).
[lx] *See* Cal. Lab. Code § 1197.5 (2023).
[lxi] *See* Cal. Lab. Code § 432.3 (2023).
[lxii] *See Smith v. Bull Run Sch. Dist.*, 722 P.2d 27, 29 (Or. App 1986).
[lxiii] *See* Or. Rev. Stat. Ann. § 652.220(2) (2023) (the eight factors: "(a) A seniority system; (b) A merit system; (c) A system that measures earnings by quantity or quality of production, including piece-rate work; (d) Workplace locations; (e) Travel, if travel is necessary and regular for the employee; (f) Education; (g) Training; (h) Experience; or (i) Any combination of the factors described in this subsection, if the combination of factors accounts for the entire compensation differential.").
[lxiv] *See* Or. Rev. Stat. Ann §§ 652.210 (5); 652.220(1)(a) (2023).
[lxv] *See* Colo. Rev. Stat. § 8-5-102.
[lxvi] *See* 2021 Nev. ALS 219, 2021 Nev. Stat. 219, 2021 Nev. Ch. 219, 2021 Nev. AB 190.
[lxvii] *See* N.H. Rev. Stat. Ann. §§ 21-I:99 to 21-I:111.
[lxviii] *See* Conn. Gen. Stat. § 31-49e-31-49(s) (2023); Or. Rev. Stat. §§ 657B5 to 675B.920 (2023); *see also* Cal. Unemp. Ins. Code §§ 3300 to 3308 (2023); Colo. Rev. Stat. 8-13.3-501 to 521 (2023).
[lxix] *See, e.g.*, N.J. Stat. § 43:21-39.2(d) (2023).
[lxx] Va. Code Ann. §§ 40.1-33.3 through 40.1-33.6 (2023) applies only to home health care workers. There is no broadly applicable private sector paid sick leave law in Virginia.
[lxxi] *See* Ariz. Rev. Stat. § 23-371 through 381 (2023); Cal. Lab. Code § 245 to 248 (2023); Colo. Rev. Stat. § 8-13.3-401 (2023); Conn. Gen. Stat. § 31-57s (2023); Me. Rev. Stat. tit. 26, § 636 (2023); Md. Code Ann., Lab. & Empl. § 3-1301 to 1310 (2023); Mass. Ann. Laws ch. 149, § 148C, 150 (2023); Mich. Comp. Laws Serv. § 408.961 to 971 (2023); Minn. Stat. Ann. §§ 181.940

through 181.944 (2023) (non-mandatory);
[lxxii] *See, e.g.*, Colo. Rev. Stat. § 8-13.3-403(2)(a) (2023).
[lxxiii] *See* Me. Rev. Stat. tit. 26, § 637(3) (2023).
[lxxiv] *See, e.g.*, Mich. Comp. Laws Serv. § 408.962(f) (2023).
[lxxv] *See* Mass. Ann. Laws ch. 149, § 148C(d)(4) (2023).
[lxxvi] *See, e.g.*, Md. Code Ann., Lab. & Empl. § 3-1304(c), (d) (2023) (48 hours of accrual per year, and 64 hours of total accrual allowed).
[lxxvii] *See, e.g.*, Seattle Municipal Code § 14.16 (2023).
[lxxviii] *See, e.g.*, Phila., Pa., Code § 9-4100 to 4110.
[lxxix] In Ohio some courts have ruled that the preemption law violates state law, thus in Franklin, Hamilton, Cuyahoga, and Lucas Counties, paid sick leave ordinance are still in effect. *See* Ohio Rev. Code Ann. § 4113.85 (2023); *City of Bexley v. State*, 149 N.E.3d 158, 159-60 (Ct. App. 2019); *City of Cleveland v. State*, 2019-Ohio-315, ¶ 9 (Ct. App. 2019); *City of Cincinnati v. State*, 121 N.E.3d 897, 898 (Ct. App. 2019).
[lxxx] *See, e.g.*, S.C. Code Ann. § 41-1-25 (2023); *Tex. Ass'n of Bus. v. City of Austin*, 565 S.W.3d 425, 440-41 (Tex. App. 2018).
[lxxxi] *See, e.g.*, Cal. Lab. Code § 230 (2023); Conn. Gen. Stat. §§ 51-247, 51-247c (2023).
[lxxxii] *See, e.g.*, Wash. Admin. Code § 162-30-020 (2023) (pregnancy treated the same as any other sickness or disability under Washington law).
[lxxxiii] *See, e.g.*, Vt. Stat. Ann. tit. 21, §§ 481 (2023)
[lxxxiv] *See* Ariz. Rev. Stat. §§ 23-371 to 381 (2023).
[lxxxv] *See, e.g.*, R.I. Gen. Laws §§ 28-57-3, 28-57-6, 28-57-11 (2023); Or. Rev. Stat. §§ 653.601 (2023); Wash. Rev. Code §§ 49.46.020 to 49.46.200 (2023).