

Rhode Island's New Wage Law – Pay Equity

William E. O’Gara, Esq.

Pannone Lopes Devereaux & O’Gara LLC

Matthew C. Reeber, Esq.

Pannone Lopes Devereaux & O’Gara LLC

Summary

- Definition of Wages
- Comparable Work – How to Determine
- Protected Classes Under the Act
- Permissible Pay Differentials – How to Determine
- Wage History – Can you use?
- Required Disclosures
- Retaliation Prohibited and Other Protections Afforded by the Act
- Private Cause of Action/Administration Enforcement
- Defense to Claim
- Practical Solutions to Pay Equity Act

Definition of Wages

“Wages” means all amounts of which the labor or service rendered is recomposed, whether the amount is fixed or ascertained on a time, task, piece, commission basis, or other method of calculating the amount and includes benefits. An employer shall not be liable under the Chapter for disparities in total gratuities as defined in Section 28-12-5 or overtime pay as defined in Section 28-12-4.1 or commissions if the disparity is due to a factor over which the employer does not have control.

Comparable Work – How to Determine

- “Comparable Work” means work that requires substantially similar skill, effort, and responsibility, and is performed under similar working conditions.
 - Factors considered:
 - Analysis of the job as a whole
 - Minor differences in skill, effort and responsibility will not prevent two (2) jobs from being comparable.

Protected Classes

Any employer that has more than one (1) employee engaged in comparable work, may not pay its employees a lower wage, inclusive of all benefits, on the basis of:

- Race,
- Color,
- Religion,
- Sex,
- Sexual Orientation,
- Gender Identity or Expression,
- Age,
- Country of Ancestral Origin

Permissible Pay Differentials

How to Determine

- A wage differential is permitted when an employer demonstrates
 - The differential is fair and not being used as pretext for an unlawful wage differential.
 - The differential is based on:
 - A seniority system,
 - **But Note:** An employer cannot reduce seniority based on an employee's leave time for pregnancy or parental family and medical leave
 - A merit system,
 - A system that measures earnings by quantity or quality of production,
 - Geographic location – if the employee works outside the State of Rhode Island,
 - Reasonable Shift differential,
 - Education, training or experience to the extent such factors are job related and consistent with a business necessity,
 - Work related travel, if the travel is regular and business necessity, and
 - Any other *bona fide* factor other than an employee's membership in a protected class.

Permissible Pay Differentials

How to Determine

- An employer must
 - Explain the factors used to determine the differential
 - Show that ***each*** factor is reasonable
- An employee's wage history alone cannot justify an unlawful wage differential
- An employment contract or other agreement is not a defense to an action if the wage differential is unlawful.

Mandatory Disclosures – Wage Range – New Hires

- Upon an applicant-potential hire's request an employer shall provide the wage range for the position applied for by the applicant.
- This disclosure should occur before discussing compensation.
- Upon hire, the employer must share the wage range with the new employee.
- “Wage Range” for new hires is defined as the wage range that the employer anticipates relying on in setting wages for the position and may include reference to any applicable pay scale, previously determined ranges of wages for the position, the actual range of wages for those currently holding equivalent positions, or the budgeted amount for the position, as applicable.

Mandatory Disclosures – Existing Employees

- An employer shall provide an employee the wage range for the employee's position **both** at the time of hire and when the employee moves into a new position.
- During the course of employment, upon an employee's request, an employer shall provide the wage differential for the employee's position.
- "Wage Range" for existing employees is defined as "reference to any applicable pay scale, previously determined range of wages for the position, or the range of wages for incumbents in equivalent positions."
- Employers cannot retaliate against an applicant or employee because they sought a wage range from the employer for their position.

Retaliation Prohibited and Other Protections Afforded by the Act

- An employer cannot prohibit an employee from asking about wages and cannot retaliate against an employee for asking about wages.
- An employer cannot retaliate against an employee or applicant for exercising any right under the Act or opposing any action made unlawful by the Act.
- Employees are protected from retaliation if they encourage or aid another employee in exerting their rights under the Act.
- Employers cannot retaliate against an employee who participates in any proceeding (complaint, investigation, administrative hearing or civil action) allowed by the Act.

Wage History – Can you use?

- “Wage history” means the wages paid to an applicant for employment by the applicant’s current employer, and/or previous employer or employers.
- “Wage history” does not include any objective measures of an applicant’s productivity, including revenue, sales or other production reports.
- An employer will not be penalized for having knowledge of an employee’s wage history at that employer if the employee works for the employer.

Wage History – Can you use?

- No employer shall:
 - Rely on the wage history of an applicant when deciding whether to consider the applicant for employment.
 - Require an applicant's prior wages satisfy a minimum or maximum criteria as a condition of being considered for employment.
 - Rely on the wage history of an applicant in determining the wages for the employee to be paid upon hire.
 - Seek the wage history of the applicant.
- If an employer makes an initial offer of employment, then it can:
 - Rely on the wage history to offer a wage higher than that offered by the employer, provided that the wage history is voluntarily provided.
 - Seek to confirm that the wage history of the applicant to support a higher wage offered by the employer.
 - If an employer completes a background check on an employee/applicant and it discloses wage history, the employer cannot use that information in determining a wage.

Private Cause of Action/Administrative Enforcement

- Private Cause of Action:
 - Any applicant or employee may file a civil cause of action
 - Damages include: compensatory damages, special damages not to exceed \$10,000.00, equitable relief and reasonable attorneys' fees and costs.
 - In setting the damages amount, the DLT, court, or a jury may look at:
 - the size of the business,
 - the good faith of the employer,
 - the gravity of the violation,
 - the history of previous violations and
 - whether the violation was an innocent mistake or willful.

Private Cause of Action/Administrative Enforcement

- Administrative Procedure:
 - An applicant or employee may file a complaint with the DLT.
 - If an applicant or employee, files a complaint with the DLT then the employee is precluded from filing a complaint in court, if the DLT has noticed an administrative hearing.
 - The DLT may file an enforcement action in court to collect any damages owed to the employee or fines owed to the DLT.
 - The DLT may also refer any complaint to the Department of the Attorney General for investigation.
 - In addition to the damages allowed under the Act, the DLT may fine employers as follows: (1) up to \$1,000.00 first offense, (2) up to \$2,500.00 second offense, (3) up to \$5,000.00 third offense.

Private Cause of Action/Administrative Enforcement

- Statute of Limitations:
 - An applicant or employee must file the claim within two years of when they knew of the discriminatory pay practice.
 - An applicant or employee may file the claim within three years of the discriminatory pay practice if the employee can show that the employer willfully and wantonly violated the Act.
 - An applicant or employee must provide the employer with notice of their intent to file a claim at least forty-five (45) days before commencing any action.

Defenses to Claim – Self Evaluation

- Full liability defense
- **Defense:** If an employer conducts a good-faith self-evaluation within two years of the commencement of an action and can show that any unlawful wage differentials have been eliminated, then the employer will have a full defense to liability.
- An employer must show “reasonable diligence” in the self-evaluation, which includes review of all relevant jobs, whether the employer attempted to identify “similar jobs,” whether the employer tested its explanatory factors for non-biased wage differentials, and whether the employer retained documents showing its evaluation process.
- Only allowed from January 1, 2023 to June 30, 2026.

Defenses to Claim – Self Evaluation

- An employer shall have ninety (90) days from the date of completion of its self-evaluation to adjust any unlawful wages.
- After June 30, 2026, self-evaluation still allows an employer to avoid liability for liquidated damages, compensatory damages and administrative fines *if* they pay any wages owed to their employees for any unlawful differentials found during the self-evaluation.

Pay Equity – Miscellaneous Provisions

- **Notice Requirement** – The DLT will create materials that employers must post in a conspicuous place or places on its premises.
- Employers must obtain a signed waiver if an employee declines health insurance or retirement benefits.
- **Safe Harbor Period:** No civil penalties will be assessed under the Act from January 1, 2023 to December 31, 2024.

Practical Solutions to Pay Equity Act

- Employment Applications
 - Eliminate any questions that seek wage history.
 - Upon interview, you can ask whether they have a wage expectation.
- Educate managers and anyone involved in hiring to understand the act's requirement.
- Educate managers and front-line supervisors about how to address a request for a wage range.
- Game plan for difficult discussions at hire and during employment.
- “Meaningful” Job Descriptions.
- Handbook – updated policies?
 - No discrimination
 - No retaliation
 - Procedure for obtaining wage requests

Practical Solutions to Pay Equity Act

- Wage Range Forms?
 - What information?
 - Required to provide the highest and lowest wage for position.
 - **Example:** Certified Nursing Assistant I - \$18.00/hour to \$26.00/hour
- Wage Range Requests
 - Document upon hire that information provided.
 - Document upon position change that information provided.
 - Obtain receipt from employee that they received information.
 - Keep receipts in employee file.
- Self-Evaluation
 - Complete a payroll audit
 - Identify problem wage differentials
 - Test reason for difference
 - Maintain copies of everything

Practical Solutions to Pay Equity Act - Retaliation – How to Handle a “Report”

- Document the complaint
- Follow up – Ask questions of about complaint and define what the employee claims about the alleged violation
- Investigate
- Advise – “no retaliation”
- Policy – do you have a policy that prohibits retaliation? If so, provide employee copy and advise them to contact Human Resources.
- Follow up – Insure no retaliation
- How do we defend against a retaliation claim from a problem employee?

Additional Resources

- DLT's Pay Equity website - <https://dlt.ri.gov/about-us/laws-rules-and-regulations/pay-equity-act>
 - Includes: DLT's Self-Evaluation Guide and DLT's Model Self-Evaluation Spreadsheet

Questions – Contact Information

- Questions?
- Contact information

Matthew C. Reeber, Esq.
Partner
Pannone Lopes Devereaux & O’Gara LLC
mreeber@pldolaw.com
401-824-5105

William E. O’Gara, Esq.
Principal
Pannone Lopes Devereaux & O’Gara LLC
wogara@pldolaw.com
401-824-5117