

June 22, 2022

VIA ELECTRONIC AND FIRST-CLASS MAIL

Sean M. Fontes, Executive Counsel (sean.fontes@dlt.ri.gov)
John Willumsen (John.willumsen@dlt.ri.gov)
Department of Labor and Training
1511 Pontiac Avenue
Cranston, RI 02920

Re: Written Comment to Proposed Pay Equity Act Regulations and Guidance

Dear Sean and John:

I am a Partner at Partridge Snow & Hahn and the Chair of the Labor & Employment Group. The purpose of this letter is to provide written comments to the proposed materials concerning the Rhode Island Pay Equity Act. In particular, we have identified items which need clarification so that we can better advise our clients as to how to comply with the law.

- (1) Further clarification as to what is “comparable work”.
 - (a) Please provide examples of what are and are not considered to be performing “comparable work” under Section 28-6-18.
 - (b) Please clarify whether when considering what is “comparable work”, the standard is similar to the federal EPA.

- (2) Statistical Analysis. The guidance with the excel template speaks to allowing a valid statistical analysis verses an individual comparison. Please clarify the following:
 - (a) Is statistical analysis always allowed or only when individual comparison is not “practicable”? If the latter, please provide guidance as to when individual comparison would not be practical (e.g., is it the size of the employer, comparable work grouping or something else?).
 - (b) When thinking about accounting for all pay differentials through statistical analysis, if an employer has 50 individual examples of men making more than women in comparable job groupings, would it be sufficient to show that statistically women were paid on average more or equal to men in each of the affected job groups?
 - (c) Please provide examples of how the statistical analysis would work across a cohort of the protected classes.

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(3) Giving Raises to Remedy Pay Disparity.

(a) The guidance with the excel template speaks to the possibility of raising employee compensation in the same amount or percentage. It would appear that unless the pay was raised on an individual basis to match comparator pay, there would still be a differential. Is it sufficient simply to give raises to those with pay differentials without actually matching the salary to those in the similar job grouping? For example, if two men are paid less than women in the same job grouping, one by 12% and other by 8%, could they both be provided a 10% raise?

(b) Often an adjustment in pay will create a pay disparity in another protected characteristic, as every individual will have at least 7 protected characteristics (everyone is of a race, color, religion or lack of religion, sex, sexual orientation, gender identity or expression and country of ancestral origin). Is a pay differential created by an adjustment under the Act an exemption in itself? For example, if in one job grouping, there are three individuals, a man and a woman making \$70,000 and a man making \$80,000 with no exemption. Can you just raise the woman's pay to \$80,000 and be done? Or once you do that, would you also have to raise the man's pay to \$80,000 (as once you raise the woman's pay, she would make \$10,000 more than one of the men with no exemption).

(4) Identifying factors (also referred to as "exemptions") to justify pay differentials.

(a) For factor 8 (another bona fide factor), please provide examples of what would or would not be included.

(b) Is the current tight labor market (often necessitating increased pay at the time of hire) a permissible reason to pay someone differently under factor 8?

(c) There is an "or" between Section 28-6-18(b)(3) and (4), which appears to say that the employer can either show the factor identified actually explains the differential or the factor is reasonably relied upon. Please confirm this means that the employer does not actually have to show the pay was set for that reason (which in many cases would be impossible to know) as long as the reason identified is what the employer relies upon to continue to pay the employees differently.

(d) The excel template formula results in unintended results because it applies an identified exemption for one situation to every possible pay differential. For example, if in the "example scenario" provided, Manager 06 had more work related travel than Manager 02 and thus has an exemption, the potential violations will disappear for Managers 01 and 05 even if those managers travel the same as Manager 06. Said another way, the spreadsheet will only work if the exemption justifies all pay differentials for the individual with an exemption, which would be rare.

(e) Please provide a definition and examples of what is and is not a "merit system".

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- (5) Wage Range. Under the proposed regulations (Section 8.8.2), it states that the range required to be given must include the minimum and maximum amount paid. Please confirm that consistent with the statute, this should not be read to require the minimum and maximum amount **currently** paid to employees in the position but rather an employer can choose any of the methods set forth in Section 28-6-17(10).
- (6) Pay Differential. The excel template identifies a difference in pay of one cent to be a “pay differential”. Including small differences in pay makes it virtually impossible to properly do an Equal Pay Act audit and hinders the goal of the Act. For example, in the statistical context, generally less than two standard deviations from the norm are regarded as chance. Thus, for purposes of the Equal Pay Act Audit, I would suggest that a “pay differential” have a threshold, such as a difference in pay exceeding \$5,000 annually or 5% of annual salary, to avoid forcing employers to make small adjustments to pay that are most likely do to chance, not discrimination.
- (7) Out of state workers. Please clarify:
- (a) If for comparison purposes, out of state workers must be included in the analysis. It appears the statute intends to exclude out of state workers, as the definition of “employment” requires the greater part of the work to be performed within the state (Section 28-6-17(6)), but the term “employment” does not often appear in the statute.
 - (b) That an out of state worker has no standing to bring a claim under the statute unless the worker is applying for a job that would be substantially performed within the state and is not provided the requested salary range.
- (8) Relevant Compensation. It is clear that money paid for reasons other than work should not be included in an employee’s pay for purposes of this law. Please confirm the following can be excluded:
- (a) Referral Bonuses;
 - (b) Signing Bonuses;
 - (c) Compensation for Relocation;
 - (d) Subjective Bonuses, such as a Holiday Bonus.
- (9) Simplification of Regulations. It appears Sections 8.4, 8.6, 8.7, 8.8.1, 8.8.3, and 8.10 are duplicative of the statutory language and can be deleted to avoid any confusion.

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I truly appreciate your consideration of these questions/comments and appreciate your time.

Sincerely,


Alicia J. Samolis *AS*

cc: Michael A. Gamboli, Esq.
Joshua D. Xavier, Esq.