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RHODE ISLAND WORKING FAMILIES PARTY

June 23rd, 2022

Dear Mr. Fontes,

We'd like to offer a few comments and suggestions on the proposed Pay Equity Regulations. We offer these out of our experience being deeply engaged with legislators at every phase of the drafting, revision, and negotiation of this bill on its way to passage, so we think we are well positioned to speak to legislative intent.

1. **Wage Range**

   The proposed regulatory language here seems to imply that a wage range need only be provided "on request." That simply isn't what the law says or what the drafters intended, and we suspect it is a mistake. The legislative language in 28.6.22 c is somewhat complicated, as it was the result of much conversation and redrafting and could use clarification. It identifies three different kinds of obligations where an employer has to provide wage ranges under different circumstances.

   a. An employer must provide the wage range for a position proactively at the time of hire and when an employee moves to a new position. No request is required in these circumstances.
   b. An employer must provide the wage range at any time that an applicant for a job requests it or that a current employee requests it.
   c. An employer "should" provide the wage range proactively before discussing compensation with a potential employee. This legislative language is vague, but the intent was to set a standard while addressing employers' concerns that individual hiring managers would make mistakes that could be costly. We suggest, and this what legislators were talking about as they wrote the language, that the regulation require employers to have a clear policy instructing hiring managers to share the wage range proactively at this moment in the hiring process but have there be no penalty or liability for a manager who fails to do so in a case. We think this would clarify "should" and be most clearly in line with the legislative intent.

2. **“One or more employees”**

   The draft regulations in 8.3 reference “one or more employees.” This concerns us because it seems to say that an employer would have to have two people doing comparable work in order for an employee to bring a claim, which we think would mean that if an employee who doesn’t have a colleague doing comparable work—example the CFO (usually there is only one and there might not be comparable jobs)—were to bring a claim of pay discrimination on the basis that their predecessor was paid more than them, they wouldn’t be able to bring such a claim because the employer doesn’t have “more than one employee engaged in comparable work.” EEOC uses a predecessor as a comparator in an example in their guidance. Based on that, an employee can use their predecessor as a comparator, if there isn’t anyone else doing comparable work at the time the discriminatory act occurred.

3. **Retaliation**

   These draft regulations say an employer is prohibited from taking an adverse action “solely on the basis of” protected activity. We read this to say that an employee has to prove it was the “but for” cause of the adverse action—i.e. there can’t be any other contributing reason for the adverse action wrapped up in it (or in other words, the protected activity needs to be more than a “motivating factor” for the adverse action). It looks like Rhode Island courts have looked at whether there was a “causal connection” between the reporting and the retaliatory act under the RI Fair Employment Practices Act. We suggest using a “motivating factor” or perhaps “causal connection” standard here.

Thank you so much for your thoughtful attention to these issues. Feel free to be in touch if you have questions.

Sincerely,

Georgia Hollister Isman

Rhode Island Working Families