

O'NEILL & BORGES' LABOR NEWS ALERT

PUERTO RICO APPROVES AGGRESSIVE EQUAL PAY LAW

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On March 8, 2017, Governor Ricardo Rosselló Nevares signed the *Puerto Rico Equal Pay Act* ("PREPA" or Law No. 16:2017). This new law aims to address and eradicate pay disparities between men and women in the government *and* private sector workplace. However, the regulatory scheme adopted goes far beyond the requirements of the federal *Equal Pay Act*. As such, PREPA imposes new restrictions on employer policies and practices related to inquiring about a job applicant's prior salary data and prohibiting employees from discussing their wages.

While inspired by similar legislation recently approved in California, Connecticut, New York, Maryland, Oregon, Delaware and Massachusetts, PREPA establishes more restrictions on employer practices and entails greater monetary exposure than any of its counterparts in the states.

An initial examination of PREPA's principal provisions follows.

Equal Pay for Comparable Work

PREPA initially contains a mandate similar to the federal *Equal Pay Act* of 1963 ("EPA"), which prohibits wage disparities between employees *of opposite* sex when they perform work that requires substantially similar skills, effort and responsibilities under similar working conditions. PREPA emphasizes that the work only needs to be "comparable." Further, the job title or job description, by itself, is insufficient to establish whether jobs are comparable.

PREPA states it should be interpreted in a manner similar to the federal EPA and corresponding federal regulations, unless PREPA provisions require otherwise. Similar to federal law, PREPA does not require an adversely affected employee to demonstrate the employer's "discriminatory intent" in establishing the different wages.

One of the ways PREPA departs from EPA is that employee wage comparison is not limited to employees working at the same "establishment." Therefore, multi-establishment employers need to compare the wages of employees working at different locations. *At a minimum*, this means the pay of an employee may need to be compared to the pay of other employees working anywhere in Puerto Rico.

PREPA, similar to EPA, allows differences in pay when the disparity is based on (1) a *bona fide* system that recognizes seniority or merit; (2) a compensation system based on quality or quantity of production, sales or profit; or (3) any other reasonable factor unrelated to the employee's sex (the "other than sex" defense). PREPA also permits pay differences based on "education, training and experience that are

reasonably related to the specific work performed," a defense that has been recognized under EPA's "other than sex" defense.

Prohibiting Salary History Inquiries in Hiring Process

Following the precedent of a Massachusetts law enacted in 2016, PREPA bans employers from seeking information about an applicant's compensation history in the hiring process. When PREPA enters into effect (see below), Puerto Rico employers will be prohibited from seeking the wage or salary history of a prospective employee- from the applicant or from a current or former employer- prior to making a job offer.

However, PREPA permits an employer to confirm prior wages or salary history *after* an offer of employment with compensation has been negotiated and made to the prospective employee or if the applicant *voluntarily* discloses such information.

The theory behind this type of legislation is that inquiries into an employee's prior salary history perpetuate prior wage discrimination. Further, relying on prior salary history may penalize job candidates who reduced their hours in their former job, or stopped working for several years, to care for children or other family members.

Massachusetts is the only state with a similar law affecting private sector employers. Since this type of restriction on customary policy and practices has not received wide acceptance, this prohibition is not well known. Puerto Rico employers need to carefully examine its provisions and make the appropriate adjustments in their hiring procedures.

Prohibiting Employer Bans on Compensation Inquiries and Discussions

PREPA makes it illegal for an employer to compel current or prospective employees, as a condition for employment or retention, to abstain from inquiring, discussing, disclosing or requesting information pertaining to his or her salary or the salary of another employee who performs comparable work.

An employer may, however, prohibit human resources employees, supervisors, managers or any other employee whose position entails access to information pertaining to employee salaries, from revealing such wage information, unless the employee whose information is being requested provides prior written consent. This prior consent is not required if the compensation information appears in a public record.

Nothing in the Law requires an employer to disclose an employee's compensation to another employee or a third party.

Anti-Retaliation Provisions

PREPA contains an anti-retaliation provision, making it illegal for an employer to dismiss, threaten or otherwise engage in retaliatory conduct against an employee who: (a) discloses his/her salary to other employees or asks other employees about their compensation; (b) objects to any practice prohibited by the statute; (c) submits a grievance or complaint regarding PREPA rights in any forum, and (d) offers or tries to offer, verbally or in writing, any testimony or information in an investigatory procedure against the employer regarding PREPA violations.

Penalties

An employer who engages in a practice prohibited by PREPA is exposed to different

types of penalties.

First, in the case of illegal wage disparity, the employee can recover unpaid wages and an additional equal amount as a penalty, plus attorneys' fees, costs and litigation expenses. *Second*, an employer who engages in discriminatory or retaliatory conduct in violation of the Act will be liable for *double* the amount of damages suffered by the employee. Curiously, the Act provides that such a damage award will not be treated as income for Puerto Rico income tax purposes.

The Act provides a partial affirmative defense from liability to employers who, within one year prior to the filing of the disparate wage claim, have completed or commenced a self-assessment of their pay practices in good faith and can demonstrate that reasonable progress has been achieved towards eliminating wage differentials based on sex for comparable work. Success in this affirmative defense will only excuse the employer from the penalty for illegal wage disparity; not from the back wage award.

The self-evaluation may be of the employer's own design, but PREPA requires employers to follow guidelines to be issued by the Puerto Rico Secretary of Labor and Human Resources. Compliance with such guidelines, by itself, will not release the employer from the penalty.

Statute of Limitations

PREPA grants employees a time period of one (1) year to file a claim under the Act, counted from the moment the employee becomes aware of the violation.

For such purpose, an unlawful employment practice occurs- triggering the commencement of the statute of limitations- whenever a discriminatory compensation decision or other practice is adopted; when an employee becomes subject to a discriminatory compensation decision or other practice; or when an employee is affected by the application of a discriminatory compensation decision or other practice, including each time wages are paid, resulting in whole or in part from such a decision or other discriminatory practice.

Effective Date

PREPA enters into effect from the date it was signed. However, employers will not be held liable under the Act until March 8, 2018. This grace period was granted to permit employers to engage in the self-assessment programs contemplated in the Act as a partial affirmative defense against claims of illegal wage disparities.

What Should Employers Do Now?

PREPA represents many challenges for employers in Puerto Rico. *First*, employers need to clearly understand PREPA provisions and how they exceed the requirements of the federal *Equal Pay Act*.

Second, employers need to carefully evaluate PREPA's impact on their policies and practices. At a minimum, employers must remove wage history questions from job application forms and interview processes. In addition, employers must ensure that anyone participating in recruitment is aware of this new law. As for multi-state employers, their job application forms must be updated to state that candidates in Puerto Rico should not answer salary history questions.

Third, employers need to review their policies regarding employee discussions or sharing of wage information.

Fourth, employers need to examine with legal counsel whether to engage in the self-assessment programs contemplated by PREPA; in particular whether such self-assessment programs and the results can be compelled to be produced in a subsequent litigation.

O'Neill & Borges LLC is available to assist in understanding the impact of PREPA on your operations and addressing the implementation process required by this new law.

*Jorge L. Capó Matos, Esq.
Rocío De Félix Dávila, Esq.*

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O'NEILL & BORGES LLC

250 Muñoz Rivera Avenue, Suite 800
San Juan, Puerto Rico 00918-1813
Tel.: 787-764-8181 - Fax: 787-753-8944

Labor and Employment Law Department

Jorge L. Capó-Matos
Luis A. Núñez-Salgado
Yldefonso López-Morales
José Fco. Benítez-Mier
Carlos E. George
Dimitri González-Izquierdo
Joanna Matos-Hicks
Alberto J. Bayouth-Montes

~
Briseida Torres-Reyes
Ivan Santos-Castaldo
Natalia Marín-Catalá
Rocío de Félix-Dávila
Adriana Moreno-Casanova