



Eighteen states and the District of Columbia have enacted provisions to stop employers from retaliating against employees who discuss their wages with each other, or from outright prohibiting these discussions.<sup>4</sup> Many of these protections were passed in the last several years.

**Colorado:** In 2017, Colorado enacted legislation that prohibits any employer from retaliating against employees for asking or talking about their wages, or requiring an employee to sign an agreement not to disclose their own wage information.<sup>5</sup> Earlier Colorado law prohibited some employers from discharging, disciplining, or otherwise discriminating against employees who inquired about or discussed their wages with others, but exempted any employer who wasn't subject to certain federal labor laws. The law eliminates the exemption and extends wage transparency protections to all employees in Colorado.

**Hawai'i:** In 2018, Hawai'i enacted legislation making it unlawful for an employer to prohibit or retaliate against an employee for disclosing his or her own wages or discussing or inquiring about other employees' wages.<sup>6</sup>

**Nevada:** In 2017, Nevada enacted legislation that prohibits employers from discriminating against employees who have inquired about, discussed, or voluntarily disclosed their wages or another employee's wages.<sup>7</sup> The law's protections do not apply to employees whose essential job functions grant them access to information about the wages of others and who disclose this information to people who do not have access to it, unless the disclosure is ordered by Nevada's Labor Commissioner or a court.

**New Jersey:** In 2018, New Jersey enacted legislation strengthening the state's pay transparency protections. New Jersey law previously protected employees from reprisals for requesting compensation information and only if the purpose of their request was to assist in investigating the possibility of pay discrimination. New Jersey's new law expands that protection to protect employees from reprisals for requesting, discussing, or disclosing information about their own compensation or about the compensation of any other employee or former employee for any purpose.<sup>8</sup> The law also made it unlawful to require an employee or job applicant to sign a waiver or otherwise agree not to disclose compensation information as a condition of employment. Additionally, the law provides that an employer may not retaliate against an employee who discusses or discloses compensation information with an attorney from whom they seek legal advice or any government agency.

**Washington:** In 2018, Washington enacted legislation that prohibits employers from requiring employees to agree to nondisclosure of their wages as a condition of employment, or from otherwise requiring employees to waive their right

to disclose their wages.<sup>9</sup> The law also prohibits employers from discharging or retaliating against an employee who has inquired about, discussed, or disclosed their wages or another employee's wages; who has asked their employer to provide an explanation for their wages or lack of opportunity for advancement; or who has encouraged an employee to exercise their rights to discuss wages and compensation under the law. The law does provide that employers may prohibit employees who have access to compensation information as part of their essential job functions from disclosing wage information of other employees or applicants to other individuals without this access, unless the disclosure is pursuant to a complaint, charge, investigation, or other legal obligation.

### ***Prohibiting Use of Salary History in Hiring***

When an employer relies on a job candidate's prior salary in hiring or in setting pay, any pay disparity or discrimination the candidate faced in her past employment is replicated and perpetuated throughout her career. Relying on prior salary history also penalizes job candidates who reduced their hours in their prior job, or left their prior job for several years, to care for children or other family members. Since 2016, six states have enacted legislation prohibiting employers from seeking prior salary history information from job candidates and employees.<sup>10</sup>

**California:** In 2017, California enacted legislation prohibiting an employer from relying on salary history information when determining whether to make an offer of employment or when determining what salary to offer to an applicant.<sup>11</sup> The law also prohibits an employer from seeking salary history information, although an applicant can voluntarily disclose their salary history. If the applicant does disclose their salary history voluntarily and without prompting, the employer may rely on that information in determining the applicant's salary. Finally, the law requires an employer to provide a pay scale for the position if requested by the applicant.

**Connecticut:** In 2018, Connecticut enacted legislation prohibiting employers from inquiring, or directing a third party to inquire, as to a job applicant's wage and salary history.<sup>12</sup> An applicant may, however, voluntarily disclose such information, and an employer may inquire about other elements of an applicant's compensation structure, provided the employer does not inquire about the value of those elements.

**Delaware:** In 2017, Delaware enacted legislation making it an unlawful employment practice for employers to screen applicants based on their compensation history.<sup>13</sup> The law also prohibits employers from seeking an applicant's compensation history, either from the applicant, or from the



applicant's current or former employer. The law does allow an employer or an employer's agent to seek an applicant's compensation history after an offer of employment and the terms of compensation have been extended and accepted for the sole purpose of confirming the applicant's compensation history.

**Hawai'i:** Hawai'i's new equal pay law prohibits employers from inquiring about a job applicant's salary history or relying on that information to determine the applicant's salary, benefits, or other compensation. The law does, however, permit an employer to consider an applicant's salary history if it is voluntarily provided by the applicant without prompting. The law also clarifies that it does not apply to applicant for internal transfer or promotion with their current employer.<sup>14</sup>

**Oregon:** In 2017, Oregon enacted legislation prohibiting employers from screening job applicants or setting the salary level for a position based on the applicant's current or past compensation.<sup>15</sup> The law also prohibits employers from seeking an applicant's salary history from the applicant or their current or former employer. The law provides, however, that after the employer makes an offer of employment that includes the terms of compensation, the employer may ask the job applicant for written authorization to confirm prior compensation. The law also clarifies that it is not intended to prevent an employer from considering the compensation of a current employee of the employer during a transfer, move or hire of the employee to a new position with the same employer.

**Vermont:** In 2018, Vermont enacted legislation prohibiting employers from inquiring or seeking information about a job applicant's current or prior compensation from the applicant themselves or from the applicant's current or former employer.<sup>16</sup> Additionally, an employer may not require that an applicant's current or prior compensation meet a certain minimum or maximum standard, or decide whether to extend an interview opportunity to an applicant based on that person's current or prior compensation. The 2018 law does provide that if an applicant voluntarily discloses information about their compensation, the employer may seek to confirm that information after extending an offer of employment with compensation to that person.

### ***Expanding Equal Pay Protections to Characteristics Other Than Sex***

Working people too often experience discrimination in pay based on characteristics other than sex, like race or disability. And some people experience intersectional discrimination based on, for example, their race and gender, or their disability and gender combined. However, like the federal

Equal Pay Act, many state equal pay laws only address sex-based pay disparities. In the last couple years, states seeking to strengthen their equal pay laws and close wage gaps have extended their laws to other characteristics protected by anti-discrimination laws so that employees have the tools to address the full array of pay discrimination.

**California:** In late 2016, California amended its equal pay act to include race and ethnicity as protected categories.<sup>17</sup> The law, as amended, prohibits employers from paying their employees at a wage rate less than the rate paid to employees of another race or ethnicity for substantially similar work.

**New Jersey:** New Jersey's 2018 equal pay legislation extended equal pay protections to all protected classes under New Jersey law, which includes race, creed, color, national origin, nationality, ancestry, age, marital status, civil union status, domestic partnership status, affectional or sexual orientation, genetic information, pregnancy, sex, gender identity or expression, disability or atypical hereditary cellular or blood trait of any individual, or liability for service in the armed forces.<sup>18</sup>

**Oregon:** Oregon's 2017 legislation extended its equal pay law to all protected classes under Oregon law, which includes race, color, religion, sex, sexual orientation, national origin, marital status, veteran status, disability and age.<sup>19</sup>

### ***Allowing Fairer Comparisons of Work and Pay***

The federal Equal Pay Act and many state equal pay laws have long required equal pay for "equal work." Many courts have narrowly and rigidly applied the "equal work" standard to throw out pay discrimination cases based on minute or irrelevant differences in the work or experience being compared. In response, states are increasingly considering adopting "substantially similar" or "comparable work" standards that hold the possibility of broader and fairer comparisons reflecting the reality of the modern workplace.

**New Jersey:** New Jersey's 2018 equal pay legislation changed their equal pay standard from "equal work" to a "substantially similar" work standard.<sup>20</sup> The law clarifies that the work should be "viewed as a composite of skill, effort and responsibility." Additionally, the law states that the wage rates in all of an employer's operations or facilities should be considered when comparing the wage rates of employees performing substantially similar work.

**Oregon:** Oregon's law has long required equal pay for "work of comparable character," and its 2017 equal pay law provides an explicit definition of "work of comparable character."<sup>21</sup> Oregon's amended law defines "work of comparable character" as "work that requires substantially



similar knowledge, skill, effort, responsibility and working conditions in the performance of work, regardless of job description or job title.”

**Washington:** Washington’s equal pay law has long provided that employers may not pay any female employee a lower wage than it pays to a male employee who is “similarly employed.”<sup>22</sup> Washington’s 2018 equal pay legislation clarifies that individuals are “similarly employed” if they work for the same employer; the performance of the job requires similar skills, efforts, and responsibilities; and the jobs are performed under similar working conditions. Additionally, the amended law provides that “job titles alone are not determinative” as to whether two employees are in fact similarly employed.

### ***Closing Loopholes in Employer Defenses***

Current federal law and most state laws provide that a difference in pay will not be considered discriminatory where an employer can show that the differential was made pursuant to a seniority system; a merit system; a production system; or a differential based on any factor other than sex. Many courts, however, have interpreted these exceptions broadly, creating legal loopholes in which employers can justify almost anything as a “factor other than sex” without much scrutiny from the courts.<sup>23</sup> This makes it extremely difficult for workers to challenge their unfair pay. Recently, several states took steps to strengthen their laws by limiting the employer defenses to claims of pay discrimination.

**Oregon:** Oregon’s 2017 equal pay legislation tightens its employer defenses to pay discrimination claims by requiring that an employer’s justifications be based on an enumerated set of bona fide factors other than sex.<sup>24</sup> Under Oregon’s amended law, employers are limited to the following eight bona fide factors other than sex when making a defense to a pay discrimination claim: a seniority system, a merit system, a system that measures earnings by quantity or quality of production, location, travel, education, training, or past experience.

**New Jersey:** New Jersey’s 2018 equal pay legislation provides that an employer’s defense to a pay differential must be based on a seniority system or merit system, or on one or more bona fide factors other than the characteristics of protected class members.<sup>25</sup> These bona fide factors may include training, education, experience, or the quantity or quality of production, and must neither be based on nor perpetuate differentials in compensation based on sex or any other characteristic of a protected class member. The factors must be shown to have been applied reasonably, must account for the entire wage differential, must be job-related with respect to the position in question, and must

be based on a legitimate business necessity. New Jersey’s new law also provides that a factor could not account for a legitimate business necessity if there are alternative business practices that would serve the same business purpose without producing the wage differential.

**Washington:** Washington’s 2018 equal pay legislation requires an employer’s defense to a pay differential be based in good faith on a bona fide job-related factor or factors that are consistent with a business necessity, not based on or derived from a gender-based differential, and “account for the entire differential.”<sup>26</sup> Washington’s amended law provides that these bona fide factors may include: education, training, or experience; a seniority system; a merit system; a system that measures earnings by quantity or quality of production; or a bona fide regional difference in compensation levels. Additionally, the law explicitly provides that an individual’s salary history is not a defense to a pay discrimination action.

### ***Challenging Occupational Segregation***

Women continue to earn less than men in part because they are not offered the same opportunities for career-advancement and promotions. Many employers continue to operate based on sex stereotypes about the competence and commitment of women—and mothers in particular—assuming that women will be uninterested or unable to perform jobs that require longer hours, frequent travel, or skills often associated with men, such as physical strength.<sup>27</sup> As a result, women are underrepresented in higher-paying positions and fields.

**Washington:** Washington’s 2018 equal pay legislation finds that equality of opportunity for career advancement is key to reducing income disparities based on gender, and prohibits employers from limiting or otherwise depriving an employee from these opportunities on the basis of gender.<sup>28</sup>

### ***Improving Workers’ Ability to Challenge Pay Discrimination***

In some states, even if an employee manages to discover that she has been discriminated against in the payment of her wages due to her sex, she may be barred from challenging the discrimination under the state’s equal pay law and obtaining relief in court due to an unjust application of a state statute of limitations. As a result, some states have been passing laws similar to the federal Lilly Ledbetter Fair Pay Act that clarify what discriminatory events trigger the statutes of limitations for pay discrimination claims.

**Oregon:** Oregon’s 2017 equal pay legislation specifies that the statute of limitations for an equal pay violation is



triggered each time the employee is paid pursuant to a discriminatory compensation decision or other practice.<sup>29</sup>

**New Jersey:** New Jersey's 2018 equal pay legislation specifies that an unlawful employment practice, specifically regarding discrimination in compensation or the financial terms of conditions of employment, occurs and triggers the statute of limitations when an individual is affected by application of a discriminatory compensation decision or other practice.<sup>30</sup> This includes every occasion that wages, benefits, or other compensation are paid, resulting from the decision or other practice. The law also explicitly states that requiring employees or applicants to consent to a shortened statute of limitations constitutes an unlawful employment practice.

**Washington:** Washington's 2018 equal pay legislation provides that a violation of the law occurs triggering the statute of limitations, when a discriminatory compensation decision or other practice is adopted; when an individual is subjected to a discriminatory compensation decision or other practice; or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.<sup>31</sup>

### ***Increasing Available Relief for Employees***

Ensuring that equal pay laws provide for adequate damages or penalties is essential to incentivizing employers to lead the way in tackling the wage gap and fully compensating victims of pay discrimination. Several states have taken steps in recent years to strengthen the amount and type of relief available to victims of pay discrimination.

**New Jersey:** New Jersey's 2018 equal pay legislation increases the relief available to victims of pay discrimination, entitling victims to up to six years of back pay for a continuous equal pay violation that continued to occur within the statute of limitations and allowing a court or the agency director to award treble monetary damages.

**Oregon:** Oregon's 2017 legislation enhanced relief available to employees who have been discriminated against in their pay.<sup>32</sup> Employees who are subjected to any prohibited behavior under the law are now entitled to receive up to two years of back pay from their employer. Employers may also be liable for compensatory damages and, if they engaged in fraud, acted with malice or willful misconduct, or have been brought to court previously over violations of the law, punitive damages.

**Washington:** Washington's 2018 equal pay legislation increased relief available to victims of pay discrimination.<sup>33</sup>

Under Washington's previous equal pay law, a victim could seek back pay through a civil action and an employer found to have violated the equal pay law would be guilty of a misdemeanor. The new law allows a victim to pursue relief through either an administrative or court proceeding and recover actual damages; statutory damages equal to the actual damages or five thousand dollars, whichever is greater; interest of one percent per month on all compensation owed; and any other appropriate relief. The new law provides that any wages and interest owed must be calculated from four years from the last violation before the complaint. For employees who file a complaint with the Bureau of Labor and Industries, the Director may order payment to the department of a civil penalty not to exceed five hundred dollars, for a first violation. For a repeat violation, the civil penalty may not exceed one thousand dollars or ten percent of the damages, whichever is greater.

### ***Holding State Contractors Accountable***

Employers who contract with the state are paid through public funds, and therefore have a special duty to address pay disparities. To ensure that the state does business with contractors who are following the laws, some states have enacted provisions to require contractors to certify that they are in compliance with state and federal equal pay laws or to report pay data broken down by sex, race, and ethnicity.

**Nevada:** In 2017, Nevada enacted a law creating a program for state vendors to self-certify to the Department of Administration that they pay their employees equal pay for equal work without regard to gender.<sup>34</sup> Although participation in the self-certification program is voluntary, the law provides that vendors who become certified will be favored during future bidding processes for state contracts. The Department must automatically certify the vendor without review, but the law provides that vendors who are found to have made material misrepresentations or otherwise defrauded the self-certification process may be prohibited from submitting bids for state contracts for up to three years.

**New Jersey:** New Jersey's 2018 equal pay legislation requires employers who enter into a contract with a public body to provide a report to the Commissioner of Labor and Workforce Development for each of their establishments that includes information about the compensation and hours worked by employees, broken down by gender, race, ethnicity, and job category, and reported by pay band.<sup>35</sup> For employers who enter into a contract with a public body to specifically perform a public work, the new law requires them to provide to the commissioner the gender, race, job title, occupational category, and rate of total compensation of every employee of the employer employed in the State



in connection with the contract. This information is to be provided through certified payroll records throughout the duration of the contract, with an update to the information whenever payroll records are required by the state prevailing wage law. For employers who enter into a contract with a public body to specifically perform a public work, the new law requires them to provide to the commissioner the gender, race, job title, occupational category, and rate of total compensation of every employee of the employer employed in the State in connection with the contract. This information is to be provided through certified payroll records throughout the duration of the contract, with an

update to the information whenever payroll records are required by the state prevailing wage law. The law requires the Commissioner to retain the information provided by any of these employers during the duration of the contract and not less than five years after the end of that period. The retained employment information will be made available to the Division on Civil Rights in the Department of Law and Public Safety, and, upon request, provided to anyone who is or was an employee of the employer during the period of any of the contracts between the employer and any public body, or any authorized representative of the employee.

1. National Women's Law Center calculations based on U.S. CENSUS BUREAU, *Current Population Survey, 2017 Annual Social and Economic Supplement*, Table PINC-05, available at <https://www.census.gov/data/tables/time-series/demo/income-poverty/cps-pinc/pinc-05.html>.
2. *Id.*
3. INST. FOR WOMEN'S POLICY RESEARCH, PAY SECRECY AND WAGE DISCRIMINATION (2014), available at [https://iwpr.org/wp-content/uploads/wpallimport/files/iwpr-export/publications/Q016%20\(1\).pdf](https://iwpr.org/wp-content/uploads/wpallimport/files/iwpr-export/publications/Q016%20(1).pdf)
4. U.S. Dep't of Labor, Women's Bureau, Equal Pay and Pay Transparency Protections, [https://www.dol.gov/wb/EqualPay/equalpay\\_txt.htm](https://www.dol.gov/wb/EqualPay/equalpay_txt.htm) (last visited June 7, 2018) (not reflected in this chart are MA, NV, WA which recently passed laws).
5. H.B. 1269, 71st Gen. Assemb. (Colo. 2017) (amending Colo. Rev. Stat. § 24-34-402).
6. S.B. 2351, 29th Leg. Sess. (Haw. 2018) (amending Haw. Rev. Stat. Ch. 378 §1 (2018)).
7. A.B. 276, 79th Reg. Sess. (Nev. 2017) (amending Nev. Rev. Stat. § 613.330 (2017)).
8. S.B. 104, 218th Leg., Reg. Sess. (N.J. 2018) (amending N.J. Pub. L. 1945, c.169 (2018)).
9. H.B. 1506, 65th Reg. Sess. (Wash. 2018) (amending Wash. Rev. Code § 49.12.175 (2018)).
10. NAT'L WOMEN'S LAW CTR., Asking for Salary History Perpetuates Pay Discrimination (June 2017), available at <https://nwlc-ciw49tixgw5lbbab.stackpathdns.com/wp-content/uploads/2017/06/Asking-for-Salary-History-Perpetuates-Discrimination.pdf>.
11. A.B. 168, 2017 Reg. Sess. (Cal. 2017) (amending Cal. Lab. Code § 432 (West 2017)).
12. H.B. 5386, 2018 Gen. Assemb., Leg. Sess. (Conn. 2018) (amending Conn. Gen. Stat. §§ 31-40z (2018)).
13. H.B. 1, 149th Gen. Assemb. (Del. 2017) (amending 19 Del. C. § 709B).
14. S.B. 2351, 29th Leg. Sess. (Haw. 2018) (amending Haw. Rev. Stat. Ch. 378 §1 (2018)).
15. H.B. 2005, 79th Leg. Assemb. (Or. 2017) (amending Or. Rev. Stat. §§ 652.210, 652.220, 652.230, 659A.820, 659A.870, 659A.875, 659A.885 (2017)).
16. H. 294, 2018 Gen. Assemb., Leg. Sess. (Vt. 2018) (amending 21 Vt. Stat. Ann. § 495m (2018)).
17. S.B. 1063, 2016 Reg. Sess. (Cal. 2016) (amending Cal. Lab. Code §§ 1197.5, 1199.5 (2016)).
18. S.B. 104, 218th Leg., Reg. Sess. (N.J. 2018) (amending N.J. Pub. L. 1945, c.169 (2018)).
19. H.B. 2005, 79th Leg. Assemb. (Or. 2017) (amending Or. Rev. Stat. §§ 652.210, 652.220, 652.230, 659A.820, 659A.870, 659A.875, 659A.885 (2017)).
20. S.B. 104, 218th Leg., Reg. Sess. (N.J. 2018) (amending N.J. Pub. L. 1945, c.169 (2018)).
21. H.B. 2005, 79th Leg. Assemb. (Or. 2017) (amending Or. Rev. Stat. §§ 652.210, 652.220, 652.230, 659A.820, 659A.870, 659A.875, 659A.885 (2017)).
22. H.B. 1506, 65th Reg. Sess. (Wash. 2018) (amending Wash. Rev. Code § 49.12.175 (2018)).
23. For more information on the "factor other than sex" loophole, see <http://nwlc.org/resources/paycheck-fairness-closing-factor-other-sex-gap-equal-pay-act/>.
24. H.B. 2005, 79th Leg. Assemb. (Or. 2017) (amending Or. Rev. Stat. §§ 652.210, 652.220, 652.230, 659A.820, 659A.870, 659A.875, 659A.885 (2017)).
25. S.B. 104, 218th Leg., Reg. Sess. (N.J. 2018) (amending N.J. Pub. L. 1945, c.169 (2018)).
26. H.B. 1506, 65th Reg. Sess. (Wash. 2018) (amending Wash. Rev. Code § 49.12.175 (2018)).
27. NATIONAL WOMEN'S LAW CENTER, Sex Stereotypes: How They Hurt Women in the Workplace - and in the Wallet (2013), available at [https://nwlc.org/wp-content/uploads/2015/08/suits\\_fact\\_sheet\\_-\\_sex\\_stereotypes\\_01.30.2013.pdf](https://nwlc.org/wp-content/uploads/2015/08/suits_fact_sheet_-_sex_stereotypes_01.30.2013.pdf).
28. H.B. 1506, 65th Reg. Sess. (Wash. 2018) (amending Wash. Rev. Code § 49.12.175 (2018)).
29. H.B. 2005, 79th Leg. Assemb. (Or. 2017) (amending Or. Rev. Stat. §§ 652.210, 652.220, 652.230, 659A.820, 659A.870, 659A.875, 659A.885 (2017)).
30. S.B. 104, 218th Leg., Reg. Sess. (N.J. 2018) (amending N.J. Pub. L. 1945, c.169 (2018)).
31. H.B. 1506, 65th Reg. Sess. (Wash. 2018) (amending Wash. Rev. Code § 49.12.175 (2018)).
32. H.B. 2005, 79th Leg. Assemb. (Or. 2017) (amending Or. Rev. Stat. §§ 652.210, 652.220, 652.230, 659A.820, 659A.870, 659A.875, 659A.885 (2017)).
33. H.B. 1506, 65th Reg. Sess. (Wash. 2018) (amending Wash. Rev. Code § 49.12.175 (2018)).
34. A.B. 106, 79th Reg. Sess. (Nev. 2017) (amending Nev. Rev. Stat. §§ 333.300, 333.340 (2017)).
35. S.B. 104, 218th Leg., Reg. Sess. (N.J. 2018) (amending N.J. Pub. L. 1945, c.169 (2018)).



