

ALABAMA PASSES EQUAL PAY ACT

Alabama is on the verge of joining the majority of other states that have their own state version of an equal pay act. On Thursday, May 30, 2019, the Alabama legislature passed the state's own equal pay act, called the "Clarke-Figures Equal Pay Act" (Alabama's EPA), and Governor Ivey is expected to sign the Act into law.

The operative language of Alabama's EPA largely mirrors the Federal EPA, 29 U.S.C. §206(d), which prohibits pay discrepancies based on gender. The Alabama EPA provides an employer may not pay any of its employees at wage rates less than the rates paid to employees of another sex or race for positions within the same establishment which requires equal skill, effort, education, experience, and responsibility, and performance under similar working conditions...." The statute contains four enumerated exceptions to this prohibition, which again mirror the federal statute:

- (1) Discrepancies based on seniority systems;
- (2) Merit systems;
- (3) A system based on the quantity or quality of production; and
- (4) A catch-all provision allowing for disparities to exist based on non-prohibited reasons.

The similarities end here.

The Alabama EPA goes beyond its federal counterpart in several ways. The federal EPA applies only to pay discrepancies based on gender. The Alabama EPA includes not only gender, but race as well. While race discrimination has long been a protected characteristic under federal laws and Executive Orders, the Alabama EPA is the first state statute to recognize race as a protected characteristic. By including race, Alabama's Equal Pay Act is much broader in scope than its federal counterpart.

Alabama's EPA also contains provisions prohibiting an employer from refusing to hire any applicant or to retaliate against any applicant or employee because the applicant refuses to provide a wage history. It is not uncommon for employers' applications to not only include a work history, but to also request the applicant's wage history as part of the application process. This practice could subject an employer to monetary liability.

Relief under the Alabama EPA appears to be less broad than that provided under federal law. The federal EPA allows the recovery of the amount of the disparity in wages for up to two or three years (depending on whether the violation is considered willful). This amount can be doubled as liquidated damages, and the fees and costs of the employee's attorneys may be awarded. Under the federal Equal Pay Act, damages for mental anguish and punitive damages are not available.

As submitted to Governor Ivey, the scope of relief under the Alabama EPA is uncertain. The Alabama EPA expressly provides that an employer in violation of the pay disparity or retaliation provisions is liable to the applicant or employee in an amount equal to the wages that the employee should have received (plus interest) for up to a two-year period. There is no express provision for liquidated damages or attorney's fees and no possibility of a three-year liability period. However, the version sent to Governor Ivey also provides the "any relief warranted" may also be awarded under the act. This provision would be very problematic for employers. Employers would argue that "any relief warranted" is restricted to equitable relief, i.e., an order not to violate act in the future, subject to additional liability to an employee and sanctions by the court for contempt. Employees would argue "any relief warranted" authorizes awards of liquidated, compensatory and punitive damages and attorney's fees. It would take several years of expensive litigation for this issue to be decided by the Alabama Supreme Court. "We say "would," because we understand that the State Senate acquiesced to the Governor's request that the "any relief warranted" be struck from the Act." We say "would," because we understand that the State Senate acquiesced to the Governor's request that the "any relief warranted" be struck from the Act.

Striking this ambiguous provision does not cure the act's uncertainty. The Alabama EPA provides "Any employer who violates subsection (a) (pay disparity) or (b) (wage history) is liable to the employee affected in an amount equal to the wages, and interest thereon, of which the employee is deprived by reason of the violation." "Employers" who violate the pay disparity or wage history provisions are liable to an "employee."

- An "applicant" is not an "employee." There is no provision establishing the liability for violating the retaliation prohibition applicable to "applicants." Does the act provide any relief an applicant?

- If an applicant is an employee for purposes of relief, how is the period of liability determined? There has been no disparity in wages because the applicant has not been employed. How is the amount of the wage established?
- How long is the period of liability? Is it automatically two years? If not, the liability period must be arbitrarily set or assumed.
- Does an applicant have to prove he or she would have been selected but for the unlawful retaliation or was at least qualified?
- If there is only one position available and 10 applicants, do all 10 applicants recover?

The Alabama EPA answers none of these questions. Absent re-drafting of the Act, the answers to these questions must be played out in court.

Many Alabamians believe the act was passed as a symbolic gesture that pay discrepancies based on gender and race are not tolerated in Alabama. Regardless of intent, the relief available under the act will be its driving force. If restricted to the amount of the pay disparity, with no liquidated, compensatory, or punitive damages and no award of attorney's fees, we expect the federal EPA to be the statute of choice. If the relief provision of the Alabama EPA is interpreted as or more broadly than the federal EPA, employers may experience an increase in employment-related litigation. We will be monitoring court filings to determine if the passage of the act results in a large number of filings. More importantly, we will be assessing court rulings regarding the relief available under the Act, which should be the primary concern of Alabama employers.

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