

# States and Local Governments Wage Fight to Get Ahead of Pay Equity Battle

by Brandon Haugrud



*Brandon Haugrud is an employment attorney at Littler Mendelson P.C. in Minneapolis, where he advises employers on a broad range of employment law matters, including Title VII of the Civil Rights Act of 1964 and the Minnesota Human Rights Act. A significant part of his practice involves assisting employers with the preparation and approval of affirmative-action plans and representing government contractors in connection with Office of Federal Contract Compliance Programs and state and local compliance reviews. Haugrud is a member of the Labor & Employment Law Section's Standing Committee on Legislation and Congressional Relations and may be reached at bhaugrud@littler.com.*

Since state legislatures reconvened in January, nearly 100 different bills have been considered for the purpose of closing the remaining pay gap that persists between men and women. Although only seven of these measures have been signed into law, this legislative trend is expected to continue into 2019 as lawmakers debate the best method to address this increasingly important issue that has grown into a national conversation.

At least 31 states, including Puerto Rico and one local municipality, have considered pay equity measures in one form or another since January. Some measures seek to expand the scope of existing equal pay laws by requiring employers to pay the same wages to employees who perform the same work,<sup>1</sup> while others seek to limit the different factors an employer may use to justify paying different wages for similar jobs. Other proposals have sought to prevent employers from inquiring about an applicant's earnings history,<sup>2</sup> while others prevent employers from banning discussions about pay and benefits in the workplace or retaliation against employees who voluntarily disclose their wages with others.

Although employers are accustomed to monitoring legislative activities at the state and federal level, inaction at these levels has opened the door to similar pay equity reform efforts from some major cities like San Francisco<sup>3</sup> and New York City,<sup>4</sup> and even some not-so-major places like Westchester County, N.Y.

As local activity has intensified, employers with operations in multiple jurisdictions and states have been confronted with the difficult task of complying with a patchwork of conflicting employment rules. In what may be a direct response to the difficulties posed by local pay equity legislation, some states passed pre-emption laws in 2018 to prevent local governments from enacting similar reforms in a piecemeal fashion.

This article examines the pay equity laws recently enacted by Westchester County, which may serve

as a model for other local jurisdictions to follow, and how some states such as Wisconsin and Michigan are responding to these trends by prohibiting city, county, and municipal governments from enacting and enforcing certain labor and employment legislation at the local level. Because successful reforms in one community could renew efforts to enact similar legislation in another, employers should pay close attention to these laws heading into 2019 when all 50 state legislatures reconvene.

## Westchester County, N.Y.

Not waiting for the state of New York to take action, on April 10, 2018, the Westchester County Board of Legislators unanimously enacted legislation that prohibits employers from relying on, requiring, requesting, or seeking information about a prospective employee's wage history during the hiring process. Furthermore, an employer may not require disclosure of an applicant's salary history as a prerequisite to an interview, further consideration, or employment.

Proponents of salary history laws argue that pay inequality is perpetuated when current pay is based on past employer decisions that might have been discriminatory. By preventing inquiries into an applicant's past salary history, it is argued that prospective employers are left with no other alternative but to set pay based on non-discriminatory economic forces found in the labor market.

Employers in Westchester County may, however, seek to confirm wage information from a current or former employer if: (1) an employment offer with compensation has been made; (2) the prospective employee responds to the offer by providing his or her prior wage information to support a wage higher than the one offered by the employer; and (3) the employer has obtained written authorization from the prospective employee to confirm wage history from the current and/or former employer(s).

The law also contains a provision prohibiting em-

employers from retaliating by refusing to hire someone for withholding his or her salary history. Effective July 9, 2018, the law applies to employers in Westchester County with four or more employees, but a provision in the law acknowledges that its life may be short-lived. The law provides that it will no longer be enforceable in the event statewide legislation incorporating the same or substantially similar provisions is enacted or in the event state or federal laws pre-empt enforcement of the law.

Legislation to prevent public and private employers from inquiring about a prospective employee's salary history is currently pending before the New York State Legislature and has already been endorsed by New York Gov. Andrew Cuomo.

### Recently Enacted Laws Pre-Empting Local Action on Pay Equity Wisconsin

In response to local efforts like Westchester County to enact employment ordinances, Wisconsin has taken steps to ease the burden on employers who may be finding it difficult to comply with a number of competing employment laws within the borders of a single state.

On April 16, 2018, Wisconsin Gov. Scott Walker signed A.B. 748 into law, which prohibits local governments from enacting or enforcing laws that create an employer obligation related to employee hours, overtime and scheduling, benefits, salary history, wage payments, claims and collections, professional licensing and certification, and labor-management relations.<sup>5</sup> The legislation effectively pre-empts the majority of local legislation and protections, with the exception of discrimination ordinances.

In addition to the categories identified above, the law includes provisions prohibiting government-imposed "labor peace agreements." These agreements are reached between a union and an employer waiving rights available under state or federal law, such as the right of an employer to oppose unionization through lawful education activities and the right to insist on a secret-ballot election to determine whether an uncoerced majority of employees want a union.

Under this new law in Wisconsin, neither the state, nor any local government, or any of their employees may require, compel, or attempt to compel any person to waive or agree to waive their rights under state or federal laws as a condition of obtaining any regulatory or other approval. Existing labor peace agreements, previously required by state or local law, remain enforceable until they are renewed, modified, or extended. At that point, an agreement may be voluntarily entered into but is no longer required.

A narrow exception to this prohibition exists for Wisconsin businesses operating in an electronics and information technology manufacturing (EITM) zone and for certain job training and apprenticeship programs connected with EITM zones.

### Michigan

On March 26, 2018, Michigan Gov. Rick Snyder signed S.B. 353 into law, amending its pre-emption laws to prevent local governmental bodies from creating any ordinance concerning what information must, can, and must not be on a job application or part of the interview process.

The law is broad by design, covering all pay equity issues but carving out an exemption for local governments to regulate criminal background checks. This amendment to Michigan's pre-emption laws took effect on June 15, 2018.

### Conclusion

Given the number of successful reform efforts in 2018, employers should expect to see other states and local governments attempt to replicate this legislation or renew legislation that failed to garner full passage. If the prospect of navigating several different pay equity laws within the borders of a single state seems unnerving, employers have good reason to be optimistic. One might expect that an increase of legislative activity at the local level will quickly lead to uniform legislation at the state level in this area of law and pre-empt the issue entirely for local governments. Employers and prospective employees should continue to monitor these developments heading into 2019 when state legislatures reconvene. ☉

### Endnotes

<sup>1</sup>See, e.g., New Jersey S104, signed into law on April 24, 2018.

<sup>2</sup>See, e.g., Hawaii S.B. 2351, signed into law on July 5, 2018, which restricts employers and their agents from inquiring about an applicant's "current or prior wage, benefits, or other compensation," or Connecticut Public Act. No. 18-8, which takes effect Jan. 1, 2019, and H. 294 in Vermont, which went into effect on July 1, 2018.

<sup>3</sup>San Francisco Ordinance No. 170350, which took effect on July 1, 2018, bans employers from asking applicants about their current or past salary or considering an applicant's salary history when deciding whether to hire an applicant or what salary to offer. The law also prohibits employers from disclosing a current or former employee's salary history without that employee's authorization, unless of course the information is publicly available.

<sup>4</sup>On Oct. 31, 2017, Int. 1253-2016 went into effect in New York City, banning employers from inquiring about an applicant's salary history through a current or former employer.

<sup>5</sup>For a closer look at Wisconsin's pre-emption law on pay equity, see Adam-Paul John Tuzzo & Jonathan O. Levine, *Still "Open for Business" – New Wisconsin Legislation to Preempt Most Local Employment Ordinances*, LITTLER ASAP (Mar. 27, 2018), <https://www.littler.com/publication-press/publication/still-open-business-%E2%80%93-new-wisconsin-legislation-preempt-most-local>.