

# Rethinking Pay Equity: Who is ‘Comparable’ for Pay Equity Purposes?

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This is the second article in our four-part series titled “Rethinking Pay Equity,” designed to provide practical guidance to help employers understand and address the many new rules, regulations, and best practices around pay equity in preparation for Equal Pay Day 2019. This article focuses on identifying “who” will be compared for purposes of pay equity under federal and state fair pay laws.

## New State and Local Fair Pay Laws

The persistent gender “pay gap” has led many state and local governments to enact new fair pay laws that are broader in certain respects than federal pay discrimination laws. [California](#) (2016), [Massachusetts](#) (2016), [Maryland](#) (2016), [Oregon](#) (2017), [Puerto Rico](#) (2017), [Washington](#) (2018), [New Jersey](#) (2018), and [Illinois](#) (2019), as well as many others throughout the country, have adopted their own fair pay laws.

While these state and local fair pay laws vary, they all generally expand the pool of employees who can be compared to determine if pay is equitable. Under the federal Equal Pay Act of 1963, [29 U.S.C. §206](#), an employer must pay men and women the same when they are performing *equal or “substantially equal”* work. To bring a claim, an employee would have to demonstrate that he or she performs virtually the same work as a comparator of the opposite sex and receives less pay. Protections under Title VII of the Civil Rights Act are similarly restricted to those who are “*similarly situated*.” See [County of Wash. v. Gunther](#), 452 U.S. 161, 168 (1981). The Equal Pay Act also restricts comparison to those in the “same establishment.”

Before 2016, nearly all states had their own “equal pay acts” that mirrored the *equal pay for equal work* language of the Equal Pay Act. Since 2016, however, states have sought to broaden the pool of comparators to those performing “substantially similar work” or “comparable” work. For example:

- California, Illinois, and New Jersey prohibit disparities among employees performing “*substantially similar work*” (the same standard is in bills pending in Colorado and

Hawaii);

- Massachusetts prohibits disparities among employees performing “*comparable*” work;
- Oregon and Maryland prohibit disparities among employees performing “*work of a comparable character*”; and
- Washington prohibits pay disparities among employees who are “*similarly employed*.”

In addition, many of the state laws do not restrict comparison to the same establishment or geographic location. For example, California’s fair pay law allows comparison to employees in other locations or establishments.

## What’s an Employer to Do?

The continued focus on pay equity by state and local governments requires employers to review their pay practices and consider a proactive, attorney-client privileged pay audit to identify and address unexplained pay disparities.

The privileged pay audit should be constructed so that employee groupings (comparator pools) match the breadth of potential comparators under the specific state and local laws that apply to the workforce. Some practical tips for employers in considering a privileged pay audit include:

- Expand the pay groupings beyond job title and compare jobs that share similar functions. New state laws are breaking away from the idea that relatively minor job related distinctions command different pay. Employers will need to broaden their ideas of comparable tasks and roles by considering the reality of the job functions.
- Evaluate the pay groupings multiple ways to see where potential issues may exist, and then focus on ensuring that those issues are defensible in the relevant jurisdiction.
- Audit job descriptions and the actual job duties of employees — *skills, efforts, and responsibilities* — to ensure that any privileged pay analyses will compare the “right” employees and identify actual legal risk for the jurisdiction.

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