

# State Pay Equity Laws May Ease Path For EEOC Salary Survey

By Anne Cullen

Law360 (July 8, 2024, 7:28 PM EDT) -- While the U.S. Equal Employment Opportunity Commission's first attempt to collect salary details from employers faced strong headwinds, experts said the proliferation of state-level pay transparency mandates may make a fresh wage data collection effort an easier lift for businesses.



Experts say that the recent pay transparency legislation boom in states and cities has fundamentally changed the way most companies manage compensation. (iStock.com/megaflopp)

As part of President Joe Biden's regulatory agenda published Friday, the commission **unveiled plans** to survey employers on the salaries of their workforces, on top of the information it already gleans annually from employers on the demographics within their job categories.

The EEOC has tried to gather this information previously. EEO-1 Component 2, a pay data collection initiative created under former President Barack Obama, was frozen by the White House under former President Donald Trump in 2017.

**Republican lawmakers** and **representatives of the business community** had successfully pushed for the initiative to be scrapped, arguing it was too costly and burdensome for employers, and that sharing wage details raises confidentiality concerns.

However, in the years since the program's demise, employment law experts pointed out that there has been a **rapid proliferation** of pay transparency mandates at the state and local level that may make the EEOC's call for wage data far less of a hurdle for companies to manage.

"If Component 2 comes back to life, I do think the impact on employers will be far different from the first time around," said Christine Hendrickson, a former Seyfarth Shaw LLP partner who is now vice president of strategic initiatives at equity-focused technology provider Syndio. "And a big part of that is the pay scale transparency laws."

### 'Things Have Changed'

In the **waning days** of the Obama administration, the EEOC secured approval from the White House to run the Component 2 pay data collection program, which was scheduled to kick off in early 2018.

However, the White House under Trump **froze the program** in 2017. A federal court ultimately reinstated the survey for **a single go-round**, during which the EEOC was able to gather wage information for 2017 and 2018. The commission then **discontinued the program in 2019** under the leadership of then-EEOC Chair Janet Dhillon, a Trump appointee.

A slew of business groups, including the U.S. Chamber of Commerce, the National Association of Manufacturers and the National Retail Federation, had contested the addition of compensation to the EEOC reporting requirements.

They argued that the EEOC underestimated how much it would cost to prepare the revised report, including the finances needed for software upgrades and new staff, and that the commission's internal system didn't have the safeguards in place to keep the extra volume of data confidential.

But the recent **pay transparency legislation boom** in states and cities has fundamentally changed the way most companies manage compensation, experts said.

"Pay transparency is having a renaissance," said Gaylynn Burroughs, the National Women's Law Center's vice president for education and workplace justice. "There has been an explosion of interest from policymakers, employers and workers in pay transparency generally."

The trend of states requiring salary ranges on job postings took off in 2022 after Colorado led the way by passing the Equal Pay for Equal Work Act in 2021. Now, about a dozen states, plus D.C., have put laws on the books requiring employers to share the range they're willing to pay for a position.

In addition, at least two states — **California** and **Illinois** — already mandate that companies file the salary details for their workforces.

A Golden State law that took effect in 2021 requires companies to send state authorities pay data that is broken down by employees' sex, race and ethnicity.

Illinois went further with a law that went into effect in early 2022 and asks certain covered employers to submit a detailed list of every person they've employed over the past year separated by sex, race and ethnicity; the date each employee was hired; their total wages; and any other information needed to explain whether pay equity exists at the company.

It's not just a U.S. phenomenon. Last year, the European Union adopted a far-reaching pay transparency directive that requires disclosure of pay scales on job postings, reporting on pay gaps, and open communication about wages and career advancement.

The result of these policy moves has been that companies don't guard their wage details so closely anymore, said Hendrickson of Syndio.

"We're just now firmly in an age where there is much more transparency about pay, and it means that employers are much more open about how they pay employees," she said. "There's been a really remarkable sea change."

Deborah Vagins, who worked on the EEOC's previous efforts on pay data as the former chief of staff to the agency's current Chair Charlotte Burrows, said the landscape is vastly different from when the agency first rolled out this kind of survey.

Software developers have also created a marketplace of tools to help companies accomplish their disclosure goals, and workers have come to expect their employers to be open about compensation, Vagins said.

"Things have changed. There have been a lot of developments — legal, technological — and there has been internal pressure for companies to make sure that they are aware of their pay practices. And I think all of those make it even easier for companies to comply," said Vagins, who is now the director of the Equal Pay Today campaign at Equal Rights Advocates.

With these developments already pushing employers to adjust their compensation practices, Vagins said the arguments against Component 2 fall flatter now.

"There were business concerns that it would be cumbersome and difficult to do, and not compatible with the way they might've been looking at data," Vagins said. "But in the almost decade since, companies are now having to do this because of state laws."

### **Hurdles on the Horizon**

Not everyone agrees that the program would be less onerous the second time around. Some management-side attorneys were less convinced that any state-level policy action will aid compliance with a potential Component 2 reboot.

"Clearly there has been an increase in the number of states enacting pay transparency laws. That does not make EEOC's second swing at Component 2 less troublesome, however," said Dean R. Singewald II, an associate at Epstein Becker Green who advises businesses on equal employment opportunity compliance.

Singewald said the EEOC is seeking information that goes far beyond the most common pay transparency mandates, making compliance an added leap.

Kristi S. Nelson Foy, a management-side labor and employment attorney at Ogletree Deakins Nash Smoak & Stewart PC, said any potential EEOC foray back into this arena will still be "confusing and burdensome," even for companies that are already complying with California's and Illinois' reporting rules.

On top of the potential pushback, Nelson Foy pointed out that the conversation may be moot should the White House change hands in the next presidential election.

"Clearly, there is a history of very differing viewpoints and prioritization of this issue, so I'll be curious if anything else is pushed further along," she said. "This is perhaps just an intellectual exercise."

At large, however, many employment law experts told Law360 that the rapidly changing landscape around pay transparency will smooth the pathway for the EEOC's next attempt to collect salary details.

"It's really this global phenomenon," Hendrickson said. "What that has meant is that employers have had to build the muscles of their people leaders to enable them to talk about pay and how pay is set in their organization."

"So if there is a Component 2 redo, the need to disclose and discuss pay will not come as much of a shock to employers as it did the first time around," she said.

-- Additional reporting by Amanda Ottaway and Vin Gurrieri. Editing by Abbie Sarfo and Nick Petruncio.