



Biden Likely to Ramp Up Pay-Equity Fight

Expanded employer reporting requirements are expected

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November 23, 2020

On the campaign trail, President-elect Joe Biden made addressing gender-based pay inequality a key plank of his outreach to women. Below are some of the legislative and regulatory actions his administration is expected to support.

Paycheck Fairness Act

Among Biden's gender-equality priorities is support for the proposed Paycheck Fairness Act (<https://edlabor.house.gov/imo/media/doc/2019-02-26%20Paycheck%20Fairness%20Section%20by%20Section.pdf>) (H.R. 7), which was passed by the Democrat-controlled House (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/house-approves-paycheck-fairness-act.aspx) in March 2019 but did not come up for a vote in the Republican-controlled Senate.

Under the proposed legislation, only "a bona fide factor other than sex, such as education, training or experience" can justify a pay difference. Pay adjustments based on subjective criteria, including managers' subjective evaluations of job performance, could be challenged or provide a basis for class-action litigation.

The bill would create a federal ban on requesting a job candidate's prior salary history. Specifically, it would make it illegal for employers to use wage history to decide whether to hire a prospective employee and would prohibit employers from relying on or seeking prospective employees' pay histories to determine their wages.

Among supporters of the legislation, the National Partnership for Women & Families, a nonprofit that promotes fairness in the workplace, praised it for "helping to break harmful patterns of pay discrimination and strengthening workplace protections for women." The organization further stated, "It is a reasonable and comprehensive bill that would combat the wage discrimination that has plagued the nation for decades."

The Society for Human Resource Management (SHRM) believes that employees should be compensated equitably and without discrimination, and it vigorously supports equal pay for equal work, with allowable pay differences based on factors not prohibited by law. In a letter to congressional leaders last year (https://advocacy.shrm.org/wp-content/uploads/2020/11/SHRM_Letter_HR7_03.26.19_FloorVote.pdf), SHRM stated its opposition to the Paycheck Fairness Act because it restricts an employer's ability to base pay decisions on many legitimate factors that employers currently use to determine compensation and benefits, such as shift differentials or hazardous work.

SHRM RESOURCE SPOTLIGHT

Overcoming Workplace Bias (www.shrm.org/ResourcesAndTools/Pages/overcoming-workplace-bias.aspx)

Pay-Data Collection Rules

Biden also campaigned on restoring Obama administration rules that required midsize and large employers to collect and disclose to the federal government compensation information by gender, race and ethnicity, intended to give government agencies better insight into pay disparities and helping them to better target enforcement.

In 2019, the Equal Employment Opportunity Commission (EEOC) announced its intent to stop collecting this data (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/employers-should-review-eeo-1-guidance-before-pay-data-reporting-deadline.aspx), concluding that the burden imposed on employers to gather it outweighed the data's usefulness for the agency.

The EEOC first announced its intention to collect pay data in 2016. In a comment letter (<https://advocacy.shrm.org/wp-content/uploads/2020/11/SHRM-Comment-on-EEO-1-final.pdf>) sent to the EEOC at that time, SHRM voiced support of the agency's efforts to end pay discrimination but urged the commission to withdraw its proposal, citing concerns regarding the data's lack of utility, potential employer burdens, and data-security and confidentiality risks.

Tanya Jansen, co-founder of beqom, a cloud-based compensation software firm, favors the expanded disclosures. "If the Biden administration reinstates the EEOC's pay-data reporting requirements, companies with the data structures [in place to] report pay data will not only be better informed on the status of their own pay gaps and able to make improvements, but also ready to comply with regulations when passed," she said.

[Visit SHRM's resource page on Pay Equity (www.shrm.org/ResourcesAndTools/Pages/Pay-Equity.aspx)]

Lawsuits and Enforcement Actions

Biden's campaign website said he would "make it easier for employees to join together in class-action lawsuits, shift the burden to employers to prove that any gender-based pay gaps exist for job-related reasons and business necessity, and increase penalties against companies that discriminate" while expanding funding "to increase the number of anti-discrimination investigators, litigators and enforcement actions."

Bobbi Kloss, director of human capital management at Benefit Advisors Network (BAN), a national consortium of health and welfare benefits brokers, said heightened enforcement actions under a Biden administration will likely "force employers to look at the competitive wages as set by the labor market, benchmarking wages [in order to] establish pay rates that are consistent across their geographical area and relevant for the positions they're hiring for."

Related SHRM Articles:

Pandemic Could Worsen the Gender Pay Gap (www.shrm.org/ResourcesAndTools/hr-topics/compensation/pages/pandemic-could-worsen-gender-pay-gap.aspx), *SHRM Online*, August 2020

Congress Considers Nationwide Ban on Salary-History Questions (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/congress-considers-nationwide-ban-on-salary-history-inquiries.aspx), *SHRM Online*, February 2019

Family Obligations Widen Gender-Pay Gap, Research Suggests (www.shrm.org/ResourcesAndTools/hr-topics/compensation/pages/effect-of-choices-on-gender-wage-gap.aspx), *SHRM Online*, December 2018

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