

## 'Equal Pay' Legislation – HBs 5618-27

- **HB 4405** – Prohibits an employer from making any deductions from wages without the written consent of the employee. Prior to making a wage payment deduction, the employer must provide the employee with a written explanation of the deduction and do so at least one pay period or 10 business days, whichever is greater.
  - Feedback:
    - Still being developed.
- **HB 4406** - Allow employees to request “wage information for similarly situated employees covering a period of not more than three years.” Although the legislation would allow employers to redact names, the information provided must include information about the sex and seniority of the similarly situated employees. The wage information provided would need to include salary and hourly wage information as well as information about bonus pay, overtime pay and other forms of compensation.
  - Feedback:
    - Proponents of the legislation say the bills are intended to accelerate pay parity by narrowing the gender pay gap and fostering an engaged and positive working environment that builds trust. However, it’s quite possible these policy changes could have unintended consequences.
    - Businesses are left to justify to disgruntled employees the rationale behind pay differentials and responding to requests for raises in order to address them...and no budget dollars available to be able to adjust quickly.
    - The bill largely ignores the numerous reasons employees might be subject to different hourly wages or salaries. This includes things not contemplated by the bill sponsor, including resume gaps, career changes, education levels, and more.
    - Another bill in the package (HB 4401) would make violations of HB 4406 a felony level offense, punishable by imprisonment for not more than two years, a fine of up to \$10,000, or both for each violation.
- **HB 5618** - Prohibits employers from asking prospective employees about past wages, fringe benefits, credit score, or credit history. Employers would be prohibited from seeking this information from other sources as well.

**Also prohibits employers from prohibiting employees from sharing their wage information.**

- Feedback:
  - A better way of phrasing (d) would be to say an employer can't "use information regarding the person's past wages or fringe benefits while employed by another employer to establish compensation and fringe benefits."
- **HB 5619 - Requires employers to create and maintain job descriptions for each position including (but not limited to) pay scale; working conditions and schedule; essential duties/responsibilities; a description of skills/training/efforts required; and salary information, including pay scale. Employers must make this information available during the recruitment, hiring or promotion process to any employee who requests it. Employers cannot revise a job description until the employee has been given an opportunity to review and initial it.**
  - Feedback:
    - Opposed.
    - This legislation is impractical and would prove administratively burdensome.
    - This legislation would prove to be disruptive – especially because salary and pay scale information can change regularly and often varies by geography.
    - Many of these requirements don't apply in other states.
    - Salary and pay scale information is already available to employees. The job description should not be required to include salary information but might be okay if requires (automatically or upon request) the job description to include the hourly rate/salary range.
    - Asking employees to approve and initial job description changes are simply impractical. Existing employees do not monitor changes in their job descriptions, and often those changes are made to more accurately reflect what an employee is currently doing. In many instances, there may be 100 or 1000 or more individuals with the same job; it would be extremely difficult to give each employee a chance to agree first before it's implemented.
- **HB 5620 – Imposes escalating fines on employers who violate wage and fringe benefit obligations. First notice: must correct (\$500 civil penalty if fail); 2nd, \$5,000; 3rd, \$15,000; 4<sup>th</sup> and subsequent: \$25,000. Gives aggrieved the right to file a private right of action (PRA) to recover actual damages (\$10,000 or actual damages, whichever is greater, plus attorneys**

**fees and actual costs. This would be on top of the penalties outlined in HB 5620.**

- Feedback:
  - Opposed.
  - This opens the door to litigate the very nature of what the job is.
  - Strongly oppose the creation of a private right of action as this will overwhelm employers, courts and the agencies meant to enforce the legislation. If 200 people request their job descriptions and claim that the information is inaccurate, employers could be dealing with thousands in fees and a huge litigation caseload.
  - It not clear who determines the violation has occurred and what rights an employer has to push back on that determination before being subject to fine.
  - Lots of questions: If a person had a minor wage discrepancy, why would they automatically be entitled to a windfall award? Is it a new violation for each job description that is inaccurate? Is it a new violation each time the job description is presented with wrong/missing information? Can it be either? Must it be both? If an employee disagrees with the job description, is it now incorrect, and therefore a violation? What if it takes 17 days to resolve instead of 15; shouldn't good faith efforts to cure be recognized?
  - The penalties are over-the-top and lack clarity around when a violation occurs. Missing information on a sheet of paper should not incur a penalty of between \$500 and \$25,000.
- **HB 5621 – Amends the Elliott Larsen Civil Rights Act (ELCRA) to strengthen anonymous reporting tools for employee(s) filing discrimination complaints (i.e., related to discrimination based on protected factors in the ELCRA).**
  - Feedback:
    - How would the Department implement this? It's difficult to imagine how an investigator can get relevant information from the employer without identifying the person who was allegedly wronged – or to make the situation right.
    - Will create burdensome and intrusive discovery requests from employers during investigations.
- **HB 5622 – Requires companies receiving state contracts (construction, repair and remodeling) to possess a “Fair Paycheck Workplace Certificate” (which is established under HB 5625).**

- Feedback:
  - Requiring employers to pay less than a 5% differential for employees across all protected characteristics nationwide is a very high bar. As written, there is no controlling for job-related factors that legitimately influence pay: hours worked, service/tenure, nature and scope of role, business unit, performance (as it relates to commission earnings), education, prior work history/experience, etc. It's literally: give us a list of your employees and their respective protected characteristics and their prior year gross pay.
  - It would be difficult for employers to properly account for differentials because they may not be aware of all employees' protected classes (e.g., national origin, age, weight, familial status and marital status). Employers do not ask employees about their protected status(es) – and shouldn't. While the legislation seems to account for this with its "if known by the employer" language, there will undoubtedly be questions.
  - As far as certificate requirements, the big unknown here is "(e) Any other information that is necessary to determine whether to issue a certificate, as determined by the director." This language is of concern.
  - Specifically refers to "average." Absent a regression that controls for all sorts of legitimate factors that influence compensation – most businesses would be challenged to hit a 5% target in unadjusted wage gaps.
  - Similar comments as to HB 5625 below.
  
- **HB 5623 - Requires employers (50+) individuals at a single work site to post employee rights in public area, including that it is illegal under state and federal laws to pay employees differently based on ELCRA protected characteristics and information about how to report a violation to the MI Department of Civil Rights. Penalties outlined in HB 5627.**
  - Feedback:
    - This bill is redundant to other state and federal requirements to post notices that say discrimination is illegal – including wage discrimination. This would just be another piece of paper saying basically the same thing.
  
- **HB 5624 – Creates guidelines for discrepancies in employee wages. Must pay equal pay for equal work if the “performance of which requires equal skills, effort and responsibility and that is performed under similar working conditions, because of a protected attribute or characteristic of the employee.” Specifies that employers may pay different wage rates based**

**on a seniority system, merit system, system that measures earnings by quantity/quality. Employers must bring the pay rate of all employees up to the equal wage, not down.**

- Feedback:
  - This bill is redundant and confusing. It would be a clear violation of existing antidiscrimination law to pay people differently based on a protected characteristic, so this adds nothing.
  - There is a huge exception for “a factor other than a protected attribute.” So if you have a white worker and a Hispanic worker whose jobs are the same in every respect but who have a \$2 difference in hourly rate because they are in different markets, is that pay difference because of a protected attribute, or because of economic factors in that location?
  - Unless there is a clear indicator (a document, a recorded statement, etc.) that one person is paid less because of their race, the parties would be presenting the same type of arguments that would already exist under existing discrimination law (i.e., pay differential is based on market factors, not race). It’s hard to imagine a situation where this sort of document would exist.
- **HB 5625 – Creates and establishes guidelines for the Fair Paycheck Workplace Certificate. Employers will need to apply for and pay a fee to the MI Department of Labor and Economic Opportunity (LEO) to get the certificate. Must disclose to LEO: the employer’s number of employees, protected attributes or characteristics of each of the employer’s employees, payroll records showing the gross amount of compensation paid to each employee in the last year, and any other information deemed necessary. Specifies there may only be a 5% difference between the average gross compensation paid to employees with different protected attributes or characteristics regardless of reason (e.g., merit, education, production, etc.).**
  - Feedback:
    - This essentially requires companies to provide payroll records and information on protected characteristics (and pay a fee) which will then be used by the state to decide whether a certificate will be awarded. Employers are obligated to follow applicable law. Seems like a lot of information to provide to the state for pretty standard payroll policies, which will create an administrative burden.
- **HB 5626 – Amends the Penal Code to expand wage discrimination protected classes and establishes penalty guidelines. Specifies an**

**employer can't discriminate in the payment of wages based on ELCRA protected classes. Penalties: 1-15 employees, \$500; 16-50 employees, \$10,000; 50 or more employees, \$20,000.**

- Feedback:
  - Penalties are not necessary because there are already plenty of opportunities for impacted individuals to obtain actual damages.
- **HB 5627 – Amends the ELCRA to establish the civil rights violation accrual date as the date when the person alleging the violation acquired actual knowledge of the violation. Allows for injunctive relief. Specifies that, if an employer violates HB 5623, the court shall award treble damages (i.e., triple the amount of the actual/compensatory damages).**
- Feedback:
  - Oppose.
  - Courts should have discretion to award appropriate damages.