

Employer Self-Evaluation Guidance

Employers seeking to undertake a self-evaluation for purposes of asserting an affirmative defense to claims brought pursuant to Rhode Island General Laws § 28-6-18 must ensure that the self-evaluation is performed with due diligence and is reasonable in scope and detail based on their own individual circumstances. The definition of due diligence will likely differ for a small business with few categories of jobs and a larger or more operationally complex organization. Employers' self-evaluations may be of their own design, or they can utilize the form made available on the Department of Labor and Training website.

Below are steps that employers should consider undertaking as part of a self-evaluation. The nature of the analysis required will vary significantly depending on the size, makeup, and resources of each employer. The steps outlined below are intended only as general guidelines and use thereof is not dispositive proof of the due diligence or sufficiency of any self-evaluation.

Step 1: Gather Relevant Information.

Gather data and other information necessary to performing a thorough self-evaluation. Such information likely includes, but is not necessarily limited to, the following for each current and former employee (if applicable):

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| a. Name/employee ID | l. Supervisory functions |
| b. Existence of protected characteristic | m. Performance ratings |
| c. Primary work location | n. Highest level of education |
| d. Work type (full-time, part-time, temporary, etc.) | o. Special licenses, certifications, etc. |
| e. Exempt/non-exempt status | p. Pay type (salary, hourly, etc.) |
| f. Date(s) of hire | q. Annualized salary or hourly rate |
| g. Job title | r. Shift differential |
| h. Job code/grade/band | s. Bonus eligibility |
| i. Date in most recent job code/grade/band | t. Eligible benefit plans/programs |
| j. Division/department/business unit | u. Bonus paid |
| k. Job function/family | v. Hours worked/type (regular, OT, etc.) |
| | w. Total compensation |

Additional information also may be relevant depending on a particular employer's compensation policies and practices and the nature of business performed. For example, if an employer takes job-related training or credentials or individual production or sales into account in determining employee compensation, that information should be gathered as well.

Step 2: Identify Comparable Work Cohorts

Identify which positions in the entity are comparable. Consider creating job groupings around the skill, effort, and responsibility required to perform a role as well as the relevance and importance of the output to the entity's business model or mission statement. Also consider working conditions, such as

the physical surroundings, hazards encountered, shift during which work is performed. While job titles and descriptions may be useful, they alone do not determine comparability and even job titles and descriptions that are facially significantly different may be found to be substantially similar if they align along the vectors noted above. Similarly, do not assume that jobs in different units, divisions, or departments are not comparable unless they in fact require different skill, effort, and responsibility.

Step 3: Calculate Whether Individuals Performing Comparable Work are Paid Differently

Check for differentials in pay within members of a comparable work cohort. Where there are differentials within a comparable work cohort, determine if applicable exemptions apply. If differentials in pay for comparable work are detected and no exemption genuinely applies, an employer can stop the analysis at this point and address the differentials. Note that an employer cannot reduce any employee's pay to address differentials.

If an employer chooses not to address differentials at this point, the employer must determine whether the pay differential is on the basis of a protected characteristic. For example, if all individuals within a comparable work group who are white earn a higher wage than those who are Black, this is strong evidence of a pay differential based on protected characteristic. There are numerous methodologies that employers can use to test for unlawful differentials. These include, but are not limited to, a case-by-case analysis of every employee, examining whether the employee has identified or is within a protected status and then reviewing the rate of pay of that employee against those of the other employees performing comparable work, and, for larger employers, a statistical analysis using objectively reliable standards for sample size, regression, and any other modeling tools applied.

Employers should also consider outliers—employees whose compensation is significantly out of line with others within a comparable work grouping to determine whether they are being paid in compliance with the statute.

Employers should consult with legal counsel about their options and what type of analysis is most appropriate for their organizations.

Step 4: Assessing Whether Differences in Pay for Comparable Work are Justified Under the Law.

Where a pay differential for comparable work is detected, regardless of the stage of analysis, an employer must determine whether the differential can be explained by one (or more) of the eight permissible factors specifically enumerated in the law. They are:

1. A seniority system; provided, however, that time spent on leave due to a pregnancy related condition or parental, family and medical leave shall not reduce seniority.
2. A merit system.
3. A system that measures earnings by quantity or quality of production.
4. Geographic location when the locations correspond with different costs of living, provided, that no location within the state of Rhode Island will be considered to have a sufficiently different cost of living.
5. Reasonable shift differential, which is not based upon or derived from a differential in compensation based on a protected characteristic.
6. Education, training, or experience to the extent such factors are job-related and consistent with a business necessity.

7. Work-related travel, if the travel is regular and a business necessity.
8. A bona fide factor other than a protected characteristic which is not based upon or derived from an existing differential in compensation based on a protected characteristic, which is job-related with respect to the position in question, and which is consistent with business necessity.

Where possible, consider assigning a numeric value to each factor that is relevant to your organization. For example, a merit system might be represented by performance ratings on a scale from 1 to 10.

Employers may use statistical modeling methodologies to analyze whether there exist broad-based exemptions; however, there must be a showing of how the model accounted for all identified pay differentials. Where practicable, employers are strongly encouraged to identify the relevant exemption for every individual receiving a differential rate of pay.

As above, employers should consult with legal counsel about their options and what type of analysis is most appropriate.

Step 5: Remediate Any Protected Class-Based Pay Differentials

Employers should take steps to remediate in a timely fashion any differentials in pay between individuals performing comparable work that are not justified by one or more of the permissible factors listed in the statute. In most cases where remediation is necessary, this will require adjustments in pay for some or all employees within a comparable work cohort. Such adjustments may follow a simple formula—e.g., providing all affected employees that same amount or percentage increase—or they may be more targeted. Keep in mind that employers may not reduce the wages of any employee solely in order to comply with statute.

Employers should develop and implement a remedial plan as soon as practicable upon completion of the self-evaluation.

Step 6: Adjust Pay Practices.

Employers that identify unlawful pay differentials between members of protected classes performing comparable work should attempt to determine the underlying cause(s) for such differentials—e.g., supervisor discretion, starting or historic salaries, raises over time—and take steps to prevent them in the future. Among other things, employers should consider implementing objective standards for setting starting salaries or hourly rates, and for applying raises and other adjustments. Employers should also consider making changes to job titles, descriptions, codes/bands/grades, etc. in order to better align comparable work cohorts. Finally, employers should consider conducting some form of self-evaluation on a regular basis (e.g., annually) to ensure that disparities do not recur over time.