



STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

May 18, 2023

Representative Janelle Bynum
900 Court Street NE H276
Salem OR 97301

Re: Legislative history of bona fide factors under pay equity laws

Dear Representative Bynum:

You asked two questions about the legislative history concerning Oregon's pay equity laws.¹ Specifically, you asked: "In the legislative history of Oregon's pay equity law, was a bona fide factor related to business necessity ever considered for adoption?" You also asked: "In addition to the eight bona fide factors adopted, were any other bona fide factors considered?"

We understand you to be asking about the legislative history concerning the bona fide factors that were included in Enrolled House Bill 2005,² which the Legislative Assembly passed in the 2017 legislative session. House Bill 2005 amended the pay equity statutes to, among other things, make it an unlawful employment practice for an employer to pay "wages or other compensation to any employee at a rate greater than that at which the employer pays wages or other compensation to employees of a protected class for work of comparable character."³ However, HB 2005 also provided exceptions to that prohibition that allow an employer to pay employees for work of comparable character at different compensation levels if all of the difference in compensation levels is based on a bona fide factor that is related to the position and based on:

- (a) A seniority system;
- (b) A merit system;
- (c) A system that measures earnings by quantity or quality of production, including piece-rate work;
- (d) Workplace locations;
- (e) Travel, if travel is necessary and regular for the employee;
- (f) Education;
- (g) Training;
- (h) Experience; or
- (i) Any combination of the factors described in this subsection, if the combination of factors accounts for the entire compensation differential.⁴

¹ ORS 652.210 to 652.235.

² Enrolled House Bill 2005 (chapter 197, Oregon Laws 2017).

³ Section 2 (2), chapter 197, Oregon Laws 2017, codified at ORS 652.220 (1)(b).

⁴ Section 2 (2), chapter 197, Oregon Laws 2017, codified at ORS 652.220 (2017 edition).

Short Answer

Based on our examination of the legislative history of HB 2005, conducted under time constraints, we do not believe the legislative history demonstrates that the legislature considered business necessity, in general, as a distinct bona fide factor upon which an employer may justify a compensation differential paid to employees who perform work of comparable character. Instead, we believe that the legislative history indicates that business necessity was considered in two ways. First, we believe the legislative history shows business necessity was considered in the context of one of several supplemental factors that an employer must demonstrate to establish that a compensation differential was based on a bona fide factor other than a protected characteristic. Second, we believe the legislative history also demonstrates that business necessity was encompassed within the specific bona fide factors that were enumerated in the final enrolled bill.

Furthermore, nothing in the legislative history of HB 2005 indicates that the Legislative Assembly specifically considered the adoption of any bona fide factors aside from the eight bona fide factors that were ultimately included in the final enrolled bill.

Discussion

As introduced, section 2 (2) of HB 2005 provided an exception to the prohibition against paying employees in equivalent jobs at different wage rates if the wage rates are based on:

- (a) A seniority system;
- (b) A merit system;
- (c) A system that measures earnings by quantity of production, such as piece-rate work; or
- (d) A differential based on a bona fide factor other than race, color, religion, sex, sexual orientation, national origin, marital status or age, such as education, training or experience, if the employer can demonstrate that the factor:
 - (A) Is not based on or derived from race, color, religion, sex, sexual orientation, national origin, marital status or age;
 - (B) Is not based on perceptions of traditional or appropriate roles associated with race, color, religion, sex, sexual orientation, national origin, marital status or age;
 - (C) Is job-related to the position in question;
 - (D) Is based on a business necessity; and
 - (E) Accounts for the entire compensation differential.

(Emphasis added.)

On the House side, the House Committee on Business and Labor held two public hearings on HB 2005. However, the committee spent very little time specifically discussing the bona fide factors listed under section 2 (2). In fact, the bona fide factors were only briefly summarized by a witness during the public hearing on February 2, 2017. That testimony discussed business necessity in the context of employer liability and the burden of proof that an employer must meet in order to establish that a pay differential is based on a bona fide factor other than one based on protected characteristics. Specifically, the witness underscored the stringent burden on the employer to prove each of the of five supplemental factors listed under section 2 (2)(d) of HB

2005, which include business necessity, to establish a justifiable defense to an allegation of a purported unlawful differential.⁵ The witness further noted that having to specifically prove each of those factors eliminates other good reasons, such as different workplace locations, that an employer might have for paying a compensation differential.⁶

In the second public hearing held by the House Committee on Business and Labor, the committee heard additional, albeit brief, testimony concerning the bona fide factors. Of note was testimony by attorney Whitney Stark, who briefly explained that an employer may pay employees differently “based on any bona fide factor other than their status in a protected category,” and further clarified that an employer would be permitted to pay a compensation differential that is based on workplace location or a merit system.⁷ Although there were several hypothetical scenarios posed in testimony by members of the public and members of the committee in an attempt to demonstrate whether a pay differential paid by an employer would be permissible under the bona fide factors set forth in the bill, there was no specific discussion or deliberation by the committee regarding the inclusion or exclusion of business necessity as a distinct bona fide factor upon which an employer could rely as a basis for justifying a compensation differential.⁸

There was similarly very little discussion of the specific bona fide factors in the Senate Committee on Workforce. In the public hearing held on April 26, 2017, the committee’s discussion focused on a work draft copy of the -A25 amendments to HB 2005 that was made publicly available.⁹ With respect to the provisions concerning the bona fide factors, the only mention of note was a statement by former Representative Lininger who reiterated that “pay differentials are okay if they are based on reasonable bona fide business reasons.”¹⁰ She explained that additional factors, such as travel and workplace location, which were expressly specified in the text of the -A25 amendments, would “per se be bona fide business reasons or reasonable bases for differential pay.” She then went on to explain that “our perspective in the House was that those [additional factors] were already encompassed” as bona fide reasons but noted that a specific reference to such factors was “positive.”¹¹

⁵ Public hearing on HB 2005 at 00:57:42, House Committee on Business and Labor, February 27, 2017 (statement of Betsy Earls), <https://olis.oregonlegislature.gov/liz/mediaplayer/?clientID=4879615486&eventID=2017021241> (last visited May 18, 2023).

⁶ *Id.* at 57:39.

⁷ Public hearing on HB 2005 at 00:08:01, House Committee on Business and Labor, March 13, 2017 (statement of Whitney Stark), <https://olis.oregonlegislature.gov/liz/mediaplayer/?clientID=4879615486&eventID=2017031280> (last visited May 18, 2023).

⁸ Public hearing on HB 2005 at 00:15:00, House Committee on Business and Labor, March 13, 2017 (statement of Kate Newhall discussing hypothetical scenarios regarding a merit system and a system that measures earnings by quantity of production), <https://olis.oregonlegislature.gov/liz/mediaplayer/?clientID=4879615486&eventID=2017031280> (last visited May 18, 2023).

⁹ Meeting materials submitted by Senator Kathleen Taylor to Senate Committee on Workforce (April 26, 2017), <https://olis.oregonlegislature.gov/liz/2017R1/Downloads/CommitteeMeetingDocument/123322> (last visited May 18, 2023).

¹⁰ Public hearing on House Bill 2005 at 00:36:50, Senate Committee on Workforce, April 26, 2017 (statement of former Representative Ann Lininger), <https://olis.oregonlegislature.gov/liz/mediaplayer/?clientID=4879615486&eventID=2017041320> (last visited May 18, 2023).

¹¹ *Id.* at 00:37:00.

In addition, a review of the amendments that were made publicly available¹² indicates that there was a change to the list of bona fide factors under section 2 (2) of HB 2005 from what appeared in previous drafts of amendments. Specifically, the -A31 amendments to HB 2005 removed paragraph (f) of that subsection, which allowed an employer to pay a differential based on a bona fide factor if the employer could demonstrate, among other things, that the factor was based on a business necessity.¹³ Apart from this change, the committee does not appear to have specifically discussed the inclusion or exclusion of business necessity from the list of bona fide factors reflected in the amendments to the bill. In fact, in a work session on May 10, 2017, in consideration of the -A31 amendments, testimonies provided by this office and interested stakeholders from the employment community described the changes to the provisions relating to the bona fide factors by, essentially, reading the list of factors included in section 2 (2).¹⁴ There was no specific discussion by the committee regarding the impetus for the changes to the list of bona fide factors or any deliberation or discussion regarding any other factors that were considered with respect to the list of bona fide factors that were ultimately included in final enrolled bill.

Conclusion

Based on our examination of the legislative history of HB 2005, conducted under time constraints, we do not believe the legislative history demonstrates that the legislature considered the adoption of business necessity as a distinct bona fide factor upon which an employer may justify a pay differential paid to employees who perform work of comparable character. Instead, we believe that the legislative history indicates that business necessity was considered as one of several supplemental factors that an employer must demonstrate to establish that a compensation differential was based on a bona fide factor other than a protected characteristic. In addition, the legislative history indicates that business necessity was also considered to the degree that specific business reasons were encompassed within the list of bona fide factors reflected in the final enrolled bill.

We also did not identify anything in the legislative record indicating that the legislature considered the inclusion of any bona fide factors other than those factors that were ultimately included in the final enrolled bill.

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¹² *Oregon Legislative Information System*, 2017 Regular Session, HB 2005 Enrolled, Amendments, <https://olis.oregonlegislature.gov/liz/2017R1/Measures/ProposedAmendments/HB2005> (last visited May 18, 2023).

¹³ See, e.g., *Oregon Legislative Information System*, 2017 Regular Session, HB 2005 Enrolled, -A26 amendments, <https://olis.oregonlegislature.gov/liz/2017R1/Measures/ProposedAmendments/HB2005> (last visited May 18, 2023).

¹⁴ Work session on HB 2005 at 00:05:30, Senate Committee on Workforce, May 10, 2017 (statement of Jessica Santiago, Staff Attorney, Office of Legislative Counsel); Work session on HB 2005 at 00:36:24, Senate Committee on Workforce, May 10, 2017 (statement of Amanda Dalton), <https://olis.oregonlegislature.gov/liz/mediaplayer/?clientID=4879615486&eventID=2017051240> (last visited May 18, 2023).

other retained counsel. Constituents and other private persons and entities should seek and rely upon the advice and opinion of private counsel.

Very truly yours,

DEXTER A. JOHNSON
Legislative Counsel

A handwritten signature in black ink, appearing to be 'js' or similar initials, written in a cursive style.

By
Jessica A. Santiago
Senior Deputy Legislative Counsel