



Ohio Legislative Service Commission

Bill Analysis

Kailey M. Henry

H.B. 330

131st General Assembly
(As Introduced)

Reps. Howse and Clyde, Sykes, G. Johnson, Kuhns, Fedor, Antonio, Driehaus, Ramos, Leland, Lepore-Hagan, Stinziano, Strahorn, Phillips, Sheehy, K. Smith, Ashford, Slesnick, Reece, Boyd, Cera, Rogers, Craig, M. O'Brien, Boyce, Patterson

BILL SUMMARY

Pay equity in public employment

- Requires public employers to establish a job evaluation system to identify and eliminate sex-based wage disparities among female-dominated, male-dominated, and balanced classes of employees.
- Requires public employers to submit an implementation report to the Director of Budget and Management every three years, and requires the Director to submit a report on employers' compliance status to the General Assembly annually.
- Creates a penalty for a state agency that fails to submit an implementation report or that does not make compensation changes to comply with the bill's requirements.
- Specifies factors regarding compensation that fact-finding panels or conciliators must consider when settling disputes under the Public Employees' Collective Bargaining Law.

Equal pay certificates

- Requires a contractor or person submitting a bid or other proposal for a state contract or a business entity applying for a grant or other economic incentive from a state agency to obtain an equal pay certificate.
- Allows the Director of Administrative Services (DAS Director) to suspend or revoke a certificate and a state agency to abridge or terminate a contract or revoke a grant or other economic incentive.

- Allows the DAS Director to audit a contractor, person, or business entity to determine if the contractor, person, or business entity is compliant with the bill's equal pay certificate requirements.
- Requires the DAS Director to submit a report regarding equal pay certificates to the Governor and the General Assembly every two years.

Prohibit retaliation for discussing wages

- Prohibits an employer from retaliating against an employee that discusses the employee's salary or wage rate with another employee.

TABLE OF CONTENTS

Public employer pay equity 2
 Reasonable compensation relationships 3
 Job evaluation system..... 4
 Public employer implementation reports..... 4
 Review of implementation reports and notification of compliance status..... 5
 Penalties 6
 Report to the General Assembly 6
 Collective bargaining..... 7
 Settlement of disputes..... 7
 Unlawful discriminatory practices 8
 Definitions – public employer pay equity 8
 Equal pay certificates 8
 Application 9
 Issuing or rejecting a certificate 11
 Suspending or revoking a certificate..... 11
 Abridging or terminating a contract or revoking a grant 12
 Audit..... 12
 Report..... 13
 Prohibit retaliation for discussing wages..... 14
 Definitions – equal pay certificates 13

CONTENT AND OPERATION

Public employer pay equity

The bill requires every Ohio public employer (a state agency or a political subdivision) to establish equitable compensation relationships between female-dominated, male-dominated, and balanced classes to eliminate sex-based wage disparities, subject to the Public Employees' Collective Bargaining Law (PECBL) and the Prevailing Wage Law (see **COMMENT 1**). An "equitable compensation relationship" means that the compensation for female-dominated classes (any class in which 70% or more of the members are female) is not consistently below the compensation for male-



dominated classes (any class in which 80% or more of the members are male) of comparable work value. A public employer must make the comparable work value of a position in relationship to other positions a primary consideration in negotiating, establishing, recommending, and approving compensation. "Comparable work value" means the value of work measured by skill, effort, responsibility, and working conditions normally required in the performance of the work.¹

Reasonable compensation relationships

The Director of Administrative Services (DAS Director), when establishing a job classification plan and assigning pay ranges, and any other public employer with the authority to determine employee compensation, must assure all of the following, as applicable:

- That compensation for positions in the classified civil service and unclassified civil service bear reasonable relationship to one another;
- That compensation for positions bears a reasonable relationship to similar positions outside of that particular employer;
- That compensation for positions within the employer's workforce bears a reasonable relationship among classes and among levels within the same occupation group.

A public employer also must assure that the provisions described above occur in preparation for negotiating a collective bargaining agreement, if applicable. Under the bill, compensation for a position bears a "reasonable relationship" to another position if both of the following are satisfied:

- Positions requiring comparable skill, effort, responsibility, working conditions, and other factors have comparable compensation;
- Positions with differing skill, effort, responsibility, working conditions, and other work-related criteria have compensation that is proportional to the skill, effort, responsibility, working conditions, and other relevant work-related criteria required.²

¹ R.C. 142.02 and 142.01.

² R.C. 142.03 and 4117.08(D).



Job evaluation system

Every public employer must establish a job evaluation system to determine the comparable work value of the work performed by each class of the public employer's employees. The public employer must meet and confer with the employees' exclusive representative (union) on the development or selection of a job evaluation system. A public employer can adopt a system already established by another public employer. A public employer must update the public employer's system to account for new employee classes and changes in factors that affect the comparable work value of existing classes. The public employer must notify the Director of Budget and Management (OBM Director) if the public employer substantially modifies an existing system or adopts a new job evaluation system.

Every public employer must submit a report on the results of the job evaluation system to the exclusive representative of the employer's employees to be used by both parties in negotiations for collective bargaining agreements. The report must contain information on (1) the female-dominated classes for which compensation inequity exists, based on the comparable work value, and (2) all data not on individuals used to support the finding in (1) immediately above.³

Public employer implementation reports

Every three years a public employer must submit an implementation report to the OBM Director. The report must contain the following information as of December 31 of the preceding year:

- A list of all of the public employer's job classes;
- The number of employees in each class and the number of female employees in each class;
- An identification of each class as male-dominated, female-dominated, or balanced;
- The comparable work value of each class as determined by the job evaluation system used by the public employer;
- The minimum and maximum salary for each class, if salary ranges have been established, and the amount of time in employment required to qualify for the maximum salary;

³ R.C. 142.04 and 142.05.

- Any additional cash compensation paid to class members;
- Any additional information requested by the OBM Director.

The OBM Director must adopt rules in accordance with the Administrative Procedure Act to establish a schedule to stagger the submission of the implementation reports. The first set of reports is due to the OBM Director by January 31 immediately following the bill's effective date.⁴

Review of implementation reports and notification of compliance status

The OBM Director must review all implementation reports the OBM Director receives to determine whether a public employer has established equitable compensation relationships as required by the bill. The OBM Director must notify a public employer in writing if the employer is in compliance with those requirements. If an employer is not in compliance, the OBM Director must issue a written statement to the employer that includes a detailed description of the basis for the noncompliance finding, specific recommended actions the public employer must take to comply with those requirements, and an estimate of the cost for the public employer to comply.

A public employer who disagrees with a finding of noncompliance must notify the OBM Director in writing. The OBM Director must provide the employer a specified time period to submit additional evidence to support the employer's claim that the employer is in compliance. That evidence may include any of the following:

- Recruitment or retention difficulties;
- Recent conciliation awards made under the PECBL that are inconsistent with equitable compensation relationships under the bill;
- Information that demonstrates that the employer made a good faith effort to comply with the bill, including constraints faced by the employer;
- A plan for the employer to comply with the bill's equitable compensation relationship requirements.

⁴ R.C. 142.06(A).

The public employer must specify a date for additional review by the OBM Director when submitting the required evidence.⁵

Penalties

A state agency that fails to submit an implementation report to the OBM Director or that does not make changes to comply with the bill's equitable compensation relationship requirements within a reasonable period established by the Director is subject to a fine of \$100 for each day the agency is noncompliant. The penalty remains in effect until the agency can demonstrate that the agency is in compliance with the bill's requirements. The Director may suspend a penalty for any of the following reasons:

- The state agency's failure to comply was attributable to circumstances beyond the state agency's control.
- The failure to comply was attributable to the state agency's severe hardship.
- The noncompliance is due to factors other than the sex of the members of the affected classes, and the state agency is taking steps to comply with the bill to the extent possible.

An agency may appeal a penalty to the Director within 30 days after the Director assesses the penalty. The Director cannot impose a penalty while an appeal is pending.⁶

The bill does not specify a penalty for political subdivision noncompliance.

Report to the General Assembly

The bill requires the OBM Director to submit a report on the status of public employers' compliance with the bill's equitable compensation relationship requirements to the General Assembly by January 1 immediately following the bill's effective date, and annually thereafter. The report must contain the following information:

- A list of the public employers in compliance with the bill's equitable compensation relationship requirements;
- The estimated cost for each employer to be compliant with those requirements;

⁵ R.C. 142.07(A), (B), and (C).

⁶ R.C. 142.07(D) and (E), 142.06(B), and 142.01(K).

- A list of the public employers the OBM Director found to not be in compliance and the basis for the OBM Director's finding;
- A list of recommended changes noncompliant employers must make for compliance;
- The estimated cost for each employer to become compliant;
- A list of the public employers that did not comply with the reporting requirement (see "**Public employer implementation reports**," above);
- Any additional information the OBM Director determines the General Assembly needs to know from a public employer.⁷

Collective bargaining

Regardless of the unfair labor practices created under continuing law, such as failure to bargain, it is not an unfair labor practice for a public employer to specify an amount of funds to be used solely for correcting inequitable compensation relationships. Additionally, nothing in the bill diminishes the duty of a public employer to bargain in good faith under the PECBL or limits the ability of the parties to collectively bargain in good faith.⁸

Settlement of disputes

The bill requires a fact-finding panel or conciliator appointed under the PECBL to consider all of the following in any settlement of a dispute involving a class other than a balanced class:

- The equitable compensation relationship standards established in the bill;
- The reasonable compensation relationships established in the bill;
- The results of a job evaluation system conducted under the bill, and any employee objections to that job evaluation system.

"Balanced class" means any class in which not more than 80% of the members are male and not more than 70% of the members are female.

In the settlement of disputes involving a balanced class, a fact-finding panel or conciliator must consider similar classifications of other public employers. The fact-

⁷ R.C. 142.08.

⁸ R.C. 142.02 and 142.09.

finding panel or conciliator also may consider equitable compensation relationship standards established under the bill, as well the results of and any employee objections to a job evaluation system conducted under the bill. The parties to collective bargaining involving a balanced class must consider similar classifications of other public employers and may consider equitable compensation relationship standards and the results of a job evaluation system.⁹

Unlawful discriminatory practices

The bill allows the Ohio Civil Rights Commission or a state court to use either of the following as evidence in any proceeding or action alleging that an unlawful discriminatory practice, as defined in Ohio's Civil Rights Law, has been committed:

- The results of any job evaluation system established under the bill;
- The report a public employer is required to submit to the exclusive representative of the employer's employees (see "**Job evaluation system**," above).¹⁰

Definitions – public employer pay equity

The bill defines the following additional terms for the public employer pay equity portion of the bill:

"Class" means one or more positions in public employment that have similar duties, responsibilities, and general qualifications necessary to perform the duties, with comparable selection procedures used to recruit employees, and use of the same compensation schedule.

"Position" means a group of current duties and responsibilities assigned or delegated by a supervisor to an employee.¹¹

Equal pay certificates

The bill prohibits a state agency from awarding a contract, grant, or other economic incentive to any of the following entities unless the entity obtains an equal pay certificate under the bill or is exempt from that requirement:

⁹ R.C. 4117.141 and 142.01.

¹⁰ R.C. 142.10.

¹¹ R.C. 142.01.

(1) A contractor wishing to be awarded a state contract for a public improvement;

(2) A person wishing to provide goods or services to a state agency;

(3) A business entity wishing to be awarded a grant or other economic incentive, including any grant or other economic incentive awarded by a state agency on the recommendation of JobsOhio.

This requirement applies to contractors, persons, and business entities that employ four or more full-time employees on any day in the prior year in the state where the entity has its principal place of business.

A contractor, person, or business entity is not required to obtain a certificate for a specific contract, grant, or other economic incentive if the DAS Director determines that obtaining a certificate would cause undue hardship to the contractor, person, or business entity. The DAS Director must adopt rules in accordance with the Administrative Procedure Act to define "undue hardship" and to establish procedures to apply for and requirements to obtain an exemption.

A certificate is valid for a period of four years and may be renewed in accordance with rules adopted by the DAS Director under the bill. The DAS Director must provide technical assistance to a contractor, person, or business entity that requests assistance regarding compliance with the bill's requirement to obtain a certificate or exemption.¹²

Application

To apply for a certificate, a contractor, person, or business entity must submit a \$25 filing fee and an equal pay compliance statement signed by the contractor, person, or the chief executive officer of the business entity to the DAS Director. The filing fees must be deposited in the state treasury to the credit of the Equal Pay Certificate Fund created in the bill and used to administer the provisions of the bill regarding certificates. Interest on investment is credited to the Fund. The equal pay compliance statement must contain all of the following information:

¹² R.C. 9.72 and 9.73(A) and (C).



- That the contractor, person, or business entity is in compliance with Title VII of the federal Civil Rights Act,¹³ the federal Equal Pay Act,¹⁴ Ohio's Civil Rights Law,¹⁵ and Ohio's Equal Pay Law;¹⁶
- That the average compensation for female employees is not consistently below the average compensation for male employees within each major job category in the contractor's, person's, or business entity's EEO-1 Report (if the contractor, person, or business entity is required to file that report), taking into account length of service, requirements of specific jobs, experience, skill, effort, responsibility, working conditions, and other mitigating factors;
- That employees of one sex are not restricted to certain job classifications;
- That the contractor, person, or business entity makes retention and promotion decisions without regard to sex;
- That compensation and benefit disparities are corrected when identified;
- The frequency in which compensation and benefits are evaluated to ensure compliance with the federal and Ohio laws listed above;
- The approach the contractor, person, or business entity uses to set compensation and benefits, including market pricing, state prevailing wage or collective bargaining agreement requirements, a performance pay system, internal analysis, or an alternative approach described by the contractor, person, or entity;
- That an employee may contact the human resources department and request to see how the employee's compensation compares with other employees in jobs of "comparable skill, effort, responsibility, and working conditions."

An "EEO-1 report" is the report required by the Equal Employment Opportunity Commission that private sector employers with 100 or more employees must file and that includes employment data for all employees of the employer during a selected

¹³ 42 United States Code (U.S.C.) 2000e *et seq.*

¹⁴ 29 U.S.C. 206(d).

¹⁵ R.C. Chapter 4112, not in the bill.

¹⁶ R.C. 4111.17., not in the bill.



payroll period, broken down by sex and race or ethnic category for each of the job categories included in the report.¹⁷

The receipt of a statement by the DAS Director does not establish a contractor's, person's, or business entity's compliance with the federal and Ohio laws listed above. Any data on individuals submitted to the DAS Director in the statement is confidential and is not a public record under Ohio's Public Records Law.¹⁸

Issuing or rejecting a certificate

The DAS Director must issue a certificate to a contractor, person, or business entity within 15 days after receiving an application. The DAS Director must reject an application if a contractor, person, or business entity submits a statement that does not comply with the bill's requirements or fails to submit the required filing fee. If the DAS Director rejects the application, the DAS Director must issue a statement explaining the reason for the rejection to the contractor, person, or business entity within 15 days after receiving the application. A record of the DAS Director's decision to issue or not issue a certificate is a public record.¹⁹

Suspending or revoking a certificate

Under the bill, the DAS Director may suspend or revoke a contractor's, person's, or business entity's certificate in accordance with the Administrative Procedure Act for any of the following reasons:

- The contractor, person, or business entity fails to comply with the federal and Ohio laws listed in the bill (see "**Application**," above);
- The contractor, person, or business entity has multiple violations of the federal and Ohio laws listed in the bill;
- The contractor, person, or business entity failed to comply with the bill's requirement to obtain a certificate or an exemption (see **COMMENT 2**).

The DAS Director must provide a contractor, person, or business entity the opportunity to comply with the bill's requirements regarding obtaining a certificate or exemption or complying with the equal pay compliance statement before suspending

¹⁷ R.C. 9.71(E); Equal Employment Opportunity Commission, *Standard Form 100, Rev. January 2006, Employer Information Report EEO-1 Instruction Booklet*, <http://www.eeoc.gov/employers/eeo1survey/2007instructions.cfm> (accessed November 28, 2016).

¹⁸ R.C. 9.73, 9.77(A), and 9.79, by reference to R.C. 149.43, not in the bill.

¹⁹ R.C. 9.73(C) and 9.77(B).

the contractor's, person's, or business entity's certificate. The DAS Director must notify a contractor, person, or business entity by certified mail of the DAS Director's decision to suspend or revoke the contractor's, person's, or business entity's certificate. A record of the DAS Director's decision to revoke or suspend a certificate is a public record.²⁰

Abriding or terminating a contract or revoking a grant

A state agency, in accordance with the Administrative Procedure Act, may abridge or terminate a contract with a contractor or person, or revoke a grant or other economic incentive from a business entity upon notice that the DAS Director has suspended or revoked the contractor's, person's, or business entity's certificate. The state agency must notify the contractor, person, or business entity by certified mail of the decision to abridge or terminate the contractor's or person's contract or to revoke the business entity's grant or other economic incentive.

The DAS Director may void a contract or revoke a grant or other economic incentive on behalf of a state agency if a contractor, person, or business entity is not in compliance with the bill's requirements regarding obtaining a certificate or exemption or complying with the equal pay compliance statement, after notifying the state agency that has the contract with a contractor or person or has awarded the grant or other economic incentive.²¹

Audit

Under the bill, the DAS Director may audit a contractor, person, or business entity to determine whether that contractor, person, or business entity is in compliance with the requirement to obtain a certificate or exemption and with the requirements of an equal pay compliance statement. The contractor, person, or business entity being audited must provide the DAS Director with information for each employee expected to work under the contract, grant, or other economic incentive for each of the major job categories included in the contractor's, person's, or business entity's EEO-1 Report (the bill does not address how to categorize employees of an employer who is not required to submit an EEO-1 Report). As a part of the audit, the contractor, person, or business entity must also provide all of the following information to the DAS Director:

- The number of male employees and female employees;
- The average length of service for male employees and for female employees within each major job category;

²⁰ R.C. 9.74(A), 9.75(A), and 9.77(B).

²¹ R.C. 9.74(B) to (D) and 9.75(B).



- The average annualized salaries paid to male employees and to female employees within each major job category, in the manner most consistent with the approach the contractor, person, or business entity uses in setting compensation and benefits;
- Performance pay, benefits, and other elements of compensation, in the manner most consistent with the approach the contractor, person, or business entity uses in setting compensation and benefits;
- Other information the DAS Director determines to be necessary in determining compliance with the bill.²²

Report

Beginning January 31, 2018, and every two years after that date, the DAS Director must submit a report to the Governor and the General Assembly on the activities of the Department of Administrative Services in issuing certificates under the bill. The report must contain all of the following information:

- The number of certificates issued;
- The number of audits conducted by the DAS Director under the bill;
- The processes contractors, persons, and business entities use to ensure compliance with the equal pay compliance statement;
- A summary of the DAS Director's auditing efforts under the bill.²³

Definitions – equal pay certificates

The bill defines the following additional terms for the equal pay certificate portion of the bill:

"Business entity" means a corporation, partnership, association, firm, sole proprietorship, limited liability corporation, limited liability partnership, or other entity engaged in business.

"Contractor" means any person who undertakes to construct, alter, erect, improve, repair, demolish, remove, dig, or drill any part of a public improvement under

²² R.C. 9.76.

²³ R.C. 9.78.

a contract and includes a construction manager, construction manager at risk, and design-build firm as those terms are defined in continuing law.

"Public improvement" means any construction, reconstruction, improvement, enlargement, alteration, demolition, or repair of a building, highway, drainage system, water system, road, street, alley, sewer, ditch, sewage disposal plant, water works, and any other structure or work of any nature by a state agency.²⁴

Prohibit retaliation for discussing wages

The bill prohibits an employer from discharging or otherwise retaliating against an employee because that employee has discussed the employee's salary or wage rate with another employee (see **COMMENT 3**).²⁵

COMMENT

1. The bill may not apply to municipal corporations. Similarly, the bill may not apply to a charter county that has adopted, in its charter, authority to exercise powers vested by the constitution or laws of Ohio in municipalities, i.e. has adopted municipal home rule authority.²⁶ The Home Rule Amendment to Ohio's Constitution grants a municipal corporation authority over matters of local self-government and local police, sanitary, and other regulations that are not in conflict with general laws of the state.²⁷ Courts have considered compensation to be a matter of local self-government.²⁸ Under the bill, the state agencies and political subdivisions – including municipal corporations and charter counties – are required to evaluate the compensation paid to their employees and eliminate any sex-based wage disparities that exist between job classes. The bill may be considered to limit a municipal corporation's or charter county's home rule authority.

2. The bill disciplines a contractor, person, or business entity for failing to comply with the bill's requirement to obtain an equal pay certificate or an exemption. However, the actual duty to comply with the bill, that is, the duty not to award a contract or

²⁴ R.C. 9.71, by reference to R.C. 9.33 and 153.65, not in the bill.

²⁵ R.C. 4113.42.

²⁶ Ohio Const., Art. X, Sec. 3.

²⁷ Ohio Const., Art. XVIII, Sec. 3.

²⁸ *United Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers, Local Union No. 377 v. City of Youngstown*, 64 Ohio St.2d 158, 160 (1980), citing *State ex rel. Mullin v. Mansfield*, 26 Ohio St.2d 129 (1971).



economic incentive to an entity that does not have a certificate, applies to the state. It is not clear how this portion of the bill will be implemented.

3. The National Labor Relations Act (NLRA),²⁹ which governs private sector labor relations, currently provides most private sector employees with protection against retaliation for discussing a salary or wage with another employee.³⁰ Section 7 of the NLRA prescribes several activities that are protected by the NLRA, including the ability to meet and confer and discuss compensation and benefits. Section 8 of the NLRA lists prohibited activities for an employer or a union; these activities are referred to as unfair labor practices. While the NLRA does not explicitly address preemption of state laws, one of the tests the U.S. Supreme Court has developed for NLRA preemption analysis, *Garmon* preemption, prohibits state and local regulation of activities that are prohibited or protected under Section 7 or 8 of the NLRA.³¹ Because the bill prohibits activity also prohibited by the NLRA, a question could be raised as to whether the bill is preempted.

HISTORY

ACTION	DATE
Introduced	09-14-15

H0330-I-131.docx/ks

²⁹ 29 U.S.C. 151, *et seq.*

³⁰ 29 U.S.C. 157 and 158.

³¹ *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 (1959).

