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Equal Pay for Equal Work? An Update on Pay Equity in the Workplace

33rd Annual Labor & Employment Conference

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OVERVIEW

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THE TRUTH ABOUT THE PAY GAP

- Despite longstanding prohibitions against compensation discrimination under federal and state EEO laws, pay disparities persist between workers in various demographic groups
 - Council of Economic Advisers report found gender wage gap in US is 2.5% higher than average industrialized countries
 - In 2015, median earnings for individuals with disabilities are significantly lower than median earnings for individuals without disabilities
 - In 2015, women working full time in the U.S. were typically paid an average of just 80% of what men were paid (an average gap of 20%)
 - Based on the above estimate, it would take an extra 44 days of work for women to earn what men earned in 2015

PAY DISPARITY IS A HOT TOPIC

- https://youtu.be/G6u10YPk_34
- Equality in pay was a cornerstone on the Obama Administration's civil rights agenda (Lily Ledbetter Fair Pay Act of 2009)
- 100s of companies have signed the Equal Pay Pledge
- There has been a steady rise in the number of Equal Pay Act (EPA) EEOC charges filed
 - Over the past (three) years, the number of EPA charges filed rose by 15%

THE FUTURE OF COMPENSATION ISSUES

- Under the Trump Administration, employers can expect an increased EEOC interest in the *reasons for gender pay differences*
- On February 9, 2017, Acting EEOC Chair Victoria Lipnic stated:
 - “I am very interested in equal pay issues. It’s something I would consider a priority.”
- Last year the EEOC announced new reporting obligations to the EEO-1 Report that requires certain employers to add summary pay data in March 2018
 - New requirement is in addition to Executive Order 11246, which already requires federal contractors to analyze and report certain pay data

RECENT PAY EQUITY CASES

- ***Oracle America Inc. (filed January 17, 2017)*** – Sued by the Department of Labor under the Obama administration for (a) pay disparities between white men and women and minorities; and (b) failure to turn over pay and compensation data in violation of federal government contractor rules. Case is currently in settlement discussions.
- ***Campbell v. Chadbourne & Parke LLP (filed August 31, 2016)*** – Female partners at top law firm seeking over \$100 million for claims of discrimination and retaliation under the Equal Pay Act and Title VII. The law firm seeks dismissal of the action on the grounds that the litigants are partners at the firm who act as business owners and cannot be considered employees who fall under employment discrimination laws. Plaintiffs are currently seeking conditional certification of a collective action under the Equal Pay Act.
- ***Coates v. Farmers Insurance (filed April 24, 2015)*** – Class action alleging pay disparity under Title VII and California state law. The insurer's 2016 settlement of the case included a fund of \$4.1 million (average of \$13,559 per class member), \$1.8 million plus costs to the attorneys who handled the bias case, and an agreement to conduct annual statistical analysis to reach benchmarks over a three-year period to increase representation of women in higher salary grades.

PAY EQUITY LAWS & COMPLIANCE

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INTRODUCTION TO PAY EQUITY LAWS

- 1963 Equal Pay Act (EPA)
- Title VII, ADEA, ADA
- State pay equity laws

THE EQUAL PAY ACT (EPA)

- Equal Pay Act (EPA) requires that equal wages be paid to men and women who perform jobs that require substantially equal ***skill, effort, and responsibility***
- Equality of pay under the EPA includes all forms of compensation, including:
 - Wages, salary, overtime pay, bonuses, stock options, profit sharing and bonus plans, life insurance, vacation and holiday pay, allowances, reimbursements, benefits, etc.
- Equal Pay Prima Facie Case
 - Lower wages paid to employees of opposite sex in the same establishment;
 - Employees perform substantially equal work; and
 - Jobs performed under similar working conditions when comparing job duties
- Intent unnecessary!
 - Required under Title VII, not for the EPA

“SUBSTANTIALLY EQUAL” REQUIREMENT

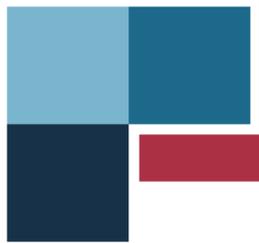
- **Under the EPA, jobs must be substantially equal, but not identical!**
 - The actual content of the jobs must be similar enough that one would expect those who hold the jobs to be paid at the same rate or level
- Job titles and formal job descriptions are helpful in making this determination, but are not controlling because jobs involving similar work may have different titles/descriptions
- Similarly, the fact that employees work in different departments or other organizational units may be relevant, but is not controlling
- Minimum objective qualifications, such as a specialized license or certification, should also be taken into account
 - **NOTE:** Persons in jobs requiring certain minimum objective qualifications should not be grouped together with persons in jobs that do not require those qualifications, even though the jobs otherwise are similar

SCENARIO #1

Ellen, a female, works for a computer services firm that has offices in numerous cities. She alleges that she is paid less than a male who performs the same job in a different branch office. The employer claims that the separate offices are separate establishments and that, therefore, the compensation rates in each office cannot be compared. The evidence shows that while the headquarters of the company exercises some control over the branches, the specific salaries offered to job applicants are determined by supervisors in each local office.

Can Ellen's salary be compared to the salary of a male employee in a different office?

- A. Yes, the local branch offices constitute a single establishment
- B. No, the local offices constitute separate establishments



Ellen's salary be compared to the salary of a
employee in a different office?



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Yes

No

ANSWER TO SCENARIO #1

- The correct answer choice is:
 - **B. No, the local offices constitute separate establishments**
- Rationale:
 - Two or more physically separate portions of a business should be considered one "establishment" if personnel and pay decisions are determined centrally and the operations of the separate units are *interconnected*
 - In Scenario #2, there is no central administrative unit responsible for hiring employees, setting compensation, and determining work assignments
 - Because compensation and work distribution are determined by supervisors in the individual branch locations, the separate branch offices appear to operate as separate facilities of a larger chain

THE EQUAL PAY ACT

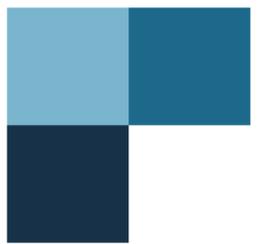
- Four exceptions for unequal pay (affirmative defenses for employers!!!)
 - Seniority system
 - Merit system
 - Incentive system
 - Factors “other than sex”
- Seniority, merit or incentive system must be ***bona fide***, which means system:
 - Was not adopted with discriminatory intent
 - Is an established system containing predetermined criteria
 - Has been communicated to employees
 - Has been consistently and even-handedly applied to employees of both sexes
 - Is in fact the basis for the compensation differential
- “Factors other than sex” must be related to job requirements
 - *E.g.*: Shift differential for night work; education, experience, marketplace value

SCENARIO #2

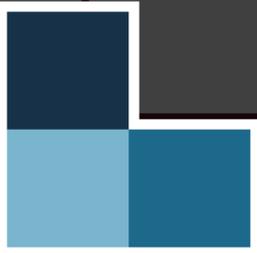
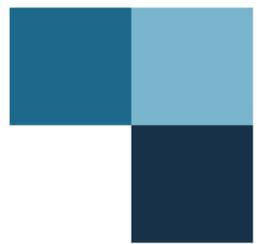
Amy, a high school teacher, alleges that she is paid \$5,000 less than a male teacher who performs substantially equal work. The school district responds that the compensation difference is due to its seniority system and that the male teacher has greater seniority. The school district also asserts that its seniority system is a systematic and formal process that was communicated to employees and is guided by sex-neutral, objective standards. An investigation reveals that the male teacher has worked at the school three years longer than Amy, which only justifies a \$3,000 difference in pay under the seniority system.

Is there an EPA violation?

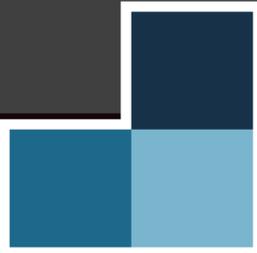
- A. No, the school district's seniority system appears to be bona fide and the male employee has worked for the school district three years longer than Amy
- B. Yes, the school district's seniority system may not operate as an affirmative defense



Is there an EPA violation?



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No

Yes

ANSWER TO SCENARIO #2

- The correct answer choice is:
 - **B. Yes, the school district's seniority system may not operate as an affirmative defense**
- Rationale:
 - A seniority, merit, or incentive system operates as a defense only to the extent that it accounts for the compensation disparity
 - The investigation into the school district's seniority system reveals that seniority accounts for about a \$3,000 difference in pay. Therefore, the seniority system alone cannot account for the \$5,000 difference in pay.
 - If there is no other bona fide system in place to explain the additional \$2,000 paid to Amy's male comparator, and the two have similar duties under similar working conditions, the school district may not assert its seniority system as an affirmative defense

SCENARIO #3

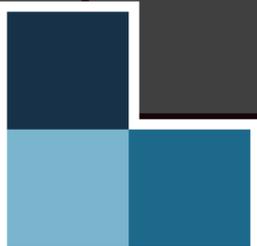
Pam, a certified public accountant (CPA), claims that ABC accounting firm violated the EPA by offering her a lower starting salary than it offered a male CPA. ABC claims it offered a higher salary to the male CPA because he had very favorable job references, he received other job offers at the higher salary, and he relied on those job offers as a bargaining tool for negotiating the higher salary with ABC. An investigation found that ABC began salary discussions with Pam with the same opening offer as given to the male CPA, and indicated it was "willing to go higher if necessary." But Pam did not bargain as assertively as the male CPA, and ended up with a lower starting salary. There is no evidence that ABC treated Pam any differently than the male CPA in salary negotiations.

Is there an EPA violation?

- A. Yes, the compensation disparity is not based on a factor other than sex or any bona-fide seniority, merit or incentive system
- B. No, the compensation disparity is based on the marketplace value of the male CPA's job-related qualifications



Is there an EPA violation?



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Yes

No

ANSWER TO SCENARIO #3

- The correct answer choice is:
 - **B. No, the compensation disparity is based on the marketplace value of the male CPA's job-related qualifications**
- Rationale:
 - A difference in the relative market value of employees at the time of their hire qualifies as a “factor other than sex” only if the employer proves that it assessed the marketplace value of the particular individual's job-related qualifications, and that any compensation disparity is not based on sex
 - **NOTE:** An employer will likely not be able to rely on the affirmative defense if the employer bargains differently with men than with women (e.g., responds more favorably to men's demands than to women's demands)

CLAIMS UNDER THE EQUAL PAY ACT (EPA)

- Statute of Limitations
 - Claims under the EPA have a two year statute of limitations
 - Three year statute of limitations if willful violation by employer
- Enforced by the EEOC, but claims may proceed directly to court
 - EEOC charge **NOT** required
- Employer has burden to prove a legitimate reason for the alleged wage disparity
- Remedies Under the EPA:
 - Payment of salary differential
 - Liquidated damages if willful
 - Attorneys fees and costs

OTHER LAWS PROHIBITING PAY DISCRIMINATION

- Title VII, ADEA, ADA, AND GINA allow for discrimination claims under (three) different theories
 - **Disparate treatment** – requires a one-to-one individual comparison
 - Allegation that an employer is intentionally compensating an individual employee at a lower rate than some comparator based on the employee's particular race, sex, age, nationality, religious affiliation, disability, or any other protected class under federal, state or local law
 - **Disparate treatment pattern or practice** – discrimination at the group level
 - Allegation that an employer is intentionally compensating one group of plaintiffs at a lower rate than a comparator group
 - **Disparate impact** – no intent required
 - Allegation that a neutral organizational policy/practice unintentionally results in lower compensation for a particular group of employees who share the same protected class characteristic

OTHER LAWS PROHIBITING PAY DISCRIMINATION

- Employee required to show that the employer's reason for the disparity is a pretext for discrimination
- Claimants are not entitled to liquidated damages
 - Claimants may assert emotional distress and request punitive damages
- Pay equity charges under Title VII have either a 180 or 300 day statute of limitations

RECENT DEVELOPMENTS IN STATE LAW ON PAY EQUITY

- Although the Obama administration pushed equality in pay as a cornerstone of its civil rights agenda, equal pay has been a bipartisan issue in some states (e.g., MA and MD Republican governors both signed equal pay acts)
- Various states are pursuing “pay equity” legislation at an alarming rate:
 - **California Fair Pay Act** (effective 1/1/2016) – restricts the “bona fide” factor standard for affirmative defense
 - **Massachusetts Equal Pay Act** (signed 8/2016; effective 7/1/2018) – restricts employer ability to require an employee to refrain from discussing pay and from requiring wage information
 - **Maryland Equal Pay for Equal Work Act** (effective 10/1/2016) – adds gender identity to protected class and limits “other than sex” affirmative defense to bona fide factors
 - **New York Achieve Pay Equity Law** (effective 1/19/2016) – burden on the employer to prove the reasons for any pay differences

NEW EEO-1 REPORTING REQUIREMENT

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WHAT IS THE EEO-1 REPORT?

- The report, in its current form, collects workforce data about gender, race, and ethnicity of employees by 10 different job groupings
- The data collected through the annual EEO-1 reporting process encompasses more than 63 million workers nationwide
- The EEOC collects data provided by private employers, and the Office of Federal Contract Compliance Programs (OFCCP) collects data provided by federal contractors
- The data is shared with other federal agencies, such as the U.S. Department of Labor (USDOL) and the Office of Federal Contract Compliance Programs (OFCCP), so that these agencies can enforce federal laws

WHAT MUST BE REPORTED?

- Employers with 100 or more employees, and federal contractors and first-tier subcontractors with 50 or more employees, must submit an EEO-1 report identifying employees' race, ethnicity, and sex for the 10 EEO-1 job categories
- **The 10 EEO-1 job categories are as follows:**
 1. Executive/Senior Level Officials and Managers
 2. First/Mid Level Officials and Managers
 3. Professionals
 4. Technicians
 5. Sales Workers
 6. Administrative Support Workers
 7. Craft Workers
 8. Operatives
 9. Laborers and Helpers
 10. Service Workers
- The EEOC provides a guide classifying hundreds of jobs into the 10 EEO-1 job categories:
<https://www.eeoc.gov/employers/eo1survey/jobclassguide.cfm>

WHAT WILL THE NEW EEO-1 REPORT REQUIRE?

- On September 29, 2016, the EEOC released an updated EEO-1 reporting form, which mandates that employers report employee compensation information and the number of hours worked by employees across 12 pay bands — ***Information that employers were never required to report in the past***
- For employees who are exempt from the FLSA, employers have the option to either: report 20 hours per week for part-time and 40 hours per week for full-time employees, or report the actual number of hours worked by the employee
 - **“Workforce snapshot”** – Employers have the discretion to select any pay period from Oct. 1, 2017-Dec. 31, 2017 for completing the EEO-1 Report
- The updated EEO-1 Report must be filed by all employers with 100 or more employees by March 31, 2018 and will encompass pay data for 2017
 - The filing deadline will be March 31 of each year going forward

NEW EEO-1 REPORT IS SIGNIFICANTLY MORE COMPLEX

- The EEOC says the new reporting format simplifies employer reporting by allowing employers to use existing W-2 pay reports, which are calculated based on calendar year
 - However it appears that the new reporting scheme is much more complex than originally anticipated
- The Old EEO-1 report had **121 data points**
 - The new EEO-1 report consists of **3,360 data points**
- Employers must now group employees into 12 distinct pay bands for each of the EEO-1 job categories using employees' W-2 compensation information, which includes wages, overtime, bonuses, and tips
- Employers are also required to collect aggregate hours worked data from the # of hours worked that are recorded under the requirements of the FLSA

SAMPLE EEO-1 PAY DATA

SECTION D - EMPLOYMENT DATA SECTION D - EMPLOYMENT DATA

Employment figures on all

Employment at this establishment - Report all permanent full- and part-time employees including apprentices and on-the-job trainees unless specifically excluded as set forth in the instructions. Enter the appropriate figures on all lines and in all columns. Blank spaces will be considered as zeros.

appropriate

Job Categories	Annual Salary in Thousands	Number of Employees (Report employees in only one category)														Total Col A-N	Total Col A-N
		Race/Ethnicity															
		Hispanic or Latino		Non-Hispanic or Latino													
		Male						Female									
		Male	Female	White	Black or African American	Native Hawaiian or Pacific Islander	Asian	Native American or Alaska Native	Two or More races	White	Black or African American	Native Hawaiian or Pacific Islander	Asian	Native American or Alaska Native	Two or More races		
A	B	C	D	E	F	G	H	I	J	K	L	M	N	O			
Executive/Senior Level Officials and Managers 1.1	\$19,239 and under																
	\$19,240 - \$24,439																
	\$24,440 - \$30,679																
	\$30,680 - \$38,999																
	\$39,000 - \$49,919																
	\$49,920 - \$62,919																
	\$62,920 - \$80,079																
	\$80,080 - \$101,919																
	\$101,920 - \$128,959																
	\$128,960 - \$163,799																
	\$163,800 - \$207,999																
\$208,000 and over																	
\$128,960 - \$163,799																	
\$163,800 - \$207,999																	
\$208,000 and over																	

PURPOSE OF NEW DATA COLLECTION REQUIREMENTS

- The EEOC says it will use the data to combat “wage gaps” based on race, ethnicity, or sex
- The goal of the additional data-gathering is to identify businesses that might have pay gaps in order to target those employers who are discriminating on the account of gender (enforcement actions)
- EEOC plans to publish reports using aggregated data and to train its investigators to use its Analytic Software Tool to identify potential indicators of discrimination warranting additional investigation
- Data provided to the EEOC may be used by the EEOC to support claims of discrimination in enforcement actions related to gender pay disparities
- Publicly available data will be used by litigants

BEST PRACTICES

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CONCLUSION — WHAT DOES 2017 BRING?

- Complex reporting requirements for employers
- Increased public and media focus on the issue of pay equity
- Possible passage of additional state pay equity laws
- Increased internal complaints
- Increased litigation
- Pay equity inquiries from investors, clients and partners

HOW CAN EMPLOYERS ADDRESS PAY EQUITY ISSUES?

1. Consider conducting self-audits (under attorney-client privilege) before the new EEO-1 “snapshot” period begins

- Identify team for privileged audit. Partner with legal counsel to minimize risk documents created through and as a result of the audit are discoverable.
- Collect the data
- Determine whether there appear to be any pay disparities that are difficult to explain through the application of legitimate business factors: skill, effort, responsibility, working conditions, experience, performance or seniority system, merit system, incentive bonus, or factors other than protected class
- Determine how and when disparities will be remedied

HOW CAN EMPLOYERS ADDRESS PAY EQUITY ISSUES?

2. Re-evaluate internal data collection system

- Assess existing technology and payroll systems to ensure that they are able to gather and manipulate the pay data in the ways required by the new EEO-1 reporting mandates
- Put systems in place to readily retrieve data regarding benefits choices employees make, because these choices can significantly affect W-2 income
- Determine how to report hours worked for exempt employees

HOW CAN EMPLOYERS ADDRESS PAY EQUITY ISSUES?

3. Review compensation practices/policies

- Identify any existing pay bands that your company uses and map them to the new pay bands on the EEO-1 form
- Evaluate all forms of compensation (starting salary, benefits, bonuses, shift differentials, separation pay, overtime) and identify or develop policies that define and explain how to set starting salaries, employees earn overtime, bonuses, commissions and other components of W-2 box 1 wages

HOW CAN EMPLOYERS ADDRESS PAY EQUITY ISSUES?

4. Training

- Review and update training for recruiters, compensation committees and employees making compensation decisions
- Provide timely and effective performance evaluations
- Develop a communications plan

HOW CAN EMPLOYERS ADDRESS PAY EQUITY ISSUES?

5. Maintain systematic records establishing the reasons for differences in pay:

- Keep records of all resumes, offer letters, previous jobs, grades, departments
- Make sure you document and maintain records of justification not based on protected class to support any differential
 - *E.g.:* Shift differential for night work; education, experience, training and ability
- Designate individuals who will be responsible for monitoring employer's record retention practices and reviewing compliance with federal, state and local law

QUESTIONS?



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THANK YOU

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