

# WORKPLACE IMPLICATIONS OF THE #METOO MOVEMENT ON PAY EQUITY

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David M. Cessante  
(313) 965-8574  
dcessante@clarkhill.com

Ellen E. Hoeppe  
(313) 309-4256  
ehoeppe@clarkhill.com

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## BY THE NUMBERS

- U.S. women on average earn only 80 cents per dollar earned by men. It is projected that it will take until 2059 for women to reach pay parity with men.
  - Research suggests that 73% of the pay gap is attributable to women not getting raises and promotions at the same rate as men within the same company
  - Research also shows the pay gap widens over time. The average college-educated man improves his earnings by 77% from age 25 to 45, while similar women improve their earnings by only 31%.

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## “THE MOTHERHOOD PENALTY”

- On average, men’s earnings increase about 6% when they have children, while women’s earnings decrease 4% for each child they have
  - Research suggests there are a couple of reasons why this may be the case:
    - Traditional notions about parenthood. According to one study, “[e]mployers read fathers as more stable and committed to their work; they have a family to provide for, so they’re less likely to be flaky...That is the opposite of how parenthood by women is interpreted by employers. The conventional story is they work less and they’re more distractible when on the job.”
    - 42% of public opinion survey respondents said that having a mother who works part time is ideal and 33% said what’s best for young children is to have a mother who doesn’t work at all

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## “THE MOTHERHOOD PENALTY” (CONT.)

- Women more than men adjust their careers for family life. A recent Pew Research Center study found:
  - 39% of women reported taking a significant amount of time off of work to care for a child or other family member (compared to 24% of men)
  - 42% reported reducing their work hours to do so (compared to 28% of men)
  - 27% of women said they had quit work altogether to take care of these familial responsibilities (compared to 10% of men)

# #METOO BRINGS PAY EQUITY TO THE HEADLINES

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## IN THE HEADLINES



“The pay gap between Mark Wahlberg and Michelle Williams is shocking — and business as usual”

Boston Globe, January 11, 2018

## IN THE HEADLINES (CONT.)



“Make the #MeToo movement your chance for a raise. Amid the scandals, more women are bringing up their salaries.”

CNBC, February 16, 2018

## IN THE HEADLINES (CONT.)



“Leading by example to close the gender pay gap: Unequal pay between men and women is a persistent problem in the United States. Salesforce, a tech company with 30,000 employees, is doing its part to change that.”

60 Minutes, April 15, 2018

# LEGAL LANDSCAPE

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# LEGAL LANDSCAPE

- Both federal and state laws govern issues related to pay equity
- Federal
  - Title VII: Prohibits discrimination based on sex. Where the claim is based on alleged disparate pay, the analysis follows the Equal Pay Act.
  - Equal Pay Act: Prohibits paying an employee a lower wage than paid to employees of the opposite sex for “equal work” on jobs the performance of which requires “equal skill, effort, and responsibility, and which are performed under similar working conditions,” except where such payment is made pursuant to:
    - (1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) a differential based on any ... factor other than sex ....”

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# FEDERAL PROTECTIONS

- What constitutes a “factor other than sex” has been the subject of significant litigation, with varying results across the country
- Most courts have held that the factor must be “business-related.” Two common defenses are:
  - A situation where a proposed male comparator negotiates a higher salary
  - A situation where an employee’s salary offer is based on her salary at her prior employer
- Both situations, although facially non-discriminatory, can perpetuate the pay gap
  - *Rizo v. Yovino* (9th Cir, 2018): The employer’s policy had a salary scale, which added 5% to any newly-hired employee’s previous salary. This was not a factor other than sex because it tended to “perpetuate rather than eliminate the pervasive discrimination at which the EPA was aimed.”
  - The courts are divided on this issue

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## FEDERAL PROTECTIONS (CONT.)

- Under Title VII and the EPA, an employee must file a Charge of Discrimination within 180/300 days of the discriminatory practice in order to exhaust her administrative remedies
  - The Lilly Ledbetter Fair Pay Act of 2009 provides that each discriminatory paycheck (rather than simply the original decision to discriminate) resets the limit to file a claim

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# STATE LAW PROTECTIONS

- State
  - Since #MeToo, several states have added or increased protection against pay discrimination
  - In addition, “ban the box” type legislation has passed in several states and municipalities
    - In October 2017, California passed a law banning employers from seeking salary history information about an applicant, either personally or through an intermediary. Employers are also required to provide applicants with a pay scale for the relevant position upon request.
    - New York City, Philadelphia, Delaware, Puerto Rico, Oregon and Massachusetts have adopted similar laws
    - In Michigan, the legislature took the opposite approach. In March 2018, Gov. Snyder signed a bill forbidding local governments from limiting the questions businesses can ask during job interviews.

# POTENTIAL PITFALLS

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# UNINTENTIONAL PAY DISPARITY

- Most employers do not intend to discriminate in setting or increasing compensation. However, pay disparity frequently occurs unintentionally.
- Hiring and initial compensation setting:
  - According to a recent Glassdoor survey, women negotiate less than their male counterparts. 68% of women accepted the salary they were offered and did not negotiate, compared to men who did so only 52% of the time.
  - One reason is that women fear being viewed as “too aggressive” or “greedy”

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## UNINTENTIONAL PAY DISPARITY (CONT.)

- Staffing “big” clients, projects, teams, accounts, etc.
  - One study of stock brokerage agencies concluded that “gender differences in management’s discretionary assignments of sales opportunities, and not in sales capacities, account for the gender pay gap at the agencies”
  - Women with children are sometimes seen as “less reliable” or “too busy” and not given the opportunity to work on important projects
  - As we saw earlier, women are also statistically more likely to take time away from work, or work reduced hours to care for children or other family members
    - These women are sometimes less likely to ask for more responsibility because they are “grateful” for the flexibility they feel they have

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## UNINTENTIONAL PAY DISPARITY (CONT.)

- Subjective performance evaluations and/or advancement criteria:
  - Unconsciously biased feedback: One study of 248 performance reviews found words like “bossy, abrasive, strident, and aggressive” are used to describe women’s behaviors when they lead. Words like “emotional and irrational” describe their behaviors when they object. These words were not used to describe men.
  - A focus on face time
  - Rewards for working longer or particular hours

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## UNINTENTIONAL PAY DISPARITY (CONT.)

- Pay raises:
  - According to new research by benefits management software firm Zenefits, 62% of men compared with 41% of women reported feeling comfortable asking for a pay raise
- Bonus and other discretionary compensation awards:
  - In March 2018, media giant Discovery reported that the proportion of its male and female employees receiving bonus payments is almost the same – 88% of women and 87.8% for men – but the size of those bonuses is 49% larger for men on average
  - A 2015 study by the World Economic Forum showed that female executives receive a lower share of incentive pay in total compensation relative to males

# TOOLS TO CREATE EQUALITY

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# CONDUCT AN INTERNAL PAY AUDIT

- Initial considerations
  - How will the data be collected?
  - Who will perform the analysis?
    - In most cases, it will make sense to have the pay audit conducted under attorney-client privilege
  - What data is needed?
    - Demographics, job title, compensation bands, performance information and anything else that is relevant to an employee's pay should be considered
  - Organize your data
    - Group together similar jobs, even across departments
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## CONDUCT AN INTERNAL PAY AUDIT (CONT.)

- Review your data
  - What's at the root of any pay differential?
- Take action, as necessary
  - Adjust pay rates and salaries?
  - Should findings be shared with employees?
  - Should changes to pay and promotion systems be made?

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# REVIEW COMPENSATION AND ADVANCEMENT POLICIES, PROCEDURES AND PRACTICES

- Are there written guidelines or policies that define the factors that may be considered when making pay or advancement decisions?
  
- If yes,
  - How are decision makers held accountable for complying with applicable policies and guidelines with respect to compensation and advancement?
  
  - Is there sufficient documentation to record the reasons for pay decisions, including where those decisions may deviate (legitimately) from expectations?
  
  - Is there an opportunity to look beyond the employee's performance ratings, numbers, etc. to determine whether she has been given opportunities that are on par with similarly situated male employees?

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# REVIEW COMPENSATION AND ADVANCEMENT POLICIES, PROCEDURES AND PRACTICES (CONT.)

- If no, should guidelines or policies be adopted?
  - The guidelines can be flexible, but consistency is the goal
  - Pay decisions should be documented, particularly when they are outside the norm
- Consider whether:
  - Guidelines and/or actual pay information will be made available to all employees
  - Compensation or advancement decisions should be subject to a second (or second level) review

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## OTHER TOOLS

- Evaluate recruiting practices
  - Consider setting guidelines for starting pay
- Update job descriptions and performance evaluations
  - Job descriptions can provide the foundation for demonstrating that certain jobs are comparable or should be differentiated for compensation purposes
- Review leave and return to work practices
  - How are women treated when they return from maternity leave with respect to work allocation, performance expectations, etc.?
- Train Managers
  - Training to get rid of unconscious bias among managers

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## QUESTIONS?



David M. Cessante

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[dcessante@clarkhill.com](mailto:dcessante@clarkhill.com)



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[hoeppe@clarkhill.com](mailto:hoeppe@clarkhill.com)

# THANK YOU

Legal Disclaimer: This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.

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