



Understanding Equal Pay Laws and Avoiding and Defending Pay Equity Claims

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Introduction to Pay Equity Laws

- 1963 Equal Pay Act
- Title VII, ADEA, ADA
- State pay equity laws
- Pay trends continue to show a gap. Council of Economic Advisers report found gender wage gap in US is 2.5% higher than average industrialized countries.



Governing Standards Under Federal Law

- The Equal Pay Act (EPA)

- Employers must not pay unequal wages to men and women who perform jobs that require (1) substantially equal skill, effort and responsibility, and that are (2) performed under similar working conditions (3) within the same establishment.
- Four exceptions:
 1. seniority system
 2. merit system
 3. system that measures earnings by quantity or quality
 4. differential based on any other factor other than sex



Governing Standards Under Federal Law *cont'd*

- Seniority, merit or incentive system must be bona fide to operate as an EPA defense.
 - an established system containing predetermined criteria
 - has been communicated to employees
 - has been consistently and even-handedly applied
 - is in fact the basis for the differential
- “Factors other than sex” defense
 - must be related to job requirements or otherwise business related
 - Employer and employee were aware that factor was being applied in setting compensation
 - must be applied consistently
 - must correspond to compensation disparity
 - e.g.: education, experience, training and ability



Governing Standards Under Federal Law *cont'd*

- The Equal Pay Act

- Two year statute of limitations
- A charge may be filed with the EEOC or go straight to court
- Employer burden to prove a good reason for the wage disparity



Governing Standards Under Federal Law *cont'd*

- **EPA – Important Things to Know**

- **Equal wages must be paid in the same form:**

- An employer cannot pay a higher hourly wage to a male employee and then attempt to equalize the difference by paying a bonus to a female employee.

- **Possession of a skill not needed to meet the requirements of the job should not be considered.**

- A female employee with a masters degree cannot be paid more than a male employee with a bachelors degree if a masters degree is not necessary to perform the job.

- **Job content, not job titles, determines whether jobs are substantially equal.**

- **If there is inequality in wages between men and women, employers may not reduce the wages of either sex to equalize their pay.**



Governing Standards Under Federal Law *cont'd*

■ Title VII

- Employee must show that he or she is paid less *because* of sex, race, age, nationality, disability, etc.
- Employee has the burden to prove that the employer's reason for the disparity is a pretext
- No liquidated damages
- Emotional distress and punitive damages, although subject to caps
- No requirement that the claimant's job be substantially equal to that of a higher paid person outside of the employee's protected class
- No requirement that work be within the same establishment
- Intent required for disparate treatment but not disparate impact
- Disparate impact cases something to watch
- 180 or 300 day statute of limitations



Recent Developments at the Federal Level

- Lily Ledbetter Act, 2009
 - Each paycheck that contains discriminatory compensation is a separate violation regardless of when the discrimination began
- Pay transparency for federal contractors adopted by Office of Federal Contract Compliance Programs in January 2016.
- EEOC-1 (2016) regulation by EEOC/DOL requires employers to report on the W-2 earnings and hours worked for all employees by race/ethnicity and gender. First compensation date due March 2018; covers 60,000 employers and 63 million employees.
 - Applies to employers with 100 or more employees
 - Must report the hours worked by employees in ten job categories divided by twelve pay bands
- New administration bears watching, but equal pay has been a bipartisan issue in some states (MA and MD Republican governors both signed pay acts). It is unlikely the Paycheck Fairness Act and Fair Pay Act will get a vote in '17.



Recent Developments in State Law

- **California Fair Pay Act**

- Replacement of the “equal work” standard with the “substantially similar” standard
- Deletion of the “same establishment” requirement
- Tightening the “bona fide” factor standard for affirmative defense antiretaliation
- Three year record keeping

- **Massachusetts Equal Pay Act**

- Takes effect July 1, 2018
- Redefine “comparable work”
- “Self-evaluation” defense
- New affirmative defenses for employer
- Restricts employer ability to require an employee to refrain from discussing pay and from requiring wage information.



Recent Developments in State Law *cont'd*

▪ Maryland Equal Pay for Equal Work Act

- Adds gender identity to protected class
- Work of “comparable character” instead of equal
- Applies to all workplaces in same county
- Limits “other than sex” affirmative defense to bona fide factors
- Antiretaliation against employees for wage inquiries
- Equal Pay Commission Establishment Act also signed - creates Equal Pay Commission in Maryland

▪ New York Achieve Pay Equity Law

- Equal work and similar working conditions standard
- Comparators must be in the same geographic region, no larger than the same county
- Burden on the employer to prove the reasons for any pay differences
- Employer must explain entire wage differential



Pay Equity Laws at a Glance

Laws	Protected Classes	Comparison Group	Same Location	Proof	Remediation
Federal Equal Pay Act	Sex only	Equal work and similar working conditions	Yes	No intent required	Must explain entire wage differential
Title VII	Sex, Race/Ethnicity, Color, Religion, National Origin	Similarly situated employees	No	Discriminatory Intent or Impact	Statistically significant groups
ADA	Disability	Similarly situated employees	NO	Discriminatory Intent or Impact	Statistically significant groups
ADEA	Age	Similarly situated employees	NO	Discriminatory Intent or Impact	Statistically significant groups
E.O. 11246	All Title VII and Gender Identity	Similarly situated employees	Yes	Discriminatory Intent or Impact	Statistically significant groups
CA Fair Pay Act	Sex only	Substantially similar work and working conditions	No	No intent required	Must explain entire wage differential
NY Achieve Pay Equity Law	Sex only	Equal work and similar working conditions	No (but same geographic region)	No intent required	Must explain entire wage differential



Pay Equity Laws at a Glance *cont'd*

Laws	Protected Classes	Comparison Group	Same Location	Proof	Remediation
Maryland Equal Pay for Equal Work Act	Sex and Gender Identity	Employees who work for the same employer in the same county and who perform work of comparable character, or work in the same operation, in the same business, or of the same type	No (but same county)	Not stated	Not stated
Massachusetts Equal Pay Act	Gender	Substantially similar skill, effort, and responsibility and performed under similar working conditions	Yes (location may be used to explain differentials)	No intent required	No stated



Recent Cases

- **Law Firms in the crosshairs**
 - 2016 lawsuits filed against Chadbourne & Parke, Sedgewick LLP, and LeClair Ryan
- **Oracle America Inc. (January 18, 2017)**
 - Being sued by the Department of Labor
 - Claims include (a) pay disparity between (i) white men and (ii) women and minorities; (b) failure to turn over pay and compensation data in violation of federal government contractor rules
- ***Coates v. Farmers Insurance* (2016) – class action alleging pay disparity under Title VII and California state law**
 - Settlement included a fund of \$4.1 million
 - Agreement to: appoint an internal compliance official to monitor compliance; conduct annual statistical analyses; reach benchmarks over a three-year period to increase representation of women in higher salary grades



Steps for Employers to Consider

- Designate individuals who will be responsible for monitoring pay practices and reviewing compliance with federal, state and local law
- Make sure that job descriptions contain specific details that reflect legitimate reasons for any pay differential
- Analyze personnel decisions that influence compensation
- Define compensable factors
- Group jobs into grades or bands
- Complete external market studies
- Evaluate all forms of compensation (starting salary, benefits, bonuses, shift differentials, separation pay, overtime)
- Make sure you have justification not based on sex to support any differential. Document bases for pay determinations



Steps for Employers to Consider *cont'd*

- Provide timely and effective performance evaluations
- Maintain systematic records establishing the reasons for differences in pay: resumes, offer letters, previous jobs, grades, departments
- Maintain information on prior “unit” performance reflected in raise pools. The size of raise pools can explain differences in pay
- Review and update training for recruiters, compensation committees and employees making compensation decisions



Steps for Employers to Consider *cont'd*

- If starting salaries and signing bonuses are negotiated, ensure that such a practice does not have an adverse impact on women or minority workers
- Ensure applications in certain states do not require prior wages or salary history
- Update record retention if in a jurisdiction requiring longer periods of time
- Ensure no prohibition against discussion of wages in company documents
- Consider whether to conduct an pay equity study (within the confines of the privilege)
- Consider implementing an adequate internal complaint procedure to bring to light and address any equal pay issues



Conclusion – What Does 2017 Bring?

- 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



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