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Mind the Gap: Practical Solutions to Minimize Pay Equity Claims

Employment and Labor


MIND
THE
GAP:
PRACTICAL SOLUTIONS TO
MINIMIZE PAY EQUITY CLAIMS

CHEAT SHEET

- ***Proactively address issues.*** Companies that fail to comply with pay equity laws are at risk of monetary loss and reputational damage. Address issues before they become a bigger problem.
- ***Conduct pay audits.*** Compare the compensation of employees doing equal or similar work and document the reasons for any differences in pay. If differences are determined to be due to sex, increase the wages.
- ***Review compensation plans.*** Impose clear and objective factors for bonuses, commissions, and salary increases based on position and duties.
- ***Implement implicit-bias training.*** Require all decision-makers to attend implicit-bias training to address unconscious assumptions that may hinder fair and objective decisions.

When the US women's soccer team won the World Cup this summer, crowds chanted "Equal pay!" in reference to pay disparities between the US women's and the men's teams. Considering the #MeToo era, pay equity in employment has become a hot-button issue on the 2020 US presidential campaign trail and has spurred legislation and numerous lawsuits.

As the New Year approaches, employers are continuing to examine how to properly identify, audit, and address equal pay issues within their organizations. While understanding that federal law prohibits gender-based pay discrimination and that an increasing number of states are passing their own legislation, employers frequently struggle with two basic questions: (1) how to know if my organization has an equal pay issue; and (2) if an issue exists, what to do to fix it. Indeed, to increase pay transparency and expand the limited "equal work" standard under federal law, US states have enacted pay equity laws that, among other things, prohibit salary history inquiries and require equal pay for "substantially similar" work.

Employers must navigate the evolving arena of pay equity laws to avoid gender-based discrimination claims based on pay, manage overall employee morale, and handle the heightened publicity surrounding pay equity issues. To ease the burden of employers confronted with pay equity issues in the workplace, this article provides an overview of the pay equity legal landscape and offers practical solutions employers may implement. Because one strategy will not work for all employers, this article also provides an explanation of the advantages and challenges associated with three possible solutions: (1) conducting proactive pay audits, (2) revising compensation plans, and (3) coordinating implicit-bias training.

Overview of the pay equity legal landscape

Equal Pay Act

An employee may also seek to recover against an employer for alleged disparities in pay under Title VII of the Civil Rights Act of 1964. There are differences between the EPA and Title VII such as administrative prerequisites and available damages. In addition, while employees can file a traditional "opt out" class action alleging Title VII violations, EPA plaintiffs must use a different device called an "opt in" class action or "collective action," as explained further below.

On June 10, 1963, President John F. Kennedy signed the Equal Pay Act (EPA) into law. As an amendment to the Fair Labor Standards Act (FLSA), the EPA requires that men and women be given equal pay for equal work. Work is "equal" if it requires "equal skill, effort, and responsibility." Skill includes considerations such as experience, training, education, and ability. Effort refers to the physical or mental exertion necessary to perform the job, and responsibility concerns the degree of accountability required in performing a job. Courts generally construe the "equal work" requirement narrowly. Therefore, jobs that are merely alike or comparable are not considered "equal" under the EPA.

Even if a plaintiff is able to establish a *prima facie* case under the EPA, a defendant can still defeat the EPA claim by establishing that the wage differential is justified under one of the affirmative defenses in the EPA: a seniority system; a merit system; a system that measures earnings by quantity or quality of production; or any factor other than sex. The most commonly invoked affirmative defense is "any factor other than sex." To establish this defense, an employer may use "any job-

related reason other than sex to justify the difference in pay." For example, "any factor other than sex" may include educational qualifications, work experience, training, or ability. To meet this burden, an employer must "submit evidence from which a reasonable factfinder could conclude not merely that the employer's proffered reasons could explain the wage disparity, but that the proffered reasons do in fact explain the wage disparity."

Pay equity laws in US states

With the purpose of expanding the limited equal work standard under the federal EPA, states have enacted their own pay equity laws. These laws vary, but may prohibit an employer from:

- Paying one employee a wage rate less than the rate paid to an employee of a different sex for substantially similar work;
- Asking about an applicant's salary history;
- Restricting employees from discussing their compensation with other employees; and
- Retaliating against employees who request that their employer justify their pay.

For example, California, Colorado (effective January 1, 2021), and New York all prohibit an employer from discriminating between employees on the basis of sex by paying an employee of one sex a wage rate less than the rate paid to an employee of a different sex for "substantially similar work" (California and Colorado) or "similar working conditions" (New York). Differentiating "equal work" from "substantially similar work," the California Department of Industrial Relations defines the more lenient state standard as "work that is mostly similar in skill, effort, responsibility, and performed under similar working conditions." Moreover, all three states prohibit (California) or will prohibit (Colorado and New York) an employer from requesting an applicant's salary history information or relying on salary history in making a salary decision. California, Colorado (effective January 1, 2021) and New York also prohibit an employer from taking adverse action against an employee for discussing compensation with other employees. An employer who violates a state's EPA may be liable for economic damages, liquidated damages, equitable relief, and the employee's reasonable attorneys' fees.

Collective actions

An employee's EPA claim may result in a collective action, which will increase the litigation cost and a company's exposure to the media. A collective action under the EPA is governed by the FLSA opt-in procedure. Under the FLSA, an aggrieved employee can bring a claim against an employer on behalf of herself and other similarly situated employees. Courts generally consider whether to certify FLSA collective actions under a two-step approach. First, the court conditionally certifies the class, based on a modest factual showing that the putative class members are similarly situated.

Various states, however, provide a different procedural mechanism for class actions based upon state equal pay laws. In California, for example, a state-court plaintiff may be granted access to contact information for all potential class members prior to a class being certified and there is no "opt-in" mechanism as there is under the FLSA. California state courts, additionally, do not have a "two-step" approach but rather have a single class certification process that increases costs of discovery and provides additional hurdles for employers seeking early resolution of a case through law and motion.

> Under the FLSA, an aggrieved employee can bring a claim against an employer on behalf of herself and other similarly situated employees.

For example, in Smith v. Merck & Co., plaintiffs — female sales representatives — moved for the conditional certification of their EPA collective action. Plaintiffs alleged that defendant — "a global pharmaceutical powerhouse" — systemically paid female sales employees less than similarly situated male sales employees who performed the same job duties and worked under the same conditions. Plaintiffs argued that the female sales representatives were similarly situated because they all were performing the same essential work and were subject to the same compensation policies and practices. The court found, at the conditional certification stage, that plaintiffs demonstrated that the sales representatives had similar responsibilities; that named plaintiffs were paid less than some allegedly similarly situated males; and that compensation decisions, although based in part on input from some direct managers, were finalized by a central, common office. Thus, the court granted plaintiffs' motion for conditional certification.

Next, during the second step, after conducting additional discovery, the court decides whether to decertify the provisional class. It is at this second stage that the court considers disparate factual and employment settings of the individual plaintiffs; the various defenses available to the defendant that appear to be individual to each plaintiff; fairness and procedural considerations; and whether plaintiffs made the proper filings.

For example, in *Ahad v. Board of Trustees of S. Illinois University*, plaintiffs — female physicians — alleged, under the EPA, that the defendant paid them and other female physicians substantially lower compensation than male physicians for the same or similar work. The court had conditionally certified the collective action, and defendants subsequently moved for decertification. The court acknowledged that its inquiry at the second stage was "more stringent" compared to the conditional certification stage. The court found that while plaintiffs shared some factual and employment settings, individual issues predominated. For instance, the court found that plaintiffs had disparate job duties and work settings; the factors affecting each opt-in plaintiffs' compensation were highly individualized; and plaintiffs had not identified a common policy or practice responsible for the alleged discrimination. Additionally, the court held that the affirmative defenses available to defendants were highly individualized as to each plaintiff and that, because plaintiffs had not shown that they were similarly situated, allowing them to proceed collectively on their claims did not promote judicial economy. Thus, the court granted defendants' motion to decertify the collective action.

As demonstrated by the two example cases, most district courts grant conditional certification given the low threshold, and the real battle for collective action status takes place when the defendant files a motion for decertification during the second stage.

Employers confronted with an EPA claim face potential liability and significant monetary exposure. For example, under the EPA, prevailing plaintiffs are entitled to lost wages, plus an equal amount in liquidated damages. Plaintiffs also may be awarded back pay, but back-pay awards "are typically limited to damages sustained" within the limitations period. Finally, plaintiffs also may be entitled to their reasonable attorney fees and costs. In collective actions, the potential damages may be significant.

The United States is only one of many countries aiming to narrow the gender pay gap. For example, Iceland, Germany, and France have recently passed legislation to improve wage equality.

ICELAND

- As of Jan. 1, 2018, employers with 250 or more employees have been required to obtain a "Pay Equity Certification" from an accredited auditor confirming that compensation for men and women is equal.
- Employers with fewer employees will have more time to comply with this legislation (e.g., employers with 25 to 89 employees have until Dec. 31, 2021).
- Companies that fail to comply with this law will be required to pay a daily fine.

GERMANY

- As of Jan. 6, 2018, employees of a company employing more than 200 employees have an individual right to request the procedure and criteria for an employer's salary determination.
- Employees may also request the median pay of employees of the opposite sex in a comparable role.
- If an employer fails to comply with its obligation, it bears the burden of proof to demonstrate that no violation has occurred.

FRANCE

- As of March 1, 2019, companies with more than 1,000 employees have been required to "report how much they pay women compared with men, using a range of government-approved metrics."
- As of Sept. 1, 2019, companies with more than 250 and fewer than 1,000 employees have been required to comply with the law; and on March 1, 2020, companies with between 50 and 250 employees must be in compliance.
- Companies with pay gaps will have three years to fix them or face a fine up to one percent of their total payroll

Minimizing risk and addressing pay equity in the workplace

In addition to significant monetary exposure, a company that fails to comply with pay equity laws may be exposed to reputational damage that affects its employees, customers, and shareholders. For example, employees demoralized over inequitable pay may choose to leave a company that does not share their values, and the company may also fail to attract top talent. Customers may switch brands, resulting in lost revenue, and stock prices may plummet due to bad press. Employers should take proactive steps to minimize this risk. While there are a number of strategies employers may implement to minimize their risk of pay equity claims, companies want to know the best and most cost-effective solutions they can implement to reduce their exposure and maximize employee contributions. Conducting proactive pay equity audits, revising compensation plans, and coordinating implicit-bias training for decision-makers are three such strategies. Each strategy, discussed below, presents challenges and advantages associated with implementation.

1. Conduct proactive pay audits

A pay audit involves comparing the compensation of employees doing equal (federal) or similar (states) work at a company. The scope of the audit may be as limited (sex only) or broad (age, race, sex, etc.) as an employer wants it to be. However, when the scope of the audit is broader, it will likely

be more costly and take a longer period of time. To conduct an audit, a company will need to collect information about each relevant employee and his/her comparators. For example, if the pay audit is based on sex among management-level employees, a company, at a minimum, will need to collect the following information for each management-level employee: sex, pay, job title, worksite location, schedule, full time/part-time status, length of service, education, and performance evaluations. A company also will need to collect documents related to the company's performance evaluation system to confirm that the company uses a consistent job evaluation system for each employee. Finally, a company may need to interview employees to discuss their actual duties and responsibilities.

After the relevant information is gathered, an employer should organize it in a spreadsheet and review the data. The review will frequently involve a cohort analysis, which is an analysis of smaller groups of individuals or a statistical regression analysis that looks for trends in larger groups of employees and smaller ones contained therein. As an employer analyzes the data, it should document the reasons for any differences in pay. The employer should determine whether any differences in pay are based on sex and, if so, increase the wages that must be changed.

Advantages

Many companies are already compiling gender and pay data, making the pay equity analysis more manageable. For example, employers with 100 or more employees and federal contractors with 50 or more employees must submit employee gender data in their EEO-1 reports to the EEOC, and pay will be included starting in September 2019. Moreover, public companies are already analyzing compensation to comply with the CEO pay ratio rule under the Dodd-Frank Act and can expand their analysis to include gender. For companies that are comparing only a few employees, a pay audit will likely be beneficial. It can be conducted by a human-resources professional and, thus, be cost effective. Keep in mind, however, that internal pay audits will not be protected by the attorney-client privilege and, thus, will be subject to disclosure during discovery in a lawsuit. An employer may wish to work with outside counsel to be protected by the attorney-client privilege.

Challenges

For companies that are comparing hundreds or thousands of employees, a pay audit will likely need to be conducted by an economist to provide an expert opinion regarding whether there is any statistically significant disparity in compensation between male and female employees, controlling for any appropriate variables. This could be costly depending on the size of the company and the scope of the audit. In this scenario, working with outside counsel is recommended, especially since failure to keep the pay audit privileged could lead to a treasure trove for class action plaintiffs seeking this information during discovery.

2. Revise compensation plans

Compensation plans identify the criteria and process that employees must satisfy to receive bonuses, commissions, or salary increases. The criteria and process should be based on clear, objective factors. The criteria should focus on the position and duties rather than on a particular employee or applicant and should exclude reliance on salary history to comply with the most restrictive state equal pay laws. The company should provide the compensation plans to all relevant employees and discuss the plans with employees to allow them to ask questions. Companies should also consider having the compensation plans reviewed by a number of diverse key stakeholders who will be able to identify the effectiveness of the compensation plans' criteria and process on employees belonging to

a diverse group.

> Revising your company's compensation plans will allow your company to confirm that the criteria and process is based on clear, objective factors.

If a company revises its compensation plans, it might also be a good time to consider the competitiveness of the company's wages by analyzing similar companies' pay ranges for specific positions.

Advantages

Revising your company's compensation plans will allow your company to confirm that the criteria and process is based on clear, objective factors. Additionally, having a discussion with your employees will demystify the pay process and build trust amongst employees that the company is making decisions based on objective criteria. Increasing transparency of the pay process also will likely result in your company maximizing employee contributions.

Challenges

Depending on the size of your company and the number of compensation plans that are applicable to your workforce, revising your company's compensation plans may take a long time and will require your company to truly prioritize this task. You may consider hiring outside counsel to assist with this project, but that will likely increase the cost. Furthermore, changes to equity compensation plans may require shareholder approval.

3. Coordinate implicit-bias training

Implicit bias "refers to the attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner." Implicit biases can negatively affect a person's decision-making if they are unaware of them. Information and self-examination can help combat this. Requiring all decision-makers to attend implicit-bias training will assist the company in combating unintentional discrimination.

Advantages

A successful training will challenge assumptions and "get people to understand how other people perceive their actions." Conducting implicit-bias training will demonstrate that the company is committed to inclusivity and will assist decision-makers on making pay equity decisions that are fair and objective.

Challenges

Discussing sensitive learning topics must be done in a proper format. "A poorly designed diversity education program can make some feel attacked, despite aiming to raise awareness and sensitivity around an issue."

Conclusion

Employers should ensure that their company complies with the federal Equal Pay Act and the new pay equity laws that states are passing. In an effort to reduce exposure to pay equity claims and avoid litigation, particularly collective actions, employers should take a proactive approach and implement strategies to address pay equity issues before they become a problem. The size of your company and morale of your employees will assist you in determining which strategy is best to implement.

ACC EXTRAS ON… Pay equity

ACC Docket

Pay Equity Laws: What's the Risk of Non-compliance? (July 2019).

#PayMeToo: The Next Wave of Class Actions? What In-house Counsel Need to Know (June 2018).

Articles

Private Equity in Australia (Feb. 2017).

Further Reading

Judge Debra H. Goldstein, Sex-Based Wage Discrimination: Recovery Under the Equal Pay Act, Title VII, or Both, 56 ALA. LAW. 294 (1995). Relatedly, the Lilly Ledbetter Fair Pay Act of 2009, passed to protect individuals against discrimination in compensation, amended Title VII and provides that the statute of limitations for filing a charge of discrimination with the EEOC runs from each paycheck that contains discriminatory pay, rather than from the date of the discriminatory act that led to the lower pay as previously held by the Supreme Court.

Les A. Schneider & J. Larry Stine, § 16:1 Introduction, 2 WAGE AND HOUR LAW (March 2018 Update).

EEOC v. Cent. Kan. Med. Ctr., 705 F.2d 1270, 1272 (10th Cir. 1983).

Sprague v. Thorn Americas, Inc., 129 F.3d 1355, 1364 (10th Cir. 1997).

See 29 U.S.C. § 206(d)(1); Corning Glass Works v. Brennan, 417 U.S. 188, 196–97 (1974).

Keiko Lynn Yoshino, Reevaluating the Equal Pay Act for the Modern Professional Woman, 47 Val. U. L. Rev. 585, 595 (2013) (citing collection of sources).

See, e.g., Equal Employment Opportunity Comm'n v. Aetna Ins. Co., 616 F.2d 719, 725 (4th Cir. 1980) (listing "shift differentials, restrictions on or differences based on time of day worked, hours of work, lifting or moving heavy objects, differences based on experience, training, or ability" as examples of "anything other than sex" exception) (internal citation omitted).

Mickelson v. N.Y. Life Ins. Co., 460 F.3d 1304, 1312 (10th Cir. 2006) (citation omitted).

See Fisher Phillips' Pay Equity Interactive Map to determine whether your company has employees in a state that has enacted a pay equity law.

Cal. Lab. Code § 1197.5(a); Colo. Legis. Serv. H.B. 19-085 (2019); N.Y. Lab. Law § 194.

State of Cal. Dep't of Indus. Relations, California Equal Pay Act: Frequently Asked Questions (Mar. 2019).

Cal. Lab. Code § 432.3(a)–(b); Colo. Legis. Serv. H.B. 19-085 (effective Jan. 1, 2021); N.Y. Lab. Law § 194 (effective Jan. 6, 2020).

Cal. Lab. Code § 1197.5; Colo. Legis. Serv. H.B. 19-085 (2019); N.Y. Lab. Law § 194.

See, e.g., Cal. Lab. Code § 1197.5(c); Colo. Legis. Serv. H.B. 19-085 (2019); N.Y. Lab. Law § 198.

No. 13-cv-2970, 2016 WL 1690087, at *1-5 (D.N.J. Apr. 27, 2016).

See, e.g., Thiessen v. Gen. Elec. Capital Corp., 267 F.3d 1095, 1103 (10th Cir. 2001).

No. 15-cv-3308, 2019 WL 1433753, at *1, 3-9 (C.D. Ill. Mar. 29, 2019).

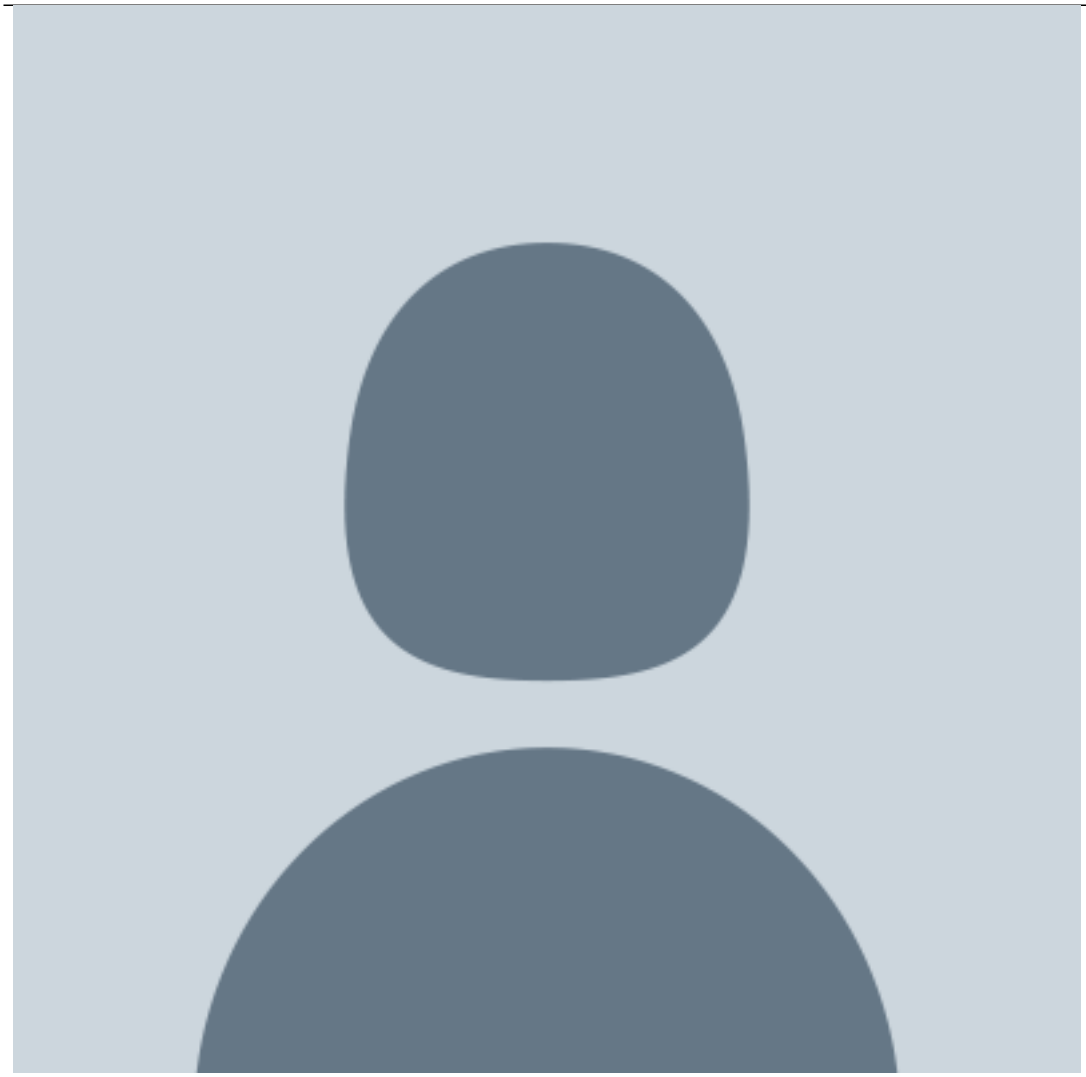
Pollis v. New Sch. for Soc. Research, 132 F.3d 115, 118 (2d Cir. 1997) (citing collection of cases).

U.S.C. § 216(b).

Nat'l Women's Law Ctr. v. Office of Mgmt. & Budget, 358 F. Supp. 3d 66, 93 (D.D.C. 2019) (vacating defendant's stay of the EEOC's revised EEO-1 form and the Sept. 15, 2017 Federal Register Notice announcing the same and ordering that the previous approval of the revised EEO-1 form shall be in effect). An appeal to the US Court of Appeals for the DC Circuit has been filed.

Dodd-Frank § 953(b), 15 U.S.C. § 78n(i).

Christine Lyman



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