Equal Pay:
Trends In Litigation, Emerging Legislation & Corporate Equity Initiatives

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Trending Equal Pay Issues: Employer considerations

What We Will Discuss

• What is the gender “pay gap”?  
• What are the laws that govern these issues?  
• How to use (or not use) prior salary history?  
• Pay audit best practices  
• Class and collective actions
Pay Gap vs. Pay Equity vs. Pay Discrimination

- Important to distinguish:
  - a **pay gap** (working men earning more on average than working women, regardless of job, role, or level) **versus**
  - **pay equity** (men and women performing equal or substantially similar work being paid equally) **versus**
  - **pay discrimination** (women being paid less than men because they are women)

- A pay gap, in and of itself, is not unlawful
- Different legal standards entail different proof
- Distinguish from other types of discrimination, where measure of damages may be pay (e.g., promotions)
Patchwork of Equal Pay and Non-Discrimination Laws

- Equal Pay Act of 1963
- Title VII of Civil Rights Act of 1964
- Executive Order 11246 (for federal contractors)
- State equal pay and anti-discrimination laws

**Key issues** in understanding and applying each law include:

- Which employees does the law treat as comparators?
- What factors can justify pay differentials between those who are comparators?
- How are burdens of proof allocated?
- Is intent an element?
Who are Comparators?

• Which employees does the law treat as comparators?

  • **Title VII** – employees must be similarly situated (i.e. comparable in all material respects)
  
  • **Federal EPA** – employees must perform equal work in jobs that require equal skill, effort and responsibility and are carried out under similar working conditions
  
  • **California** – substantially similar work when viewed as composite of skill, effort and responsibility and performed under similar working conditions
To Use or Not Use Salary History: Inconsistent Landscape

• The federal Equal Pay Act permits pay differentials “based on any other factor other than sex” (29 U.S.C. § 206(d))

  • Does this include reliance on applicants’ prior pay?

    • Courts are undecided

      • 7th and 8th Circuits: allow use of prior pay as a defense to claims under the EPA
      • 5th, 10th, and 11th Circuits: expressly reject such reliance
      • 9th Circuit: pending

• California law prohibits employers from seeking or relying on prior pay in setting starting pay (Labor Code § 432.3(e))
Tips for Setting Initial Salaries

- Set salary range prior to interviewing candidates.
- Use market data.
- Document the rationale for initial offer and negotiations.
- Handling voluntary disclosures.
- Removal of current/prior pay fields from recruitment and hiring forms
  - Contrast “salary expectations”
- Training regarding new legal requirements
Pay Audits: The Basics

• A basic audit (company-by-company)
• Need to ensure reliance on accurate data
• Typically examines base pay using regression analysis
• Use of factors to identify comparators may include
  • Job title
  • Division or Department
  • Pay level
  • Time with the company (tenure)
  • Time in job
  • Prior experience
  • Performance ratings
Pay Audits: Why a Basic Model Might Not Work

- Broad job titles (i.e., “Vice President”)
- Factors that drive pay often are not in a quantifiable or data format
- Total compensation, in addition to base pay, may include
  - Commissions
  - Stock grants
  - Bonuses
  - that are the real drivers of overall pay.

- Note on privilege: Keen interest in accessing internal assessments of pay equity, which may be undertaken for a number of different purposes.
  - Purpose of ongoing pay audits and public disclosure as limited waiver?
Pay Audits: Understanding the Issues

• Incorrect Mindset: There is a pay gap. I need to make changes.

• Correct Mindset: There is a pay gap. I need to investigate further.
  • Making changes without understanding the source(s) is a sure-fire way to make things worse.

• Understand the “issue”
  • Is it incomplete or inaccurate data?
  • Is the statistical model missing something?
  • Is it something in our operations?
Class v. Collective Actions

- Class Action Lawsuits (FRCP Rule 23)
  - Numerosity, commonality, typicality, and adequate representation
  - Burden on plaintiffs moving for certification
  - Class members may “opt out”

- Collective Actions (29 U.S.C. § 216)
  - More lenient standard upfront (conditional certification)
  - Class members must actively “opt in”
  - Defendant can move to decertify

- Use of statistics in showing challenged actions have resulted in systemic discrimination
Equal Pay: Litigation Trends
Litigation Trends

Suits On Behalf Of Lawyers

- **Coates v. Farmers Ins. Co.** (N.D. Cal. Case No. 15-1913)
- **Craddock v. LeClairRyan** (E.D. Va. Case No. 16-011)
- **Campbell v. Chadbourne** (S.D.N.Y. Case No. 16-6832)
- **Ribiera v. Sedgwick** (N.D. Cal. Case No. 16-4507)
- **Doe (Bertram) v. Proskauer** (D.D.C. Case No. 17-901)
- **Houck v. Steptoe & Johnson** (C.D. Cal. Case No. 17-4595)
- **Williams v. Jones Day** (D.D.C. Case No. 19-945)
- **Knepper v. Ogletree** (C.D. Cal. Case No. 19-060)
Suits Against Law Firms –
Some Issues

• **Doe Plaintiffs?**
  - Standard in federal court
    - only for “exceptional cases”
    - weigh privacy v. public right of access
  - *Does I-XXIII v. Advd. Textile Corp.*, 214 F3d 1058 (9th Cir. 2000)
  - *Doe v. Kamehameha Schools*, 596 F3d 1036 (9th Cir. 2010)
  - Law Firm Examples
    - *Doe v. Proskauer*
    - *Williams v. Jones Day*

• **Arbitration Agreements?**
  - *Epic Systems v. Lewis*

• **Employee? Or Partner?**
  - *Doe v. Proskauer*
Litigation Trends - Class or Collective Action

Rule 23 Class Action
- Title VII
- Benefits:
  - Opt out
  - Capture everyone

FLSA Collective Action
- Federal Equal Pay Act
- Benefits:
  - Lower bar for Conditional certification
  - Notice
  - Opt-Ins
  - No exhaustion requirement
  - Don’t have to show intentional discrimination
  - Double damages
Other Trends

• **Focus on Tech**
  - Ellis v. Google
  - Moussouris v. Microsoft
  - Jewett v. Oracle
  - Del Toro Lopez v. Uber
  - Huang v. Twitter
  - Davies v. Broadcom
  - Wellens v. Daiichi
  - Hong v. Facebook

• **Finance – EPIC BATTLES**
  - Chen Oster v. Goldman Sachs
  - Kassman v. KPMG
  - Calibuso v. Merrill Lynch

• **Self Audits**

• **Worldwide companies – reporting elsewhere**
Paths to Settlement

Is It Really All About The Money?

• All About The Money?
• All About The Programmatic Relief?
• Does “It” Fix The Problem?
Programmatic Relief

- What’s The Problem?
- What’s the Solution?
- Is It Working?
- Can You Pivot?
Components of Programmatic Relief

- Policy Change
- Responsibility/Ownership
- Communication
- Internal Monitoring
- Metrics
- Flexibility
- “Outside Help”
- Dispute Resolution
Elements of Effectiveness

- Responsibility for Compliance/Change: The Mindset
  - Defense
  - Compliance
  - Culture Change
  - Good/Smart Business

- “What Gets Measured…”
  - Measuring what matters
  - Unintended consequences

- “What Gets Trained…”?

- Fine-Tuning/Flexibility

- Partnership of The Parties
Roles of “Outsiders”
Consultants, Experts, Monitors, Special Masters, Oh My…

- Closing Settlement Gaps
- Kicking Decisions Down the Road
- Trust Issues
- Buffer on Raw Edges
Role of Monitors

- Compliance
- Consulting
- Decision Making
- Communication Facilitation
- Reality Checks
- Focus
- Getting to The End
Legislative Trends in the States

• Use of Prior Salary
  • Bans/limitations on inquiry
  • Bans on reliance/use as a defense

• Expanding Protections to Characteristics Other Than Sex

• Broader Comparisons of Work and Pay

• Limiting Employer Defenses
Legislative Trends in the States

• Pay Transparency
  • Pay secrecy prohibitions
  • Providing salary ranges
  • Pay data collection and reporting
Federal Developments

• Paycheck Fairness Act (H.R. 7, S 720)
  • Equal pay for substantially similar work
  • Limiting use of salary history
  • Prohibits retaliation for discussing pay
  • Increases penalties
  • Job-related, business necessity
  • Pay data collection
Federal Developments

• EEO-1 Form: Pay Data Collection & Reporting to EEOC

  • Employers of 100 + employees

  • Pay data reports broken down by gender, race, ethnicity & job category

  • Reporting to start: September 2019 (as of now...)
Questions?

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