Pay Audits, Pay Transparency, and the Public Disclosure of Pay Data

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I. Introduction.

Few employment law issues have commanded as much recent attention as the issue of equal pay. It is a hot topic not only among employment lawyers and legislators, but also politicians, celebrities, and professional sports players (including the U.S. Women’s Soccer Team and Hockey Team). Although Congress has not enacted federal legislation strengthening the nation’s equal pay laws since the Lilly Ledbetter Fair Pay Act in 2009, states and municipalities have been leading the charge in adopting aggressive new equal pay laws that make it easier for employees to demonstrate pay disparities, and more difficult for employers to justify them.

At the same time, there has been a growing effort to increase pay transparency, coming not only from the states, but also from the federal enforcement agencies, including the Equal Employment Opportunity Commission (“EEOC”) and the Office of Federal Contract Compliance Programs (“OFCCP”). Additionally, some private companies are voluntarily adopting pay transparency policies that go beyond legal mandates.

Further, the pressure has never been higher for employers to publicly release data regarding the existence (or nonexistence) of a pay gap, as well as to publicly commit to taking steps to ensure pay equity, in part due to activist shareholders who have filed proposals aimed at equal pay and specifically targeting the technology, finance, and retail industries.

Combined, these aggressive new state laws and the growing trends of pay transparency and public disclosure of pay data have led to a proliferation of pay audits by employers, both to assess risk and in response to threatened or actual litigation. But conducting a meaningful pay audit is complicated. Not only does it depend on an accurate model that complies with applicable law, but careful steps must be taken to maintain and preserve attorney-client privilege and work-product protections. Additionally, determining and carrying out remedial steps, including potential pay adjustments and changes to policies or practices that may have contributed to pay disparities, can sometimes be more complex than the analyses themselves.

Part II of this paper provides a brief overview of the current equal pay landscape, including both legislation and litigation. Part III discusses the recent trend of publicly disclosing pay data in response to shareholder proposals, public or competitive pressure, or a sense of social corporate responsibility. Part IV summarizes the recent push for pay transparency, including efforts by the states and federal enforcement agencies. Part V discusses the nuances of pay
audits, including the sensitive issues of preserving attorney-client privilege and work-product protections, as well as considerations that inform remedial steps such as pay adjustments or other changes to policies or practices that may contribute to pay disparities. Part VI concludes.

II. The Current State of Play When It Comes to Equal Pay.

A. The Federal Landscape.

At the federal level, equal pay undeniably was a key issue for the Obama Administration. Although Congress did not pass the Paycheck Fairness Act during Obama’s two terms in office (despite its introduction in 2009, 2011, and 2014), he took several steps—primarily through administrative agencies—that have helped shape the current equal pay landscape at the federal level.

In 2010, Obama created the National Equal Pay Enforcement Task Force, which aimed to increase federal agency coordination and enforcement efforts around the issue of equal pay among the EEOC, the Department of Labor (including the OFCCP), and the Department of Justice. In June 2013, the Task Force published a lengthy report entitled “Fifty Years After the Equal Pay Act,” in which it gave a history of the “Equal Pay” movement, touted the Task Force’s accomplishments, and emphasized concrete steps taken to increase interagency collaboration in enforcement of equal pay laws.

Additionally, in 2012, and again in 2016, the EEOC released its Strategic Enforcement Plan (“SEP”), which sets forth key areas of national priority for the EEOC. “Enforcing equal pay laws” and targeting compensation systems and practices that discriminate based on gender was an area of national priority for fiscal years 2013-2016. For fiscal years 2017-2021, the EEOC has

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1 For terminology purposes, it is important to distinguish between “pay equity”—equal pay for equal (or depending upon the jurisdiction, “substantially similar”) work—and the oft-cited “pay gap.” The “pay gap” between men and women—frequently cited nationally as women in the United States making 79 cents for every dollar a man makes—is a simple ratio of median earnings for men as compared to women. Employers sometimes also refer to their own company’s “pay gap,” which typically refers to a comparison of the median earnings of men and women company-wide. These “pay gap” statistics generally do not purport to compare similarly situated employees, or to control for other meaningful factors such as hours worked or periods of unpaid leave. While this paper discusses both concepts, the primary focus is on “pay equity,” meaning a determination of whether comparable employees are paid equitably based on the work they do, irrespective of gender.


extended this priority to also cover other types of pay discrimination, including based on race, ethnicity, age, disability, and “the intersection of protected bases.”

Moreover, on September 29, 2016, the EEOC announced approval of a revised EEO-1 form that will require employers to report aggregate W-2 pay data, as well as hours worked, by gender, race, and ethnicity across 12 pay bands for the 10 EEO-1 job categories beginning in March 2018. The job categories, which remain unchanged from the prior EEO-1 form, include broad groupings such as “Professionals” and “Service Workers.” Although the Acting Chair of the EEOC (Victoria Lipnic) voted against these revisions to the EEO-1 report, a majority vote of the EEOC would be needed to alter or rescind the revision.

As for OFCCP, in 2013, the Agency rescinded its 2006 Compensation Standards and Voluntary Guidelines on the basis that they were too narrow and, in the Agency’s view, limited its ability to investigate pay discrimination. Instead, the Agency released new guidance (Directive 307) that significantly expands the OFCCP’s approach to analyzing a contractor’s compensation practices. The Directive explains that it is part of an “ongoing policy commitment to address pay discrimination by federal contractors,” and that OFCCP will take a case-by-case approach to compensation discrimination, using a range of both statistical and nonstatistical investigative and analytical tools. Additionally, as discussed in greater detail in Section IV, infra, effective January 11, 2016, the OFCCP adopted new regulations prohibiting federal contractors from discharging or otherwise discriminating against their employees and job applicants for discussing, disclosing, or inquiring about compensation.

No longer constrained by the 2006 compensation standards, and armed with a broad new directive and a stated policy commitment of addressing pay discrimination, OFCCP has taken an aggressive approach when it comes to compensation, culminating in several lawsuits.

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9 Id.

alleging compensation discrimination filed by OFCCP in the final months and weeks of the outgoing administration.\textsuperscript{11}

Finally, in 2016, Obama invited private companies to sign the “Equal Pay Pledge,” which committed employers to conduct an annual company-wide gender pay analysis across occupations; to review hiring and promotion processes and procedures to reduce unconscious bias and structural barriers; to embed equal pay efforts into broader company-wide equity initiatives; and to identify and promote other best practices to “close the national wage gap to ensure fundamental fairness for all workers.”\textsuperscript{12} Nearly 100 companies across sectors have signed the pledge, and many have made public statements illustrating their support for it.\textsuperscript{13}

While the current administration’s approach to equal pay remains to be seen, it appears unlikely momentum for aggressively tackling equal pay will be reversed or halted all together. Indeed, as discussed in Section II, B \textit{infra}, given the patchwork of proactive new equal pay state laws, Congress may finally decide to pass new equal pay legislation at the federal level to provide employers with a consistent national standard.

\textbf{B. States Are Leading The Way on Equal Pay.}

In the absence of enhanced federal equal pay legislation, states — and even some municipalities — are leading the way when it comes to aggressive new equal pay laws. In particular, California, New York, Massachusetts, Maryland, and Philadelphia, Pennsylvania, have enacted new laws that significantly change employers’ obligations when it comes to compensation.

\textbf{1. California}

On January 1, 2016, California amended its existing equal pay law (California Labor Code section 1197.5) through the California Fair Pay Act (“FPA”). Notably, the FPA expands the statute’s comparator standard from one that compares the pay of employees who perform “equal” work to one that compares the pay of employees who perform “substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions.”\textsuperscript{14} It also eliminates the requirement that comparator employees


\textsuperscript{14} Cal. Lab. Code § 1197.5 (2016).
work at the same geographic “establishment.”15 Additionally, effective January 1, 2017, California further amended the FPA to prohibit wage discrimination on the basis of race or ethnicity in addition to sex.16

The FPA also significantly increases an employer’s burden to justify any pay disparities between or among employees who perform substantially similar work. As under prior California law, employers may rely on four affirmative defenses under the FPA to justify pay disparities: (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quantity or quality of production; or (4) a bona fide factor other than sex. The FPA creates two additional hurdles, however, that require an employer to establish that “[e]ach factor relied upon is applied reasonably,” and that “[t]he one or more factors relied upon account for the entire wage differential.”17 And while no case law yet exists interpreting these new requirements, the latter requirement — that an employer explain the entire wage differential — could dramatically change the role statistics play in any class-based compensation claim, as discussed in greater detail in Section V, D infra.

The FPA also mandates that if an employer relies on the “bona fide factor other than sex” defense, the employer must demonstrate that the factor is (1) not based on a sex-based differential in compensation; (2) job-related to the position in question; and (3) consistent with a business necessity. The burden then shifts back to the employee to demonstrate that an alternative business practice exists that would serve the same purpose without producing wage disparity.18 Additionally, effective January 1, 2017, the FPA explicitly states that “[p]rior salary shall not, by itself, justify any disparity in compensation.”19

2. New York

Also in January 2016, New York amended its existing equal pay law (New York Labor Law section 194(1)) through the Achieve Pay Equity Bill. Unlike California, New York’s statute still compares the pay of employees who perform “equal” work, although the 2016 amendments broaden the definition of “establishment” to include workplaces located in the “same geographical region, no larger than a county.”20 Like California, New York’s statute makes it more difficult for employers to justify pay disparities, including by requiring employers who rely on the “bona fide factor other than sex” defense to prove that the stated factor (1) is not based

15 Id.
17 Id.
18 Id.
19 Id.
20 N.Y. Lab. L. § 194.
on or derived from a sex-based differential in compensation; (2) is job-related with respect to the position in question; and (3) is consistent with a business necessity.\textsuperscript{21}

3. **Maryland**

Effective October 1, 2016, Maryland also broadened its existing equal pay laws in ways similar to California and New York. Although Maryland law has long stated it compares the pay of employees who perform work of a “comparable character,” courts in Maryland have looked to federal EPA case law to interpret that standard, and have held it requires a showing of substantially similar work in terms of skill, effort, and responsibility.\textsuperscript{22} The 2016 amendments broaden the comparator standard, however, to now include gender identity as well as sex, and broaden the definition of “establishment” to include all related workplaces in the same county.\textsuperscript{23} Maryland also expanded the list of defenses upon which an employer may rely to justify pay disparities to now include “a bona fide factor other than sex or gender identity, including education, training, or experience.” And, like California, Maryland requires employers to show that bona fide factors (1) are not derived from a sex-based differential in compensation, (2) are job related and consistent with business necessity, and—significantly—(3) account for the entire differential.\textsuperscript{24}

4. **Massachusetts**

Massachusetts also has amended its prior equal pay law with a new statute that takes effect January 1, 2018. The new law’s comparator standard states it compares the pay of employees of the opposite sex who perform “comparable work,” but defines that term like the California standard, explaining that it “solely means work that is substantially similar in that it requires substantially similar skill, effort and responsibility and is performed under similar working conditions.”\textsuperscript{25} The new Massachusetts law also adds several affirmative defenses, including disparities that are the product of (1) “a bona fide system that rewards seniority with the employer”; (2) “a bona fide merit system”; (3) “a bona fide system which measures earnings by quantity or quality of production or sales”; (4) geographic location; (5) “education, training or experience to the extent such factors are reasonably related to the particular job in question

\textsuperscript{21} Id.

\textsuperscript{22} *Glunt v. GES Exposition Servs.*, 123 F. Supp. 2d 847, 861-62 (D. Md. 2000) (“The MEPA essentially mirrors its federal counterpart, the EPA. The primary difference lies in that the MEPA requires equal pay for work of ‘comparable character,’ while the EPA requires equal pay for substantially similar work. Despite this difference, courts have applied the same analysis in reviewing MEPA and EPA claims.”); *see also Nixon v. State*, 96 Md. App. 485, 492-95, 625 A.2d 404 (1993); *Hassman v. Valley Motors, Inc.*, 790 F. Supp. 564 (D. Md. 1992).

\textsuperscript{23} Md. Code, Labor and Employment, § 3-301–304 (2016).

\textsuperscript{24} Id.

and consistent with business necessity”; or (6) travel that is “a regular and necessary condition” of the job.\textsuperscript{26} Notably, unlike California and New York, the Massachusetts law does not contain the “catch all” defense of a “bona fide factor other than sex.”

The new Massachusetts law also contains a “safe harbor” provision that provides an employer a defense against an allegation of wage discrimination if “within the previous 3 years and prior to the commencement of the action, [the employer] has both completed a self-evaluation of its pay practices in good faith and can demonstrate that reasonable progress has been made towards eliminating compensation differentials based on gender for comparable work in accordance with that evaluation.”\textsuperscript{27}

Massachusetts also is the first state to enact legislation prohibiting an employer from requesting, inquiring about, or relying upon prior compensation before making a job offer or during negotiations over starting salary. Employers may confirm prior compensation, however, either \textit{after} an offer of employment and compensation is negotiated and made, or in instances prior to an employment offer where the candidate voluntarily discloses his or her prior compensation.\textsuperscript{28}

5. \textbf{Philadelphia, Pennsylvania}

In January 2017, Philadelphia became the first city to enact legislation prohibiting employers from asking prospective employees about their wage history. Philadelphia Code § 9-1131, which imposed the prohibition, included an express finding by the City Council that “[s]alary offers should be based upon the job responsibilities of the position sought and not based upon the prior wages earned by the applicant.” The Pennsylvania state legislature, however, is now considering statewide legislation that would preempt any local equal pay laws, including that recently enacted in Philadelphia.\textsuperscript{29}

With these four states and Philadelphia taking the lead, other states and municipalities are likely to follow. Indeed, in the past year alone, at least five additional states, including Washington, South Carolina, Pennsylvania, Utah, and Nevada, have introduced new equal pay legislation that is more expansive than current federal law.

\textsuperscript{26} \textit{Id.}
\textsuperscript{27} \textit{Id.}
\textsuperscript{28} \textit{Id.}
C. Litigation Trends.

Along with legislators, private litigants have ramped up the focus on equal pay through a spate of compensation discrimination lawsuits. Increasingly, these include claims not only under Title VII or the federal Equal Pay Act, but also state law analogs (particularly in California and New York). Putative class action suits have been filed in New York against The New York Times and Bank of America alleging compensation discrimination against women in reporting and managing director positions, respectively. Suits making similar compensation discrimination allegations have been filed in California against Qualcomm, Inc. and the law firm Sedgwick, LLP. Now that the amended New York and California laws have been on the books for some time, additional individual and class action suits are sure to follow.

Not only has equal pay litigation increased, but defendants can expect to see more detailed demands for programmatic injunctive relief from plaintiffs’ counsel seeking to settle systemic cases. In Pan v. Qualcomm, Inc., 2016 WL 6662241, for example, the parties agreed to programmatic relief worth an estimated $4 million that included, among other things, appointing an internal “compliance official” with responsibility for monitoring compliance with the settlement agreement; retaining two consultants specializing in industrial/organizational psychology to assess policies and practices and implement changes; and conducting annual statistical analyses of compensation. Id. at *12. Similarly, in Coates v. Farmers Insurance Group, No. 15-CV-01913-LHK, the defendant committed as part of the settlement to conducting annual statistical analyses of compensation according to an agreed-upon statistical model, and to eliminating any adverse impact that model revealed unless it could justify the disparities as job related and consistent with business necessity. See id. at Dkt. No. 126-3 (N.D. Cal. Apr. 13, 2016). Looking ahead, this trend of including programmatic relief provisions that track the requirements of the new equal pay laws is likely to continue.


Another driving force that continues to keep issues related to pay equity top of mind for employers is the push to publicly disclose pay data. In the past several years, several employers have voluntarily made public disclosures regarding their pay gap (or lack thereof), and also have disclosed the steps they are taking to address issues regarding pay equity on a proactive and ongoing basis. Other employers have made similar disclosures in response to activist shareholder proposals that, if enacted, would require companies to disclose publicly the percentage pay gap between male and female employees and planned steps to address that

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gap. And, as large international employers are likely well aware, new UK regulations will require them to publish statistics and other information regarding gender pay gaps within their workforces by April 2018.\(^\text{32}\)

Proponents of public disclosures of pay data claim it helps achieve pay equity by forcing employers to assess and address the issue. Such disclosures also may allow employers to avoid shareholder proposals and can demonstrate social responsibility, thereby alleviating public or other scrutiny for failing to release data regarding pay. Publicly disclosing pay data can also entail risk, however. Not only must employers ensure public disclosures are accurate, but they also need to be mindful of arguments about waiving attorney-client privilege or work-product protections of underlying analyses. This can be sensitive particularly for employers involved in litigation involving claims of compensation discrimination.

**A. Voluntary Disclosures of Pay Data.**

Several companies in recent years have chosen voluntarily to disclose information regarding the comparison of compensation paid to male and female employees, as well as steps taken or planned to address any disparities. In September 2015, GoDaddy became the first major technology company to voluntarily disclose its pay gap statistics. Following an audit, the company revealed that women on average earned 0.28 percent more than men, although women in management were paid 3.58 percent less.\(^\text{33}\) Shortly thereafter, in November 2015, Salesforce disclosed that the company spent approximately $3 million in 2015 to reach 100 percent pay equality.\(^\text{34}\) In March 2016, Salesforce further disclosed that after completing a “comprehensive analysis of the salaries of more than 17,000 global employees,” the company had adjusted salaries for approximately six percent of its workforce—men and women alike—to reach 100 percent parity.\(^\text{35}\)

**B. Disclosures in Response to Activist Shareholder Proposals.**

Although some companies have chosen to voluntarily disclose statistics or other information about their pay data, others have done so in response to pressure from shareholder proposals issued by activist funds such as Arjuna Capital, Trillium Asset Management, and Pax World Investments. In 2015 and 2016, Arjuna filed shareholder proposals against several “tech

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giants,” including Microsoft, Intel, Amazon, Google, and Facebook, that, if passed, would have required the companies to disclose publicly the percentage pay gap between male and female employees and planned steps to address it. In response, several of these technology companies, including Apple, Intel, and Amazon, have released gender pay information, including statistics and other supporting information regarding planned steps to address pay equity on a going-forward basis. These releases have largely satisfied the activist funds. Other companies, such as Google and Adobe, have defeated the proposals and otherwise declined to disclose pay data in response to them.

In late 2016, the same three activist funds issued a second wave of shareholder proposals targeting a number of prominent U.S. financial institutions for the coming 2017 proxy season. Consistent with earlier efforts in the technology industry, these proposals demand disclosure of sex-based compensation data, as well as additional diversity statistics on employee race and gender. The institutions targeted by this recent effort include Goldman Sachs, Citigroup, Bank of America, Wells Fargo, American Express, and JPMorgan Chase.

Most recently, the retail industry has become the target of pay equity shareholder proposals. Arjuna Capital has filed proposals against Starbucks and Walmart similar to those it filed against technology companies. In addition to seeking gender pay gap information, however, the latest round of proposals also seeks pay gap information on the basis of race and ethnicity. Additionally, Zevin Asset Management LLC filed a similar proposal against TJX Cos., the owner of T.J. Maxx, Marshalls, and HomeGoods.

IV. Pay Transparency.

In addition to the push for the public disclosure of pay data, employers also now face a host of laws aimed to increase pay transparency among employees. Although the National Labor Relations Board has long taken the position that employees must be permitted to discuss their
compensation, along with other terms and conditions of employment, as part of their right to engage in concerted activity, many employees still report their employers either prohibit, restrict or discourage discussions or inquiries about pay.\footnote{Institute for Women’s Policy Research, \textit{Pay Secrecy and Wage Discrimination} (January 2014) (available at https://iwpr.org/publications/pay-secrecy-and-wage-discrimination/).}

In September 2015, the OFCCP published a final rule revising the regulations implementing Executive Order 11246, as amended at 41 C.F.R. Part 60-1, to protect employees of federal contractors who inquire about compensation from discrimination. The revised regulations took effect on January 11, 2016, and apply to all covered contracts entered into or modified as of that date. They prohibit federal contractors and subcontractors from discharging or otherwise discriminating against their employees and job applicants for discussing, disclosing, or inquiring about compensation.\footnote{Office of Federal Contract Compliance Programs, 80 Fed. Reg. 54,934 (Sept. 11, 2015) (to be codified at 41 C.F.R. pt. 60-1) (available at https://www.gpo.gov/fdsys/pkg/FR-2015-09-11/pdf/2015-22547.pdf).} The regulations also require that federal contractors incorporate a prescribed nondiscrimination provision into their existing employee manuals or handbooks and disseminate that provision to employees and to job applicants.\footnote{Id.; \textit{see also} Office of Federal Contract Compliance Programs, \textit{Pay Transparency Nondiscrimination Provision} (available at https://www.dol.gov/ofccp/PayTransparencyNondiscrimination.html).}

\section*{A. State Laws Promoting Pay Transparency.}

States also have been ramping up efforts when it comes to pay transparency. Several states, including California, Connecticut, Delaware, Maryland, Massachusetts, New York, and Oregon have enacted pay transparency laws that prohibit employers from barring their employees from discussing or inquiring about pay, and prohibiting retaliation for engaging in such conduct.\footnote{National Women’s Law Center, \textit{Progress in the States for Equal Pay} (Sept. 2016) (available at: http://nwlc.org/wp-content/uploads/2016/01/Progress-in-the-States-for-Equal-Pay-9.26.16.pdf).} For example, although California law has barred employers from prohibiting employees from discussing their compensation for years, the California FPA enhances this prohibition. The FPA not only states that employers may not prohibit employees from discussing their own wages or discussing or inquiring about the wages of others, it also provides a private right of action for employees who claim they have experienced retaliation for engaging in such conduct.\footnote{Cal. Lab. Code § 1197.5(k).} \textit{See also} Section II, B \textit{supra}, for a further discussion of the California FPA.

Similarly, New York’s Achieve Pay Equity Bill not only strengthens New York’s equal pay law generally, \textit{see} Section II, B \textit{supra}, but also includes a new pay transparency provision prohibiting employers from forbidding employees from inquiring about, discussing, or disclosing...
their own wages or the wages of other employees. Unlike California, however, New York’s pay transparency law states that employers may, in a written policy provided to all employees, “establish reasonable workplace and workday limitations on the time, place and manner for inquiries about, discussion of, or the disclosure of wages,” although such limitations must be consistent with state and federal law, may not include prohibiting an employee from discussing the wages of another employee without that employee’s permission, and must comply with regulations promulgated by the New York Department of Labor, which state that the limitations may not be so restrictive as to unreasonably or effectively preclude or prevent discussions or inquiries about wages, and must be content-neutral, narrowly tailored, and “leave open ample alternative channels for the communication of information.”

Additionally, unlike California, the New York law contains a provision similar to one contained in the OFCCP’s pay transparency regulation, specifically providing that its prohibitions regarding pay transparency “shall not apply to instances in which an employee who has access to the wage information of other employees as a part of such employee’s essential job functions discloses the wages of such other employees to individuals who do not otherwise have access to such information,” unless such disclosure is in response to a complaint or charge, or in furtherance of an investigation, proceeding, hearing, or action, including an investigation by the employer.

Massachusetts’ new equal pay legislation, which takes effect in January 2018, also prohibits employers from forbidding employees from discussing or inquiring about pay, as well as prohibits retaliation for engaging in such activities. The Massachusetts law also prohibits employers from contracting with employees to avoid pay transparency obligations. The law does, however, permit employers to prohibit employees who have access to the pay data of others due to their job responsibilities from disclosing other employees’ compensation information without first obtaining the permission of the other employee. It also confirms that employers are not obligated to disclose employee wages to any third party.

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51 Id.
Finally, Maryland’s new equal pay law states that employers may not prohibit employees from inquiring about, discussing, or disclosing their own wages or the wages of a co-worker, or from requesting that the employer provide a reason for why the employee’s wages are a condition of employment.\textsuperscript{52} It further prohibits employers from taking an adverse employment action against employees who (1) inquire about another employee’s wages; (2) disclose their own wages; (3) discuss another employee’s wages, if those wages have been disclosed voluntarily; (4) ask the employer to provide a reason for the employee’s wages; or (5) aid or encourage another employee’s exercise of rights under the Maryland law.\textsuperscript{53} Like New York, the law does allow employers to maintain a written policy which establishes reasonable workday limitations on the time, place, and manner for wage discussions, which must be consistent with standards adopted by the Commissioner of Labor and Industry and all other state and federal laws.\textsuperscript{54}

Importantly, the Maryland law does not (1) require employees to discuss or disclose their wages, (2) diminish employees’ rights to negotiate terms and conditions of employment, (3) limit an employee’s rights under a collective bargaining agreement, (4) obligate employers or employees to disclose wages, (5) permit disclosure of proprietary information, trade secrets, or information that is otherwise protected by law without written consent of the employer, or (6) permit employees to disclose wage information to a competitor of the employer.\textsuperscript{55}

B. Private Companies with Pay Transparency Policies That Go Beyond the Law.

Not only have states and the OFCCP enacted laws that promote pay transparency, but several companies voluntarily have adopted policies that go beyond the legal mandates. For example, GoDaddy allows employees to compare their salary to that of other employees who hold the same position, and employees’ pay statements indicate their salary level and range.\textsuperscript{56} Similarly, Jet.com sets all employees’ salaries based on their level, prohibits employees from negotiating those salaries, and has made its salary information available to employees and investors.\textsuperscript{57} Additionally, Whole Foods permits employees to look up the salary and bonus of any other employee in the company, all the way up to the CEO level.\textsuperscript{58}

\textsuperscript{52} Md. Code, Labor and Employment, §3-301–304 (2016).
\textsuperscript{53} Id.
\textsuperscript{54} Id.
\textsuperscript{55} Id.
\textsuperscript{57} Id.
\textsuperscript{58} Id.
V. Pay Audits.

In response to the increased regulatory, legislative, and litigation focus on equal pay, including the trends of pay transparency and the public disclosure of pay data, smart employers have adopted, or are considering adopting, more robust processes to monitor compensation. Chief among these efforts are pay audits. These audits seek to determine whether the company or some subdivision has either a pay gap or, according to one or more potentially applicable legal standards, a pay equity problem. Pay gap audits—attempting to determine the ratio between the compensation paid to male and female employees—are done for a variety of reasons, including by companies considering a public disclosure. Employers also conduct pay equity audits for various reasons, but most often to assess risk from litigation or enable legal counsel to provide informed advice about forward-looking compensation practices. This section gives an overview of some of the more common types of pay audits, and seeks to provide general guidance and practice tips for developing and conducting such audits. The best approach for a particular company will depend on a host of factors, including the impetus for the pay audit, the presence of threatened or ongoing litigation, and the particular business needs that guide the company’s compensation practices.

A. Pay Gap Audits.

Employers contemplating a public statement or disclosure about their pay data first need to determine what their data shows. Most often, employers do this through a privileged analysis to determine whether or not they have a “pay gap.” Generally, these audits are nationwide, although pay gap audits can be conducted on one or more subsets of a company’s employee population. Because the goal of such an audit is to compare the average earnings of women with the average earnings of men, these types of audits typically do not attempt to control for all variables that may legitimately impact pay (e.g., choice of specialty or role within the company).

Particularly if an employer is considering a public disclosure of pay gap statistics, it is important that the analysis and results be accurate and reliable. Accordingly, a best approach is to work with an experienced statistician or labor economist to conduct the statistical analysis. It also is important to ensure the underlying data on which the analysis is based is complete and accurate. Particularly in cases where the underlying data comes from more than one source, an experienced statistician or labor economist can help reconcile such information into a usable database, including reconciliation of current and historical data pulls.

59 Although pay audits most often address gender-based compensation differences, they can be performed to examine pay disparities between any two groups of employees (e.g., different races, ethnicities, etc.).
B. Pay Equity Audits.

Pay equity audits—which seek to assess a company’s pay practices against one or more potentially applicable legal standards or government agency approaches—are significantly more complicated than pay gap analyses. The most common type of pay equity analysis is a statistical model using regression factors to compare the pay of groups of employees. In some cases, individual, or “cohort,” comparisons also are used. Pay equity audits compare earnings of men and women after controlling for a robust set of variables that impact pay. They aim to determine whether comparable employees (who, depending on the applicable law or jurisdiction, could be “similarly situated” employees, or employees who perform “equal” or “substantially similar” work) are nevertheless paid unequally. Accordingly, a critical first step in any pay equity analysis is determining which employees to compare to one another.

In most cases, and particularly for jobs involving specialized, unique and advanced skill sets, aggregating dissimilar employees into a single statistical model will yield invalid results. Thus, in determining the appropriate employee groupings, it is imperative to identify upfront who appropriate comparators are, taking into account the myriad state and federal laws that may define related but non-identical standards. Overreliance on factors such as job title or level to identify comparators could lead to invalid results and generate false positives, if not every employee in the company with the same job title and level is truly doing the same type of work on projects of comparable difficulty and importance to the company. For this reason, courts have regularly rejected analyses that rely uncritically on job title alone to identify comparators. A more nuanced analysis is generally needed. In some cases, employers may find their jobs are so specialized and unique that comparable groups large enough for statistical analysis do not exist, and a meaningful statistical analysis is not possible.

In addition to identifying appropriate comparator groupings, a pay equity analysis also must identify and incorporate legitimate factors that could explain pay disparities. Potential examples may include time in company, time in level, organization, performance rating, or prior experience. An experienced statistician or labor economist can assist in determining which variables correlate with pay, and should be included in the model. A pay equity analysis may be subject to criticism if it omits relevant variables, or if variables that are included are later alleged to be biased or discriminatory themselves (i.e., “tainted” variables). Accordingly, carefully analyzing and determining which factors to include in an analysis is critical. It is also important to determine whether there are legitimate determinants of pay in the company’s compensation system that cannot be reduced to numeric values (i.e., are nonquantifiable), and thus cannot be accurately captured by or controlled for in a statistical model.

As with pay gap analyses, the data on which any analysis will be based must be complete and accurate. Errors or gaps in the underlying data set, which typically includes information pulled and aggregated from various sources, can lead to inaccurate or unreliable results. Accordingly,
any questions or uncertainties about the underlying data should be addressed and reconciled prior to conducting an analysis.

C. Establishing and Preserving Attorney-Client and Attorney Work-Product Privileges.

In order to preserve attorney-client privilege and attorney work-product protections, employers typically conduct pay analyses pursuant to the direction of legal counsel. As the Supreme Court has recognized, protecting these privileges is important to “encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.” Retaining outside counsel to direct the analysis—including the work of retained labor economists or statisticians—encourages candid discussions about their compensation practices, and allows exploration of a wider range of possible models without concern that those explorations may later be subject to discovery in any future litigation, and/or taken out of context.

Retaining outside counsel to direct pay audits, rather than relying solely on their in-house teams, also sidesteps arguments about whether in-house counsel are functioning in a business role, or providing advice for a “business” and not a “legal” purpose, and thus are operating outside the scope of the privilege. The engagement letters for these retentions may make clear that legal advice is being sought from outside counsel, and confirm that counsel are being retained so that they can use their legal skills and expertise to provide legal advice to the company. Any third-party experts retained by outside counsel may in turn work under a retention agreement that specifies that counsel will direct the analysis to be done, in service of counsel’s formulation of legal advice.

Pay equity audits may also fall under the ambit of protected work product, if they are done “in anticipation of litigation.” Attorney work product is a qualified privilege only, however, and the law in many jurisdictions is unsettled regarding whether litigation is “anticipated.” Nevertheless, reliance on both attorney-client privilege and attorney work product is advisable for purposes of encouraging candid discussions about compensation practices, identifying potential pay disparities, and determining appropriate remedial steps when needed.

D. Interpreting the Results and Determining Next Steps.

When statistically significant disparities are discovered in either a pay gap audit or pay equity audit, careful consideration of next steps is warranted. Doing nothing in the face of observed and unexplained disparities could potentially increase legal risk, given an employer’s knowledge

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60 Upjohn Co. v. U.S., 449 U.S. 383, 389 (1981); see also id. ("The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer’s being fully informed by the client.").
of the disparities. Accordingly, many employers seek to investigate and better understand the causes of any observed disparities, and may ultimately decide that pay adjustments are appropriate. At the same time, reflexively adjusting compensation before considering whether legitimate factors—including factors that may have been overlooked in the initial model, or may not be susceptible to statistical modeling—explain the observed differences is rarely the best course of action.

Employers can take one of several approaches in response to a pay gap audit. If the analysis does not show any significant disparity, employers may choose to publicize the results. It is important to first confirm the accuracy and robustness of the analysis, however, as highlighted above—particularly if the employer is a publicly-traded company subject to SEC oversight. If the analysis does indicate disparities, the employer may want to consider drilling down via a more robust pay equity analysis that—unlike a nationwide pay gap audit—endeavors to control for the variables that legitimately impact pay.

The results of an in-depth pay equity audit also present employers with several options. Most employers focus on those divisions or segments of the company, if any, in which statistically significant pay disparities are identified. At this point, employers may begin by taking another look at the variables included in the initial model. The presence of a statistically significant disparity simply means that the difference is unlikely to have occurred by chance, and only suggests a pay equity problem if the model appropriately controls for every variable that plays in to determination of pay. Previously omitted, legitimate variables—for example, length of service in a particular department or on a particular product team—may have further explanatory power. Cohort analyses that compare two or more employees who the initial model treated as comparators may bring to light other nondiscriminatory factors that legitimately impact pay and explain seeming disparities.

Next steps may also involve determining whether there are any outliers—be they female or male, highly compensated or not—that could have skewed the analysis. For example, a single employee who was “red circled”—i.e., who chose to move to a lower-level role within the company, but who was not required to take a corresponding pay cut—can create the appearance of a problematic disparity when, in fact, there is a legitimate explanation for the disparity. This is particularly true where the groups of employees being compared to one another are relatively small. Understanding the sources of any outlier compensation can therefore be important in determining how to proceed.

A prudent employer may also want to look more broadly at the policies or practices that may have caused any observed disparity, in order to mitigate risk going forward. This may include evaluating the performance management or evaluation systems that impact pay, and standards for promotion, to determine whether these are being consistently applied across the company.
Another heavily debated topic—and one which many employers opt to review—are practices for determining starting pay, whether of entry-level hires or lateral recruits. Additionally, employers may want to consider making targeted and appropriate pay adjustments, which must take the form of increasing the pay of one or more individuals (rather than “levelling down”).

Finally, employers can use the lessons learned from a pay equity audit to inform best practices going forward. In addition to evaluating policies and practices for determining compensation, employers are well-advised to renew their focus on documentation and record-keeping regarding pay decisions. The legitimate factors that inform an individual’s starting salary or adjustments thereafter can and should be recorded, so that the determinants that impacted pay can be reviewed if and as needed.

VI. Conclusion.

The spotlight on equal pay is likely to continue shining in coming years. The host of recent and anticipated legislative changes—along with government enforcement efforts, public disclosure pressures, and the threat of civil litigation—will continue to challenge companies seeking to ensure that their compensation systems are fair, reasonable, and defensible. Properly conducted pay audits are an important tool for employers, and understanding how to best structure and interpret those audits will remain a priority for many going forward.