Pay Issues: EEO-1 reporting, the pay gap and increasing legislation

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April 26, 2016
Joining You Today

Annette Tyman
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Seyfarth Shaw’s Pay Equity Group (PEG):

Dedicated team experienced in pay equity matters

Handle key pay litigation, including pay equity cases under new state laws

Drive proactive audits and analyses of employer pay practices

Link to publications and resources at: www.seyfarth.com/pay-equity-group
Goals For Today’s Presentation

The Pay Gap: Myth or Fact?
High Level Overview of New Legislation
EEOC’s New EEO-1 Report
Employer Best Practices
The Pay Gap: Myth Or Fact – Does it Matter?

• The Pay Gap: In 2015, female full-time workers made only 79 cents for every dollar earned by men, a gender wage gap of 21 percent.

• “Although additional research in this area is clearly needed, this study leads to the unambiguous conclusion that the differences in the compensation of men and women are the result of a multitude of factors and that the raw wage gap should not be used as the basis to justify corrective action. Indeed, there may be nothing to correct. The differences in raw wages may be almost entirely the result of the individual choices being made by both male and female workers.”

An Analysis of the Reasons for the Disparity in Wages Between Men and Women: Prepared for the Department of Labor by the Consad Research Corporation, January 12, 2009
The Pay Gap: Myth Or Fact – Does it Matter?

- **NO!**
- Proponents of the Pay Gap have won the public relations battle
- “Closing the wage gap” is commonly heard by politicians and lawmakers
- States are pushing the envelope and enacting robust pay equity laws
- Administrative Agencies are flexing their muscle to obtain pay data
- Private groups are putting pressure on certain industries for pay information, (i.e., tech industry)
Overview of the Changes to the Pay Equity Landscape
The Major Landmarks in the Pay Equity Landscape: Then

Pay Equity

- Title VII - Lilly Ledbetter Fair Pay Act
- OFCCP
- Equal Pay Act
The Major Landmarks in the Pay Equity Landscape

- Title VII
- Equal Pay Act
- Lilly Ledbetter Fair Pay Act
- OFCCP
  - Directive 307
  - Systemic Investigations
- State Law
  - CA, MN, NY and growing (MA, NJ)
- EEO-1 Proposed Report

Pay Equity
EEOC: Proposed Changes to EEO-1 Report

• Applies to employers with more than 100 employees
• If implemented on current schedule: 9/2017 filings
• Employers will provide aggregate compensation data and hours for all employees organized by (1) 10 EEO-1 categories (2) 7 sex and race/ethnicity categories (3) in 12 specified pay bands.
• W-2 earnings for a 12 month period looking back from any pay period between 7/1-9/30 (not year-end)
• Hours must be provided
Pay Data: W-2 wages

- W-2 “gross income”
  - Wages, salary, fees, bonuses, commissions, tips, taxable fringe benefits, tuition reimbursement, and other forms of reportable earnings.
  - Includes overtime, severance pay, shift differential pay

- Reporting Period: W-2 earnings for a 12 month period from any pay period between July 1st and September 30th (same as the current EEO-1 report).
Pay Data: by EEO-1 Category

- Report Compensation Data by EEO-1 Category
- 10 Job Categories Include:
  - Executive/Senior Level Officials and Managers;
  - First/Mid Level Officials and managers
  - Professionals
  - Technicians
  - Sales Workers
  - Administrative Support Workers
  - Craft Workers
  - Operatives
  - Laborers and Helpers
  - Service Workers
<table>
<thead>
<tr>
<th>Job Categories</th>
<th>Annual Salary in Thousands</th>
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<tbody>
<tr>
<td>Executive/Senior Level Officials and Managers</td>
<td>$19,239 and under</td>
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<td>$19,240 - $24,439</td>
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<td>$24,440 - $30,679</td>
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<td>$30,680 - $38,999</td>
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<td>$101,920 - $128,309</td>
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<td>$128,960 - $153,799</td>
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<td>$153,800 - $207,949</td>
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<td>$208,000 and over</td>
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</table>

<table>
<thead>
<tr>
<th>Number of Employees (Report employees in only one category)</th>
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<tbody>
<tr>
<td>Race/Ethnicity</td>
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<tr>
<td>Hispanic or Latino</td>
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<tr>
<td>Male</td>
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<tr>
<td>White</td>
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| Total Col A-N   |
What Pay Data Would Be Required: Hours

• Total hours worked by employees in each EEO-1 pay band cell.
  • To “normalize” part time and partial years hours
• Hours data is largely meaningless
  • Eligibility for overtime, commissions, bonuses are typically not the same for full-time, and partial-year or part-time employees
  • Most exempt employees do not record hours actually worked
### Snapshot of Report the Proposed Report – Hours Worked

<table>
<thead>
<tr>
<th>Job Categories</th>
<th>Annual Salary in Thousands</th>
<th>Total Cal A/N</th>
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</thead>
<tbody>
<tr>
<td>Executive/Senior Level Officials and Managers 1.1</td>
<td>$10,239 and under</td>
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<td>$10,240 - $24,439</td>
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EEOC’s Stated Purpose

• “Discern Potential Pay Discrimination”

• Per EEOC Q&A
  • “Identify Discriminatory Pay Practices”
  • “Identify and Combat Pay discrimination”
  • “Focus agency Investigations”
  • Assess complaints of discrimination
  • Provide “insight into pay disparities across industries and occupations and strengthen federal efforts to combat discrimination.” - No legal basis for EEOC to involve itself in this function
Statistical Analysis: Preliminary Tests

Statistical Test

- EEOC indicates it may use:
  - Mann-Whitney (men versus women or African Americans versus Whites)
  - Kruskal-Wallis test for comparison of more than two groups (e.g., race)

- Both of these tests are used to determine whether gender and racial groups are equally distributed across all the pay levels of a company
Limitations of EEO-1 Pay Data

• Large job groupings lump together too many varying positions for meaningful analysis

• Does not recognize that pay is highly correlated with the amount and quality of the employees’ work experiences
  • Relative Skills, Qualifications and Experience

• Does not take into account valid differences in working conditions that impact pay
  • Full/part-time status, shift differentials, overtime can be correlated with gender but are not indicative of discrimination

• Big Question: Will this data be used to attack promotion systems and allege discriminatory steering?
The Legislation: Federal and State Laws
# Comparison of EPA Laws and Pending Legislation

<table>
<thead>
<tr>
<th></th>
<th>Federal Equal Pay Act</th>
<th>Title VII</th>
<th>CA Fair Pay Act</th>
<th>NY Achieves Pay Equity</th>
<th>Mass SB 2119</th>
<th>NJ S992/A2750</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Protected Classes</strong></td>
<td>Sex Only</td>
<td>Sex, Race/Ethnicity, Color, Religion, National Origin</td>
<td>Sex Only</td>
<td>Sex Only</td>
<td>Gender Only</td>
<td>Sex Only</td>
</tr>
<tr>
<td><strong>Comparison Group</strong></td>
<td>Equal work and similar working conditions</td>
<td>Similarly situated employees</td>
<td>Substantially similar work and working conditions</td>
<td>Equal work and similar working conditions</td>
<td>Substantially similar skill, effort, responsibility; similar working conditions</td>
<td>Substantially similar work</td>
</tr>
<tr>
<td><strong>Same Location?</strong></td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>Maybe (same geographic region)</td>
<td>No (geographic location may be a defense)</td>
<td>No set geographic limitation</td>
</tr>
<tr>
<td><strong>Proof</strong></td>
<td>No Intent Required</td>
<td>Discriminatory Intent or Impact</td>
<td>No Intent Required</td>
<td>No Intent Required</td>
<td>No Intent Required</td>
<td>No Intent Required</td>
</tr>
<tr>
<td><strong>Remediation</strong></td>
<td>Must explain entire wage differential</td>
<td>Typically only in statistically significant groups</td>
<td>Must explain entire wage differential</td>
<td>Must explain entire wage differential</td>
<td>Must explain entire wage differential</td>
<td>Must prove the pay differential</td>
</tr>
</tbody>
</table>

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California Fair Pay Act

- Signed by Governor Brown on October 6, 2015
- Effective January 1, 2016
  - California-based employers
  - Other employers with California-based employees
- Amends Labor Code Section 1197.5 to become the nation’s most aggressive equal pay law
- Only focused on gender-based differences
  - Women paid less than men
  - Men paid less than women
California Fair Pay Act: Pay Equity

- Employees can be comparators even if they do not:
  - Work at the same establishment
    - *(i.e., even if they are 100s of miles apart…)*
  - Hold the “same” or “equal” jobs
  - Instead it applies to employees performing “substantially similar work” based on:
    - Composite of skill, effort, and responsibility AND
    - Performed under similar working conditions
“Substantially Similar Work” in California

**Job**

- **Skills**: Experience, ability, education, and training required to perform the job
- **Effort**: Amount of physical or mental exertion needed to perform the job
- **Responsibility**: The degree of accountability required in performing the job

**Working Conditions**

- **Physical surroundings**: (e.g., temperature, fumes, and ventilation)
- **Hazards**
Permitted Factors that Explain Pay Differences in California

- A seniority system
  - Length of service

- A merit system
  - Performance

- Quantity or quality of production
  - Widgets
  - Words
  - Windows

- A bona fide factor other than sex
  - Education, experience, training, certifications, geographic, shift, or hours differentials
  - Many other factors!
New York Fair Pay Law

• On October 21, 2015, Governor Andrew Cuomo signed a group of eight bills, known as the “Women’s Equality Agenda”, which expand protections for women in the workplace

• One of the bills was an amendment to New York’s fair pay law
  • N.Y. Labor Law § 194

• Went into effect on January 19, 2016
New York Fair Pay Law

- There are many similarities to the California law:
  - Requires that employers justify pay differentials and limits the factors that employers can use
  - Places burden on employers
  - Requires pay transparency
    - Employers may not prohibit employees from inquiring about, discussing, or disclosing wage information
    - But can have written policy establishing reasonable workplace and workday limitations on the time, place and manner such inquiries, so long as consistent with law
  - Increases amount of damages
New York Fair Pay Law - Differences from California Law

• But the modifications were not as expansive as those to California law:

  • The law still requires comparisons only for “equal work on a job the performance of which requires equal skill, effort and responsibility, and which is performed under similar working conditions”

  • Though they need not work at the same establishment, comparators must work in the same “geographic region”
• Existing statute prohibits discrimination in pay because of sex. Allows employer to justify differential based on any reasonable factor other than sex.

• Bill to add more stringent pay equity requirements to NJ’s Law Against Discrimination passed by NJ legislature on March 14, 2016.
  • Awaiting action by Governor Christie.
  • Democratic candidates for Governor in 2017 are already promising to make this a campaign issue, if Christie does not sign
Proposed Amendments to NJ LAD

• New law would prohibit paying employees of opposite sex at different rates for “substantially similar work, when viewed as a composite of skill, effort, and responsibility.”

• Narrowed defenses require employer to show that a differential based on a factor other than sex:
  • Does not perpetuate sex-based differentials in compensation
  • Is applied reasonably
  • Accounts for the entire wage differential
  • Is job-related and consistent with business necessity
  • No alternative business practice would serve the same business purpose without producing the wage differential
Proposed Amendments to NJ LAD

• Expands pay transparency provisions of current law
• Employees compared across “all of an employer’s operations or facilities”
  • Not clear if this is limited to NJ operations or might reach further
• Statute of limitations is two years, but an employee who establishes a violation during that period may recover for the entire period of discrimination.
New Jersey Pay Equity

• A separate bill passed by the Assembly on April 7, 2016 would require all bidders for NJ state contracts to “submit a report . . . that measures the extent to which men and women [who] perform the same or comparable work at different rates of pay and the extent to which job titles within that entity may be predominately held by members of the same gender”
Pending Massachusetts Legislation

Current Legislative Efforts to Amend Existing Law

• Passed unanimously in Senate Jan. 28, 2016, pending in House

• Prohibited activities:
  “discriminate . . . on the basis of gender in the payment of wage, including benefits or other compensation” or “pay any person a salary or wage rate less than the rates paid to employees of a different gender for comparable work”

• Definition of “Comparable work”
  • “[R]equires substantially similar skill, effort and responsibility and is performed under similar working conditions”
  • Eliminates reference to “character” or “characteristics” of the job
  • Defines “working conditions” to include “the circumstances customarily taken into consideration in setting salary or wages”
Pending Massachusetts Legislation

- Enumerated list of specific defenses:
  - Bona fide seniority system (maternity leave cannot affect seniority)
  - Bona fide merit system
  - Bona fide system which measures earnings by quantity or quality of production or sales"
  - Geographic location, or requirement that employee travel for the job
  - Education, training or experience “to the extent such factors are reasonably related to the particular job in question and consistent with business necessity”

- No catchall (like “factor other than sex” in federal law)
Pending Massachusetts Legislation

- Employee’s wage history is not a defense
- Broad pay transparency provisions
  - Cannot prohibit employees from discussing compensation
  - Cannot require job applicants to disclose prior wages or salary
  - Cannot screen job applicants based on prior salary level
  - Cannot seek salary information from applicant’s prior employer
- Unique defense to liability based on self-assessment
  - Must have completed evaluation of “reasonable scope and detail” within past 3 years and “demonstrate . . . reasonable” progress
  - Note – there’s no similar “safe harbor” under Federal law!
As you likely know, Massachusetts was the first state in the country to pass an equal pay law, the Massachusetts Equal Pay Act, G.L. c. 149, §§ 105A-C ("MEPA"), which makes it unlawful for an employer to "discriminate in any way in the payment of wages" as between men and women. The Office of the Attorney General is charged with enforcing MEPA, as well as a number of other wage and hour laws. Despite having an equal pay law in effect for so many years, the gender pay gap persists in Massachusetts. In fact, women working full time in Massachusetts earn on average only 81% of what men earn.¹

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Information Requests to Employers Regarding MEPA

- Requests seek records relating to all persons employed in Massachusetts by designated employer as of X date
  - Name;
  - Address;
  - Sex;
  - Race/ethnicity;
  - Part-time or full-time employment status;
  - Hire date;
  - Current title/position;
  - Start date in current position;
  - Current rate of pay or salary;
  - Work location;
  - Total compensation for last year, broken down (as applicable) into straight time earnings, overtime compensation, bonus pay, commissions any other forms of monetary remuneration; and
  - Job descriptions for each and every title/position within [your company]
Where to Go From Here
Where to Go From Here

• To fully and completely mitigate risk, most employers would need to reevaluate compensation philosophy and practices
  • Do you employ workers in states with more stringent pay equity laws?
• When have you last analyzed compensation within your organization?
• It is more important than ever to be proactive about pay
• Re: EEO-1 Report: Consider the impact to your organization
  • Evaluate the burden or challenges, if any, in providing the data
  • How would you gather the requested data
Ensure You are Doing Some Type of Compensation Analysis

• Doing nothing is risky under the current landscape
  • Particularly for employers subject to EEO-1 reporting

• In addition to changes to the law, there is a focus on enforcement & an effort to find pay discrimination issues
  • EEOC / OFCCP Trend: Proceed even if no one complains
  • OFCCP trend: aggregate/manipulate data until it finds an issue
  • State administrative bodies: collection of data
Four Steps to Take Now

A. Consider – how would you group Substantially Similar Work/Jobs [CA in particular]

B. Evaluate *Permitted* Factors that Explain Pay Differences

C. Analyze Pay

D. Modify Policies and Practices
Analyzing Pay: First and Last Step

Analyze Pay

Group Employees

Document, Document, Document

Evaluate Permitted Factors
Before you begin, understand the risks of proceeding without attorney-client privilege

- Partner with internal and external counsel
- Implement privilege protocol
- Not an “all hands on deck” exercise
CA and similar states: Group Substantially Similar Employees

Develop groupings of “substantially similar” employees:

**Job**
- Skills
  - Experience, ability, education, and training required to perform the job
- Effort
  - Amount of physical or mental exertion needed to perform the job
- Responsibility
  - The degree of accountability required in performing the job

**Working Conditions**
- Physical surroundings (e.g., temperature, fumes, and ventilation)
- Hazards
Where to Begin in Developing Similar Job Groupings

A good place to start:

• Identify “buckets” of major job categories or groupings your company already uses
  • Grades and levels
  • Job functions, and job families
  • Job descriptions
  • Skills or job ladders
  • Wage and hour classifications
  • Other
Evaluate Permitted Factors that Explain Pay Differences

A seniority system
- Length of service

A merit system
- Performance

Quantity or quality of production
- Widgets
- Words
- Windows

A bona fide factor other than sex
- Education, experience, training, certifications, geographic, shift, or hours differentials
- Many other factors!
Importance of Documenting Starting Salary Decisions

• Starting salary is typically the most important pay decision
  • “Start Low/Stay Low” phenomenon
• Consider developing a formal policy regarding how the company sets starting salary
• Document market at time of hire
• Job

  • Relative skill, effort, responsibility and working conditions of positions so you are positioned to distinguish roles
    • Job matrix
    • Job evaluation system
    • Job descriptions

• Factors that influence pay

  • Update electronically available data fields
    • Experience, Education, Market at Start, Performance Evaluations
Review Your Compensation Policies, Written Documents

• Review Written Policies and Match to Practices
  • Ensure you have captured pay transparency laws
  • Starting salary
  • Promotion increases
  • Access to overtime hours
  • Incentive compensation
  • Commissions
  • Territory assignment
  • Promotion- definition

• Watch out for
  • “Pay for Performance”
  • “Glass ceiling" issues
Modify Policies and Practices

- Review employee handbook to remove any prohibitions on employees disclosing their compensation to others
- Update retaliation policy
- Modify code of conduct, if any, to permit reporting on violations of California Equal Pay Act
- Update record retention policy
- Train HR, managers, and supervisors regarding the California Fair Pay Act and its anti-pay secrecy provisions
Practical Realities of Conducting Pay Analysis

• Employers likely need additional resources & budget to:
  • Conduct appropriate compensation analyses
  • Correct any disparities found
  • Defend claims

• Consider timing
  • Align with the compensation cycle
Thank You for Joining Us!

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