It’s Equal Pay Day: What Employers Need To Know

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David Baffa
Jonathan Brophy
Barry Miller
Annette Tyman
Jeffrey Wortman
Goals For Today’s Presentation

- High Level Overview of New Legislation
- Key Litigation Updates
- EEOC & OFCCP
- Employer Best Practices
The Major Landmarks in the Pay Equity Landscape

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

• Effective January 1, 2016
  • California-based employers
  • Other employers with California-based employees
• Amended Labor Code section 1197.5 requires employers to pay employees of both sexes the same “wage rates” for “substantially similar work,” unless the employer proves that the wage differential is based on (a) seniority, (b) merit, (c) a system that measures earnings by quantity or quality of production, or (d) some other bona fide factor other than sex, such as education, training or experience.
### “Substantially Similar Work” in California

<table>
<thead>
<tr>
<th>Job</th>
<th>Working Conditions</th>
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<tbody>
<tr>
<td>Skills</td>
<td>Physical surroundings (e.g., temperature, fumes, and ventilation)</td>
</tr>
<tr>
<td>Experience, ability, education, and training required to perform the job</td>
<td>Hazards</td>
</tr>
<tr>
<td>Effort</td>
<td>Amount of physical or mental exertion needed to perform the job</td>
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<tr>
<td>Responsibility</td>
<td>The degree of accountability required in performing the job</td>
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</tbody>
</table>
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!
California’s Recent DLSE Guidance – Roadmap For Employees To Sue

• On April 6, 2016, California’s Division of Labor Standards Enforcement issued a “Frequently Asked Questions” for the amended Equal Pay Act

• Questions are employee-focused:
  • “What do I have to prove to prevail on my Equal Pay Act claim?”
  • “When do I need to file my Equal Pay Act claim?”
  • “What do I get if I prevail in my Equal Pay Act claim?”

• Employers cannot retaliate against employees who talk or inquire about their own wages or the wages of others.
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”
New Jersey Law Against Discrimination

• 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”
Massachusetts Equal Pay Act

• Statute as it stands today -- M.G.L. ch. 149, § 105A:
  cannot discriminate in pay between the sexes for “work of like or comparable character or work on like or comparable operations”

  Positions compared for pay equity purposes must be “comparable” in “substantive content” and “entail comparable skill, effort, responsibility, and working conditions”

  “a standard which required equal pay for jobs which differ significantly in their substantive content would likely impose on employers an unfair burden and produce inconsistent and confusing results”
Pending Massachusetts Legislation

Current Legislative Efforts to Amend § 105A

• 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

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]
## Comparison of EPA Laws and Pending Legislation

<table>
<thead>
<tr>
<th>Protected Classes</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>
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</thead>
<tbody>
<tr>
<td>Sex Only</td>
<td>Sex Only</td>
<td>Sex Only</td>
<td>Sex Only</td>
<td>Gender Only</td>
<td>Sex Only</td>
<td></td>
</tr>
<tr>
<td>Comparison Group</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>Same Location?</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>Proof</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>Remediation</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>
Litigation: Key Issues
Types of Claims

- Federal Claims
  - Title VII – Gender Discrimination
  - OFCCP/EEOC Enforcement Actions

- State Claims
  - California
  - New York
  - New Jersey
  - Massachusetts
Key Issues For Single Plaintiff Cases

• Attacking The Pleadings

• Burdens Of Discovery
  • Proportionality
  • Collection of data
  • Privacy Implications

• Cohort Analyses
  • How does your individual plaintiff compare to others in the group?
Key Issues For Class Action Cases

• Establishing That Policies Are Compliant

• Address The Individualized Nature Of Decision-Making

• What Do The Statistics Show? (Early Role Of Expert)

• Early Identification Of A Person Most Knowledgeable
Key Legal Issues For Equal Pay Cases

• Statute Of Limitations

• Exhaustion Of Administrative Remedies

• Attacking Statutes On Constitutional Grounds

• Statistical Significance

• Jury Instructions And Burden Shifting

• Settlement/Closure
Compliance: EEOC & OFCCP
Changes to the EEO-1 Pay Report

• On February 1, 2016, the EEOC issued proposed change to EEO-1 Report

• Employers with more than 100 employees 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)

• Expected to be effective September 2017

• Seyfarth Shaw submitted comments on its own behalf and on behalf of the U.S. Chamber of Commerce identifying significant flaws with the proposed revisions.
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
How Does the EEOC Claim They Will Accomplish This?

• Share information
• The EEOC and OFCCP plan to develop a software tool that will allow their investigators to conduct an initial analysis by looking at W-2 pay distribution within a single firm or establishment, and by comparing the firm’s or establishment’s data to aggregate industry or metropolitan-area data.
OFCCP – Continued Focus on Pay

• Top Priority: “Systemic Pay discrimination”
  • Race and Gender

• By 2017 virtually ALL compensation violations and settlements will involve systemic pay issues.
  • 70% of pay discrimination violations in 2014 & 2015 were based on systemic allegations (increased from 13% in FY2013)

• 30-40% of discrimination cases on addressing pay

• Directive 307 “guides” the agency

• Training for Investigators continues; Statistical experts on staff

• In FY 2014 – recovered $1.5M back pay
Employer Best Practices and Risk Management
Six Things *Not To Do*

1. **Do nothing.**
   - Federal contractors must act; private employers wise to start

2. **Skip attorney-client privilege.**
   - Establish privilege protocols and set-up as legal advice and analysis

3. **Start without the end-game in mind.**
   - Think about final objectives, budget for remediation, consider timing

4. **Stop after preliminary analysis.**
   - Follow-through on discrepancies; presume annual/ongoing exercise

5. **Raise red flags when you make adjustments.**
   - Develop strategy for communicating changes and timing

6. **Publicize your commitment before you’re ready.**
   - Don’t let your PR strategy get ahead of your analyses
Conducting a Pay Analysis – High Level

- Involves partnering with Compensation, Legal, IT, Statistics professionals
- Using available data on factors that determine pay, usually involves multiple regression analyses (large populations) and cohort analyses (smaller groups)
- Evaluate reasons for outliers
- Understand gender/race differences in compensation
- If necessary, implement remediation strategies
- Develop ongoing checks and guardrails
Evaluate Overall Pay Approach

Consider your overall approach to pay -- which of these approaches do you use?:

- Seniority-based compensation (typically, union shops)
- Lock-step compensation (many accounting firms)
- Production-based system (some manufacturing organizations)
- Formulaic compensation structure
- “Pay for performance” system
- Other factors?
  - Education
  - Experience
  - Training
  - Certifications
  - Geography
  - Shifts/hours
Create Groups

• For analysis purposes, develop appropriate job groupings
  • Identify “buckets” of major job categories or groups, commonly:
    • Lines of business
    • Job functions or families
    • Grades and levels
    • Wage-hour classifications
    • Bonus or equity eligibility
    • Geography
  • Be sure also to consider:
    • Skills, certifications
    • Effort required
    • Responsibility
    • Working conditions
What To Analyze?

Consider most logical pay analyses to conduct

• Current base pay plus total pay
  • Bonus, incentive pay, equity awards, commissions, overtime, shift differentials

• Setting of starting salaries
  • Most pay problems originate from poor starting salary process (“start low/stay low”)
  • Do you hire in high-volume?
  • Is there a clear process? Is prior salary considered? (Note: may be a problem under pending legislation)
  • Is there an opportunity to tease out prior experience and skills, instead of salary?
  • Do you use ‘market midpoints’ as a starting point for determining initial salary?

• Process for merit increases
  • Do you capture the data that determines these decisions?
  • Can you avoid making differentials worse in the short-term, while addressing base pay over a longer period?

• All of the above?
Consider Data and Documentation

• Do you have data on the factors that influence pay?
• Is there an immediate opportunity to refine data, survey, capture and document factors you believe influence pay?
  • For example: prior experience, market-rate-at-start, education
• Does your HRIS data or job descriptions differentiate skills, required effort, responsibilities, working conditions so you may distinguish roles?
• Have you developed a job evaluation system or skills matrix for ranking jobs and setting market mid-point for roles?
Develop Future Checks and Guardrails

- Think about systems and processes for monitoring ongoing compliance
  - test performance ratings before they become final
  - test starting salary offers to see if throw off average pay
  - test proposed merit raises, bonuses, equity grants before they become final
- Expand HRIS to capture data on important factors going forward
Modify Policies and Practices

• Develop close partnership with Compensation group
• Review handbook to remove restrictions on discussing compensation information; update retaliation policy
• Consider need to update record retention policies
• Consider developing written guidance where appropriate regarding specific pay factors for starting salary, increases
• Consider leveraging pay model to develop tools for testing proposed starting salaries, pay increases
**Pay Equity Group Alerts**

<table>
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<tr>
<th>Date</th>
<th>Event</th>
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<tbody>
<tr>
<td>09/10/2015</td>
<td>OFCCP Announces Final Rule to Promote Pay Transparency</td>
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<tr>
<td>10/07/2015</td>
<td>California Governor Signs Strictest Equal Pay Law in U.S.</td>
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<tr>
<td>11/24/2015</td>
<td>Significant Changes to New York Laws On Pay Equity, Transgender</td>
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<td>Protection, and Wage Payments</td>
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<tr>
<td>01/07/2016</td>
<td>Massachusetts Attorney General Investigations Open New Front in</td>
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<td>Equal Pay Battle</td>
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<td>02/18/2016</td>
<td>Pay Equity Legislation: Not Just Gender Anymore</td>
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<tr>
<td>03/15/2016</td>
<td>Breaking News: EEOC Holds Public Hearing on EEO-1 Pay Report: Seyfarth to Testify on Behalf of U.S. Chamber of Commerce</td>
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<tr>
<td>03/31/2016</td>
<td>High Profile Pay Equity “Champions”: U.S. Women’s Soccer Players</td>
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<td>File EEOC Wage Discrimination Charge</td>
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<tr>
<td>04/05/2016</td>
<td>Seyfarth Submits Comments to EEOC Regarding Proposed Pay Data</td>
</tr>
<tr>
<td></td>
<td>Collection under EEO-1 Report</td>
</tr>
<tr>
<td>04/07/2016</td>
<td>New DLSE FAQs: Unequal Guidance On Equal Pay Law</td>
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</tbody>
</table>
Thank You for Joining Us!

Coming your way soon!