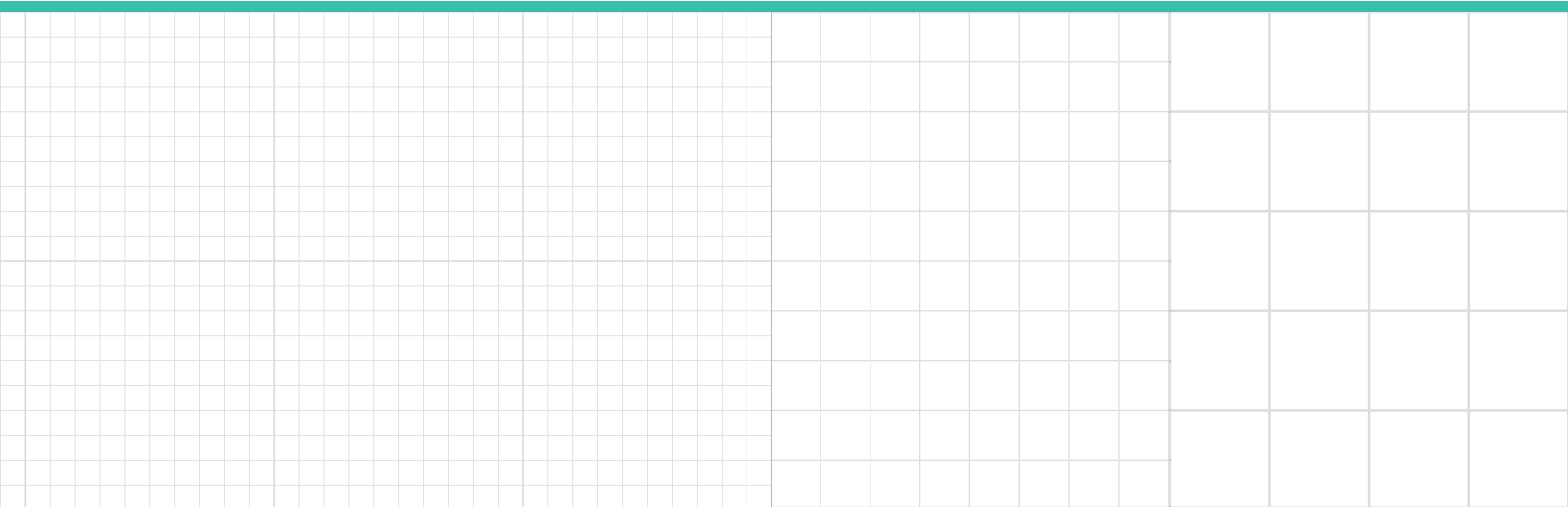


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An Introduction to Pay Equity



In Focus

Pay Equity



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Introduction

Pay equity is a hot button issue for employers in the United States for a number of reasons—reputational concerns are triggered with increasing shareholder demands for transparency; activist investor groups are pushing companies, particularly in the financial services and technology industries, to disclose gender pay data; and, in the wake of pay equity in the news, employees are asking more questions about the issue.

Compounding the pressure, the gender pay gap also can impact talent acquisition. A recent Glassdoor survey found that 67% of U.S. employees say they would not apply for jobs at employers where they believe a gender pay gap exists. The impact is magnified when looking at millennials. Approximately 80% of millennials, as noted in the Glassdoor survey, say they would not even apply for a job if they believed the company had a gender pay gap, which drives home the point that focusing on equality is, among other things, essential for a positive employer brand in the U.S. market.

Federal Updates

Federal Statutes

There are two federal laws in the U.S. (the Equal Pay Act (EPA) and Title VII of the Civil Rights Act of 1964) that forbid employers from discriminating in pay and benefits based on gender. The EPA requires that men and women be given equal pay for equal work in the same establishment. The jobs need not be identical, but they must be “substantially equal.” The EPA places a significant burden on plaintiffs to show that they are paid less because of their gender, and the law allows employers several affirmative defenses (that the difference is based on seniority, that it's based on merit, that it “measures earnings by quantity or quality of production,” or that it's based on “any other factor other than sex.”).

The Paycheck Fairness Act is legislation that would add procedural protections to the EPA. Among other things, the legislation would shift the burden to employers to demonstrate that wage differentials are based on factors other than gender and would ban retaliation against workers who inquire about their employers' wage practices or disclose their own wages. The bill (H.R.1869) has been reintroduced in Congress multiple times but has not advanced.

Federal Agencies

In August 2017, the federal Office of Management and Budget (OMB) halted the planned EEO-1 compensation data reporting requirement pending further review. Under the Obama administration, the federal Equal Employment Opportunity Commission (EEOC), which is the agency responsible for enforcing equal pay obligations under EPA and Title VII, had passed a rule requiring employers with 100 or more employees (and federal contractors with 50 or more employees) to include compensation data in their annual EEO-1 reports. (EEO-1 reports are mandatory forms for covered employers that track race/ethnicity, gender, and job category employment data.) It is unknown at this time whether the federal government will reinstate the EEOC's wage data collection, but it is looking less likely.

Despite the pause in federal gender pay reporting, government enforcement efforts to crack down on systemic discriminatory compensation disparities based on gender are ramping up across different federal agencies. Both the EEOC and the Department of Labor are aggressively pursuing numerous investigations and lawsuits that are accompanied by expansive and burdensome requests for compensation data.

Federal Courts

In recent months, several class actions against high profile companies claiming that female employees are routinely paid less, assigned to lower positions, and promoted less often than similarly qualified male staff have been given the green light to move forward in federal courts.

And, in a landmark decision by the U.S. Court of Appeals for the Ninth Circuit on April 11, 2018, a unanimous panel of judges ruled that wage differences between male and female employees based on “prior salary alone or in combination with other factors” violates the EPA. In its ruling in *Rizo v. Yovino*, the court clarified that an employee's prior salary does not meet EPA's affirmative defense that pay inequality is due to “any other factor than sex.” The court concluded that it is “inconceivable that Congress, in an Act the primary purpose of which was to eliminate long-existing ‘endemic’ sex-based wage disparities, would create an exception for basing new hires' salaries on those very disparities.”

The Ninth Circuit has jurisdiction over Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington. In its decision, the court cited cases from the Second Circuit (covering federal claims arising in New York, Connecticut, and Vermont), Sixth Circuit (Ohio, Kentucky, Tennessee, and Michigan), Tenth Circuit (Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming), and Eleventh Circuit (Florida, Georgia, and Alabama) all as interpreting the “factor-other-than-sex” exception in a similar manner. Consequently, in those jurisdictions, the *Rizo* decision makes it more difficult for employers to justify pay differentials and defend pay equity claims. It also underscores the importance of reviewing how (and whether) past salary should be used in organizations to negotiate or determine salaries.

State Updates

Salary History Bans

The Ninth Circuit decision follows a wave of new state and local regulations banning the use of prior salary or salary history in setting pay. California, Connecticut, Delaware, Massachusetts, Oregon, Puerto Rico, Vermont, San Francisco, New York City, and Philadelphia have recently passed legislation making it unlawful to inquire about prospective employees' salary history. Vermont's new salary history ban is effective on July 1, 2018, while Connecticut's ban of salary history use is effective on Jan. 1, 2019. Each

state and local law has its own twist. For instance, California's ban applies to employers and their “agents” and requires employers to provide the pay scale for a position to an applicant upon reasonable request. New York City's ban includes substantial penalties: up to \$125,000 for an unintentional violation and up to \$250,000 for a willful, wanton, or malicious act; in addition, successful employees are entitled to all remedies available under the New York City Human Rights Law, including back pay, reinstatement, compensatory damages, attorneys' fees, and uncapped punitive damages.

In “no ask” jurisdictions, it is recommended that employers:

- remove all salary questions from hiring forms (including job applications, candidate questionnaires, and background check forms);
- update interviewing and negotiating policies and procedures; and
- train recruiters hiring managers, and interviewers regarding the importance of ensuring that job candidates are not pressured (even indirectly) to disclose salary history.

Amendments to State Equal Pay Laws

Running parallel to efforts to remove individual salary history from salary negotiations, several states have amended their equal pay laws to supplement and exceed EPA. The laws range from lowering the bar for equal pay lawsuits by fundamentally altering how equal pay claims are analyzed in court to anti-pay secrecy requirements to banning questions about salary history. For example, Massachusetts has one of the most expansive equal pay laws in the country. The law not only prevents employers from firing employees for discussing their compensation with coworkers, it also prohibits employers from asking applicants about their salary history to prevent employees from being continually underpaid. In addition, the law provides incentives for companies to conduct salary reviews to detect any disparities.

The California Fair Pay Act promotes pay transparency (as employers may not prohibit employees from disclosing or discussing their own wages or the wages of others), expands the comparison standard from employees performing “equal work” to “substantially similar work,” and increases coverage of the law to require comparing employees across the entire state rather than at an employer's single work location. Employers are required to justify pay differentials, and there are limits to the factors that employers can use in their defense.

Maryland's Equal Pay for Equal Work Act is significant in that it reaches beyond just pay. In addition to promoting pay transparency, this law prohibits employers from “providing less favorable employment

opportunities” based on sex or gender identity (e.g., “mommy tracking”), and prohibits unequal pay for work of “comparable character.”

The New York Achieve Pay Equity Act increases coverage to require comparing employees across the same “geographic region” rather than at an employer's single work location, promotes pay transparency, and increases damages that may be awarded.

The Bottom Line

In the U.S., in response to investor and employee pressure, new laws and regulations, and agency actions, employers are taking proactive measures to evaluate their pay practices and ensure they maintain competitive advantage by providing fair and equal pay. Further, employers are well-advised to work with counsel to conduct periodic internal pay audits to proactively address any unexplained wage disparities. When conducting an audit, partnering with legal counsel is recommended to maximize confidentiality by establishing and maintaining an attorney-client privilege protocol.

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