TRENDING EQUAL PAY ISSUES & EMPLOYER CONSIDERATIONS

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I. INTRODUCTION

Although it has been more than 50 years since Congress passed the federal Equal Pay Act ("EPA") of 1963 and Title VII of the Civil Rights Act of 1964 to outlaw pay discrimination based on sex, the subject of wage inequality remains a contentious topic.

Beyond the protections provided and enforced under the federal EPA—which prohibits employers from paying women lower wages than men for equal work on jobs requiring the same skill, effort, and responsibility—many states have passed more stringent equal pay laws that increase the burden on employers to justify pay disparities between men and women, as well as minorities. These laws generally fall within three categories: laws defining when equal pay is required and what is comparable (or similar) work; salary-history bans that prohibit employers from inquiring about and/or limiting reliance on prior pay in setting starting pay; and pay transparency laws, making it unlawful for employers to prohibit their employees from—or punish their employees for—discussing or inquiring about wages.[2]

Within the evolving legal landscape on equal pay, this article addresses common issues and practices applicable to employers for (1) determining comparator employees, (2) setting starting pay, and (3) considering whether and how to perform a pay-equity analysis. To the extent there is overlap in the federal and California standards, this discussion may apply more broadly.

II. COMPETING LEGAL STANDARDS

A. Federal law

To prevail on an EPA claim, a plaintiff must prove that she (or he) received unequal pay for performing a job that requires equal skill, effort, and responsibility, and which is performed under equal working conditions to that of a male (or female) comparator's more highly compensated position.[3] In assessing whether two jobs are equal under the federal standard,

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[2] For additional discussion on these laws, *see* Erin Connell & Kathryn G. Mantoan, *The Evolving Landscape of Pay Equity Here and Abroad*, April 2019 (on file with author) (providing further details on California law and an overview of New York, Massachusetts, New Jersey, Oregon, and Washington equal pay laws).

[3] 29 U.S.C. § 206(d)(1) (2012).

courts apply a "substantially equal" standard.[4] To make this determination, courts consider whether two positions share a "common core of tasks," rather than looking superficially at job titles or descriptions.[5] Employers can defeat an EPA claim by showing that pay disparities are based on seniority, merit, quantity or quality of production, or "a factor other than sex."[6] If the employer proves one of these affirmative defenses, the burden then shifts back to the employee to show that the employer's proffered reasons for the wage difference are a pretext for discrimination. Title VII similarly makes it illegal to discriminate based on sex in pay and benefits.[7]

Federal law generally does not impose a strict prohibition against the use of prior salary. However, circuit court caselaw is in flux regarding the appropriate use of prior salary to explain wage differentials. In a historic ruling last year, the Ninth Circuit held that prior salary can no longer be used to justify a wage differential between male and female employees. *See Rizo v. Yovino*, 887 F.3d 453 (9th Cir. 2018) (ruling that focused on the EPA but was arguably applicable to Title VII as well). The Supreme Court has since vacated *Rizo* on a procedural issue, leaving the issue as open for interpretation once again. However, state-law salary bans—including California's—are fast making the issue a moot point.

B. California law

California's Fair Pay Act ("FPA"), effective January 1, 2016, amended Labor Code section 1197.5 to include more employee-friendly provisions.[8] Modeled after the federal Paycheck Fairness Act—which has been repeatedly introduced but never passed in Congress for more than 20 years—California's FPA now provides one of the nation's strongest equal pay protections.

An important aspect of the new law is that it modifies the standard for identifying comparators from "equal pay for equal work" (which remains the standard under the federal EPA) to "equal pay for substantially similar work" based on a composite of the employee's skill, effort, and responsibility, performed under similar working conditions. Although reference to a "composite" of factors does not appear in other state or federal equal pay laws, the language derives from federal case law interpreting both the federal EPA and Title VII, as well as from the

[4] *Brennan v. City Stores, Inc.*, 479 F.2d 235, 238 (5th Cir. 1973); *Waters v. Turner, Wood and Smith Ins. Agency, Inc.*, 874 F.2d 797, 799 (11th Cir. 1989); *EEOC v. Madison Community Unit School Dist.,* 818 F.2d 577, 582 (7th Cir. 1987).

[5] *Merillat v. Metal Spinners, Inc.*, 470 F.3d 685, 695 (7th Cir. 2006).

[6] 29 U.S.C. § 206(d)(1).

[7] 42 U.S.C. § 2000e, et seq. (2012).

[8] More information on the enacted bill, S.B. 358, and its legislative analysis, can be found at: http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160SB358.

EEOC's guidance on compensation discrimination from 2000.[9] California also eliminated the federal requirement for comparisons within the "same establishment."

California also modified the employer burden. If a plaintiff establishes that groups of employees are performing "substantially similar work" under the above definition, employers must demonstrate that unequal pay is based on certain factors, including a "bona fide factor other than sex," that is reasonably applied and accounts for the entire pay difference. Notably, the new law fails to define "reasonable" and it places the burden on the employer to demonstrate 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 plaintiff to revive the claim by demonstrating that an alternative business practice exists that would serve the same business purpose without producing the wage differential.

California law prohibits employers from seeking or relying on prior pay in setting starting pay, unless the applicant volunteers it. Pursuant to Labor Code section 432.3(e), employers cannot seek salary history, including "compensation and benefits," of an applicant or rely on salary history. Even if the applicant volunteers his or her prior salary, however, Section 1197.5 prohibits employers from relying on prior salary to justify any disparity in compensation based on sex, race, or ethnicity[10].

Finally, California law includes a number of pay transparency provisions, making it unlawful for an employer to "prohibit an employee from disclosing the employee's own wages, discussing the wages of others, inquiring about another employee's wages, or aiding or encouraging any other employee to exercise his or her rights under this section[,]" or to retaliate against an employee for such discussions. And while California does not impose an obligation for employers to disclose the wages of others in response to an *employee* inquiry,[11] the law does require employers to provide "the pay scale for a position" if an *applicant* makes a "reasonable request" for it.[12]

III. GUIDANCE FROM CALIFORNIA'S PAY EQUITY TASK FORCE

Following enactment of California's FPA, the California Commission on the Status of Women and Girls launched the Pay Equity Task Force in 2016, as a statewide, multi-stakeholder effort to engage diverse interests and facilitate meaningful discussion on recent legislative

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[9] U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, COMPLIANCE MANUAL § 10 (Dec. 5, 2000), available at https://www.eeoc.gov/policy/docs/compensation.html.

[10] This provision of Section 1197.5 has been amended several times. Up until January 1, 2017, the EPA did not impose any explicit limitation on reliance on prior pay to explain pay disparities. Cal. Lab. Code 1197.5 (1985). Beginning January 1, 2017, the statute provided that "prior salary shall not, *by itself,* justify any disparity in compensation." Stats.2016, c.856 (A.B.1676), § 2 (emphasis added). As of January 1, 2019, the EPA provides that "prior salary shall not justify *any* disparity in compensation." *See* Stats.2018, c.127 (A.B.2282), § 2 (codified as amended at Cal. Lab. Code § 1197.5(a)(4)) (emphasis added).

[11] Cal. Labor Code § 1197.5(k)(1)

[12] *Id.* § 432.3(c).

revisions to California law.[13] To address some of the vague and ambiguous language in California's FPA, the Task Force endeavored to develop broadly applicable and practical materials intended to shed light on the FPA, including the following tools to guide employers on (1) the process of identifying appropriate comparators, (2) setting starting pay, and (3) considering a pay-equity analysis.

A. Step-by-Step Wage Rate Evaluation Template for Employers

While determining whether employees are performing "substantially similar work" is a nuanced and employer- and position-specific process, the Task Force recommends that employers focus on the "overall job content and actual duties performed" to begin this assessment.[14] Employers are also encouraged to begin by "group[ing] together those positions that require the same skill, effort and responsibility (when viewed as a composite) based on function (e.g., HR, Legal, Marketing, etc.) and role from entry level to VP (e.g., assistant, director, vice president)."

However, this comparison is only a starting point, and the Task Force further suggests that employers ask the following questions to ensure accuracy in grouping positions:

- "Is the position fungible? Can you move someone from one position to another?"
- "Does this position involve the same depth, or breadth of scope? Does the role require the same skill, effort and responsibility?"
- Is "relying on 'job family' … consistent with whether the job requires the same skill, effort, and responsibility when viewed as a composite and performed under similar working conditions"?

In developing this tool, the Task Force reviewed a broad spectrum of federal authority and provides illustrative comparisons and examples, as referenced in endnotes throughout. It appears this approach for evaluating proper comparators is consistent with the approach dictated by Title VII, which may serve as a source of instructive precedent as courts begin to apply the new California law.

The Task Force includes specific benchmarks for identifying comparators as follows:

- "Skill is measured by factors such as the experience, ability, education, and training required to perform a job."

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[13] Further details on the Task Force, including approved materials and a list of its membership (including employee- and employer-advocates, experts, policymakers, state legislators, the California Labor Commissioner, and the Director of the California Department of Fair Employment and Housing) are available at https://women.ca.gov/californiapayequity/.

[14] The Task Force's "Step-by-Step Wage Rate Evaluation Template for Employers" is available at: https://women.ca.gov/californiapayequity/employers-resources/step-by-step-job-evaluation-template/.

- "Effort is the amount of physical or mental exertion needed to perform a job. Effort may be exerted by two employees in a different way, but may still be similar."

- "Responsibility is the degree of accountability required in performing a job."

Finally, the Task Force provides guidance and examples related to assessing appropriate affirmative defenses under California law, including a discussion on the validity of "a seniority system, a merit system, a system that measures earning by quantity or quality of production" and other bona fide factors that are "consistent with a business necessity and is job related." In discussing these "other bona fide factors," the Task Force identifies "education, experience, certifications, ability, seniority, performance, skill, training, and geography" as a non-exhaustive list.

B. Guidance for Employers on Starting Compensation

The Task Force also provides an overview of California law pursuant to California's prohibition on requesting prior salary information under Labor Code section 432.3(e) and sets forth "suggested practices for employers in setting starting salaries."[15] Noting that each organization is different and there is no single approach, the Task Force lists several factors employers may consider in developing a compensation philosophy to ensure employees are paid in a fair and nondiscriminatory manner. These considerations include rewarding employees for job performance and their contribution to the company, as well as gearing compensation toward employee-retention and motivation, market competitiveness, budget, and profitability.

The Task Force also includes recommendations for how employers may communicate with prospective employees without asking for prior salary information, including:

- "Ask the applicant, 'What are your salary expectations?' and ask why they believe their qualifications are in line with their expectations."

- "If the applicant mentions that he or she would be forfeiting deferred equity by leaving their current job, focus back on the applicant's expectations: 'What does that mean in terms of your compensation expectations? What will it take for you to take a job at this organization?'"

- "Be ready to discuss your pay scale (i.e. salary range) for the specific position for which you are considering the applicant and for which the applicant is qualified, whether that be an internal or external applicant. . . . If you do not already have a pay scale for the job, be prepared to provide the range of what you are prepared to pay for the position. If there is only one static rate as opposed to a range, provide the rate."

[15] The Task Force's "Guidance for Employers on Starting Compensation" is available at https://women.ca.gov/californiapayequity/employers-resources/guidance-for-employers-on-starting-compensation/.

- "Be prepared to discuss your compensation philosophy, which may help guide the applicant in setting their salary expectations and explain their basis for them."

- "Be able to clearly define the 'total' compensation being offered, especially if there are performance-based bonuses or rewards. This should also include a discussion of what other non-financial incentives the organization offers."

C. Considerations in Performing a Pay-Equity Analysis

To comply with federal and California law, employers should consider performing a pay-equity analysis—if they are not doing so already—to evaluate employee jobs and compare pay among comparators. Typically, this involves retaining legal counsel, and possibly a labor statistician to work at counsel's direction, to conduct a privileged assessment.[16] Counsel should be educated on the varying forms a pay-equity evaluation can take, as selecting the appropriate method will be an employer- and fact-specific inquiry.

The first step in performing a pay-equity analysis is to understand the employer's compensation structure. As mentioned above, the Task Force explains this as developing a "compensation philosophy" or guidelines to document company values, critical new hire factors, and differing forms of compensation to ensure "consistency in setting pay" and to "later demonstrate legitimate reasons for differences if necessary."[17]

Second, it is critical for employers to ensure they are collecting accurate and appropriate data.[18] The Task Force describes this process as "collecting information about employees, jobs, business/company practices, market data, and salaries, though the size of [an employer's] business may impact what [it] collect[s] and what makes sense to collect."

While the type of data necessary to conduct an accurate pay-equity analysis will necessarily vary by industry, size of employee population, and company pay structure, the Task Force offers a chart (included as Exhibit A) summarizing infrastructure and data that would be useful in conducting a pay-equity analysis. Again, this is not a one-size-fits all approach and the chart below is not intended to be an exclusive list. Experienced professionals may offer additional employer-specific insight.

Finally, because employee populations are constantly changing, and statistical models are unlikely to capture the nuanced factors specific to individual companies, employers are discouraged from relying on statistical models as the sole means for analyzing pay equity.

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[16] For more information on pay audits and maintaining attorney-client privilege, *see* Erin Connell & Kathryn G. Mantoan, *Mind the Gap: Pay Audits, Pay Transparency, and the Public Disclosure of Pay Data*, ABA J. OF LAB. & EMP. LAW, Vol. 33, No. 1, at *2 (Fall 2017), https://www.americanbar.org/content/dam/aba/publications/aba_journal_of_labor_employment_law/v33/Number1/JLEL%2033-1_Combined%20PDF.authcheckdam.pdf.

[17] *See* Task Force, "Guidance for Employers," *supra* note 12.

[18] The Task Force's "Tips for Compliance With The California Fair Pay Act" is available at: https://women.ca.gov/californiapayequity/employers-resources/tips-for-compliance-with-ca-fair-pay-act/.

Further action should involve deeper investigation into areas of perceived disparity, which may include interviews with managers, human resources, or other compensation personnel with knowledge of the company and its compensation framework.

IV. CONCLUSION

As state equal pay laws—including California's—continue to reflect a shifting public sentiment and out-pace the federal standards, employers are encouraged to continue reviewing their hiring and compensation practices with the above recommendations in mind. Compliance, with the myriad of overlapping federal and state equal pay laws, often requires individualized inquiry based on nuanced factors specific to employee populations and industries. Accordingly, employers are best-served by developing thoughtful and long-term strategies, typically in conjunction with counsel and other professionals.

Exhibit A

Source: California Equal Pay Task Force, Tips for Compliance with the California Fair Pay Act, *available at* https://women.ca.gov/californiapayequity/employers-resources/tips-for-compliance-with-ca-fair-pay-act/

Function	Description	Pay Equity Data			
		Small[A]		Med/Large[A]	
		Basic	Desirable	Basic	Desirable
Human Resources Management System (HRMS)	Time in Company	•		•	
	Time in Position	•		•	
	Pay Rate History (including Starting Salary)	•		•	
	Gender	•		•	
	Race/Ethnisity[B]	•		•	
	Employee Job History, Management Level History, Location History, Compensation History		•	•	
	Geographic Salary Ranges reflecting external		•	•	
	Team Size (total team size and direct)		•		•
Payroll Time and Attendance	Payroll Data	•		•	
	Earnings	•		•	
	Hours Worked	•		•	
Talent Management	Talent assessment data		•	•	
	Accomplishments; Performance against		•	•	
	Goals/Objectives		•		•
	Long-Term Career Potential (High Potential or Key Role); Training & Development Positions;		•		•
	Employee Profiles (internal/external employment history, experience, institutional)		•		•
	Competency assessments		•		•
	Succession planning		•		•
	Scope of Role—Budget P&L Responsibility, Complexity of channels, geographies		•		•
Recruiting/Talent Attraction	Job Profiles/Descriptions	•		•	
	Candidate Resumes		•	•	
External Market Data	Salary Survey analysis		•		•
	Salary Surveys with benchmark jobs		•		•
Company Practices**	Definition/Statement of Compensation Strategy (Pay for Performance; Pay for		•		•
	Definition of Recruiting Practices (Prior Salary; Blind Resume; Documentation of		•		•
Internal Job Structure Data	Job Functions/Job Families		•		•
	Career leveling matrix indicated breadth and		•		•