Pay Equity and Transparency: Legislative Efforts to “Level the Playing Field”

ACC National Capital Region
The Current “State of Pay” at the Federal Level
Federal Protections

• Although reforms have been proposed, there have been no new statutes addressing pay equality or discrimination at the federal level since 2009.

• Claims available through:
  - Equal Pay Act of 1963
  - Title VII of the Civil Rights Act of 1964
  - Age Discrimination in Employment Act of 1967
  - Americans with Disabilities Act (1990)
  - Lilly Ledbetter Fair Pay Act (2009)

• Certain recent decisions, however, have tracked some of the developments at the state and local level.
Reduced Federal Enforcement?

- No indication that EEOC will lessen the agency’s focus on discrimination related to pay
- As we will discuss, pay equity is still a priority at the OFCCP
- However, other signs indicate the federal government has “stepped away” from actively monitoring pay equity
  - Obama-era rule required EEO-1 reports to include pay data starting in 2017
  - Trump administration announced an immediate and indefinite stay of the rule on August 29, 2017
  - Litigation pending challenging the stay
OFCCP Continues To Focus On Pay Equity

• Sources of obligations:
  – Part of non-discrimination obligations addressed in enforcement audits
  – Relatively new pay transparency requirements, and prohibitions on “gag order” policies and retaliation

• Pay equity a major focus of most OFCCP compliance audits, particularly in the technology, finance and service industries

• Directive 307 gives OFCCP the flexibility to employ almost any statistical tool or approach

• Although less funding is available, focus unlikely to change

• Hopefully, additional or new guidance on the standards will be provided

• Unclear whether DOL or DOJ will be willing to pursue enforcement proceedings
Practice Pointers: Navigating OFCCP Pay Equity Audits

• Make certain that you identify and document all factors considered in setting all forms of pay

• For each factor, you need to be able to:
  – Prove that it was considered for all employees in the job group;
  – Prove how it was applied; and
  – Present (contemporaneous) data or other evidence that backs it up

• Make certain that all categories of pay and all relevant pay factors are populated, accessible, accurate and secure within your systems

• Identify appropriate pay analysis groups, with a heavy focus on the factors, pay ranges and types of pay involved in forming them
# Managing Data
(And Making Your Life a Lot Easier)

<table>
<thead>
<tr>
<th>Factor</th>
<th>Field Example</th>
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| Degree                | 1 = Less than BA/BS  
                          2 = BA/BS  
                          3 = MBA or other Masters  
                          4 = PhD                                    |
| Years of Prior Experience | Number of Years (potentially with a cap)                                      |
| Area of specialty     | For customer-facing professionals, identify relevant expertise or lines of service |
| Performance           | Convert evaluation ratings into numbers                                        |
| Market rate           | Have a rate or range associated with relevant positions                        |
| Seniority             | Date of hire (or date or re-hire + years of prior experience)                  |
| Work location         | Specify assigned work location or region                                       |
Practice Pointers: Navigating OFCCP Pay Equity Audits

• Pre-audits should:
  • Be conducted on a privileged basis
  • Slice and dice employees into pay groups that would be considered by OFCCP, EEOC or the Courts
  • Analyze and isolate all factors that impact pay
  • Analyze all forms of pay (base and variable)
  • Use multiple regression analysis methodologies employed by OFCCP, EEOC and Courts
  • Be rigorous and address not only pay inequity, but its causes

• Fix problems before OFCCP does
States and Localities Step Into the Breech
Protections Through the Employment Life-Cycle

No Disclosures in Hiring

No Retaliation

Pay Discrimination Claims

No Pay Secrecy

Pay Audits
Prohibition on Salary History Inquiries
State of State and Local Laws

- OR: From Jan 19.
- CA: From Jan 18.
- San Francisco also set to enact similar legislation.
- MA: From July 18.
- DE: From Dec 17.
- New York City: City wide law
- Pittsburgh city law. Philadelphia City current legal challenge but law enacted.
- Columbus, OH: Govt workers only.
- New Orleans: City wide law.
- Puerto Rico: From March 18.

https://www.proskauerpractice.com/illegal-employers-ask-salary-history/
Common Features of the Laws (With Exceptions)

• Cannot ask applicants about their “salary history”

• Cannot rely on salary history in determining whether to make offer or what salary to offer, unless salary information offered voluntarily and without prompting

• Cannot screen out applicant because of their salary history

• Cannot reject applicants because they refuse to disclose salary history

• Can verify salary information after offer made, typically only with written authorization

• Can discuss salary expectations (without asking about salary history)

• “Employer” defined broadly to include agents
# State and Local Laws That Have Been Enacted

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Effective Date</th>
<th>Unique Provisions</th>
</tr>
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<tbody>
<tr>
<td>Albany County</td>
<td>12/12/17</td>
<td>None</td>
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</table>
| California           | 1/1/18         | May not use prior salary to justify compensation disparities  
Must provide pay scale on request                                                                 |
| Delaware             | 12/14/17       | Liable for acts of agent                                                                                                                        |
| Massachusetts        | 7/1/18         | May only seek confirmation of salary with written consent after an offer has been made                                                          |
| New York City        | 10/31/17       | See separate slide                                                                                                                              |
| Oregon               | 10/6/17 (phased) | Excludes independent contractors  
Does not have exception for voluntary disclosures                                               |
| Puerto Rico          | 3/8/17         | None                                                                                                                                              |
| San Francisco        | 7/1/18         | Can release salary history to prospective employer without written consent                                                                  |
The Ban in the Big Apple

• Amendment to the NYC Human Rights Law
• Applies to applicants who live in NYC or interview in NYC, even if they are interviewing for a position outside of NYC
• Includes many of the same prohibitions as other laws
• Important carve outs:
  – Can consider and verify salary if disclosed voluntarily
  – May engage in discussions regarding salary expectations, including forfeiture of unvested equity or deferred compensation
  – Does not apply to current employees
  – Does not apply to acquisition situations if all employees are being hired
• Applies to agents and independent contractors
Compliance Challenges

• Development of nationwide compliance program
• Compliance in:
  – Acquisition and merger situations
  – Employee transfers and promotions
• Handling of voluntary disclosures by applicants
  – How/whether to document
  – Use of consent forms
  – How/whether to use the information
• Compliance by external recruiters and other agents
• Application to independent contractors
• Sea-change for recruiters and hiring managers
Enhanced Equal Pay Act
Provisions
Unique Features of Enhanced State and Local Laws

- Relaxed comparator standards
- Relaxed geographic standards
- Stricter application of exceptions
- Presumption of discrimination if prior salary used
- Pay equity audits may provide safe harbor
- Additional categories of damages
California Fair Pay Law

- Amendment effective January 1, 2016
- Broader prohibitions of gender wage differentials
  - New definition of “substantially similar work”
  - No longer needs to be compared in the “same establishment”
- The new law tightens employer defenses
  - Wage differential must be based on seniority system, merit system, quantity or quality of production, or bona fide factor other than sex
  - Factors must be applied reasonably and account for entire wage differential
Maryland Equal Pay for Equal Work Act

- Amendment effective **October 1, 2016**
- Extends prohibitions to gender identity
- Expands the definition of “wage”
- Expands the definition of “same establishment” to comparable employees who work in the same county
- Expands prohibitions beyond pay, such as:
  - Assigning less favorable career track or position;
  - Failing to provide information about opportunities for promotions or advancement; and
  - Limiting or depriving employees of employment opportunities
Additional Protections

• No “gag orders” on compensation disclosures and discussions, except in limited circumstances

• No retaliation against employees who disclose pay or complain about pay

• Paycheck transparency and disclosure obligations

• Potential impact of #metoo provisions, such as prohibitions on confidential settlement agreements and on arbitration of claims and federal tax reform provisions
Conducting Effective Pay Equity and Compliance Audits
Goals of a Pay Equity and Compliance Audit

• Ensure internal fairness of pay rates - positive impact on staff motivation and retention

• Obtain recommendations for improving compensation practices/policies to ensure legal compliance and mitigate legal risk

• Gain a deeper understanding of factors driving compensation decisions and how they are documented

• Identify and address pitfalls in systems, if any

• Identify any pay disparities and justifications for them and/or take appropriate remedial action

• Ensure compliance with new salary history restrictions, pay transparency obligations and anti-retaliation provisions
General Audit Timetable

• Phase 1
  – Information gathering and interviews of key stakeholders
  – Preliminary statistical analysis (base pay analysis using mean/median)
  – Legal review and assessment including identification of areas for further inquiry

• Phase 2
  – Conduct multiple regression and other statistical analyses (e.g., outliers/”other” influential drivers, cohort analysis)
  – May involve additional information gathering/interviews

• Phase 3
  – Implementation of recommendations
  – Adjustment of policies, position descriptions, salary bands and/or training
Best Practices

• Develop a communication protocol at the outset
  – Communicate to all parties involved
  – Limit the number of internal stakeholders to avoid inadvertent disclosures

• Third-party statistical expert should be retained by counsel and report directly to counsel

• Audit should be conducted at the direction of counsel
  – Retaining outside counsel maximizes the likelihood that results will be protected by applicable privileges
  – Dual function of in-house counsel may result in disclosure where audit exercise is determined to be primarily for “business” purposes

• For the drafts and analyses, all documents should explicitly refer to the request for legal advice and be marked “privileged and confidential” and “attorney work product”
Additional Steps

• “Audit” not limited to numbers – must develop procedures to monitor emerging state and local compliance obligations and to implement the changes
  – Consider national compliance programs
  – Training is critical, particularly because some of the obligations are a sea-change for recruiters and hiring managers

• Gain (or re-gain) control over compensation process
  – Develop clear job descriptions and levels or bands associated with them
  – Require levels of approval to deviate from them
  – Articulate (and preserve) valid justifications for deviations
  – If exceptions are becoming the norm, restructuring is probably necessary

• What is the perfect world? A range with a grid that sets compensation based on discrete factors
A Special Note About Retaliation

• The challenges:
  – Retaliation (or at least the perception of it) happens
  – Managers often are not given the tools to handle complainants and their concerns, leading to stray comments
  – Employees (legitimately or not) fear coming forward
  – You WANT to hear their concerns and address them

• Unlock your anti-retaliation policy from the end of your EEO and harassment policies

• Give retaliation equal play in training

• Handle complainants with care – everyone is watching

• In investigating and defending retaliation claims, you do not want to win the war, but lose the battle
Key Takeaways

• For now, pay equity reforms likely to be limited to state and local level

• Significant amount of activity that must be monitored and incorporated into your compliance strategy

• Developing a national compliance model is feasible, but requires significant coordination, policy development and training

• Pay equity and compliance audits are particularly critical given these new laws and the state of claims/litigation generally

• Anti-retaliation policies and training should be a key component of your compliance strategies
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