

Spotlight on the gender pay gap in the US

GENDER PAY GAP SERIES - NO. 3

In the US, pay equity is a hot button issue for employers 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 dominating the new cycle, employees are asking more questions about the issue.

Adding to the pressure is the fact that the gender pay gap can also affect talent acquisition. A recent Glassdoor survey found that 67% of US employees say they would not apply for jobs at employers where they believe a gender pay gap exists. Moreover, the impact is magnified when looking at millennials. About 80% of millennials say they would not even apply for a job if they believed the company had a gender pay gap, driving home the message that focusing on equality is essential for a positive employer brand in the US market.

Federal updates

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 EEOC 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 on the basis of gender are ramping up across different federal agencies. Both the US Equal Employment Opportunity Commission (EEOC), the agency responsible for enforcing equal pay obligations under the federal Equal Pay Act and Title VII of the Civil Rights Act, 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 Ninth Circuit Court of Appeals on 11 April 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 federal Equal Pay Act. The Equal Pay Act requires employers to pay equal wages to men and women who perform jobs that require "substantially equal" skill, effort and responsibility, and that are performed under similar working conditions within the same establishment. To bring a successful claim, the Act places the burden on plaintiffs to show that they are paid less because of their sex, but plaintiffs need not prove any discriminatory intent. The law allows employers to pay men and women differently if the disparity is due to one of four exceptions enumerated in the statute. Employers can permissibly pay workers at different rates if they do so based on seniority, merit, the quantity or quality of the employee's work, or "any other factor other than sex." In *Rizo v. Yovino*, the Court concluded that an employee's prior salary is not a legitimate "factor other than sex," stating 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), 10th Circuit (Colorado, Kansas, New Mexico, Oklahoma, Utah and Wyoming) and 11th Circuit (Florida, Georgia and Alabama) all as interpreting the "factor-other-than-sex" exception in a similar manner. Thus, in those jurisdictions, *Rizo v. Yovino* 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, San Francisco, New York City, Philadelphia, Delaware, Massachusetts and Oregon have all recently passed legislation making it unlawful to inquire about prospective employees' salary history. There are also a number of pending bills in other states. Each new law has its own twist, for instance, California's ban applies to employers and their "agents." California's law also requires employers to provide the pay scale for a position to an applicant upon reasonable request.

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



train recruiting, hiring managers and interviewers regarding the importance of ensuring that candidates are not pressured (even indirectly) to disclose salary history

Amendments to state equal pay laws

Alongside the efforts to remove individual salary history from salary negotiations, several states have amended their equal pay laws to supplement and exceed the federal Equal Pay Act. California, New York, Massachusetts, Oregon, Washington and New Jersey have led the way in passing more onerous pay equity legislation. At a high level, the changes effectively lower the bar for an equal pay lawsuit. As a result, the potential for class action litigation is increasing as more and more states pass robust equal pay laws (and as the national focus on gender inequality in the workplace, whether it's sexual harassment or pay disparity, continues to grow).

The bottom line

In the US, 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 a 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.

Our gender pay gap series

The Baker McKenzie Gender Pay Gap series will be spotlighting gender pay gap regulations in key jurisdictions and exploring the central issues, including how to narrow the gap.

For more on the global picture and how our global network of over 700 labor and employment lawyers are helping clients address this issue see the [Gender Pay Gap and Pay Equity brochure](#).

Next in the series: Equal pay audits: an important diagnostic tool to help close the gender pay gap.

