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Pay Equity
U.S. Women's Soccer Keeps Equal Pay in Play



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Introduction

This summer the U.S. women's soccer team won more than the World Cup—they've had tremendous success in garnering public support in their bid for equal pay. However, beyond the star power of Alex Morgan and Megan Rapinoe, pay equity continues to be a hot button issue for employers in the U.S. for a number of reasons. Reputational concerns are exacerbated 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—perceived or otherwise—is an issue that can affect a company's ability to attract and retain top talent. According to a recent Glassdoor survey, nearly three in five employees (58%) said they would not apply to work at a company where a pay gap exists. The impact intensifies when looking at millennials. In an earlier Glassdoor survey, approximately 80% of millennials say they would not even apply for a job if they believed the company had a gender pay gap. These statistics underscore how focusing on pay equity 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 on the basis of sex. The EPA has been in force since 1963 and it 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." Equal work means work performed under similar working conditions requiring equal measure of skill, effort, and responsibility. The EPA places a significant burden on plaintiffs to show that they are paid less because of their sex, 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 proposed 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 sex and would ban retaliation against workers who inquire about their employers' wage practices or disclose their own wages. The bill (H.R.7) has been reintroduced in Congress multiple times but has not advanced. As federal legislation stalls, efforts at the state and local level have been more successful, creating a patchwork landscape that can be difficult for multistate employers to navigate.

Federal Agencies The Equal Employment Opportunity Commission (EEOC) is the federal agency in charge of enforcing federal equal pay laws. This September the EEOC will begin collecting compensation data as part of its annual employer reporting process.

The EEO-1 is an annual federally mandated survey. It requires all private employers with 100 or more employees and federal contractors with 50 or more employees to report data on race/ethnicity and gender across 10 job categories in their annual EEO-1 filings. In 2016, the Obama administration pushed to expand the reporting requirements

to include wage information. "Collecting data is a critical step in delivering on the promise of equal pay," said then U.S. Secretary of Labor Thomas E. Perez. "Better data will not only help enforcement agencies do their work, but it helps employers to evaluate their own pay practices to prevent pay discrimination in their workplaces."

The EEOC thus revised the form to require employers to submit aggregate W-2 earnings and hours across 12 pay bands for each of the 10 job categories. The Office of Management and Budget (OMB) approved the revisions and the new requirements were scheduled to go into effect for the 2017 reporting cycle, with a March 31, 2018, filing deadline. After the 2016 election, the revised EEO-1 form found itself on the chopping block. In August 2017, OMB initiated a review and immediate stay of the pay data reporting requirements.

In response, the National Women's Law Center sued to reinstate it. Earlier this year, the District Court overturned the stay – requiring employers, again, to disclose employee pay. While the OMB has appealed this decision, the EEOC is on track to begin collecting this detailed race-, ethnicity-, and sex-based pay data through its new reporting portal.

Covered employers now have until September 30, 2019 to provide the EEOC with 2017 and 2018 Component 2 compensation data. In July 2019, the EEOC updated its Component 2 filing site. The site now provides a sample form, instructions, and FAQs to assist employers in submitting employee pay data.

Federal Courts

Litigation Trends Coming on the heels of the #MeToo movement, there has been a dramatic uptick in litigation against top U.S. companies over alleged unequal pay for female employees. High profile cases hit the headlines frequently and several targeted industries include professional sports, professional services organizations and technology companies.

The complaints are often filed on a class basis, alleging that the company systematically against women by paying them less, assigning them to lower positions and promote them less frequently than their male counterparts. For instance, in March 2019, 28 players from the U.S. Women's National Soccer Team filed a proposed class and collective action filed in California federal court against the U.S. Soccer Federation (the organization that governs soccer in the U.S. and runs the country's national teams) accusing the federation of pay discrimination, as well as discrimination related to the players' medical treatment and their working conditions, including the surface they play on during matches. In August 2019, the judge set a May 5, 2020, trial date.

Even if a company is successful in arguing that class certification standards are not met and the plaintiffs are unable to proceed on a class basis, defending against such claims can be incredibly costly, in addition to causing significant business disruption, distraction, and brand reputational harm.

An Update on the Prior Salary Defense 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 federal Equal Pay Act. 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."

In February 2019, the U.S. Supreme Court vacated and remanded Rizo on the basis that the Ninth Circuit improperly counted the vote of Judge Stephen Reinhardt, who died 11 days before the ruling was announced. The Supreme Court explained: "[T]hat practice effectively allowed a deceased judge to exercise the judicial power of the United States after his death. But federal judges are appointed for life, not for eternity." The Supreme Court did not otherwise comment on the substance of the decision. Now, employers in the Ninth Circuit must wait and see whether the Ninth Circuit will issue an opinion on remand that is consistent with Judge Reinhardt's ruling in Rizo.

Notably, the Seventh and Eighth U.S. Circuit Courts of Appeals have refused to adopt a per se rule that would exclude past salary as a "factor other than sex." In contrast, the Second, Tenth, and Eleventh Circuits have held that employers may not rely on salary history alone to support a wage differential.

State Updates

Salary History Bans The Ninth Circuit decision follows a wave of new state and local regulations restricting an employer's ability to inquire about an applicant's prior wages or benefits during the pre-employment process or consider that information when making interview, hiring, or compensation decisions. As of August 2019, 14 states and Puerto Rico have passed legislation prohibiting employers from inquiring into or considering a job applicant's wage or salary history: Alabama, California, Colorado, Connecticut, Delaware, Hawaii, Illinois (effective September 29, 2019), Maine (effective September 17, 2019), Massachusetts, New Jersey (effective January 1, 2020), New York (effective January 6, 2020), Oregon, Puerto Rico, Vermont and Washington. In addition, San Francisco, Kansas City, Mo. (effective October 31, 2019), Albany County, N.Y., New York City, Suffolk County, N.Y., Westchester County, N.Y., Cincinnati, Toledo, Ohio, and Philadelphia (pending litigation) have passed comparable local bans.

Generally employers of all sizes are subject to restrictions; but beyond that, 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. Connecticut's prohibits employers from "direct[ing] a third party" to inquire about a prospective employee's wage and salary history. 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. Under New Jersey's new law, employers face civil penalties of up for $1,000 for a first violation, up to $5,000 for the second violation, and up to $10,000 for each subsequent violation, collectible in a summary proceeding conducted by the New Jersey Commissioner of Labor and Workforce Development.

In "no ask" jurisdictions, it is recommended that employers:

- remove all salary questions from hiring and recruiting forms (including job postings and announcements, applications, candidate questionnaires, and background check forms);
- comply with any applicable posting or notice requirements;
- update screening, interviewing, and negotiating policies and procedures;
- train recruiters, hiring managers, and interviewers regarding the importance of ensuring that job candidates are not pressured (even indirectly) to disclose salary history;
- where necessary, ensure any external third parties such as recruiters, headhunters, and employment agencies are not seeking protected information on employers' behalf; and
- establish a standard procedure for documenting an applicant's voluntary disclosure of salary history information.

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; anti-pay secrecy requirements; banning questions about salary history; or providing safe harbors for employers who conduct equal pay audits. 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. In July 2019, the Act was revised further to expand the scope of the law beyond sex, making it illegal pay someone less based on characteristics including age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, or domestic violence victim status. In addition, the Act was amended to allow employees to be compared even if they do not hold the "same" job. Similar to California, the new law requires only a showing that the employees are engaged in "substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions."

The Bottom Line

In the U.S., in response to soccer stars, 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, statistically significant wage disparities. When conducting an audit, partnering with legal counsel is recommended to maximize confidentiality by establishing and maintaining an attorney-client privilege protocol.