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corpcounsel.com | April 10, 2019

Recognizing and Remediating Gender Pay Equity Issues in the Workplace: Part I

The #MeToo movement has compelled employers to take a harder look at their workplace policies and practices and to ensure appropriate workplace behavior among their employee ranks.

By Brian Murphy & Jonathan Stoler

The #MeToo movement has compelled employers to take a harder look at their workplace policies and practices and to ensure appropriate workplace behavior among their employee ranks. While the specific issue of sexual harassment has garnered the bulk of the headlines, potential pay gaps between men and women are equally deserving of attention and remediation even when, as is often the case, it is simply an inadvertent consequence of a legitimate pay practice. In this three-part series, Brian Murphy and Jonathan Stoler will provide employers with the tools to identify gender inequities in compensation and offer strategies for resolving them prospectively. Part I will focus on the historical context and current legislative landscape informing employer approaches to pay equity concerns. Part II will introduce employers to pay equity audits as a tool for addressing compensation disparities. And Part III will offer employers tips for implementing remediation efforts and adjusting practices to ensure future compliance.

Brian Murphy

Jonathan Stoler

Part I: The Historical and Legislative Context Informing Pay Equity Efforts

Congress enacted the Equal Pay Act of 1963 as an amendment to the Fair Labor Standards Act for the specific purpose of "prohibiting discrimination on account of sex in the payment of wages by employers." The EPA was enacted one year earlier than Title VII of the Civil Rights Act of 1964, perhaps highlighting the gravity with which Congress viewed the issue. Indeed, at the time of the EPA's enactment, Congress expressed that wage differentials depressed wages, prevented the maximum utilization of labor resources, contributed to labor disputes, burdened commerce, and constituted an unfair method of competition. Eradication of the wage gap was described as "a most worthy national policy."

The EPA did not, of course, prohibit all pay differentials among members of the opposite sex. It prohibited differentials among men and women in an "establishment" for "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working

conditions." It also allowed for pay differentials attributable to seniority systems, merits systems, quantity/ quality of production systems, or "any other factor other than sex."

The EPA has dramatically assisted in rectifying the issue. In 1979, the first year for which comparable earnings data is available, the earnings for female full-time wage and salary workers were 62 percent of those for men. As of 2017, the gap has lessened such that women earned 80.5 percent of that earned by men. The differentials vary from this mean from jurisdiction to jurisdiction, industry to industry, job classification to job classification, and across other demographic markers. On the whole, however, federal, state and local governments have resoundingly concluded that the disparity remains too great and legislative efforts have begun with renewed energy.

At the federal level, the Paycheck Fairness Act (PFA) is currently pending before Congress. As currently drafted, the bill would eliminate the allowance for wage differentials based on "any other factor other than sex," and limit the exception to bona fide factors, such as education, training or experience. The bill would also impose greater prohibitions on retaliation and strengthen enforcement mechanisms, among other requirements. Various iterations of the PFA have been introduced, and tabled, in Congress since 1997 and given the current administration, there is mild optimism, at best, that it will be enacted into law. It did, however, pass the House on March 27, by a 242-187 vote largely along party lines.

State governments have thus increasingly joined the fray to bridge

the gaps in federal legislation by resort to a variety of approaches. Some states have sought to strengthen their EPA analogues by adopting a similar approach to the PFA, limiting the potential defenses to pay equity claims. For example, some states have eliminated the concept of "equal work" in favor of "substantially similar" or "comparable" work, or relaxed the "same establishment" requirement to allow for comparisons across a broader swath of locations, such as a county or an entire state.

Other states have approached the matter from a different angle, proposing laws to promote pay transparency by banning discrimination or retaliation against employees who discuss their wages. These states believe that policies which shroud pay practices among a workforce allow pay differentials to perpetuate, if not proliferate. These laws do not go so far as the Gender Pay Reporting regulations in effect in Great Britain or the EEO-1 pay data reporting obligations applicable to certain federal contractors and large employers, but are generally borne from the same principle.

A number of states and local governments have attacked the issue by stemming the influence of historically inequitable pay decisions. These laws prohibit employers from using past salary information, or even inquiring about a new employee's past salary, for purposes of setting a new salary. This approach is premised on the theory that a prior compensation decision may have been infected by discrimination such that using it as a benchmark for future salary decisions perpetuates, even unintentionally, prior discrimination in wages.

Lastly, some states have provided employers with specialized defenses in litigation where they have themselves undertaken efforts to eliminate pay gaps and have made "reasonable progress" toward attaining that goal. These laws allow for an employer to defend against compensatory or punitive damages, for example, or allow for an affirmative defense to liability altogether, where employers have conducted audits designed to identify and resolve pay inequities among their workforces.

Employers, particularly those operating in multiple jurisdictions, are thus faced with navigating a quagmire of existing and potential hurdles. Importantly, these laws do not require that unlawful pay gaps be the result of intentional discrimination. Thus, rather than assuming a reactive posture, employers are best served to engage proactively and take the necessary steps to eliminate any existing pay inequities to effectively immunize themselves from these laws, whatever their form. Part II will examine the utility of pay audits as a tool for meeting this goal.

Brian D. Murphy *and* **Jonathan Stoler** *are partners in the labor & employment practice group at Sheppard, Mullin, Richter & Hampton LLP in New York.*

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