



# PAY EQUITY

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# GLOBAL PAY EQUITY LANDSCAPE

## Increasing Focus on Pay Equity

- Transparency – media reports, anti-secrecy laws, public reporting
- Shareholder inquiries
- Litigation
- Legislation

# FEDERAL EQUAL PAY ACT (1963)

No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.

# STATE AND LOCAL LEGISLATIVE DEVELOPMENTS

Expansion of pay equity laws as compared to Federal EPA law

- Basis of geographic comparison
- Basis of job comparison
- Additional protected classes
- Limitation of factors that can justify differences
- Enhanced damages
- Longer statutes of limitations
- Opt-out class actions
- Government contractor provisions, e.g., reporting, certification

# STATE AND LOCAL LEGISLATIVE DEVELOPMENTS

## Related Laws

- Anti-secrecy laws
- Salary history inquiry bans
- Prohibitions on limiting career advancement opportunities based on gender
- Preemption laws (MI, WI)

# LITIGATION – MULTIPLE THEORIES OF LIABILITY

- EPA claims – no proof of discriminatory intent required
  - Individual EPA cases - based on specific comparators (including successors or predecessors)
  - Class and collective EPA cases comparing employees in same/comparable jobs
- Class cases based on statistical analyses – disparate treatment (intentional “pattern and practice” discrimination) and disparate impact (unintentional discrimination)

# LITIGATION EXAMPLES

## *Ewald v. Royal Norwegian Embassy* (D. Minn. 2014)

When prior salary is asserted as a defense . . . courts must carefully examine the record to ensure that an employer does not rely on the prohibited 'market force theory' to justify lower wages for female employees simply because the market might bear such wages . . . reference to the lower-paid employee's education, experience, or other qualifications is necessary to determine whether the reliance on prior salary for the higher-paid comparator is based on a factor other than sex. . .

Justifying the comparator's higher salary does not justify the plaintiff's lower salary; it is the differential that must be explained.

The Embassy failed to determine Davidson's marketplace value. Even more importantly, it failed to determine Ewald's marketplace value. Rather, Rognlie and Berg testified that one reason that Davidson was offered more money was that he had a higher salary from his previous job

# LITIGATION EXAMPLES

*Ellis v. Google, LLC* (Calif. Superior Court, San Francisco County)

Plaintiffs claim:

- Google assigns women to lower salary bands jobs that are compensated less, promotes women more slowly, and pays women less for substantially similar work.
- Google's use of prior compensation to set starting compensation perpetuates the historic pay disparity between men and women.
- Google channels women into lower paying jobs, e.g., Operations jobs vs. Engineer jobs

Plaintiffs point to OFCCP statistical analysis – 6 to 7 standard deviation difference in every job classification

# LITIGATION EXAMPLES

*Rizo v. Yovino* (9<sup>th</sup> Cir. 4/9/18)

- “Prior to this decision, our law was unclear whether an employer could consider prior salary, either alone or in combination with other factors, when setting its employees’ salaries . . . we now hold that prior salary alone or in combination with other factors cannot justify a wage differential. To hold otherwise—to allow employers to capitalize on the persistence of the wage gap and perpetuate that gap ad infinitum—would be contrary to the text and history of the Equal Pay Act, and would vitiate the very purpose for which the Act stands.”
- ““Any other factor other than sex” is limited to legitimate, job-related factors such as a prospective employee’s experience, educational background, ability, or prior job performance.

# LITIGATION EXAMPLES

## *Bowen v. Manheim Remarketing* (11<sup>th</sup> Cir. 2/21/18)

Bowen alleges violation of EPA based on predecessor's higher salary. Manheim paid the Bowen's male predecessor \$46,350 during his first year as arbitration manager, but set Bowen's starting salary at \$32,000. Bowen's salary did not reach \$46,350 until her sixth year as arbitration manager.

Manheim asserts that prior salary and prior experience justified the pay disparity. The predecessor worked for Manheim for 6 years before his promotion to arbitration manager, he had prior managerial and mechanical experience, and he earned \$46,350 per year at Manheim before the promotion. In contrast, Bowen worked for Manheim for only 3 years before her promotion, she had limited prior managerial and mechanical experience, and she earned around \$26,000 per year at Manheim before the promotion.

Although Manheim has identified nondiscriminatory reasons for the disparity, a jury could find that Manheim has failed to satisfy its heavy burden of showing that sex provided no basis for the disparity. In other words, Manheim has not established that there is no genuine issue of material fact as to its affirmative defense.

# LITIGATION EXAMPLES

## *Bowen v. Manheim Remarketing* (11<sup>th</sup> Cir. 2/21/18)

Manheim did not simply pay Bowen's male predecessor a much greater starting salary; it set the predecessor's salary near the midpoint of the compensation range for arbitration managers but consistently set Bowen's salary at the bottom of the range. A jury could find that prior salary and prior experience alone do not explain Manheim's disparate approach to Bowen's salary over time. Once Bowen established herself as an effective arbitration manager, prior salary and prior experience would not seem to justify treating her different than the predecessor.

# COMPLIANCE AND RISK MITIGATION

- Perform a periodic attorney-client privileged, statistically valid analysis using an expert statistician
- Minimize or stop use of prior salary as a criterion for setting pay (including for promotions)
  - Look at compensation of peer group where person is going to, not compensation person has in job they are coming from
- Examine how percentage-of-current-pay increases may exacerbate pay disparities, and change methodology
- For jobs with multiple incumbents, evolve towards increased objectivity based on job-related factors
- Consider implementing mandatory arbitration with class/collective waiver