The Equal Pay Act: Updates, Trends, and Tips for Managing Enforcement and Litigation Risk

April 29, 2021

Topics for Discussion

- Fundamentals of Equal Pay Act
  - Defining key terms

- Updates and Trends
  - Legislative developments
  - Litigation developments
  - Observations on enforcement

- Tips for Managing Enforcement and Litigation Risk
  - Proactive assessments
  - Best practice considerations

FAQs and Q&A
The Equal Pay Act

Prohibits sex-based wage discrimination between women and men in the same establishment who perform jobs that require substantially equal skill, effort, and responsibilities under similar working conditions, with exceptions.

Relevance of Pay Equity

- Data showing pay disparity between women and men
  - More pronounced with respect to women of color
  - Data accounting for disparities
- Observable within higher education
Equal Pay Act – Elements

• Sex-Based
• Wage
• Substantially equal skill, effort, and responsibilities

Equal Pay Act – Elements

• In the same establishment
• Under similar working conditions
Equal Pay Act – Exceptions

Employee makes *prima facie* case

Employer must demonstrate that a difference in pay resulted from a recognized exception

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1. A Seniority System
2. A Merit System
3. A System which Measures Earnings by Quantity or Quality of Production
4. A Differential Based on any Factor Other Than Sex
Equal Pay Act – Exceptions

- Issue of new employees’ starting salaries
  - Raise up veteran employees doing equal work
  - Show new employee’s different skill

Equal Pay Act – Litigation

- No requirement to exhaust administrative remedies
  - A complainant can submit an EEOC charge or file a complaint
- Standalone claim or one of multiple claims
- Single plaintiff or group of plaintiffs (“Collective Action”)
Equal Pay Act – Litigation

• Statute of Limitations
  ▪ 2 Years from Date of Unlawful Compensation Practice
  ▪ 3 Years if Willful

• Damages
  ▪ Amount of wages employee was underpaid
  ▪ Additional liquidated damages equal to unpaid wages
  ▪ Reasonable attorneys’ fees and costs
Updates and Trends – Legislative Developments

- Paycheck Fairness Act – House passed on April 15, 2021 (again)
  - Narrows scope of fourth, catch-all affirmative defense of “any factor other than sex.”
  - Bans use of salary history in hiring and setting wages
  - Requires employers to report pay data
  - Broadens protections for workers discussing their wages
  - Expands possible damages in civil action

State Equal Pay Laws

- First Wave, approximately 2016
- Safe Harbor
- States laws can differ in significant ways
Updates and Trends – Litigation Developments, Generally

Rizo v. Yovino (9th Cir. 2020)

Updates and Trends – Higher Education

- Freyd v. University of Oregon (9th Cir. 2021)
- Miller v. Sam Houston State University (5th Cir. 2021)
- Kellogg v. Ball State University (7th Cir. 2021)
Updates and Trends – Enforcement

- For federal contractors, equal pay has been a focus of OFCCP investigations for years.
  - OFCCP uses “pay analysis groups” of similarly situated employees.
  - Favors statistical multiple regression analyses.

Updates and Trends – Enforcement

- OFCCP has mixed track record on equal pay investigations.
- Recent notable settlements FY 2020:
  - Princeton University: 106 female professors. $925,000 backpay. Females across disciplines compared.
  - U of Connecticut: 7 female academic and non-academic employees. $249,000 backpay. 3 positions.
  - Yale Medical: 4 female professors out of 16,000 employees reviewed. $87,500 backpay.
Managing Risk – Reasons for Proactive Assessments

Federal Contractor Compliance
State Law Compliance
State Safe Harbor Provisions
Employee Requests
Institutional Values

Managing Risk – Considerations for Proactive Assessments

Self audit considerations:
1. Should we?
2. Protect with attorney-client privilege.
3. Regression analysis isn’t necessary.
4. Act on the results.
5. Document reasons for legitimate differences.
Managing Risk – Proactive Assessments

• Plan ahead for:
  - Next steps following findings
  - Communication with stakeholders and community regarding next steps

Managing Risk – Best Practice Considerations

• Policies and Practices
• Data Development and Maintenance
Frequently Asked Questions

• Cost vs. Benefit of Proactive Pay Equity Studies
• Role of Pay Equity Studies in DE&I Initiatives
Further Reading


- David J. McAllister, Meredith Aimbinder, and Arielle B. Kristan, *From the Field to the Faculty Lounge: Understanding and Closing the Pay Gap* (NACUA CLE Materials, May 2020)