

Pay Equity: An Issue That's Not Going Away Anytime Soon

From the Experts

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Pay equity is on many agendas. Whatever the causes of the gender gap in pay, a healthy gap remains. Even without new federal legislation, state legislatures and local governments are enacting their own laws, creating a patchwork of legal requirements depending on geography. California, Massachusetts, New York, Maryland, Philadelphia and New York City all have new groundbreaking pay equity laws. Pay equity is also a driving focus at the Equal Employment Opportunity Commission (EEOC) and the Office of Federal Contract Compliance Programs (OFCCP). Politics may shift, but this issue won't go away.

So what to do? Most pay today is actually based on compensation decisions dating back years. Most agree that people



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should get equal pay for equal work irrespective of gender or race, but more difficult is the painstaking work of finding pay disparities, determining their causes, determining where adjustments should be made and then making them. Nevertheless, this is exactly what new law and regulations require employers to do.

The best way to deal with pay equity is to stay ahead of it with internal self-audits of compensation. This enables an employer to see, analyze and address whatever compensation disparities exist before the government or adverse parties come along. Given the possibility of having to answer to such parties, however, first cloaking any pay equity

analysis under the attorney-client privilege is critical. Then, best practice is to:

1. Know What Laws/Regulations Apply

Different laws and regulations have different requirements, including distinctive standards for: (1) acceptable reasons for pay decisions, and (2) what analyses and remediations satisfy compliance obligations and establish defenses. Anyone undertaking the trouble and expense of a pay equity self-audit should first cloak the effort under the attorney-client privilege, then ensure that it comports with whatever laws and regulations apply.

- **Employers Subject to New Pay Equity Laws:** Most challenging, in the current environment, is to be an employer with a large workforce in California, Massachusetts, Maryland, New York and the cities of New York and Philadelphia. New pay equity laws in these places have overhauled how employers are entitled to make pay decisions. Massachusetts law, however, also explicitly creates an affirmative defense for employers who voluntarily self-audit their

pay practices to detect and eliminate pay disparities.

- **Federal Contractors:** Federal contractor status carries an affirmative regulatory duty to do yearly self-examinations of pay disparities. In February 2013, OFCCP enacted its "Procedures for Reviewing Contractor Compensation Systems and Practices." Those thereafter unfortunate enough to have been targeted for compliance review experienced OFCCP's aggressive, often overbearing demands for pay data and explanations for pay disparities, coupled with litigation against those who resisted.

- **Everyone Else:** All other employers are subject only to legal standards under Title VII of the Civil Rights Act of 1964 (Title VII) and the Equal Pay Act (EPA). However, any employer with more than 100 employees must file EEO-1s, and EEOC's new EEO-1 pay data requirement demonstrates an important trend. Although the requirement itself will probably change, EEOC explained that its purpose is to "help EEOC and OFCCP better understand the scope of the pay gap and focus enforcement

resources on employers that are more likely out of compliance with federal laws." Given this purpose, and the likely reality that employers will eventually submit compensation data to EEOC, knowing and documenting the explanations for pay disparities will avoid future "focus" of "enforcement resources."

2. Determine "Similarly Situated," "Substantially Similar" "Comparable" or "Equal" Work.

Crucial to any self-audit of compensation is making "apples to apples" comparisons; ensuring that employees whose pay is being compared are truly comparable based on their work. Under Title VII, this is "similarly situated," which focuses on job titles, descriptions and duties, relevant education and experience, geographic location and/or work under common supervision. "Similarly situated" is also the standard applied by the EEOC and OFCCP, but it does not apply under the new pay equity laws. These jurisdictions now look for "substantially similar," "comparable" or "equal" work. Job titles

and descriptions alone are no longer determinative.

Although seemingly simple to determine who is “similarly situated” or engaged in “substantially similar,” “comparable” or “equal” work, such determinations can be difficult. Ideally a simple up-front review accomplishes the objective. Commonly, however, the compensation analysis itself leads an employer to individuals who are unlike the others. Discovering these, and making appropriate adjustments, not only addresses immediate questions but avoids future issues.

3. Analyze Pay Disparities/ Determine and Document Their Causes

There are many legitimate, non-discriminatory reasons for pay disparities. The challenge is to find and record those reasons for every race/gender pay disparity. Again, knowing the applicable law determines: (1) acceptable legitimate, non-discriminatory explanations; (2) how best to document results under a waivable attorney-client privilege.

By altogether eliminating any “catch-all” defense, Massachusetts now most restrictively

defines legitimate, non-discriminatory explanations, finding only the following acceptable:

- (1) A seniority system
- (2) A merit system
- (3) A system which measures earnings by quantity or quality of production, sales or revenue
- (4) The geographic location in which a job is performed;
- (5) Education, training, or experience to the extent that such factors are reasonably related to the job in question; or
- (6) Travel that is a regular and necessary condition of the particular job.

Other new pay equity laws retain “catch-all” defenses, but all now more severely restrict their use, particularly around use of prior salary. Outside these laws, all traditionally accepted reasons under Title VII and EPA remain available. Accordingly, the essential mission of an internal self-audit of pay equity is to find, then determine legitimate, non-discriminatory explanations for, compensation disparities among males and females or racially diverse workers who are “similarly situated” and/or doing “substantially similar,”

“comparable” or “equal” work. Once found, these reasons must be documented.

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