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## MIND THE GAP

The disparity in salaries between men and women has provoked debate.

[BY AMBER L. ELIAS]

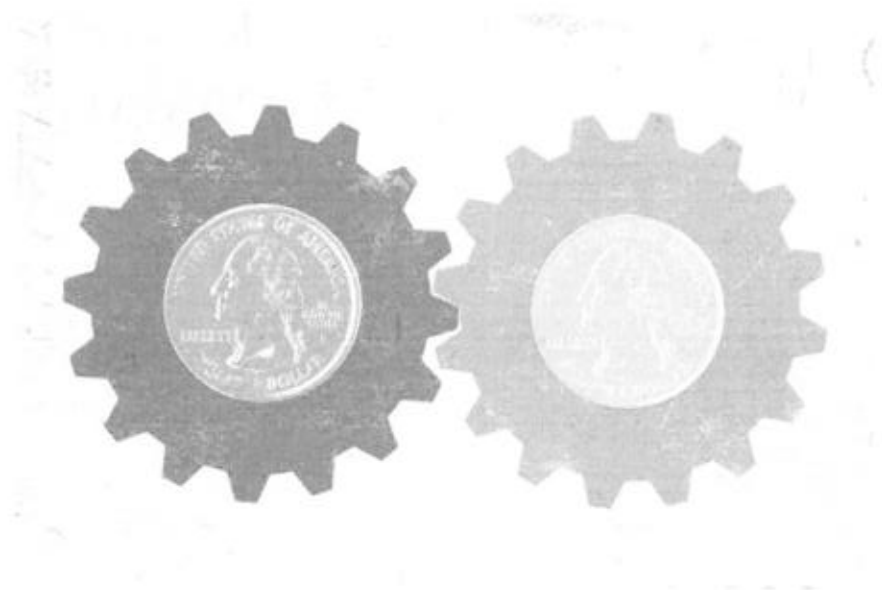
IN THE PAST YEAR, THE PERSISTENT WAGE gap between male and female earners has become a topic of national conversation. Prominent actors including Patricia Arquette, Jennifer Lawrence and Bradley Cooper have openly criticized Hollywood for underpaying its female stars. On the presidential campaign trail, candidates from both parties have been asked where they stand on the issue. And numerous bills are being debated in state capitals from coast to coast.

Although pay discrimination has been illegal for decades, women still earn just 79 percent of what men make on average. While the gap narrowed considerably between the 1970s and the 1990s, progress has stagnated, hovering between 76 percent and 79 percent since 2001. In addition, women, particularly in lower-paid positions, are less likely to have access to health insurance, retirement benefits and paid leave.

### PAY DISCRIMINATION V. PAY EQUITY

Under the federal Equal Pay Act and Title VII of the Civil Rights Act, along with anti-discrimination laws in most states, employers are required to pay men and women the same for doing the same job. The pay equity measures being debated on the campaign trail and passed in state legislatures go further, requiring that men and women be paid the same for doing different but comparable jobs. This distinction will require employers to analyze how they assign compensation for entire classes of employees.

California and New York have both enacted tougher pay equity laws that went into effect in January. Other states, including New Jersey and Massachusetts, are considering similar measures. While there are some broad similarities, each has its own quirks.



California's Fair Pay Act requires any employer with an office in the state to justify pay differences between male and female employees who are doing "substantially similar" work regardless of their job title. The law permits pay differences between "substantially similar" jobs for four reasons—a seniority system, a merit system, a system that measures earnings by quality or quantity of production or a "bona fide" factor other than sex, such as education, training or experience. These "bona fide" factors must fulfill "an overriding legitimate business purpose." And even if the employer makes such a showing, the employee can still prevail if she can prove that an alternative practice would serve the same purpose without producing a wage differential.

New York's Achieve Pay Equity Law largely mirrors the California law, but requires the same compensation for "equal" instead of "substantially

similar" work. It remains to be seen whether courts will find a meaningful difference.

New Jersey approved a pay equity bill similar to California's and New York's, but the measure adds that the justification for the differential must not "perpetuate a sex-based differential in compensation." A bill pending in Massachusetts states that while a seniority system would be a valid basis for a pay differential, an employee's seniority could not be reduced by "time spent on leave due to a pregnancy-related condition and protected parental, family and medical leave." The Massachusetts bill also applies to benefits, which could include health care, retirement, access to paid leave and fringe benefits.

These laws also allow employees to recover liquidated damages above their lost wages. Prevailing plaintiffs in California and Massachusetts could recover double damages. New Jersey would allow up to triple and it could be

PHOTO: IMA

up to quadruple damages for a willful violation in New York.

#### HE MAKES HOW MUCH??

In addition to regulating compensation, many of the new measures prohibit so-called pay secrecy policies. The California law prohibits retaliation against employees for "any action taken ... to invoke or assist in any manner the enforcement" of the law. More broadly, employers may not prohibit employees from disclosing their own wages, discussing the wages of others or inquiring about another employee's wages. The Massachusetts pay equity bill would prohibit employers from seeking the salary history of prospective employees and screening job applicants based on their salary histories.

At the federal level, the Office of Federal Contract Compliance Programs (OFCCP) published a Final Rule on Sept. 11, 2015, that prohibits federal contractors and subcontractors from discharging or otherwise discriminating

against employees and job applicants for discussing, disclosing or inquiring about compensation. At the same time, the Equal Employment Opportunity Commission recently announced that it would require all employers with more than 100 employees to include pay data in their Employer Information Reports (EEO-1 Report), potentially starting in September 2017. It is anticipated that this data will be shared with the U.S. Department of Labor and the OFCCP to help identify potential pay disparities across gender and ethnicity lines.

#### TIME FOR A PAY AUDIT

Considering the momentum behind equal pay at both the federal and state levels, and already tough penalties for pay discrimination, employers have every reason to conduct a pay audit.

Because pay discrimination is already illegal, a logical place to start is examining whether discrepancies exist within job descriptions. Employers should first look at their existing sys-

tem for setting pay ranges and identify the bases for differences between individuals within those ranges, including the type of work performed, experience, education, skill required, level of responsibility and working conditions. Employers located in California, New York and other states likely to pass a pay equity law in the near future should then look at whether there are pay discrepancies between jobs that are nominally different but require similar skill and responsibility.

The New Jersey bill suggests that employers should also be cautious about relying on factors such as "market rates" that are facially neutral but may reflect and continue existing pay discrepancies in the broader labor economy. Employers should also avoid lowering the pay of higher-compensated employees to achieve pay equality. In addition to damaging morale, this practice would be prohibited by some pay equity measures, including the Massachusetts bill.

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Additionally, companies should examine their existing employee policies on discussing pay. A blanket prohibition on discussing compensation would violate the National Labor Relations Act and may also violate new state laws and the OFCCP final rule. Given the attention that equal pay issues are receiving in the media, employers should expect employee inquiries and consider how best to respond to questions about the basis for their pay and that of co-workers. Both the California and New York laws prohibit companies from disciplining employees for inquiring about, discussing or disclosing the compensation of other employees. The New Jersey and Massachusetts bills contain similar provisions. While the California law explicitly states



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that employers are not required to disclose wages and the New York law is silent on the issue, best practice is to give ranges of compensation and not disclose the pay of a specific individual.

Employers should also consider retaining outside counsel to ensure that the audit process is sound, legally defensible and protected by the attorney-client privilege. Only the Mas-

sachusetts bill would explicitly protect employers from employees who might use a self-audit as evidence of a violation. A thorough pay audit, followed by reasonable efforts to correct any unjustified discrepancies, may provide a legal defense in the event of a pay discrimination or pay equity claim.

Equal pay is fast becoming a major issue in Washington, state capitols and

American culture at large. It's only a matter of time before it becomes an issue for every company in America. Rather than simply reacting to a lawsuit, employers should proactively examine their practices for setting compensation and benefits and make that information more transparent to employees. These steps will ensure both that employees are being paid competitively and that employers are legally protected.

*Amber L. Elias is an attorney in the Boston office of the national labor and employment law firm of Fisher & Phillips. She represents employers in labor and employment matters before federal and state courts and administrative agencies. She provides counsel and litigates for employers, on a variety of issues, including discrimination and retaliation under Title VII, the Americans with Disabilities Act, the Age Discrimination in Employment Act and state human rights laws. She also helps clients create and enforce effective personnel policies on harassment, employee privacy and data security.*

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