

Insights, News & Events

MIND THE GAP: PAY EQUITY ISSUES IN HEALTHCARE

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Women deserve the same compensation for doing the same work as men. The concept is simple and fair: equal pay for equal work. It is also the law.

Nevertheless, pay disparities persist across industries and geographies, including in healthcare. A wave of new state laws, increased enforcement of federal law, and several high profile lawsuits have placed this issue front and center for all employers. Even well-intentioned employers have found, however, that solving the problem and complying with the law is not so easy. The following will outline the landscape of the issue and provide some practical advice that health care employers can use to avoid liability.

THE WAGE GAP BY THE NUMBERS

According to the Institute for Women's Policy Research, female full-time, year-round workers made only 80.5 cents for every dollar earned by men in 2016, a gender wage gap of 20 percent. The healthcare industry is not immune from this problem. According to a 2016 study published in the Journal of the American Medical Association, which analyzed the salaries of 10,241 academic physicians, women made roughly \$51,000 less per year than their male counterparts.

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Litigation and Trials

Pay Equity and Transparency

Industry Focus

Healthcare

Doximity (an online social networking service for U.S. clinicians) studied the salaries of approximately 65,000 physicians and released findings in March 2018 showing that female doctors on average made 27.7 percent less than their male counterparts in 2017, or about \$105,000 less per year. The company further reported that the wage gap worsens depending on the state in which you practice. In Charleston, South Carolina, for example, the gap increases to 37 percent—a difference of \$134,000 annually. Kansas City, Nashville, and Providence also show greater than 30 percent pay gaps.

The pay gap is not limited to doctors. According to the Bureau of Labor Statistics, significant pay disparities existed in 2016 among registered nurses, clinical laboratory technologists and technical workers, diagnostic related technologists and technicians, emergency medical technicians and paramedics, and health practitioner support technologists and technicians (e.g., pharmacy and dietary technologists and technicians). The gaps persist even in fields such as nursing where women outnumber men almost 10:1.

FEDERAL LAW HAS OUTLAWED PAY DISPARITIES FOR DECADES

The Equal Pay Act of 1963 (EPA) requires that men and women be given equal pay for equal work in the same establishment. The jobs need not be identical, but they must be substantially equal with regard to skill, effort and responsibility and must be performed under similar working conditions within the same establishment. Pay differentials are permitted when based on seniority, merit, quantity or quality of production, or any factor other than sex.

Title VII of the Civil Rights Act of 1964 is much broader than the EPA and prohibits many types of workplace discrimination (e.g., race discrimination, sexual harassment, etc.) in addition to gender discrimination based on pay. Unlike the EPA, there is no requirement that the female employee's job be "substantially equal" to that of a higher paid male employee, nor does it

require the female employee to work in the same establishment as a comparator. For this reason, Title VII has traditionally been a more commonly pled cause of action than the EPA for employees claiming gender discrimination.

A January 2018 federal appeals court decision, however, could broaden the use of the EPA as a cause of action if its teachings are followed by other circuits. In *EEOC v. Maryland Insurance Administration*, the 4th Circuit Court of Appeals held that it is not enough for an employer's defensive evidence to show that factors other than sex *could* explain the wage disparity, but that the proffered reason other than sex *actually does* explain the wage disparity.

NEW STATE LAWS CROPPING UP ACROSS THE COUNTRY

In the past few years, a number of states have enacted pay equity laws that are far more sweeping than existing federal laws and provide narrower defenses for employers. The Massachusetts Equal Pay Act (MEPA), for example, passed in 2016 and became effective just a few weeks ago—on July 1, 2018. The law prohibits employers from paying employees of a different gender at different rates for “comparable work,” allows employees to freely discuss their salaries with coworkers, and prohibits employers from requiring applicants to provide their salary history before receiving a formal job offer.

In March 2018, Massachusetts Attorney General Maura Healey issued long-awaited guidance regarding MEPA intended to help employers comply with the new law. The guidance makes clear that the *only* lawful justifications for pay disparities between employees of different genders who perform comparable work are the following:

- a seniority system (that does not discount for time spent on leave for pregnancy-related conditions or protected parental, family or medical leave);
- a merit system;

- a system which measures earnings by quality and quantity of production, sales, or revenue;
- the geographic location in which a job is performed;
- education, training, or experience to the extent such factors are reasonably related to the particular job in question; or
- travel, if the travel is a regular and necessary condition of the particular job.

Noticeably absent from this list is the catch-all “any reason other than gender” defense that exists under the federal EPA and many other state equal pay laws. As a result, permissible variations in pay are much more limited in Massachusetts than in most of the rest of the country. The Attorney General’s guidance, however, raises as many questions as it answers. For example, the guidance does not provide significant illumination on the critical issue of what constitutes “comparable work.”

MEPA provides a defense to wage discrimination claims for any employer that has conducted a “good faith, reasonable self-evaluation” of its pay practices within the previous three years and before an action is filed against it, and has taken “meaningful steps” toward eliminating unlawful pay disparities identified through a timely self-evaluation. To be eligible for this safe harbor defense, the statute says that the self-evaluation must be “reasonable in detail and scope” and the employer must show “reasonable progress” towards eliminating any unlawful gender-based wage differentials identified by the self-evaluation. How these various terms will be interpreted by the Massachusetts Attorney General and the courts remains to be seen.

In addition to Massachusetts, other states such as New York, New Jersey, California, and Maryland have also passed new or enhanced equal pay legislation in the past few years designed to close the gender pay gap. In order to keep track of this rapidly evolving legal landscape, Fisher Phillips recently launched a [Pay](#)

[Equity Interactive Map](#) on our website. The map offers a state-by-state synopsis of pay equity laws, regulations, and requirements in a user-friendly format. The map is a tool developed by the firm's [Pay Equity Practice Group](#) formed last year in response to the enactment of robust equal pay legislation in a number of states and a substantial uptick in litigation.

LAWSUITS AND PUBLIC ATTENTION

The focus on pay equity issues across the country is demonstrated by the number of high-profile lawsuits filed around the country.

- In September 2017, three female doctors filed suit in North Carolina against their employer, the Charlotte-Mecklenburg Hospital Authority, alleging they were paid substantially less than their male counterparts, including some subordinates, in violation of the EPA.
- In January 2018, a female non-equity shareholder at national labor and employment firm Ogletree Deakins filed a \$300 million class action lawsuit alleging that the firm has a systemic practice of providing less opportunity for women attorneys to become equity partner and that women are paid disproportionately less than men doing the same job.
- In March 2018, a California state court allowed former Google employees to proceed with a class action lawsuit alleging that Google violated the California Equal Pay Act by tying starting salaries to job candidates' prior compensation and placing women in lower-paying job classes.

Pay equity issues have also garnered notable media attention. Some of you may recall that it was recently revealed that actor Mark Wahlberg was paid \$1.5 million to reshoot movie scenes that his co-star Michelle Williams made less than \$1,000 to do. In response to the public outcry concerning the disparity, Wahlberg donated his fee to charity. In April 2018, Mark Benioff, the CEO of Salesforce (a San Francisco-based maker of cloud software for businesses), appeared on

60 Minutes and shared that, despite initially believing that there was no gender pay gap in his company, a detailed audit showed otherwise. He stated that he has twice paid \$3 Million to his workers in an attempt to remedy the problem.

TIPS FOR AVOIDING LIABILITY

To avoid costly litigation, it is imperative that employers understand the various federal and state pay equity laws and take steps to come into compliance. You should conduct a comprehensive internal pay equity audit with the assistance of counsel so that the results will be protected from disclosure by the attorney-client privilege in any subsequent litigation.

You should then take affirmative steps to remedy pay disparities where they exist and implement an objective, standardized system for making pay determinations. Lastly, you must continue to re-evaluate your data on an ongoing basis as turnover, mergers, and other personnel changes will continuously impact the pay equity balance.

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