

# PAY EQUITY: LAW, LITIGATION, AND THE GATHERING OF PAY DATA

Insights

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Pay equity issues are hot. President Obama has made pay equity one of the hallmarks of his administration by signing the Lilly Ledbetter Fair Pay Act, establishing the National Equal Pay Task Force, and championing the fight for all employees to receive equal pay for equal work, regardless of sex. States throughout the country have followed suit, enacting sweeping pay equity legislation in the past few years.

In the courts, collective actions under the Equal Pay Act are on the rise, with female employees joining together to assert claims that they are paid less than their male counterparts and raising claims of pay disparity. Today's news headlines highlight pending collective actions filed against a variety of employers—including law firms, pharmaceutical companies, and financial services firms—and the exponential damage awards sought. These lawsuits will only become more frequent, and the damages demanded even greater, as data analysis of pay by gender becomes public through the Equal Employment Opportunity Commission's (EEOC) updated EEO-1 reporting form which will be required by employers with more than 100 employees.

What can employers do today to remedy unlawful pay disparity and protect themselves from future litigation and EEOC enforcement actions?

## **Background on the Equal Pay Act (EPA)**

The EPA requires that men and women in the same workplace be compensated with equal pay for equal work. Employers must be able to explain disparities based upon legitimate factors other than gender such as merit,

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qualifications, skills, education, etc. A pay equity analysis is more complicated than simply comparing job titles and salaries. Instead, employers must look at job duties and determine if employees are tasked with “substantially equal” duties. Employers must also keep in mind that equal pay encompasses far more than an employee’s base salary. Total compensation is examined for pay equality, including overtime pay, bonuses, stock options, profit sharing and bonus plans, life insurance, vacation and holiday pay, cleaning or gasoline allowances, hotel accommodations, reimbursement for travel expenses, and medical benefits.

The law permits employees to file a collective action “on behalf of himself or themselves and other employees similarly situated” to allege a claim of unlawful pay disparity. The certification process for a collective action under the EPA is the same two-step process for collective actions under the Fair Labor Standards Act (FLSA). During the past decade the number of collective actions under the FLSA have grown exponentially and collective actions under the EPA have the same potential to spawn time-consuming and costly litigation.

Employers who violate the EPA are liable in the amount of the pay differential during the two years preceding the action (three years if the violation is willful), plus liquidated damages in an equal amount. Additionally, employers will be responsible for covering the employee’s attorney’s fees and costs of the action. In the collective action context, where all “similarly situated” employees can be provided notice and have the ability to opt-in and make claims of pay disparity, potential damages awards are staggering.

### **State Pay Equity Laws**

California, Massachusetts, Maryland, and New York are at the forefront of passing pay equity legislation at the state level. These states’ statutes largely mimic the language of the EPA and prohibit gender-based pay inequality. These state laws also restrict the right of employers to prohibit employees from inquiring about, discussing, or disclosing their wages, or those of others.

- **California:** The California Fair Pay Act requires that employers provide the same pay to employees engaged in “substantially similar work.”
- **Massachusetts:** The Massachusetts Equal Pay Act, effective July 1, 2018, prohibits differences in pay for

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“comparable work,” which is defined as “substantially similar” work. The Act also prohibits employers from inquiring about a prospective employee’s salary history. Notably, the Act provides for an “affirmative defense” for employers who complete a “self-evaluation of its pay practices in good faith” and can demonstrate that reasonable progress has been made towards eliminating wage differentials based on gender for completing work.

- **Maryland:** The Equal Pay for Equal Work Act requires that employers pay employees the same amount if they “perform work of a comparable character” in the same county of the state. Maryland’s law not only prohibits pay discrimination, but also prohibits employers from providing less favorable employment opportunities because of sex or gender identity.
- **New York:** The Achieve Pay Equity Law requires the same compensation for “equal” rather than “substantially similar” work, provided that the comparators work in the same geographic region.

The damages available to plaintiffs under these state laws are comparable to those available under the EPA, and in some circumstances more generous. A successful plaintiff in action under California, Massachusetts, Maryland, or New York’s pay equity law is entitled to damages of wages and interest, plus an equal amount as liquidated damages, and attorney’s fees. In New York, a willful violation of the Achieve Pay Equity Law will result in up to 300% of wages due to the plaintiff. In addition to legislating against unlawful pay disputes, these state laws prohibit retaliation.

### **The New EEO-1 Report**

What’s more, the EEOC’s broad extension of employers’ obligations to include pay ranges on the EEO-1 report has the potential to wreak havoc in an already challenging and litigious environment.

The EEOC collects workforce data from all employers with 100 or more employees through an annual EEO-1 report. The EEO-1 report traditionally collects data about gender and race/ethnicity of employees by job groupings. While the data is confidential, the aggregated data is made available to the public.

On September 29, 2016, the EEOC announced that it approved a new EEO-1 form, which will require employers to

provide salary and pay information. The EEOC's goal in gathering this additional data is to identify businesses that may have pay gaps, and then target those employers who are discriminating on the account of gender through enforcement actions. The data will encompass more than 63 million workers nationwide and be shared with other federal government agencies (such as the Department of Labor and Office of Federal Contract Compliance Programs).

The deadline for employers to submit the new EEO-1 report is March 31, 2018. However, most employers are unaware that they will be required to report pay data on their EEO-1 reports beginning with January 1, 2017 payroll data. What this means is that employers have a limited window of opportunity to analyze their pay practices and correct any unlawful pay disparity before the pay data is disclosed to the EEOC.

## **TOP 5 IMMEDIATE ACTION ITEMS FOR EMPLOYERS**

The clock is ticking on employers' ability to analyze their pay practices, correct pay disparity issues before employee salary information must be reported to the EEOC, and adopt key prophylactic measures to prepare for a potential onslaught of litigation. Below are the steps employers should take today in order to be prepared.

### **1. Conduct an Internal Audit**

To proactively combat EEOC enforcement actions and limit future EPA litigation, it is vital for employers to conduct a privileged audit of their pay practices, preferably before January 1, 2017, the beginning of the reporting period for the new EEO-1 report. An audit will provide employers with an understanding of their pay practices and the opportunity to correct pay disparities among their male and female employees before the information is released to the EEOC and, eventually, the public.

The audit should begin with a review of the job duties of employees and the employer's compensation practices and policies. Pay data should then be analyzed to determine whether pay inequity exists among employees with substantially equal duties. For any statistically significant disparities, further analysis should be conducted to determine whether the pay difference is based on lawful factors (such as a seniority system, merit system, or other

non-gendered reason) or if steps must be taken to remedy the pay inequity.

It is strongly recommended that the internal audit be conducted by an attorney so that the attorney-client privilege shields the results and analysis of the audit from the public, including potential plaintiffs.

In addition to helping employers remedy potential EPA violations, another benefit of an internal audit is that evidence that an employer conducted an audit and made a reasonable effort to correct any unjustified pay inequity may provide a legal defense to an EPA claim.

## **2. Update Data Collection Systems**

Now is also a good time for employers to evaluate their data collection systems to determine whether they are able to gather the pay data needed for the new EEO-1 report. The current EEO-1 report merely requires the employer to identify the number of employees in each of 10 job categories who are male or female, and the number of male or female employees who identify with one of seven racial groups. In contrast, the new EEO-1 report consists of 3,360 data points, which, in addition to the information collected in the prior report, will divide each of the 10 job categories into 12 pay bands.

Technology is the key to completing the new EEO-1 report in the most efficient and cost-effective means possible. In the coming year, employers across the country will need to invest in system upgrades or entirely new systems to more efficiently collect and report data on employee pay, gender, and race in the form required for the EEO-1 report. A computer system designed to work in tandem with the EEO-1 report will relieve the burdens of the new reporting requirements immensely and will enable employers to proactively analyze their pay data to anticipate (and correct) pay disparity issues before they spawn costly litigation.

## **3. Review Compensation Policies and HR Forms**

Compensation policies should be reviewed to ensure that, moving forward, pay inequality does not persist among individuals with substantially equal job duties. Pay setting decisions should be carefully documented and reviewed to assure that the organization can justify pay disparities based upon legitimate factors other than gender (e.g. merit, seniority, geography, and education). Importantly, when hiring a new employee, the employee's prior salary should

not be a determinative factor as that salary may incorporate a gender bias.

Employee handbooks should be revised to delete policies that prohibit employees from discussing pay-related issues. Likewise, employers should be cognizant of state laws, such as the Massachusetts Equal Pay Act, that ban inquiries relating to salary history, and will require changes to Employment Applicants and interview questions.

Training on the requirements of pay equity is essential. It is important that all management level employees and human resources staff who are responsible for determining and monitoring employee compensation have a complete understanding of pay equality and the mandates of the EPA and applicable state law. This will ensure a path of ongoing compliance and eradicate unlawful pay disparity within the organization.

#### **4. Budget for the Costs of Reporting and EPA Compliance**

It is important for employers to understand how the new EEO-1 reporting requirements and the need to correct any pay inequity will affect their 2017 budget. The EEOC has acknowledged that its new EEO-1 report will be costly for employers, estimating that it will cost employers \$50 million a year to comply. Non-government sources have opined that this is an extremely low estimate, and that the cost will be far greater, exceeding several hundred million dollars.

Consideration must be given to the cost of updating technology systems for the collection of data for EEO-1 reports, the costs of completing the EEO-1 reports, and the costs associated with conducting an internal audit of pay practices.

Employers must be mindful that if the audit reveals an unlawful pay disparity, measures must be taken to increase the pay afforded to women employees. Employers are prohibited from decreasing a male employee's salary or compensation package to rectify the pay inequity.

#### **5. Prepare for When the Data Go Public**

One of the biggest concerns with the enhanced salary reporting is that the data ultimately will be made public. The EEOC indicated that it will publish industry-specific reports based on the aggregate data it compiles from the March 2018 EEO-1 reports. This will allow everyone, including

employees, to see in detail what categories of employees earn on average.

Once the data goes public, both existing and potential plaintiffs will have a plethora of pay data at their fingertips to support their lawsuits for violations of the EPA. This is most troubling in the collective action arena, where the number of litigants and potential damages is unbounded. Additionally, the EEOC will use the data as evidence of an employer's noncompliance with the EPA and to support its efforts in an enforcement action.

These reports also lead to privacy concerns about the EEOC's ability to maintain the confidentiality of the employer in producing the aggregate pay data. Specific employers or employees may be identifiable if only a few individuals appear in a particular job category or pay band.

The best way to prepare is to get ahead of the game and conduct an internal privileged pay audit, discussed above. This will provide employers with the opportunity to remedy any unlawful pay inequity *before* the data reporting period and allow for the publicly available data to reflect the organization's commitment to equal pay.

### ***Conclusion***

Pay equality legislation is here and litigation is on the rise. Employers who are well prepared for new governmental mandates will be in the best position to comply with the law and defend lawsuits alleging unlawful pay disparity in the workforce.

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