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Energy Workforce & Technology Council People & Culture Seminar

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Equal Pay for Equal Work: Understanding Pay Equity in the Workplace and How to Mitigate Legal Risk

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What is Pay Equity and Why is it Important?

- Pay equity is the concept of compensating employees who have similar job functions with comparably equal pay, regardless of their gender, race, ethnicity, or other status.
 - This practice is often more complex than simply eliminating biases.
- Employers must weigh other factors, like the employee's education and work experience, the responsibilities of the position, and the organization's long-term financial stability.
- While pay equity has merits in social responsibility, it's also important to a business's bottom line. Employers who implement fair pay policies may be able to:
 - Prevent discrimination lawsuits
 - Comply with equal pay regulations
 - Improve productivity and morale
 - Reduce workplace turnover
 - Attract talented new employees



Today's Agenda

The Statistics Don't Look Good...

Setting the Table: The Federal Equal Pay Act and Title VII

EEOC Enforcement and a Reminder About Privilege

Pay Transparency and Disclosure Laws, Salary History Bans, and Data Reporting

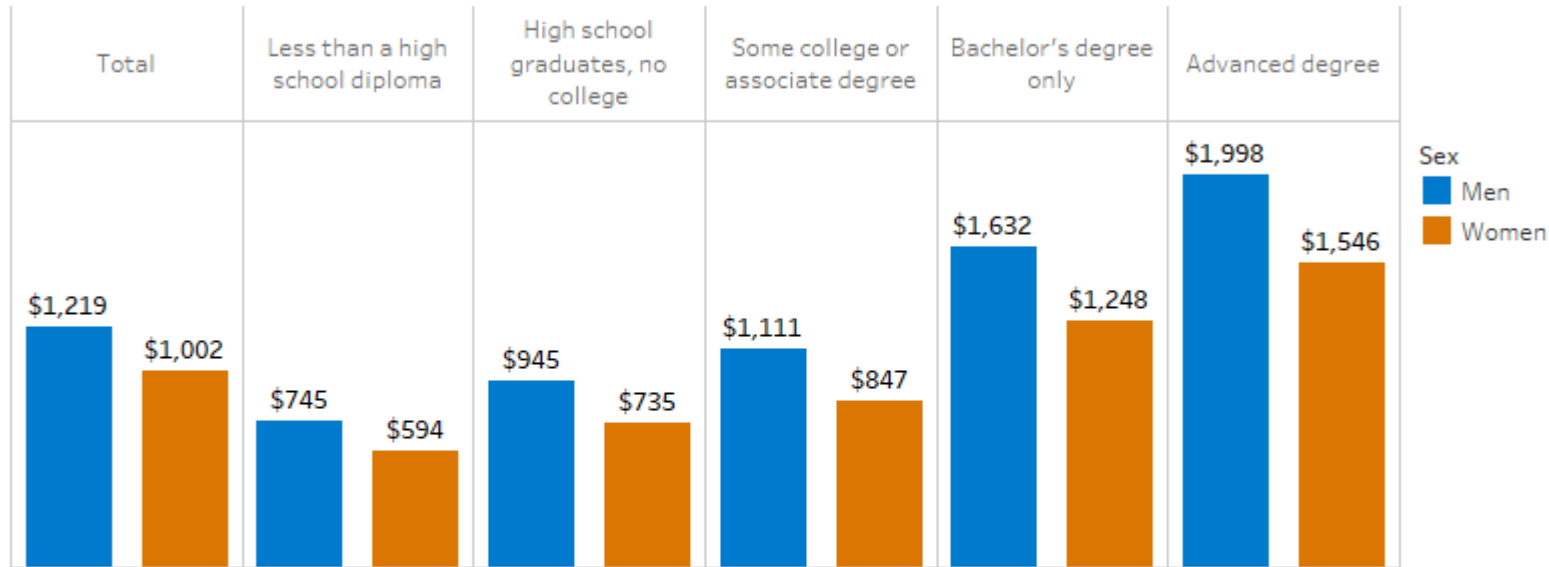
Pulling it all Together: 7 Steps to Conducting a Pay Equity Audit

Conclusion

The Statistics

Median Weekly Earnings by Sex and Educational Attainment

Median weekly earnings by sex and educational attainment



Notes: Based on median weekly earnings of full-time, wage and salary workers, 25 years and older. Advanced degree includes people with master's, professional, and doctoral degrees.

Data: U.S. Bureau of Labor Statistics, Current Population Survey, 2022 annual averages.

On average, men are paid \$1,219 per week and women \$1,002. Earnings increase with education. With less than a high school diploma, men receive \$745/week and women \$594. With an advanced degree, men are paid \$1,998 and women \$1,546.

<https://blog.dol.gov/2023/03/14/5-fast-facts-the-gender-wage-gap#:~:text=Stats.,for%20Black%20and%20Hispanic%20women>

According to the Department of Labor...

- **Stats.** Overall, women are not paid as much as men, even when working full time and year-round. On average, women working full time, year-round are paid 83.7% of what men are paid. This inequity is even greater for Black and Hispanic women.
- **Causes.** Women's labor is undervalued. Most of the disparity in women and men's pay cannot be explained by measurable differences between them. Out of the causes of the wage gap that we can measure, the main contributor is that women are more likely than men to work in low-paying jobs that offer fewer benefits.
- **Education.** Education is not enough to eliminate the gender wage gap. On average, women have more years of education and are more likely than men to have completed Associate's, Bachelor's or Master's degrees. Yet there is a significant gender wage gap at every level of education. Overall, women must complete one additional degree in order to be paid the same wages as a man with less education.

Department of Labor Observations, contd.

- **Age.** The gender wage gap does not resolve itself as women age and develop further in their careers. In fact, the wage gap for older women workers is larger than for younger women, and older Black and Hispanic women have the most extreme differences in pay.
- **Occupations.** The largest identifiable causes of the gender wage gap are differences in the occupations and industries where women and men are most likely to work. Women are 2 out of every 3 full-time workers in occupations that pay less than \$30,000 per year, and fewer than 1 in 3 full-time workers in jobs paying an average of \$100,000 or more. However, even within the same occupations, women earn less on average than men.

Setting the Table: the EPA and Title VII

What Laws Govern Pay Equity?

- Federal laws governing pay equity were first enacted in the early 1960s. The two most notable are:
 - **Equal Pay Act of 1963.** This law states that men and women employed at the same business should receive equal pay for equal work.
 - **Title VII of the Civil Rights Act of 1964.** Title VII offers broader protections than the Equal Pay Act and prohibits pay discrimination based on not just gender, but also race, color, religion, and nation of origin.
 - Almost all states have equal pay laws, some more elaborate than others. New York, for instance, has expanded the definition of equal work to include “substantially similar” work.
 - States are also starting to pass laws on pay transparency, salary history, the disclosure of pay data, etc.

EPA vs. Title VII

- Under the EPA, you are not required to file an EEOC Charge of Discrimination before going to court, but you must file a charge for a Title VII pay discrimination claim.
- The time limit for filing a case in court under the EPA is within two years of the discriminatory pay practice (or three years if the violation is willful), whereas a Title VII pay discrimination charge must be filed with the EEOC within 180 or 300 days.
- In an EPA claim, your employer will have the burden of proof (not just a burden of production similar to a Title VII claim) to establish its EPA defense (seniority system, merit system, production-quota system, or any factor other than sex).
- If you prove your employer willfully violated the EPA, you may receive liquidated damages.

EPA: The Prima Facie Case

- To state a claim under the EPA, a plaintiff must allege all of the following:
 - The plaintiff was paid less than at least one employee of the opposite sex
 - The jobs the plaintiff and the comparator employee performed required equal skill, effort, and responsibility
 - The plaintiff and the comparator employee performed the jobs under similar working conditions in the same establishment
- NOTE: A showing of “intent” is not required. Moreover, a plaintiff can rely on class-wide statistical evidence of pay disparity, in combination with comparison to specific comparators of the opposite sex, to prove an EPA claim.

What Constitutes Wages Under the EPA?

- Under the EPA, the term “wages” is extremely broad and includes all forms of compensation or payments made to or on behalf of an employee as compensation for employment, including:
 - Wages or salaries
 - Deferred compensation, including profit sharing plans
 - Expense accounts, gasoline allowances, uniform cleaning allowances, and the like
 - Use of a company car
 - Bonuses
 - Vacation and holiday pay
 - Premium pay for working on weekends or holidays
 - Any fringe benefits, such as medical, hospital, accident, life insurance, and retirement benefits

The “One-Comparator Rule”

- Many courts have held that a plaintiff can establish a wage disparity by comparing themselves to just one member of the opposite sex who is paid more, even where the plaintiff is better paid than other comparable employees of the opposite sex.
- However, other courts have pointed to such situations as tending to disprove the existence of discrimination.
- *Eisenhauer v. Culinary Institute of America*
 - Plaintiff identified a single relevant comparator
 - Employer argued that was insufficient because there were other comparable males who made less than her and other females who made more than other males
 - The court allowed the case to proceed, finding the employer could “later introduce additional data when addressing the ultimate merits of the case at trial”
 - Key takeaways?

Establishing a Wage Disparity: Wage Rates or Total Compensation?

- The question of how to compare compensation can be quite complicated.
- For example, litigants sometimes dispute whether a court can find a wage disparity based on differences in base salary or wage rate alone, or whether it must also take into account and compare total compensation, including all bonuses, commissions, benefits, and other forms of remuneration.
- *Wiler v. Kent State University*
 - Female head coach alleged she was paid less than male counterparts (compensation was based on a combination of base pay, performance bonus, camp income)
 - Court held that proper comparison was between base pay and performance bonus, not camp income (because coaches had no obligation to run a camp and the compensation earned depended on factors the University couldn't control)
 - Key takeaways?

The EPA: “Equal Work”

- Equal work means work performed under similar working conditions requiring equal measure of all of the following: skill, effort, and responsibility.
- These terms are not precisely defined in the regulations. However, “equal” does not mean “identical” – EEOC and courts conduct a fact-based inquiry to determine whether job differences are so substantial they make the jobs unequal.
- Courts compare the jobs, not the individual employees.
- Job titles are relevant to whether the jobs are equal, but are not dispositive.

Showing that Work is “Equal” or “Substantially Equal”

- What does it mean for two positions to be “substantially equal?” According to the EEOC, employers should balance these five factors:
 - **Skill:** Measured by factors such as the experience, ability, education, and training required to perform the job. The issue is what skills are required for the job, not what skills the individual employees may have. For example, two bookkeeping jobs could be considered equal under the EPA even if one of the job holders has a master’s degree in physics, since that degree would not be required for the job.

Substantially Equal, contd.

- **Effort:** The amount of physical or mental exertion needed to perform the job. For example, suppose that men and women work side by side on a line assembling machine parts. The person at the end of the line must also lift the assembled product as he or she completes the work and place it on a board. That job requires more effort than the other assembly line jobs if the extra effort of lifting the assembled product off the line is substantial and is a regular part of the job. As a result, it would not be a violation to pay that person more, regardless of whether the job is held by a man or a woman.
- **Responsibility:** The degree of accountability required in performing the job. For example, a salesperson who is delegated the duty of determining whether to accept customers' personal checks has more responsibility than other salespeople. On the other hand, a minor difference in responsibility, such as turning out the lights at the end of the day, would not justify a pay differential.

The EPA: Similar Working Conditions

- The plaintiff and comparator must perform their jobs under “similar working conditions.” This includes:
 - Surroundings, which measures the elements, such as toxic chemicals or fumes that workers regularly encounter, and the intensity and frequency of encountering these elements.
 - Hazards, which takes into account the physical hazards regularly encountered, their frequency and the severity of injury the hazards can cause.

NOTE: Similar working conditions refers to physical surroundings, not to differences in shifts or the time of day an employee works.

The EPA: Same Establishment

- “[A] distinct physical place of business, rather than an entire enterprise that might have several separate places of business.”
 - However, some business enterprises are considered a single establishment when the employer has centralized control of job descriptions, salary administration, and job assignments.
 - Ex. A power company’s service centers were separate establishments because the service centers were approximately 75 miles apart, served different customers, performed different functions for customers, and were supervised separately (*Price v. N. States Power Co.*, 664 F.3d 1186 (8th Cir. 2011)).

NOTE: The prohibition against compensation discrimination under the EPA applies only to jobs within an establishment.

The EPA: Defenses

- An employer can defend against an EPA claim when any unequal wages are paid under:
 - A seniority system
 - A merit system
 - A system that measures earnings by quantity or quality of production
 - Any factor other than sex if the employer does not reduce the wage of any employee to comply with the EPA

NOTE: These exceptions are affirmative defenses that the employer must plead and prove.

Defenses: Proving a Factor Other Than Sex

- Under the EPA, the most common factor relied upon to justify a pay disparity is the catchall “factor other than sex” defense.
 - Employers often point to factors such as levels of education, training, or other qualifications, productive output or performance, and other individually specific differences as factors that justify pay disparities.
- Q: A female applicant applies for a position that was widely advertised. During her interview she insists on being paid \$100,000. The employer agrees to her salary demand although it employs a male doing substantially similar work for \$125,000. Has the employer violated the EPA?

Proving a Factor Other Than Sex: Salary Negotiation, contd.

- Bold move! This happened in *Hunter-Tannersville Central School District*
- Court held that salary negotiation *could* form a valid defense to an unequal pay claim, but only where the employer treated applicants of different genders similarly with respect to the availability and even-handedness of such negotiations.
- Employers that determine initial salary based upon negotiations should ensure their negotiation policies and practices are equally applied to male and female applicants.
- More importantly, any wage differential ostensibly resulting from salary negotiations that would exist between comparable employees of different genders performing comparable jobs should prompt the employer to review the fairness of its processes. Such disparate salaries should not be implemented unless their fairness can clearly be supported by legitimate business reasons, including documentation of the negotiation processes that led to the agreed rates of pay.

EPA Defenses: A Final Word

- Some employers rely on a prospective employee's prior salary history to set the new hire's starting pay.
- However, this practice may implicate the EPA because women historically have been paid less than men and basing a new hire's pay on prior salary tends to perpetuate wage disparities between men and women.
- Some courts have held that an employer's EPA defense may not depend solely on prior salary. Even where an employer may use prior salary as a factor other than sex, the employer may still need to prove that it actually relied on prior salary when setting employees' pay, not just that the prior salary could explain the wage disparity.
- Using "market forces" or "economic conditions" as an affirmative defense is also risky. In an early EPA case, the Supreme Court ruled that an employer cannot pay men more than women merely because men refused to work at the low rates the employer historically paid to women.

Bonus Content: See Jury Instructions Handout

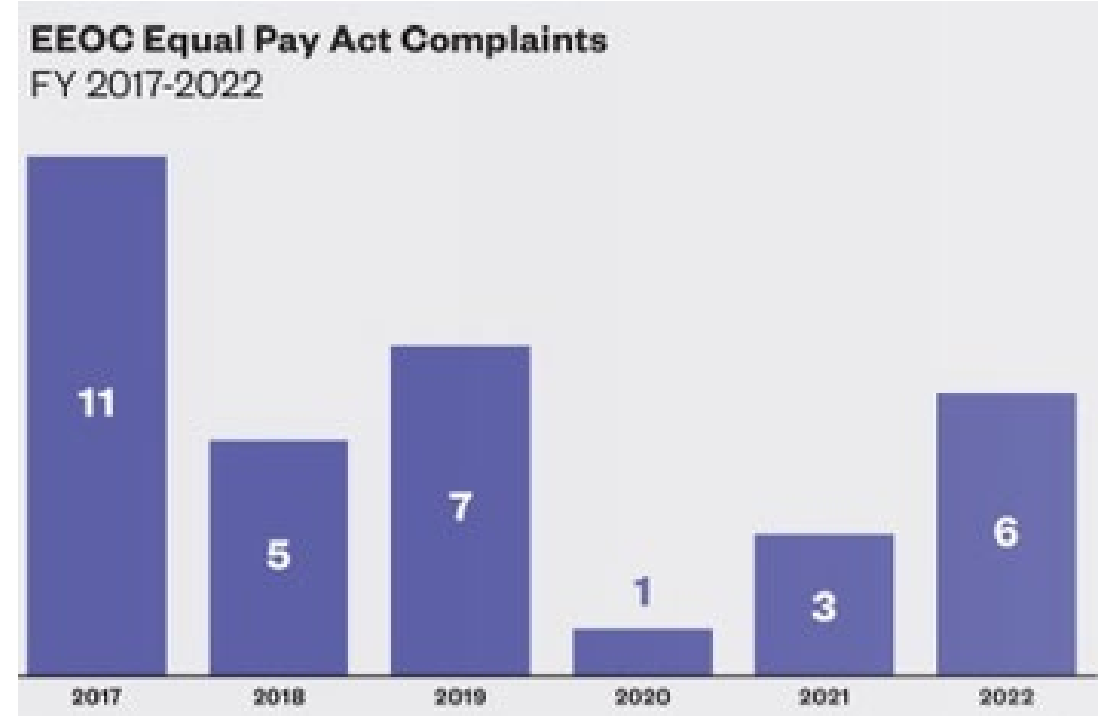
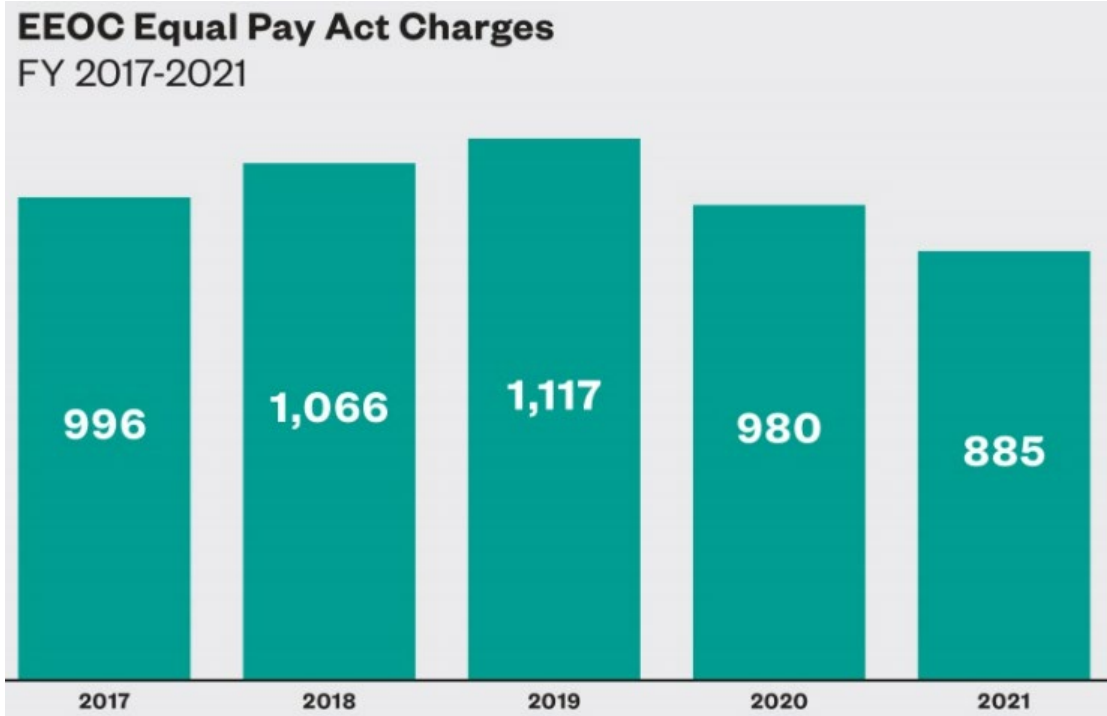
- Jury instructions are instructions for jury deliberation that are written by the judge and given to the jury.
- At trial, jury deliberation occurs after evidence is presented and closing arguments are made
- Jury instructions are the only guidance the jury should receive when deliberating and are meant to keep the jury on track regarding the basic procedure of the deliberation and the substance of the law on which their decision is based.
- Jury instructions are an important tool because they explain the law in plain language, include what elements need to be proven – once you know what a jury is going to have to decide, you can start to shape the facts and circumstances in your favor!!!
- After you leave today, take some time to read the sample EPA jury instructions in your handout...

EEOC Enforcement

The Federal Equal Pay Act and Title VII

- In fiscal year 2021, the EEOC received nearly 19,000 charges of sex discrimination filed under the EPA and/or Title VII.
- For two decades, the number of sex discrimination charges has made up around 30% of the total charges received by the EEOC, even excluding retaliation charges brought in sex discrimination cases.
- Despite being a top priority, the number of EEOC lawsuits alleging equal pay violations has dropped in the last five years, most likely due to the change in EEOC leadership that accompanied the former presidential administration. When new statistics are released, we can expect the data to reverse course.

EEOC Enforcement: By the Numbers



Examples of EEOC's Successes

- ***EEOC v. Cummins, Inc., d/b/a Cummins Business Services***, No. 3:17-cv-01306 (M.D. Tenn.) (Engine company paid a female employee less than a male performing the same work)
 - The EEOC sued Cummins Business Services alleging that the diesel engine manufacturer paid a woman working in an employee benefits position at its Nashville, Tennessee, call center less than a man holding the same position.
 - After 17 months in the position, the woman was earning \$40,900 annually.
 - When she learned that a newly hired man was being paid \$47,000, she asked for a salary review. The salary review showed she was not being compensated at the market rate, but the company refused to adjust her salary.
 - The suit was resolved through a two-and-a-half year consent decree providing \$77,500 to the female employee. The decree also provides that the company will not rely solely on prior salary in determining compensation.

Examples, contd.

- ***Estee Lauder Companies, Inc.***, 1:17-cv-3897 (E.D. Pa.) (Cosmetics company provided new fathers less paid leave and related benefits for child bonding than it provided to new mothers)
 - The EEOC sued Estee Lauder alleging that it provided male employees less paid leave for new-child bonding than it provided female employees, and denied male employees return-to-work benefits following the bonding period that were provided to female employees.
 - The suit was resolved through a consent decree providing \$1.1 million to about 200 affected individuals.
 - The decree also required Estee Lauder to implement revised paid parental leave and return-to-work flexibility policies and benefits in a way that ensures equal benefits regardless of gender or caregiver status.

EEOC Enforcement: A Reminder About Privilege

- ***EEOC v. George Washington University***

- Executive Assistant to the Athletic Director alleged she was paid less than a male “Special Assistant” for the same work.
- She filed an internal grievance. An investigation ensued. It was later handed over to a law firm, which issued a report.
- In discovery, the EEOC requested all documents relating to that investigation, but the employer withheld all documents under the auspices of the attorney-client privilege and work product doctrine.

Protecting Privilege: Key Takeaways

- The court ultimately held that the materials were privileged because the person in-house conducting the investigation contacted the employer's office of general counsel within days of receiving the grievance, after determining that litigation was likely.
- She then received guidance from in-house lawyers respecting the conduct of the investigation.
- The employer also escaped disclosure because while it asserted a "good faith defense," thereby placing its "subjective intentions at issue," it argued that the investigation materials should stay privileged because it had disclaimed an intent to rely on those materials to support its defense.

Protecting Privilege, contd.

- A company facing immediate or threatened litigation generally can rely on both the attorney work product doctrine and the attorney-client privilege to protect the confidentiality of the audit.
- However, a company conducting a pay audit for general compliance purposes may not be entitled to the same protections, as it is likely driven by other factors, such as achieving a compensation structure that mirrors the company's cultural goals and avoiding costly litigation in the future.
 - Although this type of proactive, self-driven pay equity audit is encouraged, it requires careful consideration of processes and team selection to maintain confidentiality and privilege.
- Companies must adhere to strict protocols to establish and preserve the attorney-client privilege.

Protecting Privilege, contd.

- When preparing for a pay audit, they should:
 - Determine whether outside counsel is necessary. Courts may view in-house counsel as primarily or purely functioning in a business capacity, which can create ambiguity about whether communications have a legal purpose. Engaging outside counsel for their legal expertise clearly establishes the legal purpose of the audit, but this should be explicit in any engagement letter.
 - Set the scope, breadth, and approach of the pay equity audit depending on the purpose of the audit, in particular, whether the audit is: in response to pending or threatened pay discrimination litigation; or part of a proactive legal compliance exercise.
- Identify and limit the pay audit team members to those who are relevant and necessary. Allow counsel to engage any necessary third parties, such as experts or consultants. Counsel should also ensure that any third parties sign nondisclosure agreements.
- Establish protocols, such as the preferred methods and manner of communications and the distribution and preservation of privileged and other confidential materials.

Pay Transparency and Disclosure Laws, Salary History Bans, and Data Reporting

Pay Equity is More Than Just EPA and Title VII Litigation...

- As job seekers, employees, and employers navigate what it means to “return to work,” they face a workplace landscape that has been substantially transformed.
- One change the workforce will face that has been gaining momentum during the pandemic is the increased legislative attention to pay transparency and pay data reporting, which is sweeping across the U.S. and globally.
- The policy rationale is simple: equipping the general public, employees, and the government with more data about compensation will have a positive impact on organizations and society at large achieving pay equity.

Trends: The Push Towards Pay Transparency

- Several states have adopted laws that require employers to provide applicants--or in some instances both applicants and current employees--with wage range or rate information for their positions.
- Examples: California, Colorado, Connecticut, Maryland, Nevada, New York City, Rhode Island, and Washington State. What does this entail? Consider Colorado:
 - Colorado's Equal Pay for Equal Work Act obligates employers to disclose in job postings for roles that will be Colorado-based or remote roles that could be performed in Colorado information regarding compensation and benefits being offered for the position.
 - The law also requires employers to notify their Colorado employees of promotional opportunities, whether such opportunities exist in Colorado or elsewhere, and whether or not any Colorado employee is qualified for the job.
- Look to: municipality law and consider the implications of remote work!

Trends: Pay Data Reporting is Taking Hold

- Depending on the country, employers may be required to report pay equity data to the government, publish it on the company's website, or share it directly with employees.
- In the U.S., both Illinois and California now have pay reporting laws on the books, which require disclosure of employee compensation and demographic information.
- California Example:
 - Wage data on employees in each EEO-1 Category by sex, race, and ethnicity using W-2 information.
 - Median and mean hourly rate for each combination of race, ethnicity and sex within each of the EEO-1 categories.
 - Hours worked during the reporting year for each of these employees.
 - Separate report for persons hired through "labor contractors."

What to Expect Next?

- The proliferation of remote work arrangements (and the attendant geographical differentials in pay), the growing need to replace talent lost due to the pandemic, and increasing competition around salaries and bonuses can impact an organization's pay equity.
 - The increased legislative focus on pay equity and pay transparency coupled with remote workers scattered across the country requires employers to contend with a growing patchwork of pay equity laws.
 - Complying with these state and local laws when employees are remote raises several issues such as how to count employees (to determine, for example, if the business meets the threshold employee count within the locale to be covered by its pay equity law) and how the employer must advertise job opportunities to certain populations.

Pulling it all Together: 7 Steps for Conducting a Pay Equity Audit

Basic Steps to Remember in Conducting a Pay Equity Audit

- When carrying out your pay equity audit, there are several steps you need to take to make sure it's as thorough and detailed as possible:
 - **Prepare your audit team.** Assemble a dedicated team to spearhead your audit. This team should ideally be made up of representatives from your HR department, legal team, and senior management.
 - **Train the team.** The team needs to understand pay equity laws and trends.
 - **Identify comparable jobs.** Establish criteria for what constitutes comparable work across your organization's various job titles or functions. Ensure your audit considers all the factors contributing to pay decisions. This should include the role or job title and factors such as tenure, performance, education, and location. An inclusive analysis helps ensure that your audit captures the complete picture and that its findings are as accurate as possible.

Basic Steps, contd.

- **Collect data.** Put together a comprehensive list of your team members, their job titles, pay rates, and other relevant information such as their education, experience, and performance metrics.
- **Analyze your data.** Using the data collected, identify any disparities or discrepancies in pay among your team members who are performing similar work.
- **Interpret your results.** Look for patterns or systematic disparities in how you compensate your team members. This is also the stage where you can investigate the reasons behind specific disparities.
- **Develop remedial strategies.** Once you have identified and gained an understanding of the disparities in your organization, you can formulate strategies on how you can start to correct them.
- **Implement changes and monitor progress.** The final step is to fully implement your devised strategies to correct any gender pay gaps or any other form of discriminatory pay gaps and then monitor the results over a set period of time. If these problems persist, you may need to consider tweaking your strategies until you start seeing better results.

Conclusion

Achieving Pay Equity – An Ongoing Commitment

- So, what is needed to achieve pay equity in every organization?
- In my experience, there are at least five elements:
 - Executive commitment, understanding, and attention
 - A compensation philosophy
 - Annual pay equity assessments
 - A diverse group of people in the room where pay decisions are made
 - Eternal vigilance and assigned responsibility

Commit to Education, Training, and Accountability

- In addition to offering company management some guiding principles in setting employee compensation, the company should train management on the broader issues that relate to and impact pay disparities. These include training on:
 - The prima facie case (EPA and Title VII)
 - EPA defenses
 - Pay transparency laws
 - Salary history bans. Employers that hire in certain jurisdictions, including California, Connecticut, Delaware, Hawaii, Illinois, Massachusetts, Oregon, and Vermont, should train management, recruiting, and other hiring personnel about any applicable salary history bans that restrict a company's ability to request an employee's salary history at various stages of the hiring process.
- Unconscious bias
 - Employers should train management on the dynamics and potential risks of unconscious bias and how their unintentional actions may have serious consequences for their employees' livelihoods.

Questions?



Thank you

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