

DEVELOPMENTS IN PAY EQUITY

**11TH Circuit Regional Program
College of Labor and Employment Lawyers**

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Panel

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LEGISLATIVE AND AGENCY DEVELOPMENTS

- New EEO-1 Report Required
Sept. 2017
- Suspended OFCCP Initiatives?
- State Fair Pay Laws

Background: Federal Government Focus On Pay Discrimination

- 1993: Early pay equity analyses
- 2000: The EO Survey
 - Rescinded 2006
- 2006: OFCCP Adopts a Final Rule Establishing Standards for Investigating Systemic Discrimination in Compensation
- 2007: U.S. Supreme Court's *Ledbetter* Opinion

Background (cont'd)

- January 2011: OFCCP Publishes Notice of Proposed Rescission of its Compensation Standards
- August 2011: OFCCP publishes Compensation Collection Data Tool ANPRM
- 2013
 - OFCCP Rescinds the 2006 Rules
- The 2011 tool never really takes hold

Obama 2014 Memorandum: Advancing Pay Equality Through Compensation Data Collection

- **April 8, 2014**
- **I hereby direct you to propose . . . a rule that would require Federal contractors and subcontractors to submit to DOL summary data on the compensation paid their employees, including data by sex and race. In doing so, you shall consider approaches that:**
 - maximize efficiency and effectiveness by enabling DOL to direct its enforcement resources toward entities for which reported data suggest potential discrepancies in worker compensation, and not toward entities for which there is no evidence of potential pay violations
 - minimize, to the extent feasible, the burden on Federal contractors and subcontractors and in particular small entities, including small businesses and small nonprofit organizations
 - use the data to encourage greater voluntary compliance by employers with Federal pay laws and to identify and analyze industry trends.
- **To the extent feasible, you shall avoid new record-keeping requirements and rely on existing reporting frameworks to collect the summary data. In addition, in developing the proposal you should consider independent studies regarding the collection of compensation data.**

Purpose of the Proposed Rule

- OFCCP claims that collecting summary compensation data from Federal contractors and subcontractors is a critical tool for eradicating compensation discrimination.
 - It would enable OFCCP to direct its enforcement resources toward entities for which reported data suggest potential pay violations, and not toward entities for which there is no evidence of potential pay violations. It would also enhance two enforcement objectives:
 - Greater voluntary compliance
 - Greater deterrence of noncompliant behaviors by contractors and subcontractors.
- OFCCP seeks to achieve these dual and complementary objectives while minimizing, to the extent feasible, the compliance burden borne by Federal contractors and subcontractors.

New EEO – 1 Report

- OFCCP proposal apparently abandoned and now replaced by the new EEO-1 Report
- Changes to the EEO-1 Report will require all employers to annually file summary information from W-2 forms on compensation paid to employees
- The new elevated collections requirements apply to employers with 100 or more employees
- Revised forms and new information are due on September 30, 2017
- Pay elements of new report likely to be scrapped
- What will OFCCP do next?

The Proposed Form

SECTION D - EMPLOYMENT DATA

Employment at this establishment - Report all permanent full- and part-time employees including apprentices and on-the-job trainees unless specifically excluded as set forth in the instructions. Enter the appropriate figures on all lines and in all columns. Blank spaces will be considered as zeros.

Job Categories	Annual Salary In Thousands	Number of Employees (Report employees in only one category)															
		Race/Ethnicity														Total Col A-N	
		Hispanic or Latino		Non-Hispanic or Latino													
		Male								Female							
		Male	Female	White	Black or African American	Native Hawaiian or Pacific Islander	Asian	Native American or Alaska Native	Two or More races	White	Black or African American	Native Hawaiian or Pacific Islander	Asian	Native American or Alaska Native	Two or More races		
		A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	
Executive/Senior Level Officials and Managers 1.1	\$19,239 and under																
	\$19,240 - \$24,439																
	\$24,440 - \$30,679																
	\$30,680 - \$38,999																
	\$39,000 - \$49,919																
	\$49,920 - \$62,919																
	\$62,920 - \$80,079																
	\$80,080 - \$101,919																
	\$101,920 - \$128,959																
	\$128,960 - \$163,799																
	\$163,800 - \$207,999																
	\$208,000 and over																
	\$19,239 and under																

The New EEO-1 Report

- The Revised EEO-1 would collect data by EEO-1 Job Groups
 - Each EEO-1 Category includes a myriad of widely different types of jobs.
 - For example, the Officers and Managers Group includes, among other jobs, General and Operations Managers, Sales Managers, Human Resources Managers, Construction Managers, Postmasters and Mail Superintendents, and Morticians, Undertakers, and Funeral Directors
 - Employers argue that the Revised EEO-1 Report would require comparisons between widely dissimilar jobs.

State Fair Pay Laws

California Fair Pay Act

California Labor Code Amendment

- The Fair Pay Act Amended Labor Code section 1197.5
- Took effect January 1, 2016
- Requires employers to pay wage rates to employees equal to the rates paid to opposite sex employees



Changes Imposed by Act

- Prohibits paying employees of the opposite sex less than those performing “substantially similar work”
- Substantially similar work is work that is similar when viewed as “a composite of skill, effort, and responsibility”



Changes Imposed by Act

- There is no “same establishment” requirement
- Employees may ask about comparators throughout the company



Changes Imposed by Act

- Employees permitted to inquire about and discuss wages without consequence
- No more pay secrecy!



Changes Imposed by Act

- Substantially relaxes evidentiary burden of proof for Plaintiff
- Once Plaintiff makes a *prima facie* case, burden shifts to the employer to defend against the claim



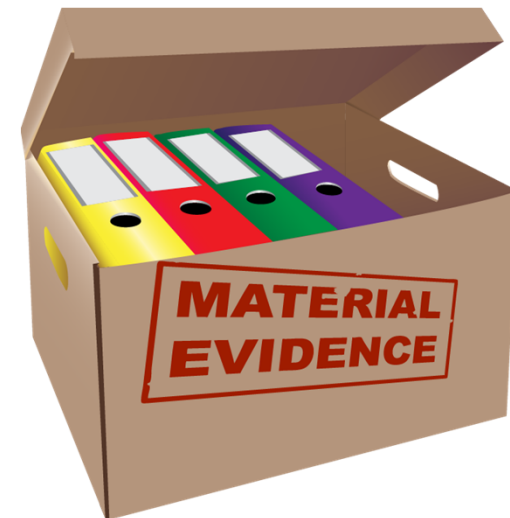
Employer's Defense

- Requires employer to show any pay differential is based on
 - Seniority
 - Merit
 - Quantity/Quality of Production
 - *Bona Fide* Factor Other than Sex



Bona Fide Factor Other Than Sex?

- Employer Must Show:
 - Difference in Compensation Not Sex-Based
 - Related to Position
 - There is a Business Necessity
- Employee Can Rebut:
 - Demonstrate That Alternate Business Rationale Exists



New York Achieve Pay Equity Act

New York State Equal Pay Act

- Women and men must receive equal pay for equal work unless difference based on:
 - Seniority system
 - Merit system
 - System that measures earnings by quantity or quality of production
 - ~~Any factor other than sex.~~
 - Bona fide factor other than sex, such as education, training or experience.



New York State Equal Pay Act

Bona Fide Factor

- Cannot be based upon or derived from sex-based differential in compensation
- Must be job-related and consistent with business necessity
 - “Business Necessity” – “factor that bears a manifest relationship to the employment in question”
i.e., effectively fulfills the business purpose it is supposed to serve



New York State Equal Pay Act

- Employer's Bona Fide Factor Defense Fails if Employee Shows:
 - the employer uses an employment practice/factor that causes a disparate impact on the basis of sex
 - an alternative employment practice/factor exists that would serve the same purpose without causing a disparate impact; and
 - the employer has refused to adopt the alternative practice/factor.

New York State Equal Pay Act

- Employees can be compared even if do not work in same establishment – must only work within same county
- Employers cannot prohibit employees from sharing wage information with other employees
 - OK to have written policies establishing reasonable workplace/workday limitations on time, place and manner and to prohibit disclosure of another's wages without permission
 - Policies must be consistent with other laws (NLRA)
- Liquidated damages – now 300% of unpaid wages

Massachusetts Pay Equity Law

MA Pay Equity Act

- Enacted August 1, 2016
 - Equal pay for “comparable work”
 - Requiring “substantially similar skill, effort and responsibility” and “performed under similar working conditions”
 - shift differentials
 - physical surroundings
 - hazards



MA Pay Equity Act

- Exceptions

- Bona fide seniority system
- Bona fide merit system
- Earnings by quantity or quality of production of sales
- Geographic location
- Education, training or experience
 - Where consistent with business necessity
- Need to travel



MA Pay Equity Act

- Also prohibits:
 - Screening applicants based on salary history (disclosure of prior wage/salary info)
 - Seeking salary info from current or former employer
 - Unless conditional offer of employment and written authorization
 - Preventing employees from discussing compensation with coworkers
 - Decreasing pay to ensure compliance

MA Pay Equity Act

- Extend SOL from 1 to 3 years
- Can go directly to court – no administrative charge prerequisite
- Affirmative defense – good faith “self-evaluation” of pay practices within 3 years
 - Reasonable in detail and scope given employer’s size
- Liquidated damages / Attorneys’ Fees
- January 1, 2018 effective date
- Anti-retaliation provision

MARYLAND

- “Equal Pay for Equal Work”
- Passed May 23, 2016
- Expands existing state law
- First law of its type to cover gender identity
- Gender identity has been a protected category in Maryland since 2014.

MARYLAND

- Can't pay wages to one sex or gender identity at rate less than paid to other sex or gender identity
- Both work at the same establishment
- Perform work of comparable character
- Or perform work on the same operation, in the same business or of the same type

MARYLAND

Prohibits adverse employment action against an employee who inquires about, discusses, or discloses his or her own wages or the wages of another employee, if those wages have been disclosed voluntarily.

Employees who have regular access to wage information are not protected unless they obtain the wage information outside their normal duties.

Employer may establish reasonable workday limitations on the time, place, and manner for inquiries about or the discussion or disclosure of an employee's wages.
(Possible NLRA preemption).

Pay Transparency – “Equal Pay Light” Bills

More states have passed laws making retaliation unlawful against employees who discuss wages, including:

Connecticut

New York

Oregon

DC

Minnesota

New Hampshire

New Jersey

Maryland

Pay Transparency – “Equal Pay Light” Bills

Wage transparency bills also proposed in:

Arizona

Hawaii

Los Angeles

Tennessee

Utah

West Virginia

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Pay Equity Audit

Why Undergo a Pay Equity Audit?

- EEO-1 Report
- State Laws
- Plaintiffs Bar
- Shareholder Pressure
- Economic / Efficiency Reasons

Major Milestones in Pay Equity Audit

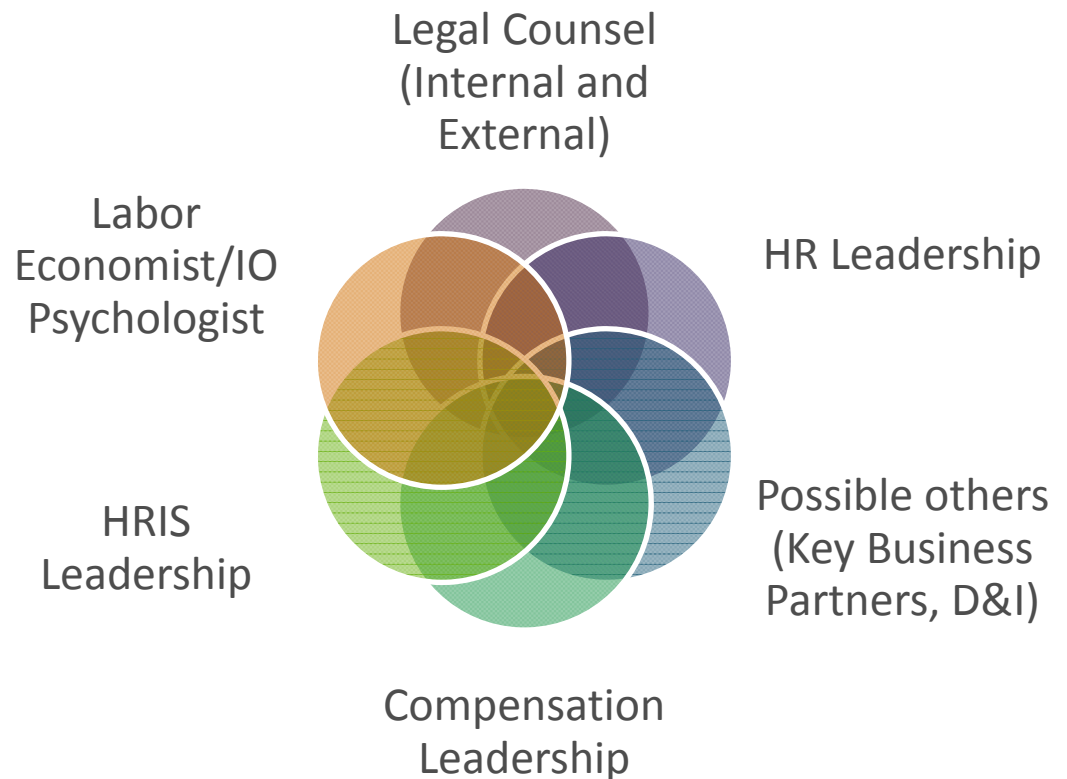
1. Identify the Work Team
2. Establish Privilege Protocol
3. Decide the Employee Groupings
4. Gather Initial Data
5. Analyze and Review
6. The Deeper Dive
7. Refine the Analysis
8. Pay Adjustments (Remediation)
9. Follow-up and Monitoring

Steps 1 and 2: Identify the Work Team and Establish Attorney-Client Privilege

Pay equity analysis is usually not an “all hands on deck” exercise.

ATTORNEY-CLIENT PRIVILEGE

- Partner with internal and external counsel
- Implement privilege protocol
- Limit the work team to key, “need to know” participants
- Mark all documents as “Privileged and Confidential”



Step 3: Pay Analysis Groupings

- **Critical to any pay equity study**
- **Groupings versus ‘controls’ – which is better?**
- **Examples:**
 - “Pooled” analysis – analyze all employees together
 - Exempt / Non-Exempt Status
 - Line of Business (Divisions)
 - Job Grade/Level
 - Job Grade (controlling for Function or Department)
 - Job Function (controlling for grade)
 - Band / Job Function / Job Family
 - Job Title
- **Key Consideration: The groups should mirror your company’s pay practices to the greatest extent possible.**
- **In litigation, this issue may be specified as part of the lawsuit.**

Step 3: Pay Analysis Groupings A Middle Path?

- **Separate Employees by Job Family**
 - Human Resources, IT, Sales, Operations, etc.
- **But control for:**
 - Grade/Band (“Responsibility”)
 - Performance ratings over multiple years (“Skill”)
 - Working conditions (e.g., Night Shift, Weekend workers)
 - Geographic location
 - Measures of Seniority
 - Education Levels / Occupational Licenses
 - Actual Productivity (piece-rate or sales workers)

Step 4: Gather Initial Data

What is Required?

▪ Job Information

- Organizational Position (Business, Division, Department etc.)
- Type of Work (Job Family/Function)
- Job Level (grade, band, sub-band, etc.)
- Job Title
- FLSA Exempt Status
- Managerial Responsibility / Number of Employees Supervised
- Differential Pay? (Shift, weekend, lead, etc.)

▪ Employee Information

- Demographic Data (Gender, Race/Ethnicity, DOB)
- Compensation Information (Base Pay, Bonus, LTI, etc.)
- FT or PT Status; typical work hours for PT workers
- Performance Ratings, preferably over several years
- Hire Date, Rehire Date, Acquisition Date, Position (Grade) Start Date
- Work Location (or Cost of Living Factor)
- Employee Type (Intern, Temp, Seasonal, or Regular)

Step 5: Conducting the Analysis and Interpreting the Results

- As long as the job groups are large enough for valid analysis, your counsel and expert will likely prepare a multi-variate regression analysis.
- An advantage of using regression analysis is that it isolates the effect of each control variable on pay.
 - e.g., a regression would estimate the effect of experience on salary separately from the effect of job grade on salary.
- Some factors should not have any effect on pay
 - An employee's Zodiac sign.
- Gender or Race/Ethnicity are included to see if there is any relationship with pay (after accounting for grade, seniority, etc.)
 - Ideally, the correlation between gender and pay is the same as the effect of the Zodiac sign: zero.
- Regression analyses inform you of whether there are differences, on average, in pay between females and males after accounting for all factors included in the model.
 - Be careful of how you interpret the results from a regression model.

Step 5: Sample Regression Analyses

Attorney Work Product

*For Internal Use Only - Do Not Distribute
Privileged and Confidential - Prepared at the Request of Counsel*

*Preliminary Draft
January 19, 2017*

Virtual Corporation **Regression Analysis of Annualized Salary** **U.S. Employees as of December 31, 2016**

Functional Area	Female/ Male Salary Difference	Difference as a Percent of Average Female Salary	Difference in Standard Deviations	Probability that the Difference Occurred by Chance	Percentage of Variation Explained by the Model	Number of Variables in the Model	Number of Employees	Number of Female Employees
Engineering	-\$1,133	-0.8%	-1.98	4.8%	96.0%	92	3,207	357
Finance	\$5,492	3.5%	1.74	8.8%	98.5%	49	94	61
Human Resources	-\$7,469	-5.1%	-1.35	19.3%	98.9%	33	53	44
IT - Information Technology	-\$1,257	-0.9%	-0.30	76.3%	92.5%	56	183	15
Marketing	\$1,941	1.3%	0.61	54.1%	94.5%	63	301	78
Operations	-\$1,304	-1.2%	-0.65	51.3%	96.3%	79	362	105
Program Manager	-\$2,902	-2.0%	-1.00	31.8%	87.5%	46	188	53
Research	\$17,592	8.9%	0.92	36.1%	90.7%	23	75	1
Sales	-\$4,104	-2.6%	-0.60	55.3%	95.5%	36	72	21

Source: Data provided by Virtual Corp.

Note: In addition to gender, the model controls for functional area, job family, grade, business unit, geographic zone, years of service, years in current position, years in current grade, and age at hire (as a proxy for prior experience).

Step 6: The Deeper Dive

- **What if some employee groups show significant pay differences? Does this mean you have a pay equity problem?**
- **Not necessarily—Consider whether there are other legitimate business factors that should have been captured. Note that it is not clear whether all factors here will pass muster under new law.**
 - Education
 - Licenses, Occupational Certificates (e.g., CPA, IT certification)
 - Disciplinary issues
 - Number of direct and indirect reports
 - Unique prior experience outside company
 - Performance differences over a sustained period of time
 - Red circling/grandfathering
 - Internally promoted into position or externally hired?

Step 7: Refine and Update the Analysis

- **Collect additional data for all employees in the adverse groups – not just the “outlier” employees.**
- **Re-estimate the regression analyses, incorporating the new factors. Are there still statistically significant pay differences? Are there still ‘outliers’ who are paid much higher or lower than predicted?**
 - If so, a “root cause” study may be appropriate. It determines whether the existing pay disparities are a result of starting pay at hire or whether they pay differences arose over the course of employees’ careers. Be careful—this may be an explanation, but not a legal excuse.
- **If pay equity issues persist, then consider making changes to employees’ pay (i.e., remediation).**

Step 8: Remediation Considerations

- **Which employees should receive an adjustment?**
 - Only protected group members?
 - Only protected group members that are ‘under paid’? What about underpaid males/whites?
 - Should some employees be excluded from consideration? (Low performers, new hires)
- **How “deep” is the remediation?**
 - Is the goal to lower the average pay difference to zero?
 - Or is the goal to lower it to less than statistical significance?
 - Is there a limit to individual pay adjustments? What about a minimum adjustment?
- **How will the pay adjustments be calculated?**
 - Should it be individually tailored? Or is a common adjustment amount/percent sufficient?
 - How about a hybrid solution that gives larger adjustments to top-performing employees?
- **When will the adjustments be made?**
 - Will the remediation be folded into an annual merit raise process, perhaps unbeknownst to employees?
 - Or will it be a stand alone, off-cycle adjustment?

Step 8: Remediation Methodologies

- **1. “Peanut Butter”**
 - All (protected) employees receive the same \$ or % increase.
- **2. Individually Tailored**
 - Employees pay is adjusted so that it matches their predicted pay from the regression analyses
- **3. Hybrid Approach**
 - Determine the average \$ or % increase for the group.
 - Adjust this amount up or down based on individual factors such as performance ratings, position in range.

Hybrid Approach Example

Performance Rating	Comp-Ratio: Less than 0.80	Comp-Ratio: 0.80 – 0.99	Comp-Ratio: 1.00 – 1.20	Comp-Ratio: Greater than 1.20
Outstanding	2.0x	2.0x	1.50x	1.25x
Exceeds Expectations	1.75x	1.25x	1.0x	0.50x
Meets Expectations	1.50x	0.75x	0.50x	0x
Does Not Meet Expectations	0x	0x	0x	0x

Step 9: Follow-Up and Monitoring

- **In years past, advice to clients was to conduct pay equity studies every 2-3 years.**
 - The legal and regulatory environment have changed dramatically in the past year. Consider making these studies an annual exercise.
- **The (previous) White House Pay Equity Pledge asks companies to commit to:**
 - Annual pay analyses, across occupations.
 - Review hiring and promotional processes.
- **Monitor factors and policies that can (eventually) lead to pay disparities:**
 - Are performance ratings similar between demographic groups?
 - Do your policies regarding promotional pay changes cause pay disparities to persist? (e.g., no pay change can exceed 10%).
 - Do you have policies with respect to setting and negotiating starting pay?

Additional Pay Equity Issues- FAQ

- Some employee groups are too small to analyze with regression. What do you do instead?
- What should be the focus of a pay equity study?
 - Base Salary?
 - Incentive Compensation?
 - Total Compensation?
- My client is asking for a study to figure out the bottom-line pay equity number. What does that mean?