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Equal Pieces of Pie: Understanding Equal Pay Laws to Avoid and Defend Pay-Equity Claims

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- *Subsequent information should not be understood as, or considered a substitute for, specific legal advice. For inquiries, please contact Melissa McDuffey, or another licensed attorney.



Introduction Pay-Equity Laws Factors Enforcement Action Plan





Introduction to Wage Gap and Pay Equity

What's the Big Deal?

- For employers, the big deal lies in liability for failing to recognize and remedy wage gaps that could be attributable to protected categories.
- The gender wage gap is discussed the most, but employers should also be cognizant of wage gaps that may exist for other protected categories.
- Wage-gap discussions and reports continue to grow. This is likely to be a significant issue in the coming years, particularly in light of the #Metoo movement.

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What's the Big Deal?

- Unemployment rate is down and the number of working women is up.
- According to a report by the American Association of University Women, women earn 80 cents for every dollar paid to men in the U.S.
- Wage gap is more significant for women of color and in older age groups.
- The Institute for Women's Policy Research estimated in 2017 that nearly \$513 billion would be added to Americans' incomes if men and women were paid equally—about 2.8% affect on gross domestic product.

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What's the Big Deal?

- "The gender earnings gap persists even when variables such as experience, education, industry and hours worked are controlled. Many economists have concluded that some – or all – of the remaining gap may be due to pay discrimination based on sex."

* Equal=Pay, An Employer's Guide to Equal Pay, Women's Bureau, United States Department of Labor





Pay-Equity Laws

Five Major Federal Laws Addressing Equal Pay

- Equal Pay Act of 1963
- Title VII of the Civil Rights Act of 1964
- Lilly Ledbetter Fair Pay Act of 2009
- Executive Order 11246
- National Labor Relations Act



Equal Pay Act of 1963

- Must pay equal wages to women and men for performing substantially equal work.
- Jobs that require equal skill, effort and responsibility and are performed under similar working conditions.
- Covers all forms of pay: salary, 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 benefits.



Equal Pay Act of 1963

- Basis of a claim under the Equal Pay Act
 - (1) Performing work which was substantially equal to that of employees of the opposing sex, taking into consideration the skills, duties, supervision, effort and responsibilities of the job.
 - (2) Conditions where the work was performed were basically the same.
 - (3) Employees of the opposite sex were paid more under such circumstances.



Equal Pay Act of 1963

- A pay disparity is only justified if the employer can show it was justified by one of the following reasons:
 - (1) A seniority system.
 - (2) A merit system.
 - (3) A pay system based on quantity or quality of output.
 - (4) A disparity based on any factor other than sex.
- Note that discriminatory intent is irrelevant!



Equal Pay Act of 1963

- Seniority, merit or incentive systems must be bona fide in order to operate as a defense.
 - It is an established system containing predetermined criteria.
 - It has been communicated to employees in advance.
 - It has been consistently and applied evenly.
 - It is actually the basis for the differential.



Equal Pay Act of 1963

- “Factor other than sex” defense
 - It must be related to job requirements or otherwise business related.
 - The employer and employee were aware that factor was being applied in setting compensation.
 - It must be applied consistently.
 - It must correspond to compensation disparity.
 - Examples: tenure/experience, education, training and demonstrated ability
 - *Rizo v. Yovina* – prior salary is not a “factor other than sex” (9th Cir. 2018).



Equal Pay Act of 1963

- Enforcement
 - Employees can file a charge with the Equal Employment Opportunity Commission (EEOC) or go straight to court.
 - Two-year statute of limitations or three years if willful.
 - It is the employer’s burden to prove that there is a good reason for the disparate wages.
 - Plaintiff cannot recover compensatory or punitive damages but may recover liquidated damages (in addition to attorneys’ fees and costs).



Equal Pay Act of 1963

- Good to know:
 - Equal wages must be paid in the same form (e.g., cannot equalize a woman's wages by offering her a bonus to compensate for her lower salary).
 - Only the skills necessary to meet the job requirements should be considered in setting pay rates (e.g., cannot pay a male more because he has a master's degree if it is not necessary to perform the job).
 - Duties actually performed (rather than job title) determines whether jobs are substantially equal.
 - If inequality exists, cannot reduce one's wages to equalize the pay.



Title VII Basics

- Cannot discriminate on the basis of sex (or other protected category).
- Applies to pay itself as well as other factors that may influence pay such as promotions and job assignments that may keep wages low.
- Enforced by the EEOC, and after a charge is filed, through the court system.



Title VII – Imposing Liability

- Plaintiff must show that she occupies a job similar to that of higher paid males and that she was discriminated against *because* of sex, race, age, nationality, etc.
- Employer can avoid liability by showing there is a legitimate, non-discriminatory reason for the pay disparity.
 - The burden is “exceedingly light.” Employer must only proffer non-gender based reasons, not prove them.
- Employee can only overcome by showing intentional discrimination regardless of proffered reason.



Title VII – Imposing Liability

- 300-day statute of limitation in Oklahoma.
- Intent required for disparate treatment but not disparate impact.
- No requirement that work be in the same establishment.
- Compensatory and punitive damages (subject to caps depending on size of employer).
- No liquidated damages.
- Employee has the burden to show pay disparity is discriminatory.



Lilly Ledbetter Fair Pay Act

- Named after a plaintiff in a pay-equity case that reached the United States Supreme Court.
- Plaintiff learned that males in the same position were making substantially more money.
- By the time plaintiff filed with the EEOC, only two paychecks fell within the 180-day limitations period.
- Insufficient evidence of intent to discriminate.



Lilly Ledbetter Fair Pay Act

- Lilly Ledbetter Fair Pay Act addressed the court case, and Congress corrected the law to avoid the outcome reached by the court.
- Now an employee has up to 180 days (300 in Oklahoma) to file a charge with the EEOC after the employer's most recent paycheck that reflects unequal wages in violation of Title VII.
- Act also contains an explicit retroactivity provision.
- Each paycheck that contains discriminatory compensation is a separate violation regardless of when the discrimination began.



Executive Order 11246

- Prohibits federal contractors, federally-assisted construction contractors and federal subcontractors from discriminating in employment decisions, including compensation, on the basis of race, color, religion, sex, or national origin, when these entities' contracts or subcontracts exceed \$10,000.



National Labor Relations Act

- Protects the rights of most private-sector employees to join together, with or without a union, to improve their wages and working conditions.
- Section 7 prohibits employers from retaliating against their non-supervisory employees covered by the act for discussing wages or working conditions with their colleagues as part of an effort to improve their working conditions.



State Laws Governing Equal Pay

- Nearly every state has some form of pay-equity law.
 - Gender-specific laws
 - Gender plus other protected categories
 - Salary history inquiry ban



Oklahoma Law

- "It shall be unlawful for any employer within the State of Oklahoma to willfully pay wages to women employees at a rate less than the rate at which he pays an employee of the opposite sex for comparable work on jobs which have comparable requirements relating to skill, effort and responsibility, except where such payment is made pursuant to a seniority system; a merit system; a system which measures earnings by quantity or quality of production; or a differential based on any factor other than sex."
 - Okla. Stat. tit. 40, § 198.1



Penalty – Oklahoma Law

- Employers who violate the law on discriminatory wages "shall be deemed guilty of a misdemeanor and shall upon conviction thereof, be punished by a fine of not less than Twenty-five Dollars (\$25.00) nor more than One Hundred Dollars (\$100.00)."
 - Okla. Stat. tit. 40, § 198.2





Possible Factors Influencing Wage Gap

Why is There a Wage Gap?

- Women less likely to negotiate
- “Motherhood” penalty
- Conscious and unconscious bias (e.g., outcome of employee evaluations)
- Wage secrecy policies
- Considering salary history in setting compensation
- Bias and stereotypes
- Women not being offered higher positions that pay more





Enforcement Efforts

Enforcement

- In the fall of 2017, the EEOC released its 2018-2021 Strategic Plan announcing that pay equity would be one of its six major priorities.
- Since that time, the EEOC has filed several lawsuits to enforce its Strategic Plan.
- In FY 2015, the EEOC received 973 wage-discrimination charges.



Enforcement – Costly Settlements

- University of Denver – \$2.66 million settlement for paying female law professors less than males (2018)
- Farmers Insurance – \$4.1 million settlement; agreed to appoint internal compliance auditor; benchmarks for increasing number of women in higher salary positions; annual statistical review of salaries (2016)
- Uber – \$10 million settlement and required reforms in employment practices (2018)
- Qualcomm Technologies – \$19.3 million settlement; internal policy changes; internal compliance officer





Employer Action Plan

What Can You Do to Avoid Liability?

- Be proactive!
 - Evaluate all forms of compensation to ensure they are equal, considering Equal Pay Act factors.
 - Revise job descriptions to show specific details that reflect legitimate reasons for wage disparity.
 - Define compensable factors.
 - Conduct annual compensation audits to ensure compliance with all federal, state and local laws.
 - Conduct external market studies and group jobs in bands with high-end and low-end salary for the position.



What Can You Do to Avoid Liability?

- Be proactive!
 - Have a designated person or department review all personnel decisions and evaluations that may affect or influence compensation.
 - Document bases for all wage (and bonus, etc.) determinations and deviations.
 - Conduct regular performance evaluations.
 - Update and train your supervisors and persons who influence or make compensation decisions.

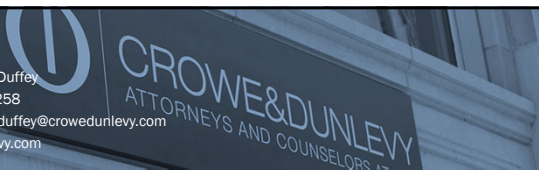


What Can You Do to Avoid Liability?

- If starting salaries and signing bonuses are negotiated, ensure that it does not have adverse impact on minorities and women.
- Don't ask for wage history on applications.
- Review policies to ensure they do not prohibit discussion of wages.
- Consider implementing an internal compliance procedure and making compensation decisions more formulaic to the extent possible.



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