Breakout Sessions – Series 1

EYE ON PAY EQUITY

PRACTICAL TAKEAWAYS FROM RECENT LITIGATION

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Equal Pay Day, federal law amendments, state fair pay laws, safe harbor defenses, gender pay gap reporting, individual and class action litigation… over the past several years, our focus has been drawn to pay equity in the workplace. This paper discusses the legal background for equal pay in employment, including some recent case law developments.

I. APPlicable LAWS

A. Federal Statutes (United States)

There are two basic federal laws that prohibit discrimination in compensation based on gender: Title VII of the Civil Rights Act of 1964 ("Title VII") and the Equal Pay Act ("EPA").

Title VII prohibits discrimination in connection with compensation (among other terms and conditions of employment) based on race, color, national origin, religion, and gender. Under Title VII, the employee claiming discrimination must prove that she was paid less than similarly situated male comparators and that the employer had an intent to discriminate, either through direct evidence or circumstantial evidence. If the employee proves discrimination, the employee is entitled to recover the difference between what the employee was paid and what she should have been paid based on her comparators’ compensation. In addition, she may recover compensatory damages and punitive damages – up to a cap that is tied to the size of the employer. Notably, Title VII also prohibits compensation discrimination based on other protected characteristics, including race, religion, color, and national origin. In addition, other federal discrimination statutes, like the Age Discrimination in Employment Act and the Americans with Disabilities Act, prohibit compensation discrimination on the basis of age or disability, respectively. The statute of limitations for claims arising under Title VII is either 180 days or 300 days from the last act of discrimination, depending on where the employee is located. The Lilly Ledbetter Fair Pay Act of 2009 ("Lilly Ledbetter Act") amended Title VII to provide that every paycheck that is affected by alleged pay discrimination gives rise to a new cause of action, and thus gives rise to a new 180/300 period in which to file a claim.

The EPA is targeted to sex discrimination in compensation and prohibits an employer from paying different compensation to employees of the opposite sex who work within the same establishment and perform equal work on jobs the performance of which requires equal skill, effort, and responsibility and which are performed under similar working conditions. If an employee establishes that she was paid less than a male coworker for performing such equal work, the EPA provides that such differences may be justified by a seniority system, a merit system, a system which measures earnings by quantity or quality of production, or based on any factor other than sex. If an employee proves a pay disparity that the employer cannot justify with one of these factors, the employee is entitled to recover the difference between what the employee was paid and what she should have been paid based on her comparators’ compensation. In addition, she may recover liquidated damages equal to the amount of the back pay awarded. The statute of limitations for claims arising under the EPA is two years, extending to three years for willful violations.

Under both statutes, the prevailing employee may recover her reasonable attorneys’ fees.

While new fair pay legislation has been proposed in the U.S. Congress regularly over the past few years, no such legislation has been passed since the Lilly Ledbetter Act. Federal courts, however, have not been shying away from the topic. In a recent decision, the Fourth Circuit Court of Appeals reversed an order granting summary judgment to an employer in an
Equal Pay Act case, finding that, in addition to justifying the pay differential through one of the articulated affirmative defenses, the employer had a “heavy” burden of showing that sex had nothing to do with any of the pay gap.  See Bowen v. Manheim Remarketing, Inc., 882 F.3d 1358 (11th Cir. 2018). The court also questioned the viability of the employer’s reliance on the plaintiff’s prior salary and lack of experience compared to her male predecessor, who made approximately $14,000 more than her. While these may have factored in to setting her initial pay, the court noted that as she gained additional experience in her job and demonstrated her competency in the job, her “prior salary and prior experience would not seem to justify treating her different than the predecessor.” This case highlights the burden employers face to justify pay differentials, as well as the need to review pay decisions for continued fairness.

B. Federal Regulations (United States)

The Equal Employment Opportunity Commission (“EEOC”) is responsible for interpreting and enforcing Title VII. Before a claimant may pursue a claim for pay discrimination under Title VII, she must first file a Charge of Discrimination with the EEOC.

The Department of Labor (“DOL”) is responsible for interpreting and enforcing the EPA. However, claimants filing charges with the EEOC alleging pay discrimination under Title VII often include a claim under the EPA as well. The EEOC will investigate claims of pay discrimination under the EPA. However, the filing of a charge does not toll the statute of limitations for an EPA claim and the EPA’s limitations period continues to run while the charge is being processed.

The EEOC also requires employers with 100 or more employees to file annual EEO-1 reports providing information regarding the numbers of employees in 10 broad job categories by gender, race, and ethnicity. Amid much discourse and controversy, in 2016, the EEOC issued regulations requiring employers to report aggregate W-2 wages and hours worked in 12 pay bands for each of the 10 EEO-1 job categories and 14 gender, race, and ethnicity categories on the current form. This reporting was to begin March 2018. On August 29, 2017, the EEOC announced that the Office of Management and Budget was initiating a review and immediate stay of the pay data collection provisions. These EEO-1 obligations relating to pay disclosure remain on hold for the time being.

On January 11, 2016, an OFCCP Final Rule under Executive Order 13665 went into effect and, to date, remains in effect. This rule, applicable only to covered federal contractors, is designed to promote pay transparency. It prohibits discrimination against those “who inquire about, discuss, or disclose their own compensation or the compensation of other employees or applicants.”

Effective August 15, 2016, additional OFCCP regulations went into effect relating to a variety of issues concerning gender discrimination – including compensation. As to compensation, the regulations prohibit contractors from paying different compensation to “similarly situated” employees on the basis of sex. Factors that may be relevant to determine whether employees are similar include “tasks performed, skills, effort, levels of responsibility, working conditions, job difficulty, minimum qualifications, and other objective factors.” Of concern to employers, the OFCCP regulations note that employees may be deemed to be “similarly situated where they are comparable on some of these factors, even if they are not similar on others.”
C. United States – State Legislation

California, Delaware, New York, Maryland, Massachusetts, Oregon, and Washington have all passed pay equity legislation that is far more protective of employees – and more challenging for employers – than federal law. Also of note are other states and localities that have passed legislation that addresses issues related to transparency, recordkeeping and compliance issue for equal pay. For instance:

- Connecticut and New Hampshire prohibit employers from retaliating against employees for discussing their pay with one another.

- North Dakota requires employers to maintain records of employee compensation for the entire length of the employee’s tenure (potentially longer than federal requirements) and to report on these records upon inquiry from the state.

- Illinois amended its equal pay law to expand coverage to employers with 4 or more employees and to increase civil penalties for equal pay violations.

- Delaware, Minnesota, and Oregon hold state contractors accountable for certifying compliance with state and federal equal pay laws.

- The city of San Diego, California recently passed an ordinance requiring many city contractors to certify compliance with the California Equal Pay Act.

- Rhode Island has created a tip line for employees to report violations of the state’s gender-based wage discrimination laws.

Additional pay equity legislation has recently been proposed in Florida, Indiana, Louisiana, Michigan, Ohio, Pennsylvania, South Carolina, and Texas.

The following is a summary of the highlights of the pay equity legislation enacted (as of the time of this paper) by California, Delaware, Massachusetts, Maryland, New York, Oregon, and Washington.

1. California

The California Fair Pay Act became effective January 1, 2016, and included the following significant changes to California’s existing pay equity law, which had closely tracked the EPA:

- Requires employers to pay employees of the opposite sex equivalent wages for “substantially similar work” on jobs the performance of which requires equal skill, effort, and responsibility when viewed as a composite of skill, effort, and responsibility.

- Eliminates the requirement that wage discrimination claims be based on a comparison of the wages of male and female employees in the same establishment.

- Elaborates on what qualifies as a “bona fide factor other than sex,” specifying that this factor “shall apply only if the employer demonstrates that the factor is not
based on or derived from a sex-based differential in compensation, is job related with respect to the position in question, and is consistent with a business necessity.” Each factor must be applied “reasonably.”

- Provides that a “business necessity” means an “overriding legitimate business purpose such that the factor relied upon effectively fulfills the business purpose it is supposed to serve.” This defense will not apply “if the employee demonstrates that an alternative business practice exists that would serve the same business purpose without producing the wage differential.”

- Provides that the one or more factors relied upon to justify the pay difference must account for the entire wage differential.

- Gives employees the right to discuss their own wages and to ask other employees’ about pay.

The California Fair Pay Act was further amended effective January 1, 2017 to apply to race and ethnicity and to prohibit employers from relying on an employee’s prior compensation to justify a pay differential.

Additional amendments became effective January 1, 2018. Specifically, the law now: (1) prohibits employers from asking job applicant’s about their salary history; (2) prohibits salary history as a factor in making a hiring decision (even if the information is volunteered by the applicant); and (3) requires an employer to provide a pay scale for a position upon reasonable request.

2. Delaware

In June 2017, Delaware passed a law, effective December 14, 2017, that prohibits employers from screening applicants based on their compensation histories (including by requiring that an applicant’s prior compensation satisfy minimum or maximum criteria) and from seeking the compensation history of an applicant from the applicant or from a current or former employer.

The law does not prohibit employers from discussing or negotiating compensation expectations as long as the employer does not request or require disclosure of the applicant’s compensation history.

3. Maryland

Maryland’s pay equity law went into effect on October 1, 2016, and it included the following significant changes to Maryland’s existing pay equity laws:

- Expands protections against pay differentials to include those based on gender identity.

- Expands the definition of “same establishment” to facilities in the same county.

- Adds a new exception that allows differentials based on employer systems that measure performance based on quality or quantity of production.
• Adds another exception that allows for differentials in compensation based on “a bona fide factor other than sex or gender identity, including education, training, or experience,” but only if that factor: (1) is not based on a gender-based differential in compensation; (2) is job-related with respect to the position and consistent with a business necessity; and (3) accounts for the entire pay differential.

• Provides that an employee can establish a violation of the act by showing that the employer’s reliance on a statutory exception is a pretext for discrimination.

• Makes it unlawful for an employer to prohibit an employee from: (i) inquiring about, discussing, or disclosing his or her wages or the wages of another employee; or (ii) “requesting that the employer provide a reason why the employee’s wages are a condition of employment.”

• Prohibits employers from taking any “adverse action” against an employee for:
  o Inquiring about another employee’s wages;
  o Disclosing his or her own wages, or discussing another employee’s wages if the other employee has voluntarily disclosed that information;
  o Asking the employer for a reason for the employee’s wages; or
  o Encouraging or aiding another employee’s exercise of rights under the new law.

• Extends the statute of limitations to three years after an employee receives a final paycheck upon discharge.

4. Massachusetts

The Massachusetts Equal Pay Act (“MEPA”) goes into effect July 1, 2018, and includes the following significant changes to Massachusetts’ existing pay equity laws:

• Prohibits employers from paying lower compensation to employees of a different gender for comparable work. Comparable work is “work that is substantially similar in that it requires substantially similar skill, effort, and responsibility and is performed under similar working conditions.”

• Provides that an employer is not liable if the pay difference is based on one or more of the following factors:
  o A bona fide seniority system – but time spent on pregnancy or family leave cannot reduce seniority.
  o A bona fide merit system.
  o A bona fide system that measures earnings by quantity or quality of production or sales.
  o The geographic location in which a job is performed.
Education, training, or experience – if such factors are reasonably related to the particular job in question and consistent with business necessity.

Travel – if the travel is a regular and necessary condition of the particular job.

- Provides employers with a “self-evaluation” defense – an employer who, within the previous 3 years (prior to the commencement of a claim), conducts a good faith self-evaluation of pay practices and can demonstrate that “reasonable progress has been made towards eliminating compensation differentials based on gender,” has an affirmative defense to an equal pay claim.

- Prohibits an employer from reducing the pay of an employee in order to comply with the law.

- Makes it illegal for employers to:
  - Require that an employee refrain from inquiring about, discussing, or disclosing information about the employee’s own wages, or any other employee’s wages;
  - Screen job applicants based on their wages;
  - Request or require an applicant to disclose prior wages or salary history; or
  - Seek the salary history of any prospective employee from any current or former employer, unless the prospective employee provides express written consent, and an offer of employment – including proposed compensation – has been made.

- Employers may prohibit HR employees, or other employees whose job responsibilities require access to other employees’ compensation information, from disclosing such information.

On March 1, 2018, the Massachusetts Attorney General (AG) issued detailed guidance on the amendments to the MEPA, which are set to go into effect on July 1, 2018. The guidance seeks to provide direction to employers and employees on the scope and meaning of the law, and addresses a number of issues about which the employer community has long sought clarity.

- Out-of-State Application. The guidance provides that the new law will apply to employees who work outside of Massachusetts, but only if Massachusetts is their “primary place of work.”
  - The AG states the “primary place of work” is the place where “most” of their work is performed. Notably, there is no specific mathematical test, and an employee need not spend 50 percent of his or her working time in Massachusetts for it to be the primary place of work. The definition of “primary place of work” is substantially identical to the definition the AG used in the Massachusetts Earned Sick Time regulations.
The guidance suggests that in determining whether a pay disparity exists, multistate employers may need to compare the wages of out-of-state employees with Massachusetts employees’ wages if the only comparators are located out of state. (The guidance notes that geographic location might justify pay discrepancies.)

With regard to the prohibition on prior salary history, multistate employers must comply with that prohibition if there is a possibility the employee will work in Massachusetts. According to the AG, this is true even if the employer is initially unsure if the applicant will work in Massachusetts.

- “Comparable Work.” The guidance makes clear that the AG’s enforcement position is that the amendments substantially broaden MEPA’s coverage. Given this, employers will likely find that determining whether pay discrepancies based on gender exist between “comparable” positions will be substantially more challenging. For example, the guidance provides the following:

  - “Comparable work” is broader and more inclusive than the “equal work” standard under the federal Equal Pay Act.

  - Specific job content is no longer determinative. Rather, comparable work may exist where the skill required for the jobs is similar, even though the jobs themselves seem different, such as an elementary school janitor job and an elementary school food service worker position.

  - Job descriptions themselves will not be considered determinative of whether jobs are comparable, although accurate job descriptions will be useful in making that determination.

- “Wages.” The term “wages” under the new law will be very broad. The guidance makes clear that wages are considered to be any form of remuneration, in whatever form, and not only base salary or hourly wages. Thus, wages include the following, although it is unclear whether stock options or other forms of equity are covered:

  - incentive pay, such as commissions, bonuses, profit sharing, and production incentives;

  - vacation and holiday pay;

  - paid time off;

  - expense accounts;

  - car and gas allowances;

  - benefits of any nature (e.g., health or life insurance, retirement plans, or tuition reimbursement), even if employees may choose not to participate in such plans; and

  - deferred compensation.
Variations in Pay. As discussed above, MEPA allows for six specific defenses to a claim of pay disparity for comparable work. However, the law expressly excludes an employee’s prior salary history as a defense to a pay disparity claim. The guidance provides further explanation of the defenses:

- Unlike the federal EPA, there is no “factor other than sex” defense, eliminating many common defenses such as market forces;

- Seniority, which can be a defense to a pay disparity, is defined as “a system that recognizes and compensates employees based on length of service with the employer,” though any time spent on “protected parental, family and medical leave” may not be excluded for purposes of determining seniority. Notably, this interpretation of “protected parental, family and medical leave” (which means leave protected under statutes such as the federal Family and Medical Leave Act, the Massachusetts Parental Leave Act, Massachusetts Pregnant Workers Fairness Act, Massachusetts Small Necessities Leave Act, and the Massachusetts Domestic Violence Leave Law) is contrary to the provisions of many of these laws, which provide that leave taken pursuant to the laws need not be included for purposes of seniority; education, training, or experience can justify a pay disparity if reasonably related to the job. The guidance indicates that a pay disparity will be viewed as permissible if a reasonable employer determined, at the time the wages were established, that such education, training, or experience would help the employee perform the job more efficiently or effectively.

- Changes in the labor market or other market forces do not justify paying employees of one gender less than employees of a different gender if they perform comparable work. Thus, according to the guidance, it will not be a defense that an employer pays an employee of one gender more than an employee of another, even if a shortage of workers with a specific skill set caused the discrepancy.

Restrictions on Seeking Salary History. The guidance has several notable provisions:

- Internal employees who apply for transfers or promotions are not covered by this provision as the employer already has the information and therefore need not “seek” it.

- Employers are explicitly allowed to ask prospective employees about salary requirements or expectations. The guidance does, however, caution employers that they should not ask questions that are intended to prompt prospective employees to disclose wage histories.

- Employers may ask applicants about matters such as sales performance and whether targets were met at prior employers, as long as the inquiries do not seek information about earnings based on those sales.

Self-Evaluation Defense. The MEPA amendments provide a very important change in the affirmative defenses available to employers. A complete defense to a claim will be available if an employer conducted a “good faith,” reasonable self-
evaluation of its pay practices within the previous three years and prior to an action being filed against it, and the employer can show reasonable progress toward eliminating any unlawful gender-based wage differentials revealed by the self-evaluation. A partial defense to liquidated damages claims may be asserted if such an evaluation was conducted but was not reasonable in scope or detail. The guidance on this defense includes several notable items:

- A new calculator tool intended to help employers determine whether a disparity exists is available for download.
- The definition of “reasonable progress toward eliminating pay disparities” states that an employer must take “meaningful steps” toward eliminating a disparity. Whether those steps are reasonable will be measured against the amount of time that has passed, the nature and degree of the progress as compared to the scope of the identified disparities, and the size and resources of the employer.
- Eliminating pay disparities does not require retroactive payments, only adjusting salaries on a going-forward basis. Employers cannot, however, reduce the salaries of employees to comply with the law.

5. New York

New York’s pay equity amendment went into effect January 19, 2016, and includes the following significant changes to the state’s existing pay equity laws:

- Modifies one of the employer defenses to a pay disparity from "any other factor other than sex" to "a bona fide factor other than sex, such as education, training, or experience."

- Provides that such bona fide factors may not be based upon a sex-based differential in compensation and must be job-related and consistent with business necessity.

- Provides that this exception is unavailable where it can be shown that the employer’s practice causes a disparate impact on the basis of sex, and the employer specifically rejected an alternative practice that would have served the business purpose without causing such impact.

- Eliminates a perceived loophole that permits employers to forbid employees from discussing wages with each other under threat of discipline.

- Adds liquidated damages liability of up to 300 percent of the total amount of wages found to be due.

6. Oregon

Oregon’s amended pay equity law includes the following provisions:

- Expands the protections of its pay equity laws to protected classifications other than sex, including race, color, religion, sexual orientation, national origin, marital status, veteran status, disability, and age.
• Expands its pay equity laws to cover “compensation” more broadly than wages – including salary, bonuses, benefits, fringe benefits, and equity-based compensation.

• Prohibits employers from screening job applicants based on current or past compensation.

• Prohibits employers from seeking the salary history of an applicant or employee, including from the applicant’s or employee’s current or former employer.

• Prohibits employers from determining compensation for a position based on the prospective employee’s current or past compensation. This prohibition does not apply to an employer considering the compensation of a current employee who is being considered for another position with the same employer.

• An employer may request written authorization from a prospective employee to confirm prior compensation after the employer has made an offer of employment that includes an amount of compensation.

• Permits an employer to pay employees different compensation levels for work of comparable character if all of the difference in compensation levels is based on a bona fide factor that is related to the position in question and is based on:
  o A seniority system;
  o A merit system;
  o A system that measures earnings by quantity or quality of production, including piece-rate work;
  o Workplace locations;
  o Travel, if travel is necessary and regular for the employee;
  o Education;
  o Training;
  o Experience; or
  o Any combination of these factors.

7. Washington

Washington’s pay equity amendment (the Equal Pay Opportunity Act (“EPOA”)) went into effect March 22, 2018, and it includes the following significant changes to the state’s existing pay equity laws:

• While the original act allowed an employer to assert a “good faith” defense, the updated EPOA goes further and lists the factors a court may consider in an employer’s “good faith” defense. “Good faith” factors include business necessity,
education, training, experience, seniority, merit, regional differences, etc. An employee may recover reasonable attorneys’ fees in a successful private action.

- The EPOA tasks the Department of Labor and Industries with administratively enforcing the EPOA. The Department’s enforcement powers include investigating employee complaints by reviewing testimony or documentary evidence. The Department may also award damages up to $5,000 and/or assess a civil penalty up to 1,000.

- The EPOA prohibits an employer from wage-secrecy measures; this change affects many employer’s existing policies and employment contracts. The EPOA prohibits an employer from requiring nondisclosure of wages as a condition of employment or requiring employees to contractually agree to nondisclosure. Further, an employer may not discharge or retaliate against employees who discuss or compare wage information. Employers are not required to disclose wage information to an inquiring employee and management employees with access to wage information is only required to disclose such information in response to a complaint, charge, or as otherwise required by an applicable legal duty. The EPOA leaves open questions, such as whether an employer may prohibit an employee from disclosure of wages outside of the company, e.g. to a competitor. There is no private cause of action for violation of the wage secrecy section.

D. United Kingdom

Chapter 3 of the Equality Act 2010 ("the Act") concerns what is known as “equality of terms.” The Act chiefly consolidates provisions elsewhere, most notably in the Equal Pay Act 1970 or existing case law.¹ The structure of equal pay law works as follows:

- The Act applies to pay, pensions (which count as pay), and contractual terms.

- The Act implies a sex equality clause (or sex equality rule for pension claims) into every contract of employment, which means that a woman and her comparator are entitled to equality of terms if the circumstances in the Act are satisfied.

- The woman and her comparator must be of opposite sexes. Of course, the same applies if the claimant is male, in which case his comparator must be female.

- Apart from one exception, where there would be no comparator, the comparator must be actual and not hypothetical. A comparator does not have to be employed contemporaneously with the woman but could have been her predecessor (but not her successor).

- The woman and her comparator must work at the same establishment or, if they do not, at establishments which enjoy the same terms and conditions. Alternatively, the woman must show that her terms and

¹ For the purposes of simplification, this paper refers to a woman as the claimant and the man as a comparator, but the same will apply vice versa and should be taken to mean this.
conditions and those of the comparator are governed by a Single Source under European law or under an associated employer.

- Equal pay can be claimed where the woman does “equal work” namely like work, work rated as equivalent, and/or work of equal value.

- The equality clause will not bite if the employer can show a “material factor.” This concept has become ever more complicated, but in essence, the employer must show that the cause of the pay differential is not a reason of sex. Unless there is a need to provide objective justification, the explanation, if free of sex, will suffice – even if the reason is mistaken.

- If, on the other hand, women are put at “a particular disadvantage,” or if the pay differential is based upon occupational gender segregation, the employer will have to provide objective justification. The exception is where there is a non-gender explanation for the disparate impact itself. It should be noted, however, that the defence does not apply to cases of occupational gender segregation.

1. Equal Work

A woman does “like work” with a man where they do the same work or work which is broadly similar; it can include work done by the woman including and exceeding the same work done by a man. The issue is what work is performed under the contract; how similar is the work done and how similar are the skills required to do it? Where the comparator is recruited on the basis of superior qualifications which are directly relevant to the work that could be performed as part of his duties, even though his work is essentially the same as the woman’s, this could demonstrate that the work is not like work.

A woman does work rated as equivalent with a man where they have been subject to a job evaluation scheme. “Work rated as equivalent” means work evaluated under a job evaluation scheme which has been accepted by employer and employee and which places different jobs on the same level as each other. Note that it is the work that is evaluated and not the person – whoever carries out that job, it is the value of the work which matters. Job evaluation is not a science, but is carried out according to agreed factors between employers and employees. Two job evaluations can come to two different conclusions. However, as long as the factors selected are non-discriminatory and fairly applied, it is binding once it has been accepted by both the employer and employees. This means that a woman may not compare herself to a man who is graded higher than her in the same job evaluation scheme. However, a woman may compare herself to a man rated below her. A job evaluation cannot be made retrospective. This is because, as a voluntary agreement, employees cannot be bound in respect of a period before they agreed to the job evaluation scheme.

Where a discriminatory job evaluation scheme has given the man’s work a higher value, the woman can claim that the job evaluation scheme is discriminatory or unreliable. Successful challenges have been brought on this basis, in particular in the public sector.

In order to determine equal value between two jobs, an Employment Tribunal will usually appoint an Independent Expert to determine the issue. The equal value procedure is set out under specific rules in the Equal Value Rules applicable in Schedule 3 of the
Employment Tribunals Rules of Procedure (Constitution etc.) Regulations 2013. The Tribunal can decide to make the assessment itself, but this is rare. The fact that a new job evaluation scheme had graded a woman and a man the same does not lead to an automatic inference that their work is, or was, of equal value (although the employer will have to show a persuasive reason why they are not of equal value if they have the same points). The Tribunal has discretion in these circumstances to appoint an Independent Expert.

Each claim against a comparator is a separate cause of action. This can give rise to difficulties where a woman wants to add or substitute a comparator out of time, given that there is no just and equitable provision for extending time limits in equal pay claims.

2. Time Limits

The time limit for bringing equal pay claims in the Employment Tribunal is six months from the termination of the employment. This means that as long as a woman remains in employment (not under a particular contract), she can bring a claim at any time unless there is a radical change of duties.

Claimants have a choice as to whether to issue a complaint under the Equal Pay provisions in the Employment Tribunal or in the civil courts. There is also an option for civil courts to transfer such claims to the Employment Tribunal for determination. Claims in civil courts have a limitation period of six years (not six months) and the costs regime is different. A claimant is able to claim for arrears of pay for six years (five years in Scotland).

3. Material Factor Defence

The Act provides a defence for employers such that

(1) The sex, equality clause in A’s terms has no effect in relation to a difference between A’s terms and B’s terms if the responsible person shows that the difference is because of a material factor reliance on which—

(a) does not involve treating A less favourably because of A’s sex than the responsible person treats B, and

(b) if the factor within subs. (2), is a proportionate means of achieving a legitimate aim.

(2) A factor is within this subs. if A shows that, as a result of the factor, A and persons of the same sex doing work equal to A’s are put at a particular disadvantage when compared with persons of the opposite sex doing work equal to A’s.

Direct discrimination is straightforward. Indirect discrimination is much less straightforward. The obvious gateway is to point to a provision, criterion, or practice which places women at a particular disadvantage in relation to men. An obvious example would be where an employee has to work full-time in order to achieve a higher hourly rate of pay.

The other is a route which has caused much of the discussion in recent years. In one high profile case (Enderby), a number of speech therapists in the National Health Service
sought to compare their pay with groups of pharmacists and clinical psychologists, who also worked in the National Health Service. The Health Authority raised a material factor defence, namely that the differences in pay were explained by separate collective bargaining mechanisms. It was accepted that there was no question of direct discrimination; that the pay system was transparent and that no requirement or condition that disadvantaged women had been applied to the groups. Nevertheless the courts found that, in circumstances where the speech therapists had established that they were a predominantly female group, and their comparators were predominantly male, the Health Authority would be required to provide objective justification for the pay differential.

4. Gender Pay Gap Reporting


a. What are the Regulations?

The reporting legislation requires employers with 250 or more employees in the UK (or employees working abroad, but who have UK employment rights) to publish statutory calculations every year showing how large the pay and bonus gap is between their male and female employees.

b. What information needs to be calculated?

Employers must collate gross hourly pay data from their systems for their employees’ relevant pay periods. The relevant pay period is determined by the frequency with which an employee gets paid and it must include the “snapshot date,” which is always April 5. For example, for an employee who is paid weekly, the relevant pay period used to calculate the hourly rate of pay would be the week that includes 5 April. The hourly rate of pay would then be calculated using a multiplier stated in the regulations (depending on what the relevant pay period is) and the employee’s normal weekly working hours.

Employers must also collate bonus information for the 12-month period ending on April 5. For this first reporting year, the bonus period was from April 6, 2016, to April 5, 2017 inclusive. Using that information, six calculations then need to be carried out using prescribed formulas which are set out within the regulations:

- Gender pay gap as a mean average;
- Gender pay gap as a median average;
- Gender bonus pay gap as a mean average;
- Gender bonus pay gap as a median average;
- Proportion of males receiving bonus payments and proportion of females receiving bonus payments; and
- Proportion of males and females when divided into four groups ordered from lowest to highest pay.

The issue of which employees fall within the scope of the regulations and what is covered under the term “pay” is not straightforward. For example, any employee who is not in receipt of his or her normal contractual pay during the relevant pay period, which must include 5 April, is excluded completely from the calculations if the reason is due to them being on leave (whether due to maternity leave, sick leave, special leave, paternity leave, etc.).
Further, any bonus that is received by an employee during the relevant pay period is also included in the ordinary pay calculation (on a pro rata basis if it relates to a period that is greater than the relevant pay period).

c. Where and by when does the information need to be published?

- The latest date that 2018 pay and bonus data could be published was April 4, 2019. The next reporting year deadline is April 4, 2020.
- The information must be published on the organization’s own website and remain there for a time not less than three years. A government website will also be created where the information will have to be published.
- There is the opportunity to submit a narrative alongside any published data to explain the results (good or bad). This narrative is key in terms of managing external and internal communications and workplace relations.
- Finally, the gender pay gap report must be signed off at board level by each organization.

d. What will happen if my organization does not comply?

It is a legal requirement for all employers that fall within the scope of the regulations to publish their gender pay gap reports. The Equality and Human Rights Commission has the power to enforce any failure to comply, but perhaps the greatest commercial risk is reputational damage caused by suspicions as to why an organization has failed to publish data when its competitors have.

II. SUMMARY OF RECENT CASES

_Yovino v. Rizo, No. 18-272, 586 U.S. ___ (Mar. 21, 2019)_

- U.S. Supreme Court vacated the Ninth Circuit’s decision, which held that an employer could not rely on salary history to justify a pay differential under the Equal Pay Act, and remanded back to the Ninth Circuit for review. The Court ruled on the procedural issue of whether a judge’s vote and ruling survived his passing. The Supreme Court ruled that it did not. As the Court noted, “federal judges are appointed for life, not for eternity.”
- In _Yovino_, a former math consultant with the Fresno County Office of Education sued her employer under the EPA after she discovered that a male colleague earned a higher salary than she did. The employer unsuccessfully moved for summary judgment on the grounds that her starting salary was based in part on her prior salary, which was a “factor other than sex” that employers may consider when setting salaries. A three-judge panel of the Ninth Circuit Court of Appeals vacated that decision based on prior Ninth Circuit precedent permitting an employer’s use of salary history in deciding employees’ salaries. The full Ninth Circuit agreed to review the case, to clarify the law. On April 9, 2018, the Ninth Circuit issued a 6-4 decision, overruling prior Ninth Circuit precedent and holding that it was impermissible for the employer to rely on the plaintiff’s prior salary to establish her pay.

- Fourth Circuit ruled that a sociology professor at Virginia State University cannot pursue a wage discrimination claim under the EPA because her job duties and responsibilities are not "virtually identical" to those of her male "comparators" in other departments of the university.

- While plaintiff's salary was at the median in relation to the salaries of male professors in her department, she attempted to compare herself to two male professors outside of her department. Her male comparators also were formerly administrators, and the plaintiff did not have prior administrative experience.

- The plaintiff attempted to justify the comparison by arguing that generally, professors perform the same generalized duties. However, the court noted this was insufficient: "Spencer must provide the court with more than broad generalities to meet her burden. She must present evidence on which a jury could rely to decide that she, Shackleford, and Dial had equal jobs, not just that they all performed vaguely related tasks using nominally comparable skills."

- The court further held that even if the comparators were proper to state a prima facie case, the university proffered an unrebutted "factor other than sex" that did in fact explain the wage disparity. Here the employer utilized a reduction in administrator salaries of nine-twelfths (or 75 percent) for all administrators transitioning to faculty positions, regardless of sex. While the plaintiff attempted to argue that the policy was erroneously applied, the court stated, "such an imprudent decision would still serve as a non-sex-based explanation for the pay disparity."


- Case involved ADA and Title VII race/gender claims brought by Union City police officer. The lower court entered summary judgment for employer in part on the basis that the two comparators plaintiff used were not "similarly situated" because they had failed physical fitness tests, not weapons certifications tests and because plaintiff's doctor had expressed concern about her proximity to certain weapons.

- Eleventh Circuit held that the appropriate test for whether comparators are properly considered is whether they are similarly situated in all "relevant respects."


- Case involved equal pay claims brought by the EEOC on behalf of three women who had formerly worked as fraud investigators for the Maryland Insurance Administration ("MIA"). The MIA assigned new hires to grade levels corresponding to positions and established the salary of new entrants based upon a step-placement system which took into account entrants' prior work experiences, relevant professional designations, licenses or certifications, prior years of service in state employment, and the difficulty of recruiting for particular positions.

- The district court held that the male fraud investigators were not appropriate comparators because they had been placed into higher step levels than the claimants upon employment with the MIA. Alternatively, the district court concluded...
that the MIA had shown that the disparity in pay was attributable to differences in the relative experience and qualifications of the female employees and the male comparators.

- The Fourth Circuit reversed, finding that an employer can avoid liability under the EPA only if it demonstrates that its proffered reasons actually explain a wage disparity. Merely asserting that a proffered reason could explain a wage disparity is not enough to prevail at summary judgment. Thus, the court held that the MIA’s use of the state’s Standard Salary Schedule was not itself sufficient to establish that a factor other than gender justified the disparities, as it was required to show that job-related distinctions in fact motivated it to place the claimants and the comparators on different steps of the pay scale.

*Kaplan v. United States, 727 F. App’x 1011, 1013 (Fed. Cir. 2018)*

- Plaintiff, who held several positions at the Air Force Office of Scientific Research, brought suit under EPA.

- The Air Force asserted an affirmative defense claiming that it paid Plaintiff in compliance with a proper merit-based compensation system, where the employees were evaluated and scored each year based on four factors: problem solving, communication, technology management, and teamwork and leadership.

- The court held that affirmed judgment in the Air Force’s favor, holding that it met its burden, as proof of payment pursuant to a merit-based system does not require proof that the system is entirely free from subjectivity. *See, e.g., EEOC v. Aetna Ins. Co., 616 F.2d 719, 726 (4th Cir. 1980) (“An element of subjectivity is essentially inevitable in employment decisions; provided that there are demonstrable reasons for the decision, unrelated to sex, subjectivity is permissible.”); Harrison-Pepper v. Miami Univ., 103 F. App’x 596, 601 (6th Cir. 2004) (“use of subjective criteria does not preclude [a] merit-based system from constituting an affirmative defense”).*

*Gumbs v. Del. DOL, 745 F. App’x 457, 459 (3d Cir. 2018)*

- Court analyzed Plaintiff’s EPA claim pursuant to 29 CFR § 1620.17, and held that for purposes of the EPA, “[r]esponsibility is concerned with the degree of accountability required in the performance of the job, with emphasis on the importance of the job obligation.”

- Court held that Plaintiff did not possess equal responsibility and accountability to that of her comparator, so the employer was not required to pay the two the same salary.

*Bowen v. Manheim Remarketing, Inc., 882 F.3d 1358, 1363 (11th Cir. 2018)*

- Court reversed summary judgment for employer, holding that although employer “may successfully raise the affirmative defense of ‘any other factor other than sex’ if [it] proves that [it] relied on prior salary and experience,” once Plaintiff “established herself as an effective arbitration manager, prior salary and prior experience would not seem to justify treating her different than the predecessor.”
McClellan v. Midwest Machining, Inc., 900 F.3d 297, 303 (6th Cir. 2018)

- Sixth Circuit held that a plaintiff is not required to tender back consideration received under a severance agreement before bringing claims for violations of Title VII or the EPA.

III. PRACTICAL GUIDANCE

A. Starting Pay Decisions

Many current pay disparities (explainable or not) can be tied back to starting pay decisions. This is because many decisions regarding changes to an employee’s pay are tied directly to their prior pay – which goes all the way back to their starting pay. Merit increases are often a percentage increase over the employee’s current pay; current compensation is a factor in determining promotional increases. Having a well-designed set of policies and procedures designed to provide for valid, justified starting pay decisions will have a positive effect on the company’s entire compensation program.

Employers should provide starting pay decision-makers with appropriate guidance and guidelines on how to make effective and legally supportable decisions regarding pay. Such guidance may include:

- Providing pay ranges for jobs that are based on valid factors (including market information and internal job valuation);
- Identifying the factors that decision-makers can and should consider in making starting pay decisions;
- Providing guidance on how to utilize those factors and/or exercise discretion within applicable pay ranges;
- Requiring decision-makers to explain and document the reasons for their starting pay decisions; and
- Incorporating other levels of review and approval of starting pay decisions to make sure they are well-founded and comply with the applicable policies.

In considering the factors that may be legitimately considered in setting a new employee’s starting compensation, one issue that has been in the news a lot lately is the issue of asking about or considering an applicant’s salary history. As noted above, several states and local jurisdictions have passed laws prohibiting employers from asking applicants about their current or prior salary/compensation or from considering such information in setting the salary of a new employee. These jurisdictions include Albany County, NY; California; Connecticut; Hawaii; Massachusetts; New York City, NY; Oregon; Puerto Rico; San Francisco, CA; Vermont; and Westchester County, NY. In addition, some federal courts, have held that employers may not justify a pay disparity under the Equal Pay Act based on an employee’s prior pay. Employers operating in these jurisdictions may need to adjust their hiring paperwork and processes – including applications, interview questions and the like – to remove questions about an applicant’s compensation history. In addition, employers who have traditionally based starting compensation offers, in part, on what an applicant made at their last employer, need to
conduct a critical review of their starting pay decision-making processes to determine how those decisions can and should be made without information regarding an applicant’s salary history.

A solid and legally supportable decision-making process with respect to starting pay will provide a good foundation for an employer’s pay equity compliance as its employees continue their career with that employer.

B. Merit Increases/Performance Ratings

Many employers utilize a system that ties merit increases to performance ratings. This is a perfectly valid approach to merit increases. However, these systems are sometimes subject to attack based on allegations that the underlying performance rating system is discriminatory or invalid. Moreover, these processes may fail to incorporate an overall assessment of performance to compensation that can leave employers exposed to claims for discrimination.

A common approach is to have supervisors and managers complete written evaluations of their direct reports’ performance – assessing their performance over the prior year. Some factors to consider in ensuring these evaluations are valuable and protected from attack include:

- Providing periodic training to managers/supervisors on how to properly evaluate performance;
- Including objective measures of performance in the evaluation, where possible;
- Requiring that where managers/supervisors are making subjective assessments of certain aspects of performance, they articulate concrete examples to support those assessments; and
- Having at least one layer of review – higher in the decision-maker’s chain of command or HR – to ensure consistency between and among each decision-maker’s assessments and across decision-makers.

Some employers utilize a calibration process in connection with performance reviews, whereby groups of decision-makers meet and discuss their planned assessments of their employees, usually with one or more higher-levels of management or HR involved. This is designed to ensure consistency in ratings across decision-makers – reining in the “easy graders” and the “tough graders” so that ratings are aligned. These processes may result in modifications to the preliminary evaluations/ratings that were planned. Calibration processes can be very valuable when they are done well. But, they are often subject to attack in discrimination litigation because plaintiff’s counsel may argue that the process was, itself, discriminatory and the plaintiff would have received a higher rating but for that discrimination. Employers should thus consider providing guidelines on how these calibration processes are conducted and, perhaps, requiring documentation of the proceedings and results.

Once performance evaluations are completed and ratings are finalized, employers often use these ratings to determine merit increases, typically from a predetermined pool of dollars. In some cases, employers provide decision-makers with full discretion on how to distribute their pool of dollars and in some cases they provide a matrix for decision-makers to use. In either case, decision-makers should be provided with clear guidance on how to use the performance ratings, and any other applicable factors, to make good merit decisions so that their decisions
are consistent. In addition, where employers use a calibration process with respect to merit increases, they should consider providing guidance on using such a process and requiring documentation.

As noted above, an employee’s starting pay can affect his or her compensation throughout their career. This is particularly apparent when it comes to merit increases, which are often calculated as a percentage over the employee’s current compensation. Employers should consider incorporating a process into their annual merit program to assess overall compensation compared to jobs, market and performance over time.

Most employers who utilize a performance review and merit increase process provide for meetings between managers/supervisors and their employees to review the results of the evaluations and provide information regarding the employees’ increases. If done well, these meetings provide a great opportunity for decision-makers to prevent employee concerns about pay equity. During these meetings, decision-makers can communicate the company’s philosophy regarding performance and compensation and provide employees with meaningful feedback about their current compensation and actions they can take to achieve higher levels of compensation in the future.

C. Promotions

Differences in job levels are, typically, a legitimate, nondiscriminatory reason for pay differences. It is valid and appropriate to pay an employee more who is at a higher level in the company with greater responsibilities and/or performing work at a higher skill level. However, as with performance ratings, promotional processes may be subject to attack based on claims that they are infected by bias and discrimination.

Promotional processes may be subject to attack based on some of the following complaints:

- Potentially qualified applicants were not aware the position was available;
- Those selected to advance in the process had similar or even lower qualifications than diverse candidates who were not selected;
- Those promoted were pre-determined, with no competitive process;
- The promotional criteria were not clear or were not applied consistently.

For competitive promotions, most opportunities should be posted internally in a manner designed to enable all qualified employees to be aware of them and have an opportunity to apply. The posting should provide a clear description of the position at issue along with minimum and preferred criteria. Employees should be provided with a reasonable time to apply and an accessible process. While employers should not use quotas to ensure diversity, they should take steps to ensure that diverse candidates are being given appropriate consideration. If the candidate pool is lacking in diversity, the employer should consider evaluating why that is the case – in order to improve promotion processes in the future.

For step-up promotions – promotions that are based on advancing to a higher level due to experience or skill set but are not competitive (i.e., candidates are not competing with one another for the promotion) – employers should consider a process that ensures all eligible
candidates are being considered fairly and based on the same criteria. This may include having written criteria clearly identifying the criteria for employees order to advance to the next level (what experience is required, what skills need to be exhibited); incorporating discussions about an employee’s level and performance relative to advancement in the performance evaluation process – with clear direction on how they can improve their chances for promotion; and evaluating decision-makers’ history with making these promotions for consistency and fairness.

A well-founded and consistently applied promotional process will provide a good basis for employers to distinguish employees based on their job levels and provide greater protection against pay equity claims.

D. Discretion and Subjectivity

Risks of liability in connection with pay equity issues may increase relative to the amount of discretion decision-makers have in making compensation decisions and the subjectivity involved in certain aspects of those decisions. The courts have made clear that the fact that decision-makers are authorized to exercise discretion and make subjective assessments does not, by itself, give rise to an inference of discrimination and that it is reasonable for employers to allow decision-makers exercise such discretion. Indeed, employer’s hire or promoted qualified individuals into management and supervisory positions based, in part, so that they can exercise judgment and discretion in performing their job duties.

Nevertheless, discretion and subjectivity are often the focus of a plaintiff’s attack on an employer’s compensation program, with the assertion that such discretion was infected with bias and discrimination. Where employers allow for unfettered discretion and do not provide guidance to decision-makers on how to exercise their discretion in a supportable and consistent manner, subjective decisions can be more difficult to explain and defend when confronted with a pay disparity claim.

Decisions that are based on purely objective factors are relatively easy to explain and defend. For example, if the only factor in determining an employee’s compensation is whether the employee met a numeric production goal, then differences in pay between two employees can be explained by the differences in whether they met, exceeded or failed to meet that production goal.

In contrast, decisions that are based on more subjective assessments of an employee’s performance (e.g., exhibiting certain skill levels, teamwork, good communication), pose greater challenges. Moreover, subjectivity and discretion providing an opening for a plaintiff to claim that decisions were infected by subconscious or unconscious bias that resulted in adverse results toward a protected person or group.

Some of the discussion above relating to employer considerations with respect to starting pay, performance evaluations, merit increases and promotions suggest policies, practices and procedures that are designed to protect compensation decisions from attacks based on discretion and subjectivity. These include providing decision-makers with: (a) boundaries on their discretion (e.g., pay guidelines); (b) clear direction as to the factors that may be may consider in making employment decisions; (c) guidance and training on how to make good employment decisions; and (d) requirements that they provide explanations for and document their decisions – including utilizing objective criteria and concrete examples to explain subjective conclusions.
Providing decision-makers with robust policies, procedures and tools that will enable them to make good decisions, while exercise the discretion they were hired for, will go a long way to protecting the employer from pay equity claims and to providing employers with the ability to explain and justify pay differences in defense of any such claims.
Eye on Pay Equity: Practical Takeaways From Recent Litigation

Presenters
Lara de Leon (Orange County/San Antonio)
Daniella McGuigan (London)

Moderator
Lisa Burton (Boston)

What’s New?
What’s New with Pay Equity

- Legislation
  - Amendments to Federal Law?
  - Increased State Legislation
    - Expansion of Protected Classes
    - Salary History Ban
    - Limitations on Affirmative Defenses

- Reporting Obligations
  - EEO-1?

What’s New with Pay Equity

- Enforcement Actions
- Claims and Lawsuits!
What’s New with Pay Equity

**United Kingdom**
- Gender Pay Gap Reporting – One year on;
- Expensive high profile equal pay litigation; and
- Mandatory ethnicity pay gap consultation

**Europe**
- France – Equal Pay Scoring
- Germany – Reporting requirements

Why the Continued Focus?

**United States**
- Gender pay gap persists
  - White women – 79 cents per dollar
  - African American women – 62.5 cents per dollar
  - Hispanic women – 54.4 cents per dollar
- Industry focus
  - Tech
  - Banking
  - Academia
  - Medicine
  - Law
Why the Continued Focus?

United Kingdom

- Current rate – 2069 to eradicate pay gap
- ONS median 17.4%
- Sector stereotypes (e.g., engineering)
- Too few women in senior leadership positions
  - Legal
  - Accountancy
  - Airlines

Anatomy of Pay Discrimination Claim

**Equal Pay Act**

- Employee’s prima facie case
  - Employer paid higher wages to an employee of the opposite sex who performed equal work on jobs requiring equal skill, effort, and responsibility under similar working conditions
- Employer’s burden
  - Pay differential was based on a factor other than sex
- Damages available

**Title VII**

- Disparate Treatment
  - Traditional burden-shifting analysis
  - Intentional discrimination
- Disparate Impact
  - Where disparities are linked to a specific discriminatory practice
- Damages available
Anatomy of a Pay Discrimination Claim

**United Kingdom**
- Equality Act 2010
- Three categories of equal pay claim
  - Like work
  - Work rated as equivalent (WRE)
  - Equal value
- Equal Value Procedure – Independent Expert
- Six years back pay plus interest and equality of pay going forward

Recent Case Law
But I did that job...

Julie has been promoted over the years from her humble beginning as an administrative assistant to her current position as Enforcement Supervisor (“ES”).

When a vacancy arises in the Regulatory Supervisor (“RS”) position, you ask Julie to fill that role on an interim basis, and give her the commensurate pay raise. You interview Julie and four other applicants for the role, and decide to hire Jim, who is much more qualified. Julie, gracious as she is, helps train Jim for the role. After a few months, you return Julie to her ES role and adjust her pay back down.

Now back in the ES role, Julie realizes she does many of the same things as she did as interim RS – and in fact, Jim continues to delegate some of the RS tasks to her to complete.

She files suit under the EPA – but you just can’t see how the two jobs are remotely similar. Are they?

Equal Work?

- Under the EPA, “equal” means “substantially equal.”
- “Responsibility” addresses the degree of accountability required in the performance of the job, with emphasis on the importance of the job obligation.
- Where employee does not possess equal responsibility and accountability to that of her comparator, the employer need not pay the two the same salary.

Gumbs v. Delaware Dep’t of Labor, 745 F. App’x 457, 460 (3d Cir. 2018)
Equal Work?

- An employee cannot rely on generalities to establish roles are substantially equal
- Similar roles among different professions or disciplines may not be equal
  - Academia
  - Medicine
  - Music

Equal Value in the UK

- A step further....
- Brought if WRE and like work claim is not possible
- Compares two totally different jobs – apples and pears
- Independent expert often appointed
- Unique and specific equal value procedure
- Expensive and long litigation process
But we have a formula...

In order to minimize the level of manager discretion and ensure fair pay, you have established a standard salary schedule for all non-executive jobs.

- Employees are assigned a grade level, which has an assigned base salary and a salary range consisting of 15 separate steps.
- Initial step placement is based on various objective factors, such as prior work experience, relevant professional designations, and licenses or certifications. You also consider how difficult it was to recruit for the job.

You hire Linda as a Market Research Manager, and assign her to the requisite grade level 12, step 4 because she only has 7 years prior marketing experience.

You also hire Todd but place him at step 8 because of his general industry background, education and prior marketing experience.

Seems fair, right?

Courts Scrutinize Bona Fide Factor Defense

- Employer’s use of a standard salary schedule was not itself sufficient to establish that a factor other than sex justified the disparities.
  - Qualifications, certifications, and employment history are all bona fide factors

- Employer must show that job-related distinctions in fact motivated it to place the employee and the comparators on different steps of the pay scale.
  - Compare Kaplan v. United States, 727 F. App’x 1011, 1013 (Fed. Cir. 2018)
When Is It Enough?

Sally has developed into a very talented program manager. When you first hired her into the role five years ago, you took a bit of a chance. While she has been with the company for three years, she has little prior relevant experience.

Still, she knows the company, and Frank, the retiring program manager, offered to train her personally.

You initially paid Sally $40,000 a year. While that was below the midpoint for entry-level for the role, it represented a $5,000 pay increase for Sally. Over the years, her pay has increased commensurate with her performance and experience, although she still was paid slightly below the midpoint.

Sally is not happy. She is still making less than midpoint, and significantly less than what Frank was making at this point in the job. But since you started to pay her based on her prior salary and experience, it’s okay, right?

Salary History – Yes or No?

- An employer may successfully raise the affirmative defense of “any other factor other than sex” if it proves that it relied on prior salary and experience.

- But, once the employee establishes herself as effective in the role, “prior salary and prior experience would not seem to justify treating her different than the predecessor.”
  - Court reversed summary judgment for employer. *Bowen v. Manheim Remarketing, Inc.*, 882 F.3d 1358 (11th Cir. 2018)

- Other federal circuits have weighed in differently
Class Action Developments

- Increase in filings
- Courts scrutinize
  - Comparator groups
  - Common decision-making

United Kingdom

- Recent high profile equal pay settlement – Glasgow City Council - £548 million(!) – 16,000 claims
- Historical National Health Service (NHS) cases
- Current private sector claims – Supermarkets – Asda, Sainsbury’s, Tesco, and Morrisons
Equal Value in Practice

Glasgow City Council v 16,000 claimants
- Female roles (catering and cleaning) earning £3 per hour less than male roles (refuse collection)
- Record settlement agreed

Asda v 30,000 claimants
- Female retail employees claiming equal value to male warehouse distribution employees
- Key legal issue – location of comparator on comparable terms

Key Takeaways
- Understand jobs that are similarly situated and (in the UK) of equal value
  - Review and update job descriptions
  - Ensure employees are in the right job
  - Consider job skills analysis
- Understand the reasons for pay decisions
  - Factors that support pay decisions
  - Manager discretion
- Routine pay audits help determine big picture compliance, but do not stop there – beware of disclosure!
- Look at specific state law/global trends
Eye on Pay Equity: Practical Takeaways From Recent Litigation

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