

KEEPING UP WITH EQUAL PAY AND PAY DISPARITY LAWS

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IN THE HEADLINES



“Make the #MeToo movement your chance for a raise. Amid the scandals, more women are bringing up their salaries.”

CNBC, February 16, 2018

IN THE HEADLINES



OUR FOCUS

- History of the Equal Pay Act
- Legal Landscape
- EEO-1 Component 2
- Best Practices

ORIGINS OF THE PAY EQUITY DILEMMA AND EQUAL PAY ACT



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HISTORY OF THE PAY EQUITY QUESTION

- Where it began
 - Women were a quarter of the American workforce by the 20th century
 - They were paid significantly less than men for the same jobs
 - Some states restricted women's working hours
- World War II
 - American women entered factory jobs
 - U.S. Congress introduced the Women's Equal Pay Act in 1945, but it failed
- 1960: Women earning less than two-thirds of what their male counterparts were paid
- EPA adopted under President John F. Kennedy in 1963

HISTORY OF THE EQUAL PAY ACT (CONT.)

When Congress passed the EPA, it made the following findings:

- Various industries allowed disparities in wages based on sex which
 - Depressed wages and living standards implicating health and efficiency
 - Prevented “the maximum utilization of the available labor resources” and caused labor disputes which burden and obstruct commerce
 - Implicated the free flow of goods, and created an unfair method of competition

PAY EQUITY LAWS & COMPLIANCE

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INTRODUCTION TO PAY EQUITY LAWS

- 1963 Equal Pay Act (EPA)
- Title VII, ADEA, ADA
- State pay equity laws

THE EQUAL PAY ACT (EPA)

- **Equal Pay Act (EPA)** requires that equal wages be paid to men and women who perform jobs that require substantially equal skill, effort, and responsibility
- **Equality of pay under the EPA includes all forms of compensation, including:**
 - Wages, salary, overtime pay, bonuses, stock options, profit sharing and bonus plans, life insurance, vacation and holiday pay, allowances, reimbursements, benefits, etc.
- **Equal Pay Prima Facie Case**
 - Lower wages paid to employees of opposite sex in the same establishment
 - Employees perform substantially equal work
 - Jobs performed under similar working conditions when comparing job duties
- **Intent unnecessary!**
 - Required under Title VII, not for the EPA

“SUBSTANTIALLY EQUAL” REQUIREMENT

- **Under the EPA, jobs must be substantially equal, but not identical!**
 - The actual content of the jobs must be similar enough that one would expect those who hold the jobs to be paid at the same rate or level
- Job titles and formal job descriptions are helpful in making this determination, but are not controlling because jobs involving similar work may have different titles/descriptions
- Similarly, the fact that employees work in different departments or other organizational units may be relevant, but is not controlling
- Minimum objective qualifications, such as a specialized license or certification, should also be taken into account
 - **NOTE:** Persons in jobs requiring certain minimum objective qualifications should not be grouped together with persons in jobs that do not require those qualifications, even though the jobs otherwise are similar

SCENARIO #1

Ellen, a female, works for a computer services firm that has offices in numerous cities. She alleges that she is paid less than a male who performs the same job in a different branch office. The employer claims that the separate offices are separate establishments and that, therefore, the compensation rates in each office cannot be compared. The evidence shows that while the headquarters of the company exercises some control over the branches, the specific salaries offered to job applicants are determined by supervisors in each local office.

Can Ellen's salary be compared to the salary of a male employee in a different office?

- A. Yes, the local branch offices constitute a single establishment
- B. No, the local offices constitute separate establishments

ANSWER TO SCENARIO #1

- The correct answer choice is:

B. No, the local offices constitute separate establishments

- Rationale:
 - Two or more physically separate portions of a business should be considered one "establishment" if personnel and pay decisions are determined centrally and the operations of the separate units are ***interconnected***
 - There is no central administrative unit responsible for hiring employees, setting compensation, and determining work assignments
 - Because compensation and work distribution are determined by supervisors in the individual branch locations, the separate branch offices appear to operate as separate facilities of a larger chain

THE EQUAL PAY ACT (CONT.)

- **Four Exceptions for Unequal Pay (*Affirmative defenses for employers!!!*)**
 - Seniority system
 - Merit system
 - Incentive system
 - Factors “other than sex”
- **Seniority, merit or incentive system must be bona fide, which means system:**
 - Was not adopted with discriminatory intent
 - Is an established system containing predetermined criteria
 - Has been communicated to employees
 - Has been consistently and even-handedly applied to employees of both sexes
 - Is in fact the basis for the compensation differential
- “Factors other than sex” must be related to job requirements
 - **E.g.:** Shift differential for night work; education, experience, marketplace value

“FACTOR OTHER THAN SEX” DEFENSE

- *Yovino v. Rizzo*: The Ninth Circuit held, *en banc*, that a wage differential based on prior salary cannot qualify as a “factor other than sex” under the Equal Pay Act
- The employer appealed the merits of the decision, but the U.S. Supreme Court punted, stating:
 - “Because Judge Reinhardt was no longer a judge at the time when the *en banc* decision in this case was filed, the Ninth Circuit erred in counting him as a member of the majority.” The Court added: “federal judges are appointed for life, not for eternity.”
 - Vacated and remanded
 - Stay tuned...

SCENARIO #2

Amy, a high school teacher, alleges that she is paid \$5,000 less than a male teacher who performs substantially equal work. The school district responds that the compensation difference is due to its seniority system and that the male teacher has greater seniority. The school district also asserts that its seniority system is a systematic and formal process that was communicated to employees and is guided by sex-neutral, objective standards. An investigation reveals that the male teacher has worked at the school three years longer than Amy, which only justifies a \$3,000 difference in pay under the seniority system.

Is there an EPA violation?

- A. No, the school district's seniority system appears to be bona fide and the male employee has worked for the school district three years longer than Amy
- B. Yes, the school district's seniority system may not operate as an affirmative defense

ANSWER TO SCENARIO #2

- The correct answer choice is:

B. Yes, the school district's seniority system may not operate as an affirmative defense

- Rationale:
 - A seniority, merit, or incentive system operates as a defense only to the extent that it accounts for the compensation disparity
 - The investigation into the school district's seniority system reveals that seniority accounts for about a \$3,000 difference in pay. Therefore, the seniority system alone cannot account for the \$5,000 difference in pay.
 - If there is no other bona fide system in place to explain the additional \$2,000 paid to Amy's male comparator, and the two have similar duties under similar working conditions, the school district may not assert its seniority system as an affirmative defense

SCENARIO #3

Pam, a certified public accountant (CPA), claims that ABC accounting firm violated the EPA by offering her a lower starting salary than it offered a male CPA. ABC claims it offered a higher salary to the male CPA because he had very favorable job references, he received other job offers at the higher salary, and he relied on those job offers as a bargaining tool for negotiating the higher salary with ABC. An investigation found that ABC began salary discussions with Pam with the same opening offer as given to the male CPA, and indicated it was “willing to go higher if necessary.” But Pam did not bargain as assertively as the male CPA, and ended up with a lower starting salary. There is no evidence that ABC treated Pam any differently than the male CPA in salary negotiations.

Is there an EPA violation?

- A. Yes, the compensation disparity is not based on a factor other than sex or any bona-fide seniority, merit or incentive system
- B. No, the compensation disparity is based on the marketplace value of the male CPA's job-related qualifications

ANSWER TO SCENARIO #3

- The correct answer choice is:

B. No, the compensation disparity is based on the marketplace value of the male CPA's job-related qualifications

- Rationale:
 - A difference in the relative market value of employees at the time of their hire qualifies as a “factor other than sex” only if the employer proves that it assessed the marketplace value of the particular individual's job-related qualifications, and that any compensation disparity is not based on sex
 - **NOTE:** An employer will likely not be able to rely on the affirmative defense if the employer bargains differently with men than with women (e.g., responds more favorably to men's demands than to women's demands)

CLAIMS UNDER THE EQUAL PAY ACT (EPA)

- Statute of Limitations
 - Claims under the EPA have a two year statute of limitations
 - Three year statute of limitations if willful violation by employer
- Enforced by the EEOC, but claims may proceed directly to court
 - EEOC charge **NOT** required
- Employer has burden to prove a legitimate reason for the alleged wage disparity
- Remedies Under the EPA
 - Payment of salary differential
 - Liquidated damages if willful
 - Attorneys fees and costs

OTHER LAWS PROHIBITING PAY DISCRIMINATION

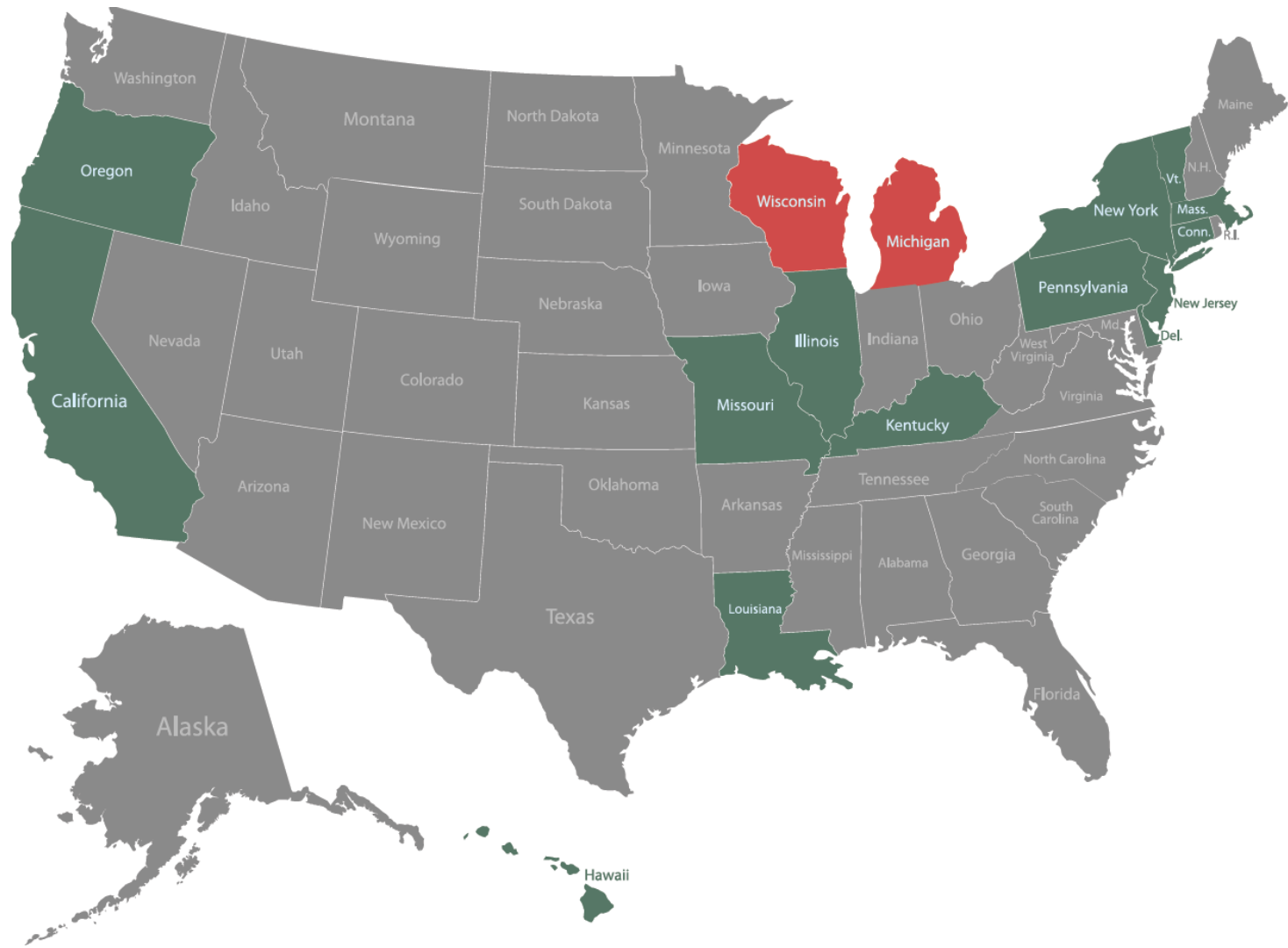
- Title VII, ADEA, ADA, AND GINA allow for discrimination claims under (3) different theories:
 - **Disparate treatment** – (requires a one-to-one individual comparison)
 - Allegation that an employer is intentionally compensating an individual employee at a lower rate than some comparator based on the employee's particular race, sex, age, nationality, religious affiliation, disability, or any other protected class under federal, state or local law
 - **Disparate treatment pattern or practice** – (discrimination at the group level)
 - Allegation that an employer is intentionally compensating one group of plaintiffs at a lower rate than a comparator group
 - **Disparate impact** – (no intent required)
 - Allegation that a neutral organizational policy/practice unintentionally results in lower compensation for a particular group of employees who share the same protected class characteristic

OTHER PAY DISCRIMINATION LAWS (CONT.)

- Employee required to show that the employer's reason for the disparity is a pretext for discrimination
- Claimants are not entitled to liquidated damages
 - Claimants may assert emotional distress and request punitive damages
- No requirement that the claimant's job be substantially equal to that of a higher paid person outside of the employee's protected class
- No requirement that work be within the same establishment
- Intent required for disparate treatment but not disparate impact
- Pay equity claims under Title VII have either a 180 or 300 day statute of limitations

STATE LAW PROTECTIONS

- State
- Since #MeToo, several states have added or increased protection against pay discrimination
- In addition, “ban the box” type legislation has passed in several states and municipalities
 - In October 2017, California passed a law banning employers from seeking salary history information about an applicant, either personally or through an intermediary. Employers are also required to provide applicants with a pay scale for the relevant position upon request.
 - New York City, Philadelphia, Delaware, Puerto Rico, Oregon and Massachusetts have adopted similar laws
 - In Michigan, the legislature took the opposite approach. In March 2018, Gov. Snyder signed a bill forbidding local governments from limiting the questions businesses can ask during job interviews.



MICHIGAN

- Elliot-Larson Civil Rights Act
- Workforce Opportunity Wage Act
 - Mirror of the federal EPA: “...shall not discriminate between employees within an establishment on the basis of sex by paying wages to employees in the establishment at a rate less than the rate at which the employer pays wages to employees of the opposite sex for equal work on jobs, the performance of which requires equal skill, effort, and responsibility and that is performed under similar working conditions, except if the payment is made under 1 or more of the following...” → seniority, merit, quantity or quality of production system or a differential based on a factor other than sex
- In March 2018, Gov. Snyder signed a bill forbidding local governments from limiting the questions businesses can ask during job interviews
- A week after taking office, Gov. Whitmer signed a directive preventing State departments and agencies from asking about salary histories until after a conditional offer of employment is made

NEW EEO-1 REPORTING REQUIREMENT

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WHAT IS THE EEO-1 REPORT?

- The report, in its current form, collects workforce data about gender, race, and ethnicity of employees by 10 different job groupings
- The data collected through the annual EEO-1 reporting process encompasses more than 63 million workers nationwide
- The EEOC collects data provided by private employers, and the Office of Federal Contract Compliance Programs (OFCCP) collects data provided by federal contractors
- The data is shared with other federal agencies, such as the U.S. Department of Labor (USDOL) and the Office of Federal Contract Compliance Programs (OFCCP), so that these agencies can enforce federal laws

WHAT MUST BE REPORTED?

- Employers with 100 or more employees (full-time and/or part-time) during the relevant workforce snapshot period, and federal contractors and first-tier subcontractors with 50 or more employees, must submit an EEO-1 report identifying employees' race, ethnicity, and sex for the 10 EEO-1 job categories
- **The 10 EEO-1 job categories are as follows:**
 - (1) Executive/Senior Level Officials and Managers
 - (2) First/Mid Level Officials and Managers
 - (3) Professionals
 - (4) Technicians
 - (5) Sales Workers
 - (6) Administrative Support Workers
 - (7) Craft Workers
 - (8) Operatives
 - (9) Laborers and Helpers
 - (10) Service Workers
- The EEOC provides a guide classifying hundreds of jobs into the 10 EEO-1 job categories:
<https://www.eeoc.gov/employers/eeo1survey/jobclassguide.cfm>

WHAT WILL THE NEW EEO-1 REPORT REQUIRE?

- On September 29, 2016, the EEOC released an updated EEO-1 reporting form, which mandates that employers report employee compensation information and the number of hours worked by employees across 12 pay bands—***Information that employers were never required to report in the past***
- For employees who are exempt from the FLSA, employers have the option to either report 20 hours per week for part-time and 40 hours per week for full-time employees or report the actual number of hours worked by the employee
 - **“Workforce snapshot”** – Employers have the discretion to select any pay period from Oct. 1-Dec. 31 of the reporting years (2017 & 2018) for completing the EEO-1 Report
- The updated EEO-1 Component 2 Report must be filed by all employers with 100 or more employees by September 30, 2019

NEW EEO-1 REPORT IS SIGNIFICANTLY MORE COMPLEX

- The EEOC says the new reporting format simplifies employer reporting by allowing employers to use existing W-2 pay reports, which are calculated based on calendar year
 - However it appears that the new reporting scheme is much more complex than originally anticipated
- The Old EEO-1 report had **121 data points**
 - The new EEO-1 report consists of **3,360 data points**
- Employers must now group employees into 12 distinct pay bands for each of the EEO-1 job categories using employees' W-2 compensation information, which includes wages, overtime, bonuses, and tips
- Employers are also required to collect aggregate hours worked data from the # of hours worked that are recorded under the requirements of the FLSA

SAMPLE EEO-1 PAY DATA

SECTION D - EMPLOYMENT DATA SECTION D - EMPLOYMENT DATA

Employment
figures on all

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.

appropriate

Job Categories	Annual Salary in Thousands	Number of Employees (Report employees in only one category)															Total Col A-N	Total Col A-N
		Race/Ethnicity																
		Hispanic or Latino		Non-Hispanic or Latino								Female						
				Male														
		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 - \$30,079																	
	\$30,080 - \$36,999																	
	\$36,000 - \$49,919																	
	\$49,920 - \$62,919																	
	\$62,920 - \$80,079																	
	\$80,080 - \$101,919																	
	\$101,920 - \$128,999																	
	\$128,960 - \$163,799																	
	\$163,800 - \$207,999																	
	\$208,000 and over																	
	\$128,960 - \$163,799																	
	\$163,800 - \$207,999																	
	\$208,000 and over																	

PURPOSE OF NEW DATA COLLECTION REQUIREMENTS

- The EEOC originally said it will use the data to combat “wage gaps” based on race, ethnicity, or sex
- The goal of the additional data-gathering is to identify businesses that might have pay gaps in order to target those employers who are discriminating on the account of gender (enforcement actions)
- Data provided to the EEOC may be used by the EEOC to support claims of discrimination in enforcement actions related to gender pay disparities
- Publicly available data will be used by litigants

OFCCP

- Office of Federal Contract Compliance Programs (OFCCP)
- OFCCP encourages self-audits
- Focus on compliance evaluations – high impact systemic cases
- Title VII theories
 - Disparate treatment
 - Disparate impact
- Collaboration
- Considers employment practices that can lead to compensation disparities
 - Monetary compensation such as salary, pay rates, bonuses, etc.
 - Training or advancement opportunities, and
 - Assignment outcomes

OFCCP PROCESS

- Scheduling Letter to request Affirmative Action Program and support data
- Initiate desk audit
 - Review AAP and data
 - Use similarly-situated analysis groupings
- Notify contractor in writing of any preliminary disparities warranting further review
- Attach any Pre-Determination Notice (PDN) for discriminatory findings
- Facilitate resolution through conciliation

POTENTIAL PITFALLS

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UNINTENTIONAL PAY DISPARITY

Most employers do not intend to discriminate in setting or increasing compensation. However, pay disparity frequently occurs unintentionally.

- Hiring and initial compensation setting:
 - According to a recent Glassdoor survey, women negotiate less than their male counterparts. 68% of women accepted the salary they were offered and did not negotiate, compared to men who did so only 52% of the time.
 - One reason is that women fear being viewed as “too aggressive” or “greedy”

UNINTENTIONAL PAY DISPARITY

- Staffing “big” clients, projects, teams, accounts, etc.
 - One study of stock brokerage agencies concluded that “gender differences in management’s discretionary assignments of sales opportunities, and not in sales capacities, account for the gender pay gap at the agencies”
 - Women with children are sometimes seen as “less reliable” or “too busy” and not given the opportunity to work on important projects
 - As we saw earlier, women are also statistically more likely to take time away from work, or work reduced hours to care for children or other family members.
 - These women are sometimes less likely to ask for more responsibility because they are “grateful” for the flexibility they feel they have

UNINTENTIONAL PAY DISPARITY (CONT.)

- Subjective performance evaluations and/or advancement criteria:
 - Unconsciously biased feedback: One study of 248 performance reviews found words like “bossy, abrasive, strident, and aggressive” are used to describe women’s behaviors when they lead. Words like “emotional and irrational” describe their behaviors when they object. These words were not used to describe men.
 - A focus on face time
 - Rewards for working longer or particular hours

UNINTENTIONAL PAY DISPARITY (CONT.)

- Pay raises
 - According to new research by benefits management software firm Zenefits, 62 % of men compared with 41 % of women reported feeling comfortable asking for a pay raise
- Bonus and other discretionary compensation awards
 - In March 2018, media giant Discovery reported that the proportion of its male and female employees receiving bonus payments is almost the same – 88% of women and 87.8% for men – but the size of those bonuses is 49% larger for men on average
 - A 2015 study by the World Economic Forum showed that female executives receive a lower share of incentive pay in total compensation relative to males

TOOLS TO CREATE EQUALITY

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CONCLUSION—WHERE ARE WE?

- Complex reporting requirements for employers
- Increased public and media focus on the issue of pay equity
- Possible passage of additional state pay equity laws
- Increased internal complaints
- Increased litigation
- Pay equity inquiries from investors, clients and partners

CONDUCT AN INTERNAL PAY AUDIT

- Initial Considerations
 - How will the data be collected?
 - Who will perform the analysis?
 - In most cases, it will make sense to have the pay audit conducted under attorney-client privilege
 - What data is needed?
 - Demographics, job title, compensation bands, performance information and anything else that is relevant to an employee's pay should be considered
- Organize your data
 - Group together similar jobs, even across departments
 - Group together similar departments, even across jobs

CONDUCT AN INTERNAL PAY AUDIT

- Review your data
 - What's at the root of any pay differential?
- Take action, as necessary
 - Adjust pay rates and salaries?
 - Should findings be shared with employees?
 - Should changes to pay and promotion systems be made?

REVIEW COMPENSATION AND ADVANCEMENT POLICIES, PROCEDURES AND PRACTICES

- Are there written guidelines or policies that define the factors that may be considered when making pay or advancement decisions?
- If yes,
 - How are decision makers held accountable for complying with applicable policies and guidelines with respect to compensation and advancement?
 - Is there sufficient documentation to record the reasons for pay decisions, including where those decisions may deviate (legitimately) from expectations?
 - Is there an opportunity to look beyond the employee's performance ratings, numbers, etc. to determine whether she has been given opportunities that are on par with similarly situated male employees?

REVIEW COMPENSATION AND ADVANCEMENT POLICIES, PROCEDURES AND PRACTICES (CONT.)

- If no, should guidelines or policies be adopted?
 - The guidelines can be flexible, but consistency is the goal
 - Pay decisions should be documented, particularly when they are outside the norm
- Consider whether:
 - Guidelines and/or actual pay information will be made available to all employees
 - Compensation or advancement decisions should be subject to a second (or second level) review

OTHER TOOLS

- Evaluate Recruiting Practices
 - Consider setting guidelines for starting pay
- Update Job Descriptions and Performance Evaluations
 - Job descriptions can provide the foundation for demonstrating that certain jobs are comparable or should be differentiated for compensation purposes
- Review Leave and Return to Work Practices
 - How are women treated when they return from maternity leave with respect to work allocation, performance expectations, etc.?
- Train Managers
 - Training to get rid of unconscious bias among managers

OTHER BEST PRACTICES

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INTERNAL DATA COLLECTION SYSTEMS

Assess existing technology and payroll systems to ensure that they are able to gather and manipulate the pay data in the ways required by the new EEO-1 reporting mandates (OR future mandates if EEOC gives any instruction)

RECORDKEEPING

- Keep records of all resumes, offer letters, previous jobs, grades, departments
- Pay justification documentation
- Designate individuals who will be responsible for monitoring employer's record retention practices and reviewing compliance with federal, state and local law

QUESTIONS?



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THANK YOU

Legal Disclaimer: This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.

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