



Impacts of Diversity, Equity, and Inclusion Efforts on Employment Litigation

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KEEP CALM AND MAKE A PLAN FOR EVALUATING PAY EQUITY ISSUES

INTRODUCTION

In the last year, many organizations have developed Diversity, Equity and Inclusion (DEI) initiatives or may be considering do so¹. The “equity” aspect of a DEI initiative involves ensuring that every person in an organization has an opportunity to advance/participate. These initiatives often are focused on determining whether unconscious biases are acting as barriers to everyone’s equal participation. One aspect of the analysis often involves analyzing pay equity. This can take the form of addressing whether the organization is complying with the law, but can also go beyond that to evaluate, for example, whether a pay gap exists between genders across the organization (regardless of position), or whether people in certain protected classifications are underrepresented at the upper levels of management.

Regardless of whether an employer has a formal DEI initiative, employers should make deliberate, informed decisions regarding what actions to take regarding pay equity. While all employers should ensure that they are in compliance with the law regarding equal pay, the requirements of the law currently are narrower than the various aspects of pay equity being addressed in the national conversation. This paper outlines the law regarding equal pay and then outlines the considerations that employers should evaluate in deciding what exactly to analyze, as well as some pitfalls to avoid.

¹ The reader’s attention is drawn to other papers being presented at the 2021 Cal Cities Annual Conference regarding the development of DEI initiatives and other legal issues that can arise.

THE APPLICABLE LAW REGARDING PAY EQUITY

Both California and Federal law prevent employers from intentionally basing compensation on an employee's protected classification, such as race, religion, national origin or sex². Employees may assert claims for wage discrimination under both the California Fair Employment and Housing Act and Title VII. In such cases, the employee must prove that the employer intended to discriminate. Here, our focus is on statutes that prevent pay differentials even if they are inadvertent: Under the Federal Equal Pay Act ["Federal EPA"; 29 U.S.C. § 206(d)] and the California Equal Pay Act ["EPA"; Labor Code section 1197.5], employers are also prohibited from paying compensation rates that do not treat employees equally, even absent any intent to discriminate.

Enacted in 1963, the purpose of the Federal EPA was to address "the fact that the wage structure of "many segments of American industry has been based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same." S.Rep. No. 176, 88th Cong., 1st Sess., 1 (1963). The Federal EPA was amended to state that "Men are protected under the Act equally with women. While the EPA was motivated by concern for the weaker bargaining position of women, the Act by its express terms applies to both sexes." 29 C.F.R. 1620.1(c). The Federal EPA does not identify gender identity, gender expression or sexual orientation as prohibited bases for wage rates.³

The Act states that

"No employer ... shall discriminate...between employees on the basis of sex by paying wages to employees...at a rate less than the rate at which [the employer] pays wages to employees of the opposing sex....for equal work on jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions..."

29 U.S.C. § 206(d).

An affirmative defense applies under the Federal EPA if the employer proves that the pay differential occurred pursuant to (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quality or quantity of production; or (4) a "differential based on any other factor other than sex." 29 U.S.C. 206(d)(1). "Any other factor other than sex" must be adopted for a neutral legitimate business reasons.

² For a more general discussion of antidiscrimination laws, see chapter 4.143 *et seq.* in the Municipal Law Handbook

<https://onlaw.ceb.com/onlaw/gateway.dll?f=templates&fn=default.htm&vid=OnLAW:CEB>

³ For a discussion of whether the Federal EPA could be interpreted to include these protected statuses, see Romero, Adam, "Does the Equal Pay Act Prohibit Discrimination on the Basis of Sexual Orientation or Gender Identity?" https://www.law.ua.edu/acrc1/files/2019/06/2.-Romero_Published.pdf

The California EPA provides broader protections for employees both in terms of which employees are covered and a more narrowly defined affirmative defense. When originally enacted, the California EPA was almost identical to the Federal EPA, with sex being the only prohibited basis for differential compensation. Since 2015, though, the California EPA has been amended to prohibit pay disparities between people of different races or ethnicities, unlike the Federal EPA. California Labor Code section 1197.5(b). Under the California EPA, the text describing the prohibition against differential pay is almost identical to that in the Federal EPA.

Under the California EPA, the affirmative defense is the same as that under the Federal EPA, except that the “bona fide factor” defense is more specific. The factor is described as:

... a bona fide factor other than sex, such as education, training, or experience. 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. For purposes of this subparagraph, “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 shall not apply if the employee demonstrates that an alternative business practice exists that would serve the same business purpose without producing the wage differential.

Cal. Labor Code section 1197.5(a)(1)(D).

In 2017, California’s EPA was amended to prohibit an employer from attempting to justify an otherwise unlawful differential solely based on prior salary at a different employer. And, since January 2018, California employers are barred from relying on or seeking an employee’s prior salary history in determining whether to hire or what compensation to offer.

Under both Acts, the employees whose compensation is being compared need not be working in the same position. An employee need only allege that they are performing work that “requires equal skill, effort and responsibility,” and “under similar working conditions.”

The Goal Should be Clear

Before undertaking any pay equity analyses, cities should first determine the specific goal of the analysis. For example, is the analysis intended only to determine whether the city has any potential liability under the state and federal pay acts? Is the goal to go beyond ensuring compliance with the law by examining pay equity along gender, racial or other demographic lines across all city positions? Or is the goal to look at the representation of various races or genders in management positions? Each type of assessment may require a different type of data, and the methodology will depend on the ultimate purpose of the analysis. In deciding what type of assessment to do, cities should understand what potential corrective actions will be necessary (that is, legally required) versus actions that are illegal (such as making race- or gender-based hiring decisions, even to address a lack of diversity).

It should also be determined, at the outset, what disclosures the City plans, if any, to make regarding the work to be done. The possibilities of unintended disclosures (leaks, accidental disclosures) and compelled disclosures (via subpoena or requests under the California Public Records Act) should also be evaluated.

Create a Plan and Assemble the Team

If a City decides to determine whether it has potential liability under the either the Federal or California equal pay acts, it should first analyze whether any part of that work would be protected by the attorney-client privilege. While the underlying data (such as the pay rates, the work being performed by the positions being compared) will not be privileged, a legal analysis of that data likely would be covered under either the attorney work product doctrine or the attorney-client privilege. Whether the agency desires to have those privileges apply will affect decisions about who is involved in the analysis.

Continuing with this example of a City analyzing its potential liability under the EPA, decisions need to be made regarding who will determine which job classifications should be compared and contrasted to determine whether they require “equal skill, effort and responsibility” and are performed “under similar working conditions.” Under the EPA, employees do not have to be working in the same classifications to meet that standard. Employees working in one classification could be determined under the law to be performing work of equal skill, effort and responsibility to employees working in a separate classification. The decision regarding which positions should be compared could potentially could fall under the work product doctrine.

If, on the other hand, a City has decided to go beyond an Equal Pay Act analysis and examine representation of certain protected statuses at various levels of the organization, which is essentially a data collection/analysis task, privileges are unlikely to apply.

Regardless of the type of analysis being done, care should be taken to ensure employee privacy and data security issues.

Conduct the Analysis and Take Appropriate Action

If an analysis reveals potential liability under the EPA, a remediation plan needs to be developed, and should be done by or with an attorney. The plan should be thorough and should consider timing of payincreases and/or retroactive pay, changes in job duties, and whether changes to policies and procedures are necessary.

Care should also be taken to anticipate the range of employee (and/or public) reactions to the corrective actions. Several years ago, Google announced that it had conducted a pay equity assessment that revealed that some men were being paid less money than women for similar

work.⁴ As a result, thousands of men received pay raises, and a public relations backlash ensued, during which Google was accused of not analyzing different questions, such as whether women had been hired at a lower pay grade than men with similar qualifications.

Conclusion

Though there is increasing pressure on cities, both through legislation and public pressure, to achieve pay equity, cities should understand the benefits and drawbacks of various types of assessments before deciding how to proceed.

⁴ “Google Finds It’s Underpaying Many Men as It Addresses Wage Equity.” New York Times, March 2, 2019