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The Complicated World of Pay Equity and Secrecy

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Although the Equal Pay Act (EPA) was enacted 56 years ago, pay (in)equity is still one of the leading human resource and employment-related legal concerns today. While there has been progress in narrowing the pay gap, women are still paid less than men for substantially similar work. When the EPA was passed, women were paid 58 cents for every dollar earned by men. Today, women are paid only 80 cents for every dollar earned by men. Factors such as race, motherhood, age and geography also contribute to pay inequities and may implicate other discrimination statutes, such as Title VII of the Civil Rights Act or state law equivalents. The issue is front and center in the media, on the campaign trails and in the boardrooms. Heightened attention, coupled with increased pay equity litigation in 2018, makes this an issue that employers can no longer afford to ignore. The trend will continue in 2019.

The EPA, which passed as an amendment to the Fair Labor Standards Act in 1963, "prohibits discrimination on account of sex in the payment of wages by employers." While this sounds straightforward, it is a complicated road for employers to identify and rectify pay inequities in the workplace. The Act prohibits unequal pay to men and women for "substantially equal jobs." "Substantially equal" does not mean identical. In evaluating whether two positions are substantially equal, the analysis includes jobs that require similar skill (experience, ability, education, and training), effort (physical and mental) and responsibility, and are performed under similar working conditions at the same work establishment. An employer's work "establishment" is generally understood to mean a distinct physical place where the employee works rather than the entire organization. To avoid liability under the EPA, an employer must prove an affirmative defense, that is, that any pay disparity is justified by: (1) a seniority system, (2) a merit system, (3) a system that measures earnings by quantity or quality of production, or (4) "any factor other than sex." Unlike most discrimination actions, an EPA claimant need only demonstrate that an employer pays men more than women without proving discriminatory intent. In other words, it doesn't matter whether the employer meant to pay an employee less because of gender – the fact that there is a pay disparity not explained by one of the four defenses is enough.

Many speculate that, historically, the reason there were not more EPA claims is the pay secrecy that companies often explicitly require or strongly encourage. Since EPA plaintiffs must show a pay disparity between women and men in substantially similar positions, they must actually know what co-workers earn to assert the claim. The National Labor Relations Act (NLRA) of 1935 prohibits employers from imposing or even implying pay secrecy policies, yet pay secrecy policies are still commonplace. State and local laws have been taking the lead in mandating pay transparency. Several states have passed laws prohibiting employers from taking action against employees who question, inquire or discuss their salaries. There is also a growing trend at the state level to enact laws prohibiting employers from requesting or relying on wage history in setting salaries.

At a federal level, Congress is considering a bill that follows the pay equity trends at the state and local levels. First introduced in Congress in 1997 (and ten times since), the Paycheck Fairness Act is again under consideration by the 116th Congress (S. 270/H.R. 7). With the intense focus on the pay equity issue and a Democratic Congress, the Act has momentum that it has not had in prior years. The Act would strengthen the EPA and include pay transparency mandates as well as a prohibition on reliance on wage histories in setting starting salaries. The proposed bill broadens the concept of equal pay for equal work by:

- expanding the definition of a work "establishment"
- narrowing the "factor other than sex" defense
- enhancing the remedies available under the EPA
- updating the class action provisions of the EPA
- strengthening oversight and enforcement by the EEOC and DOL

Given this legal landscape, savvy companies are becoming more proactive in addressing pay equity issues in their workplace. Lawyers and consultants are often utilized to assist in developing and reviewing a compensation strategy while identifying vulnerabilities regarding pay equity. The scope and complexity of a pay equity audit varies by employer, but ultimately, the goals are to identify whether pay inequity exists that cannot be explained by neutral, bona fide factors, and whether the employer's policies are creating or contributing to these inequities. These internal audits include reviews of pay structures, merit increases, promotional pay and compensation policies and practices.

Once pay gaps are identified, companies have to navigate the thorny issues of how to address the disparities. Employers facing disparities must consider the impact on personnel costs, the maintenance of pay, job and incentive structures, and morale/communication issues all while trying to avoid creating new legal liabilities. This is not a simple task, but there are many ways to address pay inequities once they are identified. Internal audits are particularly important now given the wave of legislation being enacted, designed to make equal pay act claims more accessible and easier to file.

For assistance with your organization's compensation practices, please contact any member of Baker Donelson's Labor & Employment Group.