A PUSH TO CLOSE THE GENDER PAY GAP
THE RISING TIDE OF EQUAL PAY ACT LEGISLATION AND LITIGATION

By Anthony Humphries and Bryn Goodman

Of the many hot-button gender issues in the news these days, equal pay may be the one most likely to result in increased litigation against employers of all sizes. This article identifies the current legal landscape at the federal level, touches on the recent proliferation of new state and local laws enacted to make such claims easier to bring, and explains where insurance coverage for pay inequity exposure lies.

STATISTICS PROVIDE FERTILE GROUND FOR EQUAL PAY CLAIMS

On August 25, 2017, the US Bureau of Labor Statistics published findings that women’s median weekly earnings in 2016 were approximately 20% less than men’s weekly earnings.

Statistics like these are stubbornly consistent. They provide fodder for equal pay claims and maintain the public’s awareness of a gender pay gap that never seems to improve.

In 2016, median weekly earnings were $749 for women age 16 and older who were full-time wage and salary workers. For men 16 and older, median weekly earnings were $915.

Young women and men ages 16 to 24 had the lowest earnings ($486 and $512, respectively).

Women’s median weekly earnings were highest for those between the ages of 35 and 54, with 35 to 44-year-olds ($839) and 45 to 54-year-olds ($836) earning about the same. For men, earnings were highest for 45 to 54-year-olds ($1,075) and 55 to 64-year-olds ($1,102).

MEDIAN USUAL WEEKLY EARNINGS OF WOMEN AND MEN WHO ARE FULL-TIME WAGE AND SALARY WORKERS, BY AGE, 2016 ANNUAL AVERAGES

Source: U.S. Bureau of Labor Statistics
On July 11, 2017, the Board of Supervisors for the City and County of San Francisco passed legislation to ban salary inquiries on a class action basis as well as a collective basis under the California Fair Employment and Housing Act (F.E.H.A.). The legislation prohibits employers from inquiring about the pay history of applicants before making employment offers. The law, Delaware House Bill 1, becomes effective July 1, 2018 and is to become effective December 14, 2017.

In contrast, the White House Office of Management and Budget stayed the new EEO-1 pay data collection provision, which would have required employers with 100 or more employees to report W-2 wage information and total hours worked for all employees by race, ethnicity and sex. Whether pay inequity Charges attract higher merit findings or become the subject of the few and more sharply focused litigations commenced by the Commission over the next few years remains to be seen.

The states, however, are not content to wait for the federal courts to settle on whether or not an applicant’s prior salary is a legitimate excuse for gender pay disparity.

### Notable Equal Pay Legislation at the State and Local Level

While Federal courts continue to examine the legality of using prior salary to justify pay differentials, state lawmakers are energetically attacking the gender pay gap. Numerous state and local regulations already preclude or limit employers from determining compensation based on prior salary and even more state and local laws were passed in 2016-2017 that increase the penalties or regulations intended to reduce gender pay differentials. New laws have been enacted or passed by state legislatures or city councils in California, Delaware, Illinois, Massachusetts, New Jersey, New York City, Oregon, Philadelphia, Puerto Rico, and Oregon. Similar legislation is pending, but not yet passed in the following eight jurisdictions: Connecticut, District of Columbia, Georgia, Maryland, Nebraska, North Carolina, Virginia, and Washington. Even before this new legislation, 48 out of 50 states already have equal pay laws.

A sampling of the recent state and local legislative activity in the equal pay arena includes the following:

- In September 2017, the California state legislature passed three bills related to gender pay equality, two of which were signed into law by the Governor in October 2017. A law that prohibits public and private employers from seeking or relying upon the salary history of applicants for employment goes into effect on January 1, 2018.

- On July 11, 2017, the Board of Supervisors for the City and County of San Francisco passed legislation to ban salary history from job applications. The law will go into effect on July 1, 2018—with attendant penalties to take effect on January 1, 2019.

- Delaware’s legislature recently passed a law that prohibits an employer from seeking the pay history of applicants before making employment offers. The law, Delaware House Bill 1, will amend the Delaware Equal Pay Law, and is to become effective December 14, 2017.

- The Massachusetts Equal Pay Act becomes effective July 1, 2018 and expands protection for employees because it prohibits employers from inquiring about a prospective employee’s salary history.

- In early 2016, New York State’s Achieve Pay Equity Act (A.P.E.A) went into effect and expands the statute of limitations to six years and allows lawsuits to be brought on a class action basis as well as a collective basis under the EPA.
The New York City Council also recently enacted Local Law No. 2017/067 on May 4, 2017, which took effect on October 31, 2017, and prohibits employers from inquiring about prospective employees’ salary history.

Philadelphia City Council enacted the Fair Practices Ordinance, which was scheduled to take effect on May 23, 2017 makes it an unlawful for an employer to inquire about a prospective employee’s wage history. On April 3, 2017, the Chamber of Commerce of Greater Philadelphia filed a lawsuit challenging the constitutionality of an ordinance. On May 30, 2017, the court dismissed the lawsuit. In June 2017, the Chamber of Commerce filed an amended complaint and made a motion to prevent the enforcement of the ordinance, which is pending before the court.

Puerto Rico enacted Act No. 16, which became effective on March 8, 2017, but penalty provisions of Act 16 will not be effective until March 8, 2018. The law prohibits employers from inquiring into an applicant’s past salary history, unless the applicant volunteered such information or a salary was already negotiated with the applicant and set forth in an offer letter.

Oregon amended its Equal Pay Act,17 which became effective on October 8, 2017 and operative January 1, 2019, and prohibits employers from determining compensation for a position based on current or past compensation of a prospective employee.

BUSY IN THE COURTS - AT SIGNIFICANT COST

It is not only lawmakers getting busy on this issue. The plaintiffs’ bar continues to push the equal pay issues in the courts. For example, on September 14, 2017, three former Google, Inc. employees filed a purported class action under the California Equal Pay Act against the technology giant in California State Court. In the Complaint, the employees allege that Google discriminates against female employees by systematically paying them lower compensation than male employees. The lawsuit cites to a compliance review conducted in September 2015 by the United States Department of Labor’s Office of Federal Contract Compliance Programs, which found six to seven standard deviations between pay for men and women in nearly every job classification. This is one example of the expected surge in equal pay litigation, which will follow the recent enactment of state and local laws intended to eradicate wage disparity based on gender.

Equal pay litigation can be brought by individual plaintiffs or on behalf of a class of workers. Since the cost of resolving a case brought by an individual plaintiff will largely depend on how long the pay differential existed and the level of pay, settlements of individual plaintiff cases run the gamut; some can be resolved for $100,000 or less while others cost hundreds of thousands of dollars to settle. That does not include the cost to defend individual cases, which can add another $100,000-$250,000, depending on many factors, including jurisdiction. And for an individual plaintiff’s case that is high profile or fought through to the bitter end, both the settlement cost and defense costs climb even higher.

The real risk of equal pay litigation, however, is the prospect of class litigation. It is a game of statistics and plaintiffs’ counsel will look to expand groups whose pay appears gender-disparate. Class actions are brought against companies of all sizes; there is no requirement that class actions involve only one type of worker and in fact, they are often comprised of several subclasses of workers in various jobs and at various locations. According to corporate counsel surveys, employment class actions are now the most common type of class action, making up almost 38% of all class actions in the US in 2016, an increase by more than half from the prior year. Considering the calculation of a compromised amount of wage differentials involving numerous workers over a period of years, class action settlements can easily reach into the millions and tens of millions of dollars. On top of the resolution cost are the costs of defense experts and capable defense counsel, which even in a moderately complex litigation can easily exceed $1,000,000.

A NOTE ON INSURANCE

The Equal Pay Act pertains to even the smallest employer (two or more employees) who engages in interstate commerce as long as the enterprise has gross income of at least $500,000. Like suing under other employment discrimination statutes, an employee bringing a claim under the Equal Pay Act could recover back pay, liquidated damages, and attorneys’ fees, as well as reinstatement, front pay, and compensatory and punitive damages if retaliation is found. Because equal equity claims are so susceptible to statistical showings, multi-plaintiff and class actions are common. But while large employers may be the ripest targets for plaintiff class counsel, mid-size and small employers are just as susceptible to equal pay claims. Employers of all sizes face exposure and coverage is readily available at all levels.

Although the Equal Pay Act is actually a part of federal wage and hour law, specifically, the Fair Labor Standards Act (“FLSA”), equal pay is really about discrimination, not wage and hour. As with all employment discrimination, the type of insurance policies that apply to equal pay liabilities are employment practices liability (“EPL”) policies, and not wage and hour (“W&H”) policies. In fact, a typical EPL policy will exclude W&H claims by excluding claims for violation of the Federal Labor Standards Act, et al. but specifically carve back coverage for Equal Pay Act claims. The place to look for pay equity claim coverage, therefore, is an EPL policy, double-checking that the Equal Pay Act is specifically carved out of the FLSA exclusion.

CONCLUSION

Against the backdrop of new state and local equal pay legislation, we may eventually see the federal courts reach a consensus that prior salary alone is not a legitimate system for employers to use as a gender-neutral explanation for pay differentials. Either way, the burgeoning legislative action and the high profile court cases will undoubtedly cause an uptick in equal pay claims. In addition to altering that classic interview question to ask “so what kind of a salary are you looking for?” instead of “how much do you make now?”, making sure EPL coverage is in place to mitigate the impact of the rising tide of gender equity claims is part of a sound program of preventative measures.
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ENDNOTES

2. 854 F.3d 1161, 1163 (9th Cir. 2017). This was set down for a rehearing en banc. 2017 U.S. App. LEXIS 16561 (9th Cir. Aug. 29, 2017).
3. The Ninth Circuit agreed with the Seventh and Eighth Circuits and departed from the Sixth, Tenth and Eleventh Circuits, which determined that prior salary is not a “factor other than sex” under the EPA.
8. Equal pay law passed, but vetoed by New Jersey Governor Chris Christie.
9. Legislation was pending in Maryland in 2017 to amend the Maryland Equal Pay for Equal Work Act to prohibit employers from asking about employees’ prior salaries, but in died after an unfavorable report by Maryland’s Senate Finance Committee on March 23, 2017. See, General Assembly of Maryland at http://mgaleg.maryland.gov/.
15. The law has not taken effect because Philadelphia’s Chamber of Commerce is currently challenging the law in court, which is discussed.