

Client Alert: A Focus on Pay Equity

Few areas of employment law are changing as rapidly and in so many ways as pay equity laws. There are also few compliance efforts that are so important for employers to get right if they want to be viewed as “employers of choice” in an otherwise ultra-competitive market for talent. Employers are well advised to be sensitive to a variety of new state laws, an uncertain landscape regarding EEO-1 data collection by the federal government, and a greater focus by Employment Practices Liability Insurance (EPLI) underwriters on their efforts surrounding pay equity.

Stubborn Gap to Close

While gender pay gaps have received significant media attention in recent years, pay equity gaps can arise among protected class members based on characteristics such as gender, race, nationality, age, or disability. In effect, all such gaps can result in legal liability on behalf of employers if differences are exposed.

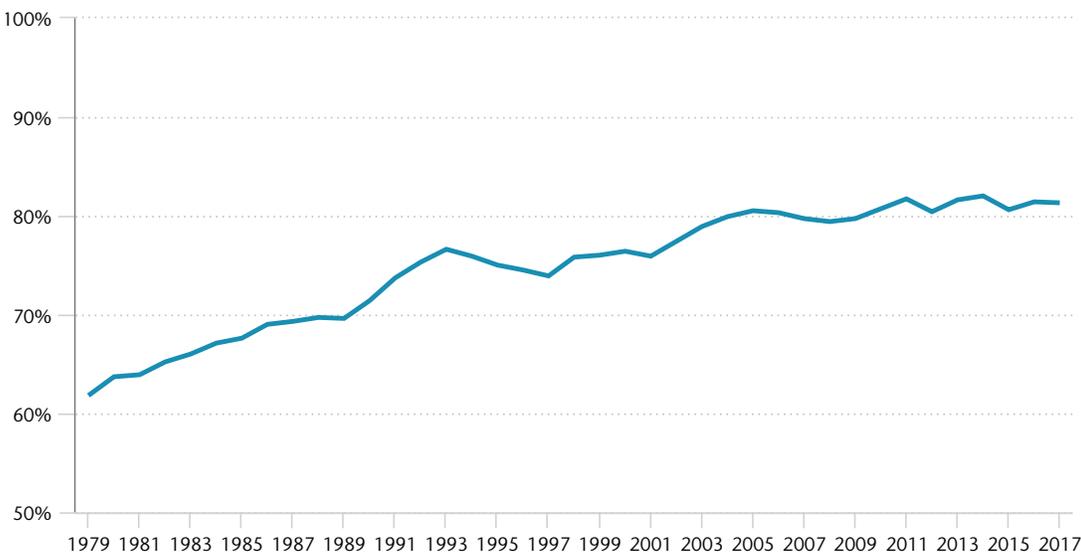
As reflected in the chart below, the most recent Census Department data reflects an approximate 19.5% gender pay gap for full-time wage and salary workers. The percentage gets worse when race is taken into consideration with American Indian, Alaska Native, Black, and Hispanic women making 26% less than white males based on surveys in 2019.

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Chart 1. Women's earnings as a percentage of men's, for full-time wage and salary workers 1979–2017 annual averages



Source: U.S. Bureau of Labor Statistics, Current Population Survey.

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States Act

Numerous states enacted changes to their employment statutes, attempting to attack the pay equity gap in different ways. These states passed initiatives like salary history bans which prohibit employers from asking applicants what their salary was at their previous employer. At last count, 14 states, nine cities, and one territory have passed such bans. Damages under these statutes often, as a general matter, include injunctive relief, plaintiffs' attorneys' fees, and, in some states, civil penalties for each violation. For instance, New Jersey allows for civil penalties of \$1,000 for the first violation, \$5,000 for the second violation, and \$10,000 for each subsequent violation. On a class-wide basis these penalties have a potential to be substantial.

Other jurisdictions amended their gender pay equity statutes to prohibit gender pay disparities even when the employees do not have the same jobs. These statutes often require only a showing that the employees perform "substantially similar work". States such as California, New York, New Jersey, Colorado, and Massachusetts have similarly broad comparators often with little guidance on what "substantially similar work" means, opening the door to litigation alleging pay disparities across very different jobs. Even more recently, states like New York, New Jersey, and Washington have applied this standard not just to gender but to characteristics such as age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, disability, genetic predisposition, familial status, marital status, and domestic violence victims. Damages for violations of these pay equity statutes are as high as 300% of wages due in New York. Colorado allows for liquidated damages equal to the amount of economic damages. Colorado recently blazed a new trail with legislation requiring employers to provide pay scale information in all job listings. A few other jurisdictions require employers to provide pay scale information to applicants during the recruiting process, but Colorado is the first to require it to be posted in all job listings. On a more positive note for employers, Colorado joins a few other jurisdictions in allowing a safe harbor from liquidated damages if an employer has conducted a pay equity audit in the two years, prior to the alleged violation.

New EEO-1 Data Capture Up in the Air

On the federal front, changes were announced to data requirements that needed to be provided under the EEO-1 Report. Under the changes, starting on September 30th, employers with more than 100 employees or employers who are government contractors with 50 or more employees were supposed to have to provide so called Component 2 data. This new data requirement calls for employers to submit information on compensation and hours worked. The purpose of the new requirement is to gather information to help identify pay gaps for those in protected classes. The EEO-1 already tracks employment data by race, gender, age, and nationality to help determine if there is an appropriate mix of hiring among protected classes. However, this prior data capture did not assist in determining whether those protected classes were paid properly. The new requirement was first announced late in the Obama administration, but the Trump administration issued a stay seeking to prevent the new data requirement from going into effect. Litigation was initiated by the National Women's Law Center to lift the stay. In March of 2019, a federal district court lifted the stay and in April the same court set a date of September 30, 2019 for employers to submit Component 2 data for the years of 2017 and 2018. The initial response by employers in providing data by that date was so insufficient that the court ordered the date to be left open until additional responses were received. The EEOC later again attempted to close the data portal, but on October 29th, the court required the EEOC to leave the portal open and continue to receive the data until at least January 1, 2020. The court's order also required the EEOC to report back every three weeks on what efforts they had taken to encourage employers to provide the data. With that in mind, employers should work with their employment counsel to determine how best to meet this data requirement on a timely basis.

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Underwriters Take Note

Not surprisingly, all of this activity in the pay equity space has not been lost on the underwriting community. Virtually all underwriters are requiring additional information specific to clients' pay equity efforts during the underwriting process. Given that most of the information required is similar across markets, but often comes in varying formats and with particular nuances, and in some cases include warranty wording that could be detrimental to clients, Aon developed a user-friendly and consistent pay equity questionnaire that many carriers have currently agreed to accept. Clients should expect greater scrutiny on these issues during their renewals in the coming year and should assess their overall efforts in advance of renewal to determine if there are areas that could use improvement prior to that renewal process.

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