

ADDRESSING PAY EQUITY IN THE

#ME TOO

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Julie Devine Lashly & Baer, P.C.

We have all heard the horrific allegations from Hollywood which helped to spark the #metoo movement. Also from Hollywood, we are hearing news of more female actors insisting that they be paid as much as their male counterparts. These issues – pay disparity and workplace harassment - are clearly linked, and they must be addressed together. Although companies have long had anti-harassment policies and trainings and attempted to create pay systems that are fair and equitable, the news has reminded us we still have a long way to go on both fronts. And although federal law has long outlawed sex-based wage discrimination in the workplace, there is still a gap between the money earned by men and women. A woman, on average, earns around 80 cents for every dollar a man makes (with an even wider gap for African-American and Hispanic women). There is also income inequality among races. White men out-earn African-American and Hispanic men and all groups of women.

Although the #metoo movement has led many companies to address their anti-

harassment policies and procedures, a specific pay equity plan is often missing from their plans. As outlined below, there are many reasons that tackling pay equity should be a key part of your plans to address workplace issues raised by the #metoo movement.

THE CONNECTIONS BETWEEN #METOO AND PAY EQUITY

Harassment certainly contributes to pay disparities. Individuals who have experienced workplace harassment are sometimes sidelined or blacklisted, terminated for complaining, prevented from seeking promotions, or they have resigned or taken less profitable positions to escape a harassing workplace. This can all lead to or contribute to pay disparities.

Pay disparities, moreover, may contribute to harassment. One thing that seems common across industries and different types of workplaces is that the abuse of power plays a role in sexual and other types of harassment. Power in the workplace is often defined by money (the owner, rain-

maker, top salesperson, or creative genius who brings in customers). Pay disparities often mean that women and minorities have less power in the workplace. Therefore, closing the wage gap may decrease the power differential, and thus decrease incidents of harassment. Decreasing the pay gap may also lead to more diverse managers and leaders who may be able to change the workplace culture and may take a fresh look at enforcement and investigation of harassment claims.

Current lawsuits demonstrate how much harassment and pay equity issues are intertwined. There are an increasing amount of lawsuits, including class-action claims, involving both pay equity and harassment/discrimination claims. These claims together can be more serious than when viewed alone. For example, a company may be able to justify a pay gap based on an objective factor. Once there are allegations of sexist attitudes or comments in the workplace, however, these wage gaps may appear more nefarious. Similarly, it may be possible to claim that a few inappropriate com-

ments were not severe or pervasive in the context of a harassment claim, or that they were properly addressed by management, but these statements could be interpreted as more concerning if there is a seemingly unfair pay gap between the parties, with no evidence of efforts to improve the pay disparities.

Increasingly, plaintiffs are also claiming that a failure to address pay equity concerns or conduct a pay equity audit (as described below) is itself a form of discrimination, and that a request for such actions is a protected activity under state and federal anti-discrimination laws. This has led to an increase in retaliation claims related to expressing pay equity concerns, which like many retaliation claims, can be difficult to defend.

CURRENT TRENDS IN PAY EQUITY LAWS

Although there is a persistent pay gap in this country, there has been a federal pay equity law for over 50 years. President Kennedy signed the Equal Pay Act of 1963, which is part of the Fair Labor Standards Act. It prohibits sex-based wage discrimination in the workplace if employees are performing jobs that require substantially equal skill, effort, and responsibility under similar working conditions. The Equal Pay Act has never required that individuals with the same job title be paid the same, but any pay differential must be based on neutral criteria, such as experience, number of employees managed, or a day/night differential.

Recently, the Ninth Circuit (covering the west coast), held that prior salary alone or in combination with other factors cannot justify a wage differential between male and female employees under the Equal Pay Act. *Rizo v. Yovino*, 887 F.3d 453, 456 (9th Cir. 2018). This is the first time a Circuit Court has held that prior salary – even in combination with other factors – cannot be used to justify a pay gap. In the Seventh and Eighth Circuits, the Courts have held that a difference in pay based on the prior pay is a legitimate factor other than sex under the Equal Pay Act. *Lauderdale v. Illinois Dep't of Human Servs.*, 876 F.3d 904, 908 (7th Cir. 2017); *Taylor v. White*, 321 F.3d 710, 720 (8th Cir. 2003). In the Tenth and Eleventh Circuits, the Courts found that an employer cannot rely *solely* on a prior salary to justify a pay disparity. *Riser v. QEP Energy*, 776 F.3d 1191, 1199 (10th Cir. 2015); *Glenn v. Gen. Motors Corp.*, 841 F.2d 1567, 1571 (11th Cir. 1988). Although the federal circuit courts do not agree on this issue, companies with operations in the Ninth Circuit must be aware of this expansive interpretation of the Equal Pay Act. Given the Circuit split,

moreover, this may be an issue eventually decided by the Supreme Court.

In addition to changing interpretations of federal law, multiple states and municipalities have been enacting or broadening their pay equity laws, including California, Massachusetts, New York City, Maryland, Delaware, San Francisco, Oregon, Puerto Rico, and Nebraska. A majority of these laws address pay transparency and prohibit or restrict companies from seeking prior salary information from applicants. These laws address common and sometimes long-held practices in companies, and apply even if there is no evidence the company has pay disparity problems. Many other states and localities also have pay equity bills working their way through the legislatures.



ADDRESSING PAY DISPARITIES

Although we have long known about pay disparities, there are still a lot of unknowns regarding pay equity. We do not know exactly how harassment and pay equity are linked, how new state laws will affect pay disparities, and whether the Supreme Court will weigh in on interpretations of the Equal Pay Act. Even with these uncertainties, companies should address pay disparity concerns by conducting pay equity audits and implementing new policies and procedures regarding compensation.

Pay Equity Audits Conducting a pay equity audit is one step a company can take to determine if there are improper pay disparities and analyze how to address them. We recommend conducting these audits with counsel, who can assist with the analysis and suggested remedies through privileged conversations. In addition, it is often helpful to align the timing of the audit and its results with your company's compensation cycle, so that you can address any compensation changes at a logical time. We are also finding that a one-time audit and any accompanying revisions to employee compensation are sometimes not sufficient. Particularly for a company that is growing due to a num-

ber of new hires, or gaining new employees through the acquisition of other companies, conducting routine audits will be needed to ensure that progress toward pay equity continues.

Policy Changes In addition to conducting pay equity audits, below are some of the concrete steps that companies are taking (sometimes prompted by new state and local laws) to avoid improper pay disparities:

- Prohibit prior salary inquiries;
- Set job salaries based on objective criteria (and don't make exceptions);
- Prohibit salary negotiations;
- Analyze who has authority to make decisions (is this a diverse group? Is it too centralized/decentralized?);
- Increase transparency about pay decisions and factors; and
- Review current employee evaluation systems, and determine if the measurements contribute to disparities in compensation decisions.

In addition to these steps, pay equity should be considered a part of your company's overall equal employment opportunity programs. An employee's pay is the primary way a company communicates to an employee his or her value at the company. Addressing pay equity shows that you are properly evaluating that employee's worth. If companies can take the tangible step of increasing an employee's pay, or even making compensation decisions and processes more transparent and fair, it also provides a tangible example of your commitment to anti-harassment policies and a workplace culture supportive of all employees. Among employees, there are increasing doubts about the efficacy of long-used programs to address workplace harassment and discrimination (like anti-harassment trainings). Addressing pay equity is a concrete way to demonstrate your commitment to ensuring a workplace free of discrimination and harassment.



Julie Devine, an attorney with Lashly & Baer, P.C. in St. Louis, has successfully defended employers in state and federal court and government investigations involving claims for discrimination, harassment, and retaliation, as well as wage/hour issues and FMLA claims. Julie also regularly provides advice and counseling to employers about an array of compliance issues.