

Making Every Day Equal Pay Day

April 2021

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Takeaways

National Equal Pay Day was created in 1996 to raise public awareness and illustrate the disparity between men's and women's wages for the same work. Twenty-five years later, more remains to be done to close the gap, and employers continue to grapple with policies and processes to ensure women and minorities are paid equitably.

What Employers Need to Know

- Research shows that women in the United States who work full-time year-round, are typically paid less for every dollar than their white, non-Hispanic male counterparts. Statistics are even bleaker for minority women.
- Pay equity remains a primary focus for employers because:
 - It's the law;
 - Shareholder and social activism have placed the spotlight on this issue; and
 - It's the right thing to do.
- There are a number of factors driving the pay gap including but not limited to:
 - Gender norms and expectations;
 - Stereotypes about women in the workplace;
 - Starting salaries and salary history disclosure requirements.
- Trends in the pay equity arena include:

Hosts



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Services

Pay Equity

- States and local legislation legislating beyond federal requirements;
- Expansion of the definition of “similarly situated” in examining gap issues;
- Transparency;
- State bans on salary history disclosure;
- Pay reporting requirements at the state level;
- Increased pay discrimination litigation from the EEOC; and
- The Paycheck Fairness Act and other federal legislation.
- Employers should:
 - Be aware of the conversation about pay equity in and outside of their organizations;
 - Comply with pay transparency rules;
 - Consider communicating about pay policies and practices;
 - Conduct pay equity analyses with the help of outside counsel to increase likelihood that work product will be cloaked in privilege.

Transcript

Alitia (00:06):

Welcome to Jackson Lewis' podcast, We get work™. Focused solely on workplace issues everywhere and under any circumstances, it is our job to help employers develop proactive strategies, strong policies, and business oriented solutions to cultivate a workforce that is engaged, stable, and diverse. Our podcast identifies the issues dominating the workplace and its continuing evolution and helps answer the question on every employer's mind, how will my business be impacted? President Biden proclaimed March 24th, 2021 to be National Equal Pay Day. Equal Pay Day was created in 1996 by the National Committee on Pay Equity to be an annual event, intended to raise public awareness and illustrating the disparity between men's and women's wages for the same work. Twenty-five years later, much work remains to close the gap and employers continue to grapple with having policies and procedures in place to ensure women and minorities are paid equitably.

This episode of We get work™ explores the continuing need for Pay Equity Day and how many factors including social pressure and government enforcement, continue to push the issue to the forefront of employer's agendas. Stepping up to the podcast mike today are Stacey Bastone and Dan Duff, principals in the Long Island office of Jackson Lewis. Stacey and Dan focus their practice on helping clients become part of the pay equity solution as well as assisting in the design and implementation of affirmative action compliance procedures to minimize regulatory risk. Stacey and Dan, the question on everyone's mind today is how can employers make Pay Equity Day a reality for their employees every day? And if they do, how will that impact my business?

Stacey Bastone (02:00):

That's such an important question, one that I'm really excited to be here talking about with you, Dan. This is something that's been at the forefront of employers' minds for a really long time now, and while there certainly seems like there's been action on this part, there also certainly feels like there's been a call to action in particular over the last few years. So we know that Equal Pay Day was March 24th this year and it symbolizes how far into the year women must work to earn what men earned in the prior year. So women in the United States who work full-time year round, are typically paid only 82 cents for every dollar paid to their male counterparts. And that translates to real money over time. The gap in earning translates to over \$10,000, less per year in [inaudible 00:02:47] earnings for women and the research shows it's even worse for women in color.

According to the research, black women working full-time year round, typically make only 63 cents for every dollar paid to their white non-Hispanic male counterparts. For Latinas, that figure is only 55 cents. And for Native Hawaiian Pacific Islander women it's 63 cents. Native American women it's 60 cents. And while Asian women are paid typically around 87 cents for every dollar, the wage gap is substantially larger for some subgroups of Asian women. So to be sure there's been some progress in this space over the years. Through the Civil Rights Act, it became law that employers can't discriminate on the basis of race or gender and the Equal Pay Act focuses on pay and requires equal pay for equal work. But these laws have been around for decades and the issues still persist.

And so while there are certain protections for women, it's really taken a long time for society to catch up, and while we've seen progress and we've seen the gap narrow over time, women are still being paid less than their counterparts. So this is an important question. It's a complicated question. And it's a question that our clients have been struggling with and one that Dan and I have been fortunate enough to really been able to counsel our clients on and hopefully help our clients move the needle in the right direction. Dan, what are your thoughts on why it's so important to our clients and to employers across the country?

Dan Duff (04:13):

Well, first of all, I think we can all agree that pay without regard to race or gender is not only legally required, but it's the right thing for everyone to do. The second I think, with all the focus on social justice that has built over the last year or so, as well as the increase that we're seeing in shareholder activism demanding action with respect to fair pay, I think every employer needs to take the time to carefully examine their pay policies and procedures. And also just employer employees are demanding more transparency about a company's pay practices. And it's important both for retention but also for employer relations reasons that employers take [inaudible 00:04:52] seriously.

And then I guess the last thing I'd just say is there's potential liability if you are not paying employees according to the law. So if you're a federal contractor, you've got the Office of Federal Contract Compliance programs. If you're not, you're probably regulated by the EOC. And there's also plaintiffs class actions attorneys who can bring claims under the federal and state laws in this area. And the liability can be millions of dollars if the class is large enough and the pay gap is large enough. So for all those reasons, I think employers really have to take it very seriously these days.

Stacey Bastone (05:24):

Dan those are great points and there certainly feels like there's been even a more urgent focus on equal pay in the last few years. I'm interested in your thoughts, but it feels to me like a lot of this, the publicity, really stems from the women's U S soccer team. Back in 2016, the five players filed the complaint with the EOC against the United States Soccer Federation alleging that they weren't treated the same way as their male counterparts. This litigation has progressed over the years and now there's 28 players who are part of a suit against that U S Soccer Federation. And while the litigation is still ongoing in that case, and there's a long legal battle involving collective bargaining agreements and other things, I think what that litigation did was bring to the forefront the issues that many women are facing and which is how they're being paid compared to their male counterparts and how their work is really being valued by their employers.

You know, in addition to that, the Time's Up movement really advanced the ball in this space as well. We can all remember celebrities standing up for equal pay. And while that started out as really targeting sexual harassment endemic in Hollywood, it really ended up in seeking gender parity and pay equity for women and women of color in Hollywood. In fact, the main priority or one of the main priorities of the Time's Up movement is a legal defense fund that's administered by the national women's law center that's there to support harassment retaliation lawsuits by women in all industries.

Dan Duff (06:53):

I definitely think the women's soccer team threw a light on this area. I know anytime you have a women's team that's extremely successful year after year, whether it's in the Olympics or in the World Cup, performing as they do and then the men's team just not progressing like the women, even close to the success that they've had, it sort of brings in to a stark contrast the pay differences between the men and the women's team and then really raises these issues. But we've also seen President Obama would raise the pay gap during his State of the Unions when he was president. And very recently you have Joe Biden signing an executive pronouncement naming March 24th of this year, the National Equal Pay Day and stressing in that pronouncement that employers should be more transparent about their pay and their pay policy. So I don't think this is going away. I think as we said earlier, any employer who's not looking closely at it could wind up with serious legal and employer relations issues.

Stacey Bastone (07:50):

Hey Dan, can you explain for us how the pay gap is actually calculated?

Dan Duff (07:54):

Great question Stacey. Essentially what it is, is the U S Census Bureau takes a random sample of the U S working population. And from that sample, a pay gap is calculated and they simply take the average or the median difference between the average gross earnings of the males in the sample versus the average gross annual earnings for females in the sample. And so the last time this was done, the pay gap suggested that women earn 82 cents on the dollar as compared to men. And this is a non-adjusted figure so it doesn't take anything else into account. And the fact that it's non-adjusted really has become a controversial fact amongst those who would advocate that the pay gap is perhaps less than that.

There are some studies that have the pay gap, once certain control factors are put into place, closer to 93 or to 95 cents on the dollar as compared to the 82 in the non-adjusted. But I think the one thing you and I and most people can agree upon is that there is a pay gap of some amount and that employers spending time to ensure that men and women are paid fairly is an important priority. So what do you

think is driving the pay gap?

Stacey Bastone (09:07):

I think that's a really difficult question and there's a number of things that are driving the pay gap that are quite frankly, that they're hard to unwrap because they're so interwoven with one another. So I think that first there's some personal factors. When men and women ... Historically they choose different jobs in some instances. So some of that is due to the fact that there are some social norms that are built right into the fabric of our lives. And women are sometimes trained internally to think, or to believe that they should go into certain occupations. The other thing is, as women intentionally sometimes choose occupations that traditionally have more flexibility, whether it be teaching, social work, other types of industries where they can have more flexibility in terms of their family lives and raising children. And so while some of these are personal choices, other times is a funneling of women and men into different types of industries based on these gender norms and expectations.

What research has shown is that female dominated industries generally pay lower wages than male dominated industries, even when those industries require similar skill levels. So these so-called women's jobs where women have historically ... They've been historically made up of a majority of female workforces like home health aides or childcare workers, they tend to have lower salaries and less benefits whereas male dominated jobs tend to be higher. On top of that, certainly the issue of families and raising children certainly can take a toll on a woman's ability to earn higher wages or employer's willingness to give higher wages. So generally speaking, more women may choose to leave the workforce or choose to work part-time because they either have to or want to take care of their family. And oftentimes there's not a lot of flexibility in the workplace to allow for either reduced or part-time schedules or the ability to return to work after perhaps taking some time off or dialing back a little bit.

So in terms of contributing to the wage gap, certainly at a basic level, working less hours would contribute to women earning less. But it's certainly more complicated than that in terms of the opportunities for women to dial back at certain times when they may want to, and then reenter the workforce later on. And then there's perceptions about women in the workplace. People and employers and managers and supervisors sometimes have certain perceptions about women. You know, assuming maybe a mother won't want to work late or work on weekends because they have a family. This can oftentimes translate into women receiving less opportunities to advance in the workplace.

Finally, a lot of research points to starting salary as being one of the major contributors to females earning less over the lifetime of their employment. So for a variety of reasons, women who come in at a lower salary, when we think about how increases are given on a percentage basis year over year, over time that's going to translate into women earning thousands and thousands of dollars less over their employment. Reasons for them starting at lower salaries. There's been research that talks about women's negotiating skills. Upon hire, they don't negotiate as much for their starting salary. And this idea of employers relying on an employee's prior salary to set a starting salary can perpetuate any potential issues, whether it be intentional discrimination or otherwise, that had occurred at their previous jobs.

So the issue of why the gap exists, I wish I had an easy answer for it but I don't because it's a complicated one. And it's one that researchers have been studying for years. And I think that if it was an easy answer the gap would be gone by now. Dan, what do you think? Do you think that there are any other contributors here?

Dan Duff (12:51):

No, I think you did a great job covering it. And I think the main thing is what your explanation shows. It's a very complicated issue. There's no simple answer. Sometimes when people look at compensation, you got to consider also the potential effect of discrimination throughout someone's history, whether their education or prior jobs. And that's one of the reasons we see these bans on prior salary information. So not easy thing to deal with, but it's out there. I think it's something that employers need to be watching very carefully and ensuring that they're compliant with all the laws that are out there on this topic.

Stacey Bastone (13:24):

Speaking about laws Dan, what are you seeing in terms of trends and enforcement of pay equity issues in the workplace?

Dan Duff (13:31):

Yeah, there's a lot of stuff going on. You've got many states passing equal pay laws that are largely designed to make it easier for claims to be brought under state law. You've got the expansion of the definition of who's similarly situated, which allows people to compare themselves further and further

away from just what their individual job title is. We're seeing a lot of aggregation of different groups together into regression models in a way that could help to result in disparities, the significant disparities show up in those models. But you've also just got things that are happening in society.

It was really interesting, the group called Equalpay.org, this year their theme for Equal Pay Day was called March Madness. The pay gap is madness. And what they did is each year in the week leading up to March 24th, our National Equal Pay Day is they pitted two themes together in like a bracket like you would see in the NCAA tournament. And they would have the two go out against each other and someone would win. And interesting on March 17th, their bracket was, the matchup was pay transparency versus employer secrecy. Pay transparency, I believe, won.

And transparency is another big enforcement trend. So you're seeing more and more agencies encourage through their actions, employers to be more open in terms of how they're paying and what they're paying, as opposed to keeping that information secret. And of course, under executive order that President Obama put out for government contractors, it's illegal to retaliate or in any way against an individual or individuals, if they ask about their own pay or the pay of someone else, or if they talk about those things in the workplace. So that's another thing that we've been looking at and that's been, I think will continue to be on the horizon.

At this time, most laws don't mandate that employers disclose pay information. And obviously there's concerns about confidentiality, competitiveness, that goes into that. But certainly the enforcement trend seems to be encouraging employers to do that. And I think that may change in the future in terms of having employers mandatorily have to provide pay information. For example, Biden's recent pronouncement order on creating Equal Pay Day as an official day on March 24th, went on to talk about the need for more transparency and the belief that unless there's more transparency, the pay gap will never go away. Employees need to know if they're being paid fairly, and oftentimes that's hidden from them. So you've got that. You've got also the salary history bans which we talked about, which prohibit in many states and also our federal contractors, it prohibits them from asking someone's current salary, if they're applying to a new job.

And the idea behind that is that if that person's salary has been made artificially low through discrimination at their current employer or past employers, you don't want that carried on to the next employer. If the next employer uses that lower salary to give that person a lower salary in the new job, that perpetuates the problem. So that's the reason behind those salary history laws that we're seeing. So all of that is happening and the amount of litigation that we're seeing, the amount of class actions that we're seeing in this area, has been steadily going up over the last few years.

Stacey Bastone (16:45):

Dan, those are great points. And on top of that, I think we're also seeing enhanced enforcement from the EEOC and the OFCCP. So for those of us familiar with EEO-1 reporting, we know that just two years ago, employers were required to provide pay data to the government as part of the EEO-1 reporting requirement. And while that requirement is essentially on hold right now from the federal government, states are really taking up the mantle and California, for instance, is requiring a very similar report to that EEO-1 pay data collection. And we've seen an increase in litigation coming from the EEOC related to pay disputes and an increase in charges being filed with that entity.

The OFCCP, which is the federal contractor watchdog, they've certainly increased their enforcement of pay discrimination disputes. We really saw an increase under the Obama administration, but it continued under Trump. And certainly under President Biden, we can expect that to continue even more. In fact, the current head of the OFCCP, Jenny Yang, was part of the EEOC and really hit the ground running and has been a vocal supporter of trying to rid out and eliminate pay discrimination in the workplace. So we can expect that the enforcement coming from the EEOC and the OFCCP to continue.

And as many of us know, just earlier this year, the Paycheck Fairness Act was re-introduced into Congress, which essentially, what it wants to do is update the Equal Pay Act by requiring among other things, employers to demonstrate that the wage differentials between men and women are based on factors other than sex, essentially making it harder for employers to defend claims of discrimination under the Equal Pay Act. And the Paycheck Fairness Act if enacted would also include a prohibition against retaliating against workers who inquire about or discuss their own wages. So again, many states have enacted these types of laws, but we haven't seen it at the federal level yet, but we do expect these types of these laws to be proposed and potentially enacted over the coming years.

Dan Duff (18:53):

So Stacey, what are employers that you represent, doing to address the many issues that we brought up today?

Stacey Bastone (19:01):

Look, the first thing is that employers are paying attention. They know that this is an important topic, and they know that it's something that it's important, not just to their employees, but to society more generally. And so the first thing is, employers are being a lot more transparent in terms of employees wages, and perhaps some of them are providing bands or ranges in their advertisements. Some of them internally are having more discussions about pay and what certain jobs, what the ranges are for jobs internally. They're also making public statements because it's important for their employees to know that they're taking it seriously. So they're talking about pay, they're opening up the conversation to their employees and they're reviewing their policies and their practices. And most importantly, many of our clients are conducting pay equity analysis. They're putting in the work to understand what issues they may have so that they can then address them.

Dan and I both work with many employers to conduct these analyses under privilege to inform our clients about what issues may exist.

Dan Duff (20:06):

Yeah, thanks Stacey. And on that last point, I think that's, it's really important to consider engaging outside counsel or at least internal counsel to assist with that, to maintain the privilege and also to consider when possible running multiple regression analysis. Since several courts have referred to multiple regression as the gold standard for pay equity analysis and provided your pools are large enough, and you have the factors that influence pay in the model and no others, you can really get at the heart of whether there's an issue or not. And that can often lead to shedding light on what if there is a pay gap, you can fix it with a significant P value. And if there isn't, then it's something you can use to defend yourself. So I think that's a key aspect of what employers should be doing and considering in light of the current atmosphere we're in.

So Stacey and I would like to thank everyone who listened in today. With March 24th, 2021, officially declared National Equal Payday by President Biden and Vice President Harris, the time is now for employers to examine fair pay within their companies and take remedial action where necessary. If you would like to speak to Stacey or myself about pay equity issues that may be facing your organization, please don't hesitate to reach out to us. Have a great day everyone.

Alitia (21:21):

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