

Election 2020: The Future of Pay Equity

By Laura A. Mitchell & Stephanie E. Satterfield

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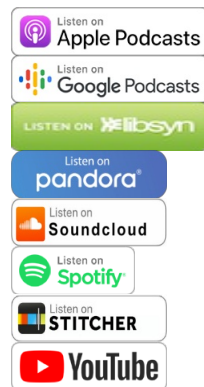
Pay Equity

Details

October 29, 2020

Public support for like Black Lives Matter and the #MeToo movement has risen to prominence in recent months. But many advocates say more can and needs to be done. They are calling for action — in the form of pay equity for nonwhite workers. As employers consider how to address disparities in pay, they face a number of issues and potential pitfalls that can lead to costly litigation and damaging publicity.

Jackson Lewis P.C. · Election 2020: The Future of Pay Equity



Takeaways

Public support for Black Lives Matter and the #MeToo movement has risen to prominence in recent months. But many advocates say more can and needs to be done in the form of pay equity for female and nonwhite workers. Employers considering how to address disparities face a number of issues and potential pitfalls that can lead to costly litigation and damaging publicity.

What Employers Need to Know

- If Republicans hold the White House and control of the Senate, it is unlikely that there will be changes to existing federal pay equity laws. States and local governments will likely continue to enact a patchwork of more aggressive fair pay laws and regulations to fill the void. We will likely see these state and local laws pass with a continued emphasis on several themes:
 - Broadening the definitions of which employees are comparable;
 - Limiting the reasons acceptable to explain pay differences;
 - Encouraging, or requiring, transparency around pay;
 - Protecting employees against retaliation;
 - Expanding recoverable damages available; and
 - Encouraging (and even incentivizing) self-analysis.
- If Democrats gain control of both the White House and the United States

Senate, there will likely be a push to pass a broader federal pay discrimination law.

- With any administration change, employers should monitor changes in the enforcement position of the EEOC and the OFCCP.
- In the wake of the racial justice movement and Black Lives Matter, race has come into sharper focus when discussing pay equity. The pay gap broadens when layering race on top of gender. For example, African-American females make on average .62 for every dollar a white male makes (the gap is .82 for white females).
- To address historic inequities in pay systems, employers should consider conducting privileged proactive pay analyses in order to identify potentially problematic areas and correct unexplained pay disparities.
- Moving forward, employers should revise their compensation systems to create pay bands by position, discontinue reliance on prior pay in setting starting pay, and ensure all pay-setting decisions are equitable within peer groups (those doing comparable work).

Transcript

Alitia (00:09):

Welcome to Jackson Lewis' Podcast, We get work™. Focused 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 issues dominating the workplace and its continuing evolution and helps answer the question on every employer's mind, how will my business be impacted? Public support for social movements like Black Lives Matter and #MeToo have risen to prominence in recent months, but many advocates say more can and needs to be done. They're calling for action in the form of pay equity for non-white workers.

As employers consider how to address disparities in pay, they face a number of issues and potential pitfalls that can lead to costly litigation and damaging publicity. This podcast addresses the areas of pay equity that, despite the best intentions, can present difficult and even insurmountable challenges for employers in what additional challenges lie ahead after the November election.

Our hosts today are Stephanie Lewis and Laura Mitchell, principals in the Pay Equity Resource Group. In Laura's version of the re-imagined workplace, pay equity would be the rule rather than the exception nationwide, and she works with companies across all industries to realize this vision for her clients' ongoing success. Stephanie works with businesses to develop and defend best in class pay systems that drive employee recruiting, engagement, and retention. Stephanie and Laura, the question on everyone's mind today is, what does pay equity mean right now, and how do these various social movements impact my business?

Laura Mitchell (02:09):

Welcome. I'm so excited to have this opportunity to chat today with my

colleague and friend, Stephanie Lewis, about the topic of pay equity and just those very questions; what does it mean to businesses? What does it mean to individuals? Because I think this is a topic that's on everyone's mind. Stephanie and I, we get to talk about this and think about this topic every day because it's what we do as practitioners, but also I think because we are professional women and we have chosen to build careers in a profession that has been historically dominated by men. So it's part of just who we are and what we do. So, thrilled to be here talking with you today about this.

This question of the impact on business, to me I think it's something that is impacting businesses in every aspect from employee conversations that are happening in the hallways to what's going on in our training rooms when we're talking about non-discrimination and harassment. So I think pay equity is really... the discussion around pay equity, I guess I should say, has really kind of changed the landscape of what we're talking about. And I think right now more than ever, we're in the midst of a political season, a presidential election that has really just heightened the sense of urgency and the intensity around this notion of pay equity and these conversations that we're having. So, what do you think is going to happen on the other side of this election with pay equity?

Stephanie Lewis (03:36):

Hi, Laura.

Laura Mitchell (03:36):

Hi.

Stephanie Lewis (03:37):

I am so excited to be here talking to you about one of our favorite subjects. And you're right. We're in a really interesting time with the upcoming election. As we sit today recording this on October 20th, we do not yet know the results of the election, and we may not for some time. But what we do know is that there are a number of different scenarios that could play out that could impact what happens in the pay equity space. So, what has not garnered a lot of attention is that the Senate could become controlled by the Democrats in addition to Biden winning the presidency. If that were to happen, then the Democrats would have control of the House, the Senate and the presidency. In that event, sweeping pay equity changes are very likely.

And we know the roadmap for what those changes might include because we've had some proposals in prior administrations, I'm including with President Obama's administration, including the Paycheck Fairness Act, which really was designed as a more sweeping bill to address and eradicate the remaining pay gap by enhancing penalties for unexplained pay differences between women and men. And that would likely be expanded to include racial pay differences. And in light of the various movements that we're currently in around pay equity, me too, and racial justice, we can fully expect that the administration would go beyond anything that's been proposed in the past to include and incorporate some of the more aggressive fair pay laws that have

been passed at the state and local level.

If the administration, the presidential administration remains Republican and the Senate remains Republican, or the Senate remains Republican but the presidency flips to President Biden, then I think that becomes a lot more challenging when maybe looking more at what is the status quo now. Maybe Laura, I mean, what are your thoughts about what that status quo might look like if we don't have a complete flip of the Senate and the White House?

Laura Mitchell (06:19):

Right. I think that's exactly right. I think if we don't have total control by one party, the likelihood of us having any type of unified federal policy, whether it's in favor of pay equity kind of pushing the envelope forward or maintaining the status quo, I think there's just going to be a lot of tension. So I think what's going to happen is the states are going to continue acting the way that they have and creating this patchwork of regulations and obligations across the country for employers. So we're going to see states kind of step up and continue to make laws for their constituents and there's not going to be one unified way that employers are going to know, or unified guidance I guess I should say, for employers to follow in this.

And I think really what we're going to see is this continued emphasis on expansion of who should be compared for pay purposes. Right now when I say patchwork, it literally is a different definition or a different way of looking at it depending on what state that you do business in. We're going to see, I think the latest trend is this increased encouragement or even requirement for pay transparency. Here in Colorado, we have now a requirement on the books that will go into effect January 1 where employers literally have to include the pay range for jobs on their job postings. That's the first law of its kind right now in the country. But I think that if we don't have unification in our leadership at a federal level, then we're going to see more states continue on that path.

Stephanie Lewis (07:55):

Absolutely. You're so right about that, Laura. And what about the agencies? The agencies are so often overlooked, but they have been big drivers in the pay equity space and that can really change with the change of administration as well, right?

Laura Mitchell (08:10):

It can. But interestingly, the past four years under the Trump Administration, we have seen the EOC and the OFCCP, our civil rights enforcement agencies under the Department of Labor, focus on and emphasize pay discrimination systemic investigations. And in fact, the OFCCP, which is the agency that governs and enforces non-discrimination laws for federal contractors, has recouped more money than it ever has in pay equity settlements. So, it's kind of counterintuitive what's been happening, but I think if we continue under a Trump Administration, those agencies are not going to let up and we're going to continue to see emphasis on investigating pay discrimination even under a

Republican administration.

Stephanie Lewis (08:59):

But a Biden Administration would probably bring back that EEO-1 pay reporting, right?

Laura Mitchell (09:06):

It absolutely would, but California is not taking any chances. So they've actually got, Governor Newsome has signed into law a California pay data reporting, which depending on the interpretation of it, could actually be a nationwide reporting tool for those employers that do business in California or have California employees. So again, the states really aren't waiting for the outcome of the election. They're just kind of moving forward to ensure that they're doing what they can to move this needle and close that pay gap.

Stephanie Lewis (09:37):

Really interesting. Laura, pay reporting is not going away no matter who is in the White House, it sounds like, right?

Laura Mitchell (09:47):

Nope. Not at all, not at all. It just may be delayed for a while, but it's not going away.

Stephanie Lewis (09:52):

So everyone's got to get their houses in order. We've spent a lot of the last five or six years talking about pay equity specifically as it relates to women and the gender pay gap. And you know, that's really been at the forefront of the discussion with the U.S. women soccer team and public debate. Now we're in this really unique moment with the racial justice movement where we are seeing so much more attention on the race-based pay gap. Laura, I know you're working in this space every day. What are the new challenges you see facing employers with the race-based pay equity claims?

Laura Mitchell (10:44):

Right. Absolutely. I think you're so on point with that, Stephanie. I think what we saw over the last several months with the George Floyd incident and all of these other incidents that have really come to the forefront has just made the discussion around what race means in America and the impact of race on life in America just mainstream. And it's been very polarizing. So I think employers are now in this position where they have to look not just at pay for females in the organization, but have the difficult task of looking at pay for women of color in their organization. And in my world and the world of statistics, we call that intersectionality, which sounds like-

Stephanie Lewis (11:28):

Well, you're throwing out these confused difficult terms already. It's a little early for that, Laura.

Laura Mitchell (11:34):

I know. I'm trying not to. I'm trying to hold back, but I just can't help myself. But that really is the notion of the interplay between race and gender and what really does that mean for pay and how do organizations look at that. Because for so long, you've mentioned that we've been focused on closing that pay gap for women. But when you close that pay gap for women, that doesn't take into consideration that there's a larger gap for women of color, right? And we've talked about that before when the disparity between just 81 cents on the dollar for men versus women, when you look at women of color, it expands to 61 cents on the dollar the difference between what a woman of color is making and a man. And so, if you're looking as an organization just to impact pay of women, you're not going to be addressing that secondary issue or that other primary issue of race. So it really becomes, how are you analyzing your pay? Is your pay analysis sophisticated enough to understand that interplay between race and gender in your compensation program?

Stephanie Lewis (12:44):

I don't think, Laura, most people understand how much race exacerbates the pay gap. When we're talking about what women make compared to men, they are doing worse when you're talking about African-American women, and they're doing even worse when you're talking about Hispanic women. And the only group that's doing better than White men are Asian men and that's only marginally. So I think this is an interesting opportunity to raise awareness around how race impacts the pay gap and to take steps to address that where as it remains important to focus on the gender-based pay gap, it's a really important part of the dialogue here.

Laura Mitchell (13:27):

Yeah. And it's even a little more complicated than that because in the world of EEO or affirmative action equal opportunity, we've been conditioned historically to think of buckets of people, right? Male and female, minority versus non-minority. But really what we're seeing is there is a subset of underrepresented minorities. And so how do you look at your practices, your pay practices, to focus really on identifying barriers that the underrepresented minorities in your organization have to access to pay equity. And so that is really when we're talking about this concept of intersectionality, to use that nerdy term again, really to parse out, just like you said, do we need to address pay practices for Asian men or do we need to focus on women of color? How does that play, because you can't just take a blanket approach and really expect to effectuate any change.

Stephanie Lewis (14:30):

You're right. It's just a real struggle. And we often get the question, is it because of a gap in education? Is it because of a gap in terms of entry into the market? I mean, I guess, let me put that to you, Laura. I mean, what should employers do to address the root cause?

Laura Mitchell (14:48):

I think that's a fantastic question, and I think in your practice where you focus on litigation, you kind of see this play out in the courtroom and in court cases and really what we're able to rely on under the law. And in my practice where we're doing a lot of proactive pay equity analysis where organizations are kind of peeling back the layers of the onion of their pay and their compensation programs to see what's really driving pay, we're finding that looking at pay when you bring someone into the organization. So starting pay really impacts the trajectory of someone's pay going forward for the duration of their employment. And so that is one of the root causes that we really are looking at and identifying for employers. But what kind of trends are you seeing in litigation? What are you seeing. Are there things that folks should shy away from, or what are we seeing as far as the court weighing in on what's appropriate and not with respect to addressing pay?

Stephanie Lewis (15:49):

In most of our cases, what we see is employers defend a pay difference by saying that the person who's being paid less is a weaker performer. And then-

Laura Mitchell (16:03):

Always.

Stephanie Lewis (16:04):

Right. Do you hear that? We pay for performance? And I think your statistical test end up usually not substantiating that there's a link between pay and performance. And guess what? Our judges look at it the same way and our juries look at it the same way, because they want to see the documented performance evaluations. And most of the time businesses are not great at differentiating between star performers and weak performers through the formal performance management system. And so it's very difficult for employers to win the argument that the pay difference is justified by performance just because the performance management system doesn't back that up in most cases. So that's a major theme we see.

Another major theme we see in litigation is this idea of paying what it takes to get top talent. Market forces required us to pay men more based on their skillset, their experience, the market. And like these other explanations, those types of explanations are going to be subject to real scrutiny, especially in this day and age of, okay, what is the availability of different demographic groups in the market based on skillset? And you as an employer will have to prove up all of your explanations for pay gaps and litigation.

Laura Mitchell (17:34):

Yeah. What's interesting, I think that is becoming the number one explanation I'm hearing from employers as to why there's differences in pay. And it's because employee A just negotiated more when we hired them on, right? It's part of our process is that we have... part of the employer's process is to allow

negotiation. And so my question always back to them is, well, why were you willing to pay them more? What value did you see in them? Why when this individual asked for \$10,000 more than what you offered them, why did you say okay? If they are the hottest thing on the market right now, what makes them that desirable? So, it has to be kind of grounded in some sort of material or objective criteria, not just, "We're going to throw money at this talent because we want them." There should be some way to quantify that. And that I think is-

Stephanie Lewis (18:30):

Paying for a position, not a person, that is blowing my mind, Laura.

Laura Mitchell (18:37):

Right. What a novel concept. But really, I think, as the market tightens and skillsets are so desirable and unique skillsets are so desirable, I hear that almost every day, that there's an internal conflict between the business and compliance folks or folks who, compensation who say, we want to maintain the structure, these pay bands, but the business is coming to me saying, "I have to get this talent in the door. They've got three other competing offers. I'm going to give them what they want, or they're going to walk away from us." And that really poses a challenge from a pay equity standpoint.

Stephanie Lewis (19:14):

Well, you're a statistical nerd, I'm a history nerd. I recently was reading the text of what President John F. Kennedy signed into law when he signed the Equal Pay Act in June of 1963, which is over 57 years ago. So we're talking about six decades of federal law that prohibits a gender-based pay gap. And at the time women earned about 60 cents for every dollar earned by men. And now, almost six decades later, women still earn only about 80 cents to every dollar that a man earns. This is a persistent pay gap and it's been illegal for a long time. So, why hasn't more been done to close the gender pay gap in that time period? And what do you see, Laura, as some successful strategies that could be used to really eradicate this problem?

Laura Mitchell (20:22):

Right. I would just say that it was signed on June 10th, six decades ago, which I'm very fond of that date because it happens to be my birthday, not six decades ago, but I do think that actually when he signed the law, he made a very valid point and he said, "This measure adds to our laws another structure basic to democracy," but he acknowledged that much remains to be done to achieve full equality and economic opportunity. And I think that is the crux of why we haven't closed this gap because you can't just throw money or dollars at a problem and expect it to be fixed. We really need to look at this idea of opportunity and what are we presenting kind of on a broader perspective.

But he did say, and I agree that it was a significant step forward. So I think the number one fundamental thing businesses can do is actually look at their pay. Get in, roll up your sleeves, figure out what is going on in your compensation

program, not just what you write on paper. Not what your guidelines are or your policies, but how is it actually being implemented? What are the effects of your willingness to negotiate with candidates on the pay of your incumbent individuals? If you let someone come in \$10,000 higher than folks that are actually performing the job, then you should be looking at reassessing the value in what you're paying the incumbents that are doing the job already for you. So I think the number one thing is really to take a critical look at the impact of your pay decisions as an organization on your employees, and then be willing to make changes to address that.

Stephanie Lewis (22:15):

I think that's really, really right, Laura. I think you just hit it dead on. I mean, we work with businesses daily who don't have established compensation systems. They don't have pay bands. They don't have ranges for starting pay by position. And they have just been getting by by paying what it takes person by person. And so of course there are going to be inequities developed in that type of ad hoc system. And so, kind of getting at the design and implementation of an equitable pay system, that really is sort of transformative and exciting and where we see real change being made in terms of closing the pay gap.

Another real headwind that influences the persistent pay gap is when employers rely on prior pay in setting starting pay. So Laura was making certain amount of money at her prior employer before joining Jackson Lewis. We figure we can get Laura for a slight bump up from what she was making. Alex was making more at his prior employer. So there's a pay gap that's baked into the system that if we set starting pay based on what people were making before they got to our business, we are perpetuating an existing pay gap. So we've really seen a lot of state and local laws really get at that issue by prohibiting reliance on prior pay. And that will likely go a long way to continue to close the pay gap too.

But I would be remiss if didn't say, in this COVID world that we live in, women are dropping out of the workforce at higher rates because of the demands on them around childcare. And that may end up creating some additional pay gap in the immediate future as women just remove themselves from the labor force for some period of time. Do you see that as a concern, Laura?

Laura Mitchell (24:22):

Absolutely. When we are thinking about kind of the aftershocks of COVID of dealing with this global pandemic, one of the things that we talk to clients about are, what are your pay practices? How are you adjusting how you look at annual merit increases? How are you adjusting the value that you assign to tenure or time with your organization for folks who've had to pause to stay at home to deal with virtual learning for children or who have had to kind of step back from their careers. Because if we continue moving forward the way that we have in the past, we're not going to account for that portion of our American population that really has been impacted by this pandemic in those ways that they really have had to put their career on hold or take a step back, and that's going to impact their pay going forward and it really shouldn't.

Stephanie Lewis (25:15):

Laura, you and I can talk about this all day, and we probably will continue the conversation for the rest of the day. But the great folks who are listening to us right now on this podcast, I have to imagine have other things that they need to move on to. So I want to leave them with some thoughts from you, our expert, about what's the next step? What does the pay equity 2.0 look like? Where do you see employers needing to focus their attention moving forward?

Laura Mitchell (25:48):

Right. I think it kind of hinges back on that notion that JFK mentioned of economic opportunity or what I think of as opportunity parity. It's not just about what we're paying individuals, but it's about what positions we have available for individuals in our organization, right? Because you can't, and most organizations don't and it doesn't make sense to, to pay entry level individuals six figures. But as an individual has the opportunity to move up in their roles, in their career, in the organization and take on more leadership positions, then their pay would increase necessarily as just a correlation to that. So if we're looking at the opportunities that we are presenting to individuals to build their careers, to attain higher levels in that organization, then pay equity is going to come along with that. So I think it's about expanding our viewpoint past just looking at pay and looking at what positions individuals have.

Okay. So what I would say is really looking at this notion of opportunities that you're allowing or presenting to everyone in your organization to move up their careers, career advancements, kind of this notion of career progression. So that's what we're seeing kind of internally, I think what folks should be looking at kind of 2.0. Stephanie, to your point from a pay equity perspective, what are your thoughts beyond that or more broadly that employers should be thinking about to effectuate chain of change and moving that needle going forward?

Stephanie Lewis (27:19):

I think that's right. I think that the next step is just focusing on getting more women and more minorities into higher positions in the organization. And so that glass ceiling look of how do we expand those leadership opportunities for women and minorities. I'm excited to work with you, Laura, to help businesses get there. So thank you for this great conversation. It's been wonderful seeing you and I look forward to talking more after the election so that we can help employers sort out what comes next.

Laura Mitchell (27:55):

Absolutely. This made my day. Thanks so much, Stephanie, I'll talk to you soon.

Speaker 2 (28:01):

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