LABOR AND EMPLOYMENT

PAY EQUITY: THE SHIFTING LANDSCAPE

Pay equity is one of the most significant workforce issues facing employers today. Over the past several years, there has been a substantial increase in high-profile pay-related litigation, with plaintiffs relying primarily on federal laws to establish their claims. At the same time, federal agencies have continued to pursue pay disparity enforcement actions under federal laws, including Title VII, the Equal Pay Act, and Executive Order 11246. And boards of directors for large companies have been fielding requests from shareholder groups demanding disclosure of pay data for male and female employees. All of these developments have increased the risk of pay equity litigation for employers of all sizes and industries.

During the 2016 presidential campaign, it appeared that new federal legislation was imminent, as both candidates brought the issue to the forefront. Since the election, much of that momentum has waned, culminating with the Trump administration's decision in August 2017 to suspend implementation of the EEOC pay data disclosure rule, which would have required covered employers to make certain disclosures by March 31, 2018. The rule would have required employers with 100 or more employees to report wage and hour information for all employees by race, ethnicity, and sex.

"While halting the onerous document collection requirements imposed by the federal pay data disclosure rule was welcome news to many employers, the lack of progress on updated pay equity legislation at the federal level has left many companies wondering what to expect on the pay equity front, and what this signals for the litigation landscape," says Trina Fairley Barlow, a partner in Crowell & Moring's Labor & Employment and Government Contracts groups. The Equal Pay Act and Title VII are still in effect, but it is unclear whether and when we will see new federal pay equity legislation, she says.

For the time being, the spotlight has shifted away from Washington when it comes to new equal pay legislation. "State and local legislatures, from California to New York, have enacted their own equal pay laws that impose obligations beyond those under existing federal law," Barlow says. Every indication is that we will see more such laws, which will likely result in increased pay equity litigation in the coming years.

This increase in state and local activity began in earnest in 2016, when California implemented amendments to its Fair Pay Act to add two significant provisions. First, says Barlow, "the amended California law changed the standards for proving pay disparities." Previously, a woman arguing that her pay was unlawfully discriminatory needed to compare her situation to that of a man who was doing "equal work." Now, Barlow says, "California law requires only that she prove that she and her male co-worker engaged in 'substantially similar' work based on a composite of skill, effort, and responsibility. This change in the law significantly broadens the definition of who can be considered a comparator." Second, Barlow says, "employees can be compared even if they don't work in the same office or geographical location." Thus, the pay of an employee in a company's suburban Bakersfield office could be compared to that of someone in its downtown Los Angeles office.

The California law also requires employers to justify differences in pay. "If John and Mary receive different compensation, the employer has an affirmative obligation to prove that the entire difference is based on seniority, merit, or some other bona fide factor, not on gender," explains Barlow.

When the California law was passed, it seemed fairly aggressive, but other jurisdictions responded by enacting legislation that is in many ways even broader. For example, Maryland updated its law to prohibit unfair pay based not only on gender but also on gender identity.

COMPLICATION AND LITIGATION

Overall, says Barlow, "these emerging state and local laws are lowering the required threshold for employees' and plaintiffs' counsel to prove pay disparity claims, while simultaneously creating an affirmative obligation for employers to demonstrate that their pay practices are not discriminatory." These new statutes also leave potential uncertainties about what constitutes prohibited conduct, which is likely to open the door to litigation. Maryland's fair pay law, for example, doesn't just prohibit disparities in pay between men and women. It also prohibits employers from providing "less favorable employment opportunities" for women. "Determining what constitutes a 'less favorable employment opportunity' is likely to be the subject of litigation under the Maryland statute," Barlow explains.

To minimize litigation risks, employers should be thinking, for example, about formalizing selection procedures for professional development opportunities that have been historically ad hoc, and documenting the reasons for those selection decisions. Furthermore, because each of the state and local fair pay laws have their individual nuances, employers with operations across several states and localities will need to think about whether to establish different policies and procedures

"The lack of progress on updated pay equity legislation at the federal level has left many companies wondering what to expect on the pay equity front." —*Trina Fairley Barlow*

for each jurisdiction, or whether a single policy that satisfies the requirements of all relevant laws makes better operational sense.

Decision making around these issues is further complicated by other types of legislation focusing on pay equity. Some jurisdictions, including Delaware and New York City, have recently enacted laws that ban employers from asking job applicants about their pay history. Other jurisdictions, such as Colorado and Nevada, have changed their laws to embrace "wage transparency" and prohibit companies from punishing employees who discuss and compare their pay with co-workers.

DOCUMENTATION MINIMIZES RISKS

For employers, this expanding mosaic of state and local laws makes it more important than ever to document and monitor pay-related processes. "Companies should consider conducting privileged, internal audits and analyses of their compensation systems, evaluation processes, and pay-related decision making to determine if there are pay disparities that cannot be justified under applicable law. If there are problems, employers should take steps to fix them," says Barlow. Equally important, employers should establish procedures for real-time documentation and review of the rationale behind hiring, promotion, and pay decisions.

Such efforts can help companies minimize litigation risks and provide the basis for a sound legal defense if litigation does ensue. In a nutshell, the emerging pay equity laws require that compensation-related decisions be based on a bona fide factor. "Employers don't want to put themselves in the position of having to go back and reconstruct the bases for decisions," says Barlow.

Finally, companies need to monitor evolving legislation—and the resulting litigation risks—in various jurisdictions. There have been numerous bills proposed at the state and local levels, and many are still pending. Notably, these efforts are backed by politicians from across the political spectrum, with proposed legislation in both "red" and "blue" states. Not all of these bills will be enacted, of course. Already, many have been stalled or voted down, and some have been vetoed by governors. But the trend seems clear. "These new laws, coupled with ongoing interest in this topic by federal enforcement agencies, provide fertile ground for continued ligation," says Barlow. "We have yet to see the end of states enacting such laws—and, in fact, it appears to be just the beginning."

UPPING THE ANTE IN EMPLOYMENT DISCRIMINATION

Federal laws such as Section 3730(h) of the False Claims Act allow plaintiffs to file independent claims for whistleblower retaliation even if the employee has not filed a *qui tam* action under the FCA. One result, says Crowell & Moring's Trina Fairley Barlow, "is a recent and seemingly ongoing spike in plaintiffs adding whistleblower retaliation claims to single-plaintiff employment-discrimination lawsuits."

This tactic raises the stakes considerably for employers. "A typical workplace-discrimination claim may not get the attention of a company's upper management," Barlow explains. "But whistleblower retaliation claims that suggest that a company or its senior-level executives have defrauded the government or have engaged in other unlawful conduct do get upper management's attention." This attention can give plaintiffs significant leverage in terms of achieving resolution of their disputes.

At the same time, the inclusion of a whistleblower retaliation claim can create some tough decisions for companies. While employers might be inclined to settle such claims, they often don't know if there is an underlying *qui tam* action or a governmental investigation pending.

If there is, however, obtaining a release of claims from the individual employee asserting the whistleblower retaliation claim might not be the best resolution, because the release may not be valid. Even if it is, settlement of the claim with the individual employee may not resolve the underlying matter.

As a result, says Barlow, "employers must simultaneously manage risks posed by threatened litigation of individual discrimination complaints while they are weighing whether and how the threatened employment litigation may affect a suspected *qui tam* action or a related government investigation."