LABOR AND EMPLOYMENT

THE SPOTLIGHT SHINES ON PAY EQUITY

The issue of pay equity between women and men has been garnering a growing amount of attention from a variety of quarters, making litigation of pay-equity claims—from class actions to individual cases—an increasingly common occurrence.

The issue has been trumpeted by the White House, members of the U.S. women's soccer team, even an actress accepting her award at the Oscars. At the same time, activist investor groups are pressuring companies for more transparency around pay equity, prompting corporate boards to explore the issue before it comes up at shareholder meetings.

At the federal level, the Office of Federal Contract Compliance Programs has been stepping up enforcement of equal-pay rules. "The OFCCP's efforts have been accelerated through changes to standardized data requests at the outset of an audit, to an increasing unwillingness to share information regarding its compensation analyses during the course of an audit," says Kris Meade, chair of Crowell & Moring's Labor & Employment Group and leader of the firm's Pay Equity team.

In Congress, efforts to amend the Equal Pay Act to render pay-equity provisions more plaintiff-friendly have long been stalled. But things are changing rapidly at the state level. Some proposals that have not made it past Congress have been incorporated in state laws in California, New York, Maryland, and Massachusetts. "The groups pushing equal pay on Capitol Hill have succeeded in those four states," says Meade. California was the first to amend its labor laws, with the changes effective in January 2016. Now, he says, "we're starting to see the first litigations filed under that law."

These state laws include some provisions that differ from federal laws. For example, Meade says, "under federal law, a woman alleging discrimination has to be doing the same job as her male counterparts." That is, a lower-paid female employee would have to find a higher-paid male employee in the exact same position to file a claim. The modified state laws have changed that standard, permitting that the work being performed need only be "substantially similar." "That's fairly vague terminology that leaves a lot of room for interpretation," says Meade. "Plaintiffs can be expected to point to different jobs and claim they are quite similar in terms of scope, responsibility, and skills required. There is likely to be battling over who is really performing substantially similar work."

Meade says that the amended state statutes will probably act as templates for other states revising their labor laws. "We're likely to see more states making their pay-equity laws more plaintiff-friendly," he says. "We think that's a trend, with more allegations of pay inequality and pay discrimination growing out of these state laws, rather than federal laws."

HERALDING JOINT EMPLOYMENT

More companies are relying on outside contractors for labor. As that happens, the federal government is scrutinizing "joint employer" situations, where two companies exercise control over the same employees.

In a 2015 case involving Browning-Ferris Industries (BFI), the National Labor Relations Board formulated a new standard for determining when companies were joint employers—discarding three decades of NLRB precedent. The previous standard required companies to have "direct control" over employees in terms of hiring, supervision, etc. Now, "indirect control" is sufficient. In June 2016, BFI appealed the ruling, and the case is now before the D.C. Circuit.

"The NLRB's standard makes it more likely the government will find companies that are joint employers" liable, for example, for one another's employment-law violations, says Crowell & Moring's Kris Meade. "A big question is whether the Trump administration will reverse course on this novel approach," he says.

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