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Pay Equity and EEO-1 Reporting Remain a Priority of Federal Regulators

Pay inequity, particularly compensation disparity based on sex, has become a very prominent political issue in the last decade and it looks like some additional changes could be on the horizon at the federal level. Democrats expressed that pay equity would be a priority in their labor agenda during the 2018 Congressional election cycle and, in February 2019, a proposal intended to further promote fair pay practices was reintroduced in Congress. In addition, just last week, a federal judge lifted the stay on the changes to the Equal Employment Opportunity Commission's ("EEOC") EEO-1 Report. The revised EEO-1 report would require certain employers to provide pay data by sex, race, and ethnicity to the EEOC, allowing it to more easily detect and track impermissible pay differentials. Though at very different stages in their respective lawmaking processes, the proposed law and final regulation are very clearly intended to address pay inequality and provide additional enforcement tools.

Stay Lifted on EEO-1 Report

In August 2017, ahead of the 2018 submission deadline, the Office of Management and Budget ("OMB") stayed collection of pay data based on race, ethnicity, and sex to allow it to review the regulation related to the lack of public opportunity to comment on the format of submission of the additional data and burden estimates related to the specific data file format provided. However, on March 4, 2019, a Washington, D.C. federal judge ordered the stay be lifted because she determined that OMB's decision was arbitrary and capricious – citing unexplained inconsistencies based on its prior approval of the rule and failure to adequately support its decision.

As we reported back in 2016, the EEOC's changes to the EEO-1 report (Employer Information Report) would have required all employers with more than 100 employees and federal contractors with more than 50 employees to submit compensation data based on set demographic information to the EEOC beginning in 2017. Specifically, employers must report pay data into one of ten EEO-1 job categories by sex, ethnicity, and race. Employers must use information from W-2s to allocate wages paid to employees in one of ten EEO-1 job categories into twelve pre-defined pay bands. These pay bands are based on calendar year W-2 income. The rule also provides that employers report the total number of hours worked by employees, making it necessary to track the hours of all employees.

During the rulemaking process, employers expressed a number of concerns triggered by the new pay data requirements. For instance, providing this type of pay data without any additional information or context for

different pay levels could create false positives – the appearance of pay inequity that is actually justified and lawful. Employers also highlighted privacy concerns and the resource burden they would face in assembling this data, including related to the requirement that employers provide the total number of hours worked, even for exempt employees whose hours may not normally be tracked.

In deciding to lift the stay, Judge Chutkan of the U.S. District Court for the District of Columbia explained that the OMB's own regulations permit it to review "a previously approved collection of information *only when* 'relevant circumstances have changed *or* the burden estimates approved by the agency…were materially in error.'" [emphasis added]. Here, she determined that circumstances did not change in "any meaningful sense" from those described by the EEOC during the rule-making process nor was OMB's speculation that its burden estimate *may* be incorrect sufficient to meet the standard. Judge Chutkan also held that the decision was arbitrary and capricious because she determined that OMB "totally lacked the reasoned explanation that the APA requires" for this type of action. She determined that the formatting changes that formed the basis for the stay were "hyper-technical" and "had no real consequences for employers." She also stated that there was no deference owed to the Agency's interpretation of its regulations as it based its decision to stay the rule's implementation on conclusory reasoning.

The current deadline for submission of the 2018 EEO-1 survey is **May 31, 2019**. In her Order, Judge Chutkan stated that "the revised EEO-1 form shall be in effect," but it is unclear whether the intent is to require the additional pay data be provided for the current data collection year. If the ruling does take immediate effect, the EEOC would likely extend the current deadline to allow employers to collect the required data as it has periodically done in the past to accommodate proper data collection. The government may also decide to appeal the decision and, if it is appealed to the D.C. Circuit, the holding of the lower court would probably be stayed pending that appeal. We will continue to follow the impact of this decision and any related guidance or clarification that comes from the Court or the EEOC. However, in the meantime, employers required to submit the EEO-1 report should start to strategize how they will collect the required compensation data for 2018.

Paycheck Fairness Act Moved to Full House

On February 26, 2019, the U.S. House of Representatives Committee on Education and Labor took a step toward moving the proposal, known as the Paycheck Fairness Act, forward in the lawmaking process when it voted along party lines to send it to the House floor for a full vote. Although discrimination in pay based on sex is already prohibited under federal law, by both Title VII of the Civil Rights Act of 1964 (Title VII) and the Equal Pay Act (EPA), this proposal would further strengthen employee protections provided by the Equal Pay Act and establish additional requirements to prevent against impermissible pay differentials due to sex.

Title VII prohibits employers from taking an adverse employment action against an employee based on race, color, national origin, religion, or sex. In the context of pay equity, it prohibits both intentional acts of discrimination, as well as facially neutral compensation structures or other practices affecting pay that unfairly impact employees within a protected category. For example, if an employer uses a compensation structure that factors in seniority and reduces seniority level based on extended leaves of absence, women may be adversely impacted in their pay levels due to pregnancy-related leave.

The EPA bars employers from paying employees who perform substantially equal work differently based on sex.

To establish a claim of pay inequity under the EPA, an employee must be able to show that (1) he or she receives a lower wage than paid to an employee of the opposite sex in the same establishment; and (2) the comparator performs substantially equal work under similar working conditions. Under the EPA, however, employers may defend against a claim of pay inequity by showing that the compensation differential is based on:

- a seniority system;
- a merit system;
- a system which measures earning by quantity or quality of production; or
- any other factor other than sex.

Any factor serves as an effective defense to pay inequity only to the extent it explains the entire wage disparity.

The proposed Paycheck Fairness Act would alter the current defenses under the EPA and add additional requirements and prohibitions for employers. Significantly, the bill would limit the final, catch all defense of "any other factor other than sex" under the EPA by requiring that the employer show the differential in pay occurred due to a "bona fide" factor other than sex and that the factor is:

- not "based upon or derived from" a sex-based disparity in pay;
- job-related;
- consistent with business necessity; and
- fully accounts for the differential in pay between employees of the opposite sex.

The proposed law would also prohibit employers from penalizing or otherwise retaliating against an employee for discussing his or her wages or the wages of co-workers and increase the potential penalties an employer could face for impermissible wage disparities, including punitive damages. In addition, it would require the EEOC to collect pay data from employers, similar to the EEO-1 form.

The Paycheck Fairness Act would also ban employers from inquiring or using an applicant's pay history in determining pay for the applicable position. This prohibition is intended to address the concern that the use of pay history would further perpetuate unlawful pay disparities. Several states, including California, Massachusetts, and Oregon, have already passed laws that bar employers from asking about an applicant's compensation history during the hiring process in some form. Each law is different in its specific coverage and restrictions – for instance, some state laws would permit an employer to ask for salary expectations, while others are more limited. Several cities and counties have also passed similar salary legislation banning inquiry into pay history. Thus, this type of ban may already be applicable to certain employers based on the state or locality in which they operate.

Due to the House's democratic majority, the Paycheck Fairness Act is expected to be passed through the House in its current form but is likely to stall in the Republican-held Senate. There has, however, been some bipartisan support on the issue of pay equity, making this proposal an important one to track.

Even without this proposed legislation, employers should be taking steps, such as evaluating their current pay structures, to ensure compensation practices do not inadvertently differentiate pay based on sex. The EEOC has identified pay inequity as one of its enforcement focuses in its Strategic Enforcement Plan for FY 2017-2021 and states continue to be active in this area as well.