

May 19, 2023

Pay Equity Risks and Best Practices

Recent trends in employment discrimination settlements suggest that existing employment practices and evolving pay equity and pay transparency laws may leave some employers susceptible to civil and regulatory action.

In this memorandum, we report on these recent trends and suggest best practices for employers to reduce litigation risks and promote compliance with evolving state and local pay equity and transparency laws.

Recent Gender Discrimination Settlements

In the last several years, the legal and mainstream press has been filled with reports about high-stakes gender discrimination civil litigations and regulatory enforcement actions. These cases—and the high-value settlements arising from them—serve as good reminders of the substantial economic and reputational risks posed to all employers by claims alleging gender discrimination and pay disparities.

Since 2020, in the civil litigation context, named plaintiffs have pursued, and settled, discrimination claims alleging gender-based disparities in pay, hiring, performance evaluations, promotions, and working conditions in violation of the federal Equal Pay Act, Title VII, and various state and local pay equity and employment discrimination laws. Often, these cases allege more than one species of discriminatory conduct, with claims concerning unequal pay brought alongside claims alleging other disparate treatment. For example, since 2020, plaintiffs have brought disparate impact claims arising from changes in the conditions of employment following pregnancy and maternity leave, compensation decisions that rely on overly subjective evaluation processes by which female employees receive lower scores than their male counterparts, promotion processes that tend to favor male employees, and even harassment and retaliation in the workplace. Plaintiffs have asserted such claims against employers in a wide variety of industries, on behalf of classes of entry-level engineers, associate bankers, professional athletes, and tenured professors, among other positions.¹

Civil plaintiffs have been able to effectively advance their claims through discovery targeted at the production of Human Resources files, including employee complaints, personnel data, performance evaluations, and compensation packages for similarly situated employees. Newly enacted pay transparency laws, discussed in more detail below, may offer future plaintiffs even greater access to some of this data, prior to the filing of their complaints.

Federal and state labor regulators—like the EEOC, the U.S. Department of Labor, or other state labor and employment offices—have similarly taken action against employers for violations of federal and state employment law. As in the civil litigation context, these challenges have affected multiple industries, with a particularly significant impact on the tech, finance, and retail industries.

¹ Likely contributing to this uptick in settlements is the high rate of class certifications approvals in recent years. J. Bennett, P. Dorian & J. Wille, Workplace Class Settlement Values, Certifications Soared in 2022, Bloomberg (Jan. 6, 2023), https://www.bloomberglaw.com/product/tax/bloombergtaxnews/daily-labor-report/X59NOTDC000000?bna_news_filter=daily-labor-report#cite.

Terms of Settlements

When faced with such high-stakes litigation or regulatory matters, employers often choose to settle discrimination claims to avoid lengthy litigation or trial. These settlements involve both monetary and non-monetary terms.

Recent gender discrimination class-action and regulatory settlements have ranged from \$925,000 to \$215 million, with federal and state regulatory settlements typically falling on the lower end from just under \$1 million to \$18 million and civil class-action settlements ranging from over \$20 million to \$215 million. Monetary terms in both kinds of settlements, however, provide for payments of back pay and interest to class members or other affected employees. These amounts can vary based on the extent of the pay disparity and the positions at issue. Some monetary terms have also included donations to relevant charities.

These settlements also often include non-monetary terms that are designed to prevent future disparities by reducing or eliminating the risk of discrimination in employment processes. For example, some settlements have required companies to hire outside monitors to suggest improvements to the company's pay practices, perform an audit of the existing pay framework, and ensure compliance with pay equity requirements. Some settlements have also required employers to commit to pay equity training and to developing more pipeline initiatives to ensure equal access to hiring and promotion opportunities. Still other settlements have included modifications of employment practices, such as establishing mandatory promotions and eliminating the use of salary history in compensation decisions. Non-monetary settlement terms often are not included in the settlement amount provided for in the settlement agreement and thus may impose additional monetary costs on employers.

Pay Equity and Transparency Laws

Recent changes in the legal landscape regarding pay equity and pay transparency may lead employers to consider examining the impact of their current pay practices and implementing best practices to preemptively mitigate or remedy any existing disparities.

As we previously [reported](#), the New York City Salary Disclosure law went into effect on November 1, 2022 and requires employers to disclose the minimum and maximum salary when advertising any job, promotion, or transfer opportunity for both current and prospective employees.² Notably, the NYC law defines salary as the "base annual or hourly wage or rate of pay" and excludes other forms of compensation or benefits such as insurance, paid and unpaid leave, and bonuses.³ This limited definition could have significant implications for hiring and promotion practices more generally.

Governor Kathy Hochul recently signed a parallel disclosure law for New York State, which goes into effect on September 17, 2023.⁴ The New York State law generally tracks the local law, with a few key distinctions. While both provisions apply to employers with at least four employees, the New York State law excludes independent contractors. The New York State law also imposes some additional requirements on employers: for example, it requires employers to disclose the job descriptions for the position in the job posting and to maintain records of compensation history for the position. Unlike the NYC law, the New York State law also does not give employers the opportunity to cure first-time violations before the imposition of a civil penalty.

Several other jurisdictions in New York State have enacted their own pay transparency laws, including Westchester County, County of Albany, and County of Ithaca. Other states requiring pay transparency include Alaska, Georgia, Illinois, Kentucky, Oregon, Maine, Massachusetts, Montana, Missouri, New Jersey, South Dakota, Vermont, Virginia, and West Virginia. Nuances in state pay transparency laws can have significant effects on corporate compliance and best practices. Employers operating in multiple cities and states should be mindful of the differences in pay transparency laws across jurisdictions and, accordingly,

² Act of Jan. 15, 2022, N.Y.C. Int. No. 1208-B, § 2, Enactment No. 2022/032, *available at* <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3713951&GUID=E7B03ABA-8F42-4341-A0D2-50E2F95320CD>.

³ New York City Commission on Human Rights, Salary Transparency in Job Advertisements (Mar. 28, 2022), <https://www1.nyc.gov/assets/cchr/downloads/pdf/publications/Salary-Transparency-Factsheet.pdf>.

⁴ Senate Bill S9427A, *available at* <https://www.nysenate.gov/legislation/bills/2021/S9427>.

consider the risks and challenges of implementing compliant practices across jurisdictions and potential ways to avoid or mitigate challenges to their practices.

We are not aware of any lawsuits or enforcement actions brought to date under the new pay transparency laws, specifically. However, compliance with these new pay transparency laws may result in an increase in pay equity litigation as it will enable additional scrutiny into a company's pay practices by internal and external actors. In jurisdictions where pay information must be accessible to state Labor Departments, it could lead to investigations and potential fines.

Pay Equity Considerations and Best Practices

With the expansion of pay equity and transparency laws across the country, employers may be vulnerable to litigation or government investigations if they are unable to defend or fail to address inequities in their existing pay practices. We provide below suggested best practices for companies to consider so that they may reduce risk, adjust to the changing legal and regulatory landscape, and encourage pay equity in their organizations.

Train Human Resources and Other Relevant Staff to Ensure Compliance. As the recent settlements discussed above demonstrate, non-compliance with pay equity and pay transparency laws can be far more costly than ensuring proper pay practices on the front end, resulting in large settlements, high litigation costs, reputational harm, and other costly consequences. Accordingly, it is important to educate and train employees involved in hiring and compensation decisions on federal, state, and local legal requirements, including new pay equity laws and their requirements.

In addition, because discrimination and equity issues can arise at all points in the hiring process and during employment, it is equally important to teach and train employees to identify unconscious bias, microaggressions, and other examples of disparate treatment that may lead to disparities in hiring, promotion, compensation, and career progression.

Conduct Regular Pay Equity Audits. Routine audits into a company's pay practices and existing compensation structures will help companies identify and rectify potential areas of inequity before a discrimination lawsuit is filed.

Establish Objective Compensation, Hiring, Promotion, and Review Practices. Pay equity audits work on the assumption that hiring and promotion decisions are made fairly and equitably. Thus to maximize the utility of pay equity audits, reduce potential for bias, and ensure that similarly situated positions receive comparable compensation, companies may consider developing detailed pay schemes based on seniority, responsibilities, and other objective measures. Companies also may develop similarly detailed structures, including monitoring processes, around hiring, promotion, and performance reviews to protect these critical processes from implicit or explicit bias by individuals within the organization.

Keep Diligent Records on the Evolution of Job Descriptions and Salaries. Some new pay transparency laws require companies to maintain records of and/or report on historical salaries for various positions.⁵ In preparation for complying with these laws and to ensure consistency across the organization, companies are encouraged to keep detailed records of job titles, responsibilities, and salaries.

Reduce or Eliminate Reliance on Salary History as a Factor in Compensation Determinations. To avoid perpetuating inequities in pay, companies should consider reducing or eliminating their use of salary history to determine an employee's compensation

⁵ See, e.g., Cal. Lab. Code § 432.3(c)(4) ("An employer shall maintain records of a job title and wage rate history for each employee for the duration of the employment plus three years after the end of the employment in order for the Labor Commissioner to determine if there is still a pattern of wage discrepancy. These records shall be open to inspection by the Labor Commissioner.").

and, instead, focus on salary expectations based on the job responsibilities and salaries for positions with similar responsibilities and titles.⁶

* * *

⁶ Note that some state pay equity laws expressly prohibit reliance on salary history information. *See, e.g.*, Cal. Lab. Code § 432.3(a) (“An employer shall not rely on the salary history information of an applicant for employment as a factor in determining whether to offer employment to an applicant or what salary to offer an applicant.”).

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

Jeh C. Johnson
+1-212-373-3093
jjohnson@paulweiss.com

Brad S. Karp
+1-212-373-3316
bkarp@paulweiss.com

Loretta E. Lynch
+1-212-373-3000

Jeannie S. Rhee
+1-202-223-7466
jrhee@paulweiss.com

Liza M. Velazquez
+1-212-373-3096
lvelazquez@paulweiss.com

Lissette A. Duran
+1-212-373-3205
lduran@paulweiss.com

Hallie S. Goldblatt
+1-212-373-3535
hgoldblatt@paulweiss.com

David Curran
+1-212-373-2558
dcurran@paulweiss.com

Associate Domonique Collins, law clerk Sera Idoko and Sustainability & ESG Advisory Practice Director Madhuri Pavamani also contributed to this Client Memorandum.