EQUAL PAY UPDATE AND EMERGING TRENDS IN STATE LEGISLATION

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I. Introduction

The United States is experiencing a significant increase in federal regulations and state law making geared towards resolving gender discrimination and closing the pay gap. While federal legislation on this topic has repeatedly stalled in Congress, state governments continue to advance the narrative on gender discrimination by imposing greater scrutiny on employers to broaden their comparator pools and justify pay practices. In the last year, California, New York, Maryland, and Massachusetts made headlines by passing legislation heralded as more demanding and employee-friendly than the federal counterparts under the Equal Pay Act ("EPA") and Title VII of the Civil Rights Act of 1964 ("Title VII"). While the majority of these laws aim to broaden the EPA's "equal work" standard, the extent to which states are actually moving the needle beyond the existing Title VII protections remains to be seen.

Section I of this article summarizes recent developments in equal pay legislation and seeks to (1) generally harmonize state law requirements with broader Title VII standards regarding employees to whom a plaintiff may be compared, and (2) identify the more aggressive efforts by states to increase the burden of proof on employers to explain any pay difference on legitimate grounds. Section II discusses current law allowing an employer to rely, in part, on prior salary in the job application process and it highlights a movement among some states toward prohibiting such a practice. Finally, Section III provides an overview of other regulatory and shareholder action developments to illustrate the ongoing complexities related to this nuanced and high-profile issue.

II. Harmonizing State Equal Pay Laws With Title VII

(a) Federal Equal Pay Act & Title VII

The EPA exists to ensure that employees performing "equal work" are paid equal wages without regard to sex. Congress's intent in passing the EPA was to "insure, where men and women are doing the same job under the same working conditions that they will receive the same pay."[1] In short, the EPA strictly prohibits an employer from discriminating between male and female employees within the same establishment by not providing equal pay for "equal work" on job performance that "requires equal skill, effort, and responsibility," and performed under "similar working conditions."[2]

Although the term "equal work" is defined as work that is equal in skill, effort, and responsibility, the regulations do not equate the term "equal" as meaning "identical."[3] As a result, slight differences in the degree of skill, effort, or responsibility will not remove that job from EPA coverage.[4] Rather, the EEOC and courts are tasked with conducting a fact-based

[1] 109 Cong. Rec. 9196 (1963) (remarks of Rep. Frelinghuysen).
[2] 29 U.S.C. § 206(d)(1) (2006).
[3] 29 C.F.R. § 1620.13(c).
[4] *See Schultz v. Wheaton Glass Co.*, 421 F.2d 259, 265 (3d Cir. 1970) ("Congress in prescribing 'equal' work did not require that the jobs be identical, but only that they must be substantially equal.").

inquiry to determine whether job differences are so substantial they make the jobs unequal.[5] Indeed, relying exclusively on job titles and generalized allegations about skill and training is insufficient to establish that two comparators are performing "equal work."[6]

Thus, a plaintiff seeking to prove an EPA violation must establish that, based on sex, the employer pays unequal wages to "men and women who perform jobs that require *substantially equal* skill, effort and responsibility, and that are performed under similar working conditions within the same establishment."[7] If that *prima facie* showing is made, the burden shifts to the employer to prove the disparity is due to one of the following permitted exceptions: (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quantity or quality of production; or (4) a differential basis on any factor other than sex.[8]

The EPA's standard is incorporated into section 703(h) of Title VII, commonly referred to as the Bennett Amendment, with a few notable distinctions in which employees might be compared in terms of "equal work."[9] First, Title VII prohibits sex-based discrimination in compensation under a slightly relaxed standard of "substantially similar" or "similarly situated," but with an added burden on the plaintiff to establish the element of intent to discriminate on the basis of sex.[10] Also, Title VII allows a plaintiff to identify comparators within an organization without limitation to the same establishment. Importantly, courts interpreting claims of sex-based compensation discrimination under Title VII have historically rejected a theory of "comparable worth"—i.e., paying men and women the same when they have jobs that require equal training and responsibility—and consistently hold that the law does not prohibit an

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[5] 29 C.F.R. § 1620.14(a).

[6] *See* Gary Siniscalco, Lauri Damrell, and Clara Morain Nabity, "The Pay Gap, The Glass Ceiling, And Pay Bias: Moving Forward 50 Years After The Equal Pay Act," 29 A.B.A. J. Lab. & Emp. L. 395, 422-23 (Spring 2014); *EEOC v. Port Auth. of N.Y. & N.J.*, No. 10 Civ. 7462 (NRB), 2012 U.S. Dist. LEXIS 69307, at *15 (S.D.N.Y. May 16, 2012) (rejected EEOC's reliance on attorneys' job titles, along with broad generalities about attorneys' skills and training, to support its allegations of pay disparity and finding this was "simply not a sufficient basis on which to premise an EPA claim").

[7] U.S. Equal Emp't Opportunity Comm'n, "Facts About Equal Pay and Compensation Discrimination," *available at* https://www.eeoc.gov/eeoc/publications/fs-epa.cfm (emphasis added).

[8] 29 U.S.C. § 206(d)(1); *see also Ryduchowski v. Port Authority of New York and New Jersey*, 203 F.3d 135 (2d Cir. 2000).

[9] 42 U.S.C. § 2000e-2(h); *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 876 (9th Cir. 1982); *EEOC v. Cherry-Burrell Corp*., 35 F.3d 356 (8th Cir. 1994) ("[W]here a plaintiff asserts a claim of unequal pay for equal work on the basis of sex, the standards are the same whether the plaintiff proceeds under Title VII or the Equal Pay Act."); *Maxwell v. City of Tucson*, 803 F.2d 444, 446 (9th Cir. 1986).

[10] *King v. Acosta Sales & Mktg., Inc.*, 678 F.3d 470, 473-74 (7th Cir. 2012) (under EPA, employer cannot merely assert that education and experience are "factor[s] other than sex" that account for pay disparities, employer must prove it; unlike under Title VII, "factor other than sex" is EPA affirmative defense on which employer has burdens of both production and persuasion).

employer from setting wages according to market process for jobs in various disciplines.[11] Indeed, as a matter of policy, applying a comparable worth standard would effectively punish employers that pay the market rate for jobs, regardless of whether the employer steered women into lower-paid jobs.[12] As such, courts have rejected this theory and its necessary implication that courts, rather than markets, must determine the proper wage for a particular job.[13]

While federal legislation seeking to strengthen the EPA and further eliminate the pay gap has been introduced four times since 2011, no bill has succeeded in passing through both houses of Congress. Given this impasse at the national level, four states in the past year have enacted laws to provide protections beyond those available under the EPA and, in a number of respects, beyond Title VII.

As summarized in **Appendix A**, over a dozen other states have some form of pay legislation enacted or pending. California, New York, Maryland, and Massachusetts have all passed sweeping reforms to their respective state equal pay laws, which many argue go well-beyond existing federal protections. However, a close comparison of these state laws to their federal counterparts reveals a significant dichotomy: on one hand, the state legislation largely aligns with the existing "similar work" standard under Title VII for determining whether disparity exists; on the other hand, these states have taken a variety of approaches to modify and increase the burden on employers to *justify* pay disparities. By charting new territory in the battle over pay bias, these state law developments create significant compliance headaches for employers, particularly those operating in multiple jurisdictions.

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[11] *See Sims-Fingers v. City of Indianapolis*, 493 F.3d 768, 771 (7th Cir. 2007) ("Title VII does not require equal work, but neither does it allow for recovery on the basis of the theory of comparable worth"); *AFSCME v. Washington*, 770 F.2d 1401, 1408 (9th Cir. 1985) (reversing district court ruling that an employer violated Title VII by setting salaries on a basis of "prevailing" or "market" rates); *see also* Siniscalco, et. al, 29 A.B.A. J. Lab. & Emp. L. at 422.

[12] *Am. Nurses' Ass'n v. Illinois*, 783 F.2d 716, 718-20 (7th Cir. 1986) (explaining that such an employer would "be justifiably surprised to discover that it may be violating federal law because each wage rate and therefore the ratio between them have been found to be determined by cultural or psychological factors attributable to the history of male domination of society; that it has to hire a consultant to find out how it must, regardless of market conditions, change the wages it pays, in order to achieve equity between traditionally male and traditionally female jobs; and that it must pay backpay, to boot.") (citing *Spaulding v. Univ. of Wash*., 740 F.2d 686, 706-07 (9th Cir. 1984).

[13] *Id.; see also Christensen v. Iowa*, 563 F.2d 353 (8th Cir. 1977) ("We do not interpret Title VII as requiring an employer to ignore the market in setting wage rates for genuinely different work classifications"); *Lemons v. City & Cty. of Denver*, 620 F.2d 228, 229 (10th Cir. 1980) (applying a comparable worth standard asks courts to "cross job description lines into areas of entirely different skills," which "would be a whole new world for the courts"); *see also EEOC v. Madison Cmty. Unit Sch. Dist. No. 12*, 818 F.2d 577, 582 (7th Cir. 1987) ("[I]t is plain that Congress did not want to enact comparable worth as part of the Equal Pay Act of 1964.").

(b) California

Prior to January 1, 2016, California law mirrored the EPA's language by requiring "equal pay for equal work" and limiting claims of pay differentials to comparators within the "same establishment." Under California's new Fair Pay Act (FPA), employers are now prohibited from paying lower wages to employees of the opposite sex for "substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions," unless certain exceptions exist.[14] On September 30, 2016, California Governor Jerry Brown expanded the law further by signing into law an amendment that includes race and ethnicity as protected categories in addition to gender.[15] This amendment goes into effect on January 1, 2017.

California law effectively departs from the EPA's "equal work" standard and appears to broaden the pool of possible comparators by eliminating per se geographical confines for the "same establishment."[16] However, there is no evidence that the phrase "substantially similar" is intended to apply more broadly than as provided for under Title VII. Indeed, the plain language of the California law pulls directly from cases and 16-year-old EEOC guidance on the types of factors related to an employee's "skill, effort, and responsibility" that are relevant for determining comparators under both the EPA and Title VII.[17] Further, in eliminating the "same establishment" requirement, Hannah-Beth Jackson, Chair of the Senate Judiciary Committee and author of S.B. 358, explained that an employer would still be able to explain that "work is performed at different geographic locations . . . so long as the employer can prove that the factor is consistent with business necessity."[18] As such, it is clear that the concept of "substantially similar" is derived directly from the cases interpreting Title VII and existing California law, wherein courts often use these phrases interchangeably with cases brought under the EPA.[19]

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[14] Cal. Lab. Code §1197.5(a) (2016).
[15] S.B. 1063, 2015-2016 Leg., Reg. Sess. (Cal. Feb. 16, 2016), *available at* https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160SB1063.
[16] Cal. Lab. Code §1197.5(a) (1985).
[17] U.S. Equal Emp't Opportunity Comm'n, Compliance Manual, Section 10: Compensation, *available at* https://www.eeoc.gov/policy/docs/compensation.html (providing that "[i]f the jobs to be compared share the same common core of tasks, consideration should be given to whether, in terms of overall job content, the jobs require substantially equal skill, effort, and responsibility and whether the working conditions are similar.").
[18] *See* Letter from Hannah Beth Jackson, Chair of Senate Judiciary Committee, to Sen. Kevin de León, (May 26, 2015), *available at* http://webcache.googleusercontent.com/search?q=cache:ftp://www.leginfo.ca.gov/pub/senate-journal/sen-journal-0x-20150526-1085.PDF
[19] *See Gunther v. Cty. of Wash*., 623 F.2d 1303, 1321 (9th Cir. 1979) ("Where a Title VII plaintiff, claiming wage discrimination, attempts to establish a prima facie case based solely on a comparison of the work she performs, she will have to show that her job requirements are substantially equal, not comparable, to that of a similarly situated male. The standards developed under the Equal Pay Act are relevant in this inquiry."); *Hall v. Cty. of L.A*., 148 Cal. App. 4th 318, 323 (2007) (to prove a violation of the EPA "a plaintiff must establish that, based on

Analysis of the bill's history also supports this conclusion, providing that the Legislature did not intend the FPA's provisions to deviate from Title VII or otherwise equate to a comparable worth standard. Early drafts of the bill also contained a standard of "comparable work," but this language was abandoned following objections from the California Chamber of Commerce. According to the Chamber, "trying to determine 'comparable' work for different job duties can be extremely subjective, leading to different interpretations and thus the potential for litigation."[20] In response, the Chamber proposed a "substantially similar" standard derived from Title VII and California's prior reliance on the federal regulations in support thereof. The California Assembly's Judiciary Committee bill analysis also retreated from a "comparable worth" standard, explaining that the term "substantially similar" is intended to prevent employers from arguing "that the jobs performed by persons of opposite sex were not 'equal' in every way."[21]

While California echoes language from Title VII's standard for determining whether pay disparity exists, California's amendments to the affirmative defenses appear to go beyond what is required under either the EPA or Title VII. As under the prior law and current federal law, California employers still have the ability to use affirmative defenses to justify disparity among employees whose actual work is substantially similar based on: (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quantity or quality of production; or (4) a bona fide factor other than sex.[22]

However, the "bona fide factor other than sex" defense has various new limitations. The new law provides a nonexhaustive list of what factors could fall under this defense, such as "education, training or experience," and it places the burden on the employer to demonstrate that any "factor other than sex" relied on by an employer is: (1) not based on a sex-based differential in compensation; (2) job-related to the position in question; and (3) consistent with a business necessity. The burden then shifts back to the employee to revive the claim if he or she demonstrates that an alternative business practice exists that would serve the same purpose without producing wage disparity.

The new burden-shifting framework models the disparate-impact framework under Title VII. However, Title VII balances the scales in disparate-impact cases by requiring employees to establish as part of their prima facie case that a *specific*, facially neutral employment practice *caused* the disparity.[23] Because the new California law does not expressly

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gender, the employer pays different wages to employees doing substantially similar work under substantially similar conditions.").

[20] Letter from California Chamber of Commerce, Civil Justice Association of California to Members of the Senate Labor and Industrial Relations Committee (April 17, 2015) (on file with authors).

[21] *Conditions of Employment: Gender Wage Differential*: *Hearing on S.B. 358 Before Assembly Committee on Judiciary*, 2015-2016 Reg. Sess. (July 7, 2015).

[22] Cal. Lab. Code § 1197.5(a) (2016).

[23] 42 U.S.C. §2000e-2(k)(1)(A)(i); *see also EEOC v. Joe's Stone Crab, Inc*., 220 F.3d 1263, 1274-76 (11th Cir. 2000); *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 655-56 (1989); *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 994–95 (1988).

include a similar requirement, employee advocates have argued that a statistical disparity alone could be sufficient to raise a prima facie disparate-impact case in California. As a result, they believe the new law will be more effective at addressing disparities that employees claim are caused by more obscure issues like implicit bias.

Moreover, the new law comes with an added layer requiring the employer to establish that "[e]ach factor relied upon is applied reasonably" (without defining "reasonable") and that "the one or more factors relied upon account for the entire wage differential"[24] (without explaining how to interpret this requirement or what proof to consider in evaluating it). This requirement is unprecedented even under federal law, and there is presently no guidance on how to interpret it.

(c) New York

On January 19, 2016, New York enacted a series of laws referred to as the Women's Equality Agenda, which makes several modifications to the state's equal pay platform. Under prior New York law, which largely tracked the EPA, employers were required to provide equal pay to men and women in the "same establishment" for "equal work," defined as work requiring "equal skill, effort and responsibility" and "performed under similar working conditions."[25] Prior law also carved out exceptions for disparities in situations where a differential is based on seniority, merit, and any factor "other than sex."

New York's amended labor law maintains the "equal work" standard but broadens the meaning of "same establishment" by defining it to include workplaces located in the "same geographic region, no larger than a county," taking into account population distribution, economic activity and/or the presence of municipalities.[26] Like California, the new law also revises the catchall "any other factor other than sex" defense to read "a bona fide factor other than sex, such as education, training, or experience."[27] Sponsors of the bill explain that this change was intended to "mirror the current defense afforded employers in disparate impact cases under Title VII."[28] Also like California, employers must prove that the stated factor (1) is not based on or derived from a sex-based differential in compensation; (2) is job related with respect to the position in question; and (3) is consistent with a business necessity.[29]

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[24] *Id.*
[25] *See*, *e.g.*, Jill Rosenberg, "New York State Expands Equal Pay Law and Other Workplace Protections for Women," Orrick Emp't Law and Litig. Blog (Oct. 26, 2015), http://blogs.orrick.com/employment/2015/10/26/new-york-state-expands-equal-pay-law-and-other-workplace-protections-for-women/
[26] N.Y. Lab. L. § 194.
[27] *Id.*
[28] New York Sponsors Memorandum, S.B. 1, 238th Leg., 2015 Reg. Sess. (N.Y. Mar. 26, 2015).
[29] N.Y. Lab. L. § 194.

(d) Maryland

Maryland's Equal Pay Act has long tracked the standard and burdens provided by federal law. Although the state requires equal pay for work of a "comparable character," courts have historically disregarded this difference in terminology and applied Title VII's "substantially similar" analysis.[30]

In May 2016, Maryland expanded its protection of employees of the opposite sex to also include "gender identity" where "both employees work in the same establishment and perform work of comparable character or work on the same operation, in the same business, or of the same type."[31] Although Maryland broadened the definition of "establishment" to include all related workplaces existing in the same county for the purposes of comparing employee wages, the law makes no change to the relevant "work of comparable character" language, suggesting that the state intends to continue to align with Title VII in this respect.

Finally, Maryland expanded its list of enumerated defenses to permit disparity in situations involving "a bona fide factor other than sex or gender identity, including education, training, or experience." Like California, Maryland shifted the burden to employers to show that bona fide factors (1) are not derived from a sex-based differential in compensation; (2) are "job related" and "consistent with business necessity"; and (3) "account[] for the entire differential."

Taking effect on October 1, 2016, Maryland law clearly broadens the scope of potential comparators, but it does not signal an intent to otherwise depart from Title VII for determining whether disparity exists. Rather, consistent with other states, Maryland is increasing the burden on employers to justify any pay disparity. Perhaps even more significant is that Maryland's expansion on equal pay is the first such act signed by a Republican governor, which indicates that equal pay efforts have crossed party lines.

(e) Massachusetts

Changes to Massachusetts law also show how the political tide has turned. The state's new equal pay legislation was signed into law by Republican Governor Charlie Baker on August 1, 2016. Massachusetts has long-prohibited an employer from sex-based pay disparity for "comparable work," but the law has not always specified a "particular set of factors to be used in

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[30] *Glunt v. GES Exposition Servs*., 123 F. Supp. 2d 847, 861-62 (D. Md. 2000) ("The MEPA essentially mirrors its federal counterpart, the EPA. The primary difference lies in that the MEPA requires equal pay for work of 'comparable character,' while the EPA requires equal pay for substantially similar work. Despite this difference, courts have applied the same analysis in reviewing MEPA and EPA claims."); *see also Nixon v. State,* 96 Md. App. 485, 492–95, 625 A.2d 404 (1993); *Hassman v. Valley Motors, Inc.*, 790 F. Supp. 564 (D. Md.1992).

[31] Maryland S.B. 481, "Labor and Employment – Equal Pay for Equal Work," (Md. May 19, 2016), *available at* http://mgaleg.maryland.gov/2016RS/Chapters_noln/CH_556_sb0481t.pdf.

determining whether work is comparable rather than equal."[32] As such, courts have interpreted Massachusetts law to apply more broadly and differ "significantly" from the federal standard.[33]

Effective July 1, 2018, recent amendments to Massachusetts law now expressly define "comparable work," explaining that it "solely means work that is substantially similar in that it requires substantially similar skill, effort and responsibility and is performed under similar working conditions: provided, however, that a job title or job description alone shall not determine comparability."[34] The new Massachusetts law also adds several affirmative defenses. While existing law expressly includes only one affirmative defense based on seniority, the new law provides defenses to allow "variations in wages" based on (1) "a bona fide system that rewards seniority with the employer"—provided that time spent on certain leave cannot reduce seniority; (2) "a bona fide merit system;" (3) "a bona fide system which measures earnings by quantity or quality of production or sales;" (4) geographic location; (5) "education, training or experience to the extent such factors are reasonably related to the particular job in question and consistent with business necessity"; or (6) travel that is "a regular and necessary condition" of the job. These changes appear to reflect an intent to align more closely with Title VII compared to previous interpretations of the law.

The Massachusetts law also goes beyond Title VII to provide a safe harbor to employers who proactively review their pay systems. Specifically, an employer has an affirmative defense against an allegation of wage discrimination if, "within the previous 3 years and prior to the commencement of the action, [the employer] has both completed a self-evaluation of its pay practices in good faith and can demonstrate that reasonable progress has been made towards eliminating compensation differentials based on gender for comparable work in accordance with that evaluation."[35]

III. Reliance on Prior Salary

(a) Federal Law

The EPA "does not impose a strict prohibition against the use of prior salary."[36] Under federal law, an employer may use prior salary as long as it is not the only factor relied on, it is not known to be based on discriminatory market factors, and the employer does not use it in a discriminatory manner without a "reasonable explanation of its use."[37] Moreover, while "education and experience (which imply greater [prior pay)]" could surely explain "some or even

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[32] *Jancey v. Sch. Comm. of Everett*, 658 N.E.2d 162, 166 (Mass. 1995) (explaining that Massachusetts was "the first State to adopt legislation requiring equal pay for comparable work," enacting an equal pay statute on July 10, 1945).
[33] *Id.* at 167 (indicating that MEPA and FEPA differ "significantly" and Massachusetts does not "follow slavishly the Federal approach").
[34] S.B. 2119, 189th Gen. Assemb., Reg. Sess. (Mass. 2016) *available at* https://malegislature.gov/Bills/189/Senate/S2119.
[35] *Id.*
[36] *Kouba v. Allstate Ins. Co.,* 691 F.2d 873, 878 (9th Cir. 1982).
[37] *Id.*

all of the difference in the starting salaries" of the applicant, "[t]here is no reason why they should explain increases in pay while a person is employed."[38]

While federal law does not prohibit use of prior salary, such reliance is likely only appropriate where it is one of several factors considered by an employer.[39] From a practical vantage, however, several other factors typically contribute to an applicant's prior salary, including job history, experiences, skills, and market conditions. Because legal developments will likely make it more challenging in the future for an employer to rely on prior salary as an exclusive factor in determining wages, employers should take care to consider and document the various other factors necessarily entwined with an applicant's prior salary.

(b) Massachusetts

Signed into law in August 2016, Massachusetts is the first state to enact legislation that outright bans an employer from discussing salaries or asking about an applicant's salary before an employment offer is made.[40] Going into effect on July 1, 2018, the bill seeks to increase transparency by prohibiting employers from screening applicants using prior salary or other forms of compensation or requiring applicants to provide their compensation history, including during the interview process or in an employment application. Also, the bill prohibits employers from seeking the compensation history of applicants from current or prior employers prior to an offer of employment and negotiating compensation. As a caveat, if a prospective employee voluntarily discloses his or her prior compensation, the prospective employer may take steps to confirm.

(c) California

Although California Governor Jerry Brown previously rejected legislation that would prohibit an employer from questioning an applicant on prior salary information, he signed legislation on September 30, 2016 that prohibits employers from relying exclusively on prior salary in justifying pay disparities.[41]

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[38] *King v. Acosta Sales & Mktg., Inc.,* 678 F.3d 470, 474 (7th Cir. 2012).

[39] *See, e.g.*, *Conroy v. Hewlett-Packard Co.*, No. 3:14-CV-01580-AC, 2016 U.S. Dist. LEXIS 44396, at *44 (D. Or. Mar. 31, 2016) (basing starting salary on prior salary and "geographic location is a legitimate, nondiscriminatory means to accomplish a business objective."); *Muriel v. SCI Ariz. Funeral Servs.*, No. CV-14-08160-PCT-DLR, 2015 U.S. Dist. LEXIS 147510, at *7 (D. Ariz. Oct. 30, 2015) ("Negotiations and prior salary explain the discrepancy in pay — not sex."); *Wachter-Young v. Ohio Cas. Grp.*, 236 F. Supp. 2d 1157, 1160 (D. Or. 2002) (noting "a court 'must find that the business reasons given by [the employer] do not reasonably explain its use of [prior salary] before finding a violation of the Act'") (citation omitted).

[40] S.B. 2119, 189th Gen. Assemb., Reg. Sess. (Mass. 2016).

[41] A.B. 1676, "An act to amend Section 1197.5 of the Labor Code, relating to employers," 2015-2016 Leg., Reg. Sess. (Cal. June 15, 2016), available at https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160AB1676.

In 2015, the California legislature passed A.B. 1017, a bill that would have prohibited asking job applicants about prior salaries.[42] Governor Jerry Brown vetoed the bill, explaining: "I agree with sponsors that we must endeavor to ensure that all workers are paid fairly and do not receive a lower wage because of their gender ... This bill, however, broadly prohibits employers from obtaining relevant information with little evidence that this would assure more equitable wages."

Undeterred, California Assembly Member Nora Campos repackaged this requirement in 2016 as A.B. 1676, which would again prohibit an employer from seeking a job applicant's prior salary history and require the employer, upon reasonable request, to provide a pay scale for the applied for position. The California Legislative Women's Caucus identified this bill as one of its top five priorities for this legislative session.[43] Still, faced with similar opposition from the prior year, the Senate significantly modified the bill after it passed in the Assembly to simply amend Labor Code section 1197.5 (the FPA) rather than create a new Labor Code section. The law now provides that "prior salary shall not, by itself, justify any disparity in compensation."[44] The preface to the bill explains that this is simply a codification of existing law.

IV. Other Efforts to Lift the Veil for Pay Transparency

In the absence of additional federal legislation on equal pay, individual states, federal enforcement agencies, and private shareholders are pushing for increased pay transparency on multiple levels. Beyond enactment of state legislation, these efforts range from increasingly aggressive regulatory reporting requirements; an emerging trend of activist groups and individual shareholders filing proposals that, if passed, require companies to disclose publicly the percentage "pay gap" between male and female employees; and the White House Pledge platform that targets companies, on a voluntary basis, to conduct annual gender pay analyses.

(a) State Law Trends

State equal pay laws increasingly include provisions to improve transparency about employee salaries. In particular, California and Maryland provide that employers may not retaliate against employees who discuss their own wages, others' wages, or seek information

[42] A.B. 1017, "An act to add Section 432.3 to the Labor Code, relating to employers," 2015-2016 Leg., Reg. Sess. (Cal. Feb. 26, 2015), *available at* https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB1017.

[43] Press Release, California Legislative Women's Caucus, Women's Caucus Announces Priority Legislation and Budget Action to Fix Outdated Infrastructure Supporting California's Women, Workforce and Economy (Feb. 11, 2016), available at http://womenscaucus.legislature.ca.gov/news/2016-02-11-lwc-releases-2016-budget-and-policy-priorities.

[44] A.B. 1676, "An act to amend Section 1197.5 of the Labor Code, relating to employers," 2015-2016 Leg., Reg. Sess. (Cal. June 15, 2016), *available at* https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160AB1676.

about another employee's salary.[45] New York and Massachusetts similarly provide that employers may not prohibit employees from inquiring about, discussing or disclosing wage information except under very limited circumstances.[46]

(b) EEO-1 Reporting Requirements

On September 29, 2016, the Equal Employment Opportunity Commission ("EEOC") announced approval of a revised Employer Information Report ("EEO-1")—which already collects employee information on race, ethnicity, and sex—to allow for collection of aggregate data on pay ranges and hours worked from employers, including federal contractors, with 100 or more employees.[47] Summary pay data for private employers subject to Title VII jurisdiction will go to the EEOC.[48] Summary pay data only for federal contractors and subcontractors subject to Executive Order 11246 will go to OFCCP.[49]

Starting with the 2017 report (due on March 31, 2018), EEO-1 filers with 100 or more employees will be required to include two additional data components to EEO-1 reports: pay data and hours worked. This data is intended to help determine if employers are paying similarly situated men and women differently and identify whether employers are either steering women into lower paying jobs or not promoting them to higher pay bands. The proposed rule also calls for use of W-2 earnings as the source of the pay data, collected in the aggregate across 12 pay bands for the 10 EEO-1 job categories.[50] According to the EEOC, these pay bands will allow it "to compute within-job-category variation, across-job-category variation, and overall variation, thus supporting the EEOC's ability to discern potential discrimination while preserving confidentiality."[51]

EEOC also expects that the data will "provide EEOC and [OFCCP] with insight into pay disparities across industries and occupations and strengthen federal efforts to combat

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[45] *See* Cal. Lab. Code § 1197.5; S.B. 481, "Labor and Employment – Equal Pay for Equal Work," (Md. May 19, 2016) av*ailable at* http://mgaleg.maryland.gov/2016RS/bills/sb/sb0481t.pdf.

[46] N.Y. Lab. L. § 194; S.B. 2119, 189th Gen. Assemb., Reg. Sess. (Mass. 2016).

[47] Press Release, U.S. Equal Employment Opportunity Commission, EEOC to Collect Summary Pay Data (Sept. 29, 2016), *available at* http://www.eeoc.gov/eeoc/newsroom/release/9-29-16.cfm.

[48] *Id.*

[49] *Id.*

[50] U.S. Equal Employment Opportunity Commission, Questions and Answers: The Revised EEO-1 and Summary Pay Data, *available at* https://www.eeoc.gov/employers/eeo1survey/2017survey-qanda.cfm.

[51] U.S. Equal Employment Opportunity Commission, Questions and Answers: Notice of Proposed Changes to the EEO-1 to Collect Pay Data from Certain Employers, *available at* http://www.eeoc.gov/employers/eeo1survey/2016_eeo-1_proposed_changes_qa.cfm.

discrimination."[52] The EEOC and OFCCP plans to "use this pay data to assess complaints of discrimination, focus agency investigations, and identify existing pay disparities that may warrant further examination."[53] In addition, the EEOC plans to publish aggregated data (likely by industry and geographic area) with the hopes that employers will use the published data to analyze their own pay practices to facilitate voluntary compliance.

During the EEOC's March 16, 2016 public hearings, the agency's original January 29, 2016 proposal came under criticism for creating a data compilation process that is more summary and vague than the historic OFCCP process.[54] The public also expressed concern that use of W-2 income data would be incomplete and result in "false positives" by curtailing any type of meaningful look at pay of workers who are in any way similarly situated in their skill, effort, and responsibility. The EEOC issued a revised proposal on July 14, 2016, and provided a second chance to comment on its proposed revisions to the EEO-1 form, which closed on August 15, 2016.[55] Nevertheless, despite significant concerns raised during both comment periods that the EEO-1 job group analysis will yield little usable data, the EEOC pressed forward with its general approach to collect pay and hours worked data.

(c) OFCCP Regulations on Pay Transparency

On April 8, 2014, President Obama signed Executive Order 13665, or the "Pay Transparency Order," amending Executive Order 11246's prohibition on employment discrimination by federal contractors based on race, color, religion, sex, sexual orientation, gender identity, and national origin.[56] Executive Order 13665 adds further protection for an employee or applicant's inquiries, discussions, or disclosures regarding his or her own compensation or the compensation of another employee or applicant.

The OFCCP's Final Rule to implement these amendments took effect on January 11, 2016. In particular, the Final Rule requires that the equal opportunity clause included in federal contracts and subcontracts be amended to include that covered contractors refrain from discharging, or otherwise discriminating against, employees or applicants who inquire about, discuss, or disclose their compensation or the compensation of other employees or applicants.[57]

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[52] Press Release, U.S. Equal Employment Opportunity Commission, EEOC Announces Proposed Addition of Pay Data to Annual EEO-1 Reports (Jan. 29, 2016), *available at* http://www.eeoc.gov/eeoc/newsroom/release/1-29-16.cfm.
[53] *Id.*
[54] Gary Siniscalco, "Orrick to Provide Testimony on EEOC's Proposed Revisions to the EEO-1 Report," (Mar. 10, 2016), http://blogs.orrick.com/employment/2016/03/10/orrick-to-provide-testimony-on-eeocs-proposed-revisions-to-the-eeo-1-report/.
[55] U.S. Equal Employment Opportunity, 81 Fed. Reg. 45,479 (July 14, 2016), *available at* https://www.gpo.gov/fdsys/pkg/FR-2016-07-14/pdf/2016-16692.pdf.
[56] Office of Federal Contract Compliance Programs, 80 Fed. Reg. 54,934 (September 11, 2015), *available at* https://www.gpo.gov/fdsys/pkg/FR-2015-09-11/pdf/2015-22547.pdf.
[57] *Id.*

The Final Rule includes dissemination requirements and further defines key terms such as "compensation, compensation information, and essential job functions."[58]

Finally, the OFCCP provides employers with two defenses to an allegation of discrimination: (1) a defense for situations where an employee or applicant makes the disclosure based on information obtained in the course of performing his or her "essential job functions"; and (2) a general defense, which could be based on the enforcement of a "workplace rule" that does not prohibit the discussion of compensation information.[59]

(d) Shareholder Activism & Social Responsibility

Beyond the federal reporting requirements and state legislation efforts to address the pay gap, this year marks a new trend in resolving pay disparity with shareholders taking action independent of any federal or state involvement. Activist groups like Arjuna Capital have filed proxy proposals that, if passed, require companies to publicize reports on company efforts to address gender pay equality.

To date, nearly a dozen prominent employers have been caught in the crosshairs of these activists efforts, and "tech giants" like Amazon and Intel are voluntarily releasing data to demonstrate social corporate responsibility and show that the pay gap is closed (or will be closed soon).[60] In contrast, companies like Google and Adobe have both defeated proposals and refused to disclose its pay data without further comment.[61] Pax World Investments and Trillium Asset Management have made similar proposals to other companies, including companies in the financial services industry. It is unlikely that this trend will slow down in the future, as Pax World Investments has already taken steps to push the envelope one step further through a rule-making petition asking the SEC to "require public companies to disclose gender pay rations

[58] *Id.*
[59] *Id.*
[60] Press Release, Arjuna Capital, Showdown on Gender Equity in Silicon Valley: Shareholders Press Seven Tech Giants to Follow Lead of Intel/Apple on Fair Treatment of Women (Mar. 2, 2016), *available at* http://www.prnewswire.com/news-releases/showdown-on-gender-pay-equity-in-silicon-valley-shareholders-press-seven-tech-giants-to-follow-lead-of-intel-apple-on-fair-treatment-of-women-300229578.html
[61] Press Release, Arjuna Capital, Alphabet Still Learning the A-B-Cs of Gender Pay Equity, (June 10, 2016), available at http://arjuna-capital.com/news/alphabet-still-learning-b-cs-gender-pay-equity-sexist-reference-lady-cfo-followed-shareholder-vote/http://arjuna-capital.com/sites/default/files/061016%20Arjuna%20Capital%20Alphabet%20gender%20pay%20gap%20news%20release%20FINAL7_0.pdf; Letter from Matt S. McNair, Senior Special Counsel, Securities and Exchange Commission, to Michael Dillon, Adobe Systems Incorporated (January Jan. 4, 2016), available at https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2016/adamseitchik010416-14a8.pdf.

on an annual basis, or in the alternative, to provide guidance to companies regarding voluntary reporting on pay equity to their investors."[62]

(e) The White House Pledge

On June 15, 2016, the White House unveiled its Equal Pay Pledge, which is intended to encourage companies, on a voluntary basis, to conduct annual gender pay analyses.[63] As of August 26, 2016, 57 corporations have signed on, including notable signatories such as Amazon, Apple, Coca Cola, Cisco, Hilton, PepsiCo, Target, IBM, Visa, and Johnson & Johnson.[64] Companies who signed the pledge agree to conduct "an annual company-wide gender pay analysis across occupations" and to "review hiring and promotion processes and procedures to reduce unconscious bias and structural barriers." The program does not detail the specific analysis these companies should perform or what structural changes they should make if sex-based pay disparities are found.

While employers can easily join the Pledge by simply completing an online statement on the White House website, they should carefully consider the ramifications of doing so. Employers should expect that the government or others (like private plaintiffs) will eventually ask them to explain their analyses, so participating employers should work with outside counsel to consider precisely how they will meet the terms of the Pledge and to what extent they should document their steps. Employers should also consider whether such pay audits, if not prepared on a privileged basis, will be subject to discovery in potential future regulatory inquiries and litigation.

(f) Beyond Borders: United Kingdom and Germany

Underscoring the new push for gender pay equity and pay transparency, the United Kingdom recently published its draft regulations on the new "gender pay gap reporting" requirements known as the "Equality Act 2010 (Gender Pay Gap Information) Regulations."[65] The Regulations will require all employers with 250 or more employees to produce certain statistics and information regarding the gender pay gap of their workforce on an annual basis. The Regulations are aimed to address a gender pay gap in the United Kingdom where voluntary

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[62] Letter from Pax World Investments to Mary Jo White, Chair of Securities and Exchange Commission (Feb. 1, 2016), *available at* https://www.sec.gov/rules/petitions/2016/petn4-696.pdf.

[63] The White House Equal Pay Pledge is available at https://www.whitehouse.gov/webform/white-house-equal-pay-pledge.

[64] Fact Sheet: White House Announces New Commitments to the Equal Pay Pledge, August 26, 2016, *available at* https://www.whitehouse.gov/the-press-office/2016/08/26/fact-sheet-white-house-announces-new-commitments-equal-pay-pledge

[65] Government Equalities Office, Mandatory Gender Pay Gap Reporting, Government Consultation on Draft Regulations, Feb. 12, 2016, *available at* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/504398/GPG_consultation_v8.pdf.

reporting has not made an impact.[66] Former-Prime Minister David Cameron announced his hope that information produced under the new law will "cast sunlight on the discrepancies and create the pressure we need for change, driving women's wages up,"[67] but it remains to be seen whether the regulations move forward under new governance. Time will tell whether this will be effective in narrowing the pay gap abroad.

Finally, Germany plans to expand on its constitutional protections outlawing sex-based pay disparities and is expected to enact its Equal Pay Act sometime in 2016.[68] If passed, the law would place extensive information requirements on employers, providing for disclosure on the average salary of co-workers, gender pay differentials within a work group, and information about the criteria and procedure for determining an employee's own salary. Germany is also expected to pass laws invalidating confidentiality clauses regarding an employee's pay within employment contracts and posting requirements to indicate the minimum wage of a position in job advertisements.

V. Conclusion

As the pay gap continues to make headlines, companies should continue to track state law developments that broaden the pool of potential comparators and increase the burden on employers to further justify pay practices. Employers should also remain vigilant to shareholder efforts that go beyond existing regulatory or legislative requirements with an eye toward protecting privileged information while also acknowledging the demand for social responsibility.

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[66] Erin Connell, et al., "Cross-Border Trends: UK to Follow US Attack on the Gender Pay Gap," Feb. 17, 2016, *available at* http://blogs.orrick.com/employment/2016/02/17/cross-border-trends-uk-to-follow-us-attack-on-the-gender-pay-gap/

[67] While the lack of penalties for noncompliance may ring somewhat hollow, "the public embarrassment it begets may do more to force a sea change for pay equity than a host of lawsuits ever could." *See* Christina Cauterucci, "The U.K. Is Set to Publicly Shame Companies That Pay Women Less Than Men," Feb. 16, 2016, Slate.com, *available at* http://www.slate.com/blogs/xx_factor/2016/02/16/gender_wage_gap_in_the_u_k_to_be_addressed_with_public_shame_database.html?platform=hootsuite.

[68] André Zimmerman and Louisa Kalloff, "Proposed German Equal Pay Act May Complicate Remuneration Issues," Apr. 29, 2016, http://blogs.orrick.com/employment/2016/04/29/proposed-german-equal-pay-act-may-complicate-remuneration-issues/.