Pay Equity a Focus For Biden Administration in 2021

In the wake of the social justice movements and a nationwide push towards greater equality, transparency, diversity and accountability, it is expected that pay equity will be a focus for the Biden administration in the coming year. Pay equity issues are gaining the attention of employees and, in turn, becoming of increasing concern for employers.

While campaigning, Vice President Kamala Harris said she wanted to make the United States a leader in the fight for pay equity. Multi-million-dollar settlements of class action equal pay claims have gripped the headlines. What will these potential changes mean for employers when it comes to decisions surrounding compensation and matters of pay equity? Employers are likely going to see sweeping changes and a significant amount of scrutiny regarding pay equity. Furthermore, potential changes will likely focus on not only the gender gap but on race-based pay differentials.

The Paycheck Fairness Act was reintroduced into Congress in January 2021. This proposed federal legislation is aimed at amending the federal law prohibiting wage discrimination on the basis of sex. The bill would make it more difficult for employers to justify pay differentials for men and women.

The Equal Pay Act of 1963 (EPA) prohibits employers from discriminating against employees on the basis of sex by paying wages to employees at a rate less than the rate it pays to employees of the opposite sex for equal work on jobs, the performance of which requires equal skill, effort and responsibility. The law recognizes four affirmative defenses, one of which is a catchall provision: "a differential based on any other factor other than sex." If passed, the Paycheck Fairness Act would significantly narrow this key defense and require employers to demonstrate that the wage differential is a matter of business necessity.

Specifically, the bill would require employers to show that the factor underlying a pay differential: 1) is not based upon or derived from a sex-based differential in compensation 2) is job-related and *consistent with business necessity* and 3) accounts for the entire differential in compensation at issue. While it may not be difficult to show that factors such as education or training, which are often cited as a reason for a pay differential, are job-related, it may prove to be more difficult to show that those factors serve an overriding legitimate business purpose that is consistent with business necessity for the particular position at issue. Unlike Title VII sex discrimination claims, the EPA imposes a form of strict liability. The EPA does not require any intent to discriminate. The imposition of a 'business necessity" defense arguably goes beyond the intent of the law, which is to prohibit sex-based pay discrimination.

In addition, the Paycheck Fairness Act would also make it unlawful to prohibit employees from disclosing or discussing information about their wages, prohibit employers from relying on salary history in setting starting pay, enhance existing prohibitions against retaliation and increase penalties under the federal law.

Many states that have enacted their own equal pay laws provide affirmative defenses similar to those provided in the existing version of the EPA without reference to business necessity.

However, a few states, including New York, have amended their state equal pay laws to include expansive protections and to strengthen the protections against pay discrimination beyond the current EPA protections. Similar to the proposal in the Paycheck Fairness Act, New York's Equal Pay Act now requires employers relying on the "factor other than sex" defense to show that the factor is job-related and consistent with business necessity. This is a more onerous burden. The state law also provides for treble damages and a six-year statute of limitations. The New York law was also amended in 2019 to expand its scope by prohibiting pay differentials based on any characteristic protected under the New York Human Rights Law, not just gender. New York law also already restricts salary history in the hiring process and requires pay transparency.

Employers are also likely to see more aggressive enforcement actions by the Office of Federal Contract Compliance (OFCCP) in the area of compensation. President Biden appointed Jenny Yang to serve as the new OFCCP director. Yang previously served at the Equal Employment Opportunity Commission (EEOC), where she was a strong advocate for pay equity. In addition, federal contractors – and other employers – are likely to see the revitalization of the federal EEO-1 "Component 2" reporting requirement that involved the disclosure of pay data to the government. This initiative was initially implemented by the Obama administration and then discontinued by the Trump administration. While the federal agencies had not, over the past few years, relied on the compensation data that had previously been collected in the EEO-1 filings, it is anticipated that a new approach may take hold under the Biden administration in an effort to search for potential pay discrimination.

While it is unknown which of these changes will take hold or how much of an impact they will have in states like New York that already maintain strict equal pay laws, it is nearly certain that the changes will provide information and incentives to employees to submit more claims of pay discrimination against employers. Pay equity claims often result from a failure of employers to have a standard process in establishing and evaluating pay. Given the significant potential liability, employers would be well advised to conduct privileged pay equity audits to identify and resolve gender and race-based compensation disparities. This allows employers to take a look at their compensation program and how is it actually being implemented and to make proactive changes, if necessary.

If you have any questions about the information presented in this memo, please contact Christa R. Cook any attorney in Bond's Labor and Employment practice.

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