

How Cos. Can Keep Up With Pay, Workplace Equity Evolution

By **Erin Connell and Kayla Grundy** (February 14, 2022)

Despite another year of the ongoing pandemic, the field of pay equity law continues to develop at a rapid pace. States and cities across the nation are enacting new pay transparency laws that require employers to affirmatively disclose how much they pay for their jobs.

New leaders at the federal administrative agencies, namely the U.S. Equal Employment Opportunity Commission and the U.S. Department of Labor's Office of Federal Contract Compliance Programs, have made abundantly clear that addressing pay equity and closing pay gaps is a top priority.

And while pay equity litigation — including sprawling class actions — is quickly gaining traction, there is also a growing awareness that equal pay for equal work is only one piece of the pie.

Legislatures, policy leaders and plaintiffs lawyers are focusing not only on pay equity, but also on the broader issue of racial and gender equity in the workplace.

In light of this trend, employers looking to proactively address both pay and workplace equity must focus not just on how much employees are paid, but also on the jobs they hold and the workplace opportunities afforded to them.



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Understanding the Current Landscape Affecting Pay and Workplace Equity

Global Pandemic

The impact of the ongoing COVID-19 pandemic on the workplace is undeniable.

Not only has it forced employers to evaluate their workforces — including their capacity for, and tolerance of, remote work — but there is a growing concern that the pandemic has disproportionately affected female employees and employees of color.

For example, on Jan. 19, EEOC Chair Charlotte Burrows and OFCCP Director Jenny Yang jointly launched the Hiring Initiative to Reimagine Equity, or HIRE, to advance equal opportunity in the workplace.[1]

The agencies specifically identified the "disproportionate impact of COVID-19 on underserved communities, the growing recognition of systemic inequality, and calls for racial justice" as the drivers for launching HIRE.[2]

Societal Changes

The #MeToo and Black Lives Matter movements have had a lasting impact on the employment sector.

These and other societal changes, combined with the growing momentum among activist

shareholders, institutional investors and regulators on environmental, social and governance factors, have increased the pressure on employers to ensure pay equity and to reveal the demographic makeup of their workforce in public disclosures of diversity, equity and inclusion metrics, goals and achievements.

Employees, too, are emboldened by the ongoing social reckoning, as evidenced by the rise in employee walkouts, protests, and open letters or social media posts about their workplace environments.

Not only are employees demanding employers take action to address workplace equity issues, but many are leaving the workforce altogether: The U.S. Bureau of Labor Statistics reports that more than 20 million Americans quit their jobs in the second half of 2021 in what has been dubbed the "Great Resignation."^[3]

This dramatic shift in the labor market has not only created a spike in the war for talent, thereby increasing pressure on employers to demonstrate their commitment to racial and gender equity, but employees — and former employees — are more emboldened than ever to take action in the face of perceived workplace injustices.

Legislation

On the legislative front, a wave of new pay transparency laws, including in California, Colorado, Connecticut, Maryland, New York City, Nevada, Rhode Island and Washington, now allow employees and applicants to learn not only what particular jobs pay, but also which jobs pay more than others.

These laws vary with respect to whether employers must disclose pay ranges for particular jobs on request or affirmatively. They also differ with respect to whether employers must disclose pay ranges to applicants only, or also to current employees seeking a promotion or transfer.

Given these differences, some multistate employers are adopting nationwide pay disclosure policies that aim to comply with all of them.

Other employers are going a step further by simply disclosing to all employees the pay ranges for their jobs.

Colorado's law, which already has faced legal challenges, requires the most significant disclosures: It not only mandates disclosure of pay ranges to both applicants and employees, but it also contains a significant disclosure requirement for job opportunities and promotions.^[4]

With respect to pay, for any job that can be performed in the state of Colorado, including remote jobs, the law requires employers to include the wage rate or range, a general description of other compensation and a general description of all benefits on job postings — not simply to applicants or candidates who have applied for a position or participated in an interview, as several other state statutes now require.^[5]

Additionally, employers must make reasonable efforts to notify Colorado-based employees of any promotional opportunities taking place anywhere within the company. And, if the job opportunity can be performed in Colorado, the notice to Colorado-based employees must include the same pay and benefits information required for job postings.^[6]

New York City already has followed Colorado's lead with respect to the pay range disclosure requirement for job postings with a new law that becomes effective on May 15.[7]

And while no other jurisdictions have yet enacted a similar requirement with respect to promotional opportunities, the broader trend of pay and job transparency reflects a growing desire to make it easier for applicants and employees to evaluate their own compensation — both as compared to peers and to the market.

Government Agencies

The amalgamation of these influential trends has not been lost on state and federal agencies.

In California, for example, the Department of Fair Employment and Housing, or DFEH, has initiated several broad-based investigations involving extensive discovery, both with and without an individual claimant.

The DFEH also has been playing a more active role in litigation.

For example, Riot Games Inc. recently settled *McCracken v. Riot Games*, a discrimination and harassment class action brought by female employees in the Los Angeles County Superior Court, for \$100 million, following an online blog post chronicling alleged unfair treatment of women at the company.[8]

Initially, the plaintiffs and Riot Games agreed to a \$10 million settlement in 2019, but the DFEH blocked that settlement, claiming the women could be entitled to more than \$400 million.

The DFEH later endorsed the \$100 million settlement, stating that the

historic agreement reflects California's commitment to strategic and effective government enforcement of the State's robust equal-pay, anti-discrimination, and antiharassment laws.[9]

The DFEH has taken a similar approach to ongoing litigation against Activision Blizzard Inc.

When Activision and the EEOC agreed to settle allegations of classwide sexual harassment and discrimination for \$18 million in September 2021 before the U.S. District Court for the Central District of California, the DFEH attempted to block that settlement as well, claiming it could interfere with a separate lawsuit by the DFEH against Activision.[10]

Although the court denied the DFEH's attempt to stop the settlement in December 2021, the agency filed a notice of appeal on Jan. 7.[11]

At the federal level, the EEOC and OFCCP also remain focused on pay equity and closing gender and racial pay gaps.

Although Charlotte Burrows has been the EEOC chair since January 2021, she will not have a Democratic majority on the commission until July 2022, after which time we may see new EEOC policy initiatives.

And while the EEOC has been without a Senate-approved general counsel since March 2021, the agency nevertheless has continued to pursue pay equity cases, as illustrated by the

EEOC's request to the U.S. Court of Appeals for the Ninth Circuit on Feb. 3 to participate in oral arguments in *Morgan v. U.S. Soccer Federation Inc.*, the American women soccer players' attempt to reinstate their equal pay claims against the U.S. Soccer Federation.

The EEOC has also expressed interest in renewing or revising the collection of pay data as a component of employers' EEO-1 reports, which was initially enacted by Yang when she was EEOC chair, before it was discontinued during the Trump administration.

Burrows and Yang have already teamed up with respect to the HIRE initiative in January, and it seems likely the agencies will continue to collaborate going forward.

Given Yang's leadership, we expect to see other pay-related developments at OFCCP in the near future.

Litigation

Employers are already seeing these trends play out in litigation, particularly in broad-based class and collective actions.

For example, the lawsuits against Riot Games and Activision involve incredibly broad sets of allegations that attack every aspect of both pay and workplace equity.

They also exemplify how private plaintiffs and government agencies can each play active roles in both the litigation and settlement processes.

Other large class or collective action pay equity suits are currently pending around the country, including against large employers such as Google LLC, The Walt Disney Co., Nike Inc., Hewlett Packard Enterprise Co. and Goldman Sachs Group Inc.

Practical Steps Employers Should Consider

For employers looking to stay ahead of the current litigation and legislative developments when it comes to pay equity, a holistic, proactive approach is best, including analyzing not only how much employees are paid, but also how they come to hold the jobs they do, how they advance within the company, and the overall employment policies and practices that ultimately result in the compensation earned.

Some concrete and practical steps are outlined below.

Develop a process for staying on top of new laws and legislation.

Pay equity and pay transparency laws are changing rapidly. The sooner an employer learns about new requirements, the more runway it gives itself to adapt.

Particularly for multijurisdictional employers that may be subject to different requirements for different employees, permitting more time to determine internally how best to implement new compliance requirements is key.

Conduct regular, robust and privileged pay equity analyses.

These analyses can assist employers in identifying areas where further research may be required, whether any adjustments may be appropriate to their systems and/or employee pay, and whether additional training resources should be deployed and to whom.

Given the complex legal landscape, legal counsel should direct such analyses under privilege to facilitate legal advice and help assess risk.

Expand privileged analyses to cover more than pay equity.

One goal of most pay equity analyses is to ensure employees are paid equitably for similar work. But other employment practices not directly implicated in a pay equity analysis, such as promotions or job leveling practices, may also need auditing to determine if they are resulting in inequitable outcomes, including compensation.

Particularly in today's landscape, employers should consider expanding their internal analyses to include other employment practices, such as performance ratings or reviews, job classification systems and promotions.

Evaluate and document starting pay decisions.

In this new era of wage range disclosures, focusing on starting pay is more important than ever.

Savvy employers are thinking ahead on how issues like negotiations, fluctuating labor markets and acquisitions may affect their compensation systems and pay equity efforts, and they are developing reliable and scalable processes for documenting starting pay decisions.

Develop a thoughtful, prompt and thorough investigations process.

As pay equity laws and litigation gain traction, so does employee awareness of pay equity. It therefore is no surprise that internal complaints and inquiries by employees about their pay are on the rise.

To ensure employees are paid competitively and fairly and to avoid internal inquiries advancing to litigation, companies should develop a thorough, thoughtful investigation process, keeping in mind it should be privileged, consistent and scalable.

Invest in robust training for pay, promotion and performance decision makers.

Ensuring pay decision makers adhere to compensation policies and practices, as well as have awareness and understanding of the potential impacts of their pay decisions, is another avenue to proactively address any issues or concerns before they arise.

Conclusion

Pay equity developments have not slowed during the pandemic, and are rapidly expanding as 2022 unfolds.

The past year brought significant developments in pay equity litigation and an invigorated push for greater pay transparency.

In this ever-evolving environment, employers that take steps to analyze their overall compensation systems and related employment practices, in addition to conducting privileged pay equity analyses, are best positioned to stay ahead of the curve.

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[1] <https://www.dol.gov/agencies/ofccp/Hire-Initiative>.

[2] <https://www.dol.gov/sites/dolgov/files/OFCCP/pdf/HIREInitiativeFactSheet-508c.pdf>.

[3] <https://www.bls.gov/news.release/jolts.t04.htm>; <https://www.npr.org/2021/10/22/1048332481/the-great-resignation-why-people-are-leaving-their-jobs-in-growing-numbers>.

[4] Colo. Rev. Stat. § 8-5-201; <https://cdle.colorado.gov/equalpaytransparency>.

[5] Colo. Rev. Stat. § 8-5-201(2).

[6] Colo. Rev. Stat. § 8-5-201(1); see also https://cdle.colorado.gov/sites/cdle/files/INFO%20%239_%20Equal%20Pay%20Transparency%20Rules%20%28Revised%20July%202021%29.pdf.

[7] <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3713951&GUID=E7B03ABA-8F42-4341-A0D2-50E2F95320CD>.

[8] <https://www.classaction.org/media/mccracken-et-al-v-riot-games-inc.pdf>; <https://www.riotgames.com/en/news/riot-settlement>.

[9] <https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2021/12/RiotGamesPR12.27.21.pdf>.

[10] EEOC v. Activision Blizzard, C.D. Cal., No. 2:21-cv-07682.

[11] <https://www.documentcloud.org/documents/21175592-dfeh-appeal>.