



# **Workplace Gender Equity in a Post-Pandemic Era**

March 2022

**BY ERIN M. CONNELL, KAYLA D. GRUNDY, & NECIA HOBBS**

Prepared for the American Bar Association Section of Labor and Employment Law, Equal Employment Opportunity Committee

## TABLE OF CONTENTS

	Page
I. Introduction .....	1
II. The Current Landscape .....	1
A. The Pandemic’s Impact on Women’s Workplace Participation .....	1
B. Societal Awareness of Workplace Gender Equity Issues .....	2
C. Legislation Focused on Pay, Promotion, and Opportunity Transparency .....	4
D. Government Agencies Pursue Broad Litigation, a Hiring Initiative, & Pay Data Collection .....	5
E. Workplace Equity Litigation Trends .....	7
III. How Employers Can Stay Ahead in the Post-COVID World .....	8
IV. Conclusion .....	9

## ***I. Introduction***

The spotlight has never shown brighter on the issue of gender equity in the workforce. Although workplaces are reopening, reports abound about the disproportionate impact the two-year pandemic has had on women at work. At the same time, societal trends, including the continuing influence of the “Me Too” movement, a growing tide of activist shareholders and institutional investors, and the rise of environmental, social, and corporate governance (ESG) issues, have raised awareness of workplace gender-related concerns. And employees, after coping with a global pandemic, and perhaps emboldened by the virtual environment and enhanced job prospects due to the growing war for talent, have increasingly joined the chorus, demanding their employers take action on important social issues.

State legislatures and government agencies are also focused on the broad issue of gender workplace equity. 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. And new leaders, including at the Equal Employment Opportunity Commission (EEOC) and Office of Federal Contract Compliance Programs (OFCCP) have made clear that addressing gender equity is a top priority, as illustrated by a new joint initiative to improve hiring, recruiting and job access (“HIRE”) for women and underrepresented groups, as well as new guidance from OFCCP on pay equity audits and new guidance from the EEOC on caregiver discrimination. The plaintiffs’ bar, too, has been increasingly active with broad-based complaints attacking all aspects of pay and workplace equity.

In light of these trends, employers looking to stay ahead of the curve must take a proactive approach that focuses not only on attracting and retaining the best female talent, but also on ensuring a culture and workplace that affords women opportunities to thrive.

## ***II. The Current Landscape***

### **A. The Pandemic’s Impact on Women’s Workplace Participation**

The COVID-19 pandemic has had a sweeping and undeniable impact on the workplace. Not only has it forced employers to evaluate their workforces, including their capacity for (and tolerance of) remote work, but labor market data indicates the pandemic has disproportionately impacted women compared to men. The unemployment rate for women fell faster than the rate for men when the pandemic struck: 17.9% of women lost their jobs from February to April 2020, compared to 13.9% of men.<sup>1</sup> Women also made up a disproportionate share of employees in the hardest-hit sectors, including hospitality, food services, and personal care and leisure.<sup>2</sup> And women were disproportionately impacted by lockdowns that closed schools and childcare facilities,<sup>3</sup> including because (according to the U.S. Centers for Disease Control and Prevention), two-third of all U.S. caregivers are women.<sup>4</sup> Additionally, women were more likely than men to have experienced an increase in housekeeping and caregiving responsibilities during the

---

<sup>1</sup> Akur Barua, *Gender equality, dealt a blow by COVID-19, still has much ground to cover*, DELOITTE (Jan. 21, 2022), <https://www2.deloitte.com/us/en/insights/economy/impact-of-covid-on-women.html>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Amanda Ottaway, *How To Improve Remote Work for Women Employees*, Law360 (Mar. 14, 2022).

pandemic, and were more likely to forego their usual work for caregiving duties.<sup>5</sup> Women with children were particularly impacted, as mothers decreased their work hours outside the home four to five times more than fathers.<sup>6</sup> The U.S. Census found that among mothers with school-age children, 1.4 million more were not working in January 2021 compared to the same period in 2020.<sup>7</sup>

Today, although lockdowns have passed, economies are rebounding, and many women have returned to work, female workforce participation has yet to return to pre-pandemic levels.<sup>8</sup> Sectors like hospitality are still on the rebound, and the increased caretaking burden continues, including because schools and daycares are often intermittently unavailable due to staffing shortages, and vaccinations are still unavailable for children under five years old.<sup>9</sup> Indeed, by February 2022, it appeared that men had recouped their job losses from the pandemic, but there were still nearly 1.1 million fewer women in the workforce than pre-pandemic.<sup>10</sup> Moreover, even for women who have now returned to the workforce, the time spent away can have lasting impacts on earnings potential and job opportunities.

## **B. Societal Awareness of Workplace Gender Equity Issues**

Societal changes, including the lasting impacts of the “Me Too” movement, combined with the rise of ESG and growing momentum among activist shareholders, institutional investors and regulators, also have increased the pressure on employers to prioritize gender workplace equity. For example, Nike last year faced a shareholder proposal calling for it to publish annually a report assessing the Company’s DEI efforts including, “the Board process for assessing the effectiveness of its diversity, equity, and inclusion programs, and the Board’s assessment of program effectiveness, as reflected in any goals, metrics, and trends related to its promotion, recruitment, and retention of protected classes of employees.”<sup>11</sup> While Nike rejected the proposal as unnecessary because it already publicly discloses diversity metrics and

---

<sup>5</sup> Luisa S. Flor and Molly E. Herbert, *Quantifying the effects of the COVID-19 pandemic on gender equality on health, social, and economic indicators: a comprehensive review of data from March, 2020, to September, 2021*, THE LANCET (Mar. 2, 2022), [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(22\)00008-3/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(22)00008-3/fulltext).

<sup>6</sup> Diego Mendez-Carbajo, *Gender and Labor Markets*, ECONOMIC RESEARCH, FED. RESERVE BANK OF ST. LOUIS (Jan. 2022), <https://research.stlouisfed.org/publications/page1-econ/2022/01/03/gender-and-labor-markets>.

<sup>7</sup> Misty L. Heggeness, et al., *Tracking Job Losses for Mothers of School-Age children During a Health Crisis*, U.S. CENSUS BUREAU (Mar. 3, 2021), <https://www.census.gov/library/stories/2021/03/moms-work-and-the-pandemic.html#:~:text=Around%2010%20million%20U.S.%20mothers,forced%20out%20in%20extraordinary%20numbers>.

<sup>8</sup> *Id.*; Matt Gonzales, *Nearly 2 Million Fewer Women in Labor Force*, SHRM (Feb. 17, 2022), <https://www.shrm.org/resourcesandtools/hr-topics/behavioral-competencies/global-and-cultural-effectiveness/pages/over-1-million-fewer-women-in-labor-force.aspx>.

<sup>9</sup> Gonzales, *supra* note 8.

<sup>10</sup> Morgan Smith, *January jobs report shows ‘troubling’ signs for women’s economic recovery amid omicron surge*, CNBC (Feb. 4, 2022), <https://www.cnbc.com/2022/02/04/january-jobs-report-shows-troubling-signs-for-womens-economic-recovery.html>.

<sup>11</sup> Nike Inc. Vote Yes: Proposal Number 7 – to Consider a Shareholder Proposal Regarding Diversity and Inclusion Efforts Reporting, As You Sow (Oct. 6, 2021), <https://d18rn0p25nwr6d.cloudfront.net/CIK-0000320187/41440828-ba31-4ca8-b4ef-92b8f512da2a.pdf>.

information,<sup>12</sup> the trend is unlikely to reverse. Indeed, Disney shareholders recently approved a proposal that requires it to not only report unadjusted median pay gaps, but also pay disparities that are statistically adjusted for job titles, seniority, and geography, and “associated policy, reputational, competitive, and operational risks, and risks related to recruiting and retaining diverse talent.”<sup>13</sup> And Pfizer is currently facing a proposal that it report to shareholders on “the effectiveness of the company’s [DE&I] efforts. The reporting should... address outcomes, using quantitative metrics for recruitment, retention and promotion of employees, including data by gender, race and ethnicity.”<sup>14</sup>

The SEC also has shown an increased focus on human capital measures, including DEI initiatives. Last year, the SEC amended 17 C.F.R. §§ 229, 239, and 240, regarding S-K Items 101, 103, and 105, respectively, to require companies to make human capital management (“HCM”) disclosures on an annual basis.<sup>15</sup> Specifically, the rule requires companies to disclose in their Form 10-K a description of their human capital resources and “any human capital measures or objectives that the company focuses on in managing the business.” Although the rule does not define “human capital” nor specify the format or criteria for the disclosure, further amendments are expected this year.<sup>16</sup>

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 their workplace altogether: the United States 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.”<sup>17</sup> This dramatic shift in the labor market not only has created a spike in the war for talent

---

<sup>12</sup> Phillip Bantz, *Nike, FedEx Shareholders Shoot Down Diversity-Transparency Proposals*, LAW.COM (Oct. 7, 2021), <https://www.law.com/corpcounsel/2021/10/07/nike-fedex-shareholders-shoot-down-diversity-transparency-proposals/>.

<sup>13</sup> *Arjuna Capital: 59% of Disney Investors Vote for Racial and Gender Pay Equity Proposal at Annual Meeting*, BUSINESS WIRE (Mar. 9, 2022), <https://www.businesswire.com/news/home/20220309005937/en/Arjuna-Capital-59-of-Disney-Investors-Vote-for-Racial-and-Gender-Pay-Equity-Proposal-at-Annual-Meeting>; Phillip Bantz, *Disney fights Shareholder Push for Transparency on Race, Gender Pay Disparities*, LAW.COM (Feb. 2, 2022), <https://www.law.com/corpcounsel/2022/02/02/disney-fights-shareholder-push-for-transparency-on-race-gender-pay-disparities/>.

<sup>14</sup> B. Maiden, *Pfizer faces shareholder proposal on DE&I disclosure*, CORP. SEC’Y (Feb. 24, 2022), <https://www.corporatesecretary.com/articles/shareholders/32918/pfizer-faces-shareholder-proposal-dei-disclosure>.

<sup>15</sup> *SEC Adopts Rule Amendments to Modernize Disclosures of Business, Legal Proceedings, and Risk Factors Under Regulation S-K, 2020-192*, U.S. SEC. AND EXCH. COMM’N (Aug. 26, 2020), <https://www.sec.gov/news/press-release/2020-192>.

<sup>16</sup> Gary Gensler, Testimony Before the United States Senate Committee on Banking, Housing, and Urban Affairs, U.S. SEC. AND EXCH. COMM’N (Sept. 14, 2021), <https://www.sec.gov/news/testimony/gensler-2021-09-14>.

<sup>17</sup> *Economic News Release, Table 4: Quits levels and rates by industry and region, seasonally adjusted*, U.S. BUREAU OF LABOR STATISTICS (last modified Mar. 10, 2022), <https://www.bls.gov/news.release/jolts.t04.htm>; *The Great Resignation: Why People Are Leaving Their Jobs in Growing Numbers*, NPR (Oct. 22, 2021), <https://www.npr.org/2021/10/22/1048332481/the-great-resignation-why-people-are-leaving-their-jobs-in-growing-numbers>.

(thereby increasing pressure on employers demonstrate their commitment to gender equity), but employees—and former employees—are more emboldened than ever to take action in the face of perceived workplace injustices.<sup>18</sup>

### C. Legislation Focused on Pay, Promotion, and Opportunity Transparency

On the legislative front, employers face a new wave of state statutes focused on pay, promotion, and opportunity transparency, including in California, Colorado, Connecticut, Maryland, Nevada, Rhode Island, Washington, New York City, Cincinnati, and Toledo. These laws allow employees and applicants not only to discuss their pay, but they also require employers to disclose the pay or pay range for particular jobs.<sup>19</sup> For example, California enacted the first such pay transparency law, but required disclosure only to applicants upon request.<sup>20</sup> The trend has expanded to include disclosures to both applicants and employees, and to require proactive disclosures without waiting for a request. For example, Rhode Island, one of the most recent adopters of this new type of law, requires proactive disclosures to both applicants and employees, *both* at time of hire *and* when the employee moves into a new position.<sup>21</sup> Additionally, upon request, employers must provide current employees with the wage range for their position, and must also provide the wage range to applicants (regardless of whether they are interviewed or offered a position).

Given these wide-ranging and mounting differences, some multi-state 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.<sup>22</sup> 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

---

<sup>18</sup> *The Great Resignation is spawning a talent war. Who will win it?*, AL JAZEERA (Jan. 10, 2022), <https://www.aljazeera.com/economy/2022/1/10/the-great-resignation-is-spawning-a-talent-war-who-will-win-it>.

<sup>19</sup> Kathryn Mantoan, Jessica R. L. James, and Necia Hobbes, *Pay Transparency Laws: It's Not Just Pay Data Reporting Anymore*, ORRICK'S EQUAL PAY PULSE (Aug. 31, 2021), <https://blogs.orrick.com/equalpaypulse/2021/08/31/pay-transparency-laws-its-not-just-pay-data-reporting-anymore/>; Kathryn Mantoan, *Pay Transparency to Current Employees – New Laws Require More Than Job Posting Disclosures*, ORRICK'S EQUAL PAY PULSE (Jan. 7, 2022), <https://blogs.orrick.com/equalpaypulse/2022/01/07/pay-transparency-to-current-employees-new-laws-require-more-than-job-posting-disclosures/>.

<sup>20</sup> Cal. Lab. Code § 432.3 (2018).

<sup>21</sup> H.B. 5261, 2021 Cong., Reg. Sess. (R.I. 2021).

<sup>22</sup> Colo. Rev. Stat. § 8-5-201; Equal Pay for Equal Work Act, Part 2, COLORADO DEP'T OF LABOR AND EMP., <https://cdle.colorado.gov/equalpaytransparency> (last accessed Mar. 13, 2022).

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).<sup>23</sup>

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 must include to Colorado-based employees the same pay and benefits information required for job postings.<sup>24</sup>

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, 2022.<sup>25</sup> The bill requires every “advertisement” for a “job, promotion or transfer opportunity” to state “the minimum and maximum salary” for such position.<sup>26</sup> Similar to the Colorado law, the NYC law defines the required range to “extend from the lowest to the highest salary the employer in good faith believes at the time of the posting it would pay for the advertised job, promotion or transfer opportunity.”<sup>27</sup>

While no other jurisdictions have yet enacted a similar requirement with respect to promotional opportunities, California has such a bill pending,<sup>28</sup> and other pay transparency legislation is pending in over a dozen other states.<sup>29</sup>

#### **D. Government Agencies Pursue Broad Litigation, a Hiring Initiative, & Pay Data Collection**

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 (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 recently settled a discrimination and harassment class action brought by female employees for \$100 million,

---

<sup>23</sup> Colo. Rev. Stat. § 8-5-201(2)

<sup>24</sup> Colo. Rev. Stat. § 8-5-201(1); see also Interpretive Notice & Formal Opinion (“INFO”) #9: Equal Pay for Equal Work Act, Part 2: Transparency in Pay and Opportunities for Promotion and Advancement, Colorado Department of Labor and Employment (July 21, 2021), <https://cdle.colorado.gov/sites/cdle/files/INFO%20%239%20Equal%20Pay%20Transparency%20Rules%20%28revised%207-21-21%29.pdf>.

<sup>25</sup> New York City Law 2022/03, <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3713951&GUID=E7B03ABA-8F42-4341-A0D2-50E2F95320CD>.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Cal. S.B. 1162, <https://legiscan.com/CA/bill/SB1162/2021>

<sup>29</sup> Alaska H.B. 146, 32<sup>nd</sup> Legislative Session (2021); Cal. S.B. 1162 (2022); Fla. H.B. 293 (2021); Ga. H.B. 1177 (2022); Ind. H.B. 1192 (2021); Mass. S.B. 2721 (2022); Mich. S.B. 324 (2021); Mich. S.B. 332 (2021); Mo. S.B. 1137 (2022); N.Y. S.B. 5598 (2021); N.Y. A.B. 6639 (2021); N.Y. A.B. 6529 (2021); S.C. S.B. 514 (2021); Tenn. S.B. 2611 (2022); Va. S.B. 447 (2022); Wash. S.B. 5761 (2022); W.V. H.B. 3247 (2021).

following an online blog post chronicling alleged unfair treatment of women at the company.<sup>30</sup> 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 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.”<sup>31</sup>

The DFEH has taken a similar approach to ongoing litigation against Activision Blizzard: when Activision and the EEOC agreed to settle allegations of classwide sexual harassment and discrimination for \$18 million in September 2021, the DFEH attempted to block that settlement as well, claiming it could interfere with a separate lawsuit by DFEH against Activision.<sup>32</sup> Although the court denied DFEH’s attempt to stop the settlement in December 2021, the agency filed a notice of appeal on January 7, 2022.<sup>33</sup>

At the federal level, the EEOC and OFCCP also remain focused on pay equity and closing gender and racial pay gaps. For example, on January 12, 2022, EEOC Chair Charlotte Burrows and OFCCP Director Jenny Yang jointly launched a “HIRE” initiative to advance equal opportunity in the workplace.<sup>34</sup> HIRE is a “multi-year collaborative effort” to “engage a broad array of stakeholders to expand access to good jobs for workers from underrepresented communities and help address key hiring and recruiting challenges.” The effort focuses on women and other underrepresented communities, and the agencies specifically identified the “disproportionate impact of COVID-19 on underserved communities,” and “the growing recognition of systemic inequality” as two of the primary drivers for launching HIRE.<sup>35</sup>

Both agencies also issued new guidance related to gender equity in March 2022. On March 14, 2022, the EEOC issued new guidance on the COVID-19 pandemic and caregiver discrimination,<sup>36</sup> and on March 15, 2022 (Equal Pay Day), OFCCP issued a new directive regarding pay equity audits by federal

---

<sup>30</sup> Complaint, *McCracken v. Riot Games*, Case No. 18STCV03957 (L.A. County Super. Ct. Nov. 6, 2018); *Riot Games Reaches Global Settlement Agreement*, RIOT GAMES (Dec. 28, 2021), <https://www.riotgames.com/en/news/riot-settlement>.

<sup>31</sup> *Riot Games, Inc. Agrees to \$100 Million Settlement and Systemic Reforms to Resolve Allegations of Workplace Sex Discrimination and Harassment*, CAL. DEP’T OF FAIR EMP. & HOUS. (Dec. 27, 2021), <https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2021/12/RiotGamesPR12.27.21.pdf>.

<sup>32</sup> Ex Parte Application to Intervene, *EEOC v. Activision Blizzard*, No. 2:21-cv-07682 (C.D. Cal. Oct. 6, 2021).

<sup>33</sup> Notice of Appeal, *EEOC v. Activision Blizzard*, No. 2:21-cv-07682 (C.D. Cal. Jan. 7, 2022).

<sup>34</sup> HIRE Initiative, U.S. DEP’T OF LABOR OFFICE OF FED. CONTRACT COMPLIANCE PROGRAMS, <https://www.dol.gov/agencies/ofccp/Hire-Initiative>; *EEOC and OFCCP Launch “Hire” Initiative to Advance Equal Opportunity*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N (Jan. 12, 2022), <https://www.eeoc.gov/newsroom/eeoc-and-ofccp-launch-hire-initiative-advance-equal-opportunity>.

<sup>35</sup> Hiring Initiative to Reimagine Equity (HIRE), U.S. DEP’T OF LABOR OFFICE OF FED. CONTRACT COMPLIANCE PROGRAMS, <https://www.dol.gov/sites/dolgov/files/OFCCP/pdf/HIREInitiativeFactSheet-508c.pdf>.

<sup>36</sup> *The COVID-19 Pandemic and Caregiver Discrimination Under Federal Employment Discrimination Laws*, EEOC-NVTA- 2022-1, U.S. EQUAL EMP’T OPPORTUNITY COMM’N (Jan. 12, 2022), <https://www.eeoc.gov/laws/guidance/covid-19-pandemic-and-caregiver-discrimination-under-federal-employment>.



contractors' that outlines OFCCP's view that it has "authority to access and review contractors' pay equity audits conducted pursuant to 41 CFR 60-2.17(b)(3)."<sup>37</sup>

The EEOC also has expressed interest in renewing (or revising) the collection of pay data under Component 2 of employers' EEO-1 reports, which was initially enacted by former EEOC Chair (and current OFCCP Director) Jenny Yang before it was discontinued during the Trump Administration. At a panel before the National Academies of Sciences, Engineering, and Medicine ("NASEM") last fall, EEOC and OFCCP spokespersons voiced their support for further pay data collection efforts in the future.<sup>38</sup> OFCCP's Director of Enforcement, Dr. Robert Lajeunesse, also told the panel that OFCCP believes the pay data will be useful and intends to use it to enhance its scheduling efforts and as an additional investigative tool.<sup>39</sup>

Given Yang's leadership, we similarly expect to see other gender equity related developments at OFCCP in the near future, including potential updates to, or replacement of, OFCCP's current compensation directive (Directive 2018-05), or to OFCCP's final rule on Predetermination Notices ("PDNs"), which defines OFCCP's evidentiary standards for certain administrative findings, including findings of compensation discrimination.

### **E. Workplace Equity Litigation Trends**

Not only are these societal trends playing out in legislatures and government agency initiatives, but litigation, particularly in broad-based class and collective action suits, are on the rise. 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.

And Riot Games and Activision cases are not alone. Other large class or collective action pay equity and/or systemic discrimination suits are currently pending around the country, including against large employers such as Google, Oracle, Disney, Nike, Hewlett Packard, and Goldman Sachs. The claims in these cases are far-reaching and range from pay equity claims to allegations about general cultural, representation, and stereotyping, as well as claims of discrimination in assignments, promotion, and job channeling. For example, the allegations in the HP complaint include: that women are not proportionally represented at HP, that the company fails to advance female employees at the same rate as male employees, that men are placed in higher pay grades and levels than women, that women are steered into lower-paying jobs based on stereotypes, that pay policies mask a wide pay range within job codes, and that looking at promotions masks inequality in pay bands.<sup>40</sup> The complaint against Nike alleged that

---

<sup>37</sup> PAY EQUITY AUDITS (DIRECTIVE 2022-01), U.S. DEP'T OF LABOR (2022), <https://www.dol.gov/agencies/ofccp/directives/2022-01>.

<sup>38</sup> *Panel to Evaluate the Quality of Compensation Data Collected from U.S. Employers by the Equal Employment Opportunity Commission through the EEO-1 Form Eighth Open Meeting*, NAT. ACADEMIES OF SCI., ENG'G, AND MED. (Sept. 23, 2021), [nationalacademies.org/event/09-23-2021/panel-to-evaluate-the-quality-of-compensation-data-collected-from-us-employers-by-the-equal-employment-opportunity-commission-through-the-eeo-1-form-eighth-open-meeting](https://www.nationalacademies.org/event/09-23-2021/panel-to-evaluate-the-quality-of-compensation-data-collected-from-us-employers-by-the-equal-employment-opportunity-commission-through-the-eeo-1-form-eighth-open-meeting).

<sup>39</sup> *Id.*

<sup>40</sup> Complaint, *Ross vs. Hewlett Packard Enterprise, Co.*, No. 18CV337830 (Santa Clara County Super. Ct. Nov. 8, 2018).

women are marginalized and passed over for promotions, that their performance is unfairly assessed, that the budgeting system has an adverse impact against women, that women are channeled into positions that are less likely to lead to promotions or increased compensation, that women's complaints about issues ranging from discrimination to harassment are ignored or mishandled, and that male bad behavior is rarely penalized.<sup>41</sup> The complaints against Disney, Goldman Sachs, Google, and Oracle are similarly broad in alleging that unequal pay occurred through a variety of discriminatory policies and practices, including performance reviews, promotions, job channeling, and more.<sup>42</sup>

Furthermore, three of these cases (against Google, Oracle, and HP) illustrate how these types of private class actions can follow, or come at the same time as, allegations of discrimination by government agencies (namely, the OFCCP). In the case of Oracle, OFCCP and plaintiffs' counsel made known they were working together through a "common interest agreement." OFCCP's case against Oracle, which alleged systemic discrimination in pay and job assignments, went to trial in December 2019, and all of OFCCP's claims were dismissed.<sup>43</sup> With respect to Hewlett Packard and Google, OFCCP settled with Hewlett Packard in October 2020 for \$1.45 million and with Google in February 2021 for \$3.8 million, in both cases to resolve allegations of systemic pay discrimination against women.<sup>44</sup> All three private class action remains pending.

### **III. How Employers Can Stay Ahead in a Post-Pandemic World**

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

Some concrete and practical steps may include:

- Develop a process for staying on top of new workplace equity laws and legislation. Pay equity and pay and promotion transparency laws are changing rapidly. The sooner an employer learns about new requirements, the more runway it gives itself to adapt. Particularly for multi-jurisdictional employers who may be subject to different requirements for different employees,

---

<sup>41</sup> First Amended Complaint, *Cahill et. al. v. Nike, Inc.*, No. 3:18-cv-01477-JR (D. Or) (Nov. 19, 2018) (ECF 42).

<sup>42</sup> Complaint, *Rasmussen v. The Walt Disney Company, et al.*, No. 19STCV10974 (Los Angeles County Super. Ct. Apr. 2, 2019); Complaint, *Chen-Oster v. Goldman, Sachs & Co.*, No. 1:10cv6950 (S.D.N.Y. Sept. 16, 2010) (ECF 5); Complaint, *Ellis v. Google, Inc.*, No. CGC-17-561299 (San. Fran. County Super. Ct. Sept. 14, 2017); Complaint, *Jewett v. Oracle America, Inc.*, No. 17-CIV-02669 (San Mateo County Super. Ct. June 16, 2017).

<sup>43</sup> Recommended Decision and Order, *OFCCP v. Oracle*, ALJ No. 2017-OCF-00006 (Sept. 22, 2020).

<sup>44</sup> *U.S. Department of Labor and Hewlett Packard Reach Agreement to Resolve Alleged Pay Discrimination Affecting Female Employees*, U.S. DEP'T OF LABOR (Oct. 26, 2020), <https://www.dol.gov/newsroom/releases/ofccp/ofccp20201026>; *Google LLC, U.S. Department of Labor Settlement Resolves Alleged Pay, Hiring Discrimination at California, Washington State Locations*, U.S. DEP'T OF LABOR (Feb. 1, 2021), <https://www.dol.gov/newsroom/releases/ofccp/ofccp20210201>.

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.
- Consider privileged analyses of broader workplace systems that may impact gender equity. 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 and leveling decisions. In this new era of pay, job, and promotion transparency, focusing on starting pay and leveling rationale is more important than ever. Savvy employers are thinking ahead on how issues ranging from negotiations, to fluctuating labor markets, to acquisitions may impact their compensation systems and pay equity efforts, and are developing reliable and scalable processes for documenting starting pay decisions.
- Develop a thoughtful, prompt, and thorough investigations process. As pay and workplace equity laws and litigation gain traction, so does employee awareness of the issues. It therefore is no surprise that internal complaints and inquiries by employees about their pay and opportunity access are on the rise. To ensure employees are paid and treated 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 decisionmakers. Ensuring pay decisionmakers 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.
- Examine structural barriers to attraction, retention, and participation. Flexible working policies and generous family leave policies may help promote workplace equity for women, and at the same time, help companies get ahead in the war on talent in a labor market that is increasingly clamoring for flexibility and better work/life balance.

#### **IV. Conclusion**

The global COVID-19 pandemic has brought an ever-changing array of challenges to employers and employees alike, and the post-pandemic era is likely to be no different. For employers looking to attract top talent while mitigating legal risk, gender equity must remain a top priority. Taking the time to adopt best practices, including proactive audits and robust training programs, not only positions employers to

come out ahead in the war for talent, but also to shape and ensure a more equitable workplace in the post-pandemic world.