



# The Equal Pay Act: *Updates, Trends, and Tips for Managing Enforcement and Litigation Risk*

April 29, 2021

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## Topics for Discussion

### Fundamentals of Equal Pay Act

- Defining key terms

### Updates and Trends

- Legislative developments
- Litigation developments
- Observations on enforcement

### Tips for Managing Enforcement and Litigation Risk

- Proactive assessments
- Best practice considerations

### FAQs and Q&A

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## The Equal Pay Act

Prohibits sex-based wage discrimination between women and men in the same establishment who perform jobs that require substantially equal skill, effort, and responsibilities under similar working conditions, *with exceptions*.

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## Relevance of Pay Equity

- Data showing pay disparity between women and men
  - More pronounced with respect to women of color
  - Data accounting for disparities
- Observable within higher education



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## Equal Pay Act – Elements

- Sex-Based
- Wage
- Substantially equal skill, effort, and responsibilities



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## Equal Pay Act – Elements

- In the same establishment
- Under similar working conditions



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## Equal Pay Act – Exceptions

Employee makes *prima facie* case



Employer must demonstrate that a difference in pay resulted from a recognized exception

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## Equal Pay Act – Exceptions

1. A Seniority System
2. A Merit System
3. A System which Measures Earnings by Quantity or Quality of Production
4. A Differential Based on any Factor Other Than Sex

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## Equal Pay Act – Exceptions

- Issue of new employees' starting salaries
  - Raise up veteran employees doing equal work
  - Show new employee's different skill



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## Equal Pay Act – Litigation

- No requirement to exhaust administrative remedies
  - A complainant can submit an EEOC charge or file a complaint
- Standalone claim or one of multiple claims
- Single plaintiff or group of plaintiffs ("Collective Action")

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## Equal Pay Act – Litigation

- Statute of Limitations
  - 2 Years from Date of Unlawful Compensation Practice
  - 3 Years if Willful

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## Equal Pay Act – Litigation

- Damages
  - Amount of wages employee was underpaid
  - Additional liquidated damages equal to unpaid wages
  - Reasonable attorneys' fees and costs

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## Updates and Trends – Legislative Developments

- Paycheck Fairness Act – House passed on April 15, 2021 (again)
  - Narrows scope of fourth, catch-all affirmative defense of “any factor other than sex.”
  - Bans use of salary history in hiring and setting wages
  - Requires employers to report pay data
  - Broadens protections for workers discussing their wages
  - Expands possible damages in civil action

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## State Equal Pay Laws

- First Wave, approximately 2016
- Safe Harbor
- States laws can differ in significant ways



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## Updates and Trends – Litigation Developments, Generally

*Rizo v. Yovino* (9th Cir. 2020)

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## Updates and Trends – Higher Education



- *Freyd v. University of Oregon* (9th Cir. 2021)
- *Miller v. Sam Houston State University* (5th Cir. 2021)
- *Kellogg v. Ball State University* (7th Cir. 2021)

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## Updates and Trends – Enforcement

- For federal contractors, equal pay has been a focus of OFCCP investigations for years.
- OFCCP Directive 2018-05 guides methodology.
  - OFCCP uses “pay analysis groups” of similarly situated employees.
  - Favors statistical multiple regression analyses.



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## Updates and Trends – Enforcement

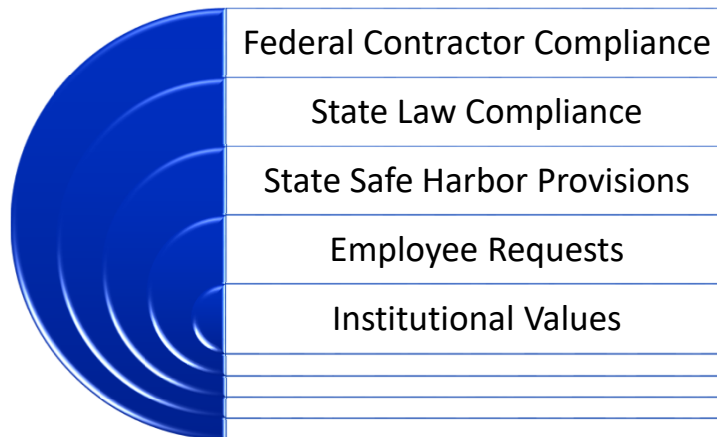
- OFCCP has mixed track record on equal pay investigations.
- Recent notable settlements FY 2020:
  - Princeton University: 106 female professors. \$925,000 backpay. Females across disciplines compared.
  - U of Connecticut: 7 female academic and non-academic employees. \$249,000 backpay. 3 positions.
  - Yale Medical: 4 female professors out of 16,000 employees reviewed. \$87,500 backpay.



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## Managing Risk – Reasons for Proactive Assessments



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## Managing Risk – Considerations for Proactive Assessments



Self audit considerations:

1. Should we?
2. Protect with attorney client privilege.
3. Regression analysis isn't necessary.
4. Act on the results.
5. Document reasons for legitimate differences.

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## Managing Risk – Proactive Assessments

- Plan ahead for:
  - Next steps following findings
  - Communication with stakeholders and community regarding next steps



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## Managing Risk – Best Practice Considerations



- Policies and Practices
- Data Development and Maintenance

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## Frequently Asked Questions

- Cost vs. Benefit of Proactive Pay Equity Studies
- Role of Pay Equity Studies in DE&I Initiatives



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## Questions?



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## Further Reading

- Brittney L. Denley, Rachel Pereira, Ryan P. Poscablo, Erin Gasparka, and Fatima Stone, *Equal Pay for Equal Work: the Current State of the Equal Pay Act and How Various States are Demanding Pay Equity* (NACUA CLE Materials, April 2019)
- David J. McAllister, Meredith Ainbinder, and Arielle B. Kristan, *From the Field to the Faculty Lounge: Understanding and Closing the Pay Gap* (NACUA CLE Materials, May 2020)

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