



Equal Pay Claims: Prevention, Investigation, and Litigation

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Goals

- Practical Audit and Investigation Tips
- Significant Recent Equal Pay Act Developments and Practical Application
- Participant Questions



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Practical Tips for Planning, Managing, and Surviving Pay Audits

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Considerations

- Voluntary or Involuntary?
- Under Privilege?
- What are your goals?

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Administrative Agency Audits

- OFCCP
 - Compliance audits to review disparities based on sex, race, or ethnicity
 - Focus may be incredibly broad
- EEOC
 - Protects against disparities based on sex
 - Equal Pay Act Claims
 - Smaller focus

Tip: Anticipate that investigators may not have a good understanding of higher education.



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Administrative Agency Audits

OFCCP Educational Institutions Technical Assistance Guide:

"[S]ince tenure-track instructors have similar job functions and duties, initial regression analysis can generally assess all tenure-track instructors as a similarly situated employee group."

"Productivity factors such as the quality of teaching, publications, research, and service to the community should be included in the regression analysis only when they can be objectively and neutrally measured."

<https://www.dol.gov/sites/dolgov/files/ofccp/CAGuides/files/OFCCP-EI-TAG.pdf>

Tips: Help investigators understand your institution and why broad categories will not work.

Complete thorough, regular performance evaluations that discuss all factors taken into consideration when setting pay.



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Administrative Agency Audits

- Settle in for a long haul
- Negotiate scope and window of review
- Be prepared to compromise



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Voluntary Audits

- Do you understand what you are getting into?
- Could your results be used against you?
- How transparent will you be?
- Are you prepared to manage administration expectations?



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Sharing Audit Results and Remedial Actions

- Communications
 - How widely will you share?
 - What tone will you take?
- Remediation
 - Retroactive?
 - Fix all at once or incrementally?



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Complaints

- How to handle informal employee complaints
 - Not all complaints will lead to an audit (nor should they)
 - Have a process in place that gives employees a way to pursue their claims internally and outside of their department
 - Well-developed criteria used to determine compensation will put you in a good place to discuss issues



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Recent Legal Developments of Note

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Positions Subject to Comparison

- EPA requires that comparators perform “substantially equal work”
- More recent state pay equity laws contain broader definitions
 - “substantially similar work” or “similarly employed” (Alabama, New Jersey, Washington)
 - “comparable work” or “work of comparable character” (Maryland, Massachusetts, Oregon)
- Many cases turn on whether a plaintiff can establish a proper comparator

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Salary History as Affirmative Defense

- Circuit court split on whether salary history constitutes a legitimate justification for wage disparity under EPA—i.e., dispute as to whether pay history qualifies as “any other factor other than sex”
- Seventh Circuit: salary history is a factor other than sex
 - “[W]ages at one’s prior employer are a ‘factor other than sex’ and . . . an employer may use them to set pay consistently with the EPA. *Wernsing v. Ill. Dep’t of Hum. Servs.*, 427 F.3d 466, 468 (7th Cir. 2005).
- Eighth Circuit: case-by-case analysis of whether salary history can be a factor other than sex
 - Courts must conduct a case-by-case analysis to ensure the prior pay history relied upon is not based on gender bias. *Taylor v. White*, 321 F.3d 710, 717–20 (8th Cir. 2003).
- Tenth and Eleventh Circuits: salary history may constitute an affirmative defense if considered in combination with other factors
 - The EPA “precludes an employer from relying solely upon a prior salary to justify pay disparity.” *Riser v. QEP Energy*, 776 F.3d 1191, 1199 (10th Cir. 2015).
 - “[I]f prior salary alone were a justification, the exception would swallow up the rule and inequality in pay among genders would be perpetuated.” *Irby v. Bittick*, 44 F.3d 949, 955 (11th Cir. 1995).



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Salary History as Affirmative Defense

- Ninth Circuit’s decision in *Rizo v. Yovino*:
 - Holding/Rationale:
 - Reversed prior 1982 Ninth Circuit decision (*Kouba v. Allstate Ins. Co.*, 691 F.2d 873) which had held that prior pay can qualify as an affirmative defense if considered in combination with other factors
 - Held that prior rate of pay does not qualify as “any other factor other than sex”
 - Only job-related factors can serve as an affirmative defense to an EPA claim
 - “[T]he history of pervasive wage discrimination in the American workforce prevents prior pay from satisfying the employer’s burden to show that sex played no role in wage disparities between employees of the opposite sex.”
 - “[P]rior pay itself is not a factor related to the work an employee is currently performing, nor is it probative of whether sex played any role in establishing an employee’s pay.”
 - Timeline:
 - Originally issued decision en banc in 2018 (887 F.3d 453)
 - Supreme Court vacated and remanded on technicality—authoring judge had died before the decision was published (139 S. Ct. 706)
 - On remand in February 2020, the Ninth Circuit ruled the same way (950 F.3d 1217)
 - Supreme Court denied cert petition on July 2, 2020 (No. 19-1176)



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Salary History Bans Are Trending

- Federal Paycheck Fairness Act
 - Would narrow the “factor other than sex” affirmative defense to a job-related factor (i.e., education, training, or experience)
 - Passed in the House in April 2021
- State and localities have adopted laws or ordinances that restrict an employer’s ability to request or rely on salary history information from job applicants
- Stated purpose of bans: to end the cycle of pay discrimination
- Increasing number of states and local governments have adopted such prohibitions
- Currently in about 20 states and 20 localities



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Types of Salary History Bans

- Some prohibit questions about past compensation until after an offer of employment has been made
- Some only prohibit employers from requesting salary history information from job applicants
- Others prohibit employers from relying on pay history in setting compensation if discovered or volunteered
- In Massachusetts, previous pay cannot be used as a defense to a pay discrimination claim
- Some laws require employers to provide applicants pay scale/range information either in the job posting or upon request
- The majority use the term “applicants”
- Only a few carve out employees seeking an internal transfer or promotion
- Some explicitly allow discussions about an applicant’s pay expectations



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Bans on Salary History Bans

- Two states have prohibited localities from adopting salary history bans
 - Michigan
 - Wisconsin



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Questions

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