On February 1st, the EEOC announced it would begin requiring employers to submit information on employee wages and work hours broken down by gender, race and EEO-1 category as part of its annual EEO-1 reporting process. For the first time, the EEOC (and the OFCCP) will have nationwide data on employee pay to help identify employers who may be unwittingly contributing to the wage gap by paying women less than men for the same type of work without a legitimate business reason for doing so, or by steering women into lower paying positions. There is no doubt this will lead to an increase in class-based investigations by EEOC under Title VII and the Equal Pay Act.

But the EEOC is not the only one looking closely at equal pay issues. Indeed, the EEOC’s announcement comes at a time when the nation is experiencing a heightened awareness of equal pay issues. National celebrities like Patricia Arquette are speaking out on the issue sparking a public debate across social media – when Twitter is afire with equal pay discussions, it is safe to call it a national conversation.

The private plaintiffs’ bar has also been paying attention to compensation issues, as the federal government and some states has implemented new rules making it easier to establish claims of pay discrimination. The strictest of these new laws, California’s Fair Pay Act, took effect on January 1. Under this Act, employees in California are no longer required to show they were paid less than a member of the opposite sex for “equal” work in the same establishment – they can now make a prima facie case under state law based on colleagues doing “substantially similar” work, regardless of location.
New York also amended its equal pay laws in January, making it easier for employees in that state to sue their employers for pay discrimination. In several other states, changes to equal pay laws have recently been enacted or are currently being considered, including Connecticut, Colorado, Delaware, Illinois, Massachusetts, North Dakota, Oregon, and Washington.

Adding fuel to the fire of employee awareness, many of these new laws include “pay transparency” requirements that make it unlawful to take adverse action against employees for asking about or talking with colleagues about compensation.

The increased attention to equal pay has already resulted in an uptick in complaints filed by private class-action plaintiffs’ law firms. In many cases, pay discrimination may be an attractive “tack on” claim for plaintiffs to include in a complaint alleging another type of discrimination, or even in a class or collective wage-and-hour action.

One thing that makes pay claims particularly attractive for plaintiffs is the availability of data. All employers are required to keep copious pay records. To a private plaintiff law firm, for every one person who walks in the door alleging pay discrimination, there may be dozens or even hundreds of other potential clients identifiable in the employer’s data.

The EEOC may have just made the task of finding those other potential claims easier. Now that (it appears) employers will be required by EEOC to prepare annual reports on employee pay, they should anticipate private plaintiffs’ lawyers will be seeking to obtain copies of those reports and analyzing them for class-based claims of pay discrimination.

So, What Should Employers Do Now?

In the wake of the increased enforcement of equal pay laws on both the federal and state level, all employers should be reviewing their pay policies and practices to ensure they comply with current law and are not creating risk for the company.

Employers should also periodically analyze their pay data with the help of qualified statisticians or other experts. Moreover, it is now more important than ever that these analyses be conducted under the attorney-client privilege – the EEOC and private plaintiffs’ lawyers are going to ask for copies of pay analyses, and there is nothing worse than having the results of your own analysis used against you.

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