



#### **Meredith Gregston**

Senior Attorney, Hunton Andrews Kurth LLP March 21, 2023

## **OFCCP Making Headlines**



- Acting Director Michelle Hodge (April 2023)
- II. Scheduling Letter
- III. Compensation, compensation, compensation
  - a. Component 2 pay data
  - b. Updated regulations
  - c. EEOC charges
- IV. Modernizing AAP regs
- V. Updated Vets form (implement by 7/25/23)





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## **Program Agenda**



- Federal Law
- II. History of Law
- III. Protected Classes
- IV. Compensation
- V. Justifications & Affirmative Defenses
- VI. Data Reporting
- VII. Compensation Audit

#### Federal Law - The Foundation



#### Equal Pay Act of 1963

Employers cannot discriminate on the basis of sex by paying lower wages
when an employee performs equal work on jobs the performance of which
requires <u>equal</u> skill, effort, and responsibility, and which are performed
under similar working conditions within the same establishment.

#### Title VII of the Civil Rights Act of 1964

 Prohibits employers from discriminating against employees on the basis of race, color, religion, sex (including pregnancy and sexual orientation), and national origin including to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment.

## That Was Largely It\*



### That was, until around 2016

#### Then COVID

- Unadjusted pay gap actually got WORSE
- In 2021 84 cents
- In 2022 -- 82 cents

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### What has really changed?

Landscape much more complex

<sup>\*</sup> Unless you are a federal contractor

## **Keep In Mind**



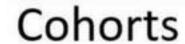
- Title VII and its state counterparts address intentional discrimination.
- The EPA and state counterparts do not require a finding of discriminatory intent.
- While the laws are similar and share a common purpose, the details can make a difference for exposure.



## Common Goal, Different Approaches









Justification

Transparency



#### **Protected Classes**



#### Equal Pay Act – sex

**Title VII** – sex (including pregnancy), sexual orientation, race, color, religion, national origin

#### State laws – vary

- CA sex, race, ethnicity (but note CA defines sex as male, female, and nonbinary)
- OR gender, race, color, religion, sex, sexual orientation, national origin, marital status, veteran status, disability or age
- NY age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, familial status, marital status, or domestic violence victim status
- Other states to watch for: AL, IL, IA, MD, NJ,
   OH

## Why This Matters



#### First determine the parameters of your audit

- Sex, race, age?
- What about ethnicity, religion, disability, sexual orientation?
- Non-binary?

#### Guidance of data collection on non-binary employees is emerging

- In 2019, the EEOC FAQs for completing the EEO-1 instructed employers to use the comment box to report data for non-binary employees. (No longer active.)
- In 2020, CA pay data reporting guide requires that non-binary employees be reported in the same manner as male and female employees.
- In 2020, OFCCP FAQs indicated employers may exclude data for nonbinary employees from the gender-based analysis.

## **Comparators & Cohorts**



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Under the EPA, an employee must show that the jobs being compared – not the individuals who hold them – are "substantially equal"

#### States have different ideas:

- Equal work AL, CT, DE, FL, GA, HI, IN, IA, KS, NM, MN, NE, NV, NH, NM, OH, PA, RI, VT, VA, WY
- Equivalent / similar work MT, WA
- Same work AZ, IL, MD
- Substantially similar work CA, CO, IL, NY, MA, NJ, OR
- Comparable work AK, ID, KY, ME, MD, MO, ND, OK, OR, PR, SD, TN, WV



#### What Does This Mean?



When facing a lawsuit, these are nuanced differences.

### Key concepts:

- Jobs do not have to be identical
- But at their core be similar
- Look at skill, effort and responsibility, and conducted under similar working conditions

When conducting an analysis or audit, look at groupings that make sense for your organization

- Job titles, families, or levels
- May need further refinement based on job requirements
- Want appropriate comparators with good sample sizes

## Substantially Equal



Full professors in university psychology department all conducted research, taught classes, advised students and actively served on university committees.

 Differences in the classes taught, number or types of students they supervised, or centers managed did not change this

## But are they?

Not all professors are interchangeable "like widgets"

 Differences in departments, courses taught, types of students supervised were important distinctions

## **Not Substantially Equal**



- Employee's male replacement did not perform substantially similar work as right before he was hired, the position was restructured and required new skills the employee did not have.
- Contract manager positions not substantially equal where dollar value and number of tasks orders were different.
- Delegation of some duties or temporarily filling a higher level position do not create comparable jobs.

## Compensation





Wages



Broader compensation

Wages, equity, benefits, other remunerations (such as bonus payment or overtime)



Reporting obligations have different terms

Which box?
Annual or annualized pay?
What does that tell us?



### **Justifications & Affirmative Defenses**



#### Under the EPA:

- Seniority system
- Merit system
- System that measures earnings by quantity or quality of production
- Any other factor other than sex

### Keep in mind – the justification:

- Must actually motivate the decision
- Must account for the entire differential
- Can be rebutted

### **Justifications & Affirmative Defenses**



#### Most state laws mirror federal law

 Examples of other permissible factors – shift, geography, training, travel, existence of lifting or movement restrictions

New trend – limit the scope of the "bona fide factor other than sex"

- Permit employee to show the existence of an alternate practice that would not create a disparity
- For example: New York, California

New trend – eliminate catchall "bona fide factor other than sex"

For example: Colorado, Massachusetts

## **Safe Harbors**

## **Compensation Audits**



### Safe Harbors

- Massachusetts
  - Affirmative defense
  - No liquidated damages
- Oregon
  - No compensatory or punitive damages
- Colorado
  - No liquidated damages
- Puerto Rico
  - No liquidated damages
- Rhode Island
  - Affirmative defense
  - No liquidated/compensatory damages, or civil penalties after 2026

## Pay Transparency & Data Reporting

### - A New Focus



Employers cannot demand pay confidentiality! But many state laws take it further:

- Employers must make pay scale available on request
  - CA, CT, MD, NV, RI, WA, Cincinnati, Ohio
- Employers must make pay scale available without request
  - CT, CO, Toledo, Ohio
- Employers must post pay ranges on job postings
  - CA, Ithaca, NY; Westchester Co., NY; New York City; NY; Jersey City, NJ; CO, WA

## **Data Reporting And Compensation Audits**



### Required Data Reporting

- California 2021, amended 2023
  - Sort employee information by race, ethnicity, and sex
- Washington, D.C. 1977
  - EEO-1 pay data submitted to EEOC must be submitted to D.C. Office of Human Rights
- Illinois Register by March 2024
  - Equal Pay Certificate; recertify every two years
  - EEO-1 pay data submitted to EEOC must be submitted with application
- Minnesota (state contractors)
  - Equal Pay Certificate
- EEO-1 Redux?

# **Key Takeaways**

## **Key Takeaways**





Understand State and Local Laws

Possibly the wave of the future

The best offense is a good defense

- Understand your job structure
- Conduct a privileged internal audit on your terms
- Evaluate your pay and performance review practices

Address issues promptly

- Individual complaints
- Red flags from audits

#### **Presenter Contact**





Meredith Gregston, Senior Attorney

mgregston@huntonak.com

(512) 567-5368

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#### **Additional Resources**



### **Hunton Employment & Labor Perspectives Blog:**

Analysis and Development in Employment & Labor Issues

https://www.huntonlaborblog.com/



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