

Equal Pay for Equal Work: Not Just a Goal Anymore

By English Bryant

Although equal pay laws have been in place for decades, the nationwide statistics show that women are still earning less than men. As a result, employers continue to face claims from women who are not receiving the same pay as their male counterparts.

The most recent data released by the Bureau of Labor Statistics in August 2010 indicates that women with full-time salaries or payroll jobs (excluding the self-employed) are making only 81 percent of the median salary of their male counterparts.

There is brighter news for women, however. Recent statistics show the unemployment rates over the past two years have increased less for women than for men. With regard to pay disparities, the gap continues to get smaller each year. Since the 1960s, women's salaries have continued to rise, from 62 to 80 percent of men's earnings. Current statistics show the younger the workers, the closer the gap. Women between the ages of 16 to 24 earned 96 percent of the median male salary in their age group; women between the ages of 25 to 34 earned 89 percent. The largest gender pay gap remains with workers over 35 years old.

In light of the continuing pay disparities, it is not surprising that women have turned to litigation to enforce their rights to equal pay. In many cases, federal courts have allowed pay discrimination claims to proceed as nationwide class actions. And Congress, in an effort to more quickly close the pay gap, has proposed legislation to make it easier to pursue equal pay claims as class actions. Employers are taking note of these trends and taking steps to ensure that equal pay becomes a reality in the workplace.

In 1963, the Equal Pay Act was passed as an amendment to the Fair Labor Standards Act. The Act prohibits employers from discriminating on the basis of sex in paying wages to employees for equal work on jobs requiring equivalent skill, effort and responsibility under similar working conditions.

The Equal Pay Act is a strict liability statute — there is no intent requirement within the statutory language. Liability under the Act is established by meeting the elements of the prima facie case, regardless of the intentions of the employer. Even a simple mistake by an employer is enough to establish liability, as the Equal Pay Act does not require any showing of intentional discrimination. The employer may only avoid liability by proving the existence of one of four statutory affirmative defenses: a seniority system; a merit system; a system that measures earnings by quantity or quality of production; or any other factor other than sex.

Under the Equal Pay Act, if factors other than sex justify the wage differential, no violation has occurred. However, the affirmative defenses are far from absolute, and the fourth defense is not intended to be a device to circumvent the requirements of the Act. Factors justifying wage differentials may include differences in education levels that are relevant to the performance of the job, effort level and attitude. Not surprisingly, this defense has produced a mix of case law as to what qualifies as "any other factor other than sex." It has also prompted proposed amendments to the Act.

An employer who violates the Equal Pay Act is liable for unpaid back wages of up to three years. For willful violations, the plaintiff may also, at the discretion of the court, recover liquidated damages in an amount equal to the back pay award.

In 1964, one year after the Equal Pay Act was enacted, Congress passed Title VII of the Civil Rights Act. Title VII goes beyond ensuring equal pay for women by barring discrimination in all aspects of employment (hiring, promotion, termination) and broadly prohibits discrimination on other bases, including race, color, religion and national origin. It also prohibits discrimination against an individual because of his or her association with someone of a particular race, color, religion, sex or national origin. Unlike the Equal Pay Act, Title VII requires plaintiffs to first exhaust their administrative remedies with the Equal Employment Opportunity Commission or similar state agency before filing suit.

Under Title VII, once the plaintiff establishes a prima facie case, the defendant employer must articulate a legitimate, non-discriminatory reason for its action. Then the plaintiff must demonstrate that the purported reason was a pretext for discrimination. The ultimate burden of proving intentional discrimination remains, at all times, with the plaintiff.

In very narrowly defined situations, an employer may be permitted to discriminate on a protected basis, where the protected basis is a "bona fide occupational qualification" reasonably necessary to the normal operation of that particular business or enterprise. For example, a nightclub may choose to hire only female attendants for the women's restrooms. This defense is quite limited.

In 2009, President Barack Obama signed the Lilly Ledbetter Fair Pay

Act, reversing the decision of the U.S. Supreme Court in *Ledbetter v. Goodyear Tire & Rubber Co.*, which had narrowed the statute of limitations for disparate pay claims under Title VII.

The Ledbetter Act effectively restarts the statute of limitations, with the issuance of each paycheck, for Title VII disparate pay claims. Thus, a plaintiff may prove that present compensation is lower because of discrimination that occurred long ago. The plaintiff may recover back pay under Title VII for up to two years preceding the filing of the charge with the EEOC.

In Title VII cases, courts generally award back pay, consisting of the wages, salary and fringe benefits the plaintiff would have earned but for the discrimination. Courts may also award other compensatory damages and punitive damages in disparate treatment cases, as permitted by the 1991 amendments to Title VII. The statute specifically limits the amounts of such damages, depending on the size of the employer. Prevailing plaintiffs are typically awarded reasonable attorneys' fees and court costs.

Earlier this year, in *Dukes v. Wal-Mart*, the 9th U.S. Circuit Court of Appeals allowed certification of a huge unprecedented class alleging disparate pay based on gender under Title VII. The 9th Circuit's decision broke from the majority of circuits by certifying such a large class of women with diverse positions within the company. As a result, the decision has been subject to much criticism from the legal community and other courts. Wal-Mart has sought review from the U.S. Supreme Court. If the case is upheld, the class would potentially cover 1.5 million female employees, ranging from part-time hourly employees to full-time salaried management.

Currently, the Paycheck Fairness Act is pending in Congress, as a proposed amendment to the Equal Pay Act. This Act would limit the available defenses under the Equal Pay Act; automatically include class members unless they opt-out; and remove the limitations on damages.

While the Equal Pay Act allows employers to show that pay disparities are due to "any other factor than sex," the proposed Paycheck Fairness Act would eliminate this broad defense, allowing employers only to argue a "bona fide factor" defense, necessitated by their business. Bona fide factors would be education; training; and experience. In addition, women would be allowed to compare wages with men not just within the same facility, but within the same county or similar political subdivision. The



proposed PFA also would allow any pay discrimination claim based on gender to be maintained as a class action; and individuals could be joined as plaintiffs without their written consent. Employers also would be liable for unlimited punitive damages as well as compensatory damages.

The Paycheck Fairness Act was proposed due to the slow achievement of the goals of the Equal Pay Act. Proponents of the Paycheck Fairness Act suggest that the court's narrow interpretations of the Equal Pay Act have stagnated the closing of the pay differential between sexes. Those opposed to the Paycheck Fairness Act categorize the act as an overzealous approach to paycheck disparities that might, with closer examination, be reasonably explained. The Department of Labor has noted that women frequently choose more family-friendly work environments, with better insurance and leave benefits, and the offset is generally lower pay.

The House passed the Paycheck Fairness Act in January 2009; action by the Senate is pending.



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Letter to the Editor

Lateral Hiring Is An Art Form

In reference to the article "Law Firms Wary of Lateral Hires," (Oct. 1) I have the following observations. I think it would be in the interest of prospective laterals to accurately understand the market and if any, such changes in process.

Since the recession, firms have not demanded increased books of business from laterals. To clarify, for at least the past five years, Am Law 200 firms have not commonly been receptive to \$1 million practices. Typical business guidelines for top tier Am Law 100 firms have been in the \$3 million range. For Am Law 200 firms, the bar begins at approximately \$1.5 million to \$2 million.

The fact the bar is at these levels has nothing to do with "most managing partners not expecting to get the exact amount of business a candidate estimates." Firms have not "doubled" the amount of required business to ensure "raising the bar ensures a higher quality candidate will walk through the door."

Law firms have been constantly refining how best to determine the nature and viability of a laterals practice and potential portability of said practice. That practice involves many factors including; analyzing historical practice metrics, understanding partners' relationships with clients and identifying risk factors of portability versus income expectations among others. Through time and experience firms have become better versed at this analysis.

Since the recession, firms have become more strategic in their lateral hiring. Firms have determined strategic practice fit, client synergy and expertise to be stronger indicators to long term success and integration of a lateral partners practice. As a result, most firms have become less interested in "field of vision" opportunities.

As stated in the article, one cannot "take a book of business." All clients are those of the firm, not any one partner. If a partner leaves a firm,

the clients are able to select counsel. In many cases, works in progress may travel with a partner or be co-counseled with a departed partner and their former firm if so expressed and desired by the client.

While lawsuits can arise, it generally involves inappropriate solicitation and not "a former employer accusing one of taking a book of business which is not theirs to take."

Last, a firm's request for three years of tax returns is not remotely in determining whether a lateral partner may overstate their book of business. Diligence gained in assessing tax returns is to verify historical income. While income can correlate to levels of productivity and book of business, verification of income is not in and of itself explanatory of the portability of one's practice.

The art of lateral partner hiring is exactly that — an art, not a science. Lateral partner hiring continues to advance as firms become more experienced. While the recession has certainly served as a wake-up call to many firms in terms of due diligence and internal strategic fit, much of the quotes within the article are inaccurate and do not accurately reflect the current state of the lateral market and how law firms analyze their process.

Despite the downturn in the economy, my firm's performance has increased, not decreased with the number of lateral partner hires. Our productivity and history is perhaps greater than that of any 5+ search firms placing partner level attorneys. Within that process we work closely with firms and partner candidates to ensure proper fit and to help ascertain important factors within the due diligence process. I believe I am in a position to speak authoritatively as to the subject matter.

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