

# EMPLOYMENT LAW UPDATE

Health, Benefits and Compliance Conference

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#METOO BRINGS PAY  
EQUITY TO THE HEADLINES

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## IN THE HEADLINES



“The pay gap between Mark Wahlberg and Michelle Williams is shocking — and business as usual.”

Boston Globe , January 11, 2018

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# LEGAL LANDSCAPE

Both federal and state laws govern issues related to pay equity

- **Federal**

- Title VII: Prohibits discrimination based on sex. Where the claim is based on alleged disparate pay, the analysis follows the Equal Pay Act.
- Equal Pay Act: prohibits paying an employee a lower wage than paid to employees of the opposite sex for “equal work” on jobs the performance of which requires “equal skill, effort, and responsibility, and which are performed under similar working conditions,” except where such payment is made pursuant to:  
  
(1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) a differential based on any ... factor other than sex ....”

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# FEDERAL PROTECTIONS

What constitutes a “factor other than sex” has been the subject of significant litigation, with varying results across the country.

- Most courts have held that the factor must be “**business-related**.” Two common defenses are:
  - A situation where a proposed male comparator negotiates a higher salary; or
  - A situation where an employee’s salary offer is based on her salary at her prior employer.
- Both situations, although facially non-discriminatory, can perpetuate the pay gap.
  - *Rizo v. Yovino* (9th Cir, 2018): The employer’s policy had a salary scale, which added 5% to any newly-hired employee’s previous salary. This was not a factor other than sex because it tended to “perpetuate rather than eliminate the pervasive discrimination at which the EPA was aimed.”
  - The courts are divided on this issue.

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# STATE LAW PROTECTIONS

- **State**
- Since #MeToo, several states have added or increased protection against pay discrimination.
- In addition, “ban the box” type legislation has passed in several states and municipalities.
  - In October 2017, California passed a law banning employers from seeking salary history information about an applicant, either personally or through an intermediary. Employers are also required to provide applicants with a pay scale for the relevant position upon request.
  - New York City, Philadelphia, Delaware, Puerto Rico, Oregon and Massachusetts have adopted similar laws.
  - In Michigan, the legislature took the opposite approach. In March 2018, Gov. Snyder signed a bill forbidding local governments from limiting the questions businesses can ask during job interviews

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# UNINTENTIONAL PAY DISPARITY

Most employers do not intend to discriminate in setting or increasing compensation. However, pay disparity frequently occurs unintentionally.

- Hiring and initial compensation setting:
  - According to a recent Glassdoor survey, women negotiate less than their male counterparts. 68% of women accepted the salary they were offered and did not negotiate, compared to men who did so only 52% of the time.
  - One reason is that women fear being viewed as “too aggressive” or “greedy.”

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# UNINTENTIONAL PAY DISPARITY

- Staffing “big” clients, projects, teams, accounts, etc.
  - One study of stock brokerage agencies concluded that “gender differences in management’s discretionary assignments of sales opportunities, and not in sales capacities, account for the gender pay gap at the agencies.”
  - Women with children are sometimes seen as “less reliable” or “too busy” and not given the opportunity to work on important projects.
  - As we saw earlier, women are also statistically more likely to take time away from work, or work reduced hours to care for children or other family members.
    - These women are sometimes less likely to ask for more responsibility because they are “grateful” for the flexibility they feel they have.

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## UNINTENTIONAL PAY DISPARITY CONT.

- Pay raises:
  - According to new research by benefits management software firm Zenefits, 62% of men compared with 41% of women reported feeling comfortable asking for a pay raise.
- Bonus and other discretionary compensation awards:
  - In March 2018, media giant Discovery reported that the proportion of its male and female employees receiving bonus payments is almost the same – 88% of women and 87.8% for men – but the size of those bonuses is 49% larger for men on average.
  - A 2015 study by the World Economic Forum showed that female executives receive a lower share of incentive pay in total compensation relative to males.

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# TOOLS TO USE

## 1. Conduct An Internal Pay Audit

### Initial Considerations

- Gather data.
  - Group together similar jobs, even across departments
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- Review your data
  - What's at the root of any pay differential?
  - Take action, as necessary

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# REVIEW COMPENSATION AND ADVANCEMENT POLICIES, PROCEDURES AND PRACTICES

If you find pay disparities, consider:

- How are decision makers held accountable for complying with applicable policies and guidelines with respect to compensation and advancement?
- Is there sufficient documentation to record the reasons for pay decisions, including where those decisions may deviate (legitimately) from expectations?
- Is there an opportunity to look beyond the employee's performance ratings, numbers, etc. to determine whether she has been given opportunities that are on par with similarly situated male employees.

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# REVIEW COMPENSATION AND ADVANCEMENT POLICIES, PROCEDURES AND PRACTICES CONT.

- Should guidelines or policies be adopted?
  - The guidelines can be flexible, but consistency is the goal,
  - Pay decisions should be documented, particularly when they are outside the norm.
- Consider whether:
  - Guidelines and/or actual pay information will be made available to all employees;
  - Compensation or advancement decisions should be subject to a second (or second level) review.

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# TOOLS TO USE CONTINUED

## 2. Evaluate Recruiting Practices

- Consider setting guidelines for starting pay.

## 3. Update Job Descriptions and Performance Evaluations

- Job descriptions can provide the foundation for demonstrating that certain jobs are comparable or should be differentiated for compensation purposes.

## 4. Review Leave and Return to Work Practices

- How are women treated when they return from maternity leave with respect to work allocation, performance expectations, etc.?

## 5. Train Managers

- Training to get rid of unconscious bias among managers.

# ARBITRATION AGREEMENTS

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# SUPREME COURT UPHOLDS CLASS ACTION WAIVERS

*Epic Systems Corp. v. Lewis,*

The US Supreme Court held that employment agreements that require employees to individually arbitrate disputes do not violate the National Labor Relations Act.

Practical Impact?

- By signing an arbitration agreement, employees thereby agree to arbitrate any employment disputes instead of proceeding with protracted and expensive litigation.
- Arbitration Agreements which contain a waiver of an employee's right to join or to participate in a collective or class action will also be upheld. Employees' claims would proceed on an individual basis in arbitration.

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# ARE ARBITRATION AGREEMENTS RIGHT FOR MY COMPANY?

## **Arbitration Pros:**

- No Juries
- Expense
- Privacy
- Efficiency
- Informality
- Early Resolution
- Choice of Arbitrator
- Finality

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# ARE ARBITRATION AGREEMENTS RIGHT FOR MY COMPANY? CONT'D.

## **Arbitration Cons**

- Finality
- Discovery Limitations
- Limited Motion Practice
- Informality
- Injunctive Relief
- Administrative Charges
- “Baby Splitting”

# INDEPENDENT CONTRATORS

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# 2015 GUIDANCE WITHDRAWN

## Wait? Am I an Employee?

- In 2015, the DOL issued an Administrative Interpretation which asserted that lack of control over the worker was not a determining factor for finding independent contractor status. The DOL concluded in the 2015 AI that "most workers are employees under the FLSA's broad definitions."

## June 2017 – About-Face

- The DOL withdrew its 2015 Administrative Interpretation (AI) on independent contracting but did not replace the AI with other guidance, stating only that removal of the AI "does not change the legal responsibilities of employers under the Fair Labor Standards Act."

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## NEW ADMINISTRATIVE INTERPRETATION AND GUIDANCE

Returning to its historical approach, in July 2018 the DOL in the new Field Assistance Bulletin states that it will consider the "totality of the circumstances to evaluate whether an employment relationship exists" and "will evaluate all factors ... to reach appropriate conclusions in each case."

The FAB titled, "Determining Whether Nurse or Caregiver Registries Are Employers of the Caregiver," although focusing on the caregiver registry industry, provides the new administration's first substantive guidance on independent contractor classification.

Overreaching Theme?

Avoid Control.

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# INDEPENDENT CONTRACTOR ANALYSIS

IRS 20 Factor Test.

The July 2018 FAB focuses on:

- Setting the pay rate
- Providing equipment and supplies
- Setting up as a true contractor
  - Obtaining an EIN, comply with state law regarding liability insurance (workers' comp and unemployment insurances)
- Controlling the work
  - Providing training or instructions, evaluating independent contractors' performance, requiring independent contractors to report to the registry instead of the client in the event of shift cancellations, limiting independent contractors' work hours or number of clients, or prohibiting other work

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# INDEPENDENT CONTRACTOR ANALYSIS CONT'D

- Scheduling and assigning work
  - Contractors and clients must determine the schedule and scope of work.
- Conducting background and reference checks
  - Quality measures which do not indicate “employment.”
- Hiring and firing
  - Level of Activity and Involvement

# IMMIGRATION ISSUES

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## IMMIGRATION PRACTICE UNDER THE “BUY AMERICAN HIRE AMERICAN” ORDER

On April 18, 2017, President Trump signed the [Buy American and Hire American Executive Order](#), which seeks to create higher wages and employment rates for U.S. workers and to protect their economic interests by rigorously enforcing and administering our immigration laws.

- **E-Verify Considerations**
- **Enhancing Fraud Detection and Prevention**

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## *IMMIGRATION CONTINUED*

### **Enforcing and Detecting Fraud**

- **DOL Audits/Investigations**
  - **Immigrant and Employee Rights**
  - **Wages and Equal Treatment under the laws**
- **ICE Raids**
- **Agency Sharing of Information**

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*IMMIGRATION CONT'D*

**THE INTERSECTION OF EMPLOYMENT AND IMMIGRATION LAW**

- **Subpoenas, Warrants and Requests for Information**
- **Companies should have a process for dealing with these.**

# THANK YOU

Legal Disclaimer: This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.

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