

New Jersey Enacts Sweeping Equal Pay Law

May 7, 2018

By [Maxine Neuhauser](#) and [Gregory D. Green](#)

On April 24, 2018, New Jersey Governor Phil Murphy signed into law the [Diane B. Allen Equal Pay Act](#) (“Equal Pay Act” or “Law”), which is designed to guarantee pay equity and eliminate discrimination in pay for all employees protected by the New Jersey Law Against Discrimination (“LAD”), not just women. The Law also expands certain reporting obligations of New Jersey public contractors.

With its enactment, this bipartisan legislation has become the country’s strongest pay discrimination law. The Law has broad application and carries the potential for significant exposure.

Substantially Similar Work

The Equal Pay Act, which goes into effect on July 1, 2018, amends the LAD and makes it unlawful for an employer to discriminate against employees who are members of a protected class by paying them “at a rate of compensation, including benefits, which is less than the rate paid by the employer to employees who are not members of the protected class for substantially similar work, when viewed as a composite of skill, effort and responsibility.”

Under the Law, an employer may pay a different rate of compensation to a covered employee only if the employer demonstrates that the differential is made pursuant to a seniority or merit system or the employer demonstrates that:

1. the differential is based on one or more legitimate, bona fide factors other than the characteristics of members of the protected class, such as training, education or experience, or the quantity or quality of production;
2. the factor or factors are not based on, and do not perpetuate a differential in compensation based on, sex or any other characteristic of members of a protected class;
3. each of the factors is applied reasonably;

4. one or more of the factors account for the *entire* wage differential; and
5. the factors are job-related with respect to the position in question and based on a legitimate business necessity, and there are no alternative business practices that would serve the same business purpose without producing the wage differential.

Employers should also be aware of the following:

- Wage rates in *all* of an employer's operations or facilities can be used for determining compensation differentials.
- An employer may not reduce any employee's rate of compensation to remedy a violation of the Law.
- An employer may not require applicants or employees to agree to (i) a limitations period that is shorter than the LAD's two-year statute of limitations or (ii) waive other protections provided by the LAD.

Remedies for Violations

Under the Equal Pay Act, in addition to other remedies provided by the LAD, employers may be liable for triple back-pay damages for up to six years, provided that a violation occurred during the two-year statute of limitations period.

Extended LAD Protections for State Contractors

In addition to their current reporting obligations, effective July 1, 2018, employers that contract with the State or other public bodies will be required to provide a report to the Department of Labor and Workforce Development ("DOL") showing compensation and hours worked by employees categorized by gender, race, ethnicity, and job category, and total compensation. The information is not limited to just those employees employed in connection with the public contract.

The Law mandates that the data be reported on a form to be prepared by the DOL. In addition, data regarding compensation and hours worked must be reported on the form by pay bands, which will also be established by DOL. The information will be retained by the Commissioner of Labor and Workforce Development and made available to the Division of Civil Rights upon request.

What New Jersey Employers Should Do Now

- Review wages and benefits with the assistance of legal counsel to determine whether compensation adjustments may be required to comply with the Law.

- Review job descriptions and pay ranges with the assistance of legal counsel to determine whether adjustments may be required to comply with the law.
- Ensure that recruiters and other human resource professionals are aware of, and receive training on, the Equal Pay Act.
- If you are a government contractor, make sure that you have a system in place to provide the additional employee data that is required by the Law.

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September 21, 2017

California's Proposed "Wage Shaming" Law Is Another Mess

By [Elizabeth J. Boca](#)

In yet another measure to expand the scope of California's equal pay laws, Assembly Bill 1209 proposes an addition to the Labor Code (section 2810.6) requiring larger employers to gather information relating to gender differentials in wages for certain employees. If signed by Governor Brown, section 2810.6 will require employers with more than 500 employees in California to submit this information to the Secretary of State, who will then make it publicly available on the internet. Governor Brown has until October 15, 2017 to sign or veto the bill. As of the date of this Advisory he has not stated his position on the bill.

AB 1209 provides that a gender wage differential does not – in and of itself – constitute a violation of the law, yet it is likely that publication of the required information will create the impression of unequal pay in certain circumstances. This could subject employers to meritless litigation and unwarranted negative publicity, or what some commentators have referred to as "wage shaming." If enacted into law, AB 1209 would require an unprecedented public disclosure of wage-related information and create a variety of potential legal risks and compliance issues. Business organizations, including the California Chamber of Commerce, have strongly opposed the measure.

Current State of Equal Pay Law in California

For decades, under California Labor Code Section 1197.5 (the "California Equal Pay Act" or the "Act"), California employers have been prohibited from paying employees of one gender less than employees of the opposite sex for "equal work" at the same location.

The Act has been amended in several significant ways in recent years. In October 2015, Governor Brown signed Senate Bill 358, which, among other things, requires equal pay for employees who perform "substantially similar work" (versus "equal work") across the entire organization (versus the same location). This was a significant expansion of the scope of the law that appears to be an effort to reintroduce the concept of "comparable worth" into the issue of gender wage equality.

The California Department of Industrial Relations (“DIR”) has published a “Frequently Asked Questions” section on its website which interprets “substantially similar work” as:

work that is mostly similar in skill, effort, responsibility, and performed under similar working conditions. Skill refers to the experience, ability, education, and training required to perform the job. Effort refers to the amount of physical or mental exertion needed to perform the job. Responsibility refers to the degree of accountability or duties required in performing the job. Working conditions has been interpreted to mean the physical surroundings (temperature, fumes, ventilation) and hazards.

The Act recognizes that there are several lawful reasons why wage disparities might exist, including: (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quantity or quality of production; (4) differences in education, training, or experience; and (5) some other bona fide factor other than sex. The employer has the burden of demonstrating that one or more of these factors exist in order to defend a claim of wage gender bias.

In 2017, the Act was again amended to specify that an employee’s prior salary history cannot, by itself, justify any disparity in compensation. The legislature had previously made several attempts to prohibit employers from seeking salary history information about applicants for employment (similar to laws recently passed in New York City and San Francisco). Another bill on its way to the Governor’s desk, AB 168, (AB 168) would prohibit such inquiries.

Collection and Submission Requirements

AB 1209 requires covered employers to analyze and submit the following information to the California Secretary of State every two years:

- (1) the difference between the mean wages of male and female exempt employees by job classification or title;
- (2) the difference between the median wages of male and female exempt employees by job classification or title;
- (3) the difference between the mean wages of male and female board members; and
- (4) the difference between the median wages of male and female board members.

AB 1209 defines “exempt” as including employees within the white collar administrative, professional and executive exemptions. It is unclear whether the statute will apply to other employees who are treated as exempt under California law (e.g., outside sales and computer professionals). AB 1209 would require employers to “categorize” this information pursuant to the California Equal Pay Act, discussed above. It is not entirely clear, but it appears that the intent of this provision is to require employers to analyze wage differentials between jobs that involve “substantially similar work” without the formal job classifications. Obviously, significant administrative efforts would be required

for employers to gather, sort, and calculate the information required by AB 1209 every two years.

Effective Date

If signed by the Governor, covered employers would be required to begin analyzing applicable wage data by July 1, 2019, and would be required to make the first submission of the information to the Secretary of State by July 1, 2020.

What California Employers Should Think About Now

There are many unanswered questions and concerns regarding the application of this potential new law including:

- How should an employer calculate the “wages” of its employees? The DIR’s website even points out the lack of clarity in this term. It states: “[a]lthough the law does not specifically define ‘wage rates,’ it refers to the wages or salary paid, and also other forms of compensation and benefits.”
- Are employers required to include the value of non-wage benefits such as 401(k)’s and health insurance? If so, how should employers take into account employees who have chosen to waive certain benefits?
- Should deferred compensation awarded to an employee be counted in the year it was granted, or in the year it is paid?
- The law does not expressly state the time period for which employers should perform the wage disparity analysis.
- The law does not specify how employers should take into account employees who have chosen to work on a reduced schedule, those who have taken leaves of absence, or those who have worked only part of the calculation period.
- How should employees who transfer from one position to another during the reporting period be handled?
- The law requests information on “female” and “male” employees. How should employers handle transgender employees, those who may have transitioned during a reporting period, and those that do not identify as male or female?

If signed by the Governor, we anticipate that employers will discover many more ambiguities and uncertainties in the law as they implement policies for compliance.

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Massachusetts Attorney General Releases Guidance for Employers on New Pay Equity Law

April 2, 2018

By [Susan Gross Sholinsky](#), [Nancy Gunzenhauser Popper](#), and [Alyssa Muñoz](#)*

The Office of the Massachusetts Attorney General (“AG”) recently issued [an Overview and Frequently Asked Questions](#) document (“Guidance”) for the Massachusetts [Pay Equity Law](#) (“Law”), which will go into effect on July 1, 2018.

The highly anticipated Law, which was the first salary history inquiry ban passed into law in the United States,¹ amends the Massachusetts Equal Pay Act (“MEPA”). The Law clarifies the MEPA by defining “comparable work,” providing a safe harbor for employers that conduct self-evaluations of pay practices, and offers additional protection to employees by prohibiting employers from asking applicants about their salary history.

The Guidance is intended to help employers navigate the Law by providing greater detail on its provisions and various examples in advance of the Law becoming effective. Additionally, the AG’s website will include a [dedicated webpage](#) that supplies (i) an overview of the MEPA, (ii) a pay calculation tool to help employers identify and calculate potential wage gaps between male and female employees, and (iii) access to webinars and events that give employers an opportunity to ask questions about the Law.

Topics Covered in the Guidance

The following topics are addressed by the Guidance (each of these topics will be discussed in greater detail below):

- Which employers and employees are covered under the MEPA
- The definition of “comparable work” and other key terms
- The definition of “wages”

¹ Subsequently, several other salary history inquiry bans have been signed into law, and some have already become effective.

- Permissible variations in pay under the Law
- How the Law restricts discussions of wages
- A prohibition on seeking salary history
- Liability for an employer that violates the MEPA
- An affirmative defense available to employers that conduct self-evaluations

Employers and Employees Covered Under the MEPA

The Guidance confirms that nearly all Massachusetts employers, irrespective of size (including state and municipal employers), are covered under the Law, with a limited exception applying to the federal government. The Law also requires that multistate employers ensure that the employees within the same geographic area within Massachusetts are paid equally for performing comparable work. In addition, if the only employees performing work comparable to the Massachusetts employee are located in a different state, it may be necessary to compare the wages of those employees to make sure that they are paid equally or, if there are disparities, that those disparities are justified under the Law.

As for employees, the MEPA applies to full-time, part-time, seasonal, per-diem, and temporary employees. A limited exception exists for babysitters and other domestic workers, workers under age 18, agricultural workers, and employees of social clubs and similar associations. Additionally, the Law will apply to employees with a primary place of work in Massachusetts, regardless of where the employee lives. For most employees, the primary place of work will be determined by the location where they perform the majority of work for their employer.² This includes employees who travel outside Massachusetts but return regularly between trips, employees who frequently switch locations of work but “spent the plurality of [their] working time” in Massachusetts over the previous year, and employees who telecommute to a Massachusetts worksite.

Definition of “Comparable Work” and Other Key Terms

Under the Law, “comparable work” is defined as work that requires substantially similar skill, effort, and responsibility and is performed under similar working conditions. The Guidance defines “substantially similar” as being “alike to a great or significant extent, but are not necessarily identical or alike in all respects.”

² The Guidance advises that it is not necessary for an employee to spend 50 percent of his or her working time in Massachusetts in order for it to be considered their primary place of work. Additionally, when an employee permanently relocates to Massachusetts, it will be the primary place of work upon the first day of actual work in Massachusetts.

The Guidance also defines several other terms and provides a number of examples for assessing comparable work:

- “Skill” includes such factors as experience, training, education, and ability required to perform the jobs, but it must be measured according to the requirements of the job, not the skills that an employee happens to possess.
- “Effort” refers to the amount of physical or mental exertion needed to perform a job and should take into account job factors that cause or alleviate mental fatigue and stress.
- “Responsibility” considers the degree of discretion or accountability, as well as duties regularly required in performing the essential functions of the job. This can include the amount of supervision the employee receives, whether the employee supervises others, and the extent to which the employee is involved in decision-making activities.
- The term “working conditions” is defined as environmental circumstances considered in determining salary or wages. This may include factors such as the physical surroundings and hazards that employees encounter on the job.

In addition, the Guidance warns employers not to rely on job titles or descriptions alone when determining which positions are comparable.

Definition of “Wages”

“Wages” are defined broadly in the Guidance and include all forms of remuneration for work performed, such as incentive pay,³ as well as benefits that an employee may choose not to participate in.⁴ The important aspect here is that employees performing comparable work are given the same opportunity to participate in incentive pay and benefits, and any distinctions in incentive pay and benefits should not be determined by gender. Further, employers are not permitted to pay an employee an extra bonus in order to make up for a base salary that is lower on the basis of gender, when the two employees perform comparable work.

Variations in Pay Permitted Under the Law

The Guidance confirms that, under the Law, one or more of the following six factors may justify a pay difference between employees performing comparable work:

³ Incentive pay includes commissions, bonuses, profit-sharing, and other production incentives.

⁴ Benefits include health or life insurance, retirement plans, tuition reimbursement, and other similar benefits that employees may choose not to take advantage of (e.g., because they are covered by a spouse’s plan).

- a seniority system that is not obstructed by leaves of absence for pregnancy-related conditions or protected parental, family, and medical leaves;
- a merit system;
- a system that measures earnings by quantity or quality of production, sales, or revenue;
- the geographic location where a job is performed;
- education, training, or experience to the extent that such factors are reasonably related to the particular job in question; or
- travel, if it is a regular and necessary condition of the job.

An employer may pay employees performing comparable work differently based on the number of hours worked but may not discriminate based on gender in terms of the assignment or availability of part-time versus full-time work. The Guidance cautions employers that intent is irrelevant under the MEPA. Therefore, unless one or more of the six factors above apply, an employer may face liability for the differential in pay on the basis of gender.

Restrictions on Discussion of Wages

Under the MEPA, employers may not prohibit employees from discussing their own wages or their coworkers' wages, or from disclosing wage information to any person or entity. However, an employer may prohibit human resources employees or supervisors who have access to other employees' compensation information as part of their job responsibilities from discussing other employees' wages. Employers are also prohibited from contracting with employees to prevent them from discussing or disclosing wages. The Guidance further confirms that the MEPA does not impose any affirmative obligation on employers to disclose information about their employees' wages.

Salary History Inquiry Ban

Under the Law, employers generally may not seek salary or wage history directly from a prospective employee or from his or her current or former employer. The Guidance notes that there are only two limited situations in which an employer may ask for this information:

- to confirm wage or salary history information that is voluntarily shared by the prospective employee, or
- after an offer of employment with compensation has been made to the prospective employee.

The Guidance provides that employers are permitted to ask a prospective employee about his or her compensation needs or expectations but should do so with caution so that their question is not framed in a way that attempts to “seek” information from the prospective employee about his or her salary or wage history. Also, the Guidance confirms that an employer may ask a prospective employee about his or her previous sales history or objectives but may not seek information about the individual's earnings through sales.

The prohibition on seeking a prospective employee’s salary history does not apply to current employees applying for an internal promotion or transfer. However, the Guidance specifies that at no time may an employee’s salary history, with any employer, justify paying that employee less than an employee of a different gender who performs comparable work.

Liability for MEPA Violations

The potential damages for an equal pay claim under the MEPA include:

- the amount that the affected employee was underpaid,
- an equal amount of unpaid wages (i.e., double damages), and
- the affected employee’s reasonable attorneys’ fees and other costs if awarded a favorable judgment.

Additionally, an employer that violates the anti-retaliation provision or one of the other provisions of the MEPA could be required to pay damages incurred by the affected employee or applicant.

Affirmative Defense for Employer Self-Evaluations

The Guidance explains that, under the MEPA, an employer may have a “complete defense” to a legal claim if it has conducted a good faith, reasonable self-evaluation of its pay practices within the previous three years and before an employee files the action. To be eligible, the self-evaluation must be reasonable in detail and scope, as well as show reasonable progress towards eliminating any unlawful gender-based wage disparities that the self-evaluation reveals. The employer bears the burden of proving that it met these standards.

In addition, the Guidance provides that an employer’s eligibility for the affirmative defense is more likely to turn on whether the self-evaluation was reasonable in detail and scope and conducted in good faith, rather than whether the court agrees with the employer’s comparable work analysis. According to the Guidance, a “good faith” self-evaluation is one that an employer does “in a genuine attempt to identify any unlawful pay disparities among employees performing comparable work.”

A self-evaluation is considered “reasonable in detail and scope” depending on the “size and complexity of an employer’s workforce.” Relevant factors to consider will include “whether the evaluation includes a reasonable number of jobs and employees” and engages in a “reasonably sophisticated” analysis. To show that it has made “reasonable progress,” an employer must “take meaningful steps toward” correcting the identified disparities in a reasonable amount of time.

In addition to an overview of the Law and frequently asked questions, the Guidance has an appendix section that includes “Self-Evaluations—A Basic Guide for Employers” and a “Sample Checklist—Policies & Practices Review” that employers may find helpful.

What Massachusetts Employers Should Do Now

The Law goes into effect on July 1, 2018. In the meantime, Massachusetts employers should do the following:

- Thoroughly review the Guidance and the AG’s online resources, including the sample checklist and pay calculator.
- Advise third parties engaged in recruiting on your behalf, such as recruiters and headhunters, of the requirements of the Law, and ensure that they will comply with it when performing recruiting activities on your behalf.
- When reviewing and/or revising your current policies and procedures, take into consideration such issues as next steps needed to implement a method of self-evaluation appropriate to your business, best practices in terms of privilege, and how to address the possibility of remediation.
- Review and, if necessary, revise and disseminate existing policies on wage transparency or confidentiality to ensure compliance with the Law.
- Provide training to management, human resources staff, recruiters, and compensation partners on the requirements of the Law.

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2017 Wrap-Up & Heads-Up: The Top Workforce Management Issues of 2017

As 2017 comes to a close, recent headlines have underscored the importance of compliance and training. In this *Take 5*, we review major workforce management issues in 2017, and their impact, and offer critical actions that employers should consider to minimize exposure:

1. [Addressing Workplace Sexual Harassment in the Wake of #MeToo](#)
2. [A Busy 2017 Sets the Stage for Further Wage-Hour Developments](#)
3. [Your “Top Ten” Cybersecurity Vulnerabilities](#)
4. [2017: The Year of the Comprehensive Paid Leave Laws](#)
5. [Efforts Continue to Strengthen Equal Pay Laws in 2017](#)

1. Addressing Workplace Sexual Harassment in the Wake of #MeToo

By Nathaniel M. Glasser and Yael Spiewak

Revelations of the Harvey Weinstein scandal, and those that have followed, have ignited sexual harassment complaints against employers across all industries. Recent news more than confirms that the issue of sexual harassment is not limited to Hollywood. As U.S. Equal Employment Opportunity Commission (“[EEOC](#)”) Acting Chair Victoria Lipnic recently said in an [interview with Law360](#), “We see this everywhere. This happens to women in workplaces all over the place.”

With the outpouring of support for victims of sexual harassment, the creation of the #MeToo movement in the last quarter of 2017, and [Time magazine’s “Silence Breaker” person of the year](#), it is clear that this is an issue that employers will need to proactively address in 2018. A [study](#) by theBoardlist and Qualtrics, based on a survey conducted this summer, reported that 77 percent of corporate boards “had not discussed accusations of sexually inappropriate behavior and/or sexism in the workplace.” Less than 20 percent of the 400+ people surveyed had reevaluated their company’s risks

regarding sexual harassment or sexist behavior, even in light of the recent revelations in the media. Plainly, those numbers are expected to, and no doubt will, increase in the coming year.

Failure to take affirmative steps to prevent harassing behavior and adequately respond to allegations of sexual harassment can have serious consequences. While sexual harassment claims may originate as internal complaints, which must be promptly addressed, they may also result in a discrimination charge filed with the EEOC or the corresponding state or local agency. Since fiscal year 2010, roughly 30 percent of the approximately 90,000 charges of discrimination received by the EEOC each year have alleged [sex-based discrimination](#), and the number of charges alleging [sex-based harassment](#) has gradually increased from just below 13 percent to just above 14 percent. Next year, this number is expected to increase because employees are becoming more comfortable reporting and publicizing incidences of sexual harassment in light of recent news, and due to the EEOC's digital upgrade that allows employees to file EEOC complaints [online](#).

Sexual harassment claims may also lead to litigation, which can be expensive and time-consuming and can create negative publicity. For instance, Mr. Weinstein's former company, The Weinstein Co. ("TWC"), has been named in a \$5 million civil suit alleging that executives of the company did nothing to protect women who did business with Mr. Weinstein, despite being aware of his inappropriate behavior. On December 6, 2017, TWC was one of the named defendants in a proposed class-action racketeering lawsuit alleging that TWC helped facilitate Mr. Weinstein's organized pattern of predatory behavior. Additionally, the New York attorney general's office is investigating TWC for potential civil rights violations in its handling of claims of sexual harassment.

There may also be unseen consequences of sexual harassment on the makeup of a workforce. [Various studies](#) have reported that harassment may lead to the departure of women from the workforce or the transition into lower-paying jobs. Further, women in jobs with a higher risk of sexual harassment often earn a premium over employees in positions with a lower risk of sexual harassment. Sexual harassment, therefore, may have real impact on compensation and implicate the [pay gap and pay equity](#).

For these reasons, many employers are looking to implement and also supplement sexual harassment training seminars provided for their employees in order to combat sexual harassment in the workplace.

Employers should also consider whether their current practices include the following:

- *A robust complaint procedure.* Sexual harassment at work often goes unreported. According to the [EEOC](#), as many as [three-quarters](#) of harassment victims do not file workplace complaints against their alleged harassers. Make sure that you have reporting mechanisms in place to receive complaints and consider allowing employees to complain directly to human resources, to a supervisor, or to an anonymous hotline.

- *A prompt investigation of complaints.* Upon receiving a complaint, promptly and thoroughly investigate the allegations, and make sure that your employees do not retaliate against the alleged victim or any person who cooperates in the investigation.
- *Independent investigations.* Ensure impartiality in the process. In certain cases, that may mean hiring an outside consultant or outside legal counsel to conduct the investigation.
- *Thorough communication practices.* A common objection asserted by complainants is that they are not informed about the status of an investigation. While complainants need not (and should not) be notified about the details or even given regular status reports, inform the complainant that an investigation will occur and be sure to provide closure—regardless of the outcome of the investigation.
- *A proactive approach.* Consider conducting employee engagement or climate surveys (with or without a consultant) to better understand the work atmosphere, rather than simply reacting to workplace complaints. Before doing so, consult with counsel to determine whether and how such a survey may be conducted (potentially under the self-critical analysis privilege, depending on the jurisdiction) to avoid it unwittingly becoming evidence in a proceeding.
- *An atmosphere of inclusiveness.* Foster an atmosphere of inclusiveness to help prevent sexual harassment. Make sure that your top-level management is involved in setting the tone, modeling appropriate behavior, and effecting positive change. Some organizations should consider creating a task force to root out and address inappropriate conduct—again with the oversight of legal counsel.
- *Effective training.* While most employers conduct some form of anti-harassment training (and those that don't offer training, should), make certain that your training is designed to effectively combat sexual harassment. Tailor the training to your specific workplace and audience. Use real-world examples of what is, and is not, harassment, and make sure that managers know how to spot potential issues and respond to any and all complaints.

2. A Busy 2017 Sets the Stage for Further Wage-Hour Developments

By Michael S. Kun and Paul DeCamp

Recently, we wrote about the [significant wage-hour developments](#) of 2017. Those developments set the stage for some rather substantial issues to be addressed.

Arbitration Agreements with Class Action Waivers

With briefing and oral argument complete, it now is only a matter of time before the U.S. Supreme Court issues its ruling in three cases involving the enforceability of arbitration agreements with class action waivers. That ruling, whenever it issues, will have a significant impact on wage-hour litigation, at least in the federal courts.

The Court is likely to rule in one of three ways:

- (i) hold that arbitration agreements with class action waivers are unenforceable, opening the floodgates to more employee class and collective actions;
- (ii) hold that arbitration agreements with class action waivers are enforceable, leading more employers to use them; or
- (iii) hold that such agreements are enforceable so long as certain conditions are met, such as making entry into the agreement voluntary and assuring employees that failure to sign the agreement will not result in adverse consequences.

When the Court rules, we will promptly address the decision on our *Wage and Hour Defense Blog*: www.wagehourblog.com.

Will Other States Implement Statutes Like California's Private Attorneys General Act?

Employers with operations in California are likely familiar with California's Private Attorneys General Act ("PAGA"). Some are perhaps too familiar with it.

PAGA allows an employee to step into the shoes of the state's Attorney General and file suit on behalf of all other "aggrieved employees" for a variety of alleged violations of California's Labor Code. The potential exposure in these cases can be huge.

PAGA lawsuits are attractive to employees and their attorneys because they are not technically "class actions." Instead, they are "representative actions." The difference is more than semantic.

As PAGA actions are not class actions, they usually cannot be removed to federal court under the Class Action Fairness Act. And, as employees are filing suit on behalf of others, not themselves, courts have held that PAGA claims are not subject to arbitration agreements signed by plaintiff employees.

Having seen their counterparts in California use PAGA to avoid federal court and arbitration—and to obtain large settlements—there are rumblings that plaintiffs' attorneys in other states will push for similar legislation. No such legislation is currently pending, but it may just be a matter of time. And that time may come in 2018—particularly if the Supreme Court rules to uphold class action waivers in arbitration

agreements. Indeed, the Center for Popular Democracy has already announced that it plans to campaign for PAGA-like statutes in several states, including New York, in the upcoming year.

A New Proposed Salary Level for White-Collar Exemptions

In 2017, the U.S. Department of Labor (“DOL”) abandoned its 2016 “Final Rule,” which would have more than doubled the minimum salary for the executive, administrative, and professional overtime exemptions from \$455 per week (\$23,660 per year) to \$913 per week (\$47,476 per year). The DOL secured a stay from the U.S. Court of Appeals for the Fifth Circuit of the lower court decision invalidating the 2016 Final Rule, to allow the DOL time to issue a new rule.

In July, the DOL issued a Request for Information (“RFI”) soliciting public comment on 11 questions seeking input on what requirements and thresholds an appropriate replacement rule should contain.

We expect to see a Notice of Proposed Rulemaking in 2018. Based on Secretary of Labor Alexander Acosta’s statements to date and the RFI, we anticipate that the proposed revised regulation will raise the salary threshold to a figure in the neighborhood of \$32,000 to \$35,000 and may loosen the other criteria for determining when an employee may be classified as exempt.

Further Changes in Federal Wage-Hour Enforcement Policies and Practices

Secretary Acosta has already made a number of changes to how the DOL’s Wage and Hour Division (“WHD”) will approach its mission, including (i) withdrawing Administrator’s Interpretations regarding joint employment and independent contractor versus employee status, (ii) announcing that the WHD will resume the long-standing practice—suspended during the Obama administration—of issuing opinion letters to provide guidance to the public, and (iii) announcing withdrawal of a 2011 final rule regarding the standards for tip pooling.

In 2018, candidates for further changes to WHD enforcement include:

- abandoning the pursuit of liquidated damages for investigations that resolve at the administrative level;
- narrowing the range of matters for which the agency will seek civil money penalties by focusing on clearly willful scenarios and repeated violations substantially similar to prior violations;
- less burdensome initial demands for information and documentation regarding related entities and individuals, as well as vendors and other business partners; and
- greater willingness to supervise back wage payments when an employer is willing to approach the WHD to confess a violation.

3. Your “Top Ten” Cybersecurity Vulnerabilities

By Brian G. Cesaratto and Adam S. Forman

Cybersecurity has never been more important, or challenging, to address. For many employers, even figuring out where to start may seem like an overwhelming challenge. The first step—and one that should be done at least annually—is to focus on the adequacy of your organization’s cybersecurity planning processes, if any, in place. To jump-start your year-end cybersecurity planning, here are our “top ten” vulnerabilities to put on your list.

*Vulnerability No. 1. **No, or inadequate, security program in place.*** It is essential that your organization have a written, formalized cybersecurity program that assigns and enforces individual job responsibilities. The absence of a written plan documenting your cybersecurity program is a significant gap that leaves you more vulnerable to a cyberattack. If your organization already has adopted a written security plan, review and, if necessary, update it periodically (no less than annually) to determine how your organization will comply with the plan to protect your systems and staff. Cybersecurity is everyone’s responsibility.

*Vulnerability No. 2. **No recently conducted vulnerability and risk assessments.*** A comprehensive, well-documented vulnerability assessment will identify gaps in your workforce management and information technology security policies, procedures, and technical controls. A formalized risk assessment will address the risks of cyberthreats exploiting the gaps revealed by the vulnerability assessment. Vulnerability and risk assessments, which may be conducted with the assistance of cybersecurity counsel under the protection of the attorney-client privilege, are fundamental building blocks for reducing cybersecurity vulnerabilities.

*Vulnerability No 3. **No evaluation of weaknesses or gaps in your controls in light of statutory requirements and potential common law claims.*** This highlights your compliance gap and legal exposure arising from poor technical and administrative controls (e.g., inadequate or nonexistent policies), particularly in financial services, health care, or where your location and business lines subject you to requirements of state data privacy and breach laws. The absence of particular controls may constitute statutory violations or be cited in litigation as evidence of red flags.

*Vulnerability No. 4. **No formalized patching process or inadequate enforcement of the current process to ensure its systematic implementation.*** Failure to expeditiously address known vulnerabilities carries potential liability. A formalized, well-documented and enforced patching process may avoid gaps in failing to timely patch a known vulnerability and help reduce exposure.

*Vulnerability No. 5. **No insider threat program.*** Most data breaches are caused by insiders—either employees or trusted third parties (or their employees). Not having in

place an insider threat program (that includes an insider threat vulnerability assessment) increases your vulnerability to insider threats.

*Vulnerability No. 6. **Lack of connection to the cybersecurity community.*** Did you know that the leading wireless (WiFi) encryption protocol (WPA2) has recently been cracked by a new method called “KRACK” (short for Key Reinstallation AttaCK)? Did you know that the National Institute of Standards and Technology (known as “NIST”) has recently proposed significant new guidance in password administration? The [new guidelines](#) recommend, for example, increasing usability, including a blacklist of poor choice passwords and allowing passwords of at least 64 characters in length to support the use of pass phrases. These are just examples of the ever-changing cybersecurity landscape. Your organization should establish contact with the cybersecurity community, including cybersecurity counsel, to facilitate training and education within your organization and to maintain current on best practices and technologies.

*Vulnerability No. 7. **Lack of stringent configuration management.*** If your organization does not use a baseline of secure configurations for each of its information and communications systems and related hardware before each goes live or before any implemented changes, then you are vulnerable. The vulnerability from permitting the live implementation of default configurations (e.g., default passwords), for example, is an ever-present and frequently overlooked vulnerability that requires rigorous oversight.

*Vulnerability No. 8. **Lack of stringent remote access management.*** If your organization permits remote access by its personnel, your potential attack surface is expanded. Granting remote access requires a combination of stringent best practices, such as rigorous human resources and technical controls (including monitoring remote access usage).

*Vulnerability No. 9. **Failing to consider available cybersecurity data.*** If you are not looking at the available cybersecurity data for your particular industry, you are likely not making the most informed decisions. Don’t fly blind—there is data out there for all industries that you can use to inform your vulnerability analysis.

*Vulnerability No. 10. **No incident response plan in place.*** No matter the level of stringent controls you put in place, you have to be prepared for the eventuality of a data incident or breach. Being reactive because you do not have a plan in place tested through training, including table-top training exercises, leaves you vulnerable.

The foregoing list is non-exhaustive. Your list may be different. Hopefully, our recommendations get you thinking about your cyber protections for the coming year.

4. 2017: The Year of the Comprehensive Paid Leave Laws

By Marc A. Mandelman and Nancy Gunzenhauser Popper

The year 2017 brought the enactment of several significant state and local paid family and medical leave laws. These new laws do not always align with the federal Family and Medical Leave Act (“FMLA”) or a company’s existing policies—even if the company’s existing policies are more generous than the FMLA. Employers operating in the jurisdictions below must be sure that their policies and practices comply with the following upcoming laws, and employers everywhere will need to be on the lookout for other states and municipalities following suit.

New York State Paid Family Leave

Effective January 1, 2018, employees working in New York State will be eligible to receive job-protected, paid family leave under the [New York Paid Family Leave Benefits Law](#) (“NY PFL”) (i) to provide care to a newborn or a newly placed child for adoption or foster care, (ii) to care for a family member with a serious health condition, or (iii) due to an exigency relating to a family member being deployed abroad. Under the NY PFL, an employee may, in a 12-month period, take leave of up to eight workweeks in 2018, increasing to 12 workweeks beginning on January 1, 2021. Benefits received under the NY PFL begin at 50 percent of the employee’s pay, up to 50 percent of the state average weekly wage (increasing to 55 percent, 60 percent, and 67 percent, respectively, on January 1 of the following three years).

The NY PFL is intended to be funded through employee payroll contributions. Employee eligibility for NY PFL benefits and leave begins after 26 consecutive weeks (for employees whose regular employment schedule is 20 or more hours per week) or 175 days (for employees whose regular employment schedule is less than 20 hours per week) of employment. Notably, the definition of “family member” under the NY PFL is significantly broader than under the FMLA. In addition, maternity leave under the NY PFL does not begin until after pregnancy disability ends, thus extending the leave beyond 12 weeks in most cases, including for employers not covered by the FMLA.

The San Francisco Paid Parental Leave Ordinance

Effective January 1, 2017, the city of San Francisco began to phase in its new [Paid Parental Leave Ordinance](#) (“PPLO”), with the final phase becoming effective on January 1, 2018. The PPLO requires that San Francisco employers pay the difference (“Supplemental Compensation”) between benefits received under California’s Paid Family Leave (“CA PFL”) insurance program and an employee’s full pay (to a cap) for a period of six weeks. This law applies only to leave taken to bond with a newborn or a newly placed child for adoption or foster care. To qualify for Supplemental Compensation, employees must (i) have been employed at least 90 days prior to starting leave, (ii) be eligible to receive CA PFL benefits, (iii) perform at least eight hours of work per week for the employer within the city of San Francisco, and (iv) work at least 40 percent of their total weekly hours for the employer within the city of San Francisco.

The California Family Rights Act

As a part of a slew of 2017 legislative changes to California employment laws, the California Family Rights Act (“CFRA”) [has been amended](#) to expand the parental bonding leave protections to California employers with only 20-49 employees within 75 miles of the worksite, beginning January 1, 2018. The CFRA’s other eligibility requirements will remain intact: the employee must work at least 12 months with the employer and have worked 1,250 hours during the previous 12-month period. This expansion of the CFRA to smaller employers does not extend to other types of job-protected leave under the law, including leave for an employee’s own serious health condition or to care for the employee’s parent or spouse who has a serious health condition.

Washington State Paid Family and Medical Leave

In 2017, Washington State enacted a comprehensive [Paid Family and Medical Leave Law](#) (“WA PFML”), which will create an insurance program to provide income replacement benefits for family and medical leaves. Eligible employees may begin to receive benefits and take leave beginning on January 1, 2020; however, payroll deductions to fund this insurance may begin as early as January 1, 2019. The WA PFML provides for up to 90 percent of an employee’s income for as much as 18 weeks of protected leave in a year. Like the federal FMLA, the WA PFML applies to employees who have been employed for at least 12 months and have worked for at least 1,250 hours in the previous 12-month period. The WA PFML applies to employers with 50 or more employees (without regard to the number of employees at a single worksite).

The District of Columbia Universal Paid Leave Amendment Act

In 2017, the District of Columbia enacted the [Universal Paid Leave Amendment Act](#) (“D.C. UPL”). Beginning January 1, 2020, the law will provide D.C. employees up to a combined 16 weeks of (i) paid family leave (up to six weeks), (ii) medical leave (up to two weeks), and (iii) parental leave (up to eight weeks) in a 52-workweek period. The D.C. UPL provides income replacement while on leave but does not provide job-protected leave—such leave is only job-protected to the extent employees are also eligible for leave under the existing D.C. Family and Medical Leave Act, which provides up to 16 weeks of unpaid job-protected leave every two years. Nearly all employees in the District of Columbia will be eligible for paid benefits under the D.C. UPL, so long as more than 50 percent of the employee’s hours worked for the employer are in the District of Columbia. The D.C. UPL will be funded by payroll taxes, and deductions may begin July 1, 2019.

5. Efforts Continue to Strengthen Equal Pay Laws in 2017

By Susan Gross Sholinsky, Jonathan M. Brenner, and Ann Knuckles Mahoney

State and local legislators have had another busy year with efforts to strengthen equal pay regulation, and there is no sign of a slowdown anytime soon. Legislation in this field

began picking up in 2016 and continued to gain momentum throughout 2017. There were approximately 100 bills relating to equal pay introduced in the state legislatures this year in more than 40 jurisdictions. We expect this trend to continue as the closing of historical pay disparities between men and women and amongst other groups remains a policy priority.

Equal pay legislation has centered around three major areas. First, legislatures are acting to expand the scope and coverage of, and narrow the exceptions for, existing equal pay laws. For example, employers in certain states with amended equal pay laws must now provide equal pay not only for “equal” work, but also for “comparable” or “substantially similar” work. Some of these laws also effectively remove geographical distinctions and narrow other exceptions that employers may rely on. This year, Oregon and Puerto Rico added themselves to the list of states and territories (including Massachusetts, California, Delaware, and Maryland) that have made these sorts of changes, and California went a step further by expanding its equal pay act to cover race and ethnicity in addition to gender. Bills along these same lines for gender pay equality are also pending or expected in at least 15 additional states.

Second, legislatures are introducing salary history bans, which prohibit employers from asking applicants about prior compensation in the hiring process. These laws aim to stop the perpetuation of prior salary discrimination by increasing focus on the value that a recruit will bring to the position and reducing reliance upon compensation decisions made by others in the past when formulating job offers. Salary history inquiry bans were recently enacted in four states, including [California](#), Delaware, Maine, and Oregon, along with Puerto Rico, [New York City](#), [Philadelphia](#), San Francisco, and Albany County (New York). Similar laws are pending in at least 13 additional states, and we expect that legislation will be reintroduced in several others during the next legislative sessions.

Finally, legislatures are acting to increase employer accountability for wages by proposing stronger pay transparency laws, which, among other things, would protect the open discussion of wages and—in at least one attempted effort thus far—would require employers to publicly disclose their wage differences between men and women. Currently, 17 states and Puerto Rico have laws governing pay transparency, although a number of these laws have been in place for some time. Recently, we have seen new or enhanced laws enacted on pay transparency in California, Colorado, Maryland, Massachusetts, Nevada, and New York, and several other states have pending legislation in this area as well. Thus far, California is the only state to have proposed a “wage shaming” law that would require larger employers to report gender wage differential information to the state for publication on a government website. The proposed law (A.B. 1209) passed the California Legislature in 2017 but was vetoed by the governor—the second consecutive year that he vetoed this type of proposed law. Similar legislation has been discussed in New York City as well.

Equal pay also saw some activity at the federal level in 2017. Representative Eleanor Holmes Norton introduced the Pay Equity for All Act of 2017 (H.R. 2418), a salary history ban law. She also introduced the Fair Pay Act of 2017 (H.R. 2095), which would lower the federal statutory standard from equal to comparable work, consistent with the

state and local trend. While additional action has not been taken on these bills since they were introduced, it is likely that Rep. Norton will continue to pursue these efforts as she has in the past.

Also on the federal front, the EEOC has included “Ensuring equal pay protections for all workers” as one of its six top priorities for 2017-2021. And although the expanded EEO-1 form (including 12 pay bands for the reporting of employee pay by gender and race/ethnicity) [was rejected earlier this year](#), EEOC Acting Chair Victoria Lipnic has stated that the EEOC remains committed to the enforcement of equal pay laws and that the decision to stay implementation of the expanded EEO-1 form does not alter this enforcement position.

As we move into 2018, employers should continue to focus on equal pay within their organization and get ahead of the curve on compliance, since the legislative momentum gained in 2017 will likely continue.

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Five Issues in Focus for Financial Services

For this edition of the *Take 5* for financial services, we focus on a number of very well-publicized issues. The tidal wave of sexual harassment allegations that followed the Harvey Weinstein revelations has drawn the attention of companies, their human resources departments, and employment lawyers. The rule on chief executive officer (“CEO”) pay ratio disclosure, which goes into effect in 2018, is a required focal point that

For the latest employment, labor, and workforce management news and insights concerning the financial services industry, please visit and subscribe to Epstein Becker Green’s [Financial Services Employment Law blog](#).

garners significant interest in an industry that is all about money. The hyper-charged political climate has brought social activism and heated political discussions into the workplace with increasing frequency—and with potential employment law implications. A heightened legislative focus on eliminating at least one recognized source of the gender pay gap has resulted in new rules that prohibit very common inquiries about past compensation during the interview process. Finally, data leaks are a mounting threat and cybersecurity is a growing concern throughout an industry that is saturated with the highly sensitive, and sometimes personal, financial information of its clients.

We address these important issues and what financial services employers should know about them:

1. [The Weinstein Effect: #MeToo Allegations in the Financial Services Industry](#)
 2. [CEO Pay Ratio: It’s Not Too Late to Calculate!](#)
 3. [Managing Employees’ Political and Social Activism in the Workplace](#)
 4. [Equal Pay Update: The New York City and California Salary History Inquiry Bans](#)
 5. [Insider Threats to Critical Financial Services Technologies and Trade Secrets Are Best Addressed Through a Formalized Vulnerability and Risk Assessment Process](#)
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1. [The Weinstein Effect: #MeToo Allegations in the Financial Services Industry](#)

By Nathaniel M. Glasser

Since news of the Harvey Weinstein scandal broke on October 5, 2017, Hollywood and the entertainment industry have been the focus of media attention about the prevalence of workplace harassment in the industry and how to deal with it. But financial services firms should be aware that sexual harassment is not an issue that is limited to Hollywood. As U.S. Equal Employment Opportunity Commission (“[EEOC](#)”) Acting Chair Victoria Lipnic recently said in an [interview with Law360](#), “We see this everywhere. This happens to women in workplaces all over the place.”

Financial firms also have been forced to confront allegations of sexual harassment publicly. For example, Social Finance Inc. (“[SoFi](#)”), an online lending firm, has been sued by a former employee alleging that CEO Mike Cagney “fosters a sexually charged corporate culture that condones unlawful conduct.” While Mr. Cagney did the right thing in response by issuing a memorandum to SoFi employees announcing that an internal investigation would occur and promising “severe action” if the lawsuit’s allegations proved true, Mr. Cagney later [resigned](#) as [questions](#) over his own behavior mounted.

Over the last two months, [Fidelity Investments](#) has [dismissed two portfolio managers](#)—one manager was terminated following allegations that he made inappropriate sexual comments at work and another manager was fired after allegations surfaced that he sexually harassed a female junior employee. In response, Fidelity’s CEO, Abby Johnson, in a video speech delivered to the firm’s 40,000 employees, stated, “We have no tolerance at our company for any type of harassment. We simply will not, and do not, tolerate this type of behavior, from anyone.” Ms. Johnson echoed those remarks in a [speech](#) given to the Securities Industry and Financial Markets Association (known as “SIFMA”) the following day. She has responded to these matters in textbook fashion after they became public, first by taking prompt remedial action against the offenders and then by making it clear that sexual harassment will not be tolerated by the upper echelons of management.

It is clear by the recent outpouring of support for victims of sexual harassment and the creation of the #MeToo movement that this is an issue that cannot be ignored by companies and should be proactively addressed. Unfortunately, a [recent study](#) by theBoardlist and Qualtrics says that 77 percent of corporate boards “had not discussed accusations of sexually inappropriate behavior and/or sexism in the workplace.” Less than 20 percent of the 400+ people surveyed had reevaluated their company’s risks regarding sexual harassment or sexist behavior, even in light of the recent revelations in the media. (The survey was conducted over the summer, before the Weinstein allegations came to light).

Consequences for Failing to Adequately Respond to Harassment Allegations

There are significant consequences for failing to implement a plan for preventing sexual harassment in the workplace, and for failing to adequately respond once a complaint of

sexual harassment has been filed. While sexual harassment claims may originate as internal complaints, they may result in a charge of discrimination filed with the EEOC or the corresponding state or local agency. Since fiscal year 2010, roughly 30 percent of the approximately 90,000 charges of discrimination received by the EEOC each year have alleged [sex-based discrimination](#), and, during that same time period, the number of charges alleging [sex-based harassment](#) has gradually increased from just below 13 percent to just above 14 percent.

Sexual harassment claims may also lead to litigation, which can be expensive and time-consuming. In the Harvey Weinstein matter, for instance, Mr. Weinstein's former company, The Weinstein Co., has been named in a \$5 million civil suit alleging that executives of the company did nothing to protect women who did business with Mr. Weinstein, despite being aware of his inappropriate behavior. Additionally, the New York attorney general's office is investigating The Weinstein Co. for potential civil rights violations in relation to its handling of claims of sexual harassment.

Aside from litigation, financial firms may face increased scrutiny from regulators. SoFi, for example, would like to expand its offerings to credit cards and checking accounts. But the allegations of sexual harassment, among other things, could [negatively impact](#) the opinions of the regulators that will decide whether SoFi is entitled to the state bank charter and federal deposit insurance needed to increase its offerings.

What Employers Should Do Now

The recent publicity regarding sexual harassment claims does not mean that financial service firms need to fear a return to the "boys club" atmosphere of the 1980s and 1990s. Financial services firms should take the following tangible actions to combat sexual harassment in the workplace:

- *Create and publicize a robust complaint procedure.* Sexual harassment at work often goes unreported. According to the [EEOC](#), as many as [three-quarters](#) of harassment victims do not file workplace complaints against their alleged harassers. Make sure that you have robust reporting mechanisms in place to receive complaints and consider allowing employees to complain directly to human resources, to a supervisor, or to an anonymous hotline.
- *Promptly investigate complaints.* Once a complaint is made, promptly and thoroughly investigate the complaint, making sure that your employees do not retaliate against the alleged victim or any person who cooperates in the investigation.
- *Conduct an independent investigation.* A hallmark of a competent investigator is someone who acts and appears impartial. In certain cases, that may mean hiring an outside consultant or legal counsel—someone unaffiliated with you—to conduct the investigation.

- *Communicate with complainants.* A common objection asserted by complainants is that they are not informed about the status of the investigation. While complainants need not (and should not) be informed about the details or even given regular status reports concerning the investigation, they should be informed that an investigation will occur, and a firm should provide closure—regardless of the outcome of the investigation.
- *Be proactive.* Consider conducting employee engagement or climate surveys, or hiring a consultant, to better understand the work atmosphere, rather than simply reacting to workplace complaints. Before doing so, consult with counsel to determine whether and how such a survey may be conducted under the self-critical analysis privilege.
- *Don't expect HR (or even legal) to be the savior.* To foster an atmosphere of inclusiveness and prevent sexual harassment, a firm cannot be solely reactionary to workplace complaints. Therefore, make sure that your top-level management is involved in setting the tone and effecting positive change. Also consider creating a task force to root out and address inappropriate conduct.
- *Design effective training.* While most employers conduct some form of anti-harassment training (and those that don't offer training, should), make certain that your training is designed to effectively combat sexual harassment. Tailor the training to your specific workplace and audience, teach employees (using real-world examples) about what is—and is not—harassment, and make sure that managers know how to spot potential issues and respond to any and all complaints.

2. [CEO Pay Ratio: It's Not Too Late to Calculate!](#)

By Andrew E. Shapiro

It is now all but certain that for the 2018 proxy season, most U.S. public companies will be required to provide an additional disclosure regarding their CEO pay ratio. The new rule, which is contained in Item 402(u) of Securities and Exchange Commission (“SEC”) Regulation S-K, requires public companies to disclose the ratio between (i) the median of the annual total compensation of all employees (except the CEO) and (ii) the annual total compensation of the CEO (the “CEO Pay Ratio”). In addition, companies will be required to briefly describe the methodology and assumptions utilized to calculate their CEO Pay Ratio.

Contrary to many people's expectations, [recent survey data](#) from the consulting firm Mercer suggests that CEO Pay Ratios (as calculated pursuant to the proscribed rules) are lowest among banking and financial firms and highest among retailers and wholesalers of consumer goods, which tend to employ more part-time workers with low wages. The survey data suggests that banking and financial firms have estimated their

CEO Pay Ratio at mostly 200:1 or less, while retailers and wholesalers of consumer goods have estimated their CEO Pay Ratio at mostly 400:1 or more.

What Employers Should Do Now

As financial companies prepare to comply with this new CEO Pay Ratio disclosure rule, we offer the following practical guidance:

- *Identify the team.* Ensure that your company has an appropriate team assembled to calculate the CEO Pay Ratio and related disclosure, as well as to establish the appropriate messaging to your company's workforce, the media, investors, and other stakeholders. It is generally recommended that individuals from the company's human resources, accounting, payroll, legal, investor relations, and corporate communications functions be involved in the process. It may also be appropriate, depending on the complexity of the company and any company-specific factors, to involve outside legal counsel and/or external compensation consultants.
- *Prepare preliminary calculations.* Recent guidance from the SEC confirmed that companies have a wide range of flexibility in calculating their CEO Pay Ratio. Be aware of the various alternatives available to your company and how these alternatives may impact the calculation of its CEO Pay Ratio. We recommend that your company prepare preliminary calculations of its CEO Pay Ratio to gain an expectation of what it ultimately will be. By doing so, your company will be better informed of how its CEO Pay Ratio may compare to its peers, how it may be impacted by using alternative methods of calculation, and what types of communication and messaging will be required.
- *Compare to peers.* After preparing preliminary calculations, we recommend that your company gain an understanding of how its CEO Pay Ratio may compare to its peers and others within the financial services industry. Since a company will generally have limited insight into what the median pay might be at its peers until it is disclosed in their filings, it may be difficult to obtain an exact understanding. However, survey data and custom research is generally accessible through outside third parties. Your company may also be able to obtain a rough sense of how its CEO Pay Ratio may compare to its peers by comparing your company's internally calculated median pay against the latest publicly available CEO pay of its peers (e.g., as disclosed in their latest Summary Compensation Table).
- *Start thinking about the disclosure and messaging.* While CEO Pay Ratio disclosures are not expected to inform proxy advisory firm voting recommendations or institutional investor voting decisions this year, it is expected that these disclosures will be a point of focus for labor groups and the media. As such, consider whether to provide additional ratios, supporting data, or narrative discussion within the context of your company's CEO Pay Ratio disclosure. Also consider developing an overall communication plan to

employees to limit potential issues associated with the fact that one-half of your company's employee population will learn that they are compensated less than the median disclosed employee.

- *Keep in mind the corporate governance process.* Given this is a new disclosure requirement, it is important to keep management and the compensation committee informed about the process, methodology, disclosures, anticipated communications, and potential risks associated with the CEO Pay Ratio disclosure requirement.

While the new rule goes into effect right around the corner, it is not too late to take the necessary steps to ensure that your company is prepared for the possible implications of the CEO Pay Ratio disclosure requirement.

3. Managing Employees' Political and Social Activism in the Workplace

By Laura C. Monaco and Amanda M. Gomez

In this increasingly polarized and highly charged political environment, employers may face challenges in figuring out how to maintain a professional atmosphere and further their business interests without infringing on their employees' rights to express their views on a wide range of political and social issues. This can be especially challenging in the financial services industry, where the workforce tends to be smart, well informed, and assertive. There are, however, some best practices that employers can follow in navigating the potential minefield of managing their employees' political and social activism in the workplace.

Know—and Train Managers About—Applicable Laws

Employers should be aware that regulating their employees' political speech and activity can implicate a variety of legal liability concerns, as well as reputational considerations among consumers and communities. As we have explained [previously](#), the National Labor Relations Board's General Counsel has issued a "Guidance Memorandum" concluding that employee action to "improve their lot as employees through channels outside the immediate employee-employer relationship" is protected concerted activity under Section 7 of the National Labor Relations Act, so long as it has a direct connection to the employees' working conditions. In some circumstances, therefore, an employer could face an unfair labor practice charge if it punishes employees who skip work to attend a pro-immigration rally—but takes no action against other employees who call out on a sunny summer Friday to head to the beach.

Moreover, although there is no federal law that prohibits discrimination against private-sector employees based on their political activity or affiliation, many states (including California and New York) and the District of Columbia have such laws. Several states also have laws that protect employees from discrimination or harassment based upon their lawful off-duty conduct, which would extend to their off-duty political activity or social activism. In California, for example, an employer cannot discriminate or retaliate

against employees because of their off-duty lawful political activities. Similar legal protections exist in several other states (including Colorado, Louisiana, and New York). Nevertheless, even if an employee's political participation is a protected activity, employers may still regulate the activity through "lawful and neutrally applied work rules."

Employers must therefore make supervisors and managers aware of what they can—and cannot—do when employees engage in political activity that may affect the workplace and ensure that such training addresses any applicable state-specific limitations and requirements.

Apply Work Rules in a Neutral, Consistent Manner

Employees' political or social activism may be exhibited in a variety of ways that impact the financial services workplace, such as unexcused absences (so that an employee can attend a protest or rally), or violations of the cell phone use policy (by employees who use their phones to tweet in support of social causes while on the job). In the case of public-facing employees who may deal with bank customers, for example, dress code infractions (such as wearing a button or pin with a political message) may also present challenges. The best way for employers to manage these issues, and to remain legally compliant, is to apply work rules and policies consistently.

For example, if an employer regularly applies its attendance policies to discipline employees for unexcused absences, the employer need not refrain from disciplining an employee who skips work to attend a political rally. Similarly, an employer that consistently prohibits its employees from using their cell phones to access social media during their work shift does not have to allow those employees to tweet in support of a political cause on work time. If, however, that employer sometimes lets its employees off the hook for unexcused absences, or occasionally allows employees to use their cell phones to check Facebook while at work, it should be wary of applying its work rules to penalize employees who are absent or using their cell phones during work time to support a political or social cause.

The safest course for employers is to apply their work rules neutrally and avoid penalizing groups of employees based on the "message" of the political or social cause those employees choose to support. An employer that declines to discipline an employee for taking an unscheduled day off to attend a pro-choice rally, for example, may trigger a discrimination claim if it then disciplines a different employee for taking an unscheduled day to attend a pro-life event. Understanding that the line between political speech and protected comments related to the terms and conditions of employment may sometimes be hard to draw, employers can help ensure that employees' discussions about politics do not become heated by neutrally enforcing work rules and policies that prohibit fighting, bullying, or harassment, and that prohibit employees from engaging in conduct that is loud or distracting or that otherwise impinges upon productivity.

What Employers Should Do Now

Our tumultuous political and social environment does not show any signs of cooling down in the near future. Therefore, an employer needs to be prepared to address and manage its employees' political and social activism and to protect and further its business interests, while at the same time ensuring that its employees' rights and morale do not suffer. Specifically, an employer should do the following:

- Put clear policies in place regarding how to address employee requests for time off.
- Ensure that rules are being applied consistently and neutrally.
- To maintain morale, consider engaging with the social issues affecting your employees through activities such as employee forums or community service events.

4. [Equal Pay Update: The New York City and California Salary History Inquiry Bans](#)

By Lauri F. Rasnick and Ann Knuckles Mahoney

Recently, there has been a tremendous focus on equal pay issues across many industries. Proponents of equal pay have focused, among other things, on the use of prior compensation to determine future compensation, believing that doing so maintains existing pay inequities. To prevent such results, the newest trend in equal pay has included salary history inquiry bans. Both New York City and California have recently enacted laws that prohibit employers from asking for a job applicant's salary history and from relying upon that history unless it is voluntarily provided.¹ The New York City law became effective on October 31, 2017, and the California law becomes effective on January 1, 2018. With these new laws, and financial services being heavily represented in both regions, financial services firms should take a hard look at their current hiring and compensation practices to avoid unwittingly violating the law.

Both the New York City and California laws prohibit seeking salary and other compensation information directly from employees and from recruiters or other sources (such as Internet searches and the like). Thus, it is important for the compliance effort to encompass the appropriate individuals who may be involved in the process to make them aware of the new laws.

¹ San Francisco also adopted a salary history inquiry ordinance similar to the New York City law that becomes effective on July 1, 2018.

Key Differences Between the New York City and California Salary History Inquiry Bans

The New York City law expressly allows employers to initiate discussions regarding an applicant's salary expectations and desires. Further, the New York City law allows employers to ask whether an applicant will have to forfeit deferred compensation or unvested equity as a result of the applicant's resignation from his or her current employer. In addition, in New York City, employers may ask about employee production and experience, such as revenues, sales, deals, and contacts. These questions may be key for financial services employers hiring revenue producers and other front-line personnel. New York City employers may also ask about the value and structure of the deferred compensation or unvested equity, request documentation to verify the applicant's representations, and consider such information in making the applicant an offer. The California law is silent on all these issues.

The California law requires that, upon reasonable request, employers provide a pay scale to applicants. The California law also reaffirms an aspect of California's Equal Pay Act that prohibits employers from justifying a pay disparity on prior salary alone. Thus, while employers may consider voluntarily disclosed salary information, they may not rely on salary history alone to justify pay discrepancies between workers of different genders or ethnicities who are performing substantially similar work. The New York City law does not contain this same restriction. Further, to the extent that there is a voluntary disclosure in California, employers may not rely on the salary history information in deciding whether to hire the individual.

What Employers Should Do Now

To ensure compliance with the new bans on salary history inquiries, employers should take the following steps:

- Remove questions about salary history from employment applications, background check forms, and any other applicable forms or policies used during the hiring process.
- Train human resources staff, managers, recruiters, and any other individuals who may interview the candidates to not seek salary history information during discussions with candidates.
- Ensure that any disclosure of salary history, if it occurs, is purely voluntary and without prompting. This means that it is not permissible to pose a question about an applicant's salary history with a caveat that answering the question is not mandatory.
- Create a "memo to file" if a voluntary disclosure is made, noting the voluntary disclosure and the circumstances under which it was made.

- Coordinate with any external background-checking vendors to ensure that background check forms do not request salary history and that a vendor does not request salary history when confirming prior employment.
- Synchronize with external recruiters and headhunters to make sure that they will not provide an applicant's salary history.
- Consider amending contracts with external recruiters to place them on notice about their obligations under the new laws, require compliance with the laws, and provide for indemnification for claims made against you based on the external party's violation of the laws.
- If your organization operates in California, prepare pay scales for open job positions and identify the objective factors (such as training, education, and experience, provided that they are required for the position) that will determine where within the applicable range an offer will be made.
- If your organization operates in multiple locations, decide whether to adopt a nationwide or location-specific approach:
 - While adopting a nationwide approach for administrative or public policy reasons may simplify matters, determine whether it would also lead to problems, such as the creation of unnecessary obligations or the denial of business salary information that your organization could otherwise have access to in jurisdictions where there is no such law.
 - If adopting a nationwide approach, consider including a caveat in certain forms or training materials (where permitted) that, at a minimum, reserves the right to seek salary history information in any jurisdiction where these questions are allowed.
 - If you take a location-specific approach, make sure that electronic onboarding and other tools do not inadvertently continue to ask for (or store) salary history from applicants based in New York City or California.

5. [Insider Threats to Critical Financial Services Technologies and Trade Secrets Are Best Addressed Through a Formalized Vulnerability and Risk Assessment Process](#)

By Brian G. Cesaratto and Robert J. Hudock

The pace of innovative financial services technology is accelerating. Firms are investing heavily to develop the next cutting-edge financial services applications that will drive future growth. Industry efforts have expanded the “attack surface” of these new technologies to dishonest employees and other malicious insiders. As the scope and criticality of these information systems increase, there is a corresponding increase in the

number of employees and other individuals (e.g., a vendor's workers) who have or may seek to gain access for a financial motive or other illegitimate purposes. Indeed, over this last year, in [separate criminal matters](#), [two computer engineers](#) were arrested by federal authorities and charged with alleged attempted theft of trade secrets comprised of a proprietary computer code used to run the trading platforms of their respective financial services employers.

Financial services firms are, therefore, well served by utilizing a formalized vulnerability and risk assessment process to identify the insider threats to the confidentiality, integrity, and availability of their most critical technologies and systems and to address the risks. New York State registered or licensed financial services firms are [required to conduct vulnerability assessments](#) biannually and risk assessments on a periodic basis. [FTC-regulated financial institutions](#) are also required to conduct risk assessments relevant to safeguarding non-public customer information.

Firms should identify their critical information systems and the supporting hardware and interconnected communication systems. The job roles associated with those systems—i.e., any insider who by virtue of his or her job position will be granted access—should be identified. In particular, managerial and other roles that involve privileged access to the systems should be pinpointed (e.g., database or network administrators). A map, chart, or other representation of the systems, data, and insiders should be made so that the organization can thoroughly understand the interconnectivity of personnel and key systems.

The insider threats to these systems for all roles should be identified and evaluated—e.g., is there a greater threat from temporary workers or third-party contractors not presently subjected to background checks as compared with full-time employees who undergo pre-employment credit and criminal background checks? The current level and strength of existing physical, administrative, and technical controls should be identified. An essential task is to determine if the principle of least privilege is being followed and enforced—e.g., for each identified role, does the insider have only the level of access required to accomplish the job responsibilities and nothing more?

What Employers Should Do Now

- Conduct a vulnerability assessment identifying reasonably anticipated insider threats.
- Next, conduct a well-documented risk assessment to assess the likely impacts (i.e., probable losses) that may result from an attack depending on the level of existing controls or those that are planned.
- Consider whether to add to or strengthen your insider threat controls consistent with your business needs, risk tolerance, and a cost-benefit analysis. Usually, for high-impact “critical” systems, the full range of available, most protective

physical, administrative, and technical insider threat controls, consistent with applicable law, should at least be considered.

- Plan and implement a “defense in depth,” selecting the proper combination of technical controls and workforce management practices and policies pursuant to a well-thought-out strategy of risk reduction. Consider, for example, a combination of enhanced background and credit checks, electronic system monitoring, rigorous mobile device and remote access management, protective provisions in vendor contracts, encryption, multi-factor authentication, biometric identification, human resources data/event logging, employee training, penetration testing, and/or technical controls (e.g., blocking access by employees to file-sharing cloud-based websites (like Dropbox)).
- Put in place a written formalized incident response plan in case an insider threat materializes. The plan should be tested through table-top exercises and should be a key component of your efforts.
- Ensure that vulnerability and risk assessments of insider threats are conducted periodically and as financial services technologies evolve.

* * * * *

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The #MeToo movement: Implications for employers

By David W. Garland, Esq., and Nathaniel M. Glasser, Esq., *Epstein Becker & Green*

FEBRUARY 27, 2018

What started as the #MeToo movement in late 2017 in response to allegations by numerous women that film producer Harvey Weinstein sexually harassed them has expanded to the movement known as #TimesUp and has touched every industry and workplace in America — including journalism, the financial sector, government, athletics, tech, academia and even the federal judiciary.¹

As Equal Employment Opportunity Commission acting Chair Victoria Lipnic said in a recent interview, “This happens to women in workplaces all over the place.”²

There is no doubt that the #MeToo and #TimesUp movements have induced a sea change in the way employers respond to such allegations.

Employers that had not seriously evaluated the risk of sexual harassment or sexist behaviors in their workplaces have begun to revisit their harassment training, complaint procedures and disciplinary protocols. In the current environment, employers should retrain their employees on acceptable conduct in the workplace and supplement prior sexual harassment seminars.

Recognizing this new reality, the U.S. House of Representatives has passed Resolution 630, which mandates annual, in-person sexual harassment training for all members and staff.³

How an employer responds to the #MeToo and #TimesUp movements may have significant implications for its reputation, its employees’ morale, and its ability to attract and retain top female talent.

CONSEQUENCES OF INACTION

An employer faces serious consequences if it fails to take affirmative steps to prevent harassing behavior or inadequately responds to allegations of sexual harassment. While sexual harassment claims may originate as internal complaints, which must be promptly investigated and addressed, they may also start as a discrimination charge filed with the EEOC or the corresponding state or local agency.

Since fiscal year 2010, roughly 30 percent of the 90,000 charges of discrimination received by the EEOC each year have alleged sex-based discrimination, and the number of charges alleging sex-based harassment has gradually increased from below 13 percent to above 14 percent.⁴ This number may increase even further in the coming months as employees become more comfortable reporting

and publicizing incidents of sexual harassment in light of recent news, and due to a digital upgrade that allows employees to file EEOC complaints online.

Sexual harassment claims may also result in litigation, which can be expensive and time-consuming, while creating unwanted and adverse publicity.

Weinstein’s former company, The Weinstein Co., has been named in a \$5 million civil suit alleging that company executives failed to protect women who did business with Weinstein, despite being aware of his inappropriate behavior. *Huett v. Weinstein Co.*, No. BC680869, *amended complaint filed* (Cal. Super. Ct., L.A. Cty. Jan. 31, 2018).

Additionally, the New York attorney general’s office is investigating Weinstein Co. for potential civil rights violations in its handling of sexual harassment claims.

There is no doubt that the #MeToo and #TimesUp movements have induced a sea change in the way employers respond to allegations of sexual harassment.

CREATE A THOUGHTFUL, PROACTIVE PLAN

Employers should not expect these trends to pass and instead should proactively address claims of sexual harassment.

In doing so, employers should ensure that their current practices include the following:

- *Effective training.* Most employers conduct some form of anti-harassment training, and those that do not offer training should. (Some states make the training mandatory). To effectively combat sexual harassment, training should be tailored to an employer’s specific workplace and audience. Employers should use realistic examples of what is, and is not, harassment, and make sure managers know how to spot potential issues and respond to complaints.
- *Robust complaint procedure.* Sexual harassment at work often goes unreported. According to the EEOC, as many as three-quarters of harassment victims do not file workplace complaints against their alleged harassers. Employers should

have a variety of effective reporting mechanisms in place to receive complaints, and they should consider creating multiple channels — such as human resources, a supervisor and an anonymous hotline — that employees can use to file their complaints.

- *Avoidance of “zero tolerance.”* While employers should not tolerate harassment in the workplace, they should consider avoiding the binary framing of “zero tolerance.” While this sounds counterintuitive, women may be discouraged from filing complaints if they believe that any incident, no matter how minor, will result in termination of the accused.⁵ Employers instead should aim to encourage open dialogue and use proportionate discipline.
- *Prompt investigation of complaints.* Employers must do more than simply maintain a policy prohibiting sexual harassment. Upon receiving a complaint, employers must promptly and thoroughly investigate the allegations, and make sure that the employee who lodged the complaint and those cooperating in the investigation do not become victims of retaliation.
- *Independent investigations.* Employers must ensure impartiality in the process, which may mean in certain circumstances hiring an outside professional investigator or outside experienced legal counsel to conduct the investigation.
- *Thorough communication practices.* Employees who lodge complaints commonly assert that they are not kept informed about the status of an investigation. While they need not (and should not) be notified about the details or even given regular status reports, they should be notified that an investigation will occur and be given periodic updates if the investigation is lengthy. Additionally, providing closure to the complaining employee is key.
- *Proactive approach.* Soliciting feedback through employee engagement or climate surveys often helps to create positive change that prevents harassment. Employers considering this approach should consult with counsel to determine whether and how such a survey may be conducted (potentially under the self-critical analysis privilege, depending on the jurisdiction) so that it does not become evidence in a proceeding.
- *Top-level management engagement.* The #MeToo and #TimesUp movements have shown that some employers may have considered an employee’s (monetary) value to the company when determining how to address misbehavior. But when management sets the tone, models appropriate behavior and effects positive change, efforts to prevent sexual harassment will be taken more seriously by the rest of the workforce and it is more likely that workplace standards will be applied equally to everyone. The employer’s culture must reflect management’s commitment.

NEW CONFIDENTIALITY CONSIDERATIONS

The #MeToo and #TimesUp movements also have prompted consideration of the appropriate use of confidentiality provisions in settlement agreements.

The recently passed Tax Cuts and Jobs Act prohibits employers from taking a tax deduction for settlements “related to” sexual harassment or sexual abuse if the settlement is subject to a non-disclosure agreement.⁶

The implications of this provision remain uncertain, as it is unclear whether it applies to settlement of sex discrimination claims, whether companies can apportion some settlement payments to sex harassment claims and other payments to other claims and then take a partial deduction, and whether it applies to severance agreements.

Until the IRS issues guidance, employers must carefully consider whether and how to incorporate confidentiality clauses in their settlement agreements.

Additionally, legislation has been introduced in multiple jurisdictions aimed at making sexual harassment allegations public, whether by limiting the use of confidentiality agreements in employment or settlement agreements, or precluding contractual provisions mandating arbitration of sexual harassment claims, or both.

At the national level, Congress has proposed legislation that would bar mandatory arbitration of sexual harassment claims.⁷ A number of states — including Arizona, California, New Jersey, New York and Pennsylvania — are considering legislation that would limit or eliminate the use of non-disclosure provisions in agreements that resolve allegations of sexual harassment.⁸

PAY EQUITY IMPLICATIONS

Sexual harassment can also affect the makeup of an employer’s workforce. Various studies have reported that harassment may lead to the departure of women from the workplace.⁹ Some women may even leave for lower-paying jobs if they believe there is less risk of harassment in the new position.¹⁰ Thus, sexual harassment can affect compensation in a way that hurts pay equity.

The #MeToo and #TimesUp movements, evolving in scope as they have expanded in size, have also more explicitly hit upon this connection.

As with #MeToo, recent attention on pay equity traces back to Hollywood, where lead actors’ salaries are often public knowledge.

Michelle Williams co-starred in the year-end blockbuster “All the Money in the World” alongside Mark Wahlberg and Kevin Spacey. When sexual misconduct allegations against Spacey came to light shortly before the movie’s release, director Ridley Scott decided to reshoot all of Spacey’s scenes with a replacement actor, requiring the other leads to reshoot as well.¹¹

Shortly after the premiere, reports surfaced that while Williams was paid only \$800 to cover her per diem expenses for the reshoot, Wahlberg received over \$1.5 million. Though ultimately a question of contractual obligation (Williams' contract committed her to reshoots while Wahlberg's did not), the optics were not good and reignited a national conversation about pay equity.

Pay equity issues should be especially top of mind for employers operating in California, Delaware, Massachusetts, New York City, Oregon, Philadelphia and Puerto Rico; all these jurisdictions have recently passed salary history inquiry bans, preventing employers from asking applicants about their prior pay.¹²

As these bans continue to gain momentum, employers who proactively address this issue will better position themselves for any future compliance requirements and reduce one risk factor associated with pay discrimination claims under the federal Equal Pay Act and similar state and local laws.

Moreover, the current spotlight shed on pay equity by Hollywood should only intensify employer focus on the various state pay equity amendments that recently have or are going into effect in states such as New York, California, Maryland and Massachusetts.¹³

If the #MeToo and #TimesUp movements maintain their current momentum, employers should expect to be pressured even further to evaluate their pay practices.

In sum, while the Weinstein revelations sparked immediate focus on sex harassment in the workplace, which will continue to shape employee interactions in the near future, they also will have a broader impact on pay equity and related issues going forward.

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⁸ H.B. 2020, 53d Leg., 2d Reg. Sess. (Ariz. 2018), <http://bit.ly/2ErYhN6>; S.B. 820, 2017-2018 Leg., Reg. Sess. (Cal. 2018), <http://bit.ly/2C13w8N>; S.B. 3581, 217th Leg. (N.J. 2017), <http://bit.ly/2HfelDv>; B. S6382A, 2017-2018 Leg. Sess. (N.Y. 2017), <http://bit.ly/2EH3yUi>; S.B. 999, 2017 Sess. (Pa. 2017), <http://bit.ly/2By058n>.

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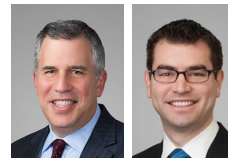
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¹³ See N.Y. LAB. LAW § 194; CAL. LAB. CODE § 1197.5 (West 2017); MD. CODE ANN., LAB. & EMPL. § 3-301 (West 2016); MASS. GEN. LAWS ANN. Ch. 149, § 1 (West 2016).

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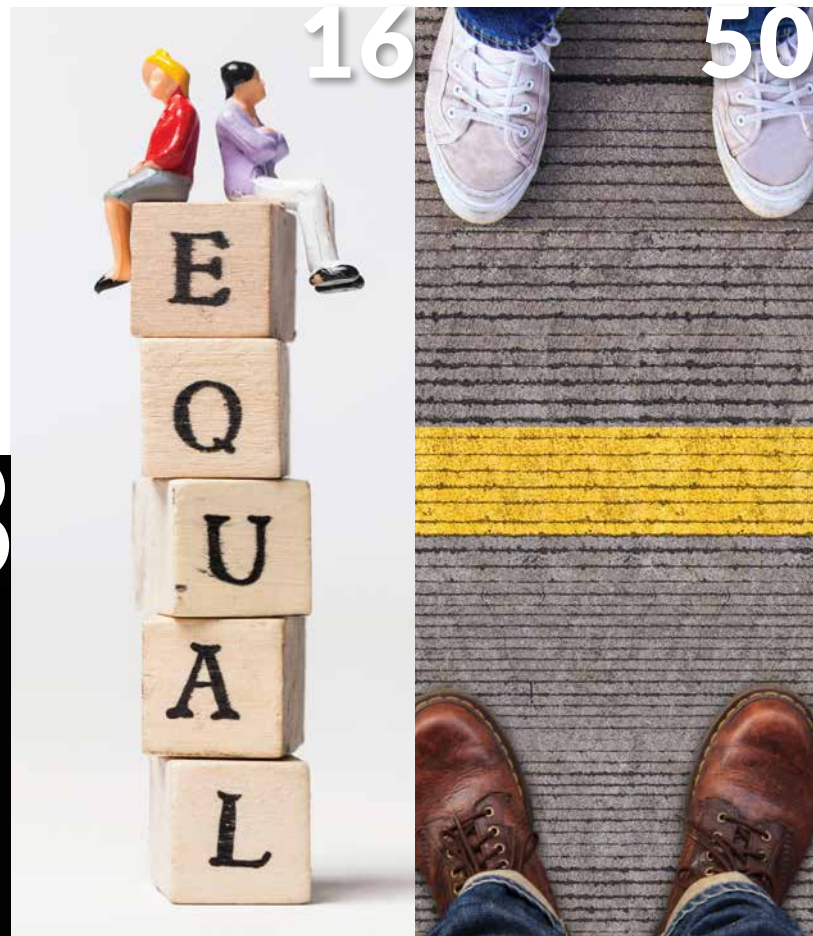
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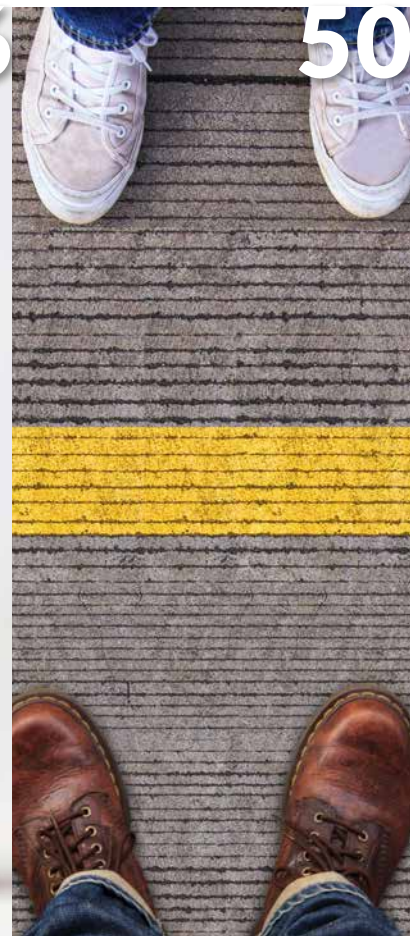


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THIS SPECIAL EDITION FOCUSES ON
Labor & Employment as well as Employee
Benefits & Executive Compensation.

As reflected by the articles, these multifaceted
practice areas span compliance, litigation, and
transactional issues. Further, these dynamic
practices closely entwine with major cultural
and economic trends such as tax reform, pay
equality, artificial intelligence, and the “me
too” movement.

2018 has been coined the year of AI.
Not surprisingly, many companies are
contemplating how to leverage machine
learning and robots to streamline their
processes. In doing so, they may unwittingly
open themselves up to liability. The article on
counseling employers about introducing these
disruptive technologies discusses the potential

legal risks and provides insight on how careful
planning can minimize potential exposure.

The treatment of women at work is another
hot-button topic. Beyond the decades-old
federal Equal Pay Act, states and cities are
expanding their existing protections as well
as adopting new laws to finally close the
persistent gender wage gap. The article and
checklist on conducting pay equity and wage
and hour audits explain how to evaluate
an employer’s compensation practices to
identify any shortcomings that the employer
should correct.

As women become more vocal about
their workplace experiences, their stories
may corroborate the claims of plaintiffs in
employment discrimination and harassment
lawsuits. The article on “me too” evidence
will help you effectively navigate the thorny
evidentiary and strategic issues that this type
of proof presents.

On the Employee Benefits & Executive
Compensation front, employers need to
understand how to avoid discrimination
and retaliation claims arising out of their
administration of benefit plans. The article on
ERISA’s protections for employees asserting
their rights to plan benefits explains how
employers can avoid infringing these rights and
prevent claims under the statute.

The longstanding trend of companies
terminating their pension plans in favor of
401(k) or other defined contribution plans has
not slowed down. One of the perpetual issues
when winding up a retirement plan is locating
missing participants who are owed a plan

LETTER FROM THE EDITOR

benefit. In December 2017, the PGBC finalized
rules to streamline its missing participant
program for defined benefit plans and open
the program for the first time to terminating
defined contribution plans. The article on
locating missing participants covers these
developments as it guides plan administrators
on handling missing participant issues for
terminating and ongoing plans.

This journal issue kicks off with an overview of
how the new tax reform law impacted benefits
and compensation issues. Most notably,
the legislation eliminated the performance-
based compensation exemption to the \$1
million cap on the deduction allowed for
compensation paid to covered executives
by public corporation under I.R.C. § 162(m).
The extent to which public companies will
alter their executive compensation packages
remains to be seen considering recent trends
emphasizing pay-for-performance among
compensation committees, proxy advisory
firms, and shareholders.

The Lexis Practice Advisor Journal and the
Lexis Practice Advisor online offering provide
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issues facing employers, which helps you
get your work done better and faster. Please
enjoy this special edition of the Lexis Practice
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The Lexis Practice Advisor Journal™ is designed to help attorneys start on point. This supplement to our online practical guidance resource, Lexis Practice Advisor®, brings you a sophisticated collection of practice insights, trends, and forward-thinking articles. Grounded in the real-world experience of our 850+ seasoned attorney authors, the Lexis Practice Advisor Journal offers fresh, contemporary perspectives and compelling insights on matters impacting your practice.

LABOR DEPARTMENT RESUMES OPINION PROGRAM, REISSUES 17 RESCINDED LETTERS

THE U.S. DEPARTMENT OF LABOR (DOL) HAS REISSUED 17 opinion letters originally issued in January 2009 during the last few weeks of the Bush administration but later withdrawn by the Obama administration “for further consideration.” The Obama administration subsequently discontinued the practice of issuing opinion letters, opting instead to issue general guidance documents.

On June 27, 2017, the DOL announced the reinstatement of the opinion letter process, stating that the letters “will benefit employees and employers as they provide a means by which both can develop a clearer understanding of the Fair Labor Standards Act (FLSA) and other statutes.”

The 17 reissued letters, dated Jan. 5, 2018, and designated as FLSA 2018-1 through FLSA 2018-17, address a wide range of issues arising under the FLSA. The letters provide case-specific guidance on actual workplace issues raised by employers, employees, or their representatives.


Among the reinstated opinions are:

- FLSA2018-1, finding that on-call hours of ambulance personnel are not compensable under the FLSA
- FLSA2018-8, finding that client service managers at an insurance company are exempt administrative employees under the FLSA
- FLSA2018-11, finding that bonuses paid to non-exempt equipment operators for each day worked at an oilfield services company must be included in the operators’ regular rate of pay

Each letter emphasizes that the opinion is based “exclusively on the facts and circumstances” provided in the submitted request.

Members of the public can access existing opinion letters or submit a request for agency guidance, including an opinion letter, at <https://www.dol.gov/whd/opinion/>.

- Lexis Practice Advisor Attorney Team

 RESEARCH PATH: [Labor & Employment > Wage and Hour > FLSA Requirements and Exemptions > Articles](#)



D.C. COURT LIFTS RULEMAKING NOTICE DEADLINE BUT HOLDS EEOC TO REVISION REQUIREMENT

JUDGE JOHN BATES OF THE U.S. DISTRICT COURT FOR THE District of Columbia has partially vacated his December 2017 order, [AARP v. EEOC, 2017 U.S. Dist. LEXIS 208965 \(D.D.C. Dec. 20, 2017\)](#), setting an August 2018 deadline for the Equal Employment Commission (EEOC) to give notice of proposed rulemaking aimed at revising two regulations governing employer-sponsored wellness programs.


However, the order, issued on January 18, [AARP v. EEOC, 2018 U.S. Dist. LEXIS 27317 \(D.D.C. Jan. 18, 2018\)](#), reaffirms the court’s earlier ruling vacating portions of the regulations as of January 1, 2019, in the absence of action by the EEOC and requires the EEOC to provide a status report on its rulemaking process by March 30.

The regulations, [81 Fed. Reg. 31,126](#) and [81 Fed. Reg. 31,143](#), which allow employers to require employees to disclose health information in order to be eligible for financial incentives tied to participation in wellness programs, were challenged by the American Association of Retired Persons (AARP) in a suit brought on behalf of its members. The AARP contended that the rules are inconsistent with requirements in the [Americans with Disabilities Act](#) and the [Genetic Information Nondiscrimination Act](#) that disclosure of health information to an employer be voluntary. Specifically, the AARP argued, employees who would not otherwise disclose health information would be forced to do so in order to obtain reductions in health coverage costs of up to 30%, as permitted by the regulations.

Finding that the EEOC failed to justify its adoption of the 30% incentive figure, Judge Bates ordered the agency to reconsider

For more information on wellness programs, see

> [IMPLEMENTING COMPLIANT WELLNESS PROGRAMS](#)

 RESEARCH PATH: [Employee Benefits & Executive Compensation > Health and Welfare Plans > Health Plans and Affordable Care Act > Practice Notes](#)

the regulations “in a timely matter,” but left them in place, finding that to vacate them would likely cause “widespread disruption and confusion.”

Subsequently, the AARP moved for vacatur of the regulations. Judge Bates granted the motion, but he set an effective date of January 1, 2019, and ordered the EEOC to issue a notice of proposed rulemaking by August 2018.

In his most recent order, in addition to lifting the August 2018 deadline and ordering a status report, Judge Bates rejected the EEOC’s request that he clarify that he “is not retaining jurisdiction over this matter,” stating instead that the case will be deemed closed as of January 2, 2019.

- Lexis Practice Advisor Attorney Team

 RESEARCH PATH: [Employee Benefits & Executive Compensation > Health and Welfare Plans > Health Plans and Affordable Care Act > Articles](#)





SUPREME COURT TO RULE ON CONSTITUTIONALITY OF TRAVEL RESTRICTIONS

THE U.S. SUPREME COURT IS EXPECTED TO RULE LATER

this year on the constitutionality of President Donald J. Trump's most recent executive order restricting the entry of certain foreign nationals into the United States.

The high court agreed on January 19 to review a ruling by the U.S. Court of Appeals for the Ninth Circuit enjoining enforcement of the executive order. [Trump v. Hawaii, 199 L. Ed. 2d 620 \(2018\)](#).

At issue is Proclamation 9645, entitled "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public Safety Threats," [82 Fed. Reg. 45161](#). The order, signed by President Trump on September 24, 2017, seeks to restrict citizens of Chad, Iran, Libya, North Korea, Syria, Venezuela, and Yemen from entering the United States because of deficiencies in the countries' "identity-management and information-sharing capabilities, protocols, and practices."

The state of Hawaii filed suit on October 17 in the U.S. District Court for the District of Hawaii, seeking an injunction against enforcement of the order. The court granted the injunction. The government appealed; the Ninth Circuit affirmed in part, limiting the injunction to "persons who have a credible bona fide relationship with a person or entity in the United States." [Hawaii v. Trump, 878 F.3d 662 \(9th Cir. 2017\)](#).

Acting on a petition by the federal government, the Supreme Court stayed the injunction pending further proceedings in the Ninth Circuit or the government's filing of a petition for writ of certiorari.

For more information on the travel ban, see

> [THE CHANGING IMMIGRATION LAWS UNDER THE TRUMP ADMINISTRATION: A NEW ERA FOR U.S. IMMIGRATION](#)

[RESEARCH PATH: Labor & Employment > Business Immigration > Employment Eligibility Verification > Articles](#)

The government filed its petition on January 5, arguing that both the U.S. Constitution and federal law "confer on the President broad authority to suspend or restrict the entry of aliens outside the United States when he deems it in the Nation's interest" and that the injunction is overly broad. Opposing review, the state of Hawaii argued that the president exceeded his authority by issuing an order "that purports to ban over 150 million aliens from this country based on nationality alone" and that the Ninth Circuit acted properly in enjoining application of the order.

A decision is expected before the high court adjourns at the end of June.

- Lexis Practice Advisor Attorney Team

[RESEARCH PATH: Labor & Employment > Business Immigration > Employment Eligibility Verification > Articles](#)

UNION MEMBERSHIP IN THE UNITED STATES

ON JANUARY 19, 2018, THE DEPARTMENT OF LABOR (DOL) released its annual report on the status of union membership in the United States, showing that for calendar year 2017, the union membership rate was unchanged from 2016, holding at 10.7%. The actual number of employees who were union members in 2017 increased by 262,000 workers to 14.8 million. By comparison, in 1983, when the DOL first started reporting such data, the union membership rate was 20.1%, nearly double the 2017 rate, and total union membership was 17.7 million workers.

If only private-sector employment is considered, the 2017 union membership rate drops to 6.5%, demonstrating the strength of organized labor's influence in the public sector, where more than 34% of the workforce is unionized—more than five times the rate in the private sector. Stated another way, in the public sector workforce, consisting of nearly 21 million workers, 7.2 million employees are unionized; in the private sector workforce, consisting of nearly 117 million workers, 7.6 million employees are organized. The occupations with the highest rate of unionization are teachers, police officers, and firefighters.

The statistics show that unionized employees enjoy a substantially higher median weekly wage than non-unionized employees: \$1,041 versus \$829.

- Bender's Labor & Employment Bulletin, Volume 18, Issue 3

For more information on union membership and organization, see

> [UNDERSTANDING THE LANDSCAPE OF UNION ORGANIZING AND UNION CAMPAIGNS](#)

[RESEARCH PATH: Labor & Employment > Labor-Management Relations > Union Organizing and Representation > Practice Notes](#)

[RESEARCH PATH: Labor & Employment > Labor-Management Relations > Union Organizing and Representation > Articles](#)



FINANCIAL FIRMS REVISITING APPROACH TO RESTRICTIVE COVENANTS

MANY BUSINESS OWNERS UTILIZE SOME FORM OF restrictive covenant when hiring employees. Whether it is to protect trade secrets or customer lists or to ensure that sensitive information remains confidential, employees routinely execute agreements barring them from competing with their former employer, soliciting their former employer's clients, or taking certain information with them when they leave.

While the enforcement of these covenants varies across jurisdictions, financial advisors and wealth management firms have chosen in the past to take a different tack. Instead of trying to restrict wealth managers from taking their clients with them


when they moved to new firms, these firms voluntarily joined the broker protocol, which permitted wealth managers to take certain client information with them when they left and allowed managers to solicit their clients to join them at their new firms. Wealth management firms believed that competition for the managers and their clients was a good thing.

The good times may be coming to an end. A recent article in the New York Times noted that Morgan Stanley, UBS, and Citibank withdrew from the broker protocol last year. If other brokerages, especially the larger ones, follow suit, clients may see their advisors subject to increased restrictions upon departing. This usually means one thing: litigation. While post-employment restrictions are subject to various levels of enforcement, the threat of litigation and its attendant costs will surely chill the liberal movement of wealth managers from one firm to another.

- *Bender's Labor & Employment Bulletin, Volume 18, Issue 3*

For more information on the Broker Protocol and issues employers should consider when hiring from competitors, see

> [BEST PRACTICES TO REDUCE LITIGATION RISKS WHEN HIRING FROM A COMPETITOR](#)

 [RESEARCH PATH: Labor & Employment > Non-competes and Trade Secret Protection > Restrictive Covenants > Practice Notes](#)

 [RESEARCH PATH: Labor & Employment > Non-competes and Trade Secret Protection > Restrictive Covenants > Articles](#)

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Richard Lieberman DYKEMA GOSSETT PLLC

2017 Tax Act Impact on Employee Benefits and Executive Compensation

THE TAX REFORM LEGISLATION ENACTED IN LATE 2017, known as the Tax Cuts and Jobs Act ([Pub. L. No. 115-97](#)) (the Tax Act), made relatively few far-reaching and substantive changes in the area of executive compensation and employee benefits. These changes, summarized in this article, primarily focus on (1) the non-deductibility of excessive employee compensation by publicly held corporations under [I.R.C. § 162\(m\)](#), (2) a new tax deferral option for certain qualified equity grants by private corporations, (3) the imposition of a new excise tax on excessive compensation paid by tax-exempt organizations, and (4) a few adjustments to existing tax-advantaged benefits provisions. However, from an executive compensation and employee benefits perspective, what may be most significant about the Tax Act is what was left out. The original legislative proposals introduced in both houses of Congress would have effectively eliminated the continuing use of non-qualified deferred compensation (NQDC) arrangements. Although the implications of the Tax Act are relatively few in the employee benefit and executive compensation area, the changes that were made are significant, albeit for limited audiences. The new rules described below are generally effective for tax years beginning after December 31, 2017.

Changes to Section 162(m) Deduction Limit

Section 162(m) provides that no deduction is allowed to a publicly held corporation for compensation paid to certain covered employees in excess of \$1 million. Prior to the Tax Act, an exception to the disallowance of a deduction for excessive compensation applied to qualified performance-based compensation or compensation payable on a commission basis. To qualify as performance-based compensation, the



corporation had to maneuver through a labyrinth of conditions to ensure that such incentive compensation arrangements were solely conditioned on the achievement of performance criteria established and certified by a duly constituted compensation committee and approved by company shareholders.

Impact of the Tax Act on Section 162(m)

The Tax Act substantially amends Section 162(m) by (1) significantly expanding the definition of covered employee, (2) eliminating the performance-based compensation exception (other than for grandfathered arrangements), and (3) broadening the limitation's application to corporations required to report under the Securities Exchange Act of 1934 (the Securities Act). [Pub. L. No. 115-97, § 13601](#).

UNDER THE NEW RULES, ONCE A COVERED EMPLOYEE, ALWAYS A COVERED EMPLOYEE. FOR EXAMPLE, AN OFFICER WHO IS ONE OF THE THREE HIGHEST COMPENSATED OFFICERS DURING 2018 WILL REMAIN A COVERED EMPLOYEE, EVEN IF SHE NO LONGER QUALIFIES AS ONE OF THE THREE HIGHEST REMUNERATED OFFICERS IN A SUBSEQUENT YEAR.

Expanded Definition of Covered Employee

Under Section 13601 of the Tax Act, the universe of potential covered employees has been greatly expanded. Under prior law, the term included the chief executive officer (CEO) of the corporation and the four highest compensated named executive officers for the taxable year, other than the chief financial officer (CFO). (The CFO was excluded because of a technical conflict between the Internal Revenue Code and Securities and Exchange Commission rules. [I.R.S. Notice 2007-49, 2007-1 C.B. 1429.](#))

A covered employee now includes:

- Any individual serving as the principal executive officer or principal financial officer during the tax year
- The three highest compensated named executive officers for the tax year, other than the principal executive officer and the principal financial officer
- Any individual who was a covered employee for a tax year beginning after December 31, 2016

[I.R.C. § 162\(m\)\(3\).](#)

Importantly, the time for identifying covered CEOs and CFOs no longer occurs as of the close of the year. Instead, the determination is now made continuously throughout the year. Thus, for example, a former CFO, interim CFO, and replacement CFO could all become covered employees in the same tax year. Further, the covered employee designation sticks to and remains with an individual throughout his or her life (and even thereafter, as [I.R.C. §162\(m\)\(4\)\(F\)](#) now provides that “[r]emuneration shall not fail to be applicable employee remuneration merely because it is includible in the income of, or paid to, a person other than the covered employee, including after the death of the covered employee.”)

Under the new rules, once a covered employee, always a covered employee. For example, an officer who is one of the three highest compensated officers during 2018 will remain a covered employee, even if she no longer qualifies as one of the three highest remunerated officers in a subsequent year. Moreover, she continues to be classified as a covered employee

after her separation from service and even after death. Therefore, if in retirement she exercises options resulting in a gain exceeding \$1 million, her former employer would not be permitted a corresponding deduction for the excess amount (as was allowed under prior law).

In view of the stickiness of the covered employee designation, publicly held corporations must be keenly aware that severance pay, deferred compensation, and other post-separation remuneration may be subject to the deduction ceiling. In this regard, they may look to design severance and other post-separation related plans to spread payments over multiple years to avoid, or at least mitigate, the effect of the cap.

Elimination of Performance-Based Compensation Exception

The Tax Act eliminates the nearly quarter-century-old exception to Section 162(m) allowing for the deduction of qualified performance-based compensation and commissions, including non-discounted stock options and stock appreciation rights. Many companies relied extensively on this exception and organized their incentive compensation programs around the rule’s qualification requirements. A narrow transition rule permits companies to continue to deduct performance-based compensation over the \$1 million threshold if it is paid under a written binding contract in effect on November 2, 2017, so long as the terms of the contract are not modified in any material way after that date. [Pub. L. No. 115-97, § 13601\(e\)\(2\).](#)

Some commenters have suggested that publicly held corporations will now revert to non-equity-linked forms of compensation, such as straight cash bonuses. For instance, according to news reports, covered employees at Netflix will now be paid straight cash bonuses regardless of company performance. On the other hand, publicly held corporations may wish to retain their existing performance-based compensation arrangements. The popularity of pay-for-performance principles among boards of directors, proxy advisory firms, and shareholders to appropriately incentivize executives is unlikely to wane. Objectively administered performance-based compensation models have become an integral tool for structuring executive compensation

Related Content

For an overview of the rules governing the executive compensation deduction limitation under I.R.C. § 162(m), as amended by the 2017 tax reform legislation, see

> [IRC SECTION 162\(M\): NAVIGATING TAX DEDUCTION LIMITATIONS FOR EXECUTIVE COMPENSATION](#)

RESEARCH PATH: [Employee Benefits & Executive Compensation > Employment, Independent Contractor, and Severance Arrangements > Executive Employment Agreements > Practice Notes](#)

For more information on the important legal and tax considerations when developing executive compensation arrangements for tax-exempt organizations, including new excise tax rules enacted under the 2017 tax reform legislation, see

> [EXECUTIVE COMPENSATION ARRANGEMENTS FOR TAX-EXEMPT ORGANIZATIONS](#)

RESEARCH PATH: [Employee Benefits & Executive Compensation > Employment, Independent Contractor, and Severance Arrangements > Executive Employment Agreements > Practice Notes](#)

For guidance in the drafting and negotiation of executive compensation agreements from the employer’s perspective, see

> [UNDERSTANDING, DRAFTING, AND NEGOTIATING EXECUTIVE COMPENSATION AGREEMENTS ON BEHALF OF EMPLOYERS](#)

RESEARCH PATH: [Employee Benefits & Executive Compensation > Employment, Independent Contractor, and Severance Arrangements > Executive Benefits and Perquisites > Practice Notes](#)

arrangements. Moreover, those companies that continue to emphasize incentive-based pay will have a freer hand since the administrative burdens of complying with Section 162(m)’s qualified performance-based compensation conditions are no longer applicable.

Of course, corporations continuing to rely on performance-based grants as a substantial element of total compensation may need to retain certain governance practices, regardless of their loss of tax relevance. For example, the NYSE and NASDAQ, as well as other exchanges, require listed corporations to maintain an independent compensation committee with the responsibility for setting executive compensation or making recommendations to the board regarding executive compensation. Moreover, disclosing such arrangements

to shareholders and seeking their preapproval remains a best practice in shareholder relations that should not be lightly discarded.

Expanded Application of Section 162(m)

Finally, the universe of corporations subject to Section 162(m) has expanded under the Tax Act. The definition of publicly held corporation has been broadened to include any corporation required to file reports under Section 15(d) of the Securities Act. Previously, the rule applied only to issuers of registered common equity securities. This means that companies not listed on any securities exchange or that have not crossed the size threshold of Section 12(g) of the Securities Act, but which issue equity or debt securities to the public in an offering registered with the SEC, are now subject to Section 162(m). As a result, many private equity firms along with certain foreign entities that are publicly traded in the United States using an American Depositary Receipt (e.g., Alibaba Group Holding Ltd.) will now find that compensation paid to covered employees in excess of \$1 million dollars is no longer deductible for U.S. federal tax purposes.

Tax Deferral Election for Qualified Equity Grants

New [I.R.C. § 83\(i\)](#) allows certain individuals to elect to defer recognizing income on qualified stock options and restricted stock units (RSUs) for up to five years. The new rule evolved from a 2016 Senate bill sponsored by Senators Mark Warner and Dean Heller, the Empowering Employees Through Stock Ownership Act (SB3152), and a companion House bill (HR5719). The purpose was to provide an extended deferral period of up to seven years for employees who exercise options to buy the stock of private companies to ease the tax burden arising from equity grants covering shares that are not publicly traded. Although the bills had bipartisan support, Congress failed to act on them until the material portions of those bills were included in Section 13603 of the Tax Act.

Historical Treatment of Options and RSUs

Under long-standing rules, if a non-qualified stock option (NQSO) does not have a readily ascertainable fair market value at the time the option is granted (which is usually the case), the grant of the NQSO is generally not subject to tax until the option is exercised. Upon exercise, the option holder will generally be subject to tax on the spread between the fair market value of the shares received and the exercise price (also known as the strike price) of the NQSO.

The obvious problem for employees of private companies is the illiquid nature of private company stock. Since a public market does not generally exist, an employee exercising an NQSO usually cannot make a cashless exercise and must go out of pocket for the federal and state taxes imposed on the

THE TAX ACT IMPOSES A NEW COST ON EXCESSIVE EXECUTIVE COMPENSATION AND SEVERANCE BENEFITS PAID BY TAX-EXEMPT ORGANIZATIONS FOR TAXABLE YEARS BEGINNING AFTER DECEMBER 31, 2017.

receipt of private company shares. A similar problem exists for stock-settled RSUs. RSUs are typically taxed on the fair market value of the award as it becomes vested (i.e., no longer subject to a substantial risk of forfeiture). However, even if a stock-settled RSU award is settled upon vesting, the grantee must come up with the cash for the associated taxes. This can also be a cashflow issue for the company because it will need to withhold and remit income and employment taxes at the time of the NQSO exercise or stock-settled RSU vesting, but it is not transferring any cash to the grantee from which it can withhold those amounts.

The new Section 83(i) election is designed to alleviate, or at least postpone, the foregoing dilemma. As further described below, if the grantee timely makes a Section 83(i) election, the income tax, but not the employment tax, owed at the time of exercise or vesting will be deferred (the deferred amount). The deferred amount will ultimately be subject to income tax at ordinary rates along with employment taxes. However, any appreciation above the deferral amount will be taxed as capital gain, similar to the tax consequences of a Section 83(b) election. Although it is possible for the deferral period to expire before the maximum five-year deferral, the deferral period nonetheless allows for more time during which a liquidity event could occur or other source of funds become available.

Conditions for Section 83(i) Elections

Pursuant to new [I.R.C. § 83\(i\)](#), if qualified stock is transferred to a qualified employee who makes an election with respect to such stock, income that would have previously been recognized upon exercise (or vesting for RSUs) is deferred for five years, or earlier upon any of the following events:

- The first date the qualified stock becomes transferable (including becoming transferable to the employer)
- The date the employee first becomes an excluded employee
- The first date on which any stock of the corporation issuing the qualified stock becomes readily tradeable on an established market
- The date on which the employee revokes the deferral election

The term qualified stock means the stock of a corporation that is the employer of the qualified employee making the election if all of the following conditions are met:

- The stock is received in connection with the exercise of an option or in settlement of an RSU.
- The option or RSU was granted by the corporation for the performance of services by the employee during a calendar year in which the corporation:
 - Did not have readily tradeable stock on an established market for any preceding year
 - Had a written plan under which at least 80% of all of the company's employees in the United States were granted stock options or RSUs with the same rights and privileges to receive qualified stock
- The employee does not have a right to sell the stock to the corporation at the time of the option exercise or RSU vesting.

[I.R.C. § 83\(i\)\(2\)](#).

Whether the granted options or RSUs have the same rights and privileges is determined by reference to the qualified employee stock purchase plan (ESPP) rules under [I.R.C. § 423\(b\)\(5\)](#). Although the company must have a broad-based plan in place, these rules do not require the company to grant an equal number of shares to all employees, although the number of shares available to each employee must be more than a de minimis amount.

Eligible Employees

The employees eligible to make the new Section 83(i) election are those who are customarily employed for at least 30 hours per week, excluding any individual who:

- Is a 1% owner or was at any time during the 10 preceding calendar years
- Is or has been at any time the CEO or CFO of the corporation (or a spouse, child, grandchild, or parent of such an individual)
- Is one of the four highest compensated officers of the corporation for the taxable year in which the option is exercised or RSU vests, or any of the 10 preceding taxable years

The Time for Making a Section 83(i) Election

Analogous to the making of a Section 83(b) election, the new Section 83(i) election must be made no later than 30 days after the option exercise or RSU vesting date (or an earlier date upon which the award becomes taxable because the employee's rights in the stock become transferable). The Section 83(i) election is made in a form and manner similar to a Section 83(b) election.

Limitations and Restrictions

It should be noted that, although the rights granted under new Section 83(i) are available for grants of incentive stock options under [I.R.C. § 422](#) and stock issued pursuant to a qualified ESPP under [I.R.C. § 423](#), an employee's Section 83(i) election will negate the preferential tax treatment otherwise afforded such options or stock.

Finally, the new deferral election is generally not available if any stock of the issuing corporation is readily tradable on an established securities market at any time before the election is made. The deferral election is also not available if the issuing corporation bought back any outstanding stock in the preceding calendar year, unless not less than 25% of the total amount the company bought back is stock for which a Section 83(i) deferral election is in effect and the buyback's eligibility criteria are made on a reasonable (non-discretionary) basis.

Reporting and Notice Requirements

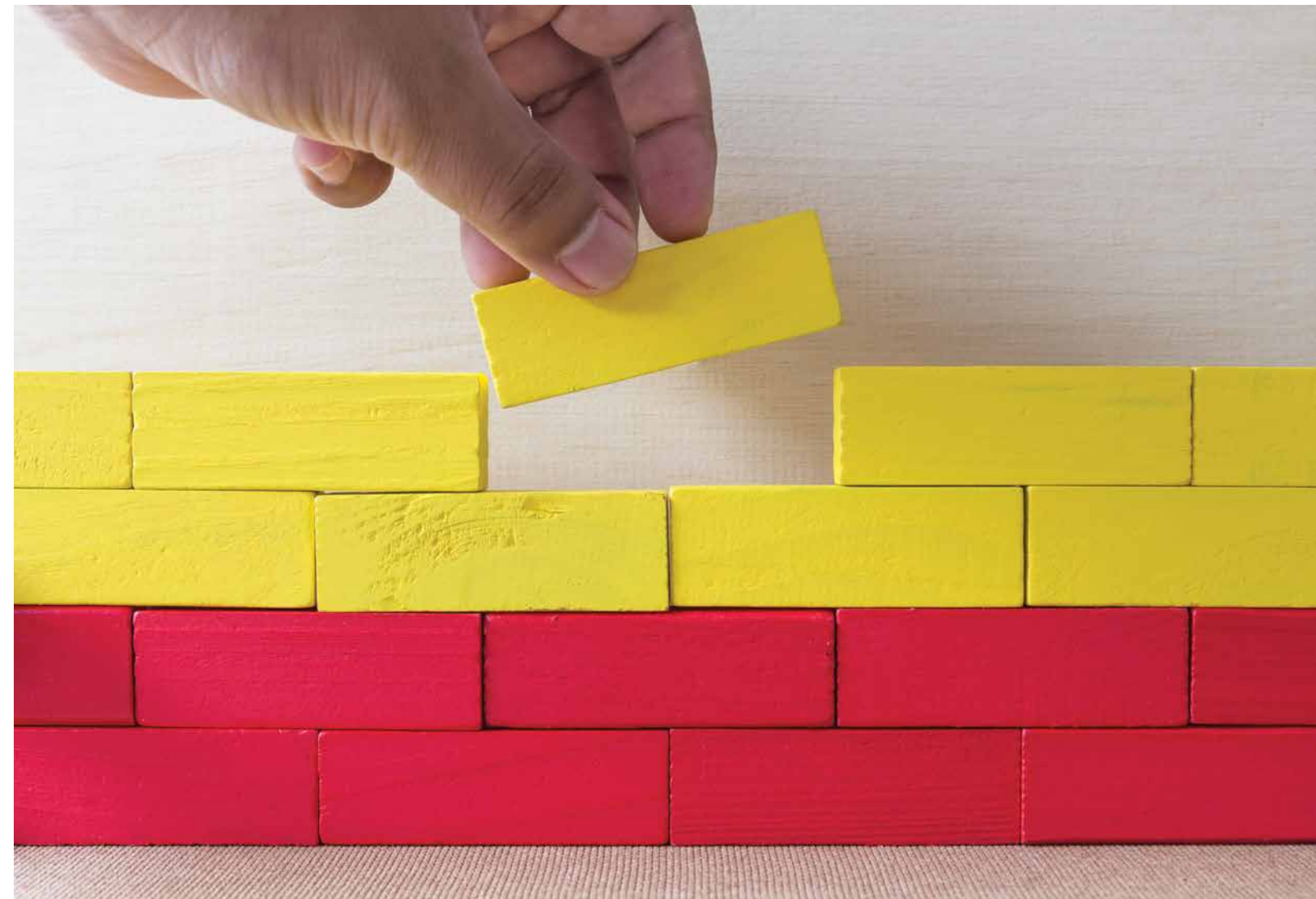
The new rule imposes several reporting and notice requirements on applicable issuing corporations. First, if a corporation has stock outstanding on January 1 of any calendar

year for which a Section 83(i) election is in effect (referred to as deferral stock) and the company purchases any of its outstanding stock during that year, it is required to report on its return for that year the total dollar amount of its outstanding stock so purchased, along with any other information that may be required in future regulations.

Second, any corporation that transfers qualified stock to a qualified employee is required to take the following actions at the time the employee becomes eligible to make a Section 83(i) election:

- Certify to the employee that such stock is qualified stock
- Notify the employee that he or she may be eligible to defer income by making a Section 83(i) election and about the consequences for making such an election

The notice requirement applies to stock attributable to options exercised or RSUs settled after December 31, 2017. Penalties apply if an employer fails to provide the required notice: \$100 for each failure to provide timely notice, up to \$50,000 for any calendar year.



The Good and the Bad of Qualified Equity Grants

In addition to lessening the tax burden imposed on recipients of private company stock, the 2016 Empowering Employees Through Stock Ownership Act was designed to create incentives for private companies to broaden the base of employee-shareholders. Whether new [I.R.C. § 83\(i\)](#) will accomplish that goal is not at all clear. For private tech corporations particularly, and other startup corporations that seek to use equity-linked compensation to attract and retain talent while minimizing cash compensation prior to a liquidity event such as a sale, merger, or IPO, qualified equity grants represent a powerful new talent acquisition and retention tool.

For the vast majority of privately owned corporations, however, the value of a Section 83(i) election may be more limited. First, the requirement to offer options or RSUs with the same rights and privileges to at least 80% of all U.S. employees may result in too great a broadening of the shareholder base from the perspective of many legacy shareholders, especially in closely held and family-controlled corporations.

Second, with the exception of private corporations with a short liquidity event timeline, the Section 83(i) election merely delays the inevitable income tax consequence, with no impact on the time for payment of employment taxes. Although there is a time value of money benefit associated with the deferral period, it remains inevitable for employees of private corporations having longer-term horizons that, at some point, they will have to go out of pocket to pay both the income and employment taxes associated with the exercised options or vested RSUs.

Excise Tax on Excessive Compensation Paid by Exempt Organizations

The Tax Act imposes a new cost on excessive executive compensation and severance benefits paid by tax-exempt organizations (EOs) for taxable years beginning after December 31, 2017. First, EOs are subject to a 21% (the corporate rate) excise tax on any remuneration paid to covered employees in excess of \$1 million. The term covered employee for this purpose means any employee (including any former employee) of an EO if the employee is one of the five highest compensated employees of the organization for the taxable year or was a covered employee of the EO for any preceding taxable year beginning after December 31, 2016. (An exception is provided for remuneration paid to a licensed medical professional (including a veterinarian) that is for the performance of medical or veterinary services by that professional.)

Second, EOs are also now subject to a golden parachute regime similar to [I.R.C. §§ 280G](#) and [4999](#), but irrespective of any organizational change in control. The Tax Act imposes a 21% excise tax on excess severance payments to highly compensated

covered employees (using the [I.R.C. § 414\(q\)](#) threshold (\$120,000 for 2018)). The tax applies to payments that are conditioned upon a separation from service that exceed the individual's average compensation over the preceding five years (the base amount), but only if the total amount of such severance payments exceeds three times the covered employee's base amount. [I.R.C. § 4960](#). [Pub. L. No. 115-97, § 136 02](#).

Other Tax Act Effects on Employee Benefits

The Tax Act changed some of the rules governing less high-profile matters as well, including the following:

- **Retirement plans.** Qualified plans are another area that escaped dramatic changes in some legislative proposals, such as dramatic reduction of pre-tax deferrals. The main change affecting retirement plans is to provide relief to participants who have an outstanding plan loan at the time of a distribution arising due to a termination of employment. In this situation, plans typically reduce the participant's plan benefit by the amount owed under the loan. That offset amount is a taxable distribution (and subject to an early withdrawal penalty for younger participants) unless the individual makes a rollover to another eligible plan or IRA (out of pocket for the remaining loan balance). The Tax Act extends the time for rolling over the offset amount from the usual 60 days to the due date (with extensions) for filing the participant's tax return for the distribution year. [Pub. L. No. 115-97, § 13613](#).
- **Fringe benefits.** The income exclusion for employer-paid qualified moving expense reimbursements under [I.R.C. § 132\(g\)](#) has been suspended through 2025 for reimbursements received after December 31, 2017. As a result, employees who are reimbursed for moving expenses will now have to report such reimbursements as income subject to both income and employment tax, at least through 2025. [Pub. L. No. 115-97, § 11048](#). Similarly, the Tax Act suspends through 2025 the income exclusion transportation fringe benefit for reimbursement of up to \$20 per month for qualified bicycle commuting previously permitted under [I.R.C. § 132\(f\)](#). [Pub. L. No. 115-97, § 11047](#).
- **Deductions for employee benefits.** Certain employer deductions for employee benefit expenses have been cut or reduced:
 - Expenses incurred to provide a qualified moving expense reimbursement and any qualified transportation fringe benefit (not just bicycle commuting reimbursements) are no longer deductible, unless paid to ensure the safety of an employee. In addition, there is a reduction to 50% for the deduction allowable for on-premises employee eating facilities eligible as an excludible fringe benefit under [I.R.C. § 132\(e\)](#). Also, beginning in 2026, the deduction available for providing employee meals for the employer's

convenience (eligible for income exclusion under [I.R.C. § 119\(a\)](#)) will also be eliminated. [Pub. L. No. 115-97, § 13304](#).

- The rules for employee achievement award deductions under [I.R.C. § 274\(j\)](#) are now restricted to awards consisting of tangible personal property, excluding cash, gift certificates, and other cash equivalents; vacations; meals; and tickets or vouchers for services and events. [Pub. L. No. 115-97, § 13310](#).
- **Volunteer award program limits.** The Tax Act increased the annual amount that may be contributed to a length-of-service award program for bona fide firefighting and emergency responder volunteers under [I.R.C. § 457\(e\)\(11\)](#) to \$6,000 (up from \$3,000), subject to adjustment for inflation. [Pub. L. No. 115-97, § 13612](#).
- **Affordable Care Act.** In a larger development, only tangentially related to employee benefits, the Tax Act essentially eliminates, as of 2019, the Patient Protection and Affordable Care Act's (ACA) individual mandate, which penalizes individuals who do not obtain qualifying health insurance coverage, either through an ACA exchange or otherwise. This could lead to fewer insurers offering individual coverage on the ACA exchanges, leaving employers back in the position of being the sole source of affordable health insurance options for their employees. On the other hand, it may be less likely that an applicable large employer that fails to offer qualifying coverage will incur an employer shared responsibility penalty if fewer of its employees opt for exchange coverage. [Pub. L. No. 115-97, § 11081](#).


The Dog That Didn't Bark: Nonqualified Deferred Compensation Unchanged

As originally proposed in the initial House bill and the Senate Conference Committee markup, [I.R.C. § 409A](#) (and [I.R.C. §§ 457A](#), and [457\(f\)](#)) would have been repealed, and NQDC would have been made taxable to employees and other service providers when vested, (i.e., when no longer subject to a substantial risk of forfeiture). Moreover, substantial risk of forfeiture was narrowly defined to cover only payments conditioned on the future performance of substantial services. Notwithstanding the complexity of Section 409A and the substantial penalties for non-compliance, under current tax law those rules permit a wide variety of compensation arrangements to defer taxation on vested amounts until payment is actually or constructively made. The proposals went further yet and would have defined NQDC to include non-qualified stock options and stock appreciation rights. As a result, the tax deferral for NQDC, including elective deferrals, supplemental executive retirement plans, stock appreciation rights, non-qualified stock options, and other arrangements would have essentially been eliminated under the now rejected proposals. This would have been a

Related Content


For assistance in the drafting and negotiation of executive compensation agreements from the executive's perspective, see

> [UNDERSTANDING, DRAFTING, AND NEGOTIATING EXECUTIVE COMPENSATION AGREEMENTS ON BEHALF OF EXECUTIVES](#)

 [RESEARCH PATH: Employee Benefits & Executive Compensation > Employment, Independent Contractor, and Severance Arrangements > Executive Benefits and Perquisites > Practice Notes](#)


For a discussion on the tax issues associated with grants of equity-based compensation, see

> [TAX RISKS OF EQUITY-BASED COMPENSATION](#)

 [RESEARCH PATH: Employee Benefits & Executive Compensation > Incentive and Equity-Based Compensation > Equity-Based Compensation > Practice Notes](#)


For an analysis of the basic types of equity and equity-based compensation awards, see

> [UNDERSTANDING TYPES AND TAXATION OF EQUITY COMPENSATION](#)

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hugely disruptive change resulting in a massive reassessment of existing and future compensation arrangements across public and private companies of all sizes. ■

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CONDUCTING PAY EQUITY AUDITS



This article provides advice and guidance to employers regarding how to ensure compliance with equal pay laws, particularly the Equal Pay Act of 1963 (EPA).

ALTHOUGH THE EPA HAS BEEN IN EFFECT FOR 50 YEARS, it gained renewed momentum with the Obama administration's creation of the National Equal Pay Enforcement Task Force, composed of members of the Equal Employment Opportunity Commission (EEOC), the Department of Justice, the Office of Personnel Management, and the Department of Labor. The task force has aggressively pursued employers who have violated the EPA's requirements and has collected significant amounts of money for victims of sex-based wage discrimination. While it remains to be seen what efforts the current White House administration takes concerning equal pay, the momentum has continued with state equal pay legislation. Several states have amended their equal pay laws to broaden their scope beyond what the EPA requires.

Virtually all employers must comply with the EPA and many, depending on their size and the state in which they are located, must also comply with other federal and state laws regarding equal pay. To limit exposure for equal pay violations, employers should adopt policies and procedures that satisfy the EPA and other federal and state requirements and help them meet their equal pay obligations and/or existing audit requirements.

Understanding the EPA

The EPA amends the Fair Labor Standards Act and generally requires employers to pay equal wages to men and women who perform work requiring substantially equal skill, effort, and responsibility, under similar working conditions (i.e., physical surroundings and hazards) within the same establishment.

Substantially equal does not mean identical. In evaluating whether two positions are substantially equal, you should disregard minor or insubstantial differences in work and should look to the overall job content rather than job title. Thus, employees who spend significant amounts of time on different tasks do not perform substantially equal work, while employees who spend a little time on different incidental tasks do. Additionally, wages is not limited to an employee's regular rate of pay; it also includes overtime pay, bonuses, stock options, life insurance, vacation, holiday pay, and any other similar payments and benefits.

Employers nonetheless retain their right to pay employees differently as long as the reason is not sex-based and does not violate other anti-discrimination laws. Thus, pay differentials are permitted when based on seniority, merit, quantity or quality of production, or another factor other than sex. When an employer must correct a wage difference, the EPA requires the employer to

increase the wage of the lower-paid employee. In other words, an employer may not reduce the wages of the higher-paid employee(s) to equalize pay.

The EPA applies to non-exempt employees as well as exempt administrative, executive, professional, and outside sales employees; however, it does not apply to other exempt employees (e.g., computer professionals).

EEOC Guidance

In 2016, the EEOC published a new fact sheet¹ that highlights the agency's interpretation of the EPA. As noted, the EPA prohibits employers from paying unequal wages to men and women who perform jobs that require substantially equal skill, effort, and responsibility under similar working conditions in the same establishment. The EEOC's fact sheet summarizes its interpretation of each of these factors:

- **Skill.** Skill is measured by factors such as an employee's experience, education, ability, and training to perform a job. It is important to distinguish between the skills required for the specific job and the skills of the employee in general. An employee may have skills in a certain area, but if those skills are not relevant to the job (e.g., a graduate degree in an unrelated field), they should not be considered in the employer's analysis.
- **Effort.** The amount of physical or mental exertion needed to perform a job.
- **Responsibility.** The degree of accountability required in performing a job. Note, however, that minor differences in responsibility will not justify a pay differential (e.g., turning off the lights at the end of the work day).
- **Working conditions.** Working conditions refer to both (1) physical surroundings (e.g., temperature, fumes, and ventilation) and (2) hazards.
- **Establishment.** An establishment is a distinct physical place of business rather than an entire business consisting of several places of business. However, in some circumstances, physically separate places of business may be treated as one establishment (e.g., if a central administrative unit hires employees, determines their compensation, and assigns them to separate work locations, the separate work sites can be considered part of one establishment).

¹ FACTS ABOUT EQUAL PAY AND COMPENSATION DISCRIMINATION, <https://www.eeoc.gov/eeoc/publications/fs-epa.cfm>.



Understanding Other Equal Pay Laws

In addition to the EPA, an employer's pay practices must also comply with other federal and state laws, some of which are discussed briefly below. Although this article primarily focuses on EPA compliance, you should evaluate the employer's pay practices under all applicable laws and recommend corrective action that minimizes the employer's full range of liability.

Federal Laws

In addition to the EPA, sex-based wage discrimination is also illegal under Title VII of the Civil Rights Act of 1964 (Title VII); thus, employees with EPA claims may also have Title VII claims. Title VII also prohibits wage discrimination based on race, color, religion, and national origin. Additionally, the Age Discrimination in Employment Act of 1967 (ADEA) and the Americans with Disabilities Act of 1990 (ADA) prohibit wage discrimination based on age and disability. Only employers with the requisite number of employees must comply with Title VII, the ADEA, and the ADA (i.e., 15 employees for Title VII and the ADA; 20 for the ADEA).

Federal Regulations and Guidance

In 2016, as part of the government's renewed focus on the issue of equal pay, the Office of Federal Contract Compliance Programs (OFCCP) issued updated guidance on sex discrimination. The EEOC also put forth an equal pay data rule, which the Office of

Management and Budget (OMB) later indefinitely stayed. The OFCCP guidance and the stayed EEOC equal pay data rule are addressed below.

OFCCP Guidance

The OFCCP rule updates its prior guidance on sex discrimination, which had last been updated in 1970, to bring it up to date with current law.² The rule also specifically:

- Prohibits sex-based wage discrimination and promotes fair pay practices (such as not denying opportunities for overtime work, training, higher pay, or higher-paying positions based on a person's sex)
- Allows employees to recover lost wages any time a federal contractor pays compensation that is the result of discrimination and not just when the decision to discriminate is made
- Prohibits discrimination on the basis of sex as to fringe benefits, such as medical insurance, life insurance, and retirement benefits, as well as profit-sharing, bonuses, and leave
- Requires federal contractors to give men and women equal access to jobs and workforce development opportunities unless they can meet the high bar of demonstrating that such requirements are a bona fide occupational qualification

WHILE THE EQUAL PAY DATA RULE REQUIREMENTS WERE MEANT TO HELP EMPLOYERS EVALUATE THEIR OWN BUSINESS PRACTICES AND PREVENT PAY DISCRIMINATION, THEY WERE ALSO AIMED AT HELPING THE EEOC AND OTHER ENFORCEMENT AGENCIES IDENTIFY AND INVESTIGATE PAY DISCRIMINATION.

The EEOC's Equal Pay Data Rule (Indefinitely Stayed by the OMB)

The EEOC's equal pay data rule would have required employers with 100 or more employees to submit pay data by sex, race, and ethnicity on their EEO-1 Reports. Specifically, under the rule, employers were scheduled to provide:

- **Summary pay data.** Employers were scheduled to provide aggregate data on pay ranges. Specifically, employers were to count the number of employees they had in each of 12 EEO-1 pay bands for each of 10 job categories. After tallying the total number of employees in each pay band by job category, employers would then enter this information in the report based on the sex and ethnicity or race of the employees. For example, an employer could report that it had 11 employees who are white women in the Professionals job category in pay band 7.
- **Aggregate hours worked data.** Employers were also scheduled to submit the aggregate hours worked by tallying the total number of hours worked by all of the employees in each pay band.

On August 29, 2017, the OMB stayed the EEOC's equal pay data rule. The pay data and hours worked information was initially due on March 31, 2018; now it is uncertain if the OMB will reinstate these reporting requirements.

While the equal pay data rule requirements were meant to help employers evaluate their own business practices and prevent pay discrimination, they were also aimed at helping the EEOC and other enforcement agencies identify and investigate pay discrimination. Therefore, if the OMB lifts the stay on these reporting requirements, it is very likely that the risk of potential equal pay claims for employers will increase, making it more important than ever that employers monitor and, if necessary, correct their pay practices to prevent any such claims.


State Laws

Many states have equal pay laws that may govern an employer's pay practices, and those states have begun to renew their focus on pay discrimination. While some states' equal pay laws closely mirror the EPA, several states, including California, Delaware, Maryland, Massachusetts, New York, and Oregon, have amended their equal pay laws to broaden their scope, while other states have similar legislation pending. As a result of the states' increased

Related Content


For more information on the Equal Pay Act, see

> [HEEDING THE EQUAL PAY ACT](#)

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For the unique requirements of the various state equal pay laws, see

> [THE WAGE AND HOUR RETALIATION AND DISCRIMINATION LAWS COLUMN OF WAGE AND HOUR STATE PRACTICE NOTES CHART](#)

 **RESEARCH PATH:** [Labor & Employment > Employment Litigation > Class and Collective Actions > Practice Notes](#)


For guidance on analyzing the employer's obligations under Title VII, see

> [COMPLYING WITH TITLE VII](#)

 **RESEARCH PATH:** [Labor & Employment > Discrimination and Retaliation > EEO Law and Protections > Practice Notes](#)


For a discussion of the employer's obligations under the Age Discrimination in Employment Act (ADEA), see

> [ADDRESSING THE ADEA'S MANDATES](#)

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For an analysis of the employer requirements under the Americans with Disabilities Act, see

> [AMERICANS WITH DISABILITIES ACT: EMPLOYER REQUIREMENTS AND REASONABLE ACCOMMODATIONS](#)

 **RESEARCH PATH:** [Labor & Employment > Attendance, Leaves, and Disabilities > The ADA and Disability Management > Practice Notes](#)

For details on preserving the attorney-client privilege and work product, see

> [PRESERVING THE ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT PROTECTION DURING INVESTIGATIONS](#)

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² See [41 C.F.R. §§ 60-20.1-20.8](#), OFCCP's SEX DISCRIMINATION FINAL RULE – FACT SHEET, https://www.dol.gov/ofccp/SexDiscrimination/SexDiscrimFinalRuleFactSheet_JRFQA508c.pdf, AND OFCCP SEX DISCRIMINATION FAQs, https://www.dol.gov/ofccp/SexDiscrimination/sexdiscrimination_faqs.htm.

SOME STATES HAVE BEGUN TO EXPAND EQUAL PAY LAWS BEYOND PAY EQUALITY BASED ON SEX. FOR EXAMPLE, CALIFORNIA HAS EXPANDED ITS LAW TO PROTECT RACE- AND ETHNICITY-BASED PAY DIFFERENTIALS.

attention to equal pay matters, it is essential that you keep abreast of any developments in your clients' state(s) to ensure that they make all necessary changes to their pay policies and audit procedures to avoid potential liability. Several of the most significant recent developments in states' equal pay laws are briefly summarized below.

Bona fide factor. Most of the equal pay amendments modify the EPA's exception that permits employers to pay employees unequally if the differential is based on any factor other than sex. The amendments generally state that such pay differentials must be based on a bona fide factor other than sex (i.e., a factor that is job-related with respect to the particular position and consistent with business necessity, such as education, training, or experience). This updated standard makes it easier for an employee to allege a prima facie case of wage disparity. Also, unlike under the EPA's standard, it allows employees to claim that a neutral factor produced a wage differential that disparately impacts employees based on their sex and that the employer did not adopt an alternative business practice that would serve the same purpose without resulting in the wage differential.

Comparable and substantially similar work. Some states have also expanded equal pay protections beyond what the EPA provides by requiring equal pay not only for substantially equal work, but also for comparable or substantially similar work. For example, California requires equal pay for employees who perform substantially similar work and Massachusetts requires equal pay for employees who perform comparable work.

Expanded protections. Some states have begun to expand equal pay laws beyond pay equality based on sex. For example, California has expanded its law to protect race- and ethnicity-based pay differentials.

Geographical scope. The state equal pay amendments vary as to the reach of the protections. California and New York, for example, have eliminated the requirement that an employee show that he or she was not being paid at the same rate as an employee of the opposite sex at the same establishment for equal work. Instead, employees need only show that they are not being paid at the same rate for substantially similar work and working conditions (California) or for equal work and similar working conditions (New York). In other

words, the comparison need not be between employees working at the same location. However, California's law provides no geographic restriction whatsoever, whereas in New York, employees can only compare themselves to others in the same geographic region, which can be no larger than the same county.

Pay transparency provisions. In addition to expanding the scope and coverage of existing equal pay laws, several states have also amended their equal pay laws to include pay transparency provisions. These provisions prohibit employers from restricting employees' ability to discuss their wages with coworkers. There are exceptions to this rule in some states. For example, in New York there may be limitations imposed on the ability of certain employees with access to employee wage information (such as human resources staff) to disclose employee wage information.

Salary history information. Another type of equal pay law that has been gaining momentum is those that prohibit employers from inquiring about an applicant's salary history. These laws are meant to ensure that any past wage discrimination is not perpetuating so that employees do not continue to be underpaid as their careers progress. Massachusetts was the first state to bar employers from forcing prospective employees to divulge how much they were making at their previous jobs. Several other states including California, Delaware, Maine, and Oregon have also passed similar laws, as well as several cities including New York City, San Francisco, and Philadelphia (although Philadelphia has stayed enforcement of its law until a lawsuit about its constitutionality is resolved).

Steps for Auditing the Employer's Equal Pay Practices

This section provides step-by-step guidance to help you audit an employer's equal pay practices to ensure they are in compliance with the EPA. You should modify these steps, as necessary, to ensure compliance with any applicable state laws as well.

Step 1: Identify the Audit Scope

Before beginning the audit, you should develop an understanding with the employer of what departments, positions, and locations the audit will address. You should also lay the groundwork for protecting the audit from disclosure.



- **Establish parameters of the audit.** Meet with the employer to determine the parameters of the audit. Determine whether any state or local equal pay laws apply and which protected categories the employer will analyze. If a company-wide audit is cost-prohibitive or not otherwise possible, consider audits that target specific high-risk facilities, departments, or positions; more limited audits are less costly and time consuming and often more palatable for employers. While targeted audits are effective, they have shortcomings that you should discuss with the employer before a decision is made. Although the scope of the audit should be set at the very outset, you should continue to assess whether it makes sense to enlarge the scope based on information revealed during the audit.
- **Take steps to preserve the attorney-client privilege and work product.** Use an engagement letter (for outside counsel) or memorandum (for in-house counsel) to establish that the scope of the audit includes providing legal advice and/or assistance in defending against anticipated litigation.

Any assessment of an organization's pay system should include an evaluation of the pay rates of all employees. When determining which employees to compare, you must ensure that the employees at issue perform equal, substantially similar, or comparable work. This typically requires substantially similar skill, effort, and responsibility, and the performance of those responsibilities under similar working conditions. You must compare pay rates by using one uniform period of time, most likely the actual or projected yearly wage, as employees tend to care most about their yearly income. Unless the pay system and/or the factors considered in determining

rate of pay are complex, you need not use a compensation expert or consultant to evaluate an employer's pay system.

Step 2: Conduct the Audit

In assisting an employer to ensure that its pay systems do not raise any equal pay issues, you should consider its performance evaluation system, compensation system, job descriptions, training programs, and other factors that influence the employer's pay rates. You must identify the various factors the employer considers in deciding how and what to pay its employees, such as length of service, years of experience in the industry, education, and geography, and you should assess whether sex, or any other protected category, factors into pay rate decisions. When analyzing employees' compensation, you will need to make sure that you compare similarly situated employees who perform like duties, even if their titles or positions do not reflect that. If you are conducting a company-wide audit, refine the audit procedures and analysis as you go and modify as needed.

More specifically, you should do the following:

- **Conduct a statistical analysis.** An employer can most effectively assess a pay rate and the impact of sex and/or other protected categories, if any, on that rate by performing a statistical analysis of male employees versus female employees. You can conduct this analysis in several ways—and, depending on its complexity, you may want to involve a compensation consultant or statistician—but the effect should be to separate out and compare the rate of pay for men and women based purely on position and grade. If a disparity exists, consider whether other factors explain the disparity such as seniority, experience, expertise, employment history, or any other neutral factors that are not based on sex or any other protected category.

**NON-ROUTINE ADJUSTMENTS
TO EMPLOYEE STATUS OR PAY
ENGENDER RISK BECAUSE THEY SIGNAL
DEFICIENCIES IN THE EMPLOYER'S
WAGE AND HOUR COMPLIANCE.**

■ **Assess performance review procedures.** Similarly, analyze job evaluation systems to ensure the employer applies them consistently and does not tend to favor certain individuals over others. Conduct this analysis by reviewing all of the factors used in determining rate of pay and assessing if the employer applies them uniformly. Make sure that the employer evaluates all positions in the same grade and/or category using similar benchmarks and scoring rubrics. A significant disparity between rates of pay among those in the same grade and position may trigger further analysis to ensure the decision-maker did not consider sex or any other protected category as a factor in setting the rate of pay.

■ **Analyze compensation factors.** Assess what employee contributions and/or qualifications the employer uses or values in determining employee raises and bonuses. You can obtain this information through interviews of and/or questionnaires provided to decision-makers or by simply requiring decision-makers to submit explanations of what factors they considered in deciding raise and bonus amounts. In conjunction with this assessment, evaluate whether all positions allow employees to exhibit those qualifications or provide those contributions for purposes of earning pay raises and bonuses.

■ **Ascertain prevalence of women, minorities, and older workers.** Evaluate any data the employer maintains regarding the demographics of its workforce to determine if women, minorities, and/or older workers tend to occupy certain positions and/or grades in the company. If so, analyze whether the preponderance of women, minorities, and older workers in certain roles impacts their pay relative to their male, non-minority, and younger counterparts. Try to limit any comparisons to employees within the same grade, department, or position and with similar experience. If pay disparities do exist among employees performing equal work, look for factor(s) other than sex or any other protected category that would explain the pay differential.

For instance, perhaps the males have more seniority than female employees in these like positions, which would account for the difference in pay rates.

Step 3: Present Your Findings to the Employer

Depending on the scope of the audit, you may present your findings and recommendations on an interim basis or at the conclusion of the audit. You and the employer should carefully consider if, and to what extent, you should provide a written report of the audit results, keeping in mind that despite efforts to protect communications and documents as privileged and/or attorney work product, your report, in whole or in part, may ultimately be deemed discoverable. If you provide a written report to the employer, also provide specific written instructions about maintaining confidentiality, including limiting distribution of the report and information contained in it to those who need to know.

Step 4: Take Remedial Actions

At the conclusion of the audit, the employer should address any unjustified disparities. This may entail a subsequent evaluation of an employee's rate of pay to determine if any reasonable basis justifies the disparity. If not, the employer must raise the affected employee's rate of pay to a level comparable to those performing equal work.

Non-routine adjustments to employee status or pay engender risk because they signal deficiencies in the employer's wage and hour compliance. Therefore, employers should give honest, brief, and general reasons for pay adjustments flowing from the audit. For example, an employer might say that the adjustment is the result of ongoing compliance efforts or, if appropriate, allows the employer to keep pace with competitors or the job market.

Step 5: Consider Future Best Practices

In addition to regular assessments of its compensation systems, the employer should also follow these best compliance practices:

■ **Be transparent.** Advise the employer to share how it establishes each employee's rate of pay and how raises/bonuses are awarded so that employees understand differentials in pay. Handbooks may be helpful to lay out general compensation policies, but the factors considered when determining who should receive a bonus may change from year to year. Instead, the employer may want to provide an annual distribution to all employees detailing how it will determine discretionary and non-discretionary bonuses for that year. You should also recommend that the employer hold one-on-one meetings with each employee specifically to discuss the employee's set rate of pay and how to reach individual targets to increase compensation. The employer can hold these meetings in conjunction with annual evaluations or at the discretion of the employer when it considers an employee for a raise or bonus.

■ **Elicit employees' views.** Solicit feedback from employees regarding their perception of pay rate differentials to determine whether employees perceive differences based on sex or any

other protected category. Feedback acquired anonymously will provide the most useful insights. The employer can provide questionnaires regarding employee perception during employee evaluation periods or during any other time when it assesses the current compensation system. The employer should consider making changes to its evaluation system based on feedback and/or useful employee recommendations to demonstrate to employees that their feedback has significance.

■ **Provide training.** Counsel the employer to include compensation determination in the employer's regular Equal Employment Opportunity (EEO) training, particularly any individual training offered to managers, supervisors, or others involved in determining compensation, raises, and bonuses.

■ **Make sure job descriptions are current.** The employer should regularly update position qualifications, skills, and duties when necessary to accurately reflect current practice and characterization. The employer should also ensure that all job descriptions are completely sex-neutral unless a specific component of the position would require otherwise. ■

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Wage and Hour Self-Audits Checklist

This checklist identifies the main risk categories for wage and hour self-audits. To avoid potentially significant liability for wage and hour violations, employers should consider wage and hour self-audits to identify and close compliance gaps.

In conducting a wage and hour self-audit, you should consider the following issues:

Preserve the Attorney-Client Privilege/Work Product

Audits often involve the production of documents that would normally be discoverable in a federal or state Department of Labor investigation or wage and hour litigation. Consequently, you should take steps to establish and preserve the attorney-client privilege and work product, to the extent possible, from the outset of the audit.

Evaluate Employer's Wage and Hour Policies and Procedures

Ensure that the employer's policies and procedures comply with applicable federal and state law and that the employer uniformly implements them.

Ensure Employer Corrected Previously Identified Shortfalls

Confirm that the employer corrected compliance gaps identified in prior audits.

Confirm Accuracy of Employee Classifications

In assessing whether the employer has correctly classified employees as exempt or non-exempt for overtime purposes, consider the following:

- **Duties.** Do exempt employees meet all requirements of the executive, administrative, professional, outside sales, computer employee, or highly compensated employee exemption? In evaluating the classification of employees, you should:
 - ✓ Review job descriptions and actual duties to ensure that the job descriptions reflect the work being performed by employees
 - ✓ Examine job descriptions to ensure they are accurate, up to date, and justify the applicable exemption –and–
 - ✓ Evaluate each exemption on a case-by-case basis and avoid decisions based solely on job descriptions and/or titles



- **Compensation amount.** Confirm that exempt employees earn at least \$455 per week on a “salary basis” to ensure that the federal exempt salary basis and threshold is satisfied. Salary basis means an employee regularly receives a set amount of compensation each pay period regardless of the quality or quantity of the employee’s work, although certain types of deductions are permissible (see the section below entitled “Deductions”). Note the following:
 - ✓ This requirement does not apply to outside sales employees, teachers, and employees practicing law or medicine. Note that not all states (e.g., California) have adopted each of these exceptions to the salary basis rule.
 - ✓ Exempt computer employees may be paid at least \$455 on a salary basis or on an hourly basis at a rate not less than \$27.63 an hour. Confirm that state law does not require a higher rate. In California, for example, computer professional employees must be paid a salary of at least \$90,790.07 annually (\$7,565.85 monthly) or an hourly wage of at least \$43.58 for every hour worked.
 - ✓ Exempt highly compensated employees must be paid at least \$100,000 annually. Note that not all states (e.g., California) recognize the highly compensated employee exemption.
 - ✓ On November 22, 2016, a federal district court judge in the U.S. District Court for the Eastern District of Texas issued a nationwide preliminary injunction barring enforcement of the U.S. Department of Labor’s (DOL) overtime expansion rule in [Nevada v. United States DOL, 218 F. Supp. 3d 520 \(E.D. Tex. 2016\)](#). That rule would have, among other things, raised the salary threshold to \$913 per week (\$47,476 yearly) on December 1, 2016. Consequently, the DOL’s overtime expansion rule did not take effect as scheduled. Then on August 31, 2017, the same federal district court judge in the Eastern District of Texas struck down the DOL’s overtime expansion rule in [Nevada v. United States DOL, 2017 Dist. LEXIS 140522 at *28 \(E.D. Tex. Aug. 31, 2017\)](#).
 - ✓ Confirm that the salary paid to employees classified as exempt satisfies the salary threshold of certain states that maintain thresholds greater than the federal \$455 weekly salary threshold requirement.
- **Deductions.** Ensure exempt employees regularly receive a predetermined amount of compensation for every workweek in which they perform any work regardless of the hours, quality, or quantity of work. Confirm that the employer only makes the following proper deductions:
 - ✓ For absences of one or more full days not for sickness/disability
 - ✓ For absences of one or more full days for sickness/disability if made according to a bona fide plan, policy, or practice of providing compensation for salary loss
 - ✓ Offsets for amounts employees receive as jury or witness fees/military pay
 - ✓ Penalties for infractions of major safety rules
 - ✓ For disciplinary suspensions of one or more full days
 - ✓ Days not worked in the first/last week of employment
 - ✓ For leave under the [Family and Medical Leave Act](#)
- **Safe harbor policy.** Confirm the employer has a safe harbor policy and procedures to address improper salary deductions. If an employer has made improper deductions from salaries, it will not jeopardize employee exemptions so long as the employer clearly communicates a policy that prohibits improper deductions and provides a complaint mechanism; reimburses employees for improper deductions; makes a good-faith commitment to comply in the future; and does not willfully continue to make improper deductions.



Evaluate Independent Contractor Classifications

The worker is more likely to be deemed an employee if:

- ✓ The worker's services form an integral part of the employer's business
- ✓ The relationship has a longer term or more permanent character
- ✓ The worker did not invest much in facilities and equipment
- ✓ The company exercises control over how, when, and where the worker performs the work
- ✓ The worker does not have any opportunity for profit and loss beyond the hourly compensation or salary received by the worker
- ✓ The worker is prohibited by the employer from providing services to another company –and–
- ✓ The worker does not use initiative, judgment, or foresight to compete for business in the open market

Review Employer Internship Programs

In January 2018, the DOL announced its withdrawal from using the previous six-factor test for unpaid internship programs that had been used under the Obama administration. The new test, which has been adopted by the Second, Sixth, Ninth, and Eleventh Circuits, is known as the “primary beneficiary” test.

■ **Primary beneficiary test.** The primary beneficiary test is flexible, and no single factor is determinative. Accordingly, whether an intern or student is an employee under federal law necessarily depends on the unique circumstances of each case. The test considers the following seven non-exhaustive factors to weigh and balance:

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee and vice versa.

2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions
3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit
4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar
5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning
6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern –and–
7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job after the internship

Evaluate How the Employer Calculates and Pays Wages

You should consider the following issues:

- **Minimum wage and overtime.** Determine if the employer pays non-exempt employees minimum wage and overtime according to applicable federal and/or state law. In particular:
 - ✓ Confirm that the employer includes all applicable payments in calculating the regular rate and overtime pay (e.g., non-discretionary bonuses, shift differentials, and other payments) and/or lawfully excludes additional payments from such calculations.
 - ✓ Confirm that deductions for the benefit or convenience of the employer (e.g., uniforms) do not reduce an employee's rate of pay below minimum wage.
 - ✓ Consider whether special requirements for overtime pay apply (e.g., for hospital workers, non-exempt salaried employees, piecework, multiple jobs, and job/day rates).
 - ✓ Advise the employer to consider participating in the DOL's pilot Payroll Audit Independent Determination (PAID) program. Employers that participate in the PAID program to resolve non-compliant overtime and minimum wage practices will not be subject to civil penalties or liquidated damages under the FLSA.
- **Compensatory time.** Determine whether the employer provides compensatory time to non-exempt employees in lieu of overtime. Note the following:
 - ✓ Only public employers (i.e., a state, a political subdivision of a state, or an interstate governmental agency) may lawfully provide compensatory time in lieu of overtime pay.
 - ✓ Private sector employers must pay overtime when employees work more than forty hours in a week. However, there may be a limited exception for validly implemented “time-off plans,” which provide time off in the same pay period at the time-and-one-half rate.
- **Deductions.** Evaluate the propriety of the deductions that the employer makes. In particular:
 - ✓ Confirm that the state in which the employer operates permits deductions from employees' wages. (For example, California prohibits employers from deducting from wages unless done so under certain circumstances set forth in [Cal. Labor Code § 224](#).)
 - ✓ If the state does permit wage deductions and permits them for the benefit or convenience of the employer (e.g., uniforms), confirm that such deductions do not reduce an employee's rate of pay below minimum wage.
 - ✓ Ensure the employer is not making impermissible deductions from exempt employees' salary basis pay. (See the section above entitled “Compensation amount.”)

Determine Whether All Hours Worked Are Recorded and Paid

Your analysis should encompass the following:

- **Timekeeping system.** Ensure the employer's timekeeping system allows for the accurate recording and calculation of hours worked.
- **Compensable time.** Confirm that non-exempt employees record all hours worked including, for example, pre- and post-shift work; compensable training, travel, and meeting time; reporting time; work performed at home; on-call time; waiting time (if engaged by the employer to wait); and any time worked during an employee's otherwise non-compensable meal and break times. Confirm that the employer pays the employees for such time.
- **Rounding.** Determine whether the employer complies with applicable rounding rules. Federal law permits employers to round employee time to the nearest quarter hour. That is, employers may round down—and not count as hours worked—one to seven minutes of work. Employers must round up—and count as a quarter hour of work time—eight to 14 minutes of work. Rounding is permissible where it is used in such a manner that it will not result, over a period of time, in failure to compensate employees properly for all the time they have actually worked.
- **Meals and breaks.** Confirm that non-exempt employees accurately record non-compensable meal and break times and that they do not perform work at such times. Under federal law, breaks of thirty minutes or more need not be compensable. Employers, however, must pay employees for breaks of twenty minutes or less and include such time in overtime calculations.
- **Off-the-clock policies/procedures.** Determine if the employer has policies and procedures in place that prohibit and prevent off-the-clock work. Determine whether there is a procedure for reporting off-the-clock work.

Review the Employer's Provisions for Nursing Mothers

You should consider the following issues concerning breastfeeding mothers:

- **Location and time for breaks.** Be sure the employer provides non-exempt nursing mothers reasonable breaks and a place to express milk (other than a bathroom). Federal law does not require breaks for exempt employees.
- **Exemption from requirements.** If the employer does not provide breaks or private location for nursing mothers to express milk, determine whether it is exempt from such requirements because it has fewer than fifty employees and can establish undue hardship. Note that state law, however, may also impose lactation break requirements.
- **Similar treatment of employees.** Generally, breaks to express milk are not compensable under federal law. However, if an employer provides compensated breaks, the employer must compensate an employee who uses break time to express milk in the same way that it compensates other employees for break time.
- **Relieved from work.** Determine whether nursing mothers are completely relieved from work when taking breaks to express milk. If not, the employer must compensate the time as work time.

Confirm Compliance with Child Labor Restrictions

The employer must comply with the following federal restrictions for non-agricultural jobs:

- **Minors age 18 or older.** No restrictions on jobs or hours.
- **Minors age 16 and 17.** May perform any job not declared hazardous by the Secretary of Labor, and are not subject to restrictions on hours.
- **Minors age 14 and 15.** May generally work outside school hours in various non-manufacturing, non-mining, nonhazardous jobs listed by the Secretary Labor in regulations published at [29 C.F.R. Part 570](#) under the following conditions:

- ✓ No more than three hours on a school day, eighteen hours in a school week, eight hours on a non-school day, or forty hours in a non-school week
- ✓ They may not begin work before 7 a.m. or work after 7 p.m., except from June 1 through Labor Day, when evening hours are extended until 9 p.m.
- ✓ Permissible work for 14- and 15-year olds is limited to those jobs in the retail, food service, and gasoline service establishments specifically listed in the Secretary of Labor's regulations
- ✓ Those enrolled in an approved Work Experience and Career Exploration Program (WECEP) may work up to twenty-three hours in school weeks and three hours on school days (including during school hours)

Evaluate the Employer's Recordkeeping Practices

Is the employer maintaining at least the following records?

- Personal information (employee's name, home address, occupation, sex, and birth date if under 19 years of age)
- Hour and day when workweek begins
- Total hours worked (each workday and each workweek)
- Total daily/weekly straight-time earnings
- Regular hourly pay rate for week when overtime is worked
- Total overtime pay for the workweek
- Deductions from or additions to wages
- Total wages paid each pay period
- Date of payment and pay period covered
- Specific information for homeworkers, employees working under uncommon pay arrangements, employees to whom lodging or other facilities are furnished, and employees receiving remedial education

Determine Whether Industry-Specific Requirements Apply

Does the employer comply with all wage and hour requirements applicable to its industry (e.g., agriculture, automobile dealers, restaurants, construction, garment, government contractors)?

Related Content

For additional information on worker classifications, see

> [CONDUCTING AN AUDIT ON EXEMPT/NON-EXEMPT EMPLOYEE CLASSIFICATIONS](#)

RESEARCH PATH: [Labor & Employment > Wage and Hour > Claims and Investigations > Practice Notes](#)

For a discussion of best practices in conducting pay equity audits, see

> [PAY EQUITY AUDITS AND BEST PRACTICES](#)

RESEARCH PATH: [Labor & Employment > Discrimination and Retaliation > EEO Laws and Protections > Practice Notes](#)

For a detailed look at the Fair Labor Standards Act's (FLSA) child labor restrictions, see

> [NAVIGATING THE FLSA'S CHILD LABOR RESTRICTIONS](#)

RESEARCH PATH: [Labor & Employment > Wage and Hour > FLSA Requirements and Exemptions > Practice Notes](#)

To obtain an overview of the FLSA's records maintenance requirements, see

> [UNDERSTANDING RECORDS MAINTENANCE AND RETENTION REQUIREMENTS UNDER THE FLSA](#)

RESEARCH PATH: [Labor & Employment > Wage and Hour > FLSA Requirements and Exemptions > Practice Notes](#)

For information on the various states' wage and hour requirements, see

> [WAGE AND HOUR STATE PRACTICE NOTES CHART](#)

RESEARCH PATH: [Labor & Employment > Employment Litigation > Class and Collective Actions > Forms and Guidance](#)

For a sample lactation break time policy, see

> [LACTATION/BREASTFEEDING POLICY](#)

RESEARCH PATH: [Labor & Employment > Attendance, Leaves, and Disabilities > Attendance and Time Off > Forms and Guidance](#)





Review the Employer's DOL Posters and Notices

Has the employer satisfied all applicable posting and notice requirements, including industry-specific requirements? Many states and cities also require employers to post certain notices advising employees of their wage and hour rights, in addition to providing employees with written notices upon hire and when the employer changes certain terms and conditions of employment (e.g., pay rate, pay day, pay period). Confirm that all such posting and notice requirements are met. See [Complying with Federal Wage and Hour Poster and Notice Requirements](#). For state wage and hour poster requirements, see [Wage and Hour State Practice Notes Chart](#).

Determine State Wage and Hour Requirements Applicable to the Employer

Federal and state law may significantly differ in many areas and employers must generally comply with the provisions most protective to employees. You should:

- Determine whether and to what extent the employer complies with applicable state wage and hour requirements
- Ensure the employer's wage and hour policies/procedures reflect applicable state law requirements

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 **RESEARCH PATH:** [Labor & Employment > Wage and Hour > Policies and Procedures > Checklists](#)



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Locating Missing Retirement Plan Participants

This article addresses the steps that plan sponsors and fiduciaries must take to locate and notify missing participants in qualified defined contribution and qualified defined benefit plans regarding benefits that are due to them under the plan.

PLAN ADMINISTRATORS ARE OBLIGATED UNDER THE Employee Retirement Income Security Act (ERISA) to conduct a diligent search to locate missing participants and beneficiaries. The fact that participants and beneficiaries cannot be located poses a problem for plan administrators in active plans when a distribution is required and in terminated plans for which the plan administrator must liquidate the benefit trust. Recently, the Pension Benefit Guaranty Corporation (PBGC) opened its missing participant program to terminating defined contribution plans and other previously excluded defined benefit plans. This article summarizes guidance regarding missing participants, provides an overview of the revised PBGC program, and offers tips for plan administrators to handle (and avoid) missing participant issues.

Missing Participant Issues in Qualified Plans

Missing participants (which term includes beneficiaries and alternate payees with accrued benefits as used in this article) become an acute issue for qualified retirement plan sponsors, administrators, or other fiduciaries in several circumstances, such as:

- The plan is being terminated and all assets are being liquidated.
- A plan participant terminated employment and is due a distribution under the plan.
- A plan participant must take a required minimum distribution under the rules of [I.R.C. § 401\(a\)\(9\)](#).



- Payments are being made for plan corrections under the Employee Plans Correction Resolution System.
- A plan distribution was made and a check for the benefit payment was returned or remained uncashed until it was no longer eligible to be presented for payment.

LOCATING MISSING PARTICIPANTS IS PARTICULARLY IMPORTANT IN ERISA-GOVERNED PLANS BECAUSE IT IMPLICATES THE FIDUCIARY DUTIES OF RESPONSIBLE PARTIES.

While it may seem unlikely that a participant would not remain vigilant about his or her retirement benefits, there are a variety of reasons individuals become missing participants. Such reasons include:

- **No updated address.** In keeping with the trend of increased workforce mobility, a participant may terminate employment and fail to provide the employer or plan with a new address.
- **Participant unable to locate the plan.** As a result of corporate transactions, the sponsor of the plan of which a participant previously was a member may change, or the plan may be merged into another plan. Thus, the participant may not know how to locate the plan.
- **Participant dies.** The participant dies but no beneficiary comes forward.

Locating missing participants is particularly important in ERISA-governed plans because it implicates the fiduciary duties of responsible parties. To assist plan fiduciaries in these efforts, the Department of Labor (DOL) and the PBGC have provided detailed guidance on steps to take to locate missing participants in both defined contribution plans (DC plans) and

defined benefit plans (DB plans). This guidance is summarized in the following sections.

Missing Participants in Terminating Defined Contribution Plans

When terminating a defined contribution plan, the plan sponsor and plan fiduciaries must notify participants that the plan is being terminated and benefits are being distributed. This requirement implicates ERISA § 404(a)'s prudent man standard of care for plan fiduciaries. ERISA § 404(a) ([29 U.S.C. § 1104](#)). While the decision to terminate a plan is a settlor decision and not a fiduciary decision, the fiduciary responsibility provisions of ERISA govern the implementation of plan termination, including steps to locate missing participants, and the choice of distribution options for a missing participant's account balance. DOL Field Assistance Bulletin 2014-01 (Aug. 14, 2014) (FAB 2014-01).

Further, the IRS has ruled that in the context of a terminating plan, all of a plan's assets must be distributed as soon as administratively feasible after plan termination. [Rev. Rul. 89-87](#); [Prop. Treas. Reg. § 1.412\(b\)-4\(d\)\(1\)](#).

DOL Field Assistance Bulletin 2014-01

FAB 2014-01 sets forth guidance on what the DOL considers reasonable efforts to locate missing participants when terminating defined contribution plans such that if such efforts are taken, the terminating plan's fiduciary duties will generally be deemed satisfied. Under earlier guidance, the DOL required that plan fiduciaries utilize the Social Security Administration's and the IRS's address forwarding services to locate plan participants or beneficiaries. Those programs were discontinued given expanded internet search options.

FAB 2014-01 requires that the following actions be taken to locate missing participants in a DC plan (in no particular order):

- **Use certified mail.** Certified mail is an easy way to find out, at little cost, whether a participant or beneficiary can be located in order to distribute benefits. The DOL has provided a model notice that may be used for mailings made to locate missing participants and beneficiaries. The model, which relates to terminated defined contribution plans, need not be followed and use of other notices will satisfy the safe harbor.
- **Check related plan and employer records.** The plan sponsor should check the employer records and the records of another of the employer's plans, such as the group health plan, for address and beneficiary information. Where there are privacy concerns, the plan fiduciary engaged can request that the employer or other plan fiduciary contact or forward a letter to the missing participant or beneficiary.
- **Check with the designated plan beneficiary.** Try to identify and contact any individual that the missing participant designated as a beneficiary to find updated contact information for the missing participant. If this raises privacy concerns, the plan fiduciary can request that the designated beneficiary contact or forward a letter to the missing participant or beneficiary.
- **Use free electronic search tools.** Plan fiduciaries must make reasonable use of internet search tools that do not charge a fee to search for a missing participant or beneficiary. The DOL has identified these services to include internet search engines, public record databases (such as those for licenses, mortgages, and real estate taxes), obituaries, and social media.

The above list is required for any distribution regardless of the participant's account balance. However, if taking all those steps does not yield results, the plan fiduciary must make a cost-benefit analysis, weighing the facts and circumstances, to determine whether further steps are necessary.

When determining whether further steps are necessary, the plan fiduciary must take into account:

- The size of participant's account balance
 - The cost of further search efforts
- DOL FAB 2014-01 lists the following as possible additional search methods:
- Internet search tools
 - Commercial locator services
 - Credit reporting agencies
 - Information brokers
 - Investigation databases
 - Analogous services that may involve charges

Distributing Accounts on Behalf of Missing Participants Who Cannot Be Located

Because all assets must be distributed for a terminating plan, if none of the fiduciary's search efforts are successful, the fiduciary's next step is to decide how to distribute the account on behalf of the missing participant. Prior to the expansion of the PBGC missing participant program, the main approach was to follow the safe harbor distribution rules for terminating individual account plans (e.g., 401(k) plans) under [29 C.F.R. § 2550-404a-3](#) and the safe harbor for automatic rollovers of mandatory cashout distributions, as contemplated by FAB 2014-01. Now, the PBGC program, described further below, is also available.

Charging Plan Accounts for Missing Participant Search Expenses

If the plan fiduciary determines that a search method that involves costs is warranted, an additional decision to consider is whether to charge the participant's account for such fees. The DOL permits the charge to individual participants in the case of charges related to distributions and the accounts of separated vested participants, so long as the amount and nature of the charges are prudent. DOL Field Assistance Bulletin 2003-03 (May 19, 2002). If participant accounts will be reduced for search fees, you should make sure the plan terms and the plan's fee disclosures are consistent with this practice.

PBGC Missing Participants Program for DC Plans

The PBGC developed a program over 20 years ago to locate and preserve benefits for missing participants in most terminating single-employer defined benefit plans, pursuant to ERISA § 4050. The Pension Protection Act of 2006 authorized the PBGC to establish a more expansive program available to defined contribution and other plans not covered by the former program. After consulting with the DOL and IRS and issuing proposed rules in 2016, the PBGC issued final rules for its revised and expanded program. The new program is applicable for plan terminations on and after January 1, 2018 and is set forth in revised [Part 4050 of C.F.R. Title 29](#).

The program is generally open to most qualified DC plans (whether single-employer, multiple-employer, or multiemployer) and plans treated as individual account plans, including applicable 403(b) plans, but excluding non-ERISA plans (e.g., non-electing church plans). However, the program is specifically limited to terminating plans and is not available for ongoing plans.

Unlike for defined benefit plans, participation by DC plans is optional. In addition, DC plan fiduciaries can decide whether to participate as either a transferring plan or notifying plan:

- Transferring plans send the PBGC funds equal to the amount of the missing participant's distributable account balance at the termination of the plan (the so-called benefit transfer amount) so that the PBGC can pay the benefit to the missing participant if and when they are located. Under an all-or-nothing rule, a transferring plan must transfer funds for all of the plan's missing participants.
- Notifying plans make other arrangements for the benefit amounts (such as a rollover to an IRA pursuant to FAB 2014-01) but enlist the PBGC's assistance in helping to locate the missing participants. Notifying plans send the PBGC information on the entity responsible for providing the benefit to share with the participant (or other eligible claimant) once found.

In addition, missing participants will be added to the PBGC's publicly available [unclaimed pension benefit database](#), which will now be unified for DB and DC plans participating in the PBGC program. This searchable database incorporates names of missing participants and plan information, such as the plan name, type, and termination dates and company name and address.

Importantly, the program is available not only for missing participants who cannot be located, but also for participants who (1) do not make a distribution election after receiving notice or (2) do not accept a lump sum payment. The program is only available for participants who are missing. Non-acceptance of a lump sum includes the failure to cash the distribution check by any applicable cash-by date that is at least 45 days after issuance of the check (or, in the absence of a cash-by date, by the check's stale date under the UCC or state law, as applicable).

Generally, the requirements to participate in the DC plan program are:

- **Diligent search.** Conduct a diligent search for all missing participants that cannot be located (or, for a notifying plan, those for whom information will be provided to the PBGC), conducted in accordance with FAB 2014-01, as described in

the discussion above, not more than nine months before making the missing participant filing (discussed below).

- **Obtaining a PBGC case number.** Request a case number by emailing the PBGC per the missing participant filing instructions.
- **Missing participant filing.** File a completed missing participants form (Form MP-200 and appropriate schedule) with the PBGC to provide relevant plan and participant information, benefit amount and beneficiary information for transferring plans, and responsible entity information for notifying plans, all in accordance with the applicable instructions (the [PBGC website](#) has draft forms and instructions, including drafts of [Form MP-200](#) and [Missing Participants Program Filing Instructions for DC Plans](#)).
- **Transfer of funds and fees (for transferring plans).** Send the benefit transfer amount to the PBGC as provided in the missing participant instructions to cover the cost of providing the benefit and, if applicable, an administration fee (expected to be \$35 per missing participant with benefits over \$250).
- **Supplemental information.** Respond to any PBGC request for supplemental information relating to the missing participants within 30 days.

Missing Participants in Terminating Defined Benefit Plans

Upon the termination of a defined benefit pension plan which is subject to Title IV of ERISA (i.e., a PBGC-insured plan), a plan sponsor must fully distribute all plan assets before the defined benefit plan can be terminated. Title IV contains extensive rules for terminating DB plans, including requiring covered plan administrators to either procure an irrevocable commitment from an insurer to provide for a missing participant's benefit or transfer the benefit liability to the PBGC. The PBGC established its missing participants program to facilitate, monitor, and ensure compliance with these obligations.

In 2017, the PBGC issued final regulations to open the program to other DB plans previously excluded from coverage as well as to DC plans. In addition, the procedures for single-employer DB plans were significantly simplified. The PBGC's final rulemaking restructures C.F.R. Part 4050 in four subparts that address different types of plans:

- Single-employer DB plans
- DC plans, discussed earlier in this article
- Certain DB plans not covered by ERISA Title IV (small professional services DB plans)
- Multiemployer DB plans

The following section provides an overview of the new program for DB plans, applicable for plan terminations on and after January 1, 2018. The program is limited to the context of terminating plans and is not available to ongoing plans having missing participants, even where a distribution is required. Separate rules apply for DB plans experiencing a distress termination that are not fully funded.

PBGC Missing Participants Program for DB Plans

Under the program, the PBGC either accepts a transfer of missing participant pension benefits from terminated DB plans to pay the distributees once located or helps connect missing participants with the insurance company responsible for their annuity contracts, as well as monitors the program and audit compliance.

Another significant change for the new program is to explicitly treat certain unresponsive individuals as missing participants, instead of as individuals who cannot be located. Specifically, the definition of missing now includes individuals who:

- Cannot be located after a diligent search
- Are subject to a mandatory cash-out lump-sum distribution and do not respond to the distribution notice
- Are subject to a mandatory cash-out lump-sum distribution and do not accept payment or are deemed not to by failing to cash the distribution check by any applicable cash-by date that is at least 45 days after issuance of the check (or, in the absence of a cash-by date, by the check's stale date under the UCC or state law, as applicable)

Missing participants are also added to the PBGC's [unclaimed pension benefit database](#), which is publicly available and will be unified for both DB and DC plans participating in the PBGC program. The searchable database lists missing participants' names, as well as plan information, including plan name, type, termination dates, company name and address.

DB Plan Mandatory Participation and General Requirements

DB plans that are PBGC-insured are required to follow the program rules during the termination process for all missing participants (including participants deemed to be missing because they fail to respond to a distribution notice or accept a mandatory lump-sum distribution). This means that for each missing participant at the close-out of the plan, they must either transfer the applicable benefit transfer amount (based on the value of the accrued benefit) to the PBGC or procure an annuity for the missing participant and convey information about the annuity provider to the PBGC. Unlike for transferring DC plans, there is no all-or-nothing rule, so different missing participants can be treated differently.

PLAN ADMINISTRATORS WHO ARE UNABLE TO LOCATE PARTICIPANTS AND BENEFICIARIES TO PROVIDE NOTICES, PLAN INFORMATION, AND PLAN BENEFITS MUST MAKE A DILIGENT EFFORT TO LOCATE THESE INDIVIDUALS TO FULFILL THEIR FIDUCIARY OBLIGATIONS.

The preceding paragraph does not apply to small professional services DB plans (having 25 or fewer participants) (SPS plans), which are not PBGC-insured. The program for these plans is optional under rules similar to DC plan participation discussed earlier.


Generally, the requirements for DB plans are:

- **Diligent search.** Conduct a diligent search for all missing participants that cannot be located (or, for a notifying SPS plan, those for whom information will be provided to the PBGC) not more than nine months before making the missing participant filing under new rules (described below).
- **Determining benefit transfer amount or purchasing annuity for each missing participant.** For plans transferring funds to the PBGC for any missing participant, the benefit transfer amount is a present value of the individual's benefit, determined as explained below. For all other missing participants, the plan must purchase an irrevocable commitment from an insurer to provide the benefit to the missing participant.
- **Missing participant filing.** File a completed missing participants form (Form MP-100 and appropriate schedule(s)) with the PBGC to provide relevant plan and participant information; benefit amount, form, and beneficiary information (for benefits transferred to the PBGC); and insurance company information (for reporting annuities to the PBGC), all in accordance with the applicable instructions (the [PBGC website](#) has draft forms and instructions, including drafts of [Form MP-100](#) and [Missing Participants Program Filing Instructions for Single-Employer DB Plans](#)).
- **Transfer of funds and fees (if applicable):** For any benefit transfer amounts, DB plans must convey the funds to the PBGC as provided in the missing participant instructions and, if applicable, pay an administration fee (expected to be \$35 per missing participant with benefits over \$250).
- **Supplemental information:** Respond to any PBGC request for supplemental information relating to the missing participants within 30 days.

Related Content


For guidance on identifying employee benefit plans and programs that are subject to regulation under the Employee Retirement Income Security Act of 1974 (ERISA), see

> IDENTIFYING ERISA EMPLOYEE BENEFIT PLANS

 **RESEARCH PATH:** [Employee Benefits & Executive Compensation > Retirement Plans > ERISA and Fiduciary Compliance > Practice Notes](#)


For a discussion on the various fiduciaries of employee benefit plans under ERISA, including their duties and obligations, see

> FUNDAMENTALS OF ERISA FIDUCIARY DUTIES

 **RESEARCH PATH:** [Employee Benefits & Executive Compensation > Retirement Plans > ERISA and Fiduciary Compliance > Practice Notes](#)


For the steps that plan sponsors and fiduciaries must take to locate and notify missing participants when terminating qualified defined contribution and qualified defined benefit plans, see

> LOCATING MISSING PARTICIPANTS WHEN TERMINATING DEFINED CONTRIBUTION AND DEFINED BENEFIT PLANS

 **RESEARCH PATH:** [Employee Benefits & Executive Compensation > Retirement Plans > ERISA and Fiduciary Compliance > Practice Notes](#)

For an explanation of the potential employer liability and notice obligations under ERISA when there is a cessation of operations at a facility that results in the termination of employment of retirement-plan-eligible employees, see

> ERISA § 4062(E): SUBSTANTIAL CESSATION OF OPERATIONS LIABILITY FOR DEFINED BENEFIT PLANS

 **RESEARCH PATH:** [Employee Benefits & Executive Compensation > Retirement Plans > ERISA and Fiduciary Compliance > Practice Notes](#)

on whether the missing participant's benefit is valued at over \$50 per month:

- **Commercial locator method for benefits over threshold.**
The DB plan must engage a commercial locator service that, as a minimum, uses information from a database maintained by a consumer reporting agency. Many companies specialize in helping plan administrators locate lost participants.
- **Records search method for benefits under threshold.**
Undertake all of the following, to the extent reasonably feasible and affordable:
 - Search plan records
 - Search plan sponsor and employer records
 - Search records of other employee benefit plans in which the missing participant participated
 - Contact any identified beneficiaries of the missing participant
 - Conduct internet searches, such as through search engines, network databases, public record databases, and social media websites

[29 C.F.R. § 4050.104.](#)

Missing Participants Filings

For the new program, the applicable version of Form MP replaces the Schedule MP that DB plans filed with the PBGC for a standard plan termination prior to 2018. Form MP-100 for single-employer DB plans, Form MP-300 for SPS DB plans, and Form MP-400 for multiemployer DB plans, are all available with corresponding instructions and Excel templates in draft form on the [PBGC website](#). Similar to the Schedule MP attachments, the new forms contain:

- Schedule A for providing information on annuities the plan purchased for one or more missing participants
- Schedule B for providing information about benefit transfer amounts to the PBGC

Filers may use Excel templates furnished by the PBGC in lieu of completing the schedules.


Additional forms must be provided that are related to the termination of the plan and not specifically to missing participants, and thus are outside the scope of this article.

Best Practices in Administering Qualified Plans

Plan administrators who are unable to locate participants and beneficiaries to provide notices, plan information, and plan benefits must make a diligent effort to locate these individuals to fulfill their fiduciary obligations. Some of this work can be done in advance of a distribution event based on returned mailings sent to a participant or beneficiary. Conducting a

diligent search has been facilitated by the increased resources available via the internet and through readily available commercial locator services. The following list offers missing participant best practices to help responsible parties fulfill their fiduciary duties and facilitate plan administration.

- Adopt a policy to identify and locate missing participants that is designed and implemented in a consistent and nondiscriminatory manner, and in accordance with ERISA § 404(a) requirements.
- Consult any third-party administrators to confirm that they have, and that they implement, a reasonable missing participant's policy and are following appropriate procedures.
- Review the plan for records on a regular basis to identify retirees with deferred vested benefits, as well as terminated vested participants, and consider periodic communications to verify accurate mailing addresses.
- Keep accurate records of all efforts to locate missing participants and instruct third-party service providers to do the same.
- Document reasons for using more expensive search services (if plan assets will be used to pay for such services).
- Monitor forfeitures resulting from failure to locate missing participants (where the plan allows this) and consider modifying or using newer locator procedures if the number of forfeitures increases.
- Periodically review data by comparing plan records to a database such as the Social Security Death Index or the National Change of Address database.
- In the context of a business transaction, like a merger or acquisition, request information regarding missing participants and beneficiaries and verify that participant and beneficiary lists are readable or transferable to the acquiring sponsor's information systems or those of its vendor.
- In the context of a change in recordkeepers or vendors, verify that the successor third-party service provider has access to complete participant and beneficiary lists.
- Include a reminder on all plan communications (e.g., summary plan description and annual notices) for participants to update their contact information, with easy-to-follow instructions.

Read the [complete Practice Note](#) on locating missing plan participants in the Employee Benefits and Executive Compensation module of Lexis Practice Advisor. 



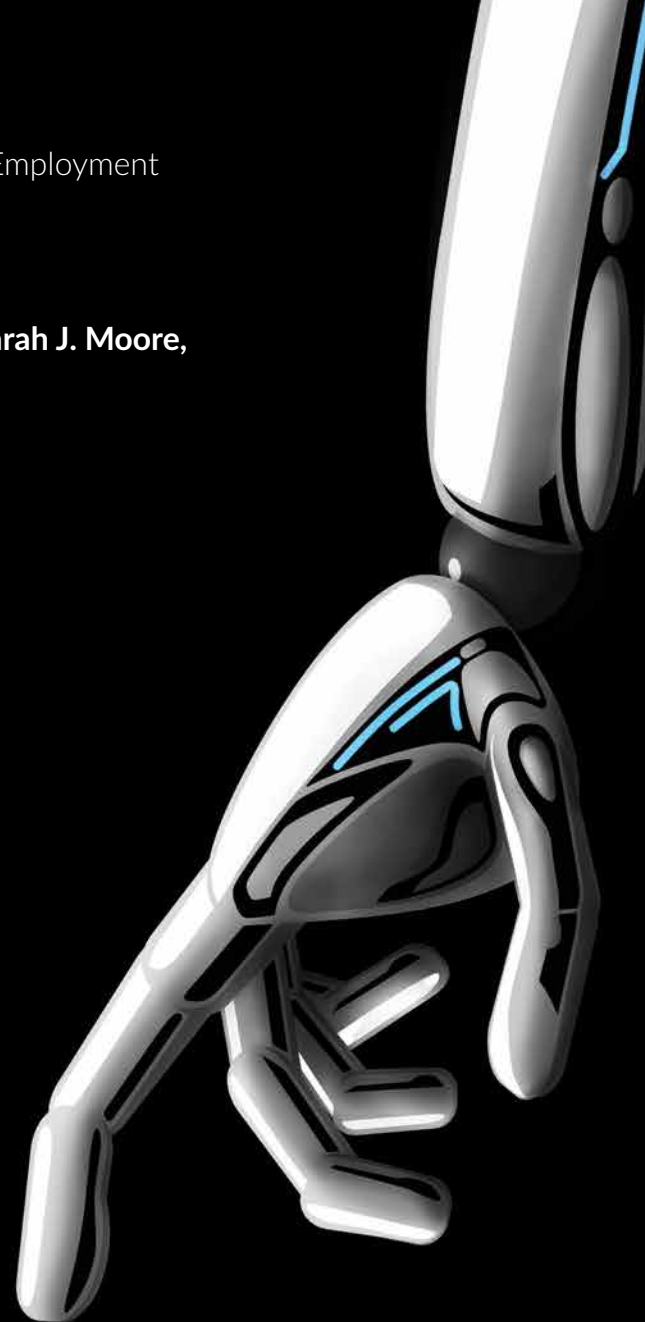
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 **RESEARCH PATH:** [Employee Benefits & Executive Compensation > Retirement Plans > ERISA and Fiduciary Compliance > Practice Notes](#)



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COUNSELING EMPLOYERS ON THE LEGAL IMPLICATIONS OF ARTIFICIAL INTELLIGENCE AND ROBOTS IN THE WORKPLACE



This article provides guidance and best practices for counseling employers on the legal implications of integrating artificial intelligence (AI) and robots into their workplaces.

Reductions in Force Due to Artificial Intelligence and Robotics

Thanks to recent technological advances, AI algorithms and robots are developing the sophistication to displace human employees, causing many employers to engage in mass layoffs and reductions in force. For instance, Goldman Sachs recently laid off nearly 600 equity traders whose work has largely been supplanted by automated trading programs and a team of computer engineers.¹

As employers continue to pursue disruptive technologies like AI and robotics that can reduce workforces, unions and employees will mount legal challenges in an effort to protect their positions. To ensure employers can implement these technologies with minimal repercussions, you should assess their risks and liabilities and help them put together a strategic plan. Consider the following measures to avoid liability from layoffs caused by AI and robotics.

- **Request a seat at the table to discuss integrating robotics and AI automation.** Counsel your human resources and in-house counsel contacts to request a seat at the table when their organization discusses how to integrate robotic and AI automation into the workplace. With your help, your contacts can assist their organization with strategic plans that implement new technologies while limiting the company's exposure.
- **Consider a voluntary ADEA-compliant termination plan.** Before recommending that an employer carry out an involuntary reduction in force (RIF), encourage it to adopt a voluntary termination strategy, such as offering employees separation agreements that release the employer from all claims in exchange for a monetary sum. Be sure to adhere to applicable state and federal laws, such as the Age Discrimination in Employment Act (ADEA) and the Older Workers Benefit Protection Act (OWBPA) when separating employees age 40 and over. Additionally, encourage employees to consult with an attorney before accepting the offer to minimize the risk that the separated employee will be able to subsequently invalidate the agreement on the grounds of coercion or duress.
- **Ensure compliance with the Worker Adjustment and Retraining Notification Act (WARN Act) and any state applicable mini-WARN Acts.** Once the employer has completed any voluntary separations, you should assess what must be done to comply with the forthcoming RIF. The Worker Adjustment and Retraining Notification Act (WARN), [29 U.S.C. § 2101 et seq.](#), requires

businesses that have 100 or more full-time employees (or 100 or more employees, including part-time, who work at least 4,000 hours per week, excluding overtime) to issue 60 days' advance written notice of a plant closing or mass layoff to (1) the affected non-union employees, (2) the representative of affected unionized employees, (3) the state or entity designated to carry out rapid response activities, and (4) the chief elected official of the unit of local government where the closing or layoff will occur. [20 C.F.R. § 639.6](#). A mass layoff is defined as either a reduction during any 30-day period of (1) 500 or more employees or (2) 50 or more employees, provided they constitute at least 33% of the employees at the worksite. [29 U.S.C. § 2101\(a\)\(3\)\(A\)-\(B\)](#). Many state laws impose additional WARN Act-like obligations, including California ([Cal. Lab. Code §§ 1400-1408](#)), Illinois ([820 Ill. Comp. Stat. 65/1 to 65/99](#)), New York ([N.Y. Lab. Law § 860 et seq.](#)), and New Jersey ([N.J. Stat. Ann. § 34:21-1 to -7](#)).

- **Determine whether reductions or plant closings are subject to mandatory bargaining.** Reductions of unionized employees or plant closings may require additional obligations. For instance, employers may need to bargain regarding the implementation of AI and robotics, since some federal circuit courts and the National Labor Relations Board (NLRB) have held that implementing new technologies and automation that affect the terms and conditions of union jobs is a mandatory bargaining subject.² Thus, instruct employers to notify the union of the changes well before implementing them so that the union has time to bargain over the decision to make, and the effects of, the operational change. Communications between the employer and the union should be in writing to create a record that the employer met its obligation to bargain in good faith under [29 U.S.C. § 158\(d\)](#) of the National Labor Relations Act.
- **Encourage employers to communicate the positive aspects of automation.** Another important consideration when implementing technological advances is the effect it has on workplace morale. If the employer is not downsizing as a result of automating, or is only conducting limited layoffs, it should assure employees that its technological advances do not foretell a RIF. Indeed, AI can have the effect of enhancing jobs rather than replacing them, such as when automation replaces repetitive manual work and frees up employees to do higher-level strategy work.

¹ See Nanette Byrnes, [As Goldman Embraces Automation, Even the Masters of the Universe Are Threatened](#), MIT TECHNOLOGY REVIEW (Feb. 7, 2017). ² See, e.g., [Renton News Record](#), 136 N.L.R.B. 1294, 1297-98 (1962); [NLRB v. Columbia Tribune Publ'g Co.](#), 495 F.2d 1384, 1391 (8th Cir. 1974); [Newspaper Printing Corp. v. NLRB](#), 625 F.2d 956, 964 (10th Cir. 1980).



The Risks of Using AI for Screening and Hiring

Another way employers may utilize AI is to filter large pools of job applicants. For example, some employers use computer software programs to auto-screen resumes as a human recruiter would. Such programs use machine learning, algorithms, and/or natural language processing to identify the best candidates for employment. Similarly, employers can use an AI-powered recruiting assistant that allows applicants to communicate through messaging apps. One such program uses natural language processing to analyze data an applicant provides and then asks the applicant additional questions to help fill gaps in the applicant's data. The applicant can also ask the virtual recruiting assistant questions. Other computer programs search social media to find information to fill the gaps in candidates' profiles and then rank the candidates. Certain employers also have candidates play neuroscience-based computer games and use the results to determine which candidates to interview.

Some employers even use AI for conducting interviews. For instance, an employer might ask a candidate to record answers to interview questions, and a computer program would then analyze the interview (utilizing machine learning, algorithms, and/or natural language processing) for key words, the speed of speech, body language, or other relevant predictors of a candidate's qualifications and future successes. The computer program would generate a report with suggestions that could then be used to determine whether a candidate should move on in the employer's recruitment process.

While a sophisticated AI screening system may be able to eliminate unqualified candidates, system limitations and inherent biases may lead to employment discrimination lawsuits. Consider taking the steps below to limit exposure resulting from using AI in the screening and hiring process.

- **Ensure employers use proper and relevant data when developing AI systems to assist with screening and hiring.** Make certain

that the employer inputs appropriate data into its AI algorithm to avoid unintentionally discriminating against job candidates. Though an AI system itself does not have any biases, the information humans choose to use in the system may be biased, and the computer-generated results could perpetuate these biases. Accordingly, failing to use a proper data set for AI can cause the algorithm to disproportionately factor in applicants' protected characteristics and/or represent certain populations, resulting in disparate impact claims.³

Thus, data should only include information that is in line with business necessity and relevant to a particular skill or trait for the particular job. For example, an AI system could analyze data regarding the skills that have made previous employees successful and pattern match to find applicants with these characteristics. Data should not include characteristics such as gender, religion, race, marital status, or whether someone has children. It should include information from all populations, not a select few.

Note that even data that is seemingly facially neutral could lead to an unintentional disparate impact. For example, (1) using data such as the distance an applicant lives from the potential job site could reflect the different ethnic or racial profiles of the surrounding towns and neighborhoods; (2) using the reputation of the colleges/universities from which an applicant obtained a degree could have a disparate impact on a protected class if equally qualified members of the protected class graduate from these colleges/universities at a substantially lower rate than those not in the protected class; or (3) using an AI system that screens applicants based on a hiring manager's previous hiring decisions could recreate the historical bias of that hiring manager if the hiring manager's decisions previously disfavored a particular protected class, and the AI codes this bias into the system.⁴

IF THE EMPLOYER IS CONCERNED THAT ITS BIG-DATA SCREENING ALGORITHMS WILL CAUSE A DISPARATE IMPACT, ENCOURAGE THE EMPLOYER TO SUPPLEMENT THE AI FILTER BY SCREENING JOB APPLICATIONS MANUALLY.

- **Utilize AI instead of human intelligence to reduce the risk of certain human biases.** Although AI filtering systems risk perpetuating human biases, as discussed above, these same applications, when used properly can actually prevent humans from selecting an applicant for an interview based on conscious or subconscious biases. For example, a subconscious racial or ethnic bias could unintentionally influence a human's decision to select or not select an applicant for an interview based on the applicant's name.⁵ An AI system would not likely use an applicant's name when deciding whom to select for an interview as it is unlikely that an AI system would distinguish race from an applicant's name. Similarly, AI systems could eliminate the human bias that would subconsciously influence a human to select or not select an applicant based on a particular appearance and eliminate the possibility of a hiring manager selecting applicants who share his or her gender, race, or other protected characteristic. To the extent possible, advise the employer to use an AI filter that is simple enough for the human resources department to easily understand, implement, and, if necessary, defend in litigation.
- **Use screening filters specific to the position the employer seeks to fill.** Ensure that the employer tailors any AI screening system to the particular job the company seeks to fill. A screening filter used to select appropriate applicants for a finance position in New York will not be effective for filling a manufacturing job in Omaha, since the characteristics the employer seeks—such as employment history, education levels, resume phrases, and other unprotected categories—will vary from job to job. Accordingly, the employer should customize the search criteria to different job openings to avoid hiring a candidate who is ill-suited for the role.
- **Review with employers any voice-recognition programs to ensure compliance with disability and ethnicity/national origin issues.** Similarly, voice-recognition software that utilizes AI to screen oral interviews may not be able to distinguish between a poor interviewer or unqualified candidate and an interviewee with a speech disability, mental disability, or native accent. Filtering

out candidates on the basis of these protected characteristics is likely to result in disability or national-origin claims.

- **Encourage employers to supplement AI use by personally screening applications.** If the employer is concerned that its big-data screening algorithms will cause a disparate impact, encourage the employer to supplement the AI filter by screening job applications manually. This way, in the event of litigation, the employer can testify to an individualized, unbiased selection process.

Health and Safety Issues Concerning Robots and Artificial Intelligence

Robotics and AI raise novel issues and concerns for employers regarding employee safety. There are currently no Occupational Safety and Health Administration (OSHA) standards specifically for the robotics industry. However, OSHA highlights general standards and directives applicable to employers utilizing robotics.⁶ OSHA also provides guidelines for robotics safety.⁷

Under the Occupational Safety and Health Act (OSH Act), a covered employer utilizing robotics—like any other employer the OSH Act covers—must conduct a “hazard assessment” in which it reviews working environments for potential occupational hazards. [29 C.F.R. § 1910.132\(d\)](#). An employer that identifies a hazard must implement a “hazard control” in the following order of preference: hazard elimination, hazard replacement, engineering controls, administrative controls, or personal protective equipment. With this legal framework as background, consider taking the following actions to mitigate the risk of employee exposure to hazards and legal actions associated with robots:

- **Enlist the assistance of an OSHA-trained attorney to assist at the outset of implementation.** As demonstrated above, the intersection between robotics operations and the law is complex, so you should advise employers to consult an attorney with expertise in workplace health and safety issues. Together, the OSHA-trained attorney and the company can develop an employee health and safety plan that minimizes the risk of a

³ See EXECUTIVE OFFICE OF THE PRESIDENT, *Big Data: A Report on Algorithmic Systems, Opportunity, and Civil Rights* (May 2016), p. 14; Roger W. Reinsch and Sonia Goltz, *The Law and Business of People Analytics: Big Data: Can the Attempt to be More Discriminating be More Discriminatory Instead?*, 61 *St. Louis L.J.* 35, 40–42 (2016). ⁴ See *Data-Driven Discrimination at Work*, Pauline T. Kim, 58 *Wm. & Mary L. Rev.* 857, 863, 873 (2017); Sofia Granaki, *Autonomy Challenges in the Age of Big Data*, 27 *Fordham Intell. Prop. Media & Ent. L.J.* 803, 826 (2017); Solon Barocas & Andrew D. Selbst, *Big Data's Disparate Impact*, 104 *Calif. L. Rev.* 671, 682, 689, 722 (2016); Federal Trade Commission, *Big Data: A Tool for Inclusion or Exclusion?* (January 2016), p. v.

⁵ See Anupam Chander, *Reviews: The Racist Algorithm?*, 115 *Mich. L. Rev.* 1023, 1029 (2017). ⁶ See *Robotics, Standards, Occupational Safety and Health Administration, Safety and Health Topics*. ⁷ See *Guidelines for Robotics Safety, OSHA Instruction STD 01-12-002* (1987).

workplace accident while creating a defense against employee claims if an incident were to occur.

- **Have the employer develop a basic understanding of the robot's potential hazards and preventive measures the employer can take.** Due to the complexity of sophisticated robots, the employer's managers and supervisors are unlikely to understand their inner workings. As a result, it may be difficult for employers to identify and eliminate their potential hazards. Accordingly, have the employer train its management staff on the robot's decision-making processes; what actions the robot could take and under what circumstances it would take such actions; and how to eliminate the hazard should the robot malfunction, such as the steps for shutting it down.
- **Know whom to contact when a robot misbehaves.** Unlike human errors, which can be addressed through discipline and retraining, when the root cause of a workplace accident involves the logic of a robot, such traditional methods are not applicable. Rather, the employer may need to consult highly trained engineers to understand why the robot malfunctioned and correct the robot's performance. If doing so is not feasible, the employer could replace a manufacturing line entirely, but due to the significant cost and disruption to the business this would cause, an employer should only order a complete replacement as a last resort.

Dangers of Artificial Intelligence in Wearable Technology

From the Apple Watch to the Fitbit, wearable technology is becoming increasingly prominent in modern life. In the workplace, using AI to catalog and assess employee data can be a significant

boon for employers, which can use AI systems to track worker movements to identify and rectify inefficiencies. Nevertheless, privacy and data security concerns abound when employers utilize such technology.

Privacy Issues

Consider the following measures to guard against privacy claims:

- **Ensure that employer monitoring does not violate employees' reasonable expectation of privacy.**
 - **Monitoring employee locations.** Few courts have considered employers' right to monitor employees' locations via GPS while using employer-owned property and vehicles, but thus far courts have not found that tracking employees' location in public areas violates their privacy rights.⁸ Some states, such as Connecticut, [Conn. Gen. Stat. § 31-48d](#), require businesses to obtain worker consent before monitoring the location of employees. You should research state and local privacy laws and advise employers accordingly. Additionally, consider distributing an employee privacy policy providing notice of the employee tracking; the business reasons for doing so; the ways in which the employer will safeguard the employee's data; and the limits on the employee monitoring, such as only tracking movements in public areas during working hours. Be sure to obtain an employee acknowledgment consenting to the monitoring.
 - **Monitoring electronic and telephonic communications.** Similarly, if employers are monitoring employee telephonic or electronic communications or website usage via wearable technology, employers must make sure that such monitoring complies with federal, state, and local privacy and other laws.

To protect an employer's right to access and monitor employee communications, employers should have clear written policies informing employees that they should not have any expectation of privacy in their use of company electronic systems and that the employer will monitor communications on company electronic systems.

- **Ensure compliance with the Health Insurance Portability and Accountability Act (HIPAA) and other relevant medical privacy laws.** If employers utilize wearable technology to collect and store health information—such as to help the employer configure an employee wellness plan—you must counsel employers on compliance with HIPAA, [110 Stat. 1936 et seq.](#), and other relevant state privacy and electronic surveillance laws. These laws typically place limits on what data employers can collect and use and require employers to provide notice to employees regarding what personal information the employer will obtain, how the employer will use that information, and with whom the employer will share the information. Be sure the employer honors its obligations under these laws and takes all the necessary steps to protect its employees' privacy.

Data Security Issues

Whenever employers gather data, including via wearable technology, they must consider the risk of data breaches and how to prevent them. As this area of law is continually evolving, ensure that the employer consults with an attorney who is well-versed in cybersecurity issues. You should also determine whether the employer has appropriate safeguards in place to prevent unauthorized intruders from obtaining private, personal employee data. For instance, IT departments should mask data collected so that it cannot be linked to a specific user and should use encryption. Additionally, consider implementing regular audits to ensure the employer's data security protocols are legally compliant and up-to-date.

Integrating AI into the Practice of Law


The amount of data that parties produce in discovery in today's employment litigations can be staggering. Compounding this problem, attorneys are expected to review this data efficiently—quickly and at a low cost. The faster and more accurately a lawyer can locate useful information, the better and more cost-effectively the attorney will be able to develop his or her case. Because AI can analyze a larger quantity of information more thoroughly than humans can, and in a fraction of the time, attorneys are turning to AI more and more as a key component of their legal practices. Consider taking advantage of recent developments in AI in your own practice in the following ways:

- **Cull through e-discovery.** AI technology used in the legal profession includes machine learning and natural language processing. In e-discovery, attorneys often utilize predictive coding, a process that uses algorithms to distinguish relevant

Related Content


For more information on voluntary separation programs and alternatives to reductions in force (RIFs), see

> ALTERNATIVES TO REDUCTIONS IN FORCE (RIFs)

 **RESEARCH PATH:** [Employee Benefits & Executive Compensation > Employment, Independent Contractor, and Severance Agreements > Executive Separation Agreements & Severance Plans > Practice Notes](#)


For a discussion of drafting separation agreements, see

> SEPARATION AGREEMENTS: DRAFTING AND NEGOTIATION TIPS (PRO-EMPLOYER)

 **RESEARCH PATH:** [Labor & Employment > Discrimination and Retaliation > Claims and Investigations > Practice Notes](#)


For information on state laws concerning RIFs, see

> THE MASS LAYOFF AND PLANT CLOSING LAWS COLUMN IN INVESTIGATIONS, DISCIPLINE, AND TERMINATIONS STATE PRACTICE NOTES CHART

 **RESEARCH PATH:** [Labor & Employment > Investigations, Discipline, and Terminations > Discharge and Layoffs/RIFs > Practice Notes](#)


For an overview of requirements under the Worker Adjustment and Retraining Notification Act (WARN Act), see

> WARN ACT COMPLIANCE CHECKLIST

 **RESEARCH PATH:** [Labor & Employment > Investigations, Discipline and Terminations > Discharge and Layoffs/RIFs > Checklists](#)

For best practices on drafting policies concerning employee privacy when using electronic devices, including a sample policy, see

> CREATING POLICIES ON COMPUTERS, MOBILE PHONES, AND OTHER ELECTRONIC DEVICES

 **RESEARCH PATH:** [Labor & Employment > Employment Policies > Company Property and Electronic Information > Practice Notes](#)

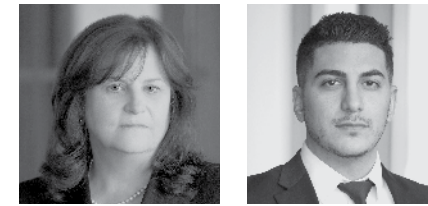
For more information on the risks of wearable technology, see

> UNDERSTANDING EMPLOYMENT PRIVACY ISSUES UNDER FEDERAL LAW

 **RESEARCH PATH:** [Labor & Employment > Privacy, Technology and Social Media > Monitoring and Testing Employees > Practice Notes](#)

⁸ See, e.g., [Elgin v. St. Louis Coca-Cola Bottling Co.](#), 2005 U.S. Dist. LEXIS 28976, at *7-11 (E.D. Mo. 2005); [Gerardi v. City of Bridgeport](#), 2007 Conn. Super. LEXIS 3446, at *17-20 (Super. Ct. Dec. 31, 2007).





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Admissibility of “Me Too” Evidence

Introduction

In early Fall 2017, the #MeToo campaign exploded into a movement across social media demonstrating the prevalence of sexual assault and harassment in the workplace. Countless public revelations of sexual misconduct allegations against Hollywood producer Harvey Weinstein and other well-known powerful men ignited the movement, exposing the cover-up and tolerance of sexual harassment, and even assault, in some workplaces as a longstanding cultural norm that must be addressed and changed. In the present social, political, and legal climate, the phrase “me too” has more powerful cultural and personal resonance than ever before. While the phrase holds cultural significance in today’s society, it has long held legal significance in the litigation of discrimination and harassment claims. “Me too” evidence is often used in civil litigation to show that others have experienced the same actions and claims as those alleged by a plaintiff. Finding such evidence, establishing its admissibility, and using it effectively confounds both plaintiff and defendant employment lawyers. But it can be an effective litigation tool—for either party.

Admissibility of “Me Too” Evidence in Federal Courts

Most sexual harassment and discrimination claims rely on circumstantial evidence. Direct evidence can be elusive in such cases, where eyewitnesses and incriminating documents are rare. For these reasons, “me too” evidence—other instances of discrimination or harassment against other employees by the alleged harasser or the same employer—may be proffered by the plaintiff in an effort to show a pattern or practice of misconduct to prove, or at least bolster, discrimination or harassment claims.


Whether such “me too” evidence is admissible or even relevant to the claims brought by a plaintiff turns on many factors, including the very facts of the discrimination and harassment.



The admission of “me too” evidence in federal courts also depends on where it falls under the Federal Rules of Evidence. [Fed. R. Evid. 404\(b\)\(2\)](#) provides that evidence of a crime, wrong, or other act “may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.” Because motive, intent, and state of mind are directly at issue in employment discrimination claims, “me too” or propensity evidence may be properly admitted under [Fed. R. Evid. 404\(b\)\(2\)](#) under certain circumstances. Other relevant parts of the Federal Rules of Evidence with respect to “me too” or propensity evidence include [Fed. R. Evid. 401](#) (Test for Relevant Evidence) and [Fed. R. Evid. 403](#) (Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons).

Despite the Federal Rules of Evidence, the federal courts, including the U.S. Supreme Court, offer little guidance as to when “me too” evidence is admissible. In *Sprint/United*

from non-relevant documents. This process usually involves an attorney expert on the subject matter reviewing a sample set of documents (known as a seed set) from the whole set of documents and coding the documents for relevance, privilege, or other issues. The computer program then analyzes the determinations the attorney made on the seed set and learns how to select relevant documents from the larger pool of documents. Among other organizational tools, algorithms can rank documents in the order of relevance or use concept clustering, which groups together documents that share certain combinations of words. This type of AI can be extremely useful to attorneys involved in employment discrimination or wage and hour litigation. For it to be effective, however, attorneys must be properly trained in how to use AI. For example, the attorneys coding a sample set of documents should be experts on the subject area. If the initial set of documents is not coded accurately, then the data the AI tool produces may not be accurate.

- **Streamline contract review.** AI can similarly be used in contract review. Software learns from contracts as they are uploaded into a database and then compares these contracts to those inputted by the attorney or end user. The software can then produce a report recommending changes to the attorney’s contract based on this comparison. 

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Management Co. v. Mendelsohn,¹ the plaintiff, Ellen Mendelsohn, was terminated from her employment as part of a reduction in force. Mendelsohn sued her employer, Sprint/United Management Co. (hereinafter Sprint), alleging that she was selected for layoff because she was over 40 years old. In support of her age discrimination claim, Mendelsohn sought to admit testimony from five other employees who claimed they were subject to discrimination and harassment based on their ages—over 40. In seeking to exclude the evidence, Sprint argued that the witnesses were not similarly situated to the plaintiff. They did not share the same supervisor, and the alleged discriminatory conduct against the five witnesses was remote in time from Mendelsohn’s termination. For these reasons, the trial court refused to admit the evidence. The U.S. Court of Appeals for the Tenth Circuit reversed, holding that while a “similarly situated” limitation on admissibility was appropriate in a discriminatory discipline case, it was not per se grounds for exclusion of evidence if there was a company-wide policy of discrimination.

The Tenth Circuit then reviewed and determined that Mendelsohn’s proposed “me too” evidence was relevant. As a result, the appellate court reversed the trial court and remanded the case for a new trial with instructions to admit the challenged testimony. The U.S. Supreme Court disagreed. The Court found that the Tenth Circuit should have remanded the case to the trial court for a further explanation of its findings and, absent an abuse of discretion, deferred to the trial court’s judgment respecting the evidentiary issues. In so finding, the Court stated: “We conclude that such [‘me too’] evidence is neither *per se* admissible nor *per se* inadmissible.”² In other words, whether evidence of discrimination (or harassment) by other supervisors is relevant and admissible in an individual case is “fact based and depends on many factors, including how closely related the evidence is to the plaintiff’s circumstances and theory of the case.”³

Following *Mendelsohn*, one district court delineated a four-factor test to use when considering the admission of “me too” evidence.⁴ The test considers (1) whether past discriminatory or retaliatory behavior is close in time to the events at issue in the case, (2) whether the same decision-maker was involved, (3) whether the witness and the plaintiff were treated in the same manner, and (4) whether the witness and plaintiff were otherwise similarly situated.⁵ Similarly, a few years later in *Griffin v. Finkbeiner*,⁶ the U.S. Court of Appeals for the Sixth Circuit outlined factors to consider in determining the admissibility of “me too” evidence, mirroring the *Hayes*’ court’s test.

OTHER FEDERAL COURTS HAVE ALSO FOUND THAT “ME TOO” EVIDENCE MAY BE RELEVANT IN CERTAIN CIRCUMSTANCES, BASED ON THE FACTS AND THEORY OF THE CASE.

Other federal courts have also found that “me too” evidence may be relevant in certain circumstances, based on the facts and theory of the case. For example, in *Goldsmith v. Bagby Elevator Co.*, the U.S. Court of Appeals for the Eleventh Circuit rejected the defendant-employer’s argument that the district court abused its discretion in admitting evidence of discrimination and retaliation against the plaintiff-employee’s coworkers.⁷ The court found this “me too” evidence was admissible to prove the coworkers’ intent to discriminate, relevant to a claim of hostile work environment, and “probative of several issues raised by [the defendant] either on cross-examination or as an affirmative defense.”⁸


In *Quigley v. Winter*,⁹ the defendant-landlord in a sexual harassment case argued that the district court erred in admitting the testimony of the defendant’s former tenants that the defendant also subjected them to sexual harassment. The defendant claimed the testimony of the three tenants was irrelevant because there was no evidence the plaintiff-tenant knew the women or observed any of the events to which they testified.¹⁰ In reaching its decision, the U.S. Court of Appeals for the Eighth Circuit reviewed the Supreme Court’s guidance in *Mendelsohn* that the admissibility of “me too” evidence “is fact-based and depends on many factors, including how closely related the evidence is to the plaintiff’s circumstances and theory of the case.”¹¹ The Eighth Circuit rejected the defendant’s argument, finding that the trial court “properly performed its gatekeeping function” by carefully analyzing the admissibility of the testimony and excluding other witnesses whose testimony was more remote in time.¹²

Recently, a Virginia district court denied an employer’s motion in limine to exclude “me too” evidence, finding that “there is no rule that would exclude evidence of other employees simply because the plaintiff has not proven that they qualify as comparators under *McDonnell Douglas*.”¹³ The court also observed that “[r]elevance and prejudice under Rules 401 and 403 are determined in the context of the facts and arguments in a particular case, and thus are generally not amenable to broad *per se* rules.”¹⁴

Related Content


For an overview on the application of Title VII to sexual harassment and discrimination claims, see

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> EXAMINING HARASSMENT CLAIMS

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For a sample complaint that alleges claims of sexual harassment, see

> SEXUAL HARASSMENT AND EMOTIONAL DISTRESS COMPLAINT (WITH JURY DEMAND)

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Admissibility of “Me Too” Evidence in California

In California, the admissibility of “me too” evidence can be more expansive. In *Pantoja v. Anton*,¹⁵ the plaintiff, Lorraine Pantoja, worked as a legal secretary for attorney Thomas J. Anton and his firm, Thomas Anton & Associates. Following her employment termination, Pantoja sued for race and sex discrimination, as well as sexual harassment. Pantoja claimed her supervisor inappropriately touched and slapped her, referred to his employees as “my Mexicans,” and, among other things, asked for a back massage. At trial, Pantoja attempted to introduce the testimony of witnesses who had experienced the same and similar behavior from the supervisor. But the trial court excluded the evidence since Pantoja had not personally witnessed the other alleged acts of harassment and discrimination. After the jury found for the employer, the plaintiff appealed. The California Court of Appeal reversed and held evidence that the supervisor had harassed other employees outside the plaintiff’s presence could have shown the supervisor harbored a discriminatory intent based on gender and would allow the jury to evaluate the credibility of

the defendant and his witnesses who denied the discrimination and harassment.

While the *Pantoja* court expanded the admissibility of “me too” evidence, the California Court of Appeal in *Hatai v. Department of Transportation*¹⁶ held that such evidence is subject to some limits. In *Hatai*, the plaintiff, Kenneth Hatai, initially alleged that he was discriminated against by his supervisor because of his Asian race and Japanese national origin. At the time of trial, Hatai sought to expand his claims by arguing that his supervisor, an Arab, discriminated against all employees who were not of Arab descent. The Department of Transportation moved in limine to exclude any evidence that the supervisor had discriminated against non-Asians, arguing that the discrimination against employees of non-Arab descent was not the claim Hatai had pled. The trial court agreed, and limited the “me too” evidence to employees subject to alleged anti-Asian discrimination. The appeals court agreed, holding that the evidence of anti-Arab discrimination or harassment was not sufficiently related to Hatai’s anti-Asian and anti-Japanese claims. The court distinguished its prior ruling in *Pantoja* because the “me-too” evidence in *Pantoja* came from individuals who were within the same protected classes alleged by the plaintiff. However, the court also observed that evidence of discrimination against protected classes different from the plaintiff’s may be admissible in other contexts, such as where favoritism of one protected class has an adverse effect on other protected classes.

Conclusion

“Me too” evidence can significantly impact either party’s likelihood of prevailing in employment discrimination and harassment actions. As employment discrimination and harassment cases increase, especially in today’s political and social climates, “me too” evidence must be considered by both plaintiffs’ and defense counsel:

- Keep in mind the basics of admissibility of any evidence. “Me too” evidence is relevant if it has a tendency to make it more or less likely that an employer acted with discriminatory intent. If other employees claim they suffered from discrimination and harassment, is it more likely than not that the plaintiff did as well? Does the relevance of such evidence outweigh the danger of undue prejudice to the defendant? Be prepared to offer a careful step-by-step analysis on the admissibility or inadmissibility of the evidence.

1. 552 U.S. 379 (2008). 2. 552 U.S. at 381. 3. 552 U.S. at 388. 4. *Hayes v. Sebelius*, 806 F. Supp. 2d 141 (D.D.C. 2011). 5. 806 F. Supp. 2d at 144–45. 6. 689 F.3d 584 (6th Cir. 2012). 7. 513 F.3d 1261, 1285 (11th Cir. 2008). 8. 513 F.3d at 1285–87. 9. 598 F.3d 938, 951 (8th Cir. 2010). 10. 598 F.3d at 951. 11. 598 F.3d at 951 (quoting *Mendelsohn*, 552 U.S. at 388). 12. 598 F.3d at 951. 13. *Emami v. Bolden*, 241 F. Supp. 3d 673, 688 (E.D. Va. 2017); see *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). 14. 241 F. Supp. 3d at 688.

15. 198 Cal. App. 4th 87 (2011). 16. 214 Cal. App. 4th 1287 (2013), overruled on other grounds, *Williams v. Chino Valley Independent Fire Dist.*, 61 Cal. 4th 97 (2015).



- Be specific on the evidence you want admitted or excluded. An attempt to admit or exclude broadly defined evidence is not compatible with *Mendelsohn* or the cases that followed.
- Use laser-focused discovery to learn specific facts and expected witnesses.
- Look at pattern and practice issues. These can raise “me too” evidence.
- Defendants can look at “not me too” evidence. Defendant can rebut plaintiffs’ “me too” evidence by showing the plaintiff was the only one to complain or allege discrimination and harassment, and such policies and behavior did not pervade the workplace.
- Defendants need to consider the undue prejudice and confusion arguments. Admitted “me too” evidence of other employees could confuse the jury and result in a trial within a trial where the defendant is forced to defend or produce evidence regarding someone other than the plaintiff.

Of course, whether a trial court will consider, or how it will rule on, “me too” evidence is still unsettled. With the #MeToo movement in full force, expect “me too” evidence to be raised in the future. **L**

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SEPARATION AGREEMENTS: DRAFTING AND NEGOTIATION TIPS FOR EMPLOYERS

This article addresses initial preparations for drafting a separation agreement and common terms that employers ordinarily should include, or at least consider including, in separation agreements.

WHEN TERMINATING AN EMPLOYEE'S EMPLOYMENT, THE employer often requests that the departing employee execute a separation agreement. In doing so, the employer seeks to obtain a comprehensive and defensible release of all real or perceived claims that the employee may legally waive in exchange for payments and/or benefits to which the employee is not otherwise entitled, which will be the consideration for the agreement. As the employer's attorney, you must ensure that the separation agreement is comprehensive, valid, and enforceable so that the employer can successfully avoid litigation and other risks stemming from the termination.

Initial Preparations for Drafting a Separation Agreement

If possible, the employer should have the separation agreement prepared in advance so that it is available for distribution to the employee at the time of the termination. The earlier you become involved in separation discussions, the more valuable you will be to the employer during the preparation and negotiation of a separation agreement.

Once involved, you should review the relevant employer policies and documents relating to the specific termination at issue—whether related to a layoff or a one-off termination—to ensure that the separation agreement is consistent with them. The documents that you should review ordinarily include:

- Employment agreement or offer letter
- The severance plan (if the employer has one)
- The employee handbook
- Ancillary agreements between the employer and employee, such as a stand-alone restrictive covenant agreement

Any of these documents may contain formulaic separation payments based upon position and years of service, partial incentive payments, payment for accrued sick or vacation days, and outplacement. Agreements specifically between the employer and the employee may also contain non-standard severance terms, such as continued vesting of incentive compensation, bonus payments, and restrictive covenants that often remain in effect following termination.

You should also consult with the employer's managers and decision-makers to understand the reasons for the termination and anticipate any actionable issues that may arise—such as alleged discrimination, retaliation, federal Fair Labor Standards Act (FLSA) issues, whistleblower activities, or breach of contract claims—and any special business risks, needs, or concerns. In conjunction with these discussions, you should review relevant personnel and disciplinary documentation about the employee.

If the termination may involve multiple employees or a plant closing, you should ascertain the applicability of the federal Worker Adjustment and Retraining Notification Act and any state analogs and ensure that the employer has provided any required notice.

Understanding and Negotiating Common Provisions in Separation Agreements

This section addresses the most essential clauses in a separation agreement. In addition, this section discusses some provisions that employees may propose during the course of negotiations.

Release of Claims

The release of claims provision is perhaps the most important part of a separation agreement. This provision provides that the employee—broadly defined to include the individual and his or her heirs, representatives, and agents—will dismiss and waive all potential or pending causes of actions, claims, charges of discrimination, complaints, etc., against the employer, whether known or unknown—broadly defined to include the company, its affiliates, employees, agents, representatives, and assigns.

In drafting the release language, you should avoid legalese and describe in plain language understandable to a non-lawyer that the employee is giving up his or her right to bring various claims in exchange for the consideration provided.

If a claim is pending before a court or administrative body, you should specify the case or charge number of the claim that the employee will withdraw or stipulate to dismiss with prejudice.

Enumerating Released Claims

To ensure that the release broadly covers all types of claims that an employee may bring under federal, state, and local law, the release should state that the employee releases all claims against the employer “to the extent permitted by law,” including claims alleging unlawful discrimination, breach of contract, tort claims including without limitation negligence, and claims for the non-payment of wages. You should also list the main employment statutes “without limitation,” including the following:

- Title VII of the Civil Rights Act of 1964
- The Pregnancy Discrimination Act
- The Equal Pay Act of 1963
- The Age Discrimination in Employment Act of 1967
- The Americans with Disabilities Act of 1990
- The Family and Medical Leave Act of 1993

Consult state and local law regarding which relevant claims the employer must list in the release or language that employers must use for employees to waive certain claims. For example, a waiver of claims under the Minnesota Human Rights Law requires that the employer provide the employee 15 days to revoke the separation agreement after the employee signs it. [Minn. Stat. § 363A.31](#).

Older Workers Benefit Protection Act (OWBPA)

If the employee is at least 40 years old, you will want the employee to release age discrimination claims under the Age Discrimination in Employment Act (ADEA). To execute such a release, the release must comply with OWBPA.

OWBPA requires that the employer provide specific information and consideration periods to an employee from whom it seeks a waiver of ADEA claims. For example, under OWBPA the release regarding an individual termination should (1) explicitly release ADEA claims, (2) not release future ADEA claims, (3) specify the consideration for the release, (4) advise the employee to consult with counsel, (5) provide the employee at least 21 days to consider the release, and (6) provide seven days to revoke the release after signing.

Releases in connection with a termination program have different requirements. For example, to obtain an ADEA waiver from an employee terminated as part of a termination program the employer must also provide the employee:

- A longer time period to consider waiving his or her potential ADEA claim (45 days, as opposed to 21 days for an individual termination)
- Additional documentation regarding those employees who were selected and not selected for termination

Mutual Release

The employer should avoid agreeing to a mutual release of claims because the employer may not know of causes of action it may have

against the employee, such as claims for fraud, theft or conversion, violations of restrictive covenants, or other compensable claims that have not come to light.

Non-waivable Claims

When drafting the release, note the following:

- Releases of claims under the FLSA may require Department of Labor or judicial supervision. To protect against future wage claims, you should consider adding recitals to the release that, to the employee's knowledge, the employee has received all compensation owed to him or her.
- The separation agreement may not contain language that purports to prevent an employee from filing charges with the Equal Employment Opportunity Commission (EEOC) or another administrative agency. You may, however, include a recital that the employee waives his or her entitlement to any damages resulting from any EEOC or other agency charge that he or she (or any third party) may file.
- In most states, the separation agreement cannot include a waiver of claims for workers' compensation and unemployment compensation. The agreement can contain a recital that the employee has reported to the employer any work-related injuries.

Last Date of Employment

You should specify the effective date of the employee's termination.

Benefits

You should specify the last day of the employee's eligibility for medical coverage and other benefits including, inter alia, dental coverage, life insurance, or participation in the employer's retirement plan. You should also enumerate any vested and accrued benefits to ensure that the employer does not overlook any required benefit payments.

Consolidated Omnibus Reconciliation Act (COBRA)

The agreement should explain that the employee may be eligible for continued health benefit coverage under COBRA and that, if the employee elects COBRA, the employee will bear the expense of such continuing coverage.

Consideration

The separation agreement must be supported by consideration beyond that which the employee is already entitled. The departing employee often will request additional separation compensation. In responding to a request for more separation pay, your initial research regarding the employee and the circumstances of his or her termination will prove indispensable.

Additionally, providing or extending certain benefits may bridge the gap between what the employer is willing to provide consideration-wise and what the employee seeks. Some examples that may arise include:

- **Outplacement benefits.** If the employer's initial offer did not include outplacement benefits, then including them in the separation agreement may be a relatively inexpensive way to increase the value of the package. On the other hand, the employer may have offered outplacement benefits that the employee does not want. If so, the employer should consider paying the cash equivalent for such services upon request.
- **Health benefits.** Many departing employees will worry over the loss of health coverage. Assuming the cost of the employee's share of the COBRA payments for a period of time may provide a relatively inexpensive way to boost the cost of the separation package while ameliorating the employee's concerns over health benefits.

Method of Separation Payments

The separation agreement should specify whether the employer will pay the consideration in one lump-sum payment or over a period of time.

If the separation agreement provides for a future stream of payments, you should discuss with the employer whether the agreement should provide that these payments will cease if the employee finds new employment. You will also need to consider [I.R.C. § 409A](#) (Section 409A) implications.


Brief Introduction to Section 409A

Section 409A generally provides that most deferred compensation plans, which may include separation agreements, must comply with various rules regarding the timing of deferrals and distributions. Deferred compensation generally occurs for Section 409A purposes when compensation is paid in a different tax year than the year in which the employee first vested in the right to be paid. Section 409A was added to the Internal Revenue Code in 2004, in part as a response to the practice of opportunistic executives at Enron

Related Content


For additional guidance on separation agreements specifically tailored for executives, see

> [DRAFTING COMMON PROVISIONS IN AN EXECUTIVE SEPARATION AGREEMENT](#)

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For detailed advice on meeting the waiver requirement set out in the Older Workers Benefit Protection Act, see

> [COMPLYING WITH THE HEIGHTENED WAIVER REQUIREMENTS UNDER THE OLDER WORKERS BENEFIT PROTECTION ACT](#)

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For a detailed discussion on the application of the non-qualified deferred compensation rules of Section 409A of the Internal Revenue Code, see

> [SECTION 409A AND SEVERANCE ARRANGEMENTS](#)

 **RESEARCH PATH:** [Employee Benefits & Executive Compensation > Nonqualified Deferred Compensation > Practice Notes](#)

Corporation accelerating the payments under their company's deferred compensation plans to access money before the company went bankrupt. Note that Section 409A also applies to independent contractors and imposes a six-month delay rule on non-exempt severance payable to certain officers of public companies.

Section 409A Penalties

The penalties for violating Section 409A apply primarily to the employee, although the employer has W-2 reporting and tax withholding obligations. The penalties for an employee include (1) the full amount of the severance pay (even if it is to be paid over several years) becomes taxable, except to the extent it is exempt from Section 409A; (2) the employee pays an additional 20% penalty tax on the severance pay; and (3) the employee may also have to pay additional interest.



THE EMPLOYER SHOULD GENERALLY REQUIRE THAT THE EMPLOYEE PAY THE EMPLOYER LITIGATION FEES AND LIQUIDATED DAMAGES, WHICH ARE PREDETERMINED MONETARY DAMAGES FOR VIOLATING THE AGREEMENT, FOR MATERIAL BREACHES OF THE AGREEMENT, SUCH AS BREACHES OF NON-DISPARAGEMENT OR CONFIDENTIALITY CLAUSES.

Complying with Section 409A

The first way to avoid the negative implications of Section 409A is to ensure that any payments meet the short-term deferral exemption. This exemption is generally available if the employer pays the severance payments within two and one-half months after the end of the year in which the termination occurs. Note that a Section 409A violation could occur if the employer has a preexisting obligation, such as under an employment agreement, to pay severance over a longer period and then accelerates payment to occur within that two and one-half month period.

A second safe harbor for separation pay exists for payments that do not exceed the lesser of either two times the employee's annual compensation or twice the compensation limit in [I.R.C. § 401\(a\)\(17\)](#)—set at \$275,000 in 2018. The termination must be involuntary and the employer must pay the separation pay by no later than December 31 of the second year following termination of employment.

You should also consider including provisions stating that although both the employer and the employee intend the agreement to comply with Section 409A, the employer and the employee agree that the agreement will be interpreted in a manner to comply with Section 409A. In addition, if any provision of the agreement is found not to comply with Section 409A, the parties will cooperate to execute any necessary amendments to accomplish compliance with Section 409A.

Tax Withholding

You should state in the agreement that applicable tax withholding (and other authorized or required deductions) will be deducted from the separation payment(s) made to the employee.

Confidentiality of Separation Agreement

You should include a clause stating that the employee agrees not to tell anyone about the separation agreement and not to provide any information in the separation agreement to anyone, other than his or her attorney, financial advisor, close family members, or as legally required. The agreement should also state that if the employee tells anyone on this list about the agreement, the employee must

simultaneously instruct them to maintain the confidentiality of the terms of the separation agreement.

Confidentiality of Proprietary Information

The agreement should contain the employee's promise to keep the company's proprietary information confidential. You may define proprietary information simply as any confidential non-public information of the employer. This provision should state that the employee may disclose such information only if required by law. This clause should also state that the employee agrees not to use the employer's proprietary or confidential information to harm or damage the employer.

You should determine if the employee previously signed a confidentiality agreement at the outset of or during employment that may contain much or all of this content. If so, this provision should incorporate by reference that previous agreement.

Return of Company Property

The agreement should memorialize that the employee will return all company property, including electronic devices, documents, and electronic data by no later than a specified date.

Restrictive Covenants

The employer may want to incorporate in the separation agreement new or existing restrictive covenants, such as non-disclosure, non-solicitation, non-competition, and provisions concerning the ownership of work product and intellectual property. Examine existing policies and agreements to determine which restrictions may apply to the employee and carefully review state law to determine the extent of enforceability.

Non-Disparagement

This provision is designed to protect the employer from disparagement by the former employee. An example of this clause is a statement that:

The employee shall not make any statements or take any actions that disparage, hold out to public embarrassment, or ridicule, the Company, its services, products, management, employees, image, tradecraft, practices, office environment, culture, or otherwise

harms its reputation. This paragraph shall not prevent [employee's name] from making truthful statements in response to a subpoena or under oath in the course of an investigation conducted by the EEOC or another government administrative agency.

Carve-out Relating to Administrative Agencies

To reduce the risk that administrative agencies will take issue with the confidentiality, non-disparagement, or similar clauses, you should include a disclaimer that such provisions do not preclude the employee from filing an administrative charge or otherwise communicating with or reporting possible violations of law or regulation to any federal, state, or local government office, official, or agency.

Mutual Non-Disparagement

While an employee may request a mutual non-disparagement provision, the employer should reject this request. First and foremost, it is impractical for the employer to monitor and filter comments made by its myriad employees. Further, if the employer has to provide evidence to a court, administrative, or regulatory body in a matter relating to the employee, such a restraint may impede forthright disclosures about the employee's performance or conduct.

Job References

Job references, if any, should be in writing. Agreeing to an oral reference inevitably leads to "he said, she said" issues. If the employer agrees to provide a specific reference letter, the employer should have the employee agree in writing to the exact terms of the reference. The employer must also ensure that the reference is accurate and provide the reference exactly as written.

No-Rehire Provisions

This clause states that the employee will not apply for re-employment and waives the right to be hired again by the employer. It may foreclose future retaliation suits against the employer for denying a future application.

The EEOC discourages no-rehire clauses. The courts, however, generally have upheld such provisions. See, for example, [Jencks v. Modern Woodmen of Am., 479 F.3d 1261 \(10th Cir. 2007\)](#); [Salerno v. City Univ. of N.Y., 2005 U.S. Dist. LEXIS 3825 \(S.D.N.Y. Mar. 8, 2005\)](#). But see [Golden v. Cal. Emergency Physicians Med. Group, 782 F.3d 1083 \(9th Cir. 2015\)](#) (remanding employment litigation settlement agreement to district court to determine whether a no-rehire provision it contained violated the [Cal. Bus. & Prof. Code § 16600](#) prohibition against restraints on the practice of a profession); [Reyes, et al. v. HIP at Murray Street, LLC, et al.](#),



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For an overview on how to use bargaining power and leverage to negotiate favorable separation agreements for executives, see

> STRATEGIES FOR NEGOTIATING EXECUTIVE SEPARATION AGREEMENTS FOR EXECUTIVES

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For a sample annotated executive separation agreement with practical guidance and drafting notes, see

> EXECUTIVE SEPARATION AGREEMENT (PRO-EMPLOYER)

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For state-specific separation agreements, see

> INVESTIGATIONS, DISCIPLINE, AND TERMINATIONS STATE EXPERT FORMS CHART

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No. 1:15-cv-00238 (S.D.N.Y. Jan. 6, 2016) (rejecting proposed settlement agreement because the agreement's no-rehire provision was inconsistent with the purposes of the FLSA). Courts have also specifically held that a no-rehire provision/policy does not in itself constitute retaliation. See, for example, [Jencks, 479 F.3d at 1263](#); [Franklin v. Burlington Northern & Santa Fe Ry., 2005 U.S. Dist. LEXIS 3288 \(N.D. Tex. Mar. 3, 2005\)](#), aff'd by [2006 U.S. App. LEXIS 8267 \(5th Cir. Apr. 5, 2006\)](#).

Cooperation

The employer should generally require the employee to cooperate reasonably in any ongoing or future litigation, investigation, or criminal/legal matter. The employer often offers indemnification for the employee's expenses and attorney's fees. The employer should typically not agree to pay the employee for time spent cooperating.

The employer may also request that the employee inform it of any subpoenas or summons related to the employer that the employee receives within a prescribed time period (e.g., within three business days of receipt).

Liquidated Damages and Litigation Fees

The employer should generally require that the employee pay the employer litigation fees and liquidated damages, which are predetermined monetary damages for violating the agreement, for material breaches of the agreement, such as breaches of non-disparagement or confidentiality clauses. The liquidated damages provision will give teeth to the agreement and encourage ongoing compliance by the employee. Don't set the liquidated damages amount too high, as courts will reject unreasonable liquidated damages provisions.

Integrated Document


You should include an integration provision stating that the agreement reflects the complete agreement of the parties. The integration provision bars reliance by the employee on oral representations or agreements outside of the separation agreement.

The integration provision may, however, result in the unintended effect of superseding and extinguishing ongoing restrictive covenants or other agreements that the employer may want to continue to enforce against the employee. To avoid extinguishing these agreements you should include a carve-out in the integration clause that preserves these obligations.

Choice of Law/Choice of Venue

This provision permits the selection of the controlling law and jurisdiction, including arbitration, regarding an allegation of material breach of the separation agreement by either party.

Severability

You should include a paragraph regarding the severability of the agreement, which means that if one paragraph is deemed unenforceable, the rest of the agreement remains enforceable. 

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Brian M. Murray BAKER & HOSTETLER LLP

Guidance for Employers on ERISA Discrimination, Retaliation, and Whistleblower Claims

This article discusses aspects of Section 510 of the Employee Retirement Income Security Act (ERISA) ([29 U.S.C. § 1140](#)), which prohibits interference with benefits and retaliation for the exercise of rights under ERISA and ERISA employee benefit plans. The prohibition applies to employee pension benefit plans and employee welfare benefit plans, to vested and unvested benefits, and to actions affecting a single individual or multiple individuals. By virtue of Section 510, employees should be able to claim benefits and exercise their rights under the law without fearing their employer's interference or reprisal.

Competing Principles in Section 510 Litigation

ERISA Section 510 prohibits discrimination (including discharge, fine, suspension, expulsion, or discipline) against any ERISA employee benefit-plan participant or beneficiary, for exercising any right under the provisions of the plan. Section 510 claims lie at the intersection of many well-established and often competing policies. Since these policies are explicitly and implicitly considered by courts at all stages of litigation, you should recognize them to help litigants better frame their legal arguments.

Factors against the Robust Application of Section 510

Several factors weigh against a robust application of Section 510. Historically, the law has not required employers to sponsor employee benefit plans. Outside of the collective bargaining context, if an employer chooses to sponsor a plan, it has broad discretion to establish the plan's terms and only marginally narrower discretion to amend those terms on a prospective basis. This is particularly true of welfare benefits because, at least prior to health care reform and with the exception of a few



Internal Revenue Code limits, the law did not prescribe levels of participation or benefits.

In addition, ERISA itself is indicative of public policy favoring employer-sponsored plans. Courts are often reluctant to

impose costs and expenses that disincentivize employers from sponsoring plans.

The employment-at-will doctrine is also lurking in the background of many Section 510 cases. This doctrine militates against courts second-guessing employment-related decisions. Federal and state comity is also a consideration since employment relationships are traditionally governed by state law.

Finally, courts recognize societal norms allowing companies to operate their businesses efficiently and to maximize profits. This factor can be particularly important when adverse employment actions are taken to control costs during a downturn in a company's financial fortunes.

Factors for the Robust Application of Section 510

On the other hand, there are factors favoring a robust application of Section 510. ERISA is the law of the land. Its primary purpose is to ensure that employers' benefit-related promises are kept. Despite the free hand that employers have in setting the terms of their plans, Congress clearly intended that employers keep the promises they have made.

Moreover, Section 510 is an integral component of the statutory scheme enacted to accomplish this goal. Without Section 510, employers could interfere with employees' opportunities to obtain promised benefits through adverse employment actions. That would undermine all of ERISA's participation, vesting, and benefit accrual requirements.

Of course, notions of fundamental fairness to employees require that employers' benefits-related promises be kept.

Types of Claims under Section 510

Section 510 authorizes:

- Interference claims
- Retaliation claims
- Whistleblower claims

For each type of claim, the alleged unlawful action must be a discharge, fine, suspension, expulsion, discipline, or discrimination. These actions must affect the employment relationship. It is not enough to show that a benefit plan has been changed in a way that disadvantages a participant or merely that a benefit claim was denied.

Interference Claims

Section 510 prohibits adverse employment actions that are taken to interfere with plan participants' and beneficiaries' earned or promised benefits. These are the most common types of claims under Section 510.

While the concept of interference claims can be simply stated, complexities arise from the need to analyze specific

... A RETALIATION CLAIM MIGHT ARISE IF AN EMPLOYEE'S EMPLOYMENT IS INVOLUNTARILY TERMINATED AFTER HE OR SHE FILES A CLAIM FOR REIMBURSEMENT OF SUBSTANTIAL MEDICAL EXPENSES UNDER A GROUP HEALTH PLAN.

adverse employment actions taken in the context of complex, multifaceted employment relationships. Plaintiffs must establish that employers specifically intended to interfere with their rights under employee benefit plans or ERISA. In the more common cases that do not involve direct evidence of discrimination, plaintiffs must also establish that their employers' proffered legitimate reasons for having taken adverse employment actions are merely pretexts for unlawful discrimination.

For example, interference claims might arise due to:

- A termination of employment shortly before a participant would become vested or qualified to receive supplemental or early retirement benefits under a pension plan
- A change in employment status (e.g., layoffs, outsourcing positions to a contractor, reclassifying employees as independent contractors or from full-time to part-time) related to workforce restructurings or a company's financial distress
- A failure to hire or maintain benefits in connection with a company merger or acquisition
- A misrepresentation about the possibility of an impending early retirement window program to an employee who terminates employment prior to implementation of the program

Retaliation Claims

Section 510 prohibits adverse employment actions taken against participants and beneficiaries in retaliation for their exercise of rights under an employee benefit plan or ERISA.

For example, a retaliation claim might arise if an employee's employment is involuntarily terminated after he or she files a claim for reimbursement of substantial medical expenses under a group health plan. For example, in [Kross v. Western Electric Co., 701 F.2d 1238, 1242-43 \(7th Cir. 1983\)](#), a claim that an employer discharged an employee in order to avoid paying medical and dental expenses was found to be cognizable under Section 510.

Whistleblower Claims

Section 510 prohibits adverse employment actions taken against individuals who have given information, have testified, or are about to testify in any inquiry or proceeding related to ERISA. For example, a whistleblower claim might arise if an employee experiences a change in employment status after raising possible violations of law relating to an ERISA plan.

Section 510 also prohibits discrimination against employers contributing to multiemployer plans for exercising rights under ERISA or giving information or testifying in any inquiry or proceeding before Congress relating to ERISA.

Proving Violations of Section 510

Generally, it is very difficult to make and prove a Section 510 claim. To state a Section 510 claim, a plaintiff may show direct evidence that the employer had specific intent to violate ERISA. In the absence of such direct evidence, courts have applied a shifting burden analysis similar to that applied in Title VII employment discrimination cases. For instance, in [Dister v. Continental Group, Inc.](#), 859 F.2d 1108, 1111–12 (2d Cir. 1988), the court adopted the burden shifting paradigm of [McDonnell Douglas Corp. v. Green](#), 411 U.S. 792 (1973) for discriminatory discharge claims under Section 510.

Elements of a Section 510 Claim

Section 510 is not a model of statutory draftsmanship. In [George v. Junior Achievement of Cent. Ind., Inc.](#), 694 F.3d 812 (7th Cir. 2012), the U.S. Court of Appeals for the Seventh Circuit referred to it as “a mess of unpunctuated conjunctions and prepositions.” Due to these shortcomings and the fact that Section 510 allows three types of claims, there is a lack of uniformity in the language courts use when pronouncing the elements of Section 510 claims. Litigants should reference the leading decisions of the relevant circuit court of appeals for the applicable formulation of a Section 510 claim.

Direct Evidence

Plaintiffs may prove their Section 510 claims through the use of direct or indirect evidence. Direct evidence consists of the proverbial smoking gun.

For example, in a case decided by the U.S. Court of Appeals for the Third Circuit, [Gavalik v. Continental Can](#), 812 F.2d 834 (3rd Cir. 1987), an employer systemically laid off employees to prevent them from vesting under its pension plan. This liability avoidance program used a scattergraph to identify and target particular employees tied to unfunded pension liabilities. A liability avoidance tracking system or “red flag” system was put in place to ensure that targeted employees were not inadvertently called back to work. The Third Circuit

Related Content

For a discussion on the roles of fiduciaries of employee benefit plans under the Employee Retirement Income Security Act (ERISA), see

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For more information on the Patient Protection and Affordable Care Act (ACA) whistleblower provisions and regulatory procedures, see

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For a description on the shared responsibility rules for applicable large employers under the ACA, see

> **EMPLOYER SHARED RESPONSIBILITY MANDATE UNDER THE ACA**

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had no trouble finding that this program was direct evidence of discrimination.

Another example of a case involving direct evidence of discrimination is [Lessard v. Applied Risk Mgmt.](#), 307 F.3d 1020 (9th Cir. 2002). In that case, parties to a company asset sale structured the purchase agreement to require employees on



leave to return to active, full-time status for their employment to transfer to the buyer after the closing. Other employees' employment transferred automatically. After finding that the purchase agreement facially discriminated against employees on leaves of absence, the Ninth Circuit Court of Appeals reversed the lower court's grant of summary judgment for the company on the employees' Section 510 claims.

Indirect Evidence

If claims are based on indirect evidence, courts apply the familiar burden-shifting paradigm developed in cases under Title VII of the Civil Rights Act of 1964. Initially, plaintiffs must demonstrate, by a preponderance of the evidence, a prima facie case of unlawful discrimination under Section 510 consisting of the following elements:

- **Prohibited conduct.** The plaintiff must demonstrate prohibited conduct. Prohibited conduct is a discharge, fine, suspension, expulsion, discipline, or discrimination. These are referred to collectively herein as adverse employment actions. The most common actions are termination of employment and changes in status such as demotions, transfers, or reclassifications.
- **Specific discriminatory intent.** Discrimination must be a motivating factor for the adverse employment action;

however, discrimination need not be the sole motivating factor. Plaintiffs must show specific evidence, not speculative and conclusory allegations, to prove specific intent. This is the linchpin of all Section 510 claims.

- **Loss of entitled right or benefit under employee benefit plan.** Plaintiffs must show a loss of an entitled right or benefit under an employee benefit plan. An entitled right is broader than a vested right because it can encompass rights to future contributions and welfare benefit rights.

If plaintiffs establish a prima facie case, defendants may offer legitimate reasons for taking adverse employment actions, which usually fall into one of the following categories:

- Employee misconduct
- Poor job performance
- Workplace restructuring
- Economic hardship and reduction of expenses

Finally, plaintiffs must demonstrate that proffered legitimate reasons are pretexts for unlawful discrimination or retaliation. Case law is instructive in determining how to make this showing. The following factors can be relevant, depending on the facts underlying the claims:

THE PATIENT PROTECTION AND AFFORDABLE CARE ACT DRAMATICALLY CHANGED THE WAY THAT HEALTH INSURANCE COVERAGE IS PROVIDED IN THE UNITED STATES. AMONG OTHER THINGS, THE ACA REQUIRES EMPLOYERS OF A CERTAIN SIZE TO OFFER HEALTH COVERAGE TO THEIR FULL-TIME EMPLOYEES OR BE AT RISK FOR EXCISE TAXES.

- **Strength of the employer’s evidence supporting its proffered legitimate reason for taking adverse employment action.** For example, if an employer asserts that an employee was terminated for failure to meet job requirements, a human resources file documenting multiple instances of the employee’s shortcomings can be powerful evidence against a claim of pretext. Also, an employer’s position can be bolstered by showing that it followed established, written policies and procedures. Conversely, an employer’s inconsistent explanations for taking adverse employment actions, demonstrated history of treating an affected group worse than others, or administering punishment that is disproportionate to the alleged offense, may bolster a claim of pretext.
- **Temporal proximity of the exercise of an employee benefit right to the adverse employment action.** Close proximity may support a finding of pretext; a significant lapse of time may undermine a claim of pretext.
- **Cost savings to the employer resulting from an adverse employment action.** Plaintiffs must show more than an employer’s knowledge of cost savings. Rather, cost savings must be the reason for an adverse employment action. Courts are more likely to find that cost savings have probative value if the alleged discrimination affects a class of individuals rather than a single employee. The size and

health of the business can also be factors in determining whether cost savings were truly the motivation for an adverse employment action.

- **Contingencies and the length of time before an individual could enjoy a purportedly wrongfully denied benefit.** For example, if an individual would have to work a lengthy period of time to become entitled to supplemental pension benefits or would have to wait a number of years after termination of employment to receive them, courts will be less inclined to find that a proffered reason is a pretext.
- **Treatment of similarly situated individuals.** If an employer took no action or less severe action against similarly situated individuals accused of similar actions in the past, that may be used to show that a more severe sanction against an employee, such as termination of employment, was a pretext for unlawful discrimination.
- **Awareness of adverse impact.** An important consideration is whether the individual who made the decision to take adverse employment action was aware of the plaintiff’s participation in a plan or the implications of the action to the plaintiff’s rights and interests in a plan.
- **Unlawful discrimination preventing benefit eligibility.** The participant or beneficiary must be eligible for benefits under the terms of a plan in the absence of unlawful discrimination.

Special Issue with Whistleblower Claims

Anti-retaliation provisions exist in a number of federal statutes, declaring unlawful the discharge or discriminatory treatment of employees who file charges alleging that their employers’ actions violate those statutes, or who otherwise initiate or participate, assist, or testify in investigations or proceedings brought under those statutes against their employers. Anti-retaliation provisions are often drafted with sufficient breadth so that they can also be construed as whistleblower provisions that protect the employee who reports violations affecting the employee, as well as other workers or the public.

The federal appeals courts are split about whether unsolicited internal complaints concerning ERISA violations are protected activities under Section 510. The Fifth, Seventh, and Ninth Circuit Courts of Appeals have concluded that these complaints are protected activities, whereas the Second, Third, Fourth, and Sixth Circuit Courts of Appeals have concluded that these complaints are not. The Department of Labor has written amicus curiae briefs consistently urging that informal complaints are protected activities under Section 510.

The split among the courts has developed due to conflicting interpretations of the ambiguous phrases “given information” and “any inquiry or proceeding.” The courts that broadly construe the whistleblower provision interpret these terms to encompass more than the giving of testimony in a formal context. For these courts, protected activity can include informal, oral complaints to a supervisor or human resource administrator. No formal proceeding need be underway at the time of the complaint; the complaint itself can be viewed as the first step of an inquiry or proceeding. These courts reason that any other construction would give employers a perverse incentive to discharge potential whistleblowers because doing so would prevent the occurrence of a formal inquiry or proceeding.

By contrast, the courts that narrowly construe the whistleblower provisions often compare them to the whistleblower provisions of the Fair Labor Standards Act. This comparison tends to result in the courts focusing on whether there is an inquiry or proceeding under the circumstances, regardless of the level of formality involved. Under this analysis, unsolicited internal complaints fall outside the protections of Section 510. If the employer is merely a passive recipient of information, no inquiry (let alone proceeding) can be said to exist. Only the employer can initiate an inquiry—either by asking questions of the employee or conducting a more formal investigation.

Remedies

Depending on the type of adverse employment action involved, affected employees could justifiably seek reinstatement to their positions, back pay, front pay, restitution of forfeited benefits, payment of benefits wrongfully denied, service credit for vesting or entitlement to supplemental benefits, restoration of seniority, and other remedies available in wrongful discharge and discrimination cases.

However, ERISA Section 502 is the exclusive enforcement mechanism for Section 510 claims. As a practical matter, Section 510 claims are brought under ERISA § 502(a)(3) ([29 U.S.C. § 1132\(a\)\(3\)](#)). Thus, the remedies available to plaintiffs include injunctions and “other appropriate equitable relief,” but generally not monetary damages.

Nevertheless, in [Cigna v. Amara, 563 U.S. 421 \(2011\)](#), the U.S. Supreme Court identified several types of equitable relief that may actually be meaningful to participants and beneficiaries. In addition to injunctions, participants and beneficiaries could seek equitable relief in the form of reformation of a plan’s terms, a surcharge (e.g., an order requiring fiduciaries to abide by the terms of a reformed plan’s terms), and estoppel. The Court described a surcharge as “‘monetary’ compensation for a loss resulting from a trustee’s breach of duty, or to prevent the trustee’s unjust enrichment.” *Cigna v. Amara*, 563 U.S. at 441. In effect, the Court provided a roadmap for bringing equitable claims under Section 502(a)(3). Notably, courts have also recognized reinstatement and, in some circumstances, restitution, as equitable remedies in the employee plan context.

Courts have discretion to award reasonable attorney’s fees and costs to either party to an action under ERISA Section 510. A fee claimant need not be a prevailing party to be eligible for attorney’s fees; it is sufficient to have some success on the merits.

Section 510 Litigation Relating to the Patient Protection and Affordable Care Act

The Patient Protection and Affordable Care Act (ACA) dramatically changed the way that health insurance coverage is provided in the United States. Among other things, the ACA requires employers of a certain size to offer health coverage to their full-time employees or be at risk for excise taxes. The ACA may prove to be very fertile ground for Section 510 claims.

Employer Shared Responsibility Provisions of the ACA

The ACA’s shared responsibility provisions apply to applicable large employers, meaning employers with an average or 50 or more full-time employees or full-time equivalents in the preceding calendar year. For this purpose, a full-time employee is a common law employee who averages at least 30 hours of service per week during a month. Part-time employees’



SECTION 510 HAS BEEN ON THE BOOKS FOR OVER 40 YEARS. AN AMPLE BODY OF CASE LAW HAS DEVELOPED FROM WHICH WE CAN IDENTIFY BEST PRACTICES TO AVOID OR DEFEAT SECTION 510 CLAIMS.

hours are aggregated to create full-time equivalent figures to determine whether the 50-employee threshold has been satisfied and whether an employer is thus subject to the ACA shared responsibility requirements.

Covered employers must either pay or play. That is, if they do not offer minimum essential health care coverage to substantially all of their full-time employees (those who work 30 hours or more on average per week), they may be subject to excise tax penalties. The pay-or-play mandate is sometimes referred to as a free rider surcharge or a free rider penalty.

Predictably, many employers have tried to avoid or minimize their exposure to these excise taxes. Whether employers are trying to avoid being subject to the ACA, or to avoid or minimize excise taxes triggered by failures to make offers of coverage or adequate offers of coverage, the ACA's structure incentivizes them to take adverse employment actions against their employees. These actions include discharges, reductions in hours to achieve part-time status, and coercive transitions to independent contractor status.

Dave & Buster's Litigation

The hospitality industry is among the hardest hit by the ACA's employer shared responsibility mandates. These businesses tend to have large numbers of hardworking but low-paid and unskilled employees. The cost of health coverage provided on ACA-compliant terms can equal or exceed many of these employees' salaries and wages. Fearing skyrocketing human resource expenses, many hospitality businesses view the ACA as an existential threat and have reacted by taking preemptive measures designed to lessen the ACA's impact on their businesses. In [Marin v. Dave & Buster's, Inc., 159 F. Supp. 3d 460 \(S.D.N.Y. 2016\)](#), the employer allegedly violated Section 510 by cutting employee hours to deny them health benefits.

Maria De Lourdes Parra Marin sued her former employer, Dave & Busters, Inc., for discrimination under Section 510. The class action complaint was filed on behalf of approximately 10,000 hourly employees whose hours were allegedly involuntarily reduced, resulting in a loss of coverage under the company's health plan or an offer of "inferior" health coverage.

The complaint alleged several communications by managers and company executives that could be used to show specific intent under Section 510 and sought "to obtain appropriate equitable relief" for acts of discrimination under Section 510. The class action complaint specifically sought:

- Reinstatement of employees to their prior full-time positions
- Restoration of rights to participate in the company's plan that complies with the requirements of the ACA
- Being made whole for:
 - Loss of wages and benefits, with interest, from the date of the reduction of hours and benefits
 - Costs of health insurance obtained to replace coverage under the company's plan
 - Reimbursement for out-of-pocket costs for medical claims to the extent that they would have been paid as if they had continued to participate in the company's plan
- Reasonable attorney's fees and costs

Dave & Buster's filed a motion to dismiss for failure to state a claim under Section 510. In denying the motion, the court found that the complaint alleged intentional interference with current health care coverage that was motivated by concern about future costs and was supported by factual allegations. The reduction in hours "affected [Ms. Marin's] employment status, her pay and the benefits she had and to which she would be entitled." Accordingly, the court concluded that "the complaint states a plausible and legally sufficient claim for relief, including, at this stage, [Ms. Marin's] claim for lost wages and salary incidental to the reinstatement of benefits."

Based on what we can discern from the pleadings and the court's ruling on the motion to dismiss, the plaintiffs will likely attempt to establish their claims on the basis of direct evidence of discrimination under Section 510. Perhaps the company will claim that its fiduciary obligation to its shareholders and disclosure obligations under securities law could not be reconciled with the constraints of Section 510. The subtext of such a claim is that the company should not be singled out for punishment just because it was honest and forthright (perhaps to a fault) about its actions.

On December 1, 2017, the court rejected a proposed settlement of this matter.

Best Practices for Avoiding and Defeating Section 510 Claims

Section 510 has been on the books for over 40 years. An ample body of case law has developed from which we can identify best practices to avoid or defeat Section 510 claims. Happily, most of these best practices comport with best practices that have been




advocated by human resources professionals when dealing with employment matters:

- To the extent possible, separate human resources personnel and functions from ERISA plan administration.
- Limit human resources personnel's access to plan-related information (ignorance can be bliss in this context).
- Maintain clear written employment policies and procedures with sanctions for violations that are commensurate with the severity of the offenses, and apply them consistently.
- Carefully document workplace incidents, disciplinary measures, performance reviews, etc., over the course of time.
- Avoid providing different, inconsistent explanations for adverse employment actions.
- Avoid linking an adverse employment action with any rights under an ERISA plan, so that specific intent to interfere is not manifest (i.e., avoid creating a smoking gun).
- Allow as brief a period as possible between a final decision to modify benefits (such as offering an early retirement window) and implementation of that modification, and develop a uniform, fiduciary-compliant approach to dealing with benefit-related inquiries during that period.
- Include employer-friendly provisions in your ERISA plan documents (e.g., expressly acknowledge ERISA status; require exhaustion of claims procedures; and reserve discretionary authority to amend and terminate the plan, construe plan terms, and make findings of fact and other administrative determinations).

- Consult with labor and employment counsel to develop standard waiver and release of claims language to be signed by departing employees.
- Conduct exit interviews with departing employees and communicate rights under plans.
- When contemplating changes to employee benefit plans:
 - Consider how various cohorts of employees will be impacted (e.g., hourly versus salaried, long-term versus short-term).
 - Document legitimate, non-discriminatory business reasons for making the changes (e.g., as part of a multifaceted and business-wide cost-cutting program in response to adverse business conditions). ■

Brian Murray is a partner at Baker and Hostetler LLP. He has a depth of experience counseling small private companies to large publicly traded corporations on diverse employee benefit and executive compensation matters across a multitude of industries, including pharmaceuticals, food and beverage, and financial services. Brian has also been heavily involved in employee benefits matters in mergers, acquisitions, and dispositions, as well as the consolidation and restructuring of employee benefit plans and arrangements after closings. He wishes to thank Dan McClain, an associate in the Cleveland office of Baker and Hostetler, for his assistance.

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Partnership and LLC Equity Compensation

This article addresses fundamental considerations in structuring equity compensation for general and limited partnerships, as well as limited liability companies (LLCs) that are classified as partnerships for federal income tax purposes.

IT SUMMARIZES THE EQUITY-BASED ARRANGEMENTS USED by entities taxed as partnerships to provide key service providers the opportunity to become true equity owners of the business. (Synthetic equity arrangements, such as phantom equity and other cash-settled programs linked to equity appreciation, are not discussed here in detail.)

For simplicity, although this article generally uses the term partnership, the information is equally applicable to all entities classified as a partnership for federal income tax purposes, including general partnerships, limited partnerships, and LLCs.

Special Partnership Compensation Considerations

There are several issues that are important to understand when advising clients on equity compensation matters for partnerships. Many of these issues are unique to partnership equity compensation, primarily because of the different tax regime applied to entities taxed as partnerships compared to entities taxed as corporations. For tax purposes, a partnership is a pass-through entity, meaning that income tax is generally not imposed at the entity level. Instead, a partnership's income, gain, loss, deduction, or credit (tax items) are allocated to its partners based on a method agreed to among the partners in the partnership agreement. The partners are liable for paying income tax on their distributive shares of the partnership's tax items as reported on their respective income tax returns. Importantly, partners are subject to tax on their distributive shares of a partnership's tax items (a tax reporting concept) regardless of whether the partnership makes



distributions of cash to its partners (an economic concept). As such, it is necessary to distinguish between a partner's distributive (or allocated) share of the partnership's tax items and distributions of partnership cash.

An equity interest in a partnership can be either a capital interest or a profits interest (including profits interests treated as so-called applicable partnership interests under new tax rules discussed further below). There are also synthetic forms of equity (e.g., phantom equity) that provide the appearance, but not the substance, of true ownership. Partnerships may consider synthetic equity alternatives due to the relatively higher costs and complexity of administering an incentive program that involves true equity interests.

Incentive Effect Considerations

When designing an equity compensation program, it is imperative at the outset to identify the organizational objectives. These will impact the choice of award type and the terms of the award. From a talent management viewpoint, the primary reason partnerships grant equity compensation is to attract, incentivize, and retain key service providers. By offering a service provider an equity stake, the partnership is able to align the economic interests of its existing partners with key service providers.

Vesting

To strengthen the incentive and retention effects of equity grants, partnerships (like corporations) typically subject the award to vesting restrictions, which can incentivize service providers to remain with the business over a designated period of time (if vesting is time-based) or to enhance performance (if vesting is performance-based), or both. On the other hand, extended vesting periods or unrealistic performance standards can diminish the perceived value of an equity award.

Capital Contribution Requirement

The partnership will also need to determine whether service providers will be asked to contribute cash or other property to receive an equity interest in the partnership or whether the equity grant will be entirely compensatory. A service provider who is required to contribute cash or other property to the partnership will have skin in the game due to having capital at risk. The psychological effect of having capital at risk tends to incentivize performance in a manner consistent with a well-designed program's objectives.

Partner Status

Some service providers highly value receiving equity compensation because of the value attributed to being a business owner. Although becoming a business owner has important psychological benefits, the change in status from employee to partner has real economic consequences, not all of which are positive, as discussed later in this article.

Voting, Redemption Rights, and Transfer Restrictions

Partnerships often impose restrictions on equity awards that are intended to primarily serve a compensatory purpose. These restrictions are usually set forth in a partnership agreement that establishes the rights and obligations of the partners and may also be included in a separate equity award agreement.

Voting rights. Compensatory equity arrangements commonly restrict voting and management rights to allow existing owners to retain control of the business. Frequently, however, there will be negotiated exceptions for certain types of significant decisions for which the parties agree that award recipients

should have a say or be able to act to preserve the value of their equity rights. Of course, voting restrictions must comply with the law of the state in which a limited partnership (or LLC) is organized.

Transfer restrictions. Almost all partnership equity awards are subject to transfer restrictions, as businesses often desire to control, or at least limit, the acquisition of its equity by unaffiliated third parties.

Redemption or buy-back rights. The partnership (or the other partners) typically has a right to redeem or acquire a service provider's partnership interest at an established price based on the occurrence of specified events (e.g., a separation from service after vesting in all or a portion of the interest). This is especially important for partnerships that are closely held and do not want inactive partners or passive investors. Such provisions should be clear about how the transfer restriction will operate, including how the transferred interest will be valued upon disposition, whether transfer is optional or mandatory, the time period in which the transfer is permitted to occur, and terms of payment (e.g., payment partially in cash and partially with an installment obligation).

Right of first refusal. For partnership agreements that permit partners to sell their interests to third parties, the partnership (and/or other partners) may also have a right of first refusal providing the remaining partners (or the partnership) with a first option to acquire any interests that a partner proposes to sell to a third party (usually at the same price and on substantially the same terms as the proposed sale).

Types of Partnership Equity Compensation

Partnership equity compensation can take the form of either capital interests or profits interests.

Capital Interests

For federal tax purposes, a capital interest in a partnership is a distinct type of equity interest. Specifically, a capital interest is defined as "an interest that would give the holder a share of the proceeds if the partnership's assets were sold at fair market value and then the proceeds were distributed in a complete liquidation of the partnership." [Rev. Proc. 93-27](#). That determination is made at the time of receipt of the partnership interest.

Similar to grants of equity in a corporation, partnership capital interests can vest immediately, over a period of time, or be based on performance. They can also be issued subject to restrictions, including transfer restrictions, redemption and buy-back rights, and rights of first refusal.



Tax Treatment of Capital Interest Grant

The tax treatment of an award of a compensatory capital interest in a partnership is governed by [I.R.C. § 83](#) and turns on whether the interest is vested at the time of grant.

Vested capital interest. A service provider awarded a capital interest that is fully vested upon grant will immediately include as taxable compensation an amount equal to the excess of the fair market value of the capital interest over the amount paid, if any, for the interest (generally referred to as the spread).

Unvested capital interest. A service provider awarded a capital interest that is subject to a vesting provision (i.e., the interest is subject to a substantial risk of forfeiture) is not subject to tax upon grant (unless the service provider makes a Section 83(b) election). Instead, as the interest vests, the service provider will be subject to tax on the spread.

In either case, the partnership generally deducts an amount equal to the compensation reported by the service provider. That deduction is allocated to the existing partners as provided for in the partnership agreement.

Given that a capital interest is taxable on the spread at the time the award vests, consideration should be given to how the recipient would be expected to pay the tax. Since transfer and other restrictions limit the marketability of a vested capital interest, the award recipient may not have sufficient liquidity to pay the federal and state income tax imposed on the spread. To minimize the financial burden on the award recipient, some partnerships combine the award of a capital interest with another cash-settled incentive such as a bonus payment or arrange for a loan.

Holding periods are important for recipients of unvested capital interests. To obtain the preferential federal tax rate associated with long-term capital gains, an individual must hold a capital asset for a period greater than 12 months. The holding period for an unvested capital interest generally does not begin to run until the interest vests, and even then, full vesting may occur over an additional period of years. If the holder disposes of the interest (or a portion thereof) within 12 months of vesting, he or she would not qualify for long-term capital gain treatment. Although a recipient of an unvested capital interest could accelerate the holding period by making a Section 83(b) election, such an election is not without potentially adverse economic consequences if the value of the interest declines since the tax paid on the grant date value cannot be recouped.

A similar issue must be addressed when granting a compensatory option to acquire a capital interest in a partnership. To avoid being taxed on the spread at the time the option is exercised, many optionees delay exercise until there is clarity regarding the timing of a capital transaction. Since the holding period cannot start until the option is exercised, many award recipients would not qualify for the preferential long-term capital gain rate because the subsequent disposition of the capital interest often occurs within 12 months of the exercise date. Such grants of compensatory partnership options are rare, however. Profits interests are more common and more highly valued by key talent.


Other Tax Consequences of Capital Interests

A partner's distributive share of tax items from a partnership is taxable as either ordinary income or loss, or capital gain or loss, depending on the character of the tax item in the hands of the partnership. A guaranteed payment made to a partner is

Related Content


For an examination of the non-qualified deferred compensation rules under I.R.C. § 409A, see

> [UNDERSTANDING NONQUALIFIED DEFERRED COMPENSATION ARRANGEMENTS AND INTERNAL REVENUE CODE SECTION 409A](#)

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For an overview of the rules governing the executive compensation deduction limitation under I.R.C. § 162(m), as amended by the 2017 tax reform legislation, see

> [IRC SECTION 162\(M\): NAVIGATING TAX DEDUCTION LIMITATIONS FOR EXECUTIVE COMPENSATION](#)

 [RESEARCH PATH: Employee Benefits & Executive Compensation > Employment, Independent Contractor, and Severance Arrangements > Executive Employment Agreements > Practice Notes](#)

treated as ordinary income subject to self-employment tax. The partnership is allowed a deduction equal to the amount of any guaranteed payments, which is passed through to its partners.

When a partner eventually disposes of a capital interest, he or she will generally recognize a capital gain equal to the net proceeds from the sale less the capital interest's basis. However, in some instances, all or a portion of the gain can be recharacterized as ordinary income if certain hot asset rules apply pursuant to [I.R.C. § 751](#).

Profits Interests

For federal tax purposes, a profits interest in a partnership is another type of distinct equity interest. By definition, a profits interest is a partnership interest other than a capital interest. [Rev. Proc. 93-27](#), [Rev. Proc. 2001-43](#).

The simplest way to distinguish a profits interest from a capital interest is to ask whether, in a hypothetical liquidation of the partnership on the grant date, the recipient would be

entitled to receive anything of value. If so, then the interest is a capital interest and the spread is taxable to the recipient, as discussed above. If not, then the interest is a profits interest, the receipt of which is not treated as a taxable event for either the recipient or the partnership. In other words, if the recipient of the interest only has a right to share in future profits (i.e., profits arising subsequent to the grant date) and in the future enterprise value (i.e., the fair market value of the partnership arising subsequent to the grant date), the interest is a profits interest.

[Rev. Proc. 93-27](#) provides that if a person receives a profits interest for the provision of services to or for the benefit of a partnership in a partner capacity or in anticipation of being a partner, the IRS will not treat the receipt of that interest as a taxable event for the partner or the partnership. However, that revenue procedure does not apply, and the receipt of a profits interest will be taxable to the recipient, if any of the following are true:

- **Certain income stream.** The profits interest relates to a substantially certain and predictable stream of income from partnership assets, such as income from high-quality debt securities or a high-quality net lease.
- **Disposition within two years.** Within two years of receipt, the recipient disposes of the profits interest.
- **Publicly traded partnership.** The profits interest is a limited partnership interest in a publicly traded partnership within the meaning of [I.R.C. § 7704\(b\)](#).

[Rev. Proc. 2001-43](#) provides an important clarification regarding the time for determining whether an unvested interest is a profits interest or a capital interest. The required determination is made at the time the interest is granted, regardless of whether it is vested or unvested at that time, provided that, if the interest is to be treated as a profits interest, all of the following must be true:

- **Treated as partner.** The partnership and the recipient treat the recipient as the owner of the partnership interest from the date of its grant, and the recipient takes into account the distributive share of partnership tax items associated with the interest in computing the recipient's income tax liability for the entire period during which the recipient has the interest.
- **No deductions.** Upon the grant of the interest or at the time that the interest becomes substantially vested, neither the partnership nor any of the partners deducts any amount (as wages, compensation, or otherwise) for the fair market value of the interest.
- **Compliance with Rev. Proc. 93-27.** All other conditions of [Rev. Proc. 93-27](#) are satisfied.

Thus, a profits interest must not violate the safe harbor requirements. For example, if a profits interest must be disposed of upon a change in control, which occurs prior to expiration of the two-year holding period, the interest would be reclassified as a capital interest carrying the corresponding tax consequences.

Traps to Avoid

Unless the award agreement provides otherwise, most recipients of profits interests are subject to the provisions of the partnership agreement in the same manner as holders of capital interests. If the partnership agreement provides for final liquidating distributions to be made in accordance with the partners' positive capital balances (in order to have economic effect), the recipient of a profits interest would not receive any proceeds from the hypothetical liquidation of the partnership on the grant date because the recipient would not have a capital account balance as of that date.

Many current partnership agreements, however, do not provide for liquidating distributions to be made in accordance with the partners' positive capital account balances. Instead, these agreements provide for liquidating distributions to be made in the same manner as non-liquidating distributions. In the view of many investors, distributing liquidation proceeds according to the partners' positive capital account balances may interfere with the deal economics, which is of higher importance to them than complying with the economic effect requirement.

Such provisions can create a serious tax issue for recipients of a profits interest.

As discussed above, the holder of a profits interest must not participate in the proceeds from a hypothetical liquidation on the grant date. However, if liquidation proceeds are distributed according to the agreement's general distribution provision, an award recipient may be hypothetically entitled to receive something of value following a hypothetical liquidation of the partnership on the grant date. The receipt of anything of value on that date would cause the interest to be classified as a taxable capital interest.

This issue can easily be avoided by building a distribution threshold or similar distribution hurdle into the partnership agreement. A distribution threshold provision requires that a minimum amount of cumulative distributions would be made with respect to other interests before the holder of a newly granted profits interest would receive a distribution arising from the hypothetical liquidation. The threshold merely provides a mechanism to avoid the unintended reclassification of a non-taxable profits interest into a taxable capital interest.

Other Tax Consequences of Profits Interests

As with capital interests, profits interests result in partnership allocations that are taxable at either ordinary income or capital gain rates, depending on the characterization of the income or gain to the partnership, and guaranteed payments received by a partner are taxed as ordinary income. Upon the redemption or sale of a profits interest, the holder will have a short-term

IF A PROFITS INTEREST IS AN APPLICABLE PARTNERSHIP INTEREST, THE GAIN OR LOSS REPORTED BY ITS HOLDER IS SUBJECT TO A SPECIAL HOLDING PERIOD.

or long-term capital gain, depending on how long the interest was held. In some instances, all or a portion of the gain can be recharacterized as ordinary income if certain hot asset rules apply pursuant to [I.R.C. § 751](#).

Applicable Partnership Interests

The tax reform legislation enacted in late 2017, known as the Tax Cuts and Jobs Act ([Pub. L. No. 115-97](#)), added new [I.R.C. § 1061](#), which impacts the tax treatment accorded to a special type of profits interest referred to as an applicable partnership interest. These rules apply when the following conditions are met, subject to the limitations discussed further below:

- **Interest issued for performance of services.** An applicable partnership interest is any interest in a partnership that, directly or indirectly, is transferred to (or is held by) a taxpayer in connection with the performance of substantial services by the taxpayer, or any other related person, in any applicable trade or business (defined below).
- **Interest in an applicable trade or business.** The interest is in an entity that conducts activities on a regular, continuous, and substantial basis that consist, in whole or in part, of raising or returning capital, and either (1) investing in (or disposing of) specified assets or (2) developing specified assets. Importantly, the activity does not actually have to rise to the level of a trade or business as that term is generally used in the Internal Revenue Code.
- **Investment or development of specified assets.** The specified assets are securities, commodities, real estate held for rental or investment, cash or cash equivalents, options, derivative contracts with respect to any of the foregoing, and partnership interests in partnerships having an interest in any of the foregoing.

SPECIAL HOLDING PERIOD FOR APPLICABLE PARTNERSHIP INTERESTS

If a profits interest is an applicable partnership interest, the gain or loss reported by its holder is subject to a special holding period. Specifically, gains passed through to a service partner from the sale of a partnership's portfolio investments, in addition to gains related to the disposition of the applicable partnership interest itself, qualify for long-term capital gain treatment only if held by the partnership or partner,

respectively, for more than three years. As a result, gain associated with an applicable partnership interest will be classified as short-term capital gain subject to tax at ordinary income rates unless the new three-year holding period requirement is satisfied.

A special rule applies for the sale of an applicable partnership interest to a related party. For such transactions, all or a portion of the resulting gain will be characterized as short-term capital gain to the extent portfolio assets of the partnership do not separately satisfy the three-year holding period requirement. A related person is a member of the transferring partner's family (within the meaning of [I.R.C. § 318\(a\)\(1\)](#)), or any person who performed a service within the disposition year or the preceding three calendar years in any applicable trade or business in which or for which the transferring partner performed a service.

LIMITATIONS ON WHAT QUALIFIES AS AN APPLICABLE PARTNERSHIP INTEREST

The three-year holding period associated with applicable partnership interests is not as broadly applicable or impactful as may initially appear. The special holding period does not apply to:

- Income or gain attributable to any asset not held for portfolio investment on behalf of third-party investors. This carve-out is subject to forthcoming regulatory guidance.
- A partnership interest held, directly or indirectly, by a corporation. Commentators have questioned whether this limitation applies to both C corporation and S corporations. Such a literal interpretation would appear self-defeating since an individual could avoid the special holding period requirement by establishing a single-member LLC classified as an S corporation to hold her investment. Although the failure to define corporation appears to be a drafting oversight, it is not clear whether the omission can be remedied using technical corrections or regulations rather than by a statutory amendment.
- A partner holding a capital interest in a partnership, regardless of whether the partnership is engaged in an applicable trade or business.



Employment Status and Benefits Issues

Individuals who perform services on behalf of a partnership and receive either (1) vested capital interests (and, presumably, non-vested capital interests for which a Section 83(b) election has been made) or (2) profits interests (whether vested or unvested) must be treated as partners for tax purposes from the date of grant. That is, under long-standing IRS policy, a service provider cannot be treated as both a partner and an employee of the same partnership simultaneously. This has several important consequences.

First, due to the pass-through nature of partnership taxation, partners report and pay income tax on their distributive share of partnership tax items (reported on Schedule K-1 to Form 1065) on their separate tax returns, regardless of whether the partnership makes an economic (cash) distribution to the partners. As noted previously, this can result in a timing issue, where a partner must currently pay tax on partnership tax items while receiving a distribution of the corresponding cash in a subsequent tax year. The income recognized in the current year is added to the partner's basis in his or her partnership interest, thereby avoiding a second tax on the same income when later distributed. Most partnerships address the timing issue by including a provision in the partnership agreement allowing for a so-called tax distribution, which is simply an advance against future distributions that are used by the partners to pay current tax.

In addition, partners are not considered employees covered by payroll (FICA) tax, unemployment insurance, or wage withholding rules. Instead, they are taxed as self-employed individuals, who are generally subject to self-employment tax under [I.R.C. § 1402\(a\)](#). The self-employment tax liability is generally equal to the combined employee and employer portions of FICA taxes for employees, although an above-the-line deduction for half the amount is usually available. Also, since there is no withholding by the partnership, partners must make quarterly estimated tax payments. Further complicating the tax situation, partners are often required to file income tax returns in each state in which the partnership has income tax

nexus. In most states, the partnership is required to withhold and remit tax on behalf of non-resident partners.

Also, a service provider's status as a partner adversely affects eligibility for certain tax-favored employee benefit plans and arrangements, such as tax-free employer-paid health and life insurance benefits and pre-tax health plan premium, FSA, and HSA contributions.

Considerations for Compensatory Partnership Equity Arrangements

The foregoing is a brief overview of the primary issues involved when designing partnership equity compensation plans. Before embarking on a compensatory equity plan, a partnership should carefully consider its driving compensation goals (e.g., incentivizing performance and talent retention), its goals for (and the effects of) creating partner-service providers, the specific terms of the plan and interests (e.g., vesting, redemption rights, and transfer restrictions), and the tax and securities law consequences for equity-based compensation. In some cases, partnerships may find that a synthetic equity or other cash-based incentive programs may be a suitable alternative. **■**

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RESEARCH PATH: [Employee Benefits & Executive Compensation > Incentive and Equity-Based Compensation > Equity-Based Compensation > Practice Notes](#)



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Recourse for Trade Secret Misappropriation under the Federal Defend Trade Secrets Act

THE DEFEND TRADE SECRETS ACT OF 2016 (DTSA), 130 STAT. 376, allows U.S. employers to protect against and remedy misappropriation of trade secret information in federal court. Before the enactment of the DTSA, in the absence of diversity jurisdiction, employers seeking redress had no choice but to sue in state court. While most states have adopted and codified some version of the Uniform Trade Secrets Act (UTSA), which provides uniform definitions and remedies for trade secret misappropriation, these laws nevertheless tend to differ from state to state both in the text of the laws themselves and in their application. Bringing suit under the DTSA allows a party to avail itself of the federal courts, which can be advantageous since federal courts often are more adept at addressing highly complex technical issues arising in trade secret cases.

Bringing a claim under the DTSA can be a double-edged sword, however, as it can make a case that an employer wishes to keep in state court (for any number of strategic reasons, including taking advantage of more employer-friendly laws or procedures) removable to federal court by the defendant. As a result, employers should think strategically before including a claim under the DTSA, particularly where the employer may prefer to remain in state court.

The DTSA Does Not Preempt Existing State Trade Secret Law

While the DTSA provides trade secret owners with a new federal cause of action, it does not preempt existing state trade secret



law regimes. As a practical matter, this means that a trade secret owner can bring parallel state and federal claims for trade secret misappropriation in federal court.¹

Because state trade secret laws may provide slightly different relief than the DTSA, it is important to consider bringing concurrent state and federal trade secret claims to avail the employer of all potential causes of action. When considering filing dual claims under the DTSA and state trade secret law, be cognizant that the definition of trade secret in the DTSA and state trade secret laws may differ.



1. See, e.g., [Panera, LLC v. Nettles, 2016 U.S. Dist. LEXIS 101473, at *4, *10 n.2 \(E.D. Mo. Aug. 3, 2016\)](#) (noting that, for purposes of analyzing plaintiff's likelihood of success at preliminary injunction stage, the court's analysis focused on the state trade secrets claim, but stating that an analysis under the DTSA would "likely reach a similar conclusion").

Statutory Definitions: DTSA vs. UTSA

Before bringing a claim pursuant to the DTSA (or state or common law), it is important to understand the definitions of key terms to ensure the employer has a viable claim.

Definition of Trade Secret

A trade secret is generally any commercially valuable information that is not publicly known where reasonable effort is taken to preserve its confidentiality. The DTSA's definition of trade secret is broad, allowing a wide range of proprietary information to fall under its protection.

Trade secret is defined as:

All forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if:

- (A) The owner thereof has taken reasonable measures to keep such information secret.
- (B) The information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.

[18 U.S.C. § 1839\(3\)](#).

This definition is not significantly different from the definition for trade secret in the UTSA and contains the familiar requirements of the UTSA that the trade secret “derives independent economic value, actual or potential, from not being generally known,” and that the trade secret owner has undertaken reasonable efforts to keep the information secret.

The UTSA definition of trade secret, which is the basis for the definition of trade secret in most state trade secret statutes, is set forth below:

Trade secret means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

- (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by,

other persons who can obtain economic value from its disclosure or use

- (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy

[Unif. Trade Secrets Act § 1\(4\)](#).

Although minor, the differences in the definition of “trade secret” between the DTSA and UTSA are not necessarily insignificant, and litigants have already attempted to exploit these differences. For example, in [RF Micro Devices, Inc. v. Xiang, 2016 U.S. Dist. LEXIS 91284, at *10-13 \(M.D.N.C. July 14, 2016\)](#), the defendant successfully argued that a guilty plea to a criminal charge of misappropriation could not establish liability under a state civil trade secret statute with a different definition of trade secret.² Thus, be sure to argue that the trade secrets at issue meet the definition of trade secret under all applicable statutes.

Definition of Misappropriation

The definition of misappropriation under the DTSA does not differ from the definition for this term under the UTSA, and is as follows:

Misappropriation is defined in detail as follows:

(A) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means –or–

(B) Disclosure or use of a trade secret of another without express or implied consent by a person who:

- (i) Used improper means to acquire knowledge of the trade secret
- (ii) At the time of disclosure or use, knew or had reason to know that the knowledge of the trade secret was
 - (I) Derived from or through a person who had used improper means to acquire the trade secret
 - (II) Acquired under circumstances giving rise to a duty to maintain the secrecy of the trade secret or limit the use of the trade secret –or–
 - (III) Derived from or through a person who owed a duty to the person seeking relief to maintain the secrecy of the trade secret or limit the use of the trade secret –or–
- (iii) Before a material change of the position of the person, knew or had reason to know that
 - (I) The trade secret was a trade secret.

(II) Knowledge of the trade secret had been acquired by accident or mistake.

[18 U.S.C. § 1839\(5\)](#); [Unif. Trade Secrets Act § 1\(2\)](#).

Drafting a DTSA Complaint

When filing suit under the DTSA, it is very important to explain in the complaint why the allegedly misappropriated information qualifies for trade secret protection. It is not enough to simply call something a trade secret in a complaint under the DTSA. Rather, a plaintiff must plausibly allege—at least in general terms—how the information qualifies as a trade secret. Where a plaintiff fails to do so, the complaint is susceptible to dismissal with prejudice.³

It is, however, necessary to be guarded about how much information about the allegedly misappropriated trade secret the employer discloses during court proceedings. Thus, it is important to balance two important considerations. On the one hand, put a sufficient amount of detail into the complaint to (1) state a claim, (2) show that the allegedly misappropriated information qualifies as a trade secret, and (3) survive a motion to dismiss. On the other hand, limit the amount of detail regarding the employer's trade secret in the pleadings, as public disclosure of a trade secret may cause the information to lose its protected trade secret status. This is an integral yet often difficult balance to strike.

The DTSA makes finding this balance easier by allowing employers to maintain the secrecy of allegedly misappropriated trade secrets during court proceedings. Specifically, the DTSA states:

[A] court may not authorize or direct the disclosure of any information the owner asserts to be a trade secret unless the court allows the owner the opportunity to file a submission under seal that describes the interest of the owner in keeping the information confidential.

[18 U.S.C. § 1835\(b\)](#).


Under this provision, the DTSA gives trade secret owners an opportunity to identify what information is subject to trade secret protection and why that information should be shielded from public disclosure. Thus, if trade secret owners make a proper submission, they then have a tool at their disposal to protect trade secret information from disclosure during court proceedings.

³ See, e.g., [Raben Tire Co., LLC v. McFarland, 2017 U.S. Dist. LEXIS 26051, at *5-7 \(W.D. Ky. Feb. 24, 2017\)](#) (finding plaintiff's failure to set forth in the complaint any measures it took to protect the allegedly misappropriated trade secret information from disclosure was fatal to plaintiff's claims and dismissing the complaint with prejudice); but compare [Mission Measurement Corp. v. Blackbaud, Inc., 216 F. Supp. 3d 915, 921 \(N.D. Ill. 2016\)](#) (explaining that “at the pleading stage, plaintiffs need only describe the information and efforts to maintain confidentiality of the information in general terms,” and that “trade secrets need not be disclosed in detail in a complaint alleging misappropriation for the simple reason that such a requirement would result in the public disclosure of the purported trade secrets”) (internal citations omitted). ⁴ See, e.g., [Adams Arms, LLC v. Unified Weapon Sys., Inc., 2016 U.S. Dist. LEXIS 132201, at *17-19 \(M.D. Fla. Sep. 27, 2016\)](#) (finding that a trade secret owner may recover under the DTSA when the misappropriation occurs both before and after the effective date if the entire misappropriation is within the three-year limitations period).

Related Content

For a listing of state trade secret laws, see

> [NON-COMPETES AND TRADE SECRET PROTECTION STATE PRACTICE NOTES CHART](#)

 **RESEARCH PATH:** [Labor & Employment > Non-competes and Trade Secret Protection > Protecting Trade Secrets > Practice Notes](#)

For assistance in drafting non-compete and trade secret protection clauses and documents, see

> [NON-COMPETES AND TRADE SECRET PROTECTION STATE EXPERT FORMS CHART](#)

 **RESEARCH PATH:** [Labor & Employment > Non-competes and Trade Secret Protection > Protecting Trade Secrets > Forms](#)


For a chart tracking key federal court *Defend Trade Secrets Act of 2016 (DTSA)* decisions in several circuits, see

> [DEFEND TRADE SECRETS ACT \(DTSA\) CASE TRACKER](#)

 **RESEARCH PATH:** [Labor & Employment > Non-competes and Trade Secret Protection > Protecting Trade Secrets > Practice Notes](#)

For more information on the statutes that protect trade secrets and what constitutes misappropriation of a trade secret, see

> [TRADE SECRET FUNDAMENTALS](#)

 **RESEARCH PATH:** [Labor & Employment > Non-competes and Trade Secret Protection > Protecting Trade Secrets > Practice Notes](#)

DTSA Statute of Limitations

There is a three-year statute of limitations for claims under the DTSA. This period begins when “the misappropriation . . . is discovered or by the exercise of reasonable diligence should have been discovered.” [18 U.S.C. § 1836\(d\)](#). The DTSA generally applies to trade secret misappropriation that occurred on or after the date of the enactment of the Act (May 11, 2016) or began before the Act's enactment and continued after the Act took effect.⁴

² The distinction relied upon by the court in *R.F. Micro Devices, Inc.* between the DTSA and UTSA was subsequently eliminated when [18 U.S.C. § 1839\(3\)\(B\)](#) was amended on May 11, 2016, by striking the phrase “the public” and inserting “another person who can obtain economic value from the disclosure or use of the information.” See *Defend Trade Secrets Act of 2016*, [130 Stat. 376](#).

DTSA Civil Seizure

The DTSA provides for an ex parte civil seizure mechanism. Civil seizure is a preventative tool employed prior to a finding of misappropriation by which a court may “issue an order providing for the seizure of property necessary to prevent the propagation or dissemination of the trade secret that is the subject of the action.”⁵ Using this tool, an employer aware of a potential misappropriation of its trade secrets may quickly prevent further dissemination of that information during the pendency of a formal DTSA case. Following issuance of a seizure order, the court must hold a seizure hearing where the party who obtained the seizure order has the burden to prove the facts underlying the order.

Civil seizure may be ordered only in “extraordinary circumstances” and requires a showing that:

- An order pursuant to [Fed. R. Civ. P. 65](#) or other equitable relief would be inadequate because the party to which the order would be issued would evade, avoid, or otherwise not comply with such an order.
- An immediate and irreparable injury will occur if seizure is not ordered.
- Harm to the applicant from denial of a seizure order (1) outweighs the harm to the person against whom seizure is ordered and (2) substantially outweighs the harm to any third parties harmed by such seizure.
- The applicant is likely to succeed in showing that the information is a trade secret and that the person against whom the order is issued (1) misappropriated the trade secret by improper means or (2) conspired to use improper means to misappropriate the trade secret.
- The person against whom the order will be issued has possession of the trade secret and any property to be seized.
- The application describes with reasonable particularity the matter to be seized and, to the extent reasonable under the circumstances, the matter’s location.
- The person against whom seizure is ordered would destroy, move, hide, or otherwise make such matter inaccessible to the court if on notice.
- The applicant has not publicized the requested seizure.

[18 U.S.C. § 1836\(b\)\(2\)\(A\)\(ii\)](#).

Only a handful of such requests have been made under the DTSA. As of this writing, we have not identified any request

for civil seizure that a court has granted.⁶ Cases where an employee used external digital storage devices and/or cloud storage services to store misappropriated trade secrets may be candidates for use of the civil seizure mechanism, especially if it is clear that the employee may not fully comply with a temporary restraining order (TRO) or preliminary injunction. Regardless of the form of the misappropriated trade secret, to make civil seizure effective, be prepared to quickly explain to the court what information was stolen, who stole it, and where it is being kept. A well-developed trade secret asset management plan—in which an employer takes proactive steps to identify, value, secure, and protect its trade secrets—will greatly assist in this process.

Seizures under Fed. R. Civ. P. 65

Where the extraordinary circumstances required for a DTSA civil seizure order are not present, litigants seeking redress for trade secret misappropriation have another option in [Fed. R. Civ. P. 65](#). Under Rule 65, a judge may grant a seizure request as part of a TRO or preliminary injunction related to allegations of trade secret theft under the DTSA and thus potentially avoid the extraordinary circumstances requirement of the DTSA civil seizure provision.⁷

Other Remedies under the DTSA

The DTSA also provides for several remedies other than seizure upon a finding that a party misappropriated a trade secret. For instance, a court may grant an injunction to prevent any actual or threatened misappropriation, provided that the injunction does not “prevent a person from entering into an employment relationship,” and that any conditions placed on employment are based on “evidence of threatened misappropriation and not merely on the information the person knows.”⁸ Where appropriate, an injunction under the DTSA may require affirmative actions to protect the trade secret.⁹ Further, in “exceptional circumstances that render an injunction inequitable,” the court may condition future use of the trade secret on the payment of a reasonable royalty.¹⁰

Following a finding of misappropriation, a court may also award damages.¹¹ Where the trade secret is willfully and maliciously misappropriated, a court may award exemplary damages of up to double the damage amount already awarded.¹² A court may also award attorney’s fees where the misappropriation or claim of misappropriation was in bad faith or where a party makes or opposes a motion to terminate an injunction in bad faith.¹³

REGARDLESS OF THE FORM OF THE MISAPPROPRIATED TRADE SECRET, TO MAKE CIVIL SEIZURE EFFECTIVE, BE PREPARED TO QUICKLY EXPLAIN TO THE COURT WHAT INFORMATION WAS STOLEN, WHO STOLE IT, AND WHERE IT IS BEING KEPT.

Inevitable Disclosure Doctrine Unavailable

By requiring actual evidence of threatened misappropriation, the DTSA explicitly rejects the inevitable disclosure doctrine under federal trade secret law.

Inevitable disclosure is a common law doctrine by which a court can prevent a former employee from working for a competitor of his or her former employer where doing so would require the employee to depend upon his or her former employer’s trade secret information.¹⁴

Notwithstanding that the DTSA proscribes application of the inevitable disclosure doctrine in a federal claim for trade secret misappropriation, trade secret plaintiffs can still allege misappropriation under the inevitable disclosure doctrine pursuant to a state law cause of action where the state common law allows application of the doctrine. Thus, because some states have adopted (or at least not rejected) the inevitable disclosure doctrine and some have not, the choice of jurisdiction is very important for trade secret plaintiffs alleging misappropriation under the DTSA with a pendent state trade secret claim under a theory of inevitable disclosure.¹⁵

Whistleblower Provision and Notice Provision

As discussed above, the remedies for employers suing former employees for trade secret misappropriation under the

DTSA include punitive damages and attorney’s fees. To take advantage of these remedies, however, an employer must advise its employees of the existence of the whistleblower immunity in any contract or other employment agreement entered into after the enactment of the DTSA.¹⁶ As such, employers should strongly consider updating their employment policies and agreements going forward to include either the required notice or a cross-reference to a policy document that includes a statement about the DTSA’s whistleblower immunity.

The DTSA also includes a safe harbor for whistleblower employees that provides for immunity from criminal or civil liability under any federal or state trade secret law for disclosure of a trade secret in confidence to an attorney or governmental official “solely for the purpose of reporting or investigating a suspected violation of law,” or in a filing in a lawsuit made under seal.¹⁷ Employers should be acutely aware of the notice provision within the whistleblower immunity section of the statute because compliance with this notice provision may affect whether an employer can seek certain remedies under the statute.

¹⁴ See, e.g., [PepsiCo, Inc. v. Redmond](#), 54 F.3d 1262, 1269–71 (7th Cir. 1995) (upholding injunction preventing former PepsiCo manager from working for Quaker Oats Company because, notwithstanding the fact that he did not take any physical trade secret information, he would inevitably rely on his knowledge of PepsiCo’s trade secrets in his new position). ¹⁵ Compare [EarthWeb, Inc. v. Schlack](#), 71 F.Supp.2d 299, 311 (S.D.N.Y. 1999) (The doctrine of inevitable disclosure thus rewrites the employment agreement and “such retroactive alterations distort the terms of the employment relationship and upset the balance which courts have attempted to achieve in construing non-compete agreements.”) with [Payment Alliance Intern., Inc. v. Ferreira](#), 530 F.Supp.2d 477, 482 (S.D.N.Y. 2007) (enforcing restriction against work for a competitor and noting factors to consider in determining whether there is a risk of inevitable disclosure). ¹⁶ [18 U.S.C. § 1833\(b\)\(3\)](#); ¹⁷ [18 U.S.C. § 1833\(b\)](#).

⁵ [18 U.S.C. § 1836\(b\)\(2\)](#). ⁶ See, e.g., [OOO Brunswick Rail Mgmt. v. Sultanov](#), 2017 U.S. Dist. LEXIS 2343, at *4–5 (N.D. Cal. Jan. 6, 2017) (denying request for DTSA civil seizure order). ⁷ See, e.g., [Magnesita Refractories Co. v. Mishra](#), 2017 U.S. Dist. LEXIS 10204, at *1 (N.D. Ind. Jan. 25, 2017) (court granted a TRO ordering seizure of a former employee’s personal laptop because there was a strong likelihood that the employee was conspiring to steal the employer’s trade secrets contained on the laptop, and the seizure needed to be carried out immediately to prevent the impending harm). ⁸ [18 U.S.C. § 1836\(b\)\(3\)\(A\)\(i\)](#). ⁹ [18 U.S.C. § 1836\(b\)\(3\)\(A\)\(ii\)](#). ¹⁰ [18 U.S.C. § 1836\(b\)\(3\)\(A\)\(iii\)](#). ¹¹ [18 U.S.C. § 1836\(b\)\(3\)\(B\)](#). ¹² [18 U.S.C. § 1836\(b\)\(3\)\(C\)](#). ¹³ [18 U.S.C. § 1836\(b\)\(3\)\(D\)](#).





THE DTSA'S ABILITY TO ADDRESS TRADE SECRET MISAPPROPRIATION OVERSEAS IS VALUABLE WHETHER THE THEFT OCCURS IN CHINA OR ANOTHER COUNTRY WITH WEAK IP PROTECTIONS.

Sample Notice Language

Below is sample notice language that employers may consider including in employment agreements entered into after enactment of the DTSA:

Defend Trade Secret Act Trade Secret Disclosure Notice

NOTICE is hereby given that this agreement does not affect any immunity under 18 U.S.C. § 1833(b)(1) or (2). For the purposes of these subsections only, which are reproduced below, individuals performing work as contractors or consultants are considered to be employees.

(1) An individual shall not be held criminally or civilly liable under any federal or state trade secret law for the disclosure of a trade secret that (A) is made (i) in confidence to a federal, state, or local government official, either directly or indirectly, or to an attorney; and (ii) solely for the purpose of reporting or investigating a suspected violation of law; or (B) is made in a complaint or other document filed in a lawsuit or other proceeding, if such filing is made under seal.

(2) An individual who files a lawsuit for retaliation by an employer for reporting a suspected violation of law may disclose the trade secret to the attorney of the individual and use the trade secret information in the court proceeding, if the individual (A) files any document containing the trade secret under seal; and (B) does not disclose the trade secret, except pursuant to court order.

Overseas Application

The terms of the Economic Espionage Act (EEA), which the DTSA modified, allow employers to use the DTSA to address trade secret misappropriation where the theft occurred outside of the United States. Specifically, the EEA includes a provision indicating that the law applies to conduct occurring outside of the United States if:

1. The offender is a citizen or permanent resident of the United States.
2. The offender is a United States corporation.
3. An act in furtherance of the offense was committed in the United States.

[18 U.S.C. § 1837.](#)

The option to apply the DTSA to overseas conduct will be immensely valuable because overseas trade secret theft continues to proliferate. The increased threat of trade secret theft overseas is a result of the lack of strong intellectual property protection in many foreign countries. Overseas application will be especially useful to address economic and corporate espionage originating in China.¹⁸ Compounding this threat is the reality that significant structural and institutional impediments undermine effective IPR enforcement in China, including a lack of coordination among government agencies, insufficient resources for enforcement, local protectionism, and a lack of judicial independence.¹⁹

The DTSA's ability to address trade secret misappropriation overseas is valuable whether the theft occurs in China or another country with weak IP protections.

The DTSA at the International Trade Commission

The DTSA may also become the trade secret statute of choice to remedy trade secret misappropriation through a Section 337 investigation before the International Trade Commission (ITC). The ITC is a quasi-judicial administrative agency with the authority to address unfair trade practices related to imports, including the authority to exclude articles from importation into the United States. A complaint in a Section 337 investigation related to trade secret misappropriation generally must show:

- (1) Importation of an article into the United States related to an unfair method of competition or unfair act, the threat or effect of which is to
 - (a) Destroy or substantially injure an industry in the United States
 - (b) Prevent the establishment of such an industry
 - (c) Restrain or monopolize trade and commerce in the United States

[19 U.S.C. § 1337\(a\)\(1\)\(A\).](#)

Notably, in a Section 337 investigation, there is no requirement that the alleged trade secret theft take place in the United States.²⁰ Additionally, Section 337 investigations move very quickly, and the ITC typically reaches a final adjudication within 16 months of initiating the investigation. Thus, where an employer has been the victim of trade secret misappropriation overseas and the theft relates to articles being imported into the United States, strongly consider bringing a DTSA action before the ITC. ■

Bret Cohen is a partner in Nelson Mullins Riley & Scarborough LLP's Boston office where he co-chairs the Labor and Employment Practice. His practice covers a range of industries in the drafting and enforcement of non-compete, confidentiality, and other employment-related agreements throughout the United States. He has also represented individual employees, typically high level executives, in such matters on behalf of the companies who seek to hire them. Mr. Cohen's practice has also regularly involved advising public company executives on terminations and employment issues and providing advice on a range of matters involving employment agreements, termination of high level executives, worker classification, deal diligence, and hiring oversight and best practices. His practice covers both the negotiation and drafting of relevant agreements and the regular enforcement in litigation of the claims of employers seeking to enforce those agreements.

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RESEARCH PATH: [Labor & Employment](#) > [Non-competes and Trade Secret Protection](#) > [Protecting Trade Secrets](#) > [Articles](#)

¹⁸ See Office of the National Counterintelligence Executive, *Foreign Spies Stealing US Economic Secrets in Cyberspace*, Oct. 2011, at i-ii (stating that "Chinese actors are the world's most active and persistent perpetrators of economic espionage"). ¹⁹ U.S. Int'l Trade Comm., *China: Intellectual Property Infringement, Indigenous Innovation Policies, and Frameworks for Measuring the Effects on the U.S. Economy*, Nov. 2010, at xiii, <https://www.usitc.gov/publications/332/pub4199.pdf>.

²⁰ See *Tianrui Group Co. v. ITC*, 661 F.3d 1322, 1332 (Fed. Cir. 2011).



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The initiative is part of Lexis' ongoing Pro Bono Task Force work to support military veterans. The content is especially valuable

to veterans who suffer post-traumatic stress disorder (PTSD) or traumatic brain injuries (TBI), but have been unable to access services provided by the Veterans Administration because of inaccuracies in their service records.

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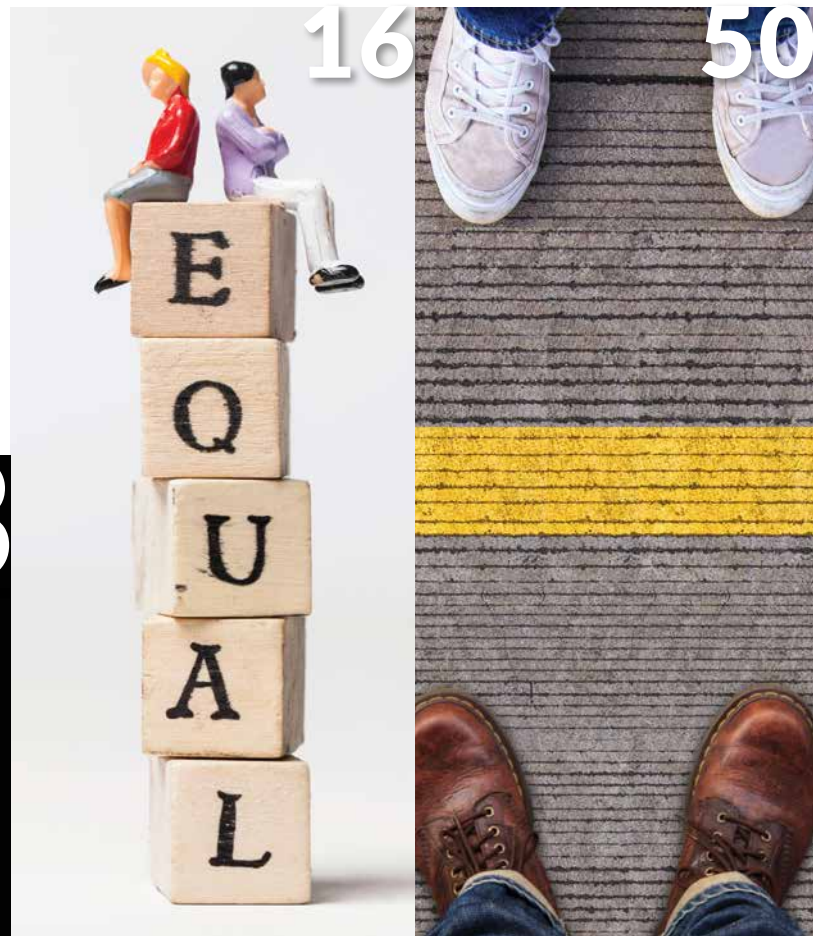
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Jeffrey M. Landes and Ann Knuckles Mahoney
EPSTEIN BECKER & GREEN, P.C.

CONDUCTING PAY EQUITY AUDITS



This article provides advice and guidance to employers regarding how to ensure compliance with equal pay laws, particularly the Equal Pay Act of 1963 (EPA).

ALTHOUGH THE EPA HAS BEEN IN EFFECT FOR 50 YEARS, it gained renewed momentum with the Obama administration's creation of the National Equal Pay Enforcement Task Force, composed of members of the Equal Employment Opportunity Commission (EEOC), the Department of Justice, the Office of Personnel Management, and the Department of Labor. The task force has aggressively pursued employers who have violated the EPA's requirements and has collected significant amounts of money for victims of sex-based wage discrimination. While it remains to be seen what efforts the current White House administration takes concerning equal pay, the momentum has continued with state equal pay legislation. Several states have amended their equal pay laws to broaden their scope beyond what the EPA requires.

Virtually all employers must comply with the EPA and many, depending on their size and the state in which they are located, must also comply with other federal and state laws regarding equal pay. To limit exposure for equal pay violations, employers should adopt policies and procedures that satisfy the EPA and other federal and state requirements and help them meet their equal pay obligations and/or existing audit requirements.

Understanding the EPA

The EPA amends the Fair Labor Standards Act and generally requires employers to pay equal wages to men and women who perform work requiring substantially equal skill, effort, and responsibility, under similar working conditions (i.e., physical surroundings and hazards) within the same establishment.

Substantially equal does not mean identical. In evaluating whether two positions are substantially equal, you should disregard minor or insubstantial differences in work and should look to the overall job content rather than job title. Thus, employees who spend significant amounts of time on different tasks do not perform substantially equal work, while employees who spend a little time on different incidental tasks do. Additionally, wages is not limited to an employee's regular rate of pay; it also includes overtime pay, bonuses, stock options, life insurance, vacation, holiday pay, and any other similar payments and benefits.

Employers nonetheless retain their right to pay employees differently as long as the reason is not sex-based and does not violate other anti-discrimination laws. Thus, pay differentials are permitted when based on seniority, merit, quantity or quality of production, or another factor other than sex. When an employer must correct a wage difference, the EPA requires the employer to

increase the wage of the lower-paid employee. In other words, an employer may not reduce the wages of the higher-paid employee(s) to equalize pay.

The EPA applies to non-exempt employees as well as exempt administrative, executive, professional, and outside sales employees; however, it does not apply to other exempt employees (e.g., computer professionals).

EEOC Guidance

In 2016, the EEOC published a new fact sheet¹ that highlights the agency's interpretation of the EPA. As noted, the EPA prohibits employers from paying unequal wages to men and women who perform jobs that require substantially equal skill, effort, and responsibility under similar working conditions in the same establishment. The EEOC's fact sheet summarizes its interpretation of each of these factors:

- **Skill.** Skill is measured by factors such as an employee's experience, education, ability, and training to perform a job. It is important to distinguish between the skills required for the specific job and the skills of the employee in general. An employee may have skills in a certain area, but if those skills are not relevant to the job (e.g., a graduate degree in an unrelated field), they should not be considered in the employer's analysis.
- **Effort.** The amount of physical or mental exertion needed to perform a job.
- **Responsibility.** The degree of accountability required in performing a job. Note, however, that minor differences in responsibility will not justify a pay differential (e.g., turning off the lights at the end of the work day).
- **Working conditions.** Working conditions refer to both (1) physical surroundings (e.g., temperature, fumes, and ventilation) and (2) hazards.
- **Establishment.** An establishment is a distinct physical place of business rather than an entire business consisting of several places of business. However, in some circumstances, physically separate places of business may be treated as one establishment (e.g., if a central administrative unit hires employees, determines their compensation, and assigns them to separate work locations, the separate work sites can be considered part of one establishment).

¹ FACTS ABOUT EQUAL PAY AND COMPENSATION DISCRIMINATION, <https://www.eeoc.gov/eeoc/publications/fs-epa.cfm>.



Understanding Other Equal Pay Laws

In addition to the EPA, an employer's pay practices must also comply with other federal and state laws, some of which are discussed briefly below. Although this article primarily focuses on EPA compliance, you should evaluate the employer's pay practices under all applicable laws and recommend corrective action that minimizes the employer's full range of liability.

Federal Laws

In addition to the EPA, sex-based wage discrimination is also illegal under Title VII of the Civil Rights Act of 1964 (Title VII); thus, employees with EPA claims may also have Title VII claims. Title VII also prohibits wage discrimination based on race, color, religion, and national origin. Additionally, the Age Discrimination in Employment Act of 1967 (ADEA) and the Americans with Disabilities Act of 1990 (ADA) prohibit wage discrimination based on age and disability. Only employers with the requisite number of employees must comply with Title VII, the ADEA, and the ADA (i.e., 15 employees for Title VII and the ADA; 20 for the ADEA).

Federal Regulations and Guidance

In 2016, as part of the government's renewed focus on the issue of equal pay, the Office of Federal Contract Compliance Programs (OFCCP) issued updated guidance on sex discrimination. The EEOC also put forth an equal pay data rule, which the Office of

Management and Budget (OMB) later indefinitely stayed. The OFCCP guidance and the stayed EEOC equal pay data rule are addressed below.

OFCCP Guidance

The OFCCP rule updates its prior guidance on sex discrimination, which had last been updated in 1970, to bring it up to date with current law.² The rule also specifically:

- Prohibits sex-based wage discrimination and promotes fair pay practices (such as not denying opportunities for overtime work, training, higher pay, or higher-paying positions based on a person's sex)
- Allows employees to recover lost wages any time a federal contractor pays compensation that is the result of discrimination and not just when the decision to discriminate is made
- Prohibits discrimination on the basis of sex as to fringe benefits, such as medical insurance, life insurance, and retirement benefits, as well as profit-sharing, bonuses, and leave
- Requires federal contractors to give men and women equal access to jobs and workforce development opportunities unless they can meet the high bar of demonstrating that such requirements are a bona fide occupational qualification

² See [41 C.F.R. §§ 60-20.1-20.8](https://www.dol.gov/ofccp/SexDiscrimination/SexDiscrimFinalRuleFactSheet_JRFQA508c.pdf), OFCCP's SEX DISCRIMINATION FINAL RULE - FACT SHEET, https://www.dol.gov/ofccp/SexDiscrimination/SexDiscrimFinalRuleFactSheet_JRFQA508c.pdf, AND OFCCP SEX DISCRIMINATION FAQs, https://www.dol.gov/ofccp/SexDiscrimination/sexdiscrimination_faqs.htm.

WHILE THE EQUAL PAY DATA RULE REQUIREMENTS WERE MEANT TO HELP EMPLOYERS EVALUATE THEIR OWN BUSINESS PRACTICES AND PREVENT PAY DISCRIMINATION, THEY WERE ALSO AIMED AT HELPING THE EEOC AND OTHER ENFORCEMENT AGENCIES IDENTIFY AND INVESTIGATE PAY DISCRIMINATION.

The EEOC's Equal Pay Data Rule (Indefinitely Stayed by the OMB)

The EEOC's equal pay data rule would have required employers with 100 or more employees to submit pay data by sex, race, and ethnicity on their EEO-1 Reports. Specifically, under the rule, employers were scheduled to provide:

- **Summary pay data.** Employers were scheduled to provide aggregate data on pay ranges. Specifically, employers were to count the number of employees they had in each of 12 EEO-1 pay bands for each of 10 job categories. After tallying the total number of employees in each pay band by job category, employers would then enter this information in the report based on the sex and ethnicity or race of the employees. For example, an employer could report that it had 11 employees who are white women in the Professionals job category in pay band 7.
- **Aggregate hours worked data.** Employers were also scheduled to submit the aggregate hours worked by tallying the total number of hours worked by all of the employees in each pay band.

On August 29, 2017, the OMB stayed the EEOC's equal pay data rule. The pay data and hours worked information was initially due on March 31, 2018; now it is uncertain if the OMB will reinstate these reporting requirements.

While the equal pay data rule requirements were meant to help employers evaluate their own business practices and prevent pay discrimination, they were also aimed at helping the EEOC and other enforcement agencies identify and investigate pay discrimination. Therefore, if the OMB lifts the stay on these reporting requirements, it is very likely that the risk of potential equal pay claims for employers will increase, making it more important than ever that employers monitor and, if necessary, correct their pay practices to prevent any such claims.


State Laws

Many states have equal pay laws that may govern an employer's pay practices, and those states have begun to renew their focus on pay discrimination. While some states' equal pay laws closely mirror the EPA, several states, including California, Delaware, Maryland, Massachusetts, New York, and Oregon, have amended their equal pay laws to broaden their scope, while other states have similar legislation pending. As a result of the states' increased

Related Content


For more information on the Equal Pay Act, see

> [HEEDING THE EQUAL PAY ACT](#)

 **RESEARCH PATH:** [Labor & Employment > Discrimination and Retaliation > EEO Laws and Protections > Practice Notes](#)


For the unique requirements of the various state equal pay laws, see

> [THE WAGE AND HOUR RETALIATION AND DISCRIMINATION LAWS COLUMN OF WAGE AND HOUR STATE PRACTICE NOTES CHART](#)

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For guidance on analyzing the employer's obligations under Title VII, see

> [COMPLYING WITH TITLE VII](#)

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For a discussion of the employer's obligations under the Age Discrimination in Employment Act (ADEA), see

> [ADDRESSING THE ADEA'S MANDATES](#)

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For an analysis of the employer requirements under the Americans with Disabilities Act, see

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SOME STATES HAVE BEGUN TO EXPAND EQUAL PAY LAWS BEYOND PAY EQUALITY BASED ON SEX. FOR EXAMPLE, CALIFORNIA HAS EXPANDED ITS LAW TO PROTECT RACE- AND ETHNICITY-BASED PAY DIFFERENTIALS.

attention to equal pay matters, it is essential that you keep abreast of any developments in your clients' state(s) to ensure that they make all necessary changes to their pay policies and audit procedures to avoid potential liability. Several of the most significant recent developments in states' equal pay laws are briefly summarized below.

Bona fide factor. Most of the equal pay amendments modify the EPA's exception that permits employers to pay employees unequally if the differential is based on any factor other than sex. The amendments generally state that such pay differentials must be based on a bona fide factor other than sex (i.e., a factor that is job-related with respect to the particular position and consistent with business necessity, such as education, training, or experience). This updated standard makes it easier for an employee to allege a prima facie case of wage disparity. Also, unlike under the EPA's standard, it allows employees to claim that a neutral factor produced a wage differential that disparately impacts employees based on their sex and that the employer did not adopt an alternative business practice that would serve the same purpose without resulting in the wage differential.

Comparable and substantially similar work. Some states have also expanded equal pay protections beyond what the EPA provides by requiring equal pay not only for substantially equal work, but also for comparable or substantially similar work. For example, California requires equal pay for employees who perform substantially similar work and Massachusetts requires equal pay for employees who perform comparable work.

Expanded protections. Some states have begun to expand equal pay laws beyond pay equality based on sex. For example, California has expanded its law to protect race- and ethnicity-based pay differentials.

Geographical scope. The state equal pay amendments vary as to the reach of the protections. California and New York, for example, have eliminated the requirement that an employee show that he or she was not being paid at the same rate as an employee of the opposite sex at the same establishment for equal work. Instead, employees need only show that they are not being paid at the same rate for substantially similar work and working conditions (California) or for equal work and similar working conditions (New York). In other

words, the comparison need not be between employees working at the same location. However, California's law provides no geographic restriction whatsoever, whereas in New York, employees can only compare themselves to others in the same geographic region, which can be no larger than the same county.

Pay transparency provisions. In addition to expanding the scope and coverage of existing equal pay laws, several states have also amended their equal pay laws to include pay transparency provisions. These provisions prohibit employers from restricting employees' ability to discuss their wages with coworkers. There are exceptions to this rule in some states. For example, in New York there may be limitations imposed on the ability of certain employees with access to employee wage information (such as human resources staff) to disclose employee wage information.

Salary history information. Another type of equal pay law that has been gaining momentum is those that prohibit employers from inquiring about an applicant's salary history. These laws are meant to ensure that any past wage discrimination is not perpetuating so that employees do not continue to be underpaid as their careers progress. Massachusetts was the first state to bar employers from forcing prospective employees to divulge how much they were making at their previous jobs. Several other states including California, Delaware, Maine, and Oregon have also passed similar laws, as well as several cities including New York City, San Francisco, and Philadelphia (although Philadelphia has stayed enforcement of its law until a lawsuit about its constitutionality is resolved).

Steps for Auditing the Employer's Equal Pay Practices

This section provides step-by-step guidance to help you audit an employer's equal pay practices to ensure they are in compliance with the EPA. You should modify these steps, as necessary, to ensure compliance with any applicable state laws as well.

Step 1: Identify the Audit Scope

Before beginning the audit, you should develop an understanding with the employer of what departments, positions, and locations the audit will address. You should also lay the groundwork for protecting the audit from disclosure.



■ **Establish parameters of the audit.** Meet with the employer to determine the parameters of the audit. Determine whether any state or local equal pay laws apply and which protected categories the employer will analyze. If a company-wide audit is cost-prohibitive or not otherwise possible, consider audits that target specific high-risk facilities, departments, or positions; more limited audits are less costly and time consuming and often more palatable for employers. While targeted audits are effective, they have shortcomings that you should discuss with the employer before a decision is made. Although the scope of the audit should be set at the very outset, you should continue to assess whether it makes sense to enlarge the scope based on information revealed during the audit.

■ **Take steps to preserve the attorney-client privilege and work product.** Use an engagement letter (for outside counsel) or memorandum (for in-house counsel) to establish that the scope of the audit includes providing legal advice and/or assistance in defending against anticipated litigation.

Any assessment of an organization's pay system should include an evaluation of the pay rates of all employees. When determining which employees to compare, you must ensure that the employees at issue perform equal, substantially similar, or comparable work. This typically requires substantially similar skill, effort, and responsibility, and the performance of those responsibilities under similar working conditions. You must compare pay rates by using one uniform period of time, most likely the actual or projected yearly wage, as employees tend to care most about their yearly income. Unless the pay system and/or the factors considered in determining

rate of pay are complex, you need not use a compensation expert or consultant to evaluate an employer's pay system.

Step 2: Conduct the Audit

In assisting an employer to ensure that its pay systems do not raise any equal pay issues, you should consider its performance evaluation system, compensation system, job descriptions, training programs, and other factors that influence the employer's pay rates. You must identify the various factors the employer considers in deciding how and what to pay its employees, such as length of service, years of experience in the industry, education, and geography, and you should assess whether sex, or any other protected category, factors into pay rate decisions. When analyzing employees' compensation, you will need to make sure that you compare similarly situated employees who perform like duties, even if their titles or positions do not reflect that. If you are conducting a company-wide audit, refine the audit procedures and analysis as you go and modify as needed.

More specifically, you should do the following:

■ **Conduct a statistical analysis.** An employer can most effectively assess a pay rate and the impact of sex and/or other protected categories, if any, on that rate by performing a statistical analysis of male employees versus female employees. You can conduct this analysis in several ways—and, depending on its complexity, you may want to involve a compensation consultant or statistician—but the effect should be to separate out and compare the rate of pay for men and women based purely on position and grade. If a disparity exists, consider whether other factors explain the disparity such as seniority, experience, expertise, employment history, or any other neutral factors that are not based on sex or any other protected category.

**NON-ROUTINE ADJUSTMENTS
TO EMPLOYEE STATUS OR PAY
ENGENDER RISK BECAUSE THEY SIGNAL
DEFICIENCIES IN THE EMPLOYER'S
WAGE AND HOUR COMPLIANCE.**

- **Assess performance review procedures.** Similarly, analyze job evaluation systems to ensure the employer applies them consistently and does not tend to favor certain individuals over others. Conduct this analysis by reviewing all of the factors used in determining rate of pay and assessing if the employer applies them uniformly. Make sure that the employer evaluates all positions in the same grade and/or category using similar benchmarks and scoring rubrics. A significant disparity between rates of pay among those in the same grade and position may trigger further analysis to ensure the decision-maker did not consider sex or any other protected category as a factor in setting the rate of pay.
- **Analyze compensation factors.** Assess what employee contributions and/or qualifications the employer uses or values in determining employee raises and bonuses. You can obtain this information through interviews of and/or questionnaires provided to decision-makers or by simply requiring decision-makers to submit explanations of what factors they considered in deciding raise and bonus amounts. In conjunction with this assessment, evaluate whether all positions allow employees to exhibit those qualifications or provide those contributions for purposes of earning pay raises and bonuses.
- **Ascertain prevalence of women, minorities, and older workers.** Evaluate any data the employer maintains regarding the demographics of its workforce to determine if women, minorities, and/or older workers tend to occupy certain positions and/or grades in the company. If so, analyze whether the preponderance of women, minorities, and older workers in certain roles impacts their pay relative to their male, non-minority, and younger counterparts. Try to limit any comparisons to employees within the same grade, department, or position and with similar experience. If pay disparities do exist among employees performing equal work, look for factor(s) other than sex or any other protected category that would explain the pay differential.



For instance, perhaps the males have more seniority than female employees in these like positions, which would account for the difference in pay rates.

Step 3: Present Your Findings to the Employer

Depending on the scope of the audit, you may present your findings and recommendations on an interim basis or at the conclusion of the audit. You and the employer should carefully consider if, and to what extent, you should provide a written report of the audit results, keeping in mind that despite efforts to protect communications and documents as privileged and/or attorney work product, your report, in whole or in part, may ultimately be deemed discoverable. If you provide a written report to the employer, also provide specific written instructions about maintaining confidentiality, including limiting distribution of the report and information contained in it to those who need to know.

Step 4: Take Remedial Actions

At the conclusion of the audit, the employer should address any unjustified disparities. This may entail a subsequent evaluation of an employee's rate of pay to determine if any reasonable basis justifies the disparity. If not, the employer must raise the affected employee's rate of pay to a level comparable to those performing equal work.

Non-routine adjustments to employee status or pay engender risk because they signal deficiencies in the employer's wage and hour compliance. Therefore, employers should give honest, brief, and general reasons for pay adjustments flowing from the audit. For example, an employer might say that the adjustment is the result of ongoing compliance efforts or, if appropriate, allows the employer to keep pace with competitors or the job market.

Step 5: Consider Future Best Practices

In addition to regular assessments of its compensation systems, the employer should also follow these best compliance practices:

- **Be transparent.** Advise the employer to share how it establishes each employee's rate of pay and how raises/bonuses are awarded so that employees understand differentials in pay. Handbooks may be helpful to lay out general compensation policies, but the factors considered when determining who should receive a bonus may change from year to year. Instead, the employer may want to provide an annual distribution to all employees detailing how it will determine discretionary and non-discretionary bonuses for that year. You should also recommend that the employer hold one-on-one meetings with each employee specifically to discuss the employee's set rate of pay and how to reach individual targets to increase compensation. The employer can hold these meetings in conjunction with annual evaluations or at the discretion of the employer when it considers an employee for a raise or bonus.
- **Elicit employees' views.** Solicit feedback from employees regarding their perception of pay rate differentials to determine whether employees perceive differences based on sex or any

other protected category. Feedback acquired anonymously will provide the most useful insights. The employer can provide questionnaires regarding employee perception during employee evaluation periods or during any other time when it assesses the current compensation system. The employer should consider making changes to its evaluation system based on feedback and/or useful employee recommendations to demonstrate to employees that their feedback has significance.

- **Provide training.** Counsel the employer to include compensation determination in the employer's regular Equal Employment Opportunity (EEO) training, particularly any individual training offered to managers, supervisors, or others involved in determining compensation, raises, and bonuses.
- **Make sure job descriptions are current.** The employer should regularly update position qualifications, skills, and duties when necessary to accurately reflect current practice and characterization. The employer should also ensure that all job descriptions are completely sex-neutral unless a specific component of the position would require otherwise. **L**

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