

PAY EQUITY

Mike Malfitano

Constangy, Brooks, Smith & Prophete

Mmalfitano@constangy.com



DID YOU KNOW?

- More women hold bachelor's degrees men
- Women are more likely to go to college and graduate school and are more likely to graduate from those schools
- College-educated young women are now as likely to be employed as doctors, dentists, lawyers, professors, managers and scientists as they are teachers, nurses, librarians, secretaries or social workers
- In the US, women are 50% of the labor force and 40% of primary wage earners

• Source: Time (<http://www.time.com/4064665/women-college-degree/>)

• Source: Huffington Post (http://www.huffingtonpost.com/lisa-marie-jenkins/unconscious-gender-bias-e_b_7447524.html)

• Source: U.S. News & World Report (<http://www.usnews.com/news/blogs/data-mine/2014/10/31/women-more-likely-to-graduate-college-but-still-earn-less-than-men>)



DESPITE THOSE STATS

- Reported that women take home 82.9 cents for every dollar earned by men
- African American women take home 68.6 cents for every dollar earned by men
- Latina women take home 60.4 cents for every dollar earned by men



WHY IS THERE A PAY GAP?

- Self-segregation into low-paying occupations
- Education
- Time in workforce
- Experience
- Other life choices that affect pay
- Discrimination?



ENSURING EQUAL PAY PROTECTION FOR ALL WORKERS

- Continued focus on pay practices that discriminate on the basis of sex
- Pay discrimination based on race, ethnicity, age, disability
- New EEO-1 pay data analysis reporting requirement



THE TRUMP ADMINISTRATION

- The President has indicated that the rights of working women are important
- EEOC Acting Chair has indicated pay equality is still a priority
- Societal pressure on companies to achieve equity will continue to mount



FEDERAL & STATE LAWS

- OFCCP & Pay Transparency
- Revisions to EEO-1 Report
- Equal Pay Act
- State & local gov't laws prohibiting employers from asking applicants about pay history
- State laws lowering standard to prove disparity in pay
- State laws limiting permissible reasons for differences in pay



EQUAL PAY ACT

- Equal Pay Act
- The Equal Pay Act requires that men and women be given equal pay for equal work in the same establishment. The jobs need not be identical, but they must be substantially equal. It is job content, not job titles, that determines whether jobs are substantially equal.



EQUAL PAY ACT

- Specifically, the EPA provides that employers may not pay unequal wages to men and women who perform jobs that require substantially equal skill, effort and responsibility, and that are performed under similar working conditions within the same establishment.



EQUAL PAY ACT

Skill

Measured by factors such as the experience, ability, education, and training required to perform the job. The issue is what skills are required for the job, not what skills the individual employees may have. For example, two bookkeeping jobs could be considered equal under the EPA even if one of the job holders has a master's degree in physics, since that degree would not be required for the job.



EQUAL PAY ACT

Effort

The amount of physical or mental exertion needed to perform the job. For example, suppose that men and women work side by side on a line assembling machine parts. The person at the end of the line must also lift the assembled product as he or she completes the work and place it on a board. That job requires more effort than the other assembly line jobs if the extra effort of lifting the assembled product off the line is substantial and is a regular part of the job. As a result, it would not be a violation to pay that person more, regardless of whether the job is held by a man or a woman.



EQUAL PAY ACT

Responsibility

The degree of accountability required in performing the job. For example, a salesperson who is delegated the duty of determining whether to accept customers' personal checks has more responsibility than other salespeople. On the other hand, a minor difference in responsibility, such as turning out the lights at the end of the day, would not justify a pay differential.



EQUAL PAY ACT

Working Conditions

This encompasses two factors: (1) physical surroundings like temperature, fumes, and ventilation; and (2) hazards.



EQUAL PAY ACT

- To establish a case against an employer under the Equal Pay Act, an employee must first show that different wages are paid to employees of the opposite sex.
- Next, she must demonstrate that the other employees receiving the higher wages perform substantially equal work on jobs requiring equal skill, effort, and responsibility.
- Finally, she must show that the jobs are performed under similar working conditions.



EQUAL PAY ACT

- Once an employee meets that threshold, the employer can only hope to avoid liability by proving that one of four situations was also at play. The employer can attempt to show that the higher wages weren't a question of gender, but rather based on:
 - (1) a seniority system,
 - (2) a merit system,
 - (3) a system which measures earnings by quantity or quality of production, or
 - (4) some other factor besides gender.



LILLY LEDBETTER FAIR PAY ACT OF 2009



LILLY LEDBETTER ACT

- On January 29, 2009, President Obama signed the first piece of legislation of his Administration: the Lilly Ledbetter Fair Pay Act of 2009 ("Act").
- This law overturned the Supreme Court's decision in Ledbetter v. Goodyear Tire & Rubber Co., Inc., 550 U.S. 618 (2007), which severely restricted the time period for filing complaints of employment discrimination concerning compensation.



LILLY LEDBETTER ACT

- The Act states the EEOC's longstanding position that each paycheck that contains discriminatory compensation is a separate violation regardless of when the discrimination began.
- Particularly important, the Act contains an explicit retroactivity provision.



LILLY LEDBETTER ACT

- Under the Ledbetter Act, People can challenge a wide variety of practices.
- These practices may include employer decisions about base pay or wages, job classifications, career ladder or promotion denials, tenure denials, and failure to respond to requests for raises.



NEW EEO-1 REPORT



WHAT IS THE EEO-1 REPORT?

- Mandatory compliance survey
- Requires employers to provide employment data categorized by race/ethnicity, gender, and job category classifications.
 - 2017 EEO-1 Report will also include classifications for pay data and aggregate hours worked



WHO IS REQUIRED TO SUBMIT AN EEO-1?

- All private employers who:
 - Are subject to Title VII, with 100 or more employees
 - Are subject to Title VII, with less than 100 employees IF
 - Company is owned or affiliated with another company, or
 - Centralized ownership or control so that the group legally constitutes a single enterprise, and
 - Entire enterprise employs a total of 100 or more employees
- All non-exempt federal contractors with 50 or more employees



EEO – 1 REPORT

- One report for single-establishment employers
- Multiple reports for multi-establishment employers



REQUIRED DATA

Employee data broken down by classifications

- Race/ethnicity
 - Self identification
- Gender
 - Male or Female (for now)
- Job Classification
- Pay
- Hours Worked



JOB CLASSIFICATIONS

- Executive/Senior Level Officials and Managers
- First/ Mid-Level Officials and Managers
- Professionals
- Technicians
- Sales workers
- Administrative Support Workers
- Craft Workers
- Operatives
- Laborers and Helpers
- Service Workers



NEW PAY DATA ANALYSIS

- EEOC is trying to determine areas of pay discrimination where further enforcement is needed
- Now required to report pay data information based on Summary pay information and aggregate hours worked



SO WHAT DOES THAT MEAN?



- A lot more information to be gathered and reported



OLD REPORT

SF 100 - Page 1

Section D - EMPLOYMENT DATA
 Employment at this establishment - Report all permanent full- and part-time employees including apprentices and on-the-job trainees unless specifically excluded as set forth in the instructions. Enter the appropriate figures on all lines and in all columns. Blank spaces will be considered as zeros.

Job Categories	Number of Employees (Report employees in only one category)															Total Col A - W
	Race/Ethnicity															
	Hispanic or Latino		Not-Hispanic or Latino													
	Male	Female	White	Black or African American	Native Hawaiian or Other Pacific Islander	Asian	American Indian or Alaska Native	Two or more races	White	Black or African American	Native Hawaiian or Other Pacific Islander	Asian	American Indian or Alaska Native		Two or more races	
A	B	C	D	E	F	G	H	I	J	K	L	M	N	O		
Executive/Senior Level Officials and Managers	1.1															
First/Mid-Level Officials and Managers	1.2															
Professionals	2															
Technicians	3															
Sales Workers	4															
Administrative Support Workers	5															
Craft Workers	6															
Operatives	7															
Laborers and Helpers	8															
Service Workers	9															
TOTAL	10															
PREVIOUS YEAR TOTAL	11															

1. Date(s) of payroll period used: _____ (Omit on the Consolidated Report.)

Section E - ESTABLISHMENT INFORMATION (Omit on the Consolidated Report)

1. What is the major activity of this establishment? (Be specific, i.e., manufacturing steel castings, retail grocer, wholesale plumbing supplies, title insurance, etc. Include the specific type of product or type of service provided, as well as the principal business or industrial activity.)

Section F - REMARKS

Use this item to give any identification data appearing on the last EEO-1 report which differs from that given above, explain major changes in composition of reporting units and other pertinent information.

Section G - CERTIFICATION

Check 1 All reports are accurate and were prepared in accordance with the instructions. (Check on Consolidated Report only.)
 2 This report is accurate and was prepared in accordance with the instructions.

Name of Certifying Official _____ Title _____ Signature _____ Date _____
 Name of person to contact regarding this report _____ Title _____ Address (Number and Street) _____
 City and State _____ Zip Code _____ Telephone No. (including Area Code and Extension) _____ Email Address _____

All reports and information obtained from individual reports will be kept confidential as required by Section 709(b) of Title VII. WILLFULLY FALSE STATEMENTS ON THIS REPORT ARE PUNISHABLE BY LAW, U.S. CODE, TITLE 18, SECTION 1001



NEW REPORT

This is the proposed EEO-1 Form to collect pay data.

SECTION D - EMPLOYMENT DATA

Employment at this establishment - Report all permanent full- and part-time employees including apprentices and on-the-job trainees unless specifically excluded as set forth in the instructions. Enter the appropriate figures on all lines and in all columns. Blank spaces will be considered as zeros.

Job Categories	Annual Salary in Thousands	Number of Employees (Report employees in only one category)															Total Col A-N	
		Race/Ethnicity																
		Hispanic or Latino		Male							Female							
		Male	Female	White	Black or African American	Hispanic or Latino	Asian	Native American or Alaska Natives	Two or More Races	White	Black or African American	Hispanic or Latino	Asian	Native American or Alaska Natives	Two or More Races			
A	B	C	D	E	F	G	H	I	J	K	L	M	N	O				
Executive/Senior Level Officers and Managers 1.1	1. \$19,239 and under																	
	2. \$19,240 - \$24,439																	
	3. \$24,440 - \$30,679																	
	4. \$30,680 - \$38,999																	
	5. \$38,000 - \$49,919																	
	6. \$49,920 - \$62,919																	
	7. \$62,920 - \$80,079																	
	8. \$80,080 - \$101,919																	
	9. \$101,920 - \$128,999																	
	10. \$128,000 - \$163,799																	
	11. \$163,800 - \$207,999																	
	12. \$208,000 and over																	
First/Mid-Level Officers and Managers 1.2	13. \$19,239 and under																	
	14. \$19,240 - \$24,439																	
	15. \$24,440 - \$30,679																	
	16. \$30,680 - \$38,999																	
	17. \$38,000 - \$49,919																	
	18. \$49,920 - \$62,919																	
	19. \$62,920 - \$80,079																	
	20. \$80,080 - \$101,919																	
	21. \$101,920 - \$128,999																	
	22. \$128,000 - \$163,799																	
	23. \$163,800 - \$207,999																	
	24. \$208,000 and over																	
Professionals 2	25. \$19,239 and under																	
	26. \$19,240 - \$24,439																	
	27. \$24,440 - \$30,679																	
	28. \$30,680 - \$38,999																	
	29. \$38,000 - \$49,919																	
	30. \$49,920 - \$62,919																	
	31. \$62,920 - \$80,079																	
	32. \$80,080 - \$101,919																	
	33. \$101,920 - \$128,999																	
	34. \$128,000 - \$163,799																	
	35. \$163,800 - \$207,999																	
	36. \$208,000 and over																	

SAMPLE



SUMMARY PAY DATA

- **Total number of full and part-time individuals employed in each of the 12 pay bands listed for each job category**
- **12 pay bands:**
 - **\$19,239 and under**
 - **\$19,240-\$24,439**
 - **\$30,680-\$38,999**
 - **\$39,000-\$49,919**
 - **\$49,920-\$62,919**
 - **\$62,920-\$80,079**
 - **\$80,080-\$101,919**
 - **\$101,920-\$128,959**
 - **\$128,960-\$163,799**
 - **\$163,800-\$207,999**
 - **\$208,000 and over**



AGGREGATE HOURS WORKED

- Report the number of hours worked that year by all employees accounted for in each pay band
- Includes full-time and part-time employees



EXEMPT EMPLOYEES

Employer's Choice

1. Report 20 hours per week for each part-time employee and 40 hours per week for each full-time employee, OR
2. Report actual number of hours worked by full or part-time employees



NEW DEADLINES

- New snapshot period for gathering data
 - October 1, 2017 through December 31, 2017
 - Any pay period during snapshot period
- New filing deadline
 - March 31, 2018



Will Apply to Private Employers and Federal Contractors with 100 or More Employees



PRACTICAL ADVICE

- Start reviewing your pay practices NOW
- Consider an audit for pay practices based on gender and race/ethnicity
 - Strive for a completely gender and race neutral pay practice
- Review job descriptions
 - Determine where your employees will fall in each of the listed job categories



TIPS FOR GATHERING DATA

- Have a procedure in place to conduct your employee survey
 - Employee self-identification is preferred
 - Give employees plenty of time to respond
- Be mindful of deadlines
 - Snapshot period for collecting data
 - Filing deadline



COMPLETING THE REPORT

- Have a checklist in place
- Designate a representative for communications with EEOC
- Make sure information is accurate
- Consider attorney assistance
 - Eases the burden
 - Preserves attorney/client privilege



PENALTIES

- Knowingly submitting false or incorrect information can result in fines and even imprisonment
- Federal contractors can lose their contracts for failing to report



COMPENSATION ANALYSIS



CONDUCT A THOROUGH COMP ANALYSIS

- Determine appropriate groupings
 - By job title, salary grade, other “level”
- Determine factors that influence compensation
 - Examine starting salaries
 - Examine compensation increases
- Make pay equity adjustments, if necessary



IDENTIFY THE FACTORS THAT INFLUENCE COMPENSATION

- Job title
- Pay grade/band
- Function
- Type of work performed
- Level of responsibility
- Sector or department
- Geographic location
- “Productivity related” characteristics
- Time in current job
- Direct measures of performance, e.g., performance scores or sales results
- Indirect measures that may be correlated with performance, e.g., education level, pre-hire experience and company seniority



REVIEW COMPENSATION POLICIES AND PROCEDURES

- Identify and review all policies and practices that bear on employee compensation
 - Pay grade/band structure
 - Quartile charts, grids, or matrices used for setting percentage increases
 - Standards for merit and other increases, bonuses, commissions and any other forms of compensation
 - Performance evaluations
- Also consider whether any compensation variables are universal across the organization, or whether they differ by business unit, geographic location, or other factors



BE PREPARED FOR NEGATIVE AUDIT RESULTS

- Statistically significant compensation differences between races and genders do not mean that the company has engaged in discrimination
- But, such statistical results may be an indication that discrimination is occurring or has occurred — either unintentionally or intentionally
- There may be a legitimate explanation for the present day pay disparity despite the unfavorable statistical results
- Depending on the statistical results of the audit, pay adjustments may be advisable for only a handful of employees, or they may be warranted on a larger, systemic scale



USE AN EXPERIENCED OUTSIDE ATTORNEY

- To maximize the opportunity to protect audit results from disclosure under **the attorney-client privilege**, it is imperative to retain outside counsel to conduct the audit
- Courts have held that if evidence exists that the audit was performed for general business purposes, such as for determining whether a compensation system is working correctly and fairly, or to assist the company in planning and establishing salaries, etc., the audit materials may not be privileged and may not in fact be protected from disclosure



ENSURE USE OF PROPER STATISTICAL TECHNIQUES

- To ensure a statistically sound analysis, it is critical for your counsel to engage and work with a qualified statistician
- The most common approach is a multiple regression analysis, but this may not be appropriate in all circumstances
- Statistical analysis itself can help to identify the factors that influence pay at a given organization



DOCUMENT THE INFORMATION LEARNED DURING THE AUDIT

- Finally, an audit of compensation will often result in HR investigating to determine the propriety of certain individuals' pay that cannot be explained by the data
- The company should document the results of such investigative efforts
 - Don't want to have to research every time an audit is performed
 - Want to have “evidence” to defend decisions



MAKE PAY ADJUSTMENTS, AS NEEDED

- Address any compensation disparities that are not explained by legitimate factors
 - Make increases where necessary
 - Determine appropriate communication to be made to affected employees
- Determine how adjustment should be administered
 - Lump sum
 - Hourly or salary increase
 - Incremental amounts



DEVELOP COMPREHENSIVE COMP SYSTEM

- Place similar jobs into groupings
- Set pay scales for every position
- Limit discretion to deviate from pay scale
- Clearly identify factors to consider in determining initial compensation & weight to be given each factor
- Process for deviations
- Method to equalize increases based on performance



CONSIDER OPPORTUNITIES FOR ADVANCEMENT

- Examine career trajectories by gender and race
- Review promotion processes
 - Both how employees are notified of promotions and how decisions are made
 - Develop policy to announce or “post” all promotional opportunities
 - Analyze promotion data for adverse impact



PREPARE COMPENSATION POLICIES

- Update handbook
 - Comprehensive list of factors impacting compensation
 - Policy regarding compensation fairness/equality
 - Revisions to existing policies
 - Pay Transparency notice (if federal contractor)
- Written guidance for decision-makers



TRAINING ON COMPENSATION SYSTEM

- Recruiters
- Hiring managers
- HR
- Executives



QUESTIONS?

