

Morgan Lewis

together

## EEOC Pay Equity Enforcement

January 24, 2013

Paul C. Evans

Blair J. Robinson

# Agenda

- EEOC Strategic Enforcement Plan
  - Enforcing equal pay laws
- EEOC Investigations and Enforcement
  - Investigative tools
- Equal Pay Litigation
  - EEOC-initiated litigation and partnership with plaintiffs' bar
- Preventive measures
  - What can you do?

# Strategic Enforcement Plan

- Previously enacted strategic plan called for development of Strategic Enforcement Plan (SEP) to establish EEOC's priorities
- On December 17, 2012, SEP for 2013-2016 approved
- “Enforcing Equal Pay Laws” is one of EEOC's six national priorities set forth in the SEP
  - “The EEOC will target compensation systems and practices that discriminate based on gender”
  - EEOC “particularly encourages” use of directed investigations and Commissioner charges to facilitate enforcement

# Strategic Enforcement Plan

- SEP sets forth how the EEOC will implement national priorities
  - Charges raising SEP issues should be afforded the “highest priority” and “receive greater investigatory attention and resources”
  - Meritorious cases raising SEP issues should be given precedence in case selection for EEOC litigation
  - SEP encourages collaboration with the private bar, nonprofits, DOJ, OFCCP, and state and local partners
  - Systemic charges of discrimination that implicate SEP priorities will be given precedence over individual priority charges

# Four Possible Initiating Events for EEOC Systemic Pay Investigations

- Expansion of investigation into individual charge
- Investigation of a class charge
- EEOC-directed investigation
- Commissioner's charge

# Individual Charges

- EEOC will be looking more closely at individual claims asserting unequal pay
- EEOC may also use unrelated claims of discrimination (e.g., promotion or termination) to seek pay information
- Be on alert if:
  - EEOC seeks information regarding pay policy and practices
  - EEOC seeks pay data
  - EEOC appears to be stockpiling pay investigations

# Class Charges

- EEOC will likely escalate class charges asserting unequal pay to its lead systemic investigators
- The priority given to these claims will mean more attention from District Director and Regional Attorney, as well as internal EEOC statisticians
- Some class counsel attempt to use EEOC to undertake precomplaint discovery
  - Everything presented to EEOC during investigation will be produced to class counsel in subsequent litigation

# “Directed Investigations” of Equal Pay Act Violations

- EEOC can conduct “directed investigations” to determine violations of the Equal Pay Act even without a charge
  - Can be initiated by District Director
  - Encouraged by President Obama’s National Pay Enforcement Task Force
- Current Pilot Program in New York, Chicago and Phoenix
  - Likely to expand based on SEP
- Employers identified through internal charge-tracking system, EEO-1s, and interagency information sharing



# Commissioner Charges

- Title VII charges can be filed by any EEOC Commissioner
- Where used, Commissioner's charges only state EEOC's belief that an employer may be engaging in discrimination
  - No additional information regarding grounds for charge
  - Broadly worded to allow for intrusive requests for information
- Assigned to experienced investigators and given high priority

# EEOC Equal Pay Investigations

- EEOC will demand access to pay policies and related documents, e.g.,
  - Compensation manuals and/or pay banding documentation
  - External studies used to set pay
- EEOC may request interviews with key compensation subject-matter experts, e.g.,
  - Human resources leaders
  - Compensation leaders
  - Managers

# Providing EEOC with HRIS Data

- EEOC regularly requests significant HRIS data
- Before turning data over:
  - Negotiate with EEOC regarding the scope of the data (and, when necessary, unilaterally narrow the request)
  - Utilize an expert to analyze the data and determine any potential risk areas
  - Consider providing documentation explaining how to interpret data that will be produced
  - Consider providing summary of your own analyses to point EEOC in appropriate direction

# Providing EEOC with HRIS Data

- EEOC's internal statisticians will analyze a company's pay data and compare it with peer companies' data
- Any data produced is likely to be shared with OFCCP
  - May trigger OFCCP audit
  - OFCCP may use data to rebut separate data produced in response to OFCCP audit
- Plaintiffs' counsel will likely be able to obtain any data and related communications turned over through an FOIA request

# Determination of the Merits of a Charge

- Once EEOC completes its investigation, it will make a determination on the merits of the charge:
  - No reasonable cause: charging party receives a right-to-sue letter that says s/he has the right to file a lawsuit in federal court within 90 days
  - Reasonable cause: both parties receive letters of determination stating that there is reason to believe that discrimination occurred and inviting the parties to conciliation
  - If conciliation fails: EEOC may file a lawsuit in federal court or give the charging party a right-to-sue letter

# EEOC's Conciliation Efforts

- If after a genuine investigation EEOC issues a cause determination, it is statutorily obligated to conciliate with the company in good faith before initiating litigation
- Recently, employers have challenged the viability of suits brought by EEOC on the grounds that EEOC failed to conciliate in good faith

# EEOC's Conciliation Efforts

- Recent cases finding EEOC's conciliation efforts sufficient
  - *Serrano v. Cintas Corp.*, 10-2629 (6th Cir. Nov. 9, 2012) (finding that EEOC conciliated in good faith where it terminated conciliation efforts after the company failed to respond to its offer of conciliation and reversing \$2.6 million award of attorneys' fees in favor of Cintas)
  - *EEOC v. United Rd. Towing, Inc.*, 10 C 6259 (N.D. Ill. May 11, 2012) (denying motion for summary judgment based on failure to conciliate where deficiencies in the conciliation process were caused by both parties)

# EEOC's Conciliation Efforts

- Recent cases finding EEOC's conciliation efforts deficient
  - *EEOC v. La Rana Haw., LLC*, No. 11-00799 (D. Haw. Aug. 22, 2012) (holding that EEOC failed to conciliate in good faith by failing to provide defendants with enough information with which they could evaluate EEOC's claims)
  - *EEOC v. Evan Fruit Co.*, No. CV-10-3033 (E.D. Wash. May 24, 2012) (holding that EEOC failed to conciliate in good faith when it refused to provide company with adequate information to evaluate EEOC's \$1 million settlement demand)
  - *EEOC v. CRST Van Expedited, Inc.*, Nos. 09-3764, 09-3765, 10-1682 (8th Cir. May 8, 2012) (holding that because EEOC did not adequately investigate the class allegations during the charge phase, employer was not given sufficient notice of the charges lodged against it and, therefore, had no meaningful opportunity to conciliate)



# EEOC Litigation

- SEP raises likelihood that equal pay claims will be litigated by EEOC
- EEOC may partner with sophisticated class counsel
  - Could face Title VII Rule 23 class action and EEOC systemic litigation
  - Typically results in more discovery battles and higher cost of defense
  - Can complicate issues if attempting to resolve the litigation (also true at conciliation stage)

# EEOC Litigation

- EEOC pay equity litigation likely to follow trends in private class actions:
  - Systemic in nature (but EEOC will argue not subject to Rule 23 or 216(b))
  - Litigated under *Teamsters* model used in private class actions
  - Focus on HRIS data
  - Continued attacks on allegedly subjective compensation practices
  - Challenges to objective components of compensation practices
  - EPA claims

# Preventive Measures

# Compensation Processes

- Develop a clear system for setting compensation
  - Ensure that pay practices are consistent with business necessity
- Companies have flexibility to develop compensation systems that best fit their businesses
  - Objective nature of criteria
- Conduct appropriate compensation reviews and risk assessments
  - Review of compensation policies
  - Statistical analyses

# Compensation Reviews

- Determine compliance with existing policies
  - Helps ensure policies are having intended outcomes
  - Provides ability to hold managers accountable for implementing policies
- Equity and fairness
  - Employee relations, satisfaction, and retention
- Reduce litigation risks and likelihood of adverse finding in government investigation
  - Identification of employees who may be outliers and therefore more likely to file a complaint
  - Component of overall strategy to reduce class action litigation risks

# Compensation Reviews

- Analyze whether disparities exist among similarly situated groups of employees
- Multiple regression analysis
  - Widely accepted and used statistical approach for analyzing compensation
  - Can reveal impact that certain factors (e.g., grade, performance) are having on pay
  - Consider type of model that government or private plaintiffs might advance
  - Test whether specific pay decisions are driving results

# Remediation Approaches

- Consider whether policy modifications are appropriate
- Consider making pay adjustments
  - Method of adjusting pay will vary on a case-by-case basis
- Multiple adjustment options available
  - Review of individualized outliers
  - Development of company-specific business rules
  - Use of statistical models to identify individuals for adjustments
- Assess statistical impact of adjustments

# Privilege Considerations

- Conduct reviews at direction of counsel
- Limit number of persons collecting and preparing data for analysis
- Only a very limited core team of people should review analysis results with legal counsel
- Keep the information confidential



# Polling Question

- Would you like us to follow up with you directly after the webinar today? Please answer the polling question on the right-hand side of your screen.

# Questions



Paul C Evans  
Partner  
215.963.5431  
pevans@morganlewis.com



Blair J. Robinson  
Partner  
215.963.5398  
Blair.robinson@morganlewis.com