

# Today's GENERAL COUNSEL

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## WORKPLACE ISSUES

# Important Considerations in Pay Equity Audits

By Denise M. Visconti

In February 2015, Patricia Arquette won an Academy Award for her role in “Boyhood,” but what garnered the most attention during the awards show were her remarks on gender equality and the wage gap between men and women. As Arquette said in her speech, “To every woman who gave birth to every taxpayer and citizen of this nation, we have fought for everybody else’s equal rights. . . . It’s our time to have wage equality once and for all and equal rights for women in the United States of America.”

The next day, California State Senator Hannah-Beth Jackson introduced the California Fair Pay Act, a bill that, as of January 1, 2016, became the first of many state laws aimed at closing the gender pay gap in the United States. Today, the concept of pay equity garners daily media coverage and has the



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attention of many in-house counsel and corporate leaders.

While there have been equal pay laws on the books for decades, the various pay equity statutes enacted in the last two to three years have changed the landscape. These statutes not only shift the burden to employers to disprove that a pay gap is due to employees’ protected characteristics, they also limit the defenses available when defending against a claim of unequal pay. For a company caught flat-footed, the existence of a pay gap could present serious legal and reputational risks.

One of the best ways for in-house counsel to determine whether a wage

gap exists within their company, as well as whether there are any legitimate business considerations that explain that gap, is to perform a pay audit before any claim is made. When thinking about performing such an audit, however, there are several important considerations.

### **Not All Pay Gaps Are Unlawful:**

Differences in pay can be caused by a number of factors and can be incredibly complicated. Not all differences are the result of impermissible decision-making. They may be caused by such factors as occupational differences, differences in industry, and personal choices by individuals who have reduced their working schedules or left the workforce

for a period of time to care for children or adult family members. The challenge is to determine whether pay gaps are the result of legitimate business considerations, or the result of gender or other protected characteristics.

An audit can help with that determination. A technology-based tool I helped our firm develop utilizes

damages under some state statutes. On the other hand, undertaking an audit and thereafter taking steps to remedy any issues it reveals can serve as a defense to a potential legal action.

***Attorney-Client Privilege:***

In-house counsel and corporate leaders considering conducting a pay audit should seriously consider performing

Although the methodologies are quite similar, often the output includes dense spreadsheets, mathematical formulas and technical reports that are difficult to understand.

Ease of use and understandable results should be the concerns that drive the choice as to how an audit is done. For example, based on feedback

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accepted statistical methods that have been used in litigation for decades to enable clients to evaluate their payroll data. This allows them to measure compensation differences between demographic groups, identify those that are statistically significant, and determine the extent to which any differences may be permissible or in need of attention.

***Be Prepared To Act:*** Conducting a pay audit should be a precursor to further investigation, particularly if the audit reveals that unexplained or problematic disparities exist. But doing an audit and not investigating the disparities — or, worse yet, not doing anything about them — could expose a company to litigation and punitive

it in a privileged context. Although the underlying data used to perform the audit may not be protected, the analysis and advice on how to proceed following the audit should be done at the direction of counsel. To do otherwise could result in that analysis and advice being turned over should a claim or litigation be filed in the future.

***Audit Nuts and Bolts:*** Not all companies have statisticians on staff who can perform the complex statistical analyses needed to evaluate their payroll data. As a result, there are an increasing number of law firms, consulting firms and employer organizations offering tools for in-house counsel and corporate leaders to use for conducting pay equity audits.

from clients, we made sure our tool allows data to be analyzed quickly and comprehensively; and it presents results in a user-friendly dashboard so the analysis can be shared with, and explained to, company leaders without sacrificing relevant information.

With an increasing number of states considering adding pay equity statutes to their books, the focus on the gender pay gap likely will remain for the foreseeable future. Understanding whether your company has a pay gap, and taking steps toward remedying it if it does exist, may not only protect your organization from legal risk, but could also translate into a strategic and competitive advantage. ■

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