New Developments in Wage Law: DOL and State Initiatives related to Overtime and Wage Equality

2016 Mid-Year Seminar

Employment Law Work Session

FLSA & Local Government

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Income Inequality as a rising concern

- Minimum Wage
- Overtime
- Subcontracting and Outsourcing
- Equal Pay and Pay Discrimination

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Minimum Wage

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States leading the way

- FLSA minimum wage increase requires legislation; bills have made no progress in Congress
- 29 states/territories and an increasing number of municipalities have minimum wage above federal level
- Many of these statutes and ordinances include scheduled increases
- Determine impact of state and local legislation:
  - Is it directly applicable to municipal employees?
  - Will it impose budgetary impact through application to state contractors

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Pay Equity

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Pay equity headlines

Roger Federer, $731,000; Serena Williams, $495,000: The Pay Gap in Tennis

By BEN ROTHENBERG APRIL 12, 2016



Rob Carr/Getty Images

Although compensation is the same at majors, the annual prize money for the top 100 earners on the WTA and ATP Tours roughly mirrors the pay gap in American workplaces.

Top Female Players Accuse U.S. Soccer of Wage Discrimination

By ANDREW DAS MARCH 31, 2016



Franck Fife/Agence France-Presse — Getty Images

…five players on the women's team filed a federal complaint Wednesday, accusing U.S. Soccer of wage discrimination because, they said, they earned as little as 40 percent of what players on the United States men's national team earned even as they marched to the team's third World Cup championship last year.

New York Times excerpts

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The “Pay Gap” and “Equal Pay Day”

- “Based on median annual earnings, a woman working full time, year-round typically earns only 79 cents for every dollar earned by her male counterpart.”

U.S. Census Bureau, Historical Income Tables Table P-40: Women’s Earnings as a Percentage of Men’s Earnings by Race and Hispanic Origin (Data for 2014 are the most recent available and are based on median earnings of full-time, year-round workers 15 and older as of March 2015)

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What accounts for the "Pay Gap"?

- Occupational Choice
- Work Location
- Work Hours
- Caregiving Responsibilities
- Differences in Willingness or Ability to Negotiate Starting Pay and/or Raises
- Note that almost 8 years of OFCCP compensation audits have produced pay discrimination allegations in only ½ of 1% of the audits

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Will the gap close?

- *"As Women Take Over a Male-Dominated Field, the Pay Drops"* by Clair Cain Miller, Upshot, New York Times, March 18, 2016
- Caregiving is unlikely to be shared equally by men & women
  (Note DOL Women's Bureau post praising the benefits of workplace flexibility for women above "It's Time for Equal Pay Now")
- How will the gap be affected by the "gig economy" and automation?

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Federal Equal Pay Act
29 USC §206

- Employed in the same establishment
- Equal work on jobs that require equal skill, effort and responsibility
- Similar working conditions
- Employer can prove that the wage difference is based on:
  - a seniority system
  - a merit system
  - a system which measures earnings by quantity or quality of production
  - a differential based on any other factor other than sex
- Intent is not at issue (note that Title VII pay discrimination relies upon demonstration of discriminatory intent)

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EEOC Enforcement Efforts

- **EEOC Sues Prince George's County for Pay Discrimination (EEOC Press Release March 15, 2015)**

"County Paid Female Engineer Less Than Her Male Colleagues, Federal Agency Charges

BALTIMORE - Prince George's County, Md., violated federal law when it repeatedly paid a female engineer less than her male coworkers because of her gender, the U.S. Equal Employment Opportunity Commission (EEOC) charged in a lawsuit it announced today.

According to EEOC's lawsuit, Joanna Smith had a bachelor's of science degree in civil engineering and more than five years of engineering experience when she was hired for an engineer III position with Prince George's County's Stormwater Management Division. Prior to accepting the position, Smith requested a salary commensurate with her experience and education, but the county hiring official told her she could not negotiate her salary, according to the lawsuit. On March 12, 2012, Smith was hired at the entry-level salary for the engineer III position. EEOC said that two weeks later after Smith was hired, Prince George's County hired a male for another engineer III position, but paid him his requested salary, which was $10,000 more than Smith's starting salary, even though they were performing substantially equal work."

Efforts to promote pay equity

- States again leading the way, with Paycheck Fairness Act stalled in Congress (http://www.ncsl.org/research/labor-and-employment/equal-pay-laws.aspx is a starting reference, but note last update was 7/1/2015). In most, but not all, states, equal pay laws apply to public employees.
- Promoting and protecting employee disclosure and discussion of compensation
- Expanding definition of "equal work"
- Limiting potential equal pay defenses
- Increasing penalties and fines for violation

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Disclosure & discussion of compensation

- State and local ordinances, regulations and agreements covering municipal employees
- OFCCP pay transparency rule for federal contractors (80 FR 54934, 9/11/2015)
- State legislation attached to equal pay statutes

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Pay transparency statutes

- Common Provisions:
- Prohibit adverse actions because an employee discloses her own compensation to others or discusses compensation information volunteered by others
- Permit employers to prohibit disclosure of confidential pay records by employees whose “essential functions” include making, accessing or protecting such records
- Protect disclosure of confidential pay records in context of discrimination charges, investigations
- Provide redress procedures

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Expanding definition of "equal work"

- Eliminating the "same establishment" requirement:
  - Some statutes include establishments that are within the same political unit, geographical unit having similar population and economic activity
  - California eliminated requirement without replacement (but did not eliminate requirement that work be performed "under similar working conditions")
- "Substantially similar work" standard (*e.g.*, California, when viewed as a "composite" of skill, effort and responsibility)
- "Comparable work" standard

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Limiting equal pay defenses

- Trend toward eliminating or restricting the "factor other than sex" defense
- Require employer to demonstrate "business necessity" of factor used
- Require employer to demonstrate that factors used account for all of the wage differential
- Prohibit use of factor if the employee demonstrates that an alternative business practice exists that would serve the same business purpose without producing the wage differential or disparate impact
- Restrict "other factors" to articulated list
- Prohibit use of prior salary history as a factor

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Limiting equal pay defenses

- The EPA limitations period is two years, extended to 3 years in case of willful violations
- A bill under consideration in New Jersey provides that an employee may recover for the entire period of time an equal pay violation occurred, so long the violation continued to occur during a two year statute of limitations
- A bill under consideration in Massachusetts provides a 3 year limitations period

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Increased penalties and fines

- EPA provides for recovery of unpaid overtime or minimum wages, liquidated damages and attorneys' fees
- Paycheck Fairness Act proposes adding compensatory and punitive damages
- State law enhancements include:
  - Liquidated damages of 300% of unpaid wages for willful violations (New York)
- State laws generally permit class action, whereas the EPA permits only an opt-in collective action

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Overtime Pay

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Tyson Foods, Inc. v. Bouaphakeo
US Supreme Court (March 22, 2016)

- Donning and duffing
- Wage-hour class actions post-*Walmart*
- Expert testimony may establish representative proof
- Employer's burden is heavy when it fails to maintain records of work time
- Damages calculation

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DOL Overtime Regulations

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History of DOL Proposed Overtime Rule

- March 13, 2014 — **Presidential Memorandum** -- "Updating and Modernizing Overtime Regulations"
- July 6, 2015 — DOL **Notice of Proposed Rulemaking** (NPRM) "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees" (80 CFR 38516)
- September 4, 2015 — **Close of Comment Period** (>250,000 comments filed)
- March 14, 2016 — DOL transmits **Final Rule to OMB** for review (average review period of four to six weeks)

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Employers await publication of Final Rule

- July __, 2016 — Publication target identified in DOL Fall 2015 Regulatory Agenda
- ????? — **Publication of Final Rule**
- ????? — **Effective Date of Final Rule** (length of period following publication?)
- ????? — **Potential challenges** under the Congressional Review Act (60 session days) or through legislation (e.g. H.R. 4773), both subject to Presidential veto

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Changes proposed in NPRM

- Proposes **increasing minimum salary level for white collar exemptions** to 40th percentile for all US salaried employees
  - In 2016, $970 per week ($50,440 annually)
  - Proposes annual increases (based on 40th percentile?), to be published in Federal Register 60 days in advance

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Changes proposed in NPRM

- Proposes **increasing minimum salary level for highly compensated employees** to 90th percentile for all US salaried employees, with similarly determined annual increases
  - In 2016, annual salary of $122,148, with at least $970 paid weekly
  - Will annual true-up continue to be permitted?

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Questions posed in NPRM

- Should non-discretionary bonuses and incentive payments count toward the salary required for exemption?
  - DOL suggests that it may provide that such bonuses can satisfy up to 10% of the minimum if paid out at least monthly
  - Large percentage of incentive programs are quarterly or annually
  - Should definition of included payments mirror that for inclusion in regular rate?

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Question posed in NPRM

- Requests comments on whether duties test should be changed
- Highlights from comments received:
  - Changes to duties test should not be included an a final rule because the lack of proposal in current NPRM prevents the legally required analysis of impact and meaningful opportunity to comment
  - Union/employee community has proposed adopting the California 50% limit on non-exempt duties
  - Note administrative burden of tracking duties and time

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Implementation Issues for Municipalities

- Compensation/reclassification process and plans
- Budget compliance and planning
- Collective bargaining
- Communication of changes to employees
- Implementation of payroll and timekeeping changes
- Dealing with negative fallout (morale, political pressure, turnover)

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Compliance options

- Increase salaries to meet new minimum
  - Is employee's current compensation close to the new minimum?
  - Is this the most efficient and cost effective way to handle?
- Retain salary but limit hours to 40
  - Can the job be done in 40 hours?
  - Does this invite or encourage "off the clock" work?

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Compliance options

- **Reduce salary**, limit hours to 40, hire more employees
  - Does this create scheduling problems?
  - Will employees accept lower salary?
  - Need to consider additional benefits costs
- **Convert position to non-exempt** and pay on hourly basis
  - Adjusting hourly rate to retain current level of compensation may be difficult (lack of records and good data)
  - Need to deal with status change (punching clock, possible different benefits)

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Salary options

- **Fluctuating work week** overtime pay
  - Salary spread over all hours worked in the week to determine hourly rate, then ½ of rate premium paid for overtime hours
  - Overtime significantly less than hourly paid at same weekly base rate
  - Need to check to see if fluctuating work week system is permitted by law (employee pay ordinances, regulations and agreeements and state or local wage hour law, if applicable)
  - Need "agreement" (for non-represented at-will employees, a written explanation) regarding the fluctuating work-week system

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Planning for change

- Map out necessary process and timeline
- Review exempt jobs with salaries <$970 per week (if many, start with jobs with lower salaries and largest amount of “overtime”)
- Develop understanding of how much time jobs actually take
- Develop understanding of scheduling, duties and option for splitting or combining positions
- Develop best alternatives for each position
- Determine impact on benefits, working conditions, morale
- When is the right time to begin discussion with union?

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Jeanne M. Phelan is a management side employment attorney, based in Baltimore. She has practiced for 35 years in small and very large firms and has now opened a solo practice. Ms. Phelan has represented employers and high level managers in a wide variety of employment matters. Among her clients are employers in numerous industry sectors, including manufacturing, distribution, retail, professional services, health care, educational institutions, financial services, computer services, local government and other service sectors.

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