Key Takeaways

Skadden

Equal Pay Audits:
Current State of the Law

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On September 20, 2018, Skadden hosted the webinar "Equal Pay Audit: Current State of the Law." The panelists were **Karen Corman**, Skadden labor and employment partner; **Robin Quittell**, managing director, chief human resources officer and counsel, Fortress Investment Group LLC; and **Risa Salins**, Skadden labor and employment counsel. **Joseph Yaffe**, Skadden executive compensation and employee benefits partner, moderated the discussion.

Renewed Focus on Pay Inequality

Ms. Corman began by providing insights into the current focus on pay inequality, which she noted is reflected in a renewed emphasis on workplace equality by large companies that have decided to publicly discuss their pay analyses and has been fueled by movements such as #MeToo and Time's Up. Ms. Corman discussed labor statistics showing a narrowing of the wage gap between 1963 and 2016, followed by stagnation in the narrowing of the gap since 2016.

Federal Equal Pay Laws

Ms. Corman reviewed federal laws addressing equal pay, including the Equal Pay Act of 1963 (EPA), Title VII of the Civil Rights Act of 1964 (Title VII) and the Lilly Ledbetter Fair Pay Act of 2009.

Ms. Corman noted the EPA's narrow focus on prohibiting only sex-based wage discrimination against employees who perform "equal work" and limiting comparison groups to employees working in the same establishment — a distinct physical place of business, rather than the employer's broader enterprise. She discussed how Title VII provides more comprehensive protections against discrimination than the EPA by extending to all aspects of employment (*e.g.*, hiring, firing and compensation) as opposed to focusing solely on pay discrimination. Ms. Corman also discussed the Lilly Ledbetter Fair Pay Act, enacted in 2009 to enable plaintiffs to challenge pay disparities that may only be discovered long after a discriminatory pay policy or decision was first established. In legislatively overruling *Ledbetter v. Goodyear Tire & Rubber Co*., the Lilly Ledbetter Fair Pay Act created the "paycheck rule" whereby the statute of limitations for bringing a wage discrimination claim under Title VII resets with each alleged discriminatory paycheck issued by an employer.

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State Law Expansions to Federal Equal Pay Laws

Ms. Salins began the discussion of state equal pay laws by noting the trend of state legislatures enacting new and more expansive pay equity laws or amending and strengthening existing pay equity laws. Ms. Salins explained that while the EPA only prohibits sex-based wage discrimination, many state laws cover wage discrimination based on race, ethnicity or other protected classes. Further, while the EPA requires equal pay for equal work, some of the more stringent state laws require equal pay for substantially similar work or even comparable work. In addition, while the EPA compares employees at the same physical establishment, many state laws allow for the comparison of employees in the same county, the same state or even all of the employer's locations. Ms. Salins also noted that a number of states (*e.g.*, New York and New Jersey) also have extended the EPA's statute of limitations of two years (or three years for willful violations) to up to six years.

Ms. Salins briefly examined the equal pay laws in four states that have more expansive protections: California, New York, New Jersey and Massachusetts. The highlights include:

- The California Equal Pay Act, as amended, sets forth a "substantially similar work" standard for equal pay, with such work measured by a composite of skill, effort and responsibility, performed under similar working conditions, and it eliminates the EPA's requirement that job comparisons be limited to the same physical establishment.
- The New York Achieve Pay Equity Act expands the definition of "same establishment" to include all locations in a geographic region no larger than a county. While it only covers sex-based wage discrimination, another proposed law, the New York State Fair Pay Act, which passed in the state assembly in April 2018, would cover wage discrimination on the basis race or national origin, if enacted.
- New Jersey's Diane B. Allen Equal Pay Act, which is now considered one of the most protective equal pay laws in the country, covers wage discrimination against all protected classes recognized under New Jersey's Law Against Discrimination, requires equal compensation for employees who perform substantially similar work, and expressly provides for job comparisons to be made across all of the employer's operations or facilities.
- The Massachusetts Equal Pay Act sets forth that equal pay is required for men and women who perform comparable work within the same geographic area in the state, and that paying a bonus to an employee who has a lower salary than employees performing comparable work is not sufficient to justify a pay disparity.

Pay Transparency Laws

Ms. Salins explained that there is no general federal pay transparency law, but the National Labor Relations Board has long held that policies that prevent workers from discussing their wages violate the National Labor Relations Act. In addition, Ms. Salins said the federal Office of Federal Contractor Compliance (part of the Department of Labor) implemented pay transparency regulations, effective January 2016, which prohibit federal contractors and subcontractors from terminating or otherwise retaliating against employees or applicants for discussing, disclosing or inquiring about compensation. Ms. Salins then addressed the growing number of pay transparency laws being implemented at the state level and provided recommendations for best practices for complying with such laws, including updating policies and confidentiality agreements to eliminate prohibitions against employees discussing compensation and ensuring compliance with all required posting requirements.

Salary History Bans

Ms. Salins discussed state, county and city laws that, with the goal of not perpetuating past wage discrimination, prohibit employers (including through agents such as outside recruiters) from asking job applicants about their compensation history. However, Ms. Salins explained that California's salary history ban permits employers to review publicly available salary history information; consider or rely on salary history information voluntarily disclosed by the applicant without prompting (provided that salary history alone may not justify a pay disparity); and ask about an applicant's salary expectations. In addition, Ms. Salins stated that New York City's salary history ban does not prohibit employers from inquiring about objective indicators of an applicant's productivity or performance during current or previous employment, such as sales, production and profits generated (provided the employer does not inquire about the applicant's profit percentage); asking a job applicant about unvested equity or deferred compensation the

applicant stands to lose upon resignation from current employment; asking about any competing offers an applicant may have received; requesting an applicant's compensation expectations; or verifying salary history voluntarily disclosed by an applicant without prompting.

Recommendations for Best Practices With Respect to Salary History Bans

Next, Ms. Quittell offered a number of insightful best practices with respect to salary history bans. In particular, Ms. Quittell:

- explained these laws require significant changes to in-house practices, such as updating hiring documents, including background check consent forms, to eliminate questions seeking salary history information or seeking consent to obtain such information;
- recommended — given that the exceptions to salary history bans are narrow and nuanced, and vary from state-to-state — leaving conversations dependent on any exceptions to salary history bans to trained human resources professionals and employment counsel;
- suggested, in addition to training those employees involved in the recruiting process with respect to salary history bans, that individuals scheduling interviews should include a list of do's and don'ts when sending calendar invitations to interviewers;
- recommended, given the ambiguity in the meaning of "voluntary disclosed" and its importance, that: (1) interviewers explicitly state they are not seeking past compensation information when asking a candidate about pay expectations, and (2) employers develop a protocol for documenting any voluntary disclosures of salary history information;
- suggested human resources departments be explicit with external vendors about which questions are off limits during the recruiting process and hold them accountable for deviating from set parameters;
- advised that companies adopt firmwide policies requiring their human resources departments to be involved in all contracts with external vendors (*e.g.*, recruiters) in order to negotiate indemnities for breaches of salary history ban laws by such vendors; and
- noted that companies may receive in-bound calls from external parties making routine inquiries in conjunction with current or former employees procuring mortgages, loans, HELOCs, etc., and the importance of understanding who is calling and getting a written explanation of the purpose for any salary information sought.

Defenses to Equal Pay Laws

Ms. Salins outlined the four affirmative defenses available to employers under the EPA: (1) a seniority system that rewards employees based on length of employment; (2) a merit system that rewards employees for exceptional job performance; (3) an incentive system that pays employees based on the quality of their work or the amount of work they perform; or (4) any factor other than sex, such as any other factor related to job performance or business operations. Ms. Salins highlighted a split among circuit courts as to whether an employee's salary history qualifies as an "other factor" that could justify a pay differential under the EPA and noted that, in April 2018, the Ninth Circuit, in *Rizo v. Yovino*, held that prior salary is not a legitimate "factor other than sex" on which employers can rely to justify pay disparities.

Ms. Salins then noted that some states, including California, New York and New Jersey, require the "other factor" outlined in the EPA's fourth affirmative defense to be a "bona fide factor," such as education, training or experience. Ms. Salins said that Massachusetts enumerates six specific defenses for differences in pay — which, in addition to those provided for under the California and New York equal pay laws, include the geographic location of the job and the extent of travel required. Ms. Salins highlighted that Massachusetts law includes a "safe harbor" for employers that have conducted a good faith, reasonable self-evaluation of its pay practices within the previous three years and before an action has been filed, provided the employer shows reasonable progress toward eliminating any unlawful gender-based wage differential that its self-evaluation reveals.

Remedies for Violations

Ms. Salins emphasized that the remedies for violations of federal and state equal pay laws could be substantial. Ms. Salins first addressed the remedies available under Title VII, including back pay, front pay, compensatory and punitive damages (subject to statutory caps), and attorneys' fees and costs. She noted that the remedies available under the EPA include two years of back pay (three years in the event of willful violations), liquidated damages in an amount equal to lost wages for willful violations, and attorneys' fees and costs.

Ms. Salins noted that some states have enhanced available remedies well beyond the federal law. Specifically, New York and New Jersey equal pay laws expand the statute of limitations to six years, thereby allowing prevailing plaintiffs to claim lost wages going back six years. Ms. Salins also explained that under New York's equal pay law, a prevailing plaintiff is entitled, in addition to lost wages, to liquidated damages equal to 300 percent of the

lost wages in cases of willful violations. In addition, under New Jersey's equal pay law, a plaintiff may be awarded treble damages — three times the amount of the pay differential. Ms. Salins also noted that New Jersey's equal pay law provides for punitive damages in the case of willful violations.

General Recommendations for Best Practices

After noting the daunting patchwork of equal pay laws that lack uniformity, Ms. Quittell offered recommendations for best practices, which included, among other things:

- updating employment applications and hiring documents to eliminate requests for compensation history;
- revising policies to eliminate prohibitions on employees discussing their compensation;
- reviewing policies related to pay for possible negative impacts on protected class members;
- implementing training on current equal pay laws for employees who make pay decisions;
- reviewing job descriptions that reflect similar or comparable work yet provide for vastly different pay to determine whether the descriptions should be revised or the pay adjusted;
- setting salary ranges for job positions; and
- approaching compensation negotiations with caution, and appropriately documenting such negotiations.