



EEO-1 and State Fair Pay Laws and Shareholder Equity Studies – Oh My!

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David S. Fortney

dfortney@fortneyscott.com

FORTNEY SCOTT

ATTORNEYS AT LAW

David B. Cohen

dcohen@dciconsulting.com

DCI
CONSULTING

Important Legal Notice

This presentation is to provide general information and updates. These materials are not intended to provide legal advice.

Employers' representatives should consult either with their in-house counsel or, as directed, with an experienced employment attorney for legal advice about whether, based on their specific facts and circumstances, their company complies with the applicable federal and state laws and regulations.



Agenda

- **Setting the Stage**
- **Determining the Scope**
- **Determining Similarly Situated Groupings**
- **Pay Factors**
- **Multiple Regression Analysis**
- **Should Pay Adjustments be Made?**
- **Avoid Discrimination in Remediation**



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Pay Equity in the News

- **States are leading the charge on the equal pay front**
 - California, New York, Maryland, Puerto Rico, Oregon and Massachusetts
 - Approximately 10 states have pending legislation
- **Conflicting standards and concepts in federal and state laws, leading to a patchwork for national employers**
- **EEOC will collect W-2 compensation information as part of the annual EEO-1 report**
- **U.S. women's soccer team filed a wage-discrimination action against U.S. Soccer**
- **Silicon valley employers release wage gap information**
 - Disclosures that came at the urging of activist investor Arjuna Capital in its campaign to hold tech firms accountable for achieving gender pay equity
- **SEC adopts rule for pay ratio disclosure**



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Why The Concern?

- **Women earn 82.5 cents on every dollar paid to men (BLS 2014 data)**
 - Gap is greater if annual rather than weekly data are used
- **Wage gap also occurs for race**

Race	Men	Women	Total	Gap
Asian	\$1,080	\$841	\$942	77.9%
White	\$897	\$734	\$802	81.8%
African American	\$680	\$611	\$629	90.0%
Hispanic/Latino	\$616	\$548	\$578	89.0%
	\$871	\$719	\$791	82.5%



More Sophisticated Analyses Wall (2000)

- **National Data Can be Misleading**
 - **Number of hours worked**
 - **Professions entered**
 - **Years experience**
- **Gaps**
 - **Uncorrected Gap 23.5 cents**
 - **Corrected for hours worked 16.2 cents**
 - **Corrected for other factors 6.2 cents**
 - **These figures are similar to the 3.8% adjusted gap for federal employees in 2012 (OPM, 2014), the 5.4% adjusted gap found by Glassdoor Economic Research (2015) and the 6.6% gap for new college grads by the AAUW (2009)**

Wall, H. J. (2000, October). The gender wage gap and wage discrimination: Illusion or reality? *Regional Economist*, pp 1-5.

Company Specific Reports

Company	Year	Female to Male Earnings
GoDaddy	2015	100.1
FaceBook	2016	100.0*
Google	2016	100.0*
Amazon	2016	99.9
Microsoft	2016	99.8
Intel	2016	99.6
Apple	2016	99.6

*Company reported that men and women are “paid the same”





Being Proactive About Pay Equity

Determining the Type of Analysis

- **What question are you trying to answer?**
 - Title VII liability
 - OFCCP audit liability
 - State law compliance
 - EEO-1 component 2 analysis
 - Shareholder wage gap analysis
 - Foreign law disclosure requirements, e.g. U.K.
- **What forms of compensation will you analyze?**
 - Base/hourly pay
 - Starting salary
 - Bonus
 - Merit increase
 - Etc.



Covering the Study Under the Attorney-Client Privilege?

- **In legal disputes, relevant documents are demanded by your adversary**
- **If a document is privileged, it can be protected from discovery, even when it is relevant**
- **Purpose is to encourage the frank disclosure of information to your attorney so he or she can best represent you**



For In-House Counsel, It's Complicated

- **In-house counsel wear two hats – legal & business**
- **Because of “business partner” dimension, risk that communications may not be protected under attorney-client privilege**
- **To be privileged – must show that communication was related to legal advice, not business advice**
- **Courts have difficulty distinguishing, no bright-line test, case-by-case scenario**



The Sliding Scale of Privilege

Not Privileged

Argument for Privilege

Privileged



No Attorney Involvement

In-House Counsel (on surface)

In-House Counsel (substance)

Outside Counsel (on surface)

Outside Counsel (substance)





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Pay Groupings

Directive 307: Pay Analysis Group

- **Pay Analysis Group** – A group of employees (potentially from multiple job titles, units, categories and/or job groups) who are comparable for purposes of the contractor's pay practices. Regression analysis may be performed on different types of pay analysis groups. A pay analysis group may be limited to a single job or title, or may include multiple distinct units or categories of workers. **A pay analysis group may combine employees in different jobs or groups, with statistical controls to ensure that workers are similarly situated.**
- **Similarly Situated Employees** – The determination of which employees are similarly situated is case specific. Relevant factors in determining similarity may include tasks performed, skills, effort, level of responsibility, working conditions, job difficulty, minimum qualifications, and other objective factors. Employees are similarly situated where they are comparable based on the factors relevant to the investigation, even if they are not comparable based on other factors.



Pay Group Example



- **Start at the job title**
 - Job titles meeting "20 and 3" rule are own pay group
 - Be careful that jobs with the same title are actually the "same job"
 - Others jobs can be
 - Lumped together into one pay group, or
 - Broken into job families or functions
- **If you have to cross grades**
 - Start with serial titles (Engineer I, Engineer II)
 - Then group according to family or function
 - Be sure to include either grade midpoint or a dummy-coded variable in your regression





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Pay Factors

Potential Salary Predictors

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- **Career Path**
 - New hire
 - Promotion
 - Demotion
- **Experience**
 - Time in company
 - Time in grade
 - Time in current job
 - Previous relevant experience (age?)
- **Performance Ratings**
- **Training**
 - Education
 - Certifications
 - Security clearance
- **Market Information**
 - Salary survey median
 - Geographic adjustments
 - Line of business
 - Merger/acquisition
 - H1-B Visa
 - Economy during time of hire
- **Job (if groups are non-similarly situated)**



Effect of Starting Pay

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Year	Female Hire \$	Male Hire \$	Merit Increase	Difference
1990	\$ 40,000	\$ 47,000	3%	\$ (7,000)
1991	\$ 41,200	\$ 48,410	3%	\$ (7,210)
1992	\$ 42,436	\$ 49,862	3%	\$ (7,426)
1993	\$ 43,709	\$ 51,358	3%	\$ (7,649)
1994	\$ 45,020	\$ 52,899	3%	\$ (7,879)
1995	\$ 46,371	\$ 54,486	3%	\$ (8,115)
1996	\$ 47,762	\$ 56,120	4%	\$ (8,358)
1997	\$ 49,673	\$ 58,365	3%	\$ (8,693)
1998	\$ 51,163	\$ 60,116	3%	\$ (8,953)
1999	\$ 52,698	\$ 61,920	3%	\$ (9,222)
2000	\$ 54,279	\$ 63,777	3%	\$ (9,499)
2001	\$ 55,907	\$ 65,691	5%	\$ (9,784)
2002	\$ 58,702	\$ 68,975	3%	\$ (10,273)
2003	\$ 60,463	\$ 71,044	3%	\$ (10,581)
2004	\$ 62,277	\$ 73,176	3%	\$ (10,899)
2005	\$ 64,146	\$ 75,371	3%	\$ (11,225)
2006	\$ 66,070	\$ 77,632	3%	\$ (11,562)
2007	\$ 68,052	\$ 79,961	3%	\$ (11,909)
2008	\$ 70,094	\$ 82,360	3%	\$ (12,266)
2009	\$ 72,196	\$ 84,831	3%	\$ (12,634)
2010	\$ 74,362	\$ 87,376	3%	\$ (13,013)
2011	\$ 76,593	\$ 89,997	3%	\$ (13,404)
2012	\$ 78,891	\$ 92,697	3%	\$ (13,806)
2013	\$ 81,258	\$ 95,478	3%	\$ (14,220)
Total				\$ (245,581)



Race/Ethnicity

- **White-Minority comparisons are no longer used**
 - “Minority” is not a protected class
 - OFCCP had tried to create groups such as “Non-Asians”
 - Medical schools often create a category called “Under Represented Minorities” which exclude Asians
- **Analysis options**
 - Always compare each race/ethnicity group to Whites
 - For each SSEG, compare the highest paid group to each of the other groups
 - This is what OFCCP is doing and is consistent with Title VII
 - In technology companies, Asians are often the highest paid group





Multiple Regression Analysis

Regression Example

- **OFCCP Audit Scenario – in the electrical engineering job title we have observed the following:**
 - **Male average salary - \$50,000**
 - **Female average salary - \$40,000**
 - **Difference - \$10,000**
 - **Statistically significant? – Yes**
- **Is this the result of discrimination or some legitimate non-discriminatory factor(s)?**
 - **Multiple regression will help answer this question**



Refined Regression Analysis



Job Group	# Males	# Females	Gender Regression Coefficient (female=1)	# Standard Deviations	Adjusted R-Square	Statistically Significant?
A	25	21	-\$4,364	-1.46	75%	No
B	43	32	\$210	0.45	63%	No
C	66	49	-\$5,409	-3.12	55%	Yes
D	12	25	-\$864	-1.12	57%	No
E	57	80	-\$30	-0.03	69%	No
F	89	55	\$1,000	1.49	74%	No
G	84	33	-\$150	-0.39	88%	No

Assessing the Results of the Statistical Analysis

- **Now that you've conducted the analysis, how do you "get over the finish line?"**
- **Do you need to make pay adjustments?**
- **Is a pay adjustment appropriate? Pay inequity does not necessarily reflect discrimination**
 - **Is the analysis statistically sound?**
 - **Considered appropriate and relevant comparators?**
 - **Do OTHER legitimate factors not in the analysis explain the disparity?**
 - **Where data alone cannot explain disparities, was additional investigation conducted with those who know the position and job?**



Avoid Discrimination in Remediation



- Apply adjustments to men and whites, not simply women and minorities
- “Reverse” discrimination claims not merely hypothetical
 - *Volpe v. Nassau Cty .*, 915 F. Supp. 2d 284 (E.D.N.Y. 2013)
 - *Maitland v. Univ. of Minnesota*, 155 F.3d 1013 (8th Cir. 1998)
 - *Smith v. Virginia Commonwealth Univ.*, 84 F.3d 672 (4th Cir. 1996)
 - *Klask v. Nw. Airlines, Inc.*, 1989 WL 308010 (D. Minn. Aug. 28, 1989)
 - *Meegan v. City of Buffalo*, 1980 WL 18660 (W.D.N.Y. July 24, 1980)
 - *Bd. of Regents v. Dawes*, 522 F.2d 380 (8th Cir. 1975)



Making the Salary Adjustment



- **What amount of Adjustment?**
 - Eliminate the flag?
 - 2.0 standard deviation?
 - State requirements (e.g., California)
- **What other considerations?**
 - Business or operational plans of the organization
 - Pending audits or litigation
 - Communications to employees
 - If adjustments are to be made, then when
 - Other factors, based on facts and circumstances





Questions?

David S. Fortney

Mr. Fortney is a co-founder of Fortney & Scott, LLC, a Washington, D.C.-based law firm counseling and advising clients on the full spectrum of work-place related matters, including employment discrimination and labor matters, compliance programs, government contracting, international dispute resolution and counseling matters, and developing strategies for avoiding or responding to workplace-related crises. Fortney & Scott, LLC has been recognized as a leading management employment law firm in the prestigious Best Law Firms survey for 2011-2017 by U.S. News & World Report and Best Lawyers for Washington, D.C.

Mr. Fortney has a broad-based practice representing and counseling employers and executives in employment and labor matters, including equal employment opportunity requirements, wage and hour matters, federal contractor's affirmative action and non-discrimination obligations, collective bargaining, workplace health and safety, and pension and welfare benefits. He brings experience from the public and private sectors in advising clients on these issues, and he frequently represents clients before the U.S. Department of Labor's agencies, the Equal Employment Opportunity Commission, and the National Labor Relations Board. Mr. Fortney's litigation experience includes obtaining defense verdicts for employers in extended jury trials, as well as designing and implementing Alternative Dispute Resolution procedures to help resolve employment claims in an efficient and fair manner.

Mr. Fortney has been widely recognized for his professional accomplishments, including being named one of the leading employment lawyers in Washington, D.C. by the Chambers USA survey of America's Leading Lawyers for Business in all years from 2005 through present. He was selected for inclusion in the 2009 through present editions of The Best Lawyers in America, Washington D.C.'s, Washington D.C.'s Best Lawyers and Super Lawyers. Mr. Fortney was also awarded an AV rating (the highest level) by Martindale-Hubbell.

E-mail: dfortney@fortneyscott.com

Fortney & Scott, LLC
1750 K Street, NW, Suite 325,
Washington, DC 20006
www.fortneyscott.com

David B. Cohen

David Cohen is President of DCI Consulting Group, Inc. and Senior Vice President of The Center for Corporate Equality (“CCE”). He provides consulting services to employers and management law firms on a wide range of human resource risk management strategies, particularly in the areas of EEO/affirmative action program development, systemic compensation statistical analyses, comprehensive human resources self-audits, and employee selection and test validation.

Recognized as a national EEO and affirmative action compliance expert, Mr. Cohen speaks frequently before corporate leaders from Fortune 500 companies, and at regional and national ILG conferences and OFCCP events. In 2006, he co-authored a book entitled *Understanding Statistics: A Guide for I/O Psychologists and Human Resource Professionals*, which was published by Thomson Wadsworth. Mr. Cohen is also the Associate Editor of the *Applied HRM Research*.

Email: dcohen@dciconsult.com

DCI Consulting Group, Inc.
1920 I St NW,
Washington, DC 20006
www.dciconsult.com

