CONDUCTING PAY EQUITY ANALYSES

Legal and Practical Considerations

DirectEmployers Association

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FEDERAL CONTRACT COMPLIANCE & EMPLOYMENT DATA ANALYTICS

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MEET THE TEAM

Joshua Roffman is the Managing Attorney of the Firm. Josh's practice focuses on advising and assisting employers with using data and statistical tools to evaluate their employment practices. He has been advising federal contractor employers about compliance with federal and state equal employment opportunity and "affirmative action" requirements for over twenty years. He currently is guiding employers in assessing their DEIA and similar programs for risk mitigation and compliance with nondiscrimination laws.

Josh also advises and assists employers with privileged pay equity statistical analyses. He develops and runs the statistical analyses and combines that with knowledge of the law and a pragmatic understanding of businesses and other employers to ensure analytical rigor, usefulness, and legal soundness.

JOSHUA S. ROFFMAN
MANAGING ATTORNEY

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MEET THE TEAM

ALISSA A. HORVITZ
MEMBER ATTORNEY

Alissa Horvitz is a Member Attorney in the firm she co-founded with Josh Roffman. Alissa focuses her practice on evaluating nondiscrimination and equal opportunity throughout all phases of employment using data and employment analytics. This includes analysis and advice regarding EEO in recruiting, hiring, promotions, terminations, and compensation (pay equity), as well as DEI reviews for government contractor employers seeking to unwind their compliance with EO 11246. Alissa also does live and virtual training on relevant employment law topics.

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JAMES M. MCCAULEY
ASSOCIATE ATTORNEY

James McCauley is an Associate Attorney with Roffman Horvitz. James's experience includes evaluation and analysis of employment practices to ensure equal opportunity; preparation of EEO-1, VETS-4212, and California Pay Data Reporting filings; pay equity analyses; and analysis of applicant and hire records to address potential claims of hiring disparities.

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OUTLINE

- Attorney-Client Privilege

- Objective for Conducting the Analyses

- Drivers of Analyses

  - Investigative and Defensive Analyses
    - Federal Pay Equity Laws
    - State Pay Equity Laws
    - State Pay Transparency and Pay Reporting Laws
  - Aspirational Analyses

- Regression Analysis v Cohort Analysis

- Running a Regression Analysis

- Putting It All Together

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ATTORNEY-CLIENT PRIVILEGE

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ATTORNEY-CLIENT PRIVILEGE

• Because of the sensitive and self-critical nature of these analyses, it is advisable to involve counsel in the project so that the analyses won't be discoverable in litigation or need to be submitted in a government audit.

• Process for preserving the privilege

   • Who conducts the actual analysis
   • Who directs the analysis
   • Who evaluates the analysis
   • How are results handled

• Actions that undermine the privilege

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WORK PRODUCT DOCTRINE
ATTORNEY-CLIENT COMMUNICATION

• Work Product Doctrine – protects from disclosure materials that were prepared in anticipation of litigation, and whose creation was motivated by the litigation

• Attorney-Client Communication – protects from disclosure communications between an attorney and client involving the rendering of legal advice

MANY PAY EQUITY ANALYSES WILL NOT BE PROTECTED AS WORK PRODUCT BECAUSE THEY ARE NOT BEING DONE IN ANTICIPATION OF LITIGATION

IN ORDER FOR THE ANALYSES TO BE COVERED BY ATTORNEY-CLIENT COMMUNICATION, IT MUST COME FROM COUNSEL WHO HAS THE ABILITY TO RENDER LEGAL ADVICE ABOUT THE ANALYSES
(AN ATTORNEY WHO CAN ADVISE ON PAY EQUITY LAWS AND ALSO UNDERSTANDS REGRESSION ANALYSIS)

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OBJECTIVES FOR CONDUCTING THE ANALYSIS

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WHAT MOTIVATES EMPLOYERS TO CONDUCT PAY EQUITY ANALYSES?

• Mitigating exposure to litigation under federal and state equal pay laws

• Meet expectations of organization's shareholders, board, or customers

• Ensure fairness and equal employment opportunity

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DEFINE ORGANIZATION'S OBJECTIVES

- Defend against discrimination allegations

- Identify and correct pay inequities

- Corporate citizenship / public relations

- Aspire for more equal pay even if current practices are likely non-discriminatory

- Can slot into three types of analyses:
  - Investigative
  - Defensive
  - Aspirational

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INVESTIGATIVE

- Analysis designed to identify areas that are flagged for potential pay inequities at a systemic level that warrant further factual investigation by the employer to identify job-related explanations and/or areas where pay adjustments may be necessary; the employer is using regression analysis to triage where further investigation of pay differences may be needed

- Analysis output can inform amount for pay corrections

- Performed from an objective perspective—not looking for a specific outcome

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DEFENSIVE

- Analysis designed to determine the most strategic way to position the employer's data for purposes of explaining and defending its pay practices in a government audit and/or against employee legal claims

- Analysis designed to minimize unexplained pay differences in order to defend a specific legal claim or present the employer's compensation data in the most favorable light

- Object is to narrow scope of any statistically significant pay differences by gender and/or race

- Performed from a strategic perspective—designed to defend existing practices and to persuade

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ASPIRATIONAL

- Two Types:

  - Public Relations

    - Making the organization look good with a given audience

  - Establishing a Specific Pay Equity Profile

    - Designed to ensure that a certain level of pay equity is established by gender and/or race/ethnicity after accounting for relevant objective quantifiable factors
    - Uses the regression models to guide employer pay adjustments to achieve overall compensation parity by gender and race/ethnicity

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DRIVERS OF INVESTIGATIVE AND DEFENSIVE ANALYSES

Federal Pay Equity Laws

State Pay Equity Laws

**Pay Reporting and
Pay Transparency
Laws**

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FEDERAL PAY EQUITY LAWS – EQUAL PAY ACT

- Gender only

- Employees working at same establishment

- On "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."

- Differences in pay permitted:
  - Seniority system
  - Merit system
  - Quantity or quality of production
  - ANY OTHER FACTOR OTHER THAN SEX

- Two-year limitations period; three year for willful violations

- Remedy=lost wages plus liquidated damages equal to lost wages if violation was willful/lacked good faith

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FEDERAL PAY EQUITY LAWS – TITLE VII
LEDBETTER FAIR PAY ACT

- All categories protected by Title VII (race, color, religion, sex, national origin)

- Disparate treatment – discriminatory compensation or other practice

- Occurs when decision/practice is adopted, when individual becomes subject to decision/practice, when individual is affected by application of decision/practice

- 180- or 300-day limitations period; can reach back to older decisions/practices if affecting pay with 180/300-day limitation period

- Remedy from up to 2 years prior to filing of charge to present

- Punitive/compensatory damages (maximum of $300,000 for employers with 500 or more employees)

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FEDERAL PAY EQUITY LAWS – TITLE VII
OTHER TITLE VII DISCRIMINATION THEORIES?

- 2006 OFCCP Standards (as a reference point, only)

- Similarly situated employee groups

- Regressions controlling for business-relevant, job-related explanations

- Pay disparities?

- Disparate impact

- Comparable worth

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STATE PAY EQUITY LAWS

- Most states have equal pay laws; most frequently similar to federal Equal Pay Act (typically encompass protected categories other than gender)

- Notable alternate approaches:
  - California
    - Uses <u>bona fide factor</u> other than sex rather than federal EPA's <u>any factor</u> other than sex
    - <u>Entire wage differential</u> must be explained by one or more of the permitted factors
  - Massachusetts
    - Education, training, or experience if reasonably related to particular job
    - Safe harbor for employers who commence self-evaluation of pay practices within 3 years prior to commencement of action and can demonstrate reasonable progress toward eliminating pay differential
    - Can avoid liquidated damages even if evaluation was not reasonable in detail and scope
    - No negative inference for employers who do not conduct self-evaluation

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STATE PAY TRANSPARENCY LAWS

- Many states require employers to post or provide salary ranges
  - In job postings
  - Upon request

- Anti Pay Secrecy Laws
  - Discussion among employees
  - No retaliation

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STATE PAY REPORTING REQUIREMENTS

- California
  - Annual reporting required - modelled after EEO-1 Component 2
  - Required from employers with 100 or more employees in US and at least one employee in California
  - Publicly release aggregated data from reports

- Illinois
  - Employers with 100 or more employees in Illinois must apply for an Equal Pay Registration Certificate
    - Recertification is required every two years
  - Employers must report individual employee demographics, wages, and hours
  - Illinois may deny an application if the data shows the employer is paying unequal wages based on gender or vis-à-vis African-American employees
  - Employees can request anonymous data on pay for their job classification or title

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DRIVERS OF ASPIRATIONAL ANALYSES

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DRIVERS OF ASPIRATIONAL ANALYSES

- Public Relations

- Civil Rights Advocacy Groups

- Shareholder Pressure/Demands

- Basic Desire to Have Similar Pay For Employer's Workforce Across All Gender and Race/Ethnicity Groups

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REGRESSION ANALYSIS
v COHORT ANALYSIS

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REGRESSION ANALYSIS

- Best fit for corporate responsibility/public relations-driven exercises
- Best fit for aspirational pay equity where employer determines ahead of time what factors will affect pay and how those factors will be applied to its workforce
- Can be, but far from always, a good approach for managing litigation risk
- Most often will still require factual follow-up on flagged areas
  - Almost always will be non-quantifiable factors that can and should be relevant to how employees are paid

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COHORT ANALYSIS

- Most amenable to small data groups or when resources for project are limited
- Emphasis is placed on researching explanations of areas flagged rather than the methodology of how/when differences are flagged
- Better than a seemingly more rigorous analysis if don't have resources or ability to do the more rigorous analysis fully and thoughtfully
- Often necessary as a follow-up step even when using regression analysis

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RUNNING A REGRESSION ANALYSIS

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INITIAL CONSIDERATIONS

- Running Race/Ethnicity Analyses

  - "Base" Race/Ethnicity Groups

    - Against "Most Favored" Group
      - Often will be a different group between the uncontrolled average and the controlled regression analysis

    - Run against multiple base race/ethnicity groups
      - More complete
      - Anticipates that there will be differences on occasion between most favored in uncontrolled look and most favored in controlled regression analysis
      - Most favored group will not be the same for each pay analysis group

- Identifying Control Variables - What Factors Affect Pay?

  - Is information available in a database?
  - If not, is it possible to get it into a database?
  - If important factors can't be included in analysis, need to research those before making any conclusions about your pay practices
  - Different factors relevant for different groupings

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PAY ANALYSIS GROUPS, DEPENDANT VARIABLES, DEMOGRAPHIC GROUPS

- Potential Pay Analysis Groups (also can combine two or more)
  - Job Title
  - Job Family
  - Job Sub-Family
  - Job Function
  - EEO Category
  - Pay Grade/Level/Band

- Dependent Variables (what you are analyzing)
  - Base Pay (annualized)
  - Bonuses
  - Total Compensation

- Demographic Groups
  - Gender
  - Race/Ethnicity

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CONTROL / EXPLANATORY VARIABLES

- Structural

  - Job Family
  - Job Sub-Family
  - Job Function
  - Job Type
  - EEO Category
  - Pay Grade/Level/Band
  - Comp Structure Mid Point
  - Job Title
  - Geographic differential
  - Department

- Length of Experience

  - Time in Job
  - Time in Grade/Level/Band
  - Overall Tenure
  - Prior Relevant Experience
  - Age (as a proxy for overall experience)

- Others

  - Performance Ratings
  - Job Skills
  - Certifications

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CONSIDERATIONS IN CHOOSING PAY ANALYSIS GROUP

- Large enough to be amenable to regression analysis
  - At least 30 employees
  - At least 5 employees in each comparator demographic group

- Grounded in employer's compensation structure and how it determines pay and defines peer employees

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DEALING WITH INDICATOR VARIABLES

- Need to have enough observations of each separate variable within the given pay analysis group

  - Ordinal variables – can combine neighboring variables to ensure sufficient observations

  - Non-ordinal variables – code variables with insufficient observations as "Other"

- May be a continuous variable that can be used as substitute

  - i.e., use salary range midpoint as one continuous variable rather than each salary range level as separate indicator variables

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HANDLING LENGTH OF EXPERIENCE VARIABLES

- Typically, three levels of experience
  - Time in job or grade
  - Time with employer
  - Age or overall experience

- Make the levels mutually exclusive
  - Time in job
  - Pre-job time with employer
  - Pre-employer experience

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HANDLING MISSING DATA

- Check to see if it can be obtained relatively easily

- Indicator variable to account for instances where data is missing

- Exclude variable from analysis

- Exclude employee from analysis

- Use statistical software to impute missing values

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PUTTING IT ALL TOGETHER

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INTERPRETING THE RESULTS

- Standard Deviations
  - 1.96 standard deviations (p-value <= 0.05%) is considered statistically significant

- Coefficient
  - Percentage difference in pay between the given gender/race/ethnicity group and the regression model base gender/race/ethnicity group after accounting for the factors in the regression model

- Adjusted R-Squared
  - What proportion of differences in pay are accounted for by the factors used in the regression model

- Residual
  - Difference between the employee's actual pay and the employee's predicted pay using the regression model

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ACTION PLAN WHEN STATISTICAL INDICATORS FOUND

INVESTIGATORY

- Subdivide pay analysis groups into smaller sub-groups to better pinpoint where issue is
- Identify statistical cohorts (regression predicts similar pay) and investigate employee differences
- Investigate statistical outliers (employees with greatest difference between actual pay and pay predicted by regression model)

NEXT STEPS

- Revise regressions based on insights from investigation
  - Refined pay analysis groups
  - New variables
  - Different use of existing variables
- Document if clear objective, job-related factual scenarios that explain flagged areas
- Pay adjustments

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INVESTIGATING AREAS WITH STATISTICAL INDICATORS

- Who?

  - Cohort employees

  - Regression model outliers
    - post-estimation residuals

- What?

  - Factors that weren't accounted for in the regression

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MAKING PAY ADJUSTMENTS

- Approach
  - Individualized
  - Formulaic
    - Using regression coefficient to establish budget
    - Using regression coefficient to determine percentage adjustment for affected group
    - Using regression post-estimation residuals to determine which employees should get adjustment
    - Using regression post-estimation residuals to determine pay adjustment amounts
- Process
- Communication?
- Timing
  - Blend into merit cycle
  - Over how many cycles?

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OTHER DISCUSSION TOPICS

- Common Problematic "Long Term" Explanations
  - Tight Labor Market
  - Company Mergers
  - Restructuring

- Analytical
  - Interactions
  - Non-linear relationships
  - Subdividing continuous variables to reflect changing impact on pay at different levels

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