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# **Employment Law Report**

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# “We Don’t Have a Pay Equity Issue”

Two things I can tell you about myself, generally:

1. I am an optimist.
2. I believe that, in general, people want to do and try to do the right thing.

When it comes to questions of equal pay, I’m here to adamantly tell you that:

1. Optimism will get you in trouble.
2. Doing the right thing isn’t enough.

How’s that for a downer?! Unfortunately, it’s true. I talk to a lot of people about pay equity. And, when I ask what people are doing to ensure compliance with pay equity laws, the most common response I hear is some form of “we don’t have an equal pay issue.” This is what I hear most often and most often it’s unjustified. It’s unjustified because people base their optimism on the fact that there’s no discriminatory animus. But, an employer can still violate equal pay laws without having discriminatory animus. In some states, an employer will be in violation of equal pay laws unless the employer can substantiate differences in pay using very narrow and very specific bases.

I encourage you to give genuine consideration to your organization’s pay practices. If your first inclination is to say “we don’t have an equal pay issue,” ensure you understand the full scope of the laws that impact you. It’s complicated, especially for organizations that operate in multiple states. Here’s a sampling of some laws that speak to pay equity:

- **The Equal Pay Act**, which is now decades old, prohibits gender-based wage discrimination between men and women who perform substantially similar job.
- **Title VII of the Civil Rights Act**, which prohibits as discriminatory differences in compensation based on sex, race, color, religion, national origin, age, disability, and genetic information.
- **Executive Order 11246** prohibits certain federal contractors from discriminating in employment decisions on the basis of gender.
- **The EEO-1 Report**, due March 2018, now requires that employers provide summary pay data.
- **Every state** (except Alabama and Mississippi) has a state-specific pay equity law. States like Oregon and Massachusetts have recently created more stringent laws.
- **State laws are becoming more broad and more stringent.** In some states, employers are prohibited from asking about a candidates prior salary (MA and CT, for example). In other states (and according to the NLRA) employers may not prohibit employees from discussing wages and may not discipline an employee for inquiring about others’ wages or disclosing information about his/her own wages. Some states (like Maryland) broadly define location and suggest that employees working in different cities and counties should be compared to one another. Some states provide very narrow and specific permissible bases for differences in pay. And, others (like Oregon) require that pay not only be equal on the basis of sex but equal across all protected classes.

The laws in this area are complicated and often extremely unforgiving. We can help.

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# Here Is What An Equal Pay Problem Looks Like

I thought I would bring things back home to Boston to take a look at the high profile equal pay lawsuit playing out between the Boston Symphony Orchestra and its principal flutist.

In July 2018, the BSO's long-time principal flutist, Elizabeth Rowe filed a gender discrimination lawsuit against the BSO seeking \$200,000 in back pay. For those wondering how equal pay claims under the new Massachusetts Equal Pay Act will play out, this case is instructive. For those hoping a case will be published that will give employers some guidance on how to interpret the new law, don't hold your breath. Rowe's case goes to mediation this week where a confidential settlement may be reached.

According to the Washington Post, Rowe's lawsuit came after years of appealing privately to BSO management about the roughly \$70,000 pay disparity with John Ferrillo, the orchestra's principal oboist. According to Rowe, she is paid less because of her gender.

Under the Massachusetts Equal Pay Act, men and women must be paid equally for comparable work.

The BSO's position is that the flute and oboe are not comparable because, in part, the oboe is more difficult to play, it tunes the orchestra, and there is a larger pool of flutists. Gender, according to the BSO, "is not one of the factors in the compensation process at the Boston Symphony Orchestra."

However, the Washington Post's highlights another factor that likely weighed heavily in the disparity between Rowe and principle Oboist John Ferrillo's wages.

When the BSO approached Ferrillo to fill its oboe vacancy, he was a prized member of the Metropolitan Opera Orchestra. In 2001, to land Ferrillo, the BSO paid him twice what the orchestra's rank-and-file make. That salary, now \$314,600, became public as part of the BSO's tax filing.

Anyone who has ever hired knows that market conditions and an individual's ability to negotiate often weigh heavily in starting salaries. A highly sought after candidate who has other job offers or already holds a high paying position can command a much larger starting salary. However, herein lies the trap for unknowing employers.

Under the Massachusetts Equal Pay Act, market factors or an employee's ability to negotiate are not factors upon which an organization can rely on to account for pay disparities. In fact, differences in pay for comparable work are only acceptable when they are based on one of the following factors:

- A seniority system (that is not affected by pregnancy, parental, or family leave).
- A merit system.
- A system measuring earnings by quantity or quality of production, sales or revenue.
- Geographic location.

- Education, training or experience (as long as reasonably related to the particular job in question).
- Travel that is a regular and necessary part of the job.

This limitation may explain why the BSO has taken the position that the oboe and flute are not comparable. If they are comparable, the BSO would be in the position of having to demonstrate that the pay disparity was based on one of the above permissible factors.

According to the Washington Post, when Rowe joined the BSO in 2004, she asked to be paid the same salary Ferrillo had negotiated. The orchestra turned her down. Rowe eventually accepted the BSO's offer, but over the next 14 years, she regularly asked to be paid the same as her male colleague.

In her suit, Rowe alleges that the orchestra ignored her and retaliated when she continued to demand a raise, even pulling an invitation to be interviewed by Katie Couric for a National Geographic TV special on gender equality.

The BSO's claim that the oboe and flute are not comparable is worth taking a closer look at. According to the BSO, the oboe is "second only to the concertmaster (first chair violin) in its leadership role" and is "responsible for tuning the orchestra." The limited pool of great oboists, the BSO said, "gives oboists more leverage when negotiating compensation."

This claim, that a position that is in extremely high demand, with a limited pool of candidates is not comparable to a position with more candidates does not appear to me to be a particularly strong argument. However, this is a new law; and judicial decisions in cases like these are how we learn to assess risk. If the case does not settle, it will be interesting to see how far this argument takes the BSO.

Many of our clients found that they avoided an equal pay problem when they worked with us under one of our equal pay audits. We stand ready to help!

# The Grinch: AKA an HR Attorney at the Holidays

The holidays are lovely. The time with friends and family, the holiday lights, the thoughtful gifts, the songs, the cookies. But, I'm writing today in my official capacity as the Grinch. You HR professionals likely know exactly what I mean by this. You hear the "really fun idea" for an office holiday party and can't help but think of the related issues. So, instead of gaily donning your ugly holiday sweater, you're fretting about risk.

Here are a few practical tips for how you can minimize your Grinch, minimize HR-related risk, and maximize your inner Cindy Lou:

- Be inclusive. Don't assume that everyone celebrates Christmas. You don't need to pretend that Christmas doesn't exist, but don't pretend as if it's the only December holiday.
- Set holiday party expectations. If your company is hosting a holiday party, clearly communicate expectations to employees in advance. These could include: dress code, alcohol consumption, non-employee attendees, and whether the party is or is not part of the work day.
- Be proactive about safety. If your company is hosting a holiday party, consider ways you can ensure employee safety and reduce liability. Maybe you use drink tickets. Or, maybe you flex your expense reimbursement policy to allow for reimbursement of taxis/uber rides the day of the holiday party.
- Gift giving. Ensure that any manager who gives a gift to his/her employees is giving a work-appropriate gift. Set expectations as to whether managers can submit for reimbursement of money spent on gifts.
- Receiving gifts. Establish a conflict of interest policy/gift policy that speaks to whether an employee can accept a gift from an outside party. Coach employees on how to handle gifts that exceed nominal value.
- Consider different employee populations. If you close the office early on Christmas Eve, for example, will hourly employees be paid for this time? What about retail or clinical employees vs administrative employees? Consider how different holiday-related decisions impact your different employees and determine an appropriate approach that can be communicated to managers for consistent application.

To all of you Hoos in Whoville, Happy Holidays. See you in 2019.

# 2018 Goes Out Like a Lion

Is it me, or has the last quarter of 2018 been a head spinner? Blink, and the Affordable Care Act is unconstitutional. Or is it? What does that even mean?

## ACA

If you haven't heard, an appellate judge in Texas decided the ACA, without the individual mandate is unconstitutional. The two-second takeaway for all of us is that nothing changes - yet. The decision has been appealed, and it seems likely it is headed to the Supreme Court. And, of course, there is a Democratic majority in the House beginning in January. One way or another, this particular drama will continue to unfold in 2019. But for now, we stay the course.

## New H1-B Visa Rules

Speaking of drama that will continue into 2019, On December 3, 2018, the Department of Homeland Security (DHS) issued a [Notice of Proposed Rulemaking](#) (NPR) proposing to amend several of its regulations governing the filing and selection processes for cap-subject H-1B petitions. Written public comments must be received by January 2, 2019.

The proposed rulemaking particularly focuses on:

- Creating an H-1B registration program for cap-subject petitions.
- Altering the selection process if the DHS receives more H-1B registrations than there are available H-1B visas.

The proposed electronic registration process would start no later than March 18, 2019, the date on which H-1B petitions generally can be filed for the new fiscal year (which begins October 1). The registration period would last at least 14 days. In finalized, the electronic registration would be mandatory and conducted through the USCIS website.

Employers should consult the USCIS website beginning in February for more information.

## MA Paid Family Leave

In more local news, we continue to move toward Paid Family Leave here in Massachusetts. The newly created Department of Family Medical Leave now has a website you may want to bookmark: <https://www.mass.gov/orgs/departments-of-family-and-medical-leave>. They have already posted an Employer FAQ, and further announcements are expect in Q1 2019.

Finally, we would like to wish you a Happy New Year.