

IS THE GOOGLE EQUAL PAY CASE THE NEXT HARVEY WEINSTEIN?

Is this the year of the woman? The decade? The century?

Women have dominated the headlines by demanding an end to decades' long mistreatment and seeking a reckoning for workplace harassment and discrimination. The Me Too campaign grew out of Hollywood's sexual harassment epidemic. Me Too slowly trickled down from Hollywood through all other industries. The Times Up campaign followed in quick succession. Times Up grew out of Hollywood's chronic pay gap. While these efforts have monopolized the headlines for months, the fight for fair pay outside of Hollywood, and inside of the office and boardroom has quietly been heating up in a putative class action brought against one of the world's largest technology companies, none other than California's own Google, Inc.

Plaintiffs dive into Google's corporate headquarters to expose what Plaintiffs claim is a systemic and intentional scheme to control base salary, pay raises, assignments and promotions directed at underpaying women. Plaintiffs accuse Google of maintaining and implementing a centralized policy and practice of mischaracterizing women's job functions as inferior to men and then intentionally paying them less based on Google's consideration of the women's prior salary. [Of course, California has now outlawed asking about employees' former salary to avoid such perpetuation of such pay gaps.]

Three former Google employees filed a lawsuit on September 14, 2017 in which they alleged violations of California's Equal Pay Act, codified in Labor Code Section 1197.5. The Equal Pay Act presently requires equal pay for employees who perform substantially similar work when viewed as a composite of skill, effort and responsibility. The 2016 Amendment to the Equal Pay Act also prohibits employers from relying on the employee's prior salary to justify a sex-based difference in salary. The amendment was needed, in part, because employers shrouded employees' salary and bonuses in secrecy; thus, if a pay gap existed, the reasons for such a gap were often attributed to discriminatory or other wrongful motivations. If liable under the Equal Pay Act, Plaintiffs may recover the pay differential plus an amount equal to the pay differential as liquidated damages and attorneys' fees. In the Google action, the plaintiffs allege that Google systematically violates the Equal Pay Act by assigning women to lower salary levels than men upon hire. The complaint alleges that Google perpetuates a salary gap throughout the women's employment because all Google salary increases are tied directly to that employee's initial salary level. Google demurred to the complaint and challenged the class action allegations. The demurrer was sustained with leave to amend due to Plaintiffs' failure to identify an ascertainable class. The class was defined as "all women employed by Google in California during the applicable class period." In sustaining the demurrer, the Court also concluded that Plaintiffs relied excessively upon the Federal Contract Compliance Program study of Google's pay practices which concluded that Google paid women less across the board. In sum, the Court concluded that the class definition and the OFCCP conclusions were too vague to adequately define an appropriate class. The Court also determined that the Plaintiffs failed to state a claim for violation of the Equal Pay Act because they did not adequately allege that the work they performed was equal to that of their male counterparts and

that their pleading was conclusory (pleading that the women performed substantially similar or equal work) or based on an irrelevant standard (here that the qualifications and skills required to perform the jobs in question are equal or substantially similar) versus the proper standard that Plaintiff performed work that was equal to those performed by her male counterparts.

On January 3, 2018, Plaintiffs filed an amended complaint. The First Amended Complaint added a fourth named Plaintiff and revised the class definition to include 31 covered positions that fall into six separate job categories, each of which Plaintiffs allege included women that were paid less than men and who were destined to earn less than their male counterparts because of Google's compensation policies. Google has once again demurred to the complaint, this time arguing that the representative plaintiffs did not work in two of the job categories, and that the intentional discrimination claim which Google claims are inherently individual and thus not appropriate for class treatment. The demurrer will be heard on March 26, 2018 at which time San Francisco Complex Court Judge, Mary Wiss, will rule on whether the Google class action will proceed.

The First Amended Complaint appears to address the Court's concerns by identifying a significantly narrower class definition which may make the class members ascertainable under the law. Similarly, the amendment attempts to explain the UFCCC study, its purported findings of a pay gap at Google and the alleged application of the UFCCC study to the lawsuit. The amendment states that the four plaintiffs were paid less than men in the same job and salary level. The amendment also states that Google routinely placed women with the same qualifications and experience as men in lower salary levels and different job families which resulted in the pay gap. The new demurrer continues the attack on the class definition and on the allegedly inappropriate intentional discrimination claim. We believe the court will resolve these remaining issues on this round of the pleadings when the demurrer is heard on March 26, 2018.

This case might be the watermark for what could eventually be considered the Decade of the Woman. If the class action is certified, ramifications from the case will trickle down into every business, large or small, that employs men and women. With help from the California legislature, equal pay for women is a public policy in California and failure to comply with California's public policy will pack an expensive punch.

Equal Pay claims in California are inevitable. With that inevitability will come the planned and panicked calls for advice. Businesses will ask: How can we protect ourselves from an Equal Pay claim? How can we defend against the Equal Pay claim we are facing if the Google class is certified? Colleagues will ask: How do we advise our clients on safeguarding against Equal Pay claims if there is a pay gap between male and female comparator employees? How can we defeat single plaintiff and potential class actions if they are brought against our clients? How can we shepherd our clients into bringing their pay policies into compliance with California law? The following strategies may help employers and practitioners.

First: Create Job Descriptions. Job descriptions help identify the day to day responsibilities of employees with the same job title. Ensure that the job descriptions are clear for each position and that they differ from other jobs such that a complainant may argue that job title should be disregarded because the daily tasks are similar or identical. Tip: When defending EPA claims one should look beyond the job title that the two employees share and evaluate actual job functions performed by each of the comparators. Focusing on the differences may convince a judge or jury that the two employees are not true comparators.

Second: Do Not Ask Prospective Employees About Prior Salaries: California outlaws this practice. If an employee's salary is based on his or her former salary, a lookback may be necessary if that employee was underpaid compared to a male counterpart solely based on a lower former salary. Tip: Carefully review salary increase and bonus policies that are related to an employee's original salary. While it may not be necessary to increase a lower salary, if salary increases or bonuses are tied directly to the original salary, like they are at Google, courts may now place an affirmative duty upon employers to narrow or eliminate the pay gap it knows exists.

Third: Ensure That Your Compensation Practices Are Gender Neutral. Compensation decisions that are based on seniority, merit, quality or quantity of annual production or other bona fide distinctions between male and female employees that do the same or similar jobs will generally be upheld by a court. Tip: If your compensation practices cannot be applied to all employees, examine why some employees are treated differently and consider a new policy that treats male and female employees alike.

Fourth: If Two Otherwise Comparable Employees Are Paid Differently, Document The Justification For The Different Pay. Sometimes, there are legitimate business reasons for paying comparable employees differently. Tip: If the pay gap is appreciable, the prudent business practice is to document the gender neutral reasons for the difference.

Fifth: Keep An Open Mind If An Employee Raises An Issue Of Equal Pay. If you receive an inquiry from an employee or supervisor, consider an agreement to review the employee's pay and address any differential that you may find. Tip: If a violation is found, remain transparent with the complaining employee and explain the decision and the reasons for it.

Employment laws in California have been developing over a period of 25 years. Fair Pay is destined to be the new go to claim, particularly because of the ability to recover double damages plus attorneys' fees. The Google class action and those that follow will undoubtedly result in a body of case law that may provide a road map for employers and practitioners to navigate the ever-changing discrimination laws. Keep a close watch for more news in the Google matter in late-March.