Chapter 4
Regulatory and Legal Considerations Regarding Salary Equity

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Gender-based pay disparities and legislative efforts to redress them are not new phenomena. In 1870, the US Congress passed a bill that prohibited gender pay discrimination for new clerks in federal jobs [1]. (The law was rarely enforced [2].) In 1942, the National War Labor Board adopted General Order No. 16, which mandated that employers pay equal compensation to women hired to replace male workers conscripted to fight in World War II [3]. In 1945, when the War Labor Board was dissolved, the Women's Equal Pay Act, which would have prohibited employers from paying women less than men for work of "comparable quality and quantity," was introduced [4]. It did not pass.

The federal gender discrimination and pay equity laws in effect today were enacted in the civil rights era. In 1961, President John F. Kennedy established the Presidential Commission on the Status of Women, which was charged with developing recommendations for achieving pay equity (and chaired by Eleanor Roosevelt) [5]. As Arthur J. Goldberg, Secretary of Labor, observed in congressional hearings that followed:

> The origin of the rate differential for men and for women performing comparable jobs is the false concept that a woman intrinsically deserves less money than a man. This outmoded concept, rooted in a psychological downgrading of women's skills, has been amply demonstrated to be false in every field of endeavor, and we simply cannot afford to give it credence in this modern space age. It is indefensible from every standpoint. To state this concept should suffice to refute it, but this has not proven to be true. Discrimination in wage payment on the basis of sex continues to exist, and this subcommittee is performing an invaluable public service in publicizing its extent and its complete lack of justification [6].

In 1963, Congress enacted the Equal Pay Act (EPA), which requires employers to pay to men and women in the same workplace equal pay for equal work [7, 8]. The Education Amendments of 1972 significantly broadened the reach of the EPA,

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making it applicable to executive, professional, managerial, and administrative jobs, which had previously been excluded [9, 10].

In 1964, Congress enacted the Civil Rights Act of 1964, Title VII of which bans employers from discriminating on the basis of race, color, religion, sex, or national origin, except where sex is a bona fide occupational qualification for the job [11]. (Given the critical role Title VII plays in pay equity litigation, it is somewhat ironic that the category "sex" was not originally included in the proposed bill but was added as an amendment at the last minute, according to some in an attempt to prevent its passage [12, 13].) In 2009, Congress enacted the Lilly Ledbetter Fair Pay Act [14] to reverse a decision of the US Supreme Court, *Ledbetter v. Goodyear Tire & Rubber Co., Inc*. [15], that had severely limited Title VII's protections by narrowly construing the law's statute of limitations in pay disparity cases.

The EPA and Title VII, both as amended, are the bedrock federal laws prohibiting gender-based pay disparities and retaliation against those who object to them. Both laws apply nationally, although the contours of the protections of each law may vary by federal circuit unless the Supreme Court has ruled on an issue.

Virtually every state has also enacted laws to prohibit gender discrimination and gender-based pay disparities. As set out more fully below, many of them provide more expansive and robust protections than those set out in the federal laws: by covering more businesses and organizations in the definition of "employer," for example, or by providing for more severe penalties. Plaintiffs (i.e., aggrieved persons advancing claims in litigation) may advance both state law claims and federal claims in litigation.

Chapter Overview

- Section I of this chapter will outline the EPA and Title VII and provide a primer on the legal elements necessary to establish claims under both laws (including retaliation claims), identify the defenses available to employers, and highlight their differences and strengths. (*Although Section I provides an overview, these laws are much more complicated than can be conveyed in a single book chapter. This information should not be construed as legal advice.*)
- Section II will review select state laws.
- Section III will identify special laws governing financial relationships between healthcare institutions and entities that provide designated health services and how they potentially impact physician compensation via safe harbor provisions, as well as IRS regulations governing a healthcare institution's 501(c)(3) status. (*Although Section III also provides an overview, these laws are much more complicated than can be conveyed in a single book chapter. This information should not be construed as legal advice.*)
- This chapter will conclude, in Section IV, with a warning and recommendation to employers: conduct an audit and find a way to fix gender-based pay inequities now. The risk of doing otherwise is significant, and liability can be staggering.

A Primer on Federal Law: The Equal Pay Act and Title VII

The Equal Pay Act (EPA)

The EPA provides that:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex [16].

To prevail on a claim for violation of the EPA, a plaintiff must prove that the employer employed the plaintiff and a male employee in the same establishment [17] in jobs requiring substantially equal skill, effort, and responsibility [18]; that the two jobs are performed under similar working conditions; and that she [19] received less total compensation [20] than a male employee doing substantially equal work [21]. The jobs need not be identical, but the content of the jobs must be "substantially equal" – a fact-specific inquiry that has caused considerable litigation [22]. *Critically, a plaintiff need not establish the employer had an intent to discriminate* [23]. Note that if the lower-paid job requires *greater* skill, effort, or responsibility than is required for the performance of the more highly paid job, the EPA may still apply; the fact that the two jobs are not substantially equal will not render the EPA inapplicable in these circumstances [24].

Even if a plaintiff is able to establish all of the required elements of her Equal Pay Act case, an employer may nevertheless defeat her claim by proving one of four affirmative defenses: that the pay differential is attributable to (i) seniority, (ii) merit, (iii) quantity or quality of production, or (iv) "any other factor other than sex" [16]. An employer must submit evidence from which a reasonable fact finder could conclude that the proffered reasons *actually* motivated the wage disparity – not just that the reasons could justify it.

The vague category "any other factor other than sex" has been particularly troublesome, as employers have used it to justify salary disparities on the basis of, among other things, "market forces" [25] and factors not adopted for legitimate business reasons [26, 27]. The circuit courts of appeal are split as to whether employers can rely solely on a female employee's prior salary as an "any other factor other than sex" affirmative defense [28]. In March 2019, the House of Representatives passed a new law, the Paycheck Fairness Act, to ensure that employers relying on the "factor other than sex" defense may not pay men and women doing substantially equal work different wages unless the wage differential is justified by a job-related reason, such as education, training or experience, and consistent with business needs [29, 30]. It is not clear if the Act will pass the Senate or be signed into law.

The fact that the employer has asserted an affirmative defense is not fatal to a plaintiff's EPA claim; she may nevertheless prevail if she rebuts the affirmative defense, which she can do by demonstrating that the defenses are "pretextual" – i.e., an illegitimate justification for a gender-based differential rather than a real and legitimate reason for the pay disparity (and often a post hoc effort to explain/justify a gender-based differential) [31]. The defendant at all times retains the burden of proving a legitimate reason for the discrepancy in pay [32].

Retaliation

The EPA also provides a cause of action for retaliation, making it unlawful "to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding …" [33]. Oral complaints are sufficient to trigger anti-retaliation protections of the EPA [34]. Although the Supreme Court has not decided whether the EPA's anti-retaliation provision applies to complaints made to the employer rather than the government [35], a number of federal courts of appeal have held so, concluding that the law should be construed broadly [36].

Retaliation claims are generally easier to prove than discrimination claims, as a plaintiff need not establish the elements of the equal pay claim itself, and the affirmative defenses are not implicated. Rather, *a plaintiff need only establish that she engaged in protected activity (i.e., complained about pay inequity), the employer took materially adverse action against her, and causation* [37]. Causation may be inferred when the adverse employment action closely follows the protected activity; if there is a significant delay, causation may be established with other evidence such as continuing animus or inconsistent or shifting explanations [38].

Coverage, Statute of Limitations, and Collective Action

The EPA applies to virtually all employers, regardless of size [39]. A claim must be filed within two years of the discrimination/retaliation or three years in the case of a "willful" violation, but *a claim arises each time an employee receives lower pay than male employees doing substantially similar work – i.e., every paycheck* [40]. Significantly, under the EPA, "similarly situated" employees have the right to pursue their claims as a "collective action" [41]. Because multiple plaintiffs are involved, the liability employers face can be substantial: two recent EPA collective action cases settled for $8.2 million and $19.5 million, respectively [42]. The attention drawn to gender-based pay inequity by the collective EPA (and Title VII) action brought by the US National Women's Soccer Team against the United States Soccer Federation, Inc. is likely to encourage more EPA actions, collective and otherwise [43].

Damages

Under the EPA, a prevailing plaintiff is entitled to recover the pay that she should have received for equal work, doubled as liquidated damages [44]. (As noted above, particularly in a collective action, these damages quickly add up.) The damages recoverable for a retaliation claim are greater, including employment, reinstatement, promotion, the payment of wages lost, and an additional equal amount as liquidated damages [45]. There is a split in the circuits as to whether punitive damages may also be awarded for a retaliation claim [46]. Attorneys' fees will be awarded to a successful claimant for both an equal pay and a retaliation claim [41]. In addition to the employer, an individual (e.g., an owner or officer) may also be personally liable for a gender-based pay disparity if s/he had the capacity to exercise control over the plaintiff [47].

The Road Ahead

The Equal Employment Opportunity Commission (EEOC) has, since 2012, included equal pay protections as one of its substantive area priorities that guide its enforcement activities [48]. Consistent with that priority, in 2016, the EEOC began to require employers to provide information about pay data in its EEO-1 reports, to be better able to track pay disparity [49, 50]. The EEOC has also started to prosecute lawsuits specifically aimed at gender pay equity [51]. Private attorneys are increasingly litigating EPA cases: one management-side employment law firm that monitors the number of gender discrimination cases filed nationally reports that since 2016, over 250 pay equity cases have been filed in the United States [52].

Title VII

Title VII makes it "an unlawful employment practice for an employer … to discriminate against any individual with respect to … compensation" *because* of sex [53]. In other words, a Title VII plaintiff (unlike an EPA plaintiff) must prove intent. She may do so using direct evidence (which typically consists of "clearly sexist, racist, or similarly discriminatory statements or actions by the employer" [54, 55] that make animus explicit) or indirect evidence, which allows a jury to infer that gender bias is motivating the pay disparity. Since overtly discriminatory statements are rare in most workplaces, most Title VII plaintiffs rely on indirect evidence.

In *McDonnell-Douglas Corp. v. Green*, the US Supreme Court articulated a framework to help courts and jurors evaluate cases in which plaintiffs have only indirect evidence of discrimination [56]. Under this three-stage framework, plaintiffs must establish a *prima facie* case of discrimination; defendants must then offer a legitimate, nondiscriminatory reason for the pay disparity [57]; and plaintiffs must then establish intent to discriminate [58, 59].

To establish her *prima facie* case, a Title VII plaintiff must show she is paid less than a member of the opposite gender in a similar job [60, 61]. Her comparator need not be in an equal job, but he must be "similarly situated in all relevant respects" [62], a burden that is not all that much lighter. The employer's obligation to articulate a legitimate, nondiscriminatory reason for the pay disparity is not a difficult burden [63], and the affirmative defenses to an EPA claim also suffice as legitimate, nondiscriminatory reasons for a Title VII claim [64, 65].

At the third stage, a Title VII plaintiff must show that, regardless of the reasons offered, her employer intentionally discriminated against her. She may do so by showing either that the proffered reason was a pretext for discrimination (i.e., an illegitimate justification) or that her gender was another motivating factor for the decision [66]. An employee can prove pretext by showing the employer's proffered reason was "(1) factually baseless, (2) not the employer's actual motivation, (3) insufficient to motivate the action, or (4) otherwise pretextual" [67].

Retaliation

Like the EPA, Title VII also prohibits retaliation [68]. Its elements are the same: protected activity, materially adverse action, and a causal connection [69].

A cause of action for retaliation under Title VII lies whenever an employer responds to protected activity in such a way "that a reasonable employee would have found the challenged action materially adverse, which in this context means it might well have dissuaded a reasonable worker from making or supporting a charge of discrimination" [70]. There is no requirement that the retaliation is job-related, and Title VII's anti-retaliation protections extend to not only former employees but also certain third parties [71, 72]. To prevail on a retaliation claim, a plaintiff must prove that the unlawful retaliatory act would not have occurred but for the plaintiff's protected activity [73]. A showing that the employer's reasons for its action are pretextual – i.e., illegitimate – can establish "but for" causation [74]. *As with EPA retaliation claims, Title VII retaliation claims are often easier to establish than the underlying discrimination, and a plaintiff may prevail on a retaliation claim even if she does not prevail on an underlying discrimination claim, should she bring one* [75]. Perhaps as a result, the total number of Title VII retaliation charges filed at the EEOC increased 86% from 1997 to 2018, climbing from 16,394 to 30,556 [76].

Coverage, Statute of Limitations, and Class Actions

Title VII's protections apply to employers with fifteen or more employees [77]. An employee seeking to prosecute a claim under Title VII must file an administrative charge within 180 days of the "unlawful employment practice"; however, that deadline is extended to 300 days if a state or local agency enforces a law that prohibits employment discrimination on the same basis [78]. She may also proceed in court,

so long as she has filed the administrative charge and initiates the litigation within 90 days of receiving a right to sue letter [79]. In response to Supreme Court decision holding that a claim of discriminatorily low pay began when the pay decision was initially made, Congress enacted the Lilly Ledbetter Fair Pay Act to clarify "that a discriminatory compensation decision … occurs each time compensation is paid pursuant to the (discriminatory decision)" [80]. *Thus, every discriminatorily low paycheck triggers a statute of limitations* [81].

Title VII claims may be prosecuted in class actions under Rule 23 of the Federal Rules of Civil Procedure. The Supreme Court has heightened the standard that must be met to prove commonality in a Rule 23(b) class action, however, making them difficult to establish [82].

Damages

Damages available under Title VII include lost wages, front pay, compensatory damages, punitive damages, and reasonable attorneys' fees [83]. Title VII caps compensatory and punitive damages between $50,000 and $300,000, depending on the size of the employer [84].

A Comparison of the Equal Pay Act and Title VII and Their Interplay

As noted in the introduction, the EPA was enacted to remedy (just) gender-based pay disparities. The Civil Rights Act of 1964 was enacted in the context of the civil rights movement, to address more wide-ranging discrimination: failure to hire, failure to promote, and wrongful termination, for instance, as well as disparate pay. As a result, although both laws provide remedies for gender-based disparate pay, there are a number of significant differences between EPA and Title VII claims for sex-based wage discrimination. Among other things, the Equal Pay Act does not require proof of intent to discriminate, has no coverage threshold in terms of number of employees, carries a longer limitations period for back pay than does Title VII, and does not require a plaintiff to file an administrative complaint or await the EEOC's conciliation efforts before proceeding in court [85]. And as noted above, an EPA collective action proceeds using a more lenient "opt-in" rules of the Fair Labor Standards Act, rather than the "opt-out" approach used in Title VII class actions. Because of these differences, gender-based pay disparity complaints often allege both EPA and Title VII claims and proceed under both, given the slightly different burdens of each.

Recovery for the same period of time may be had under both the EPA and Title VII so long as relief is not duplicative [86]. In addition, the availability of a remedy under Title VII that would entitle the lower-paid employee to be hired into, or to

transfer to, a higher-paid job does not defeat the right of the lower-paid employee to be paid the same wages as are paid to a member of the opposite sex who receives higher pay for equal work pursuant to the EPA [87].

State Laws

As noted above, many states have for years had analogs to the EPA and Title VII that often provided greater protections and remedies than their federal counterparts [88]. General Law Chapter 151B, Massachusetts' analog to Title VII, for example, applies to employers with six or more employees (not fifteen), imposes strict liability on an employer for the actions of its supervisors, and imposes no caps on punitive damages, among other things [89]. California's anti-discrimination laws apply to companies with five or more employees [90]. Michigan's anti-discrimination law applies to companies with one or more employees [91].

In the face of intractable gender-based pay inequities, however, many states have recently enacted new laws to expand protections and take more forceful steps. According to one law firm that represents primarily organizations (rather than individuals) in employment law matters, since 2016, more than 200 bills addressing pay equity were introduced in nearly every state [52]. The laws have primarily come in three forms: more aggressive pay equity laws, bans on salary history inquiries, and wage transparency laws.

Numerous states have enacted pay equity laws or significantly strengthened already existing laws; among them, Alabama, Maryland, Massachusetts, New Jersey, New York, Oregon, and Washington have enacted or broadened pay equity laws [52]. California's new Fair Pay Act is likely the most robust. It applies to *all* employers with California-based employees [92], allows employees to be compared even if they do not work at the same establishment [93], and requires only a showing that the employees are engaged in substantially similar work, "when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions" [94]. It limits the factors that employers can use to justify pay differentials and mandates that the factors explain the entire pay differential and also creates a private right of action for retaliation under which employees may seek reinstatement, reimbursement for lost wages and benefits, interest, and equitable relief [95].

Laws have been enacted prohibiting employers from inquiring about an applicant's prior compensation history, which are intended to prevent successive employers from using past discriminatorily low compensation to justify pay disparities (i.e., "market forces"). Alabama, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Massachusetts, New Jersey, New York, Oregon, Puerto Rico, Vermont, and Washington have enacted such bans [96, 97]. Several cities/local jurisdictions have also enacted salary history bans: San Francisco; Kansas City, MO; New York City; Albany County, NY; Suffolk County, NY; Westchester County, NY; Cincinnati; Toledo; and Philadelphia (see text box) [98].

Salary History Laws

Laws prohibiting employers from inquiring about an applicant's prior compensation have been enacted and intend to prevent successive employers from using past discriminatorily low compensation to justify pay disparities (i.e., "market forces"). The following states and cities/local jurisdictions have enacted such bans:

Alabama	California	Colorado	Connecticut	Delaware
Hawaii	Illinois	Maine	Massachusetts	New Jersey
New York	Oregon	Puerto Rico	Vermont	Washington

San Francisco, CA	Kansas City, MO	Albany County, NY	New York City, NY	Suffolk County, NY
Westchester County, NY	Cincinnati, OH	Toledo, OH	Philadelphia, PA	

Wage Transparency Protections

Protections prohibiting employers from banning pay disclosure in the workplace and from retaliating against employees who do so have been enacted in the following states:

California	Colorado	Connecticut	Delaware	District of Columbia
Hawaii	Illinois	Maine	Maryland	Massachusetts
Michigan	Minnesota	Nevada	New Hampshire	New Jersey
New York	Oregon	Vermont	Washington	

Wage transparency protections, which prohibit employers from banning pay disclosure in the workplace and from retaliating against employees who do so, have been enacted in California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Hampshire, New Jersey, New York, Oregon, Vermont, and Washington (see text box) [96].

Special Considerations for Healthcare Institutions

Three main laws impact employment arrangements between hospitals and physicians: the Stark Law [99], the Anti-Kickback Statute [100], and the Internal Revenue Code and related guidelines.

The Stark Law generally "prohibits a physician or immediate family member who has a financial relationship with a healthcare organization from making referrals to that entity for 'designated health services' covered by Medicare, unless a specific exception applies" [101]. The Stark Law has an exception for *bona fide* employment arrangements, however, which provides that physicians are permitted to be compensated as employees of hospitals as long as the amount paid to the physician is (i) for identifiable services, (ii) consistent with the fair market value for services performed, and (iii) not determined in a manner that takes into account the volume or value of referrals by the referring physician to the hospital. Further, the remuneration provided under the employment agreement between the hospital and physician must be commercially reasonable even if no referrals were made by the physician to the hospital. The Stark Law is a strict liability statute, and civil penalties may be imposed for violations.

The Anti-Kickback Statute provides criminal penalties for individuals or entities that knowingly and willfully offer, pay, solicit, or receive remuneration in order to induce business reimbursed under the Medicare or state healthcare programs, unless a safe harbor applies [102]. The safe harbor for employment relationships provides that remuneration does not include any compensation paid by an employer to an employee who has a bona fide employment relationship with the employer [103].

Section 501(c)(3) of the Internal Revenue Code exempts from federal income taxation certain nonprofit entities including hospitals. Specifically, a tax-exempt hospital cannot pay more than "reasonable compensation" for services rendered by physicians [104]. Violations of the IRS guidelines may cause a hospital to lose its tax-exempt status [105]. In addition, IRC 4958, the section of the Internal Revenue Code that provides for excise taxes on excess benefit transactions (also known as "intermediate sanctions"), is important when considering physician compensation arrangements [106].

To be compliant with all three laws, compensation paid to physicians by hospitals and health systems must be generally consistent with fair market value and cannot reflect the value or volume of referrals an employed physician may direct to the hospital or its affiliates [107].

A claim for items or services resulting from a violation of the Stark Law or Anti-Kickback Statute constitutes a false claim under the False Claims Act (FCA), which imposes liability on persons and companies who defraud governmental programs [108]. The FCA includes a "qui tam" provision that allows people who are not affiliated with the government to sue on behalf of the government (permitting them to recover a percentage of damages and thereby incentivizing those with knowledge of fraud to report the same); the damages that flow from such claims can be significant. In *United States ex rel. Drakeford v. Tuomey*, for instance, a $237 million judgment was issued where compensation paid to physicians under certain part-time employment agreements violated both the FCA and the Stark Law [109], although the matter eventually settled for (just) $72.4 million.

Given the potentially catastrophic consequences of failing to comply with these laws, institutions should carefully monitor physician compensation and employment arrangements [110].

What Can/Should Employers Do to Address Gender-Based Pay Inequities?

First, conduct an audit. Liability (like potential energy) exists regardless of the audit, and an audit will actually help the organization mitigate its potential future exposure. An internal audit should thoroughly review pay practices, job descriptions, salaries, bonuses, benefits, and the performance evaluation process to identify gender-based (and other) pay inequities and their potential causes, like location, education, seniority, responsibility, and performance. To the extent the organization is not fully committed (or able to commit) to organization-wide redress, the audit should be conducted by counsel, so that it is protected by the attorney-client privilege: otherwise, the disclosure of audit results (particularly if not coupled with the implementation of remedial action, if such remedial action is necessary) risks publicizing the evidence that will support a disparate pay discrimination claim. To the extent the organization is fully committed to organization-wide redress, there may be significant value in conducting a transparent internal audit involving institutional stakeholders, as described in Chap. 5 of this book: transparency can build trust around the organizational commitment to equity and facilitate a new culture that identifies bias and eliminates disparities.

Second, *correct the inequities*. *Documenting awareness of pay inequities based on gender (or any other protected category like race or national origin or age) and failing to correct it increase the risk that an organization will be subjected to punitive damages for knowing disregard of the law*. Reducing disparities will also likely reduce the risk of litigation and will certainly reduce potential damages – perhaps significantly [111]. (Note that in correcting a pay differential, an employer may not reduce any employee's pay. Instead, the pay of the lower-paid employee(s) must be increased [112].) Correcting the inequities has additional benefits beyond reducing risk and liability: research has shown that pay transparency leads to more equitable salary practices [113] and that workers who have access to organizational financial information earn more than those who do not [114]. Research suggests pay transparency may also increase collaboration and productivity [115]. Pay secrecy, in contrast, leads to more disengagement and decreased performance and may "ultimately do more harm to individual task performance … than good" [116].

Finally, although it will undoubtedly require considerable effort, create fair compensation plans (and do so with a careful eye to the Stark Law, the Anti-Kickback Statute, and the Internal Revenue Code). As the American College of Cardiology suggests [117]:

> A fair and equitable compensation plan does not need to create compensation parity, but it should create compensation equity. Every member of the organization – whether a practice, medical group, academic division, or other unit – should have an equal opportunity through the compensation plan to achieve a market-equitable income, applicable performance bonuses, and the resources required to do their specific job well. Plans should avoid undervaluing essential but nonrevenue-producing work, such as educational activities, travel to remote but strategic satellite locations ("windshield time"), committee work, research, and mentoring. Plans must also include consideration of how to balance individual productivity with team-based success, and account for differences in wRVU valuation between proce-

dural and nonprocedural work, while specifying how to appropriately reward different career stages, health risks (e.g., radiation exposure), or those with different work-life balances. For multispecialty groups …, whether employed, practice, or academic, compensation models should be differentiated by specialty in light of unique considerations including but not limited to supply, demand, training, risk and acuity, and job demands. Although many plans are constructed to reward and enhance productivity, an equally important test of the plan is the impact it has on the organizational culture – whether it aligns the members around common goals and milestones. Successful plans will provide multidimensional gains. Once implemented, most, if not all, of the impacted individuals must feel the plan is fairly and equitably applied. The plan must be flexible enough to evolve with changing circumstances in the market or organization without needing a complete overhaul annually. Every plan must be designed to meet local needs, achieve system goals, and fulfill mission-driven values. The plan should retain enough income to cover leadership costs, support underfunded key mission areas, and allow for program growth and development, including reserving funds for unexpected events. Additionally, a good compensation plan helps attract and retain candidates for positions and aligns incentives to achieve the goals of the practice, group, or academic unit. Organizations need to ensure that their compensation models are fluid and reflect industry trends (thus maintaining market competitiveness) while fulfilling legal and compliance requirements. Finally, no formula or approach is perfect, but routine review of individual total compensation under the plan, particularly with an eye to disparities, will help to close any gaps and achieve equal compensation for equal work.

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6. 1 Legislative History of the Equal Pay Act of 1963, Pub. L. No. 88-38, 88th Congress, H.R. 6060 and S. 1409 i (1963), at page 92.
7. Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56, 29 U.S.C. § 206 (June 10, 1963).
8. "Congress' purpose in enacting the Equal Pay Act was to remedy what was perceived to be a serious and endemic problem of employment discrimination in private industry -- the fact that the wage structure of 'many segments of American industry has been based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman

even though his duties are the same.'" *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974) (*citing* S. Rep. No. 176, 88th Cong., 1st Sess., 1 (1963)).

9. Education Amendments of 1972, Public L. No. 92-318, § 906(b)(1), 86 Stat. 235, 375 (June 23, 1972) (removing operation of FLSA exemption of professional employees from EPA).
10. Fair Labor Standards Act (FLSA) of 1938, 29 U.S.C. § 201 et seq. (2006); 109 Cong. Rec. 9193 (1963) (remarks of Rep. St. George) ("All of the [FLSA] exemptions apply; and this is very noteworthy, agriculture, hotels, motels, restaurants, and laundry are excluded. Also all professional, managerial, and administrative personnel[.]")
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14. Lilly Ledbetter Fair Pay Act of 2009. Pub. L. No. 111–2, 123 Stat. 5, (2009).
15. 550 U.S. 618 (2007).
16. 29 U. S. C. § 206 (d)(1).
17. "An 'establishment' is generally defined as 'a distinct physical place of business' instead of a business enterprise. Only in 'unusual circumstances' may 'two or more distinct physical portions of a business enterprise [be treated] as a single establishment.' Such treatment may be appropriate where a central administrative unit hires all employees, sets wages, and assigns the location of employment.'" *Price v. N. States Power Co.*, 664 F.3d 1186, 1194 (8th Cir., 2011).
18. In deciding whether jobs require substantially equal "skill," courts consider factors such as the level of education, experience, training and ability necessary to meet the performance requirements of the jobs. Effort refers to the mental, physical and emotional requirements for performing the job. Responsibility refers to the degree of accountability expected by the employer for a person filling the jobs, as well as the amount of preparation required to perform the job duties. United States Court of Appeals for the Third Circuit. Model Jury Instructions: Chapter 11: Instructions for Sex Discrimination Claims Under the Equal Pay Act. October 2018 [cited December 17, 2019]. Available from: https://www.ca3.uscourts.gov/sites/ca3/files/11_Chap_11_2018_Oct.pdf.
19. Although enacted to prohibit sex-based wage discrimination against women, the language of EPA is gender neutral and thus also protects men. *See, e.g., Board of Regents v. Dawes*, 522 F.2d 380 (8th Cir. 1975) (paying women more than men for substantially equal work violates the Equal Pay Act). Nevertheless, for purposes of this chapter, I refer to plaintiffs in equal pay cases as women.
20. "Under the EPA, the term "wages" generally includes all payments made to [or on behalf of] an employee as remuneration for employment. The term includes all forms of compensation irrespective of the time of payment, whether paid periodically or deferred until a later date, and whether called wages, salary, profit sharing, expense account, monthly minimum, bonus, uniform cleaning allowance, hotel accommodations, use of company car, gasoline allowance, or some other name. Fringe benefits are deemed to be remuneration for employment. . . . [V]acation and holiday pay, and premium payments for work on Saturdays, Sundays, holidays, regular days of rest or other days or hours in excess or outside of the employee's regular days or hours of work are deemed remuneration for employment and therefore wage payments that must be considered." 29 C.F.R. § 1620.10.
21. 29 U. S. C. § 206 (d)(1).
22. Lindemann B, Grossman P, Weirich CG. Employment Discrimination Law. 5th ed. Arlington, VA: Bloomberg BNA; 2012.

23. *EEOC v. Delaware Dept. of Health and Social Services*, 865 F.2d 1408 (3d Cir. 1989).
24. Riser v. QEP Energy, 776 F.3d 1191, 1196-97 (10th Cir. 2015) (*citing* Testing Equality of Jobs, 29 C.F.R. § 1620.14(a)).
25. *See, e.g., Merillat v. Metal Spinners, Inc.*, 470 F.3d 685, 697, 697 n.6 (7th Cir. 2006) (noting that the Seventh Circuit had "held that an employer may take into account market forces when determining the salary of an employee," although cautioning in a footnote against employers taking advantage of market forces to justify discrimination).
26. U.S. Equal Employment Opportunity Commission, Compliance Manual, Section 10: Compensation Discrimination (2000), at 10-IV(F)(2)(g), available at http://www.eeoc.gov/policy/docs/compensation.html#10-IV%20COMPENSATION%20DISCRIMINATION.
27. *See, e.g.*, *Belfi v. Prendergast*, 191 F.3d 129, 136 (2d Cir. 1999) (noting that an employer seeking to rely on the "factor other than sex defense [ ] . . . must . . . demonstrate that it had a legitimate business reason for implementing the gender-neutral factor that brought about the wage differential"); *Beck-Wilson v. Principi*, 441 F.3d 353, 365 (6th Cir. 2006) ("[T]he Equal Pay Act's exception that a factor other than sex can be an affirmative defense 'does not include literally any other factor, but a factor that, at a minimum, was adopted for a legitimate business reason.'" (*quoting EEOC v. J.C. Penney Co.*, 843 F.2d 249, 253 (6th Cir. 1988))).
28. "Reliance on past wages simply perpetuates the past pervasive discrimination that the Equal Pay Act seeks to eradicate. Therefore, we readily reach the conclusion that past salary may not be used as a factor in initial wage setting, alone or in conjunction with less invidious factors." *See Rizo v. Yovino*, 887 F.3d 453, 468 (9th Cir. 2018). *See also Irby v. Bittick*, 44 F.3d 949 (11th Cir., 1995); *Angove v. Williams-Sonoma, Inc.*, 70 Fed. Appx. 500 (10th Cir. 2003). *But see Lauderdale v. Ill. Dep't of Human Servs.*, 876 F.3d 904 (7th Cir. 2017); *Taylor v. White*, 321 F.3d 710 (8th Cir. 2003), both holding the opposite.
29. Paycheck Fairness Act, H.R. 7, 116th Cong., 1st Sess. (2019-2020).
30. Cardman DA. The Paycheck Fairness Act. Am. Bar Ass'n. [Cited December 17, 2019]. Available from: www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/discrimination/the-paycheck-fairness-act.html. (Discussing the deficiencies of the EPA and the need for congressional action).
31. 29 U.S.C. § 215(a)(3); *Schwartz v. Florida Bd. of Regents*, 954 F.2d 620, 623 (11th Cir. 1991) (citing *Brock v. Georgia Southwestern College,* 765 F.2d 1026, 1036 (11th Cir. 1985).
32. Under the Equal Pay Act, the defendant at all times retains the burden of proving a legitimate reason for the discrepancy in pay. *See, e.g.*, *Stanziale v. Jargowsky*, 200 F.3d 101, 107-08 (6th Cir. 2000); *Mickelson v. New York Life Ins. Co.*, 460 F.3d 1304, 1311 (10th Cir. 2006).
33. 29 U.S.C. § 215(a)(3).
34. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 4-5 (2011).
35. *Kasten* at 17 (applying the Court's usual practice of declining to "consider a separate legal question not raised in the certiorari briefs").
36. *See, e.g., Valentín-Almeyda v. Municipality of Aguadilla*, 447 F.3d 85, 94 (1st Cir. 2006) ("[P]rotected conduct includes not only the filing of administrative complaints . . . but also complaining to one's supervisors."); *EEOC v. Romeo Cmty. Sch.*, 976 F.2d 985, 989-90 (6th Cir. 1992) (retaliation claim actionable under the Equal Pay Act, for complaint to supervisor about male counterparts being paid $1/hour more); *EEOC v. White & Son Enters.*, 881 F.2d 1006, 1011 (11th Cir. 1989) (affirming finding that female employees were unlawfully terminated after complaining of unequal wages to their supervisors).
37. *Burlington Northern & Sante Fe Ry. Co. v. White,* 548 U.S. 53 (2006).
38. U.S. Equal Employment Opportunity Commission. EEOC Enforcement Guidance on Retaliation and Related Issues. August 25, 2019 [cited December 17, 2019]. Available from: https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm#_ftn70.
39. Because the EPA amended the FLSA, the coverage requirements of the FLSA apply to an EPA claim. Any employee engaged in or employed by an enterprise engaged in commerce or in the production of goods for commerce is covered by the Equal Pay Act. 29 U.S.C. §§203(d), (e), (r), (s). U.S. Equal Employment Opportunity Commission. Equal Pay/

Compensation Discrimination. [Cited December 17, 2019.] Available from: https://www.eeoc.gov/laws/types/equalcompensation.cfm.
40. 29 U.S.C. § 255.
41. 29 U.S.C. § 216(b).
42. *Wellens v. Daiichi Sankyo, Inc.*, 2014 U.S. Dist. LEXIS 70628 (N.D. Cal., May 22, 2015); *Dandan Pan v. Qualcomm Inc.*, 2017 U.S. Dist. LEXIS 120150 (S.D. Cal., July 31, 2017).
43. Morgan et al. v. U.S. Soccer Federation Inc., 2:19-cv-01717, U.S. District Court, Central District of California (Los Angeles).
44. The Equal Pay Act provides that recovery for an Equal Pay Act violation consists of the amount of underpayment and "an additional equal amount as liquidated damages." There is no statutory authority for an award of damages such as for emotional distress, pain and suffering, or lost opportunity. 29 U.S.C. § 216(b).
45. The Equal Pay Act provides for the following recovery for a violation of the anti-retaliation provision of the Equal Pay Act: "such legal or equitable relief as may be appropriate to effectuate the purposes of [the anti-retaliation provision] including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages." 29 U.S.C. § 216(b).
46. *Travis v. Gary Community Mental Health Center*, 921 F.2d 108, 112 (7th Cir. 1990) ("Compensation for emotional distress, and punitive damages, are appropriate for intentional torts such as retaliatory discharge."). However, the Eleventh Circuit does not agree that this section of the FLSA warrants such an interpretation. *Snapp v. Unlimited Concepts, Inc.*, 208 F.3d 928 (11th Cir. 2000); *but see Jones v. Amerihealth Caritas*, 95 F. Supp. 3d 807, 818 (E.D. Pa., 2015) ("This Court finds Judge Pollak's well-reasoned opinion in *Marrow* persuasive and agrees that punitive damages are available for retaliation claims under the EPA and FLSA.").
47. *See, e.g., Riordan v. Kempiners*, 831 F.2d 690, 694 (7th Cir. 1987) ("The word 'employer' is defined broadly enough in the Fair Labor Standards Act … to permit naming another employee rather than the employer as defendant, provided the defendant had supervisory authority over the complaining employee and was responsible in whole or part for the alleged violation.").
48. Gagnon M. Pay Equity Litigation Update: How The EEOC Has Pursued Its Equal Pay Focus In Fiscal Year 2019. Seyfarth Shaw LLP [Internet]. November 25, 2019 [cited December 17, 2019]. Available from: https://www.jdsupra.com/legalnews/pay-equity-litigation-update-how-the-40816/.
49. U.S. Equal Employment Opportunity Commission. Press Release, EEOC to Collect Summary Pay Data. September 29, 2016 [cited December 17, 2019]. Available from: https://www.eeoc.gov/eeoc/newsroom/release/9-29-16.cfm.
50. The EEO-1 is a report filed with the Equal Employment Opportunity Commission (EEOC), mandated by Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972. The act requires that employers report on the racial/ethnic and gender composition of their workforce by specific job categories, referred to as component 1 data. For 2019, certain employers must also report hours worked and pay data to the EEOC, referred to as component 2 data. All employers that have at least 100 employees are required to file component 1 data reports annually with the EEOC and file component 2 data in 2019 Society for Human Resource Management. New Filing Requirements. [Cited December 17, 2019]. Available from: https://www.shrm.org/resourcesandtools/tools-and-samples/hrqa/pages/newfilingrequirements.aspx. Subscription required.
51. U.S. Equal Employment Opportunity Commission. Strategic Enforcement Plan FY 2017-2021. [Cited December 17, 2019.] Available from: www.eeoc.gov/eeoc/plan/sep-2017.cfm.
52. Martin PJ, Visconti DM, Jackson C. Minding the Pay Gap: What Employers Need to Know as Pay Equity Protections Widen. Littler. August 2018 [cited December 17, 2019]. Available from: https://www.littler.com/files/pay_equity_littler_report_0.pdf.
53. 42 U.S.C. § 2000e-2(a)(1).

54. *Coghlan v. Am. Seafoods Co. LLC*, 413 F.3d 1090, 1095 (9th Cir. 2005).
55. Direct evidence of discriminatory intent is evidence that, "if believed, proves the fact [of discriminatory intent] without inference or presumption." *Coghlan v. Am. Seafoods Co.*, 413 F.3d 1090, 1095 (9th Cir. 2005) (citation omitted).
56. 411 U.S. 792 (1973).
57. "Upon sustaining his initial burden, the burden shifts to the [defendant] to articulate a legitimate, non-discriminatory reason for the pay disparity." *Lakshman v. Univ. of Me. Sys.*, 328 F. Supp. 2d 92, 104 (D. Me., 2004); *see also Stanziale*, 200 F.3d at 107-08.
58. *Anupama Bekkem v. Wilkie*, 915 F.3d 1258, 1267 (10th Cir. 2019); *Spencer v. Va. State Univ.*, 919 F.3d 199, 203 (4th Cir. 2019).
59. In certain cases, where it appears that both legitimate and unlawful (discriminatory) motives played a role in an employment decision like a termination or failure to promote, courts may elect not to use the *McDonnell-Douglas* framework but instead evaluate a disparate treatment claim under the *Price Waterhouse* "mixed motive" framework, which permits an employer to defeat a discrimination claim if it can establish that in the absence of discriminatory animus it would have taken the same action. *Price-Waterhouse v. Hopkins*, 490 U.S. 228 (1989).
60. *Sprague v. Thorn Ams., Inc.*, 129 F.3d 1355, 1363 (10th Cir. 1997); *see also Spencer*, 919 F.3d at 203; *Mengistu v. Miss. Valley State Univ.*, 716 F. App'x 331, 333-34 (5th Cir. 2018) (explaining that "[i]n order to make out a prima facie case of pay discrimination under § 1981 or Title VII, a plaintiff must show (1) that he was a member of a protected class; (2) that he was paid less than a non-member; and (3) that his circumstances are nearly identical to those of the better-paid non-member") (internal citations and quotations omitted).
61. *County of Washington v. Gunther*, 452 U.S. 161, 168-71 (1981).
62. "The plaintiff need not demonstrate an exact correlation with the employee receiving more favorable treatment in order for the two to be considered 'similarly-situated;' rather, as this court has held in Pierce, the plaintiff and the employee with whom the plaintiff seeks to compare himself or herself must be similar in 'all of the relevant aspects.'" *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 352 (6th Cir. 1998) (citing *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796 (6th Cir. 1994)); *see also Lewis v. City of Union City*, 918 F.3d 1213 (11th Cir. 2019).
63. *Sprague*, 129 F. 3d at 1363. *But see Figueroa v. Pompeo*, 923 F.3d 1078, 1092 (D.C. Cir. 2019) (finding that rather than merely stating or articulating a legitimate, non-discriminatory reason for its action "an employer at the second prong must *proffer admissible evidence* showing a legitimate, nondiscriminatory, clear, and *reasonably specific explanation* for its actions.") (emphasis supplied).
64. 42 U.S.C § 2000e-2(h) ("It shall not be an unlawful employment practice under this title [42 USCS §§ 2000e et seq.] for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d))").
65. See the discussion of the Bennet Amendment to Title VII in *County of Wash. v. Gunther*, 452 U.S. 161, 163 (1981). *See also* United States Court of Appeals for the Third Circuit. Model Jury Instructions: Chapter 11: Instructions for Sex Discrimination Claims Under the Equal Pay Act. October 2018 [cited December 17, 2019]. Available from: https://www.ca3.uscourts.gov/sites/ca3/files/11_Chap_11_2018_Oct.pdf.
66. *Niwayama v. Tex. Tech Univ.*, 590 Fed. Appx. 351, 357 (5th Cir. 2014); *Bowen v. Manheim Remarketing, Inc.*, 882 F.3d 1358, 1362 (11th Cir. 2018).
67. *Lauderdale*, 876 F.3d at 910 (internal quotation and citation omitted).
68. 42 U.S.C. § 2000e-3(a).
69. U.S. Equal Employment Opportunity Commission. EEOC Enforcement Guidance on Retaliation and Related Issues. August 25, 2019 [cited December 17, 2019]. Available from: https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm#_ftn5.
70. *Burlington N. & S.F. Ry.*, 548 U.S. at 68 (2006).

71. *See Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997).
72. *See Thompson v. North Am. Stainless*, 131 S. Ct. 863 (2011) (examining whether the third party falls within the "zone of interests" sought to be protected by the retaliation provision). *See also* U.S. Equal Employment Opportunity Commission. EEOC Enforcement Guidance on Retaliation and Related Issues at §4(b). August 25, 2019 [cited December 17, 2019]. Available from: https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm#b._Standing.
73. *See Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2533 (2013).
74. *See generally Foster v. Univ. of Maryland-Eastern Shore*, 787 F.3d 243, 252 (4th Cir. 2015); Brown, L. Retaliation Claims Under Federal Civil Rights Statutes and the Constitution. National School Boards Association: Council of School Attorneys. March 23-25, 2017 [cited December 17, 2019]. Available from: https://cdn-files.nsba.org/s3fs-public/13.%20Brown%20Retaliation%20Claims.pdf.
75. "It is well settled that the participation clause shields an employee from retaliation regardless of the merit of his EEOC charge." *Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978) (citing *Pettway v. Am. Cast Iron Pipe Co.*, 411 F.2d 998, 1004-1007 (5th Cir. 1969)); *see also Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 582 (6th Cir. 2000).
76. U.S. Equal Employment Opportunity Commission. Charge Statistics (Charges filed with EEOC) FY 1997 Through FY 2017. [Cited December 17, 2019]. Available from: https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm.
77. 42 U.S.C. § 2000e(b).
78. U.S. Equal Employment Opportunity Commission. Time Limits For Filing A Charge. [Cited December 17, 2019]. Available from: https://www.eeoc.gov/employees/timeliness.cfm
79. 42 U.S.C. § 2000e-5(e)(1).
80. Lilly Ledbetter Fair Pay Act of 2009. Pub. L. No. 111–2, 123 Stat. 5, (2009).
81. 42 U.S.C. § 2000e-5(e)(3)(A).
82. *See Walmart Stores v. Dukes*, 564 U.S. 338, 354-60 (2011); *Comcast Corp. v. Behrend*, 133 S.Ct. 1426 (2013).
83. 42 U.S.C. § 2000e-5(g), (k).
84. For employers with 15-100 employees, the limit is $50,000; For employers with 101-200 employees, the limit is $100,000; For employers with 201-500 employees, the limit is $200,000; For employers with more than 500 employees, the limit is $300,000. 42 U.S.C. § 1981a(b)(3).
85. *EEOC v. Delaware Dept. of Health and Social Services*, 865 F.2d 1408 (3d Cir. 1989). For a comprehensive list of specific differences between Title VII and the EPA, see Perez-Arrieta AM. Defenses to Sex-Based Wage Discrimination Claims at Educational Institutions: Exploring "Equal Work" and "Any Other Factor Other Than Sex" in the Faculty Context. 31 J.C. & U.L. 2004-2005; 393, 397 n. 36.
86. 29 C.F.R. § 1620.27(b).
87. 29 C.F.R. § 1620.27(c).
88. National Conference of State Legislatures. State Employment-Related Discrimination Statutes. July 2015 [cited December 17, 2019]. Available from: http://www.ncsl.org/documents/employ/Discrimination-Chart-2015.pdf.
89. Mass. Gen. Laws c. 151B.
90. California Fair Employment and Housing Act of 1959 (FEHA), Gov. Code, § 12900 et seq. (1959).
91. Act 453 of 1976 Elliott-Larsen Civil Rights Act, MCLS Ch. 37, Act 453 (1976).
92. Cal. Lab. Code § 1197.5.
93. Cal. Lab. Code § 1197.5 The California Fair Pay Act expressly removed from the preexisting California pay law statutory exemptions that applied where work was performed "at different geographic locations" and "on different shifts or at different times of day." *See also* Gagnon M, Papasevastos M. Trends and Developments in Pay Equity Litigation. Seyfarth Shaw LLP. April 2018 [cited December 17, 2019]. Available from: https://www.seyfarth.com/images/content/7/8/v1/7828/Trends_PayEquityLitigation_April2018.pdf.

94. Cal. Lab. Code § 1197.5(b).
95. Cal. Lab. Code § 1197.5(k)(2), (3).
96. Visconti D. Keeping Compliant with Expanding State and Local Equal Pay Laws. Littler. August 19, 2019 [cited December 17, 2019]. Available from: https://www.littler.com/publication-press/publication/keeping-compliant-expanding-state-and-local-equal-pay-laws?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original.
97. *See* Code of Ala. § 25-1-30; Cal. Lab. Code § 432.3; C.R.S. 8-5-102; Conn. Gen. Stat. § 31-40z; Del. Code Ann. tit. 19, § 709B; HRS § 378-2.4; 820 ILCS 112/10(b)(10); Mass. General Laws c. 149 § 105A; 5 M.R.S. § 4577; 2018 Bill Text NJ A.B. 1094; NYC Administrative Code 8-107; Puerto Rico Act No. 16 of March 8, 2017; Or. Rev. Stat. § 652.220; Rev. Code Wash. (ARCW) § 49.58.005; 21 V.S.A. Section 495m. *See also* Gagnon M, Papasevastos M. Trends and Developments in Pay Equity Litigation. Seyfarth Shaw LLP. April 2018 [cited December 17, 2019]. Available from: https://www.seyfarth.com/images/content/7/8/v1/7828/Trends_PayEquityLitigation_April2018.pdf; and Visconti D. Keeping Compliant with Expanding State and Local Equal Pay Laws. Littler. August 19, 2019 [cited December 17, 2019]. Available from: https://www.littler.com/publication-press/publication/keeping-compliant-expanding-state-and-local-equal-pay-laws?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original.
98. *See* San Francisco Ordinance No. 142-17, available from: https://sfgov.legistar.com/LegislationDetail.aspx?ID=3015043&GUID=DAFA9BFB-6960-40A3-81C7-670DD91444BA; Kansas City, Missouri Code of Ordinances Sec. 38-101, 102; NYC Admin. Code § 8-107(25); Albany County Local Law No. P for 2016, available from: http://albanycounty.com/Libraries/County_Executive/20171030-PH-16-LL_P.sflb.ashx; Wage Equity; Suffolk County Code, Art. II. § 528-7 (2018); Laws of Westchester County Sec. 1, Sec. 700.03; Cincinnati Municipal Code, Chapter 804; Toledo Municipal Code Chapter 768, Pay Equity Act to Prohibit the Inquiry and Use of Salary History in Hiring Practices in the City of Toledo; Philadelphia, Pa., Code § 9-1131. *See also* Visconti D. Keeping Compliant with Expanding State and Local Equal Pay Laws. Littler. August 19, 2019 [cited December 17, 2019]. Available from: https://www.littler.com/publication-press/publication/keeping-compliant-expanding-state-and-local-equal-pay-laws?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original.
99. 42 U.S.C. 1395nn.
100. 42 U.S.C. § 1320a-7b(b).
101. Office of Inspector General, U.S. Department of Health and Human Services. A Roadmap for New Physicians: Fraud & Abuse Laws. [Cited December 17, 2019]. Available from: https://oig.hhs.gov/compliance/physician-education/01laws.asp.
102. 42 U.S.C. 1320a-7b(b); Medicare and State Health Care Programs: Fraud and Abuse; OIG Anti-Kickback Provisions, 56 Fed. Reg. 35952 (July 29, 1991).
103. Medicare and State Health Care Programs: Fraud and Abuse; OIG Anti-Kickback Provisions, 56 Fed. Reg. 35952 (July 29, 1991).
104. Reasonable compensation is defined by IRS Treasury Regulations, 26 C.F.R. 1.162-7(b)(3): "It is, in general, just to assume that reasonable and true compensation is only such amount as would ordinarily be paid for like services by like enterprises under like circumstances. The circumstances to be taken into consideration are those existing at the date when the contract for services was made, not those existing at the date when the contract is questioned." *Id.* Moreover: [t]he IRS has stated that when determining whether a physician's compensation is appropriate, the tax-exempt hospital should ensure the total compensation package provided to a physician is reasonable for the physician's specialty and area. The IRS created a rebuttable presumption whereby physician compensation is reasonable if: (i) the compensation arrangement is approved in advance by an authorized body of the applicable tax-exempt hospital, which is composed of individuals who do not have a conflict of interest concerning the employment arrangement, (ii) prior to making its determination, the authorized body obtained and relied upon appropriate data as to comparability, and (iii) the authorized body

adequately and timely documented the basis for its conclusion concurrently with making that determination. If, however, an employment arrangement does not satisfy the rebuttable presumption requirements, a facts and circumstances approach will be followed, and intermediate sanctions may be imposed if it is found that the compensation is excessive. Intermediate sanctions may include the imposition of an excise tax against the physician and the hospital manager who approved the employment arrangement. The intermediate sanctions rules only apply to compensation arrangements with "disqualified persons." Disqualified persons are persons who are in a position to exercise substantial influence over the organization; this can include employed physicians, especially where the employed physician is highly compensated or holds an administrative position. However, even if a compensation arrangement does not involve a disqualified person, a tax-exempt institution cannot pay more than fair market value due to the restrictions on private inurement. Becker's Hospital Review. Physician Compensation: 10 Core Legal and Regulatory Concepts. August 19, 2013 [cited December 17, 2019]. Available from: https://www.beckershospitalreview.com/legal-regulatory-issues/physician-compensation-10-core-legal-and-regulatory-concepts.html (referencing Rebuttable presumption that a transaction is not an excess benefit transaction, 26 C.F.R. 53.4958-6).

105. IRC 501(c)(3) prohibits inurement of the net earnings of an organization to any private shareholder or individual. 26 C.F.R § 1.501(c)(3)-1states that an organization is not operated exclusively for one or more exempt purposes if its net earnings inure in whole or in part to the benefit of private individuals. *See also* Brauer LM, Kaiser CF. C. Physician Incentive Compensation. U.S. Internal Revenue Service. [Cited December 18, 2019.] Available from: https://www.irs.gov/pub/irs-tege/eotopicc00.pdf.
106. Brauer LM, Kaiser CF. C. Physician Incentive Compensation. U.S. Internal Revenue Service. [Cited December 18, 2019.] Available from: https://www.irs.gov/pub/irs-tege/eotopicc00.pdf.
107. "Fair market value is defined by the Stark Law as the 'value in arm's length transactions, consistent with the general market value…' The federal regulations have interpreted 'general market value' to refer to the compensation that would be included in a service agreement as the result of a bona fide bargaining arrangement between well-informed parties to the agreement who are not otherwise in a position to generate business for the other party, at the time of the service agreement." Becker's Hospital Review. Physician Compensation: 10 Core Legal and Regulatory Concepts. August 19, 2013 [cited December 17, 2019]. Available from: https://www.beckershospitalreview.com/legal-regulatory-issues/physician-compensation-10-core-legal-and-regulatory-concepts.html.
108. False Claims Act, 31 U.S.C. § 3729.
109. 976 F. Supp. 2d 776 (D.S.C. 2013). *See also* U.S. Department of Justice, Office of Public Affairs. St. Joseph Medical Center in Maryland to Pay U.S. $22 Million to Resolve False Claims Act Allegations; Press Release. November 9, 2010 [cited December 17, 2019]. Available from: https://www.justice.gov/opa/pr/st-joseph-medical-center-maryland-pay-us-22-million-resolve-false-claims-act-allegations (settling for $22 million allegations of payment of kickbacks; The settlement specifically resolved issues relating to professional services agreements which were being investigated for being above fair market value, not commercially reasonable or for services not rendered.); U.S. Department of Justice, Office of Public Affairs. Covenant Medical Center to Pay U.S. $4.5 Million to Resolve False Claims Act Allegations; Pres Release. August 25, 2019 [cited December 17, 2019]. Available from: https://www.justice.gov/opa/pr/covenant-medical-center-pay-us-45-million-resolve-false-claims-act-allegations (settling for $4.5 million an alleged violation the Stark Law by paying commercially unreasonable compensation (more than $2 million per year) to five physicians in return for referrals.).
110. Becker's Hospital Review recommends that: (a). A hospital should ensure that all compensation contracts with physicians are in writing, signed by all parties, do not take into consideration the volume or value of referrals and internal documentation should be retained to support the fair market value nature of the compensation. The documentation should include the manner in which the compensation was determined, the surveys utilized and whether

an opinion from a third-party valuation firm was sought. (b) All physician compensation arrangements should include a clear job description outlining the specific duties and services to be performed. Hospitals should also maintain an analysis and record of why a physician position is reasonably needed by the hospital. This may be particularly important where the need for the position may not be inherently clear or where a newly created position is being filled. (c) Hospitals should strongly consider obtaining third-party support for physician compensation arrangements where the physician is unusually productive or the compensation structure is outside normal practice. (d) As part of periodic compliance reviews, the hospital and physician should ensure that all agreements meet a core exception under the Stark Law and with comply or substantially comply with a safe harbor to the Anti-Kickback Statute. (e) It is also important that each compensation relationship is periodically reviewed on an on-going basis to ensure the compensation is still consistent with FMV and complies with applicable law. (f) A hospital should also consider adopting a reasonable compensation cap, especially if the arrangement is pursuant to a productivity-driven compensation structure. This concept is based on IRS guidance and may be more important where the arrangement has the potential for unusually high compensation. Becker's Hospital Review. Physician Compensation: 10 Core Legal and Regulatory Concepts. August 19, 2013 [cited December 17, 2019]. Available from: https://www.beckershospitalreview.com/legal-regulatory-issues/physician-compensation-10-core-legal-and-regulatory-concepts.html.

111. Massachusetts provides an affirmative defense to a Massachusetts Pay Act claim if the employer can show that within the prior three years, it completed a reasonable self-evaluation of its pay practices in good faith; and can demonstrate that reasonable progress has been made towards eliminating wage differentials based on gender for comparable work. Mass. Gen. Laws c. 149 § 105A. Oregon also provides a limited safe harbor to employers who conduct audits. Or. Rev. Stat. Ann. §§ 652.210 et seq.
112. U.S. Equal Employment Opportunity Commission. Facts About Equal Pay and Compensation Discrimination. [Cited December 17, 2019.] Available from: https://www.eeoc.gov/eeoc/publications/fs-epa.cfm.
113. Rosenfeld J, Denice P. The Power of Transparency: Evidence from a British Workplace Survey. American Sociological Review September 1, 2015; Available from: https://doi.org/10.1177/0003122415597019. Subscription required.
114. Research by University of Washington's Jake Rosenfeld and Patrick Denice shows that workers who have access to organizational financial information earn more than those who do not. Rosenfeld J, Denice P. The Power of Transparency: Evidence from a British Workplace Survey. American Sociological Review September 1, 2015; Available from: https://doi.org/10.1177/0003122415597019. Subscription required.
115. Recent research by Ph.D. candidate in Industrial Organization Eric Sheller and Director of the Social/Personality Graduate Program at the University of Nebraska Omaha finds that employees both appreciate pay transparency and subsequently declare more organizational commitment. Scheller EM, Harrison W. Ignorance Is Bliss, or Is It? The Effects of Pay Transparency, Informational Justice and Distributive Justice on Pay Satisfaction and Affective Commitment. Compensation and Benefits Review March 11, 2019; Available from: https://journals.sagepub.com/doi/10.1177/0886368719833215. Subscription required.
116. Belogolovsky E, Bamberger PA. Signaling in secret: pay for performance and the incentive and sorting effects of pay secrecy. Academy of Mgmt J. 2014;57(6).
117. Douglas PS, Biga C, Burns KM, Chazal RA, Cuffe M, Daniel JM Jr, et al. 2019 ACC health policy statement on cardiologist compensation and opportunity equity. J Am Coll Cardiol. 2019;74(15):1947–65.