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Equal Pay Claims: Mediation and Settlement Practice Tips

By Angela Reddock-Wright

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As an employment law mediator, Angela Reddock-Wright, founder of a dispute resolution firm in Los Angeles, says she's seen "a marked uptick" in the number of claims asserting alleged pay discrimination in the last few years. She offers practical tips for attorneys on both sides on how to prepare and approach mediation and settlement in equal pay litigation.

When I began practicing employment law 26 years ago, I represented both employees and employers on a range of workplace matters, including alleged practices related to unequal pay. What I learned was that worker pay was and is a complex and ever-evolving subject. For the past 11 years, I have been a full-time neutral, working, in large part, to mediate and resolve some of the most complex equal pay and related claims.

The Equal Pay Act of 1963 was intended to ensure pay equity for women in the workforce, and Title VII of the Civil Rights Act of 1964 made it unlawful to discriminate against workers on the basis of gender. Those laws were buttressed by the Lilly Ledbetter Fair Pay Act of 2009. In April, Mississippi became the 50th state to enact a law barring discrimination in workers' pay, yet we continue to see lawsuits alleging unequal pay based on gender, race, and other protected classifications.

In the last two or three years, I've seen a marked uptick in the number of claims asserting alleged pay discrimination, an increase that coincides with a broader rise in employee activism that occurred both before and during the Covid-19 pandemic. The EEOC reports that in 2021, 885 equal pay charges were filed with the agency, only 34 fewer charges than were filed just 10 years earlier in 2011. Pay transparency laws have provided better data to support claims, at the same time as employees have become more vocal and assertive in seeking to enforce workplace rights, including claims related to equal pay.

Pay equity claims are rarely standalone but tend to be joined with claims for gender-based discrimination, harassment, or other workplace violations. My job as a neutral is to approach each case that I mediate with a fair and open view, and to work with the parties to reach a compromised solution based on the claims and defenses at issue.

When I am retained to mediate a pay discrimination claim, I understand that the parties are anxious to resolve their differences and to settle the case. Attorneys on all sides seek finality for their clients through the mediation process.

Below are my top practice tips for attorneys representing employees/workers or companies in equal pay and related causes of action.

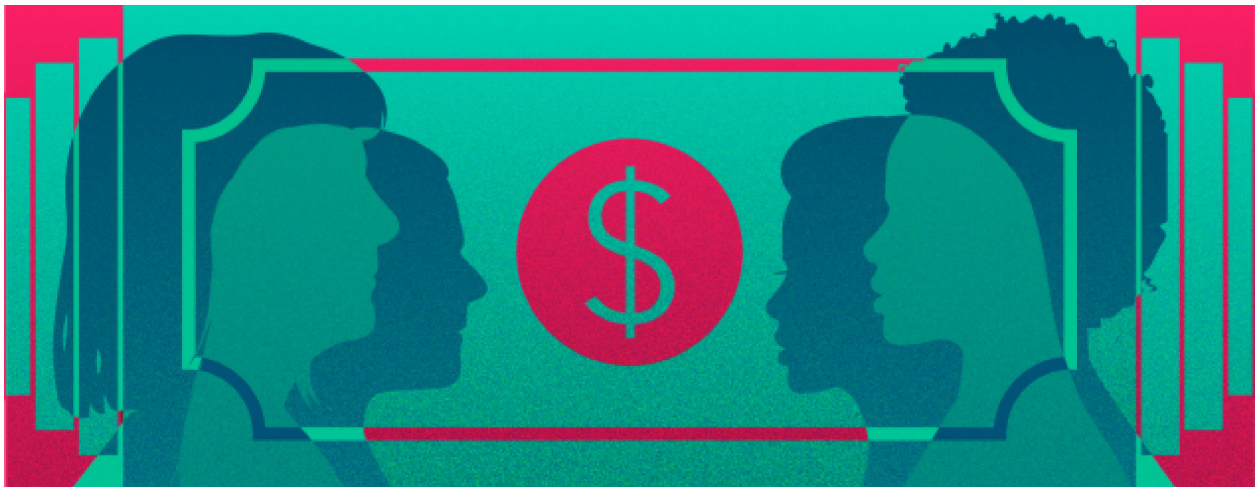


Photo Illustration by Jonathan Hurtarte/Bloomberg Industry Group

For Attorneys Representing Employees

Pay Data. Do your research. Gather as much information as you can, in formal or informal discovery, as well as through your client, potential witnesses, and public data. Seek to understand where your client's pay ranks compared to other workers in similarly situated positions with the same employer, as well as in comparison to the broader job market.

Job Descriptions. Review your client's job description and any documents related to your client's job and job-related duties; then conduct an in-depth interview with your client to fully understand their job. Look at both what is in writing regarding your client's job duties, along with duties that may not be in writing, to see how your client's job compares to her counterparts.

Damages Analysis. Do your own damages analysis to determine how much you believe your client has suffered in economic and other damages as a result of the alleged pay inequity and related claims. Your initial settlement demand, and any counteroffers, thereafter, should be carefully tied to and reflect that damages analysis.

For Attorneys Representing Employers

Employer Policies. Obtain a copy of, review, and analyze the employer's policy(ies) relating to equal pay, gender, and other forms of discrimination.

Internal Pay Data/Compensation Audit Reports. Review and analyze any internal audit reports and/or other analyses the employer has commissioned relating to pay equity and compensation within the workplace. Be prepared to address any potential inequities in pay and the reasons for them..

Counter Damages Analysis. Do your own damages analysis to determine what potential risks there are to your client and be prepared to respond to any damages analysis prepared by the worker's counsel.

For All Counsel

Know the Law. Whether representing the employee or the employer, all attorneys should be up to date on current and relevant laws and case law governing equal pay in the workplace. They should be prepared to explain why their client's case is similar or distinguishable from current law.

Research Jury Verdicts. Counsel should also research recent jury verdicts within the relevant jurisdiction(s) to have comparative and baseline information concerning the dollar amount at which an equal pay case should settle.

Flexibility. Counsel should, of course, come to mediation prepared to vigorously represent the interests of their clients. A critical aspect of mediations, however, is that counsel and clients are expected to approach mediation with an open mind and with a willingness to consider both the strengths and challenges of their case. The ultimate goal of both parties should be trying to get the case settled without the time, resources, and expense of litigation.

As equal pay and related claims continue to rise, such cases lend themselves to mediation and alternative dispute resolution processes. However, such processes only work when the parties do their homework in advance, and when they approach mediation and settlement with an open mind and a reasonable and flexible approach toward resolution.

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