



WEB EXCLUSIVE - Incorporating Pay Equity Reviews in Your Year-End Compensation Practices

Insights

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The federal Equal Pay Act (EPA) requires that men and women in the same workplace be compensated with equal pay for equal work. Nearly every state has its own law that also prohibits discrimination in wages on the basis of gender. Many states, including California, New Jersey, Oregon and New York (effective October 8, 2019) have expanded their pay equity laws to go beyond gender and extend to other legally protected categories, including race, ethnicity, and religion.

Equality in pay includes all forms of compensation, including base salary or wages, overtime, bonuses, benefits, and any other perks or remuneration. Under federal law, disparities in pay among employees with substantially equal job duties are only legally permissible if based upon a factor other than sex, such as seniority, merit, qualifications, skills, education, or level of responsibility. But most state pay equity laws—especially ones passed in recent years—are far more demanding and require that pay differentials be justified by *bona fide* factor(s) other than sex, be job-related to the position in question, and be consistent with business necessity.

State pay equity statutes also provide for far-reaching remedies, including treble damages in states such as New York and New Jersey. As a result, businesses throughout the country are struggling to comply with not just the EPA but also with a morass of state law requirements, each of which carries with it the possibility of significant liability. For a comprehensive listing of requirements in all jurisdictions, see the [Fisher Phillips Pay Equity Interactive Map](#).

What You Can Do At Year End To Ensure Compliance

With all of the buzz surrounding pay equity, and with sweeping legislation being enacted from coast to coast, many employers have already begun taking steps to review their compensation practices. Now more than ever, it is critical that you ensure your organization complies with federal and state laws. No matter what stage your organization is in, the end of the year is an ideal time to review and update compensation policies and practices and make adjustments to alleviate potential pay equity concerns.

1. 1. 1. 1. **Review Compensation Policies And Decision-Making Process**

Before finalizing year-end compensation decisions, critically examine your compensation policies and practices to ensure that, moving forward, pay inequality does not persist among individuals with substantially equal job duties. Questions to

consider include:

- Are compensation decisions based on objective or subjective criteria?
- Is there documentation to justify the pay decisions?
- If pay differentials are based upon performance, do the performance appraisals and documentation substantiate the pay treatment?
- Are there legitimate factors other than gender (or another protected category, depending on the state) that justify a pay disparity between employees performing substantially similar work?

Based on your answers to these questions, adjustments should be made *before* compensation decisions are finalized to ensure that they are based upon objective, well-documented criteria, and that any disparities among employees who perform substantially similar work are due to legitimate reasons identified under applicable federal and state law. And in many jurisdictions across the country, you are not permitted to justify a wage differential because of salary history; check with your legal counsel if you are unsure whether this standard applies to your organization.

2. Award Bonuses And/Or Compensation Increases To Level The Playing Field

Whether you conducted a pay audit earlier this year or informally reviewed the compensation paid to your employees, you may have noticed a few red flags where compensation for employees performing the same job could not be explained by bona fide factors like experience, education, seniority, or responsibility. Now is the prime time to correct these disparities for 2019 compensation.

One strategy to employ could be to award end-of-year bonuses to bridge the gap between disparate compensation for employees who perform substantially similar work. Additionally, this is the time to increase compensation of those disadvantaged to remedy any pay disparities going forward into 2020 and beyond. Through a bonus payment or salary increase, you can take steps to equalize compensation without drawing attention to a potential pay disparity.

3. Plan For The Future

While your organization may only make compensation decisions on an annual basis, pay equity is an ongoing compliance issue that requires vigilance. After the end-of-year compensation decisions are made, your company should consider what additional steps it can take to stay ahead of any equal pay issues.

One of the best ways to determine whether your company has any significant pay disparities is to conduct a legally privileged pay audit. Through an audit, you will be

able to identify potential pay disparities among employees performing comparable work, determine whether there are lawful explanations for those disparities, and take steps to correct disparities as appropriate. An audit also provides an opportunity to identify and correct weaknesses in the organization's systems to protect against claims of pay disparity going forward.

In some locations, such as Massachusetts, you may even be able to avail yourself of a legal safe harbor if you can prove you undertook a valid pay equity audit. We recommend that any such audit be conducted with advice from an attorney, preferably someone who understands the nuances of pay equity laws, so that it is cloaked with the attorney-client privilege and can remain confidential.

Organizations may also want to consider any systemic changes that should be made going forward. This would include drafting formal compensation policies and procedures and establishing safeguards to avoid exceptions that could result in unlawful pay differentials. Some companies may want to implement standard pay ranges or guidelines for each position or job classification. Moving forward, decisionmakers should be trained on how to make proper pay decisions that comply with organizational policies and the applicable law, the appropriate factors to consider when making pay decisions, how to apply guidelines and exercise discretion properly, and how to document compensation decisions.

By taking these steps, your organization will be better positioned to make compensation decisions and ensure compliance with federal and state equal pay laws while at the same time minimizing the risk for litigation based on equal pay.

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