Spotlight on Pay Equity: 5 Things Employers Should Do When Considering Pay Adjustments

Insights
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By this time of year, most companies have wrapped up their 2021 performance review process and have handed out year-end bonuses and raises for 2022. However, how can employers know their pay plans and compensation decisions are really in compliance with pay equity principles? With heightened scrutiny applied to compensation decisions and the advent of new pay equity legislation in several states and local jurisdictions, now is an ideal time to evaluate your pay practices and correct any disparities to minimize potential risk for litigation.

Fisher Phillips explored several hot pay equity issues at our recent "Pay Equity Pay Equity Virtual Summit Series 2021 / Igniting Legal Compliance and Positive Cultural Change In Your Workplace**"** With heightened scrutiny applied to compensation decisions, the advent of new pay equity legislation in several jurisdictions and an uptick in litigation, here are the five action items for employers evaluating pay equity and considering adjustments.

1. Examine Your Compensation Process

Now that most employers have implemented their year-end compensation decisions, it's time to ask whether you critically examined your compensation policies and practices to ensure that, moving forward, pay inequality does not persist among individuals with substantially equal job duties. Questions you should have considered 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, steps may be warranted to ensure that compensation decisions 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. Where disparities are identified, adjustments in pay may be required. Caution: in some locations across the country, you are not permitted to justify a wage differential because of salary history – and a blisteringly hot job market makes compensation review even more challenging.

2. Know Your Legal Obligations

While the federal Equal Pay Act (EPA) has long required that men and women in the same workplace be compensated with equal pay for equal work, many state and local laws are more stringent. For example, many states have laws requiring equal pay for "substantially similar work," which extends the scope of the equal pay laws beyond the federal mandate. Many states have enacted legislation greatly expanding employers' obligations and broadening the protected classes from those under the EPA. Of course, the advent of remote work makes multi-state compliance even more challenging. Pay equity is a growing claim du jour for plaintiffs' attorneys both on an individual and collective basis, so now's the time to evaluate you pay practices in light of the relevant law applicable to your organization.

Transparency is the latest trend in pay equity. Certain states and localities, including Colorado, Connecticut, and New York City, now or will soon require employers to establish a salary range for each position. Other states will likely amend their pay equity laws to include similar transparency provisions. It is important for all employers, especially multistate employers, to stay on top of these legal developments and begin considering appropriate salary ranges for all positions.

3. Conduct a Pay Equity Audit

There are significant financial consequences of pay equity claims, so employers should consider conducting pay audits to determine which employees perform "comparable" work, ensure employees are being paid fairly, and determine whether they are complying with new laws. The fundamental starting point for reviewing compensation and adjustments is to collect and analyze the relevant data. This ordinarily includes the following data for each employee included in the analysis: job title, department, job grade or level, hire date, gender (and, depending on the scope of the audit, other protected class identifiers such as race, age, etc.), job location, hours worked over the past 52 weeks, base wage or salary, overtime pay, and bonuses or other forms of compensation.

Depending upon the quality and accessibility of data, this process can be time consuming. Therefore, many companies use the lull after the annual performance process – such as the first few months of the new year – to conduct an audit. Before embarking on this analysis, it is recommended you work with counsel so that the results of the audit are protected by the attorney-client privilege.

4. Analyze the Data

The goal of the analysis is to determine whether men and women (and other classes of protected employees) within the group are paid equally. The methodology can vary, depending upon the size of group and the complexity of the compensation scheme. Whether you have been conducting pay equity analyses for years or are new to the process, there are critical questions to address, such as:

- What are the challenges and practical issues that arise in collecting data for a pay equity audit?
- How does an employer use pay audit results to conduct remediation, and what are the challenges inherent in that process?
- How does pay equity fit into employers' other Diversity, Equity, and Inclusion (DEI) initiatives?

5. Level the Playing Field

In the context of compensation reviews, you may notice a few red flags. Where compensation for employees performing the same job could not be explained by *bona fide* business-related factors like experience, education, seniority, or responsibility, it is important to develop a plan to address pay disparities.

One strategy you may consider employing would be to award bonuses to bridge the gap between disparate compensation for employees who perform substantially similar work. Additionally, you may plan to increase compensation of those disadvantaged to remedy any pay disparities going forward into 2022 and beyond. Through a bonus payment or salary increase, you may be able to take steps to equalize compensation without drawing attention to a potential pay disparity. Of course, it is important to evaluate both base pay and total compensation (including perks). Finally, many organizations use the audit process to identify their talent pipeline and identify candidates for promotion or changes in role.

Conclusion

Tackling pay equity is a critical element of building a diverse and inclusive workplace. The good news is that nearly three in five (58%) of U.S. organizations voluntarily conduct pay equity reviews to identify possible pay differences between employees performing similar work. Of those organizations, 83% adjusted employees' pay following a pay equity review, according to new survey data from the Society for Human Resource Management (SHRM). Fair and competitive pay is essential for employers to attract and retain talent in a tight job market.

No matter what stage your business is in, now is an ideal time to review and update compensation policies and practices and make adjustments to alleviate potential pay equity concerns. If you're interested in considering a pay equity audit, contact your Fisher Phillips counsel or reach out to any of our Pay Equity Practice Group attorneys who recently presented on this topic.

We'll continue to monitor developments in this area and provide updates as warranted. To ensure you stay up to speed, make sure to subscribe to receive Fisher Phillips Insights directly to your inbox. If you have questions, please contact your Fisher Phillips attorney, the author of this Insight, or any attorney in our Pay Equity Practice Group.

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