

Equal Pay Day: Addressing Potential Gender-Based Pay Disparities in the Workplace

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The U.S. Equal Employment Opportunity Commission (EEOC) has expressed a renewed intention to enforce federal laws prohibiting discrimination in pay amid a reported persistent “pay gap” between women and men in the United States workforce. As part of its enforcement efforts, the EEOC is focused on pay secrecy policies, retaliating against workers for asking about pay or sharing their pay with coworkers, reliance on past salary history to set pay, and requiring applicants to specify their desired or expected salary at the application stage.

The effort comes as “Equal Pay Day” is being recognized in the United States on Tuesday, March 14, 2023, a date that is meant to symbolize how far into the next year women reportedly must work to earn what their male counterparts made in the previous year. Given these events, here are some action items that employers may want to consider.

Equal Pay Training

Employers may want to train supervisors, managers, and executives on the requirements of the Equal Pay Act, Title VII of the Civil Rights Act of 1964, and other pay equity requirements. The Equal Pay Act, passed in 1963, prohibits discrimination in pay “on the basis of sex” for the performance of “equal work” in jobs that require “equal skill, effort, and responsibility” and performed in “similar working conditions.” Courts have held that “equal work” does not mean jobs are “identical” but that there is a “substantial equality of skill, effort, responsibility and working conditions” assessed based on an overall comparison of the work in totality. However, pay disparities may be explained under the Equal Pay Act by one of four exceptions: (1) a seniority system, (2) a merit system, (3) a system which measures earnings by quantity or quality of production, or a (4) differential based on any factor other than sex.

At the same time, Title VII broadly prohibits discriminatory compensation practices based on sex, in addition to race, national origin, and other protected characteristics. Title VII utilizes a different analytical framework than the Equal Pay Act, though courts have allowed employers to defend Title VII claims with the same affirmative defenses under the Equal Pay Act.

Conducting Pay Audits

Employers may want to consider conducting internal pay audits annually or every few years to examine critical components of pay across their workforces and the criteria used to make pay determinations, such as job titles, departments, seniority, and location. Proactive pay equity audits are generally not legally required, but conducting such audits can help employers identify potential pay disparity issues and give employers an opportunity to fix them. In certain limited cases, a pay equity audit can be used as a defense under certain state laws and the fact that an employer has conducted a pay audit can be evidence that an employer is attempting to fix issues, assuming appropriate remedial action has been or is being taken. Proactive pay audits conducted with the assistance of counsel, under certain circumstances, may be protected from disclosure through attorney-client privilege.

Taking Corrective Actions

Employers may want to consider what actions they can take to address any pay disparity issues that cannot be explained with nondiscriminatory factors, such as education or job-related experience. Corrective actions may include amending pay policies, refining pay scales, or making appropriate adjustments to employees' pay or job titles. However, the Equal Pay Act prohibits reducing the pay of an employee for the purpose of correcting a pay equity issue, though employees may reduce pay for a variety of reasons, including market adjustments.

Recognizing Pay Transparency & Pay Data Reporting Laws

Many jurisdictions in recent years have passed laws designed to address pay equity, including gender-based pay disparities, by requiring pay transparency in job postings. Some states and localities include requirements to post pay ranges in job postings for jobs in those states or localities, which may include remote workers. Employers may want to consider these pay transparency requirements in setting policies addressing when and where work may be done remotely. Further, some of these laws have imposed additional compliance concerns on employers' hiring, promotion, and compensation practices. Some laws, including those in California and Illinois, have also increased pay data reporting requirements. Employers may want to consider taking steps to ensure they understand the impact of these state and local laws as well.

Key Takeaways

Despite state and federal laws that prohibit employers from discriminating between women and men based on pay, a pay gap persists in the U.S. workforce. This pay gap is being targeted with a variety of new pay equity laws and compliance requirements. Further, the EEOC is focused on combating pay discrimination in all its forms. Employers may want to consider addressing potential disparities in their compensation schemes that cannot be adequately explained or defended by reevaluating their compensation policies and hiring and promotion practices.

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National Law Review, Volume XIII, Number 74

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