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Remediating Risks Revealed in a Pay Equity Audit: Part III

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By Brian Murphy & Jonathan Stoler

A thorough pay equity audit will inevitably reveal wage gaps among certain groups of comparable employees. These pay gaps may be attributable to permissible, nongender-based factors such that no further action is necessary. However, in instances where the audit has revealed gaps that are not explainable by other factors, and irrespective of whether the gaps are wholly unintentional, the audit itself is meaningless absent remediation efforts designed to resolve the issue.

An increase in the compensation of underpaid female employees is often the most appropriate remedy. Depending on the result of the audit, the increase may be necessary to base salary, bonus or some other aspect of compensation so that it more closely aligns with an appropriate male comparator in both total compensation and its constituent components. The increase will not be dollar for dollar in all instances, as it is unlikely that any two employees, no matter how similar their working conditions, will be identical, such that legitimate nongender-based factors may still play a role in determining the precise increase. Note, however, that a decrease in the salaries of male comparators will almost never be recommended given that the Equal Employment Opportunity Commission has firmly rejected that approach to wage equalization.

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An alternative approach that may be appropriate will be to move a seemingly underpaid female employee to a more fitting job title or comparator group. This approach might be right for a female employee who was underpaid by comparison to male counterparts sharing the same job title, but as to whom the audit revealed did not perform comparable duties to those sharing that job title. Instead, she performed duties more closely aligned with a lower grade within the job title or a different job title altogether. A formal change in her job title and related employment profile based on the duties she performs may reveal her to be paid equally with her true comparators. Simply moving a female employee to a lower grade may correct the pay disparity on its face, but is not without risk if the employer cannot clearly articulate a legitimate basis for doing so.

The flip side may also be true. The audit may reveal that not only was the female employee underpaid as compared to others in her job title or comparison group, but that she actually performed more advanced duties. In this instance, an employer should consider not only a pay increase, but a potential promotion that more accurately aligns with the duties she performs.

These paths, together or individually, should remediate the specific issues revealed by the pay equity audit, but they are not the end. An employer should also implement other policy and practice changes that can serve as a prophylactic measure moving forward to minimize the potential for recurrence of unintentional pay disparities.

To begin, employers should implement written policies that establish structure around compensation decisions. In the absence of ready reference points, compensation decisions often become too subjective or discretionary such that legitimate, objective explanations for any gaps are often lacking. The features of a written policy will differ from employer to employer based upon their respective compensation philosophies. For one employer, salary ranges benchmarked against the market for certain job titles may be appropriate, whereas for another, a lockstep compensation system based upon years of service may fitting, and whereas for still another, objective production targets may be the most suitable. Merit increases should be similarly cabined by objective criteria. Whichever approach is used, the written policy should require any manager deviating from the established guidelines to contemporaneously document the non-gender-based reasons supporting the decision.

A written policy should also account for any legal requirements that may be applicable within the jurisdiction the employer operates. As referenced in Part I of this article, there is an increasing trend to prohibit employers from considering salary history in benchmarking initial compensation decisions. Likewise, many jurisdictions now prohibit bans on employees discussing compensation. Whatever the specific requirements of the applicable jurisdiction may be, the written policy should emphasize them, both because they are legally required and because the legislation is designed to have the intended effect of eliminating pay gaps.

Beyond adjusting or implementing compensation policies, employers should also review tangential documents that may have a bearing on a compensation analysis or which may be relevant in an equal pay litigation. For examples, while job descriptions are often overvalued as to their predictive ability of job duties actually performed, they nevertheless provide initial grounds for mounting arguments as to whether certain jobs are appropriately compared or whether they should be separated for compensation analysis. They are also likely targets of initial discovery requests in an equal pay action. The information gleaned during an audit can be used to bolster the accuracy of job descriptions and support groupings of employees in a manner that properly reflects pay equity within the group.

Similarly, employers that rely upon performance evaluations as a metric for setting compensation should ensure that the evaluations are aligned with the revised job descriptions. Managers who will complete performance evaluations should also be trained concerning the need for accuracy and integrity in the evaluation process given their role in the compensation system. The same is true concerning promotion decisions, which must be tied to objective non-gender-based criteria lest a disproportionate amount of male employees populate higher paying, higher-level positions, while continuing to perform the duties of their lower-level, and lower-paid female counterparts.

Implementing these measures following an audit will minimize risk and financial exposure. They will not, however, serve as a perpetual seal of approval: equal pay issues are an increased focus of legislatures and will be an increased focus of litigation. Employers must periodically review their procedures and compensation data to ensure, not only continued compliance with these laws, but to realize the workplace benefits in terms of productivity and morale that accompany a workplace that is fundamentally fair.

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