Avoid pay discrimination litigation with decentralized pay

Here’s an important and surprisingly easy way to avoid potentially catastrophic class-action pay discrimination litigation: Decentralize pay and promotion decision-making to the greatest extent possible.

You may still face isolated lawsuits alleging discriminatory pay practices by a specific supervisor. However, that’s preferable to a potential class-action lawsuit on behalf of thousands of similarly situated employees across the company.

Class-action litigation is time-consuming, hard to manage, expensive—and potentially disastrous.

Recent case: A group of female KPMG associates, senior associates, managers, senior managers, directors and managing directors in the firm’s tax and advisory division sued, alleging sex discrimination under Title VII and the Equal Pay Act.

They sought court permission to represent all similarly situated female employees nationwide. If approved, the class would include 10,000 plaintiffs.

The women first sued in June 2011, alleging that KPMG discriminates against thousands of woman in pay and promotions. Shortly afterward, the U.S. Supreme Court decided *Wal-Mart Stores v. Dukes*. That case made lawsuits like the one against KPMG more difficult for employees seeking class-action status if the alleged discrimination was the product of local supervisors exercising their discretion in awarding pay and promotions.

To maintain massive class-action lawsuits and obtain backpay and damages for every class member, employees now have to show that a centralized policy was responsible for pay discrimination.

KPMG’s compensation policy lets managers make local decisions, with discretion provided under the direction of a KPMG national director of compensation strategy. Essentially, the national director and associated staff determine the overall budget for each director and provide general guidance on pay ranges and performance review standards. The guidance is consistent across the company, but allows individual managers to determine how to allocate their budgets within their divisions or groups.

KPMG argued that its system is quite flexible at the local level. A centralized framework dictates who will make discretionary decisions, but doesn’t dictate how those individual managers exercise their discretion. The system also includes a framework for regular reviews and promotions so there is a clear career path for workers to follow. However, implementing those reviews and promotion decisions falls on individual managers. In other words, the managers operate within a framework, making discretionary decisions on who is ready for promotion based on performance. Top-level managers only review the process, not individual pay and promotion decisions.

The court declined to certify the class. It said KPMG’s process means employees have to bring individual actions based on their supervisors’ decisions. They can’t bring all members of a protected class (in this case, women) into one lawsuit. (*Kassman, et al., v. KPMG*, SD NY, 2018)

7600 Leesburg Pike, Suite 300, Falls Church, VA 22043-2004 (800) 543-2002

Final note: Get expert legal help when designing compensation and promotion systems.

Pay particular attention to where you are located. Some states and municipalities have specific rules that will affect your policies, such as prohibitions against using past compensation at another company or organization to set starting pay rates.

The idea is to prevent compounding possible past discrimination from causing lower pay for a protected class. For example, if a new hire was discriminated against at her last employer and earned less there than she should have, setting her salary based on her previous salary would merely perpetuate discrimination.

7600 Leesburg Pike, Suite 300, Falls Church, VA 22043-2004 (800) 543-2002