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Pay equity is a hot topic in 2021, it may be time for a self evaluation

Pay equity is shaping up to be the hot human resource topic of 2021. A proactive pay policy self-assessment will keep smart employers ahead of the curve as the new administration vows action.

The COVID-19 pandemic has impacted some more than others — particularly women and people of color. Already, Biden has made clear that addressing racial, ethnic, and sexual pay disparities will be an integral part of pandemic recovery. Via a series of executive orders, President Biden instructed the federal government to address the inequality, including pay equity. With more executive orders, regulations, and legislation likely on the way, businesses should pay close attention and evaluate their own practices to keep ahead of these trends.

Current laws mandating equal pay

Employers already must follow federal, state, and local laws that prohibit workplace discrimination — including in pay and benefits. Title VII of the Civil Rights Act has promised equal workplace treatment regardless of race, religion, color, sex, and national origin. The Americans with Disabilities Act (ADA) protects the disabled from discrimination. The Age Discrimination in Employment Act (ADEA) extends protection to older workers. The Pregnancy Discrimination Act (PDA) and the Equal Pay Act (EPA) target sex-based workplace discrimination. And the Family and Medical Leave Act (FMLA) is meant to provide time for family-related needs — which disproportionally impact females. Altogether, these and other laws should already have eliminated inequality and delivered pay equity. Countless surveys and studies say otherwise.

Salary history discrimination may be a focus of pay equity efforts in 2021

Some states have taken concrete moves meant to eliminate pay inequality. Take, for example, setting starting salaries on hiring. For decades, employers have typically started with the applicant's current or most recent salary and gone from there. Adding a set percentage to their current salary gave the applicant a raise and often saved the hiring employer money. An applicant who applies while underpaid due to past discrimination is at an obvious disadvantage under such a system. The new employer ends up perpetuating past discrimination, though they cannot be sued for the effects of past discrimination. And the pay equity problem is never fixed.

One obvious solution is to set starting salary entirely independent of past pay. Presumably, if a prospective employer does not have current salary information, it cannot be the starting point. Other, more relevant factors like education, experience, and training then come into play.

Some states have already legislated an end to salary questions.

Alabama. Businesses cannot deny employment, a promotion, or an interview because an applicant refuses to disclose their past salary.

California. Employers can't ask for an applicant's salary history, cannot use volunteered salary history to set pay, and must provide the employer's pay scale information if asked.

> **Additional Resource:** Learn more about California's past legislation on pay equity.

New York State. New York State's Labor Law prohibits employers from asking any questions about an applicant's salary history.

Oregon. Employers cannot ask for salary history until *after* they have made a job offer. Even then, they cannot use that past salary to set starting pay.

Be sure to check where your state and city stand on salary history information.

New danger: Mandatory salary reporting

One state has gone the furthest towards fixing pay inequity. California now forces employers who are big enough to submit EEOC's EEO-1 to send the data to California authorities. The Department of Fair Employment and Housing (DFEH) will analyze the data and investigate perceived pay inequity. DFEH may then initiate investigations and potentially discrimination lawsuits based on the data. The first data submission is due March 31, 2021.

With the attention pay equity is getting in 2021, other states are sure to follow suit. Plus, chances are the EEOC intends to use the data it is collecting to do the same. Finally, it's likely that the Biden administration will push for a federal law that includes a salary history ban and new rules for pay equity. Employers should consider performing a pre-emptive pay equity audit.

Conducting a pay equity audit

Depending on the size of your organization, pay equity audits can be complex, expensive undertakings. However, that doesn't mean you shouldn't do the audit. It means top management needs to understand the costs and benefits and buy into the project. A pay equity audit is more detailed than a "pay-gap" analysis. Stockholders often request a "pay-gap" analysis that shows how much female employees are paid relative to male employees. For example, saying women earn 80 cents for every dollar a man earns is the result of a "pay-gap" analysis. "Pay gap" analyses are much simpler undertakings than a pay-equity audit.

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Pay-equity audits are generally performed to protect the company from pay discrimination charges. Companies should always include legal counsel in the process. Legal counsel will know the pay equity laws in each state in which the company operates. The analysis should show pay disparities in categories covered in those state laws. Most importantly, having legal counsel involved shields the findings from discovery as attorney-client privileged.

The federal Equal Pay Act requires employers to pay employees the same pay for the same work with a few exceptions. State laws tend to cast a broader net requiring similar pay for “comparable” or “substantially similar” work. Deciding which jobs are “comparable” or “substantially similar” is the starting point. Generally, this means work that requires similar skills, responsibilities, and effort, and are performed under similar conditions. Look at this broadly. For example, work done in different divisions can be comparable.

For each work category pull salary and demographic data. If company practices include increases for seniority, include time in the position. Similarly, if your company gives raises based on performance reviews, include those ratings.

Pay equity analysis

2021 may be the perfect time to launch into a pay equity analysis. For small groups with simple pay structures, a simplified analysis may suffice. Any difference in pay that cannot be explained by a *bona fide* reason should be examined more closely. *Bona fide* reasons include seniority, performance ratings, or another metric your company uses to determine pay. Many employers use pay history to justify lower starting salaries. Lower female salaries based on “pay history” will face an uphill battle in court. Consult with counsel to determine the best approach in the states in which you operate.

For larger groups, the best approach is a regression analysis that controls for *bona fide* reasons such as seniority, performance ratings, etc. In effect, this process removes the amount of salary variance attributable to bona fide causes. It is assumed that the unexplained variance is caused by discrimination.

Using the pay equity analysis data

The pay equity analysis will identify the workers who are underpaid because of discrimination. Federal and state laws prohibit cutting pay to address pay inequities. Employers should raise the pay of underpaid workers.

The pay equity analysis may also be useful in identifying discriminatory practices. For example, there may be a statistically significant difference in the raises given for performance evaluations. If so, the criteria used in performance evaluations may be discriminatory. Company performance evaluations may be overly based on subjective data. Alternatively, certain supervisors may be responsible for giving female employees lower ratings.

Finally, a pay equity analysis may force a company to rethink its compensation model. Does the compensation model create incentives for employees to engage in profitable behavior? Does it discourage female employees? Further analysis may include a comparison of turnover between males and females. Examine feedback from exit interviews. Do men and women give the same reasons for leaving the company?

The current push is for gender-based pay equity. A pay equity analysis can identify disparities in minority pay or other protected classes as well.

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