

Practical Tips For Avoiding Compensation Discrimination

by

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On May 28, 2007, the U.S. Supreme Court held, in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, that the time period during which a claim of pay discrimination could be filed began on the date of the allegedly discriminatory decision. The Court rejected the argument of plaintiff Lilly Ledbetter that each time a new paycheck was issued, a new act of discrimination took place that re-started the statute of limitations on the claim. Congress did not agree, and on January 29, 2009, President Obama signed the Lilly Ledbetter Fair Pay Act (“the Ledbetter Act”), greatly expanding the ability of aggrieved employees to file suit against their employers for pay discrimination. Under the Ledbetter Act, employees have a renewed claim for pay discrimination with every new paycheck they receive, even if the decision that led to the alleged pay inequity occurred many years earlier.

Although Lilly Ledbetter’s case involved a claim of pay discrimination based on gender, the Ledbetter Act applies to discrimination based on all the characteristics protected by Title VII of the Civil Rights Act of 1964: gender, race, color, religion, and national origin. It also applies to age (40 or older), which is protected by the Age Discrimination in Employment Act. In 2008, before the Ledbetter Act was passed, but while it was getting a lot of attention in the press, Equal Pay Act claims filed with

the EEOC rose almost 17%. Other fair pay legislation is pending in Congress.

According to the National Committee on Pay Equity, statistics show that fair pay legislation is still needed:

Latest Census statistics show that the gap between men’s and women’s earnings widened slightly between 2007 and 2008, from 77.8 (generally rounded to 78 percent) to 77 percent. Based on the median earnings of full-time, year-round workers, women’s earnings were \$35,745 and men’s earnings were \$46,367. Median earnings for most women of color are even lower. In 2008, the earnings for African American women were \$31,489, 67.9 percent of men’s earnings (a drop from 68.7 percent in 2007), and Latinas’ earnings were \$26,846, 58 percent of men’s earnings (a drop from 59 percent in 2007). Asian American women’s earnings in 2008 were \$42,215 -- 91 percent of men’s earnings, an increase from 89.5 percent in 2007.

All this attention to pay discrimination should have employers thinking about how to minimize potential liability for pay discrimination. Fortunately, damages for lost pay cannot go further back than two years before the date that a discrimination charge is filed. However, *(continued on p. 16)*



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lawsuits for discrimination usually bring with them claims for emotional distress, punitive damages, front pay and attorneys' fees. This means that, as a practical matter, it is more economical for employers to take a systematic and proactive approach to compensation, and to identify and remedy problems on their own, than to react to employees who take legal action. Here are some practical tips employers can use to decrease the likelihood of liability for pay discrimination.

Compensation Philosophy

First, the organization should adopt a "compensation philosophy." A compensation philosophy is a formal statement of the goals and purposes of compensation. There may be different philosophies for different types of employees within the organization. For key employees, the company may focus primarily on compensation that is externally competitive so as to attract top performers, while for other employees the focus may be on internal fairness, or on each employee's personal characteristics and role in the company, or some combination of these. Ideally, the organization's top business and human resources leaders will develop a philosophy based on the company's particular circumstances and mission. It may be helpful to solicit input from lower level employees as well via a survey or focus groups.

The formal compensation philosophy should be shared internally with all employees. From a legal perspective, the most important reason for internal publication of the compensation philosophy is to provide guidance to and limit the discretion of managers making compensation decisions. The goal is to avoid ad hoc decision making about compensation that results in arguably discriminatory pay discrepancies. Internal publication will also be helpful to employees trying to understand the company's expectations and decisions.

Job Descriptions and Performance Evaluations

Job descriptions play a role in almost every aspect of human resource administration, including: (1) recruiting new employees; (2) researching external pay levels; (3) evaluating employee performance; and (4) accommodating employees and applicants with disabilities. Job descriptions should have a consistent format, and should be developed by a team consisting of the employees who are performing the jobs, their supervisors, and Human Resources. Job descriptions should be updated each year at performance evaluation time. Each job description should include the following elements: a gender-neutral job title that is in general use in the industry in question, a list of the job's essential functions (that is, the functions that the job exists to perform and that cannot be readily transferred to other employees), the department in

which the job exists, the minimum education and experience requirements for entry into the job, whether the job is exempt or non-exempt from Fair Labor Standards Act overtime requirements, and the physical and mental requirements of the job.

Job descriptions also provide a basis for external salary survey research. Compensation data can be obtained from salary survey companies, industry membership organizations, the government, and consulting firms. Market research should be used to establish a pay range for each job title, including those jobs (if any) primarily held by female and minority employees. This can help prevent overpaying for both new employees and those employees who have occupied the same job for a long period of time. Market rates for each job should be updated on a regular basis (i.e., every two years).

Performance evaluations should take place annually. For jobs in which compensation is related to performance (as opposed to seniority), performance evaluations are the foundations for pay increase decisions. To be most useful for compensation purposes, performance evaluations should use numerical scales and an overall average number. The overall ratings can be entered into the human resources database and used to ensure consistency between compensation and performance.

Documentation, Documentation, Documentation

Human resources professionals are familiar with the advice to document the rationale for all employment decisions. The Ledbetter Act reinforces the need to document the rationale for compensation decisions. Decision makers should prepare a written, contemporaneous explanation of the legitimate business reasons for each decision, showing that the reasons are consistent with the organization's compensation philosophy. Companies should scan all HR records into an electronic format, such as PDF, and file them in searchable electronic folders so that they are easily retrievable, do not get lost and do not consume physical work space. Scan and retain not only payroll records, but also hiring records, training records, job descriptions, and performance reviews. Retain this information indefinitely because claims of pay discrimination inevitably involve comparisons with the pay of other employees. Even if similarly situated employees left the firm years ago, the rationale for pay decisions involving them may remain relevant.

Pay Equity Analysis

Some organizations statistically audit their employees' pay levels to discover whether there is any basis for concern about pay discrimination. Such monitoring should be done through legal counsel to enhance the company's ability to keep the analysis confidential on the grounds of attorney-client privilege and the attorney work product doctrine. The analysis will involve collecting information that is usually already available in the personnel information system, such as employee names, work locations, job titles, years

in the company, years in the job, pay levels, and protected characteristics such as age, gender and ethnicity. This information can be analyzed to see whether there are any statistically significant discrepancies that appear to be related to a protected characteristic. If there are such discrepancies, the individuals affected can be identified for further study. The company's attorney can work with management to investigate whether there are legitimate reasons for any pay differentials that are discovered. Such legitimate reasons might include differences in performance evaluation scores, productivity, education, certifications and prior relevant work experience. If the company cannot identify legitimate nondiscriminatory reasons for the discrepancies, the company can take steps (in the form of pay raises) to more closely align the pay of the affected female and/or minority employees with the pay of similarly situated white and/or male employees. This approach is generally less expensive than defending against a claim or claims of illegal pay discrimination.

Training and Monitoring Decision Makers

A final common sense strategy for preventing compensation discrimination is training for decision makers. All managers should receive training on the basics of employment discrimination law and understand that pay decisions must be nondiscriminatory. Managers should also understand the company's compensation philosophy and the need to make decisions consistently with that philosophy. They need to

understand the connection between performance and pay decisions. They should also be taught about the importance of creating clear, understandable documentation of pay decisions on an ongoing basis. Human Resources should also review pay decisions with managers before they are finalized to ensure that the decisions are properly documented and consistent with the company's pay policies.



Teresa Cheek has practiced employment law at Young Conaway since 1988, handling litigation involving the full range of labor and employment issues, including sexual harassment, equal pay, discrimination based on race, sex, national origin, religion, age, disability and citizenship status, unfair labor practices, and breach of non-competition agreements. She also advises companies regarding compliance with labor and employment laws and conducts internal investigations.