



NORTH RISK PARTNERS™

Pay Inequity: What You Need to Know

November 2018

Presented by:



Mike Bourgon

Goals

- Review “equal pay” concepts and significant legal developments
- Focus on conducting a compensation analysis
 - Why do one?
 - How?
 - Caveats and best practices



Introduction

Pay equity includes issues relating to the fairness of compensation paid by employers to individuals or groups of employees. To effectively recruit and retain employees, an organization must have internal equity, where employees feel they are being rewarded fairly based on performance, skills and other job requirements.

Organizations must also ensure external compensation equity with employers competing for talent in the same labor market. Understanding the legal obligations regarding pay equity allows HR professionals to evaluate the lawfulness of their organization's pay practices and identify necessary corrective action.



The EPA

The EPA was the first piece of modern civil rights legislation. It has an extremely narrow focus, prohibiting pay discrimination based only on gender. The act prohibits employers from paying women less than men for doing the same or substantially the same work at the same facility.

Under the EPA, a claimant need only demonstrate that an employer pays men more than women (without proving discriminatory intent).

The EPA

To avoid liability under the EPA, an employer must prove an affirmative defense, that is, that any pay disparity is justified by:

- A seniority system that rewards employees based on length of employment;
- A merit system that rewards employees for exceptional job performance;
- An incentive system that pays employees based on the quality of their work or the amount of work they perform; or
- Another factor related to job performance or business operations, such as paying a shift differential to workers on less popular shifts.



Title VII of the Civil Rights Act of 1964

Title VII is a comprehensive federal law that prohibits discrimination in all aspects of employment, including compensation, based on race, color, religion, national origin and gender. According to the EEOC, “Compensation discrimination on the basis of sex in violation of Title VII does not necessarily constitute a violation of the EPA. This is because Title VII compensation discrimination claims are not limited to claims of unequal pay for equal work. Compensation discrimination in violation of Title VII can be established even if no member of the opposite class holds an equal, higher paying job.



Title VII of the Civil Rights Act of 1964

Comparisons can be made under Title VII between the compensation rates of 'similarly situated' employees, which is a more relaxed standard than the equal work requirement under the EPA. Furthermore, a Title VII claim can be brought based on an employer's segregating or classifying protected class workers in lower paying jobs and limiting their opportunities to secure higher paying jobs.



Title VII of the Civil Rights Act of 1964

Finally, compensation discrimination claims under Title VII are not restricted to claims in which comparisons are made between jobs in the same establishment, although Title VII does not forbid applying different standards of compensation to employees ‘who work in different locations’ as long as the difference is not the result of discrimination.”



The Lilly Ledbetter Fair Pay Act's Modification of the Timeliness Rule

Under the Lilly Ledbetter Fair Pay Act, each new paycheck that is tainted by a prior discriminatory pay decision triggers a new EEOC charge filing period. Thus, as long as an employee's paycheck continues to be less than it would have been but for some prior discriminatory pay decision, the employee may make a timely challenge to that previous allegedly discriminatory pay decision.

The Lilly Ledbetter Fair Pay Act's Modification of the Timeliness Rule

Under the Act, an individual subjected to compensation discrimination under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, or the Americans with Disabilities Act of 1990 may file a charge within 180 days (or 300 days if a state or local agency enforces a law that prohibits discrimination on the same basis) of any of the following:



The Lilly Ledbetter Fair Pay Act's Modification of the Timeliness Rule

- When a discriminatory compensation decision or other discriminatory practice affecting compensation is adopted;
- When the individual becomes subject to a discriminatory compensation decision or other discriminatory practice affecting compensation; or
- When the individual's compensation is affected by the application of a discriminatory compensation decision or other discriminatory practice, including each time the individual receives compensation that is based in whole or part on such compensation decision or other practice.



State laws

Many states, cities and other political subdivisions have passed laws prohibiting discrimination in employment based on a wide variety of protected categories. State courts generally adopt federal courts' interpretations of Title VII although others have passed laws with greater protections. A growing trend in state laws prohibits asking about a job candidate's salary history due to concerns that this practice may perpetuate a gender-based salary gap if employers base a new employee's pay on his or her previous salary.



Most Significant Developments

- “Similar” (as opposed to “equal”) work
- Factors must explain entire difference
- Prior salary out as a factor



Reviewing Policies Regarding Pay Decisions

Developing a compensation strategy within this legal framework provides employers with an opportunity to proactively review their organizations' vulnerabilities regarding pay equity. A thorough self-evaluation includes the following steps:

- Ensure confidentiality of the self-evaluation
- Review pay structures
- Review starting pay policies
- Review merit increase policies
- Review promotional pay policies
- Review recordkeeping practices



Reviewing Policies Regarding Pay Decisions

The time to put confidentiality protections in place is before undertaking any portion of the self-audit. Once the horse is out of the barn, shutting the door is useless. Unless the organization conducts the voluntary self-audit in anticipation of specific litigation or trial, the self-audit will be subject to discovery by the government and plaintiffs' counsel unless the employer can satisfy the standards of the attorney-client privilege.





NORTH RISK PARTNERS™

Conducting a Compensation Analysis



Compensation Analysis – Why?

- Why do one?
 - External pressure
 - Internal pressure
 - Concern over brand
 - Risk mitigation



Compensation Analysis – Whether?



- Whether to do one?
 - If, and only if, commitment to implementation
 - Requires leadership commitment
- Make sure it's privileged!

Compensation Analysis – How?

- How to do one?
 - Two basic approaches:
 - › Individual deep dive/cohort analysis
 - › Statistical analysis
 - Which is better?
 - › It depends
 - › Both may be necessary



Compensation Equity Principles

Compensation equity concerned with whether individuals are paid differently in comparison to others may be framed as one of two types: those of *external compensation equity* and those of *internal compensation equity*.

External Equity

Questions of external compensation equity address whether employees in an organization are compensated at rates that are consistent with the external labor market. For example, if we are evaluating external pay equity, we may ask whether a single employee or group of employees in our organization is being compensated at a level that is approximately equal to the level that a competitor organization would be willing to pay him/her/them.

External Equity

Determining external equity is normally accomplished by first conducting salary surveys to determine the compensation and benefits packages offered by other organizations. Salary surveys can be conducted in-house or they can be purchased from a vendor. Organizations compare the survey results to their own compensation and benefit packages and then strategically determine where they want to be in the market.

External Equity

For example, organizations must determine whether they want to

- (a) be one of the highest paying organizations (in order to attract and retain the best employees) or
- (b) be in the middle of the market (because it makes better financial sense given the organization's business strategy).

Internal Equity

In contrast to external equity, which is mostly an issue of recruitment and retention, questions of internal compensation equity address whether employees *within an organization* are compensated equitably in comparison to one another. Questions of internal equity are addressed at both the individual and group level (e.g., sex, race). In both cases, internal compensation equity questions include comparisons of *similarly situated* employees.



Internal Equity

Although courts, federal agencies, and compensation experts differ in their exact definitions of what defines similarly situated employees, they do agree at the basic level that similarly situated employees are defined by similarity in the tasks performed and the conditions under which those tasks are performed. Thus, questions of internal equity concern whether differences in compensation between individuals who are performing the same or similar jobs make sense.

Individual Equity

Whether a particular employee is paid fairly in comparison to similarly situated peers is a question commonly addressed by compensation professionals. These comparisons are either generated by an employee complaint (e.g., “I have more experience than Bob, why is he getting paid more?”) or by an organization’s normal review of employee compensation.

Individual Equity

It should be noted that, although individual pay equity is a good business practice, there is not a legal requirement that private sector employees be paid fairly. As long as the pattern of pay inequity is not related to sex, race, color, religion, or national origin (or age under the Age Discrimination in Employment Act (ADEA) and disability under the Americans with Disabilities Act (ADA)), organizations are free to pay employees as they please. There is a common refrain in the salary equity field that, “You can be fairly stupid in how you pay people but you must be stupid fairly.”



Overview of a Compensation Analysis: Basic Steps

- Create Similarly Situated Groups (“SSGs”)
- Determine pertinent factors (“Controls”)
- Analyze the data
 - Identify concerning disparities
 - Research explanations
- Consider adjustments
 - Who; how much; timing; messaging
- Consider other issues



Begin by Creating SSGs



Compare people doing substantially similar work:

- Generally within same pay system
- Some groupings may be too broad
- Some may be too narrow

Begin by Creating SSGs



Other potential issues:

- “Levels” – (a valid SSG?)
- Location – (an SSG or a control?)
- Company or department – (ditto)
- Which jobs are truly “similar” –
 - When do you need an I/O psychologist?



NORTH RISK PARTNERS™

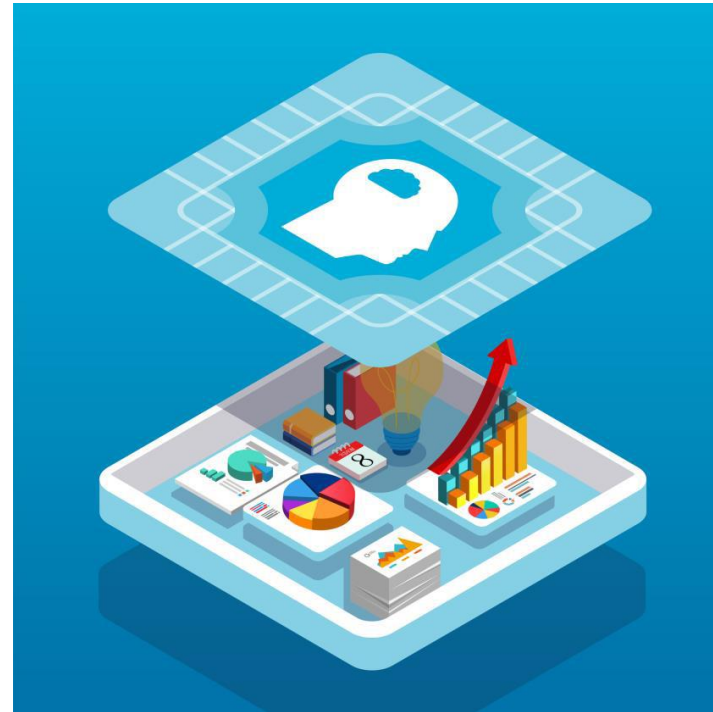
Identify Pertinent Factors or “Controls”

- Identify neutral factors (or “controls”) that affect compensation
- Common factors –
 - Time in company; time in job
- Other frequently used –
 - Education; location (if not an SSG)
- Problematic –
 - Level
 - Performance (potential as “tainted variable”)
- Check state law



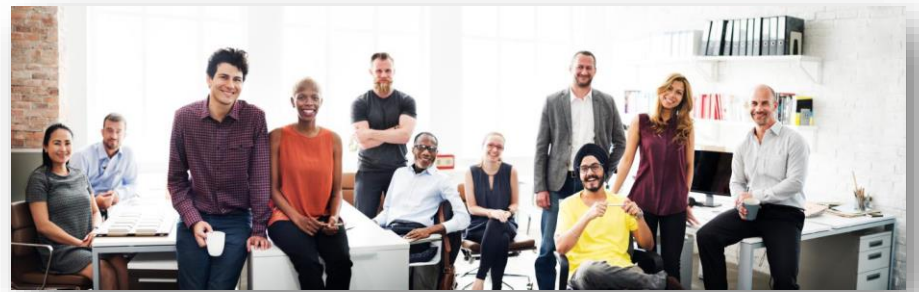
Analyze the Data

- Two basic approaches
 - Statistical analyses
 - Cohort analyses



Consider...and Implement Adjustments

- Critical decisions –
 - Who to adjust?
 - How much to adjust?
 - When to adjust?
 - What message to deliver
- All require careful consideration
- *Discussions should be privileged*



Taking Corrective Action

Compensation self-audit results could produce recommendations for corrective action in one or more of the following areas relating to policy.

- Revisions in starting pay policies by:
 - Reducing managerial discretion.
 - Improving the monitoring of compliance with policies.
 - Providing a more complete written record of decisions.

Taking Corrective Action

- Revisions in pay-for-performance plans by:
 - Moving from annual merit increases in base pay to lump-sum bonuses.
 - Reducing managerial discretion.
 - Improving monitoring of compliance with policies.
 - Providing a more complete written record of decision.



Taking Corrective Action

- Revisions in promotional pay increase policies by:
 - Reducing managerial discretion.
 - Improving the monitoring of compliance with policies.
 - Providing a more complete written record of decision.



Ongoing Maintenance Required

- Achieving – and *maintaining* – fair pay requires continuing efforts
 - Continued compliance, not “one-and-done”
 - Frequency of review?



Consider Other Issues

- Other aspects of compensation –
 - Total compensation vs. base salary; bonuses, etc.
- Other bases –
 - Race or ethnicity
- Other issues –
 - Career ladder/assignments or promotions
- Modifications to policies or procedures –
 - HRIS



Caveats and Best Practices



- Support and buy-in from the top
- Be prepared to implement results
- Carefully consider –
 - When, whom, and how much to adjust
- Ensure discussions privileged

Questions?



North Risk Partners Value-Added Services Hotline **(888) 667-4135**

Call the hotline to get personalized advice from HR and safety professionals on a variety of topics, including state and federal compliance, employer best practices, workplace programs and more.

*You may also reach Synergy Human Resources by emailing hr@northriskpartners.com