



## Avoiding the Risks of Illegal Pay Discrimination

By Shari Dunn, Managing Principal, CompAnalysis

In our experience, most employers want to pay their employees legally and fairly. Given that there are so many variables that can determine actual compensation levels, paying fairly and equitably can be a very complex task.

Illegal pay discrimination is defined as a practice that results in actual wages, salaries, bonuses and/or benefits that disadvantage protected class employees. This means that situations in which protected class employees receive less compensation than other employees who are similarly situated (same job, same performance, same tenure, etc.) can be viewed as violations of one or more of a broad array of federal laws, including Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, the Rehabilitation Act of 1973, the Americans with Disabilities Act of 1990, and now, of course, the Lilly Ledbetter Fair Pay Act of 2009. With the recent passage of the Ledbetter Act, which significantly extends the statute of limitations relative to claims, among other provisions that increase employers' risks, there is heightened employer awareness and concern about potential liabilities.

Discrimination does not have to be intentional to be illegal. If it's unintentional, the legal remedies may be less severe, but there still may be legal remedies.

What can you do to protect your organization from culpability? In our view, there are both structural and systemic causes of pay discrimination. Structurally, it is important to assure that your wage and salary structure is objectively established and maintained based solely on jobs and/or prescribed skill sets, not on the personal characteristics of incumbent employees. Systemically, it's essential to ensure that all compensation decisions, including those for new hires and existing employees, are made in a consistent manner across the organization, and without regard to factors that are not job-related.

There are four steps that you should take now to avoid potential legal problems:

1. Review your salary structure and job classifications, or establish a new structure if one doesn't exist or if it is too informal.
2. Compare the current base pay, bonuses and benefits, on a job-by-job basis, of all protected class employees to the comparable compensation elements of all other employees in those jobs; identify whether there are any apparent inequities that disadvantage protected class employees.
3. Examine your existing salary administration practices to determine whether opportunities exist to pay inequitably.
4. Assess your performance appraisal process to determine the extent to which, if at all, personal characteristics such as traits and behaviors are rated in a way that can be construed as unfairly biased, especially as such bias can be linked to protected class characteristics.

## 1. Salary Structure and Job Classifications

Classifying jobs based on duties, responsibilities and/or required knowledge, skills and abilities (KSA's) is dependent on current and accurate job descriptions, legitimate labor market data, and clear internal job comparisons. Poorly written job descriptions that contain ambiguous or misleading language, or that reflect prior or anticipated future responsibilities, can lead to misclassifications that are more reflective of the incumbents than of the job as it exists.

It is imperative that jobs be evaluated based on content, not on titles, as titles may or may not be descriptive of job functions and/or level in the organization. In addition, reporting relationships, based on the job, need to be well-defined as a part of the evaluation process. Any lack of clarity in any of these areas can lead to real or perceived bias that can then be alleged as discriminatory if the bias is or could be in favor of non-protected class employees. In short, job descriptions, especially when used to establish job values, need to portray current reality.

Salary structures are intended to be frameworks within which jobs are classified in a consistent, objective way. The basis of job classification is a combination of internal and external factors. Internally, we like to use a relative job comparison process that systematically considers five key job characteristics: (a) KSA's required, (b) supervisory responsibility, (c) nature and volume of contacts, (d) independence required, and (e) the potential impact of job of the organization's success. This process is facilitated by an unbiased third party who queries a department head about the jobs and assures that he/she is focused on job functions and not on the incumbents.

Current labor market data are the other indicators of the worth of jobs. It's important to engage in careful job matching based on written job descriptions, not titles alone. Market data generally tend to be free of bias, so the key is to use solid data from multiple sources, also making sure to match jobs with respect to location, industry and organizational size.

## 2. Perform Internal Audit of Actual Compensation

Assuming that you have a solid structure and job classifications in place, this "audit" is really a matter of simple statistical comparisons of compensation levels between the different protected classes and those who are not in protected classes. It's a way to identify any potentially damaging evidence of illegal discrimination. For example, let's say that the average salary for women is 70% of the average salary for men who hold the same job. On its face, this would constitute illegal discrimination unless it can be shown that there are identifiable, measurable, non-discriminatory reasons, such as performance or tenure, that justify the differential.

One purpose of this audit is to identify potential issues while there is time, prior to any charges being brought, to correct any that appear to be the result of discriminatory action. Whether such corrective action needs to be retroactive is a matter to be resolved with the assistance of legal counsel.

Another purpose of the audit is to determine whether there is a need to change the organization's compensation policies and/or practices, whether in the ways jobs are evaluated and classified (see #1 above), with respect to salary administration (#3 below), or relative to performance assessment (#4 below.)

### 3. Salary Administration Practices

In our opinion, several common practices contribute significantly to illegal and/or unfair pay:

- Granting annual salary increases based on percentages determined by a “merit increase matrix.” This practice typically results in salaries and wages that are loosely correlated with tenure, focusing on the increase percentage rather than on the actual resulting pay.
- Giving managers latitude with respect to pay increases, sometimes within the controls of an overall budget percentage. Often, the budget is spread evenly among all employees, regardless of current base pay, performance, or any other relevant factor. This is a popular practice because it is easy. However, it can, and often does, perpetuate and make more severe existing inequities.
- Ad hoc increases granted in reaction to employee complaints. These are usually individual situations that arise when an employee complains about his/her pay, threatens to leave for more money, or alleges that his/her pay is unfair or uncompetitive. When the employer capitulates and grants increases under these circumstances, this can create inequities where none previously existed. This practice can also contribute to undesirable pay compression.
- Hiring practices that establish a new employee's salary based on an assumption that a new employee's pay has to be some percentage higher than what he/she previously earned.

We recommend that salary adjustments for existing employees be done based on a scenario created to reflect the organization's pay philosophy. If the organization is committed to pay base salaries that reflect both the value of the job and the individual's performance, then salary adjustments need to be computed based on a formula that will result in salaries matching that scenario.

For example, if the employer's scenario stipulates that top performers be paid 115% of job value, and an individual at this performance level is currently only paid 105% of job value, it makes sense to adjust his/her salary by as much as it takes to place him/her at 115% of job value. Conversely, if the scenario stipulates that if an employee is a new hire, or still developing to full competence, he/she should be paid 90% of job value, and the employee is already being paid 102%, the correct action in this case would be to withhold any increases until the job value increases and/or full competency is achieved. Only in this way can an organization be certain that base pay levels are non-discriminatory. Regulatory agency audits are about actual pay, not about increases.

#### 4. Performance Measurement

Traditional performance appraisals are one of the most hazardous elements in an organization's pay management practices. Traditional performance appraisals typically produce individual ratings based on such subjective factors as personal traits and behaviors. The subjectivity inherent in this process makes it almost impossible to justify the salary or bonus decisions based on such ratings. It is a rare supervisor who can completely eliminate personal bias from his/her assessments of employees' characteristics. When that bias is linked to the supervisors' conscious or subconscious perceptions about the impact of age, gender, race, or disability on performance, it will ultimately influence pay decisions.

One way to mitigate the situation is to re-structure the performance management process into two distinct parts: (1) employee development, and (2) performance outcomes linked to pay.

Employee development can be established as a separate program designed to help employees improve their job-related competencies. We have found that it is most effective to make this a stand-alone process that requires supervisors to continuously work with their employees to help them improve their skills, traits and behaviors in ways that will enhance their ability to produce improved work products. Generally, the methods used will be coaching, counseling, and training. There should be no need to apply quantitative measures to this process, nor should the competency improvement necessarily be directly tied to compensation. Instead, increased compensation would be expected to come from promotions to higher level jobs and from improved results produced as a result of increased competencies.

Meanwhile, performance outcomes can be measured quantitatively in terms of goal achievement. For this purpose, goals that represent desired business results can be established and measured as percentages of achievement. These measures can be used to determine base pay levels and/or bonuses. They are free of personal bias because they are based on pre-determined business outcomes, not on person traits and behaviors.

#### Summary

Employers have many opportunities to avoid the potentially very expensive problem of illegal pay discrimination. When these policies and practices are implemented, the risk of legal exposure is greatly reduced. An added benefit is a pay and performance management process that contributes to the success of the organization, as well.

Please note that this article represents the opinion of the author and is based on conclusions reached as the result of more than 35 years of human resources management and consulting experience. The comments and recommendations presented herein do not in any way constitute legal advice, as the author is not an attorney.