Pay Equity and Employers' Actions

Elliot Dinkin
Cowden Associates Inc.

Although there is a current trend to focus on pay equality, in the end, it is really about human capital. Even if pay levels might be fully explainable by appropriate factors, underrepresentation of women and minorities still exists in leadership positions. This could be due to recruiting problems, promotion issues, skewed levels of attrition or broader and structural representation issues at the industry level. Either way, when considering pay equity issues, it is worth understanding gender, race and ethnicity progression through the organizational hierarchy, and where the unexplained failure points might exist.

Said differently, managing pay and human capital is a business risk, and failing to address compensation through this lens can lead to dramatic consequences, beyond more than the ability to attract, retain and motivate employees. Clearly, focusing on pay equality is a good place to begin, but moving the focus to a broader overall human capital matter is critical.

HISTORY

Today, 57 years after the passage of the Equal Pay Act of 1963 (EEOC n.d. 1), compensation committees throughout the nation continue to face growing risk of uncertainty, underscoring the balancing act that employers face in implementing initiatives to promote fairness and opportunity among their existing and future employees.

Twenty-five years after the Fair Labor Standards Act of 1938 (DOL 2011) passed, the Equal Pay Act of 1963 came along, prohibiting sex-based wage discrimination between men and women in the same establishment who perform jobs that require substantially equal skill, effort and responsibility under similar working conditions.

In 1964, Title VII of the Civil Rights Act (EEOC n.d. 2) banned employers from discriminating based on "race, color, religion, sex or national origin."

Fast-forward eight years. Title IX of the Education Amendment of 1972 (DOJ n.d.) expanded the reach of the Equal Pay Act of 1963 to include white-collar executive professional and administrative job categories that had been exempt from the law.

Then, the Pregnancy Discrimination Act of 1978 (EEOC n.d. 3) came along. The act requires that pregnancy, childbirth or related medical conditions and women affected by pregnancy, childbirth or related medical conditions to be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other employees who are similar in their ability or inability to work.

2009 gave us the Lilly Ledbetter Fair Pay Act, which overturned the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co. Inc.*, 550 U.S. 618 (2007), which severely restricted the time period for filing complaints of employment discrimination concerning compensation (Lilly Ledbetter 2009).

THE FACTS

One of the biggest challenges in addressing gender pay equity is distinguishing the data-driven facts from statements based on misinterpretation of that data. In fact, the most popular gender pay inequity number, that women earn just 80 cents for every dollar earned by men, is a gross oversimplification that is perpetuated by such organizations as the Center for American Progress (Frey and Bleweiss 2019). (Several articles in WorldatWork publications, such as John G. Kilgour's "The Gender-Based Pay Gap Is Gone" on page 28, have used scholarly analysis to debunk such statements.)

The discussion needs to include the fact that pay equality is not just a best-practices governance issue or a moral dilemma; it is also a long-standing legal issue. Companies face real litigation risk along with reputational, performance and engagement risk by not examining how they can improve compensation parity. Pay equality and the threat of lawsuits can take on multiple roles, including actions of shareholder derivative lawsuits. Can there be a new wave of suits, similar to the #MeToo events?

The impact on company value could be significant and companies should consider ways to protect themselves.

PAY EQUITY GOALS

Employers should focus on validating that compensation is set within acceptable reason, such as tenure, performance, role and location. Unacceptable reasons would be gender, ethnicity, rate, or other attributes that do not relate to work and contribution.

Not everyone receives the same pay nor should he or she. It is perfectly acceptable to pay two people differently because they do different work, one outperforms the other or they are in different states and prevailing wages differ among those states. These all relate to the work the person does and not his or her identity.

The focus should be on providing equal pay for equal work. A pay equity gap exists when there are differences in pay not related to these factors, and further, one or more classes of employees are disproportionately affected.

EMPLOYER ACTION: PERSUADING TOP MANAGEMENT

While management may understand risk very well (such as how cybersecurity, internal controls, audits, etc., always get management's attention), they also need to comprehend pay equality as a risk. Reasons include being able to preemptively find problems and being in a position to give positive assurances to external stakeholders. More importantly, mistakes discovered by a study could also indicate that the company made a good-faith effort to prevent them. The same can be true of pay equity. Even if a prior pay equity study had missed a situation in the data, the existence of the study can be evidence that management took the matter seriously.

EMPLOYER ACTION: PERFORMING A PAY EQUALITY STUDY

A pay equality study compares pay for similar work—accounting for legitimate factors intended to drive differences in pay, such as experience, location and role, before calculating an all else equal "adjusted" gender or racial pay gap.

Results from a pay equality study will identify one of the following:

- All is well and there are no pay equality issues.
- All is well and there are no pay equality issues; human capital problems exist with insufficient diversity within the workforce (e.g., women dropping out midcareer).
- A limited pay equality problem exists that is unintentional and solvable; compensation system operates effectively.
- Findings indicate that a systemic pay equality problem exists.
- Poor representation of women and minorities at senior levels.

Pay equality studies are largely about disentangling messy cause-and-effect relationships of this nature; is lower compensation due to genuinely weaker performance or is a poor performance evaluation a cover, even subconsciously for underlying biases?

PAY EQUALITY CONSIDERATIONS

Just as important, what is a board of directors' and compensation committee's role in preventing and responding to pay equality allegations? What is your board doing today? Is your board involved?

- Are their responses independent and reasonable or merely a rubber stamp of management's actions?
- Does management share significant issues promptly with the board?
- Is the board taking decisive action to ensure protection of the company against the gender pay equity-related claims?

Organizations should have a sound compliant compensation program in place that is:

- Reviewed regularly
- Updated as necessary
- Distributed at regular intervals
- Enforced from the top down
- Monitored by corporate counsel to ensure awareness of, and compliance with, federal and state laws, and with best practices generally.

Other considerations include internal investigations to identify potential issues and nondisclosure agreements (NDAs). If adjustments in pay practices and levels of compensation are determined and implemented because of an internal investigation, then if permissible and appropriate, consider the use of NDAs for corporate protections.

DIVERSITY GOALS

Underrepresentation of women and minorities, especially in high-paying management positions, often contributes to an organization's pay gap.

A diverse workforce can help close that gap and also provide other business advantages. McKinsey & Co. found that companies in the top quartile for racial and ethnic diversity in top management and boards of directors are 35% more likely to have financial returns above their industry medians while those in the top quartile for gender diversity are 15% more likely to have financial returns above industry medians (Hunt, Layton, and Prince 2015.)

Diversity in leadership communicates to staff, especially diverse staff, that there is a pathway to leadership and shows them a concrete example of what it looks like (Jones 2018).

Diversity can and should be a critical component of the innovation that leaders are driving in their organization, and it can and should be a competitive advantage for them. For decades, women have earned more bachelor's degrees, master's degrees and doctorate degrees than men. However, women:

- Make up less than 5% of CEOs
- Make up less than 10% of top earners in the S&P 500 (Yale 2011).

PAY EQUITY CHALLENGES

It is important to understand that implementing equal pay is not a one-off exercise. It must be an ongoing business objective, integrated within the policies and systems of an organization and kept under constant review. It requires time and resources, not only financial. However, organizations achieving equal pay may find an increase in productivity due to higher morale and employee commitment.

Challenges include:

- Complying with federal, state, regional and local laws
- Determining required levels of education and experience
- Determining job categories and responsibilities
- Considering reverse discrimination issues.

CONCLUSION

The United States has come a long way since implementing the first fair labor laws. With 50 states and 50 different sets of laws in our nation, questions arise such as:

- Which protected classes do the equal-pay laws protect?
- What comparisons on types of work are required?
- What are the permissible factors to explain pay differences?
- Is reliance on geographic location to explain pay differences permitted?
- May employers ask about salary history?

The good news: With statistics and data modeling, organizations can attack the problem from multiple angles, and form reasonable hypotheses as to what is actually taking place, thus creating an environment of recognizing the importance of equality pay.

ABOUT THE AUTHOR

Elliot Dinkin (elliotd@cowdenassociates.com) is president and CEO at Cowden Associates Inc., specializing in helping corporate clients with compensation, health-care benefits, retirement and pension issues, and Taft-Hartley fund consulting. Dinkin earned his MBA in finance and accounting from the University of Pittsburgh and a Bachelor of Arts in economics from Dickinson College.

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