



Management Alert

Is A Pay Audit in Your Future?

Seyfarth's Washington Perspective

The Obama Administration is taking action that employers must be aware of and prepare for. In President Obama's State of the Union Address on January 27, 2010, the President said:

"We're going to crack down on violations of equal pay laws – so that women get equal pay for an equal day's work."

You can't say the President didn't warn you. Recall that the first piece of legislation signed by President Obama was the Lilly Ledbetter Fair Pay Act of 2009.

But, if President Obama's State of the Union message wasn't clear enough, the subsequent establishment of the administration's National Equal Pay Enforcement Task Force and Equal Pay Initiative to "enhance compliance, public education, and enforcement of existing equal pay and other civil rights laws" should get you thinking about reviewing your compensation practices and, in particular, whether there is gender and race pay equity in your company or organization.

Today's hearing before the U.S. Senate's Health, Education, Labor and Pensions Committee sends yet another strong message to employers that substantially increased government enforcement of pay discrimination laws is on its way. Testifying before the committee about the proposed Paycheck Fairness Act, S. 182, Stuart Ishimaru, Acting Chairman of the U.S. Equal Employment Opportunity Commission (EEOC), emphasized that the EEOC is increasingly focused on ensuring an absence of sex discrimination in employer pay practices. He noted that the EEOC is "currently actively engaged in 14 cases in which wage discrimination is alleged." The EEOC has added more than 150 new staff over the past year to its investigative and attorney ranks and is requesting an additional \$18 million in enforcement resources for fiscal year 2011. Combine those extra enforcement resources with the focus the EEOC has already been placing on systemic cases and you should expect the EEOC to be reviewing its existing charge files and filing lawsuits alleging pay discrimination.

If you are a federal contractor, you should consider making a pay equity audit a high priority. The Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) enhanced its investigation and enforcement of compensation practices when it issued its standards for evaluating compensation discrimination and self-audit guidelines four years ago. Like the EEOC, OFCCP has increased its enforcement staff with a goal of hiring an additional 213 enforcement employees this year. In addition, any businesses or entities who receive American Reinvestment and Recovery Act funds should be particularly careful as the Labor Department has announced its intention to investigate recipients of these funds for compliance with federal labor laws. That may include OFCCP audits for many who may have never before thought of themselves as federal contractors. Also, importantly, there is a new effort to align the government's enforcement activities:

the National Equal Pay Enforcement Task Force is now charged with coordinating equal pay enforcement across agencies (that includes the EEOC, OFCCP, the Department of Justice and the Office of Personnel Management) and “limiting potential gaps in enforcement.”

As to S. 182, the Paycheck Fairness Act—it’s the sleeper bill of this Congressional session likely to emerge with new energy. The legislation, which passed the U.S. House of Representatives in 2009, but, was never considered in the Senate, would make it far more difficult for employers to defend pay discrimination cases. With so much attention focused on health care and the nation’s high unemployment, many think Congress has been distracted from the labor agenda. But, with the unions having to regroup on their legislative priority of the Employee Free Choice Act, there are many other interest groups who are making a major push on the Paycheck Fairness bill. Watch for further Senate action this spring or summer.

What Should Employers Do?

In the face of all of this attention on equal pay and stepped up enforcement, employers are wise to review their pay practices in an attorney-client privileged self-audit. By identifying and remedying any pay inequities that cannot be supported by legitimate, non-discriminatory factors and considerations, employers will be ensuring compliance with applicable laws, and ultimately diminishing potential risks and liabilities. Pay discrimination violations prosecuted by the federal government can include a third party imposing new and different pay practices in your organization, backpay and interest for two or three years, and other remedies. As human resources and in-house counsel assess ways to manage and mitigate risk in these difficult economic times, a pay equity analysis is one of the most valuable ways to invest limited resources. Moreover, if an employer finds an area of vulnerability, it is critical to conduct these studies under attorney-client privilege.

Seyfarth Shaw has a wealth of experience assisting clients in conducting privileged pay practice self-audits and pay equity analyses. Please contact your Seyfarth counsel or any [Labor and Employment attorney](#) on our website for more information about this important risk management and mitigation assistance.



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