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Government Interest in Pay Equity Still High, Increased Enforcement Efforts Afoot

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It is no secret that pay equity has been a signature issue for the Obama administration. However, new developments at the U.S. Equal Employment Opportunity Commission (EEOC) highlight the new ways in which the administration is pursuing its agenda.

In a radical departure from how it has historically enforced the Equal Pay Act (EPA), the EEOC has launched a pilot program through which it is auditing employer pay practices for the first time. In the past, an investigation might be initiated after a charge of discrimination, but now, the EEOC is directly targeting employers for audit.

The new pilot program was created at the behest of President Obama's National Equal Pay Enforcement Task Force, which is a coordinated effort between and among the EEOC, the Department of Justice (DOJ), the Department of Labor, and the Office of Personnel Management to identify challenges in equal pay enforcement and increase compliance with federal compensation discrimination laws. In 2010, the Task Force recommended that the EEOC use its authority under the Equal Pay Act to launch agency driven Directed Investigations into employer pay practices. Based on that recommendation, three EEOC district offices are now actively participating in an Equal Pay Act Directed Investigation Pilot Project.

While there is little public information on the pilot project, EEOC purportedly spent six months studying a range of industries and developing its auditing strategy and its district offices in Chicago, New York and Phoenix are actively auditing employers.

The audits commence with a meeting to gather background information on pay systems, compensation and review methods, and management of wage data, and to discuss the investigation. Thereafter, the EEOC structures discovery and data requests specifically developed for the employer under review and considering the employer's industry. If the audit reveals violations, the EEOC will then decide whether to pursue enforcement measures against the employer.

The agency has not explained how it has selected employers to audit, but has said that in the future it hopes to use audits to respond to concerns raised by advocacy groups and workers. It has also said that if the pilot program is successful, it may be expanded nationwide. Federal contractors already are subject to compensation audits by the Office of Federal Contract Compliance, but it now appears there is a concerted effort by the agencies to expand audits of employer pay practices to all employers, regardless of whether they are federal contractors.

Given the increasing governmental scrutiny of employer pay practices, organizations should consider conducting a preventative pay equity audit. Preventive pay audits help ensure fairness in pay rates among similarly situated employees, and enable an organization to anticipate potential vulnerabilities and address them in advance of any regulatory or private employee challenge. If a legal challenge should occur, the information learned during the audit, and any ameliorative steps taken by the employer to fix problems uncovered during the audit, will be of critical assistance in defending and ultimately defeating such challenge. To be effective, the audit results must be statistically sound, legally defensible, and, to the maximum extent possible, shielded from disclosure by the attorney-client privilege. The following are best practices for conducting these audits:

- **Identify the Factors that Influence Compensation.** Before conducting any audit, identify the legitimate (i.e., nondiscriminatory) factors that influence employee compensation in your organization, such as: job title; pay grade/band; function; type of work performed; level of responsibility; sector or personnel area; and geographic location, as well as "productivity related" characteristics, such as: time in current job; direct measures of performance – e.g., performance scores or sales results – and indirect measures that may be correlated with performance – e.g., education level, pre-hire experience, and company seniority. Also consider whether these compensation variables are universal across the organization, or whether they differ by business unit, geographic location, or other factors.

- **Review Compensation Policies and Procedures.** Identify and review all of the organization's policies and practices that bear on employee compensation, such as: pay grade/band structure; quartile charts, grids, or matrices used for setting percentage increase amounts; standards for merit and other increases, bonuses, commissions, and any other forms of compensation; and performance evaluations. To the extent there are pay practices that are not memorialized in writing, consider documenting them and updating them as they arise in the future.

- **Be Prepared For Possibly Harmful Audit Results.** Before embarking on an audit project, be prepared for the possibility that the audit will uncover statistically significant compensation differences among protected and unprotected employee groups. Such results do not mean that the company has engaged in discrimination. Nonetheless, such statistical results *may* be an indication that discrimination has occurred – either unintentionally or intentionally – at some past point in time. There may be a legitimate explanation for the present day pay disparity despite the unfavorable statistical results. Depending on the statistical results of the audit, pay adjustments may be advisable for only a handful of employees, or they may be warranted on a larger, systemic scale. Before starting any pay audit, therefore, it is critical that you obtain the buy-in from the high level decision makers who will have to approve the resources for any such compensation fixes.

- **Use An Experienced Outside Attorney.** To maximize the opportunity to protect audit results from disclosure under the attorney-client privilege, it is imperative to retain outside counsel to conduct the audit. Courts have held that if evidence exists that the audit was performed for general business purposes (such as for determining whether a compensation system is working correctly and fairly, or to assist the company in planning and establishing salaries, etc.), the audit materials may not be privileged and may not in fact be protected from disclosure. The engagement letter with outside counsel should reflect the privileged nature of the audit.

- **Ensure Use of Proper Statistical Technique.** To ensure a statistically sound analysis, it is critical for your counsel to engage and work with a qualified statistician. The most common approach to an audit of compensation is a multiple regression analysis. Statistical analysis itself can help to identify the factors that influence pay at a given organization. By working closely with an expert statistician who is experienced in conducting pay equity audits, you will maximize the reliability of your results.

- **Document the Information Learned During the Audit.** Finally, an audit of compensation will often result in company human resources performing some investigative work to determine the propriety of certain individuals' pay that cannot be explained by the data. The company should document the results of such investigative efforts so that it does not have to reinvent the wheel every year.

The above summary outlines just a few of the important steps an organization should take when deciding to conduct a pay equity audit. To learn more about these audits and best practices for conducting them, see our April 2009 - Tip of the Month: Best Practices for Compensation Audits. Proskauer's Government Regulatory Compliance & Relations Practice Group routinely assists companies with such audits. Please contact one of the lawyers listed below or your Proskauer relationship attorney for assistance in this area.

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