Legal Update Article

Rethinking Pay Equity: Being Transparent — Should Employers Publish Information About Pay?

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This is the final article in our four-part series titled "Rethinking Pay Equity," designed to provide practical guidance to help employers understand and address the many new rules, regulations, and best practices around pay equity in preparation for Equal Pay Day 2019. This article focuses on the increasing pressures on employers to publicly address pay equity and the issues to be considered in deciding whether to go public about pay. The four-part series will culminate in a complimentary webinar on April 2, Equal Pay Day, by the Co-Chairs of the Jackson Lewis Pay Equity Resource Group, Joy Chin and Stephanie Lewis.

Growing Pressure to Address Pay Equity

Since the passage of the Equal Pay Act more than 55 years ago, employers have been required to ensure fairness when it comes to paying employees. Nevertheless, the notion of an employer publicly discussing whether its employees were paid equitably was unheard of, until recently. The "gender pay gap," the difference, on average, in pay between men and women, entered the limelight during the Obama Administration. With the #MeToo and #TimesUp movements fostering discussion about previously taboo topics, including equal pay, the pay gap remains at the forefront of public discussion today.

Facing mounting pressure from politicians, employees, advocacy groups, and activist shareholder groups calling for pay transparency, many employers are rethinking how they are addressing pay equity and the pay gap and whether they should discuss publicly what they are doing about it.

Should a Company Publish Pay Information?

The decision of whether a company should disclose information regarding pay gaps, pay equity, or pay in general depends on a variety of factors, including legal requirements, internal pressure, and public relations.

Issues to Consider

Is There a Legal Requirement to Report Pay Data?

Some employers may not have a choice when it comes to releasing pay information. For instance, the U.K. Equality Act 2010 requires companies with at least 250 U.K.-based employees to report annually information showing differences in pay between male and female employees. In the United States, a federal judge recently vacated a stay of the Equal Employment Opportunity Commission's (EEOC) pay data collection, requiring employers with at least 100 employees to submit wage and hours worked information annually. EEOC has until April 3 to provide guidance on the pay data reporting requirement. Moreover, some states require certain state contractors to submit employee pay data.

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In the Absence of Any Legal Requirement, Why Discuss Pay Publicly?

If an employer is not otherwise legally required to report pay data and, instead, is considering a voluntary disclosure about pay within its organization, the employer should identify and examine the reasons for and the purpose of the disclosure. Who is the intended audience? Is the company receiving pressure from employees? From shareholders? From regulatory agencies?

Determining the underlying reasons for the disclosure will help to frame the next steps in the decision-making process, such as determining what to disclose. For example, rather than publishing specific information about pay or related analyses, the company may focus on overall pay equity "health" instead. Moreover, think past the moment and consider future years. By disclosing pay this year, is the company committing to continued reports in future years? Would it be noticed if it did not? What happens if the numbers get worse?

Has the Company Analyzed the Data?

Whether an employer is required by law to report pay data or is considering voluntarily publishing pay information, it should conduct a proactive pay equity analysis (under attorney-client privilege) to identify potential legal exposure and take action to remedy any issues. This is particularly important if the employer is considering volunteering information about pay in its organization. A preventive analysis will better position a company to determine and control its narrative. Analyzing pay should be one of the first steps in deciding whether to talk about pay.

Advantages and Disadvantages of Public Disclosure

One of the main benefits of publishing information regarding employee pay is potentially garnering trust from current and future employees, as well as the public, presuming the message is a positive one. Moreover, proactively reporting pay can put companies in a better position to control its own narrative.

Of course, there are risks to publishing information regarding pay. If the information being publicized is not clearly explained, it can be misinterpreted. Employees who believe they are or have been underpaid may use any public disclosure as ammunition in potential litigation. Moreover, negative press regarding pay could affect the company's bottom line.

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Deciding whether to share pay information is a complicated process that presents many unique challenges and should not be entered into lightly.

Please contact the Jackson Lewis Pay Equity Resource Group with any questions about disclosing pay information, conducting privileged pay audits, reviewing pay policies, or training for management.

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