Compensation Equity

Public Policy Issue Statement

April 2018

Background: Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act of 1990, the Age Discrimination in Employment Act of 1967 and the Equal Pay Act of 1963 are among the laws that prohibit wage discrimination in the workplace. Jobs that have the same functions and similar working conditions and that require substantially the same skills must be compensated equally with allowable pay differences based on factors such as experience, qualifications, seniority, geographic location, performance and other factors not prohibited by law.

In developing a total rewards strategy within this legal framework, employers take a proactive approach to compensating employees that is specific to the organization's mission, business strategy and culture.

An organization is likely to use a combination of strategies in approaching pay to attract and retain a competitive workforce. Market competition, employer size, whether the employer is public or private, level of product demand, and industry characteristics all influence the compensation and benefits philosophy. For critical jobs and competencies, the organization may decide to pay based on the value of the position to the organization, lead the competition in compensation, or match what its competitors pay. To effectively recruit and retain employees, an organization must have internal equity, where employees feel they are being rewarded fairly based on performance, job skills and other job requirements. Organizations also must ensure external equity in compensation and benefits with employers competing for talent in the same labor market.

Employers seek to retain employees by compensating them through base pay, combined with merit pay or pay for performance that ties wage increases to performance and mastery of the job. Other common pay practices include productivity-based pay determined by the employee's output, as with a piece-rate system, and person-based pay tied to desired employee characteristics such as knowledge (which includes certifications and education credentials), skills and competencies.

Other business factors considered in an employer's pay practices may include cost-of-living adjustments, general pay increases based on local competitive markets, seniority increases, lump-sum and performance bonuses, incentive pay, and differential pay. Differential pay includes additional pay for less-desirable shifts or emergency shifts, premium pay for working holidays or extra hours, hazard pay, on-call pay, reporting pay, travel pay and overtime pay. Geographic differential pay includes accommodating the cost of living in different locations, recruiting employees to certain locations or foreign pay.

In summary, employers design their pay structures to reflect the characteristics of their organizations, attract qualified applicants and retain top employees who are drawn to the mix of work and rewards of that employer.

Within this framework, the Equal Employment Opportunity Commission's compliance manual's chapter on compensation discrimination notes that "pay disparities persist between workers in various demographic groups." Recently, the pay differential between men and women has been a focus of policymakers. According to the most recent Bureau of Labor Statistics data from the third quarter of 2017, women who were full-time wage and salary workers had median weekly earnings of $767, which is approximately 81.9 percent of the median weekly earnings of male full-time wage and salary workers ($937). While this overall pay differential has narrowed over time, a variance still exists. This difference in pay, however, results from comparing salaries of men and women in all types of jobs rather than comparing only those doing similar work. When accounting for factors such as chosen occupation, hours worked, years of experience and education level, additional studies have yielded a smaller variance in pay between men and women.

Recent research has focused on the impact of caregiving demands that lead many employees to prioritize workplace flexibility over salary. These studies lend additional insight into how individual decisions may impact the pay differential.[1]

As public policymakers address pay equity, one challenge is understanding how much of the pay disparity between groups is attributable to discrimination, legitimate pay practices, the individual's ability to negotiate pay, an individual's time away from the workforce or other workplace dynamics, as well as what policy changes might help address it.

Issue: Recent congressional proposals include the Paycheck Fairness Act (PFA) that would amend the Equal Pay Act and allow employers to base employee pay differentials only on seniority, merit and production. The PFA would also shift the burden of proof to the employer in discrimination claims, making it easier for plaintiffs to challenge employer pay practices.

[1] FlexJobs' 5th Annual Super Survey (2016). https://www.flexjobs.com/blog/post/survey-workers-most-productive-in-the-office/

Several jurisdictions—most notably California, Delaware, Oregon, Massachusetts and New Jersey; various municipalities; and Puerto Rico—have passed some form of pay equity legislation. Of those, a majority have included a prohibition on asking about a job candidate's salary history due to concerns that this practice may lead to basing the new employee's pay on his or her previous salary and may perpetuate a gender-based salary gap from one job and one employer to another.

Some new and proposed state laws include a concept that appears close to or is approaching "comparable worth" using a standard of "similarly situated," which requires that jobs with comparable skills and responsibilities or jobs of comparable worth to the employer should be paid the same. Congress rejected this concept during the original Equal Pay Act debate because it would mandate the same pay for different jobs.

Another emerging trend is the inclusion of a safe harbor for employers that conduct voluntary self-evaluations of pay and are actively working to address any discrepancies. For example, the Massachusetts law provides employers an affirmative defense to liability against a claim of pay discrimination if the organization has completed a self-evaluation of its pay practices in good faith within the past three years prior to commencement of the action, *and* if the organization can demonstrate that it was a reasonable self-analysis and that it has made progress to eliminate any improper pay differences based on sex identified by the evaluation.

SHRM Policy Statement: SHRM believes that employees should be compensated equitably and without discrimination. SHRM vigorously supports equal pay for equal work, with allowable pay differences based on factors not prohibited by law, and believes that any improper pay disparities should be promptly addressed. In determining pay, SHRM supports employer flexibility to reward employees, taking into consideration legitimate business factors such as education, qualifications, relevant experience, skills, seniority, geographic location, performance and any collective bargaining agreements.

In addition, SHRM asserts that salary history should not be a factor in setting compensation. Instead, compensation decisions should be based on the value of the position to the organization, competition in the market and other bona fide business factors. Employers should be able, however, to discuss pay expectations or provide the pay range for the position sought.

SHRM also supports providing employers with a safe harbor to serve as an effective incentive to conduct proactive pay analyses and identify and address any improper pay disparities. Moreover, SHRM believes flexible workplace policies and the ability for employees to discuss pay and policies that support transparency in how pay decisions are made are important aspects of pay equity.

Key Public-Policy Principles:

- **Nondiscrimination in Pay** — Pay decisions should be made based on bona fide business factors and not based on non-job-related characteristics. In addition, employers should be provided a reasonable good-faith period to address pay discrepancies.

- **Bona Fide Business Factors** — Employers should be able to consider bona fide business factors such as competencies, education, qualifications, certifications, relevant experience, skills, seniority, geographic location, performance, any collective bargaining agreements, and business and organizational requirements and needs in making employee compensation decisions.

- **Federal Standard** — Employers should be subject to a single standard for establishing pay equity, rather than having to navigate different standards at the federal, state and local levels.

- **Pay Comparisons** — Employers should be held to the standard of equal pay for equal work and should not be required to equate different jobs using “similarly situated” or “comparable worth” standards.

- **Pay History** — SHRM asserts that salary history should not be a factor in setting compensation. Compensation decisions should be based on the value of the position to the organization, competition in the market and other bona fide business factors. Employers should be able, however, to discuss compensation and pay expectations with a job candidate or employee as part of the pay-setting process.

- **Safe Harbor for Self-Evaluations of Pay** — Employers should be provided with safe harbors to incentivize self-evaluations of pay and correction of improper disparities in compensation. Employers that utilize a federal safe harbor to address pay discrepancies and that share pay practices with their employees should be protected from liability under state, local and federal law.

- **Pay Transparency and Education** — Employers should be encouraged to share with applicants or employees the compensation for the position, total compensation philosophy, pay structure, the pay range and the factors taken into consideration in pay decisions.

- **Ability to Discuss Pay** — Employees should be free to discuss pay and pay practices without fear of retaliation.

- **Educational Programming** — Policymakers should support education efforts for individuals, particularly new entrants to the workforce, on how to negotiate pay and working conditions as part of existing financial-literacy programs or other curricula.

- **Workplace Flexibility** — Employers should be encouraged to adopt flexible workplace policies designed to support employees in meeting their work and family obligations while maintaining certainty, predictability and stability for employers. Flexibility, as a strategic business tool, can help all employees manage work and personal-life demands, thereby decreasing the prevalence of employees’ compromise on salary in exchange for flexibility.

- **Data Collection** — SHRM asserts that an employer’s compensation strategy is proprietary information due to the fundamental role it plays in recruiting and retaining employees. While disclosure of compensation information is an important tool in individual worksite investigations, SHRM does not believe government entities have demonstrated that collecting compensation information on a regular basis is effective in identifying individual cases of pay discrimination or otherwise targeting enforcement efforts. Therefore, SHRM opposes efforts to collect compensation information outside of individual worksite investigations.