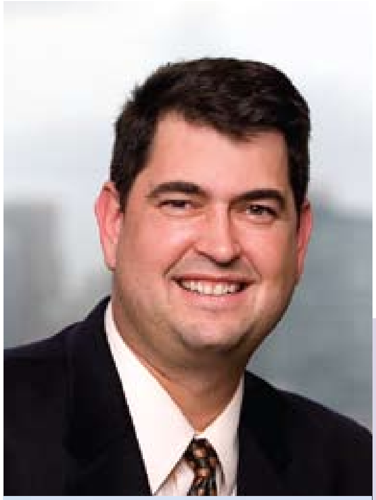

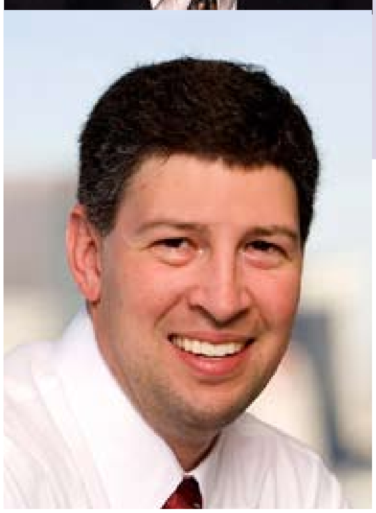

The Lilly Ledbetter Fair Pay Act and Compensation Strategies

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President Barack Obama's signing of the Lilly Ledbetter Fair Pay Act on January 29, 2009 brings notable changes to the Equal Pay Act and reverses the 2007 Supreme Court ruling that individual pay checks did not restart the period in which an individual could file a discrimination claim. Instead, the Act provides for a statute of limitations for pay discrimination which resets with each new paycheck. This provides an opportunity for allegations of ongoing pay discrimination to be filed even if they are discovered years after the discrimination began.

In the days leading up to and immediately following the signing of the Act, there has been ample commentary on the legal consequences of the legislation to employers. Many attorneys have suggested that now, more than ever, may be the appropriate time for employers to conduct a privileged review of their current compensation relationships. A compensation review for the purposes of obtaining legal advice may enable employers to limit their ongoing risks related to past employment decisions.

As employers consider undertaking such reviews, there are a number of considerations that will impact the effectiveness of the review, as well as any remediation strategies and on-going management of future risks.

Conducting Analyses Of Current Compensation Relationships

Prior to undertaking a compensation audit, the employer should understand its overall philosophy towards compensation. Answering a few simple questions can provide a good baseline of information from which to start the review process. First, what is the relevant measure of compensation to be studied? It is important to determine whether the audit should focus on base salary, incentive compensation, total compensation or some other measure. Second, what employee and employment related factors affect compensation decisions at your organization? The employer should understand whether it follows, for example, a strict wage schedule similar to the Federal GS scale or allows more flexible manager discretion and individual variation in its compensation structure. Third, at what level are compensation decisions made? There should be a common understanding of whether compensation decisions are made by the immediate supervisor or by a higher level of management. Finally, which employees are expected to have similar compensation levels?

How companies compensate employees varies substantially depending on the type and level of work performed by the employee. For example, employers may compensate employees through a base salary, bonuses, incentive payments, or commissions. However, the decisions with respect to bonuses, incentive payments and commissions for most companies are specific to discrete time periods and generally do not have recurring or ongoing impacts on pay checks. The Ledbetter legislation squarely addresses allegations of discrimination associated with the reoccurring nature of base salary, and thus companies may benefit from undertaking a privileged comprehensive review of these particular compensation decisions.

Before undertaking a comprehensive audit of current employee salaries, an employer must review how salaries are determined within their establishment. Few employers have a pay system similar to that found in the Federal government, where all employees in the same salary grade and step are paid the same base salary. More likely, individual salaries are based on a variety of employee and job related characteristics specific to the company. Prior to conducting a salary analysis, the employer should review the employee and job related characteristics that are likely to impact base salary, and determine what, if any, information is recorded and maintained by the company.

For most companies, employees are paid different salaries for a variety of reasons. As such, it is important that any analysis of relative employee compensation include the job and employee characteristics that impact employee compensation. Some of the job and employee related characteristics that typically affect base salary include:

- Level of responsibility
- Market for particular type of work
- Work experience
- Local labor market conditions
- Level and type of education
- Organizational-specific business processes.

Counsel should consider the legal defensibility of particular characteristics included in a compensation audit in light of the Ledbetter Act (and, prospectively, the Paycheck Fairness Act). In determining which compensation-related characteristics should be included in the review, it may be necessary to examine other employment outcomes, such as promotion decisions and performance evaluations, to evaluate the defensibility of these characteristics.

In addition to identifying the job and employee characteristics that are likely to impact an individual's salary, it is also important to determine for which employees the company will provide similar compensation for these characteristics. For example, an employee's level of education may be valued differently in a research and development department compared to a production department. Therefore, when designing a compensation audit, it is necessary to determine the appropriate grouping of employees who should be studied together. Improper groupings of employees can result in misleading statistical models.

There are a number of factors that should be considered when determining which employees should be grouped for comparison purposes. For example, the employee comparisons should consider the organizational structure (e.g., business units, lines of business, Affirmative Action Plans), the market structure (e.g., occupation, function, job families), the requirements of particular positions, and the level at which salary decisions are made. The groups should be structured so that the populations are sufficiently large to provide meaningful statistical analyses, but so as to not group together dissimilar employees whose characteristics are likely to be valued differently within the market or the company.

It is important to keep in mind that statistical analyses are only the start of the compensation review process. Statistically significant differences indicate that the protected group salary difference is not likely to have occurred by chance. It may be that protected group members were, in fact, paid less than their non-protected counterparts, or it may be the case that the analysis has omitted factors that explain differences in compensation. As such, groups showing statistically significant salary differences should be researched to determine whether the analysis has omitted factors related to compensation or whether there are individual employee salaries that do not "fit" with other employees in the comparison group ("outliers"). When feasible, omitted compensation-related characteristics should be collected and included in the salary comparison, and individual "outliers" should be documented.

Remediation Strategies

When undertaking a compensation review, the employer should be prepared to take any follow-up action deemed necessary by legal counsel. When statistically significant differences between protected and non-protected group members are found, counsel can provide guidance on alternative remediation strategies, which may include no action. Each remediation strategy will have consequences in terms of cost, manageability, effectiveness, and risk. The compensation analyses and individual outlier review can assist in evaluating each alternative action. Each of these consequences should be considered and explored with counsel before engaging in a remediation strategy.

Going Forward Into the Future

Assuming that an employer achieves the desired level of risk through a properly structured compensation review, the question becomes how to manage and minimize the risk going forward. The pay differences that may have been addressed as a part of the review are likely the result of many isolated decisions over an extended period of time. The cost of addressing the cumulative effect of those differences can be significant and, presumably, the employer will not want to outlay such expenditures in the future if avoidable.

There are three primary employment decisions that routinely impact the relative salary relationships of employees and account for the majority of employee salary adjustments—Starting Salary, Merit Increases and Promotional Increases. Employers can minimize the risk of new salary differences entering into the compensation process by monitoring these particular decision-making processes.

Starting Salary. Employers can develop tools for monitoring starting salary decisions and providing guidance to managers as to salary ranges. Employers may want to document exceptions to the starting salary guidance so that this information can be used to explain starting salary decisions. Insufficient data often exists on the factors that determined starting salary decisions (e.g., relevant prior work experience, education, prior compensation). To the extent that these data can be systematically collected and maintained, this information can be useful in explaining individual differences in starting salaries.

Merit Increases. As with starting salaries, employers can develop tools to monitor and review merit increases during annual salary planning processes. These monitoring tools can be relatively simple, yet effective, in monitoring whether the merit increase process

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Diversity and Inclusion… "It's All About the *And*"

By Alfred J. Torres

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RECENTLY, I was reading a white paper addressing the state of the diversity and inclusion field. One of the observations stated was that as a field, we have made tremendous strides in promoting the business case for diversity and inclusion, while creating greater awareness about the importance of diversity as essential for success in the marketplace. The paper also presented perspectives on the underlying issues that we need to continue to address—developing a universal definition of diversity; establishing a skills / competency model for diversity practitioners; and, what I'll characterize as more effort in the diversity management field.

What most caught my attention was the sense that there was less optimism about our progress, and the continuing evolution of our body of work. There is still significant concern about what diversity and inclusion really mean. Diversity practitioners are looking for that next big breakthrough in the field that will lend greater clarity and focus to the work that we do. I'm a proponent of the notion that the glass is always half full; and I believe the field is ripe with opportunity. It begins with the *"and."*

One immediate opportunity is to let go of trying to define what diversity means and recognize what it is. Diversity and inclusion is about gender, race, and other representation in the workforce. *And* it's about having the right set of skills and leadership competencies to manage and lead diverse and complex organizations. *And* our global economy requires that we embrace a broader perspective about the knowledge and tools needed to drive success on that larger stage. *And* yes, diversity is about the bottom line, measuring impact. Demonstrating performance and result linkages is what every good business discipline does. *And* we should be held to the same standard.

To take a step back, how we define our work has some importance. Consider the view offered by Roosevelt Thomas, Jr. He promotes the view that diversity (and inclusion) is about mixtures. As he observes, our opportunity is to understand what those mixtures represent, *and* recognize and appreciate the complexity inherent in those mixtures, *and* figure out the most effective ways to help our organizations manage the mix, while creating and driving value—for employees, shareholders and potentially for society at large.

I like to believe that diversity and inclusion is about how we attract, develop and retain the best talent regardless of the "package" it's in. *And* it's about how we effectively engage and leverage inclusion of that talent to drive high performance; *and* translate that performance into outstanding customer service and results for our business. Our opportunity is in the *"and."* PDJ

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adversely impacts a protected group. In developing tools to monitor merit increases, it is important to understand the underlying guidelines used in determining merit increases and develop tools that account for those underlying processes (e.g., performance reviews, compensation ratios). It is also important to ensure that the impacts of adjustments made as a part of a comprehensive salary review are not undone in subsequent merit review cycles.

Promotional Increases. Monitoring promotional increases is more difficult than monitoring starting salary or merit increases because the events are typically more complex and occur less frequently. Promotions generally occur when there is a change in position and/or level of responsibility. The promotional pay increase employees receive often depends on both the position to which they are promoted and their most recent prior position. While monitoring may be more difficult, employers can and should develop guidance with respect to promotional increases. Employers may want to document exceptions to the promotional increase guidance so that this information can be used in the future to explain differences that may evolve and become magnified over time.

For most employers, the workplace is a dynamic environment in which new employees are hired, promoted and terminated regularly. Establishing and maintaining employee salary relationships, which are determined at a particular point in time, may present particular challenges in the current economic environment given the increase in employers' downsizing activities. Therefore, it is especially important to be vigilant about managing risks by monitoring these other employment activities and their impact on salary relationships given The Lilly Ledbetter Fair Pay Act of 2009. PDJ