

Gender-based discrimination in pay: Why you should care and what you can do to prevent litigation

By presidential proclamation, April 20 is now recognized as National Equal Pay Day. This special event represents the day each year that women have to work to equal what their male counterparts earned at the end of the previous year. That is 110 days more than men have to work for the same wage. According to the Labor Department, women, on average, earn about \$.77 for every \$1.00 their male counterparts earn with similar skills.

In recent years, companies have been increasingly at risk of lawsuits stemming out of this documented pay gap between the sexes. Due to an influx of downsizing arising out of the recent recession, women now account for 40 percent of the primary breadwinners in U.S. households. This may account for why more women are frequently seeking equal salaries. In many cases, women co-workers are banding together in large class action lawsuits against their employers. The result is the potential for large damages against employers, including punitive damages that may not be covered by insurance.

For instance, 5,600 female employee plaintiffs in a class action lawsuit against Novartis Pharmaceuticals were awarded \$250 million in punitive damages by a federal court jury in New York. The plaintiffs in the case alleged (and the jury agreed) the company favored men when deciding salary and promotions. Experts think Novartis may ultimately be liable for an additional \$1 billion in compensatory damages. Other large companies with similar lawsuits filed this year include AIG, Bank of America, Goldman Sachs and Wal-Mart.

That women are paid less than men for performing the same job is not new information. In fact, since 1963 with the Equal Pay Act, lawmakers have tried to help women gain equality with regard to equal pay for equal work. Employees' right to nondiscriminatory compensation also is protected by Title VII of the Civil Rights Act of 1964 and other laws. But while laws have been on the books for decades, many companies have not abided by them.

The consequences of lower pay resonate throughout a woman's life. It has been estimated that this pay disparity results in women earning \$400,000 to \$2 million less than their male counterparts for performing the same job over a lifetime. Additionally, the lower salary that women earn causes life-long repercussions, as it affects retirement pay, 401(k) accounts and Social Security benefits.

Why are women paid less than men?

There are many theories as to why women are paid less than men. Pay inequity may be due to the fact that women often leave the workforce for some time to tend to family and other matters, while men remain in the workforce and therefore become eligible for more raises and higher bonuses. It may be a result of the fact that men are still seen as the primary breadwinners and therefore are given more

in raises than their female counterparts, or that men have stronger salary negotiation skills or higher previous salaries. Some observers, such as Kim Gandy, past president of the National Organization for Women, attribute the persistent pay gap to sexism.

Whatever the reason for the salary difference, paying women less than men for performing essentially the same job is illegal. Litigation by women seeking equal footing and equal pay with their male counterparts has been increasing. According to the EEOC, 93,277 charges were filed against employers in fiscal year 2009, which represented a 12.7 percent increase from 2007 and is just slightly lower than the record amount of charges filed in 2008 (95,402), but still the second-highest level in the EEOC's history.

The Lilly Ledbetter Fair Pay Act

Lilly Ledbetter may be one cause for the sudden rise in gender based pay discrimination suits. After working for Goodyear Tire & Rubber Co. for almost 20 years, Ledbetter learned she had been paid 20 percent less than men doing the same work. She initiated a lawsuit that took over 10 years to get through the courts. In 2007, the U.S. Supreme Court reversed a lower court ruling that awarded Ledbetter \$3 million in damages. The High Court held that the statute of limitations for an equal-pay lawsuit started when the pay is agreed to, not the date of the most recent paycheck. Ledbetter found herself decades past the statute of limitations and out \$3 million.

When Barack Obama came into office in 2009, one of his first official acts was to sign The Lilly Ledbetter Fair Pay Act into effect. This legislation sought to right the perceived Supreme Court-decision and allow women who are discriminated against to sue as long as unequal pay continues. The Ledbetter Law gives plaintiffs 180 days to file a complaint, and up to 300 days in some states, from the time each paycheck is issued that is considered a discriminatory decision.

Pending legislation

The Paycheck Fairness Act, which seeks to expand the Equal Pay Act of 1963, was passed by the House of Representatives in 2009 and is still pending in the Senate. This bill would require employers to show disparate pay is not based on gender but on concrete objectives, such as job performance. Additionally, the Paycheck Fairness Act would expand the remedies for proven pay discrimination by allowing employees to recover damages for their injuries, which would make gender-based pay discrimination suits equivalent to discrimination suits alleging race or ethnic disparity.

Not just a large company problem

Gender-based pay discrimination lawsuits are not just being brought against large companies with deep pockets but rather across the spectrum of size and industry. For example, a case recently brought by three female lawyers who work for the New Mexico's Attorney General alleges that the three women aren't paid as much as male lawyers in the office, even though they have similar responsibilities and experience. According to the lawsuit, the attorneys have the equivalent or better experience, but their male counterparts earned more. In pre-trial proceedings, the Attorney General's office cited budget restrictions as a reason for the pay disparity. The women are seeking equal pay and attorneys' fees.

Another example of gender-based pay discrimination litigation is a case filed by female Supervising Police Communications Operators (SPCO) against the city of Chicago, alleging that a disparity in pay between SPCO and Supervising Fire Communications Operators is due to their gender. The lawsuit alleges that almost half of the city's SPCOs are female, while not one of the city's SFCOs is female. The lawsuit states that on average, 911 police supervisors earn only 84 percent of what their counterparts in the fire department earn. SPCOs have an average salary of \$6,744 per month; SFCOs make \$8,048 per month – despite, the women alleged, nearly identical job descriptions and minimum experience. These women are seeking equal footing with their male counterparts.

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Scary-large damages and lengthy litigation

An area of concern for executives with regard to gender-based pay equity litigation is the very likely possibility of drawn-out class actions (the Novartis case took six years to reach a verdict, and the appeals process will likely take many more years) and the awarding of large compensatory and punitive damages that are designed to punish the employer for their illegal behavior. Novartis female sales representatives were awarded \$250 million in punitive damages (the largest-ever employment discrimination verdict, according to data compiled by Bloomberg, L.P.), and the compensatory damages at the resolution of the litigation are forecast to be in excess of \$1 billion. Class members each should receive about \$60,000. The plaintiffs' attorney argued (and the jury agreed) punitive damages should be 2 to 3 percent of the \$9.5 billion in revenues that Novartis made in 2009.

Some experts estimate that in the Wal-Mart class action, the company could potentially face damages in excess of \$1 billion. Another recent case against Wal-Mart involves the Massachusetts Supreme Judicial Court awarding a female pharmacist \$973,000 in compensatory damages and \$1 million in punitive damages. The court found evidence "that Wal-Mart paid the plaintiff substantially less than less-experienced male pharmacists, refused to pay the plaintiff the pharmacy manager salary differential that it paid to male pharmacists and terminated the plaintiff purportedly for a single policy violation but did not terminate male pharmacists for that or for more serious infractions involving violations of State and Federal law."

How can your company reduce facing a gender- based discrimination in pay practices lawsuit?

- Conduct a statistical pay-equity analysis (how much do men and women earn in the same position).
- Understand why there are pay differences between employees in the same job, and are there legitimate reasons for the pay difference, such as tenure, experience or skills; be prepared to explain them.
- Implement a process in which lower-paid women are brought up to the same salary level as their male counterparts.
- Have written anti-discrimination policies.
- Design and implement programs on topics such as employment discrimination laws, equal employment opportunity obligations.
- Thoroughly investigate complaints of inequity in pay and promotions.
- Ensure the policy toward treatment of pregnant women complies with all state and federal laws.
- Retain all documents relating to pay decisions (the recent law change starts the statute of limitations anew with each pay period, so litigation could potentially involve information over several decades).
- Conduct and retain performance reviews.
- Have specific criteria for compensation decision-making (education, years of experience, required skills, etc.).
- Implement procedures to ensure management compliance with criteria.
- Purchase adequate Employment Practices Liability Insurance (EPLI). EPLI covers employers from claims made by workers who sue their employer for violating their legal rights as employees. EPLI provides coverage for defense (usually up to the limit of insurance) and damages (not punitive) arising out of a lawsuit alleging gender-based pay discrimination and failure to promote.

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1400 American Lane, Schaumburg, Illinois 60196-1056
800 382 2150 www.zurichna.com

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