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WORKPLACE JUSTICE

ADVANCING EQUAL PAY: INNOVATIVE EMPLOYER APPROACHES

In the over 50 years since the passage of the Equal Pay Act, the gender wage gap has narrowed, but stubbornly persists in nearly every occupation, even when controlling for factors such as education and experience. In addition to strong public policies and robust enforcement of equal pay laws, concerted efforts by employers to address gender wage gaps in their own workforces are essential to achieving equal pay.

More and more employers are recognizing the need to take action. In recent years, a number of companies have acted not only to identify and remedy gender wage disparities within their own workforces, but also to establish innovative employment policies and procedures to prevent them. And new research is helping to identify effective employer interventions. Strategies and safeguards to ensure fairness in compensation decisions at critical points – including recruitment, hiring, performance evaluations and promotions, allocation of assignments and opportunities, and leadership development – help prevent the perpetuation of gender pay disparities and their magnification over time. The promising strategies described below are a few of the approaches for employers to explore, adapt, test, and adopt, in order to advance equal pay.

Regularly Conduct Equal Pay Audits

You can't manage what you don't measure—and ignorance of wage disparities is no defense to a pay discrimination claim under the Equal Pay Act. An analysis of pay patterns within an organization is essential for identifying and remedying any gender wage disparities. This type of analysis is also critical to the development of benchmarks to evaluate implementation of remedial measures and to guide efforts to prevent future inequities.

- Engage a third-party expert to conduct the analysis; do not use Human Resources (HR) staff or the company's attorneys.
- Utilize multiple regression analysis to control for factors such as employee education, experience, hours worked, and seniority.[1] It is important to note, however, that an analysis can be completed in multiple and/or iterative steps. For example, the first step may be a simple analysis of available payroll data by gender to discover red flags.
- Consider both race and gender together in the analysis; analyze whether women of color face different or larger wage gaps within the organization than women overall.
- Account for the availability of different types of compensation in addition to the base wage in measuring pay: bonuses, commissions, stock options, overtime, etc.[2]
- Include data that allows an analysis of pay of employees in comparable jobs; comparable jobs include those requiring similar job duties, skills, experience, and qualifications, even if they differ in title or specific role.[3]
- In addition to comparing pay data for employees in comparable jobs, identify any wage gaps within the organization overall that may be created by women's overrepresentation in lower-paying roles and under-representation in higher-paying roles.
- Repeat the analysis regularly—at least once a year. It is especially important to conduct equal pay analyses following a major reorganization, such as a merger or restructuring. Companies or divisions may have different or conflicting compensation policies and practices that can create wage disparities upon integration.[4]

Promote Transparency About Compensation and Pay-Setting Policies and Practices

Secrecy about pay and pay practices not only masks gender pay gaps, it perpetuates them. Providing employees with compensation information and allowing them to discuss compensation helps uncover disparities and unfair practices and promotes employee loyalty and productivity.[5] Transparency also provides companies with an opportunity to proactively review and evaluate their compensation practices and address any unjustified disparities between employees.

- Permit all employees to discuss, disclose, and inquire about their compensation without fear of retaliation (as will typically be required by law). Do not ask or require employees to waive their rights to discuss and disclose compensation information, and do not implement workplace rules that undermine employees' ability to speak to each other about their compensation.
- Define and communicate the criteria and process for determining compensation as well as evaluation and promotion processes to employees at all levels.
- Make available to employees the salary ranges for every level within a job type so that employees can evaluate whether they are being paid fairly and see job progression and career earning potential within the organization.[6] Alternatively, provide employees with the salary range for their own job type, so that they can see where they fall.
- Encourage open communication with supervisors and management about compensation and compensation-setting, evaluation, and promotion practices.

Level the Negotiation Playing Field

Using negotiation to set compensation can lead to gender wage gaps. Women are less likely to negotiate their salaries than men, and in many instances, that may be for good reason. Indeed, studies show that employers react more favorably to men who negotiate salaries, while women who negotiate may be perceived negatively and penalized for violating gender stereotypes.[7] In addition, women who do negotiate often ask for less when they negotiate than men.[8] Limiting the use and scope of negotiation can narrow wage disparities between male and female employees, as can addressing hiring managers' unconscious bias (further discussed below)—and taking these steps will also help avoid liability under the Equal Pay Act, which can arise when employers rely on negotiation as a primary method of pay setting.

- Consider whether there is a compelling business justification for using salary negotiation as a mechanism for setting compensation in the organization and in the absence of such a justification, instead rely on standardized pay scales.
- If negotiation will be permitted, be transparent about the negotiability of compensation in the job posting and at the point of a salary offer. Data show women are more likely to negotiate when it is made explicit that pay is negotiable.[9]
- Set negotiation parameters to provide structure and limits.
  - o Provide the context for the position, including the types of compensation, benefits, or conditions that are negotiable, and those that are not or are provided by default to all employees. Studies have shown that where applicants are clearly informed about the context for negotiations, the gender pay gap is significantly reduced.[10]
  - o Level the negotiating playing field by making benefits like parental leave or schedule flexibility available to all employees, so that no woman must choose between higher pay and family sustaining benefits.
  - o Do not let demands drive the compensation offered outside the predetermined range or scale, as this can lead to gender disparities because women typically ask for less than men. Anchor compensation negotiations to the going market rate offered by competitors in the industry and relevant internal comparators.[11]

Tie Compensation to Consistent, Measurable, and Objective Standards

Studies show that unconscious gender bias is pervasive and leads men's skills, experience, and performance to be overvalued by employers, while those of women are undervalued.[12] Women who have children and women of color often face additional unconscious (and conscious) biases. Unconscious bias can drive gender pay disparities, particularly where pay is primarily based on subjective, discretionary decisions.[13] Structured compensation systems and objective criteria help reduce or eliminate ambiguity that can result in biased decisions at important points, including hiring and promotion.[14]

- Conduct training for all managers to help ensure they are able to identify and correct implicit or unconscious bias in decision-making.
  - o Training can take place during existing training opportunities such as annual leadership training or new manager training.[15]
  - o A well-designed training should focus not only on participants' perceptions or attitudes, but also on behavior. It should demonstrate how implicit bias arises in everyday interactions relevant to that specific workplace, and offer concrete actions for identifying and correcting for bias.[16]
- Test assumptions that may drive inequity in pay setting, including assumptions about what constitutes relevant experience and necessary qualifications, which may track gendered expectations. For example, if gender pay inequities are arising because male employees are more

likely to have particular types of leadership experience for which the compensation system awards a pay premium, evaluate whether this experience has actually predicted or actually correlated with better performance within the organization.

- Do not ask job candidates for their prior salary history and do not use it to set their starting salary. Reliance on previous salary in pay setting can replicate discrimination and wage gaps from past employment and create disparities between new hires, or between new hires and current employees. Moreover, reliance on past salary does not legally justify a gender disparity in compensation.[17] Instead of basing compensation on past salary, tie salary ranges to neutral factors relevant to the job, such as skill level, education, competencies, and job description.
- Establish compensation structures focused on standardized, objectively measurable performance outcomes.[18] Pay employees for their performance, not for face time.[19]
- On an annual basis, evaluate whether compensation scales and criteria need to be revised.
- Ensure equal gender representation on compensation committees and engage senior management, compliance officers, and employees *not* responsible for hiring in the development of compensation policies and procedures and in the setting of pay.[20]
- Reduce the impact of bias in evaluating performance.
  - o Reduce managers' discretion in performance evaluations and setting compensation by establishing clear, measurable criteria for performance evaluations. Avoid relying on subjective, vague criteria like employee "potential" that can introduce gender bias.[21]
  - o Ensure that performance measurements actually reflect employee performance and are not a reflection of factors outside employee control such as market swings or assignment of projects or clients.
  - o Do not rely on employee self-evaluations in setting pay or, at the very least, do not allow supervisors and managers to see an employee's self-evaluation before completing the employee's performance evaluation, as women tend to evaluate themselves more harshly.[22]
  - o Conduct "comparative evaluations" to simultaneously compare the work of all employees in a job category to determine evaluations and promotions. Studies indicate such an evaluation technique makes it more likely that promotion decisions will be based on performance rather than gender, racial, or ethnic stereotypes.[23]

Empower Managers and Hold Them Accountable

An equitable compensation system will not result in equal pay if it is not implemented correctly or consistently. An organization's leadership at the highest levels must repeatedly and consistently communicate to managers and employees that equity is a top priority, and reinforce that message with a system that motivates managers to properly implement equitable compensation policies and practices.

- Budget to allow managers access to funds to address wage disparities within their department or team.[24]
- In managers' own performance evaluations, and in their own eligibility for raises and promotions, take into account their success in identifying and remedying wage disparities among employees they supervise as a relevant performance measure.[25]

Coordinate and Integrate Organizational Systems

In many companies, particularly large ones, several different departments may be responsible for areas affecting compensation, including recruitment, hiring, promotions and performance evaluations, and compliance. Failure to develop a common compensation system and coordinate implementation among the HR, compliance, diversity, and compensation departments can create and perpetuate gender wage inequities.

- Coordinate among the relevant departments and systems to develop common practices, criteria, and benchmarks to help avoid wage disparities. For instance, HR's recruiting and hiring practices should be aligned with the organization's diversity and compensation benchmarks.
- Develop shared recordkeeping and data storage policies.
- Support the professional development of HR, compliance, and diversity staff regarding the creation and implementation of compensation policies.

We all have much to gain from achieving equal pay. Eliminating gender disparities in pay will not only help women receive fair compensation, it will help employers' bottom line and reduce liability. Equal pay increases employee loyalty, productivity, and performance.[26] It also helps boost the national economy.[27] But it will take employers' commitment and innovation to make equal pay a reality.

1 *See* U.S. Dep't of Labor, Office of Fed. Contract Compliance Programs, Directive No. 307: Procedures for Reviewing Contractor compensation Systems and Practices § 8.B (Feb. 28, 2013), *available at* https://www.dol.gov/ofccp/regs/compliance/directives/dir307.htm (indicating use of multiple regression analysis to detect compensation discrimination) [Directive No. 307]; Nat'l Research Council of the Nat'l Acads., Collecting Compensation Data From Employers 62 (2012), *available at* http://www.nap.edu/catalog/13496/collecting-compensation-data-from-employers (discussing regression models for compensation analysis). *See also* Exponential Talent LLC, *Gap Inc. Pay Equity by Gender Project: In-Depth Compensation Analysis Conducted to Validate Women and Men Employees Receive Equal Pay for Equal Work,* http://www.exponentialtalent.com/gap-inc-pay-equity-by-gender-project.html (last visited June 7, 2016) (utilizing regression analysis which controlled for various factors including tenure and full-time employee status).

2 *See* Directive No. 307, *supra* note 1 § 8.B; Equal Employment Opportunity Comm'n, Compliance Manual, No. 915.003 § 10-III(C) (Dec. 2000), *available at* https://www.eeoc.gov/policy/docs/compensation.html [EEOC Compliance Manual].

3 *See* Directive No. 307, *supra* note 1 § 7.

4 *See* Susan J. Wells, *Merging Compensation Strategies,* 49 HR Magazine (May 1, 2004), *available at* https://www.shrm.org/publications/hrmagazine/editorialcontent/pages/0504wells.aspx.

5 *See* Andrew Chamberlain, *Is Salary Transparency More Than a Trend?*, Glassdoor (Apr. 27, 2015), https://www.glassdoor.com/research/studies/is-salary-transparency-more-than-a-trend/; Deborah Thompson Eisenberg, *Money, Sex and Sunshine: A Market-Based Approach to Pay Discrimination*, 43 Ariz. State L.J. 951, 1001-15 (2011).

6 Some companies are leading in embracing pay transparency. For example, Whole Foods allows employees to easily access salary information about every employee. *See* Alison Griswold, *Here's Why Whole Foods Lets Employees Look Up Each Other's Salaries*, Business Insider (Mar. 3, 2014), http://www.businessinsider.com/whole-foods-employees-have-open-salaries-2014-3. Buffer, a tech start-up, makes public each employee's salary and the formula by which they derive employees' pay. *See Introducing Open Salaries at Buffer: Our Transparent Formula and All Individual Salaries,* Buffer (Nov. 25, 2015), https://open.buffer.com/introducing-open-salaries-at-buffer-including-our-transparent-formula-and-all-individual-salaries/. At SumAll, a New York City-based company that provides analytics to businesses, employees have access to pay information. *See* David Burkus, *Why SumAll Became a Champion for Salary Transparency,* Forbes (May 2, 2016), http://www.forbes.com/sites/davidburkus/2016/05/02/why-sumall-became-a-champion-for-salary-transparency/. Jet.com publicizes its salary structure to its employees. *See* Erika Morphy, *Jet.com Is Making Its Employees' Salaries Transparent—and Non-Negotiable,* Forbes (July 21, 2015), http://www.forbes.com/sites/erikamorphy/2015/07/21/jet-com-is-making-its-employees-salaries-transparent-and-non-negotiable/#5d9eada62f89.

7 *See* Linda Babcock & Sara Laschever, Women Don't Ask: The High Cost of Avoiding Negotiation—And Positive Strategies For Change (2007); Hannah Riley Bowles, Linda Babcock & Lei Lai, *Social Incentives for Gender Differences in the Propensity to Initiate Negotiations: Sometimes It Does Hurt to Ask,* 103 Organizational Behav. & Hum. Decision Processes 84 (2007).

8 *See* Linda Babcock & Sara Laschever, Women Don't Ask: Negotiation and the Gender Divide (2003) (finding that women ask for less when they do negotiate and that women business school graduates who negotiate fare 30 percent worse than their peers who are men); Jenny Save-Soderbergh, *Are Women Asking for Low Wages? Gender Differences in Wage Bargaining Strategies and Ensuing Bargaining Success,* Swedish Inst. Soc. Res. Working Paper Series 7/2007 10 (2007), *available at* https://ideas.repec.org/p/hhs/sofiwp/2007_007.html.

9 *See* Andreas Leibbrandt & John A. List, *Do Women Avoid Salary Negotiations? Evidence from a Large-Scale Natural Field Experiment*, 61 MGMT. SCI. 2016, 2023 (2014) (finding women more willing to negotiate when the job posting indicated that wages are negotiable); Iris Bohnet, What Works: Gender Equality By Design 68-69 (2016).

10 *See, e.g.,* Hannah Riley Bowles, Linda Babcock & Kathleen L. McGinn, *Constraints and Triggers: Situational Mechanics of Gender in Negotiations*, 89 J. Personality & Soc. Psych. 951, 955-56 (2005).

11 Bohnet, *supra* note 9, at 73-74.

12 Iris Bohnet et al., *When Performance Trumps Gender Bias: Joint Versus Separate Evaluation,* Harv. Bus. Sch. Working Paper 12-083 4 (Mar. 16, 2012), *available at* http://www.hbs.edu/faculty/publication%20Files/12-083.pdf; Shelley J. Correll, S. Benard & I. Paik, *Getting a Job: Is There a Motherhood Penalty?*, 112 Am. J. Soc. 1297 (Mar. 2007), *available at* http://gender.stanford.edu/sites/default/files/motherhoodpenalty_0.pdf.

13 *See* Marta M. Elvira & Mary E. Graham, *Not Just a Formality: Pay System Formalization and Sex-Related Earnings Effects*, 13 Org. Sci. 601, 613-14 (2002).

14 *See id.* at 614.

15 For instance, Chubb conducted its bias awareness training together with performance management training and found it increased effectiveness. Cook Ross, *Diversity Best Practices: Proven Strategies for Addressing Unconscious Bias in the Workplace, Special Case Study: Chubb,* 2 CDO Insights 1, 7 (Aug. 2008), *available at* http://www.cookross.com/docs/UnconsciousBias.pdf.

16 *See* Bohnet, *supra* note 9, at 58; Dana Wilkie, *Rooting Out Hidden Bias,* 59 HR Magazine (Dec. 1, 2014), *available at* https://www.shrm.org/publications/hrmagazine/editorialcontent/2014/1214/pages/1214-hidden-bias.aspx (describing how specific companies have implemented implicit bias training).

17 EEOC Compliance Manual, *supra* note 2, at section 10-IV.F.2.g ("Prior salary cannot, by itself, justify a compensation disparity. This is because prior salaries of job candidates can reflect sex-based compensation discrimination.")

18 *See* Elvira & Graham, *supra* note 13, at 614 (finding increased gender disparities in less formalized forms of pay).

19 *See* Bohnet, *supra* note 9, at 155; Uwe Jirjahn & Gesine Stephan, *Gender, Piece Rates and Wages: Evidence from Matched Employer-Employee Data,* 28 Cambridge J. Econ. 683 (2004) (study of blue-collar workers finding that there was a smaller gender wage gap in piece-rate schemes compared to time-wage regimes).

20 *See* Taekjin Shin, *The Gender Gap in Executive Compensation: The Role of Female Directors and Chief Executive Officers,* 639 Annals Am. Acad. Pol. & Soc. Sci. 258 (Jan. 2012), *available at* http://ann.sagepub.com/content/639/1/258.full.pdf+html (finding that the gender wage gap reduced at public companies when compensation committee included women).

21 *See* Emilio J. Castilla, *Gender, Race and the New (Merit-Based) Employment Relationship,* 51 Indus. Rel. 528, 536 (2012) (finding that even where salary increases were linked to performance ratings, managerial discretion in awarding bonuses resulted in gender and racial

disparities); Elvira & Graham, *supra* note 13, at 614-15 (finding increased gender disparities in forms of pay involving increased managerial discretion); Bohnet, *supra* note 9, at 113.

22 *See* Bohnet, *supra* note 9, at 187-88.

23 Bohnet et al., *supra* note 12.

24 *See* Kim Bhasin, *How Gap Instituted Equal Pay for Men and Women,* The Huffington Post (Sept. 5, 2014), http://www.huffingtonpost.com/2014/09/05/gap-equal-pay_n_5768780.html (Gap Inc. used funds set aside for good performance to correct wage disparities revealed by equal pay audit); Kristen Bellstrom, *Salesforce Spent $3 Million to Close the Gender Pay Gap. Here's Why That's Big Deal,* Fortune (Nov. 7, 2015), http://fortune.com/2015/11/07/salesforce-3-million-close-pay-gap/ (Salesforce spent $3 million to correct gender wage disparities revealed by equal pay audit).

25 *See Feature Model Practice, Equal Pay for Equal Work: Gap, Inc.*, Gender Equality Principles (last visited June 7, 2016), http://genderprinciples.org/index.php?p=107 (during annual pay reviews, managers are provided with employees' pay ranges and held accountable for deciding and adjusting pay).

26 Eisenberg, *supra* note 5.

27 Inst. For Women's Policy Research, The Economic Impact of Equal Pay By State (Feb. 2016), *available at* http://www.iwpr.org/initiatives/pay-equity-and-discrimination/#publications (finding that if women in the United States received equal pay with comparable men, poverty for working women would be reduced by half and the U.S. economy would have added $482 billion (equivalent to 2.8 percent of 2014 GDP) to its economy).