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Managing Pay Equity Risks During the Downturn

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In-house labor and employment lawyers have much to keep them busy these days. In addition to their day jobs, counseling in-house clients and managing outside counsel, most have been working late nights and weekends on the large-scale workforce reductions that are grabbing headlines daily. Working closely with senior management, human resources, and outside counsel, they advise on selections procedures and the development of appropriate decisional units, evaluate risk with adverse impact analyses, and carefully draft releases, all to minimize the litigation risk presented by departing employees. The litigation risks of workforce reductions are not exclusively found among the departing employee population, however. Workforce reduction decisions can have an indirect albeit material impact on potential pay discrimination claims of the employees who remain. The recently passed Lilly Ledbetter Fair Pay Act (the "Ledbetter Act"), as well as the proposed Paycheck Fairness Act (the "PFA") legislation, which is a priority on the Democrats' legislative agenda, will dramatically change the legal landscape for pay discrimination claims. And employers will be well served to evaluate their pay practices, particularly after large-scale workforce reductions.

The New Pay Equity Legal Landscape

First, the Ledbetter Act, signed by President Obama on January 29, 2009, overturns the Supreme Court's 2007 holding in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), and codifies the so-called "paycheck rule." The new law practically eliminates any statute of limitations for discriminatory compensation claims under any of the primary non-discrimination laws, including Title VII, the ADEA, and the ADA. Now, simply by alleging that a portion of their most recent paycheck was tainted by a prior discriminatory decision, regardless of how long ago that decision was made, employees can bring discriminatory compensation claims, as long as that claim is brought within 300 days of the last paycheck. The Ledbetter Act is expressly made retroactive to cases pending as of May 28, 2007. Employers defending such claims, therefore, may be forced to explain decisions made many years prior by people no longer employed and, possibly, no longer alive.

The PFA materially amends the Equal Pay Act of 1963 (the "EPA"). If passed, the PFA will permit plaintiffs to bring opt-out class actions under Rule 23 of the Federal Rules of Civil Procedure, instead of the typically smaller opt-in collective actions currently permitted by the EPA. It also adds race and national origin as protected characteristics under the EPA, broadens substantially the employees whom a plaintiff can allege are comparators for purposes of proving pay discrimination claims, allows for uncapped compensatory and punitive damages, and sharply limits the affirmative defenses previously available to employers under the EPA.

These changes likely will lead to an increase in the number and scale of pay discrimination

lawsuits in the coming years. To read more about the Ledbetter Act and the PFA, and their consequences, follow this link to read other client alerts on these subjects.

RIFs and Pay Equity Risks

A large-scale workforce reduction can meaningfully alter risk of pay discrimination claims in two ways. First, the remaining employee population will likely have changed dramatically, so prior pay equity analyses may well be meaningless. Depending upon the eligibility factors used to select employees for reduction, large numbers of higher-paid white males may have left the workforce or, alternatively, large numbers of lower-paid, less-experienced employees comprised largely of women and minorities may have been severed. Most likely, the workforce reduction will have effected different changes in different departments and functions across the company. Unlike the effects of ordinary attrition and hiring on a compensation analysis, the effects of a large-scale workforce reduction can be massive. In light of the anticipated new emphasis on pay equity, a refreshed diagnostic of employee compensation is likely necessary, both to understand current risk and to potentially develop a remediation strategy to reduce or eliminate that risk.

Second, large-scale workforce reductions often result in the downgrade and demotion of some employees, very often without any immediate decrease in compensation. As a consequence, you have employees working shoulder to shoulder, in the same job title (or at least arguably performing the same work), working at the same level of performance, earning drastically different salaries. And to the extent incentive compensation is derived from base salary, the earnings gap grows even greater. In the past, few employers have reduced the pay of an employee moving to a lower-paid position, and many have not even “red-circled” such an employee. As discussed below, such policies will need to be rethought.

What Should an Employer Do?

In order to assess the risks of a pay discrimination claim in the aftermath of a reduction in force, here are some suggestions that employers should consider:

- Conduct a proactive pay diagnostic under the attorney-client privilege
  - Create reasonable measurement groups of employees doing similar types of work
  - Develop data reflecting legitimate business-related factors that explain pay at the employer
- Consider remediation strategies to “start the clock over” and to reduce the risk of previously barred claims given new life by the Ledbetter Act
- Review and strengthen documentation of compensation decisions
- Review current pay policies and practices, including
  - Setting of pay upon hire, promotion, or demotion
    - Develop a tool to identify appropriately paired comparators for making such pay decisions
    - Specifically consider a policy that will lower the pay of employees suffering a demotion to a lower-paid job classification; alternatively, consider red-circling such employees to inhibit future salary growth
  - Use of compa-ratio/rate range penetration type tools and their interface with the performance management system
  - Reconsider the use of broadbanded pay grade or level systems
    - If retaining such systems, consider an expanded use of market-based pay surveys to benchmark your company’s pay for specific jobs

- Develop mandatory written exception process to document any deviation from existing pay policies or guidance

There is no "one size fits all" solution to address pay equity issues. Policy and practice changes, and remediation strategies, are dependent upon an employer's circumstances, pay philosophy, and available data. Privilege issues are very thorny and counsel should be involved from the inception of the project.

If you have any questions concerning these developing issues, please do not hesitate to contact the authors who are partners in the Employment Law Department of the Paul Hastings Chicago office:

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