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Scrutiny of Gender Disparities in Compensation: At the Executive Level and Below



By MARTHA J. ZACKIN

By most reports, fewer women than men occupy the C-suite and those that do are paid less than their male counterparts. In its recently published *2012 S&P 500 CEO Pay Study*, a leading provider of executive compensation data, Equilar Inc., reported that only 12 of the 500 chief executive officers in this year's study were women. Although the average total shareholder return (TSR)¹ for the companies run by the female CEOs far exceeded that of the companies run by men (2.7 percent for women compared with 0.2 percent for men), the women were paid an average of almost \$500,000 per year less than their male counterparts. A similar study conducted by GMI Ratings, a corporate governance consulting firm, analyzed the salaries of more than 1,900 chief financial officers and found that female CFOs were paid an average of 16 percent less than their male counterparts of similar age at companies with comparable market values.²

¹ TSR, calculated as the net stock price change plus the dividends paid during the measurement period, is a key indicator of a company's performance.

² Tom White & Kimberly Gladman, *GMI Ratings, Female Chief Financial Officers and the Glass Ceiling* (March 29, 2012), available at http://info.gmiratings.com/Portals/30022/docs/gmiratings_glassceilingcfo_042012.pdf.

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This article examines some of the laws that prohibit gender-based pay disparities, the Obama administration's attention to this important issue, and a prediction about what to expect in the coming years.

Statutory Prohibitions on Wage Discrimination

Federal efforts to legislate gender-neutral pay policies and pay equity began with passage of the Equal Pay Act of 1963 (EPA). Hailed by Congress as "the first step towards an adjustment of balance in pay for women,"³ the EPA amended the Fair Labor Standards Act of 1938 (FLSA) to prohibit sex-based wage discrimination between men and women in the same establishment who perform jobs that require substantially equal skill, effort, and responsibility under similar working conditions. A wage disparity is not unlawful under the EPA if it is justified by a (1) a seniority system, (2) a merit system, (3) a system that measures earnings by quantity or quality of production, or (4) a differential based on any other factor other than sex.

Initially, the EPA did not apply to executive employees or others who were exempt from the overtime provisions of the FLSA. It was later amended to expand coverage to include FLSA-exempt employees.

Enacted one year after the EPA, Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on race, color, religion, sex, or national origin. Thus, Title VII also makes it illegal to discriminate based on sex in pay and benefits. Although there is overlap between the EPA and Title VII, Title VII requires only that the jobs being compared are "similar," a more relaxed standard than the "substantially equal" standard applicable to the EPA.⁴

Nevertheless, Title VII imposes other burdens that do not exist under the EPA. Specifically, an individual asserting a claim for discrimination under Title VII must first file an administrative charge of discrimination within 300 days in most states (180 days in those few states without a fair employment practice agency). There is no administrative filing requirement under the EPA, and the statute of limitations is two years—or

³ 109 Cong. Rec. 9193 (1963) (statement of Rep. Frances P. Bolton).

⁴ EQUAL EMPLOYMENT OPPORTUNITY COMM'N, EEOC COMPLIANCE MANUAL § 10-III(A)(1)(b) n.18 (Dec. 5, 2000), <http://www.eeoc.gov/policy/docs/compensation.html>.

three if the violation was willful. If an individual can meet the high threshold of proving the jobs are “substantially equal,” however, she need not prove that the employer intended to discriminate or meet the shorter administrative filing deadline.

Nine days after taking office, President Barack Obama signed his first piece of substantive legislation, the Lilly Ledbetter Fair Pay Act of 2009 (LLFPA). Amending Title VII, the Americans with Disabilities Act of 1990, the Rehabilitation Act of 1973, and the Age Discrimination in Employment Act of 1967, the LLFPA provides that an individual subjected to compensation discrimination can file an administrative charge of discrimination within 300 days in most states (180 days in those few states without a fair employment practice agency) of when the individual’s compensation is *affected* by the application of a discriminatory compensation decision or other discriminatory practice, including each time the individual receives compensation that is based in whole or part on such discriminatory compensation decision. In other words, the applicable statute of limitations restarts each time an employee receives a paycheck based on a discriminatory compensation decision.

Proposed Legislation

Over the years, other legislation has been introduced in an attempt to strengthen prohibitions against compensation discrimination. For example, the Fair Pay Act of 2011 (FPA) would amend the FLSA to prohibit compensation discrimination on account of sex, race, or national origin. It would allow acceptable differences in pay to the extent such differences were based on seniority or merit systems, systems that measure earnings by quantity or quality of production, or differentials based on bona fide factors that are demonstrably job-related or that further legitimate business interests.

Similar to Title VII, the FPA also would prohibit retaliation against any individual for opposing any act or practice made unlawful by the FPA, or for assisting in an investigation or proceeding under it. The legislation expressly would allow any actions under the FPA to be maintained as a class action, and monetary damages would include compensatory and punitive damages, attorneys’ fees, and experts’ fees. The FPA has not made it out of committee.

The Paycheck Fairness Act (PFA), first introduced in 2011 and reintroduced on May 22, 2012, as S. 3220, would amend the EPA to revise remedies for, enforcement of, and exceptions to prohibitions against sex discrimination in the payment of wages. Specifically, although the PFA would allow wage differentials that are based on a factor other than sex, it would limit such factors to bona fide factors such as education, training, or experience. The PFA further provides that the bona fide factor defense would apply only if the employer demonstrates that the factor:

- (1) is not based upon or derived from a sex-based differential in compensation,
- (2) is job-related with respect to the position in question, and
- (3) is consistent with business necessity.

The bona fide factor defense would not apply if the employee demonstrates that: (a) an alternative employ-

ment practice exists that would serve the same business purpose without producing such differential, and (b) the employer refused to adopt such alternative practice. The PFA also includes an anti-retaliation provision, expressly allows actions under it to be maintained as a class action, and provides for monetary damages to include compensatory and punitive damages and payment of attorneys’ and experts’ fees. Interestingly, the PFA would also provide resources to help women develop their negotiating skills and to fund further research to understand the lingering causes of wage discrepancies between men and women.

By a vote of 52-47, the Senate failed to secure the 60 votes needed to advance the PFA, effectively killing the measure—at least for now.

H.R. 3791,⁵ was introduced on Jan. 18, 2012. H.R. 3791 would amend the Securities Exchange Act to require publicly traded companies to include information in their annual 10K regarding the compensation of minorities and women. If passed—which is unlikely—public companies would be required to analyze compensation data for all employees and create five brackets, ranging from the lowest paid 20 percent to the highest paid 20 percent of all employees, and report the number of women and minorities that fall within each bracket. Interestingly, the bill, which is intended to identify and break through the “glass ceiling,” begins with the following statement:

Former Massachusetts Governor Mitt Romney advocated an idea for imposing pressure on public companies to benefit minorities and women during a debate with then-Senator Edward M. Kennedy in 1994, stating: “I believe that public companies and Federal agencies should be required to report in their annual 10K the number of minorities and women by income group across the company, so we can identify where the glass ceiling is and break through it. And I think that the market of America will say ‘that company has not promoted women, has not promoted minorities’ and will put pressure on American corporations and agencies to respond.”

Notwithstanding Mr. Romney’s stated support for corporate disclosures, it is unlikely that H.R. 3791 will pass under either an Obama or a Romney administration.

The Obama Administration’s Efforts

President Obama campaigned on the issue of pay equity, and it remains a signature issue of his administration.

In January 2009, weeks after taking office, President Obama issued a Memorandum for the Heads of Executive Departments and Agencies establishing the White House Task Force on Middle-Class Working Families (Middle Class Task Force).⁶ Chaired by Vice President Joe Biden, the Middle Class Task Force is focused on raising the living standards of middle-class working

⁵ Titled “An Act to amend the Securities Exchange Act of 1934 to require annual disclosures relating to the compensation brackets in which an issuer’s minority and women employees reside,” the bill was referred to the House Committee on Financial Services.

⁶ Memorandum on White House Task Force on Middle-Class Working Families, 74 Fed. Reg. 5,979 (2/3/09), http://www.whitehouse.gov/the_press_office/memorandum_for_the_heads_of_executive_departments_and_agencies.

families by developing detailed recommendations to: (1) expand education and training opportunities; (2) improve work/life balance; (3) restore labor standards; (4) protect the incomes of middle-class working families; and (5) protect retirement security.

Pursuant to a recommendation made by the Middle Class Task Force, the National Equal Pay Enforcement Task Force (Equal Pay Task Force) was established in January 2010. Intended to work in parallel with the Middle Class Task Force, the Equal Pay Task Force brings together the Equal Employment Opportunity Commission (EEOC), the Department of Labor (DOL), Department of Justice (DOJ), and the Office of Personnel Management (OPM) to enforce the law prohibiting pay discrimination and to further gender-based wage parity. The Equal Pay Task Force's recommendations include proposals to: (1) improve interagency coordination and enforcement efforts, (2) collect additional and more detailed data from the private sector, and (3) work with Congress to pass Paycheck Fairness Act.⁷

The EEOC, the federal agency charged with enforcing federal anti-discrimination laws, including the EPA and Title VII, reported fewer charges of discrimination citing the EPA filed in fiscal year 2011 than in the previous year. Despite the reduction in charges filed—919 charges in FY 2011, compared with 942 in FY 2010—the EEOC collected significantly more in monetary settlements for resolution of EPA claims, with \$23 million collected in FY 2011, compared with \$12.6 million in 2010 and \$4.8 million in 2009.⁸

On April 17, 2012, the National Committee on Pay Equity sponsored the 2012 “Equal Pay Day,” set on that date to illustrate that women would have to work 4-1/2 extra months to earn the same amount of pay as men for the prior year. On that day, the EEOC reported that it had: agreed with the Office of Federal Contractor Compliance Programs (OFCCP), the DOL office that enforces the affirmative action obligations imposed on federal contractors and subcontractors, to streamline collaboration in enforcement; entered into pilot programs to improve enforcement of laws prohibiting compensation discrimination and expand outreach; trained more than 2,000 intake workers, investigators and attorneys from EEOC, DOL's Wage and Hour Division, and state and local fair employment practice agencies on identification, investigation, and remediation of compensation discrimination; and conducted informational programs and training on equal pay issues across the country.

The OFCCP highlighted the continuing gender gap in pay as a priority in its 2013 Congressional Budget Justification. Specifically, the OFCCP stated that “addressing the pay gap is a priority for OFCCP, its sister agen-

cies within the Department of Labor, and the other members of the President's Equal Pay Enforcement Task Force throughout the Federal Government.”⁹ To achieve this strategic goal, OFCCP reported that it “anticipates continuing the effort to combat pay discrimination” through: (1) increasing the number and quality of federal contractor audits; (2) implementing new guidance and protocols, which it expects to launch this year; (3) continuing its compensation enforcement training program for compliance officers; and (4) developing a new tool to gather compensation data from federal contractors.

The Women's Bureau (WB) is the office of the DOL tasked with formulating standards and policies to promote the welfare of wage-earning women, improving their working conditions, increasing their efficiency, and advancing their opportunities for profitable employment. Since its formation in 1920, working toward pay equity has been and continues to be one of the WB's priorities. Although the WB has no enforcement authority, it is an active participant in the Equal Pay Task Force and is engaged in research, data collection, and educational projects relating to equal pay.

What's Next

In short, the Obama administration seems intent on championing the cause of gender-based compensation equality. Government agencies tasked with enforcing laws pertaining to compensation discrimination have all increased their scrutiny and enforcement activities, including the imposition of significant monetary liability on employers. As agencies cast wider nets, seeking more information through their utilization of directed investigations, more employers are refusing to settle and taking their chances in a judicial forum. And although an employer may have a good chance of prevailing in court, the cost of litigation and the risk of substantial damages may be prohibitive. For example, after six years of litigation and at least hundreds of thousands of dollars paid in legal fees, a jury in 2010 awarded a class of women \$250 million in compensatory and punitive damages against Novartis Pharmaceuticals Corp. for its discrimination against thousands of female sales representatives over pay, promotion, and pregnancy.¹⁰ The case settled for \$152 million.

What can an employer do to minimize the risk of facing a compensation discrimination claim? Although there are many factors unique to executive compensation, most compensation-related issues are at play throughout an organization. It is important for an employer to conduct an internal pay-equity analysis, at the executive level and below, **before** it is required to do so by a federal or state agency.

To the extent pay differences exist between employees in the same job, or between the current C-level executive and her predecessor, the employer should understand whether there are legitimate reasons for the discrepancies, such as tenure, experience, or performance. Specific criteria should be developed for determining compensation. A process should be developed—

⁷ Nat'l Equal Pay Enforcement Task Force, Recommendations and Action Plan, http://www.whitehouse.gov/sites/default/files/rss_viewer/equal_pay_task_force.pdf.

⁸ The statistics do not include compensation discrimination claims brought solely under Title VII. Equal Employment Opportunity Comm'n, *Equal Pay Act Charges*, <http://www.eeoc.gov/eeoc/statistics/enforcement/epa.cfm>. When combining claims for gender-based compensation discrimination brought under the EPA with those brought under Title VII, the reported numbers rise to 1,960 new charges filed and \$30.9 million in monetary benefits obtained. Equal Employment Opportunity Comm'n, *Statement on Equal Pay Day* (April 17, 2012), http://www.eeoc.gov/eeoc/newsroom/wysk/statement_equal_pay_day_2012.cfm.

⁹ Office of Fed. Contract Compliance Programs, FY 2013 Congressional Budget Justification, <http://www.dol.gov/dol/budget/2013/PDF/CBJ-2013-V2-10.pdf>, p. 21.

¹⁰ *Velez et al. v. Novartis Pharmaceuticals Corp.*, No. 04 Civ. 09194 (S.D.N.Y., July 14, 2010).

and implemented—to bring lower-paid women up to the same salary level as similarly situated male co-workers or predecessors. Pay decisions and performance assessments should be documented and the documents retained.

The self-analysis and remedial work described above should be guided by counsel to protect it from disclosure to the extent possible, and should include the following elements:

- a thorough review of compensation philosophy, processes, procedures, and guidelines;
- a thorough analysis of the factors considered when setting compensation, whether initially at the

start of employment or later, through raises and incentives;

- a determination of whether any compensation disparities exist and, if so, whether they are significant;
- a thorough analysis of the reasons for any disparities; and
- a plan to remedy any disparities that are not based on sound business-related criteria.

In addition, programs and policies pertaining to discrimination, equal employment opportunity, and affirmative action should be designed and implemented. And last, but definitely not least, employers should implement processes to ensure that managers comply.