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Top 10 Topics for Directors in 2020: Pay Equity

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The legal landscape around pay equity is also shifting. A patchwork of recently enacted state and local laws make it more difficult to justify any pay difference between men and women, and different races who are performing similar work, even when there is no discriminatory motive and the pay difference is based on nondiscriminatory reasons.

Knowing your company's vulnerability to equal pay claims and making adjustments where needed—under the protection of privilege—can both mitigate the risk of future claims and create a positive public narrative.

Recognize Ongoing Pay Inequity Issues

Boards play an important role in identifying the risks, opportunities and processes related to pay inequities. Increasingly, investors, employees and the public are looking at companies, private and public, small and large, to address pay disparities domestically and internationally among different genders and races in the workplace.

In an age where information is freely and anonymously circulated, more and more compensation information is shared online among different demographics. Pay equity discussions usually focus on hourly wages, salaries, bonuses and promotions. Several companies now tout having 100 percent pay equity among men and women, including Nordstrom, Starbucks and Adobe.

Although it's recently made headlines, pay equity has received its fair share of attention for decades. In 1963, the U.S. Congress passed the Equal Pay Act, amending the Fair Labor Standards Act and aiming to abolish wage disparities between men and women in "substantially equal" jobs within the same "establishment," which cannot be explained by a reason other than sex. Title VII of the Civil Rights Act of 1964 (Title VII) prohibits compensation discrimination. And many state and local governments have passed laws that are equally, or more, protective than the Equal Pay Act or Title VII, including California, New York City, Connecticut, Illinois, Washington and Massachusetts.

In spite of all this legislation, the U.S. Census Bureau found that in 2018 women were paid about 82 cents to every dollar made by men. When comparing the intersection of gender and race, the disparities are even more drastic with the lowest paid group. Hispanic women made 54 cents for every dollar made by the highest paid group: white, non-Hispanic men. These numbers showcase the difference in median wages between men and women. They do not reflect pay differences between men and women who are performing similar jobs, where the differences in pay are typically much smaller. The Census statistics highlight, however, another potential problem that companies face: steering women into lower paying jobs and promoting fewer women into senior positions than their male counterparts.

Take Note of Current Landscape for Investors

In the last five years, there have been more than 100 shareholder resolutions for at least 64 companies addressing the gender pay gap, with shareholders increasingly voting for these measures. Institutional Shareholder Services Inc. and other proxy advisory firms, considering shareholder proposals related to gender pay equity, have begun to broaden their policies to include pay equity issues related to race or ethnicity, as well. While the terms often get conflated, “pay equity” and “pay gap” are different:

- Pay equity usually refers to compensation for similar work, for which the difference between men and women is very small.
- Pay gap refers to the difference between the median compensation of men and women, which is much larger due to a variety of factors. Only a small portion of these factors are due to pay inequity.

Keep Track of Efforts to Change Regulation

Lawmakers continue to introduce legislation aimed at further reducing pay inequities. The Paycheck Fairness Act that has been presented, in some form, to Congress every year since 2009. Its most recent iteration would require an employer to demonstrate “bona fide job-related factors” accounting for any gender-based pay differences between men and women performing equal work, rather than the current Equal Pay Act defense of “any factor other than sex.”

Regulators also are increasingly scrutinizing companies based on current laws, including New York City's pension funds, which hold significant shares of Oracle Corp. stock. The Securities and Exchange Commission (SEC) is being called upon to investigate Oracle for misleading investors regarding pay inequities within its workforce, as alleged in an administrative lawsuit against Oracle being pursued by the Department of Labor's (DOL's) federal contractor watchdog, the Office of Federal Contractor Compliance Programs (OFCCP).

Understand Effects of Pay Inequities

Aside from litigation risk and negative publicity, perceived pay inequality and lack of transparency create a variety of problems within companies. Employees may feel undervalued, which can decrease productivity, stifle innovation, increase turnover and create a toxic us-against-them culture. As the work force struggles, a company's bottom line also suffers.

By fixing problems of pay inequity, or at least actively working toward pay equality, companies can be more transparent with the workforce about their efforts. As many are discovering, pay transparency can improve morale, increase productivity and positively impact profitability.

Consider Several Issues When Closing Pay Gap

Finding a way to achieve pay equity is a complex endeavor that involves a mix of business decisions and legal considerations. Plan carefully to avoid creating discoverable evidence that could be used against your company in future litigation. For example, before undertaking any pay equity analysis, a crucial first step is to affirmatively cloak the pay equity study as attorney-client privileged. Deliberately document the study as centered upon obtaining legal advice about vulnerability to equal pay claims—not simply to review current pay and make pay adjustments. Consider how to group employees for analysis and what explanatory factors are relevant and should be included. Also, give careful consideration to applicable legal standards. Before performing a pay equity study, the board also should ensure that their company and key parties are committed to correcting pay inequality. Consider these issues next:

- A key factor is making pay adjustments without alerting anyone to the fact that they may have been underpaid. Consider a situation where a company performs a pay equity study and identifies some women are paid, on average, 18 cents less per dollar than men in substantially similar positions. If no action is taken and an Equal Pay Act lawsuit is filed, companies may be unable to avoid an automatic doubling of back pay as liquidated damages. These are presumed unless the company waives its attorney-client privilege and shows it acted in good faith with reasonable grounds for believing that it was not in violation of the law.

- Closing the pay gap might not require immediately increasing the compensation of some omen so that the female average is raised by 18 cents, but a short-term and long-term action plan will need to be developed that ultimately aims to close the gap through merit increase cycles and when setting starting pay for those hired or promoted.
- It's also important to consider that pay equity is not just between women and men, but also between black men and white, non-Hispanic men, Hispanic women and black men, and the many other variations of race and gender. To avoid trading one problem for another, before any equity adjustments are made, you should also consider their impact on race and national origin. In 2020 and beyond, pay equity issues will draw the attention of the many stakeholders of companies. Boards and their management teams should consider the numerous positive impacts on a company that come with correcting pay inequality, and the risks associated with not evaluating their employee compensation structure. Beyond correcting disparities, companies reaching parity at a single point in time must vigilantly continue their efforts as they continue to grow and change and as employees are hired, promoted and depart.

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