

Best Practices: Employee Starting Pay from Years Ago Can Come Back to Bite a Business

by Helen B. Bloch

Are you paying your employees what they deserve? Similarly situated employees, not paid on par with one another as a result of a lower starting salary, perhaps need a pay increase.

If there is uncertainty whether your employees are being paid on par with one another for performing similar duties, your business would be well served by conducting a salary audit to ensure that employees who perform similar work receive similar pay. At least that is what the Seventh Circuit would recommend to ensure your business is not unwittingly engaging in discriminatory pay practices.

When a teacher was hired in 2006 by the Indiana Academy the hiring director told her that she did not need a higher starting salary because her husband worked too. This discriminatory approach affected her pay during her tenure. In 2017 she endeavored to rectify the situation. She brought to the Dean's attention that her similarly situated male colleagues made more money than she. The Dean responded that there was nothing discriminatory about the pay disparity. Merely, the others had higher starting salaries, so they happened to earn more than she despite her having received proportionately higher pay increases than that of her similarly situated male colleagues. Since the Academy refused to rectify its discriminatory pay practices that it attributed to "salary compression" she sued in 2018. Her lawsuit alleged sex-based pay discrimination in violation of Title VII of the Civil Rights Act and the Equal Pay Act.

The Academy moved for summary judgment on both claims arguing salary compression and qualification differences were gender-neutral reasons for the pay disparity. The district court agreed, finding that the discriminatory statement by the hiring director, assuming it was true, which at the summary judgment level it had to do, was outside of the statute of limitations.

The United States Court of Appeals for the Seventh Circuit held otherwise. In *Cheryl Kellogg v. Ball State University*, the Court decided her discrimination in pay case should go forward. The 7th Circuit started its analysis with the paycheck accrual rule, codified by the Lilly Ledbetter Fair Pay Act of 2009. Under the Ledbetter Act, discrimination in compensation occurs each time wages are paid that are based on a discriminatory practice, even if that underlying discriminatory practice took place past a statute of limitations. Thus, every time the teacher was paid wages based on the 2006 discriminatory starting salary, she had a new claim against her employer. And since the Equal Pay Act and Title VII prohibit discrimination in pay, the statement by the hiring director in 2006 was sufficient to establish that her employer discriminated against her based on her sex.

Illinois, in its quest to root out discriminatory pay practices, has taken equality in pay a step further. Its Equal Pay Act was amended in 2019 to make it illegal for an employer or a prospective employer to ask a job applicant about their pay history. No longer can an employer screen job applicants based on current or past wages or salaries, request job applicants to provide a salary history to be considered for a job interview, or require that an applicant disclose wage or salary history as a condition of employment. While it's still fair game to ask candidates about salary expectations, employers should tread lightly around the topic. Illinois' Equal Pay Act also prohibits employers from paying a lower wage based on gender for identical or similar work for jobs that are "substantially similar" in skill, effort, and responsibility.

From experience in representing businesses and individuals in employment matters, the various equal pay laws benefit older workers too. With budget cuts and lay-offs becoming the norm, employees at the senior level who lose jobs tend to be older workers. Many of these individuals are happy to accept a stable job in exchange for a lower rate of pay than their previous job, and less responsibility than their former senior position required. Generally, employers are reluctant to hire individuals for a salary that is lower than what they earned before because they feel that the potential employee will want to make more money and continue to look for other work. By taking salary history out of the picture, it is easier for an older worker to obtain new employment.

When it comes to business decisions, an employer should consider what it wants to pay for the job it wants done, *not* what can it get away with paying the worker to do the job. If the employer maintains the mindset that for a specific position it will offer a certain set salary irrespective of the classification of the potential job candidate, the business will never have to be concerned about running afoul of our equal pay laws.

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