



LILLY LEDBETTER ACT

WHY YOU MAY NEED A COMPENSATION AUDIT



Lilly Ledbetter Act

President Obama signed the bill into law
Thursday, January, 29, 2009.

This new law overturns a U.S. Supreme Court decision that said a woman (Lilly Ledbetter) could not sue for pay discrimination she had endured for 20 years for one simple reason.

- She hadn't sued within 180 days of the original discrimination.
- Ledbetter had argued that the discrimination occurred—and the clock restarted—every time she received a paycheck less than her male peers, but the justices disagreed.



Proceed With Caution

The Ledbetter Act is complex

- It is retroactive to May 28, 2007 (the day before the U.S. Supreme Court ruled against Ledbetter in her lawsuit)
- It applies to all pay discrimination charges that were pending on or after that date.
- the Lilly Ledbetter Fair Pay Act says that discrimination would be deemed to occur every time a new paycheck is delivered
- Consult with counsel and make sure you don't create unnecessary trouble for yourself.



Attorney-Client Privilege

Implement *The Attorney-Client Privilege* for all compensation audits.

- In doing so, the organization may be able safeguard the audit results against disclosure.
- By having the compensation audit conducted under the supervision of corporate or outside counsel, *The Attorney-Client Privilege* could be invoked. In general, this privilege protects the confidential exchange of information between the organization, its auditors, and its attorneys made during an internal compensation audit.
- The purpose of this privilege is to encourage open and honest discussions to ensure that the law is upheld.



Attorney-Client Privilege Prerequisites

The following four very specific prerequisites must be met for the attorney-client privilege to apply:

1. The holder of the privilege is or sought to become a client of the attorney
2. The communication relates to a fact of which the attorney was informed by his client, without the presence of strangers and for the purpose of securing either an opinion about the law, legal services or the lawyer's assistance in some legal proceeding
3. The communication to the attorney was not for the purpose of committing a crime or tort, and
4. The privilege has been claimed and not waived by the client. This privilege is triggered only by the organization's request of the attorney for legal advice, not general business advice.



Twofold Purpose of Compensation Audit

- 1. Develop a framework of analysis within which compliance issues can be identified and prioritized.**
- 2. Identify compensation practices and policies either currently in place, or missing, and defensible, or not defensible, if challenged.**



COMPENSATION POLICIES

The Audit should include a review of Employee Handbook, Compensation Policies, Practices and Processes and may also include interview of selected HR employees and other departmental managers

- 1. Are Company documented compensation policies made available to managers and employees.**
- 2. Are individuals responsible for administering them (HR and managers) aware of the compensation policies and are they administering them consistently.**



COMPENSATION PRACTICES

- Are decisions regarding an individual's compensation package communicated to the individual?
- Does the organization establish and maintain a documented policy for conducting its Compensation activities?
- Is an organizational role(s) assigned responsibility for performing or coordinating Compensation practices?
- Are adequate resources provided for Compensation activities?
- Do individuals performing Compensation activities receive the preparation needed to perform their responsibilities?
- Are measurements made and used to determine the status and performance of Compensation activities?
- Are unit measures of Compensation activities collected and maintained?
- Are aggregate trends in compensation activities and decisions measured and reviewed on a recurring basis?
- Does a responsible individual verify that Compensation activities are conducted according to the organization's documented policies, practices, procedures, and, where appropriate, plans; and addresses noncompliance?



Compensation Equity Relative to Skill, Qualifications, and Performance

- 1. Is action taken to correct inequities in compensation or other deviations from the organization's policy and plan?**
- 2. Is each individual's compensation package determined using a documented procedure that is consistent with the organization's compensation policy and plan?**
- 3. Are compensation adjustments made based, in part, on each individual's documented accomplishments against their performance objectives?**



POTENTIAL RISK

The Audit should include a review of exposure issues related to distinct stages of the employment relationship including:

- 1. Hiring, e.g., job descriptions, resumes, application forms, employment contracts, employment and salary verification**
- 2. Promotions**
- 3. Employee evaluation, e.g., performance appraisals**



EXEMPT CLASSIFICATIONS

Job positions that are misclassified as exempt from overtime requirements expose the company to liability for past overtime.

Due to the complexity of wage and hour laws and regulations it is sometimes difficult to characterize a job as exempt. Therefore a focus should be placed on jobs that may fall into the “gray” areas.



COMPENSATION AUDIT UNDER SUPERVISION OF LEGAL COUNSEL

EMPLOYER PROVIDES COMPENSATION DATA

SALARY DATA IS THEN SORTED BY:

- SALARY GRADE
- OR, BAND/ LEVEL/ GROUP/ TITLE
 - Then sorted by:
 - RACE
 - GENDER

| <u>Gender/Race</u> | <u>Title</u> | <u>Annualized Pay</u> |
|-----------------------|--------------|-----------------------|
| Minority Male 13 | PLANNER | 36,700 |
| Minority Female 12 | PLANNER | 39,500 |
| Minority Male 5 | PLANNER | 43,200 |
| Minority Female 4 | PLANNER | 43,200 |
| Minority Male 24 | PLANNER | 45,715 |
| Minority Female 2 | PLANNER | 45,855 |
| Male 22 | PLANNER | 37,500 |
| Male 14 | PLANNER | 43,220 |
| Male 4 | PLANNER | 45,695 |
| Male 3 | PLANNER | 45,695 |
| Female 3 | PLANNER | 45,695 |



MEAN & STANDARD DEVIATION

VARIABLES INCLUDE:

- CURRENT SALARY
(AS DEFINED BY EMPLOYER AND INCLUDES COMMISSIONS AND BONUSES)
- TIME IN GRADE
OR, BAND/LEVEL/GROUP OR TITLE
TO IDENTIFY WHETHER THERE IS A “POTENTIAL PATTERN”.

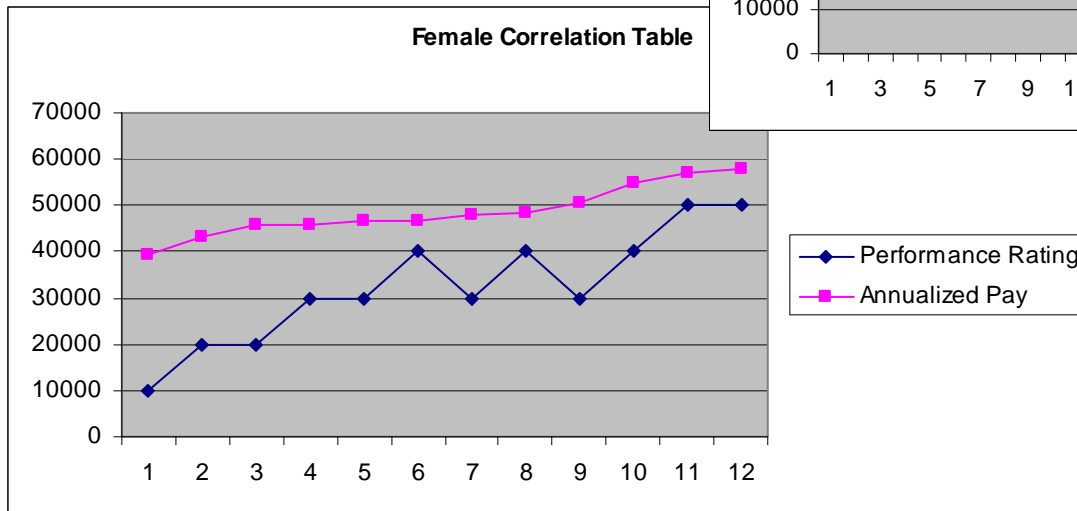
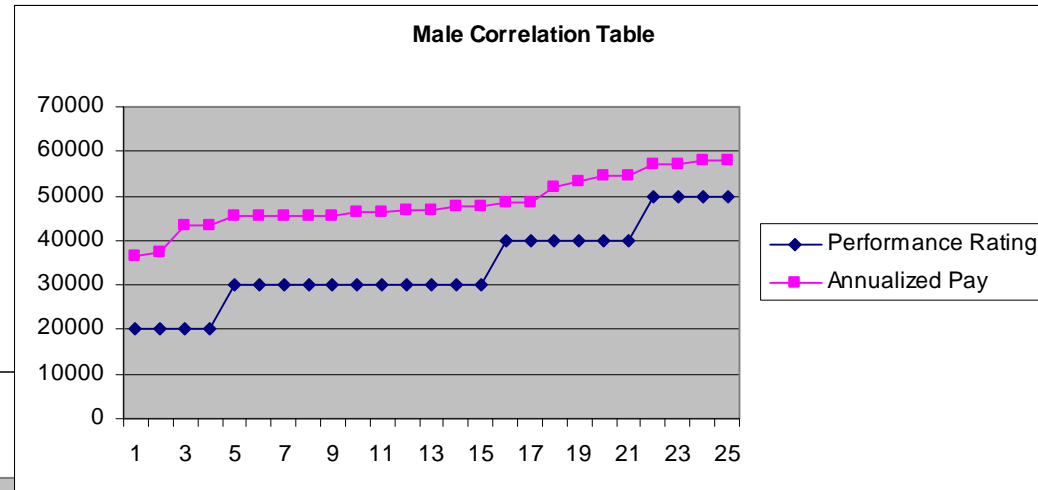
| Gender/Race | Title | Relative to Average | Annualized Pay | Number of Standard Deviations from Mean | | |
|-----------------------|---------------------------|---------------------|----------------|---|-----------------------------|--------|
| Female 12 | PLANNER | 81.3% | 39,500 | (1.63) | | |
| Female 4 | PLANNER | 89.0% | 43,200 | (0.96) | | |
| Female 3 | PLANNER | 94.1% | 45,695 | (0.52) | | |
| Female 2 | PLANNER | 94.4% | 45,855 | (0.49) | | |
| Female 6 | PLANNER | 95.9% | 46,545 | (0.36) | | |
| Female 10 | PLANNER | 96.1% | 46,690 | 0.18 | | |
| Female 9 | PLANNER | 98.3% | 47,750 | (0.15) | % Females Below Female Mean | |
| Female 11 | PLANNER | 99.9% | 48,530 | (0.01) | 8 | 66.67% |
| Female 1 | PLANNER | 104.0% | 50,501 | 0.35 | | |
| Female 5 | PLANNER | 112.7% | 54,750 | 1.11 | | |
| Female 8 | PLANNER | 117.4% | 57,000 | 1.52 | | |
| Female 7 | PLANNER | 119.4% | 58,000 | 1.70 | | |
| Total in Group | Average or Mean | | 48,668 | | | |
| 12 | Standard Deviation | | 5,534 | UCL | \$ | 59,736 |
| | 2 sigma | | 11,067 | LCL | \$ | 37,601 |



RELEVANT VARIABLES

CORRELATION ANALYSIS BASED ON:

- JOB TITLE
- JOB RESPONSIBILITIES
- TOTAL SENIORITY
- STARTING SALARY
- PERFORMANCE





PATTERNS AND PROBLEMS

- **PATTERN**

- **LOOKING WITHIN EACH COMPONENT OF EXEMPT AND NON-EXEMPT**
- **IF A PATTERN EXISTS THEN A SYSTEMIC REBUTTAL IS NEEDED**

- **PROBLEM**

- **LOOKING AT GROUPS AND INDIVIDUALS**
- **IF A PROBLEM EXISTS THEN A INDIVIDUAL OR GROUP EXPLANATIONS ARE NEEDED**

| <u>Gender/Race</u> | <u>Title</u> | <u>Relative to Average</u> |
|--------------------|--------------|----------------------------|
| Minority Male 13 | PLANNER | 75.6% |
| Minority Female 12 | PLANNER | 81.3% |
| Minority Male 5 | PLANNER | 89.0% |
| Minority Female 4 | PLANNER | 89.0% |
| Minority Male 24 | PLANNER | 94.1% |
| Minority Female 2 | PLANNER | 94.4% |



LOOKING FOR PATTERNS

- 1. REVIEW SALARY GRADES IN EACH COMPONENT WITH COMPARATORS, I.E.,**
 - FEMALES Vs MALES;**
 - MINORITY Vs MAJORITY**

- 2. FOR ALL GRADES WITH COMPARATORS**
 - DETERMINE ADVERSE IMPACT TO:**
 - MALE Vs FEMALE AND**
 - MINORITY Vs MAJORITY**



LOOKING FOR PATTERNS

- 3. DETERMINE HOW MANY GRADES WITHIN EACH COMPONENT WITH COMPARATORS ARE ADVERSE TO:**
 - FEMALES
 - MINORITY

- 4. CALCULATE THE ADVERSE PROTECTED GROUP PERCENTAGE:**
 - DETERMINE THE NUMBER OF SALARY GRADES ADVERSE TO
 - FEMALE AND
 - MINORITY
 - DETERMINE THE ADVERSE % OF FEMALES TO TOTAL EMPLOYED AND THE ADVERSE % OF MINORITIES TO TOTAL EMPLOYED



IDENTIFYING RISKS AND ACTIONS TO MITIGATE RISK

| Risk | Potential Impact (H, M, L) | Probability of Occur. (H, M, L) | Priority | Internal Control Activities (Risk Mitigations) | Risk Rating |
|--|-----------------------------------|--|-----------------|---|--------------------|
| FLSA EXEMPT STATUS | M | M | M | Add FLSA language to each job description to clarify exemption is being applied. Also, use language from specific exemption to support decision for exemption. Include expanded language for “Safe Harbor” provisions to employee handbook | M |
| Compensation System is not documented | H | L | M | Recommendation: Develop a compensation policy, salary midpoints and ranges so an employee’s relative position to midpoint can be ascertained. | M |



AUDIT CLOSURE

Auditor, Legal Council, and Employer meet to review results, and discuss recommendations and opportunities to mitigate risk.



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