WSGR ALERT

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TARGETING EMPLOYERS FOR GENDER-BASED PAY AND PROMOTION DISCRIMINATION: THE NEXT BIG THING?

Preventing and defending claims of gender-based pay and promotion discrimination is fast emerging as the latest challenge for employers seeking to reduce litigation risks. That these claims could be "the next big thing" is clear from recent jury verdicts, pending legislation in Congress, and headline-grabbing court decisions:

- The Ninth Circuit affirmed class action certification of the largest gender-discrimination class in the country's history based on Wal-Mart's allegedly discriminatory subjective pay and promotion practices.
- A jury in the Southern District of New York found Novartis Pharmaceutical Corporation liable for three class-wide issues of pay, promotion, and pregnancy discrimination in a suit brought on behalf of 5,600 female sales employees, and subsequently awarded the plaintiffs $250 million in punitive damages.
- President Obama has emphasized that closing the wage gap is a central initiative for his administration and both the president and Congress are promoting legislation, including the Paycheck Fairness Act, in an effort to close the wage gap.

These court decisions and legislative initiatives raise the spectre of a flood of class claims against employers for pay and promotion discrimination. There are, however, steps employers can take to minimize their risks.

The Largest Gender-Discrimination Lawsuit in U.S. History: *Dukes v. Wal-Mart*

On April 26, 2010, the U.S. Court of Appeals for the Ninth Circuit affirmed in large part a district court's certification of an employment-discrimination class action involving at least 500,000 (and potentially 1.5 million) female Wal-Mart employees alleging gender bias in pay and promotions in violation of Title VII of the Civil Rights Act of 1964. The class encompasses both salaried and hourly employees in positions ranging from a salaried store manager to an hourly personnel clerk, demonstrating that "mere size does not render a case unmanageable." The case, *Dukes v. Wal-Mart Stores, Inc. (Dukes)*, is the largest gender-discrimination lawsuit in U.S. history, and increases the likelihood that similar actions will be filed against employers nationwide.

In reaching its decision to certify the class, the lower court held that Wal-Mart's pay and promotion decisions were largely subjective and made within a broad range of discretion by store managers ("a common feature which provides a wide enough conduit for gender bias to potentially seep into the system"). The Ninth Circuit subsequently affirmed the trial court's finding, based on an adverse impact theory, where the allegedly discriminatory practice was the decentralized decision-making process and "excessive subjectivity" regarding pay and promotions.

Ironically, despite the discretion Wal-Mart's managers had in making pay and promotion decisions, the court found that the subjectivity involved in the decision making supported commonality findings. It did so because the discrimination the plaintiffs claim to have suffered occurred through a consistent corporate policy (i.e., "excessively subjective decision making in a corporate culture of uniformity and gender stereotyping"), as demonstrated by anecdotal and statistical evidence and expert testimony.

The consequences of the *Dukes* decision are significant:

- Subjective pay and promotion practices are more likely to be the target of wage-discrimination cases.
- The decision opens the door to more adverse impact class actions, potentially on a larger scale, whether based on gender, race, age, or other protected classes. Plaintiff's lawyers will cite this case to support their argument that lawsuits similar to this can proceed even if based on broad and conclusory allegations, a few anecdotes, and statistical disparities.
- Based on the Ninth Circuit's willingness to certify such a large class, employers can anticipate an increase in large-scale class action litigation.

Incidentally, after the Ninth Circuit issued its opinion, news reports surfaced stating that six years before the filing of the *Dukes* case, Wal-Mart actually had hired a law firm to examine Wal-Mart's vulnerability to a sex-

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discrimination lawsuit. According to these accounts, the report examined gender disparities and warned that the disparities were "statistically significant." It remains unclear whether the allegedly privileged report ever will be introduced as evidence at trial. Wal-Mart, however, has issued a public statement dismissing the report's results and taking the position that it had no bearing on or relevance to the *Dukes* case.

The Largest Gender-Discrimination Case Ever Tried in the U.S.: *Velez v. Novartis Corp.*

On May 17, 2010, a federal jury in the Southern District of New York found Novartis Pharmaceutical Corporation liable on 12 different gender-bias-related claims, including denial of promotions, unequal pay, pregnancy discrimination, sexual harassment, hostile work environment, and retaliation (*Velez v. Novartis Corp.*). In addition to awarding $3.37 million in compensatory damages to the 12 class representatives, the jury also awarded $250 million in punitive damages, equivalent to nearly 3 percent of Novartis' 2009 revenues. The jury also found Novartis liable on three class-wide claims for engaging in a pattern of discrimination against women in its pay, promotion, and leave practices. It is estimated that Novartis could end up paying up to $1 billion overall once damages are calculated for the remainder of the 5,600-person class.

While the damages award alone is noteworthy, the *Novartis* decision—the largest gender-discrimination case ever to go to trial in the U.S.—also highlights employers' obligations and risks regarding gender-based pay equity, and is likely to generate similar lawsuits. Notwithstanding, *Novartis* provides useful lessons for all employers seeking to reduce their litigation risks:

- **Limit unfettered or unstructured subjectivity in hiring and promotion practices.** Faced with certain damaging statistics (i.e., despite more equal numbers of males and females among sales representatives, 77 percent of the entry-level sales managers were males), it was exceedingly difficult for Novartis to argue that no covert bias existed in its subjective and "intangible" review and promotion practices. The danger with such unstructured policies is: (1) without some predetermined structure and criteria to review promotion processes, it is difficult to defend against claims that the subconscious biases of individual managers seep into the employment decision, and (2) it is more difficult to defend such unstructured processes and to later prove that managers based their decisions on objectively reasonable job-related criteria that are based on business necessity.

- **Avoid diversity initiatives and programs that appear to be merely "paper policies."** While Novartis instituted a "Women in Leadership" management-development program, the plaintiffs alleged that it simply amounted to sending the message to women that if they wanted to "play with the boys, you have to be one of the boys." While not clear from the facts of the case, it appears that the plaintiffs maintained at trial that the company failed to take seriously the program's purposes with regard to the advancement of women within the company, possibly ignored proposed solutions or recommendations made by the program, and ignored gender-related complaints voiced by women in the program.

- **Ensure appropriate follow-up and resolution in any grievance-reporting policy.** Trial testimony showed that females believed Novartis discouraged them from complaining to human resources, and that those who did complain received little or no response. Novartis' director of human resources admitted that employees did not receive harassment and discrimination training that provided guidance on how to file an internal discrimination complaint.

- **Take prompt action once management learns about discrimination and harassment.** One of the most damaging pieces of evidence in *Novartis* was that in 2003 (one year prior to the lawsuit), Novartis hired a consultant to investigate internal discrimination and harassment. The resulting report revealed "significant gender discrimination," and included reports of inappropriate language and gestures from men, general disregard for women's opinions, lack of oversight of mostly male managers, and an inadequate grievance procedure. Novartis failed to enact meaningful reform or take significant action as a result of the report.

- **Be aware of how distinct employment issues are interrelated and can "snowball" from one case to another.** Roughly two years after the *Novartis* complaint, Novartis was hit with three additional class action lawsuits, alleging that the company deliberately misclassified its sales representatives as exempt from federal and state overtime laws. The named plaintiffs in the wage and hour class actions are represented by the same attorneys representing the class in *Novartis*, and presumably received documents during discovery that revealed potential misclassification issues. Employers must recognize that gender-bias lawsuits also may lead to additional wage and hour lawsuits (and vice versa) as plaintiffs gain access to company payroll information through the discovery process.

A More Muscular and Formidable Equal Pay Act: The Paycheck Fairness Act

Already passed by the House of Representatives, and currently pending before the Senate, the Paycheck Fairness Act (PFA) amends the Equal Pay Act of 1963 (EPA) to provide stronger remedies and procedures for gender-based wage-discrimination claims, and to require more active federal government involvement in combating wage

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disparities. Passage of the Senate bill is likely given the strong backing by non-partisan groups, including the American Bar Association.

Although both the EPA and Title VII already provide for two federal causes of action based on gender-based pay inequities, plaintiffs tend to prefer Title VII both for its remedial and procedural heft. By contrast, the EPA offers an easier standard of proof than Title VII, as it does not require a plaintiff to prove "an intent" to discriminate. The passage of the PFA would combine the remedial strength and procedural muscle of Title VII with the lower standard of proof of the EPA to create a new and potentially attractive statutory vehicle for plaintiffs pursuing individual- and class-based gender-discrimination claims.

Specifically, the PFA does the following:

- **Expands remedies offered by the EPA:** The PFA toughens the remedy provision of the EPA (currently limited to liquidated damages and back-pay awards) by allowing prevailing plaintiffs to recover compensatory and punitive damages (already available under Title VII).

- **Encourages class actions:** The PFA adopts the "opt out" rule (i.e., that potential class members automatically are considered part of the class until they choose to opt out), which increases the likely number of class members in any such action.

- **Narrows employer defense:** Under the EPA, an employer must prove an affirmative defense that the pay differential is based broadly on a "factor other than sex." The PFA narrows this defense to require that an employer show that the differential is: (1) based on a bona fide factor, such as education, training, or experience, that is not based upon or derived from a gender-based differential; (2) job-related to the position in question; and (3) consistent with business necessity.

- **Expands anti-retaliation provisions:** In addition to clarifying that employees are protected from retaliation when making claims, the PFA also would prohibit retaliation against employees who inquire about employers' wage practices or disclose their own wages. Some states, including California, already prohibit employers from preventing employees from disclosing the amount of their wages or from retaliating against an employee for doing so.

- **Permits claims previously precluded under current case law:** Contrary to certain cases that interpreted the "establishment" provision of the EPA to preclude comparisons between wages paid in different facilities or offices of the same employer, the PFA explicitly provides that comparisons may be made between employees in offices in the same county or similar political subdivisions, as well as between broader groups of offices in some circumstances.

- **Gives federal government new authority to collect compensation data:** The PFA requires the Equal Employment Opportunity Commission (EEOC) to survey available pay data and issue regulations within 18 months that require employers to submit any needed pay data identified by the race, sex, and national origin of employees. The PFA also reinstates the collection of gender- and race-based data in the Equal Opportunity Survey, and sets standards for conducting systemic wage-discrimination analyses by the Office of Federal Contract Compliance (OFCCP). In addition, the act reinstates the OFCCP's "pay grade" methodology for use in investigations, which assumes that any pay disparities between employees in the same pay grade are attributable to a discriminatory payroll practice.

President Obama's Promise to Solve the Gender Pay Gap

Since taking office in 2009, the Obama administration aggressively has targeted the equal-pay issue. In his January 2010 State of the Union address, President Obama reiterated his administration's focus on gender pay disparity, noting that, "We're going to crack down on violations of equal pay laws—so that women get equal pay for an equal day's work." To that end, the Obama administration has implemented the following initiatives:

- **The Lilly Ledbetter Fair Pay Act of 2009.** The act, which supersedes the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, clarifies that the statute of limitations for filing an equal-pay lawsuit for discriminatory pay resets with each new allegedly discriminatory paycheck.

- **EEOC focus on gender-based discrimination.** Following a 30 percent increase in gender-based wage complaints to the EEOC, the Obama administration proposed an $18 million budget increase for 2011, including the hiring of 100 new EEOC investigators to aid enforcement, likely resulting in a greater number of gender-based lawsuits.

- **DOL emphasis on eradication of pay inequality.** The Department of Labor's (DOL's) plans to tackle the issue of gender pay inequity include the OFCCP's renewed emphasis on the identification and eradication of gender-based discrimination for federal contractors and the Women's Bureau's focus on increasing women's incomes, narrowing the wage gap, and reducing income inequality.

- **National Equal Pay Enforcement Task Force**. The administration has formalized the collaboration between the EEOC, the DOL, the Department of

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Justice's Civil Rights Division, and the Office of Personnel Management to "ensure the most rigorous enforcement possible" of equal-pay laws.

Lower Your Risk Factors

The preceding examples underscore the importance of strong and consistent HR policies and practices. While no strategy is foolproof, the following preventative measures will help lower your company's litigation risk profile:

1. Use a consistent and structured process with managed and controlled questions to avoid excessive "subjectivity" in pay and promotion decisions.

2. Proactively respond to disparities or inequities found in your company's payroll practices and confront your areas of vulnerability.

3. Conduct regular anti-harassment and discrimination trainings—effective training will include how to avoid claims for discrimination and retaliation.

4. Exercise care in permitting, funding, and supporting diversity initiatives and groups, as adverse inferences may be drawn if groups are not supported or treated seriously, their concerns or reports are ignored, they are denied funding upon request, or they receive different treatment.

5. Take every internal complaint seriously and provide a prompt, appropriate, and complete response.

6. Assess the reputation of your industry for assumptions of gender bias and take steps to present a culture of equality at your company.

7. Where appropriate, take steps to protect internal company communications concerning complaints by employees, or any internal evaluations of employment practices, with the attorney-client privilege by contacting in-house counsel or Wilson Sonsini Goodrich & Rosati employment counsel.

For more information about legal issues regarding gender-based pay claims, please contact Fred Alvarez, Kristen Dumont, Laura Merritt, Ulrico Rosales, Marina Tsatalis, or another member of the firm's employment law practice.

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