

Can Geography Still Justify Gender-Based Pay Disparity?

By **Daniela Porat**

Law360 (August 18, 2021, 6:38 PM EDT) -- Cost of living variation is a valid justification for gender-based pay disparities, but the recent revelation that Google plans to cut pay for remote workers in less costly areas ups the ante for employers to ensure such policies don't lead to de facto discrimination, attorneys say.

Under the Equal Pay Act, employers can show that a pay differential between male and female colleagues is defensible under four conditions: seniority, merit, production output, or a catch-all "any other factor other than sex." In some jurisdictions, geography is specifically designated as one such factor.

These pay conundrums employers are facing are not new. But while the legal and business analysis concerning equal pay issues may revolve around the same framework, the application is novel in this new world of remote work, said Christine Hendrickson, co-chair of the pay equity group at management-side firm Seyfarth Shaw LLP.

"This wrestling that employers are doing right now feels similar to the wrestling that employers are having to do with every factor that they think about around compensation," she said. "COVID makes everything more complicated and adds a new layer for consideration."

Same Issues 'On Steroids'

Hendrickson had discussions about geographic pay differentials before the pandemic, but the scope of the issue has changed with the proliferation of remote work, and it has "just put those discussions on steroids and has made it more challenging to come up with a fair and consistent policy," she said.

There is no legal protection afforded to a worker to choose in which state they work, said Amory McAndrew, an attorney for management-side firm Hoguet Newman Regal & Kenney LLP.

"If an at-will employee wants to work from a certain state for personal reasons, I don't see how an employer would be in violation of any laws for terminating that worker's employment, let alone reducing his or her compensation," she said.

A key question for employers moving forward, however, is whether they are going to set a national pay scale or account for geographic cost-of-living differences, Hendrickson said. Once that is settled, employers then have to determine whether employees will face upfront pay cuts or whether the pay adjustments will be managed over time, she said.

"If you had someone that was in San Francisco and they moved to Des Moines, are you going to cut their pay, or are you going to maintain them at their current rate, but not have them get increases over time, for example, until everyone kind of catches up with them?" Hendrickson said.

Whatever approach employers take to compensation for their remote workforce, they must be consistent, said Hendrickson.

"Employers should make sure that whatever policy they have around geographic differentials are reasonably and consistently applied," she said. "What you don't want to have happen is that sometimes you let people retain their higher pay when they're moving to a lower-cost-of-living area,

and sometimes you don't."

Personal Choice but Still Job-Related

Oftentimes the discussion around the factors other than sex defense revolves around whether the factor, be it a person's qualifications or experience, are related to the job at hand — **a continued point of contention.**

When it comes to an employee's personal decision to work remotely and potentially face a pay cut, attorneys said employers could likely argue that such decision is, in fact, job-related.

"If the employer found itself defending a claim because its facially neutral policy about geography and pay had a disparate impact on a protected class, the employer would likely, on top of the cost-of-living argument, have a business justification defense, given the legal, tax and administrative burdens and costs of having **employees in multiple states,**" said McAndrew.

Another reason, albeit a little "attenuated," that a worker's decision to work remotely in a more affordable area could be considered job-related is because it could be part of the employer's effort to provide workers with more flexibility in the workplace, said Courtney Blanchard, an attorney for management-side firm Nilan Johnson Lewis PA.

"A lot of employers have discovered that, in fact, maintaining flexibility in remote working is actually good for business because it attracts talent that appreciates that level of flexibility, but it also could save on overhead costs; you can reduce your office space," she said.

Menaka Fernando, a partner at worker-side firm Outten & Golden LLP, said that while employers can justifiably adjust compensation based on geography, they might open a Pandora's box if they stray from such an analysis and penalize workers for personal choices.

"I think it's important for employers to have consistency in how they pay employees and have certain pay scales for certain jobs and certain levels of experience and try to eliminate bias from these decisions to begin with," she said. "That's when you know pay disparities begin to surface and historical pay differences are perpetuated."

Disparate Impact

Employers do run the risk of exposing themselves to a lawsuit if their cost-of-living pay scheme leads to pay discrimination in practice.

"Employers have to be sure that they are applying their geography-based pay policy equitably and that it does not become a pretext to reduce the compensation of, for example, women or caregivers," said McAndrew.

If a policy that on its face is gender-neutral results in a workforce where women are paid less, for example, it's no longer gender-neutral, said Rebecca Pontikes, a worker-side attorney for Pontikes Law LLC.

Pontikes compared this issue to employers setting pay according to a **person's salary history** — a factor that used to be considered gender-neutral but is now widely understood to perpetuate pay inequity.

"People used to accept as completely true that salary history was always a gender-neutral premise," she said. "But when you bring in the context of historically how women have been paid much less, it's not gender-neutral anymore. And so, it's the same sort of thing here when you bring in the background and the context, just differentiating pay based on whether you work in or out of the office may not actually end up gender-neutral."

Blanchard also said employers will need to be mindful of how remote workers will have access to coaching and feedback from supervisors.

"It's a good practice just to remind managers that face time alone is not indicative of performance,"

Blanchard said. "And when you're doing performance reviews, consciously consider that face time is not part of whether an employee is performing well or not."

A major concern for Pontikes is that companies will start paying remote workers less money because of a perception that they are not working hard "or their managers will assume that they're being distracted by children at home and that's going to fall more heavily on women, most likely," she said.

Regardless of whether established law currently allows a cost-of-living analysis to adjust pay, Fernando said companies should be prudent about implementing geography or remote-based cuts because the pandemic isn't over.

"It's unfair, I think, to force employees right now to take added risks so that their pay won't be penalized in this way," she said. "Companies also have to keep in mind the very real discriminatory impact that a decision like this could have, because many people who did move did so for child care reasons or family responsibility reasons to be closer to other family members that could help with child care, and those responsibilities, statistically speaking, fall on women and women of color."

--Editing by Tim Ruel.

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