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### **GENDER PAY EQUITY IN THE SPOTLIGHT**

A recent federal appeals court case highlights the pitfalls of being unable to satisfactorily explain a salary differential between male and female employees who perform equal work. *Drum v. Leeson Elec. Corp.*, 8<sup>th</sup> Cir., No. 08-1678, 5/15/09.

Drum, a human resource manager, earned \$41,548 before her promotion to another position. Her male replacement was hired at \$62,500. The company's defense was that it hired the most qualified candidate at the salary required by the candidate. The appellate court reversed the grant of summary judgment to the employer, finding the company's defense to Drum's claims under the Equal Pay Act and Title VII of the Civil Rights Act of 1964 was insufficient as a matter of law. The employer has the burden of proving that the salary differential was the result of a seniority system, a merit system, a system that measures earnings by quantity or quality of production, or "a differential based on any other factor than sex." Merely articulating a legitimate non-discriminatory reason for the differential – in this case, that the candidate was the most qualified and he required this salary – is not enough to meet the burden.

With President Obama's signature into law of the Lily Ledbetter Act extending the time for plaintiffs to assert their pay equity claims, and the likely passage of the Paycheck Fairness Act, which lowers the burden of proof for employees and facilitates class action treatment of wage claims, gender pay equity is in the spotlight. As the Drum case illustrates, these cases are already hard to defend.

#### **Practice pointers:**

- Conduct a pay analysis on a regular basis to determine whether individuals performing the same job are paid the same.
- If differentials exist, ensure that they are satisfactorily documented by differences in seniority, merit, or the quantity or quality of work performed.
- Beware of "creeping" differentials: a smaller percentage raise several years in the past may be causing an inappropriate differential in the present, even though recent raises have been equal.
- Review job descriptions regularly to make sure jobs actually being performed by individuals with the same job title are actually substantially the same.

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