Article for Pay Audits, Pay Transparency, and the Public Disclosure of Pay Data

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Introduction

Although the past fifty years reflect tremendous strides in gender equality, progress in bringing women’s pay up to the level that men enjoy seems to have stalled. For full-time workers, the median salary for women still hovers around 80% of the median salary for men. It’s as if every fifth working woman in the United States is doing her job for $0 per year. Look at that secretary, mechanic, investment banker, firefighter, or librarian – she’s working for free! Why is this happening, and how can we dismantle the systems that continue to create these unfair outcomes?

Advocates have begun to look to policies that promote pay transparency—the ability for employees to find out what other employees in the workplace make—as a way of addressing this persistent pay gap. This article analyzes the attendant benefits and risks of such policies.

I. Risks and Benefits of Public Disclosure of Pay Data

Some of the benefits of public disclosure of pay data are obvious: improving employee retention, promoting compliance with employment laws, avoiding litigation, advertising good corporate responsibility, and improving the infrastructure of the labor market.

On the other hand, some risks include employers’ and employees’ privacy concerns, decreased morale, price fixing amongst employers, the cost of compiling data, potential  

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1 Anne Fisher, How Pay Transparency Can Keep People from Quitting, FORTUNE (Oct. 15, 2015), http://fortune.com/2015/10/15/pay-transparency/; see also Jennifer Deal, Why Companies Should Make Their Pay Transparent, WALL ST. J. (Mar. 14 2016), http://blogs.wsj.com/experts/2016/03/14/why-companies-should-make-their-pay-transparent/ (noting that employees greatly value “openness and honesty,” and how discouraging open communication about compensation amongst staff can actually cause “even more staff to share pay information, and many to come to the conclusion that the leaders of the organization were trying to hide unfair compensation practices.”).


3 Id. at 789-90.

4 Id. at 786-89.

5 Id. at 791-98. Employee concerns relating to privilege are discussed more infra, Part II.b.

6 Id. at 793-96.

7 Id. at 798-99.
litigation, and the possibility of pushing “precarious employment” (such as part-time and low-wage jobs) off the books to escape the reporting obligation.\(^8\)

a. The Benefits

Expanding on the benefits of public disclosure of pay data, Professor Cynthia Estlund notes that the public disclosure of pay data promotes compliance with legal mandates.\(^9\) More specifically, it promotes “uncovering and preventing discrimination,”\(^10\) as well as compliance with wage and hour laws, and avoiding wage theft.\(^11\) Public disclosure of pay data also improves the integrity and efficiency of the labor market. A foundational economic principle in any market, including the American labor market, is voluntary, informed contracting between seller and purchaser. Without public disclosure of pay data, there is information asymmetry within the contracting process – the purchaser knows more than the seller, which is particularly powerful in that the labor market involves purchasers pitting sellers against each other in competition.\(^12\) Public disclosure of pay data improves the infrastructure of the labor market by allowing employees to properly consider whether they will seek “a better opportunity elsewhere, ask[] for a raise, or simply stay[] on the job and accepting the status quo.”\(^13\) It may also influence “an employee’s decision whether to support unionization,” since unionization allows sellers to band together to act for their mutual benefit, just as the corporate structure allows sellers of goods, managers, and owners (depending on the lens through which you view the corporate form) band together for their mutual benefit.\(^14\) Lastly, public disclosure of pay data allows employers to gain more “reputational capital and the favor of various stakeholder constituencies by portraying themselves as” a socially responsible businesses.\(^15\)

b. Risks of Public Disclosure of Pay Data

Privacy is one of the more debated risks concerning public disclosure of pay data. Employers often object to the public disclosure of pay data on this basis.\(^16\) Specifically,

\(^8\) Id. at 791 (public disclosure of pay data “could accelerate the already-powerful trend toward contracting out low-wage, labor-intensive parts of the business to less responsible and less regulated entities, thus taking the lowest wage workers ‘off the books’ of the corporations that are subject to public pressure.”)

\(^9\) Id. at 785-86.

\(^10\) Id. at 785 (discussing how “[n]o one can know whether she is the victim of pay discrimination without comparing her pay to that of others, especially co-workers in similar job”) (citing Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 650 (2007) (Ginsburg, J., dissenting)). See also Gowri Ramachandran, Pay Transparency, 116 Penn St. L. Rev. 1043, 1046 (2012) (recognizing that the traditional civil rights regime in which an individual actor is held liable for the discrimination does a poor job of dealing with pay inequity and pay transparency “would help prevent, root out, and correct the discrimination in the first place, instead of relying on after the fact blame and liability.”).

\(^11\) Id. at 785 (noting how wage and hour law violations are only likely to be discovered by evaluating “aggregate [wage] information.”)

\(^12\) Id. at 788.

\(^13\) Id.

\(^14\) Id.

\(^15\) Id. at 789.

\(^16\) Id. at 791-93.
employers sometimes argue that pay data is proprietary information and constitutes a trade secret. There is evidence that “[h]uman resources professionals believe that properly designed employee compensation programs can represent a source of company competitive advantage,” and disclosing it would lead to poaching. This in turn can lead to pressure to provide increased salaries. Of course, poaching and the possibility of increased salaries would simply be evidence that the market is functioning efficiently, without artificial impediments to the free movement of labor. Any decrease in corporate profits would be reaped as increases in worker compensation.

Another potential risk of public disclosure of pay data is the decrease in “employee morale and productivity.” However, the NLRA has expressly rejected this reason as a grave enough concern to prevent public disclosure of pay data. In addition, any decrease in morale stemming from revelations of discriminatory outcomes should be temporary, as it gives rise to market corrections.

II. An Overview of Pay Transparency Laws and Their Effectiveness

Pay transparency laws exist to some degree at both the federal and state level. Two authorities governing pay transparency laws at the federal level are: (1) Section 7 of the National Labor Relations Act (“NLRA”); and (2) Executive Order (“E.O.”) 13665.

NLRA § 7 established for employees “the right to . . . engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” It is well established that “policies that prevent employees from communicating with each other with respect to pay and working conditions have generally been found by the NLRB to be unlawful interference with employee concerted activity in violation of the National Labor Relations Act.” The NLRA provision applies to both union and non-union employers.

E.O. 13665 (effective January 11, 2016) bars federal contractors from “discharging or discriminating against” employees who “inquired about, discussed, or disclosed the

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17 Id.
18 Id. at 792. For the argument how public disclosure of pay data actually does not lead to poaching, or place a company at a disadvantage, see id. at 792-93.
19 Id. at 791-93.
20 Id. at 793-96.
21 Id. at 793 (Employee morale and productivity “has not been deemed a weighty enough concern to justify pay secrecy rules under the NLRA.”) (citing N.L.R.B. v. Main St. Terrace Care Ctr., 218 F.3d 531, 537-38 (6th Cir. 2000)(“invalidating employer pay secrecy rule as interference with employee section 7 rights”); Fredericksburg Glass & Mirror, Inc., 323 NLRB 165, 173-74 (1997)(“invalidating employer rule prohibiting employees from discussing earnings with each other’’)).
24 Id. For more details concerning key cases applying Section 7 of the NLRA, including facial challenges to the validity of employer’s confidentiality policies concerning pay data, see id.
compensation of the employee or applicant or the compensation of another employee or applicant." Further, E.O. 13665 mandates that employers maintain specific pay transparency language (1) in federal contractors’ employee handbooks, and (2) in their postings to employees, through either electronic or physical posters.

Some states, such as California and New York, also have specific pay transparency laws. In California, the California Fair Pay Act (“CFPA”) states that an employer “shall not prohibit an employee from disclosing the employee's own wages, discussing the wages of others, inquiring about another employee’s wages, or aiding or encouraging any other employee to exercise his or her rights under this section.” However, there is no “obligation [for an employer] to disclose wages” of their employees. In New York, the New York Achieve Pay Equity Act bars an employer “from inquiring about, discussing, or disclosing wage information of such employee or another employee.” New York also does not require an employer disclosure employee’s compensation information.

a. Pay Transparency Laws’ Effectiveness of Bridging the Gender Wage Gap

While these pay transparency laws have not been around long enough for their effect to be confidently measured, there are reasons to have confidence that they will aid in bridging the gender wage gap. Pay “transparency is the norm” in the public sector, and for unions. The collective bargaining process inherently contributes to pay transparency. Employees of the federal government also have significant pay transparency. Pay transparency within the public sector has illustrated “the tendency of wage transparency to reduce pay discrimination . . . [as] studies have found significantly lower disparities linked to race or sex.” Other commentators

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29 Id.
30 N.Y. Lab. Law § 194(4)(a).
31 Estlund, 4 UC Irvine L. Rev. 781, 786.
32 Id. (citing Marta M. Elvira & Ishak Saporta, How Does Collective Bargaining Affect the Gender Pay Gap?, 28 Work & Occupations 469, 469, 480-81 (2001)).
33 Id. (emphasis added); see also Gowri Ramachandran, Pay Transparency, 116 Penn. St. L. Rev. 1043, 1063 (2012) (“For instance, the gender wage gap for all full-time workers, based on median annual earnings, is 23 percent. In the
have also noted how “wage gaps between men and women tend to be lower” in the public sector because of pay transparency. 34 For example, “in Washington D.C., women make ninety percent of men’s salaries, which is the closest male to female earnings ratio in the country. There is a narrower wage gap because the federal government employs a majority of the population in Washington D.C. and requires employee wage information disclosure.” 35 Such evidence supports promoting pay transparency laws in the private sector.

However, antidiscrimination advocates generally agree that pay transparency laws in their current iteration are not robust enough to effectively drive positive change. For example, they are not mandatory, and they put the burden on employees to uncover pay data, which can be inconclusive, incomplete, and misleading. By following public sector regimes of mandatory transparency, the laws could have a greater effect. 36

Initial efforts by states can have a positive effect on private employers. After the passage of the CFPA, some companies have taken it upon themselves to evaluate their own gender-wage disparities, and have even used the results of those evaluations as a basis for correcting compensation inequities. For example, Salesforce recently conducted an internal audit of its pay data, and invested $3,000,000 in adjusting pay to account for gender wage disparities. 37 After the passage of the CFPA, about a dozen other large companies in California conducted similar audits. 38 The CFPA’s author believes that since its passage, “[e]mployers are now being forced to take a look at their practices in order to comply.” 39 Since its recent amendment in 2016, gender discrimination pay cases have begun to include CFPA claims. 40 It is reasonable to

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34 Jake Rosenfeld, Salary Transparency Is Key to Narrowing Gender Pay Disparities THE N.Y. TIMES (Aug. 16, 2016), http://www.nytimes.com/roomfordebate/2016/08/15/how-to-reduce-the-pay-gap-between-men-and-women/salary-transparency-is-key-to-narrowing-gender-pay-disparities (“And, like other recent legislation, Massachusetts’s does not mandate salary transparency — which could be a big step toward eliminating the pay gap. It aims only to prevent employers from penalizing workers who discuss wages and salaries. There is a huge gulf between pay transparency — like we see in many public sector settings, where wage gaps between men and women tend to be lower — and these recent policies to help narrow gender pay disparities.”).


36 Id.; see also Jake Rosenfeld, Salary Transparency Is Key to Narrowing Gender Pay Disparities THE N.Y. TIMES (Aug. 16, 2016).


39 Id.

40 Id. (“Female employees at the California-based Sedgwick law firm filed a complaint in July alleging the company violated federal and state laws, including the California Fair Pay Act, by paying them less than their male counterparts.”); see also Hannah Fuetsch, Chapter 546: Another Step to Ensure Equal Pay Doesn't Wait Another Fifty Years, 47 U. Pac. L. Rev 577, 594-95 (2016).
conclude that the CFPA’s pay transparency and anti-retaliation provisions have catalyzed recent voluntary audits.41

b. Discoverability of Pay Audits

As employers are encouraged to voluntarily investigate pay inequity, one concern is the possible discoverability of those investigations in subsequent litigation. This is a hotly contested issue. Employers are likely to employ a “self-critical analysis” defense, arguing that requiring disclosure would have a chilling effect on voluntary compliance. Plaintiffs have a strong argument that the remedial policy of antidiscrimination laws means that they must be permitted to obtain information sufficient to enable them to prove discrimination where such discrimination exists. Courts are divided on whether audits that fit in this category are discoverable.42 Generally, “potential guideposts” for application of the “self-critical analysis” defense include: (1) materials protected have generally been those prepared for mandatory governmental reports; (2) only subjective, evaluative materials have been protected; (3) objective data in those same reports have not been protected; and (4) in sensitivity to plaintiffs’ need for such materials, courts have denied discovery only where the policy favoring exclusion has clearly outweighed plaintiffs’ need.43

III. Pay Transparency Laws: Employee Privacy Concerns

Overall, employee opinion regarding the privacy of their compensation is trending toward more open, direct, public disclosure of their own pay data. Previously, employees had been unwilling to disclose compensation information. However, a recent Wall Street Journal article noted how “technology and changing cultural norms” have caused a shift in employees’ privacy concerns regarding compensation, and an increased willingness to disclose their pay data.44 Websites like Glassdoor.com contribute to this developing norm of employee self-disclosure, where compensation and other employee benefits are widely publicized.45

Differences in views of the benefits of transparency and the importance of privacy tend to track generational lines. Younger workers “express less concern about privacy regarding money and a greater taste for transparency than their elders.”46 More concretely, a recent Wall Street Journal article noted that “[m]illennials are most likely to discuss their compensation with their parents (71%) or their friends (47%) . . . [and] co-workers (38%).” In comparison, older staff are

45 Id. (noting that “60% of millennials and 53% of older staff said they use these sites.”)
46 Estlund, 4 UC Irvine L. Rev. 781, 797–98; see also Deal, Why Companies Should Make Their Pay Transparent, WALL. ST. J. (Mar. 14 2016).
about half as likely to discuss compensation with each category: they are substantially less likely to discuss their compensation with parents (31%), friends (24%), or co-workers (19%).

IV. Comparing State-Specific Equal Pay Laws to Existing Anti-Discrimination Laws

There are several applicable federal laws that combat gender discrimination in pay: The federal Equal Pay Act (part of the Fair Labor Standards Act), Title VII of the Civil Rights Act, Executive Order 11246, and the Office of Federal Contract Compliance Programs (“OFCCP”) Directive, DIR 2013-03. There are also state equivalents of Title VII, which apply to gender discrimination in pay, such as California’s Fair Employment and Housing Act (“FEHA”). With the growing wage gap, states have recently implemented more protective state equal pay laws to address wage disparities between genders.

Although original enacted in 1949, in 2016 and 2017, the California Legislature amended the CFPA to include more protective measures. It appears that the CFPA could be more protective than existing laws (such as Title VII and FEHA) in several ways: (1) broader comparator requirements; (2) longer statute of limitations; (3) absence of an intent requirement; (4) no administrative exhaustion requirement, (5) lack of a minimum number of employees for the CFPA to apply to an employer; and (6) different (and potentially greater) damages.

As to the comparator requirements, under the existing federal laws, comparators are those who are “similarly situated” to the plaintiff. The OFCCP directive states “the determination of which employees are similarly situated is case specific.” Expanding, the OFCCP explains that the “[r]elevant factors in determining similarity may include tasks performed, skill, effort, level of responsibility, working conditions, job difficulty, minimum qualifications, and other objective factors.” Effective January 1, 2016, the CFPA “prohibits paying an employee less than that paid to employees of opposite sex, race, or ethnicity for doing substantially similar work.”

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47 Id.
49 Cal. Gov’t Code § 12900-12996.
51 Cal. Lab. Code § 1197.5.
52 These issues were discussed at length in the Alameda County Bar Association’s (ACBA) event, and its corresponding written materials, entitled Pay Equity: Best Practices for Preventing Inequality and Pursuing Litigation (Jan. 25, 2017). Presenters included Hillary Benham-Baker of Campins Benham-Baker LLP, Jamie Rudman of Sanchez & Amador, LLP, and Carolyn Rashby of Miller Law Group.
54 Id.
55 Id.
“Substantially similar work” is a composite of skill, effort, and responsibility performed under “similar working conditions.”\textsuperscript{57} Under the CFPA, plaintiffs no longer have to prove that they were in the same establishment as their comparator.\textsuperscript{58} In CFPA cases, the employer also has the burden of proving that the pay difference is based \textit{entirely} on a factor enumerated in the statute other than race.\textsuperscript{59} Although there is limited case law since the 2016 enactment of the CFPA’s “substantially similar work” requirement, it is likely broader than federal laws.\textsuperscript{60}

Other more protective aspects of the CFPA include a longer statute of limitations, the absence of an “intent” requirement, no administrative exhaustion requirement, lack of a minimum number of employees for its applicability, and potentially greater damages.\textsuperscript{61} Unlike the more restrictive one-year statute of limitations under FEHA, the statute of limitations for a CFPA claim is two years (three years if the violation is willful).\textsuperscript{62} Additionally, unlike Title VII and FEHA, the CFPA does not contain an “intent” requirement.\textsuperscript{63} Additionally, the CFPA has no administrative exhaustion requirement, unlike Title VII and FEHA. Lastly, the CFPA applies to all employers, regardless of the number of employees.\textsuperscript{64}

The CFPA may also be favorable in terms of damages. Under FEHA and Title VII, a plaintiff is entitled to compensatory and punitive damages, which are statutorily capped.\textsuperscript{65} However, the CFPA is enforced through the Department of Labor Standards Enforcement (DLSE) as a violation of the California Labor Code. As a result, under the CFPA, Private Attorneys General Act (PAGA) penalties are also available in the amount “one hundred dollars ($100) for each aggrieved employee per pay period for the initial violation and two hundred dollars ($200) for each aggrieved employee per pay period for each subsequent violation.”\textsuperscript{66} Other damages for a CFPA violation include wages denied to the employee, an equal amount of said wages as liquidated damages, and interest.\textsuperscript{67} Therefore, although it remains an unanswered

\textsuperscript{57} Id.
\textsuperscript{58} Id.
\textsuperscript{59} Id.
\textsuperscript{60} There is only one case on Westlaw within the last year that cites to Cal. Lab. Code § 1197.5: \textit{Banawis-Olila v. World Courier Ground, Inc.}, No. 16-CV-00982-PJH, 2016 WL 6563354 (N.D. Cal. Nov. 4, 2016). Further, at the ACBA’s \textit{Pay Equity} event, presenter Jamie Rudman stated that she heard directly from the Department of Labor Standards Enforcement that they have only received 16 CFPA claims since the 2016 amendment.
\textsuperscript{61} Cal. Lab. Code § 1197.5; see also ACBA’s event entitled Pay Equity: Best Practices for Preventing Inequality and Pursuing Litigation (Jan. 25, 2017).
\textsuperscript{63} Cal. Lab. Code § 1197.5(a).
\textsuperscript{64} 26 Am. Jur. Proof of Facts 3d 269.
\textsuperscript{66} Cal. Lab. Code § 2699.
\textsuperscript{67} Cal. Lab. Code § 1197.5(3)(c); \textit{see also} 26 Am. Jur. Proof of Facts 3d 269.
question due to lack of case law, it appears that the CFPA provides stronger, most robust protections to employees than FEHA and Title VII.

V. Litigating Compensation Discrimination Class Claims

To combat wage inequality, plaintiffs’ attorneys challenge employer practices that, although facially neutral, allow unfettered subjective decision making in pay and promotion decisions that have proven disparate effects against women. For professional employees, pay is often directly correlated to performance evaluation systems. Those performance evaluation procedures can disadvantage women when they systematically undervalue the relative performance of women based on a lack of reliability and validity.

Challenging these pay practices in class litigation requires statistical analysis to show disparate effects and identification of the “specific practice” causing these effects. Proving an employer’s general policy discriminates against women typically demands that plaintiffs make a prima facie showing through statistical evidence demonstrating “significant proof” of a significant disparity caused by the challenged employment practice. Plaintiffs can do so by presenting proof through documentary evidence and expert testimony showing that challenged employment practices cause a statistically significant adverse impact on performance and therefore pay for female workers. But plaintiffs must be careful to provide statistical evidence that is meaningful and reliable. Courts will reject a plaintiff’s evidence if there are flaws in the statistical proof used to support the claims.

The most widely accepted statistical approach for analyzing compensation data is the multiple regression analysis. A multiple regression analysis looks at the relationship between explanatory variables and a dependent variable. Explanatory variables are the expected influences on the dependent variable; here, compensation would be the dependent variable. The

68 See Smith v. City of Jackson, 544 U.S. 228, 239–40 (2005) (holding that plaintiffs failed to identify with sufficient precision exact “practice” that caused disparate impact on basis of age in city’s formula for raising salaries of junior public safety officers to compete with other jurisdictions).
70 Explaining in detail the statistical proof necessary and how courts evaluate such statistical proof is outside the scope of this article. But for a resource outlining the standards and case law, see Debo Sarkar & Amanda Dealy Haverstick, The Preventive Pay Equity Audit: Guidance for Modeling the Regression Analysis, 26 ABA J. Lab. & Emp. L. 61 (2010) and Thomas J. Campbell, Regression Analysis in Title VII Cases, 36 Stan. L. Rev. 1299, 1300 (1984).
71 See, e.g., Puffer v. Allstate, 255 F.R.D. 450 (N.D. Ill. 2009) (holding that plaintiffs’ statistical analyses were of “limited probative value,” in part because the expert “failed to consider certain important non-gender related variables that may have contributed to the observed salary differentials”).
72 See Bazemore v. Friday, 478 U.S. 385, 399 (1986).
regression analysis controls for the nondiscriminatory explanatory variables; here, the analysis would compare the wages of women and men.

In complex class cases involving compensation, plaintiffs’ and defense attorneys argue about the validity of the statistical modeling, including: the workforce studied; the aggregation of data; and determining what variables to use. Variables can be job related, as well as concern performance measures. Not all variables are created equal. Courts acknowledge that certain variables are tainted if they are contaminated in some way by the employer's discrimination. The tainted variable can itself “represent some of the discrimination against the protected class, so that the variable's inclusion in the compensation equation will cause the coefficient of the protected class variable to underestimate the degree of discrimination.”

Plaintiffs’ attorneys must be prepared to argue the inappropriateness of including variables that are likely tainted because of employer’s practices. Given the fact specific context of individual workplaces, advocates have to look closely at performance evaluation systems that can are easily susceptible to causing adverse impact on women, including multi-source feedback and forced distribution or ranking.

Critically, 360-degree reviews too often systematically undervalue the relative performance of women in critical areas. For example, women can be rated much worse than men on business-related measures such as “commercial effectiveness” and better on areas such as “teamwork.” Overall, rather than being a feedback tool to assist employees in development, 360-degree reviews can have common structural components that systematically undervalue the performance of women.

Forced ranking is a separate feature that often accompanies 360 reviews. Through forced ranking, managers must evaluate employees relative to each other, as opposed to purely against an objective standard. Requires managers to consider certain factors for making ranking decisions. These might include performance, contribution, and potential, by examining: (a) results of 360 reviews (which systematically disadvantage women); (b) quality of performance; (c) impact or contribution; (d) potential to assume increasing responsibility; (e) leadership/management skills; and (f) other activities. As with a 360 review, forced rankings suffer from inadequate training and ineffective monitoring. Employers sometimes fail to require weighting of factors or documentation of decisions. Transparency to employees about the process is often lacking such that they are unaware of the process and therefore ignorant of how they are being perceived and paid.

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74 Variables that have been found to be tainted include academic rank, disciplinary history, marital status, and part-time work assignment. See § 6:13. The regression model—Tainted variables, The Statistics of Discrimination § 6:13 (citing cases).
75 See id.
In addition, forced ranking can inject irrationality into the decisionmaking system. For example, if one manager has four employees, rated 7, 6, 6, and 6, and he must place them into quartiles, he may have to arbitrarily put the three 6s into the second, third, and fourth quartiles. In having to make fine (or arbitrary) distinctions between equivalent performers, the manager may inadvertently rely on unconscious bias – he will be making subjective decisions despite perhaps believing that he is acting objectively.

Furthermore, companies using forced ranking often also include a further step in the process, whereby managers meet to discuss groups of employees in different quartiles. In those meetings, managers may have discretion to shift employees up and down across quartiles. Those discretionary movements often also suffer from discriminatory bias, especially where they are unchecked by objective standards.

In order to follow the best practices of the area, compensation policies should: (1) rely on specific information; (2) weigh consistent, job-related variables that inform ranking and compensation decisions; (3) require that raters be consistent in their application of factors considered across similarly-situated employees and are calibrated to a common behavior standard; (4) ensure transparency in any 360 and ranking process; (5) require written documentation; and (6) provide effective statistical monitoring or auditing with correcting for adverse impact.  

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