

Navigating the Compensation Legal Landscape

Tips for HR

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Can compensation surveys violate anti-trust laws?

- ▶ Several courts have found that meetings between HR professionals of different companies to share/discuss salary surveys "accompanied by assurances that the participants would primarily use the data in setting their ... salaries" were "troubling" enough to reverse a dismissal of the case and to send it back for further proceedings.
- ▶ The fact that the salary surveys are available to the public does not insulate the activity from a price-fixing claim.

Is the fact that a person of one gender is willing to work for less a defense to an EPA claim?

- ▶ No. The Supreme Court has stated, "the fact that the company took advantage of such a situation may be understandable as a matter of economics, but it's differential nevertheless became illegal once Congress enacted into law the principle of equal pay for equal work."
- ▶ The "other factor other than sex" defense under the EPA puts the burden of proof on the employer.
- ▶ Can your company justify pay differentials that may appear to be gender based?

Can your company afford to pay overtime to more employees?



President Obama' s Memorandum to the Secretary of Labor – March 13, 2014

- ▶ The President has asked the Department of Labor to “modernize” and “simplify” the white collar exemption regulations
- ▶ The President believes that the executive, administrative and professional exemptions “have not kept up with our modern economy.”
- ▶ The announcement was short on specifics, but most commentators have already started weighing in ...

President Obama's Memorandum to the Secretary of Labor – March 13, 2014 (cont.)

- ▶ Possible increase in the current salary threshold of \$455 per week (\$23,660/year) – perhaps even doubling it to \$910 per week (\$47,320/year)
- ▶ Changes to the definition of “primary duty” – expect major changes in the area of “working managers,”
- ▶ The DOL will hold a series of “listening events” in the months leading up to the announcement of the changes
- ▶ The changes won't be announced until later this year, but we may see them before the mid-term elections in November

Start now to think about

- ▶ How possible changes might affect your bottom line and
- ▶ How the changes might affect operations (hours, productivity, how the work is accomplished)
- ▶ How the changes might affect morale (employees who see exempt classification as a "status symbol")
- ▶ Be ready to brief your C-suite

Can your company afford a higher minimum wage?

The screenshot shows the White House website interface. At the top, there's a header with the White House logo and navigation links like 'BLOG', 'PHOTOS & VIDEO', 'BRIEFING ROOM', 'ISSUES', 'the ADMINISTRATION', 'the WHITE HOUSE', and 'our GOVERNMENT'. Below this is a search bar and a breadcrumb trail: 'Home • Briefing Room • Presidential Actions • Executive Orders'. The main content area features the title 'Executive Order -- Minimum Wage for Contractors' and the date 'February 12, 2014'. The text of the order begins with 'By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Property and Administrative Services Act, 40 U.S.C. 101 et seq., and in order to promote economy and efficiency in procurement by contracting with sources who adequately compensate their workers, it is hereby ordered as follows:'. Section 1, Policy, states: 'This order seeks to increase efficiency and cost savings in the work performed by parties who contract with the Federal Government by increasing to \$10.10 the hourly minimum wage paid by those contractors. Raising the pay of low-wage workers increases their morale and the productivity and quality of their work, lowers turnover and its accompanying costs, and reduces supervisory costs. These savings and quality improvements will'. On the right side, there's a sidebar with a 'WHITE HOUSE SHAREABLES' section featuring a 'VIEW OUR MOST SHAREABLE CONTENT IN ONE EASY-TO-NAVIGATE PAGE' button, and a 'LATEST BLOG POSTS' section with a post titled 'Photos: This is What an #ACASurge Looks Like' dated March 29, 2014.

the WHITE HOUSE PRESIDENT BARACK OBAMA

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Office of the Press Secretary

For Immediate Release February 12, 2014

Executive Order -- Minimum Wage for Contractors

EXECUTIVE ORDER

ESTABLISHING A MINIMUM WAGE FOR CONTRACTORS

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Property and Administrative Services Act, 40 U.S.C. 101 *et seq.*, and in order to promote economy and efficiency in procurement by contracting with sources who adequately compensate their workers, it is hereby ordered as follows:

Section 1. Policy. This order seeks to increase efficiency and cost savings in the work performed by parties who contract with the Federal Government by increasing to \$10.10 the hourly minimum wage paid by those contractors. Raising the pay of low-wage workers increases their morale and the productivity and quality of their work, lowers turnover and its accompanying costs, and reduces supervisory costs. These savings and quality improvements will

WHITE HOUSE SHAREABLES

VIEW OUR MOST SHAREABLE CONTENT IN ONE EASY-TO-NAVIGATE PAGE.

START SHARING

LATEST BLOG POSTS

March 29, 2014 2:06 PM EDT

Photos: This is What an #ACASurge Looks Like

The final deadline to get covered in 2014 is right around the corner, and Americans are lining up around the country (literally) to make sure they are.

Connecticut passes historic minimum wage law -- March 27, 2014

- ▶ Law will raise the minimum wage to \$10.10 by 2017
- ▶ The highest minimum wage of any state
- ▶ But not any city -- higher minimum wages imposed by some cities, including \$10.74 in San Francisco
- ▶ Washington, D.C., will raise its minimum wage to \$11.50 by 2016
- ▶ California's minimum wage will increase to \$10 by 2016

Can your company afford to pay more for time before and after actual "working time?"



Friekin v. Apple, Inc., No. 3:13-cv-03451 (USDC, N.D. Cal)

- ▶ FLSA collective action by workers at Apple retail stores
- ▶ Plaintiffs are seeking nationwide class of potentially tens of thousands of plaintiffs
- ▶ The issue: Should Apple have paid its retail store workers for the time they spent submitting to mandatory bag checks after clocking out at shift end and before breaks?



The Core Question

- ▶ Every employer in today's climate must review and monitor whether its hourly employees are required to perform work-related activities:
 - ▶ Before their paid time starts,
 - ▶ During unpaid breaks, or
 - ▶ After their paid time ends





Recognizing the Red Flags

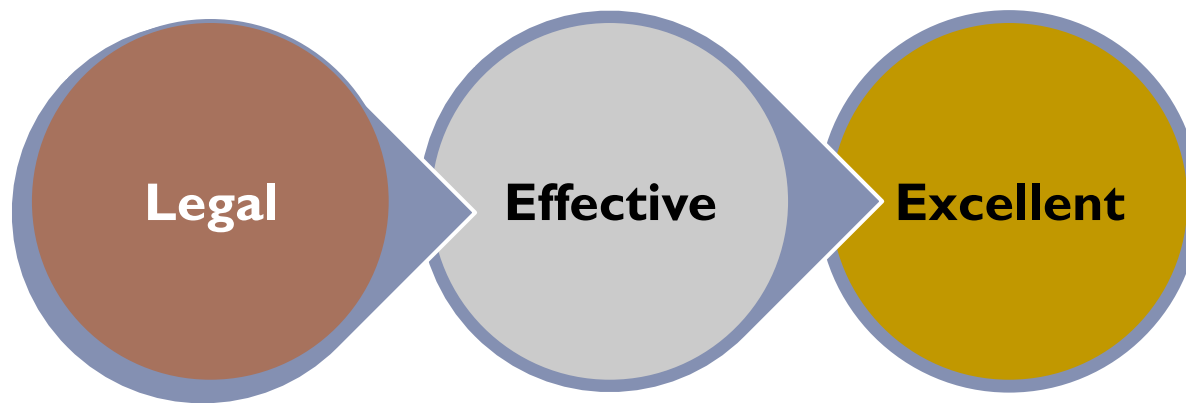
- ▶ Set shift-start and shift-end times not tied to clocking in or clocking out
- ▶ Clock-in/clock-out procedures that don't account for all work-related tasks
- ▶ Pre-shift meetings before paid time
- ▶ Supervisors who “recommend” early arrivals
- ▶ Required work-related activities performed with regularity pre-shift, post-shift or during breaks

Stay tuned...

- ▶ A cheerleader for the Cincinnati Bengals has sued claiming the team paid its cheerleaders less than minimum wage.
- ▶ Northwestern University football players ruled to be employees by Regional Director of the NLRB.
- ▶ Tech in Motion polled 847 professionals about whether they would be interested in being paid in bitcoin -- 51% said yes, and 18% said maybe.

Working in Compensation

- ▶ Specialists, Generalists, Leaders
- ▶ Range of competency:



Legal

“Employed and Un-incarcerated”

- ▶ **Wage and Hour**
 - ▶ Maintain Formal policies
 - ▶ Track hours
 - ▶ Consult with Legal team
- ▶ **Information Security**
 - ▶ Protect personal information
 - ▶ Discourage employee conversations about pay
- ▶ **Anti-trust**
 - ▶ Understand regulations
 - ▶ Screen data sources
 - ▶ Avoid competitor information



Legal

“Employed and Un-incarcerated”

▶ Salary Surveys

- ▶ Information about market instead of competitors
- ▶ Anti-trust risk mitigated by aggregating data so that individual organizations' pay practices cannot be isolated

▶ Safe Harbor

- ▶ Survey conducted by independent third party
- ▶ Data reported is at least six months old
- ▶ Minimum four reporting organizations (five preferred)
- ▶ No single participant accounts for more than 25% of the statistical sample

Effective

“Valued Member of the Team”

- ▶ **FLSA**
 - ▶ Become an internal authority on Wage and Hour Law
 - ▶ Understand state and federal regulations
 - ▶ Evaluate positions and make recommendations on FLSA status
 - ▶ Actual work versus job description
 - ▶ Recognize competing interests
 - ▶ Advocate OT Eligible versus Non-Exempt
 - ▶ Educate managers and employees
- ▶ **Oversight**
 - ▶ Align policy and practice
 - ▶ Assess programs and budgets



Effective

“Valued Member of the Team”

- ▶ **Organizational Understanding**
 - ▶ Catalog current job descriptions for all positions
 - ▶ Maintain accurate employee data
 - ▶ Experience credit
 - ▶ Performance rating
- ▶ **Unions**
 - ▶ Learn contracts
 - ▶ Monitor compliance
 - ▶ Minimum compliance
 - ▶ Over-compliance



Effective

“Valued Member of the Team”

- ▶ **Market assessment**
 - ▶ Interpret local market dynamics
 - ▶ Utilize survey data effectively
 - ▶ Scope
 - ▶ Quartiles
 - ▶ Effective date and aging
- ▶ **Anti-trust Training and Education**
 - ▶ Maintain formal policy
 - ▶ Select surveys that meet safe harbor
 - ▶ Educate and Communicate
 - ▶ Human Resources
 - ▶ Managers



Excellent *“Strategic Partner”*

- ▶ **Economics of Compensation**
 - ▶ Rely on more science, less art
 - ▶ Deploy resources to meet business objectives
 - ▶ Prioritize top performers and high turnover risk employees
- ▶ **Recruiting**
 - ▶ Establish link between compensation and recruiting
 - ▶ Screen for pay fit
 - ▶ Develop hiring guidelines
 - ▶ Upper and lower limits on new hire salary
 - ▶ Experience rating framework



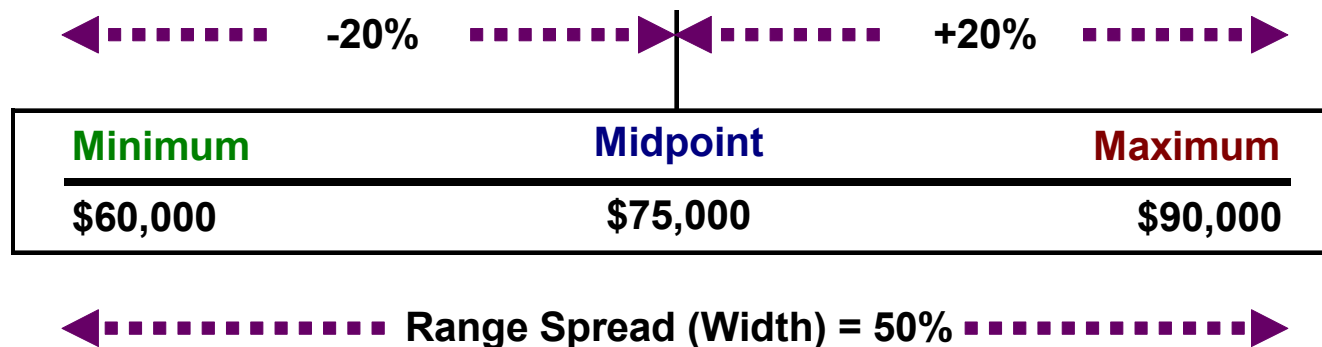
Excellent “Strategic Partner”

▶ Market Information

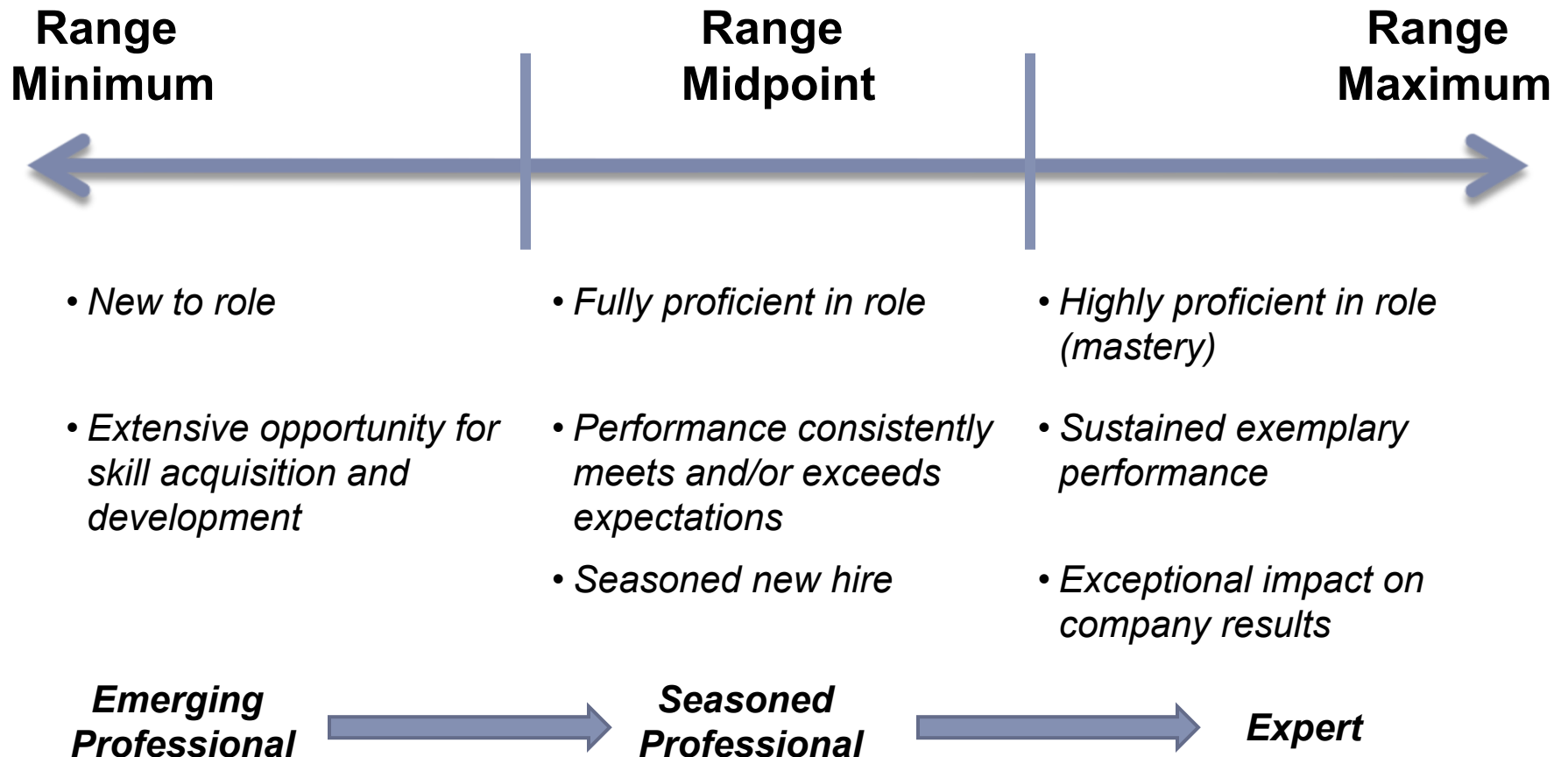
- ▶ Assess sources
- ▶ Determine if data is a target or directional
- ▶ Define comparator

▶ Pay Ranges

- ▶ Utilize proper mechanics
- ▶ Align with career progression



Excellent “Strategic Partner”



Excellent *“Strategic Partner”*

- ▶ **Compensation Planning**
 - ▶ Understand links between strategy, implementation, and maintenance
 - ▶ Anticipate, plan, and update
- ▶ **Analytics**
 - ▶ Advocate holistic view of HR finance
 - ▶ Turnover
 - ▶ Satisfaction
 - ▶ Compensation
 - ▶ Measure program elements
 - ▶ Convert data to information



Excellent *“Strategic Partner”*

▶ Culture

- ▶ Manage perceived equity
- ▶ Entitlement vs. pay for performance
 - ▶ Policies
 - ▶ Conversations with employees

▶ Leadership

- ▶ Become an organizational leader, as opposed to administrator or employee advocate
- ▶ Communicate effectively with employees
- ▶ Hold managers accountable for pay decisions

