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INSIGHT: Equal Pay: Down But Not Out

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I. Introduction

It has been fifty-five years since President John F. Kennedy signed the Equal Pay Act into law. The landmark law was the first that required equal pay for women engaged in equal work. While progress clearly has been made over the years, the wage gap persists to this day.

The latest research shows that, on average, women still earn twenty percent less than men. While it varies, the gender wage gap exists across the wage distribution and at all education levels, and the problem is exacerbated for women of color. While the debate rages as to whether the Equal Pay Act is an effective tool for closing the gender wage gap, states and local governments—in the absence of federal action—have taken it upon themselves to enact laws, regulations, and guidance to ensure that women are paid and treated equally in the workplace.

Recently, on the federal level, the Ninth Circuit Court of Appeals ruled that salary history cannot qualify as a ''factor other than sex'' when employers make pay determinations, creating a split among the federal Circuit Courts of Appeal and paving the way for potential Supreme Court review. In addition, state and municipal governments have been passing their own equal pay laws that offer protections beyond the coverage currently afforded by federal Equal Pay Act, as well as laws relating to pay transparency and salary history.

This article will provide a brief overview of the Equal Pay Act and examine recent legal developments at the state and local level, highlighting key developments in Pennsylvania, New York, and New Jersey.

II. The Federal Equal Pay Act & Recent Litigation

A. The Equal Pay Act of 1963

The federal Equal Pay Act (''EPA'') prohibits employers from paying different wages to male and female employees for equal work.

The EPA specifically states that:

No employer . . . shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.

29 U.S.C. § 206(d)(1) (2007). Any business enterprise subject to the minimum wage laws of the Fair Labor Standards Act is likewise subject to the EPA.

The primary issue of proof in an EPA action is whether the employer's disparate pay practices were based on sex. To make out a prima facie case, a plaintiff must show: 1) that the employer pays different wages to workers of the opposite sex; 2) that the employees perform equal work on jobs requiring equal skills, effort, and responsibility; and 3) that the jobs are performed under similar working conditions within the same establishment. If a plaintiff proves her prima facie case, the EPA mandates a finding of liability unless the employer can prove that the pay differential was based on a factor other than sex.

While the EPA requires that the employees perform equal work, it does not require that every single part of the jobs be identical. Rather, it is sufficient that the jobs be ''substantially similar.'' The determination of similarity is based on a comparison of three areas: skill, effort, and responsibility. Additionally, the plaintiff must establish that the job duties were performed under ''similar working conditions.''

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To avoid liability, an employer can raise one of four (4) affirmative defenses, proving that the wage differential is based on: ''(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) . . . any other factor other than sex.'' What constitutes ''a factor other than sex'' sufficient to escape EPA liability has been the source of a significant amount of litigation.

In terms of damages, unlike Title VII, double damages are available under the EPA, and claimants do not need to first file a discrimination charge with the EEOC. 29 U.S.C. § 216(b). Attorney's fees are also recoverable. Id. Further, the statute of limitations under the EPA is two years, but if an employer's violation is ''willful'' or ''reckless,'' a three-year statute of limitations is triggered.

B. *Rizo v. Yovino* and the ''Any Factor Other Than Sex'' Defense

This year, the Ninth Circuit Court of Appeals interpreted the Equal Pay Act and held that prior salary, standing alone or in combination with other factors, is not a ''factor other than sex'' sufficient to justify a wage differential between male and female employees under the law. *See Rizo v. Yovino*, 887 F.3d 453 (9th Cir. 2018) (en banc).

The plaintiff, Aileen Rizo, was hired by the Fresno County Office of Education. Upon hire, her salary was determined by the County's standard procedures, which mandated that a new hire's salary was to be determined based on previous salary, adding 5 percent, and ''placing the new employee on the corresponding step of the salary schedule.'' Factors such as the candidate's education, skill, and experience were not considered in the salary determination.

After learning that male colleagues were hired in the same position at higher salary steps, Rizo brought a lawsuit alleging violation of the EPA, arguing that the County's system had the effect of carrying illegal pay gaps forward. In response, the County asserted the EPA's ''any factor other than sex'' defense, relying on its policy as justification for the wage differential. The Ninth Circuit was tasked with determining whether, under the EPA, an employer is permitted to ''justify a wage differential between male and female employees by relying on prior salary,'' either standing alone or as one of the factors considered.

The Ninth Circuit concluded that the EPA's '' 'any factor other than sex' [defense] is limited to legitimate, job-related factors such as a prospective employee's experience, educational background, ability, or prior job performance'' and that ''[p]rior salary, whether considered alone or with other factors, is not job-related and thus does not fall within an exception to the [EPA] that allows employers to pay disparate wages.'' While acknowledging that there may be some correlation between an employee's prior salary and training, education, ability or experience, the Ninth Circuit found that relationship to be too attenuated.

Concerned that using prior salary only perpetuates previous gender pay disparities, the Ninth Circuit advised that employers would be better served to rely directly on factors connected to job-relatedness. The Ninth Circuit stopped short, however, of proclaiming that prior salary could never make its way into legitimate pay decisions. The court specifically mentioned scenarios where ''past salary may play a role in the course of an individualized salary negotiation,'' reserving that issue for future cases.

While other federal appeals courts have analyzed EPA claims in a comparable manner, the Second, Sixth, Tenth and Eleventh Circuits have stopped short of holding that employers could never consider prior salary as a factor in its pay decisions. *See Riser v. QEP Energy*, 776 F.3d 1191, 1998 (10th Cir. 2015); *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 526 (2d Cir. 1992); *EEOC v. J.C. Penney Co.*, 843 F.2d 249, 253 (6th Cir. 1988); *Glenn v. Gen. Motors Corp.*, 841 F.2d 1567, 1571 (11th Cir. 1988). On the other hand, the Seventh and Eighth Circuits have taken a different approach and have been ''reluctant to establish any per se limitations to the 'factor other than sex' exception'' to the EPA. *See Taylor v. White*, 321 F.3d 710, 717-18 (8th Cir. 2003); *see also Covington v. S. Ill. Univ.*, 816 F.2d 317, 321-22 (7th Cir. 1987).

The *Rizo* case may make its way to the U.S. Supreme Court. On August 30, 2018, the Fresno County Superintendent of Schools, Jim Yovino, filed a petition for a writ of certiorari with the Supreme Court asking the Court to review the Ninth Circuit's decision. On October 5, 2018, business groups—including the U.S. Chamber of Commerce and the Center for Workplace Compliance—filed amici curiae briefs in support of Yovino. The business groups urge the Supreme Court to take up the case, stating that the question presented in *Rizo* is one ''of extraordinary significance.'' The business groups call on the Supreme Court to reject the Ninth Circuit's ruling, which the Chamber calls a ''tortured reading of the EPA's 'catchall' [factor other than sex] defense.''

The Supreme Court will likely issue a decision on the petition for writ of certiorari later this year. For now, in light of *Rizo*, employers should keep two main points in mind when setting employee pay rates.

First, an employer must show that any factor relied upon in setting an employee's compensation is job-related.

Second, employers in the Ninth Circuit should remember that it is ''impermissible to rely on prior salary to set initial wages'' whether as a stand-alone factor or in addition to other factors. Notably, the *Rizo* decision puts the EPA on similar footing as certain state laws prohibiting employers from asking job applicants about prior salary during the hiring process, which will be examined—along with other recent state law developments—in turn.

III. Pay Equity & Gender Equality: Recent State Law Developments

In the absence of any action at the federal level to address the gender wage gap, a number of states and local governments have expanded their laws to address pay equity and transparency, including by passing laws preventing employers from inquiring about employees' salary histories during the hiring process (following the line of reasoning set forth in the Ninth Circuit's *Rizo v. Yovino* decision).

The following sections will examine key changes to the law in Pennsylvania, New York, and New Jersey.

A. Pennsylvania

According to the last census report in 2015, women in Pennsylvania earn 79 cents for every dollar earned by men. However, unlike other states, Pennsylvania has not updated the Pennsylvania Equal Pay Law (adopted in 1959, P.S. 43 § 336.1, et. seq.) since 1967, when it was

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amended so that it would apply to fewer people. While various equal pay bills have been introduced over the years by Pennsylvania state representatives, none have passed. Efforts have been made in other respects, however, at both the state and local level to address the state's gender wage gap.

For example, the Commonwealth of Pennsylvania and the cities of Pittsburgh and Philadelphia have all prohibited inquiries into salary history during the hiring process for government employees. While Pittsburgh has not been able to extend the law to private businesses (the Pennsylvania Supreme Court ruled in 2009 that the city cannot regulate the ''duties, responsibilities or requirements'' of private business), Philadelphia has a unique home rule status which affords it greater power over its local affairs. On December 8, 2016, Philadelphia became the first city in the United States to adopt a salary history ban applicable to private employers.

The Philadelphia Wage Equity Ordinance prohibits employers from asking about an applicant's wage history at any stage in the hiring process. The Wage Equity Ordinance is intended to address wage inequality by ensuring that job applicants who have historically been victims of lower wages—such as minority groups and women—will not be disadvantaged by unequal wages throughout their careers.

The ordinance makes it an unlawful employment practice for an employer, employment agency, or employee/agent of an employer/agency to ask a job applicant, in writing or otherwise, about wage history; require disclosure of wage history; condition employment or consideration of an interview on the disclosure of wage history; retaliate against a job applicant for failing to disclose his or her wage history; or rely on a job applicant's wage history from a current or former employer to determine the wages for that individual at any stage of the employment process.

The ordinance applies to all employers in Philadelphia, regardless of size or industry. Further, the ordinance provides only two limited exceptions: an employer may utilize wage history if an applicant knowingly and willingly discloses his or her wage history to the employer, or where a federal, state, or local law specifically authorizes the disclosure or verification of wage history for employment processes.

Despite being passed two years ago, the Philadelphia Wage Equity Ordinance has yet to take effect because it was challenged by the Greater Philadelphia Chamber of Commerce on First Amendment grounds. The federal district court agreed with the Chamber and partially enjoined enforcement of the ordinance. But the City has not given up yet: on September 21, 2018, it filed an appeal with the Third Circuit Court of Appeals, arguing that the district court judge erred in determining that salary history questions are ''protected speech'' and improperly ignored the City's evidence that such questions perpetuate wage gaps based on race and gender.

Employers in Philadelphia should pay close attention to this case, since the outcome will determine whether they will have to revise their practices to comply with the ordinance. More importantly, a wave of similar laws are being considered or have been adopted in various other jurisdictions. In this new environment, employers should investigate and address issues of pay equity more broadly, even where wage inequity is unknown and unintended. This might be done in the form of an internal audit of the positions and salary ranges within the company.

B. New York

New York has been one of the most active states in the areas of pay equity, recently updating its laws to address the wage gap and pay transparency in the workplace. Employers should apprise themselves of these new changes, as many of them have already gone into effect or will go into effect in the coming year.

1. The New York Achieve Pay Equity Bill

The New York Achieve Pay Equity Law, which makes significant changes to New York's equal pay act (N.Y. Labor Law § 194), went into effect on January 19, 2016. As amended, the New York Labor Law states that: ''No employee shall be paid a wage at a rate less than the rate at which an employee of the opposite sex in the same establishment is paid for equal work on a job the performance of which requires equal skill, effort and responsibility, and which is performed under similar working conditions, except where payment is made pursuant to a differential based on: (a) a seniority system; (b) a merit system; (c) a system which measures earnings by quantity or quality of production; or (d) a bona fide factor other than sex, such as education, training, or experience.''

The New York law retains the EPA-related concept of ''equal work'' in the ''same establishment.'' However, the Achieve Pay Equity Law expands the definition of ''same establishment'' to mean ''workplaces [of the same employer] located in the same geographical region, no larger than a county, taking into account population distribution, economic activity, and/or the presence of municipalities.'' N.Y. Lab. Law § 194(3).

The Achieve Pay Equity Law also modifies the statute's affirmative defenses by replacing the phrase ''any other factor other than sex'' with ''a bona fide factor other than sex.'' Id. at § 194(1)(d). To constitute a ''bona fide factor,'' a factor: ''(i) shall not be based upon or derived from a sex-based differential in compensation and (ii) shall be job-related with respect to the position in question and shall be consistent with business necessity.'' Id. Further, an employee may rebut an employer's affirmative defense by showing ''(A) that an employer uses a particular employment practice that causes a disparate impact on the basis of sex, (B) that an alternative employment practice exists that would serve the same business purpose and not produce such differential, and (C) that the employer has refused to adopt such alternative practice.'' Id.

The New York Pay Equity Law also addresses pay transparency. The law prohibits employers from retaliating against employees who disclose compensation-related information. The New York law specifically states that ''[n]o employer shall prohibit an employee from inquiring about, discussing, or disclosing the wages of such employee or another employee.'' N.Y. Lab. L. § 194(4)(a).

The pay transparency law, however, is not without limits. For example, the law permits an employer ''in a written policy . . . [to] establish reasonable workplace and workday limitations on the time, place and manner for inquiries about, discussion of, or the disclosure of wages.'' N.Y. Lab. L. § 194(4)(b). Such limitations ''may include prohibiting an employee from discussing or disclosing the wages of another employee without such employee's prior permission.'' Id.

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New York law also permits employers to prohibit ''an employee who has access to the wage information of other employees as a part of such employee's essential job functions [from] disclos[ing] the wages of such other employees to individuals who do not otherwise have access to such information, unless such disclosure is in response to a complaint or charge, or in furtherance of an investigation, proceeding, hearing, or action under this chapter, including an investigation conducted by the employer.'' Id. at § 194(4)(d).

2. The New York City Salary History Ban

At the local level, New York City has also made efforts to address the gender wage gap. Effective October 31, 2017, the New York City Human Rights Law (''NYCHRL'') was amended to make it an ''unlawful discriminatory practice'' for employers to inquire about the salary history of a prospective employee, or to rely upon salary history unless the applicant offers the information voluntarily. The new law applies to all New York City employers, regardless of the number of employees.

Under the recent amendments, it is generally unlawful for an employer or an employment agency to communicate any question or statement regarding an applicant's salary history to an applicant, an applicant's current or prior employer, or a current or former employee or agent of the applicant's current or prior employer, or rely on the salary history of an applicant in determining the salary, benefits or other compensation for the applicant. The law does, however, including a number of express exceptions. For example, there may be discussions about the applicant's compensation expectations of the new employer. As another example, if an applicant ''voluntarily and without prompting'' discloses his or her salary history, the prospective employer is permitted to consider the applicant's salary history when determining salary, benefits and other compensation, and may take steps to verify the applicant's self-reported salary history.

Under the NYCHRL, an aggrieved prospective employee may either file a complaint with the New York City Commission on Human Rights or file a lawsuit directly in New York State court. Under the broad protections of the NYCHRL, a wide range of relief is available to successful claimants, including punitive damages and attorney's fees, and there is also the possibility of additional civil penalties.

C. The New Jersey Diane B. Allen Pay Equity Act

The New Jersey Diane B. Allen Pay Equity Act took effect on July 1, 2018. The Diane B. Allen Pay Equity Act amends the New Jersey Law Against Discrimination, N.J.S.A. 10:5-12 (''LAD''). The new law is one of the broadest equal pay statutes in the country. The new law makes it an unlawful employment practice to pay employees of any protected class under the LAD (of which there are 18) at a lesser rate (including benefits) than other employees who perform ''substantially similar work,'' with regard to skill, effort, and responsibility. ''Substantially similar work'' is left undefined, but it is obvious that the legislative intent of the new law is to make this a broader standard than the equal work standard set forth under the federal EPA.

Exceptions to the law's broad prohibition are limited. They include situations where an employer can establish that the differing rate of compensation is made according to a seniority or merit system. An exception is also available if the employer can show all of the following:

1. That the differential is based on at least one legitimate factor other than the characteristics of the protected class, such as training, education or experience, or the quantity or quality of production;
2. That this factor is not predicated on and does not perpetuate a difference in compensation based on sex or another characteristic of the protected class;
3. That the factor is applied reasonably;
4. That the factor accounts for the entire compensation differential; and
5. That the factor is job-related vis-à-vis the position at issue and based on business necessity, which will not apply if it is shown that alternative business practices exist that would serve the same business purpose without creating the disparity in compensation.

Notably, comparisons of compensation rates are to be based on rates across all of the employer's operations or facilities, not just the particular employee's geographic location. Moreover, employers may not remedy any unlawful discrepancy in pay by lowering the rate of a more highly-compensated comparator employee. The new law also enhances protections against retaliation by expanding the definition of protected activity to include an employee's discussions with a lawyer or government agency about job title, job category, or compensation of the employee or any other company employee, past or present. Lastly, the new law extends the statute of limitations period for compensation-related claims from two to six years. The law adopts the continuing violation doctrine, which may make the statute of limitations irrelevant in many cases—potentially resulting in liability for numerous years. Treble damages are mandated against an employer who violates the new law.

As in New York, the New Jersey law also addresses pay transparency by making it an unlawful employment practice ''[f]or any employer to take reprisals against any employee for requesting from any other employee or former employee of the employer information regarding the . . . rate of compensation, including benefits, of any employee or former employee of the employer . . . if the purpose of the request for the information was to assist in investigating the possibility of the occurrence of, or in taking of legal action regarding, potential discriminatory treatment concerning pay, compensation, bonuses, other compensation, or benefits.'' N.J.S.A. 10:5-12(r).

In light of the new law's expansive scope, New Jersey employers should review their existing pay policies and practices to ensure that employees are receiving equal pay for performing substantially similar work. If any issues are uncovered during this review, employers should take steps to remedy any differences that could be attributed to membership in a protected class, so as to avoid running afoul of the law. Finally, although New Jersey does not currently have a salary history law, employers should keep tabs on this issue given recent developments in other jurisdictions and in the federal courts.

IV. Conclusion

Recent changes across the nation have resulted in a daunting patchwork of equal pay laws that often lack uniformity. Employers, especially those with multi-state operations, should pay close attention to the laws as they develop in the jurisdictions in which they operate.

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Further, given the proliferation of salary history bans, employers may need to update their applications and hiring documents to eliminate requests for salary history and train hiring managers to avoid questions about past compensation. In addition, employers should consider whether to conduct a voluntary compensation review to ensure there are no disparities between comparable employees, and make appropriate adjustments if needed.

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