SEYFARTH SHAW

Developments In Pay Equity Litigation

2019 UPDATE

By Matthew J. Gagnon and the Seyfarth Shaw Pay Equity Group

Developments In Pay Equity Litigation

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This publication provides a brief overview of recent developments in pay equity litigation and analyzes significant decisions and filings impacting on those issues. We hope that our clients and friends will find this reference useful as they navigate the rapidly developing landscape of pay equity litigation and decisional law.

Please feel free to contact the author, Matthew Gagnon mgagnon@seyfarth.com, or any member of Seyfarth Shaw's Pay Equity Group, with any questions.

This publication should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have. Additionally, this publication is not an offer to perform legal services nor establishes an attorney-client relationship.

OUR PAY EQUITY PRACTICE

A team of experienced professionals ready to assist as you navigate the complexities of pay equity

The pay equity landscape at the federal, state and administrative agency level continues to evolve for employers both within the United States and globally. A number of new laws, reporting requirements, and agency actions are forcing a shift in pay practices and in evaluating pay discrimination allegations. Savvy employers are also taking proactive measures to ensure they maintain a competitive advantage by providing equitable pay for their employees. Many employers also see the importance of communicating to their communities, customers, and applicants for employment that pay equality is a top priority for their organization.

Seyfarth's Pay Equity Group is a clear leader in developing and delivering fair pay solutions for an employer's workforce and in defending pay practices when employers face legal challenges regarding pay equity. Our deep involvement in these issues enables us to provide value to our clients. Our team will work alongside you in fair pay analysis to:

- Evaluate the best strategy for analyzing pay within your organization, including discussing goals with your business leaders
- Review key compensation guidelines or policies to assist in framing the compensation analytical model
- Develop appropriate statistical models by pairing our expertise in legal risk assessment with highly experienced labor economists
- Evaluate pay practices as implemented in your organization based on protected employee groupings
- Identify individuals or groupings that are driving any apparent disparities to further test the analytical framework and the factors identified as drivers of pay
- Develop recommended adjustments to further align your organization's compensation practices

We understand that confidentiality in this process is paramount. Our analysis of your pay practices is conducted under the attorney-client privilege, with care taken to protect the privilege whenever possible.

Our Pay Equity Group has developed strategic approaches to defending pay practices when clients are faced with legal challenges. We are prepared to work with you to design the best strategy for your organization from cutting-edge motion practice, to positioning matters for cost-effective resolution, to successful trial preparation and execution.

Seyfarth leads the legal industry in fair pay analysis and client advocacy. Since the origin of fair pay laws in the US, we have partnered with our clients to proactively address legal developments, minimize risk, and implement business goals in the pay equity arena.

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PAY EQUITY LEGISLATION

A. Federal Equal Pay Act

The Equal Pay Act ("EPA") was enacted by Congress in 1963, one year earlier than Title VII of the Civil Rights Act of 1964 ("Title VII"). It prohibits employers from discriminating "between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which [it] 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 . . . ."[1] The law recognizes four affirmative defenses: (1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) a differential based on any other factor other than sex.[2]

The EPA therefore overlaps with Title VII, in that both statutes prohibit discrimination on the basis of sex. However, as discussed below, the EPA diverges from Title VII, both procedurally and substantively, in important ways. In addition to private litigation, the EPA can give rise to enforcement proceedings brought by the U.S. Equal Employment Opportunity Commission ("EEOC"). For the past five years, the EEOC has identified equal pay as one of its six enforcement priorities in its Strategic Enforcement Plan.[3] Although the number of filings under the EPA still make up a relatively small percentage of the EEOC's docket, it has increased enforcement activity under the EPA over the past few years.[4]

This publication addresses significant developments in equal pay litigation in 2018 and the beginning of 2019 under the federal EPA and similar state laws. It also discusses recent developments in EEOC enforcement litigation under the federal EPA.

B. State Equal Pay Legislation

Equal pay has been an important issue at the statewide level as well, with numerous states amending their equal pay laws to supplement the federal EPA. California, New York, and Massachusetts became the first states to adopt more onerous pay equity laws in the last few years.[5] Other states soon followed. A number of states and local jurisdictions have also enacted laws preventing employers from requesting the salary history of job applicants and limiting an employer's ability to consider prior salary when making offers to new hires. Similar laws are currently under consideration in other jurisdictions. The state of equal pay legislation in the fifty states is a rapidly developing issue. For a complete and up-to-date analysis of the equal pay statutes in each state, please see Seyfarth Shaw's companion publication, the "50 State Pay Equity Desktop Reference."[6]

State equal pay laws differ from the federal EPA in significant ways. For example, on January 1, 2016, the California Fair Pay Act,[7] became effective for all employers with California-based employees. It

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[1] 29 U.S.C. § 206(d)(1).

[2] *Id.*

[3] U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION STRATEGIC ENFORCEMENT PLAN FISCAL YEARS 2017 - 2021, *available at* https://www.eeoc.gov/eeoc/plan/sep-2017.cfm.

[4] *See* Matthew J. Gagnon, Christopher J. DeGroff, and Gerald L. Maatman, Jr., *Tick, Tock….The EEOC Runs Out The Clock – Fiscal Year 2017 Marks A Last Minute Return To Frantic Filing*, WORKPLACE CLASS ACTION BLOG (Sept. 30, 2017), https://www.workplaceclassaction.com/2017/09/tick-tock-the-eeoc-runs-out-the-clock-fiscal-year-2017-marks-a-last-minute-return-to-frantic-filing/.

[5] 2017 Cal. Legis. Serv. Ch. 688 (A.B. 168) (West); N.Y. Lab. Law § 194 (McKinney); Mass. Gen. Laws Ann. ch. 149, § 105A (West).

[6] *See* Seyfarth Shaw Pay Equity Group, *50 State Pay Equity Desktop Reference: What Employers Need To Know About Pay Equity Laws, 2019 Edition*, *available at* http://www.seyfarth.com/dir_docs/publications/PayEquity_50State.pdf.

[7] Cal. Lab. Code § 1197.5.

expands upon the protections offered by the federal EPA and Title VII, as well as already-existing California law.[8] Most importantly, the California Fair Pay Act allows employees to be compared even if they do not work at the same establishment.[9] This means that an employee's pay may be compared to the pay of other employees who work hundreds of miles away. By comparison, New York's equal pay law also allows employees to be compared even if they do not work at the same establishment, but those comparators must work in the same "geographic region" no larger than the same county.[10]

Unlike the federal EPA, which requires plaintiffs to establish that they performed "equal work" as a comparator of the opposite sex, the California law requires only a showing that employees are engaged in "substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions."[11] The Massachusetts Equal Pay Act prohibits differences in pay for "comparable work."[12] Other states apply different standards for comparing the work between a plaintiff and his or her alleged comparators.

State laws also differ in significant ways with respect to the affirmative defenses available to defendants. For example, the California law imposes on employers the burden to affirmatively demonstrate that any pay differences are based on one or more of a limited number of factors. The California law also limits the factors that employers can use to justify pay differentials and requires that the factors be applied reasonably and, when viewed together, must explain the entire amount of the pay differential.[13] The Massachusetts law also creates an affirmative defense to wage discrimination claims for an employer that has (1) completed a self-evaluation of its pay practices that is "reasonable in detail and scope in light of the size of the employer" within the three years prior to commencement of the action; and (2) made "reasonable progress" toward eliminating pay differentials uncovered by the evaluation.

State laws also differ in terms of the procedural rights and remedies available to plaintiffs and defendants. For example, the California Fair Pay Act allows employees to bring an action directly in court without first exhausting administrative remedies – provided the employee does so within two years (or three if the violation was "willful") – and the employee may recover the balance of wages, interest, liquidated damages, costs, and reasonable attorney's fees.[14] The California law also extends – from two years to three – an employer's obligation to maintain records of wages and pay rates, job classifications, and other terms of employment.[15]

Under the California Fair Pay Act, employers may not prohibit employees from disclosing or discussing their own wages or the wages of others, or from aiding or encouraging other employees to exercise their rights under the law.[16] The New York law includes a similar provision. These anti-pay secrecy requirements echo similar prohibitions under the National Labor Relations Act, the California Labor Code, and an Executive Order that applies to federal contractors.

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[8] For more information about the California Fair Pay Act and other state pay equity laws, *see*, Seyfarth Shaw Pay Equity Group, *The New U.S. Pay Equity Laws: Answering the Biggest Questions*, *available at* http://www.seyfarth.com/dir_docs/publications/PayEquityBrochure.pdf.

[9] *See* Cal. Lab. Code § 1197.5. The California Fair Pay Act expressly removed from the preexisting California pay law statutory exemptions that applied where work was performed "at different geographic locations" and "on different shifts or at different times of day."

[10] NY Lab. Law §§ 194 et seq.

[11] Cal. Lab. Code § 1197.5(b).

[12] Mass. Gen. Laws. c. 149 § 105A.

[13] *Id.*

[14] Cal. Lab. Code § 1197.5(h), (i).

[15] Cal. Lab. Code § 1197.5(e).

[16] Cal. Lab. Code § 1197.5(k)(1).

CASE LAW DEVELOPMENTS IN 2018

Employers' compensation practices are increasingly being challenged in court by aggressive plaintiffs' counsel, the Equal Employment Opportunity Commission, and state agencies. The primary targets for this new wave of litigation have been firms in the health, legal, and technology industries. Those cases are rapidly reshaping the landscape of equal pay litigation across the country.

A. Proving The Prima Facie Case

The federal EPA utilizes a burden-shifting mechanism for establishing liability. First, an employee must establish a prima facie case of discrimination by showing that: (1) different wages were paid to employees of the opposite sex; (2) the employees performed equal work requiring equal skill, effort, and responsibility; and (3) the employees shared similar working conditions. State laws can differ with respect to these factors, but most state laws share a similar burden-shifting framework, which requires that employees first prove the basic elements of a cause of action before the burden shifts back to the employer to show that the alleged wage disparity is for some legitimate, non-discriminatory reason. There is no requirement under the federal EPA for a plaintiff to prove any discriminatory intent or animus on the part of the employer.

If the employee establishes a prima facie case, the burden of persuasion then shifts to the employer, who has an opportunity to show that the alleged wage differential is the result of a legitimate, non-discriminatory reason. Under the federal EPA, the permissible range of legitimate reasons for a wage disparity are explicitly set forth in the statute as four affirmative defenses. They are: (1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) any factor other than sex. The fourth defense, the so-called "factor other than sex" defense is a catchall provision that attempts to account for all of the legitimate non-discriminatory reasons that an employer may have for paying one employee differently from another employee of a different gender.

Like the factors used to establish a prima facie case, the affirmative defenses allowed by individual state laws can be different from those established by the federal EPA. However, with some exceptions, most of those affirmative defenses would also qualify as an affirmative defense under the federal EPA's catchall "factor other than sex" defense. Accordingly, this analysis will focus on developments under the federal EPA, while noting significant variations in state law where appropriate.

This burden-shifting framework forms the skeleton of all equal pay claims. It is important to note, however, that even if an employer meets its burden to establish an affirmative defense to an employee's prima facie case, the employee still has an opportunity to show that the employer's stated reason for the wage disparity is merely a pretext for discrimination.

1. Establishing A Wage Disparity

The first and most fundamental element of a plaintiff's prima facie case is establishing that a wage disparity exists; i.e., that different wages were paid to employees of a different sex. In a case that involves just one or a handful of plaintiffs, this might only require the identification of one or more alleged "comparator" employees who are of the opposite sex and who were paid at a higher rate. With class cases, however, the identification of a wage disparity can be much more complex. Statistics can be used to great effect in a single-plaintiff case, but they are particularly critical when a plaintiff is alleging classwide or systemic wage discrimination.

For example, in *Bridewell-Sledge v. Blue Cross of California*,[17] the Court based its denial of class certification on a close analysis of the parties' competing expert reports. Among other things, plaintiffs

[17] *Bridewell-Sledge v. Blue Cross of Cal.*, No. BC477451, 2018 Cal. Super. LEXIS 3879 (Cal. Super. Ct. Aug. 28, 2018).

alleged that their employer engaged in "endemic, pervasive gender-based employment discrimination in pay by consistently paying their female employees at a wage rate less than that paid to their male employees for substantially equal work."[18] The Court held that plaintiffs' theory was not borne out by the statistical evidence.

California courts may consider statistical evidence as "indicators of a defendant's centralized practices in order to evaluate whether common behavior towards similarly situated plaintiffs makes class certification appropriate."[19] Plaintiffs' expert performed a regression analysis that sought to take account of race, sex, years of company services, age, and educational attainment to conclude that males were paid more relative to females in a manner that was both large in absolute magnitude of the pay differential, and statistically significant.[20] However, the Court held that plaintiffs' expert had failed to apply the proper criteria for assessing the potential wage differential under the California Fair Pay Act because the law only prohibits such wage disparities for employees doing "substantially similar work" when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions.[21]

Plaintiffs' expert had attempted to control for location and job category using the EEOC's EEO-1 categories to establish that any two individuals within the same EEO-1 category were performing "substantially similar work."[22] The employer's expert opined that because there are only ten such categories, they would, by necessity, tend to group employees within the same category who are demonstrably not performing "substantially similar work" within the meaning of California law. The employer's expert noted, among other things, that "over 80 percent of the records in [plaintiff's expert's] analytic file fall into a *single* EEO-1 occupational category, [plaintiff's expert's] model has effectively no statistical control to situate employees with respect to their skill, effort and responsibility."[23]

The Court agreed and rejected plaintiffs' expert's model, holding that it "does not properly analyze the pay rates of putative class members and juxtapose those against employees who perform *substantially similar* work."[24] Without the use of any statistical methodology to assess statutory violations on a class basis, the Court would have to "individually review a class member's status and assess whether those employees perform 'equal work' under 'similar working conditions' or 'substantially similar work when viewed as a composite of skill, effort, and responsibility.'"[25] The Court therefore denied class certification.

Similarly, in *Kassman v. KPMG LLP*,[26] the Court rejected an employees' attempt to use statistics to prove classwide wage discrimination because the statistical analysis could not adequately account for the differences among individual employees' job duties and working conditions. In that case, plaintiffs sought to bring a class and collective action on behalf of more than 10,000 female Associates, Senior

[18] *Id.* at *1.

[19] *Id.* at *26 (quoting *Sav-On Drug Stores, Inc. v. Super. Ct.*, 34 Cal. 4th 319, 333 (Cal. 2004)).

[20] *Id.* at *39. Even though there is no requirement under the California Fair Pay Act or the federal EPA for plaintiffs to prove intentional discrimination or discriminatory animus, courts often allow the use of evidence – including expert statistical evidence – that would tend to demonstrate intentional discrimination. *See, e.g., Storrs v. Univ. of Cincinnati*, No. 1:15-CV-136, 23018 WL 684759 (S.D. Ohio Feb. 2, 2018) ("[Plaintiff may present facts and argument regarding sex discrimination to the extent these facts (1) prove the elements of her EPA claim, (2) demonstrate that UC acted willfully, and (3) rebut UC's affirmative defense that the discrepancy was based on a factor 'other than sex.' Although intentional discrimination is not an element of an EPA claim, courts typically allow evidence that demonstrates that the defendant acted willfully or suggests that the defendant's affirmative defense is pretextual.") (emphasis omitted) (citing *Boaz v. Fed. Express Corp.*, 107 F. Supp. 3d 861, 891 (W.D. Tenn. 2015) ("Although intent to discriminate is not a requisite element for making out an EPA claim, a showing of discriminatory motivation may be used to demonstrate that an affirmative defense on which the employer relies is in fact pretextual.") (quotation omitted); *Simpson v. Merchs. & Planters Bank*, 441 F.3d 572, 580 (8th Cir. 2006).

[21] *Bridewell-Sledge*, 2018 Cal. Super. LEXIS 3879, at *44.

[22] *Id.* at *44-47.

[23] *Id.* at *45.

[24] *Id.* at *47.

[25] *Id.* at *48.

[26] *Kassman v. KPMG LLP*, No. 11-CV-3743 (LGS), 2018 WL 6264835 (S.D.N.Y. Nov. 30, 2018).

Associates, Managers, Senior Managers/Directors, and Managing Directors within the company's Tax and Advisory Functions from 2009 to the present.[27]

Plaintiffs' expert performed a regression analysis and found statistically significant differences in compensation – both in terms of base and total compensation – between men and women, controlling for job level, experience, education, job location, and performance ratings.[28] The employer's expert, on the other hand, concluded that no statistically significant disparity exists when employees are appropriately classified according to specialized job categories.[29] Rather, the data "reflects a heavier concentration of men in higher compensated units and heavier concentration of women in lesser compensated units."[30] When controlling for those different units, the employer's expert found statistically significant pay disparities in only a few units, some of which were in favor of female employees, and therefore showed only sporadic and isolated within-job sex disparities in pay.[31]

The employer also tried to exclude plaintiffs' expert's report entirely, arguing that it could only determine correlation, i.e., whether women are paid less than men, but could not establish causation, i.e., that they were paid less than men *because of* their sex.[32] But the Court held that this was no bar to relevance because correlation alone "logically advanced Plaintiffs' case."[33] However, that evidence, even in combination with the anecdotal evidence of discrimination submitted by plaintiffs, was not enough to establish commonality for purposes of class certification or to allow the case to continue as a certified collective action. Plaintiffs had failed to establish that pay and promotion practices are uniform across the company, so there was no good reason to rely on aggregated, nationwide statistics.[34] Because the Company allowed individual managers discretion over pay decisions, the Court held that "there is no (non-discretionary) uniform causal mechanism for determining pay and promotion operating across the Proposed Collective. This means that there are likely 1,100 defenses to justify why the 1,100 Opt-Ins were paid as they were. Adjudicating the claims of the proposed collective in a single action would give rise to obvious procedural difficulties and could not assure fair treatment of any party involved."[35]

Statistics are also often used in cases that involve only one or a handful of plaintiffs. For example, in *Spencer v. Virginia State University*,[36] the Court rejected an attempt by a tenured Associate Professor in the Department of Sociology to use statistics to establish that she was paid less than a term-appointed Associate Professor in the Department of Mass Communications, and a term-appointed Associate Professor in the Department of Educational Leadership.[37] The Court held, among other things, that the plaintiff had failed to establish that those positions were the same, noting that: "the functional responsibilities that comprised 'teaching a class' and the skillset required in doing so varied across all three departments."[38]

But the Court also held that the analysis performed by plaintiff's own expert showed that the University did not suffer from any systemic gender-related wage disparity.[39] Among other things, plaintiff's expert found that plaintiff's comparators were overpaid in comparison to their peers, including both male and female faculty members, and that there was not a statistically significant level of male faculty being paid

[27] *Id.* at *1.
[28] *Id.* at *6.
[29] *Id.* at *7.
[30] *Id.*
[31] *Id.* at *7.
[32] *Id.* at *13.
[33] *Id.*
[34] *Id.* at *21.
[35] *Id.* at *26.
[36] *Spencer v. Va. State Univ.*, No. 3:16-CV-989-HEH, 2018 WL 627558 (E.D. Va. Jan. 30, 2018).
[37] *Id.* at *8.
[38] *Id.* at *9.
[39] *Id.* at *10.

more than their female counterparts by school.[40] The Court concluded that the "absence of systemic discrimination combined with improper identification of a male comparator suggests a failure to establish a prima facie case."[41]

2. Showing That Work Is "Equal" Or "Substantially Similar"

To establish a prima facie case under the federal EPA, an employee must establish that they were paid less than an employee of the opposite sex – often referred to as a "comparator" – for "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."[42] As discussed above, this "equal work" requirement can present some significant hurdles to putative plaintiffs, especially for those hoping to certify sprawling classes. Some states, however, have adopted more lenient standards, such as California's standard: "substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions."[43] Other states apply a "comparable character," standard, or some other standard that may be more or less lenient than the "equal work" or "substantially similar work" standards.[44]

No matter the standard used, the requirement that a plaintiff show that they performed the same or similar work as their chosen comparators is often the most significant stumbling block for a plaintiff's prima facie case.[45] For example, In *Miller v. City of New York*,[46] the District Court for the Southern District of New York dismissed a sprawling class of over 2,000 city employees alleging claims under the federal EPA, the New York State Human Rights Law, and the New York City Human Rights Law. That case involved a class (and conditionally certified collective action) of female school crossing guards, who alleged that they were paid less than traffic enforcement agents even though they do the same work.[47]

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[40] *Id.*

[41] *Id.* (quoting *Stag v. Bd. of Trs., Craven Cmty. Coll.*, 55 F.3d 943, 950 (4th Cir. 1995)).

[42] 29 U.S.C. § 206(d)(1)

[43] *See* Cal. Lab. Code § 1197.5(a).

[44] *See, e.g.,* Md. Code Lab. & Empl. §§ 3-304(b)(1)(i). For a complete description of the various standards used in the different states, *see* Seyfarth Shaw's "50 State Pay Equity Desktop Reference," *available at* http://www.seyfarth.com/dir_docs/publications/PayEquity_50State.pdf.

[45] Federal employees arguably must meet an even higher threshold for proving a prima facie case because controlling Federal Circuit Court authority imposes an extra requirement – that plaintiffs establish that the alleged pay differential was "based on sex." In *Gordon v. U.S.*, 903 F.3d 1248 (Fed. Cir. 2018), *vacated as moot*, 2019 WL 916719 (Fed. Cir. Feb. 25, 2019), the Federal Circuit affirmed the dismissal of two Veterans Affairs physicians' federal EPA claim because they had not established that the alleged pay differential was "based on sex." The plaintiffs had pointed to another physician recently hired into an identical position and ten male ER physicians as their comparators. *Id.* at 1252. The Court agreed with plaintiffs that they had "raised a fact issue that [employer's] employees of different sex performing equal work on jobs requiring equal skill, effort, and responsibility under similar working conditions were paid differently." But, relying on an earlier Federal Circuit case, the Court held that this showing was not sufficient to establish a prima facie case because plaintiffs must also show that the "the pay differential between the similarly situated employees is 'historically or presently based on sex.'" *Id.* at 1254 (citing and quoting *Yant v. U.S.*, 588 F.3d 1369 (Fed. Cir. 2019)). According to the Court, the plaintiffs had pointed to no evidence that the pay differential was based on sex and that they could not "satisfy this requirement merely through an inference drawn from the statutory elements of the prima facie case under the EPA." *Id.* The *Gordon* Court's decision drew a sharp dissent from Judge Reyna, who argued that the Court's "based on sex" requirement "imposes an extra-statutory requirement onto the EPA plaintiff's prima facie case." *Id.* According to Judge Reyna, this changed the statutory burden-shifting regime of the EPA, effectively shifting the burden onto plaintiffs to prove discrimination, rather than leaving it with the employer to disprove discrimination: "*Yant*'s requirement that an EPA plaintiff must affirmatively prove that a pay differential between employees of different sexes is historically or presently based on sex is at odds with the broadly remedial nature of the EPA to redress wage discrimination between employees of different sex." *Id.* at 1256-57.

[46] *Miller v. City of New York*, No. 15-CV-7563, 2018 WL 2059841 (S.D.N.Y. May 1, 2018).

[47] *Id.* at *1.

The Court disagreed, holding that there were "stark differences in training, job requirements, and job responsibilities" between the two positions.[48] The Court expressly rejected plaintiffs' broad generalization that the two positions were the same because they both involved "direct[ing] the flow of pedestrians and traffic," holding that the Court must consider actual job content.[49] The Court pointed to the following key differences between the positions: (1) traffic enforcement agents undergo ten times more training than school crossing guards; (2) they are full-time employees who can be required to work nights, weekends, and overtime, whereas crossing guards are part-time employees who work no more than five hours per day; (3) they have greater responsibilities, including issuing summonses and testifying in court; and (4) they work at different, often busier intersections and sometimes at night.[50]

Because the evaluation of "equal" or "similar" work is so fact-specific and often difficult to prove, plaintiffs often attempt to rely on various proxies to establish that requirement. For example, in *Heatherly v. University of Alabama Board of Trustees*,[51] the District Court for the Northern District of Alabama held that a job evaluation system, on its own, could not establish a prima facie EPA violation. In that case, the Director of Human Resources for the University of Alabama brought a federal EPA claim alleging that she was paid less than three male employees in director-level positions.[52] Plaintiff argued that the university used a job evaluation system, the Mercer System, to establish pay grades for different jobs based on such factors as knowledge and experience, job complexity and creativity, and physical demands and working conditions in accordance with standards determined by the University.[53] Because the use of that system established the same pay grade for her position versus those of her male comparators, she argued that this established the "equal work" prong of her prima facie case.[54]

The Court disagreed, holding that binding precedent forced it to look at actual job content to determine whether the skill, effort, and responsibility required is substantially equal; it could not merely rely on a job evaluation system.[55] Moreover, because the job evaluation system allowed for wide salary ranges even within the same pay grade, this showed that "an employee's categorization into a pay grade does not pinpoint that employee's exact salary and that multiple employees within the same pay grade may have and earn varying salaries."[56]

In *Kling v. Montgomery County, Maryland*,[57] the District Court for the District of Maryland held a federal EPA plaintiff can establish a prima facie case by comparing her work and job responsibilities to a comparator's position and responsibilities *from the past*, even if the comparator no longer holds that position. In that case, a "Hispanic Liaison" for the Montgomery County Police Department requested a reclassification of her position to a higher pay grade, pointing to a male county employee who she alleged held a similar position at a higher pay grade.[58] After the county pointed out that the male comparator's

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[48] *Id.* at *4.

[49] *Id.* at *5

[50] *Id.*; *see also Crain v. Judson Indep. Sch. Dist.*, No. SA-16-CV-832-XR, 2018 WL 5315219 (W.D. Tex. Oct. 26, 2018) (granting summary judgment to employer where "Plaintiff's job as an aide did not require him to possess professional teaching skills and that other aides and supervisors at Adventure Club were not professional teachers. Adventure Club employees were subject to a different employee manual than ACE teachers. As noted by [employer], Plaintiff's own summary-judgment evidence demonstrates that Adult & Community Education and Adventure club were separate departments and that Adult & Community Education employees such as [comparator] were paid different rates than the Adventure Club employees."); *Stephens v. Bd. of Trs. of the Univ. of S. Fla.*, No. 8:17-CV-53-T-23AAS, 2018 WL 4823125 (M.D. Fla. Oct. 4, 2018) (holding that clinical physician had failed to establish "equal work" because plaintiff's own argument "about the termination of her administrative stipends – compensation for non-clinical work – renders invalid a comparison between [plaintiff] and her male colleagues. [Plaintiff] spent half her time on non-clinical work; her male colleagues spent all their time on clinical work.").

[51] *Heatherly v. Univ. of Ala. Bd. of Trs.*, No. 7:16-CV275-RDP, 2018 WL 3439341 (N.D. Ala. July 17, 2018).

[52] *Id.* at *5.

[53] *Id.* at *13.

[54] *Id.*

[55] *Id.*

[56] *Id.* at *14.

[57] *Kling v. Montgomery Cnty., Md.*, 324 F. Supp. 3d 582 (D. Md. 2018).

[58] *Id.* at 588.

current position included significant contract monitoring, training, and other responsibilities beyond plaintiff's role, she pointed to the position the comparator held from 2004-2008.[59]

Although the Court held that the plaintiff's current position and the male comparator's earlier position "share a common core of tasks," the Court still found differences in roles and responsibilities that precluded plaintiff's prima facie case.[60] Crucially, however, the Court held that an EPA plaintiff may resort to comparator positions from the past – even those that are well before the statute of limitations for her claim – to establish a prima facie case of wage discrimination, holding that it was consistent with the purpose of the EPA "to consider the wages that a comparator previously received for substantially similar work; the Court should not have to disregard a gender-based discrepancy in salaries simply because the higher paid position has evolved or no longer exists."[61]

B. Significant Class And Collective Action Decisions

Unlike the EEOC, which can bring lawsuits on behalf of a class of aggrieved individuals without meeting the requirements for class certification, private litigants must establish that their equal pay lawsuits can be decided on a class-wide basis. The procedures for establishing a collective action under the federal EPA are governed by the opt-in procedures of the Fair Labor Standards Act ("FLSA"). Those procedures can confer a significant litigation advantage to plaintiffs because the standard applied at the conditional certification stage of an FLSA collective action is much more lenient than the standards applied to certify a class action under Rule 23 of the Federal Rules of Civil Procedure or its state-law analogues.

Section 216(b) of the FLSA allows an action under the EPA to proceed "by any one or more employees for and in behalf of himself or themselves and other employees similarly situated."[62] The only statutorily-mandated procedural prerequisite to bringing a collective action is that: "no employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought."[63] Although § 216(b) is silent as to how the collective action certification issue should be analyzed, most district courts use a two-step approach in analyzing collective action certification requests.[64] The plaintiff's burden at the conditional certification stage is quite low. A plaintiff need "merely provide some factual basis from which the court can determine if similarly situated potential plaintiffs exist."[65] "[C]onditional certification in the first step requires nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy or plan."[66]

At the conditional certification stage, the Court does not make any final decisions as to whether a collective action is appropriate. The employer will have the opportunity to later decertify the collective if the Court approves conditional certification and authorizes notice. At the more onerous second-stage

[59] *Id.* at 591-92.

[60] *Id.* at 595-96.

[61] *Id.* at 592. *See also Powell v. New Horizons Learning Solutions Corp.*, No. 17-CV-10588, 2018 WL 6571216 (E.D. Mich. Dec. 13, 2018) ("If a female employee is paid less that a male predecessor, the Sixth Circuit permits claims of unequal pay.") (citing *Conti v. Am. Axle*, 326 Fed. Appx. 900, 914 (6th Cir. 2009)).

[62] *See* 29 U.S.C. § 216(b) (providing a private right of action "by any one or more employees for and on behalf of himself or themselves and other employees similarly situated," provided that "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought").

[63] *Id.*

[64] *See Knox v. John Varvatos Enters., Inc.*, 282 F. Supp. 3d 644, 652-53 (S.D.N.Y. 2017) (citing *Hoffmann–La Roche Inc. v. Sperling*, 493 U.S. 165 (1989); *Braunstein v. E. Photographic Labs., Inc.*, 600 F.2d 335, 336 (2d Cir. 1978); *Damassia v. Duane Reade, Inc*., 2006 WL 2853971, at *2 (S.D.N.Y. Oct. 5, 2006)).

[65] *Bouaphankeo v. Tyson Foods*, 564 F. Supp. 2d 870, 892 (N.D. Iowa 2008).

[66] *Id.* (quoting *Young v. Cerner Corp*., 503 F. Supp. 2d 1226, 1229 (W.D. Mo. 2005)); *see also Dietrich*, 230 F.R.D. at 577 ("Courts have held that plaintiffs can meet this burden by making a modest factual showing sufficient to demonstrate that they and potential plaintiffs were victims of a common policy or plan that violated the law.").

Class Actions vs. Collective Actions

- Governed by Rule 23 of the Federal Rules of Civil Procedure or analogous state laws
- Applies to numerous areas of law and can relate to actions asserted under federal or state statutes (but not the federal EPA)
- Generally a more rigorous and challenging certification process in which plaintiffs must satisfy several criteria to support their class action allegations
- Certification requirements under Rule 23(a) include: (1) Numerosity; (2) Commonality; (3) Typicality; (4) Adequacy of Representation
- Rule 23 class action members are "in" unless they affirmatively "opt out," which tends to lead to higher participation as compared to collective actions

- Governed by 29 U.S.C. § 216(b)
- Applies only to actions filed under the Fair Labor Standards Act ("FLSA"), Equal Pay Act ("EPA"), and Age Discrimination in Employment Act ("ADEA")
- Certification requirements are often not as rigorous as those of a class action – § 216(b) only requires that collective action members be "similarly situated"
- Most courts have adopted a two-tiered analysis in determining collective certification wherein step 1 is a lenient, pre-discovery analysis, and step 2 is a more demanding, post-discovery determination
- § 216(b) requires members of the collective action to affirmatively opt in by filing an individual consent to join, which tends to lead to lower participation as compared to class actions

analysis, the Court will ultimately account for all of the important facts learned through discovery that inform which putative plaintiffs, if any, are similarly situated to the existing plaintiffs.[67] Many employers think this two-stage process gives EPA plaintiffs a significant strategic advantage because the relatively lenient standard applied at the conditional certification stage provides an easier route to expand a case into a class proceeding. And as any employer who has been involved in employment class litigation knows, once a case is certified – even conditionally certified as a collective action – the burden, costs, and stakes of that litigation increase dramatically.

For example, in *Bertroche v. Mercy Physician Associates, Inc.*,[68] a female physician brought a collective action complaint against her employer alleging systemic wage discrimination against female family practice physicians. The Court ordered the parties to prepare data compilations showing the average compensation for male physicians versus female physicians.[69] Although the parties disagreed about which physicians should be included in the average, the Court noted that even defendants' analysis showed that other potential plaintiffs exist because it showed that some female physicians were paid less than their male peers.[70] The Court disregarded defendants' claims that the pay disparities can be accounted for by the fact that different physicians expend different amounts of effort to earn their compensation, and that non-medical practice revenue contributed to total compensation for some physicians.[71] The Court held that the plaintiff was not required to show at the conditional certification stage that the wage disparity was due to discrimination, nor that other potential plaintiffs are "similarly situated."[72] Rather, it was enough merely to show that other potential plaintiffs exist who may have been discriminated against based on their gender, which defendants' own data showed.[73]

In *Finefrock v. Five Guys Operations, LLC*,[74] the District Court for the Middle District of Pennsylvania granted conditional certification of a collective action of female restaurant Assistant and General Managers. In that case, the employer used two processes for determining managers' salaries.[75] An individual hired for an open position is paid the same salary as the person who previously held the position; if the company acquires a franchise store, then the managers at that store are hired by the employer at the same salary.[76] The District Manager sets salaries and raises with approval from the Area Manager, Director of Operations, and, eventually, the Vice President of Operations.[77]

Defendant tried to defeat conditional certification by pointing to the fact that the EPA only addresses wage disparities among the same "establishment," meaning a "distinct physical place of business rather than an entire business or 'enterprise' which may include several separate places of business."[78] The Court held that plaintiffs had provided a sufficient modest factual showing that the employer could be considered a single establishment for purposes of the EPA, pointing to the employer's nationwide job descriptions and policies, the frequency with which plaintiffs had transferred store locations, and the fact that final compensation decisions were approved by the central office.[79] Those same factors allowed the Court to conclude that conditional certification of a nationwide collective action was appropriate: "[b]ecause the

[67] *Id.* at 895.

[68] *Bertroche v. Mercy Physician Assocs., Inc.*, No. 18-CV-59-CJW, 2018 WL 4107909 (N.D. Iowa Aug. 29, 2018).

[69] *Id.* at *3.

[70] *Id.*

[71] *Id.* at *4.

[72] *Id.* at *3.

[73] *Id.*

[74] *Finefrock v. Five Guys Operations, LLC*, 344 F. Supp. 3d 783 (M.D. Pa. 2018).

[75] *Id.* at 786.

[76] *Id.*

[77] *Id.*

[78] *Id.* at 789 (quoting 29 C.F.R. § 1620.9(a).) *See also Gambino v. City of St. Cloud*, No. 6:18-CV-869-Orl-31TBS, 2018 WL 5621517 (M.D. Fla. Oct. 11, 2018) (holding that city employees worked within the same "establishment," noting that the Eleventh Circuit recognizes that "[u]nder appropriate circumstances, multiple offices may constitute a single establishment for EPA purposes") (citing *Marshall v. Dallas Indep. Sch. Dist.*, 605 F.2d 191, 194 (5th Cir.1979)).

[79] *Id.*

focus of the inquiry at this conditional certification stage is not whether there was an actual violation of law, but rather whether the proposed Plaintiffs are similarly situated, the court finds that Plaintiffs have met their modest factual burden."[80]

The standard for conditional certification is more lenient than the standard applied at the second stage of the two-stage collective action certification process. Sometimes this means that even if plaintiffs are successful in obtaining conditional certification of a collective action, that collective action will later be decertified after discovery has revealed the substantial differences among collective action members, which makes certification through trial untenable.

For example, in *Ahad v. Board of Trustees of Southern Illinois University*,[81] the District Court for the Central District of Illinois conditionally certified a collective action of female faculty physician employees of Southern Illinois University School of Medicine and SIU Physicians & Surgeons, Inc. Plaintiff alleged that the medical school systematically paid her and other female physicians less than their male counterparts with similar experience, responsibility, and seniority.[82] The Court was satisfied that plaintiffs had met their minimal burden to obtain conditional certification at step one of the process because all faculty physicians performed the same job duties involving patient, teaching, and administrative functions.[83] The Court explicitly held that the factual similarities among the potential plaintiffs need not relate to job duties or circumstances; those issues can be addressed during step two of the certification process.[84]

However, on September 12, 2018, the Court denied plaintiff's request for class certification of the same claims under the Illinois Equal Pay Act, Title VII, and the Illinois Civil Rights Act.[85] Plaintiff's expert had shown that female physicians are paid less at a statistically significant level than similarly situated male physicians.[86] However, the Court held that this statistical disparity, by itself, was not enough to warrant class treatment; plaintiff must establish the "glue" that can produce a common answer to the questions of whether and why compensation for female physicians is lower than male physicians.[87]

Plaintiff pointed to the fact that the implementation of defendant's compensation system allowed individual compensation decisions to be made by Department Chairs and the Dean and Compensation Committee.[88] According to plaintiff, the case was appropriate for class treatment because that centralized decision making yielded an inequitable result. The Court held that this was not sufficient because plaintiff had "not presented any argument that objective factors considered by the Department Chairs or the Dean in determining compensation resulted in the pay disparity."[89] Plaintiff's statistical evidence alone, "does not and cannot show whether a common cause existed regardless of the statistically significant showing of pay disparities based on gender."[90]

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[80] *Id.* at 791. *See also Knox v. John Varvatos Enters., Inc.*, 282 F. Supp. 3d 644 (S.D.N.Y. 2017). In *Knox*, the District Court for the Southern District of New York conditionally certified a collective action of female sales associates. The defendant, a retailer with 22 stores throughout the United States, was alleged to have discriminated against female sales associates by providing male sales associates – and only male sales associates – a $12,000 annual allowance to purchase the Company's branded clothing to wear to work. *Id.* at 651. The District Court held that the plaintiffs had "easily made" their modest factual showing establishing that they and the putative collective action of women sales associates are similarly situated for purposes of conditional certification. *Id.* at 654. Critical to the Court's analysis was the fact that plaintiffs were able to point to a written dress policy that was applied across all 22 retail locations, which stated that all male employees received a clothing allowance. *Id.* at 654-55.

[81] *Ahad v. Bd. of Trs. of S. Ill. Univ.*, No. 3:15-CV-3308, 2017 WL 4330377 (C.D. Ill. Sept. 29, 2017).

[82] *Id.* at *1.

[83] *Id.* at *4.

[84] *Id.*

[85] *Ahad v. Bd. of Trs. of S. Ill. Univ.*, No. 3:15-CV-3308, 2018 WL 4350180 (C.D. Ill. Sept. 12, 2018).

[86] *Id.* at *9.

[87] *Id.* at *10.

[88] *Id*.

[89] *Id.*

[90] *Id.* at *11.

On the other hand, when plaintiffs proceed under state equal pay statutes, they must meet the more rigorous standards applicable to federal Rule 23 class actions or similar state-specific class action requirements. If they can meet those standards, however, they are often rewarded with a much larger class, because those classes are "opt-out" classes rather than "opt-in" classes. Under the collective action mechanism of the EPA, conditional certification allows notice to be sent to putative members of the collective action, which allows them to opt into the lawsuit. If they do not do so, then they are not a part of the collective action. Class actions, on the other hand, automatically include every employee who meets the class definition unless they affirmatively choose to opt out of the class action. When combined with the sometimes more lenient standards for establishing a prima facie case that are available under some state equal pay statutes, this can provide powerful incentive for plaintiffs to pursue a class action under state law, rather than the federal EPA.

For example, in *Ellis v. Google, Inc.*,[91] the Superior Court of California, San Francisco County, initially struck class allegations that sought to join together all women employed by Google at its Mountain View headquarters – from low-level hourly positions to top-ranking executives – in one massive pay equity complaint alleging systematic pay discrimination under the California Fair Pay Act. Plaintiffs alleged that Google discriminates against its women employees by systematically paying them lower compensation than their male peers for performing substantially similar work under similar working conditions.[92] The complaint also alleged that Google assigned and kept women in job ladders and levels with lower compensation ceilings and advancement opportunities than those to which men with similar skills, experience, and duties were assigned, and that Google promoted fewer women, and promoted them more slowly, than similarly-qualified men.[93]

The Court initially held that plaintiffs' class definition was simply too broad in that it failed to allege a common policy or course of conduct applicable to the entire class. Without such a policy, it was impossible to identify class members who had valid claims from those who did not, rendering plaintiffs' proposed class unascertainable.[94] Plaintiffs then amended their complaint to narrow their proposed class to female employees who worked in any of 30 separate positions, which plaintiffs categorized into six job "families."[95] They also added allegations that Google maintained a company-wide policy for setting starting salary that included consideration of an employee's prior salary. According to plaintiffs, that policy perpetuates a historical pay disparity that exists between men and women and caused female employees to receive a lower starting salary than men in the same job position and level.[96]

The Court upheld the class definition in the amended complaint, finding that "Plaintiffs allege that Google has a company-wide policy for setting compensation that includes considering an employee's prior salary in deciding her starting salary and/or job level," and that those allegations "are sufficient at this stage to demonstrate that common issues of law and fact predominate over individualized questions."[97] Whether plaintiffs can maintain their case as a class action through the class certification stage remains to be seen. However, it still ranks as one of the most noteworthy decisions in pay equity litigation of the past few years with potentially far-reaching consequences because the pay disparity alleged in plaintiffs' complaint is based on nationwide averages.

[91] Order Sustaining Def. Google Inc.'s Dem. to Pls.' Class Action Compl., *Ellis v. Google, Inc.*, No. CGC-17-561299 (Cal. Super. Ct. Dec. 4, 2017).

[92] *Id.* at 1-2.

[93] *Id.* at 2.

[94] *Id.* at 4.

[95] Am. Compl. ¶¶ 2-3, *Ellis v. Google, Inc.*, No. CGC-17-561299 (Cal. Super. Ct. Jan. 3, 2018).

[96] *Id.* ¶¶ 40-41.

[97] Order Overruling Def.'s Dem. to First Am. Compl. and Den. Alternative Mot. to Strike, *Ellis v. Google, Inc.*, No. CGC-17-561299 (Cal. Super. Ct. Mar. 27, 2018).

C. Disproving Discrimination: Employers' Affirmative Defenses

Under the burden-shifting framework applicable to the federal EPA, if a plaintiff successfully establishes a prima facie case, the burden shifts to the employer to establish one of the four statutory affirmative defenses, *i.e.*, that the pay disparity is justified by: (1) a seniority system; (2) a merit system; (3) a pay system based on quantity or quality of output; or (4) a disparity based on any other factor other than sex.[98]

As with the standards for establishing a prima facie case, the affirmative defenses allowed to a defendant under state laws may vary from what is allowed under the federal EPA. For example, under the California Fair Pay Act, an employer has access to the first three federal EPA affirmative defenses. But the fourth defense, the "factor other than sex" defense, is severely curtailed. Under California's statute, a defendant must demonstrate "[a] *bona fide* factor other than sex, such as education, training, or experience."[99] The statute further clarifies that "this factor shall apply only if the employer demonstrates that the factor is not based on or derived from a sex-based differential in compensation, is job related with respect to the position in question, and is consistent with a business necessity."[100]

The California statute imposes further limitations on each of the affirmative defenses, requiring that each factor relied upon is "applied reasonably," and that the factors "account for the entire wage differential."[101] Finally, the statute explicitly excludes the use of prior salary as a justification for a wage disparity.[102] Most of these additional requirements were enacted in 2015 and became effective on January 1, 2016. Because these provisions are only a few years old, the courts are still working out how they should be interpreted and applied, and how exactly they depart from the federal requirements.

1. Proving A Factor Other Than Sex

Under the federal EPA, the most common factor relied upon to justify a pay disparity is the catchall "factor other than sex" defense. Employers often point to factors such as levels of education, training, or other qualifications, productive output or performance, and other individually-specific differences as factors that justify pay disparities. The defense is intentionally broad, and so the factors that employers raise under the framework of this defense tend to be as varied as American workplaces themselves.

For example, in *Ruiz-Justiniano v. U.S. Postal Service*,[103] the District Court for the District of Puerto Rico held that a salary guideline that allowed for a bump-up from current salary at the time of hire was enough to establish the "factor other than sex" defense. In that case, a male postal worker alleged that he was paid less than a female employee in the same position. After holding that the plaintiff had established a prima facie case, the Court pointed to a salary guideline in place at the time of the female comparator's hire, which allowed her to be given an offer up to five percent higher than her private sector salary.[104] Plaintiff argued that the reasoning behind the guidelines – to stay competitive in outside hiring – was mere pretext for wage discrimination.[105] The Court held that "this does not change the fact that upon

[98] 29 U.S.C. § 206(d)(1).

[99] Cal. Lab. Code § 1197.5(a)(1)(D).

[100] *Id.* The statute further clarifies that "business necessity" means "an overriding legitimate business purpose such that the factor relied upon effectively fulfills the business purpose it is supposed to serve. This defense shall not apply if the employee demonstrates that an alternative business practice exists that would serve the same business purpose without producing the wage differential." *Id.*

[101] *Id.* § 1197.5(a)(2-3).

[102] *Id.* § 1197.5(a)(4).

[103] *Ruiz-Justiniano v. U.S. Postal Serv.*, No. 16-CV-1526 (MEL), 2018 WL 3218363 (D.P.R. June 29, 2018).

[104] *Id.* at 16.

[105] *Id.* at *17.

making an external hire, . . . the salary hiring guidelines established by USPS headquarters were used to determine her salary."[106]

Employers should beware, however, that fine-grained differences between employees – while perhaps legitimate as "factors other than sex" – will often not be weighed and decided by a court prior to trial. Those decisions are often left for the jury, meaning that employers face the unpalatable prospect of a jury trial, even if they do have a meritorious defense.

For example, in *Gonzales v. County of Taos*,[107] the District Court for the District of New Mexico refused to weigh an employer's "other factors" at the summary judgment stage. In that case, the employer sought to justify the alleged pay disparity by pointing to the different qualifications between plaintiff and her male comparator.[108] Specifically, plaintiff had argued that although her comparator had 27 years of experience in adult detention centers, he had no experience as a director of a detention facility as she had, and because she had numerous certifications and training in the field of detention administration.[109] The Court denied summary judgment for the employer, holding that those relative levels of experience and qualifications "are questions of fact for a jury to decide and are not appropriate for summary judgment "[110]

Similarly, in *Ackerson v. Rector and Visitors of the University of Virginia*,[111] the District Court for the Western District of Virginia held that two university administrators were paid at different rates because of their different credentials, experience, achievements, etc.[112] The Court refused to undertake that analysis itself, holding that "[w]hile the potential differences in qualifications, certifications, and employment history *could* explain the wage disparity between the claimants and [comparator], the EPA requires that a factor other than sex *in fact* explains the salary disparity."[113]

And in *Bowen v. Manheim Remarketing, Inc.*,[114] the Eleventh Circuit reversed a summary judgment decision in favor of an employer because the employer's proof was not sufficient to show that sex played no part in the alleged wage differential. In that case, an auto retailer arbitration manager alleged that she was paid less than her male predecessor in that position.[115] The Eleventh Circuit emphasized an employer's "heavy burden" to establish that a factor other than sex can account for the pay differential, holding that an employer must show that sex "provided *no basis* for the wage differential."[116]

The employer tried to argue that prior salary and prior experience justified the alleged disparity. The prior manager had worked for the company longer and had a higher salary before being promoted into that position.[117] However, the Eleventh Circuit held that those arguments were undercut by the fact that

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[106] *Id. See also Terry v. Gary Cmty. Sch. Corp.*, 910 F.3d 1000, 1010 (7th Cir. 2018) (holding that a salary freeze provided an adequate justification for a pay disparity because: "there is nothing from which we may reasonably infer that there were ways to circumvent the salary freeze and that because the District did not take such measures, the District was simply choosing not to increase [plaintiff's] salary."); *Reddy v. Ala. Dep't of Educ.*, No. 2:16-CV-1844-SGC, 2018 WL 4680152 (N.D. Ala. Sept. 28, 2018) (holding that employer adequately justified pay disparity between two physicians on the basis of those physicians: (1) different levels of relevant experience; (2) different levels of clinical practice experience; (3) different medical specialty; and (4) prior salary history); *Hayes v. Deluxe Mfg. Operations LLC*, No. 1:16-CV-2056-RWS-RGV, 2018 WL 1461690 (N.D. Ga. Jan. 9, 2018) ("[Employer] has shown that the pay disparity between [plaintiff] and her male comparators was based on increases in the starting hourly wage over the years, market considerations, merit-based increases, and consideration of an applicant's experience and qualifications, and it has therefore offered factors that were not based on sex and 'are sufficient to sustain its burden to show that the salary disparity does not result from sex discrimination.'") (quoting *Schwartz v. Fla. Bd. of Regents*, 954 F.2d 620, 623 (11th Cir. 1991)).

[107] *Gonzales v. Cnty. of Taos*, No. 17-CV-582-F, 2018 WL 3647206 (D.N.M. Aug. 1, 2018).

[108] *Id.* at *14.

[109] *Id.* at *15.

[110] *Id.*

[111] *Ackerson v. Rector & Visitors of the Univ. of Va.*, No. 3:17-CV-11, 2018 WL 3209787 (W.D. Va. June 27, 2018).

[112] *Id.* at *7.

[113] *Id.* (citing and quoting *EEOC v. Md. Ins. Admin.*, 879 F.3d 114, 123 (4th Cir. 2018)) (emphasis in original).

[114] *Bowen v. Manheim Remarketing, Inc.*, 882 F.3d 1358 (11th Cir. 2018).

[115] *Id.* at 1360.

[116] *Id.* at 1362 (emphasis in original).

[117] *Id.* at 1363.

plaintiff's salary had consistently been set at the low point of the compensation range, even after she had established herself in the position and demonstrated that she was an effective arbitration manager.[118] Moreover, plaintiff had presented evidence that the employer's managers' decisions were influenced by sex bias and that they took sex into account when making personnel decisions: "affidavit testimony establishes that sex-based pay disparities were common at [employer], that the managers refused to remedy the disparities, and that the managers repeatedly exhibited an unwillingness to treat women equally in the workplace."[119]

These and other cases show that courts can be reluctant to interpret the "factor other than sex" defense in a way that provides an easy path out of litigation for employers. Although broad in terms of what it will recognize as legitimate bases to justify a pay disparity, the defense ultimately hinges on a fact and case-specific analysis that allows for few bright line rules to guide employers. That provides an advantage to plaintiffs and plaintiffs' lawyers because, when facing the cost and uncertainty of trial, many employers may choose to settle at an inflated value.

2. The Use Of Salary History As A Legitimate Factor Other Than Sex

At its core, equal pay litigation is about how employers set and adjust salary levels. In a free and competitive marketplace, starting salary must take some account of applicants' prior salary. If employers cannot meet or exceed that salary, they risk losing applicants to other employers who will. One issue that comes up frequently in equal pay litigation, therefore, is whether and to what extent an employer can justify a pay disparity by pointing to employees' prior salaries at the time they were hired. Many employers take the common sense view that they must start higher-paid applicants at a higher salary, or those applicants will not take the job. On the other hand, some courts and commentators have argued that paying employees based on past earnings only perpetuates a systemic gender pay gap that persists in the labor force. There is little debate as to whether prior history can be used *at all*; courts recognize this as a legitimate factor other than sex to justify a wage disparity. The issue that has divided the federal Courts of Appeals is whether salary history by itself is enough to justify a disparity. Several recent decisions have addressed this issue, including one from the Supreme Court.

In *Rizo v. Yovino*,[120] an employee of Fresno County alleged that the County's use of prior salary history to determine starting salaries was a violation of the federal EPA.[121] The County used a salary schedule to determine the starting salaries of management-level employees, which consisted of twelve levels, each with progressive steps within it.[122] To determine the step on which a new employee would begin, the County considered the employee's most recent prior salary and placed the employee on the step that corresponds to his or her prior salary, increased by 5%.[123] Because the plaintiff's prior salary was below the Level 1, Step 1 salary, even when increased by 5%, she was automatically started at the minimum salary level.[124] She later learned that her salary was less than her male peers and sued under the federal EPA.

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[118] *Id.*

[119] *Id.*

[120] *Rizo v. Yovino*, 854 F.3d 1161 (9th Cir. 2017), *rev'd en banc*, 2018 U.S. App. LEXIS 8882 (9th Cir. Apr. 9, 2018), *rev'd*, 139 S.Ct. 706 (2019).

[121] *Id.* at 1163.

[122] *Id.*

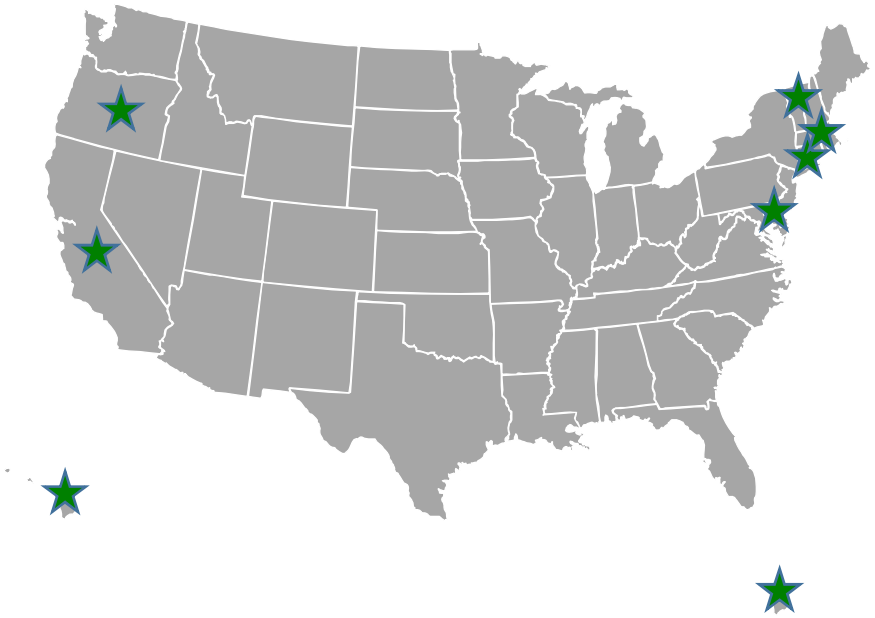
[123] *Id.*

[124] *Id.* at 1164.

State Salary History Bans

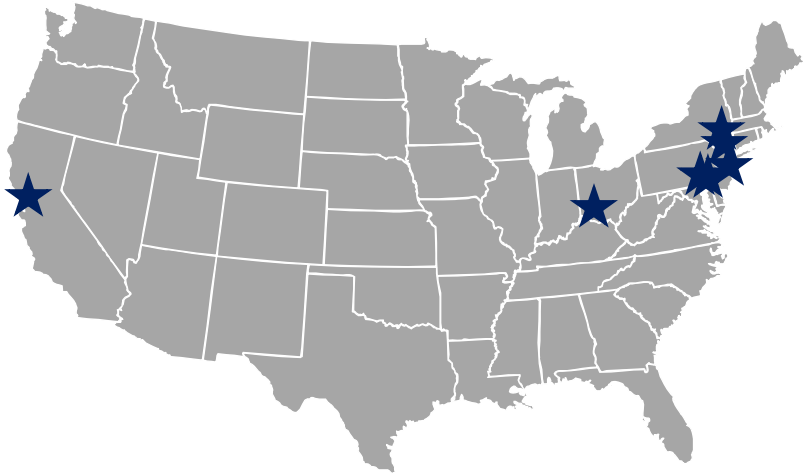
States and Territories

- California
- Connecticut
- Delaware
- Hawaii
- Massachusetts
- Oregon
- Puerto Rico
- Vermont



Cities and Counties

- Albany County, NY
- Cincinnati, OH (eff. 3/13/2020)
- New York City, NY
- San Francisco, CA
- Suffolk County, NY (eff. 6/30/2019)
- Philadelphia, PA (consideration only)
- Westchester County, NY



The District Court held that when a pay disparity was based exclusively on prior wages, it could not be based on a factor other than sex: "[A] pay structure based exclusively on prior wages is so inherently fraught with the risk – indeed, here, the virtual certainty – that it will perpetuate a discriminatory wage disparity between men and women that it cannot stand, even if motivated by a legitimate non-discriminatory business purpose."[125] The District Court recognized that its decision was potentially in conflict with prior Ninth Circuit precedent, *Kouba v. Allstate Ins. Co.*, which held that prior salary can qualify as a factor other than sex, provided that the employer shows that the prior salary effectuates some business policy and the employer uses prior salary reasonably in light of its stated purpose as well as its other practices.[126]

On April 9, 2018, the Ninth Circuit, sitting *en banc*, reversed the panel decision and overruled *Kouba*, holding that "[r]eliance on past wages simply perpetuates the past pervasive discrimination that the Equal Pay Act seeks to eradicate. Therefore, we readily reach the conclusion that past salary may not be used as a factor in initial wage setting, alone or in conjunction with less invidious factors."[127] According to the Ninth Circuit, a legitimate "factor other than sex" must be "job related," which automatically excludes the use of prior salary: "[a]t the time of the passage of the Act, an employee's prior pay would have reflected a discriminatory marketplace that valued the equal work of one sex over the other. Congress simply could not have intended to allow employers to rely on these discriminatory wages as a justification for continuing to perpetuate wage differentials."[128]

However, on February 25, 2019, the Supreme Court reversed the *en banc* decision of the Ninth Circuit because the author of that decision, the Honorable Stephen Reinhardt, had died before the decision was filed and therefore could not be counted in the *en banc* majority.[129] Without Judge Reinhardt's vote, the Ninth Circuit's decision would have been approved by only five of the ten judges on the *en banc* panel.[130] According to the Supreme Court, "it is generally understood that a judge may change his or her position up to the very moment when a decision is released," and "a case or controversy is 'determined' when it is decided."[131] Allowing Judge Reinhardt to cast a vote for a decision filed after his death would "effectively allow[] a deceased judge to exercise the judicial power of the United States after his death," a practice that would run afoul of the constitutional dictate that "federal judges are appointed for life, not for eternity."[132]

The Supreme Court's decision effectively reverses the Ninth Circuit's decision in *Rizo v. Yovino*, ameliorating to some degree the growing split among the Courts of Appeals on this issue. For example, the Seventh Circuit came to the opposite conclusion as the reversed *en banc* decision in *Rizo*. In *Lauderdale v. Illinois Department of Human Services*,[133] the Seventh Circuit held that the Illinois pay plan for state employees did not violate the EPA by basing pay increases, at least in part, on an employee's prior salary. The Department had conceded that plaintiff had established a prima facie case under the EPA because she had taken over the same responsibilities as her predecessor but was paid less.[134] She was therefore paid less for work that was equal to, if not more demanding than, the work performed by

[125] *Rizo v. Yovino*, No. 1:14-CV-9423-MJS, 2015 WL 9260587, at *9 (E.D. Cal. Dec. 18, 2015).

[126] *See Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 876-77 (9th Cir. 1982).

[127] *Rizo v. Yovino*, No. 16-15372, 2018 U.S. App. LEXIS 8882, at *37 (Apr. 9, 2018). A three-judge panel of the Ninth Circuit initially reversed, holding that its decision was controlled by *Kouba*. Because the District Court had not evaluated whether the County's use of prior salary effectuated a business policy, or whether its reasons for doing so were reasonable, the decision was vacated and remanded to the District Court for further consideration. *Rizo*, 854 F.3d at 1167. However, the Ninth Circuit then announced that it would rehear the case *en banc. Rizo v.* Yovino, 869 F.3d 1004 (9th Cir. 2017).

[128] *Id.* at *16-17.

[129] *Yovino v. Rizo*, 139 S.Ct. 706 (2019).

[130] *Id.* at 708.

[131] *Id.* at (quoting *United States v. American-Foreign S. S. Corp.*, 363 U.S. 685, 688 (1960).

[132] *Id.*

[133] *Lauderdale v. Ill. Dep't of Human Servs.*, 876 F.3d 904 (7th Cir. 2017).

[134] *Id.* at 907-08.

her male predecessor. However, the Department argued that the pay discrepancy was based on non-discriminatory bases, including the employees' prior salaries.[135]

The Seventh Circuit noted that its prior decisions had consistently held that a difference in pay based on the difference in what employees were previously paid is a legitimate factor other than sex under the EPA.[136] Relying on that precedent, the Seventh Circuit held that a pay discrepancy that was created in reliance on prior salaries is not a violation of the EPA unless sex discrimination led to the lower prior wages.[137] Given the salary history, as well as some budget concerns that also impacted the pay decision, the Court held that no reasonable juror could find that plaintiff was paid less because of her sex, and upheld the grant of summary judgment to the Department.[138] The Eighth Circuit has also followed this line of reasoning.[139]

Other Circuits have held differently. For example, in *Irby v. Bittick*,[140] a female police investigator alleged that she was paid less than the five other investigators in her division, all of whom were male.[141] The Eleventh Circuit held that "[w]hile an employer may not overcome the burden of proof on the affirmative defense of relying on 'any other factor other than sex' by resting on prior pay alone, as the district court correctly found, there is no prohibition on utilizing prior pay as part of a mixed-motive, such as prior pay and more experience."[142] Because the employer had established that it weighed the male investigators' experience when setting their incoming salary above that of the plaintiff, it upheld summary judgment in favor of the employer.[143]

In an unpublished decision, the Tenth Circuit also held that prior salary cannot stand alone as a defense to an EPA claim. In *Angove v. Williams-Sonoma, Inc.*,[144] a male retail employee alleged that he was paid at a lower rate than a female employee in the same position in violation of the EPA.[145] The employee argued that the District Court had impermissibly applied a "market factor" theory to evaluate his claim, arguing that it is impermissible to justify a wage disparity solely upon the "going market rate" for employees of a certain gender.[146] The Tenth Circuit held that this theory only arises where an employer

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[135] *Id.* at 908-09.

[136] *Id.* at 908 (citing *Wernsing v. Dep't of Human Servs.*, 427 F.3d 466, 468 (7th Cir. 2005); *Dey v. Colt Constr. & Dev't Co.*, 28 F.3d 1446 (7th Cir. 1994); *Riordan v. Kempiners*, 831 F.2d 690 (7th Cir. 1987), and *Covington v. S. Ill. Univ.*, 816 F.2d 317 (7th Cir. 1987)).

[137] *Id.* at 909.

[138] *Id.*

[139] *See Taylor v. White*, 321 F.3d 710 (8th Cir. 2003). In *Taylor*, a female civilian employee of the Army alleged that her pay at a lower pay grade than her male peers was a violation of the EPA. *Id.* at 713. The Army sought summary judgment, arguing that the pay disparity was the result of its non-statutory salary retention policy that was intended to retain skilled workers and protect workers' salaries. *Id.* at 716. The employee argued that, as a matter of law, an employer should not be allowed to rely on prior salary or a salary retention policy as a defense under the EPA because those factors would permit the perpetuation of unequal pay structures. *Id.* The Eighth Circuit examined the Circuit split and, in particular, adopted the reasoning of the Ninth and Seventh Circuits in *Kouba* and *Covington* over that of the Eleventh Circuit (discussed below). *Id.* at 718-19. The Eighth Circuit concluded: "we believe a case-by case analysis of reliance on prior salary or salary retention policies with careful attention to alleged gender-based practices preserves the business freedoms Congress intended to protect when it adopted the catch-all 'factor other than sex' affirmative defense. To conduct a reasonableness inquiry into the actions of the employer or to limit the application of a salary retention policy to only exigent circumstances would, we believe, unnecessarily narrow the meaning of the phrase 'factor other than sex.'" *Id.* at 720.

[140] *Irby v. Bittick*, 44 F.3d 949 (11th Cir. 1995).

[141] *Id.* at 952.

[142] *Id.* at 955 (citing *Glenn v. Gen. Motors Corp.*, 841 F.2d 1567, 1571 n.9 (11th Cir. 1988)).

[143] *Id.* at 957.

[144] *Angove v. Williams-Sonoma, Inc.*, 70 Fed. Appx. 500 (10th Cir. 2003).

[145] *Id.* at 502.

[146] *Id.* at 507. The employee relied on prior Eleventh Circuit and Supreme Court precedent, *Mulhall v. Advance Security, Inc.*, 19 F.3d 586, 596 n. 22 (11th Cir.1994) and *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974). In *Corning Glass Works*, the Supreme Court rejected an argument that an employer's higher wage rate for men on the night shift was permissible, holding that: "The differential arose simply because men would not work at the low rates paid women inspectors, and it reflected a job market in which [employer] could pay women less than men for the same work. That the company took advantage of such a situation may be understandable as a matter of economics, but its differential nevertheless became illegal once Congress enacted into law the principle of equal pay for equal work." 417 U.S. at 204-05.

purports to rely on the "going rate" for employees based on their gender.[147] Although setting an employee's salary based solely on what the market would pay male versus female employees would clearly violate the EPA, there was no evidence to suggest that is what happened.[148] The Tenth Circuit concluded that "where an employer sets a new employee's salary based upon that employee's previous salary and the qualifications and experience the new employee brings, the defendant has successfully invoked the Act's affirmative defense."[149] This is because "the EPA only precludes an employer from relying *solely* upon a prior salary to justify pay disparity."[150]

This issue continues to divide the District Courts as well. For example, in *Duncan v. Texas Health & Human Services Commission*,[151] two female nurses and one male nurse applied and were hired into the same nursing position but at different salary levels.[152] The employer's usual practice was to offer each applicant the minimum starting salary for the position and begin salary negotiations from there.[153] However, the male applicant was offered a higher salary initially because of his higher private sector salary.[154] The female employees argued that the male employee was paid more solely because of his gender and his prior salary.[155] The employer attempted to justify the salary disparity by arguing that the male employee possessed particularly valuable work experience and because it was trying to match his private sector salary.[156] The Court rejected that argument, holding that "a reasonable factfinder could reject [employer's] position that the salary disparity was the result of a factor other than sex and find [employer] discriminatorily applied its negotiation policy by allowing [plaintiff] greater latitude to negotiate."[157] The Court noted that "it is an open question in the Fifth Circuit whether negotiation even qualifies as a 'factor other than sex,'" noting that "several circuits have found that employers may not seek refuge under the 'factor other than sex' exception where the defendant's sole justification for a pay disparity is an applicant's prior pay."[158]

In *Grigsby v. AKAL Security, Inc.*,[159] on the other hand, the District Court for the Western District of Missouri held salary negotiations, without more, established an employer's affirmative defense. There, a privately-contracted airport security screener alleged, among other things, two claims under the federal EPA. The employer did not dispute her prima facie case, but argued that the wage disparity could be explained by the fact that her and her comparators' salaries were set through salary negotiations.[160] That alone was enough to establish the "factor other than sex" defense: "there are no facts which would allow a fact finder to find that [employer's] decision to pay [plaintiff] more than [comparator] in the Director of Airport Operations position was based on gender because his salary was set through negotiations and he was the best available person for the job, necessitating a higher pay."[161]

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[147] *Angove*, 70 Fed. Appx. at 508.

[148] *Id.*

[149] *Id.*

[150] *Id.* (emphasis in original). The Sixth Circuit has also adopted the reasoning of the Eleventh and Tenth Circuits. *See Perkins v. Rock-Tenn Servs., Inc.*, 700 Fed. Appx. 452, (6th Cir. 2017); *Balmer v. HCA, Inc*., 423 F.3d 606, 612 (6th Cir. 2005), *abrogated on other grounds by Fox v. Vice*, 563 U.S. 826 (2011).

[151] *Duncan v. Tex. Health & Human Servs. Comm'n*, No. 17-CV-23-SS, 2018 WL 1833001 (W.D. Tex. Apr. 17, 2018).

[152] *Id.* at *1.

[153] *Id.*

[154] *Id.* at *2.

[155] *Id.* at *3.

[156] *Id.*

[157] *Id*. at *4.

[158] *Id.* at *4 n.3 (citing *Rizo v. Yovino*, 887 F.3d 453 (9th Cir. 2018), *rev'd*, 139 S.Ct. 707 (2019)).

[159] *Grigsby v. AKAL Security, Inc.*, No. 5:17-CV-6048-DGK, 2018 WL 3078769 (W.D. Mo. June 21, 2018).

[160] *Id.* at *7.

[161] *Id.*

In *Stice v. City of Tulsa*,[162] a city employee alleged that she was paid a lower salary than males in her department despite performing higher quality work.[163] The city explained the differences in pay as resulting from tenure, experience, and education level, among other things.[164] However, the company's HR department then conducted a salary review of plaintiff's department, which determined that plaintiff's salary was significantly below other employees within her job position.[165] Plaintiff's salary was increased as a result, but not to the level of other male colleagues. The city justified the pay disparity by arguing that plaintiff's comparators were started with higher starting salaries, and that its system of percentage-based salary increases provides a non-discriminatory explanation for the differences in pay.[166]

Plaintiff argued (citing *Rizo v. Young*) that "courts have rejected reliance on higher starting salaries as a 'job related' factor that can be used to explain differences in pay between male and female employees."[167] However, the Court held that neither *Rizo*, nor the Tenth Circuit has held that the use of prior salary history can never be a consideration to justify a pay disparity, just that it cannot be the *only* consideration.[168] The city claimed that it had based starting salaries on other factors, such as education and experience.[169] After reviewing the relative levels of education and experience between plaintiff and her comparators, the Court rejected this defense, holding that although the city had "offered a gender neutral explanation for [comparator's] salary that is over $12,000 greater than plaintiff's, and a reasonable factfinder 'could' credit this explanation," that explanation was "not so convincing that any rational jury would find in favor of defendant on plaintiff's EPA claim."[170]

Finally, in *Thomas v. Gray Transportation, Inc.*,[171] a female dispatcher and broker for a trucking company alleged that she was paid less than another dispatcher who was male. The Court entered judgment in favor of her employer, however, after the company established that the male dispatcher had worked for the company as a driver manager and had kept his previous salary when he became a dispatcher.[172] According to the Court, the comparator's "prior work (and salary) for [employer] establish that his higher salary was based on a factor other than sex."[173]

3. Other Affirmative Defenses

A "factor other than sex" is the most commonly asserted defense in equal pay litigation across the country. The other defenses are available, however, and can be just as successful at stemming equal pay litigation before trial. If employers choose to rely on a seniority or a merit system, or a system that bases pay on the quantity or quality of output, they must be careful that those systems are well documented and communicated to employees. A system that appears ad hoc or that is inconsistently applied risks being met with skepticism by a court.

For example, in *Brunarski v. Miami University*,[174] the District Court for the Southern District of Ohio held that a merit system that used vague criteria that were inconsistently applied could not justify a wage

[162] *Stice v. City of Tulsa*, No. 17-CV-261-CVE-FHM, 2018 WL 3318894 (N.D. Okla. July 5, 2018).
[163] *Id.* at *1-2.
[164] *Id.* at *2.
[165] *Id.*
[166] *Id*. at *4.
[167] *Id.*
[168] *Id.* (citing and quoting *Angove v. Williams–Sonoma, Inc.*, 70 F. App'x 500, 508 (10th Cir. July 8, 2003)).
[169] *Id.* at *5.
[170] *Id.*
[171] *Thomas v. Gray Transp., Inc.*, No. 17-CV-2052-KEM, 2018 WL 6531661 (N.D. Iowa Dec. 12, 2018).
[172] *Id.* at *7.
[173] *Id. See also Ouzts v. Leebos Stores, Inc.*, No. 1:16-CV-277, 2018 WL 4495217, at *3 (W.D. La. Sept. 19, 2018) ("[I]t is undisputed that in order to recruit [comparator], [employer] agreed to pay [comparator] the same salary and vacation he had been earning at Coca-Cola. [Comparator's] significant prior experience and demand that his Coca-Cola compensation package be matched are legitimate, non-discriminatory factors that fall within the catch-all exception.").
[174] *Brunarski v. Miami Univ.*, No. 1:16-CV-311, 2018 WL 618458 (S.D. Ohio Jan. 26, 2018).

disparity. In that case, two female university professors alleged that they were paid less than comparable men. Among other things, the university attempted to justify the pay disparity as the result of a merit-based system.[175] It argued that plaintiffs' comparators received larger merit raises because of their involvement in study abroad programs and because of exceptional performance.[176] The Court held that the university had failed to establish this affirmative defense. Among other things, the Court found that the standards for awarding so-called "super-merit" raises were vague and contradictory.[177] There was no evidence to show that the factors cited by the university had been used previously to award super-merit raises or any other type of raise.[178] Moreover, the Court found that the university's application of the factors ostensibly used to justify the super-merit raises were not "commensurate with satisfaction" of those factors.[179] The Court found a number of inconsistencies in terms of how those factors were supposed to affect the award of raises, versus how they were actually applied.[180]

Finally, the Court analyzed whether the university had a legitimate business reason for relying on the factors it applied to determine super-merit raises. Although the university had articulated a legitimate reason for those factors, "the same could be said for almost any individual factor it chose to now focus on that somehow relates to teaching, research, or service."[181] Given the lack of evidence that the university's factors had ever been communicated to professors prior to their use, and that they deviated from the standard factors used for other raises, the Court held that the university "must show that there was an actual legitimate business purpose of Miami or the FSB for its focus on these factors to the exclusion of other factors typically considered when awarding a merit raise under the standard factors."[182] Having failed to do so, the Court concluded that the university had failed to demonstrate the existence of a bona fide merit system.

Proper and consistent documentation of how and why a merit-based system is applied often goes a long way toward helping an employer establish that defense. For example, in *Summy-Long v. Pennsylvania State University*,[183] the Third Circuit affirmed dismissal of a female physician's wage claim because, among other things, numerous items in the record "reflected a lack of academic performance in comparison to her colleagues."[184] Among other things, she had been urged to increase publications and to obtain external funding to support her research. She also "failed to apply to renew her National Institute of Health grant even after being reminded repeatedly for three years by her superior."[185] The Court held that this evidence established that "[t]he difference in [her] salary compared to her male coworkers resulted from, among other things, her lack of publications and failure to obtain external funding."[186]

4. Pretext

Even if an employer succeeds in establishing one of the enumerated affirmative defenses, a plaintiff may still succeed on an equal pay claim if he or she can show that the proffered reason for the wage disparity is merely a pretext for discrimination. Inconsistent application of work policies, as well as shifting and inconsistent testimony regarding the proffered justifications, are red flags that can lead to a finding of pretext.

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[175] *Id.* at *10.
[176] *Id.*
[177] *Id.* at *11.
[178] *Id.*
[179] *Id.*
[180] *Id.*
[181] *Id.* at *12.
[182] *Id.*
[183] *Summy-Long v. Pa. State Univ.*, No. 17-1206, 2017 WL 5125627 (3d Cir. Nov. 6, 2017).
[184] *Id.*
[185] *Id.*
[186] *Id.*

For example, in *Fortenberry v. Gemstone Foods, LLC*,[187] the District Court for the Northern District of Alabama allowed an equal pay lawsuit to proceed to trial even though the employer had presented an apparently legitimate basis for the difference in pay. In that case, a purchasing manager argued that she was discriminated against on account of her gender because she was not paid for weekend work, while her male counterparts were.[188] The company argued that only "production managers" were paid weekend pay and that plaintiff's role as a purchasing manager was not "pertinent to the plant's production needs."[189] However, this reason had never been discussed with plaintiff before it was applied, and when she did discuss it with the company, she had been given several different reasons for why she did not receive weekend pay.[190] Moreover, she presented evidence to show that the company applied its policy inconsistently, pointing to, among other things, a maintenance manager who did receive weekend pay and whose role was not essential to production.[191] The Court held that plaintiff had established a colorable basis for a jury to conclude that the policy was pretext for gender discrimination: "a reasonable jury could find that [employer's] inconsistent application of its weekend pay policy and its shifting reasons for why it did not pay [plaintiff] for weekend work show that [employer's] policy is pretext for a gender-based reason for the pay differential."[192]

In *Hornsby-Culpepper v. Ware*,[193] on the other hand, the Eleventh Circuit clarified that the pretext analysis hinges on evidence regarding the employer's state of mind, and is not merely a dispute over the legitimacy of the employer's proffered justifications. In that case, a County Clerk complained about wage discrimination when she was hired at a lower salary than her predecessor in that position, and when her request for a higher salary was denied.[194] The employer provided three non-discriminatory reasons for the lower salary, which involved budgetary constraints and the fact that plaintiff had previously been terminated from that position.[195] Although plaintiff disputed the proffered reasons, the Court found that she had "failed to point to any affirmative evidence establishing that his proffered reasons were false or a pretext for unlawful sex discrimination."[196] The Court held that the touchstone of the pretext inquiry centers on the employer's beliefs, not the employee's beliefs; "a plaintiff is not allowed to merely recast an employer's proffered nondiscriminatory reasons or substitute her business judgment for that of the employer."[197]

D. Other Important Substantive Decisions Impacting Pay Equity Litigation

1. Retaliation Claims: Establishing The Causal Link

Because the federal EPA is incorporated into the FLSA, it includes the anti-retaliation provisions of that statute. Section 15(a)(3) of the FLSA states that it is a violation for any person to "discharge or in any other manner discriminate against any employee because such employee has" engaged in protected

[187] *Fortenberry v. Gemstone Foods, LLC*, No. 5:17-CV-1608-AKK, 2018 WL 6095196 (N.D. Ala. Nov. 21, 2018).

[188] *Id.* at *1.

[189] *Id.* at *4.

[190] *Id.*

[191] *Id.*

[192] *Id.*

[193] *Hornsby-Culpepper v. Ware*, 906 F.3d 1302 (11th Cir. 2018).

[194] *Id.* at 1307.

[195] *Id.* at 1312-13.

[196] *Id.* at 1314.

[197] *Id*. at 1313 (quoting *Alvarez v. Royal Atlantic Developers, Inc.*, 610 F.3d 1253, 1265 (11th Cir. 2010)). *See also Hall v. Ala. State Univ.*, No. 2:16-CV-593-GMB, 2019 WL 137593, at *11 (M.D. Ala. Jan. 8, 2019) ("Merely questioning the wisdom of a reason is not sufficient as long as the reason is one that might motivate a reasonable employer. . . . Hall's arguments question whether ASU should have relied on [comparator's] experience and success but do not undermine ASU's reliance on those factors. . . . This court cannot conclude, therefore, that a sufficient question of fact as to pretext exists.").

conduct, such as filing a complaint of wage discrimination.[198] Establishing a causal link between a plaintiff's protected activity and the adverse employment action suffered as a result is often the most difficult burden for a plaintiff to overcome to establish liability on a retaliation claim. Timing is often critical to that analysis.

For example, in *Yearns v. Koss Construction Co.*,[199] the District Court for the Western District of Missouri held that the length of time between the alleged protected activity and adverse employment action showed that the two were not causally connected. In that case, a general laborer and traffic controller for a construction company complained that she was terminated after she complained about, among other things, unequal pay at her workplace.[200] The Court found that plaintiff had suffered an adverse employment action, but had failed to establish that she had engaged in a protected activity or to establish a causal connection between her alleged protected conduct and the adverse employment action.

First, the Court noted that plaintiff's complaint had been about hours missing from her paycheck and therefore "concerned inaccurate reporting of her work hours, and did not include any references to gender pay disparities or retaliation."[201] But even if she had engaged in protected activity, she had failed to establish a causal link between that and her subsequent layoff. Among other things, plaintiff pointed to the fact that a male employee was assigned to replace her immediately after her layoff, even though the company had claimed the layoff was the result of a "winding down" at plaintiff's worksite.[202] But the Court rejected this argument, noting that her complaint came two months before her layoff.[203] According to the Court, "[e]ven assuming the June 2015 Complaint occurred on the last day of June, over eight weeks passed until her August layoff. This lengthy time period weakens any potential causal link."[204]

The Fourth Circuit came to a similar conclusion in *Coleman v. Schneider Electric USA*.[205] In that case, the Fourth Circuit upheld the lower court's dismissal of plaintiff's retaliation claim, holding that she had failed to establish a causal connection between her alleged protected conduct – filing an EEOC charge – and the subsequent adverse employment action. Holding that "the relevant date is when the decisionmakers learned of [plaintiff's] protected activity," the Court noted that the adverse action happened more than one year after they learned about the EEOC charge.[206] Moreover, plaintiff had been unable to point to any other evidence of retaliatory animus. The Court noted that she had been given an above-average performance review after her EEOC charge, which "undercut[] any inference that [plaintiff's supervisor] acted with retaliatory animus when he issued the disputed performance evaluation."[207]

On the other hand, when an adverse action follows closely after a plaintiff's protected activity, this can be powerful evidence to establish a causal link between the two. For example, in *Donathan v. Oakley Grain, Inc.*,[208] a female employee alleged that her employer terminated her in retaliation for complaining that she

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[198] 29 U.S.C. § 215(a)(3). Under the FLSA, an employee has engaged in protected conduct if he or she has "filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee." *Id.* What counts as "filing a complaint" is often a contentious issue. For example, in *Burke v. State of New Mexico*, 696 Fed. Appx. 325 (10th Cir. 2017), the Tenth Circuit affirmed the District Court's dismissal of, among other things, a retaliation claim brought pursuant to New Mexico's Fair Pay for Women Act because the plaintiff failed to allege that she had engaged in any protected conduct. Analyzing the statute under the rubric of the federal EPA, the Tenth Circuit held that although plaintiff had alleged that she had questioned her superiors about an alleged pay disparity, she had failed to allege that this "questioning" rose to the level of actual objection or opposition to the alleged pay disparity. *Id.* at *2.

[199] *Yearns v. Koss Constr. Co.*, No. 17-CV-4201-C-WJE, 2019 WL 191656 (W.D. Mo. Jan. 14, 2019).

[200] *Id.* at *1.

[201] *Id.* at *3.

[202] *Id.* at *4.

[203] *Id.* at *5.

[204] *Id.*

[205] *Coleman v. Schneider Electric USA*, No. 18-1265, 2019 WL 141073 (4th Cir. Jan. 9, 2019).

[206] *Id.* at *2.

[207] *Id.*

[208] *Donathan v. Oakley Grain, Inc.*, 861 F.3d 735 (8th Cir. 2017).

had not received bonuses in line with other employees in similar positions, and that new employees she was required to train were starting at higher rates of pay.[209] She put her complaints in an email to the president of the company. Ten minutes later, the president forwarded her email to plaintiff's manager. They then discussed her complaint by phone, at which time the manager informed the president that he was going to lay off people from the facility where the plaintiff worked.[210] Plaintiff was laid off approximately eight days later.[211] The Eighth Circuit held that the female employee had established a prima facie case: "[plaintiff] was terminated from her office position even though [employer] had not included the office position in its seasonal layoffs any of the prior three years that [plaintiff] had worked for the company (or during the years when [plaintiff's] predecessor held the post). Plaintiff's termination occurred despite the absence of negative reviews, and [employer] hired [replacement] to fill the position the very next working day."[212]

2. Arbitration Agreements

Law firms have been the subject of some of the most high-profile equal pay lawsuits over the past few years. Those cases have been filed by partners of the firm, some of whom signed partnership agreements with arbitration provisions. Their claims therefore raise a number of legal issues concerning the employment status of partners and the enforceability of arbitration provisions in the context of a legal partnership.

This issue was addressed directly by a California court in 2018. In *Ramos v. Superior Court*,[213] an Income Partner at a law firm alleged various causes of action under state law for discrimination, retaliation, wrongful termination, and anti-fair-pay practices.[214] The law firm sought to compel arbitration pursuant to an arbitration provision in the partnership agreement.[215] The Court of Appeals reversed the order of the trial court compelling arbitration, holding that the arbitration agreement is unconscionable.[216]

Under prior California precedent, *Armendariz v. Foundation Health Psychare Services, Inc.*,[217] the California Supreme Court had held that mandatory employment agreements that require employees to waive their rights to bring statutory discrimination claims under the Fair Employment and Housing Act and related claims for wrongful termination in violation of public policy are unlawful.[218] Although the law firm argued that *Armendariz* should not apply because an "Income Partner" should not be considered an "employee," the Court held that it need not address that issue because it found that the law firm was in a superior bargaining position vis-à-vis its Income Partners, akin to that of an employment relationship.[219]

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[209] *Id.* at *737*.

[210] *Id.*

[211] *Id.*

[212] *Id.* at 740-41.

[213] *Ramos v. Super. Ct.*, 239 Cal Rptr. 3d 679 (Cal. Ct. App. 2018).

[214] *Id.* at 685.

[215] *Id.*

[216] *Id.*

[217] *Armendariz v. Found. Health Psychare Servs., Inc.*, 99 Cal. Rptr. 2d 745 (Cal. 2000).

[218] *Ramos*, 239 Cal Rptr. 3d at 692.

[219] *Id.* at 693. Whether non-equity law partners can be considered "employees under the federal EPA has been the subject of other recent equal pay litigation. For example, in *Campbell v. Chadbourne & Parke LLP*, No. 16-CV-6832 (JPO), 2017 WL 2589389 (S.D.N.Y. June 14, 2017), a female partner claimed that she was paid less than her male peers. *Id.* at *1. The law firm defendant tried to dispense with the claims quickly – before substantial discovery had taken place – by arguing that the term "partner" and the terms of the operative partnership agreement foreclosed the possibility that female partners could be considered employees under the EPA. *Id.* at *2. The Court denied summary judgment on the grounds that additional discovery was necessary to determine "employment" status under the factors set forth in *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440 (2003). Those factors are: (1) whether the organization can hire or fire the individual or set the rules and regulations of the individual's work; (2) whether and, if so, to what extent the organization supervises the individual's work; (3) whether the individual reports to someone higher in the organization; (4) whether and, if so, to what extent the individual is able to influence the organization; (5) whether the parties intended that the individual be an employee, as expressed in written agreements or contracts; and (6) whether the individual shares in the profits, losses, and liabilities of the organization. *Campbell*, 2017 WL 2589389, at *2 (citing and quoting *Clackamas Gastroenterology Assocs., P.C.*, 538 U.S. at 449-50). Plaintiffs argued that additional discovery would show that the law firm's

Among other things, the Court found that Income Partners can be expelled from the partnership "for any reason," and that the plaintiff had no opportunity to negotiate the arbitration provision because the partnership agreement had been adopted by the capital partners before she joined the firm.[220]

Turning to the arbitration provision itself, the Court held that the provision's limitation of remedies would prevent plaintiff from obtaining some of the remedies available to her under her statutory claims, including the right to backpay, front pay, reinstatement, or punitive damages under California's Fair Pay Act.[221] The arbitration provision stated that the arbitrators would have no authority to substitute their judgment or override determinations of the firm's partnership or Executive Committee.[222] The Court held that this would constrain the relief the arbitration could provide and would prevent the arbitrators from providing remedies that would otherwise be available in a court of law.[223] In addition, the Court held that the provisions that required plaintiff to pay half the costs of arbitration and her own attorneys' fees, and the confidentiality provision, rendered the agreement unconscionable and therefore void under California law.[224]

A similarly broad class and collective action was recently alleged against a law firm (an employment law firm, of all things), which also implicated the potential applicability of an arbitration provision. In *Knepper v. Ogletree, Deakins, Nash, Smoak & Stewart, P.C.*,[225] a non-equity shareholder of the firm alleged that "Ogletree's female shareholders face discrimination in pay, promotions, and other unequal opportunities in the terms and conditions of their employment."[226] The complaint alleges both a collective action under the EPA and a state class action under the California Fair Pay Act (among other things). On January 1, 2019, the District Court for the Northern District of California held that an arbitration agreement at least facially applied to plaintiff and therefore transferred her case to the Central District of California, which has jurisdiction to determine the arbitrability of her claims pursuant to the relevant arbitration agreement.[227] Whether her claims survive as a class or collective action, or whether she is compelled into arbitration, will be an interesting issue to watch in 2019.

hiring, firing, and promotion decisions, as well as decisions concerning any individual partner's degree of control, autonomy, and access to profits are determined exclusively by the firm's Management Committee. *Id.* at *3. Given the fact-sensitive nature of the factors used to determine employment status, the Court denied the law firm's motion for summary judgment until additional discovery could be taken relating to those factors. The lawsuit later settled.

[220] *Id.* at 694.

[221] *Id.* at 696-97.

[222] *Id.* at 696.

[223] *Id.*

[224] *Id.* at 704.

[225] Compl., *Knepper v. Ogletree, Deakins, Nash, Smoak & Stewart, P.C.*, No. 3:2018-CV-00304 (N.D. Cal. Jan. 12, 2018), ECF No. 1.

[226] *Id.* ¶ 3.

[227] *Knepper v. Ogletree, Deakins, Nash, Smoak & Stewart, P.C.*, No. 18-CV-304-WHO, 2019 WL 144585 (N.D. Cal. Jan. 9, 2019).

DEVELOPMENTS IN EEOC ENFORCEMENT OF EQUAL PAY ACT CLAIMS

A. EEO-1 Reporting Requirements

Arguably, the most significant step the EEOC has taken in the last few years relating to its enforcement of the federal EPA is the changes that it tried to make to employers' EEO-1 reporting obligations. The EEO-1 Report is a survey document that has been mandated for more than 50 years. Employers with more than 100 employees, and federal contractors or subcontractors with more than 50 employees, are required to collect and provide to the EEOC demographic information (gender, race, and ethnicity) in each of ten job categories (Executive & Senior-Level Officials and Managers, First/Mid-Level Officials & Managers, Professionals, Technicians, Sales Workers, Administrative Support Workers, Craft Workers, Operatives, Laborers and Helpers, and Service Workers).[228] On February 1, 2016, the EEOC proposed changes to the EEO-1 report, which would have required more detailed reporting obligations; specifically, data on employees' W-2 earnings and hours worked.[229]

The EEOC's proposed changes came under fierce opposition by pro-business groups. The U.S. Chamber of Commerce in February 2017 asked the Office of Management and Budget ("OMB") to rescind its 2016 approval of the EEOC's plan.[230] The Equal Employment Advisory Council, a Washington, DC-based association of large employers, followed suit a month later and submitted a letter seeking the OMB's reconsideration.[231] Three weeks later, Senators Lamar Alexander (R-Tennessee) and Pat Roberts (R-Kansas) wrote another letter to the OMB urging it to rescind the new requirements.[232] In their letter, the Senators called the revisions to the EEO-1 report "misguided" and said that "[t]hese revision will place significant paperwork, reporting burden and new costs on American businesses, and will result in fewer jobs and higher prices for American consumers."[233] The letter also reiterated concerns regarding the costs associated with compliance. The EEOC projected compliance costs to be $53.5 million and estimated it would take employers approximately 1.9 million hours to complete the report.[234] Citing the U.S. Chamber of Commerce's estimates, the Senators projected costs to be far higher – $400.8 million – and estimated that it would cost employers and federal contractors $1.3 billion annually.[235]

On August 29, 2017, the EEOC announced that the OMB, per its authority under the Paperwork Reduction Act, had immediately stayed the EEOC's pay data collection components of the EEO-1 Report that was to become effective on March 31, 2018.[236] The next day, Acting Chair of the EEOC, Victoria Lipnic, issued a statement advising employers that the EEO-1 Report used in previous years should be submitted by the March 31, 2018 deadline.[237] Commissioner Lipnic further stated: "The EEOC remains committed to strong

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[228] *See* Current EEO-1 Report, *available at* https://www.eeoc.gov/employers/eeo1survey/upload/eeo1-2.pdf.

[229] *See* Equal Employment Opportunity Commission, *Agency Information Collection Activities: Revision of the Employer Information Report (EEO-1) and Comment Request*, *available at* https://www.gpo.gov/fdsys/pkg/FR-2016-02-01/pdf/2016-01544.pdf.

[230] *See* U.S. Chamber of Commerce, *Request for Review; EEOC's Revision of the Employer Information Report*, *available at* http://src.bna.com/mFi.

[231] *See* Equal Employment Advisory Counsel, *Review of the Equal Employment Opportunity Commission's Employer Information (EEO-1) Report (OMB Control Number 3046-0007)*, *available at* http://src.bna.com/nUp.

[232] *See* Letter from Lamar Alexander, Chairman of Committee on Health, Education, Labor and Pensions, & Pat Roberts, United States Senator, *available at* http://src.bna.com/nTJ.

[233] *Id.*

[234] *Id.*

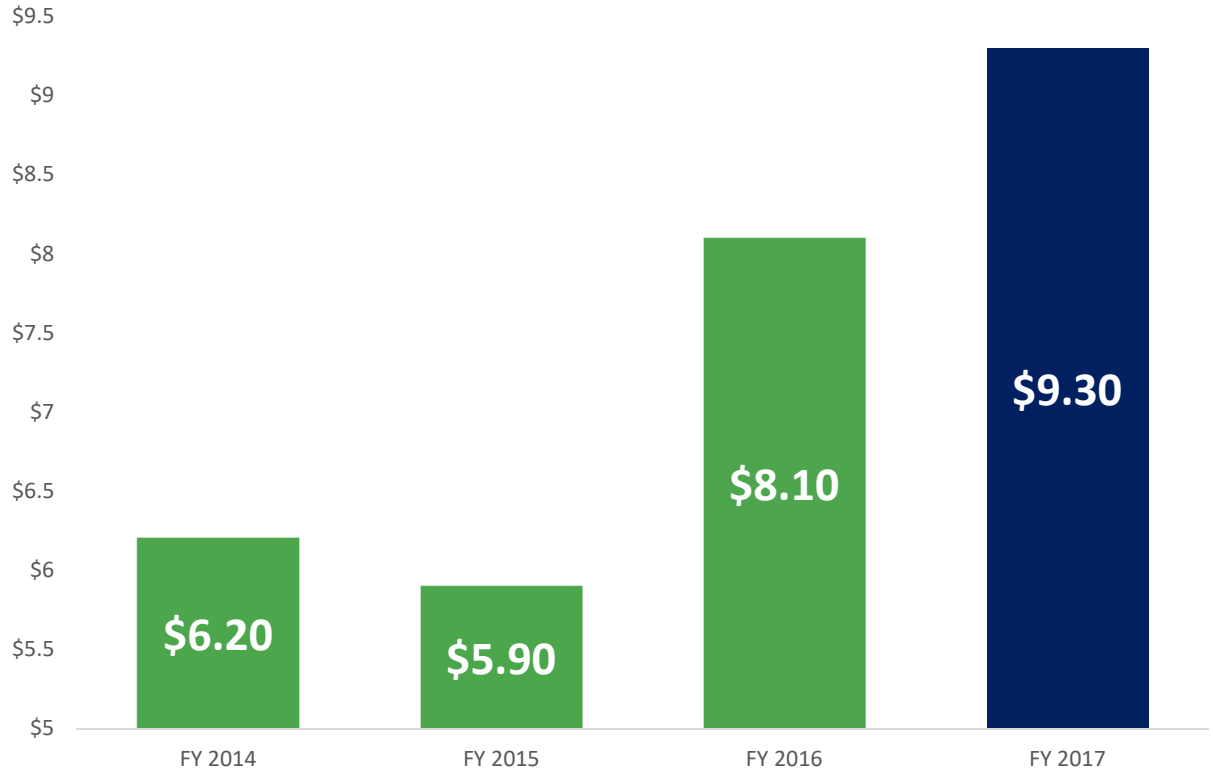
[235] *Id.*

[236] *See* Annette Tyman, Lawrence Z. Lorber, Michael L. Childers, *Breaking News: Revised EEO-1 "Component 2" Stayed Effective Immediately; Component 1 Still in Effect*, SEYFARTH SHAW CLIENT ALERTS (Aug. 29, 2017), http://www.seyfarth.com/publications/OMM082917-LE2.

[237] *Id.*

EEOC Enforcement Of The Equal Pay Act

Settlements of EPA Charges FY 2014 - 2017 (in millions)



"We don't just decry pay discrimination, we combat it over and over…. I remain committed to the EEOC's push for equal pay and have worked to ensure that our agency remains a leader in this area." – Victoria Lipnic, Acting Chair

enforcement of our federal equal pay laws, a position I have long advocated. Today's decision will not alter EEOC's enforcement efforts . . . . Going forward, we at the EEOC will review the order and our options. I do hope that this decision will prompt a discussion of other more effective solutions to encourage employers to review their compensation practices to ensure equal pay and close the wage gap."[238]

Then, on March 4, 2019, in *National Women's Law Center v. Office of Management and Budget*,[239] the District Court for the District of Columbia held that the OMB's stay of the EEOC's revised EEO-1 collection regulations was unlawful. The OMB had justified its stay based on the fact that the data file specifications that employers were to use in submitting EEO-1 data were not contained in the Federal Register notices.[240] According to the OMB, this meant that the public was not given an opportunity to provide comment on the method by which employers were to submit data to the EEOC, and that the EEOC's burden estimates did not account for the use of those data specifications.[241]

The Court dismantled both arguments, holding that the data file specifications merely explained how to format a spreadsheet, they did not change the content of the information collected: "[t]he government's argument therefore focuses on a technicality that did not affect the employers submitting the data."[242] With respect to the EEOC's burden estimates, the Court noted that the OMB had not found that the data file would change the EEOC's initial estimates, just that it *may* do so, an assertion the Court said was "unsupported by any analysis."[243] Ultimately, the Court concluded that the OMB's stay was "arbitrary and capricious" because it "totally lacked the reasoned explanation that the APA requires."[244] The Court vacated the stay effective immediately.

The 2018 EEO-1 reporting period opened on March 18, 2019. The deadline for employers to submit reports is May 31, 2019. Because the Court's order vacated the OMB's stay of the revised EEO-1 reporting obligations, those obligations are in effect. However, when the EEOC opened the 2018 Survey for employer reporting, the EEOC website stated that it was open to receive the data that was required under the old regulations. With respect to the new reporting obligations, the EEOC stated that it is "working diligently on next steps," and would "provide further information as soon as possible."[245] Plaintiffs immediately requested a status hearing with the Court to hear from the OMB and the EEOC regarding their plan to implement the Court's order with respect to the new reporting obligations.[246] The hearing was held the next day, on March 19, 2019.[247] The OMB and EEOC were ordered to submit a filing to the Court by April 3, 2019 that addresses whether and how they plan to comply with the Court's order and proceed with the collection of pay data as part of the new EEO-1 reporting obligations.[248] As of the time of this writing, the OMB and EEOC have not submitted that filing to the Court. Plaintiffs have been given until April 8, 2019 to respond to their submission. Employers should therefore look for a decision from the Court on or after April 8, 2019 that may explain how they should proceed.

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[238] *See* EEOC, *What You Should Know: Statement of Acting Chair Victoria A. Lipnic about OMB Decision on EEO-1 Pay Data Collection*, https://www.eeoc.gov/eeoc/newsroom/wysk/eeo1-pay-data.cfm.

[239] *Nat'l Women's Law Ctr. v. Office of Mgmt. & Budget*, No. 17-CV-2458 (TSC), 2019 WL 1025867 (D.D.C. Mar. 4, 2019).

[240] *Id.* at *15.

[241] *Id.*

[242] *Id.*

[243] *Id.* at *16.

[244] *Id.* at *17.

[245] *See* Pls.' Req. Status Conference at 2-3, *Nat'l Women's Law Ctr.*, No. 17-CV-2458 (D.D.C. Mar. 18, 2019), ECF No. 47.

[246] *Id.* at 1.

[247] Minute Entry, *Nat'l Women's Law Ctr.*, No. 17-CV-2458 (D.D.C. Mar. 19, 2019).

[248] *Id.*

B. Case Law Developments

The EEOC has had mixed success litigating pay equity issues in court. For example, in *EEOC v. Maryland Insurance Administration*,[249] the EEOC filed a complaint on behalf of three female fraud investigators who claimed they were paid less than their male counterparts in violation of the EPA. The District Court found that the males were not only hired at higher grades than their female counterparts, but also that the males had more experience working in the State, either in law enforcement or within the Administration itself.[250] The District Court concluded that "as to all of the comparable male employees to which the EEOC points, reasons other than gender justified the pay disparity between them."[251] Moreover, the Court found that the EEOC did not use proper comparator evidence because it did not work in the same unit as the females who were allegedly underpaid. These employees worked as enforcement officers, not fraud investigators.[252] The Court additionally found these comparators inappropriate based on their hiring level and previous experience, both of which were distinguishable from the female fraud investigators.[253]

The Fourth Circuit reversed, holding that the EEOC had established a prima facie violation of the EPA, and that there was a genuine issue of material fact as to whether the employer had offered sufficient evidence to rebut that prima facie case.[254] According to the Fourth Circuit, the facts about the male comparators' professional experience and designations are relevant to the employer's affirmative defense and should not have been considered by the District Court when analyzing the EEOC's prima facie case.[255] Moreover, once a plaintiff has established a prima facie case, the burden on an employer to prevail at the summary judgment stage is a heavy one: "[B]ecause the employer in an EPA action bears the burden of ultimate persuasion, once the plaintiff has established a prima facie case the employer will not prevail at the summary judgment stage unless the employer proves its affirmative defense so convincingly that a rational jury could not have reached a contrary conclusion."[256] Because the employer's evidence did not meet this burden, the District Court erred when it granted summary judgment.[257]

However, in *EEOC v. VF Jeanswear, LP*,[258] the District Court for the District of Arizona denied the EEOC's attempt to enforce an administrative subpoena that sought personal information identifying all supervisors, managers, and executive employees at the company nationwide, including various details about their positions, their employment and termination dates, and the facilities where they worked.[259] This decision is notable because of the substantial deference that courts usually show to the EEOC's administrative subpoena enforcement powers. The EEOC often relies on such legal authority to force employers to hand over nationwide information – even when it is investigating a single charge of discrimination – which it then uses to support a more expansive pattern or practice claim.

In *VF Jeanswear, LP*, the EEOC was investigating a single charge of gender-based pay and promotion discrimination.[260] The EEOC argued that the company-wide information would provide relevant context and comparative data regarding those who have been hired or promoted, and that information regarding

[249] *EEOC v. Md. Ins. Admin.*, 879 F.3d 114 (4th Cir. 2018).

[250] *EEOC v. Md. Ins. Admin.*, No. JFM-15-CV-1091, 2016 WL 6069488, at *1 (D. Md. Oct. 14, 2016).

[251] *Id.* at *1.

[252] *Id.* at *1-2.

[253] *Id.* at *1; *see also* Gerald L. Maatman, Jr. and Michael L. DeMarino, *Court Rejects EEOC's EPA Lawsuit Theory*, WORKPLACE CLASS ACTION BLOG (Oct. 23, 2016), http://www.workplaceclassaction.com/2016/10/court-rejects-eeocs-epa-lawsuit-theory/.

[254] *Md. Ins. Admin.*, 879 F.3d at 116.

[255] *Id.* at 122.

[256] *Id.* at 121.

[257] *Id.* at 123-24.

[258] *EEOC v. VF Jeanswear, LP*, No. MC-16-CV-47-PHX-NVW, 2017 WL 2861182 (D. Ariz. July 5, 2017).

[259] *Id. at* *2.

[260] *Id. at* *1.

the reasons for employees' terminations could be related to the lack of promotion opportunities.[261] This was a bridge too far for the Court, which held that the "crux" of the inquiry was "whether [the Charging Party's] charge of demotion is enough for a companywide and nationwide subpoena for discriminatory promotion, a discriminatory practice not affecting the charging party."[262] Ultimately, the Court concluded that "even under a generous reading of relevance, the nationwide, companywide search for systemic discrimination in promotions to top positions is too removed from [the Charging Party's] charge of one-off demotion from a sales job to be relevant in a practical sense."[263]

[261] *Id. at* *6.

[262] *Id.*

[263] *Id.*

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