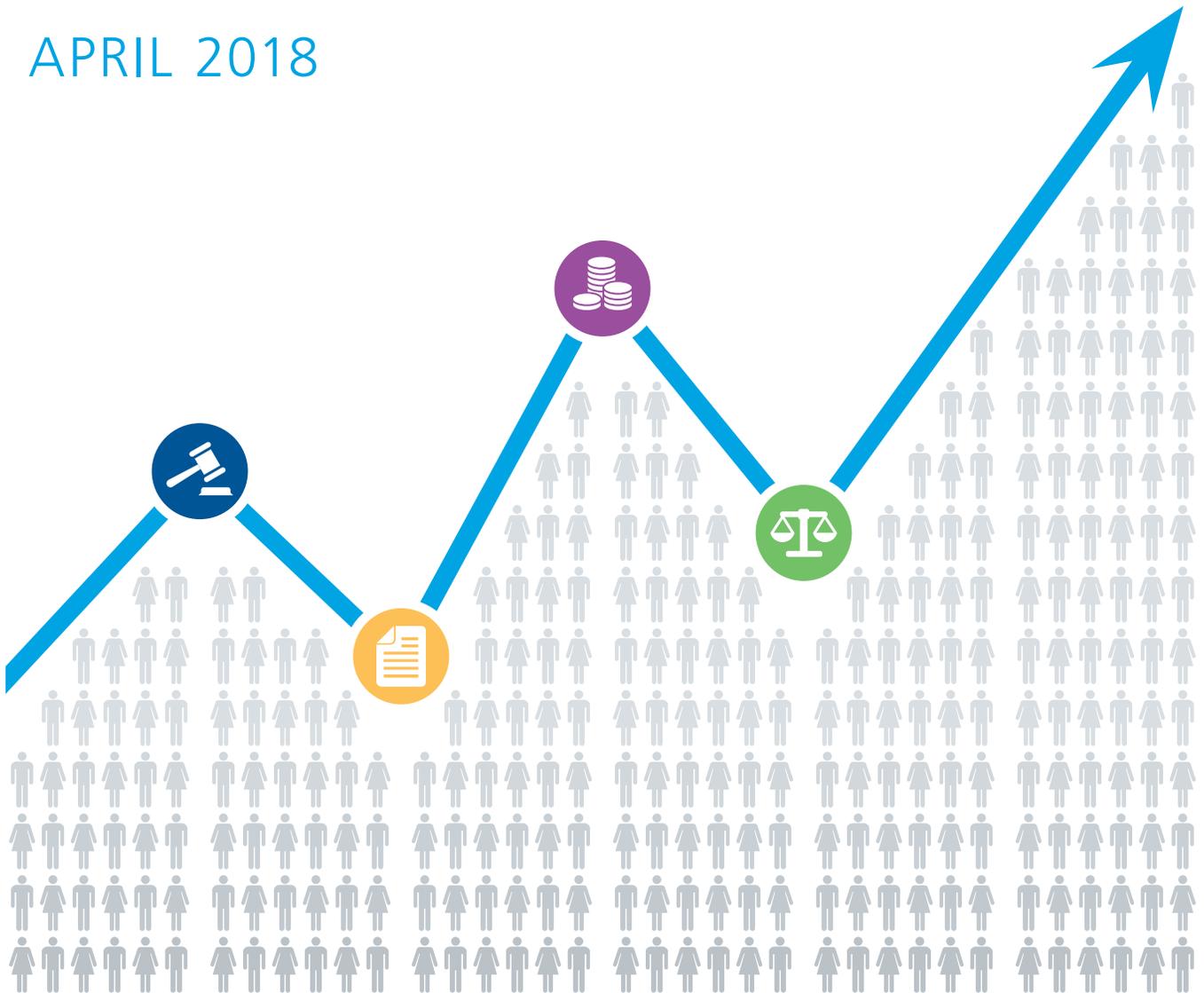


# Trends and Developments in Pay Equity Litigation

APRIL 2018



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**April 2018**

This publication provides a brief overview of recent trends and developments in pay equity litigation and analyzes significant decisions and filings that have had an impact 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 legislation and decisional law.

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## 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 . . . .”<sup>1</sup> The EPA therefore overlaps with Title VII, in that both statutes prohibit discrimination on the basis of sex. But the EPA also diverges from Title VII, both procedurally and substantively, in important ways.

For example, when individual employees bring private claims under the EPA, they can do so using the collective action procedures of the Fair Labor Standards Act (“FLSA”), rather than Rule 23 class action procedures.<sup>2</sup> Many employers think this 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.

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.<sup>3</sup> And in fact, the EEOC has increased the number of EPA claims it has filed over the past few years, although they still make up a relatively small percentage of the EEOC’s docket.<sup>4</sup> Unlike private litigants, the EEOC does not have to meet the requirements of Rule 23 or the collective action procedures of the FLSA in order to pursue claims on behalf of aggrieved individuals.<sup>5</sup> This publication addresses significant developments in EPA litigation in 2017 and the beginning of 2018, including developments in EEOC enforcement litigation.

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<sup>1</sup> 29 U.S.C. § 206(d)(1). The law recognizes four exceptions where such payment is made pursuant to: (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. *Id.*

<sup>2</sup> 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”).

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

<sup>4</sup> See Matthew J. Gagnon, Christopher J. DeGross, 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), available at <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/>.

<sup>5</sup> See *Gen. Tele. Co. of the Nw., Inc. v. EEOC*, 446 U.S. 318, 333-34 (1980) (“We hold, therefore, that the EEOC may maintain its § 706 civil actions for the enforcement of Title VII and may seek specific relief for a group of aggrieved individuals without first obtaining class certification pursuant to Federal Rule of Civil Procedure 23”).

## Equal Pay Act ("EPA")

VS.

## California Fair Pay Act

- Collective proceedings limited to "similarly situated" employees who affirmatively choose to join the suit
- Compares employees whose jobs require equal skill, effort, and responsibility, and are performed under similar working conditions
- EPA claims can be initiated directly in court or by filing a charge with the EEOC

- Allows for broader opt-out class actions that meet the more rigorous requirements of a class action
- Allows employees to be compared even if they do not work at the same establishment, or if they do not share the "same" or "substantially equal" jobs
- Employees may bring private right of action directly in court or may file a complaint with the California DLSE



## B. State Equal Pay Legislation

Pay equity has been an important issue at the statewide level as well, with numerous states amending their equal pay laws to supplement the EPA. California, New York, and Massachusetts led the charge and became the first states to adopt more onerous pay equity laws.<sup>6</sup> Other states followed suit, including Maryland.<sup>7</sup> On June 1, 2017, Oregon amended its Equal Pay Act.<sup>8</sup> In the last two years, cities and states have also adopted salary history bans. Bans have been enacted in New York City, Albany County, NY, Massachusetts, Philadelphia, PA (under challenge), Delaware, Puerto Rico, San Francisco, CA, Oregon, and California.

### 1. California Fair Pay Act

On January 1, 2016, one of the nation's most aggressive and frequently litigated pay equity laws, the California Fair Pay Act,<sup>9</sup> became effective for all employers with California-based employees. It expands upon the protections offered by the federal Equal Pay Act and Title VII, as well as already-existing California law, in significant ways.<sup>10</sup>

Most importantly, the California Fair Pay Act allows employees to be compared even if they do not work at the same establishment.<sup>11</sup> This means that an employee's pay may be compared to the pay of other employees who work hundreds of miles away. Employees can also be compared even if they do not hold the "same" or "substantially equal" jobs. The California law requires only a showing that the employees are engaged in "substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions."<sup>12</sup> 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.<sup>13</sup>

These changes dramatically lower the bar for an equal pay lawsuit, permitting plaintiffs to compare themselves with persons of the opposite sex working at any location for the same employer, and in any similar – not the necessarily the same – job. While Title VII does not require a showing of "equal work" within the same establishment, it does require a showing of

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<sup>6</sup> 2017 Cal. Legis. Serv. Ch. 688 (A.B. 168) (West); N.Y. Lab. Law § 194 (McKinney); Mass. Gen. Laws Ann. ch. 149, § 105A (West).

<sup>7</sup> Md. Code Ann., Lab. & Empl. § 3-304 (West).

<sup>8</sup> 348 Oregon Or. Rev. Stat. Ann. § 652.220 (West).

<sup>9</sup> Cal. Lab. Code § 1197.5.

<sup>10</sup> For more information about the California Fair Pay Act and other state pay equity laws, see, Seyfarth Shaw Pay Equity Group's publication: *The New U.S. Pay Equity Laws: Answering the Biggest Questions*, available at [http://www.seyfarth.com/dir\\_docs/publications/PayEquityBrochure.pdf](http://www.seyfarth.com/dir_docs/publications/PayEquityBrochure.pdf).

<sup>11</sup> 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." Nonetheless, employers may still justify pay differences based on geographic, shift, or hours differentials as a bona fide factor other than sex, as clarified by Senator Hannah-Beth Jackson, who introduced the Fair Pay Act legislation. See Senator Jackson's letter in the May 26, 2015 Senate Daily Journal, available at <ftp://www.leginfo.ca.gov/pub/senate-journal/sen-journal-0x-20150526-1085.PDF>.

<sup>12</sup> Cal. Lab. Code § 1197.5(b).

<sup>13</sup> *Id.*

discriminatory intent or a specific practice or policy with a discriminatory impact<sup>14</sup> – a showing that is not required under the California Fair Pay Act. The California law therefore 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 permitted reasons for differences in pay are a: (1) seniority system; (2) merit system; (3) system that measures earnings by quantity or quality of production; or (4) bona fide factor other than sex, such as education, experience, or training.<sup>15</sup> The last justification will apply only if the employer demonstrates that the factor is not based on or derived from a sex-based differential in pay, is job related with respect to the position in question, and is consistent with a “business necessity” (i.e., the factor relied upon effectively fulfills the business purpose it is supposed to serve); and it will not apply if the employee can demonstrate an alternative business practice that would serve the same business purpose without producing the pay differential.<sup>16</sup>

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.<sup>17</sup> 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.

Finally, in addition to vesting enforcement authority in the California Department of Labor Standards Enforcement (“DLSE”), the California law also 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.<sup>18</sup>

The California Fair Pay Act also creates a private right of action for employees who allege they have been discharged, discriminated, or retaliated against for engaging in any conduct protected by the statute.<sup>19</sup> These employees may seek reinstatement and reimbursement for lost wages and benefits, interest, and “appropriate equitable relief,” provided they do so within one year of the alleged violation.<sup>20</sup>

The California law also allows employees to file complaints with the DLSE alleging employer violations of the new prohibitions on discrimination, retaliation, and restricting employee wage-information discussions.<sup>21</sup> And it 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.<sup>22</sup>

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<sup>14</sup> See 42 U.S.C. 2000e-2.

<sup>15</sup> Cal. Lab. Code § 1197.5(b)(1).

<sup>16</sup> Cal. Lab. Code § 1197.5(b)(1)(D).

<sup>17</sup> Cal. Lab. Code § 1197.5(k)(1).

<sup>18</sup> Cal. Lab. Code § 1197.5(h), (i).

<sup>19</sup> Cal. Lab. Code § 1197.5(k)(2).

<sup>20</sup> Cal. Lab. Code § 1197.5(k)(2), (3).

<sup>21</sup> Cal. Lab. Code § 1197.5(f).

<sup>22</sup> Cal. Lab. Code § 1197.5(e).

## 2. Other Significant State Pay Equity Laws

**New York:**<sup>23</sup> Similar to the California law, the New York law requires employers to justify pay differentials, limits the factors employers can use to explain differences in compensation, and places on employers the burden of proving the reasons for any pay differences. Also, like the California law, employees in New York can be compared even if they do not work at the same establishment. However, the New York law is more restrictive than California, in that comparators must work in the same “geographic region,” no larger than the same county. The New York law also provides that employers may not prohibit employees from inquiring about, discussing or disclosing wage information, and increases liquidated damages for willful violations to 300% of wages due.

**Maryland:**<sup>24</sup> Maryland’s updated Equal Pay for Equal Work Act prohibits pay discrimination on the “basis of sex or gender identity,” and covers employees who work for the same employer at workplaces located in the same county of the state and who “perform work of comparable character or work in the same operation, in the same business, or of the same type.” The Maryland law covers more than just pay disparities. It also prohibits employers from “providing less favorable employment opportunities,” which includes placing employees into “less favorable career tracks” or positions, “failing to provide information about promotions or advancement,” and “limiting or depriving” employees of employment opportunities because of sex or gender identity. Additionally, employers may not forbid employees from “inquiring about, discussing, or disclosing” their wages or the wages of other employees.

**Massachusetts:**<sup>25</sup> The Massachusetts Equal Pay Act prohibits differences in pay for “comparable work.” An employer can avoid liability for a wage differential between employees of opposite genders only if it can establish that the difference is based on one of the limited factors enumerated in the statute. An employee’s previous wage or salary history is not a defense to a claim of wage discrimination, and the law includes a prohibition on requesting a prospective employee’s compensation history. Employers are also prohibited from reducing the wages of any employee in order to eliminate wage differentials and may not prohibit employees from discussing or disclosing their own or other employees’ wages. 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.

**Oregon:**<sup>26</sup> Oregon’s Equal Pay Act forbids paying wages in a manner that discriminates against a member of a protected class. This includes paying wages or other compensation “to any employee at a rate greater than which the employer pays wages or other compensation to employees of a protected class for work of comparable character,” unless the difference is: (1) based on a bona fide factor; (2) related to the position in question; and (3) based on the specifically enumerated factors outlined in the law. The Oregon law is unique in that it has a very expansive definition of “protected class.” The Oregon law prohibits pay discrimination based not only on gender, race, national origin

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<sup>23</sup> NY Lab. Law §§ 194 et seq.

<sup>24</sup> Md. Code Lab. & Empl. §§ 3-301 et seq.

<sup>25</sup> Mass. Gen. Laws. c. 149 § 105A.

<sup>26</sup> Or. Rev. Stat. Ann. §§ 652.210 et seq.

or color but also on religion, sexual orientation, marital status, veteran status, disability or age. Also, the law gives employers who conduct a pay equity analysis a limited safe harbor.

**New Jersey:**<sup>27</sup> On March 26, 2018, the New Jersey Legislature passed Senate Bill 104, entitled the Diana B. Allen Equal Pay Act, which modifies the Law Against Discrimination (“LAD”) to promote equal pay for all groups protected from discrimination under the LAD (i.e., it is not limited to gender). Governor Phil Murphy is widely expected to sign the measure into law. The bill would require employers to justify pay differentials, limit the factors employers can use to explain differences in compensation, and expand the LAD retaliation provision. Comparison of differentials in pay may be based on all of an employer’s operations or facilities; and to comply with the law, an employer cannot lower the compensation of employees. Also, notably, an unlawful employment practice is considered to occur *each occasion* that an individual is affected by application of a discriminatory compensation decision or other practice.

**Washington:**<sup>28</sup> On March 8, 2018, Washington’s Governor signed into law the Equal Pay Opportunity Act. The new law requires employers to justify pay differentials, limits the factors employers can use to explain differences in compensation, and places on employers the burden of proving the reasons for any pay differences. The Washington law also provides that employers may not prohibit employees from disclosing or discussing their own wages or the wages of others, and requires employers to provide the same career advancement opportunities to all employees in comparable positions, regardless of gender.

### 3. State Laws On Salary History Bans

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. Currently, California,<sup>29</sup> Delaware,<sup>30</sup> Massachusetts,<sup>31</sup> New York City and Albany County, NY,<sup>32</sup> Philadelphia, PA (stayed pending legal challenge),<sup>33</sup> Oregon,<sup>34</sup> and San Francisco, CA<sup>35</sup> have enacted such bans. Puerto Rico also passed a ban, which largely mirrors the Massachusetts law. Similar laws are currently or have recently been under consideration by many more jurisdictions.

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<sup>27</sup> S 104, available at <https://legiscan.com/NJ/text/S104/id/1752387>.

<sup>28</sup> H.B. 1506, available at <http://lawfilesex.leg.wa.gov/biennium/2017-18/Pdf/Bills/House%20Passed%20Legislature/1506-S2.PL.pdf#page=1>.

<sup>29</sup> Cal. Lab. Code § 432.3.

<sup>30</sup> Del. Code Ann. tit. 19, § 709B.

<sup>31</sup> Mass. General Laws c. 149 section 105A.

<sup>32</sup> NYC Admin. Code § 8-107(25); Albany County Local Law P for 2016, available at [http://albanycounty.com/Libraries/County\\_Executive/20171030-PH-16-LL\\_P.sflb.ashx](http://albanycounty.com/Libraries/County_Executive/20171030-PH-16-LL_P.sflb.ashx).

<sup>33</sup> Philadelphia Bill No. 160840, available at: <https://phila.legistar.com/LegislationDetail.aspx?ID=2849975&GUID=239C1DF9-8FDF-4D32-BACC-296B6EBF726C&FullText=1>; *Chamber of Commerce for Greater Philadelphia v. City of Philadelphia and Pennsylvania Human Relations Commission*, No. 17-01548 (E.D. Pa. April 6, 2017) (alleging that the Philadelphia law violates the First Amendment, the Due Process Clause of the Fourteenth Amendment, the Commerce Clause, Pennsylvania’s First Class City Home Rule Act, and the state’s Constitution).

<sup>34</sup> Or. Rev. Stat. § 652.220.

<sup>35</sup> San Francisco Ordinance No. 142-17, available at <https://sfgov.legistar.com/View.ashx?M=F&ID=5328258&GUID=A694B95B-B9A4-4B58-8572-E015F3120929> (effective 7/1/2018).

# CASE LAW DEVELOPMENTS IN 2017

There appears to be a renewed interest among Plaintiffs' attorneys in the Equal Pay Act and analogous state laws. The primary targets for this new wave of litigation have been firms in the legal and tech industries. Those cases are already generating new and intriguing law that has the potential to reshape the landscape of pay equity litigation, including whether and how those claims can be maintained as collective or class actions.

## A. 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 pay equity lawsuits can be decided on a class-wide basis. The procedures for establishing a collective action under the federal Equal Pay Act are governed by the opt-in procedures of the Fair Labor Standards Act. Those procedures can confer a significant litigation advantage to plaintiffs because of the lenient standard applied at the conditional certification stage.

For example in *Knox v. John Varvatos Enterprises, Inc.*,<sup>36</sup> the District Court for the Southern District of New York conditionally certified a collective action of female sales associates at stores operated by the defendant in the United States. 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.<sup>37</sup>

The court noted that although Section 216(b) of the FLSA does not prescribe any procedures for approval of collective actions, the courts in the Second Circuit (and elsewhere) apply a two-step certification process.<sup>38</sup> At step one, plaintiffs must only make a “modest factual showing” that they and others were victims of a common policy or plan that violated the law.<sup>39</sup> If they are successful, the collective action is conditionally certified and notice is sent to putative members of the collective action to give them an opportunity to join the litigation.<sup>40</sup> After further discovery, the district court must then apply a more stringent standard to determine whether all plaintiffs are similarly situated such that the case can proceed to trial as a collective action.<sup>41</sup>

In *Knox*, 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

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<sup>36</sup> *Knox v. John Varvatos Enters., Inc.*, 282 F. Supp. 3d 644 (S.D.N.Y. 2017).

<sup>37</sup> *Id.* at 651.

<sup>38</sup> *Id.* at 652-53 (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), cert. denied, 441 U.S. 944, (1979); *Damassia v. Duane Reade, Inc.*, 2006 WL 2853971, at \*2 (S.D.N.Y. Oct. 5, 2006)).

<sup>39</sup> *Id.* at 653 (“The Second Circuit has endorsed a “two-step process” for approval of a collective action: ‘At step one, the district court permits a notice to be sent to potential opt-in plaintiffs if the named plaintiffs make a modest factual showing that they and others together were victims of a common policy or plan that violated the law’”) (quoting *Myers v. The Hertz Corp.*, 624 F.3d 537, 555 (2d Cir. 2010)).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

situated for purposes of conditional certification.<sup>42</sup> 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.<sup>43</sup>

Some courts have been willing to conditionally certify a pay equity collective action even where significant differences exist among putative members of the collective. For example, in *Ahad v. Board of Trustees of Southern Illinois University*,<sup>44</sup> 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.<sup>45</sup> The District Court applied the two-step collective action certification process, even though that process has never been adopted by the Seventh Circuit.<sup>46</sup>

The District 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.<sup>47</sup> The District 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.<sup>48</sup> While the court acknowledged that it may not be possible to compare salaries across different departments, the court held that this did not preclude conditional certification: “Whether it is fair to compare the salaries of women and men who are in different departments or subdivisions – when Plaintiff has provided evidence that the job descriptions for the three tiers of physicians are the same – is a question to be resolved at the second step of the certification process.”<sup>49</sup>

On the other hand, when plaintiffs proceed under state pay equity statutes, they often must meet the more rigorous standards applicable to Rule 23 class actions, or similar state-specific class action requirements, which do not allow differences among putative class members to be glossed over so lightly. If they can meet those standards, however, they are rewarded with a broader class definition. Unlike a collective action under the EPA, which is limited to just those employees who affirmatively choose to “opt in” to the lawsuit, a class action binds together the entire class unless employees choose to “opt out” of the class.

For example, in *Ellis v. Google, Inc.*,<sup>50</sup> 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

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<sup>42</sup> *Id.* at 654.

<sup>43</sup> *Id.* at 654-55.

<sup>44</sup> *Ahad v. Bd. of Trustees of S. Ill. Univ.*, No. 3:15-CV-03308, 2017 WL 4330377 (C.D. Ill. Sept. 29, 2017).

<sup>45</sup> *Id.* at \*1.

<sup>46</sup> *Id.* (noting that “a majority of courts, including courts in this District, have adopted a two-step method to determine whether a plaintiff is ‘similarly situated’ to putative class members”).

<sup>47</sup> *Id.* at \*4.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> Order Sustaining Defendant Google Inc.’s Demurrer to Plaintiffs’ Class Action Complaint with Leave to Amend, *Ellis v. Google, Inc.*, No. CGC-17-561299 (Cal. Super. Ct. Dec. 4, 2017).

massive pay equity complaint alleging systematic pay discrimination. Plaintiffs filed a complaint against Google on September 14, 2017, bringing a claim under the California Fair Pay Act and alleging 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.<sup>51</sup> 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.<sup>52</sup> The Court 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.<sup>53</sup>

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."<sup>54</sup> 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.<sup>55</sup>

Google renewed its challenge to Plaintiffs' class allegations. But this time, the Court upheld the class definition, 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."<sup>56</sup> 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 since the pay disparity alleged in Plaintiffs' complaint is based on nationwide averages.

A similarly broad class and collective action was recently alleged against a law firm (an employment law firm, of all things). In *Knepper v. Ogletree, Deakins, Nash, Smoak & Stewart, P.C.*,<sup>57</sup> a non-equity shareholder of the firm alleges that "Ogletree's female shareholders face discrimination in pay, promotions, and other unequal opportunities in the terms and conditions of their employment."<sup>58</sup> The Complaint alleges both a collective action under the EPA and a state class action under the California Fair Pay Act (among other things). Whether this case can survive as a collective or a class action will be an important development to watch for in 2018.

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<sup>51</sup> *Id.* at 1-2.

<sup>52</sup> *Id.* at 2.

<sup>53</sup> *Id.* at 4.

<sup>54</sup> Am. Compl. ¶¶ 2-3, *Ellis v. Google, Inc.*, No. CGC-17-561299 (Cal. Super. Ct. Jan. 3, 2018).

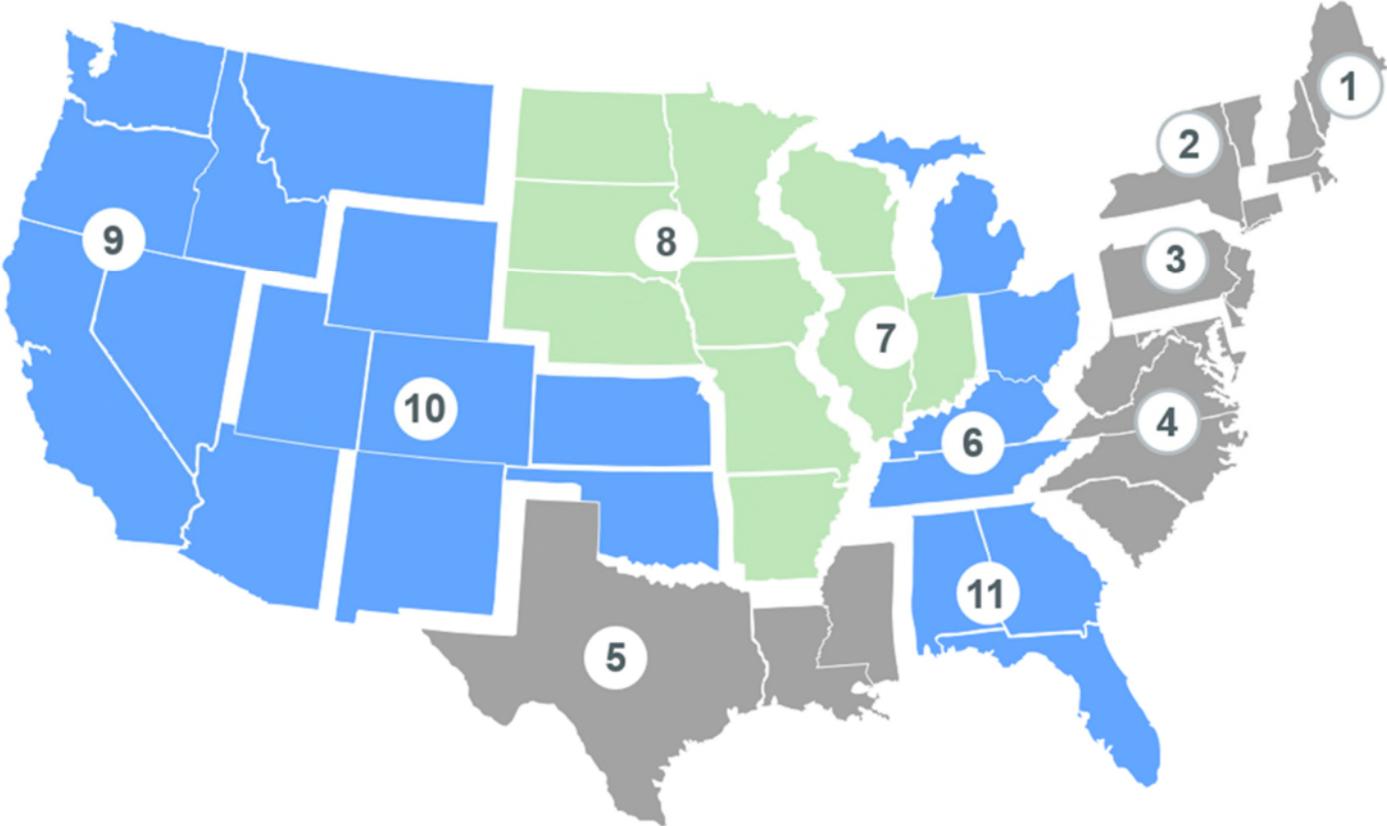
<sup>55</sup> *Id.* ¶¶ 40-41.

<sup>56</sup> Order Overruling Defendant's Demurrer to First Am. Compl. and Denying Alternative Motion to Strike, *Ellis v. Google, Inc.*, No. CGC-17-561299 (Cal. Super. Ct. Mar. 27, 2018).

<sup>57</sup> Complaint, *Knepper v. Ogletree, Deakins, Nash, Smoak & Stewart, P.C.*, No. 3:2018-CV-00304 (N.D. Cal. Jan. 12, 2018), ECF No. 1.

<sup>58</sup> *Id.* ¶ 3.

*The Circuit Courts are split as to whether employers can rely solely on prior salary to meet the “legitimate factor other than sex” defense to an EPA Claim.*



-  The use of prior salary, standing alone, **DOES justify** a salary disparity
-  The use of prior salary, standing alone, **DOES NOT justify** a salary disparity

## B. Salary History As A Legitimate Factor Other Than Sex: An Evolving Circuit Split

A number of federal Circuit Courts issued important decisions in 2017 and early 2018 impacting the merits of pay equity claims. Several, including the Ninth and Seventh Circuits, considered whether the use of prior salary could justify a salary disparity as a legitimate “factor other than sex.”

In *Rizo v. Yovino*,<sup>59</sup> an employee of Fresno County alleged that the County’s use of prior salary history to determine starting salaries was a violation of the EPA.<sup>60</sup> 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.<sup>61</sup> 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%.<sup>62</sup> 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.<sup>63</sup> She later learned that her salary was less than her male peers and sued under the EPA.

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.”<sup>64</sup> 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.<sup>65</sup>

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.<sup>66</sup> However, the Ninth Circuit then announced that it would rehear the case *en banc*.<sup>67</sup> On April 9, 2018, the full Ninth Circuit 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

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<sup>59</sup> *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).

<sup>60</sup> *Id.* at 1163.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 1164.

<sup>64</sup> *Rizo v. Yovino*, No. 1:14-CV-9423-MJS, 2015 WL 9260587, at \*9 (E.D. Cal. Dec. 18, 2015).

<sup>65</sup> See *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 876-77 (9th Cir. 1982).

<sup>66</sup> *Rizo*, 854 F.3d at 1167.

<sup>67</sup> *Rizo v. Yovino*, 869 F.3d 1004 (9th Cir. 2017).

wage setting, alone or in conjunction with less invidious factors.”<sup>68</sup> 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.”<sup>69</sup>

The Seventh Circuit came to the opposite conclusion in *Lauderdale v. Illinois Department of Human Services*.<sup>70</sup> In that case, 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.<sup>71</sup> She was therefore paid less for work that was equal to, if not more demanding than, the work performed by her male predecessor. However, the Department argued that the pay discrepancy was based on non-discriminatory bases, including employees’ prior salaries.<sup>72</sup>

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.<sup>73</sup> 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.<sup>74</sup> 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.<sup>75</sup> The Eighth Circuit has also followed this line of reasoning.<sup>76</sup>

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<sup>68</sup> *Rizo v. Yovino*, No. 16-15372, 2018 U.S. App. LEXIS 8882, at \*37 (Apr. 9, 2018).

<sup>69</sup> *Id.* at \*16-17.

<sup>70</sup> *Lauderdale v. Ill. Dep’t of Human Servs.*, 876 F.3d 904 (7th Cir. 2017).

<sup>71</sup> *Id.* at 907-08.

<sup>72</sup> *Id.* at 908-09.

<sup>73</sup> *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)).

<sup>74</sup> *Id.* at 909.

<sup>75</sup> *Id.*

<sup>76</sup> 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.

In overruling its prior precedent, the Ninth Circuit split from the reasoning of the Seventh and Eighth Circuits and joined other Circuits that have held an employer's EPA defense may never be based on prior salary alone. For example, in *Irby v. Bittick*,<sup>77</sup> a female police investigator alleged that she was paid less than the five other investigators in her division, all of whom were male.<sup>78</sup> 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."<sup>79</sup> 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.<sup>80</sup>

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.*,<sup>81</sup> 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.<sup>82</sup> 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.<sup>83</sup> The Tenth Circuit held that this theory only arises where an employer purports to rely on the "going rate" for employees based on their gender.<sup>84</sup> 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 in this case.<sup>85</sup> 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."<sup>86</sup> This is because "the EPA only precludes an employer from relying *solely* upon a prior salary to justify pay disparity."<sup>87</sup>

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<sup>77</sup> *Irby v. Bittick*, 44 F.3d 949 (11th Cir. 1995).

<sup>78</sup> *Id.* at 952.

<sup>79</sup> *Id.* at 955 (citing *Glenn v. Gen. Motors Corp.*, 841 F.2d 1567, 1571 n.9 (11th Cir. 1988), *cert. denied*, 488 U.S. 948 (1988)).

<sup>80</sup> *Id.* at 957.

<sup>81</sup> *Angove v. Williams-Sonoma, Inc.*, 70 Fed. Appx. 500 (10th Cir. 2003).

<sup>82</sup> *Id.* at 502.

<sup>83</sup> *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 Corning 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.

<sup>84</sup> *Angove*, 70 Fed. Appx. at 508.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *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).

## C. Other Important Substantive Decisions Impacting Pay Equity Litigation

On June 14, 2017, the District Court for the Southern District of New York issued a decision in *Campbell v. Chadbourne & Parke LLP*,<sup>88</sup> which denied a law firm's motion to dismiss equal pay allegations on the grounds that a partner in a law firm is not an "employee" under the EPA. In that case, a female partner claimed that she was paid less than her male peers.<sup>89</sup> 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.<sup>90</sup>

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 Associates, P.C.*<sup>91</sup> 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.<sup>92</sup>

Plaintiffs argued that additional discovery would show that the law firm's 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.<sup>93</sup> 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.

Other courts have addressed employers' use of merit systems. For example, in *Summy-Long v. Pennsylvania State University*,<sup>94</sup> the Third Circuit affirmed summary judgment against a female physician who alleged that she was paid less than male physicians for the same work.<sup>95</sup> The Third Circuit held that the University defendants had shown that the salary disparities were the result of a merit system.<sup>96</sup> In particular, the Third Circuit noted that numerous items in the record "reflected a lack of academic performance in comparison to her colleagues."<sup>97</sup> Among other

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<sup>88</sup> *Campbell v. Chadbourne & Parke LLP*, No. 16-CV-6832 (JPO), 2017 WL 2589389 (S.D.N.Y. June 14, 2017).

<sup>89</sup> *Id.* at \*1.

<sup>90</sup> *Id.* at \*2.

<sup>91</sup> *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440 (2003).

<sup>92</sup> *Campbell*, 2017 WL 2589389, at \*2 (citing and quoting *Clackamas Gastroenterology Assocs., P.C.*, 538 U.S. at 449-50).

<sup>93</sup> *Id.* at \*3.

<sup>94</sup> *Summy-Long v. Pennsylvania State University*, No. 17-1206, 2017 WL 5125627 (3d Cir. Nov. 6, 2017).

<sup>95</sup> *Id.* at \*1.

<sup>96</sup> *Id.* at \*2.

<sup>97</sup> *Id.*

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.”<sup>98</sup> 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.”<sup>99</sup>

In *Donathan v. Oakley Grain, Inc.*,<sup>100</sup> the Eighth Circuit considered the parameters of a retaliation claim under the EPA. In that case, a female employee alleged that her employer terminated her in retaliation for complaining that she 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 than her.<sup>101</sup> 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.<sup>102</sup> Plaintiff was laid off approximately eight days later.<sup>103</sup>

The Eighth Circuit reversed the District Court’s grant of summary judgment to the employer. The court found that the female employee had established a prima facie case: “[Plaintiff] was terminated from her office position even though Oakley Grain 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 Oakley Grain hired Fletcher to fill the position the very next working day.”<sup>104</sup> According to the Eighth Circuit, a rational finder of fact could infer from the temporal proximity of the conversation between the president of the company and the manager, and the decision to terminate Plaintiff’s employment, strong evidence of causation.<sup>105</sup>

The Tenth Circuit came to a different conclusion in *Burke v. State of New Mexico*.<sup>106</sup> There, the Court 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.<sup>107</sup>

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Donathan v. Oakley Grain, Inc.*, 861 F.3d 735 (8th Cir. 2017).

<sup>101</sup> *Id.* at 737.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 740-41.

<sup>105</sup> *Id.* at 741.

<sup>106</sup> *Burke v. State of New Mexico*, 696 Fed. Appx. 325 (10th Cir. 2017).

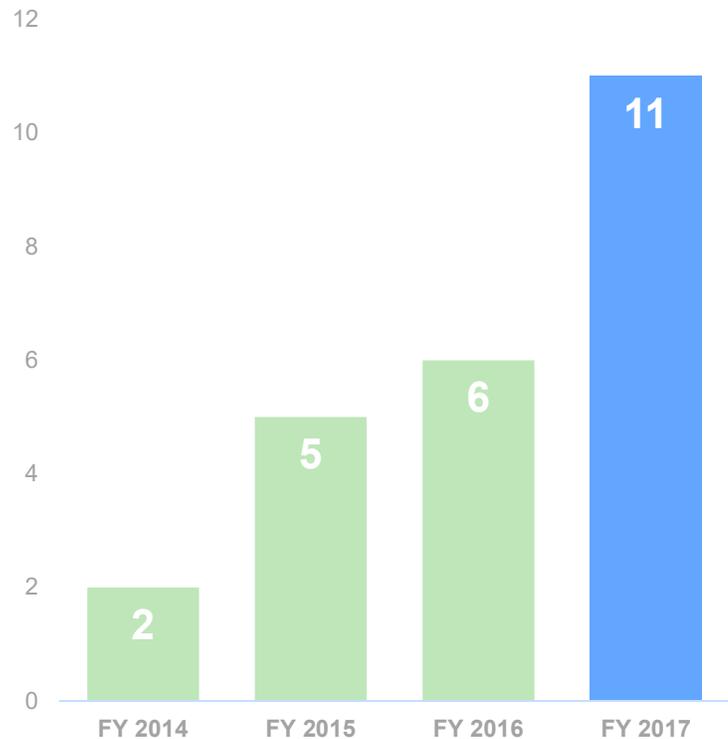
<sup>107</sup> *Id.* at 334.



# EEOC Enforcement Of The Equal Pay Act

*“Some believed Acting Chair Victoria Lipnic was foreshadowing future trends when she made it clear at her first public appearance that she is ‘very interested’ in equal pay issues”*

**EPA Filings FY 2014 - 2017**



EEOC will continue to focus on compensation systems and practices that discriminate based on sex under the Equal Pay Act and Title VII. Pay discrimination also persists based on race, ethnicity, age, and for individuals with disabilities, and other protected groups.

## D. Recent Developments In EEOC Enforcement Of Equal Pay Act Claims

Arguably, the most significant step the EEOC has taken in the last few years to ramp up its enforcement of the EPA is the changes that it tried to make to EEO-1 reports. The EEO-1 Report is a survey document that has been mandated for more than 50 years. Currently, 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).<sup>108</sup> On February 1, 2016, the EEOC proposed changes to the EEO-1 report, which would have required more detailed reporting obligations for all employers with more than 100 employees.<sup>109</sup>

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.<sup>110</sup> 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.<sup>111</sup> 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.<sup>112</sup>

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."<sup>113</sup> The letter also reiterated concerns echoing many employers' 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.<sup>114</sup> 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.<sup>115</sup>

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<sup>108</sup> See Current EEO-1 Report, <https://www.eeoc.gov/employers/eeo1survey/upload/eeo1-2.pdf>.

<sup>109</sup> See EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Agency Information Collection Activities: Revision of the Employer Information Report (EEO-1) and Comment Request*, <https://www.gpo.gov/fdsys/pkg/FR-2016-02-01/pdf/2016-01544.pdf>.

<sup>110</sup> See U.S. Chamber of Commerce, *Request for Review; EEOC's Revision of the Employer Information Report*, <http://src.bna.com/mFi>.

<sup>111</sup> See Equal Employment Advisory Counsel, *Review of the Equal Employment Opportunity Commission's Employer Information (EEO-1) Report (OMB Control Number 3046-0007)*, <http://src.bna.com/nUp>.

<sup>112</sup> See Letter from Lamar Alexander, Chairman of Committee on Health, Education, Labor and Pensions, & Pat Roberts, United States Senator, <http://src.bna.com/nTJ>.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

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 otherwise become effective on March 31, 2018.<sup>116</sup> The next day, Acting Chair, 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.<sup>117</sup> Commissioner Lipnic further stated: "The EEOC remains committed to strong 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."<sup>118</sup>

Despite this setback, the EEOC has continued to aggressively push forward on its pay equity initiative. On June 12, 2017, the EEOC filed two lawsuits alleging violations of the EPA. One lawsuit alleged that a Nebraska bank violated the EPA by paying women and men unequally for jobs with the same required skill, effort, responsibility, and working conditions.<sup>119</sup> One month later, on July 11, 2017, the Court entered judgment in favor of the EEOC, requiring the Nebraska bank to pay \$30,598 to a woman whom it unlawfully paid less than a man.<sup>120</sup>

In another lawsuit, the EEOC alleged that a former manager of programs and services at a juvenile correction and detention facility violated federal law by paying a female facility investigator less than it paid the male employee who formerly held the position.<sup>121</sup> Two months later, the EEOC filed another lawsuit against Denton County, Texas alleging that Denton County violated the EPA by paying lesser wages to a female clinician than it paid to a male physician performing the same job.<sup>122</sup> On September 5, 2017, the EEOC filed suit against a Delaware company that until recently operated a Pizza Studio restaurant, and still owns other restaurants nationwide, alleging that the company violated the EPA by withdrawing job offers from two teens

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<sup>116</sup> 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>.

<sup>117</sup> 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. 30, 2017), <http://www.seyfarth.com/publications/OMM082917-LE2>.

<sup>118</sup> 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>.

<sup>119</sup> Press Release, Equal Employment Opportunity Commission, *EEOC Sues Heritage Bank for Paying Women Less Than Men*, (June 12, 2017) <https://www1.eeoc.gov/eeoc/newsroom/release/6-12-17b.cfm>.

<sup>120</sup> Press Release, Equal Employment Opportunity Commission, *Federal Court Enters Judgment in Favor Of EEOC In Suit Charging Equal Pay Act Violation*, (July 11, 2017) <https://www1.eeoc.gov/eeoc/newsroom/release/7-11-17.cfm>.

<sup>121</sup> Press Release, Equal Employment Opportunity Commission, *G4S Youth Services Sued by EEOC for Pay Discrimination*, (June 12, 2017) <https://www1.eeoc.gov/eeoc/newsroom/release/6-12-17a.cfm>.

<sup>122</sup> Press Release, Equal Employment Opportunity Commission, *Denton County Sued by EEOC For Discrimination Under the Equal Pay Act*, (Aug. 31, 2017) <https://www.eeoc.gov/eeoc/newsroom/release/8-31-17a.cfm>.

after the woman complained about being offered less pay than her male friend.<sup>123</sup> On November 9, 2017, the Court entered judgment in favor of the EEOC.<sup>124</sup>

The EEOC has had mixed success litigating pay equity issues in court. For example, in *EEOC v. Maryland Insurance Administration*,<sup>125</sup> 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.<sup>126</sup> 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.”<sup>127</sup> Moreover, the court found that the EEOC did not use proper comparator evidence because they did not work in the same unit as the females who were allegedly underpaid. These employees worked as enforcement officers, not fraud investigators.<sup>128</sup> 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.<sup>129</sup>

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.<sup>130</sup> 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.<sup>131</sup> 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.”<sup>132</sup> Because the employer’s evidence did not meet this burden, the District Court erred when it granted summary judgment.<sup>133</sup>

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<sup>123</sup> Press Release, Equal Employment Opportunity Commission, *EEOC Sues Pizza Studio Restaurant Owner for Violating Equal Pay Act*, (Sept. 5, 2017) <https://www.eeoc.gov/eeoc/newsroom/release/9-5-17.cfm>.

<sup>124</sup> Press Release, Equal Employment Opportunity Commission, *Federal Court Enters Judgment in Favor Of EEOC In Suit Charging Equal Pay Act Violation By Pizza Restaurant*, (Nov. 9, 2017) <https://www1.eeoc.gov/eeoc/newsroom/release/11-9-17a.cfm>.

<sup>125</sup> *EEOC v. Md. Ins. Admin.*, 879 F.3d 114 (4th Cir. 2018).

<sup>126</sup> *EEOC v. Md. Ins. Admin.*, No. JFM-15-CV-1091, 2016 WL 6069488, at \*1 (D. Md. Oct. 14, 2016).

<sup>127</sup> *Id.* at \*1.

<sup>128</sup> *Id.* at \*1-2.

<sup>129</sup> *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/>.

<sup>130</sup> *Md. Ins. Admin.*, 879 F.3d at 116.

<sup>131</sup> *Id.* at 122.

<sup>132</sup> *Id.* at 121.

<sup>133</sup> *Id.* at 123-24.

However, in *EEOC v. VF Jeanswear, LP*,<sup>134</sup> 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.<sup>135</sup> 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.<sup>136</sup> 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 the reasons for employees' terminations could be related to the lack of promotion opportunities.<sup>137</sup> 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."<sup>138</sup> 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."<sup>139</sup>

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<sup>134</sup> *EEOC v. VF Jeanswear, LP*, No. MC-16-CV-47-PHX-NVW, 2017 WL 2861182 (D. Ariz. July 5, 2017).

<sup>135</sup> *Id.* at \*2.

<sup>136</sup> *Id.* at \*1.

<sup>137</sup> *Id.* at \*6.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*



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