

Changes in the Air – Employers Considering Prior Salary When Setting Wages Need to Know the Applicable Laws

Labor & Employment Law Update

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The Equal Pay Act can create significant exposure for employers, if not considered when setting female employees' wages – especially if you are relying upon a female applicant's prior salary history and there is a difference in the pay of similar male employees.

The Equal Pay Act is dangerous for employers because plaintiffs are not required to prove discriminatory intent by the employer. All a plaintiff must show is that there is a wage disparity for equal work requiring the same skill, effort and responsibility, which is performed under similar working conditions. Once a plaintiff establishes that, the burden shifts to an employer to establish that the difference is based on one of the following four statutory exceptions:

- a seniority system;
- a merit system;
- a system which measures earnings by quantity or quality of production; or
- a differential based on any other factor other than sex.

Historically, the Equal Employment Opportunity Commission (EEOC) and the federal Appellate Courts for the Second (Connecticut, New York and Vermont), Eighth (Arkansas, Iowa, Minnesota, Missouri, Nebraska, South Dakota and North Dakota), Tenth (Colorado, Kansas, New Mexico, Oklahoma, Utah and Wyoming) and Eleventh (Alabama, Florida, and Georgia) Circuits have taken the position that employers may consider prior salary as a mix of factors to set female employee wages without violating the Equal Pay Act – but prior salary cannot be the sole factor for any wage differential with a male employee in a similar role. On the other hand, the Seventh Circuit (Illinois, Indiana and Wisconsin) has held that using prior salary alone is a basis other than sex for wage differential that does not violate the Equal Pay Act.

Recently, the U.S. Court of Appeals for the Ninth Circuit (California, Alaska, Arizona, Hawaii, Idaho, Montana, Nevada, Oregon and Washington) took its prior decisions a step farther by finding that prior salary does not fit within the exception of a factor other than sex because it is not a legitimate measure of work experience, ability, performance, or any other job-related quality. In doing so, the Ninth Circuit held that allowing employers to consider prior salary would simply continue the gender-based assumptions and discrimination that the Equal Pay Act was intended to stop.

This recent decision falls in line with the increasing number of state and local laws being passed that prohibit employers from asking applicants for prior salary information. States and cities/municipalities that currently have laws prohibiting employers from requesting/considering prior salary information include the following:

- California (all employers)
- Massachusetts (all employers)
- Oregon (all employers)
- Delaware (all employers)
- New York (state employers)
- New Jersey (public employers)
- Puerto Rico (all employers)
- San Francisco (all employers)
- New Orleans (city positions)
- New York City (all employers)
- Albany County, New York (all employers)
- Philadelphia (all employers – currently subject to legal challenge)
- Pittsburgh (city positions).

With these changes you need to be aware of the laws impacting your operations and if you want to request and/or consider prior salary history when setting wages. If you are not sure, seek legal counsel in reviewing your employment practices.

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